

KO AOTEAROA TĒNEI



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

**Te Taumata Tuarua**

**Volume 2**



WAI 262

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*Auē e te mate kei hea tāu wero, auē e te reinga kei hea tōu wikitōria?*

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

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

*Nā ia kua whakaurupā te aroha ki a koutou katoa*

*I roto i tēnā i tēnā makiu makiu*

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

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

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

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

*Hei whakanakonako i te pūtea kupu tuku ki tō koutou*

*I tō te ikeike kano i tō te rangiahua nui*

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

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

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

*Okioki i tō koutou moenga roa.*

*Oh death, where is your sting; grave, where is your victory?*

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

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

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

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

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

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

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

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

*Rest now, in peace.*



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

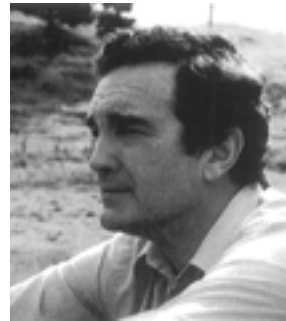


We have lost so many of the valued contributors to the Wai 262 inquiry. Of the original named claimants we have lost Hema Nui a Tawhaki Witana (Te Rarawa, also known as Del Wihongi), Te Witi McMath (Ngāti Wai), Tama Poata (Ngāti Porou), and John Hippolite (Ngāti Koata); only Haana Murray QSM CNZM (Ngāti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

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



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



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

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





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ABBREVIATIONS

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

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



## ABBREVIATIONS

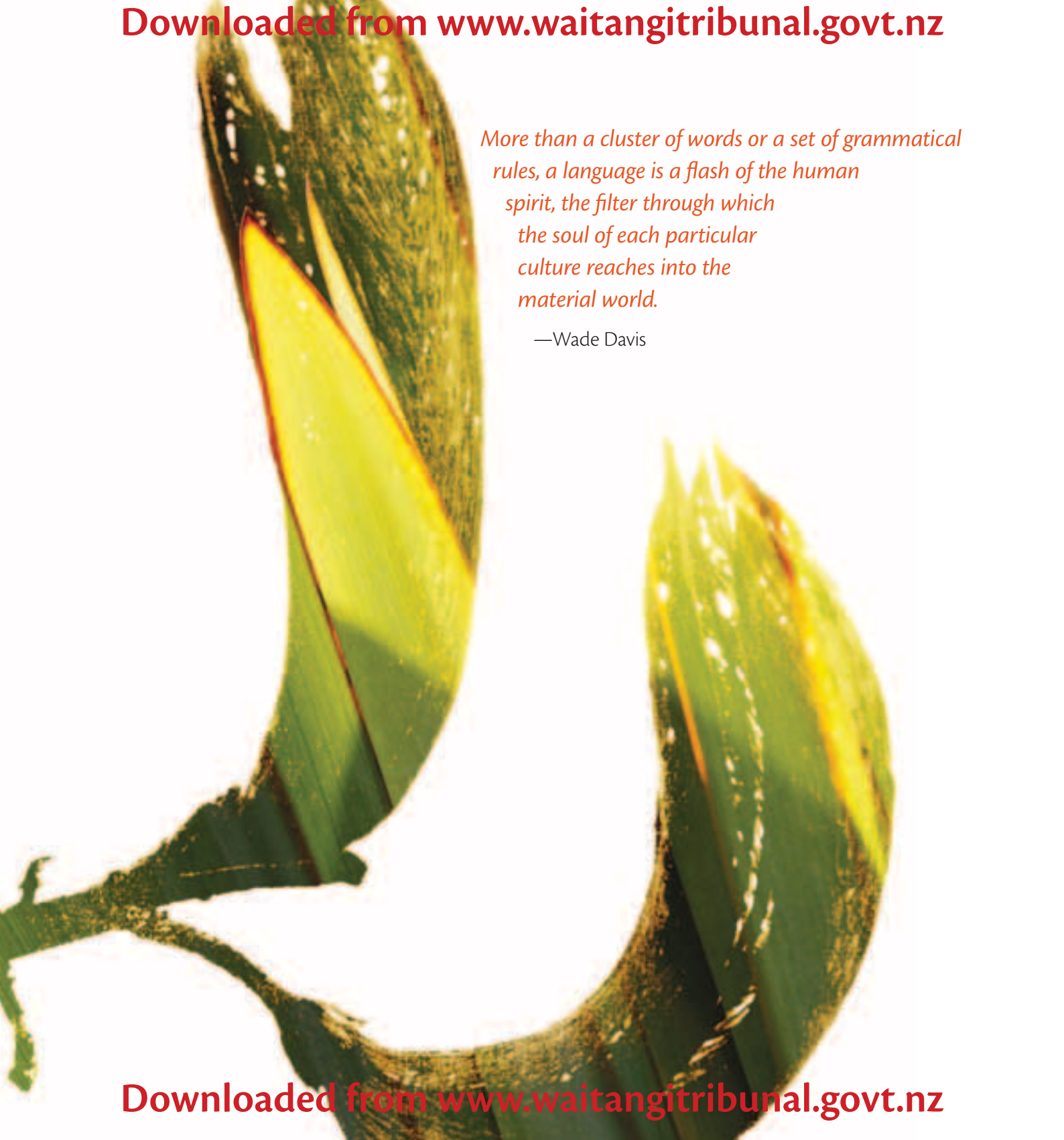
NZCER	New Zealand Council for Educational Research
NZEI	New Zealand Educational Institute
NZ–HK CEP	New Zealand – Hong Kong Closer Economic Partnership
NZIPA	New Zealand Institute of Patent Attorneys
NZLR	<i>New Zealand Law Reports</i>
NZPD	<i>New Zealand Parliamentary Debates</i>
NZQA	New Zealand Qualifications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

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

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

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





*More than a cluster of words or a set of grammatical rules, a language is a flash of the human spirit, the filter through which the soul of each particular culture reaches into the material world.*

—Wade Davis

TE REO MĀORI

*Ko te reo te mauri o te mana Māori.*

The language is the core of our  
Māori culture and mana.

—Sir James Henare



## TE REO MĀORI

### 5.1 PREFACE

During the drafting of this report, we were aware that the parties might benefit from the early release of certain chapters as they grappled with the complex issues involved in the claim. We preferred not to do so, however, on the basis that the principal value of the report would be in its totality rather than in its components. But, after the Minister of Māori Affairs announced in July 2010 a full ministerial review of the Māori language sector and strategy, we reluctantly decided that it would be best to release our te reo Māori chapter in advance of the rest of the report so that the review panel would have our own analysis available as it conducted its inquiry. It seemed unhelpful for two inquiries into the same subject matter to proceed in silos.

We therefore released the te reo Māori chapter in pre-publication format on 19 October 2010. In a matter unrelated to the advance release of the chapter, we also declared our findings and recommendations to be provisional only. We did so mainly because the chapter addressed matters that went beyond the narrow set of reo issues agreed to earlier by the Crown and claimants concerning tribal dialects and the protection of te reo from inappropriate use. We had, indeed, considered the Crown's entire Māori language programme of work (our reasons for doing so are explained in detail in section 5.2.3). We therefore acknowledged that the parties would have placed more and perhaps different evidence in front of us had the inquiry actually been framed in such a way, and we accordingly provided the opportunity for any party to make a submission on the te reo Māori chapter's contents to us by 25 November 2010, which we would consider before issuing our full and final Wai 262 report.

We received submissions from the Crown, Ngāti Koata, and Ngāti Porou.<sup>1</sup> The Crown attached a lengthy statement, written by Te Puni Kōkiri, which set out 'factual points' that the Tribunal should address. Ngāti Koata and Ngāti Porou both supported the Tribunal's findings but disagreed with its recommendations, arguing for a direct role for individual iwi in identifying the appropriate remedies to safeguard te reo. After due consideration, we were not convinced by these submissions that the chapter needed to be amended. Any changes we have subsequently made are minor only, and relate principally to matters of report-wide consistency and cross-referencing. We have not updated the chapter to 2011, so it continues to refer to the situation at the time of the chapter's initial release. In recognition, however, of the fact that a brief period for submissions did and could not constitute a full inquiry into the reo issues we covered, our findings and recommendations should rightly continue to be regarded as provisional. This is far from the last word on the subject, but it is now for others to take the matter further.

## 5.2 INTRODUCTION

This is not the first time the Tribunal has considered claims about the Māori language and the Crown's Treaty obligations. In 1986, the Tribunal's landmark inquiry into the te reo Māori claim (Wai 11) concluded that te reo Māori was a taonga guaranteed under the Treaty, and that the Crown had significant responsibilities for its protection.<sup>2</sup>

### 5.2.1 The identification of issues

In the Wai 262 statement of claim the seven claimant iwi made a range of claims about Crown actions and policy concerning te reo. The three Te Tai Tokerau iwi focused on the Crown's alleged failure to protect their existing systems of mātauranga and the systems of knowledge for the transmission of that mātauranga, including te reo Māori.<sup>3</sup> Ngāti Porou focused on the Crown's alleged failure to protect te reo ake o Ngāti Porou, a tribal taonga and the essential means of transmission of knowledge of Ngāti Porou culture and heritage.<sup>4</sup> Ngāti Kahungunu alleged that the Crown had failed to protect Ngāti Kahungunu cultural knowledge, including te reo.<sup>5</sup> And Ngāti Koata stated that the Crown had failed to protect Ngāti Koata

knowledge and use of te reo, and had in fact facilitated the decline in its use by Ngāti Koata.<sup>6</sup>

The Crown, in its statement of response, acknowledged its Treaty obligation to protect te reo Māori, as found by the Tribunal in its 1986 report on the te reo Māori claim. The Crown contended that, through its current legislation, policies, and practices, it was meeting any such obligation. It also argued, though, that any recognition or protection of te reo occurs in a country where the majority of citizens speak English only, freedom of expression is a fundamental human right, and where all language is the 'common heritage of mankind'. In those circumstances, it said, the Crown had no Treaty obligation to prevent the 'misuse' of te reo.<sup>7</sup>

In the light of the claims, the Crown's response, and the Tribunal's previous consideration of the te reo Māori claim in 1986, our December 2005 draft statement of issues proposed the following issues with respect to te reo:

Does the Crown owe any obligations in respect of te reo Māori other than those identified by this Tribunal in the Te Reo Māori (1986 WAI 11) report?

Has the experience of Māori and the Crown in respect of

## A NOTE ON DEFINITIONS

### Dialects

The terms 'dialect', 'mita', 'tribal reo', and 'reo a iwi' have many interpretations. Some commentators describe dozens of 'dialects' within the reo of one particular iwi, while others identify variations across distinct geographical divides. Ngāti Porou Rūnanga chair Dr Apirana Mahuika told us that he 'bristled' at the use of the phrase 'tribal dialects', and stated that 'Te reo ake o Ngati Porou is not a tribal dialect. It is my language and therefore all that I am.'

Our own view is that dialectal differences are important, and at times pronounced in terms of idiom and accent. But the differences are not sufficient to impede verbal understanding between native speakers from different tribal areas. Indeed, despite effectively describing te reo ake o Ngāti Porou as a separate language, Dr Mahuika also explained that 'there are areas

of commonality in all the different reo of the different iwi. So that if you sit down and listen to a native speaker speaking the reo irrespective of where that person may come from you understand it.'

### Revitalisation and revival

Some sociolinguists prefer to use the terms 'revitalisation' and 'revival' in different ways, with the former being used to refer to languages that are still in common use but in a declining state of health and the latter being used to refer to languages that are functionally dead or extinct. However, we use the two terms interchangeably, with a general preference for 'revival'. By this, we are certainly not implying that te reo Māori is dead. Rather, we use 'revival' in the general sense of 'bringing back to strength'.



language revival and maintenance since the Te Reo Māori report enabled the Crown's obligations as found in that report to be defined with greater particularity today? If so, how?<sup>8</sup>

The draft statement of issues also proposed an analysis of what findings in the 1986 report had been accepted and acted upon by the Crown, and whether New Zealand legislative and policy instruments were sufficient to meet any further obligations identified. Accordingly, we proposed asking what amendments to New Zealand law and policy might be needed to bring them into line with the Crown's ability to meet any obligations so identified.<sup>9</sup>

In responding to the draft statement of issues, in March 2006, Crown counsel submitted that the Crown opposed any inquiry into the te reo issues we had proposed:

The claimants have not asserted a Crown failure to respond to the WAI 11 recommendations, yet the Tribunal proposes auditing Crown conduct since the 1986 report.

Further, the Tribunal asks whether there now exist obligations other than those found by the Tribunal in Wai 11. The Crown opposes inclusion of issues revisiting the Wai 11 claim so as to locate further Treaty obligations not previously identified, particularly in the absence of claimant allegations that novel Treaty obligations have emerged.<sup>10</sup>

Discussion between the parties led to claimant agreement with the Crown on this point. Thus, in a joint memorandum of 21 June 2006, Crown counsel confirmed that the parties had agreed that the te reo issues for inclusion in the statement of issues should be divided into two sections, relating to the distinctiveness and the use of te reo Māori.<sup>11</sup> We therefore adopted the parties' agreed wording in the statement of issues. With respect to distinctiveness, the statement of issues thus asked:

Does the Crown have obligations under the Treaty of Waitangi/Te Tiriti o Waitangi to protect and promote Te Reo o Ngāti Porou, o Ngāti Kahungunu, o Ngāti Koata, o Ngāti Kuri, o Ngāti Wai, o Te Rarawa?

Does the Crown have obligations under the Treaty of Waitangi/Te Tiriti o Waitangi to actively protect Te Reo o Ngāti Porou, o Ngāti Kahungunu, o Ngāti Koata, o Ngāti Kuri,

o Ngāti Wai, o Te Rarawa as an essential means of cultural identity, cultural expression, and knowledge transmission to the particular iwi?

The statement of issues went on to ask whether such obligations had been met, and whether and how New Zealand law and policy needed to be amended to be brought into line with any Crown obligations.<sup>12</sup>

With respect to use, the statement of issues asked:

Does the Crown have an obligation under the Treaty of Waitangi/Te Tiriti o Waitangi to protect Te Reo Māori from use in a manner inconsistent with tikanga Māori underpinning Te Reo?

As with distinctiveness, the statement of issues asked whether this obligation had been met, and whether New Zealand law and policy needed to be brought into line with any such obligation.<sup>13</sup>

We address the issue of protection of te reo from inappropriate use in chapter 1. As we explain there, while the issue of use cannot be easily severed from any other matters pertaining to te reo, its discussion fits more appropriately with our treatment of related issues concerning intellectual property and regulatory safeguarding from misuse and exploitation. We therefore make no further comment upon this aspect of the reo issues here.

## 5.2.2 The arguments of the parties

### (1) *The claimants*

#### (a) NGĀTI POROU

Counsel for Ngāti Porou focused in closing submissions on matters relating to tribal dialect, or te reo ake o Ngāti Porou, although some witnesses also gave evidence about the historical suppression of te reo.

The claimants argued that the Crown was singularly failing to meet its obligations to tribal reo. Counsel submitted that 'The situation now facing te reo ake o Ngāti Porou is, perhaps unsurprisingly, very similar to the situation that faced te reo Maori generally when the reo claim was made in the early 1980s.' Just as Māori generally in the early 1980s were struggling to keep their reo alive, so today were Ngāti Porou 'working under severe disadvantages, financial and otherwise.'<sup>14</sup> Counsel suggested that

5.2.2(1)(b)

the horse had effectively bolted elsewhere and that the Crown should prioritise areas where native speakers were still left. The ageing demographic of these speakers meant that Crown action was most urgent.<sup>15</sup>

While there were some Ngāti Porou initiatives in place, counsel said it was very hard for those who live outside the rohe to learn te reo ake o Ngāti Porou. Furthermore, on the East Coast itself, the health of te reo ake o Ngāti Porou had regressed, despite the gains made by the recent 'Whaia Te Iti Kahurangi' initiative. This was a joint project of Te Rūnanga o Ngāti Porou and the Ministry of Education to address issues raised by the Education Review Office (ERO) in its highly critical 1997 report on the quality of education received by Ngāti Porou East Coast students. In 2004, the New Zealand Council for Educational Research noted the project's success, but referred to the 'acute' need to develop more Ngāti Porou teachers fluent in the tribal reo.<sup>16</sup> Another ERO report in 2006 again referred to the poor quality of te reo teaching in secondary schools in Te Tairāwhiti and thus represented 'a significant backwards step'.<sup>17</sup>

Counsel was also critical of Te Puni Kōkiri's regional profile on the health of te reo Māori in Te Tairāwhiti, which was based largely on 2001 census data and the results of the 2001 survey of the health of the Māori language. This profile did not reach any conclusions about tribal reo, and in fact concluded the health of te reo in the region to be 'in a relatively stable condition'.<sup>18</sup> The claimants objected to this, given the problems the profile identified with intergenerational transmission and likely declining proficiency.<sup>19</sup> The 'relatively stable' verdict also contrasted with the profile's finding that 'specific interventions' would be needed in order to maintain the current quality of te reo in Te Tairāwhiti in coming decades. The Crown had been unable to point to any 'specific interventions' beyond a language bank to preserve features of tribal dialects, said counsel (see section 5.2.2(2)).<sup>20</sup>

Overall, said counsel, the Crown's approach had been, at best, one of 'benign neglect': there was no strategy for protecting tribal reo and no series of 'specific interventions'. The Crown had spent only \$253,000 on specific Ngāti Porou language initiatives, but none since 2004, and much of what it did spend had come from the contestable community-based language initiative funding pool

administered by the Ministry of Education. Even the New Zealand Qualifications Authority's efforts to develop its capacity to audit courses conducted in tribal dialect were 'not determined by any overall Crown strategy in relation to te reo, but . . . determined by NZQA's own priorities'.<sup>21</sup>

The Crown had appeared to suggest that it was primarily up to Ngāti Porou to preserve its own form of te reo. However, counsel argued, the Crown was actively funding and supporting a new and standardised form through the work of Te Taura Whiri i te Reo Māori (the Māori Language Commission) and Māori Television that was causing the destruction of te reo ake o Ngāti Porou. The Crown was thus failing to fulfil its article 2 obligations to iwi. After all, said counsel, 'although the rights conferred by Article 2 are often talked about in terms of Māori generally, the Treaty is in effect a compact between the Crown and . . . different tribal groupings'.<sup>22</sup>

Dr Mahuika portrayed himself as fighting a battle against the work of Te Taura Whiri, metaphorically suggesting he was constantly having to dig the Te Taura Whiri weeds out of his garden in order to plant the seed of te reo ake o Ngāti Porou. He, like other claimants, described much of the 'new language' as 'unintelligible'. All he wanted was to hear a language on the Māori news that any native speakers could understand, he explained, rather than one few could.<sup>23</sup>

#### (b) NGĀTI KAHUNGUNU

Counsel for Ngāti Kahungunu did not focus on the preservation of te reo specifically in closing submissions. But counsel did submit that te reo was an essential component of mātauranga Māori, which he did make extensive submissions about. The Crown needed to continue to implement strategies to strengthen te reo Māori so as to ensure 'the overall protection of Ngāti Kahungunu cultural knowledge'.<sup>24</sup> Several Ngāti Kahungunu witnesses addressed the issue of the protection of te reo from what they saw as inappropriate use (such as commercial exploitation of certain place names).<sup>25</sup>

#### (c) TE TAI TOKERAU

Counsel for the Te Tai Tokerau claimants predominantly focused on the use of te reo Māori and referred to submissions on the protection of mātauranga Māori generally.<sup>26</sup>

However, counsel also called Wai 262 a valuable chance for a ‘stocktake’ of the Crown’s responses to the Tribunal’s 1986 te reo report.<sup>27</sup> For their part, Te Tai Tokerau witnesses – like those of Ngāti Kahungunu – focused predominantly on issues around inappropriate use and place names.<sup>28</sup>

(d) NGĀTI KOATA

Ngāti Koata witnesses mainly gave evidence about the historical suppression of te reo.<sup>29</sup> Ngāti Koata also called Māori language broadcaster Piripi Walker (of Ngāti Raukawa ki te Tonga) to discuss te reo issues on their behalf. Discussing the impact of Te Taura Whiri’s work on tribal dialect, Mr Walker expressed sympathy for an agency he described as under-funded but doing an admirable job on many fronts (for example, creating ‘five thousand new words’ for teaching physics and chemistry). However, he considered that Te Taura Whiri should consult with iwi about important decisions – for example, on whether transliterations were permissible.<sup>30</sup>

Mr Walker’s evidence also covered a wide range of issues with respect to contemporary Crown support for and protection of te reo. He concluded that:

The Crown has taken a number of steps to carry out the recommendations made by the Waitangi Tribunal in the te reo Māori claim. However, these steps have not had the necessary amount of funding or support from the Government to truly make an impact. The Māori Language Act has provided token official recognition for Māori, lacking recognition in many areas such as the right to use spoken and written Māori in dealings with all central Departments and local authorities, signage and official publications. A further full commission of inquiry into language rights has not been instituted. Funding for projects and organisations promoting Te Reo in comparison to other organisations both in New Zealand and overseas has been inadequate with a subsequent low impact. Te Reo Māori must be promoted not just to Māori, and not just in one week of the year. In order to truly protect and promote Te Reo Māori in accordance with its Treaty obligations, the Government must promote the use of Te Reo Māori more widely than currently so that it can be used in everyday situations, as has been the case for the Welsh language in Wales.<sup>31</sup>

(2) *The Crown’s response*

Te Puni Kōkiri policy director Tipene Chrisp, the key Government official with responsibility for Māori language policy, said that Government legislation and policy now incorporated the important principles established in previous Tribunal inquiries and in litigation concerning te reo. These included:

- ▶ te reo being a taonga of the Māori people;
- ▶ the Government having an obligation to take ‘all reasonable steps’ to support the revitalisation of te reo;
- ▶ Māori and the Government having shared responsibility, with separate but complementary roles; and
- ▶ the Government’s obligation to support the Māori language not being absolute or fiscally unlimited.<sup>32</sup>

Overall, said Mr Chrisp, the implementation of the Government’s 2003 *Māori Language Strategy* was an ‘ongoing process’ and the ‘Government is consistently seeking to improve our performance across the whole of government. In summary, we believe that we are doing the right things, and we are steadily improving how we do these things.’<sup>33</sup> His stance was endorsed by Crown counsel, who added that ‘the Crown . . . looks forward to continuing to work with iwi to strengthen that performance.’<sup>34</sup>

Crown counsel also explained that the prior litigation and the Crown’s subsequent incorporation of the aforementioned principles into its legislation and policy was the reason it had sought to limit the focus of the inquiry. In other words, there was no need to revisit such matters. Crown counsel noted that claimant counsel had agreed to a narrow set of issues, and submitted that the Tribunal should limit itself in its findings to the matters set out in the statement of issues.<sup>35</sup>

With respect to dialect, the Crown emphasised its obligation is to te reo: the extent to which it has any obligation to tribal reo depends upon whether those dialects ‘have a relationship to Te Reo.’ Counsel also distinguished between the Crown’s obligations to support te reo and its use as a vehicle to transmit mātauranga Māori: ‘the extent of the Crown’s obligation is to protect and revitalise Te Reo; it is for iwi to transmit the associated knowledge according to their local preferences.’<sup>36</sup>

Despite emphasising iwi responsibility for dialects, the Crown certainly did not deny its own responsibility. It described how it supports tribal reo by funding

iwi radio stations, assisting iwi to implement language plans, and entering into iwi education partnerships.<sup>37</sup> For example, Mr Chrisp referred to funding that had been made available to develop unique Ngāti Porou curriculum guidelines<sup>38</sup> and the Māori language archiving work of the National Library that can ‘create a language bank of various features of te reo ake o Ngāti Porou and other reo a iwi’.<sup>39</sup> Secretary for Education Karen Sewell noted her Ministry’s iwi education partnership with Ngāti Porou that had yielded a variety of education resources based on te mātauranga o Ngāti Porou, and the \$239,000 of community-based language initiative funding made available to Ngāti Porou for the planning and protection of te reo ake o Ngāti Porou.<sup>40</sup> Arawhetu Peretini, the acting chief adviser Māori at the New Zealand Qualifications Authority, explained that unit standards in te reo Māori qualifications had been developed that recognise dialectal differences.<sup>41</sup>

In questioning witnesses, however, Crown counsel seemed concerned to suggest there were real limits to how far the Crown could go. For example, in cross-examining legal historian Dr David Williams in 2002, counsel noted that the relief sought by Ngāti Porou to make te reo ake o Ngāti Porou the language of daily life for its members included the use of television programming. His question to Dr Williams, about the need to treat all iwi equitably, implied that this was unworkable because it would need to be provided equally to any iwi with ‘similar views about their particular reo’.<sup>42</sup> Similarly, he asked Mr Walker in 2006 whether local signs to the airport would need to be in English, Māori, and tribal dialect, or whether Te Taura Whiri would need to produce versions of Microsoft Office in every tribal reo. It seemed that the purpose of such questioning was to make the whole notion of a Crown obligation to dialect appear completely impractical.<sup>43</sup>

With respect to the work of Te Taura Whiri, Mr Chrisp said that ‘socio-linguistic theory’ confirmed that a national body charged with defining new words and terms and administering the official lexicon was the appropriate governmental action. He said that the new terms provided by Te Taura Whiri – such as those for the days of the week – were put up as options rather than for mandatory use.<sup>44</sup> He added that Te Taura Whiri’s policy to

prevent any further transliterations entering te reo Māori was in fact derived from Māori preferences.<sup>45</sup>

### 5.2.3 Our extension beyond the statement of issues

As can be seen, the issues to be covered in the inquiry were kept to a narrow focus. However, as the inquiry proceeded, it became increasingly apparent that it would be both impossible and artificial to deal with these specific matters (support for dialects and protection from inappropriate use) without examining the Crown’s wider te reo policy. While counsel had agreed to ring-fence these issues, Māori witnesses clearly recognised that separation was not viable.

Crown counsel described Mr Walker’s evidence (which ranged much more broadly than the matters contained in the statement of issues) as ‘something of an audit . . . of how the Government has addressed te reo since the report in Wai 11’. Mr Walker readily agreed that that was what he had done. This approach was justified, he said, because the Crown’s obligations to protect and promote tribal reo ‘all lie firmly on the level of the Crown’s protection generally through its instruments that are available to it’.<sup>46</sup> In other words, he felt that examining the Crown’s protection and promotion of te reo in general was fully relevant to assessing its support for iwi dialects (and, presumably, protection from inappropriate use).

The Crown itself took a similar approach when presenting evidence. For example, both Tipene Chrisp and Karen Sewell went well beyond the matters defined in the statement of issues, although they described these parts of their evidence as ‘background’ or ‘context’. For Ms Sewell, this included general ‘information regarding the Ministry of Education and its role in providing Māori language education’, while Mr Chrisp set out ‘the purpose, structure and focus of the Māori Language Strategy’.<sup>47</sup>

For us, any doubts about the proper boundaries of our inquiry were resolved in a pivotal moment of cross-examination. Counsel for Ngāti Koata asked Mr Chrisp whether protecting or promoting te reo o Ngāti Koata would necessarily also include protecting or promoting te reo Māori generally within the Ngāti Koata rohe. Mr Chrisp replied ‘I think there’s a clear relationship between the two, yes.’ Counsel then asked ‘And therefore if Te Reo

Māori suffers a loss then Te Reo o Ngāti Koata must suffer a loss too?’ To this, Mr Chrisp replied ‘Given the connection, yes.’<sup>48</sup> The witness effectively endorsed the view that assessing the Crown’s general performance was a prerequisite for considering the issue of tribal reo (although, in our view, he could not reasonably have disagreed with the proposition).

We have therefore decided to examine the Crown’s general te reo policies and practices alongside our consideration of the matter of tribal dialect. We make no apology for going against the agreement of Crown and claimant counsel. There is simply no logical basis for separating the state of te reo and the state of particular dialects. The health of te reo as a whole and the health of individual tribal dialects are mutually dependent: any threat to one is a threat to the other, and any Crown activity that impacts on one necessarily impacts on the other.

Were this not the case, why would the Crown have chosen to submit so much evidence on the general revival effort? As became increasingly clear to us as the inquiry progressed, the answer was that such evidence was not so much ‘context’ for the story as the story itself.

In taking this approach, we acknowledge that more evidence, or different evidence, might have been presented to us had the inquiry’s focus been broader. We accept that further research may yield better insights. Our findings and recommendations ought properly to be treated as provisional for that reason. But, as a commission of inquiry, we would be remiss not to comment where we feel sufficiently conversant with the facts to do so – such is the nature of our inquisitorial function. We trust we do so in a constructively critical manner and without contravening the principles of natural justice.

Thus, this chapter comprises:

- ▶ a brief account of the historical decline of te reo and the post-1986 revival (section 5.3);
- ▶ a summary of the health of te reo in 2010 (section 5.4);
- ▶ our analysis of the Treaty interest in te reo, and the obligations this imposes on the Crown and on Māori (section 5.5);
- ▶ our assessment of the Crown’s current te reo policy. We base this on four principles deriving from the

Crown’s Treaty obligation: partnership, a Māori-speaking government, wise policy, and appropriate resources (section 5.5.6); and

- ▶ our recommendations for reform and structural change (section 5.6).

### 5.3 HISTORICAL DECLINE AND POST-1986 REVIVAL

Our assessment of the Crown’s current te reo policies and practices necessarily begins with a brief overview of the state of the Māori language throughout the twentieth century. We traverse the historical period (pre-1975) only briefly, in accordance with the presiding officer’s 2006 ruling that the remaining hearings would focus on post-1975 events and that no substantive findings would be made on historical claims.<sup>49</sup> We draw heavily on the account provided by the Tribunal in its 1986 report on the te reo Māori claim, which shared our focus on the post-1975 period.<sup>50</sup>

In short, many developments over more than two decades have today contributed to a full array of contemporary Crown measures and policies aimed at reviving and promoting te reo Māori. The two biggest areas of investment have been Māori language education and broadcasting. Many of these initiatives were first undertaken and driven by Māori themselves.

#### 5.3.1 Towards English monolingualism, 1900–75

While many Māori were bilingual at the end of the nineteenth century, most spoke te reo as their ‘ordinary means of communication’. Then came what the te reo Māori Tribunal identified as the first of three 25-year periods in the history of the Māori language in the twentieth century. During the first, from 1900 to 1925, Māori children went to school as monolingual Māori speakers and all effort was focused on their learning English. The children had to leave te reo at the school gate and were punished if they did not.<sup>51</sup>

Between 1925 and 1950, the children of the first period grew to adulthood and, while they spoke te reo to their parents and older relatives, they would not speak Māori to their children. Parents simply did not want their own children to be punished in the way that they had been. Of

Pita Sharples speaking at the opening of New Zealand's first kura kaupapa Māori at Hoani Waititi Marae in 1985. Invited dignitaries included the Prime Minister, David Lange, and the Governor-General, Sir Paul Reeves.



course some children were taught te reo, or at least could understand it well, but by and large English had become their first language.<sup>52</sup>

The period from 1950 to 1975 was one of accelerating monolingualism, as education policies were compounded by urbanisation and associated practices such as ‘pepper-potting’.<sup>53</sup> The new generation of parents was convinced that their children had to speak English to get ahead, and thus a whole generation grew up who either knew no Māori or knew so little that they were ‘unable to use it effectively and with dignity’. The total domination of English-language mass media also acted as an ‘incessant barrage that blasted the Maori tongue almost into oblivion’.<sup>54</sup>

The main evidence provided to the Wai 262 inquiry about the twentieth-century history of te reo Māori was Dr Williams’s report *Crown Policy Affecting Maori Knowledge Systems and Cultural Practices*. Like the te reo Māori Tribunal, Williams noted the research of Professor Bruce Biggs, which showed that the ability to speak te reo amongst Māori children declined from 90 per cent in 1913

to 80 per cent in 1923 to 55 per cent in 1950 to 26 per cent in 1953–58 and to 5 per cent in 1975.<sup>55</sup>

### 5.3.2 The health of te reo in the mid-1970s

Professor Biggs’s 1975 figure presumably derives from the research of Dr Richard Benton for the New Zealand Council for Educational Research. Between 1973 and 1979, Benton surveyed 6,470 Māori families (comprising over 33,000 individuals) throughout the North Island. He concluded that, in the mid 1970s, there were 64,000 fluent speakers of Māori within the Māori community (approximately 18 per cent of all Māori) and another 30,000 who could understand conversational Māori quite well. However, he identified only two domains where fluent speakers felt secure: on the marae and at certain religious observances. Moreover, in only 170 of the 4,090 households surveyed with resident children was the youngest child rated as fluent. Writing in 1991, Benton commented:

It was clear that Maori was, by the 1970s, playing only a very marginal role in the upbringing of Maori children, and that,



Te Reo Māori Society patron, Hemi Potatau, with a petition he was about to present to Parliament in June 1978 calling for the setting up of a Māori television production unit. Along with land loss, the status of te reo was a great galvanising issue in Māori protests over Treaty rights in the 1970s and 1980s.

if nature were left to take its course, Maori would be a language without native speakers with the passing of the present generation of Maori-speaking parents.<sup>56</sup>

Later, in 2001, Benton and fellow researcher Nena Benton reflected that the number of pre-school children who could speak Māori fluently in 1979 was ‘almost certainly less than a hundred’.<sup>57</sup>

### 5.3.3 Māori initiatives to save the language

In response to the dawning realisation that the language was in serious peril, a series of Māori initiatives began that effectively brought te reo back from the brink. In September 1972, the Ngā Tamatoa Council (led by Hana Jackson) presented a petition to Parliament signed by 30,000 people, calling for Māori culture and language to be taught in all New Zealand schools. Jackson’s accompanying submission referred to speaking Māori as:

the only real symbol of Maori identity . . . For us to be able to speak Maori is the truest expression of our Maori tanga.

It is the substance of our Maori tanga. It is our link with the past and all its glories and tragedies. It is our link with our tipuna.<sup>58</sup>

The presentation of this petition led to the annual celebration of Māori Language Day, which in 1975 became Māori Language Week.

After 1975, Māori protests and petitions continued unabated. It is little wonder given the prevailing mood of the Government (for example, the Minister of Māori Affairs Ben Couch said in 1979 that he saw no need to take further legislative steps to protect the language).<sup>59</sup> Thus, in 1978, another 30,000-signature petition was presented to Parliament, this time by the Te Reo Māori Society of Wellington. It sought the establishment of a Māori television production unit within the New Zealand Broadcasting Corporation. Another petition in 1981, signed by 2,500 people, called for Māori to be made an official language of New Zealand.<sup>60</sup>

The te reo revival was gathering pace. In 1979, Te Ātaarangi – a community-based Māori language learning

programme – was initiated to teach speaking and listening skills to adult Māori. Te Wānanga o Raukawa was established in 1981 to teach Māori culture and knowledge at tertiary level because of the lack of such provision in the mainstream system. The first urban Māori radio station, Te Upoko o te Ika in Wellington, broadcast for one week during Māori Language Week 1983.

Most significantly, perhaps, 1982 saw the advent of the *kōhanga reo* (or language nest) movement for Māori preschoolers. Its philosophy centred around *kaupapa* and *tikanga* Māori, as well as *whānau* involvement – in particular through the teaching of *tamariki* by their grandparents. The first *kōhanga reo* opened in Wainuiomata in April 1982. With some support from the Māori Education Foundation and the Department of Māori Affairs, numbers rose rapidly, and by 1985 there were over 6,000 children attending 416 *kōhanga reo*.<sup>61</sup> This was clearly a grass-roots movement of incredible energy and momentum.

Frustration at the lack of opportunities for children to keep learning in *te reo* at primary school led to a Māori immersion primary school (or *kura kaupapa* Māori) being established, by Māori, at Hoani Waititi Marae in West Auckland in 1985. This was perhaps the most significant development in Māori language schooling since the country's first bilingual school was designated at Rūātoki in 1977. The birth of *kura kaupapa* was followed, in January 1988, by the 'Matawaia Declaration' in which bilingual school communities called for the creation of an independent, statutory Māori education authority to establish Māori control and the autonomy of *kaupapa* Māori practices in the education system.

These developments demonstrate that, alongside land, the health of *te reo* has been one of the two great galvanising issues in Māori protests over Treaty rights during the last three or more decades. Propelled by a profound depth of feeling and sense of purpose, efforts to safeguard the Māori language gave great impetus to the Māori 'renaissance' overall.

#### 5.3.4 The inquiry into the *te reo* Māori claim

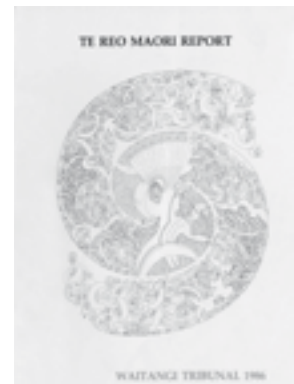
In the mid-1980s, Māori concerns over *te reo* that had been building over the previous 15 years became focused on the Waitangi Tribunal. The *te reo* Māori (Wai 11) claim was brought by Huirangi Waikerepuru and Ngā

Kaiwhakapūmau i te Reo Māori (the Wellington Māori Language Board) and primarily sought to have Māori made an official language of New Zealand. The claimants also laid a number of complaints about the education system and the lack of broadcasting support for *te reo*.

In its 1986 report, the Tribunal stated that it was 'clear that the Maori language in New Zealand is not in a healthy state at the present time and that urgent action must be taken if it is to survive'. The Tribunal felt there was a danger of Māori becoming like 'Church Latin', only ever being used on ceremonial occasions. It did note, however, the advent of a 'remarkable thing' – the *kōhanga reo* movement – which it felt demonstrated the 'valiant efforts' Māori parents were prepared to make to repair the damage to *te reo*.<sup>62</sup>

The Tribunal reflected that Māori would become an increasingly large part of the New Zealand population into the future, particularly amongst the school-age population. It also anticipated that more and more people would be inclined to identify with their Māori ancestry. New Zealand's population appeared to be undergoing a profound change, which meant that 'the demand for fluency in the Maori language will increase rather than diminish. If there are difficulties put in the way of those who want to attain that fluency then serious social tensions could develop'.<sup>63</sup>

The Tribunal warned that the sense of social injustice associated with Māori concerns for their language could become 'explosive'. It also said that *te reo* Māori was 'the embodiment of the particular spiritual and mental



The Waitangi Tribunal's 1986 *Report of the Waitangi Tribunal on the Te Reo Maori Claim*. The Tribunal found that *te reo* was a *taonga* and that urgent action was needed to improve its health.





During their inquiry into the te reo Māori claim, members of the Tribunal visited a kōhanga reo at Waiwhetu in Lower Hutt in June 1985. The visit inspired the following comments in their published report: 'The infants come to a place where nothing but Maori is spoken. They have their day filled with activity – games, songs and other pastimes to be found in any kindergarten – but all in Maori. Within a surprisingly short time they master Maori fluently in a childish way until they are five or six years of age when they go to an orthodox primary school. By that time they are able to carry on an animated conversation in Maori and we watched them doing so in a Kohanga reo that we visited.' The members pictured are Chief Judge Edward Durie and Paul Temm QC.

concepts of the Maori', which in turn provided useful alternatives to Western ways of thinking. The Tribunal cautioned that, without te reo, 'this new dimension of life from which New Zealand as a whole may profit would be lost to us'.<sup>64</sup>

The Tribunal recommended that:

- ▶ legislation be introduced enabling anyone to use the Māori language if they wished in all courts of law and in any dealings with Government departments, local authorities and other public bodies;
- ▶ a supervising body be established by statute to supervise and foster the use of the Māori language;
- ▶ an inquiry examine the way Māori children were educated to ensure that all those who wanted to learn Māori could do so from an early age, with financial support from the State;
- ▶ broadcasting policy be formulated that had regard to the Crown's obligation to recognise and protect the Māori language; and

- ▶ bilingualism in Māori and in English become a prerequisite for any jobs deemed necessary by the State Services Commission.<sup>65</sup>

The Tribunal did not recommend that te reo Māori be a compulsory subject in schools, nor that all official documents be published in both English and Māori. At that time, it said, 'we think it more profitable to promote the language than to impose it'.<sup>66</sup>

### 5.3.5 The Maori Language Act 1987

It is commonly believed that the Tribunal's report on the te reo Māori claim led to the introduction of legislation by the Crown. Te Taura Whiri, for example, states on its website that '[a]lthough calls had been made over a number of years for legislation to recognise the status of the Māori language in New Zealand, it was the tribunal's finding that finally prompted the drafting of the Māori [L]anguage Bill'.<sup>67</sup> In fact the Māori Language Bill was introduced into the House by Minister of Māori Affairs Koro Wetere on

29 April 1986, the same day that the Tribunal signed and released its report. In other words, the Bill's drafters had no prior consideration of the Tribunal's report, although they were clearly prompted by the Tribunal's inquiry.<sup>68</sup>

That said, the report was able to be considered before the legislation was enacted in 1987. The Maori Language Act gave te reo official language status, thus granting speakers the right to use it in the courts and other settings (albeit not in any dealings with Government departments, as the Tribunal had recommended). The Act also established the Māori Language Commission, which was initially called Te Komihana mō te Reo Māori but later (in 1991) renamed Te Taura Whiri i te Reo Māori. The commission was to have (and still has) a board of up to five members, all appointed by the Minister of Māori Affairs, who gives regard not only to candidates' 'personal attributes but also to their knowledge and experience in the use of the Māori language'.

The commission's functions were defined under section 7 of the Act as including:

- ▶ initiating or developing policies and practices to give effect to Māori being an official language of New Zealand;
- ▶ generally promoting te reo as a living language; and
- ▶ advising the Minister of Māori Affairs as requested on matters relating to the Māori language.

Section 8 also gave the commission powers to:

- ▶ hold or attend any inquiries to enable it to ascertain the wishes of the Māori community with respect to te reo;
- ▶ undertake or commission research into the use of te reo;
- ▶ consult with Government departments about the use of te reo in the course of their business;
- ▶ publish information relating to the use of te reo; and
- ▶ report to the Minister on any matters regarding te reo that it thinks should be drawn to the Minister's attention.

### 5.3.6 Developments in education

With the passage of the Education Act in 1989, the Ministry of Education assumed control for all aspects of Māori-medium education that had previously sat within the Department of Māori Affairs. At the same time, the



Te Kura Kaupapa Māori o ngā Mokopuna, Seatoun, Wellington. This kura was opened in 1994, one of dozens established around the country in the mid-1990s as the Government sought to make amends for the previous lack of Māori-medium schooling options for kōhanga children.

then Minister of Māori Affairs, Koro Wetere, envisaged kōhanga reo becoming fully administered by iwi authorities within five years. However, a change in Government and the repeal of the Runanga Iwi Act 1990 in 1991 ended any such plans, with the new administration preferring language and education initiatives to be implemented through mainstream departments rather than through any devolution to iwi.<sup>69</sup>

With increased funding under the Ministry of Education's regime, the number of children at kōhanga reo continued to rise sharply, peaking with 14,514 students at 809 kōhanga services in 1993 (up from 8,724 children at 470 services in 1989). By 2009, this had declined to 9,288 children attending 464 kōhanga reo. The proportion of Māori children in early childhood education attending kōhanga reo was just under half at the 1993 peak and today stands at just under a quarter.<sup>70</sup>

It was a similar story for schooling, where the Ministry of Education's funding also led to dramatic growth in the number of kura kaupapa during the early to mid-1990s. While there were just six kura kaupapa in 1990, there were 13 in 1992, 34 in 1995, and 59 in 1998. There was similar growth in the overall number of schools offering some level of Māori-medium learning.<sup>71</sup> Excluding kura kaupapa, this reached 396 by 1999. A moratorium was placed

on new kura kaupapa between 1998 and 2002, but by July 2009 there were 70 kura kaupapa and three aspiring kura kaupapa (kura teina). Other Māori-medium schools had dropped back to 321.

The total number of students in bilingual and immersion learning peaked at 30,793 in 1999, including 18.6 per cent of all Māori school students (up from 12.5 per cent in 1992). The peak in Māori student numbers in Māori-medium education came later, in 2004 (27,127), but the proportion of Māori students in this form of learning had dropped to 16.9 per cent. By 2009, it had dropped further to 15.2 per cent. The high point in non-Māori participation in Māori-medium learning was in 1998 (4,432 students, or 0.8 per cent of all non-Māori school students).

Looking specifically at secondary schools, the number of Māori students learning via the medium of te reo for at least 12 per cent of the time more than doubled from 1992

to 2009. At primary level the rise in the number of Māori students in some form of Māori-medium education over the same time period was over 50 per cent.

Between 1989 and 2009, the number of students learning Māori as a subject at secondary schools rose 40.3 per cent, and the number of schools offering the subject increased by around two thirds. The 2008 figure was the highest total during the entire period, although the number of schools offering Māori in 2008 was not as high as in 2003.<sup>72</sup>

At the tertiary education level, there was also a massive rise in overall Māori participation but it occurred somewhat later than the growth of kōhanga reo and Māori-medium schooling. It peaked at 23.1 per cent of the Māori population in 2004. The 2009 figure was 19.6 per cent, which remained much higher than the participation rate for the total population of 12.4 per cent. Much

Nan Bella teaching children Māori vowel sounds at Waiwhetu School in 1991. At this time, the demand for Māori-medium education was soaring.



5.3.7

of this rise can be attributed to the phenomenal growth of the wānanga, and particularly Te Wānanga o Aotearoa, after the Government increased funding as a result of the wānanga Treaty settlement in 2001. At the very peak of this growth, in 2004, Te Wānanga o Aotearoa had nearly 70,000 enrolments. This number had fallen to less than 43,000 in 2009.

The rise of wānanga also led to a massive increase in the number of students in te reo Māori courses at tertiary level, which peaked in 2003 at 36,356 learners. However, this number had dropped to 16,934 by 2007.<sup>73</sup>

Other developments of note in Māori language education include the 1999 incorporation of the kura kaupapa Māori guiding philosophy, ‘Te Aho Matua’, into the Education Act. After complaints from the Hoani Waititi kura kaupapa, it was also agreed in 2001 that ERO would apply the principles of Te Aho Matua to assess the delivery of education in kura kaupapa.<sup>74</sup> More recently, the Ministry of Education has launched its Māori education strategy for 2008 to 2012, *Ka Hikitia – Managing for Success*, in April 2008, and its Māori-medium curriculum, *Te Marautanga o Aotearoa*, in September the same year. For a number of years now, the Ministry has also reported annually on Māori education in its publication series entitled *Ngā Haeta Mātauranga*. There have been a range of measures to attract and retain Māori-speaking teachers, the development of more Māori language teaching resources, partnerships between the Ministry and iwi organisations, and so on.

### 5.3.7 Developments in broadcasting

The first major development in Māori broadcasting in the post-te reo Māori report era was radio station Te Upoko o te Ika receiving funding in 1987 as a pilot for the introduction of a network of Māori radio stations around the country. Other stations began operating with State funding the following year.

In 1989, when the Crown amended the Broadcasting Act 1976 in order to create new State-owned enterprises, the New Zealand Māori Council and Ngā Kaiwhakapūmau i te Reo Māori filed proceedings in the High Court to stop the transfer of the assets. In May 1991, the High Court declined to grant relief in respect of radio assets but adjourned the claim over television assets to

allow the Crown to submit a scheme designed to protect te reo Māori if the assets were transferred.<sup>75</sup>

In July 1991, Cabinet took its undertakings on Māori broadcasting to the High Court. These included, amongst other things, the development of special-purpose Māori television. The Crown accepted that ‘the Maori language and culture were taonga, and hence entitled to the protection of the Crown in accordance with article 2 of the Treaty’. The High Court accepted the Crown’s undertakings and allowed the transfer of television assets.<sup>76</sup>

Piripi Walker (right) and Tama Te Huki in the studio of Wellington Maori language radio station Te Upoko o te Ika, on the day it started broadcasting in 1987. Mr Walker gave evidence to the Tribunal in 2006 on behalf of Ngāti Koata.



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The lawyers acting for the New Zealand Māori Council in the *Broadcasting Assets* case about to enter the Downing Street, London, offices of the Privy Council in 1993. *From left:* Eugenie Laracy, Martin Dawson (who acted for Ngāti Koata in our inquiry), and Sian Elias (now the chief justice).

The New Zealand Māori Council and Ngā Kaiwhakapūmau i te Reo Māori appealed that decision – first to the Court of Appeal and then to the Privy Council.<sup>77</sup> Each court dismissed the appeal, but the Privy Council emphasised the previous undertakings the Crown had given to the courts. The Privy Council also stressed that, given the ‘vulnerable state’ of te reo, the Crown might well need to ‘take especially vigorous action for its protection.’<sup>78</sup>

In response to this litigation, the Crown amended the Broadcasting Act in 1993 and established Te Māngai Pāho to fund Māori language and culture broadcasting. This was a hugely significant step, for the size of the funds available to Te Māngai Pāho and how the agency chooses

to allocate them have had a major impact upon the amount and quality of Māori language broadcast content.

In 1996, the Crown set up a joint Crown–Māori working party on Māori broadcasting. From 1996 to 1997, the Aotearoa Māori Television Network was piloted in the Auckland region. In 1998, the Government agreed to the establishment of a Māori television trust (Te Awhiorangi), which in 1999 presented its business case to ministers. That year’s change of Government, however, led to a delay while the new administration considered its options.

In 2000, responsibility for Māori broadcasting was transferred from the Ministry of Commerce to Te Puni Kōkiri, which invited a group of Māori broadcasters to

make recommendations on Māori broadcasting. This led to Cabinet deciding in 2001 to establish a Māori television service. The Māori Television Service Act came into force in May 2003 and Māori Television finally went to air on 28 March 2004. A second, Māori language-only channel, Te Reo (available only on the digital network), was launched in March 2008.

Te Māngai Pāho provides operational funding for the Māori Television Service and the network of 21 iwi radio stations as well as contestable funding for television programming and other funding for radio programmes and Māori language music. The television programming funded is mainly screened on Māori Television but also includes several Television New Zealand (TVNZ) programmes such as *Te Karere*, *Waka Huia*, and *Marae*, as well as the occasional programme aired on TV3.<sup>79</sup>

The State broadcasters (TVNZ and Radio New Zealand) have charter agreements with ministers that require them to promote Māori language and culture – although, as we discuss in section 6.3.1, the Government will soon replace the TVNZ charter with other provisions.<sup>80</sup> Iwi radio stations have Māori language content incentive bonuses. The Māori Television Act also sets out the requirements for the channel in terms of the scheduling of Māori language content. On the whole, however, the Crown has given the State broadcasters the leeway to choose how to interpret and fulfil their charter requirements, on the basis of preserving what Te Puni Kōkiri described as the principle of ‘arm’s length’ State involvement in the broadcasters’ operations.<sup>81</sup>

### 5.3.8 Developments in public services and use

The way the public sector uses and provides for te reo Māori has developed since 1986. However, moves towards greater bilingualism in the public sector remain the prerogative of each Government agency.

Examples of developments include the following:

- ▶ Services provided by Te Taura Whiri under the Maori Language Act (certification and registration of translators and interpreters).
- ▶ The 1991 Maori Language Act amendment, which slightly broadened settings where te reo Māori can be used (for example, in the Tenancy Tribunal).

- ▶ Proficiency standards for public servants (as measured by the public sector Māori language proficiency examination).
- ▶ The ‘Language Line’ translation service.
- ▶ Bilingual forms for key citizenship documents, the census, and so on.
- ▶ Some departmental Māori language planning and use (often in the form of translation of key documents and Māori versions of agency titles). Further uptake is promoted and encouraged by Te Taura Whiri.
- ▶ Te reo Māori versions of important publications such as *Dictionary of New Zealand Biography* volumes and ‘Te Ara’, the online encyclopaedia.
- ▶ Some increases in Māori signage.
- ▶ Māori versions of place names being recognised for use by New Zealand Post.
- ▶ Simultaneous translations in recent years at Waitangi Tribunal hearings (albeit not, ironically, in the Māori Land Court).
- ▶ The availability, since 1997, of an interpreter for speeches given in Māori in Parliament.

### 5.3.9 Developments in community language support

The Government has put in place a number of policies and practices that recognise the need for local-level language regeneration.

Key among them is Te Taura Whiri’s language planning services, which have been developing since 1995. These are primarily for Māori communities but are also aimed at Government departments (see above) and the private sector. Te Taura Whiri offers support to communities, marae, iwi, hapū, and whānau to build profiles of the amount and quality of te reo being spoken within the community and to establish te reo plans for future growth. As part of the service, Te Taura Whiri offers language planning web pages, workbooks, programmes, and so on.

Since 2001, groups have been able to apply for Mā Te Reo funding to support their community reo objectives (such as holding wānanga and noho marae). The Mā Te Reo fund was set up by Te Taura Whiri with a limited lifespan, although the Crown told us that options were being examined to allow it to continue beyond its



◀ A New Zealand passport. Te reo Māori has been used on the passport's inside pages since 1994 and on its cover since 2009.

▶ Online encyclopaedia, 'Te Ara'. The pages of 'Te Ara', as well as some Government services and information, are now offered in te reo Māori.

▼ Newsreader Scotty Morrison preparing to present the twenty-fifth birthday edition of *Te Karere* on a newly unveiled set at TVNZ's central Auckland studios, February 2009



5.3.10(1)

scheduled termination. However, its final funding round ran from March to May 2010.<sup>82</sup> The fund's size was \$1.9 million annually.<sup>83</sup>

Money is also available to the Ministry of Education's iwi partners, on a four-year cycle, from the Ministry's community-based language initiative fund, which we have already mentioned, and which was set up in 1999. The size of the fund in 2006 was \$5.1 million over four years.<sup>84</sup> Te Puni Kōkiri told us that the fund has been used to support tribal dialects through such initiatives as tribal dictionaries, oral history projects recording kaumātua speaking in tribal dialect, and so on.<sup>85</sup>

Meanwhile, Te Puni Kōkiri conducts surveys on the health of te reo and attitudes to it, and builds regional te reo profiles using survey and census data. These profiles can thus provide an approximate picture of the health of tribal dialects by showing the number of older native speakers within particular districts. This information-gathering by the Ministry provides valuable help to Māori groups in their planning.

### 5.3.10 The Māori Language Strategy

#### (1) Development

The key tool in the Crown's process of setting a te reo Māori agenda is the *Māori Language Strategy* (MLS). It was first developed in 1997, in an attempt to bring some coordination to a sector that had evolved in a relatively unplanned way since the 1980s. In summary, its five overarching Māori language policy objectives were initially:

- ▶ to increase the number of those who know the Māori language;
- ▶ to improve proficiency levels in Māori;
- ▶ to increase the number of situations in which Māori can be used;
- ▶ to ensure the Māori language can be used for the full range of modern activities; and
- ▶ to foster positive attitudes towards the language 'so that Māori-English bilingualism becomes a valued part of New Zealand society'.<sup>86</sup>

In 1999, the Government decided to revise the MLS after first undertaking research into the status of te reo in New Zealand.<sup>87</sup> A monitoring team was established to lead this work within Te Puni Kōkiri,<sup>88</sup> which included the 2001 survey on the health of the Māori language (see



Te Puni Kōkiri's 2003 *Māori Language Strategy*, a key document in our inquiry. Its vision is for te reo to be 'widely spoken' by Māori by 2028.

below). Thus, in March 2003, Te Puni Kōkiri produced a discussion document about the Government's proposed major revision of the MLS, entitled *A Shared Vision for the Future of Te Reo Māori*. The document explained that a Māori reference group had been established in 2002 to 'provide a basis for an ongoing relationship with Māori language stakeholders'. Membership of the reference group included representatives of Māori broadcasting organisations, Māori education organisations, general Māori organisations, and officials from Government departments.<sup>89</sup> The reference group and Te Puni Kōkiri had collectively developed the outcome statements in the discussion paper, and in early 2003 'a small focus group of kaumātua and language experts' met to further refine the discussion paper text.<sup>90</sup>

Te Puni Kōkiri sought feedback from Māori on the discussion paper by mail, email, phone, or attendance at one of 14 regional consultation hui held between 14 and 28 March 2003. In his foreword to the published MLS, the then Minister of Māori Affairs wrote that 'The Māori Language Strategy draws strongly on Māori thinking about, and aspirations for, the Māori language. It has been prepared with input from Māori language experts and through community consultation'.<sup>91</sup>

The final MLS document was produced jointly by Te Puni Kōkiri and Te Taura Whiri. Cabinet approved it in October 2003, and directed lead agencies to produce implementation plans by June 2004. The agencies were to set five-year targets that would function as milestones towards the overall MLS targets (for 2028). As we will see



below, some of the outcomes set for language revival in the final MLS differed from those that appeared in the discussion document. Presumably, officials made these changes in the course of obtaining Cabinet approval of the MLS goals.

While an internal Crown review of the MLS began in 2008, the publication of a new version may initially have been postponed because of the impending release of our report. As it transpired, however, on 29 July 2010 Minister of Māori Affairs Pita Sharples announced that a review panel of Māori language experts headed by Tamati Reedy would undertake a complete review of the MLS in order ‘to ensure the programmes and expenditure across the whole of government are responsive to Iwi/Maori aspirations.’<sup>92</sup> We return to this review and the motivation for it below.

### **(2) What the MLS says**

Various agencies have responsibilities under the MLS, including six lead agencies – Te Puni Kōkiri, Te Taura Whiri, the Ministry for Culture and Heritage, the Ministry of Education, the National Library, and Te Māngai Pāho. The 10 functions under the strategy (broadcasting, education, policy development, provision of public services, and so forth) are spread across the six agencies.<sup>93</sup> Te Puni Kōkiri is the overall lead agency, with responsibility for policy development, sector coordination, and the monitoring of both Māori language health and the effectiveness of agency activities.

The MLS has a 25-year timeframe, recognising that significant change in the use and knowledge of te reo Māori will take a generation. Its overall vision is that:

By 2028, the Māori language will be widely spoken by Māori. In particular, the Māori language will be in common use within Māori whānau, homes and communities. All New Zealanders will appreciate the value of the Māori language to New Zealand society.<sup>94</sup>

Supporting this vision are five goals. We examine these in more detail later in this chapter, but in summary, they aim to strengthen:

- ▶ language skills;
- ▶ language use;

- ▶ education opportunities in the Māori language;
- ▶ community leadership for the Māori language; and
- ▶ recognition of the Māori language.<sup>95</sup>

### **(3) How the MLS is implemented**

Two of the 10 ‘functions of Government’ under the MLS are shared between agencies, but each of the other eight is the sole responsibility of one lead agency. These functions, and the activities undertaken by the agencies, are described below.<sup>96</sup>

#### **(a) MĀORI LANGUAGE EDUCATION**

The Māori language education function extends across the early childhood sector, primary, and secondary schools, the tertiary sector and community education. It includes both Māori language immersion education and ‘Māori as a subject’ education. The planning and implementation of work in this area is allocated to the Ministry of Education.

#### **(b) MĀORI LANGUAGE BROADCASTING**

The Māori language broadcasting function involves supporting the growth of te reo Māori by funding radio and television broadcasting in the Māori language. The responsibility for Māori language broadcasting policy and planning is allocated to Te Puni Kōkiri and the implementation of it to Te Māngai Pāho and the Māori Television Service.

#### **(c) MĀORI LANGUAGE ARTS**

Support for Māori language arts covers activities such as kapa haka, speech competitions and new writing in te reo. Responsibility for this function lies with the Ministry of Culture and Heritage, with input from other departments and from Māori organisations.

#### **(d) MĀORI LANGUAGE SERVICES**

The Māori language services function includes Government te reo services, lexical development, dictionary making, benchmarking of proficiency levels in the Māori language and certification of translators and interpreters. Responsibility for this function lies with Te Taura Whiri, reflecting its legislative mandate to undertake such functions.



Headlines from 1989 to 1995 showcasing the revival of te reo.

(e) MĀORI LANGUAGE ARCHIVES

The Māori language archives function involves the collection and maintenance of Māori language archives (whether written, audio, or audio-visual). Responsibility for this function sits with the National Library, with input from other Government agencies.

(f) MĀORI LANGUAGE COMMUNITY PLANNING

The Māori language community planning function involves the provision of funding and advice about language planning for whānau, hapū, iwi and Māori. Responsibility sits with Te Taura Whiri, because of the strong links to the administration of the agency's Mā Te Reo fund.

(g) MĀORI LANGUAGE POLICY, COORDINATION, AND MONITORING

A coordination function is necessary in order to ensure a 'whole-of-Government' approach. This function also involves monitoring the health of te reo Māori and the

effectiveness and efficiency of the Government's Māori language functions, as well as undertaking periodic stock-takes of Government Māori language programmes and services.<sup>97</sup> Te Puni Kōkiri is responsible for this function.

(h) PUBLIC SERVICES PROVIDED IN MĀORI

The public services function relates to the official language status of te reo, and aims to ensure that all New Zealanders can access public services through the Māori language. While each Government agency is responsible for developing its own internal Māori language plan, Te Puni Kōkiri and Te Taura Whiri are responsible for planning and implementing this work.

(i) MĀORI LANGUAGE INFORMATION

The Māori language information function involves supporting the regeneration of the language through the provision of information. Recent examples have included Māori language television and radio programmes, an interactive website, an information kit for new parents,

new phrase booklets, and reo events promoting Matariki. Te Taura Whiri is responsible for this function.

(j) WHĀNAU LANGUAGE DEVELOPMENT

The whānau language development function involves trained mentors working on a one-to-one basis with participating families to support intergenerational language transmission. Responsibility for this function sits with Te Taura Whiri.

**5.3.11 State funding for te reo Māori**

The State's resourcing of te reo Māori was estimated at \$177.9 million in 1999. By 2002, it had grown to \$225 million and, by 2006, to approximately \$226.8 million.<sup>98</sup> It has been defined as resourcing both for 'services and programmes that [contribute] more or less directly to supporting the health of the Māori language' and for 'activities that are being undertaken by . . . government agencies to support the growth and development of the Māori language'.<sup>99</sup> The education sector accounts for the largest share of this resourcing, with \$132.8 million in 1999, \$137.6 million in 2002, and approximately \$142.3 million in 2006. The second-biggest area of expenditure is Māori language broadcasting. Money for Te Māngai Pāho, for example, increased from \$22.2 million in 1999 to \$49.1 million in 2002 and \$49.8 million in 2006.<sup>100</sup>

**5.3.12 Conclusion**

After decades of active suppression or, at best, 'benign neglect', te reo Māori had reached a perilous state by the 1970s, with very few younger speakers.

Against that background, Māori initiatives to protect and revive the language began in the 1970s and 1980s. They included petitions, a Māori radio station, the first kura kaupapa Māori, and – most importantly of all – the birth of the kōhanga reo movement in 1982 and its subsequent spectacular growth.

Meanwhile, in its 1986 *Report on the Te Reo Maori Claim*, the Waitangi Tribunal recommended that te reo be made an official language, that a Māori language commission be established, that the education system and broadcasting policy support the Māori language, and that anyone who wished to do so be enabled to speak in Māori in the courts or when dealing with any public bodies.

Soon after, the Maori Language Act 1987 made te reo Māori an official language and established the Māori Language Commission (soon to be known as Te Taura Whiri i te Reo Māori). Te reo could be used before the courts but not, however, in any dealings with the Government.

In the two decades since the Maori Language Act was passed, there have been many developments that have collectively formed the State's modern Māori language policy. They include the expansion of Māori-medium education, the growth of the wānanga, the establishment and funding of a network of iwi radio stations and the Māori Television Service, the broadening of public services in te reo Māori, the funding of community-based language initiatives, and the development in 1997 of the first Māori language objectives to coordinate Government Māori language activities.

**5.4 THE HEALTH OF TE REO IN 2010**

We have outlined how the Crown's present te reo policies and programmes have developed. To determine whether these are working, we must first assess the health of te reo Māori in 2010.

There are a number of gauges to measure this, notably the participation in Māori-medium education and the learning of Māori as a subject in the mainstream school system, as well as the results of various surveys and censuses over the last 15 or so years.<sup>101</sup> The Crown submitted evidence about all these matters, both during the hearings and after, as new material came to hand. That said, we did not actively canvass a number of the issues we address here during our inquiry, and did not hear from key interested parties, such as the Kōhanga Reo National Trust. While our conclusions must remain provisional, therefore, we nevertheless set out the following observations because – as explained earlier – having considered these issues, and being convinced of their relevance to the matters at hand, it would be wrong of us not to do so.

**5.4.1 Early childhood education**

As we saw in the previous section, Māori enrolments in kōhanga reo reached their peak in 1993, when half of all Māori in early childhood education were at kōhanga. But

the percentage of Māori pre-schoolers at kōhanga and the overall number of children attending kōhanga has since fallen practically each successive year. The number of kōhanga themselves has likewise declined every year without exception since 1994. Thus, in 2009 there were 464 kōhanga reo and a further 27 puna kōhungahunga (otherwise known as 'puna reo'), which are essentially parent-led Māori playgroups in which te reo is used as much as possible. Less than a quarter of all Māori at pre-school attended one of these services, with a total student number at them of 9,565 (only 277 of whom were at puna reo).<sup>102</sup> At the same time, the number of Māori children attending any form of early childhood education rose by 27 per cent. In other words, kōhanga today have a much smaller share of a much larger market (see tables 5.1 and 5.2 and figure 5.5).<sup>103</sup>

If the 1993 rate of Māori participation in kōhanga had been maintained, the number of tamariki at kōhanga reo would have increased to 18,300 by 2008. In reality, in that year the enrolment at kōhanga was only 9,200, including 8,700 Māori children – 9,600 fewer Māori children than there would have been had the 1993 share been maintained (see figure 5.3).<sup>104</sup>

The decline in kōhanga reo attendance may be having an impact on the number of pre-schoolers competent in te reo. After adjustments for those too young to speak or for whom no answer was provided, census results show that the proportion of those in the Māori ethnic group aged from zero to four who were reported as being able to speak te reo dropped from 21.9 per cent in 1996 to 18.2 per cent in 2006. A drop-off can also be observed in the figures for the five to nine year age group, which declined from 22.1 per cent in 1996 to 18.8 per cent in 2006 (see table 5.9).

Of course, it remains possible that the kōhanga that have fallen by the wayside were those did not have competent te reo speakers in charge of them, and were therefore not making much impact on the census statistics. Even so, the drop in the number of kōhanga is such that there must have been at least some where the children were being well taught. The census decline does appear to match the decline in kōhanga participation, in any event (see figure 5.4).

What we are seeing, therefore, is a quite spectacular

rise and then steady fall of kōhanga reo. The Ministry of Education's publications show that it is clearly aware of the problem. For example, its 2007 draft of *Ka Hikitia* stated that the falling number of kōhanga was a 'challenge' and an issue that 'needs further investigation'.<sup>105</sup>

It seems that Māori began leaving the kōhanga reo movement in the mid-1990s for a number of reasons. One was probably that more Māori were in paid work, meaning more parents opting for all-day care or care where they were not expected to play such a significant role. (The numbers of all children in kindergartens and playcentres has also declined since 1996, for probably the same sorts of reasons. Instead, the real growth has come in licensed 'education and care' services.)

Another factor has doubtless been the dwindling number of older Māori speakers in rural communities and urban neighbourhoods. Observers have said it was these people who made the spectacular growth of kōhanga reo possible.<sup>106</sup> There have also been some concerns expressed by individual kōhanga about the centralised autonomy of the Kōhanga Reo National Trust, although we are in no position to gauge the strength of that feeling. In any event, we are aware of a good deal of loyalty to the trust's centralised model. We return to this later in the chapter (see section 5.5.6(3)(d)).

In fairness, there have also been some concerns about the quality of teaching. A perennial problem has been the paucity of good early childhood teachers who are also skilled in te reo, a dilemma acknowledged by the National Trust leadership itself. ERO reviews in the 1990s showed that the quality of teaching and even the use of te reo at many kōhanga was distinctly lacking. Similarly, concerns about child safety and financial mismanagement at various kōhanga have commanded a good deal of media attention.<sup>107</sup>

In 2007, kōhanga largely missed out on the Government's introduction of its promised 20 free hours of early childhood education at centres with registered teachers. The scheme did not necessarily exclude kōhanga, but required them to have qualified teachers.<sup>108</sup> In late 2007, the Ministry of Education extended the policy to kōhanga where at least one teacher had the National Trust's 'Whakapakari' teaching qualification, but still only a quarter of the country's kōhanga reo could take advantage

Table 5.3: Te reo-oriented early childhood education, 1989–2009 – student and centre numbers

Year	Number of kōhanga	Number of licence-exempt kōhanga	Number of puna reo	Students at kōhanga	Students at licence-exempt kōhanga	Students at puna reo	Total kōhanga	Total te reo-oriented ECE centres	Total kōhanga students	Total te reo-oriented ECE centre students
1989	470	—	—	8,724	—	—	470	470	8,724	8,724
1990	616	—	—	10,108	—	—	616	616	10,108	10,108
1991	630	—	—	10,451	—	—	630	630	10,451	10,451
1992	719	—	—	12,617	—	—	719	719	12,617	12,617
1993	809	—	—	14,514	—	—	809	809	14,514	14,514
1994	773	46	—	12,508	1,035	—	819	819	13,543	13,543
1995	738	36	—	14,015	248	—	774	774	14,263	14,263
1996	704	63	—	13,279	1,023	—	767	767	14,302	14,302
1997	675	30	—	13,104	401	—	705	705	13,505	13,505
1998	613	33	—	11,689	361	—	646	646	12,050	12,050
1999	600	50	—	11,859	524	—	650	650	12,383	12,383
2000	583	29	—	11,138	381	—	612	612	11,519	11,519
2001	562	24	20	9,594	214	—	586	606	9,808	10,017
2002	545	14	24	10,389	138	351	559	583	10,527	10,878
2003	526	12	32	10,319	130	408	538	570	10,449	10,857
2004	513	13	43	10,418	191	580	526	569	10,609	11,189
2005	501	11	49	10,070	146	519	512	561	10,216	10,735
2006	486	8	41	9,493	89	289	494	535	9,582	9,871
2007	470	7	30	9,236	69	343	477	507	9,305	9,648
2008	467	3	32	9,165	43	454	470	502	9,208	9,662
2009	464	0	27	9,288	0	277	464	491	9,288	9,565

Note that there are other early childhood education centres where te reo is used as a language of instruction besides kōhanga reo and puna reo. For example, in 2009 11 licensed 'Māori immersion services' other than kōhanga reo used te reo more than 80 per cent of the time, and a further 634 used te reo 12 to 80 per cent of the time. However, these centres are not readily identifiable within the statistics, and their numbers are not consistently available over time. We thus restrict 'te reo-oriented ECE centres' to kōhanga reo (both licensed and licence-exempt) and puna reo.

of this. More recently, the new Government announced in May 2009 it would extend the policy to all kōhanga reo from July 2010, regardless of whether they were teacher- or parent-led.<sup>109</sup>

Finally, it is possible that momentum has been going out of the kōhanga movement. The sense of urgency that propelled such explosive growth may now have been replaced by complacency about te reo's revival – ironically,

Table 5.4: Te reo-oriented early childhood education by percentage, 1989–2009

	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
<b>Māori students in ECE</b> . . . . .	19,557	22,419	21,705	24,342	28,503	28,952	29,856	30,323	30,703	29,698
<b>Māori students at kōhanga</b> . . . . .	8,603	10,007	9615	11,401	14,027	12,415	13,600	13,028	12,955	11,619
<b>Total students at kōhanga</b> . . . . .	8,724	10,108	10,451	12,617	14,514	12,508	14,015	13,279	13,104	11,689
<b>Māori students at kōhanga (%)</b> . . . . .	98.6	99.0	92.0	90.4	96.6	99.3	97.0	98.1	98.9	99.4
<b>Māori students at licence-exempt kōhanga</b> . . . . .	—	—	—	—	—	1030	239	1004	398	361
<b>Total students at licence-exempt kōhanga</b> . . . . .	—	—	—	—	—	1035	248	1023	401	361
<b>Māori students at licence-exempt kōhanga (%)</b> . . . . .	—	—	—	—	—	99.5	96.4	98.1	99.3	100
<b>Māori students at puna reo</b> . . . . .	—	—	—	—	—	—	—	—	—	—
<b>Total students at puna reo</b> . . . . .	—	—	—	—	—	—	—	—	—	—
<b>Māori students at puna reo (%)</b> . . . . .	—	—	—	—	—	—	—	—	—	—
<b>Māori students at all te reo oriented ECE (%)</b> . . . . .	98.6	99.0	92.0	90.4	96.6	99.3	97.0	98.1	98.9	99.4
<b>All Māori in ECE at kōhanga (%)</b> . . . . .	44.0	44.6	44.3	46.8	49.2	42.9	45.6	43.0	42.2	39.1
<b>All Māori in ECE at licence-exempt kōhanga (%)</b> . . . . .	—	—	—	—	—	3.6	0.8	3.3	1.3	1.2
<b>Māori in ECE at puna reo (%)</b> . . . . .	—	—	—	—	—	—	—	—	—	—
<b>Māori in ECE at te reo oriented centres (%)</b> . . . . .	44.0	44.6	44.3	46.8	49.2	46.4	46.4	46.3	43.5	40.3

Again, we restrict 'te reo-oriented ECE centres' to kōhanga reo (both licensed and licence-exempt) and puna reo. Note that 2009 data were not available for licence-exempt services, although we do know there were in 2009 no licence-exempt kōhanga and there were 277 children at puna reo.

1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
32,037	32,255	31,026	32,779	33,892	35,232	35,756	35,000	35,618	37,122	N/A
11,545	11,021	9,532	10,365	10,309	10,409	10,062	9,480	8,679	8,683	8,829
11,859	11,138	9,594	10,389	10,319	10,418	10,070	9,493	9,236	9,165	9,288
97.4	98.9	99.4	99.8	99.9	99.9	99.9	99.9	94.0	94.7	95.1
508	376	211	138	130	191	146	88	64	39	0
524	381	214	138	130	191	146	89	69	43	0
96.9	98.9	98.6	100	100	100	100	98.9	92.8	90.1	0
—	—	167	310	354	455	448	243	263	339	N/A
—	—	209	351	408	580	519	289	343	454	277
—	—	79.9	88.3	86.8	78.4	86.3	84.1	76.7	74.7	N/A
97.3	98.9	98.9	99.4	99.4	98.8	99.3	99.4	93.3	93.8	N/A
36.0	34.2	30.7	31.6	30.4	29.5	28.1	27.1	24.4	23.4	N/A
1.6	1.2	0.7	0.4	0.4	0.5	0.4	0.3	0.2	0.1	0.0
—	—	0.5	0.9	1.0	1.3	1.3	0.7	0.7	0.9	N/A
37.6	35.3	31.9	33.0	31.8	31.4	29.8	28.0	25.3	24.4	N/A





**2005**

Level 1	11,052	117	11,169	1,574	12	1,586	12,755
Level 2	3,826	114	3,940	1,168	11	1,179	5,119
Level 3	3,971	529	4,500	1,216	45	1,261	5,761
Level 4(a)	3,128	1,437	4,565	645	69	714	5,279
Total	21,977	2,197	24,174	4,603	137	4,740	28,914

**2004**

Level 1	11,291	105	11,396	1,178	6	1,184	12,580
Level 2	4,019	175	4,194	1,145	21	1,166	5,360
Level 3	4,023	318	4,341	983	21	1,004	5,345
Level 4(a)	3,492	1,622	5,114	996	184	1,180	6,294
Total	22,825	2,220	25,045	4,302	232	4,534	29,579

**2003**

Level 1	11,100	74	11,174	1,032	3	1,035	12,209
Level 2	3,498	149	3,647	997	14	1,011	4,658
Level 3	4,623	453	5,076	923	25	948	6,024
Level 4(a)	3,776	1,636	5,412	727	52	779	6,191
Total	22,997	2,312	25,309	3,679	94	3,773	29,082

**2002**

Level 1	10,679	108	10,787	847	6	853	11,640
Level 2	3,926	182	4,108	1,005	11	1,016	5,124
Level 3	4,343	432	4,775	720	36	756	5,531
Level 4(a)	3,615	1,407	5,022	519	30	549	5,571
Total	22,563	2,129	24,692	3,091	83	3,174	27,866

Year	Primary – years 1–8			Secondary – years 9–13+		
	Māori	Non-Māori	Total	Māori	Non-Māori	Total
<b>2001</b>						
Level 1	10,181	81	10,262	883	10	893
Level 2	4,196	191	4,387	877	41	918
Level 3	4,525	465	4,990	826	20	846
Level 4(a)	3,447	1,371	4,818	645	106	751
Total	22,349	2,108	24,457	3,231	177	3,408
<b>2000</b>						
Level 1	10,268	103	10,371	772	13	785
Level 2	4,302	217	4,519	815	34	849
Level 3	4,394	508	4,902	1,086	32	1,118
Level 4(a)	3,762	2,026	5,788	958	81	1,039
Total	22,726	2,854	25,580	3,631	160	3,791
<b>1999</b>						
Level 1	10,173	128	10,301	574	3	577
Level 2	4,230	162	4,392	833	16	849
Level 3	4,503	522	5,025	1,031	47	1,078
Level 4(a)	4,500	2,938	7,438	1,008	125	1,133
Total	23,406	3,750	27,156	3,446	191	3,637
<b>1998</b>						
Level 1	9,696	107	9,803	465	6	471
Level 2	4,391	231	4,622	851	19	870
Level 3	4,653	797	5,450	981	48	1,029
Level 4(a)						
Total						

<b>1997</b>									
Level 1	9,110	101	9,211	438	5	443	9,654		
Level 2	4,506	211	4,717	861	45	906	5,623		
Level 3	4,633	558	5,191	1,099	95	1,194	6,385		
Level 4(a)							7,107		
Total							28,769		
<b>1996</b>									
Level 1	8,250	137	8,387	315	2	317	8,704		
Level 2	4,506	231	4,737	926	31	957	5,694		
Level 3							5,954		
Level 4(a)							6,353		
Total							26,705		
<b>1995</b>									
Level 1							8,326		
Level 2							5,788		
Level 3							5,558		
Level 4(a)							5,612		
Total	19,044	2,806	21,850	2,943	466	3,409	25,284		
<b>1994</b>									
Level 1							7,140		
Level 2							5,873		
Level 3							4,833		
Level 4(a)							4,115		
Total	17,011	1,644	18,655	3,124	182	3,306	21,961		

Year	Primary – years 1–8			Secondary – years 9–13+		
	Māori	Non-Māori	Total	Māori	Non-Māori	Total
<b>1993</b>						
Level 1						6,214
Level 2						4,325
Level 3						5,172
Level 4(a)						3,618
Total	15,433	1,174	16,607	2,563	159	2,722
<b>1992</b>						
Level 1						4,618
Level 2						4,244
Level 3						5,554
Level 4(a)						3,010
Total	13,671	1,275	14,946	2,380	100	2,480

The data for 1996, 1997, and 1998 differ from those published in the series *Education Statistics of New Zealand* for those years. That is because the Ministry of Education later published adjusted figures for the total number of students in level 4(a) in each of these years, as well as level 3 for 1996, on the basis that the earlier data had been inflated. See Ministry of Education, *Enrolments in Maori Medium Programmes by Level of Immersion, 1992 to 2004*, 'Education Counts', Ministry of Education, <http://www.educationcounts.govt.nz> (accessed 23 September 2010). The adjusted figures do not allow us to provide the complete breakdown by Māori and non-Māori and primary and secondary schools. Limited data only were available for 1992 to 1995. The 1995 total includes 25 Māori special school students.

complacency arising in part from the very success of the movement in the 1980s and early 1990s.

The question is whether we are yet to see the bottom of the *kōhanga reo* decline. In *Ka Hikitia*, the Ministry of Education's targets for early childhood education are to increase overall Māori participation to 95 per cent by 2012 and to improve rates of literacy and numeracy amongst Māori in the early years of primary school by specified amounts. Thus, while there are some general goals aimed at strengthening Māori language early childhood education (chiefly around improving quality), there is no specific target for increased participation in *kōhanga reo*.<sup>110</sup>

#### 5.4.2 Schools

##### (1) Overview

While there have been clear gains in the number of students participating in Māori-medium education since 1992, as with *kōhanga reo* the numbers reveal both a rise and fall. From 12.5 per cent of all Māori students in 1992, a peak was reached in 1999 with 18.6 per cent spread across 455 schools (including *kura kaupapa*). Since then, however, there has been a decline in the proportion of Māori students in Māori-medium learning every year except 2003. The proportion in 2009 was 15.2 per cent, the lowest return since 1994, and the number of schools offering bilingual or immersion learning had fallen to 394. While the high point in the number of Māori students in Māori-medium education came in 2004 (27,127), it still represented a decline in proportion over the previous year. Moreover, the number of students has declined every year since 2004. The total for 2009 was 25,349, which is lower than in 1998 (see table 5.4).

It is a similar story with non-Māori participation in Māori-medium learning. This peaked in 1998 at 4,432 students, or 0.8 per cent of all non-Māori at school. Since then the total has shrunk back down to 2,882 in 2009, or 0.5 per cent of all non-Māori school students. For both Māori and non-Māori, the absolute numbers have been relatively static for the last decade. Instead, the big change has been in the proportion of Māori involved in Māori-medium education given the 15.4 per cent rise in the Māori school population between 1999 and 2009, which has resulted in an extra 22,260 Māori students (see table 5.4 and figure 5.6).

Currently, therefore, there are 2,600 fewer students in Māori-medium education at school than there were over a decade ago. As a subset of this, there were in 2009 48.4 per cent more students in Māori-medium at secondary school, including 211 per cent more learning at secondary school at level 1 of immersion (81 per cent or more in *te reo* – see endnote 71 for the definition of levels 1 to 4(a)) than in 1999. However, this reflects the relative lack of capacity at secondary level in the past. Moreover, the total number of students learning at level 1 in primary school in 2009 (9,837) was the lowest since 1998 and represented a 13.7 per cent decline from the peak of 11,396 in 2004 (see table 5.4 and figure 5.9).

The drop-off in students choosing Māori-medium education as they progress from primary to secondary school is profound. In 2009, for example, the number of students receiving Māori-medium teaching at level 1 dropped from 1,192 at year 8 (the last year of primary school) to 552 in year 9. By year 11 – usually the last year of compulsory schooling – it had dropped as low as 271.

##### (2) *Kura kaupapa*

In 2009, almost exactly half of all students receiving Māori-medium education at level 1 were at *kura kaupapa*, a proportion that has risen over time since the early 1990s. As noted, these *kura* have grown in number from 6 in 1990 to 70 in July 2009, albeit with a much reduced rate of expansion after the moratorium on new *kura kaupapa* from 1998 to 2002.

The moratorium was brought about by some of the same capacity and quality concerns that affected *kōhanga reo*. Essentially, the Ministry of Education was caught out by the success of *kōhanga reo* and, in the early 1990s, had limited options for parents who wished their children to move from *kōhanga* into further Māori-immersion education. Opening more *kura kaupapa* as quickly possible was a key component of the policy response to this problem. However, there was a lack of properly qualified teachers, especially principals, and of *te reo* teaching resources – major problems that a 1995 ERO report on *kura kaupapa* said were impeding students' learning. The report also found that there were no agreed standards on what fluency was, so there was no way of knowing whether teachers and students could speak good Māori.<sup>111</sup> In 1996, the

Table 5.6: Student percentages in Māori-medium schooling, 1992–2009

Year	Māori students in Māori-medium education	Māori school students	Percentage of Māori school students in Māori-medium education	Non-Māori students in Māori-medium education	Non-Māori school students	Percentage of non-Māori school students in Māori-medium education
1992	16,051	127,906	12.5	1,375	536,502	0.3
1993	17,996	131,712	13.7	1,333	534,848	0.2
1994	20,135	136,367	14.8	1,826	536,204	0.3
1995	21,987	138,095	15.9	3,272	546,801	0.6
1996	23,222	138,016	16.8	3,483	559,309	0.6
1997	24,432	140,873	17.3	4,337	571,403	0.8
1998	25,642	144,403	17.8	4,432	580,176	0.8
1999	26,852	144,738	18.6	3,941	582,658	0.7
2000	26,357	146,913	17.9	3,014	582,776	0.5
2001	25,580	149,590	17.1	2,285	584,334	0.4
2002	25,654	152,556	16.8	2,212	595,528	0.4
2003	26,676	157,270	17.0	2,448	604,485	0.4
2004	27,127	160,732	16.9	2,452	603,922	0.4
2005	26,580	162,534	16.4	2,344	600,256	0.4
2006	26,340	162,385	16.2	3,001	598,376	0.5
2007	25,986	164,020	15.8	2,506	595,886	0.4
2008	25,726	165,425	15.6	3,007	592,669	0.5
2009	25,349	166,998	15.2	2,882	593,861	0.5

Note that the 1992 and 1993 Māori school student totals are regular class and special education student tallies combined (that is, adults are not included). The 1992 and 1993 non-Māori school student totals are calculated by subtracting the identified Māori tallies the total school population (including special education, adult, foreign fee-paying, and MERT scholarship students). For the years 1994 to 2009, the non-Māori total is the total school population minus the total Māori school population. As with table 5.3, the data for 1996, 1997, and 1998 differ from those published in the series *Education Statistics of New Zealand* for those years because the Ministry of Education later published adjusted figures.

Māori Affairs Committee focused on the teacher shortage and found that while the Government had recently increased funding for Māori immersion teacher training, the situation was ‘still critical’.<sup>112</sup>

In a July 1997 newspaper report (which we naturally treat with some caution), Māori Language Commissioner Timoti Kāretu was reported as saying that Government

plans to open five new kura kaupapa a year were misguided. He said students at kura kaupapa were ill-served by the insufficient numbers of teachers fluent in te reo, and that the Government should instead focus on training more teachers to ensure vacancies were filled by staff competent both in Māori and in teaching. He added: ‘As we rush headlong into opening more and more kura

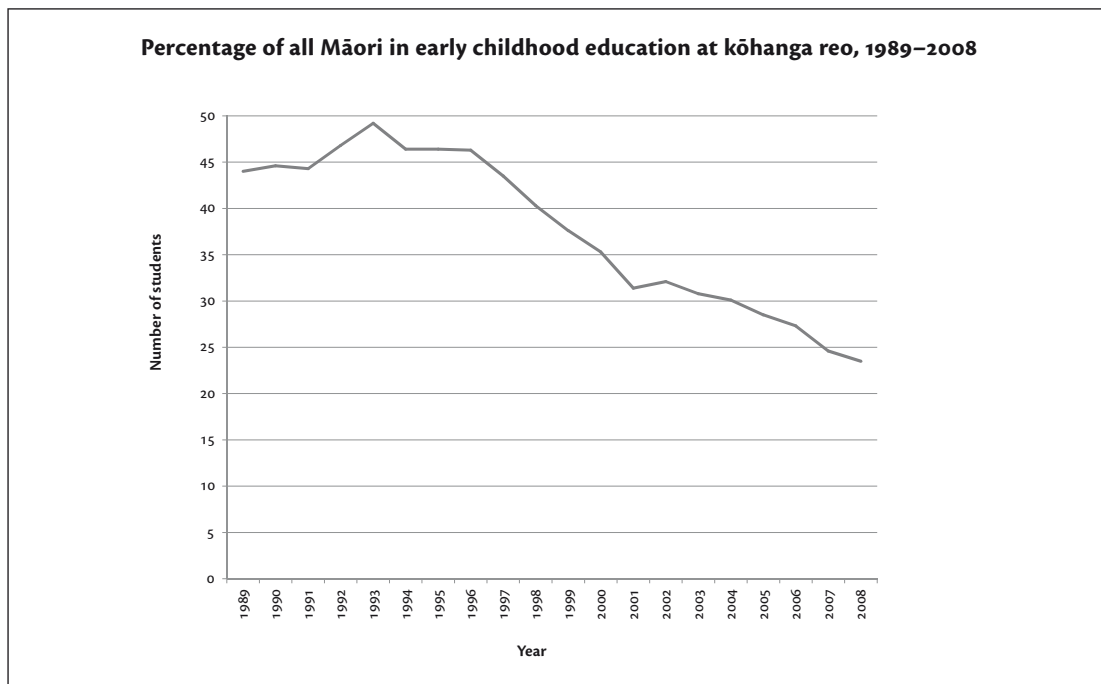


Figure 5.1

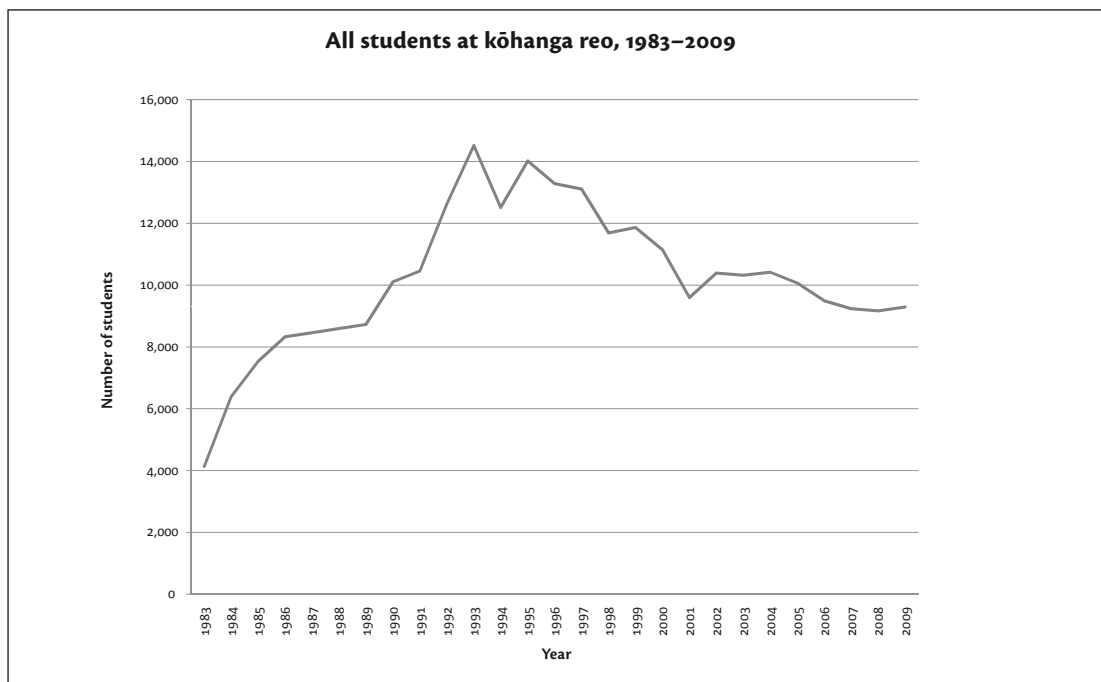


Figure 5.2

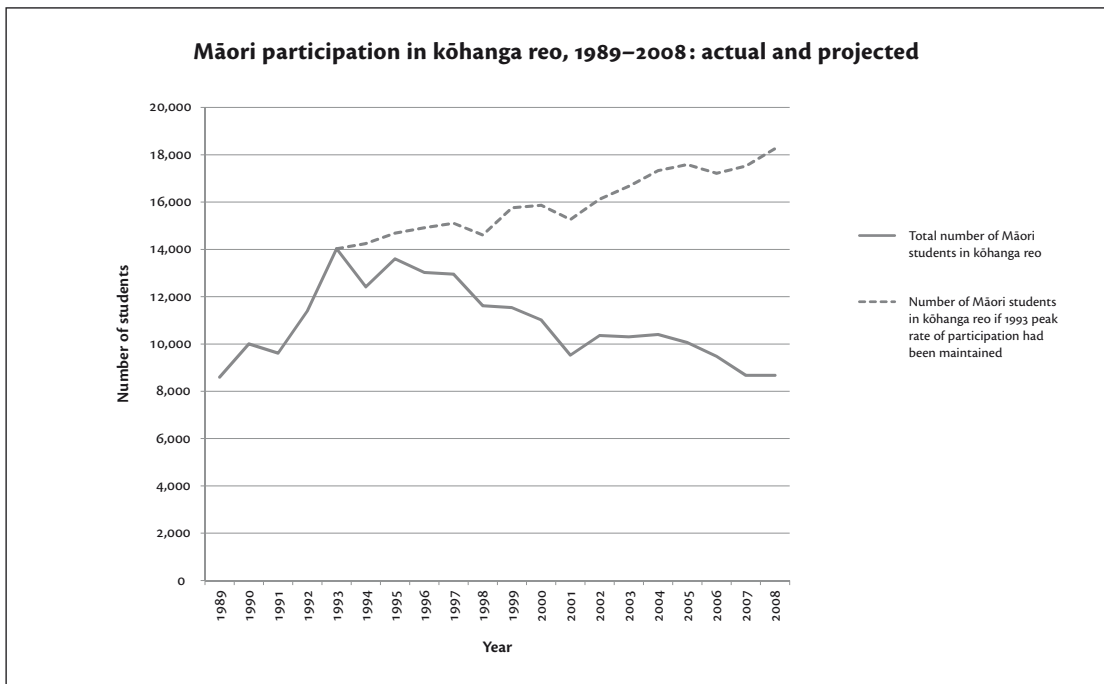


Figure 5.3

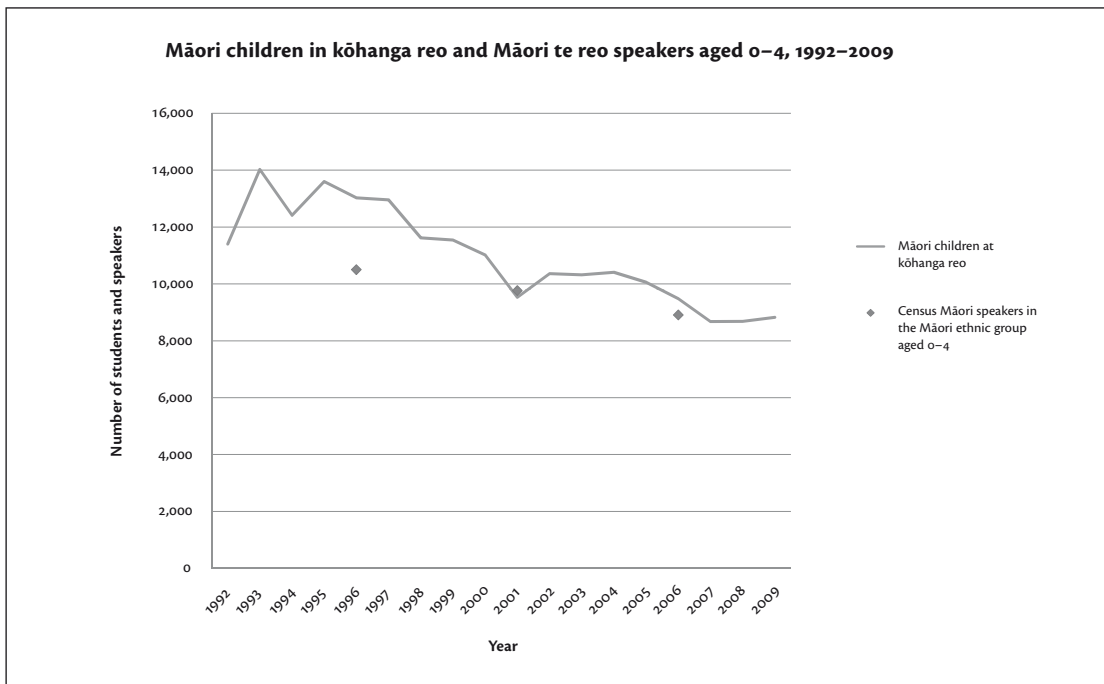


Figure 5.4



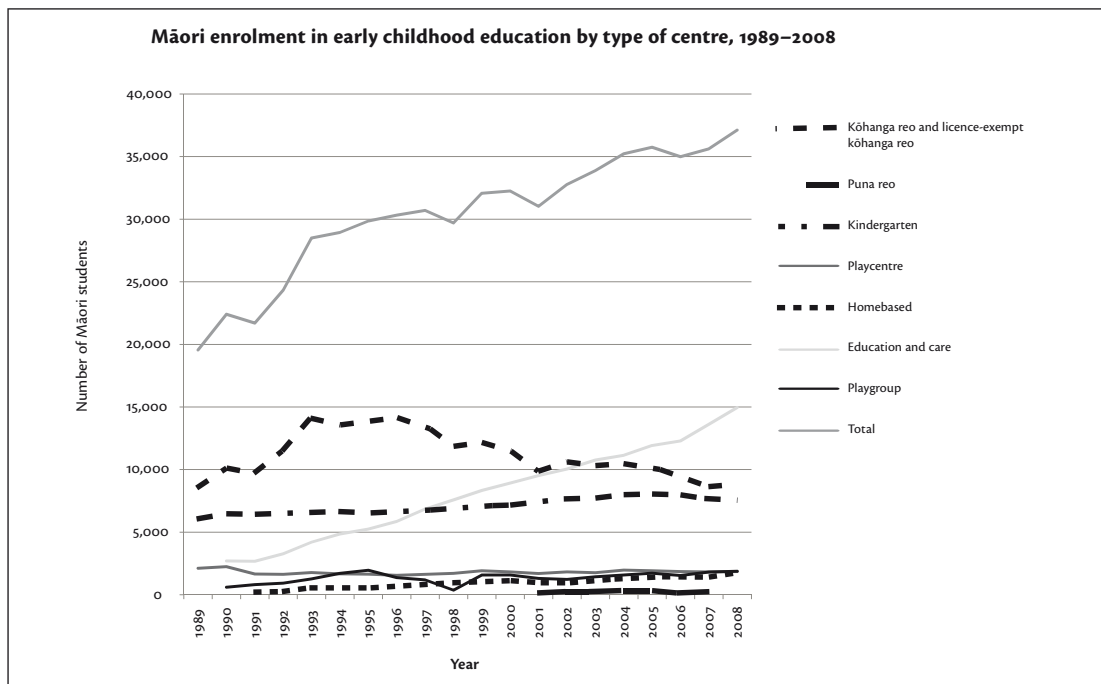


Figure 5.5

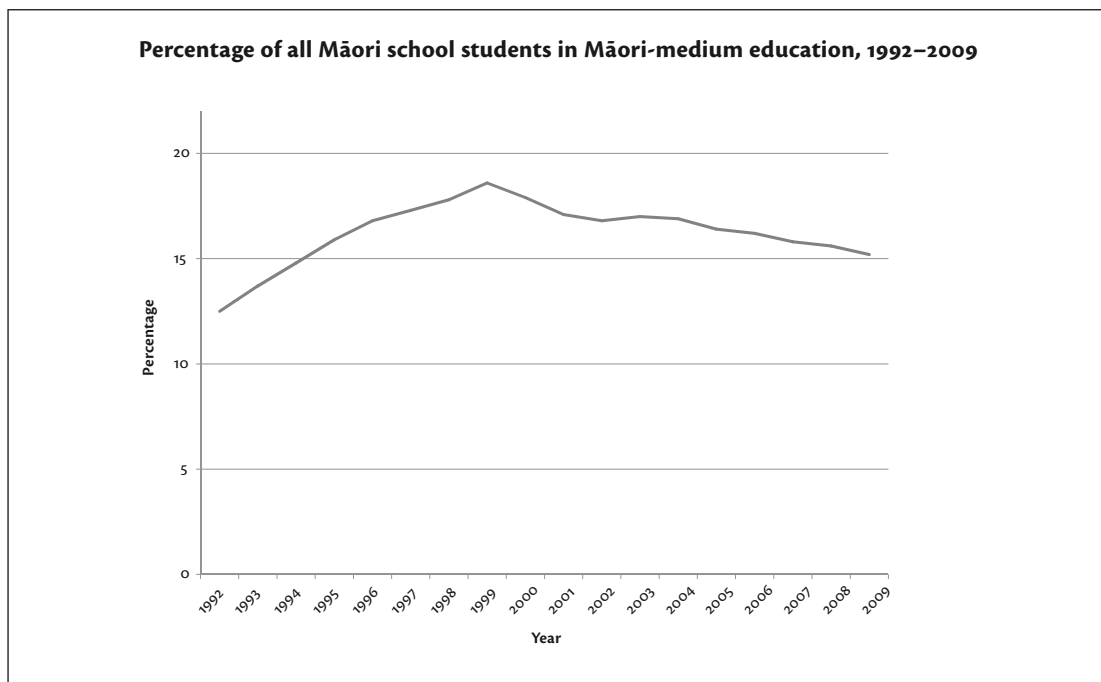


Figure 5.6

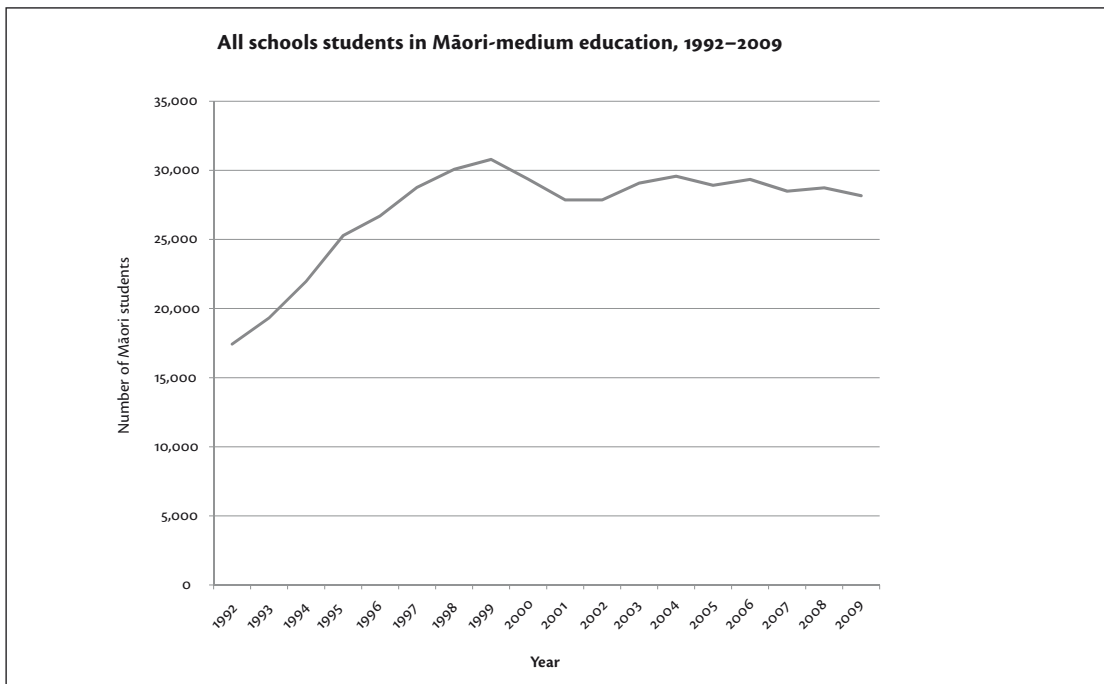


Figure 5.7

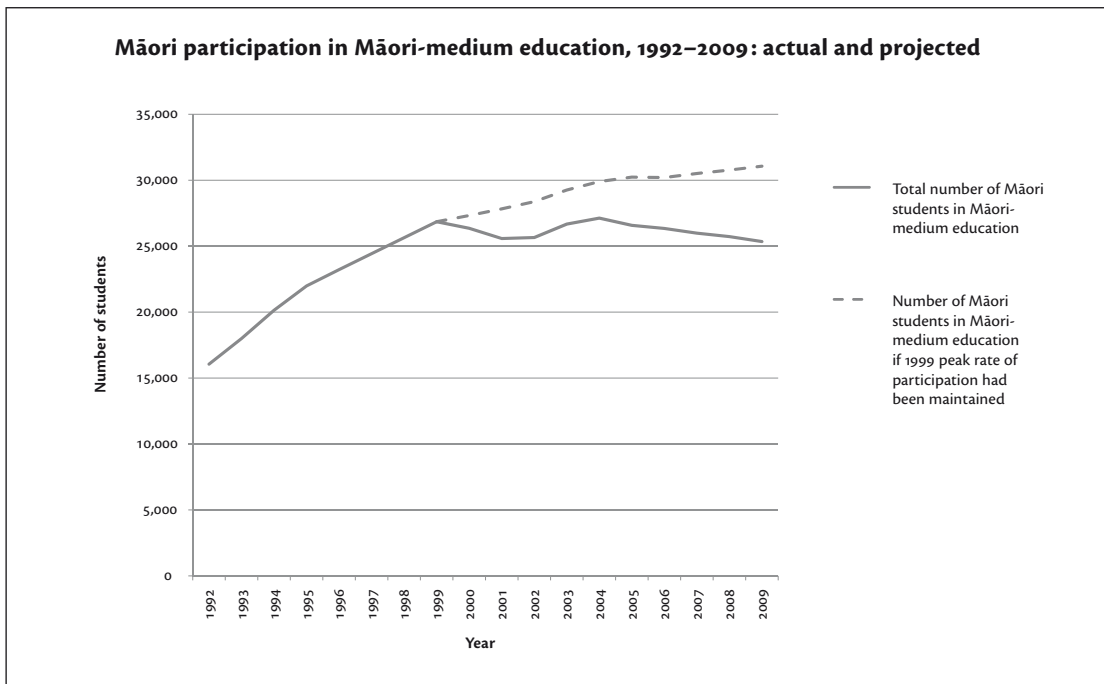


Figure 5.8

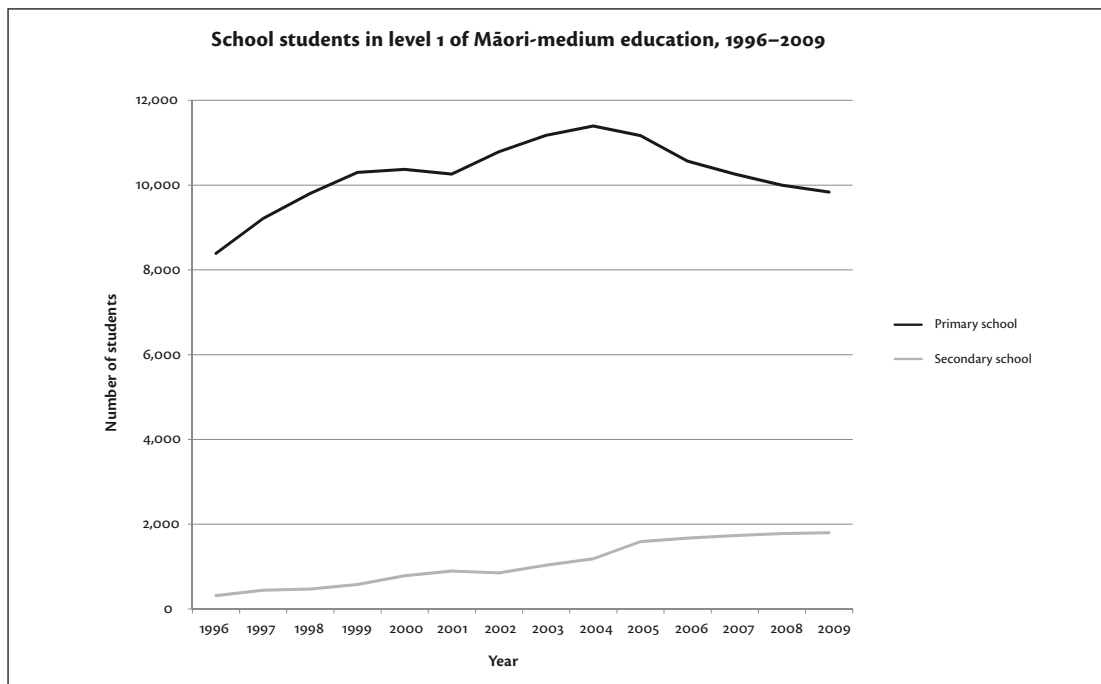


Figure 5.9

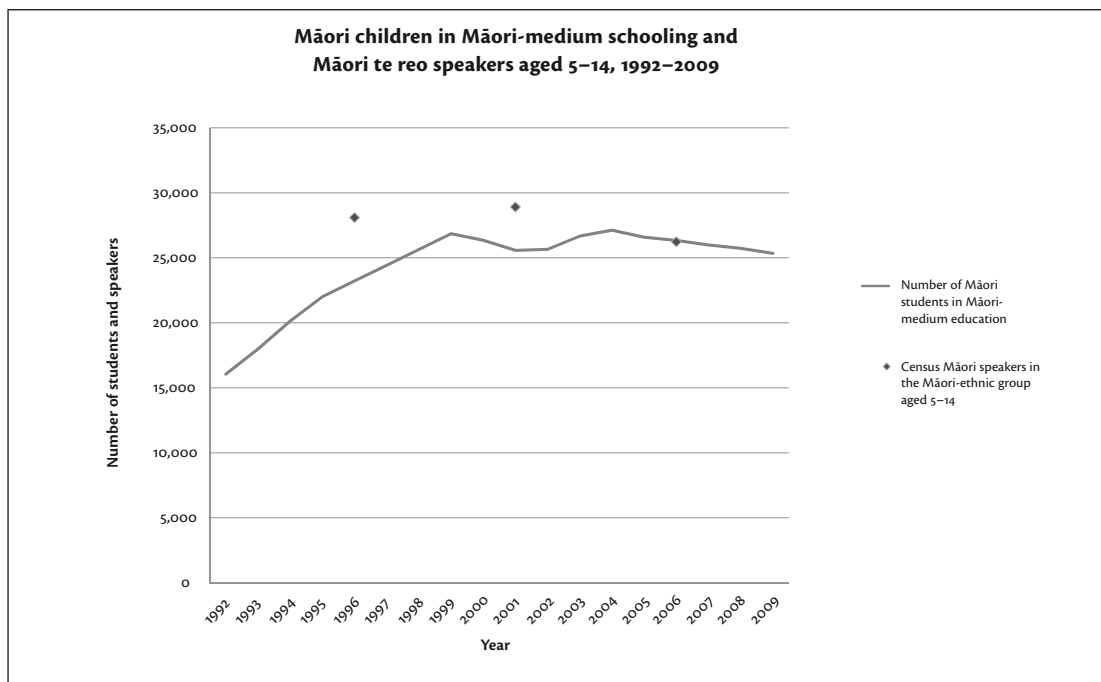


Figure 5.10

Table 5.7: Māori language and English teacher vacancies, 1997–2009

Year	Secondary school subject	FTTE vacancies	
		Number	Percentage
2010	Māori (total)	5.8	8.1
	Māori (te reo)	2.8	3.9
	Māori medium/bilingual	3.0	4.2
	English	14.8	20.7
2009	Māori (total)	18.2	12.2
	Māori (te reo)	12.2	8.2
	Māori medium/bilingual	6.0	4.0
	English	26.1	17.5
2008	Māori (total)	18.6	9.3
	Māori (te reo)	10.7	5.3
	Māori medium/bilingual	7.9	3.9
	English	23.9	11.9
2007	Māori (total)	9.9	5.2
	Māori (te reo)	8.1	4.3
	Māori medium/bilingual	1.8	0.9
	English	17.6	9.3
2006	Māori (total)	9.0	5.0
	Māori (te reo)	4.0	2.2
	Māori medium/bilingual	5.0	2.8
	English	14.8	8.2

Year	Secondary school subject	FTTE vacancies	
		Number	Percentage
2005	Māori	14.1	8.1
	English	16.0	9.2
2004	Māori	20.5	9.0
	English	40.1	17.6
2003	Māori	9.1	3.4
	English	42.1	15.8
2002	Māori	9.1	3.8
	English	30.9	13.0
2001	Māori	10.0	5.9
	English	15.2	8.9
2000	Māori	11.0	8.8
	English	14.3	11.5
1999	Māori	7.5	5.7
	English	15.2	11.5
1998	Māori	9.5	7.2
	English	7.7	5.8
1997	Māori	11.4	6.7
	English	16.1	9.4

'FTTE' stands for 'full-time teacher equivalent'

kaupapa Maori – five a year – and staffing them with people whose language is not of an acceptable level of competence, we begin to demean our own language and to put the educational futures of our children into considerable jeopardy.’ He said the system was stuck in the ‘near enough is good enough’ syndrome.<sup>113</sup>

In 2001, Richard and Nena Benton wrote:

Many kura kaupapa are small (under 50, sometimes less than 20 students), ill-equipped, lacking stable staffing, unable to recruit trained teachers, adversely affected by internal disputes, and sometimes without teachers who have sufficient knowledge of Māori to teach effectively through the language.<sup>114</sup>

Earlier, the Bentons also cited the concerns of Māori parents about the quality of care and education in the Māori-medium sector. They summarised the views of one man they interviewed as follows:

Ramere is quite critical of the kōhanga reo where he was going to enroll his child. He didn’t think it was safe to leave the child there because of the bullying problem among some of the older children. He is very concerned that his sisters’ children are receiving ‘a second rate education’ from having to make do with ill-trained teachers in both the kōhanga reo and kura kaupapa Māori. They had decided that the language was more important than the education their children would get, but he does not accept that one should have to choose between reacquiring the language, which he regards as a spiritual and cultural necessity, and benefitting fully from a sound education in a physically and psychologically safe environment.<sup>115</sup>

### (3) A shortfall of te reo teachers

The Ministry of Education has responded over the years to the problem of teacher shortages with numerous budget increases and scholarship schemes to attract quality teachers. But still the problems persist. The Ministry of Education said in 2009 that:

Challenges facing Māori language education providers in immersion and other settings include the shortage of

qualified teachers, the need for a greater range of teaching and learning resources, and ensuring the provision of quality teaching practice across the sector.<sup>116</sup>

The same year, while under questioning in the Whanganui district Tribunal inquiry, Ms Sewell said:

We need more good teachers of te reo Maori. We do not have them and it is quite hard to get them. When you do have trained and qualified and fluent teachers, other people would get them too. They can earn more money doing other things. They are sought after by other groups in the community. They are really talented and skilled people and it is quite hard to keep them.<sup>117</sup>

Notably, the specific target for growing participation in Māori language education in *Ka Hikitia* is not to increase the proportion of students by 2012, but rather to maintain the participation rate at the 2006 level of 21 per cent.<sup>118</sup> This refers not just to those involved in Māori-medium education in levels 1 to 4(a) (see table 5.3), but also to levels 4(b) and 5 (learning te reo as a subject for at least three hours a week or up to three hours a week respectively). The total of 158,602 students in levels 1 to 5 in 2006 had fallen from 167,105 in 2003. By 2009, it had fallen further to 151,314. While including more than 100,000 students in level 5 learning arguably presents quite a misleading picture of the true state of ‘Māori language education’, it can be seen that the Ministry’s target is in any event eluding it,



A 1986 teacher recruitment advertisement in the Department of Māori Affairs’s magazine. The following year, the Department of Education commissioned a report from bilingual education expert Bernard Spolsky, who concluded that there was an urgent need for bilingual teachers and that at least 1,000 more would be needed over the next decade.



Newspaper headlines have regularly touched on te reo teacher shortages.

with the proportion dropping from 21.9 per cent in 2003 to 20.8 per cent in 2006 to 19.9 per cent in 2009.<sup>119</sup>

Perhaps maintaining the 2006 level was an ambitious target after all. The Ministry may well be acutely conscious of the decline in participation in Māori language education that has set in in recent years and mindful that further expansion might not be sustainable given the shortage of teachers that already exists.

Clear evidence of the teacher shortage is provided by the Ministry of Education's annual survey of teacher vacancies in secondary schools at the start of the school year, which has been running since 1997 (see table 5.5). Focusing on the 2010 figures offers a misleading picture, as the overall number of teacher vacancies practically halved from 2009 to 2010 because of the effects of the recession.<sup>120</sup> But in 2009 the number of full-time teaching equivalent (FTTE) vacancies in secondary schools that were te reo or Māori-medium teachers was 18.2, not far behind the 18.6 in 2008 and 20.5 in 2004. The 2009 total

represented the highest proportion (12.2 per cent) since the stocktake began of teacher vacancies that were Māori-medium or subject positions.<sup>121</sup>

The survey has only asked primary schools if any of their vacancies were for Māori-medium or bilingual teachers since 2009. That year, there were 14.6 FTTE such vacancies, which represented 8.1 per cent of all primary school teacher vacancies. Despite the effects of the recession, this had risen to 15.3 FTTE vacancies and 13.0 per cent of all primary teacher vacancies in 2010.<sup>122</sup>

Table 5.5 puts the Māori language teacher shortage at secondary school into perspective, by comparing vacancy numbers with those for teachers of English. While about 90 per cent of secondary students attend English classes each year, the rate of full-time equivalent English teacher vacancies has ranged between 5.8 and 20.7 per cent of the total. By contrast, the roughly 10 per cent of secondary students in Māori-medium and te reo classes have faced teacher vacancy rates of between 3.4 and 12.2 per cent of

Table 5.8: Surveyed demand for Māori language education, 1992 and 1995

Level of Māori language use	1992 AGB McNair survey			1995 MRL Research survey		
	Māori preferred primary	Māori primary attended	Māori preferred secondary	Māori preferred primary	Māori primary attended	Māori preferred secondary
	(%)	(%)	(%)	(%)	(%)	(%)
Māori only	7	1	5	7	4	4
Mainly Māori	13	1	11	5	3	5
Māori and English	57	31	61	56	36	57
Māori as a subject	15	14	19	18	17	24
Only greetings etc in Māori	6	39	2	8	27	4
English only	1	11	2	6	12	4

the total, and in 1998 there were even more Māori teacher vacancies than English ones.

In 2001, the Ministry of Education surveyed 15,000 secondary school teachers to ascertain the match of teacher qualification to subject taught. The results showed that te reo and Māori-medium teachers had relatively low levels of third-year university study or university qualifications. However, this survey is of limited use only, because both these groups had extremely high rates of non-response to the survey (57.4 per cent of Māori-medium teachers, for example, compared to 8.3 per cent of teachers at secondary schools and 17.2 per cent of secondary teachers at composite schools).<sup>123</sup> While not definitive, therefore, the survey further emphasises the scope for improvement. We do not know whether the Ministry has attempted to secure a better response rate from te reo and Māori-medium teachers.

#### (4) Accounting for decline in te reo education at school

The decline in Māori-medium schooling – or, at best, the flattening off of growth – has its roots in some of the same issues we have identified as contributing to declining participation in kōhanga reo. Quality of education is

central. In Te Puni Kōkiri's 2006 survey on the health of the Māori language, the main reasons Māori parents gave for not placing their children in Māori-medium schooling were that the children were too young (26 per cent) or there were no local services (17 per cent). But 8 per cent cited 'lower quality education' and 5 per cent cited 'poor administration/management'. Thus, while Māori-medium schools are apparently producing comparably favourable National Certificate of Educational Achievement results – as well as much lower levels of truancy, suspension and unjustified absences than those of Māori in mainstream education – many parents are clearly aware of the scarcity of highly qualified teachers and the lack of teaching resources in these schools.

Waning momentum is again likely to be a factor. The 2006 survey found that 9 per cent of parents who were not schooling their children in Māori-medium education said that English was the priority, 8 per cent said that their child 'can choose to learn later', and 6 per cent said that their child 'will attend at future date'.<sup>124</sup> While not all dismissive of learning te reo, many of these parents clearly thought it could wait for another day. Bilingual education expert Professor Stephen May and colleagues

Table 5.9: Subjects taken by secondary school students: te reo Māori and selected other languages

Year	Māori (including te reo rangatira)	Schools taught at	French	Schools taught at	Japanese	Schools taught at	German	Schools taught at	Spanish	Schools taught at
1989	18,909	222	31,275	292	10,039	109	8,500	139	218	15
1990	19,470	233	28,964	296	12,442	145	9008	135	268	9
1991	19,818	244	27,720	282	15,921	173	9,009	135	256	11
1992	22,303	268	26,409	284	19,738	204	9,395	131	856	23
1993	22,657	281	26,057	283	21,991	214	9,196	127	980	23
1994	23,874	293	26,117	276	26,301	236	8,951	127	1,264	34
1995	25,134	303	24,511	277	26,486	252	9,365	126	1,343	37
1996	25,278	309	22,815	265	27,039	264	9,102	117	2,370	46
1997	22,325	315	21,166	257	25,399	275	8,550	139	2,158	55
1998	21,462	314	21,676	255	22,376	278	7,912	132	2,580	58
1999	20,189	299	23,705	262	22,155	264	7,762	114	3,318	68
2000	20,720	319	24,272	252	21,529	263	8,240	117	3,858	76
2001	20,555	329	23,816	254	19,981	258	7,496	106	4,407	86
2002	21,015	329	24,056	254	19,400	247	7,073	108	4,823	86
2003	23,852	373	24,253	306	21,449	290	7,603	199*	5,820	186*
2004	24,817	366	25,689	270	20,928	257	6,809	137	6,505	132
2005	24,158	365	26,128	270	19,689	247	6,893	120	7,543	140
2006	23,903	370	27,614	267	18,489	230	6,686	111	8,100	141
2007	24,864	359	27,284	263	18,440	236	6,623	109	9,531	155
2008	27,620	358	28,245	261	18,157	228	6,251	105	10,900	156
2009	26,525	N/A	27,197	N/A	17,304	N/A	6,085	N/A	11,167	N/A

\* These figures are as stated

The Māori language student totals provided were reached by adding the individual totals for te reo Māori and te reo rangatira. We realise that some students are enrolled in both subjects, so there will be some double-counting. We understand that the totals also include those students participating in Māori-medium education, although we are unsure if this leads to further duplication. With respect to the total number of schools, we make the assumption that schools that teach te reo rangatira also teach te reo Māori. The number of schools subjects were taught at was unavailable for 2009.



from Waikato University contended in 2004 that Māori-medium education must be for a minimum of six years to be effective and not compromise a child's education. They also argued that only levels 1 and 2 (50 per cent instruction in the medium of te reo Māori and above) should be considered actual bilingual programmes. Their view was that parents were insufficiently aware of these issues in choosing when to move their children between Māori-medium and mainstream schooling.<sup>125</sup>

It remains to be seen, therefore, whether the proportion of Māori participating in Māori-medium education will continue to decline, as it has done inexorably since 1999, as well as what impact this will have on the overall health of te reo. Already, the decline may be seen in the declining proportion of 10- to 14-year-olds able to converse in te reo, which fell from 24.4 per cent in the 2001 census to 21.4 per cent in 2006 census (see table 5.9).

The large majority of those learning Māori as a subject in secondary schools (including those learning via the medium of te reo itself) appear to be Māori. In 1995, 1998 and 2009, for example, they represented around two thirds of the total.<sup>126</sup> Overall, the number of students learning Māori as a subject for at least three hours per week at secondary school has increased by 40.3 per cent since 1989 (along with an increase of around two thirds in the number of schools offering it).<sup>127</sup> The 2008 and 2009 figures represent the highest number of Māori subject students since 1996, after a subsequent trough that reached its lowest point in 1999. After overtaking French (traditionally the most popular language taught at secondary schools<sup>128</sup>) in 1995, Māori has remained behind French since 1998. Indeed, the popularity of Māori may bear some relation to the fortunes of other languages such as French, Japanese, German, and Spanish, which have all ebbed and flowed in numbers, perhaps in relationship to each other and according to fashion. What is particularly striking is the meteoric rise of Spanish, which has grown 5,000 per cent in student numbers since 1989 and possibly taken students away from German and Japanese (and, for that matter, Māori).<sup>129</sup> See table 5.7.

#### 5.4.3 Tertiary education

Māori involvement in tertiary education needs to be assessed in terms of a vastly complicated picture that

includes type of institution, level of course (from certificate to doctorate – that is to say, levels 1 to 10 of the National Qualifications Framework – see section 6.5.1), full- or part-time study, length of course, general field of study, age and gender of students, participation rate, completion rate, attrition and retention rates, progression rate to further study, and immediate past experience of students (as school leavers or as employed or unemployed with or without school qualifications). Statistical information on all these matters is comprehensive for the last few years but challenging to penetrate.

What can be said with confidence is that there has been a massive rise in Māori participation in tertiary education from about 1998. Much of the growth, however, has been in lower-complexity courses, such as level 1 to level 3 certificates. In 2009, 42,369 Māori were studying for such qualifications, which represented more than half of all Māori enrolled in tertiary education during the year (compared to a rate of slightly more than a third for all students). In 2003 – at the peak of this growth for Māori – there were 26,755 Māori in level 1 to level 3 certificates at wānanga alone. Since 2004, institutes of technology and polytechnics have taken over from wānanga as the leading tertiary institutions in terms of Māori student numbers.<sup>130</sup>

We have seen that the rise of the wānanga led to a massive increase in the number of people studying te reo at tertiary level. In his 2007 report for the Ministry of Education, *He Tini Manu Reo – Learning Te Reo Māori through Tertiary Education*, David Earle confirms this post-2001 trend but comments that the 'majority of learners were enrolled in non-formal education or level 4 certificates and were taking courses at levels 1 and 2, which are equivalent to senior secondary school'. Overall, he suggests that tertiary education courses are not sufficient on their own to build conversational proficiency in te reo Māori, and the contribution of tertiary te reo education from 2001 to 2005 was mainly 'to increase substantially the number of people with a basic understanding of the language'.<sup>131</sup>

That said, Earle acknowledges that tertiary courses are 'also increasing the number of people with conversational fluency' where they build on existing skills or are reinforced by ongoing learning and support outside the classroom. Since many of the students will be mothers (the typical student is a 30- to 50-year-old woman, who

Table 5.10: Change in population size and te reo speaking in census age cohorts in the Māori ethnic group, 1996–2006

Born	1996 census		2001 census				2006 census			
	Size of cohort	Number of speakers	Change in size of cohort		Change in number of speakers		Change in size of cohort		Change in number of speakers	
			Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
1997–2001	–	–	–	–	–	–	–789	–1.2	+2,478	+25.4
1992–96	71,664	10,500	–5,550	–7.7	+3,282	+31.3	+612	+0.9	+216	+1.6
1987–91	67,422	14,718	–4,617	–6.8	+408	+2.8	–4,272	–6.8	–1,905	–12.6
1982–86	57,318	13,377	–7,791	–13.6	–1,128	–8.4	–6,753	–13.6	–2,481	–20.3
1977–81	51,714	12,420	–9,621	–18.6	–2,505	–20.2	–3,987	–9.5	–1,044	–10.5
1972–76	47,346	10,095	–7,182	–15.2	–777	–7.7	–708	–1.8	–213	–2.3
1967–71	43,149	8,913	–3,897	–9.0	+75	+0.8	–654	–1.7	–99	–1.1
1962–66	41,994	9,255	–3,669	–8.7	–30	–0.3	–1,053	–2.7	+3	0.0
1957–61	36,405	8,658	–3,546	–9.7	–288	–3.3	–951	–2.9	–120	–1.4
1952–56	28,041	7,503	–2,949	–10.5	–498	–6.6	–903	–3.6	–51	–0.7
1947–51	22,344	7,080	–2,871	–12.8	–681	–9.6	–843	–4.3	–315	–4.9
1942–46	16,098	6,366	–2,271	–14.1	–825	–13.0	–1,014	–7.3	–477	–8.6
1937–41	13,857	6,543	–2,307	–16.6	–1,104	–16.9	–1,392	–12.1	–828	–15.2
1932–36	10,185	5,235	–2,244	–22.0	–1,170	–22.3	–1,431	–18.0	–915	–22.5
Pre-1932	15,834	8,412	–6,138	–38.8	–3,111	–37.0	–3,234	–33.3	–2,031	–38.3

has no school qualifications, was previously employed, and is taking a wānanga course), Earle also comments that ‘tertiary courses may be having a positive role in strengthening te reo Māori within the whānau and home environments.’

Earle concludes that:

If engagement in te reo Māori courses at tertiary level is to result in a continued and sustainable improvement in language proficiency, there is also a need to consider what options are provided for students beyond the initial period

of study and to move into higher levels of study. This is a matter for communities, families and individuals to consider, as well as government and education providers.<sup>132</sup>

The Ministry of Education has been more bullish about the growing te reo student numbers at tertiary level. It has linked the rise directly to the ‘significant gains in proficiency in te reo among Māori since 2001’ revealed by Te Puni Kōkiri’s 2006 survey on the health of the Māori language.<sup>133</sup> Of course, such an interpretation relies upon the accuracy of the 2006 survey, which we discuss below at

section 5.4.4(3). Our view is that the tertiary courses have given many Māori parents, along with a large number of non-Māori, a solid introduction to the language. The courses have given students confidence to go further, where they have wanted to, or the inclination to encourage their children to go further. On their own, however, they are certainly not creating a generation of fluent speakers or language teachers.

#### 5.4.4 Censuses and surveys

##### (1) *Pre-1996 national speaker estimates*

We have already noted the findings of Richard Benton's 1970s survey on the health of te reo, especially the scarcity of fluent speakers among Māori children. The reo which Benton measured as 'fluent' in the 1970s was probably at a higher level than that considered fluent today, given that there were many more older native speakers of te reo alive then. As Māori language academic Ian Christensen has remarked, 'A tendency towards a diminished perception of fluency may be a natural characteristic of a language in decline.'<sup>134</sup>

In a 1992 report commissioned by the Ministry of Education to engender discussion on a New Zealand languages policy, Dr Jeffrey Waite projected the results of Benton's survey forward to 1986 with corrections for mortality and other demographic variables. This showed that, at the time of the Tribunal's report on the te reo Māori claim, only 700 North Island Māori children under the age of 10 were fluent in te reo, as opposed to 19,400 fluent speakers aged 55 and over. This did, however, appear to represent an increase in the number of younger speakers from that estimated by Benton in 1979. Overall, Waite guessed there were 81,000 fluent and marginal speakers of Māori in the North Island in 1986.<sup>135</sup>

In 1995, Statistics New Zealand conducted a national Māori language survey on behalf of Te Puni Kōkiri and Te Taura Whiri. It confirmed Benton's conclusion that te reo was in a perilous state, finding that 8.1 per cent of Māori aged over 16 had a high proficiency in spoken Māori, 51.3 per cent had low to medium fluency, and 40.6 per cent had no proficiency. Put another way, it showed there were just over 22,000 highly fluent adult Māori speakers – a significant decline from the 64,000 revealed by the 1975

survey. Nearly three-quarters of those highly fluent were aged 45 and over.<sup>136</sup> Obviously, if children learning at kōhanga and kura kaupapa had been included, the figures would have been somewhat different.

##### (2) *Māori-language education demand surveys, 1992, 1995*

Two surveys conducted in the first half of the 1990s indicated the then potential market for Māori-language education. The first survey, conducted in 1992 by AGB McNair for the Ministry of Education, canvassed the caregivers of 500 Māori and 500 non-Māori pre-school and primary-school children and suggested that supply was a long way off meeting Māori demand for Māori-language education.

According to the survey, some 77 per cent of the caregivers for Māori children wanted their charges to receive at least some primary-school teaching in te reo (over and above learning Māori as a subject), but only 33 per cent of those with school-age children had their children in such schools. And, though a mere 7 per cent of caregivers wanted their children to have little or no Māori language taught, 50 per cent of school-age Māori children were receiving just this kind of education.<sup>137</sup>

At that time, there were 89,115 regular classroom Māori primary-school students but only 13,671 Māori students in Māori-medium classes at primary school (15.3 per cent). This is a far cry from the more than 68,000 that would have been seen if the preferences of the 77 per cent of caregivers had been met.

Seventy-seven per cent of Māori caregivers also preferred that their children receive Māori-medium education at secondary-school level, though because those children had not yet begun secondary school, we have no placement figures to compare with those preferences. However, at that time, there were 37,061 regular classroom Māori secondary-school students, and if a 77 per cent demand had been met, there would have been 28,537 students in Māori-medium classes. Instead, there were just 2,380 (6.4 per cent).

Non-Māori children tended to be much more likely to attend a type of school that accorded with their caregivers' preferences. Notably, 7 per cent of the caregivers preferred their children's primary schooling to be in Māori and English, with 2 per cent preferring their instruction

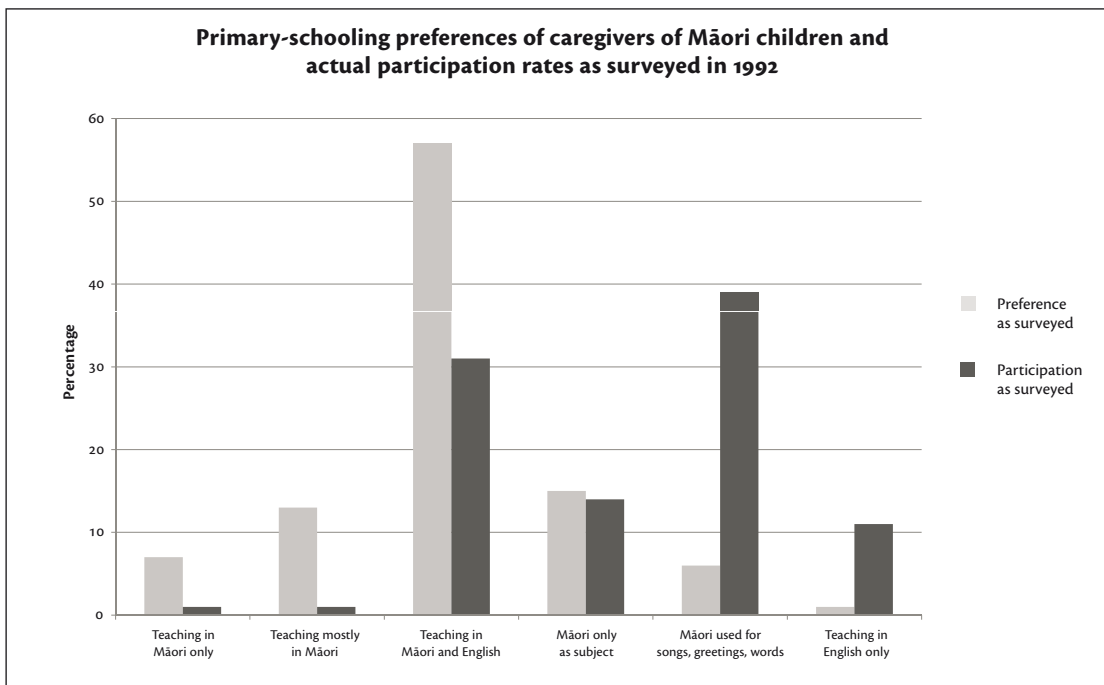


Figure 5.11

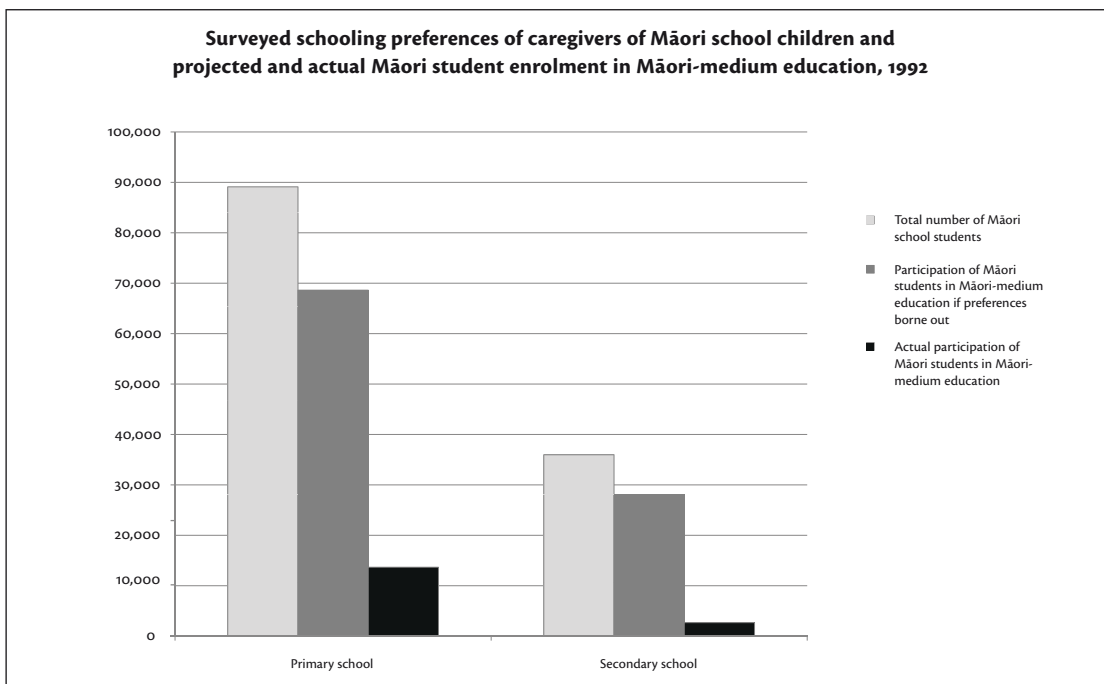


Figure 5.12

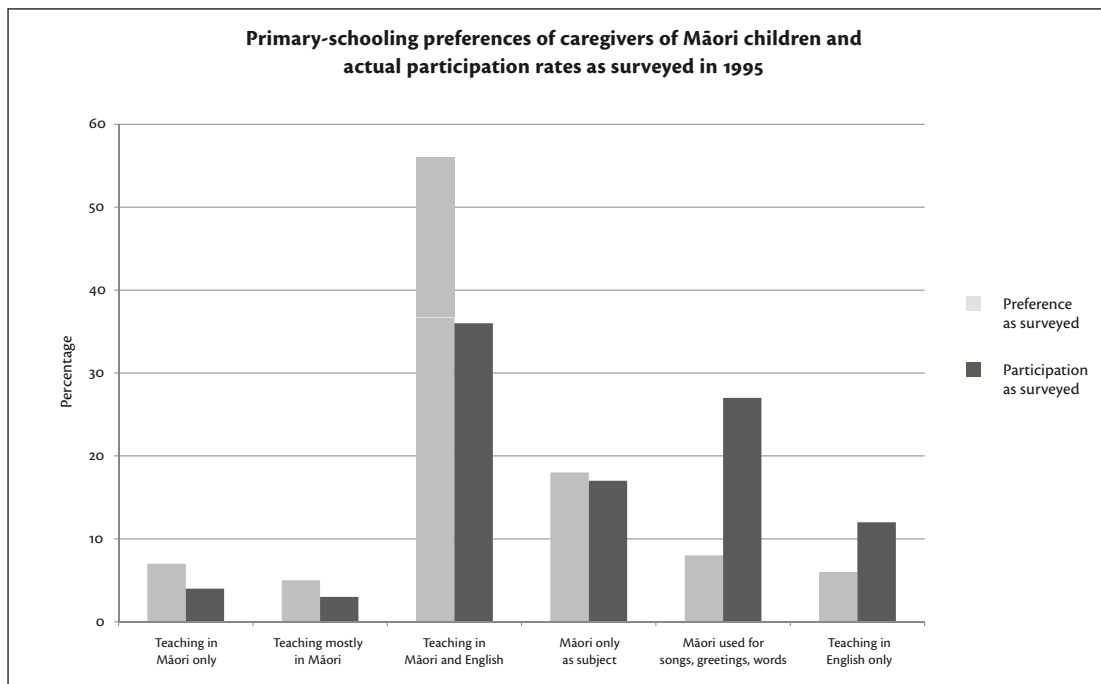


Figure 5.13

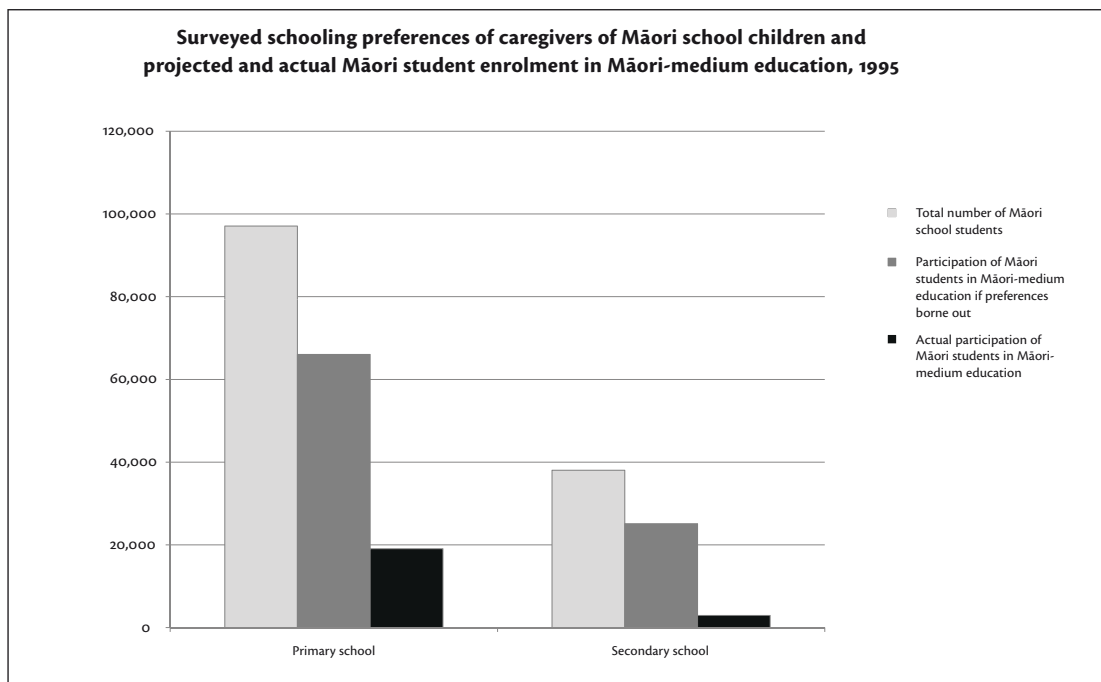


Figure 5.14

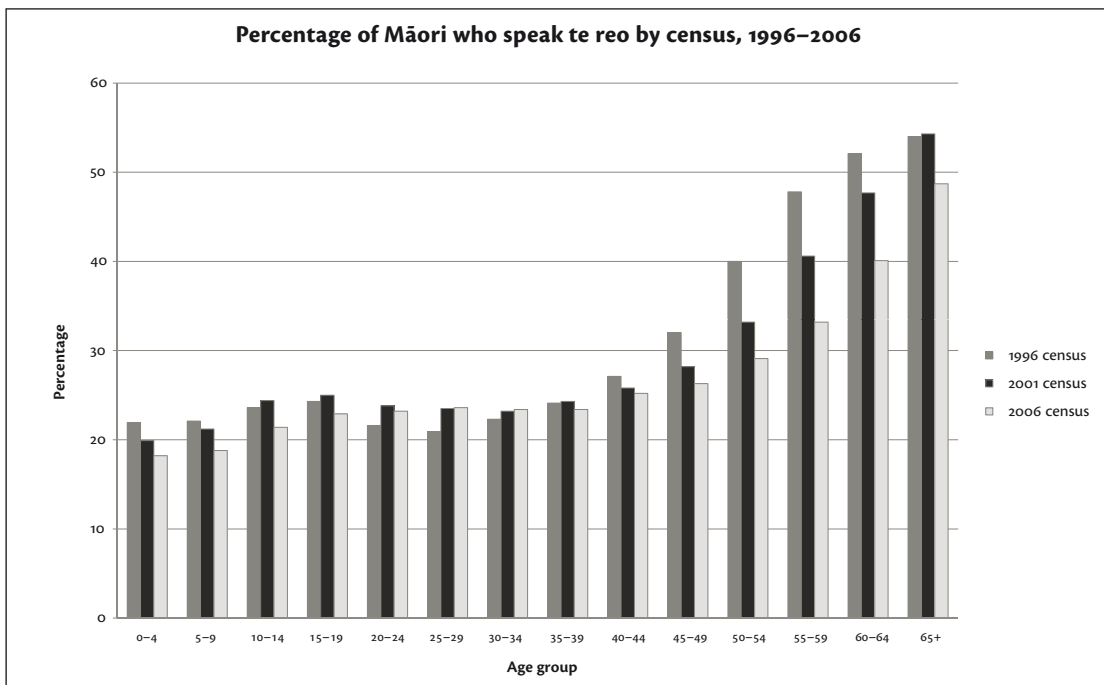


Figure 5.15

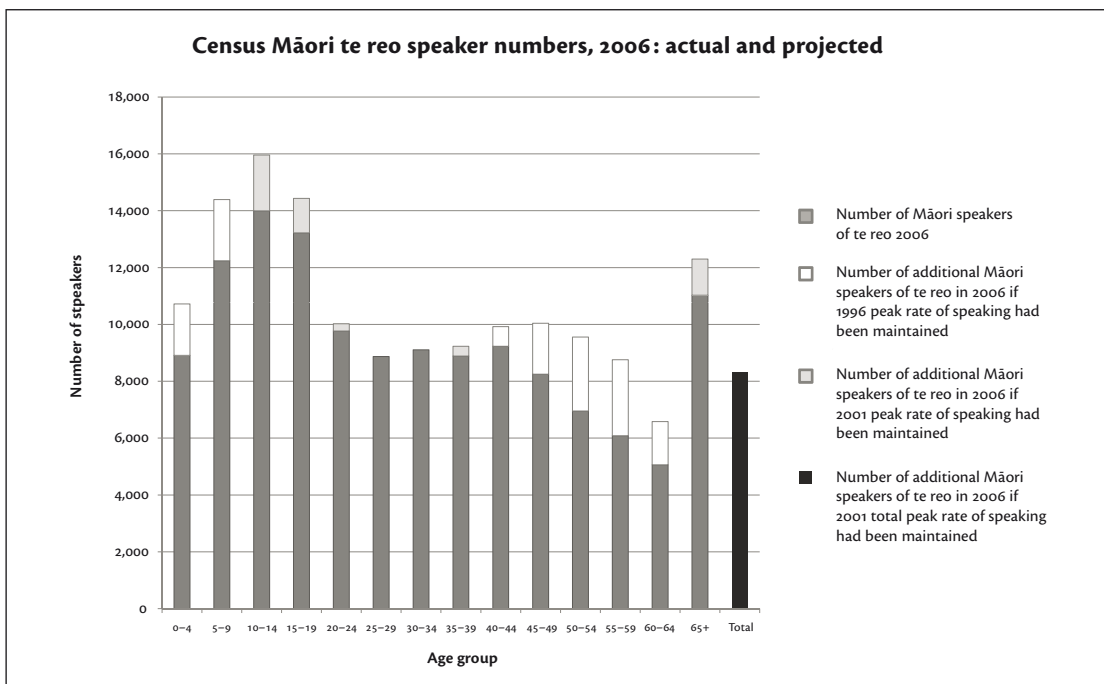


Figure 5.16

to be mostly in Māori. While the survey indicated that this ambition was met for most of those who held such preferences and who had children already at school,<sup>138</sup> the percentages are more important than they first seem, because if accurate they would have translated nationally to a relatively significant number of children (that is, 29,546 students out of the 328,286 regular classroom non-Māori primary-school students). In actuality, the number then in Māori-medium classes was 1,275 (0.4 per cent).

Māori-medium education at secondary school level was also preferred by 9 per cent of non-Māori caregivers, which would have translated into 17,177 of the 190,851 regular classroom non-Māori students in Māori-medium classes. The real figure was just 100 (less than one tenth of a per cent).

The second survey was carried out for the Ministry of Education by MRL Research in 1995 and was intended to ascertain the likely demand for Māori and Pacific Island language education to 2020. Accordingly, 650 Māori and 550 Pacific Island caregivers for children aged 10 or under were interviewed in Auckland and Wellington.

The results were similar to those recorded in 1992, in that a 68 per cent demand for Māori-medium primary-school education was being met by a 43 per cent supply, while a 14 per cent preference for education weighted most heavily towards English was contradicted by a 39 per cent placement in such schools.

The trend continued at secondary-school level, with bilingual learning wanted by 57 per cent of caregivers, instruction mainly in Māori by 5 per cent, and Māori immersion by 4 per cent.<sup>139</sup>

There were then 97,091 regular classroom Māori primary-school students. Had 68 per cent of them been in some form of Māori-medium education, there would have been 66,022 such students, but the figure was only 19,044 (19.6 per cent). At secondary-school level, there were 38,049 regular classroom Māori students, and had the preferences of the 66 per cent of caregivers been realised, there would have been 25,112 in Māori-medium learning. Instead, there were 2,943 (7.7 per cent).<sup>140</sup> At both levels, the clear gap between supply and demand again seems irrefutable.

These results allow us to comment on the demand for Māori-language instruction in the 1990s and the extent

to which that demand was being met. While margins of error exist and there is some evidence of slightly reduced demand and somewhat improved supply in 1995, there is a striking consistency across the two surveys.

It is, of course, unknown whether places in such forms of education were full or whether a large number of Māori students had Māori-medium learning options available locally but were not making use of them. In other words, the rate of placement cannot be regarded simply as the rate of supply. However, given that there was a shortage of Māori-medium teachers at the time, it is unlikely that the actual level of supply was significantly higher. Even if we assume that the surveyed level of demand was exaggerated,<sup>141</sup> this would not bridge the clear chasm between supply and demand. For example, if the actual level of demand in 1992 was radically lower – say only 35 per cent instead of 77 per cent – this would still have meant that 17,500 Māori primary school children were not attending their caregivers' favoured form of Māori-medium education.<sup>142</sup>

Overall, one can thus see that the supply of Māori-medium schooling probably improved between 1992 and 1995 but that Māori demand, while still high, may have fallen slightly.

Peak demand (in terms of the proportion of Māori students in Māori-medium learning) came in 1999. In the decade since, demand has clearly declined, irrespective of supply, although of course we must remember that ongoing teacher shortages have shown an incessant supply-side problem.

### (3) *Census results, 1996–2006*

The 1996 census was the first to ask respondents which languages they could hold a conversation in about a lot of everyday things. It found that 25 per cent of the Māori ethnic group could hold such a conversation in te reo Māori. Nena and Richard Benton found this an 'amazing revelation', having assumed, on the basis of the 1995 national survey, that the result would be far worse. Half the speakers were under 25, whereas the 1995 survey had suggested the median age of speakers aged 16 and over would be closer to 50.<sup>143</sup>

There have now been three censuses asking a language question, and further significant Te Puni

Kōkiri-commissioned surveys into the health of the Māori language in 2001 and 2006 (see below). Setting the results of the 1996 census alongside the 2001 and 2006 results, we can discern medium-term trends in the health of the language (see table 5.9):

- ▶ The proportion of those aged zero to nine who can speak the language has declined significantly since 1996.
- ▶ In all the age groups from 10 to 39, the proportion of te reo speakers rose between 1996 and 2001; for the 10- to 24- and 35- to 39-year-olds, this proportion declined again by 2006 (in the case of 10- to 19-year-olds to less than 1996 levels); and for the 25- to 34-year-olds it continued to climb, but at a much-reduced rate.
- ▶ For the 40- to 64-year-olds, there was an ongoing decline which was dramatic at the older levels (for example, from 47.8 per cent of those aged 55 to 59 in 1996 to 33.2 per cent of those aged 55 to 59 in 2006).
- ▶ Amongst those aged 65 and over, there was a marginal decrease in 2001 and a steep decline in 2006.
- ▶ In 2006, the age groups with the lowest proportions of reo speakers were those spanning the years zero to 14. As these also happen to be the most populous, the more positive responses – such as the nearly 50 per cent of those aged 65 and over who were speakers – represent much smaller numbers of people.
- ▶ The key concern about this lower-speaking ability amongst the young is that it was not the case in 1996, when those aged zero to nine had higher proportions of speakers than those aged 20 to 29, and those aged 10 to 14 out-rated those aged 20 to 34.

While the reasons for these changes are undoubtedly complex, some trends do seem readily explicable. The decline in younger speakers would clearly seem to relate to the drop-off in those attending kōhanga reo and the declining proportion of those attending Māori-medium schooling. Conversely, the rises among some age cohorts will relate to factors such as the increased participation in Māori-medium schooling in the late 1990s or the growth in those in later age brackets taking tertiary courses in te reo (notwithstanding Earle's comment that such courses would not enable one to converse proficiently in Māori on their own).<sup>144</sup> An example of the latter may be the 30- to

34-year-olds in 1996, who as 35- to 39-year-olds in 2001 and 40- to 44-year-olds in 2006 increased their proportion of reo speakers. The decline of speaker proportions in the older age groups also clearly relates to the fact that, as many older speakers pass away, they are increasingly replaced by those who have never learnt te reo.

#### **(4) Projecting the census results forward**

Looking to the future, we know roughly how the Māori population pyramid will look in 16 years' time. By 2026, according to Statistics New Zealand, the Māori population is likely on mid-range projections to number 811,000 – up from 624,000 in 2006.<sup>145</sup> It will be older, but still have a larger-than-average number of younger people.<sup>146</sup> If current trends continue, and the proportion of children aged zero to four able to speak Māori continues to decline across censuses, we estimate that around 16 per cent of the 258,000 Māori in the zero to 14 age range will be te reo speakers in 2026 (unadjusted for those too young to speak). Likewise (and using an approximate analysis based on the ageing of current age cohorts), around 20 per cent of the 303,000 aged 15 to 39, 24 per cent of the 181,000 aged 40 to 64, and around 26 per cent of the 69,000 aged 65 and over will be speakers.

In other words, it is unlikely that the official tally of Māori speakers of te reo Māori in 2026 will be more than 150,000.<sup>147</sup> That is a rise of 14 per cent during a period in which the Māori ethnic group population is projected to rise by 30 per cent (on medium projections). The estimated number of speakers represents a likely 20 per cent proportion of the official 2026 census-night tally for the Māori ethnic group, compared with 23.7 per cent in 2006.

It is also likely that, by 2026, there will be very few older native speakers of te reo left. Today, those with higher degrees of language proficiency are found in the older age brackets. It is unlikely that the overall proficiency of those 150,000 speakers in 2026 will be any better, if better at all, than the 131,610 Māori speakers of te reo today.

Current trends, therefore, suggest that the ongoing gains being made with te reo are not offsetting the ongoing losses occurring as older speakers pass away. Moreover, the theoretically ongoing gains are in fact beginning to turn into losses amongst the crucial younger age groups, who represent the future health of te reo.



Table 5.11: Māori ethnic group te reo speaker numbers by age group in census, 1996–2006

Age group	1996 census				2001 census				2006 census			
	Māori te reo speakers	Total Māori	Total Māori who answer language question	Māori te reo speakers (percentage)	Māori te reo speakers	Total Māori	Total Māori who answer language question	Māori te reo speakers (percentage)	Māori te reo speakers	Total Māori	Total Māori who answer language question	Māori te reo speakers (percentage)
0–4	10,500	71,664	47,945	21.9	9,765	67,560	49,070	19.9	8,910	66,426	48,956	18.2
5–9	14,718	67,422	66,597	22.1	13,782	66,114	65,009	21.2	12,243	66,771	65,122	18.8
10–14	13,377	57,318	56,682	23.6	15,126	62,805	61,992	24.4	13,998	66,726	65,411	21.4
15–19	12,420	51,714	51,111	24.3	12,249	49,527	48,996	25.0	13,221	58,533	57,734	22.9
20–24	10,095	47,346	46,736	21.6	9,915	42,093	41,660	23.8	9,768	42,774	42,103	23.2
25–29	8,913	43,149	42,646	20.9	9,318	40,164	39,651	23.5	8,871	38,106	37,589	23.6
30–34	9,255	41,994	41,502	22.3	8,988	39,252	38,741	23.2	9,105	39,456	38,910	23.4
35–39	8,658	36,405	35,925	24.1	9,225	38,325	37,963	24.3	8,889	38,598	37,987	23.4
40–44	7,503	28,041	27,686	27.1	8,370	32,859	32,442	25.8	9,228	37,272	36,619	25.2
45–49	7,080	22,344	22,125	32.0	7,005	25,092	24,840	28.2	8,250	31,908	31,369	26.3
50–54	6,366	16,098	15,915	40.0	6,399	19,473	19,274	33.2	6,954	24,189	23,897	29.1
55–59	6,543	13,857	13,688	47.8	5,541	13,827	13,648	40.6	6,084	18,630	18,325	33.2
60–64	5,235	10,185	10,048	52.1	5,439	11,550	11,403	47.7	5,064	12,813	12,628	40.1
65+	8,412	15,834	15,578	54.0	9,360	17,637	17,238	54.3	11,031	23,124	22,651	48.7
Total	129,033	523,374	516,132	25.0	130,485	526,281	517,798	25.2	131,610	565,329	555,316	23.7

The 'Total Māori who answer language question' figures represent 'Total Māori' minus those whose response to the language question was 'don't know', 'refused to answer', 'response unidentifiable', 'response outside scope', and 'not stated' (that is, 'not specified' (1996) and 'not elsewhere included' (2001 and 2006)) as well as those within the zero to four age group for whom the response was 'no language' (that is, children too young to speak). Responses of 'no language' are retained for other age groups (where they are very few). Percentages are calculated on the basis of those answering the language question. The percentage of speakers (across the bottom line) includes those for whom the response was 'no language' in the zero to four age group, as these are the figures generally cited.

## 5.4.4(5)

In its report on *The Health of the Māori Language in 2001*, Te Puni Kōkiri stated, with respect to the census results, that:

The predominant feature between 1996 and 2001 is the stability of numbers of Māori speakers at all levels; there is even some moderate growth in some areas. This suggests that the long-term decline in the number of Māori speakers that occurred over a number of decades may have been arrested.<sup>148</sup>

When the 2006 census results were released, officials suggested that the small increase in the number of Māori speaking Māori represented a stabilisation of te reo after a long period of decline, with a likely rise in the number of younger speakers. In fact, however, the age group recording the biggest growth in te reo speakers between 1996 and 2006 (in absolute numbers) was those aged 60 and over, as the population aged. Speakers in this age group increased from 13,647 in 1996 to 16,095 in 2006.<sup>149</sup> By contrast, the numbers of speakers aged zero to 14 declined from 38,595 in 1996 to 35,151 in 2006. The 2006 result does not appear to be evidence of a further stabilisation at all. See table 5.9.

#### (5) *Te Puni Kōkiri's 2006 survey*

In 2006, Te Puni Kōkiri conducted a survey on the health of the Māori language that seemed to contradict the census result. Announcing the results in July 2007, the Minister of Māori Affairs said that they showed 'significant progress towards the achievement of the goals of the Māori Language Strategy'. He said highlights included:

- ▶ a 9 percentage point increase since Te Puni Kōkiri's 2001 survey in the number of Māori who could speak more than a few words and phrases (that is, from 42 per cent in 2001 to 51 per cent in 2006);
- ▶ a 7 percentage point increase in those who could speak te reo very well, well, or fairly well (that is, from 20 per cent in 2001 to 27 per cent in 2006);
- ▶ the numbers who could understand (by listening), read, and write more than a few words and phrases increasing by 8, 10, and 11 percentage points respectively;

Te Puni Kōkiri's 2008 report on the results of its 2006 survey on the health of the Māori language. Te Puni Kōkiri claimed that there had been 'significant growth in the numbers of Māori adults who can speak and understand the Māori language to varying degrees of proficiency'.



- ▶ the number of 15- to 24-years-olds who could speak te reo increasing by 13 percentage points and those 25 to 44 by 16 percentage points; and
- ▶ an increase in adults speaking te reo to their preschoolers at home by 17 percentage points, to primary school children by 14 percentage points and to secondary school children by 20 percentage points.<sup>150</sup>

As noted, the Ministry of Education also hailed the survey results, arguing that increased Māori proficiency in te reo since 2001 had been helped by the substantial growth in enrolments for tertiary te reo Māori courses during that period.<sup>151</sup>

#### (6) *Discrepancies between the 2006 census and survey*

The 2006 census and the 2006 survey are thus at odds with each other. While Te Puni Kōkiri found major improvements in speaking proficiency amongst those aged 15 to 44 since its previous survey, the census showed declining proficiency among those aged 15 to 24, a very marginal improvement for those aged 25 to 34, and a decline for those aged 35 to 44. The very small improvement in speaking proficiency for those aged 55 and over in the survey contrasts with a major decline amongst those in this age group in the census.

Te Puni Kōkiri has publicly stated its view that:

The Māori Language Survey is a better measure of the Māori language [than the census] as it is a face-to-face interview

and has a variety of questions that investigate language acquisition, skill and use. It asks a number of questions, each targeted at an aspect of language revitalisation that we need to know about.

This survey provides a more robust way to look at the health of the Māori language than a single question which requires a large degree of interpretation.<sup>152</sup>

Despite this, the Ministry of Social Development's influential *Social Report* for 2007 was equivocal about whether progress was being made or not. It noted that the survey and census data were 'not directly comparable' and concluded that:

The 2006 Census shows a slight decrease in the proportion of Māori who speak Māori since 2001, while the 2006 Survey on the Health of the Māori Language shows an increase over the same period. It is not clear whether the proportion who speak Māori has declined slightly or increased.<sup>153</sup>

Dr Peter Keegan from the School of Māori Education at the University of Auckland has also commented on the 2006 census and survey results, saying that the question of whether te reo Māori 'is gaining or losing ground today' was 'difficult' to answer.<sup>154</sup>

Linguist Dr Winifred Bauer of Victoria University has conducted a comprehensive comparison of the census and survey results for 2001 and 2006, and is less than impressed with the reliability of the 2006 survey. She argues, first, that changed sampling methods and reportage of data between the 2001 and 2006 surveys make 'serious survey comparison impossible'. She then points to the large margins of error in both the surveys (particularly when focusing on small subgroups within the overall survey sample), which were even bigger in the 2006 survey. She also notes the added potential for unreliability in the 2006 survey introduced by the particular sampling method.<sup>155</sup>

Most importantly, Dr Bauer says that the 2006 survey is simply not credible because it is so at odds with the census results in respect to general speaking proficiency, the gap between men and women's proficiency, and the use of te reo by children. Many of the gains claimed by Te Puni

Kōkiri relate to very small numbers of survey respondents, are well within the margin of error, and are achieved by combining those stating they can speak 'very well' and 'well' (since the former group is too small on its own for any credible analysis). By contrast, the census has asked the same question of the entire population, so there are no sampling errors and the results are directly comparable.<sup>156</sup>

Overall, Dr Bauer concludes that:

- ▶ The surveys simply do not tell us what lies behind the key trends discernible from the census, and in fact 'have failed to provide a better picture than the censuses in crucial areas'. Consequently, it is arguable whether these five-yearly national surveys 'have any value'.<sup>157</sup>
- ▶ The survey results contradict reality: that the health of the language continues to decline. Certainly, there was no improvement in the language proficiency of the critical parenting generation cohorts, who are vital to intergenerational transmission, between 2001 and 2006.<sup>158</sup>
- ▶ There is real danger in casting the 2006 survey results in such a positive light. Doing so will encourage complacency about the health of the language at a time when a sense of urgency is still needed.<sup>159</sup>

#### 5.4.5 Conclusions: how healthy is te reo in 2010?

There was a true revival of te reo in the 1980s and early-to-mid-1990s. It was spurred on by the realisation of how few speakers were left, and by the relative abundance of older fluent speakers in both urban neighbourhoods and rural communities. The revival was a Māori movement, it was achieved through education, and it was incredibly successful at a grass-roots level. The movement was perhaps at its most powerful during its earliest surge, as demonstrated by Māori born from 1977 to 1981 being more likely to speak te reo than those born either from 1967 to 1976 or from 1982 onward (see table 5.10).

From around 1994 to 1999, te reo has been in renewed decline. The problem is not just one of declining numbers of Māori speakers but also, strikingly, declining proportions, for it has also coincided with a significant rise in the number of younger Māori. Critically, the decline is now occurring at both the young and old ends of the

5.4.5

Table 5.12: Likelihood to be a te reo speaker by age group in the Māori ethnic group at the 2006 census

Rank	Age group (by years born)	Rank of total people in age group
1	Before 1942	14
2	1942–46	13
3	1947–51	12
4	1952–56	11
5	1957–61	10
6	1962–66	9
7	1977–81	6
8	1967–71	8
9	1972–76	7
10	1982–86	5
11	1987–91	4
12	1992–96	2
13	1997–2001	1
14	2002–06	3

spectrum. The figures clearly contradict the perception that, among Māori under 40, it is younger people who are more likely to speak Māori. The figures also show that the most populous Māori age groups are also the least likely to be Māori-speaking (see table 5.9).

All this means that, if trends continue, over the next 15 to 20 years the te reo speaking proportion of the Māori population will decline further, even as the absolute number of speakers continues to slowly climb. And despite the higher numbers of te reo speakers likely to be found in, say, 2026, they are likely to be less fluent than speakers now, given the relatively few older native speakers who will still be alive.

The 2006 Te Puni Kōkiri-commissioned Māori language survey showed much more positive results than the 2006 census, but it has been strongly criticised by a leading scholar for its lack of reliability. The survey certainly

does have large margins of error. Moreover, its inconsistency with key trends apparent in the census and backed up by other data sources suggest it is unwise to proclaim, as did the Minister of Māori Affairs, that the results showed ‘significant progress’ towards achieving the *Māori Language Strategy* goals.

Needless to say, the decline in te reo overall – and in particular the loss of older native speakers – must be having a major impact on the health of tribal dialects. By definition, older native speakers are speakers of dialect. This by no means holds true for children today whose first language is Māori. Something of the fate of tribal dialect is indicated by the fact that there were 20,190 Māori te reo speakers born before 1942 in the 1996 census, but only 11,031 speakers of the same cohort in 2006. By 2026, there will probably be not many more than a couple of thousand. In certain areas of the country, of course, the loss of older native speakers is more pronounced than elsewhere, as shown by Te Puni Kōkiri’s regional profiles of the health of the Māori language. In any language with faltering health – or, in this case, a faltering revival – its own variations must be its most vulnerable elements. This is the inevitable state of tribal dialects today, with some elements already all but gone and others clearly in peril. Unless dialects begin to be spoken more by younger Māori, their prospects beyond the next 20 years are obviously bleak.

The current decline in te reo Māori seems to have several underlying causes. They include:

- ▶ the ongoing loss of older native speakers who have spearheaded the revival movement;
- ▶ complacency brought about by the very existence of the institutions which drove the revival;
- ▶ concerns about quality, with the supply of good teachers never matching demand (even while that demand has been shrinking);
- ▶ excessive regulation and centralised control, which has alienated some of those involved in the movement; and
- ▶ an ongoing lack of educational resources needed to teach the full curriculum in te reo Māori.

The issue of teacher supply strikes us as crucial – the 1992 and 1995 surveys showed the potential market for Māori language education, but the amount of

**‘Massive drop looms for Maori-medium education’**

*NZ Education Review, 20 February 2009*

**‘Nothing to celebrate in Maori language statistics’**

*Timaru Herald, 30 July 2009*

**‘Bilingual classes shut’**

*Marlborough Express, 9 December 2009*

The decline in the health of te reo is reflected in these 2009 news headlines.

Māori-medium education available has clearly never come remotely close to those levels. We are unaware of any attempt to follow up on these demand surveys, which is of itself a concern. We suspect that demand would be less today, highlighting the failure to capitalise on past momentum.

Successes in Māori language education are today confined to pockets. Undoubtedly, excellent speakers are coming through kura kaupapa and wharekura, but this does not offset the overall decline in Māori participation in Māori-medium education. The Ministry of Education wishes to increase Māori participation rates in early childhood education, but would appear content for this increase to be in centres that are typically English-medium. At tertiary level, more students are studying te reo than in the 1990s, and this may be contributing to language revival at some levels. But it will not help produce the teachers so sorely needed while so many te reo Māori tertiary students are in lower-level (1 to 3) study.

## 5.5 ANALYSIS AND CONCLUSIONS

Having established that the health of te reo remains fragile at best, we turn now to consider the Treaty interests and issues at play in 2010.

It has been well-established by earlier Tribunals that te reo Māori is a taonga guaranteed to Māori under article

2 of the Treaty. That there is a Treaty interest at play is thus undeniable. Moreover, as we explain below, there are no real countervailing interests that impact on the Crown’s duty to support te reo – apart from cost. So what should the Crown and Māori do to ensure its survival and health? In this section, we identify the key components of their respective obligations, and discuss how these should form the basis of a genuinely Treaty-compliant modern Māori language regime.

### 5.5.1 The Treaty interest

#### (1) *Te reo as a taonga*

We begin by considering the nature of the Treaty interest in te reo Māori in 2010. The Tribunal has already established that ‘o ratou taonga katoa’ guaranteed in article 2 can be translated as ‘all their valued customs and possessions’ or ‘all things highly prized’, and covers both tangible and intangible things. More specifically, the te reo Māori Tribunal found that ‘It is plain that the language is an essential part of the culture and must be regarded as “a valued possession”’. It added:

We question whether the principles and broad objectives of the Treaty can ever be achieved if there is not a recognised place for the language of one of the partners to the Treaty. In the Maori perspective the place of the language in the life of the nation is indicative of the place of the people.<sup>160</sup>

That te reo is a taonga guaranteed recognition under the Treaty has been explicitly recognised by the Crown. Indeed, the preamble to the Maori Language Act 1987 states that:

Whereas in the Treaty of Waitangi the Crown confirmed and guaranteed to the Maori people, among other things, all their taonga: And whereas the Maori language is one such taonga.

But even describing te reo as a taonga understates its importance. The language is clearly a taonga of quite transcendent importance to Māori, and few other taonga could rival its status. Without it, Māori identity would be fundamentally undermined, as would the very existence of Māori as a distinguishable people. As the te reo Māori Tribunal put it, ‘If the language dies the culture will die, and something quite unique will have been lost to the world.’<sup>161</sup> The extraordinary importance of the language was also emphasised by the Privy Council when, in 1994, it endorsed the earlier High Court finding that language was at the ‘core’ of Māori culture and that the Crown is under an ongoing obligation to take what steps are reasonable to assist in its preservation.<sup>162</sup>

Given the importance of this taonga to Māori, the Crown’s protection of it clearly needs to accord with Māori preferences – and, indeed, be determined in large measure by Māori ideas. This kind of partnership or co-ownership is inherent in the Treaty. Furthermore, the Crown must see Māori and te reo as not somehow external to itself, but a core part of the society it represents – and thus a key influence over how it conducts itself. And because the Treaty of course also grants the Māori interest a greater status than simply that of a minority group within society, the Māori interest thus has a corresponding claim to resources, both fiscal and otherwise.

We should add that the Crown endorsed the United Nations Declaration on the Rights of Indigenous Peoples in 2010. Article 13 of the declaration states that indigenous peoples ‘have the right to revitalize, use, develop and transmit to future generations their . . . languages’, and that signatory states ‘shall take effective measures to ensure that this right is protected’.<sup>163</sup>

## (2) *Tribal dialects as taonga*

In our view, tribal dialects must be considered iwi taonga in the same way that te reo Māori is a taonga to Māori generally. In 1840, there was not one uniform ‘reo’ in New Zealand but many variations, and the Treaty recognised tribal independence. And so it must follow that, for individual iwi, dialects are taonga of the utmost importance: they are the traditional media for transmitting the unique knowledge and culture of those iwi and are bound up with their very identity. Ngāti Porou, for example, are well known within te ao Māori for their unique idiom, without which the iwi would lose a core element of its distinctiveness. We believe that this applies to other tribes with unique expressions and vocabulary.

Counsel for the Te Tai Tokerau claimants submitted that the distinctive reo of the three northern iwi were ‘the vehicles by which the mythology, oral history and cultural identity is transmitted from generation to generation’. Counsel thus argued that the Crown needed to recognise as taonga ‘the specific reo that is treasured by the kaitiaki themselves, rather than a generalised amalgam “te reo Maori”’.<sup>164</sup> We agree about the Crown’s need to see distinctive features of tribal reo as taonga to those iwi, but we do not agree that this negates the status of te reo Māori itself as a taonga. We prefer the explanation of counsel for Ngāti Porou, that tribal dialects ‘together comprise the Maori language as a whole and . . . contribute to its unique character’.<sup>165</sup>

## 5.5.2 Other valid interests

Arguably, there are no countervailing interests that impact upon ongoing support for te reo. It seems to us that a national consensus has developed in recent years that te reo Māori is worthy of saving – it has certainly been the policy of successive elected governments. In other words, New Zealanders seem to recognise that te reo helps shape our collective identity at the same time as it sustains Māori cultural identity. We can see this reflected in the way that use of te reo has become much more prevalent within the New Zealand mainstream.

There will always be issues around affordability and cost. Potentially, though, it may be unaffordable *not* to continue supporting the growth in knowledge and use

of te reo. Māori educational achievements remain poor, but more teaching of te reo and in the medium of te reo may encourage Māori students to perform better, as the Ministry of Education suggested in its annual report on Māori education for 2006–07:

In 2006 Year 11 candidates (students) attending Māori language schools achieved higher National Certificate of Educational Achievement (NCEA) attainment rates than their peers attending English language schools.<sup>166</sup>

The report referred to this as pointing to ‘promising pockets of success’ in Māori-medium education.<sup>167</sup> There is also evidence that Māori in immersion and bilingual schools (where te reo is used at least 12 per cent of the time) are significantly less likely to be stood down, suspended, unjustifiably absent or truant than Māori in decile 1–4 mainstream schools.<sup>168</sup> While Ms Sewell told us that ‘the numbers are quite small and drawing statistical conclusions from them may be risky’, she did add that ‘some students who’ve come through kohanga and kura kaupapa Māori . . . have been extraordinarily successful’. She was asked by counsel for the Te Tai Tokerau claimants whether research showed ‘that kaupapa Māori education is likely to lead to better learning outcomes’. She replied that ‘In some instances it does.’<sup>169</sup>

We agree that caution is essential in interpreting these figures. We are aware, for example, that Māori-medium students have had low achievement levels in the science learning area, and that – as the Ministry of Education puts it – the low student numbers make comparison with mainstream students ‘difficult and sometimes misleading’.<sup>170</sup> Furthermore, low truancy rates may show that Māori-medium schools are performing their custodial functions well, but do not necessarily mean that the quality of learning is high. However, and despite these cautions, such results give some cause for optimism. This is because, as the relatively youthful Māori ethnic group becomes a larger share of the overall population,<sup>171</sup> such improvements are clearly in the national interest.

It is also well accepted by scholars that being bilingual is beneficial for a child’s cognitive development and communicative ability. This educational goal, therefore, can be

met equally well by Māori as by French or Japanese. At the same time as instilling a greater sense of shared New Zealand identity (something we return to in conclusion at section 5.5.5), therefore, learning Māori can also help deliver developmental benefits.

With regard to dialect, the issue of countervailing interests is complicated by the fact that some Māori might feel that the Crown should primarily focus on saving te reo Māori itself. Some smaller iwi, for example, would certainly struggle to maintain any kind of distinct dialect, such is the paucity of native speakers now amongst them. This was reflected in the proposal that, in order to protect te reo o Ngāti Koata, the Crown must also protect and promote te reo Māori in Ngāti Koata’s rohe, given the close relationship between the two.<sup>172</sup> Perhaps this preference stems from the fact that Ngāti Koata’s specific reo is already all but lost. Counsel for Ngāti Kahungunu also seemed to imply that general language revival needed to come ahead of addressing tribal dialect. He submitted that the Crown must ‘continue to implement appropriate remedies to strengthen Te Reo Maori generally, and ultimately to strengthen Te Reo of Ngati Kahungunu and other individual reo specifically.’<sup>173</sup>

By contrast, Ngāti Porou clearly felt that urgent action is needed to protect and save their unique dialect while there is still a remnant of native speakers proficient in it. Perhaps the lesson in all of this is that the Crown will need to tailor its activities according to the varying preferences of different iwi.

### 5.5.3 The obligation of the Crown

The survival of te reo is clearly of paramount importance to Māori, and this places a significant obligation on the Crown as Treaty partner to protect it. This weight of obligation, coupled with the Crown’s duty to act in favour of te reo as a simultaneous matter of national interest, must be met with commensurate action – the development of a modern, Treaty-compliant regime to ensure the survival of the Māori language. What would such a regime look like? The answer, we believe, is to be found in four key principles that strike us as self-evident components of the Crown’s Treaty obligation:

- ▶ Partnership: The survival of te reo can be achieved



1972: Māori language petition



Members of Nga Tamatoa who participated in a three-week sit-in at Parliament in 1972 to protest about – amongst other things – the loss of te reo

1970

1972

## TIMELINE: THE REVITALISATION AND RENEWED DECLINE OF TE REO MĀORI, 1970–2010

Te reo speakers:  
Growth and decline in speaking proficiency amongst Māori children





1980: Māori Language Week March



Two members of the Waitangi Tribunal, Chief Judge Edward Taihakurei Durie (left) and Paul Temm QC, visit a kōhanga reo at Waiwhetu, Lower Hutt (1985)

1977: First bilingual school at Rūātoki

1979: Te Ātaarangi established

1982: First kōhanga reo established in Wainuiomata

1977

1979

1980

1982

1983

Kōhanga reo:  
Growth and decline  
in kōhanga reo  
enrolments

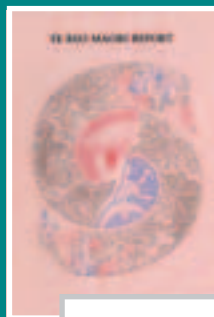
Late 1970s:  
Estimated that fewer than 100 Māori children under five fluent in te reo

1982: First kōhanga reo established

1983: 4,132 children in 170 kōhanga; 33 per cent of all Māori children in early childhood education at kōhanga



1985: Pita Sharples speaking at the opening of Te Kura Kaupapa Māori o Hoani Waititi



1986: Release of the Report of the Waitangi Tribunal on the Te Reo Maori Claim



1987: Te Upoko o te Ika Māori Radio Station launched

1987: Maori Language Act passed

1984

1985

1986

1987

1989

1986: An estimated 700 Māori children under 10 speak te reo

1989: 8,724 children in 470 kōhanga; 44 per cent of all Māori children in early childhood education at kōhanga

1987: Fifty primary schools offering Māori-medium education; 3 per cent of all Māori primary school students in Māori-medium education



1995: Stamps marking Māori Language Year

1996: Census form released in te reo

1990 1991 1992 1993 1995 1996

1993: 14,514 children in 809 kōhanga; 49.2 per cent of all Māori children in early childhood education at kōhanga

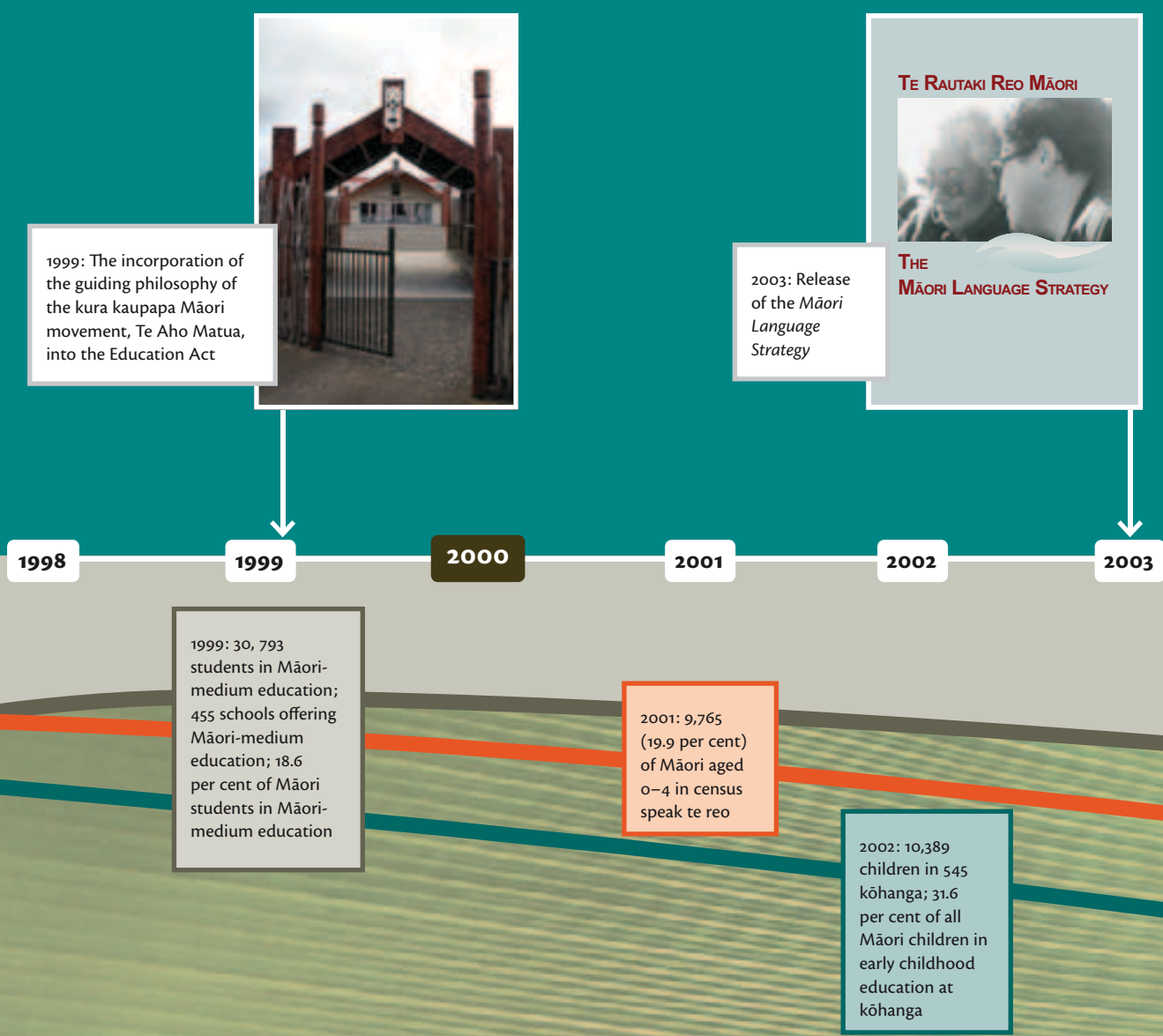
1996: 10,500 (21.9 per cent) of Māori aged 0-4 in census speak te reo

1995: 25,284 students in Māori-medium education; 15.9 per cent of Māori students in Māori-medium education

1991: 261 primary and 54 secondary schools offering Māori-medium education

1992: 17,426 students in Māori-medium education; 12.5 per cent of Māori students in Māori-medium education

Māori-medium education: Growth and decline in Māori-medium schooling enrolments





2004: Launch of Māori Television

2004

2006

2008

2009

2010



2009: Number of kōhanga drops to 464

2006: 8,910 (18.2 per cent) of Māori aged 0–4 in census speak te reo

2008: 9,165 children in 467 kōhanga; 23.4 per cent of all Māori children in early childhood education at kōhanga

2009: 28,231 students in Māori-medium education; 394 schools offering Māori-medium education; 15.2 per cent of Māori students in Māori-medium education

only in a paradigm of genuine partnership between Māori and the Crown.

- ▶ A Māori-speaking government: The Government must accept the idea that it should not be an English-speaking monolith.
- ▶ Wise policy: In light of the importance of the taonga and the wide call on the resources of the State in other areas, there is a particular need for the highest standards of transparent, insightful, and cost-effective policy.
- ▶ Adequate resources: Once policies of the requisite quality have been developed, there must be enough resources made available to implement them so that there is no gap between rhetoric and reality.

We now examine each of these principles in more detail and consider how they might be applied to benefit te reo.

### (1) *Partnership*

The principle of partnership is of course well articulated. It requires that the Crown and Māori act reasonably and in the utmost good faith towards each other. It requires cooperation and, on the part of the Crown, a willingness to share responsibility and control with its Māori Treaty partner where it is appropriate to do so (see also section 6.8, where we propose a set of working principles for a cooperative working partnership between Māori and the Crown).

It is certainly appropriate to do so in the case of te reo. The last 30 years have shown that ensuring te reo's protection is simply too big a task to be tackled either by the Crown alone (which appears to be happening now under the MLS) or by Māori alone (as happened before the 1980s).

For Māori, the principle of partnership means being properly supported to contribute the initiative, ideas, and energetic leadership that will ensure the language's survival, just as they did in the 1980s. The story of kōhanga reo, kura kaupapa and Māori broadcasting initiatives shows that success is possible where Māori are supported to properly express their sense of responsibility and love for te reo. Success is much less likely where leadership and initiative sits with the Crown, and Māori have the status of mere supplicants or consultees.

In calling for greater Māori participation, we do not mean more Māori public servants helping to develop language policy. The revival of the Māori language can only happen if the challenge is owned by Māori themselves, and that sense of ownership can only come from the participation of Māori communities – be they represented by kaupapa-based organisations or kin groups. In essence, the Crown must transfer enough control to enable a Māori sense of ownership of the vision, while at the same time ensuring that its own expertise and resources remain central to the effort.

This brings us to the Crown's role in the partnership, which is to provide the necessary logistical and financial support, as well as its considerable research expertise and comprehensive data. As Nena and Richard Benton commented in 1999, the State's job is 'to see that needed resources are there'. For example, they said the State would need to finance a television channel (a key component of Māori language revitalisation) because the 'Māori community cannot finance such an initiative on its own'. The Bentons added that it is important that State finance does not become State control, because 'state control in development activities generally has retrogressive outcomes'.<sup>174</sup>

This view is backed up by well-regarded international research. Stephen Cornell, writing for the influential Harvard Project on American Indian Economic Development, has commented that 'the likelihood of achieving sustainable development rises as power and authority are devolved to Indigenous nations or communities, moving non-Indigenous entities, including central governments, from decision-making to resource roles and freeing Indigenous peoples to decide these things for themselves and by their own criteria'. He adds that the traditional 'divorce between those with authority to make decisions and those bearing the consequences of those decisions has resulted in an extraordinary and continuing record of central government policy failure' in the United States, Canada, Australia, and New Zealand.<sup>175</sup>

Genuine Crown–Māori partnership is crucial to te reo not only because of the Treaty but also because of the perilous health of this vital taonga. It is only through a joint effort by two partners in a quality relationship that te reo stands any chance at all.



'Kia Tupato!' signs around the Wellington south coast warn drivers to watch out for penguins. This sign was not a Government initiative, but it shows the kind of signage that would be more common if the Crown committed to greater bilingualism.

### **(2) A Māori-speaking government**

Fundamentally, there is a need for a mindset shift away from the pervasive assumption that the Crown is Pākehā, English-speaking, and distinct from Māori rather than representative of them. Increasingly, in the twenty-first century, the Crown is also Māori. If the nation is to move forward, this reality must be grasped.

If the Crown is serious about preserving and promoting the language it must also endeavour to speak te reo itself. This not only leads by example but provides symbolic as well as tangible support to keeping the language alive. Māori should be able to use their own language, given its official status, in as many of their dealings with the New Zealand State as practicable – particularly since the public face of the Crown will often be a Māori one. The idea of the Crown speaking Māori is of course not novel; by necessity, this was the status quo for a large proportion of New Zealand's colonial past.

### **(3) Wise policy**

The kāwanatanga principle requires the exercise of good and responsible government by the Crown, in exchange

for Māori acknowledging the Crown's right to govern. This requires the Crown to formulate good, wise and efficient policy.

In the case of te reo, its importance as a taonga and the sheer necessity for its protection to be secured through genuine partnership means the need for a genuinely Crown–Māori policy is especially urgent. The Crown must commit to working with Māori in ways that go beyond, say, a few consultation hui and a reference group. Only in this way can it be ensured that the policy is not only wise but the right one. This is an essential step; it would be a travesty to pour resources into a policy doomed to failure by its very lack of Māori support and ownership.

Once a strategic and transparent Crown–Māori policy is established, the Government's Māori language sector must be highly functioning and infused with common vision and purpose. Precious resources should be applied carefully. Simply put, the State owes Māori policies and services that are not undermined by structural issues, competing priorities and intermittent focus.

We should add that, in education, the Government's

5.5.3(4)

goal should always be well-educated, inspired, and productive students. Quite aside from the taonga status of te reo, therefore, if its greater use in education can help achieve those overarching goals, the Government would be doubly negligent not to pursue it.

#### (4) *Appropriate resources*

The terms of the Treaty clearly set out that the Crown's right to make laws carries a reciprocal obligation: to accord the Māori interest an appropriate priority (see section 1.6.1). In the context of te reo, the Crown must therefore recognise that the Māori interest in the language is not the same as the interest of any minority group in New Zealand society in its own language. Accordingly, in decision-making about resource allocation, te reo Māori is entitled to a 'reasonable degree of preference'<sup>176</sup> and must receive a level of funding that accords with this status.

Of course, this priority should be reflected, in the first instance, in the formulation of wise policy. In theory, the required level of funding should simply flow from that – that is, the funding allocated should be whatever is sufficient to implement the policy.

Since the Māori language revival began more than 30 years ago, good economic times have come and gone. Fiscal restraint in the hard times is understandable and acceptable, but there is a reciprocal need to put more resources into the problem when the Crown's coffers can sustain it. As the Privy Council said in the *Broadcasting Assets* case, where a taonga is in a vulnerable state, the Crown may well be required 'to take especially vigorous action for its protection.'<sup>177</sup>

Finally, we are aware of the argument that the Crown's spending on te reo should be focused more directly on communities where te reo is a common means of communication. We agree, but this must not mean the Crown reducing its focus on more 'mainstream' te reo resourcing. There is no future in an 'either/or' approach to funding if the language is to be protected.

#### 5.5.4 The Māori obligation

The Privy Council found that the obligation to protect te reo is certainly not the Crown's alone. Just as we did for the Crown, we have identified the principles that define

the nature and extent of the Māori obligation to te reo. They are: kōrero Māori, partnership, and compromise.

#### (1) *Kōrero Māori*

As the Privy Council put it, 'Maori are also required to take reasonable action, in particular action in the home, for the language's preservation.'<sup>178</sup> The home is an example of a domain where it is clearly beyond the Government's power to directly influence the extent to which Māori is used. Other such domains obviously include the marae and hui. Providing the Government has established a supportive environment according to the principles we have described, Māori must choose to use te reo as much as possible in these settings. Only in this way, for instance, can te reo become the language of socialisation at home for Māori children – the education system itself, even at kōhanga level, cannot provide this.

In meeting the obligation to speak Māori (including dialect) as much as possible, Māori must overcome any reticence about using te reo for fear of failure. Whakamā (embarrassment) can be the enemy of language revitalisation. Māori must also guard against being complacent because of the perceived recent successes in te reo revival. Such perceptions are not necessarily correct. Ongoing vigilance is appropriate.

#### (2) *Partnership and compromise*

As we have said, the poor health of te reo demands a response that is a true expression of Crown–Māori partnership – neither party can tackle the problem without the other's wholehearted involvement. Māori must be prepared to work with the Crown on reviving te reo and must take advantage of opportunities for learning or listening to te reo. They should participate in the language as much as possible – whether by enrolling their children in Māori language education (where a local option exists and is of sufficient quality), listening to or watching Māori language broadcasts, and engaging fully with the Crown over the formulation of Māori language policies.

This cooperation may require occasional compromise. In particular, Māori must be open-minded about what revival methods will work or should be made available. Dogmatic approaches that risk alienating even fellow



Māori must be kept in check. It seems likely to us that a flexible stance will sometimes be required, in the interests of the language.

In the running of *kōhanga* and *kura*, Māori must also strive to get along with each other. Whānau-based, *kāinga*-based, and community-based movements have a strength that derives from their grassroots character, but they have their risks. People do what they can in their spare time, for *koha* and often with little acknowledgement. Important tasks are often left for the committed few. Ordinary people, sometimes with limited skills and less time are required to step up to administer organisations with staff, budgets, accountabilities, compliance requirements, and so on. This will always create stresses. Infighting can break out. Relationships can be strained sometimes to breaking point. Tamariki and the community inevitably suffer. Another obligation on the Māori side is therefore to find ways to reduce the incidence of community infighting at *kōhanga* and *kura*, and to build skills that resolve conflict where it does occur.

### 5.5.5 Conclusion: the Treaty interest in te reo and the obligations of the Crown and Māori

Te reo Māori and its variations are taonga of transcendent importance to Māori, and the Crown has a significant obligation to protect them vigorously and actively. This obligation has four components: partnership; a Māori-speaking government; wise policy; and appropriate resources.

Māori also have a significant obligation to te reo and its variations. They must speak the language as much as possible, especially within the home and other Māori 'domains'. Whakamā and complacency must be set aside. Māori must also be willing to cooperate with the Crown in the process of language revival and remain open-minded about what methods of language transmission hold validity. Furthermore, they must guard against the harmful impacts of internal disagreements.

Protecting te reo is important not just because of the Treaty; it is in the national interest for at least three other reasons:

- ▶ better knowledge of te reo may possibly lead to better Māori educational outcomes;

- ▶ any form of second-language learning or bilingualism is known to assist children's cognitive development; and
- ▶ te reo Māori can also play a key role in fostering a shared sense of national identity.

### 5.5.6 Assessing the Crown's Māori language effort

Having set out the place of te reo under the Treaty and the Treaty partners' consequent obligations, we now turn to the Crown's actual performance in protecting the language. How adequate is the current *MLS*, for example, and to what extent does it express the aspirations and vision of Māori for their language?

We assess the Crown's performance against the principles we have identified as the essential cornerstones of a modern, Treaty-compliant Māori language regime – partnership, a Māori-speaking government, wise policy, and appropriate resources. We also comment on how Māori themselves are fulfilling their own obligations to te reo.

#### (1) Partnership

Significant progress has been made since 1956 when – with the Government's assimilative policies perhaps at their zenith – the Minister of Māori Affairs, Ernest Corbett, said that the preservation of te reo 'was up to each member of the race' and if the children of Māori leaders could not speak te reo it was not the Government's fault. Secretary of Māori Affairs Jack Hunn said much the same in his highly influential 1960 report into Government law and policy concerning Māori.<sup>179</sup>

Thanks largely to the Māori protest efforts described earlier in this chapter (see sections 5.3.3 and 5.3.4), the State's vital and significant role in language maintenance and revival is well accepted. So too is the importance of Māori ownership of the challenge. As the Privy Council has noted, Māori must be to the fore in decision-making about language revival because it is ultimately Māori action and choices that will decide te reo's fate – providing, of course, that the Crown has put in place all necessary support. In other words, Māori must play a leading role in setting and owning the agenda, and share in the decision-making about Māori language goals and policies.

Our assessment of the extent to which this has

happened, and is happening today, has unfortunately been hampered by gaps in the information placed before us. What remains clear, however, is that, while some Māori are invariably consulted or appointed to reference groups, officials control the overall direction of the agenda.

In this, officials may have lost sight of the fact that, for some iwi, the battle has moved beyond a basic fight to save te reo and into a struggle to retain their specific tribal reo. We sense that the Crown does consider that tribal reo is primarily the responsibility of Māori themselves to preserve. Arguably, this view is a direct descendant of the ideas of Corbett and Hunn. Just as it was difficult for ministers and officials to understand that there might be a vital role (and indeed an obligation) for the State to help Māori preserve te reo Māori 50 years ago, so it may now be a challenge for the Crown to comprehend that it has a crucial role in supporting iwi to safeguard tribal dialects.

Consultation on the MLS may serve as a representative case study on the Crown's approach to partnership. In March 2003, Te Puni Kōkiri produced a discussion document about the proposed new MLS, and 14 regional consultation hui took place over a fortnight that month. The same Te Puni Kōkiri staff cannot have attended all the hui, because sometimes two were held on the same day, in locations as distant as Auckland and Invercargill. We did not seek, and nor were we provided with, information about the level of engagement with Māori at these hui or generally in response to the discussion document.

One of the 14 hui was held at Tuatini Marae at Tokomaru Bay on the East Coast on 25 March 2003. We know a little about the kōrero at this hui because it was the subject of an exchange between counsel for Ngāti Porou and the witness for Te Puni Kōkiri. Counsel reminded him that Ngāti Porou's message had been clear: its overwhelming priority was te reo ake o Ngāti Porou. The witness agreed with this recollection, and emphasised that a strength of the Crown's community language planning was that it allowed the Crown 'to hear from [an] iwi what their priorities are and then to try and provide support around those priorities.'<sup>180</sup>

However, the MLS as published did not particularly reflect the extent of Ngāti Porou's concerns about the retention of their tribal reo, stating only that iwi dialects

would be 'supported' by 2028 (see discussion on this and other goals below). Counsel submitted, accurately in our view, that:

It is not specified in the Māori Language Strategy how the Crown proposes to achieve this goal [around local-level language revitalisation and iwi dialects] to ensure the ongoing retention of tribal dialects in the period leading up to 2028, by which time the large majority of the native speakers of those dialects are likely to have passed away.<sup>181</sup>

Another goal of the MLS involves the use of te reo Māori in targeted domains such as 'whānau', 'Māori communities', 'marae and hui at other venues', 'kapa haka' and 'karakia'.<sup>182</sup> We have no evidence of the extent of Māori involvement in the wording of this goal. Even were this particular goal inherently sound, Māori should have had the key role in devising its wording themselves, rather than have officials define it for them.

The Minister of Māori Affairs's foreword to the MLS says that the document 'draws strongly on Māori thinking about, and aspirations for, the Māori language' and has been prepared 'with input from Māori language experts and through community consultation.'<sup>183</sup> But, as we have remarked in chapters 3 and 4, goals that 'draw strongly' on 'input' from Māori communities are not necessarily defined or endorsed by them.

Again, the problem is an absence of Māori ownership, which is crucial to success since Māori themselves are the key actors in the revival process. As we have shown, it is principally through Māori initiative and effort that the reo revival effort has moved forward at all over the last 30 years. That effort was not honoured in the process by which the MLS was formulated – a quick round of consultation hui, then the development of goals whose wording appears to reflect Crown rather than Māori preferences. The lessons of the Harvard Project on American Indian Economic Development, the early success of kōhanga reo, and the more recent success of Māori Television all emphasise the need for the Crown to ensure Māori ownership of key decisions about te reo.

Moreover, the consultation hui on the MLS were destined from the outset to be of limited influence. We say

this for two reasons. First, the Cabinet Policy Committee agreed on 26 February 2003 that Te Puni Kōkiri should undertake consultation with Māori by 17 April 2003 ‘to confirm key components of the revised Maori Language Strategy’ (emphasis added).<sup>184</sup> Clearly, the intention was not to be guided by Māori ideas but to quickly run Crown ideas past Māori during a six-week window. Secondly, when the Minister of Māori Affairs reported back to the committee with the results of this consultation, on 23 July 2003, it was with the aim of being able to release the revised MLS during Māori Language Week – due to begin in just five days.<sup>185</sup> We suspect that the opportunity for publicity this event would generate may have driven the timeframe officials were working to, including the timeframe for consultation.

The point about the MLS is that only the most committed reo advocates would have any idea of what it is and what it says. It was a standard piece of pre-consulted Crown policy for the good of Māori, admittedly promulgated by officials committed to the survival and growth of te reo, but sitting in sharp contrast to the grassroots momentum of the kōhanga reo movement in the early 1980s. At that time, all Māori committed to te reo understood the kōhanga reo strategy and all supported it. What is needed again is a groundswell idea with the Government providing policy support, not a policy trying to substitute for the lack of a groundswell. It is time to go back to the people and rebuild the power of the te reo partnership that existed in the 1980s and early 1990s.

Finally, we note that at the Hui Taumata Reo in Wellington in December 1995 (which marked the end of Māori Language Year), participants called for ‘a wholehearted commitment’ by the Government ‘by words and deeds to work in partnership with Māori for the protection and promotion of Māori language’, and ‘an end to inaction and unilateral decision-making’.<sup>186</sup> Fifteen years later, that criticism will resonate with many Māori arguing for a greater role in setting the policy agenda for their language.

## (2) A Māori-speaking government

Like Māori, the Crown too must own the challenge facing te reo – and, as with Māori, the best way of meeting that challenge is to use the language. The te reo Māori

Tribunal thought in 1986 that the cost of publishing all public documents in Māori could not be justified, given that there were then more pressing matters to spend money on (such as basic revival). However, it said te reo should definitely be able to be used in the courts, adding that ‘There must also be the right to use it with any department or any local body if official recognition is to be *real* recognition, and not mere tokenism’ (emphasis in original).<sup>187</sup> The Tribunal also recommended that fluency in te reo become a requirement for holding certain positions in the public service.

### (a) TE REO IN THE COURTS

The passage of the Maori Language Act in 1987 allowed participants in court proceedings to speak in Māori, regardless of whether they could also communicate in English. But there are genuine constraints on the exercise of this right: for example, the High Court requires at least 10 working days’ advance notice of any intention to speak Māori.<sup>188</sup> Under the Maori Language Act, court participants do not have the right to be addressed in Māori and there is no requirement for the proceedings to be recorded in Māori.<sup>189</sup> Even in the Māori Land Court, applicants must inform the registrar of their intention to speak Māori in court so that an interpreter can be arranged.<sup>190</sup> Thus, it is no easier to use Māori in court than any other language besides English. In fact, foreign nationals are catered for by means of interpreters so they can actually communicate and understand proceedings, whereas the ability of Māori court participants to communicate in English is effectively excused by the provisions of the Maori Language Act. It seems to us that this falls short of the intent behind the Tribunal’s recommendation in 1986.

### (b) TE REO IN GOVERNMENT AGENCIES

The Crown has clearly not yet adequately responded to the Tribunal’s recommendation about the use of te reo by Government departments and public bodies. We heard about the Government’s te reo proficiency standards for public servants (which, when met, can lead to small increases in annual remuneration at participating departments), as well as the establishment of the ‘Language Line’

service to provide translation on demand for clients of various Government agencies.<sup>191</sup> But Language Line has apparently been little used by Māori, and Te Puni Kōkiri conceded that it involved ‘a bit of mucking around with the telephone.’<sup>192</sup>

Most tellingly, in 2001 only 18 out of around 100 Crown agencies claimed to have completed Māori language plans. Of these, only four were provided to Te Puni Kōkiri and only two were of a sufficient standard.<sup>193</sup> Although we were told that Te Puni Kōkiri intended to publish an update,<sup>194</sup> its 2006 inventory of Māori language services (released in April 2008) was silent on the matter. Te Puni Kōkiri has since confirmed it is unable to provide any update of the 2001 situation.<sup>195</sup>

Te Puni Kōkiri and Te Taura Whiri monitor the uptake of Māori language initiatives by State sector agencies, and advise them about these initiatives when requested. There is no formal legislative requirement for entities to report on their progress in this area – although in 2003, Cabinet did ask Te Puni Kōkiri to prepare terms of reference for a review of the Maori Language Act with a possible view to reassessing this lack of compulsion.<sup>196</sup> In 2004, the Minister of Māori Affairs informed the Chair of the Cabinet Policy Committee that ‘I do not consider that it is appropriate to establish a review of the Māori Language Act at this time.’<sup>197</sup> Te Puni Kōkiri conceded there was no consistent guideline or coordinated framework across the State sector for agencies to use in assessing their commitments to the use of te reo.<sup>198</sup>

As we will see, the draft of the MLS sent out for consultation in early 2003 set a goal to double Māori language use in ‘national and local government (including hospitals)’ by 2028. However, this wording was absent from the version of the MLS endorsed by Cabinet in July of that year and the final document does not set a definite target for increased reo use in Government agencies.<sup>199</sup> Indeed, officials have questioned the appropriateness of ploughing resources into the public service’s reo capacity when Māori whānau and communities are crying out for resources. We have some sympathy with this view but ultimately, if the te reo movement is successful, the Crown will have to deliver on the goal anyway – it is really just a question of when. The more Māori speakers there

are in the country, the more the Crown will have to speak Māori too.

Piripi Walker remarked that the Crown does commit money to services in te reo, but it is often in the form of translating strategic and accountability documents into Māori. He called this a form of ‘over-excitement’ by the Crown. Mr Walker praised the Welsh model, under which all Welsh public agencies are required to allow the public to use Welsh for any written or spoken transaction, and their staff to use Welsh at work. He said that similar provision exists for French in Canada, and for the Basque and Catalan languages in Spain.<sup>200</sup>

Te Taura Whiri and Te Puni Kōkiri have joint responsibility under the MLS for the provision of public services in Māori. In November 2007, the Office of the Auditor General (OAG) noted in its report on *Implementing the Māori Language Strategy* (which we return to below at section 5.5.6(3)(c)) that both agencies had deprioritised this activity:

In some cases, agencies have chosen to prioritise activity in some of their areas of responsibility above activity in other areas. For example, Te Taura Whiri has done few of the planned activities related to providing public services in te reo Māori. Staff at Te Taura Whiri and Te Puni Kōkiri (which are jointly responsible for this area) consider this a lower priority than their other responsibilities, because it makes a lesser contribution to language revitalisation than other activities.<sup>201</sup>

#### (c) TE REO AND STATE BROADCASTERS

Te Puni Kōkiri told us that the Crown’s role in broadcasting was to set only the broad direction, which it did through Radio New Zealand’s and TVNZ’s charters that require them to support the Māori language. The charters are reviewed every five years. Beyond that, we were told it was up to the respective State broadcasters to implement the charter as they saw fit (given what we have described in section 5.3.7 as the convention of arm’s-length Government involvement). Te Puni Kōkiri said that the most helpful thing TVNZ could do was to create a positive environment for te reo, while leaving the broadcasting of Māori language content to Māori Television.<sup>202</sup> Of course,



The limited options for Māori-medium education at school were a great frustration to kōhanga parents in the 1980s and at the start of the 1990s.

the TVNZ charter is soon to be scrapped, but we assume this philosophy would remain nonetheless.

To us, however, it seems that the Crown could be much more specific about its expectation that State broadcasters should promote Māori language and culture. If there is an inherent contradiction between TVNZ doing this and securing sufficient advertising revenue, then perhaps shareholding ministers could accept a lower financial return (the Privy Council suggested it was fully within their discretion to do so).<sup>203</sup> Not only has TVNZ had to make a profit, but it has also had to exhibit ‘social responsibility by having regard to the interests of the community’, although we note that this provision in its legislation is amongst those being repealed.<sup>204</sup> The advent of Māori Television was certainly no justification for TVNZ marginalising Māori-language programmes, such as occurred with *Te Karere* in 2007. Besides, in its 2007 ‘Māori Content Strategy’ (which we discuss in section 6.3.1), TVNZ has adopted the lofty goal of delivering ‘Content that ensures the health of the Māori language and tikanga’. It even adds that this strategy will allow it to ‘Revitalise the Māori language’, no less.<sup>205</sup>

#### (d) MOVING AWAY FROM MONOLINGUALISM

There seems to us to be clear scope for the Crown to commit more effort to achieving greater bilingualism in the public service. One way is by building into the Maori Language Act an obligation on Crown agencies to use and plan for te reo. Another is incorporating into the MLS some real targets for departments to aim for.

We acknowledge that a balance must be struck between investing in public services in te reo Māori and other vital activities, such as training Māori-medium teachers, and we know the Crown cannot do everything. But we do believe the Crown can and should do more about the use of te reo by its own agencies. As it stands there are very few Crown agencies that routinely engage with the public in Māori. The Waitangi Tribunal and the Māori Land Court are two examples. But the Tribunal has only relatively recently acquired the facility of simultaneous translations in its formal hearings and judicial conferences, and no such infrastructure yet exists in the Māori Land Court. If such deterrents to the use of Māori are found in the Māori Land Court, the impediments to its free use elsewhere can only be imagined.

The point of all this is that there is no reason why the Crown must be monolingual in English. In referring to the relationship between ‘the Crown and Māori’, it is important not to overlook the fact that the Crown represents Māori too – it is not a Pākehā institution, even if that has been its character for much of the past. As we said earlier (see section 5.5.1), the Government must shift its mindset so it comes to see Māori not as external to itself but as part of its very own make-up.

To ensure the survival of the language, the Government’s goal must be for a significant proportion of Māori people to be able to speak Māori in future. That goal must be supported by a plan for how these people will be able to engage with the State in te reo, which they will surely want to do. Any progress in the speaking of Māori by

5.5.6(3)(a)

Māori, therefore, must be matched by the State – otherwise, the familiar pattern of supply falling well short of demand will be repeated.

### (3) *Wise policy*

In this section, we look at several issues – past Government failures of planning and vision; the adequacy of the current MLS goals; the cohesion and functionality of the Government Māori language sector; and the adequacy of support for tribal reo.

#### (a) PAST FAILURES IN GOVERNMENT POLICY

Looking back, the bureaucracy's efforts to put in place measures to deal with and encourage the Māori language renaissance were decidedly leaden-footed. The explosion in the numbers attending kōhanga reo in the early 1980s should have instantly signalled that greater opportunities were needed in primary schools for te reo to be learned or for Māori-medium learning (or both). However, the reaction was pedestrian, perhaps because officials saw kōhanga reo as a passing fad or perhaps because they simply could not make the mental leap that follow-through at school would be needed. Various schools began to offer some form of Māori-medium education but, as we have seen, this did not meet the ever-rising demand. Moreover, the first Māori immersion primary school – at Hoani Waititi Marae in west Auckland – was a Māori initiative, in 1985. By 1990, the number of kura kaupapa stood at only six.

In 1987, bilingual education expert Bernard Spolsky was commissioned by the Department of Education to report on Māori–English bilingual education. Given the '493 kohanga reo programmes' then in operation, he estimated that at least 3,000 children a year would enter the school system expecting 'a significant use of Maori in their curriculum'. From these 'rough projections' he concluded that 'we are facing a need for at least 1000 qualified Maori bilingual teachers over the next decade'. He suggested that it was a 'matter of high priority for the department to prepare and maintain more precise projections to make possible the necessary long-term planning. One critical need is a survey of the present situation of qualified or nearly qualified Maori bilingual teachers.'<sup>206</sup>

Spolsky's projections were conservative; within the

next few years, the number of kōhanga had in fact risen by several hundred over and above the 1987 total. The number of schools offering bilingual or immersion classes, or full immersion or bilingual programmes, rose markedly over the following decade as well. But the 1992 and 1995 surveys of demand for Māori language education showed clearly that supply remained well short of the mark.

It was the failure of Government supply that accounted for the eventual decline in student numbers and not the failure of the language movement. Indeed, buoyed by that movement, Māori demand swelled to meet the Māori-medium education supply and soon outstripped it. In short, there clearly existed an enormous and enthusiastic market with no apparent ceiling in the 1990s; the bureaucratic failure to capitalise on that represents a major opportunity squandered.

The Government's decision to open new kura kaupapa as quickly as it could – the number of such schools increased nearly 900 per cent from 1990 to 1998 – was problematic. Such a rapid increase was clearly unsustainable, since there was no adequate provision for teacher supply. The result was that the quality of education available to kura kaupapa students was often sub-par. We do not know whether Spolsky's recommendation for more teachers was ever taken up; if there was any follow-up, either the Government's demand projections fell well short or the required numbers of teachers were simply not produced. Moreover, the apparent emphasis on kura kaupapa may have met with the approval of the advocates of immersion, who opposed bilingual education on principle, but it increased the problems of teacher supply because it involved finding teachers who could teach the entire curriculum in Māori. At the same time, of course, the Government was vigorously defending Māori broadcasting litigation and there were long delays in establishing a Māori television service, which could have usefully backed up the gains being made in the classroom.

The first MLS, in 1997, undoubtedly came a number of years too late. This meant that long-term targets for the revival of te reo – let alone any development of such a vision in partnership with Māori – were completely absent from planning for a long time after the introduction of the Maori Language Act in 1987. Even once it was formulated, the 1997 strategy did not set out concrete

targets or interim milestones. After Spolsky's rough proposals, therefore, the first major attempt at plotting a specific course for the future seems to have been the substantial 1998 report for the Treasury by Canadian economists Francois Grin and Francois Vaillancourt, entitled *Language Revitalisation Policy: An Analytical Survey*.<sup>207</sup>

Grin and Vaillancourt described 'modest' enrolment in Māori-medium education, which they suggested was explained by two factors: supply and demand. On the supply side, they noted that teacher training – one of the 'important building blocks of a proper Maori-intensive education system' – was still inadequate. Among other things, they proposed that it first be established what proportion of Māori children should be taught by Māori-speaking teachers by 2005 (for example, 50, 80, or 100 per cent). The number of teachers required could then be calculated. A series of monetary incentives could be put in place to attract the right candidates (either fluent speakers who were not teachers or non-Māori-speaking teachers); an adequate supply of teaching materials could be produced; and the necessary intensive teacher- and language-training programmes established.<sup>208</sup>

In our view, the real significance of Grin and Vaillancourt's proposals is not the specific formula or timeframe they arrived at, nor even their realisation that the supply of Māori-speaking teachers was crucial, but the fact that they proposed a vision and a plan. We believe that the faltering revival of te reo that we have described results in large degree from the very failure of the bureaucracy to develop – with Māori – a vision and plan. Officials simply did not understand the strength of the language movement in its early years, nor move to put in place measures that would cater for it throughout the school system – including initiatives to produce the necessary teachers and resources.

The 2003 MLS was a retrospective attempt to establish a vision and a set of goals to assist in realising that vision. This was better than nothing, but it should have occurred earlier to prevent the 'supply bottleneck' and all its consequences (and, of course, it should have been developed by the Crown and Māori in partnership). Nor did the new MLS offer the 'wise policy' needed to overcome the gridlock. The shortcomings in its core goals are outlined in the next section.

#### (b) THE MLS GOALS

To support its overall vision, the MLS sets out five goals for 2028. They are aimed at increasing language proficiency, language use, educational opportunities in te reo Māori, community leadership for the Māori language, and public support and recognition for the language.

We have already identified a major structural stumbling block with the MLS – that it is not a *Māori* language strategy but a *Crown* Māori language strategy. Despite this fundamental failing, we nonetheless think it is worth looking closely at each of its goals.

##### (i) Goal 1

Goal 1 states that:

*The majority of Māori will be able to speak Māori to some extent by 2028. There will be increases in proficiency levels of people in speaking Māori, listening to Māori, reading Māori and writing in Māori.*<sup>209</sup>

When this goal was discussed during the hearing, Crown witnesses implied that it would be a tall order. Mr Chrisp said (in the context of the 2006 census results) that goal 1 was 'a stretch' but good to aim for. Ms Sewell said simply, 'I don't know whether we will meet that [target]'.<sup>210</sup>

But when it is unravelled, perhaps goal 1 is not so ambitious after all. Since those Crown witnesses put forward their views, it has become apparent to us that the 2028 target will not be measured in terms of the census result (although Te Puni Kōkiri's witness indicated in cross-examination that it would, and thus a massive increase in speaker numbers would be required<sup>211</sup>).

The census asks a simple question: 'In which language(s) can you hold a conversation about a lot of everyday things?' In the last three censuses, about a quarter of all those in the Māori ethnic group have answered 'Māori'. But goal 1 of the MLS is clearly not intended to raise this proportion to 'the majority' by 2028. Goal 1's references to increased 'proficiency levels' and ability to speak Māori 'to some extent' show that the basis for measuring success will be not the census but Te Puni Kōkiri's quinquennial survey. As we have seen, that survey defines those with some level of proficiency at speaking, reading, listening to and writing te reo as anyone answering any of 'very well,'

5.5.6(3)(b)(ii)

‘well’, ‘fairly well’, and ‘not very well’. By this measure, the proportion of Māori adults who could speak Māori ‘to some extent’ was 42 per cent in Te Puni Kōkiri’s 2001 survey and 51 per cent in 2006.<sup>212</sup>

At the time the 2028 goal was set, therefore, the target required was not much of an advance on what had already been achieved. In fact it was then reached by the time of the next survey. It clearly lacked ambition. One wonders whether Māori themselves would have set such a target – we think not. We accept that the decline in the proportion of younger speakers revealed by the census means that the 2028 target may not even be achieved using the Te Puni Kōkiri measure, but we doubt this consideration entered the equation in 2003.

It therefore seems appropriate for some more specific proficiency targets to be worked into goal 1. As it stands, it could be met even if the majority were able to speak Māori ‘not very well’ in 2028. The MLS also needs to include interim milestones to achieve goal 1, so that agencies are clear about the ongoing need for action and results. And, of course, it is critically important that Te Puni Kōkiri uses a survey methodology that yields accurate results, particularly given the significant expense involved.

To our mind, goal 1 only becomes ambitious if in fact it does refer to the census results – when it actually becomes hopelessly unrealistic. In that regard there is a need to move beyond celebrating the ‘stabilisation’ in the overall number of Māori te reo speakers across the 1996–2006 censuses. Instead, there is an urgent need to focus on dramatically lifting the numbers of younger speakers of te reo.

#### (ii) Goal 2

Goal 2 states that:

*By 2028 Māori language use will be increased at marae, within Māori households, and other targeted domains. In these domains the Māori language will be in common use.*

Achieving this goal depends heavily on the efforts of Māori themselves. Thus, as noted above, the ‘key domains’ listed include ‘whānau’, ‘Māori communities’, ‘marae and hui at other venues’, ‘kapa haka’, and ‘karakia’.

But it is also noted that te reo was spoken the least in 2001 ‘in the workplace, at sports and while socialising’. Thus, additional ‘key domains’ include ‘sports and recreation’ and ‘Government agencies.’<sup>213</sup>

We consider that it is important for the strategy to include a goal about Māori language use in Māori domains. It is also important for Māori to ‘own’ the te reo challenge, and so Māori should arguably have had responsibility for wording this particular goal themselves<sup>214</sup> (and indeed the whole strategy, as we have already noted). Specifically, we consider that the term ‘common use’ in goal 2 may need further elaboration. It would be worth having some statistical targets to aim for in terms of using Māori in the home, at marae, and in other specifically Māori settings. The Te Puni Kōkiri survey on the health of the Māori language should be able to track progress towards such targets, if it presents a reliable picture.

#### (iii) Goal 3

Goal 3 states that:

*By 2028 all Māori and other New Zealanders will have enhanced access to high-quality Māori language education.*<sup>215</sup>

Here again, the lack of definition of ‘enhanced access’ means it is not clear what this goal really entails. It needs further definition, including specific targets for participation by both Māori and non-Māori in Māori-medium pre-school and schooling, and in tertiary and community Māori language learning. There should also be some targets for retaining students in the Māori-medium learning environment in the transition from pre-school to primary, and from primary to secondary. This would help counter the significant drop-off that occurs at the second of these transitions. Specific targets for increasing the teaching of Māori to all children in mainstream schools are required too.

There is also need for some clear aims around the quality of the Māori-medium education available, perhaps as measured through ERO reports. Māori parents will not accept an inferior education for their tamariki just because it happens to be in the medium of te reo. The quality of education on offer has clearly been an issue in



East Coast schools in recent years, to judge by successive ERO reports, and it has doubtless been a factor behind the decline in Māori pre-schoolers attending kōhanga reo nationwide from the 1994 peak.

The te reo Māori Tribunal called for the Crown to 'ensure that all children who wish to learn Maori be able to do so from an early age and with financial support from the State.'<sup>216</sup> With this in mind, we asked Ms Sewell if every child who wished to had access to a Māori-medium education (which we note is slightly different to what the te reo Māori Tribunal was referring to). Although she was not certain about the primary level, she said she had had not received any letters from parents complaining that Māori-medium education was not available to their children. With respect to the secondary level, she was reasonably confident that, 'for the most part, those parents who want their secondary age children to be engaged in learning in te reo Māori [have it] available to them in New Zealand'. Bearing in mind the te reo Māori Tribunal's concern, we asked her whether 'supply now meets demand'. She said that there was always the prospect of more kura becoming registered, but that the significant growth of 'six or seven years ago' (she was speaking in early 2007) 'seems to have levelled out.'<sup>217</sup>

Of course, the growth has 'levelled out' because infrastructure never kept ahead of demand. In other words, the failure to meet demand wounded momentum. But this is no justification to rest easy today: instead, it creates a heightened responsibility to foster new demand – if for no other reason than the MLS goals depend on it. We must see new Māori-medium schools opened or Māori-medium classes established within existing schools (or both). Goals must be set for the supply of te reo teachers (both teachers of te reo and teachers in te reo). The Crown must anticipate demand for teachers and classroom places generated by two factors – first, the rising number of Māori of school age and, secondly, the increase in Māori-medium students necessary to meet MLS targets and which should in theory flow from the overall effect of the strategy.

(iv) *Goal 4*

Goal 4 states that:

*By 2028, iwi, hapū and local communities will be the leading parties in ensuring local-level language revitalisation. Iwi dialects of the Māori language will be supported.*<sup>218</sup>

It is appropriate that kin groups and local Māori communities lead local-level language revitalisation. But goal 4 should clarify that that this will occur 'with the support of the Crown'. Otherwise, the goal of tribal reo being 'supported' by 2028 seems wholly vague and inadequate, and a cause for concern for iwi fearing the loss of their dialects without urgent intervention and support.

One possible solution is for iwi authorities to have a role in administering or controlling local immersion schools and kōhanga, as envisaged two decades ago at the time of the Runanga Iwi Act 1990. Today, many of those organisations have much greater capacity than in the late 1980s. We return to this matter in conclusion.

(v) *Goal 5*

Goal 5 states that:

*By 2028 the Māori language will be valued by all New Zealanders and there will be a common awareness of the need to protect the language.*<sup>219</sup>

Presumably, this goal will be measured in terms of the results of the Te Puni Kōkiri survey of attitudes to the Māori language, which is conducted every three years. Again, however, the goal's ambiguous wording creates uncertainty about the size of the task. When this goal was set already 90 per cent of non-Māori apparently believed it to be a good thing for Māori to speak Māori at home and on the marae. Thus, while only 40 per cent supported the use of Māori in public places,<sup>220</sup> there was arguably already evidence of 'common awareness' of the need to protect te reo. The latest attitudes survey, in 2009, more than confirms this, giving corresponding results of 97 and 77 per cent respectively.<sup>221</sup> Indeed, as we have said, we perceive that a national consensus has existed for some years that te reo is worth saving. Therefore, this goal too needs much greater definition and the addition of some clear targets based around certain aspects of the attitudes survey.

*(vi) The MLS goals: conclusion*

Overall, our view is that the MLS is intentionally high level and abstract, and has been constructed within the parameters of a bureaucratic comfort zone. It is, as we have said, less a Māori language strategy than a Crown Māori language strategy.

We consider that a set of much more specific targets and interim milestones needs to be added to the strategy. We understand that Te Puni Kōkiri initially attempted to identify appropriate interim targets, but abandoned this work because it felt there was not enough information about the state of the Māori language, or the likely impact of Government activities, for realistic targets to be set. The department instead planned to undertake research to enable new targets to be set for the 2008–13 period.<sup>222</sup> Nonetheless, we believe that more detailed targets should have been included from the outset and that there seems little justification for the imprecision in the wording of the goals. Ms Sewell acknowledged to us that ‘I think the time is right for the Ministry [of Education] to use the wealth of data that it now has, both its own data and data from Statistics New Zealand, to look more specifically at what would be the indicators for us that we were on track.’<sup>223</sup> Hopefully, our analysis of the Ministry’s published statistics set out in the appended tables will assist in this regard.

It is particularly disappointing to note that Te Puni Kōkiri’s March 2003 discussion document on the proposed MLS did contain more specific and adventurous targets, which were dropped. For example, one outcome was that ‘Māori language use will be doubled in targeted domains by 2028’, with these domains defined as including ‘public signage (including public announcements), and national and local government (including hospitals)’. Another outcome was that ‘By 2028 the Māori language will be in common use in the majority of Māori homes.’<sup>224</sup> As can be seen, the wording of the eventual MLS goals was watered down from these earlier proposals.

Piripi Walker pointed out that the MLS sets no goals for the speaking of te reo in the wider community<sup>225</sup> – only that all New Zealanders will value te reo or have ‘enhanced access’ to Māori language learning opportunities.<sup>226</sup> It seems to us essential that the strategy also include goals around non-Māori use of te reo, if it is to

have a sufficiently broad vision. Although the number of non-Māori speakers is not surveyed by Te Puni Kōkiri, it is recorded in the census: the latest reveals a 15 per cent drop in the number of non-Māori speakers. As Te Puni Kōkiri suggested, this may of course relate to increased awareness of what conversational Māori entails through exposure to Māori Television.<sup>227</sup> However, it may also indicate that many non-Māori are abandoning the reo revival movement, in the way that those at the margins of interest and with less at stake are the first to leave movements that begin to falter. In this case, the decline in non-Māori speakers may be a warning sign of impending disaster, like those provided by canaries in the coal mine. A drop of such magnitude is, in any case, dramatic and should be a cause for concern or – at the very least – investigation.<sup>228</sup> Yet again, it is symptomatic of policy that is neither good, wise, nor efficient.

*(c) IMPLEMENTATION OF THE MLS*

In examining how well the agencies charged with implementing the MLS are working together, we were able to consult the OAG’s November 2007 report on the implementation of the MLS over its first four years. The OAG’s performance audit was intended ‘to see whether the lead agencies responsible for implementing the Strategy were carrying out their roles effectively’ and ‘to provide assurance to Parliament on whether the Government’s Māori language revitalisation efforts were well coordinated and targeted through lead agencies’ implementation of the Strategy.’<sup>229</sup>

It seems clear that the first five years of the MLS were something of a false start. These were crucial times in the revival of te reo Māori, but the OAG report paints a picture of lost opportunities due to poor communication and coordination, unrealistic expectations, and deprioritising within agencies. As we had already seen from documents provided by the Crown during our own inquiry, by 2007 many agencies had not yet drawn up their five-year implementation plans or had done so inadequately. Other plans had morphed into general agency statements of intent or other strategic documents. Te Puni Kōkiri itself had only produced a draft plan by the Cabinet’s June 2004 deadline. Moreover, the agencies’ overall focus had been on ongoing planning and coordination, rather than



The 2007 report by the Office of the Auditor General, *Implementing the Māori Language Strategy*. The report paints a picture of lost opportunities due to poor communication and coordination, unrealistic expectations, and deprioritising within agencies.

setting any sort of statistical targets to serve as interim milestones for the 2028 goals in the MLS.<sup>230</sup>

There are many reasons why agencies failed to adequately undertake the basic work needed to get the MLS moving, all of which are traversed in the OAG report. Te Puni Kōkiri's leadership of the sector was variable up until early 2005, with staffing changes causing some disengagement. Further, Te Puni Kōkiri has no power to compel its fellow lead agencies to act.<sup>231</sup>

Te Puni Kōkiri also failed to realise the challenges facing agencies in which the Māori language is of relatively marginal importance; for these agencies in particular, the June 2004 deadline for implementation plans agreed to by Cabinet was unrealistic. Some of these agencies explained that they had inadequate resources to do the work required; some said that other pressing work quickly assumed priority. As the OAG noted, however, the June 2004 deadline was directed by Cabinet and should have been met. If it could not be met, ministers should have been told, which they were not. The OAG also observed that the agencies operated in such significantly different environments that the task of gaining stakeholder cooperation was vastly uneven. The National Library can hardly compel the various libraries, archives, and other repositories to comply with the MLS over Māori language archives, for example. By contrast, Te Māngai Pāho has much more leverage over Māori language broadcasting with those it funds to produce or deliver te reo programming.<sup>232</sup>

As a result, Te Puni Kōkiri had had to become much more flexible about what sorts of engagement and

planning it would accept from the other lead agencies. The majority of the intended target-setting for the strategy's first five years had been long abandoned, and the OAG said the agency was looking to set new interim targets for the 2008 to 2013 period.<sup>233</sup> It is worth recalling the MLS's optimistic statement in 2003 that lead agencies would 'develop detailed implementation plans that will guide their development and delivery of [their respective te reo] functions for the next five years. These plans will identify specific targets within each function and the resources to ensure that the functions are delivered.'<sup>234</sup>

There is one other matter worth noting. The MLS requires Te Puni Kōkiri to evaluate the effectiveness of what the lead agencies have done to implement it. By late 2007, however, Te Puni Kōkiri had still not undertaken this evaluation according to the terms set out in its own draft implementation plan. The OAG noted that this was in part because agencies had simply not made enough progress for their activities to be evaluated. Te Puni Kōkiri claimed that it could still undertake the planned evaluation in 2008 on the basis of some targeted policy work, its surveys, and research into focus areas for Māori language revitalisation. However, the OAG felt that this did 'not constitute systematic evaluations of the effectiveness of Māori language activities carried out by the government agencies.' Additionally, changes in the way Te Puni Kōkiri had carried out its monitoring function since 2003 created uncertainty as to how exactly it intended to carry out its evaluation role. The OAG recommended that this be clarified.<sup>235</sup>

In sum, by late 2007 (at the time of the OAG report), Te Puni Kōkiri's crucial five-year targets for the MLS remained unchanged. These were:

- ▶ by 2008, all government Māori language policies and initiatives would have a clear rationale centred on the Strategy; and
- ▶ by 2008, all Māori language policy would be appropriately co-ordinated to ensure a whole-of-government approach to Māori language revitalisation.<sup>236</sup>

It was by this time nearly five years since the MLS was approved and 10 years since Cabinet agreed to the first set of Māori language policy objectives (and, for that matter,

fully 21 years since the Tribunal's report on the te reo Māori claim). But it was by no means certain that these basic goals would be achieved. The OAG observed that 'fully achieving TPK's [Te Puni Kōkiri's] two 2008 outcomes will need sustained commitment to the Strategy and timely action by all lead agencies, including TPK, in the next few months leading up to the deadline.'<sup>237</sup> We are unaware of whether these two targets have now been met.

On a structural level, therefore, it seems that the sector is handicapped by a lack of power on the part of the lead agency, and by a lack of motivation on the part of agencies whose overall focus is well removed from te reo (and who accordingly have failed to put the necessary resources into implementation planning). Having a strategy and vision is undoubtedly worthwhile, but having one in a sector that is unable to pull together with sufficient energy and urgency is a serious problem.

Even within Te Puni Kōkiri, there are distractions that work against concerted effort. Mr Chrisp explained that, in addition to Māori language and broadcasting, he also had oversight of the Ministry's work in Māori education, Māori health, Māori housing issues, and criminal justice.<sup>238</sup> Te Puni Kōkiri has a small team dedicated to Māori language work, and Te Taura Whiri has a similarly small staff component for the policy dimensions of its work. Increasing these agencies' human resources is one obvious step. But aside from spending more, the Crown must also spend money better, through better coordination and greater motivation within the Government Māori language sector. The OAG report makes this clear.

In 2009, the OAG issued a short follow-up report on the actions taken in response to its 2007 review. It noted that eight of its 11 recommendations were being taken up by Te Puni Kōkiri in its internal review of the MLS, and the other three were the subject of ongoing work. Overall, it found that 'all agencies are showing increased commitment to the Strategy.'<sup>239</sup> While that is a step in the right direction, it does not negate our concerns about the strategy itself, nor the policy that gave rise to it.

#### (d) CROWN SUPPORT FOR TRIBAL REO

We consider that the Crown could have done more to help Ngāti Porou achieve its goals for its dialect. It seems

to us that Ngāti Porou has relatively little influence over the expenditure of te reo resources within its own rohe. It is not simply a case that Ngāti Porou preferences need to be more adequately regarded in Government decision-making, but that the decision-making needs to be shared. We have already criticised goal 4 of the MLS on the basis that its ambition for 2028 – that 'Iwi dialects of the Māori language will be supported' – is weak. This wording demonstrates what little meaningful input iwi such as Ngāti Porou have had into the MLS on matters of great importance to them.

Since local-level action is crucial in the movement to revive te reo Māori, it follows that the Crown must support local preferences. Just as the Crown must make decisions in concert with Māori about its overall reo strategy, so too must it work in partnership with iwi about issues of importance to them, such as dialect. Counsel for Ngāti Porou was correct to suggest that the time for action on te reo ake o Ngāti Porou is now, for older speakers are steadily diminishing in number. It seems that the Crown has not tuned its ear sufficiently to these concerns.

Ngāti Porou witnesses argued that bureaucratisation in Māori language education had stifled local initiative and thus adversely affected their reo a iwi. For example, Dr Mahuika said that kōhanga reo had operated competently and within their own resources when they were simply the initiative of Māori and received some support from the Department of Māori Affairs. Giving evidence in 1999, he said that many local whānau, who ran kōhanga in terms of local tikanga, had ceased to do so because they lacked the formal qualifications required by the New Zealand Qualifications Authority to receive funding. The result of the Ministry of Education's assumption of control in 1989 was that kōhanga proliferated, because of the extra funding available, but that the quality of reo spoken by graduates thereby declined, thus impacting on te reo ake o Ngāti Porou.<sup>240</sup> As Dr Mahuika put it:

Iwi Maori initiatives have been successful utilising their own tikanga systems and values, but these are not sustainable because of funding constraints. Whenever success is seen, the government of the day will find a way of taking over, and once this occurs, failure once again emerges.<sup>241</sup>

In its early days, the strength of kōhanga reo was that it was a national movement. This meant economies of scale could be achieved with respect to staffing and resources, and it meant national strategies could be developed for teaching and certification. In recent times, there has been a build-up of resentment at local community level about lack of control of kōhanga. The traditionally fierce independence of Māori communities has made these sorts of tensions a common issue with Māori policy and programmes of any kind. Just where the balance should fall in this case is a matter well beyond the scope of the evidence we heard. We are very sure, however, that if the reo movement is to be revitalised, this must occur at the flax roots. Mita like the mita of Ngāti Porou will survive and flourish only if language regions have sufficient control to make this happen. Those responsible for policy settings in this area must find ways of delivering local control while keeping the advantages of national coordination. This is a difficult problem but hardly a new one. We revisit these issues in our conclusion.

With respect to Te Taura Whiri's work on standardising te reo, we certainly accept the need for such a body serving as the 'keeper' of the official lexicon. We also acknowledge that no language or dialect is static, and that in this globalised world, evolution and change occurs probably quicker than ever before. However, we are unclear as to whether Te Taura Whiri has been acting in accordance with Māori wishes or contrary to them. Piripi Walker, for example, told us that it was wrong for Te Taura Whiri to have made the unilateral decision that there would be no more transliterations, because many cherished words in Māori are transliterations. Indeed, many of them date from early contact and the English word transliterated has itself sometimes fallen out of common use.<sup>242</sup> On the other hand, Te Puni Kōkiri's witness told us that Te Taura Whiri's decision to prevent any further transliterations entering te reo Māori was in fact derived from Māori preferences.<sup>243</sup>

We can conclude only that some Māori are concerned about Te Taura Whiri's direction and that the commission needs to make it plain that it is acting in accordance with Māori rather than bureaucratic preferences.

Other than that, the most we can say about the new,

standardised reo promoted by Te Taura Whiri is that we are aware of the lively debate amongst Māori linguists and speakers about its impact on te reo generally and on the health of dialects and older native speakers in particular. It is a discussion in which we have no specific expertise and in which we sympathise with the positions of both sides. If anything, we merely make the point that there must be room for debate on the right way forward, and a willingness on both sides to see matters from the other perspective.

We note, in any event, the following comment of the Te Taura Whiri commissioners in the agency's *Statement of Intent, 2008–09*: 'Te Taura Whiri i te Reo Māori is aware of the need to capture, preserve and further develop iwi dialects that remain. This is pivotal to the ongoing development of the language of the paepae.'<sup>244</sup>

During Māori Language Week 2009, Erima Henare, the Māori Language Commissioner, also stated that Te Taura Whiri considered that the MLS 'would be better aligned to supporting language initiatives which revitalise hapu and iwi dialects and other successful community based projects.'<sup>245</sup>

#### (4) *Appropriate resources*

Looking through the record of the last 20 years, it is difficult to find many affirmations that the Māori language revival effort is well funded – unless of course they come from the Government itself. Professor Stephen May and others, for example, referred in 2004 to the 'long-standing and ongoing under-resourcing of Māori-medium education.'<sup>246</sup> Māori Language Commissioner Dr Patu Hohepa went so far as to make the following comments about Te Taura Whiri's funding in the commission's 2002 annual report:

As Te Taura Whiri i te Reo Māori, our existence, our activities concerning the Māori language and our optimism are fraught with frustrations. The enduring one is inadequate funding. One wonders if there are other Commissions still surviving whose base funding level has remained almost static for 14 years. Either the endurance of former Māori language commissioners needs commending, or the remarkable immovable consistency of different governments needs

noting, given that my esteemed predecessors have often raised this same concern.<sup>247</sup>

Even Crown witnesses also made frequent reference to the limited resources available to them. Mr Chrisp of Te Puni Kōkiri, for example, explained that ‘One of the dilemmas that we face is there is a finite pool of resources.’ He later commented that ‘we are able to undertake work to support the Māori language to the extent that funding is available to [do] that so there is a clear relationship between what we can do and the funding that is available.’ He also noted that Māori Television ‘broadcast to the limit of the budget that is available to them.’<sup>248</sup> Ms Sewell said that the amount of support the Ministry of Education could provide for Māori language initiatives was impacted upon by factors including ‘the allocation of finite resources.’<sup>249</sup> She explained that the Ministry supported iwi dialects ‘but it’s always within the context of it being a government department with expectations, demands and resources that are limited.’<sup>250</sup> Likewise, Alexander Turnbull Library chief librarian Margaret Calder explained, with respect to Māori language materials held by the National Library, ‘The decisions about where resources go of course is made at a library-wide level, given that there never are enough resources.’<sup>251</sup>

In response to Tribunal questions about Te Puni Kōkiri’s lack of operational capacity, Mr Chrisp said that it had been successful in influencing other agencies, including, for example, the Ministry of Education.<sup>252</sup> However, he admitted that ‘if we had more operational capacity available we would do more work.’<sup>253</sup> There is no ring-fencing of money for Te Puni Kōkiri’s te reo policy work, with the amount dedicated being essentially comprised of staff salaries (which Mr Chrisp estimated at around \$150,000 to \$200,000 annually). He also guessed that the amount spent on te reo policy at Te Taura Whiri would be about \$100,000.<sup>254</sup> We were told that no further bids for extra resources were made in 2006, and we were not advised after the close of our hearings of any bids (successful or otherwise) in 2007.<sup>255</sup>

We have noted (in section 5.3.11) the approximate Government spending on activities that support te reo in the first part of this chapter. While it is not possible for us to state exactly what level of funding would be sufficient to

ensure te reo’s protection, the Crown’s own witnesses did not seem to be convinced that the funds they had to work with were enough – even for what strikes us as an inadequate agenda. As we have suggested, the Crown must first establish the components of a ‘wise and efficient’ policy and then determine the necessary resources accordingly. We suspect neither of these tasks has yet been fulfilled.

### 5.5.7 The Māori obligation

#### (1) *Kōrero Māori*

As we have stressed, Māori too have obligations to ensure the survival of te reo. The MLS defines the principal responsibilities of Māori as (among other things) whānau language transmission, Māori language use in Māori domains, leadership of local language revitalisation, the maintenance of tribal dialects, and maintaining and supporting paepae functions. The MLS states that these were roles that Māori identified for themselves during the 2003 consultation hui.<sup>256</sup> Certainly, the importance of home and neighbourhood language use in language revival has been emphasised by many scholars, and the principles that the kōhanga reo movement were founded upon show that Māori have taken this aspect seriously.

But there is some evidence that Māori are not speaking te reo in Māori domains to the extent they could. For example, Te Puni Kōkiri’s 2001 survey found that only 56 per cent of Māori adults who could speak Māori ‘well’ or ‘very well’ used Māori for half or more of the time when speaking with pre-school children (and only 41 per cent did the same with primary school children). It seems that a key barrier to using te reo for many Māori is the fear of criticism or failure, and respondents in the 2001 survey typically reported that few ‘safe domains’ existed. Kōhanga reo was seen as a relatively ‘safe’ environment, because respondents ‘knew that the infants would not judge their ability to speak Māori.’ Otherwise respondents tended to say that they would only speak Māori with those of a similar level of ability.<sup>257</sup>

Some of this whakamā may be being overcome. The 2006 survey of the health of the Māori language (to the extent we can rely on it) showed that there had been good increases in the proportions of Māori speaking Māori at hui, on the marae, at work, and within the home – particularly to pre-schoolers.<sup>258</sup> However, Te Puni Kōkiri added



Positive news headlines and media releases about the health of te reo have reinforced a sense of complacency.

that, 'Despite positive shifts in the amount of Māori being spoken, there are still a number of people who have a degree of speaking proficiency but do not use it.'<sup>259</sup> The onus on Māori, therefore, is to speak te reo as much as possible, and particularly within the home. It is also necessary to take te reo outside the home in order to make it as much of a living language as possible.

Māori must also guard against complacency. We suspect that many may reflect upon the incredible change that has taken place since the 1980s – the advent of Māori

Television and the iwi radio network, the number of kura kaupapa and the funding available to wānanga, the bilingual census forms, the National Radio presenters who introduce themselves in Māori, and so on – and think that the battle is won. But despite such developments, especially the advances in Māori broadcasting, the distractions and penetration of the global mass media and the culture it represents are much greater today than in the 1980s and 1990s. Ongoing vigilance is therefore imperative.

**(2) Partnership and compromise**

If language retention depends on language transmission, Māori should also cooperate with and take advantage of whatever opportunities for language transmission are put in place by the State – even if they resent what they perceive as the State's excessive 'capture' of the process. State 'capture' is simply the corollary of State funding.

Māori language revivalists must also be open-minded about what kind of Māori language education is appropriate. However, we have seen some adopting a relatively purist position, and contending that immersion is the only remedy. Writing in 1988, for example, former Māori Language Commissioner Timoti Kāretu and his colleague Jeffrey Waite argued that the establishment of 'exclusively Māori-medium schools' was 'the only way' for the language to be retained. 'For there to be success', they wrote, 'the teachers will have to be appropriately trained, and must banish English in all teaching situations, from kōhanga reo to university and beyond.'<sup>260</sup> The influence of this pro-immersion lobby can be seen in the particular status given kura kaupapa Māori within the Education Act 1989 (which was not accorded to bilingual schools) and the statutory recognition, a decade later, of the kura kaupapa guiding philosophy, Te Aho Matua.

Others, however, are not so sure that this is the right approach. The 1992 and 1995 surveys commissioned by the Ministry of Education found that the majority of Māori parents wanted their children taught in both English and Māori. Citing the 1995 figures, Nena and Richard Benton argued in 1999 that 'A successful revitalization policy would need to take cognizance of this solid support for a "middle way".'<sup>261</sup> Stephen May and his colleagues commented in 2004 that partial immersion schools can be as effective as those offering full immersion in teaching children te reo, as long as at least 50 per cent of the instruction is in Māori.<sup>262</sup>

We have no particular scholarly expertise to bring to the debate about immersion or bilingual learning, and would not presume to pronounce upon the validity of the respective arguments. We do not for a moment wish to advocate any lessening of the commitment (by the Crown as well as Māori) to immersion learning. But we do urge Māori language revivalists to see value in all three approaches: immersion, bilingual and 'as-a-subject' Māori

language learning. All make a contribution to maintaining the health of te reo. The considerable demand for the latter two forms of learning, combined with the state of te reo, means they should be explored more fully by the joint Crown–Māori partnership.

All this raises the issue of what kind of revival Māori seek. Do they want their children to be taught algebra in Māori, or do they simply want them to be able to use te reo in everyday conversation – at home, in shops, in sports clubs – and take full part on the marae? In our view, there is an obligation on Māori to debate the end goal and communicate that to the Crown so that revival policies can match Māori preferences.

Finally, those who simply complain that the Crown has robbed Māori of their reo need to bear in mind the nature of the Māori obligation too. As Robert McGowan says with respect to rongoā, it exists all around for those who wish to grasp it.<sup>263</sup>

**5.5.8 Conclusion: the Crown's performance**

When the Tribunal recommended in 1986 that:

- ▶ Māori be made an official language of New Zealand;
- ▶ a supervisory body be established by statute to foster the use of the language;
- ▶ all children who wish to learn Māori be able to do so from an early age; and
- ▶ the Treaty obligations to protect te reo Māori be met in broadcasting policy,

and the Maori Language Act was passed the following year, te reo advocates may have felt that a sufficient regime would be put in place to revive te reo and ensure its survival as a living language.

However, in 2010 there must be a deep-seated fear for the survival of te reo. The number of speakers is down in the key younger age groups, and older speakers with the highest fluency – whose language comprises the unique tribal variations of te reo – are naturally declining in number. For all the rhetoric about forward progress, even the Crown's key witness conceded that there was still a need for 'life support'.<sup>264</sup>

Not only must there be a great concern about the language's health, therefore, and in particular the health of tribal dialects, but there must also be a deep unease about the Crown's responses to the situation. In the late 1970s,



after decades of governmental neglect or worse, te reo had reached a time of crisis. But Māori action breathed new life into the language. In fact, so powerful was the Māori commitment to revitalisation that, in the 1980s and early 1990s, it practically knew no bounds. How else can one explain the growth, in just a decade, of the kōhanga reo movement from nothing to the scale of its operation in 1993? How else should one view the surveys at that time that showed enormous Māori demand for Māori-medium education? We suspect that, but for bureaucratic and political failure to capitalise adequately on this momentum, te reo Māori would not be in such a worrying state today.

The remarkable thing is that Māori do not know this story. The received wisdom is that the revival of te reo over the last 25 years is nothing short of a miracle. There is an element of truth in that. But the notion is that te reo is making steady forward progress, particularly amongst the young, is manifestly false. The Government bears significant responsibility for this misconception. In its report on *The Health of the Māori Language in 2006*, which it released in July 2008, Te Puni Kōkiri concluded that 'it is apparent that the health of the Māori language in relation to all three language variables analysed (status; knowledge and acquisition; and use) has improved markedly since 2001'. While this claim was accompanied by the usual rejoinder about the need to maintain vigilance and effort, the key message was that the Government's efforts had been a success. In fact, the very next sentence suggested that credit was due to Government initiatives to support language revitalisation since 2001.<sup>265</sup>

Even Te Taura Whiri – whose chair was scathing of Government efforts to revitalise te reo during the 2009 Māori language week<sup>266</sup> – has been susceptible to this kind of embellishment. In its brief to the incoming Minister in 2008 it wrote of reaching 'a turning point in this journey, and the corner is one of anticipation as the 150,000 Māori and 30,000 non-Māori who now use the Māori language in some way, continue moving forward'.<sup>267</sup> A change in government initially brought no break in the official line: in July 2009 the Minister of Māori Affairs announced that it was 'great to be able to say that te reo Maori is in a healthier state than it was five years earlier'.<sup>268</sup>

A year later, however, the mood had changed. In

announcing the Tamati Reedy-led review of the MLS, Minister Sharples said on 29 July 2010 that a 'more co-ordinated approach' was needed that ensured 'the programmes and expenditure across the whole of government are responsive to Iwi/Maori aspirations'.<sup>269</sup> Expanding on his motivation for the review in a speech the same day, he remarked that 'We have a Māori Language Strategy that is not up-to-date and has largely not been implemented. This has to change'.<sup>270</sup> We are glad that the Minister has identified what had become quite apparent to us, and we trust this report will be of benefit to his review – as we have explained, our decision to release this chapter was prompted by a desire to avoid our report and the ministerial review proceeding in separate silos.

The issue of teacher supply and education has clearly played a big part in stalling the revival's momentum. We are aware of the pitfalls of focusing exclusively on education. We understand the experts' view that focusing overly on formal education risks neglecting the home and community environment, where the language spoken in everyday life is a living tongue in every sense. However, we still believe that Māori language education is crucial. The education system is where children's focus is captured and their interest stimulated. Where schooling is backed up by Māori language broadcasting and support for those who wish to speak te reo in the home, it is a sphere in which the Crown can make an enormous impact. The reality is, though, that the numbers participating in Māori language learning in the education system, apart from at tertiary level, have declined since the 1990s. In 2010, it is vital that this be rectified.

We have already outlined improvements we think should be made to the MLS goals, and noted the kind of vision and forward planning proposed by Grin and Vaillancourt in 1998. Once the end goal is identified and agreed upon by the Crown and Māori, officials will know how many teachers will be needed by when. This will in turn show how many are needed in training now, and how many potential trainees must emerge from the school system in the near future.

In our opinion, this is the kind of forward-looking thinking that is needed, and we are not convinced that it is widespread today. Instead, we find in *Ka Hikitia* a willingness to simply hold the status quo in the number of

students in 'Māori language education' and no specific plan to increase the number of children in Māori language pre-school. We have also seen apparent ministerial satisfaction with a Maori Language Act that is clearly failing to stimulate the Government's own efforts to speak te reo; endless teaching scholarship plans that may be linked to perceived demand issues but are not necessarily linked to long-term goals about language health and vitality; and a survey that may not be giving the most accurate information but has nevertheless provided opportunities for positive media statements.

Bearing in mind that the aim is for the majority of Māori to be speaking te reo (albeit 'to some extent') in 20 years' time, we doubt how effectively the Crown's current actions match its professed long-term goals.

Ms Sewell suggested that supply had essentially met demand in terms of the availability of Māori-medium education. But that is quite possibly incorrect, given the ongoing teacher shortages. In fact teacher supply still struggles to meet a demand that has clearly diminished in the face of perennial supply problems. Even if Ms Sewell is correct, this does not mean that supply is sufficient to achieve wider goals about saving and enhancing a taonga of immense importance.

As we have said, supply ultimately needs to get ahead of demand if the MLS goals are to be met. If we use our imaginations today we might even foresee a time when there will be a Māori flight from the mainstream system to Māori immersion and bilingual learning, given the early indications (tentative at this stage) of better educational outcomes for Māori children in that environment. Will the bureaucracy be prepared for that?

In sum, and with reference to the four principles that must underpin the Crown's Māori language regime, we make the following (provisional) findings:

- ▶ There has been a failure of partnership, with Māori lacking control over the key decisions being made about their own language. This is despite lessons from New Zealand and overseas showing that actual Māori decision-making will be crucial to the success of the effort to revive te reo, for Māori choices and actions (presupposing the existence of Crown support) will ultimately decide te reo's fate.

- ▶ The Government itself has failed to become more Māori speaking and thus reflect the aspirations of a growing number of the citizens it represents.
- ▶ There has been a profound failure (or, at best, a belated move) to develop policy that will assist in the revival of te reo and the safeguarding of dialect. The gains made since 1980 owe more to the sheer power of the Māori language movement than to Government action. That movement now has itself been weakened by the governmental failure to give it adequate support and oxygen.
- ▶ Given the policy failure, the priority accorded te reo in resourcing has also been inadequate.

By contrast, Māori have largely met their own obligations to te reo. Certainly, there is a need to guard against whakamā, complacency, internal disputes at kōhanga and kura, and narrow thinking about the best form of Māori language learning. Māori must also decide exactly what future they see for te reo so that revival policies can match these preferences and aspirations. But, as we have seen, at the time it really mattered, Māori were up for it. The momentum they generated was crucial, for Māori have a tendency to live up to the expectations they create of themselves – and in the 1980s and early 1990s, that expectation clearly was to be Māori-speaking.

## 5.6 REFORMS

Young speakers and learners of te reo Māori are steadily declining in number and proportion. There is an urgent need to reinvigorate the Māori language sector: more of the same is not an option if the language is to prosper. It is with this sense of urgency that we make our provisional recommendations for reforms. We make no apology for the fact that these recommendations are far-reaching. Simply, the gravity of the situation calls for proportionate action. The Reedy review may itself come to similar conclusions. While we are not experts in this field and have no desire to pre-empt that panel's deliberations, it is open to them to take account of our position as they formulate their own report.

In sum, we recommend that four fundamental changes occur:

- ▶ Te Taura Whiri should become the lead Māori language sector agency. This will address the problems caused by the lack of ownership and leadership identified by the OAG.
- ▶ Te Taura Whiri should function as a Crown–Māori partnership through the equal appointment of Crown and Māori appointees to its board. This reflects our concern that te reo revival will not work if responsibility for setting the direction is not shared with Māori.
- ▶ Te Taura Whiri will also need increased powers. This will ensure that public bodies are compelled to contribute to te reo's revival and that key agencies are held properly accountable for the strategies they adopt. For instance, targets for the training of te reo teachers must be met, education curricula involving te reo must be approved, and public bodies in districts with a sufficient number and/or proportion of te reo speakers and schools with a certain proportion of Māori students must submit Māori language plans for approval.
- ▶ These regional public bodies and schools must also consult iwi in the preparation of their plans. In this way, iwi will come to have a central role in the revitalisation of te reo in their own areas. This should encourage efforts to promote the language at the grassroots. We explain these changes as follows.

#### 5.6.1 Sectoral leadership by Te Taura Whiri

It is clear that in 1986 the Tribunal saw the Māori Language Commission as central to reviving te reo. It described the recommended commission as a body that would foster the language, watch over its progress and set standards for its use. But, aside from the nature of the commission's function, the Tribunal declined to be overly prescriptive:

We do not see a need to be too detailed in our recommendation on this particular point – the number of persons appointed to such a body, the precise extent of its powers, the kind of support staff it should have, are all matters on which opinions might differ widely. We simply say that the Maori language should be officially recognised so that it can

be used on any public occasion and in dealing with any public body, and that there should be a supervisory body to set proper standards for its use and to take appropriate action to foster its proper development.<sup>271</sup>

As it stands, Te Taura Whiri undertakes many of the functions envisaged for it by the Tribunal, but it is not the leader within what is now the Māori language sector. Instead, there are six 'lead agencies', with one of them – Te Puni Kōkiri – the overall sectoral leader. Te Taura Whiri has largely been relegated to the role of a stable of language technicians, while all the important decisions are made elsewhere. On some levels, this seems incongruous; it is Te Taura Whiri, and not Te Puni Kōkiri, that has both an exclusive focus on te reo and the real expertise on the matter. Neither are the two agencies' roles separated along the lines of policy and operations, for Te Taura Whiri also has a policy component to its work. But this derives from the statute under which it was originally created; by contrast, the MLS sets out no policy role for Te Taura Whiri.

In fact, the Maori Language Act itself intended that Te Taura Whiri be the lead agency and key adviser to the Government on matters pertaining to te reo Māori. Section 7 states that its functions include initiating or developing policies and practices to give effect to Māori being an official language of New Zealand; generally promoting te reo as a living language; and advising the Minister of Māori Affairs as requested on matters relating to the Māori language. Under section 8, its powers include undertaking research into te reo Māori, reporting on any matters of relevance to the Minister, and consulting with Government departments about their use of te reo in conducting their business. The Act makes no mention of Te Puni Kōkiri, nor of its predecessors. Clearly, though, since Te Puni Kōkiri was established in 1992, it has come to assume many of the roles set out for Te Taura Whiri under the 1987 Act.

We did not seek any explanation as to why the Māori language sector has evolved in this way.<sup>272</sup> However, we do consider it illogical that the body created under statute to advise the Government on te reo Māori issues has been relegated down the hierarchy. It now sits below an agency which has no such statutory role, other than the general



Welsh road markings near Cardiff Airport. Bilingualism in Government services is taken much more seriously in Wales.

monitoring function provided for by its own establishment Act. Te Taura Whiri, of course, is more independent in its structure than Te Puni Kōkiri, given that its executive is mainly answerable to a five-person board (albeit comprised of individuals appointed by the Minister of Māori Affairs) – although this may be unrelated to its relative marginalisation. In any event, we consider that centralising core responsibility for the Māori language within the agency that has exclusive focus would make more organisational sense and, if done properly, would have more punch.

We recommend, therefore, that a revamped Te Taura Whiri should serve as the leader within the Māori language sector as it was originally intended to be. None of the other agencies have the same concentration of focus on and expertise in te reo.

#### 5.6.2 Te Taura Whiri to function as a Crown–Māori partnership

Given our emphasis on the need for partnership in language revival, Te Taura Whiri would need to be run in a different way. Rather than being governed by a five-person Crown-appointed board, it should instead be governed by equal numbers of appointees of both Māori and the Crown. The Māori appointees could be chosen by an electoral college of Māori constituency members of Parliament and representatives of various Māori organisations with a clear interest in te reo (including iwi organisations, whose interest will be in tribal reo). The Crown appointees could be chosen by the Minister of Māori Affairs. We note that such an approach seems to work quite successfully with the Māori Television Service and its own Māori electoral college system.

A truly equal Crown–Māori collaboration should see positive results for te reo Māori. We concur with the Harvard Project on American Indian Economic Development that the exercise of de facto control by Government decision-makers over key indigenous development decisions invariably leads to failure. But the Crown must still provide the necessary financial support. What we are recommending is a body to govern the te reo sector that allows an authoritative and independent Māori voice at the Crown-funded table. Such a body would need to harness Māori passion for te reo as well as the structure, method and professionalism of the public sector.

### 5.6.3 Te Taura Whiri to have greater powers

The foregoing changes would make some difference, but on their own we doubt they would be enough to turn around the fortunes of te reo. We consider that Te Taura Whiri would need to be given powers to require other agencies to contribute to Māori language revival efforts. Without a Government-wide commitment to te reo, particularly in areas where large numbers of te reo speakers are concentrated, the language will inevitably continue its decline. We believe that cooperation and encouragement work better than coercion, but sharp teeth will come in handy in emergencies.

There are elements of compulsion in the language regimes of other countries. In Wales, for example, the Welsh Language Board has had statutory powers to require public bodies to prepare language schemes that set out how they will treat the Welsh and English languages equally when providing services to the public.<sup>273</sup> The Canadian Commissioner of Official Languages also has a role in policing compliance with the Official Languages Act, which allows any member of the public to communicate with and request or access services from federal government departments in either French or English.<sup>274</sup>

We believe there are six key areas of the broader public service in which Te Taura Whiri should have the power to require the production of and compliance with Māori language plans, approve key documents, or set planning targets. Where language plans are required, Te Taura Whiri should provide model plans and assist public bodies to both produce and implement their plans. In any case of non-compliance with targets or plans (both in producing

them or complying with them once approved), Te Taura Whiri would be able to refer the matter to the Minister of Māori Affairs, who would be empowered to sanction the relevant agency or authority until it complied. Such sanctions might include budgetary penalties, probationary controls over language matters or simply ‘naming and shaming’. We set out the six areas of government as follows.

#### (1) *Central government*

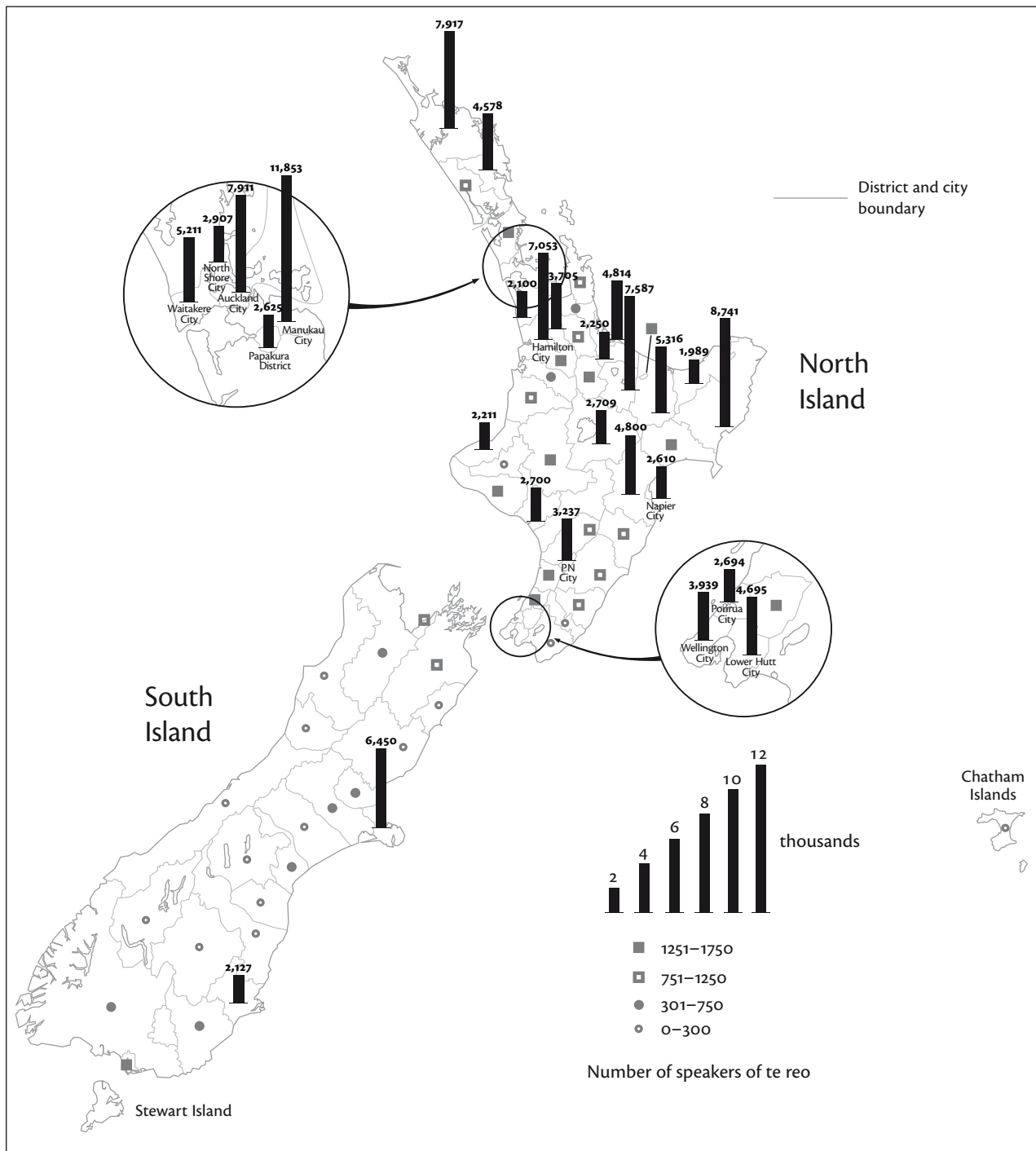
All central government agencies in Wellington should be required to produce plans that set out how they will contribute to the revitalisation of te reo Māori. This will include education sector agencies, although for obvious reasons we deal with some aspects of the education system specifically below.

#### (2) *Local government, district health boards, and branches of central government in certain districts*

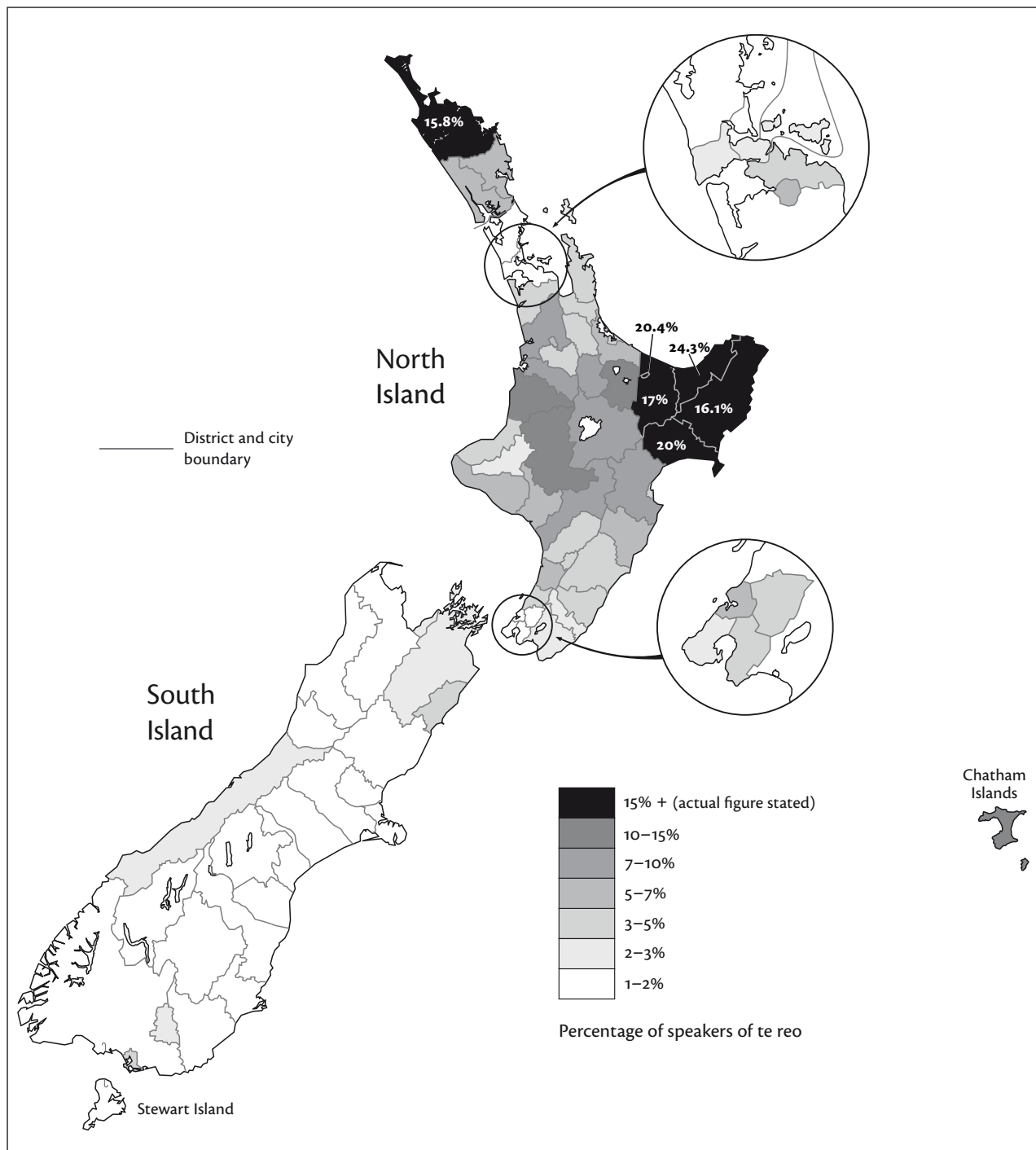
In certain parts of the country, where there are significant numbers of te reo speakers or a sufficient proportion of te reo speakers in the total population, all public agencies and authorities should be required to produce similar plans. The relevant districts could be calculated on the basis of the census returns for local government areas. Affected public agencies and authorities would be the territorial authorities meeting that particular speaker threshold as well as any district health boards or regional branches of central government located partly or wholly within those local government boundaries.

In each case, the public agency or authority should consult with the local iwi before submitting its plans for approval. This is not merely token consultation. The reforms we have in mind would vest certain substantive powers in iwi. We return to the role of iwi below.

The speaker threshold could be a simple calculation, such as 5,000 people or 5 per cent of the total population. We are aware that this would create anomalies, so it could instead be based on a more sophisticated formula, such as the number of thousands of speakers multiplied by the speaker percentage. This would give a fairer and more equitable result. Our point is simply that the large numbers of speakers in the biggest cities must be catered for as well as the high proportions of speakers in regional areas.



Map 5.1: Number of speakers of te reo by local authority, 2006 census



5.6.3(3)

It should be remembered that Māori have a reciprocal role in this reform as well, because it is only triggered when the number of te reo speakers reaches the required threshold. Some districts, for example, will reach the threshold in years to come with renewed Māori effort. Others could conceivably drop out if Māori do not maintain their own obligation to kōrero Māori.

### (3) *Education curricula*

All early childhood, primary, and secondary curricula involving te reo should be submitted to Te Taura Whiri for approval. So, too, should Te Taura Whiri approve all level 1 to 3 certificate te reo courses at tertiary level.

### (4) *Schools*

All State-funded schools (except kura kaupapa and other te reo immersion schools) with rolls of at least 75 students, of whom at least 25 per cent are Māori, should be required to produce plans that set out how they will contribute to the revitalisation of te reo Māori. As with local government and public agencies, in each case the school should consult with the local iwi before submitting its plan for approval. This will undoubtedly involve additional iwi to those in the local government areas identified using the calculation in section 5.6.3(2).

### (5) *Teachers*

After consultation with the Secretary for Education, Te Taura Whiri should set targets for the training of Māori language and Māori-medium teachers on a five-year rolling basis. This aspect of Te Taura Whiri's new powers is vitally important, of course, because the te reo movement choked in the 1990s due to the failure to train a sufficient number of teachers. Teacher training institutions should submit plans for Te Taura Whiri's approval showing how they plan to meet the te reo teacher targets.

### (6) *Broadcasting*

Both the State broadcasters – TVNZ, Māori Television, and Radio New Zealand – and the State broadcasting funders – New Zealand On Air and Te Māngai Pāho – should be required to produce te reo plans. In addition, any broadcaster drawing on Te Māngai Pāho funds (which would include, for example, the iwi radio network

and, presumably on occasion, other broadcasters such as TV3) should also be required to submit plans to Te Taura Whiri for approval.

### 5.6.4 *Te Taura Whiri to offer dispute-resolution service*

We have mentioned that interpersonal disputes occasionally break out in the running of kōhanga reo and kura due to the pressures on the committed few of responsibility and time. We recommend that Te Taura Whiri offer a conflict resolution service to kōhanga and kura whānau, so that there be as little disruption to children's learning as possible.

### 5.6.5 *An enhanced role for iwi*

We are aware that Te Taura Whiri has for some time provided practical advice to iwi and hapū in the formulation of long-term language plans.<sup>275</sup> We believe it is now time for the State not just to facilitate internal iwi planning but to actually be affected by those plans. As we have seen, our recommendation is that certain agencies, authorities, and schools must consult with iwi in the formulation of their language plans for approval by Te Taura Whiri. Plans would not be approved where consultation has not occurred. We believe that, in this way, iwi language planning will effectively become implemented in the instrumentalities of the State. We also consider it likely that iwi will play an important role in alerting Te Taura Whiri to any issues of non-compliance with approved agency, authority, or school plans in their respective rohe.

We also make the following suggestion. In recognition of the strong desire in certain communities for local control, we wonder whether the kōhanga reo within each iwi's rohe could collectively opt (with, say, a 75 per cent majority) to secede from the national trust and come under the control of the local iwi authority. This is of course a matter for Māori rather than the Crown, but we raise it nonetheless as a potential solution to some iwi concerns.

### 5.6.6 *Conclusion*

These provisional recommendations may be seen as challenging. They may even be resisted in certain quarters. In reality, however, they would only bring New Zealand into line with regimes applied in comparable countries overseas. Given the significant spend on te reo policies



now, they will not necessarily come at great extra cost. Reprioritisation could well address most new expenditure. These may be matters to be addressed by the review panel in due course. In the end, the question is whether we as a nation wish to preserve te reo as a living language or not. If we do, our recommendations merely reflect the urgency of the situation and the pressing need for thorough change.

Te Taura Whiri will need to monitor the health of the language carefully. Finally, therefore, we recommend that it report back to the community on progress every two years.

### 5.7 THE FUTURE

Twenty-five years since the Waitangi Tribunal first considered the position of te reo, we have had another opportunity to take stock of this singularly important issue. And, just as the Tribunal's report in 1986 ushered in a period of change and progress, so we hope that our own report can help rejuvenate a movement that has lost some of the energy that propelled it in the early days.

Naturally, we hope that when the 2028 goals are being assessed in another 18 years' time, they will have all been met. We also hope that each interim review of the MLS sets out new and visionary goals so that that sense of urgency is never lost. As we have said, those goals must be owned and formulated by Māori and the Crown in partnership.

One other matter bears mention: into the future New Zealand will look increasingly different from today. The population is set to become increasingly diverse, with mid-range projections that those of Asian origin will number 791,000 by 2026, only slightly behind the projected Māori population of 811,000. Pacific peoples will rise to 481,000, with Pākehā (and 'other') numbers rising slightly to 3.5 million but declining steeply in terms of proportion, from 77 to 70 per cent.<sup>276</sup>

As we become an increasingly diverse society, how will our shared values and nationhood be expressed and celebrated? We cannot know for certain, but it is quite possible that our greater heterogeneity will mean we rely more and more upon Māori culture to mark our unique place in the world and give us a common bond of identity.

In the years to come, we hope that te reo will indeed be healthy enough to properly serve this cause.

### 5.8 SUMMARY OF RECOMMENDATIONS

Clearly, the Government's Māori language agenda is not working. Most of the key indicators show that the language is currently going backward. We therefore provisionally recommend that:

1. A revamped Te Taura Whiri become the lead Māori language sector agency, as intended in the Maori Language Act and as befits the agency's expertise and singular focus.
2. Te Taura Whiri function as a Crown–Māori partnership through the equal appointment of Crown and Māori appointees to its board. The Māori appointees could be chosen by an electoral college and the Crown appointees by the Minister of Māori Affairs.
3. Te Taura Whiri have greater powers, including:
  - ▶ the authority to require and approve Māori language plans of the following public agencies and authorities:
    - all central government agencies;
    - all local authorities, district health boards, and regional branches of central government in local body districts where the census shows a sufficient number and/or percentage of te reo speakers in the population;
    - all State-funded schools (other than kura kaupapa and other immersion schools) with at least 75 students, of whom at least 25 per cent are Māori; and
    - all State broadcasters, as well as any other broadcasters drawing on Te Māngai Pāho funds.
  - ▶ and the authority to:
    - approve all early childhood, primary and secondary curricula involving te reo, as well as all level 1–3 tertiary te reo courses; and
    - set targets for the training of Māori language and Māori-medium teachers and require and approve plans from teacher

training institutions showing how they will meet these targets.

4. Both the authorities and agencies in districts that meet the speaker threshold, and schools that have the required Māori student population, consult with local iwi in the formulation of their plans. In this way, iwi language planning will effectively become implemented in the instrumentalities of the State.
5. Te Taura Whiri offer a dispute-resolution service to kōhanga and kura whānau to ensure that the occasional conflicts that occur disrupt children's learning as little as possible.
6. Te Taura Whiri monitor the health of the language carefully and report back to the community on progress every two years.

We also make a tentative suggestion to address the strong desire in certain communities for local control. Perhaps the kōhanga reo within any iwi's rohe could be allowed (with a 75 per cent majority) to secede from the Kōhanga Reo National Trust and come under the control of the local iwi authority. This is of course a matter for Māori rather than the Crown, but we raise it nonetheless.

#### Text notes

1. Papers 2.538, 2.537, and 2.540 respectively.
2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 4th ed (Wellington: GP Publications, 1996), pp 20, 49–50
3. Claim 1.1(g) (Haana Murray and others, second amended statement of claim on behalf of Ngāti Kuri, Te Rarawa, and Ngāti Wai, 20 October 2001), pp 10–11
4. Claim 1.1(e) (Tama Poata and others, second amended statement of claim for Ngāti Porou, 19 October 2001), pp 6–7
5. Claim 1.1(d) (Apera Clark and others, fourth amended statement of claim on behalf of Ngāti Kahungunu, 21 September 2001), pp 11–17
6. Claim 1.1(f) (John Hippolite and others, second amended statement of claim on behalf of Ngāti Koata, 24 October 2001), pp 9–10
7. Paper 2.256 (Crown counsel, statement of response, 28 June 2002), pp 34–35
8. Paper 2.261 (Waitangi Tribunal, draft statement of issues, 20 December 2005), p 42
9. Ibid
10. Paper 2.266 (Crown counsel, submission responding to memorandum of directions dated 16 February 2006, 15 March 2006), p 4
11. Paper 2.308 (Crown counsel, submission concerning joint memorandum of parties in relation to te reo issues in the draft statement of issues (paper 2.261), 22 June 2006). See also paper 2.309 (counsel for Ngāti Porou, submission concerning memorandum on behalf of Ngāti Porou claimants in relation to the te reo section in the draft statement of issues (paper 2.261), 22 June 2006), in which counsel for Ngāti Porou confirmed her agreement.
12. Paper 2.314 (Waitangi Tribunal, statement of issues, 6 July 2006), p 53
13. Ibid, p 54
14. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, 4th ed (Wellington: GP Publications, 1996), p 10 (quoted in doc s6 (counsel for Ngāti Porou, closing submissions, 23 April 2007), pp 76–77)
15. Steven (Tipene) Chrisp, under cross-examination by counsel for Ngāti Porou, 21st hearing, 25 January 2007 (transcript 4.1.21, pp 298–299). Tipene Chrisp has been identified as Steven in transcripts and testimony. We therefore refer to both names in footnotes, but to Tipene in the main text.
16. Cathy Wylie and Vyletta Arago-Kemp, *Whaia Te Iti Kahurangi: NZCER Evaluation 2004*, report commissioned by Te Rūnanga o Ngāti Porou and the Ministry of Education (Wellington: New Zealand Council for Educational Research, 2004), p 103
17. Document s6, p 82
18. Te Puni Kōkiri, *Te Ora o te Reo Māori i Te Tairāwhiti: The Health of the Māori Language in Te Tairāwhiti* (Wellington: Te Puni Kōkiri, undated), p 2, in doc R33(b) (Te Puni Kōkiri, a collection of regional language profiles, undated), p 94
19. Counsel for Ngāti Porou, cross-examination of Steven (Tipene) Chrisp, 21st hearing, 25 January 2007 (transcript 4.1.21, pp 300–302)
20. Document s6, pp 78–79
21. Document s6, pp 79–80, 84, 85; paper 2.457 (Crown counsel, submission concerning requests of Te Puni Kōkiri and Ministry of Education witness for further information, 30 March 2007), attached letter from Ministry of Education dated 14 March 2007
22. Document s6, pp 72–78
23. Apirana Mahuika, under questioning by Crown counsel and the presiding officer, 16th hearing, 30 August 2006 (transcript 4.1.16, pp 352–353, 361–363)
24. Document s1 (counsel for Ngāti Kahungunu, closing submissions, 16 April 2007), pp 49–50

25. Document 118 (Piri Sciascia, brief of evidence, 2000), pp 4–5; doc 113 (Rerekohu Robertson, brief of evidence, 2000), pp 2–5
26. Document s3 (counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, closing submissions, 16 April 2007), p 184
27. Ibid, p 55
28. Document b9 (Wiremu McMath, brief of evidence, 1998), pp 3–8; doc c2 (Houpeke Piripi, brief of evidence, undated), pp 25–29
29. Document H9 (Terewai Grace, brief of evidence, 6–10 November 1999), p 3; doc H8 (Alfred Elkington, brief of evidence, 6–10 November 1999), p 2; doc H12 (Priscilla Paul, brief of evidence, 6–10 November 1999), p 3
30. Piripi Walker, under cross-examination by Crown counsel, 17th hearing, 8 September 2006 (transcript 4.1.17, pp 436–437)
31. Document R35 (Piripi Walker, brief of evidence, 18 August 2006), p 11
32. Document R33 (Steven (Tipene) Chrisp, brief of evidence on behalf of Te Puni Kōkiri, 8 January 2007), pp 3–4
33. Ibid, p 10
34. Document T2 (Crown counsel, closing submissions, 21 May 2007), p 44
35. Ibid, pp 41–42
36. Ibid, p 42
37. Document R33, pp 11–18
38. Ibid, p 17
39. Steven (Tipene) Chrisp, under cross-examination by counsel for Ngāti Porou, 21st hearing, 25 January 2007 (transcript 4.1.21, p 314). There was no discussion on this in the evidence of Margaret Calder for the National Library, nor did counsel take it up with her. He did, however, suggest to Mr Chrisp that he wondered if this meant that the only specific initiative the Crown was taking for te reo ake o Ngāti Porou was to preserve a record of it for when it is ‘ultimately lost’.
40. Document R29 (Karen Sewell, brief of evidence on behalf of the Ministry of Education, 8 January 2007), pp 12–15. The sum spent on specific support for te reo ake o Ngāti Porou was later confirmed as being \$253,000, as noted by counsel for Ngāti Porou in closing submissions (see above). See also paper 2.457, app (Rawiri (senior manager Maori education, Ministry of Education) to Hardy and Shaw (Crown counsel), 14 March 2007).
41. Document R30 (Arawhetu Peretini, brief of evidence on behalf of the New Zealand Qualifications Authority, 8 January 2007), pp 12–13
42. Crown counsel, cross-examination of David Williams, 13th hearing, 23 May 2002 (transcript 4.1.13, p 260)
43. Crown counsel, cross-examination of Piripi Walker, 17th hearing, 8 September 2006 (transcript 4.1.17, pp 434–435, 438)
44. Steven (Tipene) Chrisp, under cross-examination by counsel for Ngāti Porou, 21st hearing, 25 January 2007 (transcript 4.1.21, pp 309–310)
45. Document R33, pp 18–19
46. Piripi Walker, under cross-examination by Crown counsel, 17th hearing, 8 September 2006 (transcript 4.1.17, p 426)
47. Document R29, p 1; doc R33, p 3
48. Steven (Tipene) Chrisp, under cross-examination by counsel for Ngāti Koata, 21st hearing, 25 January 2007 (transcript 4.1.21, p 343)
49. Paper 2.279 (Waitangi Tribunal, memorandum concerning historical claims, 2 May 2006), pp 4, 7
50. The te reo Māori claim was heard over four weeks in mid- and late 1985, before the 1985 legislative amendment came into effect that extended the Tribunal’s jurisdiction back to 1840.
51. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, pp 8–9
52. Ibid, pp 9–10
53. ‘Pepper-potting’ was a policy pursued by the Department of Māori Affairs in urban centres during the 1950s and early 1960s whereby state housing for Māori was scattered within predominantly non-Māori communities in order to encourage ‘integration’. The term was used, for example, by the Secretary of Māori Affairs Jack Hunn in his 1960 report into Government law and policy concerning Māori: JK Hunn, *Report on Department of Maori Affairs*, 24 August 1960 (Wellington: RE Owen, 1961), p 41
54. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 10
55. Document K3 (David Williams, *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices* (Wellington: Waitangi Tribunal, 2001)), p 137; Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 11
56. Richard Benton, *The Maori Language – Dying or Reviving?* (1991; reprinted Wellington: New Zealand Council for Educational Research, 1997), pp 5, 12, 29
57. Richard Benton and Nena Benton, ‘RLS in Aotearoa/New Zealand 1989–1999’, *Can Threatened Languages Be Saved? Reversing Language Shift, Revisited: A 21st Century Perspective*, ed Joshua A Fishman (Clevedon: Multilingual Matters, 2001), p 425
58. Document K3, pp 164–165
59. Ibid, p 104
60. Ibid, pp 165–166, 167
61. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 35

62. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, pp 10, 12
63. *Ibid*, p 16
64. *Ibid*, pp 16, 17
65. *Ibid*, p 51
66. *Ibid*, p 1
67. Te Taura Whiri, 'Language Issues – Te Reo Māori', [http://www.tetaurawhiri.govt.nz/english/issues\\_e/reo/reo.shtml](http://www.tetaurawhiri.govt.nz/english/issues_e/reo/reo.shtml) (accessed 21 April 2008)
68. Piripi Walker alleged that the Government introduced its Bill without waiting for the Tribunal's report because it feared 'the weight of the Tribunal recommendation on official recognition of the Māori language'. The Government thus 'thwarted from the outset any expectation that Māori speakers would enjoy real language rights to use the language in public bodies': doc P35, p 4.
69. Document R3, pp 172–173
70. Comprehensive statistics on early childhood and school-age Māori-medium education are provided in the tables in this chapter. These figures and other references to early childhood education, schooling and tertiary education statistics in this chapter are drawn for the main part from the Ministry of Education's 'Education Counts' website ([www.educationcounts.govt.nz](http://www.educationcounts.govt.nz)) and are not separately referenced in each instance.
71. These are defined by the Ministry of Education as schools or classes within schools where students learn via the medium of te reo for between 12 and 100 per cent of the time. Four levels operate (with more funding for higher percentages of time spent learning via the medium of te reo): level 1 (80 per cent and above via the medium of te reo), level 2 (50 to 80 per cent), level 3 (30 to 50 per cent), and level 4(a) (12 to 30 per cent): Ministry of Education, *Funding, Staffing and Allowances Handbook* (Wellington: Ministry of Education, 2008), ch 1, pp 14, 30.
72. The number of schools that a subject was taught at was unavailable for 2009.
73. Ministry of Education, *Ngā Haeata Mātauranga – Annual Report on Māori Education 2007/08* (Wellington: Ministry of Education, 2009), p 115. Students may be counted more than once in these numbers. We have not seen any updated figures.
74. Education Review Office, *Evaluation Indicators for Education Reviews in Te Aho Matua Kura Kaupapa Māori* (Wellington: Education Review Office, 2008), p ii
75. *New Zealand Maori Council v Attorney-General* unreported, 3 May 1991, McGechan J, High Court, Wellington, CP942/88
76. *New Zealand Maori Council v Attorney-General (No 2)* unreported, 29 July 1991, McGechan J, High Court, Wellington, CP942/88. The quotation is from the Court of Appeal's summary of the 1991 case: *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576, 589 (CA).
77. *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA); *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC)
78. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517
79. Te Māngai Pāho, *Annual Report for the Year Ended 30 June 2009* (Wellington: Te Māngai Pāho, 2009), pp 4, 8–9, 10–11
80. See Television New Zealand Amendment Bill 2009 (89–1), cl 6.
81. Steven (Tipene) Chrisp, under questioning by the presiding officer, 21st hearing, 25 January 2007 (transcript 4.1.21, pp 361–362)
82. Document R33, p 15. The acting chief executive of Te Taura Whiri seemed to suggest that iwi would pick up the role of investing in language regeneration initiatives to some extent: '2010 Final Ma Te Reo Funding Round opens', Te Taura Whiri press release, 13 April 2010.
83. Te Puni Kōkiri, *Rārangi Mahi o ngā Ratonga Reo Māori 2006 – Inventory of Māori Language Services 2006* (Wellington, Te Puni Kōkiri, 2008), app 1, p 1: Te Taura Whiri records a figure of 1.8 million per year in its annual reports from 2004 to 2009, as does Tipene Chrisp: doc R33, p 15.
84. Te Puni Kōkiri, *Rārangi Mahi*, app 1, pp 1, 2. Tipene Chrisp described the size of the fund as \$1.6 million annually: doc R33, p 15.
85. Document R33, p 15
86. Te Puni Kōkiri, *Te Tūāoma – The Māori Language: The Steps That Have Been Taken* (Wellington: Te Puni Kōkiri, 1999), p 11
87. Te Puni Kōkiri, *A Shared Vision for the Future of Te Reo Māori* (Wellington: Te Puni Kōkiri, March 2003), p 4
88. Document R33(a) (Te Puni Kōkiri, *The Health of the Māori Language in 2001* (Wellington: Te Puni Kōkiri, 2002)), p 7
89. Those Māori organisations consulted included Kawea Te Rongo, Te Pūtahi Pāho, and Te Whakaruruhau (broadcasting); Kura Kaupapa Māori, Te Ātaarangi, Te Kōhanga Reo, wānanga, and universities (education); and the Māori Women's Welfare League and iwi involved in language planning (general). Government agencies represented were the Ministry of Education, Te Māngai Pāho, Te Puni Kōkiri, and Te Taura Whiri.
90. Te Puni Kōkiri, *A Shared Vision*, pp 1, 5
91. Document R33(j) (Te Puni Kōkiri and Te Taura Whiri, *Te Rautaki Reo Māori: The Māori Language Strategy* (Wellington: Te Puni Kōkiri, 2003)), p 3
92. Pita Sharples, 'Review of Maori Language Strategy and Sector', New Zealand Government media release, 29 July 2010
93. The published MLS document listed eight 'functions of Government' (doc R33(j), pp 31–35) but, in October 2003, Cabinet agreed to include activities in two additional areas – a Māori

language information programme and assistance with whānau language development: doc R33(yyyy) (Controller and Auditor-General, *Implementing the Māori Language Strategy* (Wellington: Office of the Auditor-General, 2007)), p 12.

94. Document R33(j), p 5
95. Ibid, p 7
96. Ibid, pp 31–35; doc R33(yyyy), p 12
97. Document R33, p 7
98. For the 1999 and 2002 figures, see doc R33(a), p 15, and for the 2006 figure, see Te Puni Kōkiri, *Rārangi Mahi o ngā Ratonga Reo Māori 2006*, app 1, pp 1–2. In communicating the 2006 stocktake result, Te Puni Kōkiri advised that the information may be incomplete and that, with reference to the similar inventory undertaken in 2000 (which presumably gives the 1999 figure), ‘it is not possible to directly compare the information because different methodological approaches were used in 2000 and 2006’: Te Puni Kōkiri, *Rārangi Mahi*, p 2, fn 3.
99. Te Puni Kōkiri, *Rārangi Mahi*, p 11; doc R33(a), p 15
100. For the 1999 and 2002 figures, see doc R33(a), p 15, and for the 2006 figures, see Te Puni Kōkiri, *Rārangi Mahi*, app 1, pp 1–2. The principal component of the 2006 education sector figure is the \$65 million allocated for student component funding of Māori language courses in tertiary institutions.
101. Not all the most up-to-date education statistics were available to us at the time of writing.
102. In 2009, there were 11 licensed early childhood education te reo Māori immersion services other than kōhanga reo. In other words, some former kōhanga may not so much have ceased to exist as become a different kind of childcare centre. There were also 634 licensed services where children received between 12 and 80 per cent of their communications from teachers in Māori, although the range is so broad that we cannot do much more than note this statistic: see Ministry of Education, *Education Report: Annual Census of Early Childhood Services, July 2009* (Wellington: Ministry of Education, 2009), p 6.
103. We are aware that there was an even higher proportion (52.4 per cent) of Māori in early childhood education at kōhanga in 1986. At that time, however, the overall number of Māori attending early childhood education was significantly lower (fewer than 16,000, as opposed to 28,500 in 1993): Lisa Davies and Kirsten Nicholl, *Te Maori i Roto i nga Mahi Whakaakoranga: Maori in Education: A Statistical Profile of Maori Across the New Zealand Education System* (Wellington: Ministry of Education, 1993), p 105, tbl A1.
104. We use 2008 here because we do not know the number of Māori children in licence-exempt early childhood services in 2009.
105. Document R29(j) (Ministry of Education, *Ka Hikitia – Managing for Success: The Draft Māori Education Strategy, 2008–2012* (Wellington: Ministry of Education, 2007), p 11. In 2005, the Ministry suggested that kōhanga reo enrolments had decreased ‘because the number of TKR [Te Kōhanga Reo] services has declined. This is a result of a consolidation process undertaken by the TKR Trust since 1995’: Ministry of Education (Data Management and Analysis), *Hui Taumata, 2005: Māori in Early Childhood Education and Schools* (Wellington: Ministry of Education, 2005), p 2. We do not believe that the answer is this straightforward, and nor does the Ministry believe so today (see endnote 107).
106. Benton and Benton, ‘RLS in Aotearoa’, p 426
107. Ms Sewell is clearly aware of all these issues. In her evidence to the Whanganui district Tribunal inquiry in April 2009, she wrote that the reasons for the decline were ‘unclear’ but added that likely factors included increased Māori employment and the ‘increasing responsiveness of other services, such as the day education and care services, to working families including those seeking education with an emphasis on Māoritanga’: Karen Sewell, brief of evidence on behalf of the Ministry of Education, 27 April 2009 (Wai 903 RO1, doc 05), pp 8–9. Under questioning in May 2009, she added that some kōhanga have sought independence from the national trust. She also remarked that quality of language and standards of care have at times been lacking, but such matters were the responsibility of the trust, over which she had no control: Karen Sewell, under questioning by Ranginui Walker, 15th hearing, 27 May 2009 (Wai 903 RO1, transcript 4.1.15, pp 188–189).
108. ‘Celebrate the Start of 20 Hours Free ECE’, New Zealand Government press release, 2 July 2007
109. Ministry of Education, ‘Budget 2009: Questions and Answers for Early Childhood Education Services (Wellington: Ministry of Education, 2009)
110. Ministry of Education, *Ka Hikitia – Managing for Success: The Māori Education Strategy, 2008–2012* (Wellington: Ministry of Education, 2009), p 31. This is an update of the 2008 publication.
111. The 1995 ERO report also said that all kura were too small to qualify for a non-teaching principal and that this caused the principals great difficulty with workload: Education Review Office, *Kura Kaupapa Māori*, vol 10 (winter 1995), pp 4–12.
112. Māori Affairs Committee, *Te Uiuitanga Mātauranga Māori – Inquiry into Māori Education*, Report to the House of Representatives, sess 1, 44th parliament, 1.9H, 1996, p 6
113. ‘Greater Need for Teachers Fluent in Maori, Says Karetu’, *Evening Post*, 9 July 1997
114. Benton and Benton, ‘RLS in Aotearoa’, p 436
115. Richard Benton and Nena Benton, *Revitalizing the Māori Language: Consultants’ Report to the Māori Development Education Commission* (Ngāruawāhia: Alta Vista Pacifica Tāpui, 1999), p 33
116. Ministry of Education, *Ka Hikitia* (2009), p 25

117. Karen Sewell, under questioning by Wharehuia Milroy, 15th hearing, 27 May 2009 (Wai 903 RO1, transcript 4.1.15, pp 193–194)
118. Ministry of Education, *Ka Hikitia* (2009), p 35
119. Ministry of Education (Education Information and Analysis), 'Māori Language in Education', *Ngā Haeata Mātauranga – Annual Report on Māori Education, 2008/09* (Wellington: Ministry of Education, 2010), p 20. We note that the 2009 total and percentage represented small increases over 2008.
120. Megan Lee, *Monitoring Teacher Supply: Survey of Staffing in New Zealand Schools at the Beginning of the 2010 School Year* (Wellington: Ministry of Education, 2010), p 1
121. Significantly, each annual report on *Monitoring Teacher Supply* carries a stock remark along the lines of 'vacancies and readvertised vacancies were greatest in schools in rural areas (population <1,000), in schools with a higher proportion of Māori students on their roll (relative to other schools) and in low-decile schools (deciles 1–3)': Lee, *Monitoring Teacher Supply: Survey of Staffing in New Zealand Schools at the Beginning of the 2010 School Year*, p 1.
122. Lisa Ng and Megan Lee, *Monitoring Teacher Supply: Survey of Staffing in New Zealand Schools at the Beginning of the 2009 School Year* (Wellington: Ministry of Education, 2009), p 11; Lee, *Monitoring Teacher Supply: Survey of Staffing in New Zealand Schools at the Beginning of the 2010 School Year*, p 12
123. Ministry of Education, 'Match of Teacher Qualification to Subject Taught: Secondary Schooling', <http://www.educationcounts.govt.nz> (accessed 15 June 2008)
124. Research New Zealand, *2006 Survey on the Health of the Māori Language: Final Report*, prepared for Te Puni Kōkiri (Wellington: Research New Zealand, 3 July 2007), p 190
125. Stephen May, Richard Hill, and Sarah Tiakiwai, *Bilingual/Immersion Education – Indicators of Good Practice: Final Report to the Ministry of Education* (Wellington: Ministry of Education, 2004), pp 122–124, 127–129
126. Figures do not seem to have been published yearly on this matter. For 1995, see Ministry of Education, *Education Statistics of New Zealand for 1995* (Wellington: Ministry of Education, 1996), tbl 30, p 52; for 1998, Ministry of Education, *Education Statistics of New Zealand for 1998* (Wellington: Ministry of Education, 1999), tbl 36, p 61. For 2009, see Ministry of Education (Education Information and Analysis), 'Māori Language in Education', in *Ngā Haeata Mātauranga, 2008/09*, p 21. Note that the 2009 figure excludes secondary students being taught in Māori-medium settings.
127. For further comparison, secondary school Māori language enrolments were 1,437 in 1970, 11,110 in 1975, 14,682 in 1980, and 16,981 in 1985; Jeffrey Waite, *Aotearo: Speaking for Ourselves – A Discussion on the Development of a New Zealand Languages Policy*, 2 vols (Wellington: Learning Media, 1992), vol 2, p 37.
128. Indeed, no fewer than 48,762 secondary school students (30.8 per cent of the total number) were learning French in 1970: Waite, *Aotearo*, vol 2, p 70.
129. Of course it should be acknowledged that some children now even learn Spanish through the medium of Māori – the Ministry of Education noted in a 2005 press release that Spanish was being taught at Te Kura Kaupapa Māori o Te Koutu in Rotorua. 'Great Things Are Happening In New Zealand Schools', Ministry of Education press release, 23 December 2005
130. Ministry of Education, 'Provider-Based Enrolments', Excel spreadsheet, 20 August 2010, tbls ENR.7, ENR.11
131. David Earle, *He Tini Manu Reo: Learning Te Reo Māori Through Tertiary Education* (Wellington: Ministry of Education, 2007), p 11
132. *Ibid*, pp 11, 63
133. Ministry of Education, *Percentage of Māori Population Proficient in Te Reo Māori* (Wellington: Ministry of Education, 2008), p 3
134. Ian Christensen, 'Proficiency, Use and Transmission: Māori Language Revitalisation', *New Zealand Studies in Applied Linguistics*, vol 9 (1), 2003, p 45
135. Waite, *Aotearo*, vol 2, p 31; Benton and Benton, 'RLS in Aotearoa', p 425
136. Te Puni Kōkiri, *The National Māori Language Survey: Te Mahi Rangahau Reo Māori* (Wellington: Te Puni Kōkiri, 1998), pp 33–35. Dr Winifred Bauer notes that Tipene Chrisp has said, in a personal communication to her, that the results of the 1995 survey are considered unreliable. We are unsure as to the exact reason: Winifred Bauer, 'Is The Health Of Te Reo Māori Improving?', *Te Reo: The Journal of the Linguistic Society of New Zealand*, vol 51, 2008, p 34.
137. The survey also sought to contrast preferred schooling types by perceptions of availability of those types of schools 'locally'. However, these cross-tabulations were, according to the AGB McNair report, 'aggregate figures across the whole sample and do not tell us, for example, how many of the people who want bilingual education have that option available to them in their local area'. In other words, the survey was unable to verify the exact match of supply to demand except to the extent that children were in their caregivers' preferred type of schooling (as set out in the text above): see AGB McNair, *Survey of Demand for Bilingual and Immersion Education in Māori* (Wellington: Ministry of Education, 1992), pp 81, 82.
138. *Ibid*, pp 70, 82
139. MRL Research Group, *Maori and Pacific Island Language Demand for Educational Services: Overview*, report to the Ministry of Education, Wellington, November 1995, pp 24, 28–29, 42–43. Eighteen per cent of Māori caregivers preferred primary schooling where te reo was available as a subject (rising to 24 per cent at secondary level). In fact, 17 per cent of Māori children

attended such a primary school. Note that the information on page 29 of the report has been incorrectly presented. We were able to ascertain the correct percentages from the figure titled ‘Primary School Usage and Preference’ on the facing page, as well as from the way information in other tables was presented.

140. Ministry of Education, *Education Statistics of New Zealand for 1995*, p 42
141. We say this because the surveyed rate of participation in Māori-medium education was considerably higher than we know to have been the case in these two years. It is of course possible some caregivers told the survey-takers what seemed the ‘right’ answer about their preferred schooling for their children.
142. Ministry of Education, *Education Statistics of New Zealand for 1992* (Wellington: Ministry of Education, 1993), pp 38, 54
143. Benton and Benton, ‘RLS in Aotearoa’, p 423
144. An example may be the 30 to 34 year olds in 1996, who as 35 to 39 year olds in 2001 and 40 to 44 year olds in 2006, increased their proportion of reo speakers.
145. The figure of 624,000 is the official Māori ethnic group figure of 565,329 once it has been adjusted for those estimated to have been missed by the census, been temporarily overseas, to have not responded to the ethnicity question, and so on.
146. Statistics New Zealand, ‘National Ethnic Population Projections: 2006 (Base) – 2026 Update’, *Hot Off the Press* (Wellington: Statistics New Zealand, 22 April 2010), p 12; Statistics New Zealand, ‘Tables, National Ethnic Population Projections: 2006 (Base) – 2026 Update’, Excel spreadsheet, 22 April 2010, tbls 1m, 3m
147. This figure, of course, excludes those who do not answer the census, are temporarily overseas, or fail to answer either or both of the ethnicity and language questions.
148. Document R33(a), p 19
149. The other growth areas were those aged 15 to 19 and 35 to 54, with the only other substantial gain in absolute numbers being made by those aged 40 to 49. There were declines amongst those aged 20 to 34 and 55 to 59. The growth in those over 60 may of course relate to more than just the ageing population, as some may well be being thrust into kaumātua roles and suddenly having to take learning to reo very seriously.
150. ‘Survey Shows More Māori are Speaking Te Reo’, New Zealand Government press release, 24 July 2007; doc R33(vvvv) (Te Puni Kōkiri, *Te Tirohanga ki te Reo Māori, The Māori Language Survey*, Wellington: Te Puni Kōkiri, July 2007), pp 5, 7
151. Ministry of Education, ‘Percentage of Māori Population Proficient in Te Reo Māori’, p 3
152. ‘Survey Shows More Māori Are Speaking Te Reo’, New Zealand Government press release, 24 July 2007
153. Ministry of Social Development, *The Social Report 2007* (Wellington: Ministry of Social Development, October 2007), p 127. In its 2008 report the Ministry wrote that ‘Between 2001 and 2006, the proportion of Māori who can speak Māori declined slightly while the total number of Māori who can do so increased over this period’: Ministry of Social Development, *The Social Report 2008* (Wellington: Ministry of Social Development, 2008), p 129
154. Peter Keegan, ‘FAQ about the Maori Language’, [http://www.maorilanguage.info/mao\\_lang\\_faq.html](http://www.maorilanguage.info/mao_lang_faq.html) (accessed 25 May 2008)
155. Bauer, pp 35–38, 50–51
156. *Ibid*, pp 33–73
157. *Ibid*, p 62
158. *Ibid*, pp 34, 70
159. *Ibid*, p 67
160. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, pp 20, 21
161. *Ibid*, p 1
162. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517, 518 (PC)
163. United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295, adopted 13 September 2007), art 13
164. Document s3, p 183
165. Document s6, p 70
166. Document R29(k) (Ministry of Education, *Ngā Haecata Mātauranga – Annual Report on Māori Education, 2006/07* (Wellington: Ministry of Education, 2007)), p 38
167. *Ibid*
168. *Ibid*, pp 66–67
169. Karen Sewell, under cross-examination by counsel for Te Tai Tokerau, 21st hearing, 26 January 2007 (transcript 4.1.21, pp 391, 409)
170. Siobhan Murray, *Achievement at Māori Immersion and Bilingual Schools: Update for 2004 Results* (Wellington: Demographic and Statistical Analysis Unit, Ministry of Education, 2005), pp 3, 4
171. While Māori currently comprise 15 per cent of the New Zealand population, they represent 24 per cent of those aged under 15, which Statistics New Zealand predicts will rise to 28 per cent of those under 15 by 2026: Statistics New Zealand, ‘National Ethnic Population Projections: 2006 (Base) – 2026 Update’, p 7.
172. Counsel for Ngāti Koata, cross-examination of Steven (Tipene) Chrisp, 21st hearing, 25 January 2007 (transcript 4.1.21, p 343)
173. Document s1, p 50
174. Benton and Benton, *Revitalizing the Māori Language*, p 12

175. Stephen Cornell, *Indigenous Peoples, Poverty, and Self-Determination in Australia, New Zealand, Canada, and the United States*, Joint Occasional Papers on Native Affairs 2006–02 (Tuscon and Cambridge MA: Native Nations Institute for Leadership, Management, and Policy and the Harvard Project on American Indian Economic Development, 2006), pp 16, 17
176. This phrase is taken from the Court of Appeal's decision in what is known as the *Whales* case, where Ngāi Tahu were entitled to have a 'reasonable degree of preference' over other ventures seeking a licence for whale-watching operations at Kaikoura: *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 554 (CA).
177. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)
178. *Ibid*, p 518
179. Hunn wrote that language, arts, crafts, and the institutions of the marae were the 'chief relics' of Māori culture still in existence and that 'Only the Maoris themselves can decide whether these features of their ancient life are, in fact, to be kept alive; and, in the final analysis, it is entirely a matter of individual choice': doc K3, pp 80, 141.
180. Steven (Tipene) Chrisp, under cross-examination by counsel for Ngāti Porou, 21st hearing, 25 January 2007 (transcript 4.1.21, pp 299, 303)
181. Document s6, p 78
182. Document R33(j), p 21
183. *Ibid*, p 3
184. Document R33(cc) (Cabinet Policy Committee, 'Revised Māori Language Strategy', minute of decision, POL Min (03) 17/13), 23 July 2003), p 1
185. Document R33(dd) (Cabinet Policy Committee, 'Revised Māori Language Strategy', minute of decision, POL Min (03) 200, 21 July 2003), p 1
186. Te Taura Whiri, *Te Hui Taumata Reo Māori: Proceedings of Te Hui Taumata Reo Māori Held in Wellington, 11–13 December 1995* (Wellington: Te Taura Whiri, 1996), p 43
187. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 47
188. High Court Rules, r 1.11
189. Maori Language Act 1987, s 4(2)(a)–(b)
190. Maori Land Court Rules 1994, r 15
191. Document R33, pp 9, 19
192. Steven (Tipene) Chrisp, under cross-examination by counsel for Ngāti Koata, 21st hearing, 25 January 2007 (transcript 4.1.21, p 346)
193. Document R33(a), p 31
194. Steven (Tipene) Chrisp, under cross-examination by counsel for Te Tai Tokerau, 21st hearing, 25 January 2007 (transcript 4.1.21, p 328)
195. When we queried the omission Te Puni Kōkiri explained that it had 'not undertaken any assessment of the state of language planning across government during the last five years', essentially because such work had been given a low priority: paper 2.488 (Crown Law Office, memorandum responding to 3 July 2008 memorandum of presiding officer, 9 July 2008), p 1.
196. Cabinet issued this instruction in July 2003, at the same time it approved the MLS.
197. Document R33(ee) (Parekura Horomia to chair, Cabinet Policy Committee, 5 May 2004)
198. Steven (Tipene) Chrisp, under cross-examination by counsel for Te Tai Tokerau, 21st hearing, 25 January 2007 (transcript 4.1.21, p 327)
199. Te Puni Kōkiri, *A Shared Vision*, p 6; doc R33(j), p 21
200. Document P35, p 6
201. Document R33(yyyy), p 29
202. Steven (Tipene) Chrisp, under questioning by the presiding officer, 21st hearing, 25 January 2007 (transcript 4.1.21, pp 360–361)
203. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 519–520 (PC)
204. Television New Zealand Act 2003, s 12(3)(c)
205. Document R31(b) (Television New Zealand, 'Māori Content Strategy: Māori Content and Programming that Inspires New Zealanders on Every Screen' (Auckland: Television New Zealand, 2007), pp 3, 24
206. Bernard Spolsky, 'Report on Māori – English Bilingual Education' (Wellington: Department of Education, 1987), p 21
207. Francois Grin and Francois Vaillancourt, *Language Revitalisation Policy: An Analytical Survey. Theoretical Framework, Policy Experience and Application to Te Reo Māori*, Treasury Working Paper 98/6 (Wellington: The Treasury, 1998)
208. *Ibid*, pp 199, 232, 233
209. Document R33(j), p 19
210. Steven (Tipene) Chrisp, under questioning by the presiding officer, 21st hearing, 25 January 2007 (transcript 4.1.21, p 362); Karen Sewell, under questioning by the presiding officer, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 34)
211. Steven (Tipene) Chrisp, under questioning by the presiding officer, 21st hearing, 25 January 2007 (transcript 4.1.21, p 363):  
PO: Well if you look at your goal 1 which is really by far your most significant goal, the majority of Māori being able to



- speak Māori to some extent by 2028, that's a doubling of the numbers of Māori speakers [in the census]?  
 sc: Yes.  
 po: Well actually no a doubling of the proportion, it will be a far larger doubling, sorry it will be a far larger increase in actual numbers won't it?  
 sc: Yes.
212. For the 2001 result, see doc R33(a), p 20, and for the 2006 result, see Te Puni Kōkiri, *Te Oranga o te Reo Māori 2006 – The Health of the Māori Language in 2006* (Wellington: Te Puni Kōkiri, 2008), pp iv, 22. We note that, while Te Puni Kōkiri records a figure of 24 per cent who could speak 'not very well' and a total of 51 per cent who could speak to some extent in its 2008 publication, the Research New Zealand report on the 2006 survey states that 26 per cent could speak te reo 'not very well' and 53 per cent could speak to some extent: Research New Zealand, *2006 Survey on the Health of the Māori Language*, p 28.
213. Document R33(j), p 21
214. We acknowledge that the MLS states that the 'key domains' were 'identified by Māori': doc R33(j), p 21.
215. Ibid, p 23
216. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 51
217. Karen Sewell, under questioning by the presiding officer, 21st hearing, 30 January 2007 (transcript 4.1.21(a), pp 33–34)
218. Document R33(j), p 25
219. Ibid, p 27
220. Document R33(a), pp 35–36
221. Te Puni Kōkiri, *Ngā Waiaro Atu Ki Te Reo Māori: Attitudes Toward the Māori Language*, summary sheet 002–2010 (Wellington: Te Puni Kōkiri, 2010), p 8
222. Document R33(yyyy), pp 27–28
223. Karen Sewell, under questioning by the presiding officer, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 35)
224. Te Puni Kōkiri, *A Shared Vision*, pp 6, 8
225. Document R35, p 10
226. Document R33(j), p 23
227. Steven (Tipene) Chrisp, under questioning by the presiding officer, 21st hearing, 25 January 2007 (transcript 4.1.21, p 362)
228. This abandonment may also be happening because of a degree of non-acceptance by some Māori of non-Māori learning te reo. The extent of this is, of course, difficult to know.
229. Document R33(yyyy), p 5
230. Ibid, pp 19–20, 22, 27–28
231. Ibid, pp 18–20, 26
232. Ibid, pp 24, 29
233. Ibid, pp 19, 24, 27–28
234. Document R33(j), p 35
235. Document R33(yyyy), p 32
236. Ibid, pp 17–18
237. Ibid, p 20
238. Steven (Tipene) Chrisp, under cross-examination by counsel for Ngāti Porou, 21st hearing, 25 January 2007 (transcript 4.1.21, p 296)
239. Office of the Auditor-General, *Performance Audits from 2007: Follow-up Report* (Wellington: Office of the Auditor-General, 2009), p 29
240. Document G4 (Apirana Mahuika, brief of evidence, 12 April 1999), pp 55–57
241. Document G4, p 55
242. Two examples Mr Walker gave were tōkena for socks (from 'stockings') and neketai for tie (from 'necktie'): Piripi Walker, under cross-examination by Crown counsel, 17th hearing, 8 September 2006 (transcript 4.1.17, p 437). Similarly, Apirana Mahuika described transliterations such as the Māori days of the week as 'Taonga Tuku Iho . . . made by our tīpunas'. He strongly objected to the new names for the days of the week, a lot of which, he said, were in fact taken from Scandinavian mythology. See Apirana Mahuika, under questioning by Crown counsel and the presiding officer, 16th hearing, 30 August 2006 (transcript 4.1.16, pp 354–355).
243. Document R33, pp 18–19
244. Te Taura Whiri, *Statement of Intent, 2008–09* (Wellington: Te Taura Whiri, 30 June 2008), p 6
245. Te Taura Whiri, 'State of Māori Language Still Perilous', press release, 23 July 2009
246. May, Hill, and Tiakiwai, *Bilingual/Immersion Education*, p 2
247. Te Taura Whiri, *Annual Report of the Māori Language Commission for the Year Ended 30 June 2002* (Wellington: Te Taura Whiri, 2002), p 6
248. Steven (Tipene) Chrisp, under cross-examination by counsel for Ngāti Porou and Te Tai Tokerau, 21st hearing, 25 January 2007 (transcript 4.1.21, pp 299, 312, 319)
249. Document R29, p 15
250. Karen Sewell, under questioning by the presiding officer, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 27)
251. Margaret Calder, under cross-examination by counsel for Ngāti Koata, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 55)
252. The OAG report tends to suggest that there have been limits to the impact of that influence. It notes that Te Puni Kōkiri has few

- 'mechanisms to encourage the other lead agencies [aside from the agencies it monitors] to complete their Strategy planning': doc R33 (yyyy), p 26.
253. Steven (Tipene) Chrisp, under questioning by the presiding officer, 21st hearing, 25 January 2007 (transcript 4.1.21, p 358)
254. Steven (Tipene) Chrisp, under cross-examination by counsel for Ngāti Porou, 21st hearing, 25 January 2007 (transcript 4.1.21, p 297)
255. Given the frequent references to limited resources, this seems an unfortunate omission. It could not have been due to tight economic conditions: Mr Chrisp agreed with counsel for the Te Tai Tokerau claimants in January 2007 that the country's economic indicators were 'very good': Steven (Tipene) Chrisp, under cross-examination by counsel for Te Tai Tokerau, 21st hearing, 25 January 2007 (transcript 4.1.21, p 319). The OAG confirmed in 2007 that there was a 'lack of designated resources for planning and implementation, and conflicting priorities within agencies': doc R33(yyyy), p 7. It is reasonably clear that Te Puni Kōkiri needed more resources.
256. Document R33(j), p 29
257. Document R33(a), pp 27, 28–29
258. Te Puni Kōkiri, *Te Oranga o te Reo Māori 2006*, pp 28, 31
259. Document R33(vvvv), p 7
260. Timoti Kāretu and Jeffrey Waite, 'Te Reo Māori', *New Zealand Official Yearbook, 1988–1989* (Wellington: Department of Statistics, 1988), p 226
261. Benton and Benton, *Revitalizing the Māori Language*, p 94
262. May, Hill, and Tiakiwai, *Bilingual/Immersion Education*, p 129
263. In his master of social science thesis, Robert McGowan remarks that academics and tino rangatiratanga campaigners often portray rongoā as 'one of the *taonga* taken from them by the *Pakeha*, but do not know enough to be aware that *rongoa Maori* is very much alive and available to them if only they were ready to make themselves available to the world in which it belongs': doc K11 (Robert McGowan, 'The Contemporary Use of Rongoa Maori, Traditional Maori Medicine' (masters thesis, University of Waikato, 2000)), p 117.
264. Steven (Tipene) Chrisp, under questioning by the presiding officer, 21st hearing, 25 January 2007 (transcript 4.1.21, p 362)
265. Te Puni Kōkiri, *Te Oranga o te Reo Māori 2006*, p 35
266. Te Taura Whiri, 'State of Māori Language Still Perilous', press release, 23 July 2009
267. Te Taura Whiri, *Briefing for the Minister of Māori Affairs* (Wellington: Te Taura Whiri, 2008), p 2
268. New Zealand Government, 'Set of Maori Language Research Reports Now Complete', press release, 31 July 2009
269. Pita Sharples, 'Review of Maori Language Strategy and Sector', press release, 29 July 2010
270. Pita Sharples, 'Speech to Iwi and Community Stakeholders' (speech announcing ministerial review of *Māori Language Strategy* and sector, Waikato, 29 July 2010)
271. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 48
272. We are aware, however, that Māori Language Commissioner Patu Hohepa made the following remarks on page 1 of Te Taura Whiri, *Annual Report of the Māori Language Commission for the Year Ended 30 June 2000* (Wellington: Te Taura Whiri, 2000):
- Burning issues continue to bedevil our work. Such an issue is the taking of some Māori language services and products from the Commission into your Ministry. They were better left to the Commission. Even though this Commission was created as the guardian and the activist for language promotion and maintenance, how could these be done if control over important aspects such as research and audit as well as possible funding have been moved to your Ministry? . . . That the Commission has continued to be at the mercy of non-Māori speaking analysts, linguists and decision-makers in your Ministry continues to cause repercussions in the Commission.
273. The board has also had the power to request local education authorities to prepare Welsh Language Education Schemes, showing how Welsh-medium education will be provided in their areas. The board approves or rejects such schemes: see Welsh Language Board, 'History of the Board', <http://www.byig-wlb.org.uk/English/about/Pages/HistoryoftheBoard.aspx> (accessed 18 September 2010).
274. Office of the Commissioner of Official Languages, 'About Us', [http://www.ocol-clo.gc.ca/html/roles\\_e.php](http://www.ocol-clo.gc.ca/html/roles_e.php) (accessed 18 September 2010)
275. Document R33(d) (Te Taura Whiri, *A Guide for Iwi and Hapū to the Preparation of Long-Term Māori Language Development Plans* (Wellington: Te Taura Whiri, 2000))
276. Statistics New Zealand, 'Tables, National Ethnic Population Projections: 2006 (Base) – 2026 Update', tbls 1A, 1M, 1E, 1P

#### Sidebar notes

**Page 388:** Document P29(a) (Apirana Mahuika, second corrected brief of evidence, 17 August 2006), p 8; Apirana Mahuika, under questioning by Crown counsel and presiding officer, 16th hearing, 30 August 2006 (transcript 4.1.16, p 352)

**Table notes**

**Table 5.1:** Data from Ministry of Education, 'Education Counts', <http://www.educationcounts.govt.nz>

**Table 5.2:** Data from Ministry of Education, 'Education Counts', <http://www.educationcounts.govt.nz>

**Table 5.3:** Data from Ministry of Education, 'Education Counts', <http://www.educationcounts.govt.nz>

**Table 5.4:** Data from Ministry of Education, 'Education Counts', <http://www.educationcounts.govt.nz>

**Table 5.5:** Data from Ministry of Education, *Monitoring Teacher Supply: Survey of Staffing in New Zealand Schools at the Beginning of the [1997-2009] School Year* (Wellington: Research Division, Ministry of Education, 1997–2009)

**Table 5.6:** Data from AGB McNair, *Survey of Demand for Bilingual and Immersion Education in Maori* (Wellington: Ministry of Education, March 1992), pp 70, 82, and MRL Research, *Maori and Pacific Island Language Demand for Educational Services: Overview* (Wellington: Ministry of Education, November 1995), pp 24, 29, 43

**Table 5.7:** Data from Ministry of Education, 'Education Counts', <http://www.educationcounts.govt.nz> (accessed 2 February 2010)

**Table 5.8:** Data from Statistics New Zealand, *Maori (Census 96) 1996 – Reference Report* (Wellington: Statistics New Zealand, 1997), tbls 4, 17; Statistics New Zealand, '2001 Census of Population and Dwellings: Māori Tables', <http://www.stats.govt.nz> (accessed 2 February 2010), tbls 3(a), 13(a); Statistics New Zealand, '2006 Census Data: Quickstats about Māori – Tables', <http://www.stats.govt.nz> (accessed 2 February 2010), tbl 9

**Table 5.10:** Data from Statistics New Zealand, '2006 Census Data: Quickstats about Māori – Tables', <http://www.stats.govt.nz> (accessed 2 February 2010), tbl 9

**Whakataukī notes**

**Page 384:** Wade Davis, *Light at the Edge of the World: A Journey Through the Realm of Vanishing Cultures* (Vancouver: Douglas and McIntyre, 2001), p 13

**Page 385:** Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 4th ed (Wellington: GP Publications, 1996), p 34

*The rich legacy from the past is held by us on trust for future generations. It must be nurtured, not lost.*

—House of Commons Culture, Media, and Sport Committee



WHEN THE CROWN CONTROLS MĀTAURANGA MĀORI

6

*Ko te manu kai miro, nōna te ngāhere,  
ko te manu kai mātauranga, nōna te ao.*

The bird that eats miro inherits the forest,  
but the bird that eats traditional  
knowledge inherits the world.



## WHEN THE CROWN CONTROLS MĀTAURANGA MĀORI

### 6.1 INTRODUCTION

Mātauranga Māori is at the heart of the Wai 262 claim. Every Crown agency that appeared in our inquiry, and most of those that did not, deals with mātauranga to some extent. For most agencies, however, it is incidental to what they do. The Ministry of Health's engagement with mātauranga rongoā, for example, is only a small component of its work across a broad range of modern health issues. Likewise, while the Department of Conservation operates the Mātauranga Kura Taiao Fund (aimed at ensuring the preservation of mātauranga Māori as it relates to biodiversity management – see section 4.5.5), its principal engagement with Māori is over day-to-day operational matters affecting the conservation estate.

But there are some Crown agencies for which mātauranga Māori is very much core business. Working in education, the arts, culture, heritage, broadcasting,<sup>1</sup> science, and archives and libraries, these agencies engage with mātauranga Māori in a variety of ways. Some are its custodians, some its owners; others fund it, while others again are responsible for transmitting it. As such the Crown is practically in the seat of kaitiaki. For instance, today Māori children often learn about their culture in schools rather than at their koro's knee. Documents in archives and libraries may be the most complete sources of particular knowledge. The State often provides the key financial support for the creation of taonga works. All of this places particular obligations on the Crown to protect both the mātauranga itself as well as the interests of kaitiaki in it.

While there are many differences between the broad group of agencies we have described, we examine them together in this chapter because it allows us to see their commonalities and connections. The chapter is separated into five principal sections.

The first section (section 6.2) deals with Crown policies concerning Māori artefacts or taonga tūturu (also known as moveable cultural heritage). Many such items are held by the Museum of New Zealand Te Papa Tongarewa (Te Papa); others are unearthed from time to time or found in swamps, bush, on beaches, and elsewhere. The section therefore is divided into two parts. One focuses on the work of Te Papa; the other on the regime in place for dealing with newly found items in the Protected Objects Act 1975, which is administered by the Ministry for Culture and Heritage. Claimants here were concerned about the degree of control they say kaitiaki should have over objects held either by the Crown – whether as permanent museum holdings or in temporary custody after being found – or in private collections. In some cases, they were also concerned that items were wrongly acquired and should be returned to kaitiaki.

The second section (section 6.3) addresses the Government's arrangements both for funding the creation and presentation of taonga works and broadcasting Māori culture.

◀ Te Waka Huia promoting New Zealand's presence at the Venice Biennale in 2009. Our national image in the international arena and at home is greatly strengthened by kapa haka performances like these.

With respect to arts and culture funding, it focuses principally on the policies of Creative New Zealand, while also touching on Lottery Grants Board funding and the work of the Ministry for Culture and Heritage. With respect to broadcasting, it addresses Television New Zealand (TVNZ) – referred to by TVNZ’s own witness as ‘New Zealand’s largest cultural institution’<sup>2</sup> and which has played a key role in bringing New Zealand arts and culture into the nation’s living rooms. Here, therefore, the claimants were concerned with the extent to which their mātauranga is supported and depicted in public television. Although not raised formally by the claimants, we also refer, for completeness, to the role of Radio New Zealand, which has had similar public broadcast functions to TVNZ.

The third section (section 6.4) concerns the mātauranga held by archival institutions such as Archives New Zealand, the National Library, TVNZ, and Radio New Zealand (the latter two with respect to their film, television, and sound archives). An example of this mātauranga that concerned the claimants was the whakapapa contained within Native Land Court minutes – and, for that matter, the evidence submitted to this Tribunal, which will eventually be archived. Other material containing mātauranga includes photographic images, film reels, departmental files, and so on. For the claimants, it was inappropriate for the mātauranga held in these repositories to be generally open to anyone to access or use without requirement for kaitiaki consent.

The fourth section (section 6.5) deals with Crown regulation and control of the teaching of mātauranga in the education system, as well as the extent to which mātauranga Māori is accepted as a distinct system of learning itself. The section thus focuses principally upon the work of the New Zealand Qualifications Authority (NZQA) as well as the policies of the lead agency in the sector, the Ministry of Education. The issue for the claimants was the extent to which they are able to control the focus and delivery of education to their children (and adults, at tertiary level) as well as the degree to which the system of formal education helps to keep their mātauranga alive.

The fifth section (section 6.6) considers the place of mātauranga Māori in the Government’s funding policies

for research, science, and technology. It therefore concentrates mainly on the policy work of the Ministry of Research, Science and Technology (MORST). The claimants raised questions about the provision for mātauranga Māori-focused research in the Crown’s substantial expenditure on research, science, and technology, and said that the importance of their mātauranga had not been recognised by the science system. We note that, at the time of writing, legislation had passed replacing MORST with a new Ministry of Science and Innovation. We have not been able to consider these changes. While some details may have changed, however, the principles we enunciate will remain the same.

As can be seen, therefore, claimants were often concerned about the sufficiency of financial support for maintaining their mātauranga; at other times, their focus was on the control or ownership of the products of mātauranga. The claimants usually sought a greater – sometimes even an exclusive – say over the State’s provision for mātauranga Māori. They refused to accept the role of consultees, without real power, over the maintenance and transmission of their culture. The Crown contended that it was making great efforts to support mātauranga Māori, albeit within a context of financial constraints and the countervailing effect of other valid interests.

In each of these five sections, we begin by describing our understanding of the current policy or legislative framework that governs the particular sector, including the nature of any specific provisions that are targeted at mātauranga Māori. We then relate the key points raised by both the claimants and the Crown, and conclude with our own Treaty-based analysis and comments on the appropriate way forward.

Finally (in section 6.7) we deal with the special situation of Te Puni Kōkiri. When the Crown presented its case in late 2006 and early 2007, Te Puni Kōkiri did not give evidence beyond matters concerning te reo Māori. It is clear, however, that both its policy work and external funding are targeted at mātauranga Māori in numerous ways. We therefore decided in December 2008 to ask Te Puni Kōkiri for further information, in particular about the Māori Potential Fund it administers. This is a pool of some \$23 million annually, disbursed to the community



according to the themes of Te Puni Kōkiri's Māori Potential Approach which includes goals around culture and knowledge.

Superficially, at least, there is considerable overlap between this chapter and chapter 1, which deals with taonga works and mātauranga Māori within the context of intellectual property law. But while the focus of that chapter is on the fit between the obligations of kaitiaki of taonga works and mātauranga Māori and the IP system, here the focus is on the Crown's rights and obligations in its own role as owner and transmitter of mātauranga. As we have noted in chapter one, effectively the two chapters address two sides of the same story – who should create, protect, own, and transmit mātauranga? How should this happen, and in whose interests?

We acknowledge that the matters covered in this chapter are not only complex in detail and contemporary in focus, but were not always the subject of extensive evidence before us. We have endeavoured, therefore, to present as thorough a picture as possible in the circumstances, in part by keeping abreast of the various policy and funding changes that have occurred since our hearings closed in 2007. There will doubtless be omissions in what we present, but we are confident we have a sufficient understanding of the current law and policy to make our conclusions and findings.

## 6.2 TAONGA TŪTURU

We deal here with taonga tūturu – otherwise known as artefacts, moveable cultural heritage, or cultural objects – in two quite distinct spheres. The first is taonga held by the Crown in the national museum, Te Papa. The second is the Crown's statutory regime for addressing ownership of cultural objects that are found randomly from time to time, usually during archaeological digs or earth-moving and construction. While these matters are dealt with by the Crown under quite distinct policies and settings, we group them together for the simple reason that, ultimately, the Treaty interest in them is the same.

### 6.2.1 Current legislation, policies, and funding

#### (1) Te Papa

We begin by looking at Māori cultural objects in the possession of Te Papa. For a start, it is necessary to introduce the museum itself, which holds some 40,000 Māori cultural items.<sup>3</sup>

Te Papa was established by the Museum of New Zealand Te Papa Tongarewa Act 1992. It is the only museum in New Zealand that is a Crown entity, as regional museums are accountable to trust boards or local authorities. In accordance with the Crown Entities Act 2004, it is run by a board. Members of the board are appointed by the Minister for Culture and Heritage, but the Minister may not direct the board on 'cultural matters'. The board has a broad range of responsibilities with respect to the running of the museum. In fulfilling these functions, the board is, inter alia, to:

Endeavour to ensure both that the Museum expresses and recognises the mana and significance of Maori, European, and other major traditions and cultural heritages, and that the Museum provides the means for every such culture to contribute effectively to the Museum as a statement of New Zealand's identity.<sup>4</sup>

The board comprises six to eight members, whom the Minister is to appoint on the basis of their 'knowledge and experience of, and commitment to, the functions of the Board, and the specific activities of the Museum'.<sup>5</sup> There is no stipulation for Māori representation on the board, and nor does the Act mention the Treaty of Waitangi or its principles.

Te Papa's budget is partly derived via parliamentary appropriation through Vote: Arts, Culture and Heritage. In 2009/10 this amount was \$23.6 million. This represented around half of Te Papa's total operating revenue, the rest being gained through commercial activities, fundraising, and other sources.<sup>6</sup>

Te Papa's *Concept for the Museum of New Zealand Te Papa Tongarewa* sets out a series of principles and goals for fulfilling the museum's legislative aims. The *Concept* was developed in 1989 and extended in 1991. Notwithstanding the lack of statutory requirement for



The Museum of New Zealand Te Papa Tongarewa. Te Papa holds the world's largest collection of taonga Māori artefacts.

Māori board representation, the *Concept* states that Te Papa's board will include 'effective Maori representation'. The *Concept* also states that: 'In all that it does the Museum of New Zealand Te Papa Tongarewa will honour the principles of Te Tiriti-o-Waitangi – the Treaty of Waitangi.'

The *Concept* also makes reference to:

- ▶ the need to recognise the 'bicultural nature' of New Zealand society;
- ▶ the aim to have Māori play a key role in determining and shaping how Māori treasures and culture are presented; and
- ▶ the intention to use te reo Māori in the museum where appropriate, both spoken and written.<sup>7</sup>

In keeping with the principles expressed in the *Concept*, in 1989 and 1990 Te Papa staff consulted with iwi and key stakeholders on a policy that would lay 'the foundation for Māori participation and involvement in Te Papa'. This Mana Taonga policy was endorsed by the museum's board in 1992. It recognises the cultural connections of Māori to their taonga through both 'the whakapapa in respect of the traditions and histories that taonga represent, as well

as the whakapapa of the creator of the taonga'. The policy states:

The rights of mana taonga cannot be erased and continue to exist for those taonga held within Te Papa's care. In a practical sense, mana taonga provides iwi and communities with the right to define how taonga within Te Papa should be cared for and managed in accordance with their tikanga or custom.<sup>8</sup>

Te Papa's board adopted a 'Bicultural Policy' in 1994 and subsequently reviewed it in 2002. This policy is designed to give greater detail about how the museum implements the bicultural approach set out in its *Concept*. The policy includes four guiding principles, summarised in the Te Papa witnesses' evidence as follows:

- ▶ *Te Papa in the Community* – to develop and maintain relationships with tangata whenua and tangata tiriti communities to tell our nation's stories, and to be a leader in bicultural development, including providing services externally to community stakeholders;
- ▶ *Te Papa's Collections* – to encourage communities in

the care and management of their cultural heritage, and that all activities are underpinned by scholarship and mātauranga Māori;

- ▶ *Organisational Capacity* – to enable the board’s decision-making to be inclusive of tangata whenua and tangata tiriti views, to provide bicultural leadership through the partnership between the kaihautū and chief executive, and [to] develop Te Papa’s internal staff bicultural capability, including through bicultural process, practice and training; and
- ▶ *The Te Papa Experience* – to ensure the Te Papa experience reflects cultural identities of tangata whenua and tangata tiriti.<sup>9</sup>

Te Papa also has a set of corporate principles and goals that, once again, stress biculturalism and mana taonga.<sup>10</sup>

In terms of the practical application of Te Papa’s bicultural principles, the museum has a position of kaihautū that sits alongside the chief executive. It has a Roopu Whakamana Māori team that advises the kaihautū and chief executive on tikanga Māori, relationships with

iwi, and biculturalism. It also has a Karanga Aotearoa Repatriation team that leads the work on repatriating kōiwi tangata from overseas institutions. The museum holds regular iwi exhibitions that run for two and a half years, and supports other museums around the country in their care and presentation of their collections – including taonga – through its ‘National Services Te Paerangi’ function, which the board adopted in 1996.<sup>11</sup>

### (2) Protected objects

If Te Papa represents the Crown’s ownership of Māori artefacts already in its possession, the Protected Objects Act 1975, by contrast, represents the Crown’s assumption of interim ownership over such items that are newly found. From 1976 to 2008, 6,020 items were officially notified as found, with numbers fluctuating between a high of 945 in 1978 and a low of 18 in 1994.<sup>12</sup>

The Act was passed in November 2006 as an amendment to the Antiquities Act 1975 rather than an entirely new piece of legislation, and hence carries the date of



Items such as Te Takinga Pātaka and the wharenui Te Hau ki Tūranga show the great value and variety of taonga held by Te Papa.

1975. The Antiquities Act itself had been the successor to a series of enactments during the twentieth century that had been aimed at restricting the export of Māori artefacts and other relics. These were, principally, the Maori Antiquities Acts of 1901 and 1908 and the Historic Articles Act 1962.<sup>13</sup>

The Antiquities Act 1975 ended the application of the common law doctrine of finders law, under which newly found heritage items were vested in the finder. It declared that any items found after 1 April 1976 were deemed to be prima facie the property of the Crown. It also:

- ▶ provided for rightful possession of Māori artefacts to be claimed by application to the Māori Land Court;
- ▶ required dealers trading in items found before 1 April 1976 to be registered;
- ▶ required anyone wishing to buy Māori artefacts to register as a collector; and
- ▶ gave the Secretary for Internal Affairs (later the chief executive of the Ministry for Culture and Heritage) the right to refuse permission to export any antiquity from New Zealand.<sup>14</sup>

There had previously been export restrictions in place but, in passing the 1975 Act, the Government had responded to the perceived need to make these provisions stronger.<sup>15</sup>

The 2006 amendment to the 1975 Act was intended to address more recently identified shortcomings in the legislation. To inform the review of the 1975 Act, a Māori Reference Group was established in around 2000 'to provide advice (and support) on policy proposals regarding the development of the [protected objects legislation] and an associated iwi consultation process.'<sup>16</sup> Key features of the new regime include:

- ▶ A change from use of the term 'artifact' to 'taonga tūturu', which is defined as an object over 50 years old that relates to Māori culture, history, or society and was, or appears to have been, manufactured or modified in New Zealand by Māori, brought into New Zealand by Māori, or used by Māori. Excluded from this definition was the 'waste and by-products' of the manufacture of taonga tūturu. By contrast to the new 50-year rule, the Antiquities Act had defined artefacts as those known to have been in use prior to 1902.<sup>17</sup>
- ▶ A new process for establishing ownership of newly

found taonga tūturu, with the chief executive of the Ministry for Culture and Heritage authorised to determine custody of any item and seek an order as to ownership from the registrar of the Māori Land Court. Where ownership is disputed, parties may continue to dispute ownership in the Māori Land Court, and the chief executive may 'facilitate' such applications on request.

- ▶ The creation of new categories of items to which export restrictions apply.
- ▶ Greatly increased fines for breaches of the Act.<sup>18</sup>

Like the Antiquities Act, the Protected Objects Act has no retrospective effect. A taonga found before the 2006 legislation that was more than 50 years old but made after 1901 did not meet the definition of 'artifact' under the 1975 legislation. The passage of the 2006 amendment, however, did not alter its status, even though it was now the required 50 years old. Had the same item not been found until 2007, though, it would indeed have acquired the status of a 'taonga tūturu'. The crucial determinant, therefore, is the terms of the legislation in force at the time of an item's discovery.<sup>19</sup>

As a matter of operational policy, the chief executive first consults tangata whenua and the relevant local museum before making a determination as to custody.<sup>20</sup> The new legislation carries forward the requirement of the Antiquities Act that people must first become registered collectors before they can be granted custody. This applies, for example, to individual Māori, marae committees, and tribal rūnanga.

The Antiquities Act provided no effective means for the Crown to seek the return of illegally exported items from overseas. Therefore, a range of provisions were inserted into the Protected Objects Act (under sections 10A to 10C) that enabled New Zealand to accede to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995). In this way New Zealand demonstrated to other countries that it was committed to halting the international illicit trade in heritage objects, and thus gained reciprocal protection overseas for stolen or illegally exported New Zealand heritage items.<sup>21</sup>



Archaeological dig, Cook's Cove, Tolaga Bay, November 2007. The process for determining ownership of items found during such excavations is set out in the Protected Objects Act.

### 6.2.2 The position of the claimants

#### (1) *Te Papa and other museums*

Counsel for Ngāti Porou claimed the iwi was disadvantaged by the fact that the Government focuses on the repatriation of kōiwi tangata and has no specific policy to support repatriation for other taonga. The iwi has very few, if any, kōiwi tangata held in overseas institutions, although they have many taonga tūturu or artefacts overseas.<sup>22</sup> A notable example is the Ruatepupuke II whare from Tokomaru Bay, which dates from 1881 and is held by the Field Museum in Chicago.

Ngāti Porou rūnanga chair Dr Apirana Mahuika called for the return to Ngāti Porou guardianship and control of all the iwi's taonga tūturu, wherever held. He feared that, as long as taonga remained in Crown ownership, it was possible they could be sold: he also speculated that museums might be privatised. Dr Mahuika was also critical of the lack of any legislative requirement for Te Papa to act in accordance with the Treaty of Waitangi.<sup>23</sup> In his 2006 updating evidence, he said he understood the traditional educative role of museums but felt 'these days

[are] numbered' as iwi demands for repatriation grow: 'Repatriation is about our people and us. It is about informing, educating, and introducing our own taonga to us and our uri.'<sup>24</sup>

In giving expert evidence on behalf of Ngāti Porou in 2002, Professor Hirini Mead contended that 'displaced taonga' should be repatriated and that the Government should help Māori to recover their taonga from overseas institutions. However, unlike some claimant witnesses, he did not consider it necessary for *all* taonga to be repatriated; the main priority was unique 'heritage pieces' (such as a unique flax sail held in the British Museum) without which Māori cannot keep or revive their arts. Professor Mead said that Britain had a moral duty to return such items and its lack of action could not be excused by the need to change British law first. He noted the 1993 Mātaatua Declaration (arising from an indigenous peoples' conference in Whakatāne) that called for museums to provide an inventory of their indigenous cultural objects and to offer them back to their traditional owners. Finally, Professor Mead called for significant research to



Rededication of Ruatēpupuke II, a Ngāti Porou wharenui held by the Field Museum in Chicago, 1986. This meeting house was repaired and refurbished in a joint project between Ngāti Porou and the Field Museum, with 20 Māori delegates primarily from Ngāti Porou attending the reopening of the house to the public. Ngāti Porou are seeking the repatriation of their taonga held in overseas museums.

‘uncover the whakapapa and korero of each taonga’. While he acknowledged that museums and other institutions would continue to play a role in housing and caring for taonga, he said that ‘Māori must drive this bus rather than be merely passengers.’<sup>25</sup>

Another Ngāti Porou witness, Rei Kohere, had made an inventory of more than 700 Ngāti Porou taonga held by museums around New Zealand. He said the exercise had helped build better relations with museums, and brought to light various taonga thought lost. But it had also revealed that many of the most important Ngāti Porou taonga are overseas. He said that Ngāti Porou’s goal was to repatriate its taonga, and the creation of ‘a tribal

whare taonga within the Ngati Porou community’ was under consideration. He said that storing taonga at various Ngāti Porou marae was another option, but acknowledged this brought storage and care challenges.<sup>26</sup>

Mr Kohere called for more research into the provenance of many items held by museums – a significant exercise, but warranted if it led to the creation of a comprehensive Ngāti Porou taonga database.<sup>27</sup>

Counsel for Ngāti Kahungunu argued that there was nothing in the legislation governing the Auckland Museum or Te Papa that provided for the Treaty-based involvement of Māori in the governance of these institutions. While both institutions held many Ngāti

Kahungunu taonga, the iwi was unable to exercise kaitiakitanga or rangatiratanga over them.<sup>28</sup>

Counsel's submissions will have stemmed in part from the testimony of Mere Whaanga, who gave evidence in 2001 about her time working for Auckland Museum from 1995 to 1999. She accused the museum of exhibiting 'entrenched institutional racism' and being 'monocultural' and 'a last bastion of colonialism'. This was in spite of it possessing 'arguably . . . the largest and most significant collection of taonga in the world.' She was particularly critical of its provision for only one Māori member out of ten at board level, while Te Papa had no statutory requirement for Māori board membership at all. 'Without adequate representation at governance level', she said, 'Māori are prevented from proper participation in the operational levels of the museums. This means that the exercise of rangatiratanga and kaitiakitanga in regard to all taonga is at the whim of non-Māori.'<sup>29</sup>

In updating evidence, Ngahiwi Tomoana noted that Ngāti Kahungunu was planning 'to establish a Kahungunu Culture Centre to collect and exhibit taonga of the iwi from the past and present.'<sup>30</sup>

Counsel for Ngāti Koata was critical of the lack of reference to Treaty principles in Te Papa's establishment Act, as well as the absence of any statutory requirement for Māori representation on the museum's board. Counsel asserted that Māori suffer prejudice through the Crown's sole appointment of board members. Counsel also criticised the lack of priority accorded to the repatriation of taonga domestically as well as the museum's legal ownership of taonga in its collections. While noting various references to Treaty principles and key Māori concepts in policy documents (including Mana Taonga), counsel described the museum as 'Talk[ing] about biculturalism and partnership but [having] no tangible commitment to it'. The museum's engagement on Treaty rights was 'only at [the] whim of staff'. Counsel was also critical of the Ministry for Culture and Heritage's lack of a domestic taonga repatriation policy.<sup>31</sup>

By contrast, counsel for the Te Tai Tokerau claimants called Te Papa's Mana Taonga policy an example of a 'strong policy which reflects that the mana of the taonga lies with kaitiaki'. Although the Crown's legal ownership of the taonga held by the museum was inherently contrary



Māori flax sail held in the British Museum. Appearing for the claimants, Professor Hirini Mead asked: 'Where do these taonga rest the remainder of the time? Who looks after them? Who weeps over them? Why have they not been returned home? On what basis can the British Museum claim the moral right to keep them in London?'

to the Treaty, counsel nevertheless concluded that ‘within the inadequacy of the legislation and policy of the Crown, Te Papa has a code of ethics which recognises the importance of mana, kaitiakitanga, matauranga and tikanga.’<sup>32</sup> Counsel added that:

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 people themselves, and their environment.<sup>33</sup>

## (2) Protected objects

The claimants’ concerns about the current legislative regime were wide-ranging. Counsel for Ngāti Kahungunu said that, before 1975, the antiquities legislation was wholly inadequate, in that it did not prevent the export of taonga, it allowed the finders of taonga to keep them (as per the common law), the Crown acquired taonga from what was deemed prohibited activity and did not return them to customary owners, and there was no control of fossicking or grave-robbing. Under the new 1975 legislation, he continued, there was little practical improvement for Māori. For example, there was no mechanism to address Māori claims to taonga wrongly taken before 1 April 1976 and any taonga found after that date were deemed to be prima facie the property of the Crown, subject to a Māori Land Court decision as to the traditional ownership. The Crown could decide who had custody of newly found taonga without any need to consult iwi.

The 2006 legislation, counsel argued, still does not remedy Māori concerns or provide adequate protection of taonga. In sum, it carries forward the prima facie Crown ownership of newly found taonga (pending the resolution of any claims to ownership), there is still no provision for Māori to claim ownership of taonga found before 1976 (he said the bulk of Ngāti Kahungunu taonga were found before that date and are currently deposited in museums), it has flawed procedures for determining ownership, and

it has no impact on existing and inadequate museum legislation. Furthermore, said counsel, the fact that the Crown has now signed up to international agreements on the repatriation of illegally acquired antiquities is wholly negated by the length of time the Crown took to take this step.<sup>34</sup>

Counsel argued that the Crown should have made the 1975 legislation retrospective or done so in 2006 for the pre-1976 period. Ngāti Kahungunu taonga are today spread around the world in museum collections and the Crown has done nothing to protect them.<sup>35</sup>

The Te Tai Tokerau claimants largely concurred with these points. Counsel submitted that interim ownership of newly discovered taonga should be awarded to the tangata whenua of the area where the object is found.<sup>36</sup> Māori expertise was also needed in the recording and registering of objects, both in terms of export applications and registration generally. As it stands, said counsel, officials decide whether an object is a taonga tūturu or to whom a taonga belongs rather than these things being decided by Māori under tikanga, and few of the very many taonga found are returned to iwi ownership.

Counsel also contended that the age of an object before it can be classified as a taonga tūturu (50 years) is arbitrary and the blanket non-categorisation of ‘waste and by-products’ of the manufacture of taonga tūturu rules out genuine taonga items such as flints and middens. The Te Tai Tokerau claimants also objected to iwi, hapū, or whānau representatives having to formally register as collectors in order to reacquire lost taonga (such as via auction). Doing so allows the Ministry for Culture and Heritage to inspect their taonga collection at any time. Counsel added that there has been no education or awareness campaign or iwi, hapū, or whānau capacity building that could allow Māori groups to ‘re-connect with their taonga’ via the ‘albeit deficient’ processes in the Act.<sup>37</sup>

Counsel for Ngāti Koata made similar submissions, arguing further that the Ministry did not properly incorporate the feedback of its own Māori Reference Group when reviewing the Antiquities Act 1975. Counsel also noted the lack of reference to the principles of the Treaty in the Protected Objects Act and suggested that the Ministry gains its ‘Māori dimension’ from Te Puni Kōkiri





Auckland War Memorial Museum. While some claimants criticised its lack of practical commitment to honouring the Treaty, the Crown pointed out that the Auckland Museum is run by the local authority and is not subject to the Crown's oversight.

rather than from Māori directly. In sum, said counsel, while the Ministry acknowledges the 'special relationship of Māori to their taonga' it does 'not provide mechanisms with which they can exercise rangatiratanga and kaitiakitanga according to that special relationship'.<sup>38</sup>

Counsel for Ngāti Porou did not comment specifically on the protected objects regime in closing, but did make a submission relevant to the 50-year rule concerning the age at which an object qualifies under that legislation as a 'taonga tūturu'. Counsel explained that whether a particular cultural expression contains or incorporates aspects of mātauranga and is therefore worthy of protection as a taonga depends on whether it embodies the necessary cultural attributes. Thus, he said, a meeting house – 'which is typically named after and represents an ancestor of the community to which it belongs' and, because of this symbolism, 'clearly embodies notions of tapu, mauri, ihi, wehi and mana associated with that community and that community's culture, heritage and identity' – can be a taonga regardless of whether it is carved in 1840 or 2007.<sup>39</sup>

### 6.2.3 The position of the Crown (1) *Te Papa and other museums*

The Crown counsel contended generally that the Crown does not have an obligation to protect kaitiaki relationships with taonga held in museums 'to the extent that kaitiaki has the meaning given to it in the statement of issues'. There, 'Kaitiaki' are said to have a right, amongst other things, to 'regulate' and 'control' taonga works.<sup>40</sup>

Counsel made the point that the circumstances by which museums came to hold taonga vary considerably. In many cases, they have done so quite legitimately – as a result of gift or sale. Moreover, as responsibility for regional museums (including the Auckland War Memorial Museum) sits with local authorities rather than the Crown, regional museums carry no Treaty obligations. However, Te Papa does provide support to iwi in terms of their relationships with regional museums.<sup>41</sup>

Te Papa itself was described by Crown counsel as working diligently to involve iwi in the care and use of the taonga in its collection (as per its Mana Taonga policy). The museum was also open to transferring legal

ownership of taonga as long as the historical circumstances of acquisition had been worked through first. Counsel noted Te Papa's work in repatriating kōiwi tangata from overseas, and acknowledged the practical, legal, and political obstacles to repatriating other overseas-held taonga. However, Te Papa is funded to selectively purchase taonga that appear on the international art market.<sup>42</sup>

New Zealand's difficulties in repatriating taonga from overseas were also mentioned by Jane Kominik, the deputy chief executive of the Ministry for Culture and Heritage. She said that the 2002 'Declaration on the Importance and Value of Universal Museums', signed by many of the leading museums in Europe and the United

States, essentially rejected calls for artefacts to be repatriated from museums to their countries of origin. However, there was currently a supportive environment for the repatriation of kōiwi from the United Kingdom since the passing of the Human Tissue Act there in 2004. Speaking out on the return of other taonga, she said, would potentially jeopardise the sometimes delicate negotiations for the return of kōiwi.<sup>43</sup>

Arapata Hakiwai, Te Papa's Director, Mātauranga Māori, added that the British Museum was particularly concerned about setting any precedents, given the regular calls, for example, for it to return the Elgin Marbles to Greece. Te Taru White, the museum's kaihautū, explained

Boxes containing kōiwi tangata (human remains) of 33 Māori are carried onto Te Papa's Rongomaraeroa Marae during a repatriation pōwhiri in 2009. The return of such remains from overseas museums follows usually delicate negotiations.



that approaching institutions first about kōiwi allowed the museum to ‘make that first point of contact . . . Our pragmatic solution is let’s get in the door first, get what we can [in] the most expedient and gentle way possible and look at where else we can go after that.’<sup>44</sup>

Within New Zealand, however, Mr White was quite willing to acknowledge that ownership of taonga could be returned to iwi where the provenance of the item was known and the acquisition had been wrongful. Speaking of the carved ancestral house Te Hau ki Tūranga, which he described as ‘probably the most significant taonga that we have at Te Papa’, he said:

Clearly the Government stated that they had breached the Treaty in taking it, that’s a public announcement. Te Papa . . . might argue that we own that by matter of law, but by matters of moral and ethical obligations and our own commitments to working with iwi we have already acknowledged that legal ownership at some point will transfer, there’s no issues around that.<sup>45</sup>

While ownership will clearly not be transferred in every case, Mr Hakiwai explained that the museum had a ‘very vibrant active loan programme’ under which taonga are loaned not only to regional museums but also to marae.<sup>46</sup>

## (2) Protected objects

Crown counsel submitted that the Ministry for Culture and Heritage interprets prima facie Crown ownership of newly found Māori artefacts as ‘the Crown acting in a temporary trustee capacity from the time of finding until such time as custody is awarded or actual or traditional ownership is claimed’.<sup>47</sup> Counsel quoted the Waitangi Tribunal’s earlier endorsement of this situation in the Hauraki inquiry: ‘It is important for all to understand that . . . prima facie ownership in the Crown is an important protection. . . . This is an example where the Crown can operate to assist Māori actively, and Māori should make use of this assistance.’<sup>48</sup>

Counsel argued that the introduction of the Protected Objects Act in 2006 had facilitated the return to Māori ownership of newly found artefacts through a new administrative process. Rather than being required to

establish ownership through potentially expensive legal proceedings in the Māori Land Court, claimants now apply for ownership to the chief executive of the Ministry for Culture and Heritage. When personally satisfied of a claim’s validity, the chief executive then applies to the registrar of the Māori Land Court for an ownership order. If the chief executive is not satisfied that any competing claims to ownership have been resolved, the matter is addressed as previously in the land court.<sup>49</sup>

Ms Kominik said that, under the new legislation, the onus was on the chief executive to engage proactively in the process. She also said she was sure the chief executive would not apply for an order from the Māori Land Court unless he was satisfied that the parties had come to agreement. If the contestants wished him to refer matters to the court, he did so. Ms Kominik said she felt the chief executive would undoubtedly take advice on these matters from the Ministry’s Kaihautū Māori.<sup>50</sup>

Ms Kominik also contended that the Māori Reference Group, set up by the kaihautū at the time of the Antiquities Act review, had been influential. The Ministry had assumed the group had thought that the waste and by-products of manufacture should not be taonga, although she acknowledged that some Māori had submitted to the select committee that flints and shavings were indeed taonga. In any event, she said she was quite sure that the Māori Reference Group had a ‘degree of comfort’ about prima facie Crown ownership of newly found taonga, even if it was not their preferred option.<sup>51</sup>

Ms Kominik said that the delay in joining the UNESCO Convention (see section 6.2.1(2)), which was signed in 1970, arose from the need to amend domestic legislation to make the convention’s provisions workable, although she acknowledged that the opportunity to do this could have been taken when the Antiquities Act was passed in 1975.<sup>52</sup>

While Crown counsel did not appear to address the claimants’ complaint about neither the 1975 nor 2006 legislation having retrospectively invalidated the export or private acquisition (through finders law) of Māori artefacts, we can assume that the Crown would oppose any such invalidation. Ms Kominik stated that it would not have been right for the legislation to be retrospective.<sup>53</sup>

Punga (anchor stone) held by Te Papa. This stone is said to have travelled from Rarotonga with the explorer Kupe and was left on the beach in Porirua. Such taonga keep alive the memory of the ancestors who created them.



#### 6.2.4 Analysis

Our appraisal of the current law and policy governing moveable Māori cultural heritage begins with an analysis of the extent of the Māori Treaty interest in protected objects and museum pieces. Is the relationship between cultural objects and kaitiaki of a kind that invokes the protections of the Treaty and, if so, what level of protection is required? We then turn to the existence of other valid interests that might affect the degree of recognition that could reasonably be accorded the Māori interest. Our concluding comments and proposals for reforms seek, wherever possible, to reconcile these competing interests.

##### **(1) Is there a Treaty interest in taonga tūturu?**

The clear answer to the question whether there is a Treaty interest in taonga tūturu is ‘yes’. As we have discussed in chapter one, these taonga are the products of mātauranga Māori and embody key Māori cultural attributes such as mana, tapu, and mauri. Many have been made under tapu, fought over in battle, gifted to consolidate important alliances or relationships, carved to represent ancestors, and so on. In fact, the objects have a whakapapa of

their own that links them to the tribal ancestors who are depicted or who created them. For example, the anchor stone of a legendary waka not only provides vital evidence of how ancestors lived, but also keeps alive the memory of the tupuna who fashioned it. Given this ongoing connection, the Treaty gives the Māori interest in protected objects and museum pieces a high priority. In short, these are not just general heritage items that provide a window onto New Zealanders’ pasts – such as antique bottles or china – but taonga with their own mauri.

That said, the two categories of such taonga give rise to differing Treaty interests. First, are those taonga taken wrongly from Māori or rediscovered after having been lost for some period of time. In such cases iwi maintain a rangatiratanga interest in them, for the items were never willingly alienated. This includes an ongoing interest in objects rediscovered during the period when finders law applied, although by necessity we treat this category separately when considering other valid interests below. Secondly, are objects that were willingly sold or gifted by Māori. As Professor Mead put it, museums often ‘hold a clear and legitimate legal title to the taonga

in their collections.<sup>54</sup> In such cases, because the ongoing cultural and spiritual relationship between iwi and taonga remains, so too does the Treaty interest – although, unlike the interest in items wrongfully taken, it does not give rise to an expectation of the taonga's return. But the ongoing Treaty interest *does* give iwi a moral right to a say in the ongoing care of taonga that were legitimately sold or given. Effectively, Māori are entitled to exercise a kaitiaki relationship with such taonga, instead of the rangatira-tanga relationship that applies where taonga were lost or wrongly taken.

There must also remain a continuing Māori cultural interest in taonga even where willingly sold and held in private collections. After all such objects still hold mātauranga Māori and will still carry some ongoing significance and association for kaitiaki. This level of kaitiaki interest may well be residual – perhaps no more than a right of acknowledgement and continuing association in many cases – yet that interest will be important to kaitiaki. Here, in any event, there are important parallels with the relationship of Māori with land that remains in private ownership. As we described in section 3.3.2, the Resource Management Act acknowledges the kaitiaki relationship Māori have with their ancestral lands and other taonga regardless of whether they are now in private ownership. Not only is this relationship given statutory recognition, it is also something that New Zealanders have come to acknowledge: Māori cultural interests in privately-held land are, to some extent at least, respected by land-owners and decision-making authorities. It would not seem too much of a stretch for the Māori cultural interest in moveable cultural property to be accorded similar recognition in the law and within the community – especially considering that the connection between Māori and objects made by Māori is much more obvious than that between Māori and land. It may be that best practice guidelines – developed, say, by Te Papa – could give private owners advice on how to involve kaitiaki in the care of the taonga they own.

In our view, the Treaty interest in moveable Māori cultural heritage is also greater where the items are vulnerable to loss or damage. Most taonga tūturu in public or private collections today are likely to be well looked after physically (although, of course, it is not that long ago that



Pou by Manos Nathan. Made from the head of a kauri tree, this pou is carved in the tiki or waka kōiwi form. It was the artist's intention to pay homage to that carving tradition as well as show the continuing development of this style. It is a reminder that contemporary artworks can also be taonga.

many items were kept in very poor conditions in the old National Museum on Buckle Street). But whether they are well looked after *spiritually* depends partly on whether they are held in public museums in New Zealand, or held privately or by overseas institutions. In the first case, the quality of spiritual care relies on the knowledge of museum staff, the institution's relationships with iwi, and so on. To the extent that Te Papa's standards are matched by other institutions, this quality of care will be very good. But taonga held privately or by overseas institutions are unlikely to receive the kind of spiritual care their kaitiaki believe is necessary. Again, the development of best practice guidelines by Te Papa might assist, even if they would be difficult to implement in some cases.

We mention two secondary issues at this point. The first is whether the 'waste and by-products' of the manufacture of cultural objects are taonga and thus should be regarded as 'taonga tūturu' under the protected objects legislation. The Ministry for Culture and Heritage's guidelines (which explain how it will apply sections 11 to 16 of the Protected Objects Act in practice) state that waste and by-products (such as shells, flakes, and ovenstones) are not taonga tūturu 'unless there is evidence that the object had a secondary use' – for example as a 'cutting or scrapping [*sic*] instrument'. The guidelines imply that this exclusion stemmed from the Māori Reference Group's preference

for the term 'taonga tūturu' to be used to reflect the 'worth and value of objects handed down and found'.<sup>55</sup>

We note that the guidelines do allow for some flexibility: they state that 'there could be exceptional circumstances in which scientific material [such as the examples of waste and by-products mentioned above] should be notified. The Ministry is happy to discuss these cases with iwi, archaeologists and the museum'.<sup>56</sup> We agree with this case-by-case approach and think it should be emphasised more strongly in the guidelines. Ultimately, decisions about what constitutes taonga tūturu should be made by those culturally competent to do so, rather than by the Ministry for Culture and Heritage alone. We return to this below in our conclusion and recommended reforms.

The second matter is whether items should be 50 years old before they can qualify for protection as 'taonga tūturu' under the Act. We agree with counsel for Ngāti Porou that newly created items can be taonga if they embody the requisite cultural attributes, but with certain reservations. First, the greater the antiquity of an item, the greater its value as a taonga is likely to be. Age does matter. Secondly, it may simply be inappropriate for new taonga to be subject to the same export restrictions or registration requirements as older items. New taonga are not what the Protected Objects Act is intended to deal with. It is also likely that an age limit is the only practical

Shell midden, Waiotahi. This midden is about 500 years old and contains primarily pipi shells, which come from the local estuary. The Ministry for Culture and Heritage generally does not regard shells, flakes, and oven stones as taonga tūturu in the way it applies the Protected Objects Act. This is the kind of case-by-case decision we consider should be made by those culturally competent to do so.



means of operating a protected objects regime. We doubt that an item-by-item assessment is remotely feasible, even where decisions are made by those with the necessary cultural competence.

**(2) Are there other valid interests in regard to taonga tūturu?**

Inevitably, there are other interests that must be weighed against the Treaty interest. In the case of items held by museums, there are several matters to consider. First, even where rights of repatriation due to an unextinguished rangatiratanga interest could be said to exist, museums must have the resources to house items properly. As most iwi do not, taonga could not be repatriated to iwi without adequate arrangements for storage and care. Indeed, many kaitiaki – for whom the preservation of their taonga is of the utmost importance – will not want the ‘burden’ of having items returned to them. While the situation is changing, as yet few iwi are able to build new whare taonga and to employ experts in preservation and care.

Museums mount other arguments against repatriation. It is often claimed, for example – perhaps with some justification – that if institutions had not acquired and kept taonga many would by now have disintegrated. Some museums feel, rightly or wrongly, that this gives them a clear stake in deciding the future of particular items.

Defenders of the British Museum’s ownership of the Elgin Marbles, for example, point to the marbles’ vastly superior condition to other marble monuments left exposed to the Athens pollution. Museums also claim to have traditionally played a vital role in educating visitors about other cultures and creating a greater understanding of the peoples of the world.

In any event, overseas institutions are beyond the Crown’s control (as indeed are all museums in New Zealand other than Te Papa). The Minister for Arts, Culture and Heritage is also prohibited under Te Papa’s governing legislation from directing its board on cultural matters. And whereas the Crown can attempt to exert some pressure on overseas institutions, it must exercise care in doing so. Pushing these museums to return taonga could jeopardise delicate negotiations for the return of kōiwi tangata, and we have no doubt that many iwi would prioritise the return of human remains over cultural artefacts.

With respect to the protected objects regime, some similar considerations apply. Found items are often in a delicate condition, and need urgent restoration or ongoing preservation by qualified staff in optimum conditions. By and large, these are things only the Crown can provide. For example, items retrieved from swamps are sent immediately to the wet wood laboratory at Auckland



The Elgin Marbles, British Museum, London. Controversy still surrounds the removal of these marble reliefs from Athens to London between 1801 and 1805, as well as their ongoing retention in Britain.

University for preservation, and the considerable costs of this are met by the Crown.<sup>57</sup> Prima facie Crown ownership not only removes any potential obstacles to this occurring, but prevents the common law rights of finders or landowners applying to found objects. It also at once takes the sting out of the disputes that occasionally arise amongst iwi, hapū, or whānau as to who should be awarded legal ownership of discovered objects, as it leaves custody with the Crown until the matter can be resolved in the Māori Land Court.

Finally, we note that privately held items lawfully acquired under finders law (or other legal but non-Treaty-compliant means) before 1976 are private property. We acknowledge the ongoing existence of a rangatiratanga interest in these taonga and the strong Māori desire to reacquire them. However, while there is no distinction between these items and illegally acquired taonga in terms of the Treaty, rangatiratanga is not the law. The retrospective invalidation of pre-1975 ownership would be confiscatory and unfair on those who had acted in accordance with the laws of the day, even though, in our view, those laws involved a Treaty breach. This is essentially the same well-established principle that applies to current private ownership of land wrongly acquired from Māori.

### (3) Conclusion and reforms

In considering Government policy and legislation on moveable cultural heritage, three key principles guide our conclusions. The first is that there is an ongoing cultural relationship between kaitiaki and taonga tūturu, regardless of the circumstances of an object's alienation. That seems irrefutable. Just as the Pākehā descendants of the subject of a painted portrait will feel a reverence for and personal connection to the image, even if they do not own it, so is it with Māori and a museum piece such as a chief's patu. It is not just an object or work of art, but a link with the tupuna.

The second is that there is a clear Treaty interest in taonga tūturu. The exact nature of that interest is determined by the circumstances in which taonga were transferred away from iwi. Some were never willingly given or sold – something that can be tested by determining whether all those with a valid say under tikanga consented to the transfer and whether, if there were specific terms of

transfer, the recipient has honoured them. If an object is indeed found to have been wrongfully transferred, the iwi maintains a rangatiratanga interest in it, with all its implications of control and authority. But where the transfer was willing, the iwi has a kaitiaki interest, similar to the Māori interest in privately held land which is recognised by the RMA regime.

The third core principle is that the Treaty interest in moveable cultural heritage may need to be balanced against any other interests. In our view, *no* other interests can override the unextinguished rangatiratanga interest in taonga that have been wrongfully acquired or retained and are now held by our national museum, Te Papa. These must be offered to kaitiaki, and this process seems to be under way. Where wrongfully acquired taonga are held by overseas institutions, we acknowledge the need for careful negotiation that does not jeopardise parallel efforts to repatriate kōiwi tangata; however, the Crown must continue to keep the issue alive, by developing (with Māori) forward-looking policy for the repatriation of taonga too. Where illegally acquired taonga have long been in private hands, the prospects for their return are faint given the statute of limitations.<sup>58</sup>

With respect to the operation of the antiquities legislation, both past and present, two competing interests are relevant: the rights of private property owners, and, in the case of the Protected Objects Act 1975, the well-being of the taonga itself. While Māori may wish to reacquire privately held taonga, we consider it would be wrong to achieve this by retrospectively invalidating pre-1975 acquisitions – even though the legislation under which those acquisitions were made was not Treaty compliant. In these cases, private property interests outweigh the kaitiaki interest. Similarly, in cases where kaitiaki lay claim to newly-found taonga that are fragile and require urgent preservation or repair, the reality is that many iwi and hapū will not have the necessary resources to care for them. In such circumstances, interim Crown ownership is an effective way of ensuring the well-being of the taonga is to the fore.

In considering the adequacy of current Crown policy, we have examined it in light of these core principles. Does the current regime provide for the two levels of Treaty interest – the ongoing kaitiaki relationship in cases of



legitimate alienation, and the unextinguished rangatiratanga interest in cases of discovery or wrongful acquisition and retention? And does it allow for an adequate balance of Treaty and other interests? Once again, we look first at the regime covering taonga already held by the Crown (at Te Papa) and in other museums, and then at the regime for dealing with newly found objects (the Protected Objects Act 1975).

(a) TE PAPA

We believe that the museum's policies more than adequately meet the Crown's obligations (although, as we explain further below, there is plenty of scope for the museum to do more). For a start, the museum has expressed a willingness to hand back wrongly acquired taonga to kaitiaki. This includes what might be considered the centrepiece of the entire national museum, Te Hau ki Tūranga, although given the Crown's apparent lack of legal title we doubt that Te Papa could reasonably take any other stance. The general willingness to make such restitution is commendable, in any event.

With respect to taonga that were legitimately acquired, we consider that Te Papa's policies in this regard have set a benchmark that other public museums in New Zealand should aspire to. The Mana Taonga policy is well regarded for its genuine effort to involve kaitiaki in decision-making over their taonga. Professor Mead argued that kaitiaki have a right to make decisions with museum staff about the storage, handling, display, and preservation of their cultural heritage, and from our understanding, the Mana Taonga policy is largely delivering this. While Te Papa has no single, formal partnership table with Māori, it has a range of provisions that collectively meet the partnership requirements of the Treaty. These include the equal standing of the position of kaihautū alongside the chief executive, the arrangements in place with iwi during their two-and-a-half-year exhibitions, and the terms of Mana Taonga and other policies.

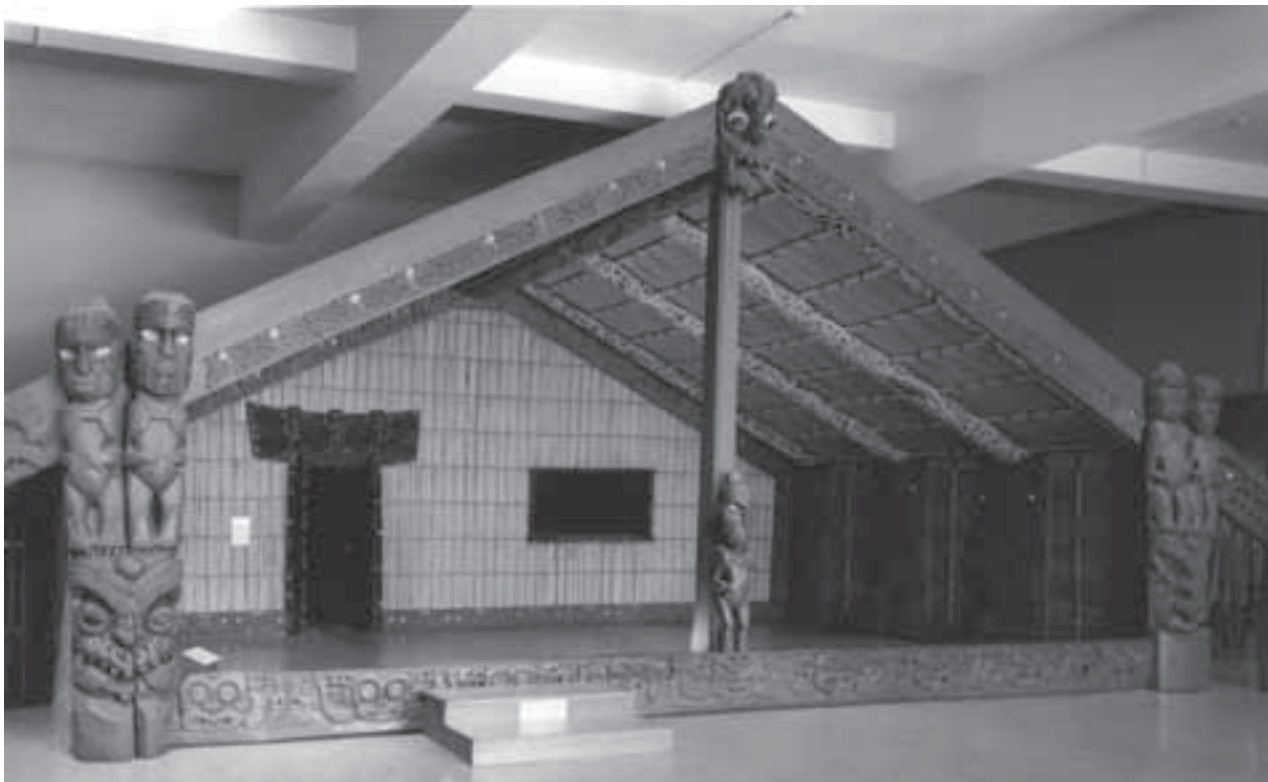
The provision in the Ngāti Porou Deed of Settlement with the Crown initialled on 29 October 2010 for a letter of commitment between Ngāti Porou and Te Papa (as well as with the Department of Internal Affairs – see our conclusion in section 6.4.4(3) below) 'to facilitate the care and management, access and use, and development and

revitalisation of Ngāti Porou taonga'<sup>59</sup> is another expression of partnership.

To this extent, there is no merit in fixating on the lack of reference to Treaty principles in Te Papa's governing legislation, or the lack of a statutory requirement for a Māori presence on its board. As we can see, Te Papa's internal policies emphasise the requirement to act in accordance with the Treaty and commit the museum to ensuring effective Māori representation at board level. As it happens, in early 2010, four of the eight Te Papa board members were Māori – although two were replaced by non-Māori when their terms expired in August 2010. We do not agree with counsel for Ngāti Koata that Te Papa makes no tangible commitment to biculturalism and partnership, and note that counsel for the Te Tai Tokerau claimants recognised the museum's willingness to acknowledge kaitiaki and deal with them in transparency and good faith. Again, as Professor Mead put it, museums over the last twenty years have come a long way in accepting the concept of 'cultural ownership' of taonga.

The model of indigenous participation in museum management developed by Te Papa has made it a world leader, and rightly so. While we suspect that, like other museums, Te Papa is still learning, we commend it for the steps it has taken to date. That said, of course, Te Papa can always take the next step in the evolving indigenous-settler partnership approach to cultural heritage. We recommend that it take this step. We do not have the expertise to prescribe exactly what that step should be; we simply see the need for ongoing evolution. We describe in section 3.5.4(2), the innovative model that has been developed for co-governance of the Waikato River. If co-governance is an effective way of managing environmental taonga in which there are multiple interests, including a kaitiaki interest, perhaps it might also be a suitable model for managing moveable cultural heritage?

In all this, there are undoubtedly lessons for other government departments engaging with mātauranga. Te Papa is partly such a success because of its shared decision-making with Māori and bicultural approach. Given the amount of mātauranga it holds, and the way it presents our unique national identity, we suspect that it could not work in any other way. But it seems to us that Te Papa very quickly grasped this formula for success, and has



Mātaatua whareniui, which was carved by Ngāti Awa and other Mātaatua waka carvers in the 1870s. The Government took this house for exhibition overseas in 1879 but it was not given back to Ngāti Awa, eventually being housed in the Otago Museum. It has at last recently been returned to Ngāti Awa and will become the centrepiece of a new Ngāti Awa cultural centre in Whakatāne.

been to the fore amongst agencies working directly with mātauranga in developing successful collaboration with Māori.

A positive development into the future will be the construction of a number of tribal whare taonga around the country. As noted, Ngāti Kahungunu plans to build one to house its treasures, and Ngāti Awa is well advanced with plans for a gallery in Whakatāne where, presumably, will sit the carved house Mātaatua which was returned to the iwi under its 2002 Treaty settlement with the Crown. As we have mentioned, Te Papa has an active programme of loaning taonga to regional museums and even to marae. With the advent of more tribal museums that have adequate facilities and trained staff, we would hope that this loan programme would gain further momentum. Many

loans could be long-term, and some may even become permanent. That will of course be a matter for Te Papa and the relevant iwi to negotiate.

#### (b) TAONGA HELD IN OVERSEAS COLLECTIONS

With respect to overseas institutions, we agree once more with Professor Mead that there can be little justification for the British Museum to hold in perpetual storage unique cultural artefacts that, if returned to New Zealand, would breathe life into dying or lost Māori arts – and which would themselves be revived by the presence of their kaitiaki. We also agree with Dr Mahuika that the traditional educative role of museums can no longer justify the retention (without permission) of essentially stolen cultural objects. The same applies to claims

that plundered items have received better care than they would have if not stolen: a thief's quality of care is no defence of the theft itself.

That said, we are also well aware of the need to tread carefully given the delicate negotiations taking place over kōiwi tangata, and the sensitivity around setting any precedents given the existence of higher-profile pieces taken from other countries. On a positive note, however, we concur with those who have observed a remarkable shift amongst international museums even in the last decade that has, for example, allowed the kōiwi repatriation programme to succeed. This gives cause for optimism about the repatriation of other taonga into the future. In any case, as the Ministry for Culture and Heritage develops policy around the repatriation of taonga in the coming years, we would expect it to undertake significant consultation with Māori about it.

#### (c) THE PROTECTED OBJECTS REGIME

Private New Zealand collectors of taonga tūturu are in an entirely different set of circumstances, and are covered by the protected objects regime. As we have noted, such collectors are not required to respect Māori cultural interests in their property in the way that land-owners are. They are, however, constrained in what they can do with their objects by the law. They cannot, for example, export them without applying for and obtaining permission, and that permission will not be forthcoming if the item is of such significance that its loss would 'substantially diminish New Zealand's cultural heritage'.<sup>60</sup> This constraint on legitimate private owners of taonga tūturu could be said in part to reflect the Treaty interest arising from the ongoing kaitiaki spiritual and cultural connection.

Notwithstanding this constraint, we recommend that Te Papa develop best practice guidelines for private collectors who are willing to involve kaitiaki in the care of the objects they own. Private property cannot be interfered with, but nor should we pretend that there is no ongoing cultural interest.

There are other areas of the protected objects regime where the Crown's approach is essentially correct. For example, given the existence of valid interests aside from the Treaty interest itself (namely, the rights of private property holders and the well-being of the taonga

themselves), we recommend that prima facie Crown ownership of found items should be retained, as a practical necessity in terms of:

- ▶ urgent restoration;
- ▶ preventing the application of finders law; and
- ▶ the possibility of competing claims to ownership.

We recognise that the term 'prima facie Crown ownership' causes some anguish but, like the Hauraki Tribunal, we see it as primarily a semantic detail. The Crown's role in taking responsibility for the immediate care of found items and facilitating the resolution of customary ownership is an example of the responsible exercise of kāwanatanga. As we have said elsewhere in this report, we must in any event accustom ourselves to the view that the Crown is not a monolithic Pākehā institution but is in fact Māori too. In our view, rangatiratanga will be recognised if ownership is resolved fairly and promptly.<sup>61</sup>

There is, however, no actual need for the legislation to state that found taonga tūturu are 'prima facie the property of the Crown'.<sup>62</sup> The same effect could be gained, without giving offence, by the Act referring instead to 'interim Crown trusteeship'. We recommend that the legislation be amended accordingly. Many claimants clearly felt that the very words 'property of the Crown' were in themselves confiscatory of the rangatiratanga interest.

In our view, there are other changes that should be made to the protected objects regime to adequately provide for the Treaty interest in taonga tūturu. The key issue relates to the power of the chief executive of the Ministry for Culture and Heritage, who is the key decision-maker, along with the Māori Land Court, on matters relating to protected objects. For example, the chief executive is charged with deciding upon applications for permission to export objects. If it is determined that the object 'is of such significance to New Zealand or part of New Zealand that its export from New Zealand would substantially diminish New Zealand's cultural heritage', the application is declined. This decision is to be made with regard to the advice of two or more 'expert examiners'.<sup>63</sup> Counsel for Ngāti Porou suggested that the trigger for refusing the export of an object is 'a reasonably high threshold', since what matters to a particular iwi, hapū, or whānau might not involve the substantial diminution of New Zealand's cultural heritage. The view of a particular Māori group

might thus carry lesser weight. The Ministry for Culture and Heritage official responsible for the administration of the Protected Objects Act, Brodie Stubbs, had to agree with this proposition.<sup>64</sup>

It also falls to the chief executive to apply to the registrar of the Māori Land Court for confirmation of ownership of found items. Where competing claims to ownership exist, the chief executive may either refer the matter to the court or determine that such claims have been resolved, and make an application to the court to have ownership confirmed. Counsel for the Te Tai Tokerau claimants asked what particular expertise the chief executive had in making such decisions. Ms Kominik said that she was sure the chief executive would always take advice if any doubt existed, and was likely to turn in the first instance to the Ministry's Kaihautū Māori. She conceded, though, that no requirement for the chief executive to take advice exists in either the Act or the operational guidelines.<sup>65</sup> We note also that the Ministry no longer employs a Kaihautū, although it has recently established the position of Pou Ārahi Whakahaere, or Strategic Māori Adviser.

These two examples of administrative discretion on matters of potentially deep cultural significance suggest that a formal Māori voice in this decision-making would be appropriate. That strikes us as protective of both the rangatiratanga interest and the chief executive, who otherwise carries a responsibility for decisions that surely require an understanding of tikanga. Indeed, in December 2002, the Ministry's Māori Reference Group (which appears to have been very well qualified to speak on matters of tikanga) advocated the establishment of 'a tohunga group – a pool of expert examiners – that will cover each area of Māori cultural objects'. The tohunga group would replace the Māori Land Court 'as the authority to decide actual or traditional ownership of newly found artifacts' and also 'make decisions on export application for taonga Māori'.<sup>66</sup> A similar idea was mooted during the 1990s in the draft Protection of Movable Cultural Heritage Bill, which proposed a Roopu Wananga Taonga to make decisions on the ownership, custody, and export of cultural artefacts, while a Cultural Heritage Council dealt with non-Māori heritage items.<sup>67</sup> This could have been an appropriate partnership for managing protected objects

but, like the Māori Reference Group's 2002 proposal, it did not come to pass.

We therefore recommend the establishment of a body of Māori experts who can make decisions, with the chief executive, on:

- ▶ applications for export of Māori objects;
- ▶ customary ownership of newly found taonga; and
- ▶ whether individual items should qualify for protection under the Act where they might be described as 'scientific material' rather than taonga works.

As the Māori Reference Group suggested, this group of experts could also include professionals, such as representatives of the museum sector.<sup>68</sup> Its establishment would help fulfil the Crown's duty to act in partnership with Māori in the protected objects regime.

A recent expression of partnership is to be found in the arrangement entered into on 20 February 2009 between the Crown and Waikato-Tainui over taonga tūturu found in the environs of the Waikato River. Known as the Taonga Tuku Iho Accord, the agreement provides that the chief executive of the Ministry for Culture and Heritage will:

allow for Waikato-Tainui kaitiakitanga as temporary custodians of any taonga tūturu found within the Accord Area or identified as being of Waikato-Tainui origin found elsewhere in New Zealand, until ownership is determined, on such conditions agreed between Waikato-Tainui and the Chief Executive as to the care of the taonga tūturu.<sup>69</sup>

This clause has been misinterpreted as providing for automatic Waikato-Tainui custody of any items so described.<sup>70</sup> In fact, the subsequent clause in the agreement sets out that 'there may be situations where the Chief Executive considers that other arrangements are more appropriate, [and] if so, the Chief Executive may make other arrangements'.<sup>71</sup> In other words, the Accord has not required any amendment of the Protected Objects Act, but rather put the onus on the chief executive to consult with and notify Waikato-Tainui 'within the limits of the Act'.<sup>72</sup> As such, we see the accord as a significant constraint on Crown trusteeship that goes a considerable way towards recognising the iwi's rangatiratanga interest.

But the reforms we are proposing will require the Protected Objects Act to be amended. We also recommend that the Act exempt kaitiaki who reacquire taonga from having to register as collectors and thus have their entire collections open for inspection by the Ministry for Culture and Heritage. Mr Stubbs said that that was not the intention of the Act, but conceded that it could be interpreted that way.<sup>73</sup>

As we have indicated, we do not support any retrospective invalidation of the private ownership of taonga acquired legally before 1975. However, in light of the pre-1976 application of finders law and the relative lack of export controls, we recommend that the Crown should establish a restitution fund to help kaitiaki reacquire their taonga on the open market as they come up for sale. Iwi may also wish to contribute to such a fund if their resources permit, making it effectively a partnership. We acknowledge that pre-1992 Māori grievances are currently being addressed through the historical claims settlement process. In this case, however, we believe that such action would be an appropriate step by the Crown to make some amends for the loss of so many taonga under the defective (in Treaty terms) regimes of the past.

Finally, we have an overall recommendation that applies to the subsequent two sections as well as this. We have spoken of the need for partnership mechanisms in the protected objects regime, and complimented Te Papa for the steps it has taken so far to act in partnership with kaitiaki. Across the culture and heritage sector (as we shall see) there are already a variety of Māori advisory committees providing agencies with a Māori perspective. But in none of these cases do these groups have formal decision-making powers. This must change, for we believe that real partnership with Māori communities is essential in the care and promotion of mātauranga. Our key recommendation therefore is the establishment of a Crown-Māori partnership entity in the culture and heritage sector. Here we see equal numbers of Crown and Māori appointees guiding the culture and heritage agencies in the setting of policies and priorities concerning mātauranga. The Māori appointees could be chosen by an electoral college comprising members representing bodies such as Toi Māori Aotearoa (the Māori artists body), Te Rōpū Whakahau

(the Māori Librarians and Information Management Group), and Te Matatini Society (the organisers of the biennial kapa haka festival), together with iwi organisations and other Māori entities with a more general focus. We return more fully to the concept of partnership entities in the conclusion to this chapter.

### 6.2.5 Summary of findings and recommendations

There are two levels of Māori interest in taonga held by museums or subject to the protected objects regime:

- ▶ a kaitiaki or ongoing cultural relationship where those items have been willingly transferred to the care of others; and
- ▶ a rangatiratanga interest where items are newly discovered or were wrongfully acquired.

With respect to both these categories of taonga, Te Papa is giving effect in its policies to the partnership inherent in the Treaty of Waitangi. It recognises the cultural relationship of kaitiaki in its Mana Taonga policy and the rangatiratanga interest in its willingness to return wrongly taken taonga. Its shared decision-making with Māori is a model for other agencies and public museums in New Zealand to follow.

However, we recommend that Te Papa explore the next step in the evolving indigenous-settler partnership approach to cultural heritage. The innovative model developed for the co-governance of an iconic environmental taonga (the Waikato River) may provide the basis for a similar approach to managing moveable cultural heritage.

Many taonga are in overseas museums. There can be little justification for these institutions to retain possession of stolen items or artefacts upon which indigenous peoples depend for the maintenance of their traditions, but we understand the need for the Crown to tread delicately in this area, especially given the ongoing negotiations for the return of kōiwi tangata. As it develops in due course, we expect that Crown policy concerning the repatriation of taonga will be developed through significant consultation with Māori.

With respect to the Protected Objects Act, we have a set of recommendations. First, we recommend that Te Papa develop best-practice guidelines for private collectors

of taonga who are willing to involve kaitiaki in the care of the objects they own. Secondly, we recommend that prima facie Crown ownership of newly discovered protected objects should remain in place as a matter of practicality, but should be statutorily renamed ‘interim Crown trusteeship’ to more explicitly acknowledge the ongoing rangatiratanga interest in such objects. Thirdly, we recommend that a body of Māori experts share in decision-making with the chief executive of the Ministry for Culture and Heritage on:

- ▶ applications for export of Māori objects;
- ▶ customary ownership of newly found taonga; and
- ▶ whether individual examples of ‘scientific material’ should qualify for protection as taonga tūturu.

Fourthly, we recommend that the Protected Objects Act be amended to exempt kaitiaki who reacquire taonga from having to register as collectors with the Ministry for Culture and Heritage (and thus potentially having to open their entire collections for the Ministry’s inspection). Lastly, we recommend the Crown establish a restitution fund to help kaitiaki to reacquire their taonga on the open market as they come up for sale. Iwi may wish to contribute to such a fund as their resources permit.

With respect to the culture and heritage sector as a whole, we recommend the establishment of a Crown–Māori partnership entity. Equal numbers of appointees of Māori and the Crown would provide direction, in this case, to the Ministry for Culture and Heritage and Te Papa in setting policy and priorities in the care of taonga tūturu.

### 6.3 ARTS, CULTURE, AND BROADCASTING

In this section we examine the work of the Crown agencies that subsidise Māori to produce modern renditions of mātauranga Māori and taonga works, largely in the arts, broadcasting, and the maintenance of marae.

By ‘modern’ we do not necessarily mean ‘innovative’ or ‘non-traditional’: our concern here is with all newly-created artistic and cultural works, whether in a traditional or contemporary style. Moreover, we are concerned not only with these ‘products’ of mātauranga, but equally with the mātauranga itself that went into their creation.

It is worth reiterating at this point that newly-created

artistic or cultural works may be just as worthy of taonga status as an ancient artefact. While age can certainly intensify the mauri of an artwork, taonga status depends on the extent to which a work embeds kōrero and invokes tribal ancestors. In section 1.6.2(1), we cited Te Papa’s modern marae, Rongomaraeroa, as an example of a new cultural work that does just this. By contrast we suggested that other contemporary artworks that are discernibly Māori, but so generic or derivative that they have no whakapapa, no kōrero, and no kaitiaki, are best described as ‘taonga-derived’. They lack mauri and there is no specific relationship between them and iwi Māori to protect.

The agencies we review in this chapter tend to have a funding role that carries an obligation to promote New Zealand’s unique arts, culture, and identity – which naturally involves a significant emphasis on Māori culture. Two of the agencies (TVNZ and Radio New Zealand) are more recipients of government money than disbursers of it, although we include them here since they too have been tasked with ensuring a proper and equitable representation of mātauranga Māori in their own fields.

The agencies covered in this section include, therefore:

- ▶ the Government’s principal arts funder, Creative New Zealand;
- ▶ the Ministry for Culture and Heritage, which directly funds certain arts organisations;
- ▶ TVNZ, whose charter agreement with the Government has obliged it to screen programming that promotes Māori culture;
- ▶ Radio New Zealand, which has similar charter obligations of its own;
- ▶ the Lottery Grants Board, which funds (among other things) the upkeep of marae including the preservation of marae artworks; and
- ▶ New Zealand On Air, which funds broadcasters and programme makers to make and screen content that focuses on New Zealand culture and identity.

TVNZ, Radio New Zealand, the Lottery Grants Board, and New Zealand On Air are all Crown entities rather than government departments, and only TVNZ appeared before us. For these reasons we make no findings about the last three. We include them in this section for the sake of completeness, however, since their activities are highly relevant to the matters in hand.

Overall, claimants were concerned about the levels of funding these agencies make available to Māori artists, communities, or programme-makers, particularly when compared with ‘mainstream’ equivalents. In this, the claimants contended that agencies were failing to live up to their obligations to mātauranga Māori.

Once again, we note the crossover between this chapter and chapter 1, which focuses on intellectual property issues. The two chapters deal with separate strands of what is essentially the same topic, but this chapter considers the Government’s general level of support for mātauranga Māori in newly-created taonga works and broadcasts, rather than the intellectual property rights arising from them. We begin by describing the relevant legislation, government policies, and funding arrangements for the ‘newly-created art and culture’ agencies.

### 6.3.1 Current legislation, policies, and funding

#### (1) *Creative New Zealand*

Creative New Zealand is the trading name of the Arts Council of New Zealand, and was established by the Arts Council of New Zealand Toi Aotearoa Act 1994.

One guiding principle of the Act is that those exercising its functions ‘shall recognise in the arts the role of Maori as tangata whenua’ (section 5(b)). Recognition is also required of ‘the arts of the Pacific Islands’ peoples of New Zealand’ as well as ‘the cultural diversity of the people of New Zealand’ overall (sections 5(c) and 5(a)). Below the Arts Council, the Act therefore establishes two boards: the Arts Board (which has a general purview, and funds a South Pacific Arts Committee) and Te Waka Toi, the Māori arts board. The responsibility of these boards, as set out under section 14, is primarily to allocate available funding to artists (or, in the case of Te Waka Toi, to Māori artists specifically).

Under the Act, the Arts Council board, the Arts Board and Te Waka Toi each have seven members. The Minister for Arts, Culture and Heritage appoints them and is, when appointing Arts Council board members, to have regard to ‘The recognition of Maori as tangata whenua’ (section 9(3)). Any Māori members on the Arts Council board are to be appointed after consultation with the Minister of Māori Affairs (section 9(4)), as are all members of Te Waka Toi (section 17(5)).

Creative New Zealand’s revenue in 2009/10 was \$44.5 million. Its funding comes mainly from the Government through Vote: Arts, Culture and Heritage (\$10.2 million in 2009/10) and from the New Zealand Lottery Grants Board (\$32.3 million in 2009/10). It also receives smaller amounts from other sources.<sup>74</sup>

Before proceeding any further we must explain that, at the time of writing, the Government had announced plans for significant change to Creative New Zealand’s governance arrangements. The Arts Council, the Arts Board, Te Waka Toi, and the Pacific Arts Committee are to be replaced with one streamlined board, dropping the total number of board members from 28 (spread across the four boards) to 13. A minimum of four Māori are to sit on the new board, along with two members with specialist knowledge of Pacific arts. The Minister for Arts, Culture and Heritage explained on 16 February 2010 that the new arrangement, which will need to be introduced through legislation, ‘guarantees that issues involving Māori and Pacific arts are represented at the top table for decision-making, which under the current cumbersome structure is not the case.’<sup>75</sup>

Because these changes had not yet been enacted, we can only comment on them in general terms. In the meantime, we must necessarily focus on the current arrangements. But our conclusions are both informed by the existing regime and conscious of its intended replacement. In this way, we believe our treatment of Creative New Zealand is as relevant as possible in a fast-changing environment.

In addition to the current statutory requirement for an organisation-wide focus on Māori arts, Creative New Zealand also has a specialist Māori Arts Services Team. Its manager, Muriwai Ihakara, was the Creative New Zealand witness before our inquiry. The team’s primary function has been to advise on Māori arts policy, and to service Te Waka Toi. Like the Arts Board, Te Waka Toi has principally allocated funding on two distinct bases: from a contestable pool (\$1.54 million was allocated to 81 applicants in 2008/09) and in support of arts organisations on a recurrent basis (\$1.34 million was allocated in 2006/07<sup>76</sup>). The Arts Board has had proportionately larger amounts to allocate (for example \$6.37 million of contestable funding was allocated to 308 applicants in 2008/09). Under



*Hikurangi* by Phil Berry. Berry (Ngāpuhi) has been permitted to use the Toi Iho mark of excellence from Te Waka Toi/ Creative New Zealand for his painting and kōwhaiwhai. The creation of the mark was facilitated by Te Waka Toi in consultation with Māori artists, who also designed and created the trade mark.

the present legislation, the Arts Council determines the amount of funding that is available for allocation by each arts board. The amount of contestable funding allocated by the Arts Board rose 24.7 per cent from 1999/2000 to 2008/09, from \$5.11 million to \$6.37 million. The corresponding amount allocated by Te Waka Toi rose 13.6 per cent over the same period, from \$1.36 million to \$1.54 million, including a dip to \$1.31 million in 2005/06.<sup>77</sup>

While there has been nothing to restrict Māori from applying for Arts Board funds, applicants to Te Waka Toi have had to be of Māori descent, those carrying out the art works have likewise had to be of Māori descent, and

‘the project must benefit Māori’. Te Waka Toi currently has six contestable funding programmes. These are:

- ▶ Heritage Arts – to support projects that contribute to the maintenance and preservation of the heritage arts of Māori.
- ▶ Te Reo – to support projects that promote and strengthen the use of Te Reo, oral and written, across artforms.
- ▶ New Work – to support the creation of original artworks by tangata whenua across artforms.
- ▶ Indigenous links – to support projects that strengthen links between tangata whenua artists



and the indigenous peoples of the Pacific and other nations.

- ▶ Experiencing Māori Arts – to support projects that provide opportunities to experience Māori arts.
- ▶ Toi Ake – to support the preservation and development of toi Māori for hapū and iwi.<sup>78</sup>

In addition, Te Waka Toi has offered a number of what Mr Ihakara called ‘special opportunities’. These include two overseas residencies per annum specifically for Māori artists and annual Te Waka Toi awards for outstanding contributions to Māori arts. In 2006, Creative New Zealand also introduced a new Tohunga Tukunga programme, worth \$100,000 annually, under which expert carvers, weavers, haka performers and so on can pass on their skills to younger Māori artists.<sup>79</sup> Other initiatives include the ‘Regional Strengths Maurangi Toi’ fund designed to support the arts on a regional basis, as well as, of course, the Toi Iho trade mark, which we have discussed in section 1.4.3(3).<sup>80</sup>

A fair proportion of Heritage Arts, New Work, and Toi Ake money goes towards the creation of new artworks or the restoration of old ones at marae, as well as the development of marae arts strategy plans. The 2006/07 Creative New Zealand annual report, for example, shows that well over \$400,000 was spent in that financial year on such projects.<sup>81</sup>

Aside from its recurrent and contestable funding, Creative New Zealand also distributes a fund of \$2.9 million (in 2009/10) to local authorities, who in turn allocate it to community arts projects under the ‘Creative Communities’ scheme. In 2009/10 there were 2,418 recipients of this pūtea, who thus received roughly \$1,200 each.<sup>82</sup>

## (2) Lottery Grants Board

The Lottery Grants Board, which is administered by the Department of Internal Affairs, has a Marae Heritage and Facilities fund which can be applied to the construction or improvement of marae buildings as well as the conservation of whakairo, tukutuku, and kōwhaiwhai. Support and advice for applicants are provided by the Waka Taonga Māori Heritage team at the Historic Places Trust.<sup>83</sup> While this fund could as easily be described as ‘heritage’ rather than ‘living art and culture’, we include

it within this section because, as we shall see, the bulk of its pūtea is expended on marae infrastructure rather than heritage items such as carvings.

In recent years, the fund seems to have received around 140 applications per year, with the 2007/08 figure of 175 being the highest. The annual fund allocation in 2009/10 was \$8.3 million, a significant increase from \$4.1 million in 2003/04. The fund, however, remains heavily oversubscribed (albeit not to quite the same extent as Creative New Zealand funds): from 2005/06 to 2009/10 the average amount of funding approved was 56 per cent of that requested.<sup>84</sup>

It is not always clear from the published figures what proportion of the fund is expended on the construction of ablution blocks as opposed to the restoration or creation of cultural adornments. Figures for the 2004/05 funding year, however, show how the \$5.5 million of funding approved that year was used: \$206,150 was tagged to ‘Conservation of Cultural Property’ and \$346,000 to ‘Conservation of Historic Places’, while the vast bulk of the money was allocated to ‘Buildings/Marae Construction’.<sup>85</sup>

The Lottery Grants Board also has an Environment and Heritage fund that can be applied to, amongst other things, the conservation of whare taonga.<sup>86</sup> From a quick perusal of fund recipients it does not appear that many marae-based projects have been funded, although this may reflect a tendency to apply to the Marae Heritage and Facilities fund instead.

## (3) Ministry for Culture and Heritage

The Ministry for Culture and Heritage has the primary responsibility for advising ministers on arts, culture, heritage, and broadcasting policy. It manages the disbursement of funds to a number of agencies within the sector, including Creative New Zealand, Te Papa, New Zealand On Air and (until 2008) TVNZ. It also directly funds some arts organisations. For example, in 2009/10 the Ministry provided \$1.2 million to Te Matatini Society Incorporated for its work in fostering Māori performing arts and staging the biennial national kapa haka competition.<sup>87</sup>

## (4) Te Puni Kōkiri

We address Te Puni Kōkiri separately at the end of this chapter, but note here that its Māori Potential Fund is a

6.3.1(5)

significant source of money for the preservation and production of Māori arts and culture, with numerous recipients of funding across a wide spectrum of activities. We should also mention that Te Puni Kōkiri provided Te Matatini Society with \$325,000 in 2008/09.<sup>88</sup> Further, as part of its marae development programme, it began, in 2008/09, ‘a marae survey and assessments to build an information platform to support future policy and investment approaches.’<sup>89</sup>

### (5) *New Zealand On Air*

This is the trading name of the Broadcasting Commission, the Crown entity which disburses funding to broadcasters and programme makers to ensure the broadcast of content focused on New Zealand culture and identity. New Zealand On Air’s primary functions, as spelled out in section 36(1)(a) of the Broadcasting Act 1989, are:

To reflect and develop New Zealand identity and culture by—

- (i) Promoting programmes about New Zealand and New Zealand interests; and
- (ii) Promoting Maori language and Maori culture.

New Zealand On Air has a Māori strategy that includes the aim of supporting ‘the production of quality Māori programmes made for a general audience in prime time’. In 2009/10 it spent \$6.2 million on Māori broadcasting investments – predominantly on television content, but also some radio programmes and music. Its Māori strategy describes a ‘Māori programme’ as ‘one that makes a conscious effort to reveal something of the past, present or future of the Maori world’.<sup>90</sup>

### (6) *TVNZ*

As we have explained, TVNZ has not been a funder of living art and culture in this context, but an important and highly influential recipient of the Government’s cultural spend. At the time of our inquiry, TVNZ’s activities were governed by the Television New Zealand Act 2003, under which TVNZ’s ‘principal objective’ in carrying out its functions was to ‘give effect to its Charter . . . while maintaining its commercial performance’. The charter provisions, as set out in the Act, have included the requirement

for TVNZ to ‘ensure in its programmes and programme planning the participation of Maori and the presence of a significant Maori voice’ (section 12(2)). More specifically, in fulfilment of its objectives under the charter, TVNZ has been required, inter alia, to ‘in its programming enable all New Zealanders to have access to material that promotes Maori language and culture’ (section 12(2)(b)(iii)); and ‘feature programmes that serve the interests and informational needs of Maori audiences, including programmes promoting the Maori language and programmes addressing Maori history, culture and current issues’ (section 12(2)(b)(viii)).

Until July 2009, the Government contributed \$15 million annually to TVNZ to enable it to meet its charter obligations by making or screening programmes that it otherwise would not have done in a commercial environment.<sup>91</sup>

Since that date, however, the \$15 million has been renamed the ‘Platinum Fund’ and redirected to New Zealand On Air as contestable funding for the six main free-to-air television channels (TV1, TV2, TV3, C4, Prime, and Māori Television).<sup>92</sup> In line with this change, in December 2009 the Minister of Broadcasting introduced amending legislation to replace the charter ‘with a briefer, and less prescriptive, statement of functions, which enables Television New Zealand . . . to determine its own priorities against a general set of functions.’<sup>93</sup> The functions are to be the maintenance of TVNZ’s ‘commercial performance’ and the provision of ‘high quality content’ that (a) ‘is relevant to, and enjoyed and valued by, New Zealand audiences’ and (b) ‘encompasses both New Zealand and international content and reflects Māori perspectives’.<sup>94</sup>

Given the ostensible scope of these changes, we asked the Crown in December 2009 to explain their implications for its previous evidence in Wai 262 about TVNZ’s role.<sup>95</sup> We were thinking in particular about the broadcaster’s July 2007 Māori Content Strategy, which was supplied to us (along with an update on how the strategy is being implemented) by Crown counsel in October 2009. In the strategy TVNZ sets out that, due to changing demographics, Māori programming is a growth area and ‘potentially one of the biggest sources of competitive advantage’. To achieve its goal of becoming ‘the New Zealand content leader’ TVNZ believes it to be ‘critical’ that it become also



Newsreader Scotty Morrison preparing to present the twenty-fifth birthday edition of *Te Karere* on a newly unveiled set at TVNZ's central Auckland studios, February 2009.

'the Māori Content Leader'. The strategy sets out that this will happen through 'refreshed' and expanded content, including the screening of Māori programmes in prime-time on its two digital channels, TVNZ 6 and TVNZ 7, and the increased availability of these programmes via the TVNZ website.<sup>96</sup>

In its October 2009 update on the implementation of the strategy, TVNZ explained that it was now screening Māori programmes across 'multiple platforms' – that is, TV1, TV2, TVNZ 6, TVNZ 7, tvnz.co.nz, and TVNZ on-demand – and that it was on course to nearly treble the 2007 total number of Māori programme hours by 2010. It included some research figures showing that nearly 47 per cent of Māori watch TVNZ on a daily basis and never tune in to Māori Television, while 13 per cent watch both channels and just 0.5 per cent watch Māori Television exclusively. It also included some figures showing viewer numbers for its Māori programmes. Perhaps surprisingly, these reveal that around three quarters of the audience of programmes such as *Marae* and *Waka Huia*, for example, are non-Māori.<sup>97</sup>

The Crown's key message in its January 2010 memorandum explaining the Television New Zealand Amendment

Bill was that 'the funding available to TVNZ for Māori content is not affected by the removal of the Charter'. Counsel pointed out that contestable funding from New Zealand On Air and Te Māngai Pāho remained available, and that only \$679,000 of the \$5.6 million TVNZ accessed for Māori programming in the year to June 2009 was charter money. The Crown contended accordingly that the Māori Content Strategy was unaffected by the charter's demise.<sup>98</sup> We return to the Crown's January 2010 submissions in setting out the positions of the parties below.

Other matters to note with respect to TVNZ include the fact that its legislation (both the current Act and the new Bill) makes no reference to the Treaty or its principles. Nor is there any statutory requirement for Māori representation at board level. Instead, the general provisions of the Crown Entities Act 2004 (which also has no Treaty clause) apply to TVNZ's governance arrangements. At the time of writing there was one Māori on the board.

As noted above and discussed in chapter 5, TVNZ receives funding for making its Māori language programmes from Te Māngai Pāho. These programmes are produced by TVNZ's Māori department, which was established in 1987.

In 2003 TVNZ created the position of kaihautū, whose job was to inform senior management and board members on Māori issues that impact upon TVNZ's business.<sup>99</sup> The position was disestablished in 2007, not long after TVNZ's witness gave evidence before us.

### (7) *Radio New Zealand*

Radio New Zealand is a Crown entity established under the Radio New Zealand Act 1995. It comprises several platforms, including Radio New Zealand National, Radio New Zealand Concert, Radio New Zealand International, and separate broadcasts of parliamentary proceedings. It is funded principally by New Zealand On Air, which in 2009/10 provided \$32.5 million, most of which (82 per cent) was allocated to Radio New Zealand National. Smaller amounts were allocated to Radio New Zealand Concert (15 per cent) and Sound Archives/Ngā Taonga Kōrero (2 per cent). Radio New Zealand International received \$1.9 million directly from the Ministry for Culture and Heritage.<sup>100</sup>

Section 7 of its establishment Act sets out Radio New Zealand's charter obligations to shareholding ministers. Under section 7(1)(b) it is to provide:

A range of New Zealand programmes, including information, special interest, and entertainment programmes, and programmes which reflect New Zealand's cultural diversity, including Maori language and culture.

In its 2008/09 annual report, Radio New Zealand stated that it had met this obligation through '417 hours of Māori language and culture programming' on Radio New Zealand National and Radio New Zealand Concert during the preceding year. It also mentioned, amongst other things, its 'New Zealand focused presentation including greetings and sign-offs in te reo Māori'.<sup>101</sup> Māori programming on Radio New Zealand National includes *He Rourou*, a brief daily (weekday) broadcast in te reo Māori, and *Te Ahi Kaa*, a weekly hour-long programme predominantly in English. Other programmes, without having a specifically Māori focus, of course also regularly deal with Māori subjects.

### 6.3.2 The position of the claimants

Reflecting the agencies which had representatives appear as witnesses for the Crown, and the focus of their testimony, the claimants' main focus was on Creative New Zealand and TVNZ. In the interests of the timely release of our report we chose not to call for submissions when the Government announced its changes to Creative New Zealand's governance arrangements.

#### (1) *Creative New Zealand*

Counsel for Ngāti Koata was critical of the lack of reference to Treaty principles in Creative New Zealand's 1994 establishment Act, and suggested that the agency was constrained by the limitations of its governing legislation.<sup>102</sup>

Counsel for Ngāti Porou did not make closing submissions about the work of Creative New Zealand. However, dramatist and writer Keri Kaa of Ngāti Porou – herself a member of Te Waka Toi from 2000 until 2006 – complained of a lack of funding for Ngāti Porou artists. She calculated that Ngāti Porou artists had requested \$3.8 million in funding from Te Waka Toi from 1998 to 2006 but had received just over \$1 million, an amount she described as 'less than pathetic' in relation to the funding of 'mainstream arts and of sport'. She said Ngāti Porou artists on the East Coast lived 'hand to mouth' and struggled to purchase the materials they needed for their art. She also complained of the difficulties Māori film-makers faced obtaining funding, the lack of financial support for kapa haka at the grass-roots level, and the low-level of government funding for the upkeep of Ngāti Porou marae (via the Marae Heritage and Facilities fund).<sup>103</sup>

Likewise, master weaver Connie Pewhairangi of Ngāti Porou complained in 2006 of the lack of funding for weaving. Locally, she said (in what may have been a reference to the Creative Community scheme), the Creative New Zealand arts committee had just \$42,000 to allocate annually, and this was spread across an area stretching from Wairoa to the East Coast. She thought the East Coast would only receive about \$2,000 of this total. She explained that 'very few of us artists apply because of the paperwork, the competition for the funds, and the small amount on offer. It is a pathetically small amount of money'.<sup>104</sup>



Donna Campbell and Sam Mitchell at the Roopu Raranga Whatu o Aotearoa (National Weavers Association) hui, 2009. Te Waka Toi/Creative New Zealand has provided funding to Te Roopu Raranga Whatu o Aotearoa.

She did acknowledge, however, that Te Waka Toi had provided money to keep alive the struggling national weavers' association, Te Roopu Raranga Whatu o Aotearoa. She personally gave marae-based weaving wānanga for free, in order to keep the art-form going. What she really hoped for, she said, was for a cultural centre funded by the Government that would produce art works to be sold in galleries in the big cities (along the lines of such centres established for Aboriginal artists in Australia).<sup>105</sup>

**(2) TVNZ**

Counsel for Ngāti Koata argued that TVNZ only has a Māori department because of the direct funding provided by Te Māngai Pāho and New Zealand On Air for *Marae*, *Te Karere*, *Waka Huia* and *Mai Time*, and that the channel uses the existence of Māori Television as a means to 'excuse [its own] inadequacies'.<sup>106</sup> Counsel also criticised TVNZ's fulfilment of its obligations under its charter which, given the approaching repeal of the charter, we

do not traverse here. Counsel did, however, make submissions in February 2010 on the effect of the charter's removal. In these counsel argued that the failure to prescribe any legislative requirements of TVNZ in terms of its broadcasting of Māori content – thus leaving such matters to 'internal policy' – created 'a risk' that Ngāti Koata and wider Māori interests would be 'overlooked in the pursuit of commercial objectives'. Counsel contended that the domination of commercial imperatives had already been acknowledged under the charter regime when Whai Ngata, the head of TVNZ's Māori department, gave evidence in January 2007.<sup>107</sup>

### 6.3.3 The position of the Crown

The extent of the Crown's closing submissions was to note Creative New Zealand's support of Toi Iho, Te Waka Toi, Toi Māori Aotearoa (the organisation representing a broad spectrum of Māori artists), Toi Ake, Artists Alliance (the national body representing artists), and Tohunga Tukunga as examples of Crown contributions to the development, regulation, control, and use of mātauranga Māori by kaitiaki. Counsel added that, while 'the primary role' in terms of the preservation and transmission of mātauranga Māori sits with Māori, the work of Creative New Zealand – such as 'creative community/project funding . . . [and the] Tohunga Tukunga programme' – also contributed.<sup>108</sup>

Mr Ihakara made the point that many other agencies apart from his own delivered support to Māori arts and artists, including Te Puni Kōkiri, the Māori Language Commission, the Department of Internal Affairs, the Ministry for Culture and Heritage, Māori Television, TVNZ, and Te Papa.<sup>109</sup> He also said that the lack of an iwi-specific funding regime allowed for a flexible approach, which he maintained was the most appropriate. He said that the Māori-specific proportion of the Creative New Zealand grants funding matched the Māori proportion of the New Zealand population.<sup>110</sup> Under cross-examination, he added that Creative New Zealand had a fair measure of flexibility under its Act, and he seemed to imply that the Māori share could grow over time.<sup>111</sup>

Mr Ngata said that TVNZ 'is New Zealand's largest cultural institution. It takes very seriously the mantle of culture and heritage.' This included Māori culture, he said.

To that extent 'TVNZ is committed to maintaining the presence of a significant Māori voice in programming – not just for Māori but for mainstream viewers as well.' He also described the then kaihautū as effectively 'the ombudsman of Māori issues at TVNZ.'<sup>112</sup> He added under cross-examination that 'one of the greatest things' about making Māori programmes at TVNZ was having access to the network's broadcasting schedule.<sup>113</sup>

As noted above, in January 2010 Crown counsel supplied more information about the forthcoming removal of TVNZ's charter. Counsel noted that 'there has never been a quota requirement for Māori content . . . on television' and that TVNZ has 'only had a Charter since the 2003 Act'. The main point was that, '[w]ith or without a Charter, TVNZ has demonstrated a stable commitment to Māori language and Māori interest programming'. However, there were two limitations on this commitment: first, TVNZ must maintain its commercial performance and, secondly, current conditions in the advertising market were 'difficult'. These realities required TVNZ to review the screening of all its programmes.<sup>114</sup>

### 6.3.4 Analysis

We now turn to our own analysis of current law and policy governing the arts, culture, and broadcasting sectors. Once again, we begin by examining the extent of the Māori Treaty interest. What, for example, is the Treaty interest in modern Māori artworks or television programming? How vulnerable are traditional Māori arts? Having considered these matters, we then assess the nature of any other valid interests that must be weighed against the Treaty interest. We conclude by balancing these considerations, and proposing a way forward that would ensure the Crown's support for Māori arts, culture, and broadcasting gives effect to the Treaty.

#### **(1) Is there a Treaty interest in Māori arts, culture, and broadcasting?**

At the start of this section, we said that what makes an artistic or cultural creation a taonga – regardless of its age – is the extent to which it embeds kōrero and invokes tribal ancestors. Where a work displays a limited connection to mātauranga Māori only, there is little Treaty interest in the process that led to its creation. Where the

artwork is a taonga, however, there will be a considerable Treaty interest in the mātauranga that went into it. Therefore, the basic question comes down to whether and to what extent there is mātauranga Māori in the artworks and programmes funded or broadcast by the agencies we have named. The answer is that there clearly is considerable mātauranga in marae, heritage arts, and television and radio programme content that promotes Māori culture and history, and there usually will be in contemporary artworks by Māori artists.

As it happens, the Treaty is hardly needed to mount an argument for state support of mātauranga Māori in living art and culture. That is because this mātauranga makes such a massive contribution to the nation that government funding of it is entirely self-justifying. Just as the symphony orchestra and the ballet bring world culture to New Zealand, Māori arts both bring New Zealand culture to the world – and, importantly, bring New Zealand culture to New Zealanders. In other words they support our image internationally and serve our own self-image. Such functions are clear in, say, the performance of kapa haka in Piazza San Marco in Venice to promote New Zealand's entries in the 2009 Biennale, or the way New Zealanders turn readily to 'Pōkarekare Ana' when in need of a national song.

Yet despite the great efforts of many dedicated proponents of Māori arts and culture, and the vibrancy of these activities, the mātauranga behind them is today generally vulnerable. While Māori evidently carry the primary responsibility for keeping this mātauranga alive, the Crown also shares in this responsibility, for the reasons we set out in our conclusion to this chapter (section 6.8.1).

### ***(2) Are there other valid interests affected by the Crown's subsidisation of Māori arts, culture, and broadcasting?***

The principal constraint on the Crown's obligations to support such activities must be financial. Money in the arts sector is scarce enough. In the past, when proponents of extra Māori funding in the arts have called for a greater share, they have alienated their allies in the Pākehā artistic community, who see such calls as potentially diminishing an inevitably limited resource pool. Such was the case in the late 1990s, when demands were made for direct government funding for kapa haka in keeping with

(or even at the expense of) similar support for the Royal New Zealand Ballet and the New Zealand Symphony Orchestra.

Radio New Zealand and TVNZ have been formally obliged to promote Māori language and culture (and TVNZ will continue to do so without that formal obligation, according to the Crown). Unlike Radio New Zealand, TVNZ also faces the reality of having to return a substantial dividend to the Government. It has arguably been caught in no-man's-land between public broadcaster (and 'cultural institution') and commercial enterprise – although, if anything, its amended role under the new government means its public broadcasting responsibilities are heavily relaxed.

### ***(3) Conclusion and reforms***

In light of this discussion, two key principles stand out in our view to guide us in our conclusions. The first is that the mātauranga Māori in Māori arts and culture is a taonga, as was clearly established in chapter 1. Indeed, such is the importance of this mātauranga to New Zealand that taonga status and the Treaty are valid considerations among many others, because government support makes eminent sense on other levels. As the examples mentioned above show, mātauranga Māori is fundamental to the national image we consciously project, as well as to our instinctive sense of collective identity. Moreover, the artistic and cultural expressions of that mātauranga are of immense importance to Māori identity. Important tribal differences also serve as markers of iwi identity, such as regional variations in whakairo and waiata that tell tribal stories.

The second important principle is that the effort involved in ensuring the survival and transmission of mātauranga Māori in arts and culture must be a shared responsibility between Māori and the Crown. Māori may carry the primary responsibility for keeping this mātauranga alive, but there are many reasons why the Crown must accept its share of responsibility too – among them are the State's complicity in the historical loss of mātauranga (we focus on the stigmatising of mātauranga Māori and the State's official suppression of rongoā in chapter 7 and mention the historical suppression of te reo Māori in section 5.2). Also significant are the vast social

changes that have taken place within the Māori community over the last 100 years (and particularly the economically driven urbanisation that has occurred since the Second World War). As a consequence, most Māori today are removed from the environs where the learning of mātauranga traditionally took place, which has created a significant void in its transmission from generation to generation. Moreover, in modern society, the state is obliged to perform a wide range of roles that were previously the preserve of the home, the church, or the wider kin group. No one, for example, expects our arts, culture, and heritage to be transmitted by family members alone, and state support for the ballet, the symphony orchestra, and local television content is unquestioned. In the same way, we think Māori are entitled to state support for the transmission of their culture. But, as we have stated, this is a shared enterprise. One party cannot succeed without the other: in this field as much as any other, Māori and the Crown must act as partners, as the Treaty contemplates.

With these two principles in mind, we consider the adequacy of the present funding and policy. We examine, in turn, the regime for supporting Māori arts and culture, funding for marae infrastructure and artworks, and Māori broadcasting.

#### (a) THE ADEQUACY OF CROWN FUNDING AND POLICY FOR MĀORI ARTS AND CULTURE

We note that the New Zealand Symphony Orchestra received \$13.4 million in 2009/10 directly from the Ministry for Culture and Heritage (up from \$12.4 million in 2006/07), and the Royal New Zealand Ballet received \$4.4 million (up from \$3.5 million in 2006/07). By contrast, Te Matatini Society received \$1.2 million, the same sum it received in 2006/07 and no great advance on the \$1.1 million it received when it first secured direct government funding a decade ago.<sup>115</sup> We have also noted the difference between the contestable pools administered by Te Waka Toi and the Arts Board (to which Māori applicants have of course also been able to apply). Mr Ihakara explained that Te Waka Toi was allocated 12 per cent of Creative New Zealand's project funding because Māori are 12 per cent of the population – although, as mentioned, he seemed to suggest Creative New Zealand's flexible arrangements could see this grow in future.<sup>116</sup>

On the face of it, however, there has been little growth and in fact a proportionate funding decline. Te Waka Toi's contestable funding allocations rose only 13.6 per cent from 1999/2000 to 2008/09, compared to 24.7 per cent for the Arts Board and 78.7 per cent for the Pacific Arts Committee.<sup>117</sup> Te Waka Toi's share of all contestable funding thus went down during this period, despite the steady growth in the proportion of the population who identify as Māori.

The total number of applications and overall amounts requested annually have also declined. From 1999 until 2005 or 2006, it seems that Te Waka Toi contestable funding was slightly more heavily over-subscribed than that of the Arts Board. Since then, however, there has been a dramatic drop-off in the numbers of applications to Te Waka Toi and the overall amount requested. In 2004/05, for example, \$6.09 million was requested in 211 applications, but this amount fell significantly in the subsequent three years: by 2008/09, only \$2.88 million was requested across just 117 applications. In other words, in 2008/09, 53.7 per cent of the amount of Te Waka Toi contestable funding requested was approved, compared to only 23.8 per cent in 2004/05 and 26.2 per cent in 2005/06. While there has been ongoing decline in the number of applications for contestable Arts Board funding since 2000/01, the overall amount requested has been relatively constant.<sup>118</sup> The Crown provided no explanation for this steep decline in requests for Te Waka Toi funds by Māori artists.

There is nothing inherently wrong with fewer applications, as the amount of funding allocated has not itself declined. There is also nothing wrong with the Arts Board having had more money to allocate than Te Waka Toi, especially since Māori have been equally able to apply for Arts Board funding. The Arts Council's flexibility to decide relative funding levels each year could also in theory work in the favour of Māori artists. Nor is it necessarily wrong that the ballet and the symphony orchestra should receive much more in direct funding than Te Matatini. There is, however, a suggestion in all these figures that the priority the Māori arts should command under the Treaty is not being reflected in funding decisions, and that Māori artists themselves have been turning away from Te Waka Toi. Whatever the reason for that, the bottom line is that the share of contestable funding



allocated to Māori artists has declined over the last decade. The Crown's subsidisation of the creation and presentation of taonga works appears to be in a state of consistent downward drift.

In our view, this is not only about inadequate funding: the underlying problem is the arts and culture funding sector's lack of vision and understanding of the importance of mātauranga Māori and taonga works. Creative New Zealand, the Ministry for Culture and Heritage, and the other funding bodies need policies, strategies, and objectives explicitly acknowledging the importance of mātauranga Māori and taonga works, and the Crown's role in supporting them. These must be worked out in partnership with Māori. We recommend that the partnership entity we have already described at 6.2.4(3) above serve as a vehicle for this joint decision-making.

In this regard we note that a major research project on 'The Health of Māori Heritage Arts', commissioned by Creative New Zealand, was completed in 2009. It sets out the current status of ten heritage artforms, from carving and weaving to oral arts and canoe navigation. We were encouraged to see the comments of the chief executive of Creative New Zealand that the project had the aim of 'assisting Māori communities to set their priorities for maintaining these arts'.<sup>119</sup> We recommend that Māori and the Crown use this project as an information base for identifying future funding priorities and criteria.

Reinvigorating the arts and culture agencies in the manner we suggest should bring multiple benefits. First, a greater commitment to supporting newly-created taonga works – and greater involvement by Māori in setting objectives and priorities – will inevitably see more funding channelled towards Māori arts and culture. But more energetic support for Māori arts and culture will also maximise the contribution they can make to national identity and to the New Zealand economy. Creative New Zealand is itself well aware of the importance of Māori arts to its own brand, if the covers of its 2006/07 annual report and 2007/10 statement of intent are anything to go by. A waka taua on the world stage – gliding under the Golden Gate Bridge – is a powerful statement of Creative New Zealand's purpose.

But to present this image to the world, mātauranga in the arts must first be strong domestically. The most

important step is the sharing of decision-making and the allocation of an appropriate level of funding to Māori arts and culture that gives a reasonable preference to the Māori Treaty interest.

#### (b) STRUCTURAL CHANGES IN THE ARTS AND CULTURE FUNDING SECTOR

As we have said, Te Waka Toi will no longer exist once the proposed legislation is passed. We cannot know whether the funding of Māori arts and culture will receive appropriate priority under the new regime. But, given the declining share for Māori arts under a ring-fenced funding system, some concern is justified.

We sympathise with the drive for efficiencies, and note that it is hoped the planned changes will divert money from the Creative New Zealand bureaucracy to artists.<sup>120</sup> But we do see the demise of Te Waka Toi as a cause for regret. Both the dissolution of a Māori-specific funding body, and the guarantee that only four out of up to 13 members of the new overarching body will be Māori (when there is already minority Māori representation on the existing Arts Council board), mean that the existing degree of Māori control over the funding of Māori arts may dissipate. Beyond that, we do not know enough about the new arrangements to make a judgement.

But we do believe that the division between a Māori and a general or non-Māori body in an area of culture and heritage is a valuable model that properly recognises the distinct Māori Treaty interest. Indeed, Crown counsel submitted in closing that Te Waka Toi was an example of a Crown contribution 'to the development, regulation, control and/or use of tikanga Māori and Mātauranga Māori by their kaitiaki'.<sup>121</sup> We can say no more at this point because we are yet to see exactly what changes transpire. It is enough here for us to express our caution.

#### (c) THE ADEQUACY OF CROWN FUNDING AND POLICY FOR MARAE IMPROVEMENTS

Māori wishing to preserve and improve marae, including the restoration of marae artworks, can access several funds. We have insufficient information to say whether these funds are adequate, but any regular visitor to rural Māori communities will be conscious of the poor condition of many ageing whareniui. Te Puni Kōkiri's

comprehensive marae survey should provide a picture of the national marae asset base, not only in terms of physical and cultural infrastructure but also the financial and administrative skills of the hau kāinga.<sup>122</sup> As with Creative New Zealand's research into the health of Māori heritage artforms, we recommend that this stock-take be used to clarify national priorities for marae improvements, indicate what funding will be needed to support them, and what criteria should operate in assessing funding applications. Once the research exercise is complete, a partnership process should take place to identify those priorities and establish a set of objectives to last a generation.

(d) THE ADEQUACY OF CROWN FUNDING AND POLICY FOR BROADCASTING

Mr Ngata's evidence showed clearly that commercial considerations win out over the promotion of Māori culture on the national broadcaster, even under the charter requirement to include a 'significant Māori voice' in programming. Now that TVNZ has been freed of its charter obligations – and particularly also given the current downturn in the advertising market – it seems logical to conclude that these commercial imperatives will only intensify. The programmes of its Māori department, for instance, are aired according to the decisions of commercially-sensitive schedulers. TVNZ's Māori Content Strategy has clearly succeeded in extending the availability of Māori programmes, as well as their presence in primetime, but this has been achieved through the advent of the digital channels, TVNZ 6 and TVNZ 7. As we have noted, too, the position of kaihautū, which Mr Ngata extolled, was discarded by TVNZ in 2007.

TVNZ may partly feel now that the existence of Māori Television relaxes its obligations to Māori cultural themes in its programming, even if it explicitly denies this.<sup>123</sup> It will reason that Māori Television is catering more than adequately for that audience, and there is much truth to this. TVNZ is also damned if it is seen to compete with Māori Television in the production of Māori programmes, and damned if it is seen as doing too little. The reality, too, is that Māori-themed programmes do not rate well – TVNZ's public perception surveys show that programmes such as *Te Karere* and *Marae* are regarded

as having low importance and being of even lower interest. Its 2007 annual report even referred to the "minority interest" status of programmes such as those with Māori and religious content.<sup>124</sup>

We firmly believe that Māori culture must be prominent on mainstream New Zealand television, as well as on the 'niche' channels. For Māori programmes, gaining access to the 'holy grail' of TV1 and TV2 is still very difficult, because those channels are so relentlessly ratings-driven. Yet prominent display in the national broadcaster's shop-window is a powerful symbol of inclusion. If TVNZ truly wishes to be New Zealand's 'largest cultural institution' and 'Māori content leader', it – or rather shareholding ministers – must accept that this will come with an associated cost. We recommend that it accept this and act accordingly. We have already made this point in chapter 5 in respect of te reo Māori. Māori viewers are not simply catered for by Māori Television: TVNZ's own evidence shows that nearly half of all Māori watch TVNZ and never switch to Māori Television, with TV2 pulling by far the highest number of Māori viewers.<sup>125</sup>

The Crown–Māori partnership entity in the culture and heritage sector will provide useful direction for TVNZ, which cannot trade in mātauranga without making space for kaitiaki involvement in decision-making. One of the key areas the new entity should tackle is strategies for reconciling TVNZ's obligation to the community (particularly the Māori community) with its commercial focus. We accept that this may not be easy. But we consider that the creative minds of TVNZ, working alongside Māori, should be able to come up with commercially successful ways to present Māori programmes in TVNZ's 'shop window' – rather than relegating them to secondary channels.

We note that Radio New Zealand's introduction of greater use of te reo Māori to national audiences has been received very positively. Listeners have by no means switched off. We think the nation has reached a point in its development where risks like this can and should be taken – there is doubtless a greater public tolerance than TVNZ's strategists realise.

We also recommend that TVNZ act cooperatively with Māori Television in programming and scheduling.<sup>126</sup>

Competition in an area as important as te reo and mātauranga Māori is not a sensible model – not yet, in any event, for one day we might indeed hope it will be.

### 6.3.5 Summary of findings and recommendations

The mātauranga Māori in living art and culture is not only a taonga, but also fundamental to our collective national identity. We reiterate that its survival and transmission depends on the contributions of both Māori and the Crown, and the two parties must act as partners in this joint enterprise to ensure the best results. The partnership entity for the culture and heritage sector that we introduced in the last section is therefore our key recommendation.

In partnership with Māori, therefore, the relevant agencies should develop a clearer vision, objectives, and priorities for funding Māori art and culture. We recommend that current research projects, such as those on the health of Māori heritage arts and the physical and cultural strength of New Zealand's 1,300 marae should (if done well), be used as an information base to enable Māori and the Crown to establish a set of objectives in these key areas of mātauranga to last a generation. Arts funding can then be driven off these priorities, rather than allocated on some proportion-of-population basis. This should reverse the apparently ongoing decline in the proportion of contestable funding made available for Māori arts.

TVNZ's new digital channels have allowed it to expand its Māori programming content. However, we recommend it do more if it wishes to be New Zealand's 'Māori content leader'. It must feature Māori cultural programming on the channels that represent its 'shop window', rather than relegate it to niche channels or leave it to Māori Television. We also recommend that it cooperate with Māori Television over te reo and mātauranga Māori programming and scheduling.

## 6.4 ARCHIVES AND LIBRARIES

The main Crown repositories of documents which contain mātauranga Māori are Archives New Zealand, the National Library (including the Alexander Turnbull Library), TVNZ's film and television archive, and Radio

New Zealand's audio archive. Within these institutions is a vast amount of Māori knowledge – whether donated by Māori informants; collected by the Crown in the course of its functions; or acquired by scholars as part of their research, or by film-makers and photographers when working with Māori subjects. Here, therefore, we turn away from issues of funding to those of ownership, access, and control.<sup>127</sup>

The claimants objected to the fact that their mātauranga in these repositories was generally open to anyone to access, without prior kaitiaki consent. They were particularly concerned that some of their mātauranga that could be accessed was sensitive in nature. They wanted to be treated by the Crown archives and libraries as more than just consultees, and to in fact have real decision-making power. Some even wanted government-held documents containing their mātauranga to be returned to them.

We begin this section, once again, by examining the key features of current Crown policy.

### 6.4.1 Current legislation, policies, and funding

#### (1) *Departmental restructuring*

We note the following at the outset. Until late 2010, Archives New Zealand and the National Library were government departments in their own right. Archives New Zealand was established in 2000, when responsibility for the National Archives was transferred from the Department of Internal Affairs to a stand-alone department. As such, it was responsible to its own minister. The National Library became an independent government department in 1988, and its role was clarified and strengthened in the National Library (Te Puna Mātauranga o Aotearoa) Act 2003. It too was answerable to its own minister, the Minister Responsible for the National Library.

However, in December 2010 the Government passed legislation reintegrating Archives New Zealand and the National Library once again into the Department of Internal Affairs.<sup>128</sup> At the time of writing – just after the passage of the amending legislation – it was not entirely clear to us what impact this would have on these institutions' policies. In the interests of completing our report, and not constantly revisiting new developments, we

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therefore base the following synopsis on the state of affairs applying before the reintegration. The principles we articulate should apply regardless of the structural detail.<sup>129</sup>

We note, however, that some questions concerning the role of Māori staff and advisory bodies remain in the air. In communicating the structure of the newly integrated Department of Internal Affairs in November 2010, the department's chief executive explained that the future of the advisory groups Te Komiti Māori (at the National Library), Te Pae Whakawairua (at Archives New Zealand) – both of which are introduced and discussed below – and Te Atamira Taiwhenua at the department would need 'careful consideration'. Similarly, with respect to Māori-focused staff positions, the chief executive remarked that:

More investigation is required to work out an appropriate operating model and structure that will create greater critical mass around the Māori advice dimension and avoid undue fragmentation, but at the same time ensure that specialist advice and services continue to be provided to the parts of the business that depend on it.

The status quo is being maintained 'until further work determines the preferred long-term approach'.<sup>130</sup>

We suggest that the findings and recommendations of this report – principally the need for greater partnership between Māori and the Crown over the maintenance and transmission of mātauranga Māori – should be to the fore in any ongoing consideration of these matters.

## (2) Archives New Zealand

As the official guardian of New Zealand's public archives, Archives New Zealand holds the Crown's documentary record of its relationship with Māori. This naturally places Archives New Zealand in a unique position with respect to the study of Māori history.

Archives New Zealand holds a vast amount of material, including 96 (shelf) kilometres of archives and 21,500 motion picture reels. It has offices in Auckland, Wellington, Christchurch, and Dunedin, and employs 131 full- and part-time staff.<sup>131</sup> Its most treasured documents include the surviving drafts of the Treaty of Waitangi, the 1835 Declaration of Independence of the Northern Chiefs, and the 1893 women's suffrage petition. While these would

never be sold, the value of all assets held in the national collection was estimated to be \$522.3 million at 30 June 2010.<sup>132</sup> The Treaty, the Declaration, and the suffrage petition are all likely to be worth \$10 million or more each.

The work of Archives New Zealand in storing and caring for government records is governed by the Public Records Act 2005. A purpose of the Act is 'to encourage the spirit of partnership and goodwill envisaged by the Treaty of Waitangi (Te Tiriti o Waitangi)'. Under various other sections of the Act, and in order to 'recognise and respect the Crown's responsibility to take appropriate account of the Treaty of Waitangi (Te Tiriti o Waitangi)' (section 3(g)):

- ▶ the chief archivist must ensure there are processes in place for consulting with Māori (section 11);
- ▶ at least two members of the Archives Council must have 'knowledge of tikanga Maori' (section 14);
- ▶ the Archives Council 'may provide advice concerning recordkeeping and archive matters in which tikanga Maori is relevant' (section 15); and
- ▶ iwi-based or hapū-based repositories 'may be approved as a repository where public archives may be deposited for safekeeping' (section 26).

The Archives Council is a body set up to advise the Minister Responsible for Archives on recordkeeping and archival matters (section 15(1)(a)). Appointments to the council are made by the Minister after consultation with the Minister of Māori Affairs (section 14(3)).

The chief archivist makes use of an internal Māori consultative group, Te Pae Whakawairua, set up in 2002. Membership is drawn from Māori around the country with expertise in tribal groups, central and local government, and education and research.<sup>133</sup> Archives New Zealand has a kaihautū on its staff, who is a senior manager and responsible for the 'Community Archives' and 'Responsiveness to Māori' programmes. This latter initiative is designed to ensure Archives New Zealand services meet the needs of Māori<sup>134</sup> and is one of Archives New Zealand's four overall 'strategic principles' (along with 'Better, smarter, customer-focused services', 'Digital transformation', and 'Value for money').<sup>135</sup> The kaihautū is a member of Te Rōpū Whakahau, the Māori Librarians and Information Management Group. The staff also includes a cultural adviser, who serves at the same time



The Treaty of Waitangi on display at Archives New Zealand headquarters in Wellington. The Treaty documents were included on UNESCO's Memory of the World Register in 1997.

as Archives New Zealand's kaumatua, and a community archivist. The person holding this position is required to have knowledge of te reo and tikanga Māori, and be able to work with Māori and non-Māori community groups on managing community archives.<sup>136</sup>

A key purpose of the Public Records Act is to provide for public access to records of long-term value (section 3(c)(ii)). Restrictions on access may be put in place by depositing agencies, but the chief archivist's advice is that they are to be 'applied sparingly' and have 'a limited time span'. One ground for restricting access identified by the chief archivist is 'To protect traditional knowledge', which is defined as 'Sensitive information regarding people, places or cultural practices that would not normally

be made public'. The chief archivist's guideline for agencies depositing such material is that it be restricted for 70 years and the restriction then be reviewed.<sup>137</sup> In any event, all restrictions imposed under the Public Records Act are subservient to the processes of the Official Information Act 1982, which ultimately prevails when the release of archival information is being considered.<sup>138</sup> The Official Information Act has an overriding 'principle of availability', whereby information is to be made available 'unless there is good reason for withholding it' (section 5).

Archives New Zealand also becomes involved with material that has not yet been deposited. For example, the chief archivist issues standards, including those for the storage of public records and archives. Although the

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Stacks of archives at Archives New Zealand, Wellington. Archives New Zealand holds over 4,000,000 records from 1840 to the present day. Numerous records contain mātauranga Māori, whether in the form of correspondence from Māori leaders to government ministers and officials, or in Crown records concerning Māori leaders, communities, and land.



standard covering storage of physical records that applied when the chief archivist gave evidence in January 2007 has since been replaced by a mandatory storage standard, both versions state that:

The rights of Māori to their recorded knowledge, which is a taonga in . . . terms of the Treaty of Waitangi, should be respected when this knowledge is incorporated into government records and archives. The standard aims to support Māori cultural practice regarding care of records by encouraging protection of sensitive information and the long term preservation of valued records.<sup>139</sup>

### (3) *National Library*

While Archives New Zealand is the keeper of the Government's records, the National Library keeps all other records. And like Archives New Zealand, the National Library holds a vast amount of material. This includes 2.9 million books, 4.5 million photographs and negatives, enough newspapers for a stack two kilometres high, 9 kilometres of shelf space of manuscripts and 4 kilometres of serials, 10,000 oral history interviews, 140,000 ephemera items, and so on.<sup>140</sup> The National

Library's collections are growing at a rate of 3 per cent per annum.<sup>141</sup>

'Mātauranga' is left undefined in the National Library Act, which was the preference of the Library's Māori Reference Group that provided advice during the Bill's development.<sup>142</sup> There is no mention of the Treaty or its principles in the Act. However, the Act does contain some provisions that relate directly to Māori.

First, the legislation established a body called the Guardians Kaitiaki of the Alexander Turnbull Library. The task of the Guardians Kaitiaki is principally to advise the Minister Responsible for the National Library on matters affecting the Alexander Turnbull Library, including 'the capacity of the Alexander Turnbull Library to acquire documents to be used for the purposes of research, scholarship, or mātauranga Māori, or by other libraries and the people of New Zealand' (section 18(1)(a)). Before making appointments to the Guardians Kaitiaki, the Minister must consult with the Minister of Māori Affairs (section 16(3)(a)). Secondly, the Act established the Library and Information Advisory Commission/Ngā Kaiwhakamārama i Ngā Kohikohinga Kōrero (LIAC), whose role it is to 'provide advice to the Minister on

library and information issues, including mātauranga Māori' (section 23). Again, LIAC members are to be appointed only after consultation with the Minister of Māori Affairs (section 22(3)).

The actual number of Māori to serve on the seven-member LIAC (which includes the chief executive – who is also the National Librarian – as an *ex officio* member) and the five-member Guardians-Kaitiaki is not specified in the Act. However, the evidence to us of the Alexander Turnbull Library Chief Librarian, Margaret Calder, referred to 'the Māori representative' (singular) of each body.<sup>143</sup>

In addition to the Guardians Kaitiaki and LIAC, the National Library has a Māori advisory body called Te Komiti Māori. This group, which is put together by invitation of the National Librarian, advises the chief executive on matters pertaining to Māori, including mātauranga Māori.<sup>144</sup> The Library also has a 'Services to Māori – Ratonga Māori' team consisting of several 'Hononga Māori' positions. Within the staff of the Library is an 'active voluntary group of Māori staff', Te Rōpū Māori. Members of this group also participate in Te Rōpū Whakahau (see above). Specialist Māori positions on

the National Library staff also include the oral historian, Māori; the national preservation officer, Māori; the Alexander Turnbull Library Māori materials coordinator; and the senior reference librarian – Māori subject specialist.<sup>145</sup>

Aside from these Māori staff and advisory bodies, the framework through which the National Library engages with and serves Māori is 'Te Kaupapa Mahi Tahī: A Plan for Partnership 2005 – 2010'. This plan was first launched in 2001 and updated several years later. In the words of the chief executive, it aims to 'foster and advance relationships with communities' and 'recognises that mātauranga Māori belongs primarily with iwi'.<sup>146</sup> Amongst a number of undertakings, the plan states that:

Taonga Māori are cared for, protected and made accessible in collaboration with iwi and Māori.

All New Zealanders' access to mātauranga Māori is facilitated.

We actively seek input and take notice of iwi and Māori communities' needs.

We strive for excellence and innovation in the shared care of taonga.



Part of the Pacific collection at the National Library. These are some of the many books in the library's collection which contain Māori subject matter.

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Apirana Ngata and Peter Buck alongside a tukutuku panel at Ngata's home at Waiomatatini, 1923. Sir Apirana Ngata's papers were donated to the Alexander Turnbull Library by his whānau between 2000 and 2005, with special conditions for care and access.



We understand and apply the principles of the Treaty of Waitangi in our work.<sup>147</sup>

Ms Calder described Te Kaupapa Mahi Tahi as meaning the National Library takes 'account of mātauranga Māori in everything the Library does.'<sup>148</sup>

More specifically, the National Library has developed a set of principles for the care and preservation of Māori materials. These include the need for the Library to seek 'collaborative relationships' with whānau connected to the taonga in its collections.<sup>149</sup> The Alexander Turnbull Library also works closely on access and care arrangements with families depositing important material to the Library, such as the Ngata whānau's donation of the papers of Sir Apirana Ngata. The National Library has also contributed to a project that allows for the use of Māori subject headings to be used by library cataloguers; digitised material of general interest to Māori and specific interest to certain Māori groups; and formed close relationships with certain iwi over particular archives or exhibitions.<sup>150</sup>

#### (4) Television New Zealand

The third of the agencies that holds a significant amount of mātauranga in its archives is TVNZ, which we introduced in the previous section. In 1990, the Crown sold the National Film Unit (NFU) to TVNZ. The agreement did not, however, include the NFU's actual film and photographic material, which remained subject to the Archives Act 1957 and its successor legislation, the Public Records Act 2005. Under the sale agreement, TVNZ was allowed to hold this material until it reached 25 years of age, at which point it was to be returned to the National Archives (now Archives New Zealand).<sup>151</sup>

As it happens, however, Archives New Zealand has allowed over 100 original films to remain stored in the TVNZ archive, and TVNZ has been permitted to keep copies of most of the original material it received in 1990. The reason is that TVNZ has the capacity to act as a production library (using the material in its own programmes or licensing others to use it) and Archives New Zealand does not, and the latter 'recognise[s] the desirability of making the National Film Unit collection accessible and



ha[s] agreed that TVNZ should facilitate that.' TVNZ has thoroughly catalogued the material, to which is routinely added new material from TVNZ's own programmes.<sup>152</sup>

Requests for access to and use of Māori images from this extensive archive are referred to the Manager of TVNZ's Māori department for approval. As noted, at the time of our hearings, in January 2007, this was Whai Ngata. Mr Ngata said he and his staff liaised with the Māori community over such requests.<sup>153</sup> Under cross-examination, Mr Ngata said that TVNZ's kaihautū would probably assume the responsibility for making decisions about the use of Māori images in his own absence.<sup>154</sup> As we have noted above, the position of kaihautū at TVNZ was disestablished shortly after Mr Ngata gave his evidence.

### (5) *Radio New Zealand*

As mentioned, Radio New Zealand was not raised in submissions by claimant counsel, nor did the organisation appear before us. We do no more than mention it here for the sake of completeness.

In 1956, the New Zealand Broadcasting Corporation established the Sound Archives as a separate unit to store discs and tapes of radio broadcasts. Initially located in Timaru, this repository has been housed in Christchurch since 1992. A separate Māori collection, which dates from the early 1960s, remains located in Auckland. In 1998 a new corporate body was established, Sound Archives/ Ngā Taonga Kōrero, which brought together these two collections under common management. It is a fully-owned subsidiary of Radio New Zealand, and its role is to 'create and preserve for posterity this country's premier collection of historical broadcast audio recordings' from any network or station. Between them, the Auckland and Christchurch repositories hold some 14,000 lacquer discs, 20,000 open reel tapes, 10,000 analogue and digital tape cassettes, and a large number of related items.<sup>155</sup>

The Ngā Taonga Kōrero archive contains what Radio New Zealand describes as 'a substantial collection of Māori audio material.'<sup>156</sup> It includes recordings of 'marae openings, the Coronation hui, Hui toopu, Hui Aranga, cultural festivals both regional and national, nga tangi-hanga, welcomes and farewells, Waitangi, royal occasions, and Maori cultural clubs.'<sup>157</sup> There do not appear to be any particular impediments to accessing or using material

from this significant collection of mātauranga. The Sound Archives/Ngā Taonga Kōrero website explains that 'The aim of collection building, cataloguing and preservation activity is permanent accessibility. Access is the main manifestation of the utility of the collection, and hence its *raison d'être*.' In fact the website states that access transactions are treated in the strictest confidence and that Sound Archives/Ngā Taonga Kōrero 'will ensure that details of a client's project are not communicated to a third party.'<sup>158</sup>

### 6.4.2 The position of the claimants

We set out here the arguments of the parties about these archives and libraries. We begin by setting out the contentions about Archives New Zealand and the National Library together, which reflects the way most of the claimants grouped them. We then relate the submissions made about TVNZ.

#### (1) *National Library and Archives New Zealand*

The claimants said a considerable amount of mātauranga is held by the National Library and Archives New Zealand (including evidence submitted in Waitangi Tribunal inquiries), and that this often touches on sensitive information around rongoā, whakapapa, and other confidential mātauranga. The Te Tai Tokerau claimants expressed serious concerns over the long-term protection of this material. Counsel submitted that the current law and policy governing the two institutions is inadequate to protect the relationship of kaitiaki with their taonga or taonga works, 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.'<sup>159</sup>

Counsel for Te Tai Tokerau acknowledged the claimants' awareness that the National Library and Archives New Zealand play an important role in preserving taonga, but submitted that it was clear that improvements were needed. Kaitiaki needed to be fully involved in any actions relating to their taonga, and 'databases, registers and other repositories of traditional knowledge must be highly confidential so as not to facilitate misappropriation and misuse.' More fundamentally, arrangements 'must preserve and protect the kaitiaki relationship with their traditional knowledge.'<sup>160</sup> Catherine Davis of Te Rarawa

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expressed concern about what would happen to the Wai 262 record of inquiry when the claim was concluded. She felt its deposit in Archives New Zealand would be ‘a perverse outcome’ given the nature of the claim.<sup>161</sup>

Counsel for Ngāti Koata was critical of the fact that the Public Records Act 2005, which governs the activities of Archives New Zealand, only requires ‘appropriate account’ to be taken of the Treaty of Waitangi. Counsel submitted that the Act’s ‘overriding principle’ of public access has the clear potential to collide with Māori concerns. Access restrictions are determined by depositing agencies and there is no requirement for Māori to determine issues of access. Nor is there currently any ‘provision for iwi Māori to be in a direct position to exercise kaitiakitanga with respect to these documents’. Counsel felt that Archives New Zealand staff were ‘attuned’ to issues around who holds ‘the mana in terms of the archival material’ (in Kaihautū Terehia Biddle’s words), but the reality is that the legislation – including the overriding Official Information Act – ultimately determines their actions.<sup>162</sup>

Counsel for Ngāti Koata noted that the National

Library’s establishment Act has no reference to the principles of the Treaty and that there is no legal provision for the Māori exercise of kaitiakitanga. Counsel argued that the fact that access conditions can only be arranged when items are deposited, and not revisited later, means that the ‘horse has bolted’ with respect to material already deposited that is of concern to Māori, such as the McLean papers (which we discuss in section 6.4.4(1)). Counsel conceded that ‘Kaupapa Mahi Tahi’ is a ‘promising document’, and there are ‘positive measures in place’ that recognise Māori kaitiakitanga over their mātauranga. But the legislation ultimately determines the limited level of actual protection of mātauranga Māori, especially since it upholds the principle of public access to the library’s materials.<sup>163</sup>

Counsel for Ngāti Porou submitted that the Māori consultative committees established by the National Library and Archives New Zealand had essentially procedural and advisory functions that were subject to overriding objectives such as public access. Said counsel, ‘There is no more substantial right conferred on the customary owner or kaitiaki of the taonga held by these agencies and Maori



Just some of the evidence presented in this inquiry. While much of the evidence was heard in public and remains accessible to the public, confidential evidence will not be released without the consent of the appropriate kaitiaki.

must rely on the goodwill of those within those agencies for protection. If that protection is not provided then the options available to Maori are limited.<sup>164</sup>

In 1999, Ngāti Porou witness Apirana Mahuika expressed his 'serious concerns' about Māori Land Court records – including whakapapa, especially to Hikurangi – becoming increasingly available electronically. He felt that Ngāti Porou should be given 'the prior and senior rights to this information'. Yet, he said, 'the Maori Land Court, which is an arm of the Crown, has never entered into dialogue with Ngati Porou about this proposal. This is a further breach of our Treaty rights.'<sup>165</sup> Dr Mahuika reiterated these concerns in his 2006 updating evidence, arguing that the 'Maori Land Court itself should transfer control and rights in the records to Ngati Porou'. He said that the iwi 'could establish its own archive to house these and other records of our history for our people and our future Ngati Porou scholars'. As he explained, 'Part of the problem with open access is that non Ngati Porou have access to this information and they are becoming recognised as scholars of Ngati Poroutanga.'<sup>166</sup> Te Kapunga Dewes also advocated in 1998 for the return to Ngāti Porou care of all

recorded oral archives of the iwi, wherever held,<sup>167</sup> as well as some Māori Land Court records and family records (such as those held in church archives).<sup>168</sup>

## (2) *Television New Zealand*

With respect to the National Film Unit and television archives held by TVNZ, counsel for Ngāti Porou noted that the Manager of TVNZ's Māori department assessed requests for the use of Māori footage stored in the archives and only allowed their use under certain conditions. However, counsel argued, TVNZ is not compelled to take this approach, which in fact relies upon the goodwill of the Māori department and Mr Ngata in particular. Counsel argued that the 'limited control that Māori in fact have over the images held by TVNZ' is reflected in the lack of consultation with Māori over the transfer of the National Film Unit images to Television New Zealand in 1990.<sup>169</sup>

### 6.4.3 The position of the Crown

The Crown gave examples of various policies and provisions it contended protected the relationship of kaitiaki



Microfilm indexes of Maori Land Court Minute Books at Archives New Zealand. The Ngāti Porou claimants sought the return to them of control over these records relating to their tribal lands and whakapapa.

with their taonga. In the case of Archives New Zealand, these examples included:

- ▶ the Public Records Act 2005;
- ▶ the Responsiveness to Māori programme;
- ▶ advice and consultation provided to depositing agencies;
- ▶ the protection of traditional knowledge as one of the grounds on which access can be restricted;
- ▶ relationships with Māori groups;
- ▶ proposals in respect of approved repositories as well as the development of approved repositories within iwi as a specific contribution to the preservation and transmission of mātauranga Māori;
- ▶ the positions of Kaihautū and Cultural Advisor; and
- ▶ the Archives Council and Te Pae Whakawairua.

For the National Library, examples included:

- ▶ the National Library (Te Puna Matauranga o Aotearoa) Act 2003;
- ▶ Te Kaupapa Mahi Tahi – Plan for Partnership (2005/10);
- ▶ Recommended Principles on the Care and Preservation of Māori Materials;
- ▶ Ratonga Māori team;
- ▶ agreements with depositors about access restrictions;
- ▶ relationships established with iwi;
- ▶ the position of the National Preservation Office;
- ▶ specialist Māori staff;
- ▶ groups such as the LIAC, Te Komiti Māori, Te Roopu Māori and the Guardians Kaitiaki; and
- ▶ the advice and guidance the Library provides to depositors of unpublished material.

For TVNZ, initiatives protecting the relationship of kaitiaki with their taonga cited by the Crown included:

- ▶ the position of Kaihautū; and
- ▶ consent processes in respect of proposed users of TVNZ material and TVNZ's use of recorded material, including liaison with the Māori community.<sup>170</sup>

In reference to the issue of the 'legitimate interest' of public access, the Crown stressed that there was a strong Māori interest in that access. He argued that since the lives of so many younger Māori today are quite disconnected from those knowledgeable in tribal whakapapa, one of the only ways for them to access their own whakapapa will be through minutes of the Native Land Court.<sup>171</sup>

In her evidence, Ms Calder said that the National Library operated under the principle that all taonga have mauri. Thus, she said, the Library 'actively seeks relationships with Māori to make decisions about all aspects of the management of taonga in order to protect and preserve the physical objects as well as their integrity and significance for future, present and past generations'.<sup>172</sup> Under cross-examination she explained that only where agreement had been made with a depositor of material can access to and use of images by users of the library be controlled. However, she added, library staff provided advice about the 'sensitivities around particular images' (ie, Māori ones). While there was no legal avenue to prevent use, she said, 'our advice can be quite heavy-handed'. With reference to the lack of any specific provisions to address Māori interests in the National Library's 2003 establishment Act, Ms Calder considered that the Act's permissive nature allowed the Library to attend to such matters in its own terms.<sup>173</sup>

Archives New Zealand Kaihautū, Terehia Biddle, said the organisation had yet to consider the tapu of the records it cared for. However, she noted that there was water for cleansing purposes when visitors leave the room where the Treaty is displayed, and karakia are spoken for staff nervous about the mauri of old documents. It was impossible not to feel the spirit of the material, she said, and Archives staff have thus become more attuned to working with it.<sup>174</sup>

Archives New Zealand Chief Archivist Dianne Macaskill said under cross-examination that Archives New Zealand, as a relatively new government department, had 'achieved some things' since 2000 in terms of responsiveness to Māori needs but 'we recognise that we are really on a journey in doing this'.<sup>175</sup> In her evidence she explained that the 'next major piece of work' that her department would undertake would include 'establish[ing] principles for the management of access to records that contain traditional knowledge'.<sup>176</sup>

In September 2009 we requested an update on this project.<sup>177</sup> We were told that Archives New Zealand had commissioned two reports from consultants that:

- ▶ examined how Crown agencies are defining and managing mātauranga Māori; and
- ▶ reviewed Archives' policies and practices for

consulting with Māori and responding to Māori requests.<sup>178</sup>

Counsel outlined the steps Archives New Zealand was taking to respond to the consultants' recommendations and be 'proactive' in this area, such as enhancing access to certain archives for certain iwi. Overall, said counsel, Archives New Zealand 'look forward to the Tribunal's report in Wai 262. It is anticipated the report will provide authoritative guidance and a framework for the public sector to move forward in this area.'<sup>179</sup>

For TVNZ, Mr Ngata said that requests for the use of Māori images from TVNZ's archives had been denied in the past where the intended use was believed to be for purely commercial purposes. 'The integrity of the people whose images appear on a programme', he said, 'has been and continues to be of the utmost importance to the Māori department and to TVNZ.'<sup>180</sup>

#### 6.4.4 Analysis

We now set out our own views of the Crown's ownership of mātauranga Māori in archives and libraries, beginning once more with the Treaty interest. What degree of interest in this material do kaitiaki have under the Treaty? What other interests may constrain the Treaty interest? Here, we consider matters such as the principle of public access and, within that, the particular issue of Māori public access. We then outline our ideas on the most practical way in which these competing interests can be balanced while according an appropriate priority to the Māori Treaty interest.

##### **(1) Is there a Treaty interest in mātauranga held by government archives and libraries?**

It seems to us unarguable that collections of Māori material in archives and libraries are taonga because they hold mātauranga about, and generated by, kaitiaki communities – for example, Native Land Court Minutes recording whakapapa in relation to land. As with all such taonga, it falls to the Crown to protect the kaitiaki relationship with them and the mātauranga they embody, and to take steps that enable kaitiaki to discharge their obligations to these taonga.

Two examples illustrate the importance of these forms of mātauranga. The first is the papers of Donald McLean



Sir Donald McLean (1820–77). The Alexander Turnbull Library holds the Donald McLean papers, many of which contain Māori content. Over 100,000 letters have been digitised and are available online, including some 3,000 letters in te reo Māori, a large number of which have been translated and transcribed. This collection represents an invaluable repository of mātauranga.

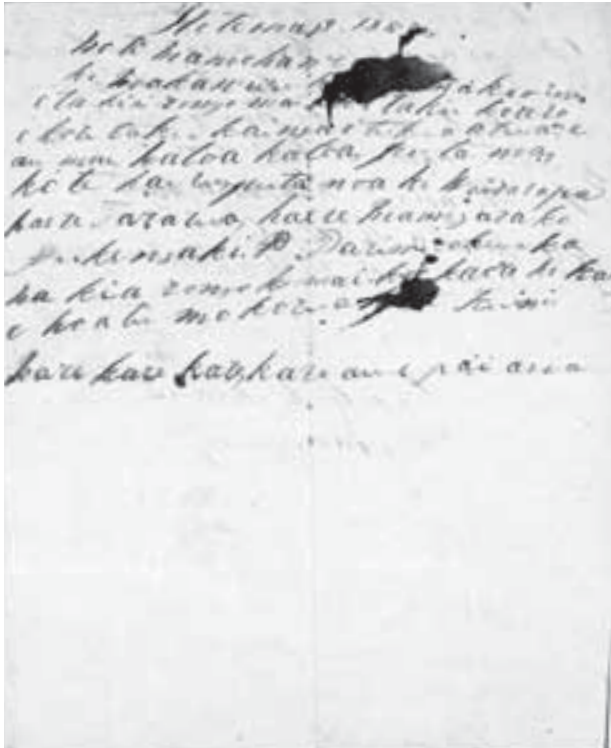
– the colonial land purchase agent and politician, who, alongside Governor George Grey, was perhaps the most influential Pākehā in Crown relationships with Māori in the nineteenth century – held by the National Library. The McLean collection includes diaries, notebooks, maps, official papers, and a vast series of letters, including nearly 3,000 written to him by Māori. This correspondence represents the largest surviving group of nineteenth-century Māori letters and contains a considerable amount of mātauranga. As the National Library puts it on its website:

6.4.4(2)

The letters have research value for studying Māori attitudes to land and land sales, inter-hapū politics, the social history of Māori communities, the wider history of interaction between Māori and Pākehā, and for the study of how te reo Māori developed as a written language.<sup>181</sup>

A more recent example is TVNZ's archive of episodes of *Waka Huia*. This series originated in 1987, just after the acclaimed Te Māori exhibition. At the time, Mr Ngata and fellow broadcaster Ernie Leonard shuddered to think of the consequences if the plane carrying the kaumātua who had accompanied the exhibition in the United States were to 'drop out of the sky'. As a result, they devised *Waka Huia* as a televised means of preserving the mātauranga and reo of kaumātua. More than 20 years and 800 hour-long episodes later, this archive of material forms, in TVNZ's own description, 'a body of knowledge of

Letter from Ihaka Te Haterei to Donald McLean regarding land purchasing in the Wairarapa.



inestimable value for [M]āoridom and New Zealand as a whole.<sup>182</sup>

There are many other examples of collections of mātauranga, whose immense importance to Māori is self-evident. Such mātauranga-rich documents and images are not only nationally significant records but are also key sources of tribal identity and memory. Some carry great mana and Crown witnesses attested to the power of their presence.

We have already noted in section 6.2.4(1) (in respect of moveable cultural heritage) that the Treaty interest in mātauranga Māori is increased where cultural items are vulnerable to loss or damage. Material held by government archives and libraries are today well looked after in a physical sense. The Crown employs expert preservationists and does not allow fragile material to suffer further damage. Ongoing digitisation is also clearly assisting in physical preservation. Of course, this degree of physical care has not always occurred in the past; one thinks, for example, of the serious harm done to the original Treaty documents when poor storage between 1877 and 1908 led to water and rodent damage. The Hope Gibbons Building fire in Wellington in 1952 also destroyed a significant number of government archives.

There is also evidence that archival documents are receiving better care spiritually than has previously been the case. Ms Biddle's evidence bears testimony to that. Moreover, the National Library certainly endeavours under its Kaupapa Mahi Tahi plan to involve kaitiaki in the care and protection of their taonga.

These improvements notwithstanding, it seems clear that the Treaty gives the Māori interest in archived material a high priority. As such, it would appear at first glance that kaitiaki should have a significant voice over access to and use of their mātauranga. There are practical limits to this, however, as we discuss below.

**(2) Are there other valid interests with regard to mātauranga in government archives and libraries?**

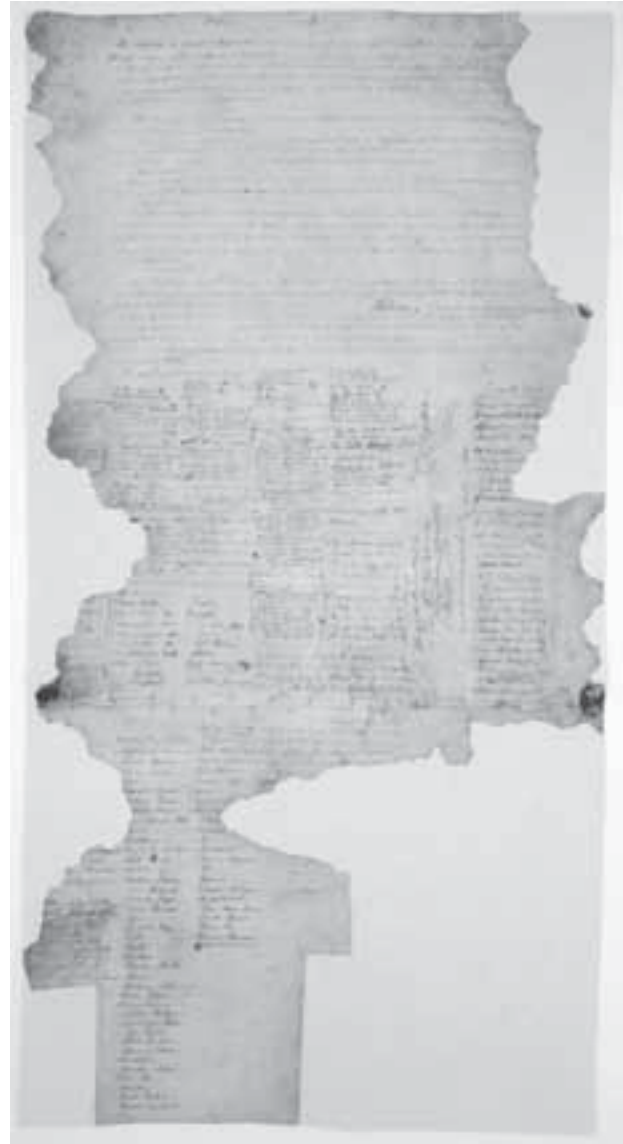
As we heard from some claimants, kaitiaki do not always want their mātauranga held by libraries and archives to be freely accessed. However, that clashes with what has become one of the central tenets of open and democratic societies: freedom of access to information (see our

discussion in section 1.6.3, of the need to strike a balance in such matters). This freedom is regarded as an essential means by which ordinary people, the news media, Opposition members of Parliament, and others can hold those in power accountable for their decisions. While some countries tend to signal a different emphasis in the title of legislation governing such access – the United Kingdom, for example, has an Official Secrets Act – New Zealand has an Official Information Act (which replaced our own Official Secrets Act in 1982). As we have noted, the overriding principle in the legislation is that information is to be made available ‘unless there is good reason for withholding it’.

What this ‘principle of availability’ means, in essence, is that generous public access to government records must be safeguarded. While the principle applies most obviously to contemporary government information, it must by extension also apply to historical material. In other words, if the historical records of government are to be withheld from public scrutiny, there must be a good reason for it. As we have noted, the chief archivist’s advice to depositing agencies is that restrictions should be used sparingly and be of a limited duration only, as sensitivity inevitably decreases with the passage of time.

These, then, are some of the issues that must be weighed against the clear Treaty interest in documentary mātauranga held by the Crown. Perhaps the most important consideration, however, is this. As we have said, digitisation of material is allowing more and more archives and records to be available electronically, and the claimants are concerned that this will significantly open up access to material they regard as confidential, such as whakapapa in Native Land Court records. However, this same technology can connect Māori throughout the world to key information about their heritage. The reality is that many Māori who might want to access such information – especially amongst the estimated one in six who now live overseas – will not be able to learn about their whakapapa from kaumātua or their own family. They have become dependent upon public records for that information. To that extent, there is now a strong *Māori* interest in the principle of unrestricted access.

A further consideration, in the case of the Turnbull Library, is that unless access restrictions are agreed with



Treaty of Waitangi ‘sheet 1’. The damage seen in the photograph occurred between 1877 and 1908 when inadequate storage led to both water and rodent damage. Today, documents in the care of archival institutions have specialist care from preservationists.

6.4.4(3)

the depositor of the material at the time of deposit, the library is relatively powerless to intervene. It has an obligation to respect the wishes of the depositors, who may well have been Māori themselves.

Finally, with respect to the call on some claimants' part for the return of documents to them, some of the same issues would apply as with artefacts (which we discussed in section 6.2.4). That is, the Crown has the expertise and resources to adequately store and care for the material long-term, and most iwi do not. The Crown also legitimately acquired the mātauranga in most instances, with papers willingly lodged, consent given for photographs taken, and testimony given freely in open court. Some Māori may not have realised at the time just how widely available their mātauranga or image would become through their willing transmission of it to a researcher, photographer, or government official, but whether this should cause us now to virtually restrict access is quite another matter. Given the undeniable Treaty interest, however, we do think that an appropriate balance must be struck. Finding that balance is what we now seek to do in conclusion.

### (3) Conclusion and reforms

We are guided by the following core principles. First, the material held in Crown archives and libraries includes a large amount of mātauranga Māori and, regardless of how it came into the Crown's possession, Māori have a strong Treaty-based interest in it. Some collections of material are important taonga indeed, and iwi Māori have every right to continue to see themselves as kaitiaki of it. Our second guiding principle is that there are nevertheless important reasons to maintain relatively free public access, and especially Māori public access. Such are the exigencies of modern democracy, and the realities of how many Māori live today, without day-to-day contact with kaumātua and their heritage except via electronic media.

Mindful of both of these principles, and the tension between them, we consider that documentary mātauranga should remain as open to the public as it is at present. That is, aside from the existing exceptions such as restricted government material (including, of course, confidential Wai 262 evidence) or deposited material that

has controls over access (such as the papers of Apirana Ngata in the Turnbull Library), researchers should be able to continue to access other documentary mātauranga as before.

However, there must be some accommodation of the Treaty interest. It is in the area of *use*, as opposed to access, that we think an element of constraint is appropriate. How best to exercise that constraint, though, is problematic. The most obvious approach might seem to be requiring kaitiaki consent whenever another party wants to use documentary mātauranga for public or commercial purposes – for example, Ngāti Kahungunu permission would be needed before images of Ngāti Kahungunu tupuna from the Samuel Carnell collection in the Turnbull Library could be reproduced in a published work. We suspect that this approach would deliver the kind of control that many of the Wai 262 claimants seek.

But we do not think that it would work. In fact, it could lead to outcomes that were contrary to both the Māori and the national interest. Scholars, both Māori and Pākehā, would be discouraged from researching Māori topics. Indeed, had such an approach been taken in the past, books such as *Haka: A Living Tradition* by Wira Gardiner and *Te Whatu Tāniko: Tāniko Weaving Technique and Tradition* by Professor Mead might never have been written. Scholarly articles that have advanced our knowledge of traditional Māori society might never have been written. And ordinary Māori people seeking access to their own mātauranga might have been turned away.

Our recommendation, therefore, is to manage the use of mātauranga Māori in Archives New Zealand and the National Library through the same objection-based approach we have described in section 1.7.1. Access to these repositories for private research purposes would remain free and open, as it would for research relating to Treaty claims and other legal proceedings (indeed, this is a legal requirement). However, where users plan to exploit mātauranga for commercial gain, they would need to either consult with kaitiaki or seek kaitiaki consent (as appropriate) before doing so. Kaitiaki would be able to bring any objections to the commission we have recommended in chapter 1, which could order a respondent's



compliance. This commission could also make declaratory rulings to guide users as to whether any kaitiaki rights might be infringed. This would avoid the potentially chilling effect on researchers of uncertainty.

Effectively, we believe, such an arrangement would deter kaitiaki from attempting to refuse every last use of their mātauranga held in Crown repositories. On the other hand, researchers would be guided about when to obtain appropriate consent, and the potential consequences of their failure to do so. We believe this to be the appropriate balance between the Treaty interest and the valid interest of the public, including the Māori public. We understand the potential implications of this change, but we cannot pre-empt the work of the commission. A balance clearly needs to be struck between scholarly and commercial works, but that balance can only be found in actual cases rather than in the abstract here.

The situation of TVNZ would require a somewhat different regime, however. There, at present, requests for use of Māori images in the National Film Unit and television archives are considered by the head of TVNZ's Māori department. We have no doubt that Mr Ngata made well-considered decisions and consulted conscientiously. We are also sure that his successor, Paora Maxwell, continues to do so. But just as we sounded a note of caution in section 4.7.3 about reliance on individuals who have built relationships rather than systemic provisions, we suspect that this system relies on the integrity and good judgement of the head of the Māori department, and should be strengthened. We are not suggesting the same objection-based approach (including declaratory rulings) for every use of mātauranga-bearing footage, for such an arrangement would prove altogether too unwieldy for the fast-paced world of the TVNZ newsroom.

Rather, we recommend that guidelines covering the granting of consent, including clarification of the occasions when it will be necessary to refer directly to kaitiaki for that consent, be developed by TVNZ for use by its Māori department. The register of kaitiaki and their mātauranga Māori we have outlined in section 1.7.2(3) would be helpful to this process. In any event, we recommend that TVNZ consult with Māori thoroughly on the production of these guidelines. It may also be appropriate

for Sound Archives/Ngā Taonga Kōrero to develop similar guidelines with respect to its own collections, but as we have said that is a preliminary observation only.

The reforms we have recommended should not apply retrospectively to pre-existing uses of archival material made without kaitiaki consent, but should apply henceforth. Where no kaitiaki exists – that is, where the mātauranga contained within the documentary material is generically Māori, rather than specific to any discernible Māori group – there is no kaitiaki relationship to protect. Guidelines for researchers should explain the differences.

Of course the Public Records Act is overridden by the Official Information Act, which does not mention the Treaty and gives no consideration to safeguarding mātauranga Māori. In essence, the two pieces of legislation should be consistent. They should maintain the principle of reasonable public access, but both allow for an element of control by kaitiaki over commercial publication.

While the reforms set out above apply to Crown repositories only, there is nothing to stop private archives and libraries issuing advice of their own to researchers about when it might be appropriate to consult kaitiaki or seek kaitiaki consent. We recommend that Archives New Zealand and the National Library provide generic guidelines for any private institutions willing to at least take that step.

It remains for us to comment briefly on the general provision for shared decision-making within the institutions we have discussed here. While we note that there are no formal partnership arrangements, we believe that the principles present in Te Kaupapa Mahi Tahī, and which led to the formation of Te Pae Whakawairua, should continue to influence the relationship of the National Library and Archives New Zealand with iwi. Although considering them ultimately subservient to the principle of public access, claimant counsel seemed to think well of these initiatives. New ways of delivering partnership will undoubtedly arise from the establishment of the partnership entity for the culture and heritage sector that we have already mentioned in sections 6.2.4(3) and 6.3.4(3) and return to in the conclusion to this chapter. One practical expression of this may well be the approval of iwi organisations as

repositories of public records where they have adequate arrangements for preservation, access, and storage. Ms Macaskill, chief executive of Archives New Zealand, was certainly open to such a development, and in fact some iwi may be in a position to receive material already.

As we have already mentioned, the Ngāti Porou Deed of Settlement with the Crown initialled on 29 October 2010 includes provision for a letter of commitment between Ngāti Porou and the Department of Internal Affairs (as the Crown agency now responsible for Archives New Zealand and the National Library) and Te Papa ‘to facilitate the care and management, access and use, and development and revitalisation of Ngati Porou taonga.’<sup>183</sup> Such an agreement should be another means by which the Crown can deliver partnership with kaitiaki over their documentary mātauranga.

#### 6.4.5 Summary of findings and recommendations

Māori have a significant Treaty interest in the documents and images held by the Crown, and some kaitiaki wish to have more control over access to the mātauranga to which they have obligations. However, the exigencies of modern democracy and the fact that many Māori today have little direct day-to-day access to their cultural heritage, mean that public access to that mātauranga should not be curtailed.

In recognition of the Treaty interest, however, we recommend there be some constraint on the commercial use of that mātauranga. As we have explained more fully in chapter 1, an objection-based approach should operate whereby kaitiaki of mātauranga held by Archives New Zealand and the National Library should be able to prevent the commercial use of their mātauranga unless they have given consent or been consulted, as appropriate.

We recommend that TVNZ, on the other hand, consult with Māori and produce thorough guidelines for its Māori department staff on handling requests for the use of mātauranga-laden footage from its film and television archive.

These reforms should neither apply retrospectively, nor to mātauranga that is generically Māori and has no specific kaitiaki. We recommend that generic guidelines about when it might be appropriate to consult kaitiaki or seek kaitiaki consent be prepared by Archives New

Zealand and the National Library for any private archives and libraries willing to offer them to users.

#### 6.5 EDUCATION

We turn now to the Crown’s oversight of the teaching of mātauranga Māori within the education system, and more particularly to the activities of the Ministry of Education and the New Zealand Qualifications Authority (NZQA). We begin with an overview of the education sector and the essence of Māori concerns about the treatment of their mātauranga within it.

The Ministry administers the Education Act 1989 and is the lead education agency. It is the successor to the much larger Department of Education that existed before the 1989 legislation, but was shorn of many of its functions by the reforms initiated by the fourth Labour Government. In fact, the department was replaced by ten new agencies, including the Ministry, the Education Review Office (ERO), which monitors school performance, and NZQA, which oversees the system of academic and vocational qualifications.<sup>184</sup> Much later, in 2003, the Tertiary Education Commission (TEC) was also established to allocate funding to tertiary education institutions.<sup>185</sup>

Part of the rationale for these reforms was to decentralise decision-making and to separate policy from operations, in the expectation of gaining efficiencies in educational administration. As it happens, however, the Ministry has retained significant operational responsibilities (essentially in the early childhood and schooling sectors), and agencies such as NZQA and the TEC do in fact have some strategic and policy functions. For example, the TEC is responsible for ‘policy advice and implementation’ across the tertiary education sector<sup>186</sup> and NZQA has developed Māori and Pasifika strategies. But the Ministry has overall leadership and strategic responsibility – as it explains on its website, it is ‘the Government’s lead advisor on the education system, shaping direction for education agencies’ and ‘develop[ing] strategic policy for the education sector.’<sup>187</sup>

The evolution of this complex set of inter-agency relationships and boundaries has occurred at the same time that the State has taken on a much greater role in the transmission of mātauranga Māori. One of the features

of New Zealand education in the last 20 years has been the drive to integrate mātauranga Māori into learning at all levels. This must be seen as a significant and positive development. One of its unavoidable effects is that the Crown, as the funder and largest provider of education in New Zealand, must oversee the interpretation and transmission of mātauranga Māori wherever it occurs within the state-funded education system. There is now deep Māori interest in both how much control the Crown has over mātauranga Māori education and in the way it exercises that control.

As we have explained, the last 100 years have resulted in vast social changes within the Māori community, in particular the rapid urbanisation that has distanced most Māori from the environments and economy that nurtured mātauranga Māori. This has created a significant void in the transmission of mātauranga, and to a limited extent the State has filled it.

What concerns many Māori, then, is how the Crown has stepped into this breach. They argue that they have been left out of key decision-making and that the teaching of their mātauranga has been underfunded. Many point out that the state only belatedly accepted its responsibilities, in the 1980s, after a great deal of Māori struggle. Some indeed argue that it is now time for Māori to have full control over their own education and knowledge. For example, Wayne Ngata of Ngāti Porou told the Tribunal in 1998 that ‘Education is the key but only if the lock is to a whare Maori which contains matauranga Maori, which is controlled and owned by iwi Maori and which serves first and foremost Maori, not New Zealanders’ interests.’<sup>188</sup>

The claimants’ criticisms focused on the policies of the Ministry of Education and NZQA. We therefore consider the work of these two agencies in turn, setting out their respective policies and the arguments of the parties about them. However, our concluding remarks deal with the two agencies collectively. That is because the Treaty interest in the mātauranga the two agencies deal with is essentially the same. In each case, the issue at the heart of the matter is one of control.

Perhaps surprisingly, the TEC did not feature in claimant submissions and no TEC representative appeared before us during the presentation of the Crown’s evidence. It is, however, clearly a ‘mātauranga agency’ – indeed, its

Māori title is ‘Te Amorangi Mātauranga Matua’. We do not examine its activities here, although we think it likely that our conclusions in this section will also be of direct relevance to it.

### 6.5.1 Current legislation, policies, or funding

#### (1) *New Zealand Qualifications Authority*

We begin by discussing NZQA, which is a Crown entity established under the Education Amendment Act 1990. It was set up with the specific purpose of rationalising New Zealand’s disjointed system of qualifications, which was characterised by multiple examination boards, qualifications that were not transferable between agencies and institutions, and the absence from some industries or fields of knowledge of any formal qualifications to recognise people’s skills. A complete overhaul was seen at the time as an economic necessity.

NZQA’s functions are set out in part 20 of the Act, with its object being ‘to establish a consistent approach to the recognition of qualifications in academic and vocational areas’. It is governed by a board of eight to 10 members (comprising ‘the Authority’ itself), who are appointed by the Minister of Education. In making appointments, the Minister is to consult ‘such persons, authorities, and bodies as the Minister considers appropriate and shall have regard to the interests of industry, the professions, and the authorities and bodies that are respectively responsible for providing compulsory and post-compulsory education’. There is no requirement for the Minister to consult with the Minister of Māori Affairs. In late 2010, there was one Māori on the board of nine members.

NZQA’s specific functions are set out in section 253 of the Act. In essence, NZQA oversees the setting of standards for qualifications in secondary schools and post-compulsory learning institutions. Under section 253(1)(c) it is required to establish a framework of national qualifications that ensures both that ‘all qualifications have a purpose and a relationship to each other that students and the public can understand’ and ‘there is a flexible system for the gaining of qualifications, with recognition of competency already achieved’. Sections 258 and 259 of the Act set out NZQA’s authority to grant approval to applications from learning institutions to teach courses, and to grant accreditation to institutions to provide those courses.

NZQA has thus set up the New Zealand Register of Quality Assured Qualifications, which is ‘a comprehensive list of all quality assured qualifications in New Zealand’. A ‘subset’ of this register is the National Qualifications Framework (NQF), which comprises nationally endorsed unit and achievement standards<sup>189</sup> and national qualifications. NQF qualifications are designed to be of a standard comparable to qualifications around the world. The NQF has 10 levels, from one (basic trades training and the equivalent of senior secondary school) to 10 (doctoral study).<sup>190</sup>

An objective of the NQF is to ‘recognise the principles of the Treaty of Waitangi’. In pursuit of this goal, NZQA established from the outset a specific field within the NQF called Field Māori, which aims to cater for the growing demand for formal recognition of Māori pedagogy, knowledge, and skills.<sup>191</sup> The idea was also to boost Māori participation in post-compulsory education and training by providing ‘alternative qualifications pathways to mainstream tertiary options.’<sup>192</sup> The status of a separate field within the NQF has thus placed mātauranga Māori on a similar level to ‘Business’, ‘Sciences’, ‘Humanities’, ‘Engineering and Technology’, and the other fields within the framework (there are 17 in total).<sup>193</sup>

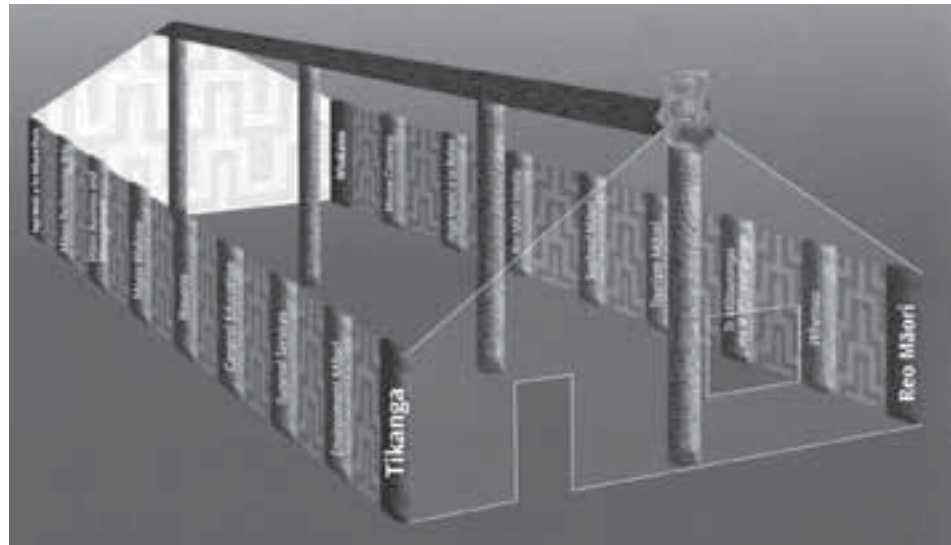
Within Field Māori are 19 sub-fields (from whakairo

and reo to funeral services, marae catering, and tourism)<sup>194</sup> and, at the time of time of our hearings, almost 30 qualifications and over 700 unit standards. According to the Acting Chief Adviser Māori at NZQA, Arawhetu Peretini, the registered Field Māori unit standards can:

- ▶ have a direct employment outcome;
- ▶ provide a Māori dimension to industry;
- ▶ correspond to the New Zealand Curriculum Framework;
- ▶ encourage Māori learners to achieve educationally;
- ▶ contribute to the maintenance of traditional Māori culture; and
- ▶ contribute to the development of Māori culture.<sup>195</sup>

Within NZQA is a Māori Qualifications Services business unit (MQS) that works specifically on the creation and development of unit standards for Field Māori. The MQS works closely with whakaruruhau, or Māori advisory groups – panels of Māori with expertise relevant to the development of particular unit standards and qualifications. When Ms Peretini, gave evidence in January 2007, there were 29 whakaruruhau (such as Whakaruruhau Whakairo, Whakaruruhau Māori Performing Arts, et cetera) and a draft Terms of Reference for whakaruruhau was ‘nearly complete.’<sup>196</sup> This draft indicated that the eight members of each whakaruruhau would include

Image from the NZQA website representing the many skills and disciplines of the Māori qualification category known as Field Māori. NZQA notes that ‘the disciplines, or sub-fields, within Field Māori are represented by pou (pillars) in the whareniui (meeting house) where knowledge is nurtured. The four cornerstones are Reo Māori (the Māori language), Tikanga (Māori traditions and customs), Ngā mahi a te whare pora (traditional weaving), and Whakairo (traditional carving)’.



two subject matters experts; two community stakeholders (representatives of iwi, for example); two people with a specific Māori industry perspective; one person with expertise in education and training in the specific area being developed; and one person able to offer a national policy perspective.<sup>197</sup>

NZQA is responsible for registering and accrediting educational providers, including Māori providers. In January 2007, NZQA had registered over 130 providers who identified as Māori. NZQA's Provider Development and Support unit has a core role in assisting Māori providers to deliver quality programmes and improve outcomes for Māori learners, in part to 'uphold the principles of retention and preservation of Mātauranga'.<sup>198</sup>

The position of Chief Adviser Māori was established at NZQA in 2004, a key purpose of the role being to develop and implement a Māori strategy. This piece of work – called *The Māori Strategic and Implementation Plan for the New Zealand Qualifications Authority 2007–2012* – was published in May 2007, a little after Ms Peretini gave her evidence (she had nevertheless attached a pre-publication copy dated September 2006).<sup>199</sup> The plan has six strategic goals. NZQA will:

- ▶ contribute to students' ability to succeed as Māori;
- ▶ contribute to students' ability to succeed as citizens of the world;
- ▶ ensure that qualifications add to the knowledge base of Māori communities;
- ▶ ensure that qualifications increase capability within Māori communities;
- ▶ ensure that health and well-being in education and training will contribute to enhancing social well-being; and
- ▶ support Māori participation across the education spectrum, thus contributing to the transformation of the New Zealand economy.<sup>200</sup>

The plan also outlines 16 'key actions' designed to contribute to the strategic direction of 'Full Māori participation in a knowledge-based society and economy'. These actions involve:

- ▶ increasing the rate of qualification completions for Māori learners;
- ▶ establishing an external Māori reference group to advise NZQA on, amongst other things, 'options for



Cover of *The Māori Strategic and Implementation Plan* (NZQA). The plan is aimed at enhancing Māori educational success and participation and the potential for qualifications to increase capability and knowledge within Māori communities.

local qualifications that will advance hapū, iwi and Māori communities';

- ▶ creating a 'Māori Qual' mark for qualifications that incorporate Māori knowledge;<sup>201</sup>
- ▶ assessing providers in accordance with their own distinctive philosophies and Māori values;
- ▶ establishing a Kaitiaki Group charged with ensuring 'the Authority's approach to Māori knowledge is compatible with Māori values';<sup>202</sup> and
- ▶ using Māori experts to validate all fields in the NQF that incorporate Māori knowledge.<sup>203</sup>



Te Kura Kaupapa Māori o Takapau, 2009. Before a school may be designated a kura kaupapa Māori, the umbrella organisation for such schools, Te Rūnanga Nui o Ngā Kura Kaupapa Māori, must first be consulted.

## (2) Ministry of Education

From NZQA and the formal system for recognising Māori skills and knowledge in education and training, we turn to the Ministry of Education. As the lead agency in the education sector, the Ministry's role with regard to mātauranga Māori is pivotal, as we have seen with specific respect to te reo in chapter 5.

The Ministry's responsibilities are set out in the Education Act 1989. It is indeed the Ministry's Act, for it

administers the legislation. The Act contains no 'Treaty clause' to remind the Ministry and other agencies of their Treaty obligations, and in this regard the Act sits in contrast with other enactments of the time such as the Conservation Act 1987 (see chapter 4) and the Resource Management Act 1991 (see chapter 3). In fact, the only reference in the Act to Treaty compliance is the requirement under section 181(b) for tertiary institution councils to 'acknowledge' Treaty principles in carrying out their functions.

However, parts of the Act do make genuine provision for Māori interests. Section 60A provides for the Minister of Education to publish from time to time 'national education guidelines', including those relating to 'the broad requirements' of school boards to 'take all reasonable steps to discover and consider the views and concerns of Maori communities living in the geographical area the school serves, in the development of a school charter'.<sup>204</sup>

Section 63, therefore, stipulates that every school board must prepare and maintain a school charter that contains a section including:

the aim of developing, for the school, policies and practices that reflect New Zealand's cultural diversity and the unique position of the Maori culture; and  
the aim of ensuring that all reasonable steps are taken to provide instruction in tikanga Maori (Maori culture) and te reo Maori (the Maori language) for full-time students whose parents ask for it.<sup>205</sup>

One of the Ministry's core responsibilities, also under section 60A, is the publication of national curriculum statements. A new national *New Zealand Curriculum* was launched by the Ministry of Education in November 2007. This followed on from a draft that was available earlier in 2007 when Crown witnesses (including the Secretary for Education, Karen Sewell) gave evidence and closing submissions were formulated (as such the claimants based their submissions on the draft document – see below). The curriculum refers to the Treaty of Waitangi as one of its underlying principles and states that 'The curriculum acknowledges the principles of the Treaty of Waitangi and the bicultural foundations of Aotearoa New Zealand. All

students have the opportunity to acquire knowledge of te reo Māori me ōna tikanga.<sup>206</sup>

The curriculum also stresses the importance of te reo Māori and refers to aspects of mātauranga Māori in other contexts, such as ‘traditional and contemporary Māori musical arts’ and ‘Māori visual culture’. The ‘unique bicultural nature of New Zealand society that derives from the Treaty of Waitangi’ is emphasised in the section setting out the teaching of the social sciences.<sup>207</sup>

The curriculum explains that it is ‘a statement of official policy relating to teaching and learning in English-medium New Zealand schools’ and as such is to be distinguished from its parallel Māori-medium school curriculum, *Te Marautanga o Aotearoa* (see below). Together, states the curriculum, ‘the two documents will help schools give effect to the partnership that is at the core of our nation’s founding document, Te Tiriti o Waitangi – the Treaty of Waitangi.’<sup>208</sup>

Aside from the provision for mātauranga Māori in mainstream education, the Ministry also supports kaupapa Māori learning, as we have examined in chapter 5. For example, it provides bulk funding to Te Kōhanga Reo National Trust to disburse to a network of hundreds of kōhanga reo. While there is no reference to kōhanga reo within the Education Act, kura kaupapa Māori are defined and specifically provided for. Under sections 154A and 155 the Minister of Education may designate schools as kura kaupapa, although not without consulting with the umbrella organisation representing kura kaupapa, Te Rūnanga Nui o Ngā Kura Kaupapa Māori o Aotearoa. The reason for this is that new kura must comply with Te Aho Matua, the guiding philosophy of the kura kaupapa movement, and the rūnanga is its kaitiaki. A kura kaupapa itself is defined in section 155 as a school in which:

- ▶ te reo is the principal language of instruction; and
- ▶ the charter of the school requires the school to operate in accordance with Te Aho Matua.

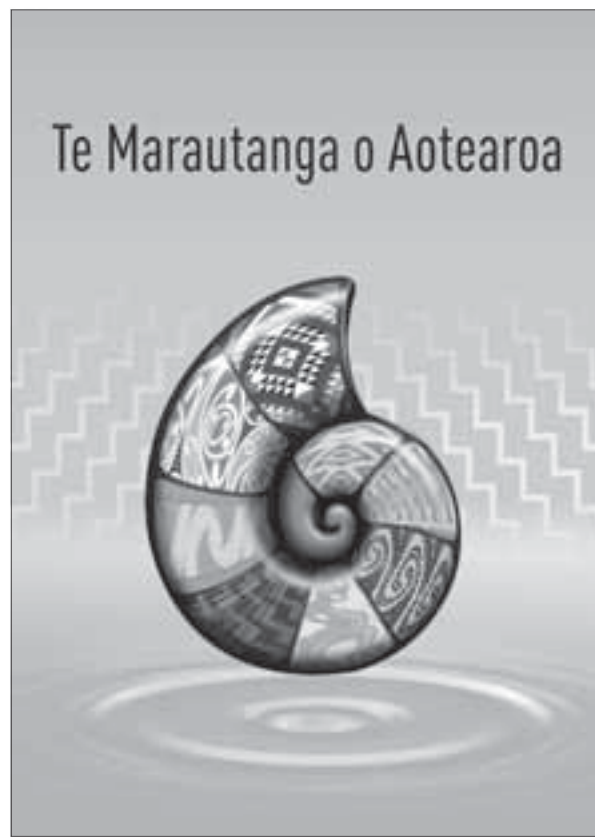
Before establishing a kura kaupapa the Minister must also be satisfied that the parents of at least 21 students who would enrol there would want such a school to be established and that the education offered was ‘not available at any other state school that children of the parents concerned can conveniently attend’. The term ‘kura kaupapa

Māori’ is protected under the Act for use by schools approved under section 155 of the Act only.

As noted in chapter 5, in 2009 there were 70 kura kaupapa and three aspiring kura kaupapa (kura teina) attended by some 6000 students. We also noted (in section 5.3.6) that it was agreed in 2001 that ERO would apply the principles of Te Aho Matua in assessing the delivery of education in kura kaupapa Māori.

As mentioned, a Māori-medium school curriculum exists called *Te Marautanga o Aotearoa*. The latest revised version was released in draft form in November 2007, when our hearings had closed, and launched in final form on 26 September 2008. Ms Sewell explained in early 2007 that the ‘overarching principles’ for the revision were:

*Te Marautanga o Aotearoa*, the Māori-medium school curriculum, 2008





Te Wānanga o Raukawa, one of three wānanga established by the Education Act 1989. It currently offers 49 courses from certificate to Masters level at its campus and on marae around the country.

- ▶ What is mātauranga Māori and how should it be reflected within the education system?
- ▶ What are the Māori philosophical approaches that need to be considered in Māori medium education?
- ▶ How does Māori pedagogy influence student learning outcomes?<sup>209</sup>

Amongst a wide range of objectives, *Te Marautanga* attempts (as translated) to ‘help learners to be successful in the Māori world and the wider world’ and ‘nurture the language and customs of whānau, hapū and iwi’. It has a natural focus on te reo, stating that ‘Ultimately it is through Māori language that the full range of Māori customs can be expressed, practised, and explained.’ *Te Marautanga* emphasises that ‘knowledge from the old world has a real purpose as the foundation from which new knowledge is produced’. Thus the importance of pāngarau (mathematics) is introduced by reference to its traditional use in ‘building, sailing and navigating on the open water, and gardening’ and, with respect to pūtaiao (science), it is stated that ‘Linking together traditional

and modern knowledge enables new knowledge bases to develop and be expanded.’<sup>210</sup>

The Education Act also allows for the establishment of wānanga as tertiary institutions. Under section 162(4)(b) (iv), a wānanga:

is characterised by teaching and research that maintains, advances, and disseminates knowledge and develops intellectual independence, and assists the application of knowledge regarding ahuatanga Maori (Maori tradition) according to tikanga Maori (Maori custom).

There are three wānanga: Te Wānanga o Raukawa, Te Whare Wānanga o Awanuiarangi, and Te Wānanga o Aotearoa.<sup>211</sup> As we have related in section 5.3.6, the wānanga expanded spectacularly after their 2001 Treaty settlement with the Crown. Despite problems which beset Te Wānanga o Aotearoa in 2005, prompting staff and student numbers to drop significantly, it remains by far the biggest of the three wānanga, offering over



60 qualifications to 36,693 full- and part-time students (21,222 equivalent full-time students) in 2009.<sup>212</sup> Two of its most popular courses are Mauri Ora (Māori culture and New Zealand history) and Te Ara Reo Māori.<sup>213</sup>

Within the education system, therefore, are pre-school, school, and tertiary institutions that are specifically focused on Māori language and culture, and indeed a separate Māori-medium curriculum that is by no means a straight translation of the mainstream school curriculum. Altogether this kaupapa Māori education system represents a quantum change in the New Zealand education landscape. It mirrors the similar breakthrough for mātauranga Māori in the area of qualifications with the advent, at a similar time to the formal backing of kura kaupapa, of Field Māori in the NQF. Within the mainstream, too, there are requirements for school boards to give active consideration to the teaching of te reo and tikanga Māori in formulating each school's charter. Again, this matches the existence of numerous 'Māori components' within most areas of the NQF.

Also launched in 2008 was *Ka Hikitia*, the Māori Education Strategy for 2008–2012. At the time Ms Sewell

gave evidence, this existed in draft form, but we refer here to the final product. (We have also discussed *Ka Hikitia* in chapter 5, focusing on its goals for Māori participation in Māori language education.) The goal of *Ka Hikitia* is to raise Māori achievement in the education system through the 'strategic intent' of 'Māori enjoying education success as Māori'. The claim is that this focus 'will achieve a transformational shift in the performance of the education system for and with Māori'. As such, the document refers to 'sharing power', supporting Māori 'self-development and self-determination', and acknowledging and including Māori culture in the learning process. One way it says this will occur is 'increasing whānau and iwi authority and involvement in education', in part through further emphasis on the Ministry's education partnership agreements with iwi organisations.<sup>214</sup>

### 6.5.2 The position of the claimants

#### (1) *The New Zealand Qualifications Authority*

We heard praise for NZQA's Māori Strategic Plan from some claimants. Counsel for the Te Tai Tokerau claimants acknowledged Ms Peretini's description of the way 'Māori



▲► The Ministry of Education strategy *Ka Hikitia*, 2008. Its 'strategic intent' is 'Māori enjoying education success as Māori'.



knowledge can be appropriately included in national curricula, and quality assurance processes that are consistent with Māori intellectual traditions can be applied in a fitting manner.<sup>215</sup> However, counsel also noted the way Crown policies had led to the disintegration of traditional whare wānanga: ‘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.’<sup>216</sup>

Ngāti Koata also had praise for NZQA, describing its Māori Strategic Plan as ‘a remarkable document’ that shows ‘an awareness of the issues’, ‘a willingness and acceptance of Māori authority and control over their matauranga’, and an acknowledgement of ‘the need for high level change to allow Māori authority, aspirations and world views with regard to their matauranga to be exercised and recognised’. All that was needed now ‘is a mandate (from the top level) for them to proceed with putting this into practice and resourcing for engagement with iwi, and raising the capacity of iwi to participate’. Counsel also felt that NZQA had already put ‘many useful frameworks’ in place, such as whakaruruhau.<sup>217</sup>

Counsel nevertheless had some criticisms. The wānanga cannot set their own standards in accordance with their own tikanga. Moreover, whakaruruhau are not themselves decision-makers, are not selected by iwi but by NZQA, and are not an entrenched system. This general lack of Māori decision-making power, said counsel, is ‘Not a reflection of tino rangatiratanga’. Counsel also noted that there had of course been no Māori Strategic Plan until 2006, thus implying the plan had come rather late.<sup>218</sup>

We heard other unfavourable views of NZQA from Te Tai Tokerau witnesses in an earlier phase of the inquiry (in 1997 and 1998). Haana Murray complained of the NZQA requirement for formal qualifications to prove one can teach in areas such as weaving. She argued that the tohunga-taught skills were simply not given any credit.<sup>219</sup> Similarly, Mereraina Uruamo said that whānau did the same job as NZQA-approved providers but got no recognition for it. She argued that traditional Māori educational structures were being undermined, in breach of the Treaty

of Waitangi. Qualifications to teach mātauranga Māori, she said, came from the iwi or the hapū, not universities or polytechnics. While NZQA said one had a choice about becoming formally qualified or not, she added, the reality was that only approved providers received any resources to teach.<sup>220</sup>

Niki Lawrence said that she began teaching korowai in the early-mid-1990s but found the education system ‘more of a bloody hindrance’ than a help. The Education Training and Support Agency closed down her course because no obvious employment outcomes arose from it.<sup>221</sup> Te Warihi Hetaraka was unhappy about NZQA owning the unit standards for te reo, weaving, and whakairo which he and other experts had developed over a five-year period. He said that his own qualifications from the New Zealand Māori Arts and Crafts Institute were not recognised by the education system, and argued that the failure to accept Māori methods of education was in breach of the Treaty.<sup>222</sup>

Ngāti Kahungunu witnesses also commented on NZQA. Sandy Adsett, a Ngāti Kahungunu artist tutoring at Tairāwhiti Polytechnic in Gisborne, said in 2000 that the school had ‘resisted becoming subject to the New Zealand Qualifications Authority Standards’. This was principally because NZQA required tutors to have formal qualifications ‘and the way the education system is structured fails to give proper recognition to other skill based criteria or . . . cultural knowledge.’<sup>223</sup>

Ngāti Kahungunu arts tutor Jacob Scott, then the head of Visual Art and Design at the Eastern Institute of Technology (EIT, the former Hawke’s Bay Polytechnic), gave evidence in 2001. He also complained of the lack of recognition for those without formal qualifications, but directed this grievance at polytechnic managers rather than NZQA. He said he had designed a degree course in visual art and design, which had been approved by NZQA. However, the EIT hierarchy had undermined the course by requiring the staff to have academic qualifications. His school has thus been ‘colonised from within’, as he put it.<sup>224</sup>

In updating evidence in 2006, Mr Scott related his more recent experiences working for Te Wānanga o Aotearoa. While expressing his belief that the Wānanga’s 2005 ‘demise’ was ‘a massive example of dominant culture



*Kaitiaki: The Guardians of Freedom* by Jacob Manu Scott. Scott, an artist and designer, gave evidence about NZQA for Ngāti Kahungunu. The sculpture depicts two guardian beings that stand tall, respecting the land and the people and upholding the principles and practices of kaitiakitanga.

dynamics and recolonising', he had a fair amount of praise for NZQA. He said that NZQA was supportive of those without formal qualifications but, again, it was the 'regular academic world' that would not accept teachers in this category. In reference apparently to NZQA's whakaruru-hau, he said that 'The NZQA people are in fact a panel of gathered experts and peers who do understand the context of the situation. They are generally aware of both sides, of the academic aspects and the value of practice

based research, and they tend to agree and support and be prepared to build new paradigms.<sup>225</sup>

By contrast Robert McGowan was less enthusiastic about NZQA. In his evidence for Ngāti Kahungunu he said he was 'reluctant' to see the teaching of rongoā (our focus in chapter 7) come under NZQA at all.<sup>226</sup> As he put it:

It is difficult for us to teach a Maori subject within the confines of a formal course that is NZQA accredited, particularly when what we try to teach as required by tikanga Maori cannot be achieved within the framework that has been proscribed. The current system does not provide the opportunity for Maori to develop their own courses.<sup>227</sup>

Mr McGowan went on to say that 'for something as important as this . . . Māori need to be allowed and to be resourced to run a process of passing on their particular knowledge in a way which is determined by Māori.'<sup>228</sup>

## (2) Ministry of Education

Counsel for Ngāti Kahungunu suggested that the primary way in which New Zealand legislation or policy instruments contribute to the preservation and transmission of tikanga Māori and mātauranga Māori is through the education system. This system was crucial in two respects. First, since 85 per cent of Māori children are educated in the mainstream system, if that system does not cater for the preservation and transmission of cultural knowledge, it is likely that knowledge will continue to be lost. Secondly, the education system can also help build wider societal appreciation of the importance of preserving Māori cultural knowledge. In other words, 'unless ultimately all New Zealanders believe that tikanga Maori and matauranga Maori are important and need protection to ensure that they are preserved and transmitted, they will not be adequately preserved and transmitted.'<sup>229</sup>

For these reasons, counsel explained, the then-new draft national curriculum was very important. However, even a 'cursory glance' at it showed that it was 'fundamentally inconsistent with the Treaty and truly deficient in all facets of ensuring the ongoing transmission and preservation of tikanga Maori and matauranga Maori'. Counsel was thus very heartened by the undertakings of Ms Sewell that she would address the claimants' concerns with the

draft, and advised that he would raise the issue with the Tribunal again if the next iteration of the national curriculum remained inadequate. His subsequent lack of complaint seems to indicate acceptance. (The nature of the new national curriculum document has been summarised above in section 6.5.1(2).<sup>230</sup>)

Counsel for the Te Tai Tokerau claimants said the current state of Māori education needed to be understood in the context of the past, when Māori were assimilated as much as possible into European modes of thought and learning. They quoted from Ranginui Walker, who described the education authorities as having, at the outset, ‘invalidated Maori language and cultural practices by excluding them from the curriculum. Thus was Maori epistemology displaced by the textual authority of the grand narratives emanating from Europe.’<sup>231</sup>

However, counsel also expressed support for the undertakings of Ms Sewell. They said she ‘illustrated a willingness to be actively engaged in finding solutions’, partly through entering ‘into a “long conversation” with Maori about how the education curriculum and its

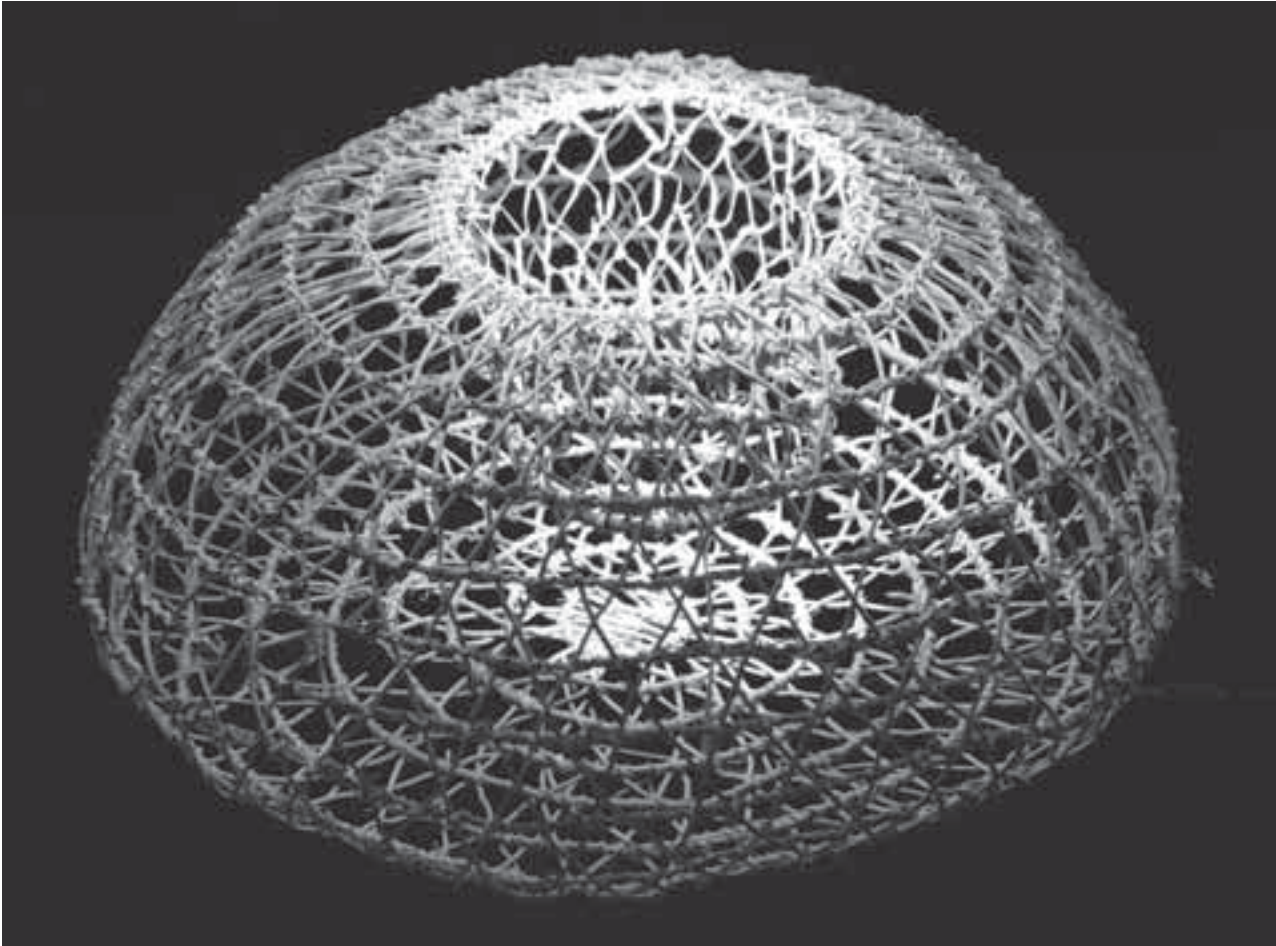
delivery might best accommodate Maori aspirations for tino rangatiratanga.’ ‘Refreshingly’, said counsel, ‘she did not seem fazed by the prospect of “sharing decision-making authority”, acknowledging that it would require negotiation with Maori.’<sup>232</sup>

Counsel for Ngāti Koata agreed that the Ministry of Education’s expressed commitment to protecting mātauranga Māori (and te reo) was ‘deserving of much credit’. However, the ‘real tests’ were how the Ministry would achieve this in practice and what insights it would display around ‘facilitating and protecting the exercise of tino rangatiratanga over Mātauranga Māori’. Counsel did criticise the lack of reference to the Treaty and its principles in all of the Ministry’s corporate documents, remarking that ‘the reality is that they are forgotten about, ignored or overridden’. The ‘glaring shortcoming’ of the lack of any reference to the Treaty in the draft national curriculum was also noted, although Ms Sewell’s assurances meant that this omission was ‘happily now recognised’. Counsel also suggested that the Ministry does not yet adequately engage with iwi Māori.<sup>233</sup>



Peter Buck measures a tāruke kōura (crayfish trap) with two kaumātua at Waiapu, East Coast.

Ngāti Porou evidence was that the last iwi member who could make kiekie crayfish traps in the traditional way had died.



Tāruke kōura (traditional crayfish trap) made by John Puketapu (Te Āti Awa), 2000. Mr Puketapu is one of very few people left with the mātauranga and expertise to make traditional tāruke kōura.

Amongst the Ngāti Kahungunu claimant evidence from 2000 and 2001, Nigel How spoke of the decline in knowledge of weaving<sup>234</sup> and Aggie Nuku recalled her father's knowledge of the stars and the way everyone would plant and fish by the moon. While this 'used to be common knowledge', she said, it is now 'written knowledge only'.<sup>235</sup> Wally Kupa related the difficulty of passing on knowledge of crayfish pot making and gathering kai-moana: 'Wanangas cost money', he explained.<sup>236</sup>

In his 2006 evidence (see also above under NZQA), Mr Scott said that the replacement of the Te Wānanga o

Aotearoa leadership team with Crown managers in 2005 had had a negative impact on the learning that was still being undertaken at the Wānanga. The focus had become too exclusively on financial matters and there had been little emphasis for over a year, he said, on education. Moreover, he felt the effect had been to derail Māori confidence and cause Māori 'to once again be subservient to fit the Crown's expectations and perception of what we should be doing'. This was after the Wānanga had been empowered by a vision of innovation and opportunity for Māori (as well as Pākehā) from a Māori base.<sup>237</sup>

For the Te Tai Tokerau claimants, Haana Murray of Ngāti Kuri called in 2006 for a whare wānanga to be set up in Te Hāpua to teach the ‘matauranga of our people before more of it is lost.’<sup>238</sup>

While the emphasis in the Ngāti Porou submissions and evidence was on the fate of te reo o Ngāti Porou within the education system (see section 5.2.2(1)(a) and our subsequent discussion), various witnesses commented upon the educational provision for other aspects of their mātauranga. These claimants said that their cultural knowledge was heavily depleted and in fact had been weakened considerably by government policies. For example, Ada Haig said in 1998 that little weaving was done in Te Whānau a Rua,<sup>239</sup> and Connie Pewhairangi gave further evidence about the difficulty in retaining weaving knowledge in 2006.<sup>240</sup> Dr Mahuika said in 1999 that the last person he knew who could make crayfish traps in the traditional way was dead and that that knowledge now only existed on film held not by Ngāti Porou but by the Film Archive.<sup>241</sup>

Ngāti Porou claimants thought that their own control of education was the answer to retaining their mātauranga. We have already quoted the 1998 comments of Wayne Ngata that education must be ‘controlled and owned by iwi Maori’ and serve the interests of Māori rather than New Zealanders.<sup>242</sup> Likewise, Hone Taumaunu, who had been a public servant in the field of education for 45 years, said in 1999 that an education syllabus was needed that taught Ngāti Porou culture, reo, songs, history, and so on. Otherwise, he said, Ngāti Porou would not have ‘a knowledge and an understanding of self in the truest sense’. He wanted all schools within Ngāti Porou to be ‘empowered to develop curricula in Ngati Poroutanga’ and an open whare wānanga where university qualification equivalents were available in all aspects of mātauranga Ngāti Porou.<sup>243</sup> In a similar vein, Ms Pewhairangi acknowledged the teaching of weaving at institutions like Te Wānanga o Aotearoa but said that the requirement for written papers, student loans, and so on made them ‘not the answer to keeping our art form alive’. Her preferred solution was the establishment of a state-funded Ngāti Porou creative arts centre to teach the younger generation<sup>244</sup> (see also arts and culture funding in section 6.3.2(1)).

### 6.5.3 The position of the Crown

Crown counsel acknowledged that Māori have ‘a fundamental role to play’ in the development, regulation, control, and use of their mātauranga. Examples of Crown measures that contributed to this were:

- ▶ the creation of Field Māori within the NQF;
- ▶ ‘the work of the Māori Qualifications Service and Whakaruruhau (Māori advisory groups) to develop unit standards and national qualifications for Field Māori’; and
- ▶ the support for Māori pedagogy and mātauranga Māori through the funding of and support for kōhanga reo, kura kaupapa Māori and wānanga.<sup>245</sup>

With specific respect to NZQA, Ms Peretini said that the potential of the NQF to bring about a new era for Māori education had been recognised in 1995 by ‘prominent academics’. She quoted from a 1995 doctoral thesis that stated that:

The development of Māori specific unit standards and qualifications based on Māori knowledge together with the protection and management of these by Māori under the umbrella of *Te Tiriti o Waitangi* and in relation to Intellectual Property Rights is a significant development in the history of education in this country.<sup>246</sup>

The advent of Field Māori, Ms Peretini added, made New Zealand ‘the first country in the world to establish an entire classification in an educational framework that formally recognises indigenous knowledge’. She said that NZQA’s Māori Strategic Plan for 2007–2012 aimed to protect and enhance tikanga and te reo Māori within the unit standards and national qualifications. She pointed to praise for the work of NZQA from claimant Jacob Scott (whose evidence we have quoted in section 6.5.2(1)) and said, in conclusion, that NZQA would continue to promote ‘Māori based qualifications and unit standards to facilitate quality-learning outcomes.’<sup>247</sup>

Under cross-examination Ms Peretini said that, while the whakaruruhau were not statutorily required, one had never been disestablished and their advice was always followed. She said that, in registering providers teaching Māori content, NZQA attempted to ensure that they had an understanding of ‘the rohe, iwi and whānau dynamics

within that area.’ She also said that NZQA would have no issue with wānanga ultimately having control of their own quality assurance methodology, and basing that on Māori values, but that at present there was a lack of capacity to take on such a role.<sup>248</sup>

Ms Sewell said that there were various ways in which the Ministry of Education recognised Māori interests through legislation. She specifically cited section 63 of the Education Act 1989 (on the aims of school charters), for example, as we have above. With respect to the revision of *Te Marautanga*, she set out – as mentioned – all three ‘overarching principles’ that formed the basis for the review.<sup>249</sup>

Ms Sewell also pointed to the role of the three wānanga established under section 162 of the Education Act. She said ‘the protection and advancement of Mātauranga Māori’ was central to their activities, and added that they enjoy the flexibility to ‘implement educational programmes in a way that best meets the needs of their communities’. She also stressed the iwi partnerships that the Ministry had entered into. For example, engagement with Ngāti Porou had led to the production of ‘a number of educational resources focussing on Mātauranga-o-Ngāti Porou’. However, while the Ministry had the flexibility to support targeted rather than generic initiatives to protect mātauranga Māori, the funding of those initiatives ‘will be impacted by a number of factors including the allocation of finite resources and the balancing of different interests to achieve the best education outcomes for all students.’<sup>250</sup>

Under cross-examination, Ms Sewell said that her Ministry was quite prepared to ‘do things differently’ in order to achieve better educational outcomes for Māori students. An example was ERO’s shared decision-making with representatives of kura kaupapa in the development of a set of measures for assessing the performance of such schools (see section 6.5.4(3) below). She had no problem, she said, with Te Rūnanganui o Ngā Kura Kaupapa Māori ultimately replacing ERO as the reviewers of kura kaupapa – it was just a matter of capability. She also saw the potential for the development of tribal curricula in certain schools, where iwi mātauranga would be taught, with the iwi and the Ministry working in partnership to meet the needs of the community.<sup>251</sup>

Overall, she said, ‘the Ministry like everybody else has

taken I think really committed and forward-looking and even dedicated steps over the last 5 to 10 years to work differently with iwi.’<sup>252</sup>

#### 6.5.4 Analysis

We come now to our analysis and findings on the Crown’s oversight of the teaching of mātauranga Māori. We begin by assessing the nature of the Treaty interest in the transmission of mātauranga through the state-funded education system, and consider any other valid interests that may impact on the Treaty interest. Our analysis explores the question: is there an interface in education between the interests of Māori, of mātauranga Māori, and of the nation as a whole?

##### **(1) Is there a Treaty interest in the Government’s supervision of the teaching of mātauranga?**

Traditionally, the transmission of Māori knowledge occurred within the whānau or in the whare wānanga, where the passing on of knowledge enabled each new generation to prosper. Unsurprisingly, therefore, mātauranga Māori as a system of knowledge was – and remains – highly prized, and it is axiomatic to conclude that it is a taonga in its own right. Indeed, this was not seriously challenged in our own inquiry, and it has been the conclusion of other Tribunals. The Wananga Capital Establishment Tribunal, for instance, wrote in 1999 that ‘There can be no doubt that te reo Maori and matauranga Maori are highly valued and irreplaceable taonga for New Zealand. These taonga exist nowhere else. The Crown has a duty actively to protect these taonga.’<sup>253</sup>

For a long time in New Zealand’s past, however, the Crown was not convinced it had any such duty. More to the point, the Crown saw its role more in terms of breaking down traditional Māori understandings and substituting Western concepts and knowledge. Generations of Māori schoolchildren were thus taught not about Kupe but about Cook. They learnt stories of Western progress and colonial expansion, the names of British monarchs, and of course the English language. The state system allowed for little or no accommodation of tribal narratives, whakapapa, concepts such as kaitiakitanga, and indeed the Māori language itself. So concerned were they that their children should succeed in what had become a

*Te Maori* exhibition shown at the Field Museum in Chicago, 1986. Seminal cultural events such as the touring of this exhibition from 1984 to 1987 have helped the revitalisation of mātauranga Māori. Some 1.54 million people visited *Te Maori*, 620,000 in the United States and 920,000 in New Zealand.



Pākehā-dominated world, many Māori parents were complicit in this rejection of the value of their mātauranga.

But mātauranga Māori stubbornly would not die. Māori innovated and incorporated Western knowledge, but maintained the core elements of their mātauranga. We explain in chapters 5 and 7, for example, how mātauranga reo and mātauranga rongōā have persisted in spite of the very real obstacles placed in the way of their transmission. That transmission continues today across Māori domains – on the marae, at wānanga, in tribal gatherings, and in forums such as the Ngata lectures hosted by Ngāti Porou – and in mixed or state-funded domains, such as kura kaupapa and Māori broadcasting. This contemporary enthusiasm is born in part from the reawakening experiences of the 1980s, which included the struggles over land and language. It can also be traced – in the view of Professor Mead – to specific cultural events such as the international Te Māori exhibition from 1984 to 1987 and

the construction of waka taua for the 1990 sesquicentennial celebrations.<sup>254</sup> Today, Professor Mead says, ‘There is no turning back’, and mātauranga Māori ‘will be pursued with some vigour and will be studied for years to come.’<sup>255</sup>

But despite this evident vitality, the task of keeping tradition alive in a changing world is not one that Māori can undertake on their own. As we set out in the chapter’s conclusion (section 6.8.1), the Crown must also share in the responsibility, and not just to make amends for the assimilationist policies of the past. Rather, it must be recognised that, in our increasingly urbanised and fragmented society (and indeed our globalised world), without state support Māori culture is vulnerable to further dissipation and loss. The Treaty interest, therefore, is the State’s contribution to the project of keeping Māori culture vital and relevant. Māori have their own responsibilities to discharge, but the Crown must also commit sufficient resources to support new means of cultural transmission.





Te Whare Wānanga o Awanuiārangi. The Tribunal's *Wānanga Capital Establishment* report said in 1999 that wānanga such as Te Whare Wānanga o Awanuiārangi are 'a modern application of an ancient process'.

Again, as the Wānanga Capital Establishment Tribunal put it with specific respect to wānanga:

wānanga Maori are a modern application of an ancient process that was responsible for the protection, maintenance, and advancement of these taonga [te reo and mātauranga Māori] and . . . the Crown should move actively to ensure their viability and survival.<sup>256</sup>

**(2) Are there other valid interests with regard to the Government's supervision of the teaching of mātauranga?**

Opponents of the teaching of mātauranga Māori within the state system might contend that there are worthier recipients of the limited education dollar – basic literacy and numeracy courses, for example. They might question why the State should have to provide for the transmission of mātauranga, and argue that if Māori want to retain their culture, it is simply up to them. They might question

why a 'minority culture' should be taught, seeing this as divisive and 'separatist'. And they might suggest that the emphasis in the education system on Māori culture ultimately holds Māori back, locking them into stone-age ways of thinking that can offer them nothing in the modern world.

These sorts of opinions are often to be heard in public debates, although we suspect that they are becoming less common and not quite as strident with the passing years. We do not simply dismiss such ideas, for there is something to them if one sets aside the various prejudices at work. Affordability, for example, is certainly an issue that invites scrutiny of any spending. The point of kaupapa Māori education, too, should not be to leave students any less equipped in the core skills in reading, writing and mathematics with which all children should emerge from school. And a mātauranga Māori-focused education should not be for Māori children alone to pursue



Kaiako and children at the opening of Hoani Waititi School (the first kura kaupapa Māori) in 1985.

– all those with an interest should be welcomed. In short, educational experiences and outcomes should be largely comparable with those offered by the mainstream system, notwithstanding differences in curricula and language of instruction.

But are cost and uniformity valid constraints on the Crown's recognition of the Treaty interest in mātauranga Māori education? We think not. That is because kaupapa Māori education is not just about preserving mātauranga, but also about getting Māori into successful models of education. Wānanga, for example, have been extraordinarily successful in attracting second-chance learners back into learning,<sup>257</sup> while kōhanga reo have offered structured education for pre-schoolers within a whānau-oriented environment. In other words, in pre-school and

post-compulsory learning, where Māori participation has traditionally been lower, kaupapa Māori services now exist, operating distinctly yet fully within the education system. In turn, they have helped grow Māori participation rates.<sup>258</sup>

Moreover, the provision of options that promote mātauranga does not necessarily take resources away from mainstream education, because the cost of educating a child is relatively similar no matter which school they attend. In other words, the cost of 'kaupapa Māori' education is not a burden on the budget. There is a developing view that Māori are healthier, more productive, and higher achieving when strong in cultural knowledge. As Professor Mason Durie has written, 'a secure Māori identity appears to be positively correlated with good health,

and with better educational outcomes even in the presence of adverse socio-economic conditions.<sup>259</sup> The results of cultural dislocation and the ensuing loss of strength in identity may be observed in the numbers of Māori in prison, reliant on state-funded benefits, and otherwise failing to reach their potential. Exactly the same phenomenon is observable, and with similar intensity, wherever colonisation has displaced indigenous peoples and broken their connections with their culture. The after-effects of this dislocation are now proving expensive for the post-colonial State. In reality, the Crown cannot afford to do nothing about it. The cost is already too high and it is increasing. The most cost-effective way of addressing the social effects on Māori of cultural dislocation is to address the dislocation itself through state expenditure. Increasing Crown engagement in this area suggests that basic truth is already understood.

Finally, we mention once again that Māori customs and knowledge are now a key aspect of national identity. When they are strong, New Zealand's distinct identity is strong. On this level too, therefore, state support for the preservation and transmission of mātauranga Māori serves the interests of all New Zealanders.

### (3) *Conclusion and reforms*

Several basic principles guide our conclusions. The first is that the State damaged mātauranga Māori and its traditional systems of transmission – and it did so intentionally. That was the object of government education policy for a significant period. Secondly, faced with the prospect that Māori would fail educationally in both cultures and lose their mātauranga, the Crown has at last been working to repair some of this damage. Since the 1980s, then, we have seen genuine state support for, first, *kōhanga reo*, then *kura kaupapa Māori*, and eventually *wānanga*. The sophistication of that support now includes even an entire Māori-medium school curriculum.

Thirdly, it is clear that the transmission of mātauranga Māori, as well as Māori success in the education system, are valid Treaty interests. Māori must assume their own responsibilities, but the State has an enormous role to play. Fourthly, these goals are also in the national interest. The failure of so many Māori to achieve success in education is a phenomenon that undermines our collective

harmony and prosperity. If Māori culture and identity is boosted through education, so correspondingly are we strengthened as a nation.

Fifthly, and finally, the model that will produce the best outcomes in Māori education is partnership – other models will not work. The Crown on its own, for example, cannot successfully transmit mātauranga in the education system or anywhere else – the idea is absurd. Nor is the employment of Māori bureaucrats the answer, for that does not change the fact that ultimate control rests in the hands of centralised decision makers rather than Māori communities themselves. Ms Peretini acknowledged as much when she conceded the danger that, in the process of NZQA's regulation, the Māori essence might be squeezed out of the knowledge system.<sup>260</sup> All of the above reflect our conclusions in chapter 5.

But neither can Māori succeed on their own, as they lack the resources, if not the motivation. Rather, the trick for the Crown is to empower and support the community. Here, as we did in section 5.3.3(1), we note the findings of Stephen Cornell for the influential Harvard Project on American Indian Economic Development. Cornell argues that 'the likelihood of achieving sustainable development rises as power and authority are devolved to Indigenous nations or communities, moving non-Indigenous entities, including central governments, from decision-making to resource roles and freeing Indigenous peoples to decide these things for themselves and by their own criteria.' Countries like New Zealand, he contends, have suffered repeated policy failures through an inability to recognise this.<sup>261</sup> What he is referring to, essentially, is the need for a partnership in which the State provides logistical and financial support and the Māori Treaty partner exercises decision-making responsibility.

There is already a degree of partnership in the education system, where *kōhanga reo*, *kura kaupapa*, and *wānanga* receive state support but maintain a reasonable measure of autonomy. Some of that support has been hard won. *Wānanga*, for example, have battled for state funding and autonomy before the Tribunal on more than one occasion, and *kura kaupapa* at one point refused to be assessed by ERO, eventually winning the inclusion of reference to *Te Aho Matua* in the Education Act and a commitment that they would be assessed under those terms

alone. In fact, the success of kura kaupapa in maintaining their independence while securing state funding and statutory recognition for their guiding philosophy represents in microcosm what the claimants are striving for in Wai 262. It shows that, where kaitiaki accept accountability obligations to the funding Crown, and are willing to cooperate and align with the broader governmental objectives, the Crown may be willing to vest genuine power in kaitiaki communities.

How, then, can the partnership arrangements of the kaupapa Māori sector be matched in the education sector overall? For some claimants, even the achievements of kura kaupapa probably do not go far enough. Some advocate a relatively autonomous Māori education system – effectively ‘Māori control of things Māori’. We have already mentioned Wayne Ngata’s belief that education must teach mātauranga Māori and serve Māori interests first and foremost. In a similar vein, counsel for Ngāti Koata called for the wānanga to set their own course standards in accordance with their own tikanga, rather than have the standards approved by NZQA and existing within the NQF. Te Tai Tokerau counsel said that there should be Māori control and authority over all aspects of learning so that kaupapa Māori education ‘interact[s] with the education system’ rather than ‘[sits] within it.’<sup>262</sup>

While we understand the sentiment, that level of autonomy is no longer workable. Where there is state funding, then legitimate issues arise around standardisation across educational qualifications and accountability to the taxpayer. Where Crown funding exists there must be a degree of systemisation, albeit one that does not stifle Māori motivation. The right balance is crucial, because the education system is vital to the preservation of mātauranga Māori, and Māori educational achievement is crucial to national prosperity.

We acknowledge that the education system has already made considerable progress. The very existence of a state-funded kaupapa Māori pathway in education from pre-school to tertiary level is proof alone of that. In fact, education was an area that attracted some strong praise from the claimants – possibly the strongest endorsements of any the claimants were willing to make. For example, NZQA’s Māori Strategic Plan was generally seen as a remarkably positive acceptance of the need for Māori

authority over the teaching of their mātauranga. The whakaruruhau system was seen as enlightened. Some of the complaints that were made about NZQA in the earlier phase of our inquiry were not repeated by counsel in closing, which suggests that the agency has been making good progress in its ongoing responsiveness to Māori concerns. Encouragingly, we note too that Ms Peretini allowed for the strong possibility that the whakaruruhau would eventually become decision-makers rather than advisers.<sup>263</sup>

Likewise, claimants were broadly supportive of Ms Sewell’s willingness to personally commit to sharing decision-making power with Māori over educational issues, and to place much greater stress on the Treaty, biculturalism, and mātauranga Māori in the national curriculum. We also noted the significant shift in wording and emphasis from the draft national curriculum to the finished product, and are very supportive of that change. The earlier draft spoke to a different political climate that we hope is now behind us.

In the meantime we have *Ka Hikitia*, the Māori Education Strategy for 2008/12 launched in 2008. Like many government strategies its language is high level and upbeat, and it speaks of transformational change. We have little information about the consultation with Māori that occurred after the draft version was released in 2007,<sup>264</sup> and it remains to be seen whether the strategy will have the transformational effect it claims it will.

The Ministry also has, as one of its six ‘priority outcomes’ in its latest Statement of Intent, ‘Māori enjoying education success as Māori’. To achieve this, the Ministry explains that ‘we need an education system that captures and reflects that identity, language and culture are essential ingredients for all learners and critical to the success of Māori learners in education’. It also plans to build ‘relationships with iwi as the prime sources and expert providers of identity, language and culture’. However, the indicators of the success of this priority outcome are not so much the retention or transmission of mātauranga Māori but the proportions of Māori participating in early childhood and tertiary education or achieving literacy and numeracy standards and NCEA qualifications.<sup>265</sup> But Māori participation in education and the achievement by Māori of academic standards are not necessarily the same thing as the successful transmission of mātauranga. We

recommend the Ministry develop some specific indicators around mātauranga Māori in order to properly gauge its Māori-focused activities.

On a positive note, though, we detect a genuine willingness amongst education officials to make a difference, and this augurs well for its success. The agencies seem perfectly aware that greater Māori achievement through education, including the preservation and transmission of mātauranga Māori, is in everyone's interests. The way forward lies with the approach indicated in cross-examination by Ms Sewell – that the Crown should embark upon a 'long conversation' with Māori about curriculum development that leads to the genuine sharing of decision-making. We recommend that this dialogue take place through the establishment of a Crown–Māori partnership entity in education to set objectives and direction for Māori achievement in the sector.

As with the culture and heritage partnership entity we have recommended in section 6.2.4(3), this body cannot be just another advisory group; it must be the ultimate decision-maker. Nor should it be seen as another expensive layer of bureaucracy. Rather, it must be a model for the way the Crown (or the State) works in partnership with the particular community it is educating, for the best educational outcomes. Māori representatives could be chosen by an electoral college comprising, say, the governing bodies of kaupapa Māori education (the Kōhanga Reo National Trust,<sup>266</sup> Te Rūnanganui o Ngā Kura Kaupapa, and Te Tau Ihu o Ngā Wānanga), as well as representatives of Māori interests in mainstream education. We discuss the idea of electoral colleges further at 6.8.3(4) below.

As we have said, this is a model for the empowerment of the kaupapa Māori community. But it is more than that. It is a model that can reignite the energy and momentum that made kōhanga reo, kura kaupapa, and wānanga into internationally-recognised social phenomena. If that can be recaptured through community partnership, we will really begin to make renewed progress.

#### 6.5.5 Summary of findings and recommendations

In the past, the State intentionally damaged mātauranga Māori and its systems of transmission. Belatedly, however, in the face of rising Māori demands and to fill a void caused by the impact of colonisation, the State has stepped

in to play a role in the transmission of mātauranga. Overall, there have been enormous strides made in the State's accommodation of the Treaty interest in education over the last 25 years, and we are pleased to see that NZQA and the Ministry of Education are clearly willing to consolidate and further this progress.

Māori retain a considerable responsibility to transmit their own mātauranga, but they cannot succeed without ongoing state support. The best outcomes in the delivery of education will thus derive from a form of joint venture or partnership. Kaitiaki must accept both a degree of systemisation in education delivery and full accountability to the taxpayer under this partnership, in recognition of the deployment of State resources. But a balance must be found, for Māori independence and motivation must not be stifled.

The kaupapa Māori education pathway already represents an acknowledgement of partnership in education, as does the existence of 'Field Māori' in the National Qualifications Framework. This partnership needs to extend to all forms of education. We recommend the establishment of a Crown–Māori partnership entity to set objectives for Māori education, and suggest that Māori representatives on the entity be chosen via an electoral college. We also recommend that the Ministry of Education develop some specific indicators around mātauranga Māori in order to properly gauge its Māori-focused activities.

## 6.6 SCIENCE

The final of our five sections on the mātauranga agencies focuses on the funding of mātauranga Māori within the Government's research, science, and technology (RS&T) sector, including the policy that describes the purpose and scope of this funding.

At the time of completion of this chapter, in late 2010, the sector was poised to undergo significant structural change, with legislation being passed to merge the Ministry of Research, Science and Technology (MORST) with the Foundation for Research, Science and Technology (the foundation). This change was originally announced in March 2010. The Minister of State Services' paper to Cabinet on the subject, which has been publicly

released, noted the ‘duplication of policy advice on RS&T planning and prioritisation between MORST and the Foundation’ and argued that ‘the multiplicity of agencies and funds causes programme and product clutter, lack of clarity about the policy framework, confusion about lead agency responsibilities, and associated difficulties for researchers and firms to get the help they need.’<sup>267</sup>

The result of the merger is the creation of the Ministry of Science and Innovation (MSI). In order to bring our report to conclusion it has not been possible to be fully up to date with these changes. We therefore describe the policies and funding current within the sector before the passage of legislation in December 2010. As we have said, while some details may change in the new structure, the principles we identify will continue to apply.

The RS&T sector operates under a three-tiered system of policy-makers, funders, and research organisations or providers. At the apex of this system is the Minister of Research, Science and Technology. Under the Minister’s direction is MORST, which is responsible for setting RS&T policy and administering Vote: RS&T. In 2009/10 the size of this investment was some \$721.6 million. Beneath MORST are the three funding agencies: the foundation, the Health Research Council (the HRC), and the Royal Society of New Zealand (the RSNZ). These agencies operate independently from MORST in disbursing RS&T funds to the third tier of the system, the research organisations themselves. These include the nine Crown Research Institutes (CRIs); tertiary education institutes; and private, community, and not-for-profit research organisations.<sup>268</sup>

The claimants’ concerns with this system involved the extent to which the Crown had recognised the value of their mātauranga, as well as the need to deal with it in a distinct way within the RS&T system. They also raised concerns about MORST’s perceived failure to consult with Māori over its policies, as well as its lack of mention of the Treaty or its principles. These concerns were quite aside from issues concerning the intellectual property rights of kaitiaki in indigenous flora and fauna subject to research, which we have addressed separately in chapter 2.

### 6.6.1 Current legislation, policies, and funding

MORST, which was established by Cabinet direction in 1989, is the sector leader. While it has had the central role in policy-making, both the foundation and the HRC have also had additional formal policy advice functions under their establishment legislation (a matter noted, in the case of the foundation, by ministers in agreeing to the amalgamation). Under section 5(1) of the Foundation for Research, Science and Technology Act 1990, one function of the foundation is to ‘provide independent policy advice to the Minister [of Research, Science and Technology] on matters relating to research, science and technology, including advice on national priorities for those matters’. Likewise, under section 6(1)(a) of the Health Research Council Act 1990, the HRC is to ‘advise the Minister [of Health] on national health research policy’. The RSNZ’s statutory functions are more focused upon promoting awareness and understanding of science and technology in New Zealand.<sup>269</sup>

The foundation is required under its Act to consult regularly with ‘representatives of industry, researchers, Maori, and the community’ in formulating its aforementioned policy advice. We were told by Dr Helen Anderson, the then chief executive of MORST, that the foundation ‘convenes specialist advisory groups with expertise on Māori research and innovation’ for such purposes. As an example, she named the six Māori who comprised the advisory group for the 2006/07 Te Tipu o Te Wānanga funding portfolio.<sup>270</sup>

Sections 21 to 23 of the Health Research Council Act 1990 spell out the role and functions of the Māori Health Committee within the HRC, which is charged with advising the HRC ‘on health research into issues that affect Maori people, with particular reference to research impinging on cultural factors affecting the Maori people’. The other relevant legislative provision is section 24(2) of the Royal Society of New Zealand Act 1997, which allows the RSNZ governing council to coopt members for various purposes, including ‘Giving effect to the principles of the Treaty of Waitangi’.

The overarching policy framework that addresses Māori research issues is Vision Mātauranga. This policy was introduced by MORST in March 2005 and aims to

‘unlock the innovation potential of Māori knowledge, resources and people’ and ‘provide strategic direction for research relevant to Māori funded through Vote RS&T.’<sup>271</sup>

It has four themes, which are set out below together with their accompanying objectives:

- ▶ Indigenous innovation: ‘To create *distinctive products, processes, systems and services* from Māori knowledge, resources and people through distinctive R&D activities.’
- ▶ Taiao: ‘To discover distinctive and successful approaches to environmental sustainability by exploring iwi and hapū relationships with land and sea and *Kaitiakitanga* – an emerging approach to environmental management on the basis of traditional values, principles and concepts.’
- ▶ Hauora/Oranga: ‘To discover successful – including distinctive – approaches and solutions to Māori health and social needs, issues and priorities.’
- ▶ Mātauranga: ‘To develop a distinctive body of knowledge at the interface between indigenous knowledge and RS&T that can be applied to aspects of RS&T. This theme will explore ways to accelerate the creation of knowledge and the development of people, learning, systems and networks.’ (Emphasis in original.)<sup>272</sup>

As can be seen, Vision Mātauranga emphasises the ‘distinctiveness’ that flows from Māori knowledge and approaches. To that extent, MORST draws a distinction between the kind of research that will be undertaken to deliver Vision Mātauranga, on the one hand, and general research of relevance to Māori as well as other New Zealanders, on the other. An example of the latter is research into health problems, such as cancer or diabetes. In other words, ‘Vision Mātauranga focuses on the *distinctive* contributions that might arise from the innovation potential of Māori knowledge, resources and people (any combination) as well as responding to needs and issues that are distinctive to the Māori community.’ (Emphasis in original.)<sup>273</sup>

A Vision Mātauranga Advisory Group (VMAG) was set up in 2005 to act as the guardians of the policy framework.<sup>274</sup> This group, which in 2007 included Professor Charles Royal, Professor Mason Durie, and the Very



The Vision Mātauranga policy framework, introduced by MORST in 2007, aims to ‘unlock’ the ‘innovation’ potential of mātauranga Māori.

Reverend Muru Walters, advises the chief executive of MORST on policy issues (including funding policy), and the chief executive in turn advises the Minister of Research, Science and Technology. Specific funding decisions are made by the likes of the foundation, which has advisory committees with Māori representation,<sup>275</sup> as noted above with respect to Te Tipu o Te Wānanga. In future, of course, these decisions will be made within MORST, although the Minister of State Services’ Cabinet paper stresses the need to retain ‘the independence of decision-making in respect of the funding of particular research proposals or research programmes.’<sup>276</sup>

Aside from Vision Mātauranga, other investment strategies to note include the foundation's *Maori Economic Innovation Strategy 2005–2012*,<sup>277</sup> which is intended to 'guide the Foundation's science investments that aim to contribute to improved economic outcomes for Maori and New Zealand'. The strategy forms part of the foundation's wider 'Māori Research and Innovation Strategy'. The strategy is strongly aligned to Vision Mātauranga, and includes the following proposed vision for 2020: 'Maori knowledge and culture is vital and dynamic providing distinct points of premium value for the New Zealand brand, niche opportunities for Maori, and an ongoing source of innovation for distinctive products.'<sup>278</sup>

In allocating money to applicants from its six contestable funding portfolios, the foundation first scores research proposals using a points system. Relevant factors include likelihood of project success and RS&T, economic, social, or environmental benefits to New Zealand. In order to 'rank and differentiate between proposals that have similar scores' and make sure 'that an appropriate range of research is supported within each portfolio', the foundation then applies eight 'balance factors'. One of these is 'Māori Research and Innovation'.<sup>279</sup> Work relating to Vision Mātauranga is to be 'supported in all research areas'.<sup>280</sup> As such, Vision Mātauranga has not been a research funding category in its own right, although from 2010 a small fund has now incorporated 'Vision Mātauranga' into its title (see below).

There is also *The Health Research Strategy to Improve Māori Health and Well-being 2004–2008*, which was published by the HRC in 2004.<sup>281</sup> It aims to 'invest in a range of research activities that will enhance the ability of the health sector' to improve Māori health outcomes.<sup>282</sup> While this strategy was published before Vision Mātauranga, it includes various goals that promote similar themes. For example, the goal of 'Māori health research and innovation' is described as 'To support and provide opportunities for Māori health researchers to place matauranga rangahau hauora and new health research knowledge in the market place'.<sup>283</sup> The strategy, along with the Rangahau Hauora Māori Research Portfolio, was devised by the HRC to demonstrate its Māori responsiveness to MORST when its funding was transferred from Vote: Health to Vote: RS&T.<sup>284</sup>

Like the foundation, the HRC also scores general research applications in terms of the extent to which they relate to Māori health issues. Thus applications are awarded a 'science score' out of a possible 28 points, and the most successful of these are then awarded up to a further 16 points in terms of how well they conform to the HRC's priorities. The extent to which an application involves one of the HRC's five priority populations (Māori, Pacific peoples, children and youth, older adults, and the disabled) can earn three points. The extent of alignment with Vision Mātauranga is worth two points, and alignment with *He Korowai Oranga*, the Māori Health Strategy, is worth one point. Thus, out of a possible overall total of 44 points, a maximum of six points can be scored for specifically Māori-focused aspects of research applications.<sup>285</sup>

Funding of Vision Mātauranga-related research has principally been delivered through the Vote: RS&T 'Māori Knowledge and Development' output expense (MKDOE), which pre-dates Vision Mātauranga in that it was established in 2000/01. In 2010, it was renamed the 'Vision Mātauranga Capability Fund' as part of a wider restructuring of Vote: RS&T 'to provide simplicity and transparency'.<sup>286</sup> Agencies which have administered MKDOE funds are the foundation, through the Te Tipu o Te Wānanga portfolio (where research proposals must align with at least one Vision Mātauranga theme), and the HRC, through Rangahau Hauora. The RSNZ does not administer MKDOE funds but, according to Dr Anderson, is required under the operating principles of the Marsden Fund (which it administers on behalf of the Marsden Fund Council) to 'give expression to the themes of Vision Mātauranga throughout its research investments on behalf of government, when and where appropriate'.<sup>287</sup>

As noted, research of specific as well as general interest to Māori is certainly undertaken from other Vote: RS&T output classes. For example, MORST remarks that:

Many Māori businesses and enterprises are located within conventional sectors of the New Zealand economy, such as agriculture, fisheries and forestry. These entities are eligible to apply for support for R&D activities in the usual manner and these research investments may yield innovations within these sectors.<sup>288</sup>



It is not possible for us to quantify the amount that is being spent on such research from the available information. We suspect that calculating it would in any event present some difficulties, since defining exactly what ‘Māori research’ entails would be far from straightforward. It is possible, however, to trace the amount of research funding tagged specifically to Māori knowledge since the inception of MKDOE in 2000/01. This reveals that while the total size of Vote: RS&T grew by 52.2 per cent between 2000/01 and 2009/10, the size of MKDOE grew by 22 per cent over the same period, from \$4 million to \$4.9 million. MKDOE has also reduced in size somewhat since 2003/04–2004/05, and now represents 0.7 per cent of the total Vote (having been as high as one per cent in 2002/03 and 2003/04).<sup>289</sup>

Another stream of funding aligned to the themes of Vision Mātauranga has been the foundation’s Te Tipu Pūtaiao fellowship scheme for post-graduate and post-doctoral study, which is funded through the ‘Supporting Promising Individuals’ (SPI) output class. In 2010 this pūtea was also added to the new Vision Mātauranga Capability Fund. It is not possible to ascertain exactly what proportion of the SPI expenditure in previous years has been tagged to Māori research fellowships, but from 2005/06 to 2009/10 Te Tipu Pūtaiao fellowships ranged between 15 per cent and 32 per cent of all fellowships awarded via the SPI, the size of which has been about \$8 million annually.<sup>290</sup> Reflecting this, Dr Anderson said in evidence that ‘Te Tipu Pūtaiao currently invests up to \$1 million per annum in research projects by Māori who are studying for Masters, PhD, and Postdoctoral qualifications.’<sup>291</sup>

The budgeted sum for the Vision Mātauranga Capability Fund in 2010/11 is \$5.5 million, which comprises a transfer of \$4.9 million from MKDOE, a transfer of \$1.1 million from SPI, and one-off reduction in out-year funding of \$0.5 million.<sup>292</sup>

### 6.6.2 The position of the claimants

Counsel for Ngāti Koata had some praise for MORST, observing that Vision Mātauranga did indeed attempt to foster ‘innovation and opportunity in research relevant to Māori’. The Ministry’s chief executive had also expressed some commitment to cooperating with Māori, protecting

indigenous flora and fauna, and building Māori research capability. However, counsel considered this commitment was undermined by ‘a subjective self-analysis’ that concluded that contemporary policies, practices, and projects were actually delivering these objectives, when the evidence was to the contrary. Not only were there no references to Treaty principles in Vision Mātauranga, but Māori were not even formally consulted on it. In general, said counsel, MORST was not acting in a Treaty-compliant way; it did not even mention the Treaty in its own statement of intent.<sup>293</sup>

Counsel for the Te Tai Tokerau claimants was also critical of MORST, saying that the Ministry had signalled in a 1995 paper that steps should be taken to ensure mātauranga Māori achieved a ‘parity of funding’. Recommendations had included that mātauranga Māori be accepted as both ‘a legitimate research topic under the Research, Science and Technology framework’ and ‘a knowledge paradigm of nature different from Western Science.’<sup>294</sup>

In other words, said counsel, the Crown recognised from at least 1995 that there were fundamental differences in the knowledge systems that meant there were different ways in which they needed to be funded and approached. Counsel noted also that the 1995 paper had described how the retention and development of mātauranga Māori could deliver competitive advantage to New Zealand’s knowledge economy, as well as strengthening national identity.<sup>295</sup> Counsel did not express an opinion, however, on whether this understanding was part of Vision Mātauranga.

### 6.6.3 The position of the Crown

The Crown did not discuss this matter, including Vision Mātauranga, in its closing submissions. In her evidence, however, Dr Anderson concluded that:

Through the policies and funding described in this evidence, and with Vision Mātauranga as the cornerstone, MORST is certainly acting to increase the amount and quality of flora and fauna research and collaboration with Māori. The Government has worked to develop policies and funding mechanisms that collaborate and integrate mātauranga and Māori knowledge into research in New Zealand.<sup>296</sup>

Under cross-examination, Dr Anderson argued that it was important to bear in mind that Vision Mātauranga research is only the proportion of the overall research spend where there is 'distinctive added value from mātauranga Māori'. A great deal more research is funded that is of specific interest to Māori, she said. While it does not mention the Treaty, she contended that the Vision Mātauranga policy gives effect to the Treaty and indeed 'builds on' the Ministry's actual Treaty obligations. She also suggested that there were other agencies 'embedded' in the RS&T sector that had the Treaty in their legislation.<sup>297</sup>

Dr Anderson conceded that iwi had not been consulted on Vision Mātauranga. However, she stressed that her VMAG included some highly respected Māori scholars, and she relied upon their advice. She confirmed that the VMAG had believed that including the Treaty in the wording of the policy would have been a distraction. She felt that it would quite probably have been too hard to identify the correct right-holders in mātauranga Māori for the purposes of consultation, and she did not believe a cohesive answer would have been obtained in any case. She felt that her own discussions with the VMAG constituted a formal interaction with Māori.<sup>298</sup>

#### 6.6.4 Analysis

Our analysis of the Crown's RS&T funding policy as it pertains to mātauranga Māori begins by examining the nature of the Treaty interest in the funding of RS&T. We ask whether mātauranga Māori is broadly akin to science, and thus whether it has relevance in the state-funded science system. Having established that it is relevant, and having reaffirmed that it is a taonga, we then assess what other valid interests might weigh against recognition of and provision for the Treaty interest. Finally we offer our conclusions on the Crown's policy, basing these on the set of key findings that arise from our analysis.

##### (1) *Is there a Treaty interest in the Government's RS&T funding policy?*

The first issue to clarify is what relevance mātauranga Māori has to the funding of science. Is it, as some assert, too subjective, irrational, and unquestioning to merit comparison with science? Can it produce sufficient

material or technological benefits to warrant a share of science funding? One scientist, Mike Dickison, argued in 1994, for example, that because mātauranga Māori mixes 'supernatural with mundane explanations' and relies on 'authority rather than challenge and consensus', it can hardly be seen as 'science'. In short, he said, it is simply 'a mixture of religion, mythology and observed facts' rather than an objective and rational system of observation and experimentation. While he made references to what children are taught in schools rather than science sector funding, Dickison suggested that promoting mātauranga Māori in the context of science will inevitably lead to the reflection that the mātauranga is 'less comprehensive and often simply wrong'.<sup>299</sup>

But others argue that mātauranga Māori does engage in methods that are akin to science, and therefore has a valid place within the science system. Such was the argument in the 1995 MORST paper cited by counsel for the Te Tai Tokerau claimants, which states:

Both science and mātauranga seek to codify knowledge in a useful manner. Both result in useful and un-useful concepts. Both rely on empirical observation and codifying that knowledge in a theoretical framework. The perspectives however are different. *Science* seeks to isolate the study of matter from the real world under a set of specific conditions, understand the topic in its isolation, and from there [draw] observations about its place in the real world. *Mātauranga* studies a topic in the real world, and from its interactions in the real world seeks to build a conceptual framework in which to codify that knowledge. [Emphasis in original.]<sup>300</sup>

During our inquiry, this was not a matter of debate between the Crown and claimants, since the Government has for some time now accepted the relevance and validity of funding mātauranga Māori-related research from its RS&T budget. But for those who yet feel some unease about that, let us consider for a moment an achievement of mātauranga Māori that enabled the survival and prosperity of Māori in Aotearoa.

When Polynesian settlers arrived in Aotearoa they brought various tropical plants with them in the hope of establishing them as crops. Previous voyaging had only been from one tropical island to the next, and crop



An excavated kumara storage pit at Kauri Point Pā in the western Bay of Plenty, 1963. These highly sophisticated underground storage pits protected tubers from frosts and allowed the cultivation of the delicate tropical kumara as far south as Banks Peninsula.

transfer had been relatively straightforward. But New Zealand's cooler seasons presented a singular horticultural challenge. As only the very northern tip of Northland is entirely frost-free, experimentation would have been rapidly needed to find ways of saving the tropical plants from succumbing to the cold. At first this probably included building sheltering walls and fences and mixing the soil with charcoal, ash, sand, and gravel to make it warmer and better draining. Over the longer term, however, even such techniques as these may not have allowed the survival of tropical perennials like the kumara in any part of New Zealand.

The answer, which ethnobotanist Douglas Yen has

called 'the highest Maori achievement in agriculture',<sup>301</sup> was the development of a successful, climate-controlled storage technique that allowed a sufficient quantity of kumara seed stock to be preserved for the next spring's planting. In sum, underground pits were constructed with sumps, drains, bracken lining, raised ridges, and so on, and these housed the precious tubers safely in dry and warm conditions. The development of this complex technique – almost certainly in Northland – allowed kumara cultivation to spread as far south as Banks Peninsula, an incredible extremity of latitude for such a delicate tropical vegetable. That far south the pits would have required a quite sophisticated design to withstand the heavy winter

frosts. As Yen concluded in 1961, this technique had no precedent in the tropics and was ‘an innovation of some magnitude that could not have been arrived at by a sudden and inspired agricultural deduction immediately on the plant’s introduction.’<sup>302</sup>

Kūmara cultivation became an intense and ritualised activity, with knowledge of the seasonal cycles imperative to success. Commemorating the theft from Whānui (the star Vega) by his brother Rongo-māui of the celestial kūmara, harvest occurred when Whānui rose in the east on autumn mornings. And the caterpillars that attack the kūmara leaves during summer – and appear in large numbers on damp nights – were believed to be the sky ancestors Nuhe, Toronū, and Moka sent to earth by Whānui to punish Rongo-māui for the theft. The kūmara, similar cultivated foods, insect pests, and other things related to its seasonal cycle were connected by whakapapa in what scientist Mere Roberts and others describe as a form of ‘folk taxonomy’. They suggest that, while this had important differences from Western science (such as the inclusion of non-living entities like Whānui, and the ultimate descent of all things from the children of Rangi and Papa), such groupings into ‘the most intuitive and basic of all classifications’ was similar to phylogeny. It showed the ability of Māori ‘to perceive underlying patterns in nature’ and was an essential tool in ensuring the kūmara’s survival.<sup>303</sup>

The successful conversion of kūmara into a temperate annual crop in Aotearoa, therefore, was a triumph of mātauranga Māori.<sup>304</sup> This mātauranga is not Western science, since it arises from an entirely different cultural context and world-view. But the observation, experimentation, innovation, and classification involved in this example shows that it nevertheless has similarities with the scientific method. In our view, therefore, it is quite appropriate to fund mātauranga Māori within the RS&T system. At the same time, however, mātauranga Māori’s fundamental differences from science must also be recognised in that funding. It would indeed be quite wrong, for example, to evaluate mātauranga Māori simply according to scientific criteria.

It remains then for us to comment on the Treaty interest in the funding. Over centuries of observation and adjustment, Māori built up knowledge of the natural

environment – including the medicinal properties and edible components of its flora, the habits of its fauna, the fertility of its soils, the navigability of its tides, and so on – along with the technologies to exploit such knowledge. As we have implied, it was, in essence, the means to the survival, development, and prosperity of pre-contact Māori, and each iwi developed its own mātauranga about its unique environment that allowed it to survive within it. The mātauranga also has a whakapapa that links it with the ancestors who developed it. It is thus the source of tribal traditions and customs; there is kōrero about it and tikanga based upon it.

In short, mātauranga Māori is a taonga giving rise to Treaty obligations on the Crown, as well as Māori. For their part, Māori must show a willingness to maintain and transmit mātauranga Māori in accordance with article 2 of the Treaty (‘so long as it is their wish to retain the same’). And the Crown has an obligation to actively protect that mātauranga Māori from loss. As the Privy Council has said in the context of te reo Māori, where a Government has previously acted to suppress, its obligation now to protect is all the greater.

## **(2) Are there other valid interests with regard to the Government’s RS&T funding policy?**

Once again, the principal constraint on the funding of mātauranga Māori is financial. The New Zealand Government already expends over the OECD government average on research and development, which is largely due to below-average spending in this area in New Zealand by business.<sup>305</sup> Contestable RS&T funding is also well over-subscribed, usually by 400 to 500 per cent, according to John Kape of the foundation. Over-subscription for funding is, of course, by no means an inherently bad thing. Dr Anderson said, for example, that having an over-supply of researchers in New Zealand was ‘a great situation to be in’. She did add, however, that she ‘would just like to be able to fund them all’ if she could.<sup>306</sup>

This highlights both that RS&T funding is limited, and that there is a valid interest in the impact on other RS&T projects if the share of funding allocated to projects aimed specifically at mātauranga Māori were to increase significantly. Other research projects contribute significantly to the national good, and thus there is a clear public interest

in the allocation of RS&T funding. Moreover, there is what we might call a strong 'Māori public interest', since many RS&T projects will have specific benefits for, say, Māori health (such as diabetes research), Māori business (for example, forestry, land care, and aquaculture research), and so on. There are also, of course, many research projects on taonga species where Māori interests may directly benefit, notwithstanding the Māori claim to control access to those species for such research (see chapter 2).

But beyond this, we struggle to identify other potentially valid concerns. Dr Anderson implied that there was a real danger that New Zealand scientists or scientific projects could be attracted offshore by any requirement for increased recognition of the Māori interest in RS&T.<sup>307</sup> But the experience of the CRIS, for example, shows that researchers and Māori are successfully dealing with research ethics and intellectual property on a routine basis. At the ground level, we heard many stories of goodwill and mutual advantage.

For example, as we relate in section 2.7.4(5), GNS Science has established access and benefit sharing-type arrangements with Māori landowners in the course of its research into extremophiles in geothermal fumaroles; NIWA has its own Māori development unit and has conducted research in partnership with iwi, such as its tītī research with Ngāi Tahu; CFR has a framework for partnership with Māori called Te Putahi o Ngā Wai, and has researched traditional foods and Māori horticulture; Scion has a stand-alone Māori advisory committee called Te Aroturuki; and Landcare Research/Manaaki Whenua provides samples from its New Zealand Flax Collection to Māori communities and has in fact devolved the distribution role to the Māori weavers' association, Te Roopu Raranga Whatu o Aotearoa. It is the partnership with Māori that gives the CRIS an advantage, because linking with communities that have a deep empathy with natural phenomena is really science plus.

In the end, mātauranga Māori is not any kind of 'competition' for Western science. Rather, the two systems of knowledge are complementary, and New Zealand can benefit from that. As Professor Durie suggests, 'the interface between Māori knowledge and science provides an opportunity for an expanded understanding of ourselves and the world around us'. As he goes on to say



Fishing using the tau kōura method, Lake Rotoiti. Te Arawa continues to use traditional methods for harvesting freshwater crayfish from Lake Rotoiti. NIWA's website notes that bundles of fern fronds are left on the lake bed for kōura to take refuge in before being hauled to the surface and into the boat, where the kōura can be picked out. NIWA is collaborating with Te Arawa and Ngāti Tūwharetoa to use tau kōura as a basis for monitoring kōura populations in lakes. This research encourages the sharing of mātauranga about seasonal cycles and species habitat.

with specific respect to Māori involvement in science (but with, we suspect, a broader application):

Full understanding requires the capacity to learn from quite different systems of knowledge and to appreciate that each has a validity of its own within its own cultural context. Science is one such system, Māori cultural knowledge is another.<sup>308</sup>

6.6.4(3)

In a similar fashion, in 1996 Mere Roberts also called for educators and professional scientists to ‘pursue the teaching of research into and the teaching of . . . mātauranga Maori, not simply because equity demands it, but because all New Zealanders stand to benefit by it.’<sup>309</sup> We think this is likely to be particularly so in environmental management and sustainability. It is hard to believe that the insights of Māori communities that have lived next to natural environments for hundreds of years would not be of advantage to our collective need to live responsibly in our environment.

### (3) Conclusion and reforms

The core principles that stand out in considering the adequacy of support for mātauranga Māori in RS&T funding are as follows. First, the mātauranga involved is a taonga. Secondly, mātauranga Māori has a number of characteristics normally attributed to science – especially a reliance on observation and experimentation – but it is not the same as science. The two systems of knowledge are complementary rather than competing. This is really the key point. Māori arrived at innovative solutions to the challenges of living within the New Zealand environment. They were able to do so because of their intimate and inter-generational relationship with it. It stands to reason that scientific research can only benefit from this insight. Thirdly, therefore, there is real potential for partnership between science and mātauranga Māori.

These principles were all reflected in the 1995 MORST paper, the exact status of which is unclear. Entitled *The Interface Between Matauranga Māori and Mainstream Science*, its authorship is not stated but it appears to have been written by a Māori employee of MORST<sup>310</sup> and was ‘Approved for general release’ by the MORST chief executive. As such, we do not believe it represents MORST policy, then or now, but it does provide a yardstick by which to measure progress in terms of making space for mātauranga Māori within the RS&T system.

The paper argued that, while mātauranga Māori was not specifically ‘science’ in terms of orthodox Western methodology, it was of ‘ultimate benefit’ to New Zealand and needed to be protected within the RS&T framework. At the same time, scientific methodologies ‘should

themselves in turn benefit from the interaction with alternative cognitive processes. Mātauranga Māori has some strong overlaps (and indeed strengths) with environmental science, astronomy and pharmacy, and much to offer from a teaching perspective.’<sup>311</sup> The paper thus recommended specific and separate funding for mātauranga Māori in the RS&T system with a three-way focus on:

- ▶ research into maintaining traditional Māori knowledge;
- ▶ research into exploring the interface between traditional knowledge and modern applications; and
- ▶ research which builds research capability within the Māori community.<sup>312</sup>

Since tohunga no longer existed in sufficient numbers, the paper suspected that Western concepts of ‘quality’ would need to be applied in the meantime, as new quality criteria developed over time. It recommended that a specifically Māori group should be established to manage the fund, with its members appointed by iwi on a waka basis. The paper noted the taonga status of mātauranga under article 2 of the Treaty of Waitangi but also contended that, in breach of article 3, Māori lacked equitable access and were under-represented in the science sector. ‘In part’, said the paper, ‘this lack of involvement may be [due to] a perceived lack of relevance to Maori.’<sup>313</sup>

We heard nothing about this paper in the Crown evidence or submissions. In any event, MORST may well contend that the advent of both MKDOE and Vision Mātauranga is the answer to the paper’s recommendations. Indeed, by 1996 the foundation had concluded that there was an urgent need for a separate mātauranga Māori fund to record and preserve traditional Māori knowledge that was not otherwise eligible for public funding.<sup>314</sup> We can assume that the establishment of MKDOE in 2000/01 was the first major attempt to remedy this. But how successful have first MKDOE and then Vision Mātauranga actually been in this regard?

One measure is the allocation of funds, and here we are struck by the figures we cited earlier showing the size of funding increases over recent years. In sum, the overall government non-departmental RS&T spend increased from \$467.1 million in 2000/01 to \$708.1 million in 2009/10, but funding available within MKDOE

grew over the same period from \$4 million to only \$4.9 million. This small amount has in fact not only gone backwards in relative terms to the total expenditure but has also decreased in absolute terms from the \$5.5 million allocated in 2003/04 and 2004/05. The funding of ‘mātauranga’ research by such a small and dwindling pool of money suggests that the effort to support it has been token.<sup>315</sup>

There is recognition of mātauranga Māori in mainstream funding processes, of course. For example, we have noted the ‘Māori Research and Innovation’ ‘balance factor’ that applies to a wide range of foundation investment portfolios, as well as the HRC’s method of assessing the ‘priority’ of research applications. This is in effect the optional ‘Māori box’ to tick in mainstream funding applications. We have no information, however, as to whether the foundation’s Māori balance factor is any more influential in eventual ranking than other balance factors such as ‘Capability’, ‘Risk/return’, ‘Alignment to priority intent’, and so on. Its existence should in theory at least ensure a representation of projects that relate to Māori knowledge and culture, although it may conversely ensure there is not an ‘over-representation’ of such projects, whatever that might be. What, then, of Vision Mātauranga? We agree that the policy is innovative and forward-looking, but to us it has failed to capture the imagination – particularly of those who introduced it and allocate funds to deliver it. Simply, there is no evidence of the kind of quantum change such an innovative policy should engender. After a brief mention in MORST’s Statement of Intent for 2008–11,<sup>316</sup> Vision Mātauranga is not referred to in the Statements of Intent for 2009–2012 or 2010/11.

The 2008–11 mention comes under the heading of ‘Sharpening the agenda for science’, one of MORST’s four strategic priorities. By contrast, Vision Mātauranga does not feature under MORST’s other three priority areas of ‘Engaging New Zealanders with science and technology’, ‘Improving business performance through research and development’, and ‘Creating a world-class science system for New Zealand’. This reinforces the extent to which a focus on mātauranga Māori has not been integrated throughout the RS&T system: instead, in the words of Vision Mātauranga, it is seen as ‘unique’, ‘distinctive’

and ‘emerging’ – and, in our view, ultimately marginal. If Vision Mātauranga is to have a ‘transformational’ impact, then it should feature more extensively than this. We recommend that science sector agencies give greater prominence to Vision Mātauranga, or make mātauranga Māori a strategic priority in its own right.

As noted, we heard much evidence of productive and collaborative relationships between Māori and research organisations (such as the CRIS) on research projects involving indigenous flora and fauna. There appears to be a gulf between this rich partnership on the ground and the relative impoverishment of Vision Mātauranga’s implementation. In other words scientists work well with kaitiaki whose mātauranga is of clear benefit to their projects, but research based on mātauranga itself is being neglected.

The lack of reference to the Treaty in Vision Mātauranga also contrasts with the recommendations of the 1995 MORST paper. That the VMAG felt the Treaty would be a ‘distraction’, according to Dr Anderson, and should thus be left out of the Vision Mātauranga policy, is an indictment of the political environment of the times. Officials – and obviously their Māori advisers as well – had clearly become hesitant even to mention the Treaty.<sup>317</sup> Thus asked if MORST had a Treaty policy, Dr Anderson gave the reply that ‘MORST has a Vision Mātauranga policy’. When pressed about whether MORST was committed to honouring the Treaty she eventually said ‘yes’, but her initial response was that MORST sought to understand the Treaty’s ‘spirit’ and implement it ‘where possible’.<sup>318</sup> While we accept that this response probably reflected the prevailing political climate of the times, the importance of the Treaty and the need to act in accordance with it perhaps still remains a challenge for RS&T policy makers.

There is an extent to which the RS&T agencies can only see the economic potential of mātauranga Māori. In saying this, we acknowledge that they are largely driven by economic imperatives and opportunities; indeed, boosting economic activity was a key reason for their establishment (and a driving motivation for the amalgamation of MORST and the foundation). MORST is also principally concerned with high-level policies and strategies, rather than day-to-day interaction with the community, and

thus sits at the opposite end of the government spectrum to Te Papa. It is also clearly the guardian of the technological tradition that brought Tasman and Cook, rather than Kupe, to New Zealand. But MORST and the other agencies must begin to recognise the benefits of preserving mātauranga Māori for its own sake, and for cultural and social reasons – not just for New Zealand’s economic benefit. In other words, there is an RS&T angle to nation-building that is not purely economic. The 1995 MORST paper saw this too.

In sum, therefore, MKDOE and Vision Mātauranga were genuine attempts to accommodate mātauranga Māori within the RS&T system, as the system itself accepted was needed. They were, however, failed attempts, as mātauranga Māori continues to sit at the margins and we see no evidence of a desire to change that. Vision Mātauranga also came at a bad time politically, and it may partly have been thwarted by negative attitudes within the science community. There may also not have been the capacity on the Māori side to grasp the opportunity, although we cannot comment with any authority. Besides, this is not the point. This was a great idea struggling to get through a half-closed door.

How, then, to properly open that door? An idea mooted from time to time has been the establishment of a Māori CRI, but as long as such an institution was beholden to the purchasing decisions of mainstream science, we would not be confident of significant change. Rather, we recommend, as the best vehicle to ensure both that the benefits of mātauranga Māori are available to science, and that mātauranga Māori itself grows and prospers, the creation of a Māori purchase agent (that is, a body like the foundation that will disburse money to researchers). The aim of this purchase agent would be to fund both the preservation of mātauranga Māori and research that explores the interface between mātauranga Māori and modern applications, as well as to boost Māori research capacity. This would be an altogether different proposition to MKDOE (or its successor, the Vision Mātauranga Capability Fund), where a Crown-appointed advisory group makes recommendations to the Foundation board.<sup>319</sup> Instead, we recommend that Māori decision-makers control and allocate a fund of much greater size – say \$20 million annually, or a smaller sum initially if Māori research capacity could

not at first sustain this<sup>320</sup> – and have a support staff with policy and strategic capability within the new single science agency.

We believe that this arrangement would be an appropriate expression of partnership in the sector. In that research, science, and technology is a more contained sector than, say, culture and heritage – and has a smaller pool of Māori with expertise – a less complicated process than in the arts sector may well be employed for identifying representatives of the Māori partner. In other words, this could rely on our general guidelines set out in section 6.8.3(4), rather than through an electoral college. In any event, we recommend that board members include a mix of those with expertise in mātauranga Māori and science.

The administrators of this fund must not confuse mātauranga Māori with Māori scientists, which the RS&T system has perhaps been guilty of in the past. We acknowledge of course that some Māori scientists are adept in mātauranga Māori. But no one should assume that they are automatically experts simply because they are Māori. As Professor Durie has said, ‘Māori participation in science, even if it leads to the advancement of Māori social or economic wellbeing, and no matter how laudable, is not the same as the advancement of mātauranga Māori.’<sup>321</sup> Into the future, we certainly hope that more Māori scientists will emerge who have benefited from both a kaupapa Māori education as well as instruction in the tenets of Western science. Those that do may have a particular advantage of being able to grapple with problems from more than one perspective.

In any case, we believe that a Māori purchase agent would provide the missing element of partnership within the RS&T system. We recommend that such a body have a limited lifespan. After 10 or 15 years it should be reviewed and, if mātauranga Māori research is by then flourishing, its funds should be reintegrated within the mainstream funding system, which would carry on the object of funding mātauranga Māori to at least that level. If not, the separate purchase system may need to continue for a longer period. The Māori purchase agent’s goal must be to increase mātauranga Māori research capacity to the extent that it has the ability and track record to flourish as part of the mainstream RS&T system.



### 6.6.5 Summary of findings and recommendations

Mātauranga Māori allowed Māori to survive and prosper in Aotearoa, and as such is an important taonga. There is, therefore, a significant Treaty interest in funding provision for it. Moreover, as mātauranga Māori and science are complementary systems of knowledge, there is considerable scope for shared benefits and partnership between them. It is appropriate for the Government to fund both knowledge systems through Vote: RS&T.

Belatedly recognising the potential of mātauranga Māori in RS&T, in 2000 the Government set up the Māori Knowledge and Development Output Expense (MKDOE) and in 2005 introduced the 'Vision Mātauranga' policy framework. The former was meant to provide an avenue for mātauranga Māori to be recorded and preserved, while the latter was to champion the 'distinctive' opportunities that mātauranga Māori offered science in New Zealand.

Both policies, however, have failed, as mātauranga Māori remains clearly at the RS&T margins and there is no evidence of a strong desire to change this.

To enable mātauranga Māori to get through the RS&T door, we recommend the establishment of a Māori purchase agent, with a much larger sum to spend than MKDOE. We recommend that members of the new entity's board include a mix of those with expertise in mātauranga Māori and science. Given the nature of the sector, they could be selected in accordance with the general guidelines set out in our conclusion to this chapter, rather than through an electoral college.

We recommend that the aim of this purchase agent be to fund both the preservation of mātauranga Māori and research that explores the interface between mātauranga Māori and modern applications, as well as to boost Māori research capacity. We recommend that, once it has achieved its key objectives, the fund be re-integrated with the mainstream system.

Finally, we also recommend that science sector agencies give greater prominence to Vision Mātauranga, or make mātauranga Māori a strategic priority in its own right.

### 6.7 THE SPECIAL POSITION OF TE PUNI KŌKIRI

Te Puni Kōkiri (otherwise known as the Ministry of Māori Development) is a small policy ministry and the Government's principal adviser on its relationship with Māori. It is the successor to the former Department of Māori Affairs. Māori cultural outcomes are at the forefront of its strategic direction, seeking to be the policy leader on Māori culture and aiming to have Māori 'succeed as Māori', 'confident and expert in their culture'. 'Mātauranga' (along with 'Rawa' and 'Whakamana') is one of the three 'pou' of its overall guiding philosophy on realising Māori potential.

As such, practically everything Te Puni Kōkiri does is meant to recognise 'the unique place of Māori culture' – the Ministry's corporate documents are filled with numerous references to 'culture'. Aside from its policy advice, including a mātauranga Māori workstream it has established partly in anticipation of the findings of this report, each year Te Puni Kōkiri allocates a fund of more than \$23 million to Māori community initiatives and projects, much of which is aimed at supporting Māori language and culture, marae development, and so on. This fund is known as the Māori Potential Fund (MPF).<sup>322</sup>

Despite this activity across all areas of mātauranga Māori, the Crown led no evidence about Te Puni Kōkiri's role other than with respect to reo (see chapter 5). Given the nature of the Wai 262 claim, and especially the focus of this section, this omission was disappointing. It left us with a lacuna in the evidence that could not satisfactorily be filled by examining Te Puni Kōkiri's publications and website. In December 2008, therefore, the presiding officer formally requested that Te Puni Kōkiri provide information about MPF expenditure in support of mātauranga Māori, with particular reference to culture, arts, archives, heritage, science, and education.<sup>323</sup>

Te Puni Kōkiri supplied the requested information promptly.<sup>324</sup> It identified about 480 investments from the first two and a half years of the MPF's existence that seemed to have some relevance to the areas of mātauranga subject to the presiding officer's direction.<sup>325</sup> Te Puni Kōkiri did not categorise the investments according to those headings, however, as it felt the likely application of so many investments to more than one area would make such a breakdown impossible.

Te Aro Pā opening, 11 October 2008. In the 2008/09 round of Māori Potential Fund allocations, the Wellington Tenth Trust was granted \$5,000 to host the official opening of the unearthed Te Aro Pā Whare Ponga.



At the higher end of the scale the investments included \$1.5 million in 2008/09 for Te Ātaarangi Educational Trust (following on from \$1.1 million in 2006/07 and \$1 million in 2007/08) for the continued implementation of its He Kāinga Kōrerorero Whānau Language Development programme and \$1.7 million in 2006/07 for Te Rūnanga o Ngāi Tahu for a 'multi year programme of integrated investments designed to support its longer term objective to continue Ngāi Tahu identity and culture'.<sup>326</sup> There were numerous smaller projects, such as \$500 to Lytton High School for the promotion of oratory and leadership amongst rangatahi. Most investments were well under \$50,000.

The investments appeared to cover every conceivable aspect of mātauranga Māori, as this small selection of examples demonstrates:

- ▶ the recording of oral history to capture kaumātua speaking about tikanga;
- ▶ the production of a CD of Māori music;
- ▶ the construction of a tribal rock art visitor centre;
- ▶ kapa haka festivals and tournaments;
- ▶ other festivals celebrating culture, tribal or hapū identity, film, and so on;

- ▶ marae cultural exchanges and other inter-tribal engagements;
- ▶ the development of Māori literature;
- ▶ research into tribal taonga;
- ▶ Matariki festivals or celebrations;
- ▶ tribal wānanga to improve skills in whaikōrero, mōteatea, and karanga;
- ▶ redevelopment plans for whare tupuna; and
- ▶ the promotion and learning of tribal dialect.

Over the first two and a half years of the MPF, the expenditure on the investments identified by Te Puni Kōkiri amounted to \$21.1 million. We can see from this that the MPF is certainly a significant funder of mātauranga Māori. The projects it funds are of a kind that any number of the other agencies working to support mātauranga in the named areas would conceivably be willing to back. This is clearly a critical area of government activity in the efforts to support the retention and transmission of mātauranga Māori.

But to our knowledge, there has been no overall evaluation of the effectiveness of the MPF. Te Puni Kōkiri did attach several completed evaluations of MPF expenditure that it felt may have some relevance to the areas subject

to the direction. These evaluations were of Te Ātaarangi Educational Trust's He Kāinga Kōrerorero Whānau Language Development programme (as mentioned above); Te Puni Kōkiri's Strengthening Management in Governance programme; and selected investments in rangatahi initiatives in 2006/07.<sup>327</sup> While we appreciated Te Puni Kōkiri's attempt to furnish us with as much information as possible, we concluded that these evaluations were not ultimately relevant to our focus in this chapter.

Several things occur to us about the MPF. First, we recommend that it be protected and remain in place. However, we also recommend that its investments are evaluated, by both Māori and the Crown. We note that an internal evaluation of 'cultural investments' was due by 'the end of 2009'.<sup>328</sup> we do not know the outcome. Secondly, we think that the range of activities covered by the fund shows the importance of sound coordination with other mātauranga agencies, lest there be areas of overlap. This might include the creation – particularly amongst the culture and heritage agencies – of a sector-wide mātauranga strategy.

Moreover, we do not see evidence of any partnership with Māori over this fund. As we understand it, officials determine the priority and success of funding applications on their own, and without direct input from the Māori community. This must change. We recommend the MPF be allocated in partnership with Māori, with mātauranga experts and others from the community deciding equally with Te Puni Kōkiri on general funding priorities and the fate of specific applications. As such, we recommend the establishment of a board to allocate the fund comprised equally of Te Puni Kōkiri staff and representatives of the Māori community. This seems the appropriate expression of partnership in this case. Since the fund's coverage is so broad, we doubt an electoral college could easily be formed to choose Māori representatives in this instance. But perhaps the running of this fund could even provide some momentum for the establishment of a Māori appointments college with broad community mandate. If not, we suspect a consensual approach and the application of accumulated common sense will need to be employed.

The administration of the fund must not be allowed to become an unproductive layer of bureaucracy: it must

draw on the energy of the Māori community to allocate funds in a wholly transparent way.

## 6.8 CONCLUSION

We have, in this chapter, considered the performance of around a dozen agencies whose core business involves protecting mātauranga Māori and helping to ensure its transmission. These are the nine agencies whose witnesses gave evidence of direct relevance to this chapter, as well as Te Puni Kōkiri, the Foundation for Research, Science and Technology, the Lottery Grants Board, and Radio New Zealand. Some of the evidence touched on additional agencies, such as the Tertiary Education Commission, New Zealand On Air, and the Health Research Council.

Having considered the performance of these agencies, and the state of the mātauranga they deal in, certain overarching conclusions occur to us. These are, first, that responsibility for the revival and survival of mātauranga Māori is shared between Māori and the Crown – one party cannot and should not be expected to transmit mātauranga Māori without the help of the other. Secondly, there are reasonable limits on the Crown's obligation: other legitimate interests inevitably impact on the degree of control the Crown can yield to kaitiaki. Thirdly, since the effort to maintain mātauranga Māori requires that the Crown and Māori act in partnership, both parties should ensure that their working partnerships operate according to a set of sound principles.

Here we run through each of these ideas in turn, and do so in some detail. We then return more briefly to the mātauranga agencies and assess their performance in the light of these overall conclusions.

### 6.8.1 Shared responsibility between Māori and the Crown

Crown counsel sought to stress that responsibility for preserving and transmitting mātauranga Māori ultimately lies with Māori themselves, and cited Professor Mead to this effect.<sup>329</sup> We certainly do not wish to downplay the significance of the Māori responsibility, and we do not think that the claimants sought to do so either. Whānau, hapū and iwi are the kaitiaki of mātauranga Māori. Its survival ultimately depends upon Māori commitment

to its protection, propagation and transmission. If that commitment is absent, or if the kaitiaki are in any way ambivalent about it, then no amount of Crown support will save mātauranga Māori from eventual extinction. Kaitiaki must be to the fore in the survival and revival of mātauranga Māori. The Crown's role, within reasonable limits, must be that of a partner in joint venture with kaitiaki. The trick is for each partner to accept its own leadership responsibility and to acknowledge the leadership of the other. While we do not underestimate the difficulty of finding the right balance, it has been the Tribunal's experience that achieving such a dynamic is essential to establishing successful partnerships.

If there is controversy over these ideas, it is not about the fact of Māori leadership in this area. Rather, it is about where the line is to be drawn between the roles of the partners in this shared endeavour. In this way the principles applicable to the survival and revival of mātauranga Māori are closely allied to those we explored in respect of te reo Māori (see section 5.5).

On the Māori side, leadership in the maintenance of mātauranga Māori is seen on marae, at hui, tangi, and iwi or hapū wānanga. In such places and at such gatherings, mātauranga Māori is constantly rehearsed. Public repetition keeps it alive and maintains its currency. Leadership is also seen in homes where kaumātua and parents choose to live in accordance with – and to pass on – the values of tikanga Māori because they give meaning, security and a sense of place or purpose in a modern world of contestable values. In these ways, Māori seek to ensure the long-term viability of mātauranga Māori.

To be frank, if mātauranga Māori lost its place on marae, at hui, and in Māori homes – that is, if Māori stopped caring about its survival – there could be no justification for the expenditure of State resources on its resuscitation. Of course Māori do care and the issue does not arise.

But these efforts by Māori will never be enough in themselves. There are at least three reasons for this. The first is that we live in a complex, highly urbanised society. The vast majority of Māori no longer live in village communities, constantly attending hapū hui and in close contact with kaumātua. Their opportunities to learn about mātauranga Māori in traditional settings are limited by

economic and social circumstances not always of their own making (as we have remarked in section 6.3.4(3)). Despite the difficulties in maintaining contact with 'home', a surprising number of urban-based Māori do so. But some measure of support is clearly needed.

The second reason relates to history. While we do not consider that a lengthy assessment of State policies towards the survival of Māori culture is a productive use of our time, there can be no doubt that successive colonial and post-colonial governments in New Zealand have been hostile to the survival of Māori culture generally and of mātauranga Māori in particular. We do not say that State policy has been the only contributing factor in the loss of mātauranga Māori over the last century and a half. There are undoubtedly many other factors, not least a strong desire among Māori themselves for the advantages of modernity. But the Māori approach tended to be to seek reconciliation between the two cultures, rather than the sacrifice of one in favour of the other. In any event, we are well past the point where State complicity in the loss of mātauranga Māori can be credibly denied. That, in our minds, sharpens the Crown's obligation.

The third reason relates to the modern role of the State. In twenty-first century New Zealand the State has taken on many of the roles formerly the preserve of the home, the church or the wider kin group. Among other things, it educates our children and re-educates our adults; it redistributes our wealth; it supports our industries; and it sustains those aspects of our arts, culture, and heritage that would not otherwise survive competition for national resources or the predation of global cultures. Few of us expect the home or the church to be the primary educator any more. Nor do we expect our arts, culture, and heritage to be transmitted by parents and grandparents alone. There is little argument today about state support for the nzso or the Royal New Zealand Ballet. Nor does there appear to be any difficulty in justifying funding to encourage broadcasters to beam locally made programmes into New Zealand living rooms. In our view, Māori are also entitled to expect the State to support the transmission of their culture – particularly te reo Māori and mātauranga Māori.

Another reason why the Crown should support mātauranga Māori stems not from its obligation to Māori

but rather from its obligation to the country as a whole. As we have said elsewhere, New Zealand has developed to a point where core aspects of Māori culture have become a part of our national identity. We use the Māori language to express that identity, whatever our ethnicity. We use Māori performance and song in the same way. We integrate Māori ideas into the way we describe ourselves. In these ways, Māori culture is fundamental to our unique New Zealand culture. Crown support for the survival and revival of mātauranga Māori must also be seen in this context. It is not just Māori who benefit – all New Zealanders do.

Finally, a further reason for the Crown to support mātauranga Māori derives from how we are changing over time. Māori are becoming an increasingly significant proportion of New Zealand's population, and in that sense it is entirely appropriate for the Crown to increase the allocation of resources that support mātauranga Māori. As we have said elsewhere, those demographic changes mean Māori culture can no longer be regarded as 'other'. The Crown must be seen as a Māori institution as much as it has traditionally been seen as a Pākehā one.

In sum, in the preservation, propagation and transmission of mātauranga Māori, the Crown and Māori are partners. The Treaty of course makes them partners but, just as importantly, the demands of this particular endeavour are such that neither party can succeed without the full support of the other. In other words, the Treaty may make the Crown and Māori partners, but in this case the context demands it.

### 6.8.2 Reasonable limits on the Crown's obligation

How then is the division to be made between Crown and Māori responsibility? Some of the basic principles are suggested by the foregoing discussion. Obviously Māori are responsible for mātauranga Māori in the home and the marae. In all of the other areas covered in this chapter – from culture and heritage, to education, to research and science – the Crown is, equally obviously, responsible at some level. But to what extent is the Crown obliged? As Crown counsel and Crown witnesses are wont to remind us, the Crown's obligation to Māori must be constrained by limited funds, competing priorities, and the wider public good. The legitimate rights and expectations

of others must also be considered. These will include, for example, private property rights in physical taonga and manuscripts.

We agree that these legitimate other interests exist. We have, therefore, attempted to balance both sides' interests in every instance. In some cases, we have concluded that the Māori Treaty interest requires some fetter on the public interest, such as in how documentary mātauranga in government repositories may be used. In short, where kaitiaki exist, their relationship with their taonga must receive a reasonable degree of protection. On other occasions, however, the public interest must prevail. For example, there is a significant Māori interest in the preservation of public access to documentary mātauranga, and we have recognised that. In many cases, though, there is no competing public interest, because support for mātauranga Māori is clearly to the benefit of us all.

The inescapable conclusion is that there can be no single rule. Each case has its own context, and each context helps us to define the appropriate limits. What is common to all cases is the need to identify the wider or competing interests and to carefully weigh them.

### 6.8.3 Partnership principles

The need for viable partnership models between Māori and the Crown in the retention and transmission of mātauranga Māori is our key recommendation. Since that is so, we spend some time here setting out how these partnership arrangements should function. We recommend the application of a series of principles to the construction of these working partnerships, be they specific partnership entities or less formalised iwi-agency arrangements. By 'principles' we do not mean the principles of good behaviour spelled out by the Court of Appeal in 1987 in the *Lands* case, but principles for practical application in the context of modern government policies and programmes. We suggest them as logical elements of a cooperative working partnership or genuine joint venture in the area of mātauranga Māori. They are:

1. The survival and revival of mātauranga Māori must be accorded an appropriate priority vis à vis other Crown priorities.
2. The Crown must ensure its agencies act in a coordinated and consistent fashion when developing

policies and programmes around mātauranga Māori.

3. The Crown must develop clear and relevant objectives both at sector and agency level after:
  - (a) careful analysis; and
  - (b) a process of shared decision-making with Māori partners.
4. Just who represents the Māori partner in each case will depend on the sector and the particular sector issue. Mātauranga Māori and the Māori community are both too complex to admit of a single model of representation applicable to all cases.
5. The Crown must provide sufficient time and resources for meaningful Māori involvement.
6. Māori must engage fully and not as adversaries in the objective-setting process.
7. The partners must make every effort to reach agreement through a spirit of compromise.
8. Once the objectives are agreed, the resources set aside in each agency must be sufficient to achieve them, and within a reasonable timeframe.
9. Where possible, programmes for the implementation of these objectives should involve shared action.
10. Objectives and programmes should be accompanied by shared processes of ongoing review and evaluation.

We have articulated a number of these principles in other chapters, but here – where we deal with a wide range of agencies in one place – it has been helpful to set out them out in a comprehensive list. We will now consider each of them in turn.

#### **(1) According mātauranga Māori appropriate priority**

The business of government involves a perpetual contest for scarce resources. They may, for example, be financial or human resources, or legislative, Cabinet, or ministerial time. The Tribunal has said often that taonga Māori are entitled to a reasonable level of priority in this contest, because they are Treaty protected. This does not mean that Māori interests will trump all others. Rather, the people who set priorities both across government and within agencies are required to give careful consideration to the relative weighting of the Māori interest, even as they focus

on the wider issues and priorities of the day (many, perhaps most, of which will have no specific Māori element). Māori interests may not always receive substantive priority, but they are always entitled to priority consideration.

This process of balancing priorities is, we accept, for the Crown, but priority decisions must be reasonable, and the process must be transparent. Put simply, decision-makers ought to explain how and why they came to their view. In that way they are accountable to the Treaty partner and the wider public. We draw some comfort from the fact that in respect of most of the agencies we have considered in this chapter, this is what happens in practice. Priority and funding may vary from year to year, but this is not generally the result of analytical neglect.

#### **(2) A coordinated Crown approach**

In each of the sectors we have considered, there are a number of different agencies making policy, or delivering programmes, or funding, that relate to mātauranga Māori. We understand a certain amount of information-sharing already exists between them, particularly when they operate in the same field. For example, an agency that offers funding is likely to ask applicants whether they have also sought or received funding elsewhere, so that there is no double-up, or at least officials are aware of the extent of shortfall being sought. But agency coordination must, in our view, go further than this. The first agency's objectives in allocating funding should be in synch with those of the second agency. Both should share a vision and strategy for mātauranga Māori within their field, rather than fund on the basis of their respective agency objectives. This is simply sensible government.

Strategising should ideally be sector wide, and led by an agency whose mandate gives it natural oversight of the issues. In the case of the culture and heritage sector it may be necessary for engagement to take place at a sub-sectoral or even agency level if sector-wide discussions produce results that are too generalised to drive sound objectives. We see no reason, in fact, why there could not be sector-wide and sub-sectoral discussions. In any case, a sector-wide strategy should do more than avoid duplication of effort, though that in itself is commendable. It should bring a greater sense of purpose and meaning to agencies' work, allowing them to see where that work fits

within the bigger picture and how it contributes to overarching goals. It should motivate them to act, given the collaborative agenda. And a strategy should, in theory at least, elevate the status and importance of mātauranga Māori in each agency's eyes, with a resulting increase in urgency and attention.

That is the Crown's responsibility. But a Crown strategy will be ineffective if not equally owned by Māori, whose mātauranga is at stake. Māori must set the objectives with the Crown, therefore, and it is to this principle that we now turn.

### **(3) A partnership for setting objectives**

We recognise that objective-setting in government is never a blue skies exercise. Objectives must be set with realistic expectations of likely resourcing firmly in mind. The prioritisation process we have suggested at (1) above assists in maintaining that realism. We are also aware that setting objectives and striking budgets requires complex, iterative negotiations within the relevant individual agencies, between agencies within a sector, and with ministers. They are strategic, political, and highly disciplined processes. We do not underestimate the procedural challenges and time pressures they represent for agencies. Nonetheless, we think it is possible to carve out a space within those processes where the sector agencies can engage collectively with Māori in a partnership for setting sectoral objectives – be they high-level, medium- to long-term strategic objectives, or more concrete annual business objectives. It is necessary to make this space available to ensure the objectives reflect the needs of the kaitiaki of the mātauranga. We see this step as crucial.

No doubt this will tend to lengthen the process and make it more resource intensive, but we do not see how sector agencies can set objectives in relation to mātauranga Māori without having Māori at the decision-making table. There are, we accept, practical issues about how this might be done, and we address those below. But the principle is unarguable. In the first place, the subject is mātauranga Māori and Māori have the greatest investment in its survival. Māori also have the greatest incentive to bring new ideas to the table. The simple reality is that the survival and revival of mātauranga Māori will be achieved only with kaitiaki at the centre of any collective

efforts. If the kaitiaki role is marginal, there can be no prospect of success. Thus, partnerships in objective-setting are not only right in principle. They will also produce better results in practice.

One practical issue for determination is when these discussions should take place. It seems obvious to us that engagement on overarching strategies should occur as early as possible. It may of course be necessary for Māori and sector agencies to convene more regularly at the sub-sectoral level. All these negotiations will no doubt be subject to the complex political processes we have mentioned above, but they should at the very least significantly influence those decisions.

### **(4) Identifying the representatives of the Māori partner**

Identifying the representatives of the Māori partner to engage with the Crown at a national level has been the subject of debate for many years. In the area of mātauranga Māori, just who these people will be will depend on the sector and the particular sector issue. We do not underestimate the difficulty of identifying the representative Māori partner in this area, but it is vital to the success of the partnership model we propose that this be done.

Here we do not refer to ministerial appointees at board or advisory-body level within agencies,<sup>330</sup> nor to Māori expert advisory committees established to give specialist advice to agencies on particular topics. They bring to the table a Māori voice or subject-matter expertise, but they do not perform a partnership function, and are not expected to. Partnership can certainly exist at that level, but it requires an equivalence of power, and advisers do not enjoy that. Rather, we are referring to representatives of the Māori community who can engage in high-level discussion around matters of common interest to Māori and the Crown in fulfilment of the Treaty's partnership requirements. Objective-setting for mātauranga Māori programmes is a good example of this.

Usually there will be a community of specialist interest entitled to participate in decision-making. In the case of Te Waka Toi, for example, Māori artists and writers have had an obvious special place. Similarly, oversight of mātauranga in education requires the participation of nationally accepted tikanga Māori experts. Where a Māori

6.8.3(5)

business perspective is needed, the Federation of Māori Authorities (FOMA) is frequently called upon to provide that voice, and Māori academics add their perspective to decision-making in the sciences and social sciences. These specialist and expert stakeholders bring a valuable voice to the table, and they can be brought together on a sector-wide basis without undue difficulty. True partnership, however, comes from the Crown engaging with a combination of these voices and representatives of the wider Māori perspective.

It is more difficult to engage the wider Māori voice in discussions over national policies and programmes. In a practical if rough-and-ready means of engaging with the wider, non-specialist Māori community, personal approaches are often made to representatives of national Māori organisations and to national and tribal leaders whose standing is such that their participation is likely to receive widespread support.

Shoulder-tapping of this kind sometimes leads to accusations that the Crown hand-picks its Treaty partner in order to produce a particular outcome. In fact this happens less often than might be expected. Most partnership representatives in the area of mātauranga Māori pick themselves through a combination of cultural expertise, political credibility (in the Māori world), and knowledge of the system.

It would, we admit, be far tidier if there were a Māori appointments college with a broad mandate from the Māori community, but there is not – at least not yet. We have suggested in chapter 5 how a Māori electoral college could be put in place to make appointments to a revamped Te Taura Whiri i Te Reo Māori, with Māori appointees chosen by Māori electorate members of Parliament and organisations with a clear interest in te reo (including iwi organisations, whose interest is in tribal reo). We also noted that one such body has operated successfully in appointing board members to the Māori Television Service since 2003. That body, Te Pūtahi Paoho, includes one representative from each of 11 organisations with either a national or Māori-language focus. These 11 elect four appointees to the Māori Television Service board (where they are joined by three Crown representatives chosen by responsible ministers).

We acknowledge that such a model will be more difficult to implement in the area of mātauranga Māori, because of the range of stakeholders and the lack of history of representation in these areas. But we do not discount the possibility that discussions following the release of the Wai 262 report might produce such a college, as indeed they did with Māori Television in eventual settlement of the long-running broadcasting litigation.

Where it is found that a Māori electoral college, or some other representative model, is impractical, we offer the following guiding principles for developing partnerships. First, it is important that the relevant field of Māori expertise be well represented. Secondly, there is an equally important place for ‘political’ representation in its widest Māori sense. In considering invitations to tribal or community leaders, the agency must ensure there is a spectrum of views at the table and avoid grooming selections in the hope of producing acceptable results. Thirdly, as in all things, there should be wide consultation with relevant Māori organisations and networks, and a willingness, both in consultation and selection, to go beyond ‘the usual suspects’.

These principles are imprecise, and we accept that this is less than satisfactory for any agency seeking to develop policy and programmes in partnership with Māori, still less for agencies working together sector wide. But we are satisfied that such principles combined with two decades of experience in building modern Treaty relationships mean ways will continue to be found to make these partnerships productive.

#### **(5) Resources and time for meaningful engagement**

There are two important ingredients in an effective working partnership. They are resources to allow the partners to participate, and time to enable them to make considered decisions. As we have noted, sector-wide partnerships should produce some efficiencies in these respects. Agencies will usually have the resources to fuel their decision-making process, but they will often be short on time. Māori, by contrast, are usually resource poor but will find the time if the issue is a priority for them. In practice, Māori participation will need to be resourced by the relevant agency or lead agency within the relevant sector.



Few Māori organisations have independent funds to enable participation without assistance. Perhaps in the future this will not be the case but, for the present, reasonable resourcing of the Māori Treaty partner to participate in partnership models for decision-making must be seen as a cost of doing business in the mātauranga Māori sector.

**(6) *The quality of Māori engagement in objective-setting***

For their part, Māori also owe a duty of fidelity to the partnership. That is, they must engage fully in the objective-setting process, and endeavour to meet reasonable timeframes. While disagreements will always occur, engagement should not be adversarial. The Treaty obligation to cooperate does not require Māori to sell out on the principles they hold dear, but it does require them to begin with a genuine desire to explore common ground. There can be no place for positional approaches to discussions.

**(7) *The importance of seeking agreement***

The Crown often argues that it has a right to govern, and that provided there is appropriate consultation with Māori on matters of deep interest to them, the ultimate decision is for the Crown. We think this position is simplistic in principle and unrealistic in practice. There are situations – many of them in the area of mātauranga Māori – in which obdurate Māori opposition will inevitably lead to abandonment of a proposed policy. That will often be for the practical reason that Māori opposition would have undermined the policy anyway. In other situations, either because it is good politics or because it maximises the proposal's chance of success, the Crown will be anxious to promote the perception that Māori have taken the initiative and the Crown is in support. Whatever the reasons, the Crown often relies on Māori support for its policies and often bows to Māori opposition. In practice, sometimes the will of the Crown prevails and sometimes it does not. The same applies to Māori.

That is not to say that the Crown can be held to ransom or that in areas such as mātauranga Māori it must abandon its right to govern. Ultimately, a decision must be made, and if the Treaty partners cannot reach agreement on a matter of deep interest to them both, then a democratically elected government must exercise its mandate.

Our point relates to the mindset the Crown brings to the discussion. That attitude will determine how much time and effort it puts into finding common ground. The correct mindset, in our view, is that every reasonable effort will be made to reach agreement, and that resort to the right to govern will occur only when all other reasonable options have been explored. The purpose of the partnership model is to provide a platform in which agreement is expected and encouraged. It requires a readiness to compromise from the outset. Too often this readiness is absent.

**(8) *Achieving agreed objectives***

Once the parties have agreed on the objectives they wish to pursue, the next task is to ensure that sufficient resources are allocated to achieving them within a reasonable timeframe. Excellent objectives are worthless unless accompanied by sufficient resources. It follows, then, that the objectives drive the resourcing question, not the reverse. We were troubled to hear of resourcing decisions tied to Māori population proportionality, and we saw several examples of funding that was clearly based on the maintenance of historical levels. The only rational basis upon which to assess the sufficiency of funds is the outcome sought in their expenditure. That is why setting objectives is so important.

**(9) *Shared action***

In most of the cases we considered in this chapter, Māori controlled or shared in the control of programme delivery because relationships with the Crown were good, and because programme success depended on buy-in from local communities anyway. It is clear that, where possible, programmes involving partnership in the implementation of agreed objectives should be sought.

**(10) *Shared review and evaluation***

Agreed objectives and relevant programmes should be subject to ongoing and shared review and evaluation. This point is really common sense. Review and evaluation allow the partners jointly to assess the quality of the agreed objectives, the funding needs of the programmes under them, and whether the programmes are in fact

succeeding. What is important is that shared review and evaluation are the means by which both partners accept responsibility for the outcomes achieved – positive or otherwise. While tino rangatiratanga is often seen as a right, and kāwanatanga is described as a prerogative, review and evaluation remind us that both are more aptly described as responsibilities.

#### 6.8.4 Working principles – conclusions

To summarise, we have recommended a principled approach for constructing working partnerships between Māori and the Crown in the support, oversight, ownership, and custody of mātauranga Māori. We identified ten high-level principles to guide the partners in working through prioritisation, objective-setting, programme delivery, and evaluation.

We stated that, while the prioritisation of the Māori interest is a matter for each agency, agencies must be able to explain why and how they reached their decision. We also recommended that agencies within each sector work in a coordinated fashion vis à vis mātauranga Māori, and be guided by an overarching strategy that is agreed with Māori. We also explored some ways of identifying appropriate representatives of the Māori partners. This might be done by Māori appointments colleges or by the Crown itself, guided by the principles we set out.

We then recommended that individual agency strategic and business objectives in respect of the Māori interest be set early, using partnership models in which the parties must strive to reach agreement. That requires each party to be fully engaged and open to compromise. It also requires the Crown to assist Māori to participate in the discussion.

We recommended that the level of resources allocated by the agency to support, oversee, own, or hold mātauranga Māori be driven by the agreed objectives, and be sufficient to achieve them in a reasonable timeframe, although we acknowledged that objective- and budget-setting are complex and uncertain processes. We recommended that programme delivery should follow a partnership model, as should the review and evaluation phase, not least because this underscores that tino rangatiratanga for Māori and kāwanatanga for the Crown are responsibilities as much as anything else.

#### 6.8.5 The performance of the mātauranga agencies

We now turn to our concluding comments about the performance of the mātauranga agencies. First and foremost, we note that every one of the agencies we reviewed is doing *something* for mātauranga Māori. Some may not be doing enough, some may not be doing it very well; but at least they are doing something. This, in itself, is a considerable advance from the situation 20 years ago.

The second striking point is that while the legislative and policy measures governing the activities of the nine key agencies have much in common, there are also significant inconsistencies. Some pieces of legislation mention the Treaty, but others do not. Likewise, some Acts provide explicitly for Māori representation at board level, while others make no such provision. There are some legislative acknowledgements of mātauranga Māori, but most recognition is found in internal policy documents. There are usually Māori advisory groups, or key Māori positions within each organisation, but titles differ and so does the status accorded to these roles.

Overall, some agencies are clearly making considerable efforts to assist Māori in the cause of safeguarding or reviving their mātauranga. In this, we do not believe that the wording of the relevant statutes is as important as what is being done in practice.<sup>331</sup> There is no legislative requirement for Treaty compliance in the establishment Acts for Te Papa, the National Library, and the Ministry of Education and NZQA, for instance, yet all of these agencies have adopted strategies or policies that affirm the importance of the Treaty and the agency's commitment to its principles. Mana Taonga, the Māori Strategic and Implementation Plan, and Te Kaupapa Mahi Tahi were all praised by the claimants, and the completed national curriculum may well also have been, had it been in place at the time of our hearings.

Amongst some of these agencies, we saw willingness to honour the Treaty not just in words but through the actual sharing with Māori of decision-making power. Te Papa is committed to working closely with kaitiaki over the taonga it holds in its collections, for example. Likewise, both Ms Peretini for NZQA and Ms Sewell for the Ministry of Education spoke of their willingness to have Māori bodies with sufficient capacity make decisions in matters of direct concern to them.

In other cases, recognition of the Māori interest in the Crown's regulation, funding, or control of mātauranga has been less forthcoming. In some instances, notably with regard to Te Waka Toi and MKDOE, the evidence shows that Māori-specific funding has actually gone down proportionately, despite the priority interest mātauranga Māori is accorded under the Treaty. The inclination to make any mention of the Treaty in policy statements was also in retreat around 2004 and 2005, although this aversion seems to have been overcome, if the new national curriculum is anything to go by.

There are also cases where Crown agencies must act with greater coordination. Support for marae by Te Puni Kōkiri, Creative New Zealand and the Lottery Grants Board is one current example of potential inconsistency, and the extent of broadcasting agency cooperation over the screening of content with te reo and mātauranga Māori is clearly another. In any event, the considerable spending on the MPF needs to be carried out in a way that coordinates with the rest of the culture and heritage sector (since that is where most of the expenditure is focused). We recommend that Te Puni Kōkiri and the Ministry for Culture and Heritage take leadership roles in improving levels of coordination and collaboration between the culture and heritage agencies.

A number of agencies have set up their own Māori advisory groups or consultative committees to help steer the direction of policy on matters involving mātauranga Māori. We commend the advent of the whakaruruhau, Ngā Kaitūhono, Te Komiti Māori, and Te Pae Whakawairua, for example, as well as individuals exercising some influence, such as the Ministry for Culture and Heritage's Pou Ārahi Whakahaere. But while we heard that the advice of these committees was invariably taken, none of them as yet have any formalised decision-making powers. These were mooted for the whakaruruhau, but not for the others. Here, counsel for Ngāti Porou was correct to observe that the functions of these committees are 'largely procedural in nature and . . . focused around the provision of advice.'<sup>332</sup>

For all the positive initiatives in some of the agencies, therefore, this very lack of decision-making power is a breach of the Treaty and a cause of prejudice. It is more difficult to quantify the prejudice that kaitiaki continue

to suffer due to the cultural dislocation and disempowerment that manifestly persist following colonisation, but we have no doubt that there is Crown culpability for that loss of mātauranga as well.

In short, agencies need to establish real forms of partnership with Māori communities over the delivery and care of mātauranga. For example, Māori should share decision-making on taonga tūturu with the chief executive of the Ministry for Culture and Heritage, and NZQA should empower the whakaruruhau as decision-makers, rather than advisers, about unit standards delivering mātauranga Māori. Kaitiaki should share in decision-making over the allocation of the MPF – it is not enough that Te Puni Kōkiri has Māori officials involved in such decisions. Māori and Te Puni Kōkiri should also collectively decide on a suite of objectives for marae once the results of the Ministry's marae survey are known. The same goes for Māori and Creative New Zealand now that research into the health of Māori heritage arts is complete.

One model for achieving partnership and accommodating the diversity of interests lies in the draft Protection of Moveable Cultural Heritage Bill of the 1990s, which proposed the establishment of both Māori and non-Māori partner bodies to deal with taonga tūturu and non-Māori heritage items respectively. This model, which we consider properly recognises the distinct Māori Treaty interest, has been successfully applied in other contexts. One example (albeit one planned for scrapping) is the split within Creative New Zealand between Te Waka Toi and the Arts Board, with the parent Arts Council – which has specific provision for Māori representation given its overall purview – sitting above. Other examples of the provision of different levels of governance or representation to address both specific and general Māori interests include the arrangements at the National Library and Archives New Zealand. In both cases, non-statutory committees (Te Komiti Māori in the National Library and Te Pae Whakawairua at Archives New Zealand) operate beneath statutory bodies which include Māori members in a reflection of their overarching responsibility.<sup>333</sup> Similarly, under the Historic Places legislation, the provision for Māori membership of the Historic Places Trust is coupled with a separate Māori Heritage Council.

Aside from these more specific examples of partnership,

we repeat that the Crown should establish partnership entities in the culture and heritage<sup>334</sup> and education sectors, along with a Māori purchase agent in the field of RS&T as an appropriate partnership measure in that sector. It is not for us to say exactly what these partnership entities will deliver, beyond empowerment of the communities whose taonga are managed or affected in the everyday course of the relevant agency's business. That in itself is a highly significant outcome, but there may be others.

As a final word, we agree with counsel for the Te Tai Tokerau claimants, who acknowledged that there had been, since 1975, 'improvements in the Crown's recognition of, and provision for, the Treaty relationship'.<sup>335</sup> Indeed, we perceive a growing recognition, over the last two decades in particular, of:

- ▶ the need to rectify past practices, under which mātauranga Māori was often exploited or disregarded;
- ▶ the value of mātauranga Māori to ngā iwi Māori in terms of their cultural well-being and unique identities; and
- ▶ the value or potential value of mātauranga Māori to New Zealand generally in terms of our national identity, our economy, and our social cohesion.

There is, of course, always room for improvement, and we have made a number of suggestions to that effect. There is also variability across agencies in terms of their performance. Quite aside from our proposals, therefore, the Crown must constantly seek out ways of improving its responsiveness to Māori.

### 6.9 SUMMARY OF RECOMMENDATIONS

Protecting and transmitting mātauranga Māori is a responsibility shared between Māori and the Crown: neither party can succeed without the help of the other. While there are reasonable limits on the Crown's obligation, and the need to balance Māori and other legitimate interests on a case-by-case basis, there is nonetheless a clear necessity for the Crown and Māori to work in partnership.

We therefore recommend the establishment of viable partnership models between Māori and the Crown in the retention and transmission of mātauranga Māori. We

recommend that a series of principles apply to the construction of these working partnerships, which we set out as follows:

1. The survival and revival of mātauranga Māori must be accorded an appropriate priority vis à vis other Crown priorities.
2. The Crown must ensure its agencies act in a coordinated and consistent fashion when developing policies and programmes around mātauranga Māori.
3. The Crown must develop clear and relevant objectives both at sector and agency level after:
  - (a) careful analysis; and
  - (b) a process of shared decision-making with Māori partners.
4. Just who represents the Māori partner in each case will depend on the sector and the particular sector issue. Mātauranga Māori and the Māori community are both too complex to admit of a single model of representation applicable to all cases. However, in certain cases it will be appropriate to select representatives of the Māori partner through the use of an electoral college.
5. The Crown must provide sufficient time and resources for meaningful Māori involvement.
6. Māori must engage fully and not as adversaries in the objective-setting process.
7. The partners must make every effort to reach agreement through a spirit of compromise.
8. Once the objectives are agreed, the resources set aside in each agency must be sufficient to achieve them, and within a reasonable timeframe.
9. Where possible, programmes for the implementation of these objectives should involve shared action.
10. Objectives and programmes should be accompanied by shared processes of ongoing review and evaluation.

While each case will vary, all these principles are needed to ensure success.

In addition, we make the following sector-specific recommendations and suggestions:

**6.9.1 Culture and heritage agencies****(1) Sector-wide**

- ▶ We recommend that Te Puni Kōkiri and the Ministry for Culture and Heritage take leadership roles to improve the current levels of coordination and collaboration between these agencies over mātauranga Māori.
- ▶ We recommend the formation of a Crown–Māori partnership entity for the culture and heritage sector to guide agencies in the setting of policies and priorities concerning mātauranga Māori. It should comprise equal numbers of Māori and Crown appointees, and have adequate resources and time to ensure successful engagement. This body's exact role and powers, and how it is serviced, should be decided by the parties.
- ▶ We suggest the formation of an electoral college to identify representatives of the Māori partner to sit on this entity.

**(2) Taonga tūturu**

- ▶ We recommend that Te Papa explore the next step in the evolving indigenous–settler partnership approach to cultural heritage. The innovative model developed for the co-governance of the Waikato River may provide the basis for a similar approach to managing moveable cultural heritage.
- ▶ In respect of the Protected Objects Act, we recommend that:
  - Te Papa develop best-practice guidelines for private collectors of taonga who are willing to involve kaitiaki in the care of the objects they own;
  - prima facie Crown ownership of newly discovered protected objects remain in place as a matter of practicality, but be statutorily renamed 'interim Crown trusteeship';
  - a body of Māori experts share in decision-making with the chief executive of the Ministry for Culture and Heritage on applications for export of Māori objects; customary ownership of newly found taonga; and whether individual examples of 'scientific material' should qualify for protection as taonga tūturu;

- the Act be amended to exempt kaitiaki who reacquire taonga from having to register as collectors with the Ministry for Culture and Heritage; and
- the Crown establish a restitution fund to help kaitiaki to reacquire their taonga on the open market. Iwi may wish to contribute to such a fund as their resources permit.

**(3) Arts, culture, and broadcasting**

- ▶ We recommend that Māori and the Crown use Creative New Zealand's major research project on 'The Health of Māori Heritage Arts' as an information base for identifying future funding priorities and criteria.
- ▶ We recommend likewise that Te Puni Kōkiri's comprehensive marae survey be used to clarify national priorities for marae improvements, indicate what funding will be needed to support them, and what criteria should operate in assessing funding applications. Once the research exercise is complete, a partnership process should take place to identify those priorities and establish a set of objectives to last a generation.
- ▶ We recommend TVNZ does more to fulfil its aim of being New Zealand's 'Māori content leader'. It must feature Māori cultural programming on its mainstream channels and its shareholding ministers must accept that content leadership bears an associated cost.
- ▶ We also recommend that TVNZ cooperate with Māori Television over te reo and mātauranga Māori programming and scheduling, for competition in an area as important as te reo and mātauranga Māori is not yet a sensible model.

**(4) Archives and libraries**

- ▶ We recommend that there be some constraint on the commercial use of the mātauranga in documents and images held by the Crown. Specifically, we recommend that:
  - an objection-based approach operate, whereby the kaitiaki of mātauranga held by Archives New Zealand and the National Library can

seek to prevent the commercial use of their mātauranga unless they have given consent or been consulted, as appropriate; the commission we have recommended in chapter 1 would adjudicate; and

- TVNZ consult with Māori and produce thorough guidelines for its Māori department staff on handling requests for the use of mātauranga-laden footage from its film and television archive.

These reforms should not apply retrospectively, nor to mātauranga that is generically Māori and has no specific kaitiaki. While they do not apply to private archives and libraries, we also recommend that:

- ▶ Archives New Zealand and the National Library prepare generic guidelines about when it might be appropriate to consult kaitiaki or seek kaitiaki consent for any private archives and libraries willing to offer them to users.

#### (5) *Education agencies*

- ▶ Again, we recommend the establishment of a Crown–Māori partnership entity in the education sector. Māori representatives to sit on it could be chosen via an electoral college.
- ▶ We recommend that the Ministry of Education develop some specific indicators around mātauranga Māori in order to properly gauge its Māori-focused activities.

#### 6.9.2 **Research, science, and technology agencies**

- ▶ We recommend the creation of a Māori purchase agent (that is, a body that will disburse money to researchers) as the appropriate expression of partnership in the science sector. It would boost Māori research capacity and fund the preservation of mātauranga Māori and research that explores the interface between mātauranga and modern applications.
- ▶ We recommend that members of the new entity's board include a mix of those with expertise in mātauranga Māori and science. Given the nature of the sector, they could be selected in accordance with

the general guidelines set out in our conclusion to this chapter, rather than through an electoral college.

- ▶ We recommend that, once it has achieved its key objectives, the fund be re-integrated with the main-stream system.
- ▶ We recommend that science sector agencies give greater prominence to Vision Mātauranga, or make mātauranga Māori a strategic priority in its own right.

#### 6.9.3 **Te Puni Kōkiri**

- ▶ We recommend that the Māori Potential Fund (MPF) be protected and remain in place.
- ▶ We recommend that the MPF's investments be evaluated, by both Māori and the Crown.
- ▶ We recommend that the MPF be allocated in partnership with Māori, with mātauranga experts and others from the community deciding equally and transparently with Te Puni Kōkiri on general funding priorities and specific applications.
- ▶ As such, we recommend the establishment of a board to allocate the fund comprised equally of Te Puni Kōkiri staff and representatives of the Māori community.

#### Text notes

1. We exclude Te Māngai Pāho and the Māori Television Service from consideration here, given their specific focus on the Māori language. We therefore address their roles in chapter 5. We recognise at the same time, of course, that their contribution to mātauranga Māori is significant and should not be overlooked by our thematic division. Reo is mātauranga, after all, and Māori Television does not broadcast solely in te reo.
2. Document R31 (Tanara Ngata, brief of evidence on behalf of TVNZ, 8 January 2007), p 4
3. Aside from other New Zealand museums, there are also significant numbers in overseas institutions – the British Museum, for example, has 3,500 and the Field Museum in Chicago has 2,600: Arapata Hakiwai, oral evidence on behalf of the Museum of New Zealand Te Papa Tongarewa, 21st hearing, 26 January 2007 (transcript 4.1.21, p 429)
4. Museum of New Zealand Te Papa Tongarewa Act 1992, s 8(b)
5. Ibid, s 10(3)

6. Museum of New Zealand Te Papa Tongarewa, *Annual Report 2009/10* (Wellington: Museum of New Zealand Te Papa Tongarewa, 2010), p 45; Ministry for Culture and Heritage, *Annual Report 2010* (Wellington: Ministry for Culture and Heritage, 2010), p 52
7. Document R32(a) ('A Concept for the Museum of New Zealand Te Papa Tongarewa', 4 April 1989 and 2 December 1991)
8. Document R32(b) (Museum of New Zealand Te Papa Tongarewa, 'Mana Taonga', September 1992)
9. Document R32 (Arapata Hakiwai and Te Taru White, brief of evidence on behalf of the Museum of New Zealand Te Papa Tongarewa, 8 January 2007), p 7
10. Document R32(d) (Museum of New Zealand Te Papa Tongarewa, 'Our Principles, Corporate Principles and Goals', undated), p 1
11. Document R32, pp 8–9, 12–13
12. Paper 2.493 (Crown counsel, memorandum in response to memorandum-directions of the presiding officer, 20 January 2009), p 1. This figure reflects the number of distinct taonga found – for example, an adze broken in three is counted as one item rather than three. For a full explanation see paper 2.453 (Crown counsel, memorandum in respect of requests of January Crown witnesses for further information, 26 February 2007), p 6.
13. Document R28(a) ('Laws, Policies and Practices relating to the Protection of Moveable Cultural Property 1901–1976', undated)
14. Document R28 (Jane Kominik, brief of evidence on behalf of the Ministry for Culture and Heritage, 8 January 2007), pp 6–7
15. Document R28(a), p 5
16. Document R28(h) ('Māori Reference Group: Proposed Terms of Reference', undated), p 1
17. The 50-year rule was based on the idea that an item passed down for at least two generations was a 'taonga tuku iho', the term used in the Protection of Moveable Cultural Heritage Bill developed by the Department of Internal Affairs in the early 1990s (which was originally intended to succeed the Antiquities Act 1975): Jonathan Keate, 'A Proposal to Improve the Protection of New Zealand's Movable Cultural Heritage by Means of a Statutory Trust', *Victoria University of Wellington Law Review*, vol 23, no 3 (1993), p 114 (including note 61).
18. Document R28, pp 7–12
19. Document R28(b) (Ministry for Culture and Heritage, 'Protected Objects Act 1975: Guidelines for Taonga Tūturu', 1 November 2006), p 3
20. Document R28, p 13
21. Ibid, pp 10–11
22. Document S6 (Counsel for Ngāti Porou, closing submissions, 23 April 2007), pp 48–49
23. Document G4 (Dr Apirana Mahuika, brief of evidence on behalf of Ngāti Porou, 12 April 1999), pp 34, 64–65
24. Document P29 (Dr Apirana Mahuika, brief of evidence on behalf of Ngāti Porou, 16 August 2006), p 12
25. Document M15 (Dr Hirini Mead, brief of evidence on behalf of Ngāti Porou, 17 May 2002), pp 12–13, 15–21
26. Document P24 (Rei Kohere, brief of evidence on behalf of Ngāti Porou, 15 August 2006), pp 6–8
27. Ibid, pp 9–10
28. Document S1 (Counsel for Ngāti Kahungunu, closing submissions, 16 April 2007), p 9
29. Document J11 (Mere Whaanga, brief of evidence on behalf of Ngāti Kahungunu, undated), pp 2, 8, 15–16
30. Document P8 (Ngahiwi Tomoana, brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006), p 7
31. Document S4 (Counsel for Ngāti Koata, closing submissions, 18 April 2007), pp 76–77
32. Document S3 (Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, closing submissions, 5 September 2007), p 66
33. Ibid, p 175
34. Document S1, pp 43–45
35. Ibid, p 46
36. Rei Kohere likewise called into question the application of prima facie Crown ownership of items found on Māori land or indeed anywhere within the rohe of Ngāti Porou: doc P24, p 9. Implicit in his comment seems to be the narrower issue of whether finders law should continue to apply to items found by tangata whenua on their own papakāinga.
37. Document S3, pp 172–174
38. Document S4, p 77
39. Document S6, pp 30–31
40. Document T2 (Crown counsel, closing submissions, 21 May 2007), p 35, referring to the definition in paper 2.314 (Waitangi Tribunal, statement of issues, 6 July 2006), p 5
41. Ibid, p 35
42. Ibid, p 36
43. Document R28, pp 20–22; Jane Kominik, oral evidence on behalf of the Ministry for Culture and Heritage, 21st hearing, 23 January 2007 (transcript 4.1.21, pp 136, 149)

44. Arapata Hakiwai, oral evidence on behalf of the Museum of New Zealand Te Papa Tongarewa, 21st hearing, 26 January 2007 (transcript 4.1.21, p 428); Te Taru White, oral evidence on behalf of the Museum of New Zealand Te Papa Tongarewa, 21st hearing, 26 January 2007 (transcript 4.1.21, pp 428–429)
45. Te Taru White, oral evidence on behalf of the Museum of New Zealand Te Papa Tongarewa, 21st hearing, 26 January 2007 (transcript 4.1.21, pp 425, 426. We note that it is quite arguable that the Crown has no valid legal ownership of Te Hau ki Tūranga to transfer. Such was the conclusion of the Tribunal in the Gisborne inquiry: Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, pp 601–602.
46. Arapata Hakiwai, oral evidence on behalf of the Museum of New Zealand Te Papa Tongarewa, 21st hearing, 26 January 2007 (transcript 4.1.21, p 441)
47. Document T2, p 31
48. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 3, p 954, cited in doc T2, p 31
49. Document T2, pp 31–33
50. Jane Kominik, oral evidence on behalf of the Ministry for Culture and Heritage, 21st hearing, 23 January 2007 (transcript 4.1.21, pp 141, 160, 171–172)
51. *Ibid*, pp 154, 156–158
52. *Ibid*, pp 134–135)
53. Document R28, pp 18–19
54. Document M15, p 9
55. Document R28(b), p 4. As noted above, however, this was simply the Ministry's 'assumption': Jane Kominik, oral evidence on behalf of the Ministry for Culture and Heritage, 21st hearing, 23 January 2007 (transcript 4.1.21, p 157).
56. Document R28(b), p 4
57. Jane Kominik, oral evidence on behalf of the Ministry for Culture and Heritage, 21st hearing, 23 January 2007 (transcript 4.1.21, p 158)
58. Limitation Act 1950, s 5(1)
59. Ngati Porou and Turanganui o Ngati Porou Trustee Limited and the Crown, 'Deed of Settlement of Historical Claims', 22 December 2010, p 44. See also Ngati Porou and Turanganui o Ngati Porou Trustee Limited and the Crown, 'Deed of Settlement Schedule: Documents', pp 204–217.
60. Protected Objects Act 1975, s 7A(1)(c)
61. There were plans in the formulation of the Protection of Moveable Cultural Heritage Bill in the 1990s for the replacement of the existing presumption of Crown title to newly-found objects with provisions vesting ownership in the appropriate iwi: Robert K Paterson, 'Protecting *Taonga*: The Cultural Heritage of the New Zealand Maori', *International Journal of Cultural Property*, vol 8, no 1 (1999), p 119. It is not clear when the Government moved back in favour of prima facie Crown ownership. The Māori Reference Group's advice in 2000 was that objects should be returned to the hapū exercising mana whenua over the area where the object was discovered, whereafter they 'would eventually find their way back home': quoted in doc R28(m) (Ministry for Culture and Heritage, 'Newly Found Cultural Objects Issues', 20 December 2000), p 9.
62. Protected Objects Act 1975, s 11(1)
63. *Ibid*, ss 7A(1)(c) and 7A(3)
64. Brodie Stubbs, oral evidence on behalf of the Ministry for Culture and Heritage, 21st hearing, 23 January 2007 (transcript 4.1.21, p 140)
65. Jane Kominik, oral evidence on behalf of the Ministry for Culture and Heritage, 21st hearing, 23 January 2007 (transcript 4.1.21, p 160)
66. Document R28(o) (minutes of Māori Reference Group meeting attaching draft overview paper, 16 December 2002), p 1
67. Document R28(h), p 1; Jane Kominik, oral evidence on behalf of the Ministry for Culture and Heritage, 21st hearing, 23 January 2007 (transcript 4.1.21, pp 153–154)
68. Document R28(o), p 1
69. Chief Executive of Ministry for Culture and Heritage and Waikato-Tainui, 'Taonga Tuku Iho Accord', 20 February 2009, pp 11–12 (cl 8.3.1(d))
70. For example, a media report of the Accord's signing suggested that '[t]he accord gives Tainui automatic custodial rights to all artefacts found in and around the Waikato River': 'Tainui Become Guardians of Artefacts', *Waikato Times*, 21 February 2009, p 11.
71. 'Taonga Tuku Iho Accord', p 12 (cl 8.3.1(e))
72. *Ibid*, p 11 (cl 8.3.1)
73. Brodie Stubbs, oral evidence on behalf of the Ministry for Culture and Heritage, 21st hearing, 23 January 2007 (transcript 4.1.21, pp 131–132)
74. Arts Council of New Zealand, *Annual Report for the Year Ended 30 June 2010* (Wellington: Arts Council of New Zealand, 2010), p 104
75. Minister for Arts, Culture and Heritage, 'Creative NZ Governance Streamlined', media release, 16 February 2010
76. The source for the figure of \$1.34 million in recurrent Te Waka Toi funding in 2006/07 is the brief of evidence of Muriwai Ihakara on behalf of Creative New Zealand, 8 January 2007: doc R27, p 10. We note that this includes funding for Taki Rua Productions that was provided jointly by Te Waka Toi and the



- Arts Board: Arts Council of New Zealand, *Annual Report for the Year Ended 30 June 2007* (Wellington: Arts Council of New Zealand, 2007) p105. The corresponding sum allocated for 2010/11 was \$1.45 million: Creative New Zealand, ‘Recurrently Funded Organisations’, [http://www.creativenz.govt.nz/funding/recurrently\\_funded\\_organisations](http://www.creativenz.govt.nz/funding/recurrently_funded_organisations) (accessed 8 December 2010).
77. In terms of other contestable funding, the \$0.54 million allocated by the Screen Innovation Production Fund (a partnership between Creative New Zealand and the New Zealand Film Commission, and now replaced by the Independent Film Makers’ Fund) in 2008/09 was 9.2 per cent higher than in 1999/2000, while the \$0.47 million allocated by the Pacific Arts Committee in 2008/09 was a whole 78.8 per cent higher than 1999/2000: paper 2.507(a) (‘Creative New Zealand Project Funding for the Period 1 January 1999 to 30 June 2009’), and paper 2.507 (Crown counsel, memorandum providing further information, attachment, 24 July 2009); see also doc R27, pp 6–11, 14–15. The Pacific Arts Committee was allocated \$0.58 million in 2009/10: Arts Council of New Zealand, *Annual Report 2010*, p124.
  78. In his 2006 evidence Mr Ihakara said there were five contestable funding programmes, but in an updating memorandum in July 2009 the Crown included Toi Ake as a sixth programme in this category. Mr Ihakara had explained that Toi Ake was a \$310,000 per year fund for developing customary and contemporary Māori art on an iwi basis, although the actual amount expended on Toi Ake in recent years has in fact been significantly less. Annual reports and the Creative New Zealand website show that Toi Ake projects received \$263,000 in 2004/05, \$252,000 in 2005/06, \$262,000 in 2006/07, \$63,000 in 2007/08, \$137,000 in 2008/09, and \$152,000 in 2009/10: see also doc R27, pp12–13, 17; paper 2.507(a).
  79. Mr Ihakara nominated this figure as the total size of the Tohunga Tukunga funding (Muriwai Ihakara, under questioning by the presiding officer, 21st hearing, 23 January 2007 (transcript 4.1.21, p191)), although the Creative New Zealand annual report for 2006/07 records expenditure under this programme of only \$22,000 (p 81). This may be explained by Tohunga Tukunga being a new programme introduced during 2006/07. In the 2007/08 annual report, however, expenditure for Tohunga Tukunga for the year is recorded as only \$60,000 (p 58), while for 2008/09 it is recorded as a mere \$4,000 (p 83) and for 2009/10 only \$44,000 (p 123).
  80. Document R27, pp16–19
  81. Arts Council of New Zealand, *Annual Report 2007*, pp101–103. The same level of detail has not been available in subsequent annual reports.
  82. Arts Council of New Zealand, *Annual Report 2010*, p27
  83. New Zealand Historic Places Trust, ‘Conserving Marae Buildings and Taonga: Taonga Whakaoranga Marae’, undated, <http://www.historic.org.nz/en/ProtectingOurHeritage/MaoriHeritage/ConservingMaraeBuildings.aspx> (accessed 25 August 2008)
  84. New Zealand Lottery Grants Board, *Annual Report for the Year Ended 30 June 2010* (Wellington: Department of Internal Affairs, 2010), p14; New Zealand Lottery Grants Board, *Annual Report for the Year Ended 30 June 2009* (Wellington: Department of Internal Affairs, 2009), p27; New Zealand Lottery Grants Board, *Annual Report for the Year Ended 30 June 2008* (Wellington: Department of Internal Affairs, 2008), p25; New Zealand Lottery Grants Board, *Annual Report for the Year Ended 30 June 2007* (Wellington: Department of Internal Affairs, 2007), p23; New Zealand Lottery Grants Board, *Annual Report for the Year Ended 30 June 2006* (Wellington: Department of Internal Affairs, 2006), p16; New Zealand Lottery Grants Board, *Annual Report for the Year Ended 30 June 2005* (Wellington: Department of Internal Affairs, 2005), p14; New Zealand Lottery Grants Board, *Annual Report for the Year Ended 30 June 2004* (Wellington: Department of Internal Affairs, 2004), p21
  85. New Zealand Lottery Grants Board, ‘Lottery Grants by Committee, July 2004–June 2005’, undated, [http://www.dia.govt.nz/diawebsite.nsf/Files/ROGS-7-4-6-5-bycttee/\\$file/ROG\\_7-4-6-5\\_by\\_cttee.pdf](http://www.dia.govt.nz/diawebsite.nsf/Files/ROGS-7-4-6-5-bycttee/$file/ROG_7-4-6-5_by_cttee.pdf) (accessed 16 January 2009)
  86. Department of Internal Affairs, ‘Lottery Grants: Environment and Heritage’, undated, [http://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Lottery-Grants-Environment-and-Heritage?OpenDocument](http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Lottery-Grants-Environment-and-Heritage?OpenDocument) (accessed 7 October 2008)
  87. Ministry for Culture and Heritage, *Annual Report 2010* (Wellington: Ministry for Culture and Heritage, 2010), p52. The Ministry records this payment as being to the Aotearoa Traditional Māori Performing Arts Society, which we understand is also known as Te Matatini Society Incorporated.
  88. Ministry for Culture and Heritage, *Briefing to the Incoming Minister for Arts, Culture and Heritage* (Wellington: Ministry for Culture and Heritage, 2008), p48. This payment is not mentioned amongst the list of Māori Potential Fund recipients for 2008/09. Te Matatini did receive \$50,000 from the fund in 2006/07: doc R33(zzzz)(a).
  89. Te Puni Kōkiri, *Briefing to the Incoming Minister*, (Wellington: Te Puni Kōkiri, 2008), p19. A previous national marae survey in 1997 was apparently aimed at the physical needs of marae only, rather than cultural needs as well: Te Puni Kōkiri, ‘Marae Development Project 2009’, undated, <http://www.tpk.govt.nz/en/in-focus/marae> (accessed 24 July 2009).
  90. New Zealand On Air, ‘Te Rautaki Māori’, June 2008, p1; New Zealand On Air, *Annual Report for the Year Ended 30 June 2010* (Wellington: New Zealand On Air, 2010), pp16, 59
  91. Paper 2.520 (Crown counsel, memorandum, 15 January 2010), p2
  92. Ibid, p2
  93. Explanatory note to Television New Zealand Amendment Bill 89–1 (2009), <http://www.legislation.govt.nz/bill/government/2009/0089/4.0/DLM2411801.html> (accessed 5 March 2010)

94. Television New Zealand Amendment Bill 2009, cl 6
95. Paper 2.517 (Memorandum-directions of the presiding officer, 14 December 2009). As can be seen, there are parallels between the forthcoming amendments to both TVNZ and Creative New Zealand's legislation. We decided not to request further information and submissions in the latter case, however, because of the need to finalise our report.
96. Document R31(b) (TVNZ, 'Māori Content Strategy: Māori Content and Programming that Inspires New Zealanders on Every Screen' [2007]), pp 3, 18, 24
97. Document R31(c) (TVNZ, 'Update to Crown Law on Television New Zealand's Māori Content Strategy & Implementation', undated), pp 3, 9–10
98. Paper 2.520, pp 1–2
99. Document R31, p 7
100. Radio New Zealand, *Annual Report 2009–2010* (Wellington: Radio New Zealand, 2010), pp 31, 50
101. Radio New Zealand, *Annual Report 2008–2009* (Wellington: Radio New Zealand, 2009), p 11. An update of the specific number of hours of Māori language and culture programming was not available in the 2009/10 annual report.
102. Document S4, p 77
103. Document P40 (Keri Kaa, brief of evidence on behalf of Ngāti Porou, 20 August 2006), pp 10–14, 25
104. Document P28 (Connie Pewhairangi, brief of evidence on behalf of Ngāti Porou, 16 August 2006), p 5
105. *Ibid*, pp 4, 6
106. Document S4, p 78
107. Paper 2.526 (Counsel for Ngāti Koata, submission, 26 February 2010), p 3
108. Document T2, pp 38, 39
109. Document R27, p 3. There is of course a wide variety of other sources of funding, such as licensing and gaming trusts, private and corporate sponsors, and local authorities.
110. *Ibid*, pp 11, 21–22
111. Muriwai Ihakara, oral evidence on behalf of Creative New Zealand, 21st hearing, 23 January 2007 (transcript 4.1.21, p 191). When asked about this he replied, as translated, 'the law that covers Creative New Zealand . . . is wide [in] scope and it is a flexible law . . . I can see it will change in time for Māori people.'
112. Document R31, pp 4, 5, 7
113. Tanara Ngata, oral evidence on behalf of TVNZ, 21st hearing, 23 January 2007 (transcript 4.1.21, p 195)
114. Paper 2.520, pp 1–3
115. Prior to 1998/99 we understand that the kapa haka festival organisers applied for and received Creative New Zealand funding. The same year the Royal New Zealand Ballet also moved to direct government funding from having to apply to Creative New Zealand: Ministry of Cultural Affairs, *Annual Report for the Year Ended 30 June 1999* (Wellington: Ministry of Cultural Affairs, 1999), p 33; Ministry for Culture and Heritage, *Annual Report 2007* (Wellington: Ministry for Culture and Heritage, 2007), p 52; Ministry for Culture and Heritage, *Annual Report 2010*, p 52.
116. Document R27, pp 11, 20; Muriwai Ihakara, oral evidence on behalf of Creative New Zealand, 21st hearing, 23 January 2007 (transcript 4.1.21, p 191). We note that, at the 2006 census, the Māori ethnic group in fact comprised 14.6 per cent of the population usually resident in New Zealand, while those of Māori descent comprised 17.7 per cent.
117. Paper 2.507(a)
118. *Ibid*, pp 1–4
119. Arts Council of New Zealand, *Health of Māori Heritage Arts 2009: Research Summary Report* (Wellington: Arts Council of New Zealand, 2010), p 3. In full, the 10 artforms are: 'Toi Whakairo (carving); Kōwhaiwhai (rafter decoration), Tukutuku (wall decoration); Whare Pora (weaving, textiles, basketry); Whaikōrero, Karanga, and Whakapapa recitation (oral arts); Waiata, Mōteatea, and Pao (traditional song and chant composition), Taonga Pūoro (traditional instruments); Tā Moko (body modifications and tattoo); Tārai Waka (canoe design and construction, voyaging, navigation); Haka (composition, teaching, and performance); Whare Maire (Tūmatauenga – martial arts); Traditional Māori Games (Whakaropiropi, Mu Torere, Mahi Whai, etc)' (p 6).
120. The Minister for Arts, Culture and Heritage estimates that there will be savings of around \$200,000 per annum: 'Creative NZ Governance Streamlined', media release, 16 February 2010
121. Document T2, p 38
122. According to Te Puni Kōkiri, 998 marae have been identified and 750 invited to participate in the survey. The project will continue to run through the 2010/11 year: Te Puni Kōkiri, *Annual Report for the Year Ended 30 June 2010* (Wellington: Te Puni Kōkiri, 2010), p 15.
123. In its October 2009 update on the implementation of its Māori content strategy, the broadcaster states that the launch of Māori Television in 2004 'did not mean that TVNZ could abrogate its responsibilities': doc R31(c), p 1.
124. TVNZ, *TVNZ Annual Report FY2007* (Wellington: TVNZ, 2007), p 24. TVNZ has also written, in its 2007 Māori content strategy, that when, in 2000, it was a requirement to deliver *Marae* 100 per cent in te reo Māori, 'viewers left in droves': doc R31(b), p 11.
125. Document R31(b), p 8

126. There are some mixed messages from TVNZ about this. In its 2007 Māori content strategy and associated update, for example, it emphasises its sharing of content with Māori Television, yet it adds that it will at times ‘be rivals with other parties’ with respect to such material. It also stresses the ‘highly competitive’ nature of Māori broadcasting and its own ratings dominance over Māori Television: doc R31(b), pp 3, 18, and doc R31(c), pp 3, 8–9.
127. We do not consider here the New Zealand Film Archive, as it is not a Crown repository but is run by a charitable trust.
128. The changes were signalled in early 2010: Minister of State Services, ‘State Sector Changes to Improve Performance’, media release, 25 March 2010; see also Cabinet, ‘Next Steps in Improving State Services Performance’, Cabinet Minute, CAB(10) 10/21
129. With respect to the structural detail we note that the chief executive of the National Library – while not opposed to the idea of the National Library and Archives New Zealand amalgamating – opposed an amalgamation centred on the Department of Internal Affairs: Minister of State Services, ‘Next Steps in Improving State Services Performance’, Cabinet Paper, CAB(10) 118, p 10
130. Department of Internal Affairs, *Organisational Structure for the Department of Internal Affairs: Decision Document* (Wellington: Department of Internal Affairs, November 2010), pp 47, 49
131. Archives New Zealand, *Annual Report for the Year Ended 30 June 2010* (Wellington: Archives New Zealand, 2010), p 2
132. *Ibid*, pp 64–65
133. Document R26 (Dianne Macaskill, brief of evidence on behalf of Archives New Zealand, 8 January 2007), pp 10–11, 14; Dianne Macaskill, oral evidence on behalf of Archives New Zealand, 21st hearing, 25 January 2007 (transcript 4.1.21, p 283)
134. Document R26, pp 4, 8–9
135. Archives New Zealand, *Statement of Intent 2010–2013* (Wellington: Archives New Zealand, 2010), p 12
136. Document R26, pp 11–13; Archives New Zealand, *Annual Report 2007* (Wellington: Archives New Zealand, 2007), p 24
137. Document R26(b) (Archives New Zealand, ‘Making Access Decisions under the Public Records Act’, December 2005), pp 1, 3–4
138. Dianne Macaskill, oral evidence on behalf of Archives New Zealand, 21st hearing, 25 January 2007 (transcript 4.1.21, p 271)
139. Document R26(a) (Archives New Zealand, ‘Storage Standard: Standard for the Storage of Public Records and Archives’, 23 February 2000), p 2; Archives New Zealand, *Storage Standard: Standard for the Storage of Records and Archives* (Wellington: Archives New Zealand, 2007), p 1
140. National Library of New Zealand, *Annual Report 2007/08* (Wellington: National Library, 2008), p 4
141. National Library of New Zealand, *Annual Report 2009/10* (Wellington: National Library, 2010), p 14
142. Document R3 (Margaret Calder, brief of evidence on behalf of the National Library of New Zealand, Wellington, 21 November 2006), p 4
143. *Ibid*, pp 5, 6
144. *Ibid*, p 6; National Library of New Zealand, ‘Komiti Māori’, undated, <http://www.natlib.govt.nz/about-us/friends-advisors/komiti-maori/?searchterm=komiti> (accessed 20 December 2010)
145. Document R3, pp 6–9; National Library of New Zealand, ‘Leadership Group’, undated, <http://www.natlib.govt.nz/about-us/people/key-people> (accessed 21 December 2010)
146. Document R3(a) (National Library of New Zealand, ‘Te Kaupapa Mahi Tahi: A Plan for Partnership 2005–2010’, undated), p 6
147. *Ibid*, p 12
148. Document R3, p 7
149. *Ibid*, pp 7, 14
150. *Ibid*, pp 7–8, 10–13
151. Document R31, pp 8–9
152. *Ibid*, p 9
153. *Ibid*, p 10
154. Tanara Ngata, oral evidence on behalf of TVNZ, 21st hearing, 23 January 2007 (transcript 4.1.21, p 199)
155. Sound Archives, ‘About Us’, [http://www.soundarchives.co.nz/about\\_us](http://www.soundarchives.co.nz/about_us) (accessed 24 March 2010)
156. Radio New Zealand, *Our Many Voices: Statement of Intent 2009–2012* (Wellington: Radio New Zealand, 2009), p 6
157. Sound Archives, ‘Access Policy’, [http://www.soundarchives.co.nz/policies/access\\_policy](http://www.soundarchives.co.nz/policies/access_policy) (accessed 24 March 2010)
158. *Ibid*
159. Document S3, pp 175–176
160. *Ibid*, p 176
161. Document P5 (Catherine Davis, brief of evidence on behalf of Te Rarawa, 11 August 2006), p 22
162. Document S4, pp 73–74
163. *Ibid*, pp 74–76
164. Document S6, p 46. ‘Kaitieki’ is the Ngāti Porou dialect form of ‘kaitiaki’.
165. Document G4, pp 50–51
166. Document P29, pp 13–14

167. Document E1 (Te Kapunga (Koro) Dewes, brief of evidence on behalf of Ngāti Porou, 31 July 1998), pp 13–14
168. Te Kapunga Dewes, oral evidence on behalf of the claimants, 5th hearing, 11 August 1998 (transcript 4.1.5, pp 171–172)
169. Document s6, pp 47–48
170. Document T2, pp 34–35
171. Ibid, pp 39–40
172. Document R3, p 7
173. Margaret Calder, oral evidence on behalf of the National Library of New Zealand, 21st hearing, 30 January 2007 (transcript 4.1.21(a), pp 41–43, 57)
174. Terehia Biddle, oral evidence on behalf of Archives New Zealand, 21st hearing, 25 January 2007 (transcript 4.1.21, pp 291–292, 295)
175. Dianne Macaskill, oral evidence on behalf of Archives New Zealand, 21st hearing, 25 January 2007 (transcript 4.1.21, p 268)
176. Document R26, p 9
177. Paper 2.509 (Memorandum-directions of the presiding officer requesting further information, 3 September 2009), p 3
178. Document R26(c) (Aatea Solutions, ‘Co-Management of Mātauranga Māori: Literature Review of the New Zealand Public Sector Discourse for Archives New Zealand’, report commissioned by Archives New Zealand, 2009); doc R26(d) (Aatea Solutions, *Framework for Consulting with Māori: Toolkit Development: Report for Archives New Zealand* (Wellington: Archives New Zealand, 2009))
179. Paper 2.513 (Crown counsel, memorandum providing further information, 1 October 2009), pp 11–14
180. Document R31, p 10
181. Alexander Turnbull Library, ‘Letters written to Donald McLean (in Māori)’, undated, <http://mp.natlib.govt.nz/static/introduction-mclean-series-2?!=en> (accessed 2 July 2009)
182. TVNZ, ‘About Waka Huia’, TVNZ, undated, <http://tvnz.co.nz/waka-huia/695194> (accessed 2 July 2009)
183. Ngāti Porou and the Crown, ‘Deed of Settlement’, p 44. See also Ngāti Porou and the Crown, ‘Deed of Settlement Schedule: Documents’, pp 204–217.
184. Others included the Early Childhood Development Unit, the Special Education Service, the Career Development and Transition Education Service, and the Education and Training Support Agency: Jonathan Boston, ‘Reorganizing the Machinery of Government: Objectives and Outcomes’, *Reshaping the State: New Zealand’s Bureaucratic Revolution*, ed Jonathan Boston, John Martin, June Pallot and Pat Walsh (Auckland: Oxford University Press, 1991), p 243.
185. There are now six government education agencies: the Ministry, ERO, NZQA, TEC, the New Zealand Teachers Council, and Career Services.
186. Tertiary Education Commission, ‘About Us’, 3 December 2009, <http://www.tec.govt.nz/About-us> (accessed 8 January 2010)
187. Ministry of Education, ‘What We Do’, 11 August 2008, <http://www.minedu.govt.nz/theMinistry/AboutUs/WhoWeAre/AboutTheMinistry.aspx> (accessed 7 July 2009)
188. Document E3 (Wayne Ngata, brief of evidence on behalf of Ngāti Porou, 31 July 1998), p 13
189. These standards are effectively ‘what a “learner needs to know or what they must be able to achieve” in order to meet the standard’: doc R30 (Arawhetu Peretini, brief of evidence on behalf of NZQA, 8 January 2007), p 7.
190. Document R30, pp 5–6
191. NZQA, ‘About Māori qualifications’, <http://www.nzqa.govt.nz/formaori/about.html#field> (accessed 7 July 2009)
192. ‘A New Wave’, *QA News*, issue 35, October 2000, <http://www.nzqa.govt.nz/publications/newsletters/qanews/october-2000/file-3.html> (accessed 7 July 2009)
193. The fields are defined as ‘broad area[s] of learning’: doc R30, p 9.
194. NZQA, ‘Field – Māori’, <http://www.nzqa.govt.nz/framework/explore/field.do?frameworkId=75867> (accessed 8 January 2010)
195. Document R30, pp 9–11
196. Ibid, pp 11–12
197. Document R30(a) (‘Whakaruruhau “Terms of Reference” based upon “Kaitiakitanga”’, draft, undated), pp 4–5
198. Document R30, pp 13–15
199. Document R30(c) (NZQA, ‘Te Rautaki Māori ā Te Mana Tohu Mātauranga: Māori Strategic and Implementation Plan for the New Zealand Qualifications Authority 2007–2012’, September 2006)
200. NZQA, *Statement of Intent 2008–11* (Wellington: NZQA, 2008), p 17. See also NZQA, *The Māori Strategic and Implementation Plan for the New Zealand Qualifications Authority 2007–2012* (Wellington: NZQA, 2007), pp 21–22
201. In April and May 2010 NZQA undertook consultation on quality assuring mātauranga Māori qualifications and courses. The ‘Māori Qual’ mark was part of the NZQA proposal: NZQA, ‘Quality Assuring Mātauranga Māori Courses and Qualifications’, consultation paper, March 2010, p 15.
202. The Kaitiaki Group was established in June 2008 and later renamed Ngā Kaitūhono.

203. Document R30, pp 16–20. See also NZQA, *Māori Strategic and Implementation Plan*, pp 23–37.
204. Education Act 1989, s 60A(1)(c)(ii)(C)
205. *Ibid*, s 61(3)(a)(i)-(ii)
206. Ministry of Education, *New Zealand Curriculum* (Wellington: Ministry of Education, 2007), p 9
207. *Ibid*, pp 14, 21, 30
208. *Ibid*, p 6
209. Document R29 (Karen Sewell, brief of evidence on behalf of the Ministry of Education, 8 January 2007), p 8
210. Ministry of Education, *Te Marautanga o Aotearoa*, English translation, undated, <http://tmoa.tki.org.nz/Nga-Marautanga-o-Aotearoa/Te-Marautanga-o-Aotearoa> (accessed 26 April 2011), pp 6, 7, 10, 11, 31, 54
211. The Tribunal has twice reported on wānanga issues: in 1999, following a claim about the insufficiency of the Crown's capital funding; and again in 2005, when claimants raised issues of control over Te Wānanga o Aotearoa, what it could teach, and to whom: Waitangi Tribunal, *The Wananga Capital Establishment Report* (Wellington: Legislation Direct, 1999); *The Report on the Aotearoa Institute Claim Concerning Te Wananga o Aotearoa* (Wellington: Legislation Direct, 2005).
212. Ministry of Education, 'Domestic and International Student Enrolments, EFTS and Completions for Providers 2004–2009', undated, [http://www.educationcounts.govt.nz/statistics/tertiary\\_education/provider\\_summary](http://www.educationcounts.govt.nz/statistics/tertiary_education/provider_summary) (accessed 12 November 2010)
213. Ministry of Education, *Profiles & Trends 2009: New Zealand's Tertiary Education Sector* (Wellington: Ministry of Education, 2010), p 74
214. Ministry of Education, *Ka Hikitia – Managing for Success: Māori Education Strategy 2008–2012* (Wellington: Ministry of Education, 2008), pp 4, 5, 9, 11, 19, 27
215. Document R30(b) (NZQA, 'Te Rautaki Māori ā te Mana Tohu Mātauranga – The Māori Strategic Plan for the New Zealand Qualifications Authority, 2007–2012', September 2006), p 16
216. Document S3, p 180
217. Document S4, pp 78–79
218. *Ibid*
219. Document D6 (Haana Murray, brief of evidence on behalf of Ngāti Kuri, undated), pp 16–17
220. Document D7 (Merereina Uruamo, brief of evidence on behalf of Ngāti Kuri, undated), pp 8–9
221. Document D3 (Niki Lawrence, brief of evidence on behalf of Ngāti Kuri and Te Rarawa, undated), pp 7, 9
222. Document B10(a) (Te Warihi Hataraka, brief of evidence on behalf of Ngāti Wai, undated), p 7
223. Document I4 (Sandy Adsett, brief of evidence on behalf of Ngāti Kahungunu, 2000), pp 6–7
224. Document I19 (Jacob Scott, brief of evidence on behalf of Ngāti Kahungunu, 2000), pp 7–9
225. Document P21 (Jacob Scott, brief of evidence on behalf of Ngāti Kahungunu, 15 August 2006), pp 5, 6
226. Robert McGowan, oral submission on behalf of the claimants, 17th hearing, 4 September 2006 (transcript 4.1.17, pp 83–84)
227. Document P14 (Robert McGowan, brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006), pp 9–10
228. Robert McGowan, oral submission on behalf of the claimants, 17th hearing, 4 September 2006 (transcript 4.1.17, p 84)
229. Document S1, p 47
230. *Ibid*, pp 47–48
231. Document S3, pp 165–166
232. *Ibid*, p 65
233. Document S4, p 86
234. Document J12 (Nigel How, brief of evidence on behalf of Ngāti Kahungunu, 2001), pp 4–5
235. Document I10 (Aggie Nuku, brief of evidence on behalf of Ngāti Kahungunu, 2000), p 6
236. Document I6 (Wally Kupa, brief of evidence on behalf of Ngāti Kahungunu, 2000), p 3
237. Document P21, pp 2–3, 7–8
238. Document P20 (Haana Murray, brief of evidence on behalf of Ngāti Kuri, 14 August 2006), p 5
239. Document E4 (Ada Haig, brief of evidence on behalf of Ngāti Porou, 31 July 1998), p 8
240. Document P28, pp 4–6
241. Document G4, p 52
242. Document E3, p 13
243. Document G8 (Hone Taumaunu, brief of evidence on behalf of Ngāti Porou, March 1999), pp 5, 7
244. Document P28, pp 5–6
245. Document T2, p 38
246. Tania Ka'ai, 'Te Tātari i te Kaupapa', PhD thesis, University of Waikato, 1995 (quoted in doc R30, p 7)
247. *Ibid*, pp 9, 16, 20–21

248. Arawhetu Peretini, oral evidence on behalf of NZQA, 21st hearing, 31 January 2007 (transcript 4.1.21(a), pp 142, 144, 147–148)
249. Document R29, pp 4, 8
250. Ibid, pp 11–12, 13, 15
251. Karen Sewell, oral evidence on behalf of the Ministry of Education, 21st hearing, 26 January 2007 (transcript 4.1.21, pp 397, 405)
252. Karen Sewell, oral evidence on behalf of the Ministry of Education, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 15)
253. Waitangi Tribunal, *Wananga Capital Establishment Report*, p 50
254. Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (Wellington: Huia, 2003), pp 3–4. Of course the heightened awareness also stemmed from the emergence of an urban-raised and well-educated generation of young Māori in the 1970s, who acted as forceful advocates. Changing demographics have also allowed Māori greater assertiveness.
255. Ibid, p 4
256. Waitangi Tribunal, *Wananga Capital Establishment Report*, p 50
257. Albeit often in level 1 to 3 courses and with less success amongst young Māori men: Paul Callister, ‘Which Tertiary Institutions are Educating Young, Low-skill Māori Men? A Research Note’, Victoria University of Wellington Institute of Policy Studies Working Paper 09/07, July 2009.
258. The qualification on this is of course the decline in kōhanga reo enrolments since 1993, which we discuss in chapter 5. Overall, however, the advent of the kōhanga reo movement has certainly had a significant impact on Māori participation rates in early childhood education.
259. Mason Durie, *Mauri Ora: The Dynamics of Māori Health* (Melbourne: Oxford University Press, 2001), p 56
260. Arawhetu Peretini, oral evidence on behalf of NZQA, 21st hearing, 31 January 2007 (transcript 4.1.21(a), p 165)
261. Stephen Cornell, *Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States*, JOPNA no 2006–02, Native Nations Institute for Leadership, Management and Policy, 2006, pp 16, 17
262. Document S3, p 170
263. Arawhetu Peretini, oral evidence on behalf of NZQA, 21st hearing, 31 January 2007 (transcript 4.1.21(a), p 166)
264. Ms Sewell advised that, in late 2006, after *Ka Hikitia* was developed, ‘[l]eading Māori academics’ were consulted on its ‘theoretical basis’ and there was also ‘focused engagement’ with over 30 iwi and Māori organisations across five hui: paper 2.453, pp 17, 25–27 (Karen Sewell, letter, 14 February 2007, p 4; ‘Ka Hikitia Iwi-Engagement Attendance Register’, 23 November 2006, pp 1–4 (Karen Sewell, letter, 14 February 2007, app D)). We are unaware of the engagement that occurred during the formal consultation on the draft during 2007.
265. Ministry of Education, *Statement of Intent 2010–2015* (Wellington: Ministry of Education, 2010), pp 24–25
266. We say this notwithstanding our suggestion in chapter 5 that the kōhanga reo in any tribe’s rohe be allowed (with a 75 per cent majority) to secede from the Kōhanga Reo National Trust and come under the administration of the local iwi authority.
267. Cabinet Paper CAB(10) 118, p 5
268. Document R6 (Dr Helen Anderson, brief of evidence on behalf of MORST, 21 November 2006), pp 2–4
269. Royal Society of New Zealand Act 1997, s 6
270. Document R6, pp 5–6
271. Document R6(a) (MORST, *Vision Mātauranga: Unlocking the Innovation Potential of Māori Knowledge, Resources and People* (Wellington: MORST, 2005)), p 4
272. Document R6(a), pp 13, 15, 17, 20
273. Ibid, p 12
274. Document R6, p 7
275. Dr Helen Anderson, oral evidence on behalf of MORST, 19th hearing, 13 December 2006 (transcript 4.1.19, pp 211–213)
276. Cabinet Paper CAB(10) 118, p 6
277. Document R6(b) (FRST, ‘Māori Economic Innovation Strategy 2005–2012’, draft, December 2005). The version of the strategy submitted in evidence is stamped ‘draft’. It still appears as a draft on the foundation’s website. We are unaware of why this 2005 document might remain in draft form, unless this is an error; Dr Anderson’s advice in early 2007 was that it was ‘expected to be finalised in 2007’: doc R6, p 9.
278. Document R6(b), p 3
279. FRST, ‘Your Guide to the Application Process: 2009/10 Investment Round’, December 2009, pp 28, 35–36
280. FRST, ‘Research, Science & Technology (RS&T) sector overview’, <http://www.frst.govt.nz/investframe/RSToview> (accessed 5 November 2010)
281. The advice of Crown counsel in October 2009 was that a new version of this strategy was tentatively scheduled for release in April 2010: paper 2.513, p 14.
282. Document R6(c) (Health Research Council, *Ngā Pou Rangahau Hauora Kia Whakapiki Ake Te Hauora Māori – The Health Research Strategy to Improve Māori Health and Well-being, 2004–2008* (Wellington: Health Research Council, 2004)), p 2

283. Document R6(c), p 19
284. *Ibid*, p 10
285. Health Research Council, ‘Assessment of Research Applications’, [http://www.hrc.govt.nz/root/HRC\\_Priorities/Assessment\\_of\\_Research\\_Applications.html](http://www.hrc.govt.nz/root/HRC_Priorities/Assessment_of_Research_Applications.html) (accessed 14 October 2008)
286. The Treasury, ‘Budget 2010: Vision Matauranga Capability Fund (M56)’, <http://www.treasury.govt.nz/budget/2010/ise/v2/119.htm> (accessed 8 November 2011)
287. Document R6, pp 10–11. When Dr Anderson gave her evidence the size of the Marsden Fund was \$33.9 million. From the available information it is not possible to discern what proportion of this funding did in fact give expression to the themes of Vision Mātauranga. The size of the fund is now \$46.8 million: MORST, *Annual Report, 2006/2007* (Wellington: MORST, 2007), p 55; MORST, *Annual Report, 2009/2010* (Wellington: MORST, 2010), p 62.
288. Document R6(a), p 13
289. MORST, *Annual Report, 2000/2001* (Wellington: MORST, 2001), p 56; MORST, *Annual Report, 2001/2002* (Wellington: MORST, 2002), p 78; MORST, *Annual Report, 2002/2003* (Wellington: MORST, 2003), pp 85–86; MORST, *Annual Report, 2003/2004* (Wellington: MORST, 2004), pp 57–58; MORST, *Annual Report, 2004/2005* (Wellington: MORST, 2005), pp 81–82; MORST, *Annual Report, 2005/2006* (Wellington: MORST, 2006), pp 72–73; MORST, *Annual Report, 2006/2007*, pp 54–55; MORST, *Annual Report, 2007/2008* (Wellington: MORST, 2008), pp 59–60; MORST, *Annual Report, 2008/2009* (Wellington: MORST, 2009), pp 59–60; MORST, *Annual Report, 2009/2010*, pp 61–62; MORST, *Statement of Intent 2007–2010* (Wellington: MORST, 2007), pp 35–36; MORST, ‘The 2007/08 Budget for Vote Research, Science and Technology’, MORST, <http://www.morst.govt.nz/publications/a-z/b/budget/2007/> (accessed 1 September 2008)
290. FRST, *Annual Report, 2005/06* (Wellington: FRST, 2006), p 36; FRST, *Annual Report, 2006/07* (Wellington: FRST, 2007), p 42; FRST, *Annual Report, 2007/08* (Wellington: FRST, 2008), p 38; FRST, *Annual Report, 2008/09* (Wellington: FRST, 2009), p 31; FRST, *Annual Report, 2009/10* (Wellington: FRST, 2010), pp 28, 49
291. Document R6, p 12
292. New Zealand Government, *Education and Science Sector: Information Supporting the Estimates of Appropriations for the Government of New Zealand for the Year Ending 30 June 2011*, B.5A, vol 2 (Wellington: New Zealand Government, 2010), pp 148, 154–156, 182–183
293. Document S4, pp 67–69
294. Document S3, p 163
295. *Ibid*, p 164
296. Document R6, p 18
297. Dr Helen Anderson, oral evidence on behalf of MORST, 19th hearing, 13 December 2006 (transcript 4.1.19, pp 208, 215)
298. *Ibid*, pp 211, 287–289, 303. For example, the presiding officer asked Dr Anderson if MORST ‘should have formally consulted with those who claimed to be the traditional right- or interest-holders in the knowledge’. Her reply was that if the Tribunal ‘could guide us as to who those people are that would be a very helpful outcome’. She added that MORST could have consulted different iwi ‘but reconciling those views is something that perhaps would be beyond us’.
299. Mike Dickison, ‘Maori Science: Can Traditional Maori Knowledge Be Considered Scientific?’, *NZ Science Monthly* (May 1994). Dickison suggested that science is ‘wider in scope and both more detailed and more accurate in almost every case’.
300. MORST, *The Interface Between Matauranga Maori and Mainstream Science* (Wellington: MORST, 1995), p 9 (doc A15(a) (David Williams, ‘Mātauranga Māori and Taonga Document Bank’, folder 1), p 259)
301. Document Q17(a) (Douglas Yen, ‘The Achievements of the Maori Agriculturalist’, in *Nga Mahi Maori o Te Wao Nui a Tane: Contributions to an International Workshop on Ethnobotany, Te Rehua Marae, Christchurch, New Zealand, 22–26 February 1988*, ed W Harris and P Kapoor (Christchurch: DSIR, Botany Division, 1990), p 37)
302. Document A15(i), pp 4112–4113 (DE Yen, ‘The Adaptation of Kumara by the New Zealand Maori’, *Journal of the Polynesian Society*, vol 70, no 1 (1961), pp 339–340)
303. Mere Roberts, Brad Haami, Richard Benton, Terre Satterfield, Melissa L Finucane, Mark Henare, and Manuka Henare, ‘Whakapapa as a Māori Mental Construct: Some Implications for the Debate over Genetic Modification of Organisms’, *The Contemporary Pacific*, vol 16, no 1 (Spring 2004), pp 12–20
304. Another triumph of mātauranga Māori was its highly successful transmission. Dickison suggested that Māori lacked the ‘communications network, and ways of reliably storing, disseminating and duplicating information’ that were necessary prerequisites for the development of science. But his comment failed to account for the widespread transmission across Aotearoa – in pre-literate Māori society – of the mātauranga involved in kūmara cultivation, for example. Because Māori culture was oral, one can see that the whole point of the mātauranga became its transmission; modern science, by contrast, still struggles to make itself broadly accessible.
305. This was at least the case several years ago: see, for example, Statistics New Zealand, *New Zealand in the OECD* (Wellington: Statistics New Zealand, 2005), pp 36–37.
306. John Kape, under cross-examination by counsel for Ngāti Kahungunu, 19th hearing, 14 December 2006 (transcript 4.1.19, p 269); Dr Helen Anderson, under cross-examination by counsel

- for Ngāti Kahungunu, 19th hearing, 14 December 2006 (transcript 4.1.19, p 273). Mr Kape, the foundation's Strategy Manager, Māori Innovation, answered some questions during the cross-examination of Dr Anderson.
307. Dr Helen Anderson, under cross-examination by counsel for Ngāti Kahungunu, 19th hearing, 14 December 2006 (transcript 4.1.19, p 273)
308. Document A15(a) (Mason Durie, 'Māori Science and Māori Development', address to the Faculty of Science, Massey University, 18 July 1996), pp 169, 178
309. Document A15(a) (Mere Roberts, 'Teaching Indigenous Knowledge and Western Science', paper prepared for Centre for Pacific Studies, University of Auckland, 1996), p 125
310. It is noted on page 2 of the document that its author is a descendant of an ancestor named Tauī, but no further details are provided: doc A15(a) (MORST, *The Interface between Matauranga Maori and Mainstream Science* (Wellington: MORST, 1995), p 252.
311. *Ibid*, p 265
312. *Ibid*, p 267
313. *Ibid*, p 252
314. 'Maori research "under-funded"', *Dominion*, 17 June 1996, p 10
315. MORST, *Annual Report, 2000/2001*, p 56; MORST, *Annual Report, 2003/2004*, pp 57–58; MORST, *Annual Report, 2004/2005*, pp 81–82; MORST, *Annual Report, 2008/2009*, pp 59–60; MORST, *Annual Report, 2009/2010*, pp 61–62
316. MORST, *Statement of Intent, 2008–2011* (Wellington: MORST, 2008), p 6
317. In another context, Ms Sewell explained the removal of reference to the Treaty in the draft national curriculum as probably stemming from 'a decision that the Treaty and its importance was a kind of "given" now', rather than from any deliberate excision: oral evidence on behalf of the Ministry of Education, 21st hearing, 26 January 2007 (transcript 4.1.21, pp 380–381).
318. Dr Helen Anderson, oral evidence on behalf of MORST, 19th hearing, 13 December 2006 (transcript 4.1.19, p 209)
319. As an aside we must acknowledge that, in the case of Te Tipu o Te Wānanga in 2006/07, the advisory group was certainly well qualified from a mātauranga Māori perspective to make those recommendations.
320. We note, however, that Mr Kape said that MKDOE was as heavily oversubscribed as any other research portfolio and in fact tended 'to be at the higher end of over-subscription': John Kape, under cross-examination by counsel for Ngāti Kahungunu, 19th hearing, 14 December 2006 (transcript 4.1.19, p 269).
321. Document A15(a) (Mason Durie, 'Matauranga Māori: Iwi and the Crown', draft discussion paper prepared for mātauranga Māori hui, James Henare Māori Research Centre, University of Auckland, 26 September 1996), p 187
322. Te Puni Kōkiri, 'Māori Potential Fund', <http://www.tpk.govt.nz/en/services/mpf/> (accessed 8 November 2010)
323. Paper 2.490 (Waitangi Tribunal, memorandum-directions concerning documentation of Te Puni Kōkiri distribution of Māori Potential Fund, 2 December 2008)
324. Paper 2.491 (Crown counsel, memorandum concerning Te Puni Kōkiri and MPF, 24 December 2008)
325. Documents R33(zzzz)(a)–(c) (Te Puni Kōkiri, list of recipients and funds allocated to them from the Māori Potential Fund in 2006/2007, undated; Te Puni Kōkiri, list of recipients and funds allocated to them from the Māori Potential Fund in 2007/2008, undated; Te Puni Kōkiri, list of recipients and funds allocated to them from the Māori Potential Fund thus far in the financial year 2008/2009, undated). Note that the 2008/09 financial year was not yet complete when documents were requested and received.
326. Document R33(zzzz)(a)
327. Documents R33(zzzz)(a)–(c); doc R33(aaaaa) (Massey University, Te Pūtahi-ā-Toi, 'He Kāinga Kōrerorero: Whānau Language Development; Process Evaluation Report', report commissioned by Te Pūni Kōkiri, November 2007); doc R33(bbbbb) (Massey University, Te Pūtahi-ā-Toi, 'He Kāinga Kōrerorero: Whānau Language Development; Final Outcomes Evaluation Report', report commissioned by Te Pūni Kōkiri, May 2008); doc R33(ccccc) (Te Puni Kōkiri, 'Arotakenga Moni Whakangao ki te Whakatairanga i te Whakahaeretanga me te Kawanatanga – Evaluation of Investments in the Strengthening Management and Governance Programme', draft report, July 2008)
328. Paper 2.513, p 10
329. Document T2, pp 27–30, 39
330. All Crown entities, as distinct from departments of state and ministries, have boards. Some departments, however, such as the National Library and Archives New Zealand, do have (or rather have had, given their integration into the Department of Internal Affairs) ministerially appointed advisory bodies.
331. We say this with a certain unease about the relatively weak Treaty clause in the Public Records Act, however. We feel that Archives New Zealand, of all agencies, should have something stronger in its governing legislation than a requirement to 'take appropriate account' of the Treaty when it houses the very document itself. On a practical level we imagine that Archives New Zealand staff take very considerable account of the Treaty indeed. There cannot be a more important taonga held by Archives New Zealand, and a stronger Treaty clause in its governing legislation seems



appropriate for the agency chosen to care for our founding document.

332. Document s6, p 46
333. These are the Guardians Kaitiaki of the Alexander Turnbull Library, the Library and Information Advisory Commission, and the Archives Council.
334. The ‘culture and heritage’ agencies are those whose activities were traversed in the first three sections of this chapter, as well as Te Puni Kōkiri. That is, they are the Ministry for Culture and Heritage, Te Papa Tongarewa, Creative New Zealand, TVNZ, New Zealand On Air, the Lottery Grants Board, Archives New Zealand, the National Library, and Te Puni Kōkiri.
335. Document s3, pp 61–62

### Whakataukī notes

**Page 488:** Culture, Media and Sport Committee, *Caring for our Collections: Sixth Report of Session 2006–07*, 2 vols (London: The Stationery Office Ltd, 2007), vol 1, p 3

**Page 489:** Source unknown

*Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.*

—Constitution of the World Health Organization

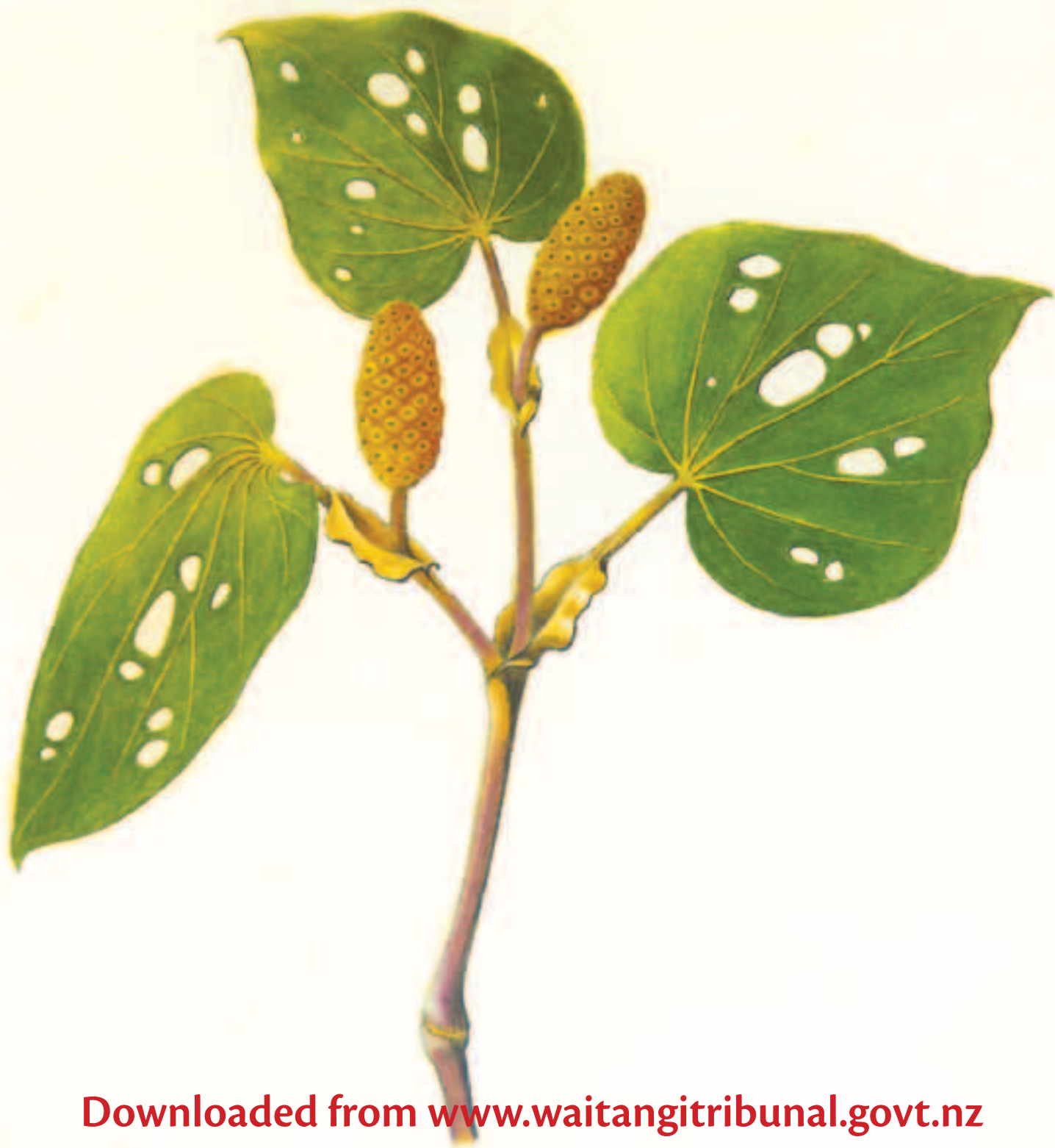


RONGOĀ MĀORI

*Mauri: Te mana atua kei roto i te tangata ki te tiaki i a ia, he tapu.*

The divine power that sustains wellbeing, sacred essence.





## RONGOĀ MĀORI

### 7.1 INTRODUCTION

This chapter concerns rongoā Māori (traditional Māori healing) – what it has to offer, and the adequacy of current Crown support for it. By ‘support’, we mean more than funding alone; we refer also to the State’s acceptance of rongoā, and its willingness to genuinely allow rongoā to make a difference to health in New Zealand. The claimants contended that the Crown’s support for rongoā was quite inadequate and delivered kaitiaki little control.

Our analysis is shaped by two important realities: first, the historical suppression of healing practices, and, second, the current crisis in Māori health. Together these form the context within which rongoā has been practised, has developed, and has sometimes declined.

We begin by briefly explaining rongoā’s significance to this claim, situating rongoā within the encounter between New Zealand’s two founding systems of knowledge and world views. We explain how rongoā represents a set of values and understandings quite distinct from, though not necessarily in conflict with, Western knowledge and values. Thus, rongoā remains outside the Pākehā world view that has become synonymous with ‘mainstream New Zealand’ – a position that has shaped official responses to rongoā from the nineteenth century to the present day.

In section 7.1.2, we explain the components of rongoā practice and its place within fundamental Māori conceptions of health and well-being. Then, turning to the past, we examine the Tohunga Suppression Act 1907 and how it came into being. We review a range of historiographical and legal arguments about what motivated its passing, whether it was justified, and its impact on traditional Māori healing practices. After summarising the parties’ positions, we offer our own conclusions about the Act’s significance – including the extent to which the Act, and the sentiments which gave rise to it, continue to reverberate in the present day.

The nature of recent government support for rongoā is the focus of section 7.3. We summarise the expansion (and occasional contraction) of government support since 1995, when the Government decided that healthcare providers should purchase traditional Māori healing services. Our discussion focuses especially on the development of standards, funding, strategy, the establishment of a national body, regulation, and commercialisation.

We return to our central theme in section 7.3.10: given the current Māori health crisis, what has rongoā got to offer and is the Crown making enough use of it? What funding, strategies, and policies are in place, and could they be better? Has the State allowed space for the Māori approach to operate, or has its embrace of rongoā been altogether more

◀ Kawakawa (*Macropiper excelsum*). Polynesian settlers in New Zealand named kawakawa after similar species found in the Pacific that were also used for traditional healing.

token and symbolic? We then state our conclusions and recommendations, in which we set out ways in which the health system can better support rongoā services.

This chapter does not deal with issues of environmental degradation and access, cultural harvest, ownership of biological and genetic resources of rongoā species, and transmission of mātauranga rongoā through the education system. While these are core rongoā topics, they are dealt with in chapters 2, 3, 4, and 6 respectively. In sections 7.3.7 and 7.3.8 we do, however, reiterate our earlier findings on the regulation and commercialisation of rongoā, which we reported on under urgency in 2006.<sup>1</sup> These findings still apply.

Nor does the chapter deal with the general accommodation of mātauranga Māori in the delivery of mainstream health services in New Zealand. That subject is too broad for our consideration. What we can say, though, is that the country's systems of health – both public and private – must be made more attractive to Māori, whose health is so comparatively poor. There are many Māori for whom the cultural dimension to healthcare is important. For them at least, culturally infused health services will encourage their use of the health system.

### 7.1.1 The significance of rongoā to Wai 262

At some point in their occupation of Aotearoa, Polynesian settlers – Kupē's people – became Māori (as we have discussed in chapters 1 and 2). Their culture and values came to be expressed not in Hawaikian terms but in ones developed in their new environment. Old habits gave way and new styles of art, variations on cultural rites, and even a different form of language evolved. While some successful acclimatisations occurred, the existence of new species, seasons, and rhythms of living demanded new approaches in horticulture, fishing, and birding. So it was with medicine – while some plant species encountered by the settlers were probably similar to those found elsewhere in the Pacific, such as kawakawa, Māori had to embark on an extended period of experimentation and discovery to learn all that Aotearoa's flora had to offer.

Throughout, however, the importance of the atua in the healing process remained. 'Tapu' is a concept found in all Polynesian cultures, and its significance was undiminished amongst Māori at the time of European contact and

beyond. For Māori, as for other Pacific peoples, health was and remains a holistic phenomenon concerning not just the body but also the spirit, or the taha wairua. Healers, or tohunga, addressed both the physical symptoms and the metaphysical causes of any diminution of health or well-being.

When Cook's people arrived in New Zealand, they brought with them their own medical philosophy. At the time of early contact, European understandings of the biological causes of disease were themselves limited, but they were expanding rapidly with the help of empirical science and secular pathology. These disciplines emphasised biomedical causes of illness, and placed little weight upon social or psychological origins. In the ensuing clash between Māori and European systems of knowledge and approaches to health, European medicine inevitably dominated. From then on, Māori largely maintained their mātauranga rongoā out of Pākehā sight.

Today, the Wai 262 claimants want to see mātauranga Māori emerge from the domination of the Pākehā knowledge system, and be supported to flourish once again in Māori hands. Health is a key area, and the protection and enhancement of rongoā are prominent amongst claimant concerns. The claimants do not seek to replace Western medicine, but rather to ensure the benefits of rongoā can be enjoyed as a complement to it. Ultimately, this chapter is a study of how successfully the Crown has combined New Zealand's two founding world views and systems of knowledge in the area of greatest importance, human health.

### 7.1.2 Rongoā in traditional Māori conceptions of health and well-being

At the time of the first extensive European contact, Māori society had developed a sophisticated system of public health. This system operated on an unwritten set of rules that was maintained by communal belief in their efficacy and power. The philosophical basis for these rules was, as Māori health expert Mason Durie has written, the 'division of people, places, or events as either tapu or noa'.<sup>2</sup> We rely on Professor Durie's explanations throughout this section.

'Tapu' is a concept usually defined in terms of spirituality, but it also has a more secular, social dimension. In this



*Tapu* by Horatio Robley, c. 1863. A tohunga being served food by a child. Māori society strictly adhered to the rules of tapu. The most high-ranking tohunga, for example, were considered to be in a permanent state of tapu and were therefore not allowed to handle food.

context, it essentially means ‘off limits’. Breaches of tapu invited mental suffering and physical consequences such as disease, even death. Tapu people or items included food sources, such as nesting kererū or fishing grounds in spawning season; those vulnerable to ill health or distraction such as women who had recently given birth, warriors preparing for battle, or grieving families of the

deceased; and unsafe waste such as rotting food or public latrines. It made eminent sense for these situations or matters to be tapu. Thus, tapu was not just a means of discouraging rule-breakers, but also a preventative measure that stopped people becoming sick or otherwise safeguarded the community’s interests.<sup>3</sup>

‘Noa’, by contrast, ‘denoted a state of relaxed access.’ The



Tohunga using divining rods. Tohunga were expert in a variety of practical and spiritual matters and commanded considerable authority in Māori communities.

balance between tapu and noa depended entirely on circumstances, such as the seasons, the state of communal health, and so on.<sup>4</sup> Obviously some things (such as waste) were always tapu while some mundane matters (such as prepared food) were always noa.

Traditional Māori healing thus operated within what Professor Durie calls this ‘wider philosophical and theoretical context’ of tapu and noa. Injuries sustained through accidents or combat were known as ‘mate tangata’, and were treated in a relatively straightforward fashion. But there were different diagnostic process for ‘mate atua’ – illnesses for which there was no apparent cause, such as rashes, respiratory problems, or mental illness. Here the focus was on identifying and remedying the likely breach of tapu which lay behind the symptoms.

As Professor Durie explains, skilful practitioners addressed both the root cause and the symptoms simultaneously.<sup>5</sup> These practitioners were the tohunga. Tohunga means ‘expert’ and there were many types of tohunga in traditional society, such as expert carvers, boat-builders, horticulturalists – and healers (described in this chapter as ‘tohunga rongoā’). They commanded considerable respect and authority, although this depended on communal well-being being maintained. Their methods varied, many being ‘quite pragmatic’ while ‘others derived

from more complex understandings of religion, psychology, and philosophy.’<sup>6</sup>

Professor Durie describes five categories of healing undertaken by tohunga, many of which were carried out in combination.<sup>7</sup> The first include karakia and ritenga, or incantations and rituals (we switch to the present tense here because we are describing practices that are still very much alive). Depending on the severity of the breach of tapu, powerful karakia might be required indeed.

Second are rongoā, by which Professor Durie means plant medicines. (In this report, we refer to these herbal remedies as ‘rākau rongoā’, whereas ‘rongoā’ describes all categories of traditional healing. This is also the usage favoured by the Wai 262 claimants and government officials. We are aware, however, that other terms have traditionally existed to describe leaf medicines, such as ‘wairākau’.)

Thirdly, tohunga use mirimiri, a form of massage, usually to relieve sore joints and limbs but sometimes also to force evil spirits or kēhua from a sufferer’s body.<sup>8</sup> Sub-categories of mirimiri include romiromi (using the fingers) or takahi (the feet). Fourthly, water is used in cleansing rituals or treatment of sickness, a practice probably common to all societies. Traditionally the water used for healing came from springs or clear, natural streams; in other words, tapu water was the purest. Lastly, there were minor surgical procedures, such as blood-letting to relieve swelling, incisions to drain infected ear drums, and so on.

The sophistication of traditional Māori healing is nowhere better demonstrated than in the area of rākau rongoā. As we have seen in section 2.1, effective medicines were and continue to be derived from many native plants. The antiseptic and soothing qualities of harakeke were well known to Māori and are used today in skincare products; koromiko is recognised by Pākehā as a remedy for dysentery<sup>9</sup> and a favoured plant of tohunga rongoā; poroporo was used by Māori as a contraceptive and is now grown commercially around the world for this purpose; and mānuka, also much prized in traditional healing, has been shown to have unique antibacterial qualities. These are but a few examples.

It would be wrong to conclude, however, that the practice of rongoā was by any means focused upon herbal





Three important rongoā plants: koromiko, harakeke, and mānuka.

remedies. In the holistic Māori view of health, outward manifestations of sickness reflect broader environmental, family, or spiritual problems. Rākau rongoā are not considered effective on their own. Indeed, the most important form of treatment by tohunga was and remains spiritual. Robert McGowan, a Pākehā rongoā expert and former Catholic priest, told us how he had sought information from tohunga Paul Mareikura of Whanganui about the healing properties of certain plants. Mareikura replied: ‘Why do you want to learn about medicines from the trees? You already have the main medicine.’ Mr McGowan knew what this meant, but asked nonetheless. The reply came: ‘You have the karakia. Without karakia nothing else matters. It is the most important medicine.’<sup>10</sup>

Karakia, in other words, is not simply the ritual carried out before treatment and possibly afterwards: without karakia rongoā is incomplete. Karakia is entwined in the collection and preparation of the healing agents, the medicine, the diagnosis, the treatment, and the healing. Without karakia or – even more seriously – inappropriate karakia, the condition being treated may even get worse.

Rongoā, then, is a multi-dimensional form of care and healing, and its character reflects the environment in which it developed. It may well appear quite different from

Western methods of health care, but on closer inspection there are in fact a number of similarities. As Professor Durie puts it:

In essence, there is a universal belief that, because unseen forces can cause illness, special efforts are necessary to protect communities and individuals. Rules must be observed and precautions enforced. Whether the unseen force is called a virus or an infringement of tapu may be less important than the subsequent practical application of measures designed to prevent illness or injury. As public health advocates the world over have demonstrated, it makes sense to separate clean from unclean, replace dangerous situations with safe ones, and distinguish pure from contaminated water.<sup>11</sup>

In fact, late eighteenth-century Māori treatment of the sick was at a similar level of scientific advancement to contemporary practice in Europe.<sup>12</sup> It has been widely thought (including by scholar Elsdon Best, Māori doctor and anthropologist Peter Buck, and several more recent Māori scholars<sup>13</sup>) that pre-contact tohunga did not administer any oral medicines, developing these only after observing the European practice.<sup>14</sup> Contemporary Māori healers reject this view.<sup>15</sup> Intuitively, we agree,



Te Rangi Hiroa (Peter Buck), Apirana Ngata, and Maui Pomare in the 1920s. These old boys of Te Aute College and members of the Young Maori Party were determined campaigners for Māori health reform.

even though the importance placed on the ‘supernatural aspect’ of the holistic healing process may well have retarded the development of herbal cures.<sup>16</sup> In any event, the debate for our purposes is largely beside the point, for Māori healers have certainly been administering internal herbal remedies since before the signing of the Treaty of Waitangi in 1840.

## 7.2 THE TOHUNGA SUPPRESSION ACT 1907

It is impossible to consider rongoā in a modern context without examining the origins and impact of the Tohunga Suppression Act 1907. The Act and its effects were key issues for the claimants, who contended that it had severely impacted upon customary healing.

### 7.2.1 Introduction

For much of the nineteenth century, missionaries and Pākehā doctors had little option but to co-exist with tohunga, sometimes receiving patients only when the

tohunga’s skills were exhausted. But these Western authorities also represented a challenge to the tohunga’s authority, particularly in the treatment of introduced diseases. Colonial doctors were usually harshly critical of the tohunga, even if they were sometimes forced to recognise Māori healing abilities.

In one case in the early 1880s, a doctor and local Māori disputed who should treat a soldier who had fallen into a boiling Rotorua pool and been badly scalded. A compromise saw the doctor treat one leg and his Māori hosts the other; the latter leg healed much more quickly and with less pain, to the bitter disappointment of the doctor.<sup>17</sup>

If this incident represented a form of partnership between Māori and Western medicine, it was short-lived. Critics stridently condemned tohunga involvement in medical care from the mid-1880s. Indeed, they claimed tohunga to be no better than quacks. Educated young Māori leaders, including former pupils of Te Aute College Peter Buck, Apirana Ngata, and Maui Pomare, New Zealand’s first Māori doctor – whose very agenda

was modernising reform, particularly in health – joined in this chorus of scepticism and condemnation. The contest for medical supremacy between Māori holism and the Western severance of science and spirituality led to the outlawing of all tohunga activities under the Tohunga Suppression Act 1907. The Act remained in force until 1962.

The Tohunga Suppression Act merits closer examination because it symbolises the subordination of mātauranga Māori to European knowledge. In the context of Wai 262 it represents an extreme example of the dominance of one of our founding systems of knowledge at the expense of the other. It also shows, perhaps, the singular achievement of the custodians of mātauranga in maintaining their practice and transmitting their knowledge in spite of this official suppression. Ultimately,

though, a consideration of the Act allows us to reflect on whether remnant scepticism still undermines acceptance of mātauranga rongoā today.

### 7.2.2 The impact of colonisation and disease

Infectious diseases hit Māori severely in the decades following Cook's voyages of discovery from 1769. After centuries of isolation from 'the global reservoir of infection', and with a population too small and scattered to support a 'national disease pool' – that is, a population large enough to allow the constant spread of infectious illnesses – Māori succumbed terribly to a host of diseases in what health historian Raeburn Lange has called 'a disaster of unprecedented proportions'. From the time of first contact until the signing of the Treaty, it is thought that the Māori population may have fallen by as much as 30 per

A whare in the Whanganui district, 1908. At this time most Māori lived in remote areas, with little or no access to doctors.





Maui Pomare stands beside a traditional whare, circa 1911. Pomare, as Native Health Officer, led the drive to improve living conditions in Māori villages.

cent, with a great deal of this decline due to disease rather than the usually cited musket warfare.<sup>18</sup>

The nadir of Māori population decline had been reached by the mid-1890s, but by 1900 Māori society remained devastated by the inter-related effects of disease, poverty, and poor sanitation. Tuberculosis was perhaps the major killer. On the one hand, holding fast to their traditional understanding of sickness left Māori ill-equipped to deal with a predicament brought about by new circumstances and diseases. But, on the other hand, the loosening of aspects of traditional Māori life – such as strict adherence to tapu – led to hygiene standards falling and sanitation quickly deteriorating.<sup>19</sup> Moreover, most Māori continued to live in remote areas and had difficult or no access to Pākehā doctors. Hospitals that may have been in the vicinity often refused to admit Māori on the basis that such patients were unlikely to be able to pay for treatment.<sup>20</sup> But most Māori had little interest in such alien places where no accommodation was made for Māori spirituality.<sup>21</sup> As Lange explains, those who ran hospitals ‘were usually disdainful of Maori beliefs.’<sup>22</sup>

The situation during the latter part of the nineteenth century could hardly have been worse. Māori health reformers – led by the Te Aute old boys, now prominent members of the Young Maori Party – began a drive to improve the conditions in Māori villages and the health of Māori communities. In this they focused much of their attention on those they saw as arch-villains, the tohunga.

### 7.2.3 The link between tohunga and ill health at the turn of the nineteenth century

By the late nineteenth century, many observers considered that the ‘traditional’ tohunga had vanished and been replaced by a new form of ‘degenerate tohungaism’. Lange argued in 1968 that the changes wrought by colonisation had indeed weakened the traditional tohunga’s position, since he was powerless to counteract new diseases. Similarly, Western knowledge and Christianity had undermined the community’s reverence for the tohunga as the ‘keeper of mysterious secrets.’<sup>23</sup> In his place had arisen what Best referred to as ‘shamanistic low-grade practitioners’ who employed ‘sacerdotal jugglery.’<sup>24</sup> Māori



Maui Pomare, seated front centre, and Peter Buck (at this time the assistant Native Health Officer), to his right, with a gathering of Māori sanitary inspectors, July 1907. To Pomare's left is the Chief Health Officer, James Mason.

themselves (including in particular the activists of the Young Maori Party) were amongst the harshest critics of this 'new' tohunga. Buck described him as a 'sorry apology' and 'a fraud and a quack', while Pomare called him 'pernicious' and 'vile' (amongst many other things)<sup>25</sup> and referred to 'tohungaism' as a 'cancerous malady'.<sup>26</sup> Pākehā, too, voiced their concerns: journalist and amateur ethnographer William Baucke called the tohunga 'leering', 'greasy', and 'rascally'.<sup>27</sup>

There were legitimate grounds for concern. Tohunga often failed to refer cases on to doctors, or prevented or interfered with medical treatment. There is evidence, too, that some of their own treatments were harmful, especially the immersion of patients in water, in cases of fever. While water had always been used as a ritual in traditional healing, its application in treating modern diseases was regularly disastrous. In the 1918 influenza epidemic, for example, many tohunga immersed their patients in water and gave them pneumonia in the process.<sup>28</sup>

Were these 'new' tohunga really so different from their predecessors? Lange, for example, has sought to rehabilitate the reputation of the late-nineteenth-century tohunga. He acknowledges that there were undoubtedly many '[d]ubious tohunga' who profited 'from residual belief in mate Maori'. But he also points out that the herbal remedies used by most tohunga were the same as the remedies frequently praised by the medical establishment today. Further, he argues that even in the last century the psychological impact of a tohunga could be a powerful factor in healing some patients.<sup>29</sup> As he puts it:

The status of the turn of the century tohunga was much lower than that of their pre-European predecessors, for great changes in material culture and social patterns had robbed them of their central role in daily life. Christianity had seriously undermined their authority. But as long as widespread belief in traditional health concepts remained, tohunga were assured of a function in the treatment of sickness. They were

not all 'impostors', although this was constantly alleged in this period. They were the direct descendants of the traditional tohunga, but were conspicuous only for their activities in the one role left for them, that of healer. . . . Tohunga were 'quacks' only in the sense that they worked within a system of belief that belonged to the very different circumstances of an earlier age. They had to some extent adapted to the times by incorporating elements of Christian faith-healing into their traditional practice.<sup>30</sup>

Despite the mocking nature of this 1910 cartoon, Pomare worked tirelessly as Native Health Officer from 1901 to 1911.



In a similar vein, religious law academic Malcolm Voyce suggests that the supposedly new and fraudulent tohunga was in fact 'still a development of the traditional form of *tohunga*. Despite some very obvious misapplications of medicine (in the view of mainstream Western medicine), he may still have given relief in some cases because he understood the magical religious outlook of his patients.' If the number of tohunga did rise at the end of the nineteenth century, suggests Voyce, it may well have been because of the sheer scale of sickness and the parallel absence of Pākehā medical assistance.<sup>31</sup> The rise of 'tohungaism' at this time, therefore, was more a *result* of the prevalence of illness, than a cause of it.<sup>32</sup>

#### 7.2.4 Measures to deal with harmful tohunga

Given the health crisis in Māori communities, action was needed on two fronts: to combat the lack of understanding of the causes of disease, and to improve sanitary standards in Māori kāinga. One option would have been to invest massively in primary Western health care in Māori communities while also winning over Māori trust in Pākehā medicine (by training more Māori doctors, for example). But this course was not taken. As health historian Derek Dow writes, the efforts of the Department of Public Health to improve Māori health from 1900 'were hampered by a tortuous chain of command, constant financial restraint, political interference and a substantial degree of bureaucratic bickering.'<sup>33</sup> After Pomare was appointed the department's Native Health Officer in 1901, he became, says Lange, something of a 'one-man nationwide health service for the Maori on a shoestring budget.'<sup>34</sup>

The first official moves against tohunga were taken. Public warnings were issued to them and some of the worst cases were prosecuted under criminal law. Section 240 of the Criminal Code Act 1893, for example, provided for imprisonment with hard labour for those convicted of 'witchcraft, sorcery, enchantment, or conjuration', and section 50 of the Indictable Offences Summary Jurisdiction Act 1894 dealt with deception and palmistry.<sup>35</sup> A number of convictions were obtained in the following years, usually for deaths resulting from water immersion. Sometimes, tohunga were also charged with



Maori Councils' representatives meeting the Governor, Lord Ranfurly, at Rūātoki in 1904. Also in attendance are Native Minister James Carroll and Native Health Officer Maui Pomare. From 1900 to 1907 the councils had legislative power to regulate the activities of local tohunga.

murder, manslaughter, and failing to provide the necessities of life.<sup>36</sup>

But by 1900, it was clear that this approach was not having the desired effect. Pressure on the Government to take more direct action was reflected in the Maori Councils Act 1900, in which the newly established councils were given the power to regulate tohunga activities. Specifically, section 16(5) of the Act empowered councils to pass by-laws for 'regulating the proceedings of tohungas, and the punishment by fine of those (whether

European or Maori) who practise upon the superstition or credulity of any Maori in connection with the treatment of any disease'. However, this was greeted with incomprehension by many Pākehā, who saw the Act as 'aiding and abetting the tohunga scourge'.<sup>37</sup>

Perhaps unsurprisingly, not everyone elected to the councils was as impatient to curb tohunga as the likes of Buck and Pomare. A conference of councils in 1903, for example, could not agree upon a common approach for dealing with tohunga. While regulations for licensing



The Premier, Sir Joseph Ward, meeting Tūhoe prophet Rua Kēnana on the beach at Whakatāne in 1908. Rua's emergence in 1906 tipped the balance in favour of a ban on tohunga.

tohunga were formulated that same year, by 1906 it was apparent that different councils were enforcing the regulations in quite different ways. The Mataatua Council, for example, was apparently not prepared to take any action.<sup>38</sup> In any event, the Government seems to have preferred a licensing regime rather than an outright ban because, as Native Minister James Carroll argued, it brought tohunga 'within the mesh of the law'. He also contended that 'the ancient customs of a race which has only recently emerged from a state of barbarism cannot be abolished all at once.'<sup>39</sup>

With no councils willing to 'tackle the tohungas' until 1904, Ngata said the 1900 Act had 'remained a dead-letter'.<sup>40</sup> Opposition member of Parliament WH Herries demanded to know in 1905 why the Government did not take heed of Pomare's constantly voiced concerns and, at the very least, prosecute cases under the Criminal Code Act. Carroll responded in 1905 that the Government was doing all it could.<sup>41</sup> His own desire for change was doubtless tempered by realism; as Lange comments, Carroll

'was reluctant to sponsor a new suppression measure, believing that a blanket denunciation of all tohunga would obscure the distinctions between them, and that such a central and persistent aspect of traditional culture could be changed only gradually, by education rather than force.'<sup>42</sup>

### 7.2.5 The passage of the Tohunga Suppression Act

It became increasingly clear that the licensing regime under the Maori Councils Act was not having the kind of effect Pākehā politicians and Māori reformers were demanding. The former were indignant to think that some councils were in fact supporting tohunga rather than curbing them, and in the end even the Young Maori Party members joined in with what Lange calls the 'Pakeha clamour for outright suppression.'<sup>43</sup> Pomare wrote annually to urge the passage of legislation that prohibited 'the practice of any kind of *tohunga* whatsoever.'<sup>44</sup> Soon enough, in September 1906, Carroll introduced a Tohunga Suppression Bill. While this Bill did not progress beyond



a first reading, it returned the following July in near-identical form (see below for the 1907 Act's full wording).

The 1906 Bill followed upon the rise of Rua Kēnana. Rua was a faith healer who claimed to be the son of Jehovah, the brother of Jesus, and able to heal the sick and raise the dead. He 'burst upon the scene'<sup>45</sup> in 1906 with a prophecy that King Edward VII would come to Gisborne on 25 June that year and give Rua £4 million to purchase back from Europeans all the land Māori had lost. The King would remove the Pākehā from New Zealand and return it to Māori ownership.<sup>46</sup> On 24 May 1906, Rua thus arrived in Gisborne with 100 followers to await the King's arrival, having encouraged his supporters to sell their stock and equipment as they awaited the millennium.<sup>47</sup> Their presence excited great anxiety amongst the local Pākehā settlers, and Rua's standing was in no way diminished by the King's failure to arrive. Rua showed no sign of moving on, and the Government and the Takitimu Maori Council both considered legal options for evicting

him from the district before he and his followers finally left for Maungapōhatu on 29 August.<sup>48</sup>

After the May prophecy, Carroll derided Rua as a 'charlatan' whose promises of eternal life found a ready following amongst the gullible.<sup>49</sup> Rua certainly drew many followers to the interior on what has been called his 'great trek into the wilderness'. After his initial retreat from Gisborne, Rua was soon joined by a wave of migrants from Waimana and Rūātoki, and the local press complained that Māori were failing to show up for work.<sup>50</sup> Carroll's 1906 Bill seemed to refer clearly to Rua with its references to 'the foretelling of future events' and to the inducement of Māori 'to neglect their proper avocations'.<sup>51</sup>

Rua was still the focus of much Government attention when Carroll reintroduced the legislation in July the following year. The same month the Superintendent of the Maori Councils, JB Hackworth, wrote to Best that: 'As you say the Rua trouble is very serious – I have reported your remarks to Mr Carroll and he authorises me to tell

Rua's community at Maungapōhatu, 1908



**AN ACT to suppress Tohungas.**

WHEREAS designing persons, commonly known as tohungas, practise on the superstition and credulity of the Maori people by pretending to possess supernatural powers in the treatment and cure of disease, the foretelling of future events, and otherwise, and thereby induce the Maoris to neglect their proper occupations and gather into meetings where their substance is consumed and their minds are unsettled, to the injury of themselves and to the evil example of the Maori people generally:

BE IT THEREFORE ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Tohunga Suppression Act, 1907.

2.(1.) Every person who gathers Maoris around him by practising on their superstition or credulity, or who misleads or attempts to mislead any Maori by professing or pretending to possess supernatural powers in the treatment or cure of any disease, or in the foretelling of future events, or otherwise, is liable on summary conviction before a Magistrate to a fine not exceeding twenty-five pounds or to imprisonment for a period not exceeding six months in the case of a first offence, or to imprisonment for a period not exceeding twelve months in the case of a second or any subsequent offence against this Act.

(2.) No prosecution for an offence against this Act shall be commenced without the consent of the Native Minister first had and obtained.

3. The Governor may from time to time, by Order in Council gazetted, make such regulations as he thinks fit to enable the intention of this Act to be carried out.

4. Subsection five of section sixteen of the Maori Councils Act, 1900, and all regulations made under that subsection, are hereby repealed.

The Tohunga Suppression Act was passed in 1907 and remained on the statute books until 1962.

you that that the Government is legislating this session to stop the trouble.<sup>52</sup> In introducing the Bill, Carroll indirectly referred to Rua when he remarked upon ‘so-called prophets . . . who prey on the credulity by claiming the power to predict and foretell events’. Then, as an example of ‘this class of practitioner’, he directly referred to ‘the notorious Rua.’<sup>53</sup> Other members too stressed the need to act against Rua.

In the debate Ngata also expressed support for the Bill, but voiced concern over the provision giving an unlimited power of discretion to the police and Justices of the Peace; he doubted these authorities could ‘discriminate one tohunga from another’. His concern was heeded, with the Bill being amended to require the consent of the Native Minister before any charges could be laid.<sup>54</sup>

### 7.2.6 The Act in practice

The Tohunga Suppression Act 1907 remained in force until it was repealed by section 44 of the Maori Welfare Act 1962. Ironically, it was never used against Rua himself. In fact there were altogether rather few prosecutions and even fewer convictions than under the previous regime; the first successful conviction under the Act was not secured until 1910. A handful of other convictions relating to patient deaths followed, including the 1914 conviction of a Pākehā registered midwife – Mary Ann Hill, the ‘White Tohunga’ – whose treatments of mate Māori had led to a number of fatalities. In all, Lange found nine convictions between 1910 and 1919, but he noted that some of the best-known tohunga, such as Mere Rikiriki of Ngāti Apa, were not charged even where there were complaints.<sup>55</sup> Legal historian David Williams, in his evidence to this Tribunal, also identified nine convictions between 1910 and 1919, as well as an unsuccessful prosecution in 1955.<sup>56</sup> Both Lange and Dr Williams allow that there may have been other convictions that have not yet been traced.<sup>57</sup>

A recommendation in the influential 1960 ‘Hunn report’ on Government law and policy concerning Māori (see also section 5.4.6(1)) led to the Tohunga Suppression Act’s repeal in 1962. That year Hunn described the Act to Minister of Maori Affairs Ralph Hanan as a ‘dead letter’, with prosecutions having been ‘few and far between’ (he identified only three, in 1910, 1914, and 1955).<sup>58</sup> The Act’s

ineffectiveness was also indicated by the comment in a 1960 paper on poor Māori health by Dr Rina Moore that ‘A very large section of the Maori people believe that their illness should be managed by the local Tohunga.’<sup>59</sup> Lange commented in 1968 that the extent to which ‘tohungaism’ survived was not then understood. He cited the comment of psychologist Geoffrey Blake-Palmer in 1954 that it was ‘very much alive’, and concluded that ‘a large proportion of the race still believes that Maori treatments and recourse to *tohungas* are necessary and desirable.’<sup>60</sup>

### 7.2.7 The historiographical debate

Our analysis of the enactment and impact of the Tohunga Suppression Act 1907 has been guided by the work of several scholars. This first is an article by Lange which appeared in 1968. Two biographies of Rua published in 1979 – one by Judith Binney, Gillian Chaplin, and Craig Wallace, and the other by Peter Webster – inevitably engage with the legislation. In 1989, Joyce looked specifically at the Act in a journal article. A decade later, Lange expanded on his earlier work in a history of the Maori Health Department from 1900 to 1920, while a book by Dow examined Māori health and government policy from 1840 to 1940: both books covered the Act.<sup>61</sup> In 2001, both Dow and law academic Māmari Stephens published articles about the Act, and Dr Williams produced his historical evidence for this inquiry. Stephens has since written about the Act in another article (2007) and a book chapter (2008). Professor Durie has touched on it in several publications about Māori health, and in 2004 Richard Hill did likewise in his history of Crown–Māori relations from 1900 to 1950.<sup>62</sup>

The Tohunga Suppression Act has thus been a fertile ground for scholarship. It is therefore remarkable that general histories – notably Keith Sinclair’s *A History of New Zealand*, James Belich’s *Making Peoples* and *Paradise Reforged*, and Michael King’s *The Penguin History of New Zealand* – all neglect to mention it.<sup>63</sup> This omission contrasts sharply with the strong views expressed by some Māori commentators on the Act’s significance. Professor Mead, for example, says the Act was one of the government policies that ‘dismant[ed] the traditional leadership and social systems and . . . suppress[ed] tikanga Māori.’<sup>64</sup> Professor Durie, for his part, argues that the Act outlawed



Rua at Maungapōhātu, 1908

‘[t]raditional healers and political leaders’ and, by extension, ‘opposed Māori methodologies and the legitimacy of Māori knowledge in respect of healing, the environment, the arts, and the links between the spiritual and the secular – te kauae runga and te kauae raro.’<sup>65</sup> More recently, in 2007, Auckland academic Leonie Pihama contended that the Act was ‘designed to oppress and suppress Tangata Whenua, . . . to put an end to any following of healing or rongoā, . . . [and] to oppress and suppress Mātauranga Māori and any and all attempts by iwi to keep control of our own well being.’<sup>66</sup>

In this inquiry, the historians’ varying views and interpretations of the Act’s significance clearly influenced

Crown and claimant submissions. Weighing the merits of the historians’ arguments about the Act therefore helps us assess the validity of the claimant allegations. It also gives us a context for assessing contemporary government support for rongoā because, if the 1907 legislation were still in force, the practices of today’s healers would almost certainly be illegal. What has changed in the way the State views rongoā, and why?

Our analysis of the diverse historiographical arguments about the Act focuses on three issues that all the historians have grappled with:

- ▶ the motivation for the Act
- ▶ whether its passage was justifiable, and
- ▶ its impact on Māori traditional healing.

#### (1) *Motivation for the Act*

The orthodox position is that the Bill’s introduction was essentially a response to the emergence of Rua. This was suggested by Lange in his 1968 work, and repeated by numerous scholars over the next four decades.<sup>67</sup> Webster, for instance, considers that ‘Although it was generally agreed that the Bill was necessary and should apply to all tohunga, it is obvious from the debates and from opinions in the contemporary press, that the measures were aimed specifically at Rua.’ As he explains it, ‘no one cared about fortune telling amongst the Maori’, but what made this different was that Rua’s prophecy was profoundly unsettling for the establishment.<sup>68</sup> In a similar vein, Voyce remarks that: ‘The idea of protecting Maori from Rua and *tohunga* generally must be seen as untrue. Rather, the TSA aimed at the protection of Europeans from Rua.’<sup>69</sup> More recently, Dr Williams told this Tribunal that Rua was ‘at the forefront of Crown policy formulation’ in preparing the Tohunga Suppression Bill.<sup>70</sup> And in 2004, Hill wrote that ‘the legislation was intended specifically for potential use against resistance leader Rua Kenana.’<sup>71</sup>

This orthodoxy has recently been challenged by Dow from one perspective, and Stephens from another. Dow maintains that the emphasis on Rua interprets the Act out of context, and that genuine concerns for Māori health were a much more important motivation than has been recognised.<sup>72</sup> He argues that antipathy towards the activities of tohunga was a longstanding feature of the Pākehā medical fraternity in the nineteenth century. Dow also

suggests that the fact that ‘care of diseases’ was listed before ‘the foretelling of future events’ in the Act’s preamble showed what the lawmakers’ real priority was.<sup>73</sup>

Stephens, by contrast, agrees that Rua was outwardly the reason for the legislation, but argues that in reality he may have been little more than a ‘handy spectre’. She suggests that the true motivation lay with a Government desire to roll back the power of autonomous Māori bodies such as the Maori Councils and to quell wider public uncertainty about medical technologies and millennial movements.<sup>74</sup> She concludes that the intent of the Act was therefore ‘symbolic’. Māori members of Parliament

went along with it, she argues, in order to affirm their loyalty and in the hope of securing greater provision of state health care for Māori communities. For example, Ngata’s support for the legislation may have been a means of defending himself, in the face of other members’ indignation, for his earlier role in licensing tohunga as the Organising Inspector of the Maori Councils in 1903.<sup>75</sup>

What then of the fact that the Act was never used against Rua himself? Those who are convinced that the Act was specifically concocted to ‘get’ Rua propose various reasons. Webster suggests that Rua ceased to make further millennial pronouncements, and that it would have

Police officers leading Rua and other prisoners from Maungapōhatu in 1916. Rua is in a white shirt beside the horse.



7.2.7(2)

been difficult in any event to prove he had committed any particular offence under the Act. Moreover, it eventually ‘became easier and more convenient for the authorities to prosecute him for other reasons.’<sup>76</sup> Lange suggests that the Government decided in the interim to negotiate with Rua, but always intended to arrest him at some point, as indeed occurred in 1916.<sup>77</sup> But Dow, in keeping with his position that the Act was essentially a health measure, suggests that the authorities were still interested in prosecuting Rua under the Act on health grounds two decades later.<sup>78</sup>

Stephens discounts these explanations since the Act was ‘apparently tailor-made’ for Rua. Evidence for a prosecution could easily have been obtained from Rua’s arch-rival within Tūhoe, the chief Numia Kererū, for example (who in fact requested prosecution against him in December 1907). In Stephens’s view, the ‘most important reason that Rua Kenana was not prosecuted under the Act is that the Government needed his cooperation in the sale of Tuhoe land and gold-mining in the Urewera.’ She considers it conceivable that some members of Parliament debating the Tohunga Suppression Bill in late 1907 were well aware of the political factionalism within Tūhoe and may have already considered it self-defeating for the Government to prosecute Rua. Indeed, as she points out, Ngata soon brought Rua onto the Tūhoe negotiating committee and by 1910 the prophet had sold 40,000 acres at Maungapōhātu.<sup>79</sup>

### (2) *The justification for the Act*

Many of the scholars we have cited appear to believe that there was no justification for the Act, regardless of their views on its origins or its enforcement. Lange makes no particular comment on this, but does call the legislation ‘unprecedentedly stringent.’<sup>80</sup> Dr Williams is less equivocal, criticising the use of ‘repressive criminal law sanctions’<sup>81</sup> to deal with ‘issues that had much to do with the inaccessibility of medical treatment for poor Maori communities.’<sup>82</sup> Webster’s comments reflect his view that the Act was aimed at Rua. He argues that the recent memory of armed conflict with Māori made the Government respond to the slightest Māori reaction against the spread of settlement ‘with a seriousness quite out of proportion to the incident itself.’<sup>83</sup>

But Dow is much more willing to ascribe good and justifiable intentions to the Act’s architects. For him, the Tohunga Suppression Act was no different from the Maori Councils Act and the Quackery Prevention Act in reflecting Parliament’s concern ‘to protect the simple and the credulous against tricksters and charlatans.’ As he puts it:

The *Tohunga Suppression Act 1907* was an attempt to eliminate the perceived dangers to health of *tohungaism*, just as the Quackery Prevention Act aimed to reduce the threat posed by patent medicines and unqualified practitioners. . . . the 1907 legislation removed some of the branches, without damaging the roots. While the saw was ultimately wielded by parliament, the guiding hands were those of Western-trained health professionals, Maori and Pakeha alike.<sup>84</sup>

Stephens appears to consider that the Act was justified on health and safety grounds. She suggests that the death of Wainuiomata woman Janet Moses in a failed exorcism in 2007 serves as a reminder of the reasons why the Act was passed. Quoting the comment of Rawiri Taonui of the University of Canterbury that ‘Fraudsters posing as tohunga or healers were known to operate in the Maori community’ and ‘are certainly out there’, she adds: ‘This is exactly what the legislature also thought in 1907.’<sup>85</sup>

### (3) *The impact on traditional Māori healing*

The failure to act against Rua is a key reason Stephens considers the Act to have been primarily a symbolic measure. But if Rua was spared, what of other healers? Those convicted presumably did not see the legislation as essentially symbolic. Dr Williams, for one, says that despite the relatively few convictions, it would be wrong to conclude that the Act was ‘sporadically enforced for about a dozen years or so and then forgotten about.’ In fact, he provides examples of investigations of tohunga during every decade the Act remained in force. As he argues:

the few prosecutions represent only the tip of an iceberg in relation to the impact of the suppression laws. Throughout the period the Act was in force school teachers, doctors, coroners, nurses, police constables, Maori councils and ordinary citizens could and did initiate investigations of healers

and religious leaders whose activities attracted attention. To avoid the unwelcome attention of the authorities a tohunga would have been well advised to operate covertly.<sup>86</sup>

Dr Williams adds that the notion that the Tohunga Suppression Act had long been a ‘dead letter’ (as Hunn described it in 1962) is belied by the passage of section 14 of the Maori Purposes Act 1949. This empowered the tribal committees set up under the Maori Social and Economic Advancement Act 1945 to fine anyone found to be in breach of the suppression legislation. Dr Williams further argues that the ‘stigma’ attached to the activities of tohunga arising from the Act has in fact persisted into contemporary times. For example, he notes the moot-ing of a tohunga register in the late 1980s and the negative reaction from many rongōā practitioners who felt uncomfortable with the label and unwilling to have their names registered.<sup>87</sup>

Other scholars have suggested that the Act’s impact was altogether more limited. Voyce, for example, describes the Act as a ‘failure’, for the simple reason that ‘the traditional ways of the Maori were too deeply ingrained to be effected [*sic*] by legislation’. Writes Voyce, ‘I conclude that while some *tohunga* may have modified their activities, on the whole the deterrent effect of the act was negligible.’ For Voyce, the ‘problem’ aspects of tohunga – which clearly existed at the turn of the century – dried up for other reasons, largely because of greater Māori confidence in hospitals and doctors, but also because emerging prophet T W Ratana urged his followers to reject tohunga.<sup>88</sup> Lange’s position seems to lie somewhere between Voyce and Dr Williams. He too concludes that the Act failed to have a deterrent effect because ‘it was unrealistic to expect that so integral a feature of the traditional culture as “tohungaism” could be destroyed by legislative means’. But he agrees that tohunga were ‘driven underground’.<sup>89</sup>

Stephens, who has analysed complaints received about tohunga and the prosecutions laid, concludes that the accusations of tohungaism were ‘often laid by people with a vested social, political or economic interest in the downfall of the accused. . . . It appears that there are relatively few requests for prosecutions surviving in government archives that indicate a non-partisan concern to stamp out the practice of tohungaism itself, although

anti-tohunga rhetoric appears to be utilised in order to provoke ministerial action.’<sup>90</sup> Voyce also remarks upon the ‘evidence that factions within Maori communities attempted to employ this legislation for their own purpose as a means to remove unwanted leaders.’<sup>91</sup> In light of this insight, Stephens concludes that the extent to which tohunga went ‘underground’ would have been motivated by their desire to protect themselves from Māori accusers rather than Pākehā authorities.<sup>92</sup>

Stephens also perceives a certain half-heartedness about the Act on the part of the judiciary, arguing that sentences were relatively lenient – particularly compared to those meted out earlier under the Criminal Code Act. She suggests that judges interpreted the Act narrowly and were willing to convict only in cases where there was plain evidence of a claim to supernatural powers. An example is the second conviction obtained under the Act – that of a healer in Hawera named Puna who was charged after a woman died in her care. It seems Puna was a modernist in that she routinely referred cases to the doctor (who indeed spoke highly of her) and maintained the strictest standards of hygiene. What sealed her conviction, however, according to the police investigator, was her steadfast refusal to deny she possessed ‘the mana to cure sickness.’<sup>93</sup> Her £10 fine (about \$1,500 in today’s terms) was well short of the maximum penalty.

## 7.2.8 The arguments of the parties

### (1) *The claimants*

Counsel for Ngāti Kahungunu described the Act as effecting ‘a complete legislative ban on the practice of Maori traditional healing between 1907 and 1962’.<sup>94</sup> In outlining the reasons for the Act’s introduction, counsel relied on interpretations of Lange and especially Dr Williams. He quoted Dr Williams’s statement that the Act was a ‘blunt instrument of state coercion aimed at all tohunga’ and endorsed Dr Williams’s conclusion that:

The fact that the criminal law was used to stigmatise tohunga was important symbolically and ideologically. It was no longer possible for any healer or religious leader to honour the traditions of tohunga and their whare wananga of the past without running the risk of prosecution. In addition to that the suppression legislation was indeed directly

enforced on numerous occasions. The threat of prosecution was no mere idle threat.<sup>95</sup>

Counsel noted Dr Williams's acknowledgement that there were few actual convictions and that tohunga were evidently not stigmatised in the eyes of their own people. He pointed, however, to Dr Williams's argument that the 'real effect' of the legislation was on the preservation of traditional knowledge, since, in Dr Williams's words: 'No system of cultural knowledge can flourish in a climate of fear and ill will.'<sup>96</sup>

Counsel for the Te Tai Tokerau claimants also focused on the Act's impact on the transmission of cultural knowledge, and similarly adopted Dr Williams's contentions. Counsel submitted that the 'stigma associated with traditional healing which has its origins in that legislation and subsequent policy, was far-reaching'. Tohunga 'lost respect, were unfairly associated with unsafe and unhealthy practices, and their teaching methods [were] called into question'. Evidence from claimant witnesses demonstrated a reluctance to pass on cultural knowledge among their own whānau. Counsel also contended that in dealing with 'quackery' lawmakers had alternatives to the 'abolition of a practice of matauranga Māori' by means of the Act.<sup>97</sup>

In sum, said counsel, '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'. The Crown had not called any evidence to counter Dr Williams's historical research, and had failed successfully to rebut Dr Williams's essential conclusions.<sup>98</sup>

Counsel for Te Waka Kai Ora, the National Māori Organics Organisation, made similar allegations.<sup>99</sup>

## (2) *The Crown*

Crown counsel maintained that it was 'unproven' whether customary Māori healing had been adversely affected by the Act. The legislation did not apply to the traditional knowledge systems of customary healing or to customary Māori healing generally. Rather, its focus was on 'misleading behaviour and taking advantage of Māori beliefs', said counsel, and not on 'natural healing processes'. Counsel

quoted Voyce's observation that 'a person who cured by herbs, massage and poultices for instance would not be committing an offence provided, of course, they did not profess or pretend to their patients that they had supernatural powers'. Crown counsel noted that Dr Williams had agreed, under cross-examination, 'that those who cured by herbs, massage or poultices would not be committing an offence under the Act'.<sup>100</sup>

Crown counsel contended that the provision in the Act requiring the agreement of the Native Minister before a prosecution could be commenced provided another layer of protection against misuse. Referring to an earlier Tribunal's comment that some tohunga 'were skilled herbalists and healers, but others were ineffective and even dangerous', counsel refuted that Tribunal's conclusion that competent and modernising tohunga were 'lumped . . . together with the ineffective and the dangerous' – given the distinction made at the time by the likes of Ngata between the different types of tohunga.<sup>101</sup>

Crown counsel assessed the Act's impact under two heads: 'direct effect' and 'indirect effect'. Under the former, counsel submitted that the Act had very little impact, with only 10 convictions in 55 years. Moreover, prosecutions came about only after significant concern was expressed by the (Māori) community. With respect to indirect effect, counsel cited Voyce's conclusion that, 'while some tohunga may have modified their activities, on the whole the deterrent effect of the Act was negligible'. Other factors, such as increased Māori support for and confidence in Western medicine, also played a significant role in the decline in the number of tohunga, counsel argued. In any event, traditional tohunga practices may have been in decline even before the Act's passage, as evidenced by Ngata's remark during debate on the Bill that the tohunga of old no longer existed.<sup>102</sup>

Overall, said counsel, the Act was aimed at protecting public health and safeguarding citizens from fraud, which are roles required of the Crown. Counsel noted the health concerns arising from deaths caused by water immersion, and suggested that Carroll clearly introduced the 1907 Act after earlier 'attempts to regulate tohunga proved unsuccessful'. To that extent, the Tohunga Suppression Act was a justified response to the prevailing situation.<sup>103</sup>





A district nurse weighs a baby, Waihara Gumfields, Northland, circa 1930s. A major investment in Māori health services would have been a much better means of addressing Māori health problems than suppressing tohunga.

### 7.2.9 Analysis

Our assessment of the Tohunga Suppression Act revolves around the three principal issues we identified as focal points in the historiographical debate, although here we deal with them in a slightly different order:

- ▶ Was the passage of the Act justified?
- ▶ What motivated the Act?
- ▶ What was its impact on traditional Māori healing?

#### (1) *Was the passage of the Act justified?*

Clearly, there was a massive public health problem in Māori communities in the latter part of the nineteenth century, as they dealt with the ravages of disease and the related effects of poverty. Where tohunga were exacerbating these problems (by, say, immersing fever sufferers in water), we believe it would have been an irresponsible Government that did not seek to prevent and deter methods of treatment that were clearly causing further misery.

But how should this have been achieved – was suppression the right approach?

(a) THE ACT WAS NOT AN ADEQUATE RESPONSE TO THE LATE NINETEENTH-CENTURY MĀORI HEALTH CRISIS

We have described the various options the Government used to address harmful tohunga practices, first by criminal prosecutions, then by regulation and licensing via the Maori Councils, and finally by outright suppression through special legislation.

Notably absent from this list is major investment in adequate and culturally attuned health services for Māori. This clearly did not occur – Voyce remarks, for example, upon ‘the genuine lack of help towards the Maori people in the Liberal era over health and land policy’.<sup>104</sup> It is not as if the Crown was blind to this option – during the debate on the Tohunga Suppression Bill, Ngata stressed that the tohunga was the only option for Māori in many districts, since the national level of spending on Māori medical care at the time was a mere £3,000 for 46,000 people. Said Ngata, ‘I think this is the proper place to point out a real grievance on the part of the Maori people, in the lack of enthusiasm displayed by successive Governments in the matter of medical attendance on the Maori sick’. The only method of deterring Māori from relying on tohunga was to provide them with ‘something better’.<sup>105</sup>

Ngata was adamant on this point. If increased medical services were not provided, he said, ‘legislate as you will, you will never suppress tohungaism. You cannot do it. All the laws that could be passed in this House could not do it.’ When asked by another member why this was so, Ngata replied: ‘You are getting down to bedrock when you get to tohungaism.’<sup>106</sup>

It was not just Māori members who called for better medical services for Māori. In the same debate, WH Herries also argued that the remedy for the harmful effects of ‘the ordinary tohunga who simply pretends to cure and does not pretend to be a prophet’ was ‘the distribution of qualified doctors amongst the Maoris’. Said Herries: ‘If the Maori race had qualified doctors and resident doctors amongst them that they could go to in their sicknesses, then, Sir, ordinary tohungaism – the ordinary quack tohunga – would cease to exist, because his occupation would be gone.’<sup>107</sup>

Whatever the extent of health care available to Māori (and Dow argues that it was more than other historians

have conceded<sup>108</sup>), it was still clearly insufficient given the scale of the ongoing Māori health crisis. *The Napier Hospital and Health Services Report* found, with specific respect to the Māori of Ahuriri, that they were ‘left virtually without State medical assistance through the half-century of their greatest medical distress’, and it was not until nearly 1940 that they reaped much medical benefit from the existence of Napier Hospital, built in 1860.<sup>109</sup>

Looking at the options the Crown chose instead of improving health services for Māori, we believe that – since eradication of tohunga was manifestly impossible, but some tohunga practices were clearly a problem – the best approach would have been a combination of licensing and regulation of tohunga by Māori leaders via the Maori Councils, as well as prosecution in cases of genuine fraud and outright dangerous practice. But, to achieve this, the councils needed adequate resources, which they did not have. The Tribunal’s observation in *The Napier Hospital and Health Services Report* that ‘the Tamatea Maori Council suffered, like others, from the parsimonious level of Government funding, which severely limited the development of the councils’<sup>110</sup> is relevant here. Thus, the Crown bears further responsibility for the extent to which the licensing of tohunga from 1900 to 1907 was unsuccessful due to a lack of capacity on the councils’ part.

(b) THE ACT FAILED TO DISTINGUISH BETWEEN TOHUNGA WHOSE ACTIVITIES WERE HARMFUL AND THOSE WHO WERE NOT

The Tohunga Suppression Act defined three specific offences: for tohunga to gather Māori around them by practising on their superstition or credulity; to mislead Māori by professing to have supernatural powers in the treatment or cure of any disease; and to mislead Māori by professing to have supernatural powers in the foretelling of future events. As noted, the Crown contended that these offences did not include traditional Māori healing. Counsel cited Voyce’s opinion as well as Dr Williams’s concession that a tohunga who used herbal remedies would not be committing an offence. Effectively, the Crown echoed Lange’s suggestion that ‘[t]he Bill was worded in such a way that it was not tohunga as such who

were being suppressed, but tohunga whose activities were demonstrably harmful'.<sup>111</sup> In other words, the Act was concerned with fraudsters and charlatans.

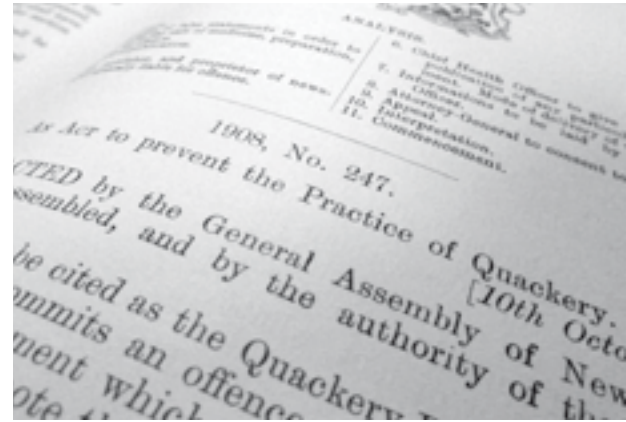
But, in reality, no tohunga would treat a patient with herbs alone; Dr Williams's concession is thus beside the point. Voyce himself acknowledges as much with his rejoinder that tohunga would indeed have committed an offence when administering herbal remedies if they 'profess[ed] or pretend[ed] to their patients that they had supernatural powers'.<sup>112</sup> As we have set out already, tohunga rongoā have always regarded the spiritual aspect of healing as altogether the most important component of a patient's treatment. We therefore think it highly unlikely that a tohunga at the turn of the nineteenth century would have professed no supernatural powers when treating the sick. Puna's conviction because she refused to disown such powers is evidence enough of that.

The trouble is that the Act lumped in those who could be said to have 'misled' Māori by 'professing' supernatural powers with those who 'attempted to mislead' Māori by 'pretending' to have such powers. It made no distinction between them, and thus effectively equated traditional tohunga with opportunist quacks. And, by doing so, it effectively banned Māori healing in general – including activities that were accepted by Māori communities at the time, and are accepted today, as standard rongoā practice.

Ngata was well aware of the distinction between traditional tohunga and quacks, and between those practices that were harmful and those that had something valuable to offer. His support for the Bill was tempered by this understanding, which ran considerably deeper than that of many of his fellows. He maintained that:

All tohungas are not bad. There are tohunga who supply a real want. They are no worse than the herbalists you have. There is a large and unexplored field in the flora of New Zealand if only the medical men would devote their attention to it. Real remedies for certain complaints natural to the human being are to be found in our own flora.<sup>113</sup>

Ngata would not have thought there were tohunga who used only herbs. Rather, this was doubtless his way of suggesting to Pākehā members of Parliament that



The Quackery Prevention Act 1908 was aimed at preventing medical harm being done by tricksters and charlatans. Such legislation could have covered the activities of fraudulent tohunga.

their blanket condemnation of the tohunga was entirely misplaced.

(c) THE ACT WAS NOT NEEDED TO DEAL WITH 'QUACKERY'

If quackery was the problem the Tohunga Suppression Act was intended to address, the Government could have turned to the criminal law for the answer. The Quackery Prevention Act 1908 could have been worded in such a way as to capture the deceitful practices of some 'tohunga'. This point was made under cross-examination by Dr Williams.<sup>114</sup> Indeed, Dow notes that Dr James Mason, Chief Health Officer of the Department of Public Health, had in 1904 advocated a single Act to prohibit the practices of quacks and tohunga.<sup>115</sup> The member for Northern Maori, Hone Heke Ngapua, said in the debate on the Tohunga Suppression Bill that its principal flaw was the absence of any suppression of the 'practices as are exercised by the pakeha tohungas, who manage to kill their patients in a very similar fashion'.<sup>116</sup> Even Pomare stressed the equal evil of 'Pakeha quackery', and advocated the simultaneous prohibition of 'all quacks, both Maori and Pakeha'.<sup>117</sup>

Section 16 of the Maori Councils Act 1900 also allowed for the punishment of those who practised 'upon the

superstition or credulity of any Maori in connection with the treatment of any disease'. There are, however, important distinctions between this provision and the 1907 legislation. For a start, the 1900 Act used more moderate terms and focused ostensibly on those who took advantage of Māori, rather than those who simply professed supernatural powers. But, more importantly, it left the enforcement up to Māori themselves, as represented by the councils. The management of a cultural institution is inherently best left in the hands of the experts in that culture, as the Crown itself has recognised today with its contemporary rongoā policy (as we shall see).

In summary, we conclude that the Tohunga Suppression Act was not justified because it was an inadequate response to the prevailing Māori health crisis. It failed to distinguish between tohunga whose activities were harmful and those who were not. And it was not needed to deal with 'quackery' – other legislative options were already available, or could have been created.

Rather than being a genuine attempt to deal with the problems affecting Māori at the time, the Act was an expression of an underlying mindset that was fundamentally hostile to mātauranga Māori (notwithstanding the support for the legislation by the Māori reformers). The Act's very title sent an aggressive and provocative message about the Government's view of Māori beliefs. Far from tackling charlatans or dangerous practices, the legislation imposed an effective ban on traditional Māori healing overall. Thus, in our view, the Act was not only unjustified but also racist, in that it defined a core component of Māori culture as wrong and in need of 'suppression'.

Moreover, in removing the power of the Maori Councils to regulate the activities of tohunga, the Crown was in breach of the Treaty principles of tino rangatiratanga and partnership, and in outlawing those activities, it was in breach of its duty of active protection. Given the paucity of medical care made available to Māori communities at this time, it was also in breach of the principle of equity.

### **(2) What motivated the Act?**

Because we have concluded that the Act was unjustified, we need not dwell on the intentions behind it. None of

the possible motivations – genuine health concerns, fears about the threat presented by Rua – is a valid excuse.

But we do believe there is much of value in Stephens's work, which looks beyond the standard interpretations and interrogates the meaning of seemingly contradictory events. The underlying motivations of the Māori members of Parliament, and their Pākehā counterparts' discomfort with the autonomy of Māori institutions, are valuable new insights to bring to the debate.

We agree with Stephens that the Act was a rhetorical gesture, or as she calls it a 'palliative symbol'.<sup>118</sup> It was a declaration by Parliament rather than a measure that would be regularly deployed in kāinga. It failed to tackle Rua or improve Māori health standards, but symbols can nevertheless be very powerful indeed.

This leads us to the final key issue, which is perhaps the most relevant, given our contemporary focus: the impact of the Act on traditional Māori healing.

### **(3) What was the Act's impact on traditional Māori healing?**

The orthodox Māori view is that the Act banned traditional healing altogether in practice as well as in theory. Several claimant counsel expressed this view, and it is one endorsed by commentators such as Professor Durie, Professor Mead, and Pihama, who also argue that the ban was hugely damaging to the practice of Māori culture.

However, most of the scholars whose work we have reviewed suggest that the Act had a more limited impact – and, in fact, a different agenda. There is in any case little evidence of the targeting of genuine healers whose practices were not dangerous. While Dr Williams claimed in his report that the Act was used against 'local healers and herbalists' rather than the prophetic leaders it had been designed to tackle,<sup>119</sup> he conceded under cross-examination that the use of herbal remedies by those convicted was only an assumption on his part.<sup>120</sup> Stephens, for the reasons we have set out already, finds that the Act 'was not aimed at the use of traditional Māori healing practices per se'.<sup>121</sup>

Despite records of sporadic investigations under the Act in the decades after its introduction, the balance of evidence suggests that the Act had become obsolete

by the time it was repealed. In fact, the evidence of the claimants themselves indicates that the Act failed to significantly deter tohunga from operating and Māori from seeking traditional methods of healing. Piripi Aspinall and Hunaara Tangaere II, of Ngāti Porou, for example, listed a number of highly skilled tohunga who remained active during the period of the Act's operation. Apera Clark of Ngāti Kahungunu also spoke of his grandfather, who practised as a healer before the Act was repealed.<sup>122</sup> Under cross-examination at this inquiry, Professor Durie too said that, in his view, by the late 1950s the Act was no longer a strong deterrent and Māori healers were practising openly.<sup>123</sup>

That does not mean, of course, that the Act had no impact. In the 1990s, Mr Clark and Denis Lihou said they would not use 'tohunga' as a term for present-day traditional healers because of its negative association with the Tohunga Suppression Act.<sup>124</sup> Various other claimant witnesses also spoke of what they felt had been the highly negative impact of the legislation. Himiona Munroe of Ngāti Wai said that the Act led to many traditional healers giving up or becoming 'closet tohunga', with the movement going 'underground'. He said his tohunga uncle Te Ngaronoa Mahanga put on disguises to treat the sick, and was seen as a 'crackpot' even by members of his own whānau. Dr Bruce Gregory of Te Rarawa, and a former member of Parliament, said in 1998 that Māori had still not recovered from the effects of the Act to that day. And Mere Whaanga of Ngāti Kahungunu spoke of her mother's shame at being raised by her grandfather, a healer, who had the reputation of an 'evil witchdoctor'.<sup>125</sup>

Perhaps the apparent contradiction in the evidence is exemplified by Charlie King for Ngāti Kahungunu, who said that the Tohunga Suppression Act was 'directly responsible in not encouraging our older people with rongoa knowledge to pass it down to the following generations'. At the same time, however, he said that his parents had disregarded the Act 'and carried on with traditional medicines and other healings such as the use of waters'.<sup>126</sup>

Dr Williams's argument that the Act deterred the passing on of traditional knowledge rests in part on what he referred to as the 'sociology of law'. This field of study, he explains, allows that behaviour will be modified by law

even where that law is not enforced.<sup>127</sup> Voyce, by contrast, writes that 'there is a lack of evidence that law changes the society it seeks to influence'.<sup>128</sup> Again, we conclude that the Act largely failed to alter Māori behaviour. At the same time, however, we have no doubt that the Act stigmatised Māori traditional healing – although this stigma already existed before the Act's passage and would certainly have persisted irrespective of it. Thus, to the extent that rongoā practice went underground, it is likely to have been as much because of sheer intolerance from Pākehā and Māori reformers as from fear of the long arm of the law. As Stephens and Voyce suggest, the potential to be accused by a Māori rival with ulterior motives was doubtless also a significant factor.

The question then is to what extent the Act's stigmatising of mātauranga Māori damaged traditional healing. This is inherently difficult to quantify. We know that tohunga numbers declined as the twentieth century progressed, and that Māori knowledge of rongoā diminished – even though a desire to access such healing methods remained strong at the time of the Act's repeal, and appears to have picked up in recent years. But we suspect that most of the causes of the decline in recourse to and knowledge of traditional healing lie beyond the Act itself.

One important factor identified by claimants was the end of the traditional lifestyle of Māori rural communities. This was emphasised by various Ngāti Koata witnesses, for example, who said that rongoā had clearly provided a community health system on Rangitoto ki te Tonga (D'Urville Island) in the inter-war years. However, Benjamin Hippolite told us the use of rongoā had declined as people moved to the cities where it was not accessible. Puhanga Tupaea said, 'Our lifestyle has been dismantled, and so our use of rongoa has somewhat diminished'. Priscilla Paul said that knowledge of rongoā had been suppressed by Māori themselves because of the 'pressures of the urban Pākehā world'. She also said that knowledge of aspects of rongoā had been lost as people's access to the bush declined. Hori Elkington stressed the loss of te reo Māori as an important factor, since the language was key to the transmission of the knowledge associated with rongoā. Huia Elkington also said that Māori suffered mental health problems through the lack of easy access



Aotea Square, Auckland, 1984. Māori urbanisation is as likely a reason for the decline in rongoā knowledge as any direct impact from the Tohunga Suppression Act.

to the bush and its healing foods and plants.<sup>129</sup> What is notable about all these witnesses' briefs of evidence is they make no mention of the Tohunga Suppression Act.

Mr McGowan also emphasised the separation of so many Māori from their traditional rural communities as a key factor in the decline in use and knowledge of rongoā. As he asked in his 2000 thesis:

How can knowledge of something like *rongoa Maori* survive when the people of the day no longer live in the physical setting in which it developed? Can an urbanised people, no less capable than their *tupuna* but living in entirely different circumstances, retain a body of knowledge that requires an

intimate knowledge of the natural environment, an environment that is quite foreign to them?<sup>130</sup>

For Mr McGowan, the loss of traditional healers has occurred largely 'because the circumstances of the modern lifestyle do not facilitate the persistence of an environment in which such knowledge can be readily passed on to succeeding generations.'<sup>131</sup>

Today, at an official level, a more sympathetic climate exists towards Māori traditional healing than perhaps at any other time in New Zealand's history. Growing acceptance of the health benefits of rongoā, particularly since the 1980s, has both stemmed from and influenced its

comeback. The strength of Māori commitment to rongoā, and the resilience of mātauranga Māori, indicate that the Tohunga Suppression Act ultimately had a limited impact in terms of influencing Māori perceptions of traditional healing. This is endorsed by researcher Sam Rolleston's comment in a 1989 report for the Department of Health that: 'In many of the more isolated pockets of Maori settlement especially, tohunga have always received training and practised their skills. Maori communities have been aware of how to contact tohunga and utilise their knowledge despite the attitudes of officialdom.'<sup>132</sup>

This enduring belief in Māori traditional healing means that its place is now assured within the public health system.

### 7.2.10 Conclusion

We have described how, at the turn of the nineteenth century, Māori society was in the midst of an ongoing health crisis caused by poverty, poor sanitation, and a lack of immunity to many virulent diseases. Few Māori had access to Western-trained doctors, and tohunga were powerless to counteract the effects of sickness. Some tohunga practices, such as immersing influenza sufferers in water, in fact caused further harm.

Problems such as these were not unusual in cultures in transition from traditional methods to modern understandings of disease. In an attempt to address these problems in a way that delegated control to Māori communities, the Maori Councils were empowered in 1900 to regulate the proceedings of tohunga. They were, however, insufficiently resourced to perform this function.

The emergence of the prophet Rua in 1906 provided a convenient tipping point for those who were arguing for more stringent measures to control tohunga.

We acknowledge that the exact reasons for the introduction of the Tohunga Suppression Act in 1907 are disputed, but conclude that the Act was fundamentally unjustified because it was an inappropriate response to the late nineteenth-century Māori health crisis. Investing in adequate and culturally attuned health services for Māori would have been far more effective. The Act failed to distinguish between tohunga whose activities were harmful and those whose activities were not. Nor was the Act needed to deal with 'quackery'. Other options were

(or soon became) available through the criminal law, the Maori Councils Act regime, and the Quackery Prevention Act 1908. There was simply no need for suppression.

The Act was also racist because it effectively banned all tohunga activities (not only those that were harmful) and defined a core component of Māori culture as wrong and in need of 'suppression'. We have concluded, therefore, that the Crown's actions in failing to provide Māori with adequate health care, removing the power of the Maori Councils to regulate the activities of tohunga, and banning traditional Māori healing practices breached the Treaty principles of tino rangatiratanga, partnership, and equity and the duty of active protection.

In assessing the impact of the Tohunga Suppression Act, we concluded that, while the Act had some prejudicial impact on tohunga activities, it did not – and could not – get rid of the practice. It was primarily a symbol of official rejection of the tohunga and mātauranga Māori. Factors which had more impact on the demise of the tohunga and the loss of knowledge about rongoā included the clearing of the bush and the movement of people from rural communities to town and cities. The actual attack on rongoā's status was altogether more practical and prosaic.

## 7.3 CONTEMPORARY GOVERNMENT SUPPORT FOR RONGOĀ MĀORI

### 7.3.1 Introduction

The story of the Tohunga Suppression Act and its impact provides the context for examining contemporary Government support for rongoā Māori. In this section we will examine current law and policy, and whether it provides sufficient support for rongoā Māori – or whether the kind of narrow-minded scepticism that led to the suppression legislation still acts against its acceptance.

Despite the legislation and its undoubted contribution to the stigmatising of customary Māori healing, rongoā has survived. In fact, it survived for eight or more decades during which its practice was effectively banned or disregarded by the State.

Now, tohunga are organising themselves into collectives and challenging for more resources. As it was at the turn of the twentieth century, the Government has once again been forced to confront the practice of tohunga

rongoā. Yet there are other pressures too. The State also faces a crisis in Māori health – albeit this time one caused by ‘lifestyle’ rather than infectious diseases.

We begin by setting contemporary rongoā policy issues within the broader context of the Wai 262 claim. We then trace the initial growth of Government support for rongoā in the 1990s, leading to the development of agreed standards for healing and the signing of several rongoā contracts in 1999. This formal embrace by the State of traditional Māori healing is the key issue for the rongoā aspect of Wai 262. The Crown maintains that it shows a discharge of its Treaty-based responsibilities; the claimants say that the State’s support has not gone far enough. We examine these arguments from several angles, looking in turn at the expansion of contracts and funding; the decision to exclude core aspects of rongoā from official funding; the Crown’s overall strategy with respect to rongoā (including the development of a new national rongoā body); and issues around regulation and commercialisation.

We conclude by describing the current state of Māori health, analysing the Crown’s performance, and issuing our recommendations.

### 7.3.2 Early Government recognition

Our narrative of the development of modern Government rongoā policy begins in the 1980s. In 1982, Dr Gregory and other Labour members of Parliament failed in their attempt to introduce a Bill that documented Māori traditional remedies and protected them from exploitation. The then Minister of Māori Affairs, Ben Couch, told the House that ‘A law is not needed for the documentation of traditional Maori medicines.’ He questioned why such protection was sought when New Zealand was ‘home to many races, all of which have their own racial remedies.’<sup>133</sup>

But as the years wore on, Māori perspectives on health, including the value of rongoā, began to emerge from the shadows and acquire greater official acceptance. Rolleston’s 1989 report for the Department of Health mooted the tohunga register that we noted earlier (see sections 7.2.7 and 7.2.9). While most tohunga Rolleston spoke with opposed the idea of their names going onto such a register, he did note a ‘resurgence of interest in traditional forms of knowledge and the widening acceptance that the tohunga has much to offer in modern health care.’<sup>134</sup>

In 1992, Ngā Ringa Whakahaere o te Iwi Māori (Ngā Ringa Whakahaere) was established as a body to represent Māori traditional healers.<sup>135</sup> Professor Durie has depicted this as part of a conscious but difficult decision by traditional healers to ‘be recognized as an integral part of the New Zealand health service and to adopt a more public profile.’<sup>136</sup> The difficulty arose because of what Professor Durie describes as the ‘risk that the goals and methods could be misinterpreted or that official requirements would shape healing practices according to Western traditions.’ The move was inevitable, however, for, as Professor Durie explains, Māori themselves were ‘pushing for easier access to tohunga and for an open approach to healing.’<sup>137</sup> Mr Clark, who was involved in establishing Ngā Ringa Whakahaere, explained to the Tribunal in 2000 that it was set up:

- ▶ To uphold, promote, protect and sustain the mana of Maori traditional healing
- ▶ To develop standards for the correct and safe practice of Maori traditional healing
- ▶ To develop standards of excellence for the training of those involved in practising traditional Maori healing
- ▶ To develop policies such as monitoring, accreditation and evaluation that will enhance the practice of Maori traditional healing.<sup>138</sup>

By 1995, the Crown probably had no option but to support Māori cultural practices in health. Having done so practically everywhere else – in language, education, conservation, environmental regulation, the arts – it could not reasonably have neglected to do so – particularly given the growing Māori concern about health. Health disparities between Māori and non-Māori were continuing to worsen, in a trend that had begun in 1980 (and which followed three post-war decades of improvement).<sup>139</sup> But embracing the Māori philosophical approach in health may have been the hardest step the Crown took, since it arguably carried the biggest political risk. A lingering stigma was still attached to the practices of tohunga. The healing powers of native flora were relatively well known, but there had been little change in the general Pākehā understanding of rongoā in the years since the lifting of suppression.



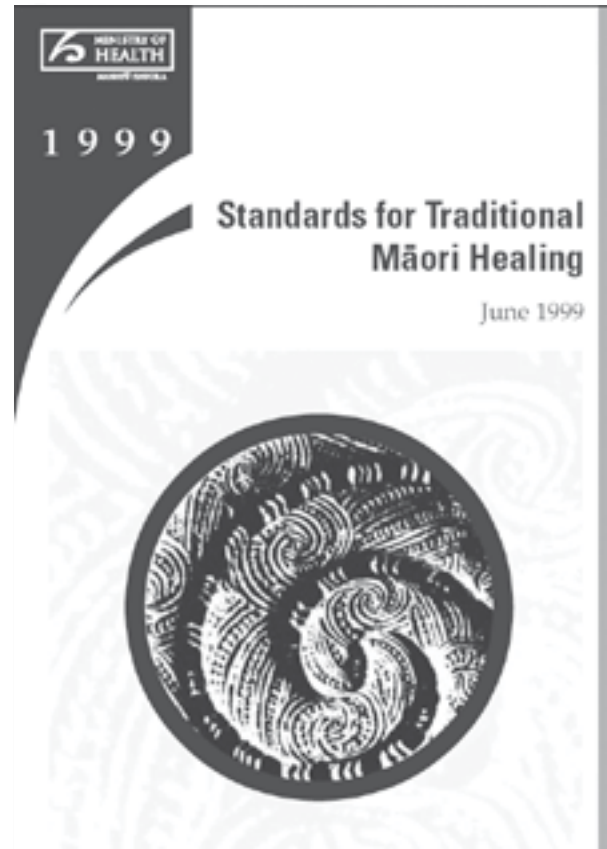
It was against this background that the first major breakthrough in rongoā funding occurred in 1995, when the National Advisory Committee on Core Health and Disability Services recommended to the Minister of Health that:

Regional Health Authorities purchase aspects of Māori traditional healing, to be provided in conjunction with other primary health services, where there is reason to believe this will improve access to effective services for Māori and lead to better health outcomes.<sup>140</sup>

That same year the Central Regional Health Authority contracted Mr Clark and Mr Lihou's Napier clinic, Te Whare Pikiora o te Rangimarie, as a pilot for engaging rongoā Māori healing services. In 1996, Professor Durie was engaged by the Ministry of Health to write a report that would 'assist in the development of policies relating to the purchase and provision of traditional health services'. He proposed that certain criteria needed to be met before traditional healing services were purchased – including evidence of a traditional basis to the healing, adequate information about the healing service, the healers' willingness to accept and promote other forms of treatment, and high levels of accountability. One criterion in particular was the establishment of ethical guidelines and minimum safety standards, preferably in conjunction with a 'recognised and acceptable body' with 'standing in the eyes of healers as well as their clients'. Professor Durie concluded that: 'The purchase of traditional healing will inevitably require some formalisation of healing activities in order to develop acceptable standards, satisfactory arrangements for monitoring and appropriate indicators.'<sup>141</sup>

### 7.3.3 The development of standards and expansion of contracts

As an upshot of Professor Durie's proposals, in June 1999 the Ministry of Health published *Standards for Traditional Māori Healing*, which it had developed with the support of Ngā Ringa Whakahaere and the Health Funding Authority.<sup>142</sup> The *Standards* addressed matters such as record-keeping, patient rights, referral to other health services, training and supervision of staff, and the



*Standards for Traditional Māori Healing*, June 1999. This Ministry of Health publication aimed to set standards for contemporary rongoā practice.

hygienic and tikanga-based gathering and preparation of herbal remedies (a footnote explained what tikanga entailed). The *Standards* also explained that rongoā was exempt from the provisions of the Medicines Act 1981 as long as it contained no scheduled medicine; was made only from plant material and water, ethyl alcohol, or another inert substance; and no claims to a therapeutic effect were made about it.<sup>143</sup>

Dr Williams was critical of the *Standards* in his research report for this inquiry, remarking that 'there must be a question about the appropriateness of a Ministry, whose predecessors campaigned so vigorously for so many

decades to suppress tohunga, now imposing standards on tohunga including a definition of what is encompassed by tikanga. . . . [A]fter decades of suppressing tohunga earlier in the century, the Ministry of Health now wishes to co-opt the cultural knowledge of tohunga to work within the regulatory structures of the state.<sup>144</sup> Writing in 2001, however, Professor Durie essentially depicted the *Standards* as a positive step towards the goal of traditional healing being able to be practised with ‘confidence and reliance.’<sup>145</sup> Rhys Jones, in his 2000 thesis on rongoā, likewise said that the publication of the *Standards* ‘further legitimis[ed] the status of traditional Māori healing within the health system,’<sup>146</sup> a sentiment echoed by Mr McGowan in his 2002 evidence.<sup>147</sup> Whichever way this collaboration between the Ministry of Health and Ngā Ringa Whakahaere is regarded, it clearly led to the expansion of publicly funded rongoā services. In 2000, the Health Funding Authority contracted a further nine rongoā services.

The Authority was then disestablished under the provisions of the New Zealand Public Health and Disability Act 2000. This reform requires brief explanation since it is directly relevant to the way rongoā continues to be funded. In sum, the 24 Hospital and Health Services (the health service providers) and the Authority (the health service funding arm) were replaced by a system of 21 District Health Boards (DHBS) receiving centralised funding through the Ministry of Health. The establishment of the DHBS ended the funder/provider split that had existed since 1993. Charged more specifically with reducing inequalities in their populations, the DHBS represent the desire of the Government both to shift entirely away from a competitive health funding system and to encourage more community input into decision-making. Each DHB is governed by an 11-member committee, seven of whom are elected. Each must have at least two Māori representatives.<sup>148</sup>

But whereas most personal health service contracts devolved to DHBS, rongoā contracts were transferred from the Health Funding Authority straight to the Ministry of Health. This is because, according to its Chief Adviser Māori Health, Wi Keelan, the Ministry recognised that ‘these services were still in a developmental stage and required some stability and protection in the face of major sector upheaval.’ Feedback from rongoā

service contractors in 2004 indicated ‘stakeholder support’ for the contracts remaining with the Ministry.<sup>149</sup> But there was clearly more to the arrangement than that. In 2007, acting Deputy Director-General of Māori Health, Theresa Wall, agreed under cross-examination with Ngāti Kahungunu’s proposition that ‘rongoā practitioners find it easier to deal with the Ministry and . . . don’t really trust the DHBS.’<sup>150</sup>

Aside from operational funding, rongoā service providers can also secure Ministry funding to develop their infrastructure and capacity via the Māori Provider Development Scheme (MPDS), established in 1997. We understand that the size of the MPDS fund is around \$10 million annually. Neither Mr Keelan nor Ms Wall could tell us exactly what proportion of the fund had been available for rongoā service providers but Ms Wall did say that ‘they all get it every year.’<sup>151</sup> Information provided after the hearing of the Crown’s witnesses by the Ministry shows that Ngā Ringa Whakahaere received \$475,500 in MPDS funding from January 2002 to June 2007,<sup>152</sup> but no information was provided about the various contracted rongoā providers who accessed MPDS funds independently of Ngā Ringa Whakahaere. The Ministry also provides funding for a rongoā course at Te Wānanga o Raukawa.<sup>153</sup>

In terms of the rongoā contracts themselves, from 2001 to 2005/06, the Ministry managed 12 contracts covering 18 providers. In 2006, two new contracts encompassing four new providers were added. The sum expended on these contracts grew from \$1.2 million in 2002/03 to \$1.9 million in 2006/07.<sup>154</sup> We understand that the figure today may be some \$1.9 million spread across 16 contracts. No new contracts were entered into between 2001 and 2005 because of a lack of funds and the need for the Ministry to develop a rongoā plan<sup>155</sup> – a subject we return to below. As well, by 2007, two DHBS (Wairarapa and Bay of Plenty) were themselves contracting rongoā services,<sup>156</sup> and a number of other DHBS were indirectly funding rongoā services though their contracts with primary healthcare organisations (PHOs) employing traditional healers.<sup>157</sup> However, according to Ms Wall, the development of rongoā Māori was not currently a priority for DHBS.<sup>158</sup>

As far as we can see, the Ministry does not wish to allocate a lot of money to personal health services, the funding of which it sees as a core responsibility of the DHBS.

However, as Ms Wall conceded, the Ministry has limited ability to influence DHBS to purchase rongoā services, and even less ability to influence PHOs. There is thus a kind of holding arrangement currently in place, under which the Ministry has retained the contracting of rongoā services ‘in order to build their capacity and capability so that when we devolve them to DHBS they are in a much better position to get additional services.’<sup>159</sup>

#### 7.3.4 Funding of rākau rongoā and the problem of official definitions

A somewhat contradictory funding arrangement is in place for the contracted rongoā services. Until 2004, rākau rongoā or ingested herbal remedies were contracted for and funded by the Ministry, but they have since been specifically excluded – although funding levels have remained unchanged.<sup>160</sup> The reason for the exclusion, according to Mr Keelan of the Ministry, is that ‘the Ministry cannot monitor safety or quality control or ensure other protection mechanisms for consumers and providers.’<sup>161</sup>

Susan Martindale of the New Zealand Medicines and Medical Devices Safety Authority (Medsafe) suggested the change was triggered by the practices of healers. As their access to native plants was becoming more difficult, they were gathering bigger quantities of plant material while in the bush and making bigger batches of rākau rongoā. To store these larger quantities, they were using plastic milk bottles and then finding the concoctions were putrefying. While she was not certain, she thought this was why the Ministry had pushed for a suspension of direct funding of rākau rongoā.<sup>162</sup>

Mr Keelan said that rongoā service providers were consulted on and supported this change at a hui in Rotorua in June 2004. He explained that while the Ministry does not fund rākau rongoā, healers remain free to manufacture and supply it – although the Ministry recommended that this be done in accordance with the *Standards*<sup>163</sup> (in fact contracted providers are required to comply with the *Standards*).

Counsel for Ngāti Kahungunu asked Mr Keelan if it was not a ‘slightly unusual situation’ for rongoā providers to receive no funding for preparing an intrinsic component of rongoā but to be required to do so in accordance

with the *Standards* set by the Ministry. Counsel also suggested that the non-funding of rākau rongoā ‘fundamentally [broke] rongoā apart’ given the holistic nature of the healing process.<sup>164</sup> Mr Keelan acknowledged the anomaly, but said that ‘It was the hui in Rotorua that came up with the idea that until safety measures were placed around the production . . . of herbal remedies for ingestion . . . it ought not to be funded by the public purse.’ Ultimately, he said, the Ministry wanted ‘to try and sort that particular issue out’ through the rongoā sector forming a national body and regional networks that could collectively resolve it. ‘Until some standards and some kind of arrangement is made by the national body,’ he said, rākau rongoā would remain unfunded.<sup>165</sup>

We examined the minutes of the 28–29 June 2004 hui in Rotorua. They suggest that it was in fact Ministry officials who put forward the proposed change to service specifications to exclude rākau rongoā from the contractual outputs purchased by the Ministry. The ‘feedback highlights’ about this and other proposals do not record any comment by hui members.<sup>166</sup> Regardless of the order of events, however, we can assume that the tohunga rongoā agreed with the notion that quality control provisions needed to be implemented before ingested rākau rongoā was paid for. They may not have been overly concerned, however, for the funding levels themselves did not change. We return to the issue of the development of a national body below.

But it is not just the ingested herbal remedies aspect of rongoā that is unfunded. Certainly, the contract service specifications specifically exclude rākau rongoā, but they are silent on what else rongoā entails. The *Standards* and the rongoā contract service specifications emphasise record-keeping, referrals, patient rights, and the hygienic preparation and storage of remedies – but nowhere does the Ministry attempt to define rongoā, nor what we have described as the core aspect of traditional Māori healing, the taha wairua.

Of course this is understandable. One can well imagine how healers might resist any attempt by officials to articulate ‘standards’ of spiritual care, and how officials might hesitate to do so. Nevertheless, as Mr McGowan points out, by avoiding such definitions, the *Standards* arguably fail to advance understanding of the very essence of

7.3.5

rongoā Māori and create ‘the danger of seeing traditional Maori medicine in terms of a list of criteria drawn up to provide a means of assessment for funding purposes.’<sup>167</sup>

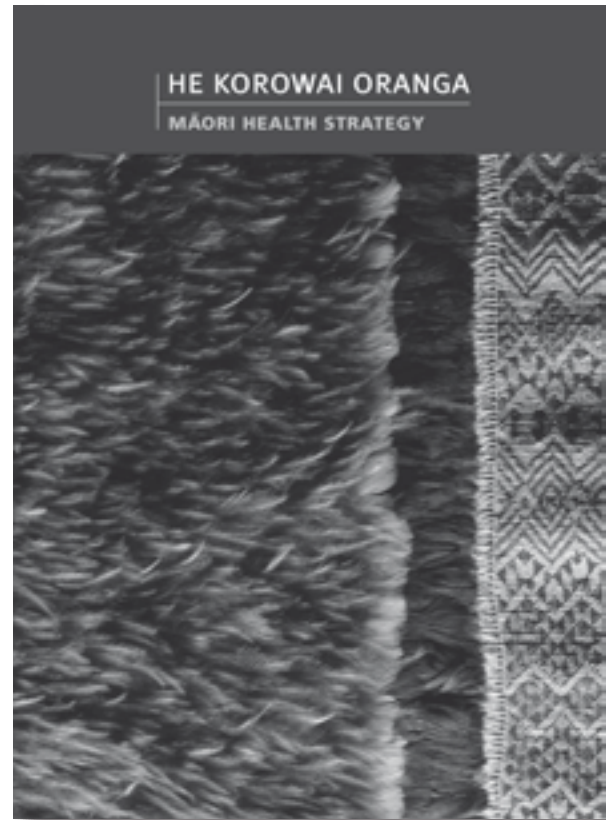
Anthropologist Tony O’Connor likewise comments on the exclusion of most spiritual issues (other than karakia, for example) from statements by the Ministry of Health on what aspects of rongoā it is funding. As one Māori Health Directorate official told O’Connor, healers are not expected to report on the ‘fringe stuff’ they do (such as the eradication of kēhua or ghosts). In other words, according to O’Connor, while the Crown does not suppress such forms of rongoā it does not officially resource healers to perform them either. This potentially gives the concepts and practices of more ‘traditional’ tohunga less legitimacy than the aspects of rongoā that it does fund.<sup>168</sup> O’Connor argues that the Crown is effectively placing bureaucratic limits around what aspects of rongoā knowledge and practice it will protect, and therefore which aspects may prosper. We have no doubt that political pressure and public opinion play a significant role in influencing the Ministry’s decisions.<sup>169</sup>

### 7.3.5 Ministry strategies and plans

The Ministry of Health’s overall aim for Māori health is expressed in its Māori health strategy of 2002, *He Korowai Oranga*, as ‘whānau ora’, which it defines as ‘Māori families supported to achieve their maximum health and well-being’. To achieve this it expresses its support for ‘Māori-led initiatives to improve the health of whānau, hapū and iwi’. A specific objective in the strategy is ‘To recognise and value Māori models of health and traditional healing’, which is explained as follows:

Māori want to be able to express themselves as Māori in Aotearoa. This pathway<sup>170</sup> supports whānau (including tohunga, kaumātua, Māori healers, health specialists and researchers) to develop services that reflect Māori cultural values. Therefore, extending opportunities for health services to practise Māori views of health and healing (while recognising the diversity of whānau) will be fostered in order to progress whānau ora outcomes.

Using models that operate within and through te ao Māori can be a very effective means of reaching Māori whānau. For



The 2002 Māori health strategy document, *He Korowai Oranga*. An objective of the strategy is to recognise and value traditional Māori healing.

example, health promotion initiatives that use an approach based in the Māori world have achieved effective results.

The Ministry of Health will support the health sector to ensure Māori cultural values are included in the planning, funding and delivery of health services.

In particular, this pathway recognises that Māori traditional healing is based in indigenous knowledge – it encompasses te ao Māori and a Māori view of being. Māori traditional healing practices include mirimiri (massage), rongoa (herbal remedies) and acknowledging te wairua (spiritual care). For Māori the unobservable (spiritual, mental and

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emotional) elements are as relevant as the observable or physical elements.<sup>171</sup>

Pathway two of the strategy relates to Māori participation in the health and disability sector. It explains that DHBs have ‘primary responsibility’ for improving Māori health. As such they are ‘expected to work in partnership with iwi and Māori communities to ensure their decision-making effectively leads to whānau ora improvement and supports the achievement of Māori health aspirations.’<sup>172</sup>

In November 2002, the Ministry of Health published *Whakatātaka: Māori Health Action Plan 2002–2005*, which set out how the goals of *He Korowai Oranga* would be attained. This included the ‘action’ that ‘The Ministry of Health will work with Māori traditional healing practitioners to support Māori traditional healing practices within the health and disability sector’. A project plan was to be developed by June 2003.<sup>173</sup> In 2006, another action plan was published (*Whakatātaka Tuarua*), setting out what needed to be done to achieve the goals of *He Korowai Oranga* from 2006–2011. It set a new milestone for meeting the same traditional healing ‘action’: the implementation and dissemination over the following year of the newly released rongoā development plan, *Taonga Tuku Iho*.<sup>174</sup>

*Taonga Tuku Iho* was published in June 2006. As noted above (in section 7.3.3), the Ministry entered no new rongoā contracts during the years 2001 to 2005, partly because it had not devised a comprehensive plan for the development of rongoā Māori services. The publication of *Taonga Tuku Iho* now allowed for the contracting of new providers. The plan has four goals:

- ▶ Improving the quality of rongoā services
- ▶ Creating leadership to strengthen safe practice through networking and quality assurance.
- ▶ Increasing the capacity and capability of rongoā services
- ▶ A work plan for research and evaluation activities.<sup>175</sup>

The plan set out the intention to establish a rongoā advisory group by December 2006, finalise the structure of a national rongoā body by June 2007 and its terms of reference by December 2007, and review the 1999

*Standards* by June 2008. It also outlined other activities such as supporting the annual rongoā Māori national hui and collating data on the rongoā workforce.<sup>176</sup>

All these Ministry strategies and plans were cited by the Crown as ways in which it supports the provision and development of rongoā services. Although the claimants’ comments were limited to *Taonga Tuku Iho*, they clearly felt that this support was insufficient. In our analysis and conclusions in sections 7.3.10 and 7.3.11, we return to the issue of whether the Crown has acted out the good intentions expressed in these documents.

### 7.3.6 The development of a national body

The development of a representative national body for tohunga rongoā is a key issue in this narrative. The Ministry of Health has clearly set a lot of store by the development of such a body, which it said in *Taonga Tuku Iho* could ‘support quality systems, establish quality assurance and foster regional and local networks.’<sup>177</sup> But some are wary of what they see as a Crown initiative, or argue that a Māori-driven representative body (Ngā Ringa Whakahaere) already exists. The new national body thus became an important focus for submissions, both during and after the hearings.

As noted above, when Ngā Ringa Whakahaere was established in 1992 it was intended to serve as a national body for traditional Māori healers. There had in fact been previous attempts to set up a representative body: according to Mr Lihou, Koro Rapana Hemi had founded a national network of healing centres in 1982 called Te Puna o te Ora o Aotearoa, although by the time Ngā Ringa Whakahaere was set up it had presumably ceased to exist.<sup>178</sup> Mr Clark also referred to another national body of the 1980s called Te Whakaahu Trust.<sup>179</sup>

The importance and potential impact of a recognised and authoritative national body has been well canvassed. In his 1996 paper on policy for purchasing traditional healing services, Professor Durie wrote that:

Before policy relating to traditional healing in New Zealand’s health system can be formulated, there needs to be discussion with a body which is representative and has authority to make decisions. . . . progress will be retarded if there is no

body which is able to act on behalf of the particular healing fraternity. In its absence, decisions are likely to be taken by an external agency, such as the Ministry of Health, thereby undermining both autonomy and cultural significance.<sup>180</sup>

Professor Durie clearly felt at the time that Ngā Ringa Whakahaere could be the body in question, and the Ministry's collaboration with it on the *Standards* indicated that the Crown felt so too. Indeed, when the *Standards* were published in 1999, the Deputy Director-General Māori Health, Ria Earp, referred in her foreword to Ngā Ringa Whakahaere as 'the' national body of traditional Māori healers.<sup>181</sup>

By November 2006, however, when Mr Keelan wrote his brief of evidence, he said that 'although Ngā Ringa Whakahaere receive funding as a national Rongoā body, Ngā Ringa Whakahaere has not been mandated as *the* national body representative of all traditional healers in New Zealand' (emphasis in original). He added that the Ministry felt there would be no conflict between Ngā Ringa Whakahaere and a new national body because of 'their separate and specific roles.'<sup>182</sup> *Taonga Tuku Iho* explained that the new national body would address:

- › competency and credentialling
- › national information data set
- › complaints and serious incidents
- › monitoring and overview of quality development and accreditation
- › national advocacy and lobbying
- › national workforce development and education programmes
- › intersectoral relationship building<sup>183</sup>

So it seems that by 2006 the Ministry had changed its tune. At some point it must have decided there was no longer value in backing Ngā Ringa Whakahaere as the de facto national body, and that it was time to consider other options. Just when this was we cannot be sure, because of course the Ministry continued to support Ngā Ringa Whakahaere with MPDS funding. There is a hint, though, that the Ministry may have begun to lose faith soon after the publication of the *Standards*. A 'timeline analysis'

concerning the Ministry's relationship with Ngā Ringa Whakahaere, which was submitted as evidence by the Crown after the close of its hearings, included the comment that: 'Soon after the release of the "standards" NRW failed to function due to internal mismanagement and personality clashes within the system.'<sup>184</sup>

By 2003 Ministry officials were addressing gatherings of rongoā practitioners on the subject of a national body, but not in terms of developing Ngā Ringa Whakahaere's mandate. In June of that year, Mr Keelan spoke to some 60 participants at a Whakatāne hui about the '[v]alue of having a National body that can coordinate the regions and perform certain tasks on behalf of all the groups.'<sup>185</sup> At the June 2004 hui for contracted rongoā providers in Rotorua, the role of Ngā Ringa Whakahaere was discussed, but the hui notes show Mr Keelan felt that 'there still remains the issue of how to establish a national organisation with wider affiliated membership and greater support.'<sup>186</sup> At a hui of rongoā providers in Tauranga in May 2006 (just before the publication of *Taonga Tuku Iho*), there was 'general consensus' among participants on the need to form an advisory group to progress the development of a new national body. Of the seven members of the group, one was to be a representative of Ngā Ringa Whakahaere. Ministry officials readily agreed to support this group<sup>187</sup> and, under its eventual terms of reference (agreed in July 2007), its members were accountable to the Ministry.<sup>188</sup>

All this was, of course, troubling to Ngā Ringa Whakahaere. In his August 2006 evidence, manager Mark Ross said that the organisation represented 40 whare oranga or healing centres throughout the country and that its mission was to be 'the authoritative and principal voice in respect of Māori traditional health and healing'. The moves towards the establishment of a new national body, he said, were an 'undermining of NRW's role and kaupapa [and] would obviously be of serious concern to our network of traditional practitioner[s]'.<sup>189</sup> Under cross-examination he conceded that only six of the 18 whare oranga funded by the Ministry of Health sat under his organisation's umbrella,<sup>190</sup> but he added that Ngā Ringa Whakahaere nevertheless remained the only collective of whare oranga. He felt that the Ministry had



▲► Kaumātua and kuia at the launch of the new national rongoā body, Te Paepae Matua mō te Rongoā, at Hauiti Marae, Tolaga Bay, June 2008.



funded Ngā Ringa Whakahaere ‘just enough to keep its head above water’, but without having ‘any idea where it wants to take it.’<sup>191</sup>

Mr Keelan, on the other hand, told us that by establishing the rongoā advisory group, the Ministry wanted to facilitate ‘traditional healers themselves to determine what a national Rongoā body should look like.’<sup>192</sup> Cross-examined on the subject by counsel for Ngāti Kahungunu, Mr Keelan maintained that the call for a new national body had come from rongoā practitioners themselves at hui the Ministry had attended. Those healers did not consider Ngā Ringa Whakahaere sufficiently representative. Ms Wall explained that the Ministry still wished to be guided by the healers, and to this extent was ‘agnostic as to whether it’s Ngā Ringa Whakahaere who becomes that national body’. Similarly, while Mr Keelan agreed that the Crown often ‘picked winners’ and built up

their capacity – and he seemed even to suggest that the Crown had in fact done this for a time with Ngā Ringa Whakahaere – he was clearly not prepared to endorse Ngā Ringa Whakahaere.<sup>193</sup>

In material provided in March 2008 after hearings had closed, the Crown reported that the advisory group had held a series regional hui in late 2007 and early 2008 to discuss the establishment and specific functions of a new national body. They had confirmed, said Crown counsel, that the national body would be launched in June 2008.<sup>194</sup> This took place at Hauiti Marae in Tolaga Bay on 16 June 2008, with the name of the new national body being Te Paepae Matua mō te Rongoā.<sup>195</sup> The Ministry of Health provided it with \$200,000 in establishment funding and \$100,000 MPDS funding in 2008/09.<sup>196</sup>

We asked Crown counsel in April 2009 for an update on the composition, purpose, and scope of Te Paepae

Matua. Ms Wall described the decision to establish Te Paepae Matua (which she called a ‘collective’ rather than a ‘body’) as one made by the rongoā community themselves. Te Paepae Matua consists of tohunga rongoā, iwi representatives, and administrators drawn from nine regions. The Ministry, Ms Wall said, ‘sits outside the Collective. Its role is one of support. The actual shape and function of the Collective has been led by the rongoā sector.’ However, she said one of its key purposes is to implement *Taonga Tuku Iho*, as well as review the existing national *Standards*.<sup>197</sup>

The claimants’ responses to this update are discussed more fully in section 7.3.9. But we note here that the claimants still expressed support for Ngā Ringa Whakahaere and complained of a lack of funding for rongoā. Some considered they had been overlooked in the process of establishing Te Paepae Matua, others that Te Paepae Matua’s validity remained subject to the outcome of the Wai 262 claim. Others, however, participated in and supported Te Paepae Matua.

### 7.3.7 The Medicines Act 1981 and ANZTPA

We have already mentioned the Medicines Act 1981, which regulates the manufacture, sale and supply of all medicines and related products in New Zealand. A ‘herbal remedy’ is defined in section 2 of the Act as:

a medicine (not being or containing a prescription medicine, or a restricted medicine, or a pharmacy-only medicine) consisting of—

- (a) Any substance produced by subjecting a plant to drying, crushing, or any other similar process; or
- (b) A mixture comprising 2 or more such substances only; or
- (c) A mixture comprising 1 or more such substances with water or ethyl alcohol or any inert substance.

Rongoā is exempt from the provisions of the Act through section 28, which excludes herbal remedies where they are supplied or sold:

- (a) Under a designation that specifies only the plant from which it is made and the process to which the plant has

been subjected during the production of the remedy, and does not apply any other name to the remedy; and

- (b) Without any written recommendation (whether by means of a labelled container or package or a leaflet or in any other way) as to the use of the remedy.

In other words, rongoā is not caught by the provisions of the Medicines Act 1981 where it is supplied in packaging that does no more than state its ingredients and method of manufacture, and where no written claim is made about its healing properties or appropriate dosage.

Counsel for Te Waka Kai Ora queried whether forms of rongoā that are not plant based, such as those using fish oil, are covered by the section 2 definition of herbal remedy. Ms Martindale explained that section 32 of the Act would apply in such circumstances.<sup>198</sup> That section provides that, subject to other provisions, ‘natural therapists’ may manufacture or sell any medicine that is not a restricted, pharmacy-only, or prescription medicine.

In the late 1990s, the Government decided to replace the Medicines Act 1981 by entering into a joint trans-Tasman regulatory regime with the Australian Government. This stemmed in part from what was seen as the unsustainable nature of New Zealand’s current system for regulating therapeutic products. As explained by Medsafe and the Therapeutic Goods Administration of the Australian Department of Health and Ageing, ‘New Zealand does not have sufficient capacity in terms of technical expertise to continue to evaluate the risks and benefits of increasingly complex high risk products (such as medicines of biological origin)’. By joining with Australia it was felt that compliance costs would be reduced, trade would be facilitated, and the two countries would be in a stronger position to ‘meet a wave of innovative therapeutic products which are being driven by emerging technologies and globalisation.’<sup>199</sup>

The two governments entered into the Australia New Zealand Therapeutic Products Authority (ANZTPA) agreement on 10 December 2003. However, it could not be implemented without legislation being passed. In September 2006, when this was about to happen, counsel for Ngāti Kahungunu and Te Waka Kai Ora sought urgent



interim findings from us on the basis that this development was likely to cause their clients significant prejudice. The claimants contended that there had not been adequate consultation with Māori around the agreement and that it would adversely impact on their interests in rongoā. In fact there had only been one consultation hui specifically with Māori – at Rotorua in July 2006, some two and a half years after the Government signed up to the agreement. Even that hui was called with very limited notice, and Ministry of Health witnesses conceded later under cross-examination that consultation with Māori had ‘not been [of] the required standard’.<sup>200</sup>

We issued our first interim report on the ANZTPA regime on 8 September 2006, and another on 3 October 2006, before the scheduled introduction of legislation on 10 October.<sup>201</sup> To summarise what happened, the Crown assured the claimants that the prevailing exemption for rongoā in the Medicines Act would be retained under ANZTPA and that no prejudice would therefore arise out of the passage of the implementation legislation. Crown counsel contended that any issues of concern to the claimants could be resolved in the wording of the rules to give effect to the agreement, and there was ample opportunity for further discussion with Māori on that front. On the basis of these assurances, the Ngāti Kahungunu claimants withdrew their request for urgent interim findings, but the Te Waka Kai Ora claimants did not. Counsel for the latter argued that the Tribunal should make use of this window of reform opportunity to comment generally on the Treaty compliance of the regulation of therapeutic products. He also contended that sharing decision-making with a larger and more powerful partner (Australia) that bore no Treaty obligations to Māori would place a further obstacle in the path of the Crown’s discharge of its Treaty duties in New Zealand.

In conclusion, we considered that it did appear that the Medicines Act exemption on selling rongoā products without claim to therapeutic effect might change under ANZTPA, in that Māori retailing rongoā products as dietary supplements seemed likely to become subject to regulation. While we had no objections to this in itself (even claimant witnesses accepted that effective safety controls were required for the sale and export of rongoā products),

we did consider the claimants had a valid point: nowhere within ANZTPA was there anyone who was either Māori or knowledgeable in rongoā, and who could thus impose rules on practitioners with any authority. As such, we concluded that the level of actual prejudice to the Māori interest from ANZTPA depended on the details of the regime. Given the significance of rongoā to Māori, provision had to be made for Māori participation in decision-making – not just at the level of consultation, but rather at board level or on expert committees. Thus, we saw the formulation of the ANZTPA rules as a positive opportunity for both parties. For the Government it would allow for the introduction of the new regulatory regime; for Māori it would mean the chance to have a significant say in the regulation of rongoā, including its commercial development. We therefore recommended that the Crown embark on a process of consultation with Māori over ANZTPA that entailed genuine and open-minded engagement aimed at finding solutions.

Mr Keelan subsequently advised the Tribunal that the Ministry was sending out a consultation document to claimants and seeking a date to meet them about their ANZTPA-related concerns.<sup>202</sup> Crown counsel later referred, in April 2007, to the ‘current programme of consultation that is being undertaken on the recommendation of this Tribunal’.<sup>203</sup> But as it transpired, the Government found itself short on support in the House when it tried to pass the ANZTPA legislation in 2007. On 16 July 2007, the Minister in charge of the ANZTPA negotiations announced that the Australian Government had been ‘informed of the situation and agrees that suspending negotiations on the joint authority is a sensible course of action’.<sup>204</sup>

That may not be the end of the matter, however, as some form of agreement with Australia on the joint regulation of therapeutic products may yet be established. This is not just because Medsafe is overburdened, and the release of new medicines into New Zealand is a long and expensive process, but also because we are drawn to such arrangements with Australia as a result of both the Closer Economic Relations trade agreement of 1983 and the Trans Tasman Mutual Recognition Arrangement of 1998 (which seeks to remove regulatory barriers and facilitate

trade between the two countries). The interim recommendations we made in October 2006 therefore continue to have relevance. We are unaware of the outcome of the Ministry of Health's consultation with Māori over ANZTPA in 2007, but we trust it has placed the parties in a strong position to make progress should the prospect of trans-Tasman regulation be renewed.

Also since our hearings concluded, the National and Green parties have jointly developed proposals for a scheme to regulate natural health products on the New Zealand market. In March 2010, they released a consultation paper seeking submissions on a proposed Natural Health Products Bill. It would replace the existing legislative regime which the Associate Health Minister Dr Jonathan Coleman described as 'outdated, inadequate and quite restrictive'.<sup>205</sup> Like the Medicines Act 1981, the Bill would exempt natural products made by rongoā Māori practitioners for particular patients from the requirement to gain pre-market product approval. However, approval would be required where such products were manufactured and distributed more widely 'because an unregulated larger-scale manufacturing process may produce an unsafe or poor quality product that is used by a large number of people without reference to a learned practitioner who can monitor its safety in use'.<sup>206</sup> It was expected that drafting of the Bill would begin towards the end of 2010.

### 7.3.8 Commercialisation

There are essentially two schools of thought amongst the claimants on the potential commercialisation of rongoā. The first holds that it is quite inappropriate to commercialise rongoā: commercialisation would destroy the essence of rongoā and render it ineffective, and/or make it expensive and thus inaccessible to most Māori. The second maintains that someone is going to make a lot of money in the future from Māori traditional remedies, and it may as well be the rightful owners of the mātauranga. In this regard, some viewed the exemption for herbal remedies under the Medicines Act in a positive light, and others regarded it effectively as a restriction.

We note this matter here because of its significance to claimants, and because officialdom and the new national body will inevitably have to grapple with it at some point.

But we pass no judgement on it, for it strikes us ultimately as an internal Māori debate rather than one for the Tribunal to adjudicate upon. We simply record the claimants' perspectives so that the range of views they expressed is set out for those who will have a hand in designing regulations in future.

Some claimants, like Ngaire Culshaw for Ngāti Kahungunu, expressed what might be called a 'purist' view: 'Rongoa is more than the plant. It won't work if it is produced commercially.'<sup>207</sup> Similarly, 86-year-old Raukura Robinson of Ngāti Wai gave evidence over two days in 1998, having begun a three-day fast the day beforehand owing to the tapu nature of her kōrero. She explained under re-examination from counsel that rongoā is a 'divine gift for the benefit of people and not for commercialising'.<sup>208</sup> Mr Clark also said that remedies were 'dispensed without charging for the rongoa or the rongoa services, in the belief that what is a god given gift is given freely'.<sup>209</sup> Others, such as Alfred Elkington of Ngāti Koata and Houpeke Piripi of Ngāti Wai, expressed similar sentiments.<sup>210</sup>

Mr McGowan explained that there were also some practical concerns behind the opposition to commercialisation. There was 'a great fear within practitioners and users of traditional Māori medicine' that if rongoā were to be commercialised then Māori 'will be the ones who will be least able to afford what those products might be'.<sup>211</sup> Murray Hemopo of Ngāti Kahungunu also expressed concern that commercialisation of rongoā would soon see rongoā plants 'depleted like the fisheries'.<sup>212</sup> Doubtless, tohunga rongoā also fear that a focus on commercial production would lead to the loss of the tikanga associated with rongoā that has always been such a vital element of the healing process.

On the other hand, we also heard from Philip Rasmussen, a medical herbalist and businessman who owns a company manufacturing herbal medicines and 'over the counter' herbal products. Giving evidence for Ngāti Kahungunu, he said that the commercial development of rongoā was 'unavoidable'.<sup>213</sup> A number of countries overseas, he explained, were already growing large stands of New Zealand plants in order to produce drugs. If New Zealand failed to introduce regulation of commercial herbal medicine, he said, the country would

‘miss windows of opportunity’.<sup>214</sup> For this reason he supported the proposed ANZTPA regime’s application to natural as well as pharmaceutical medicines, although improvements were needed both to ‘enable natural product development using Rongoa Maori’ and to ‘include a collaborative approach with Maori’.<sup>215</sup> As he put it under cross-examination:

we have to pursue product development, using New Zealand native plants, and . . . we should do in the most ethical manner possible, and that has to involve Maori at an early stage . . . Maori need to benefit economically, first and foremost. This is a global world we live in. We can’t hold back development, it is going to happen whether we like it or not.<sup>216</sup>

Mr Rasmussen thought that a pan-Māori body could oversee the commercialisation of rongoā to ensure it was carried out ethically.<sup>217</sup> Paul Morgan of the Federation of Māori Authorities also expressed his organisation’s belief that ‘traditional rongoa [can] be developed into a product for healing and done on a commercial basis’.<sup>218</sup>

There are hints that tohunga rongoā might be softening to the prospect of commercialisation. For example, the chair of Ngā Ringa Whakahaere, Tamati Mangu Clarke, said that perhaps the time had come to at least discuss the issue of rongoā providers being paid.<sup>219</sup> Several years earlier, Mr Lihou seemed to suggest that commercialisation was wrong where Māori were neither consulted nor benefited, but that it might be acceptable if Māori health benefited and Māori retained control of the process. As he put it, ‘It’s not the question of commercialisation that is the issue’.<sup>220</sup> Ngā Ringa Whakahaere manager Mr Ross also agreed under cross-examination that commercialisation was acceptable when it was ‘not under that kind of individual profit motive, but more as like a community development, economic development thing’.<sup>221</sup>

### 7.3.9 The arguments of the parties

#### (1) *The claimants*

Counsel for Ngāti Kahungunu argued that, after being ‘officially banned’ until 1962 (when the Tohunga Suppression Act was repealed), rongoā services have continued to find it ‘extremely difficult’ to attract government funding. He was critical of the low amount of money

spent by the Ministry of Health on rongoā contracts since 2001, as well as the fact that any major increase in funding would have to come from the DHBS through the PHOS. According to counsel, the Ministry ‘relies on what appear to be vague attempts to influence or change the way in which DHBS and PHOS operate in the sector’<sup>222</sup> – concerns he reiterated in his 2009 submission on the establishment of Te Paepae Matua.<sup>223</sup>

Counsel for Ngāti Kahungunu also contended that Ministry of Health officials had limited knowledge about the number of rongoā practitioners, and that the decision not to fund ingested herbal remedies amounted to a ‘fundamental assault’ on rongoā, because it artificially split a holistic remedy. It also worked against the transmission of traditional knowledge and the ability of practitioners to meet the quality requirements set down in the *Standards*.<sup>224</sup> Counsel highlighted the impact on traditional healing of rongoā practitioners’ limited access to the bush and the extent of environmental modification within the iwi’s rohe. He criticised, too, what he saw as the unfair requirement for tohunga rongoā to work within the confines of the Medicines Act to ensure their practice fell within its exemptions (for example, by making no claims to a therapeutic effect). The Medicines Act was thus ‘inadequate’ and inconsistent with the Treaty. Counsel argued that ANZTPA would be little better.<sup>225</sup>

With regard to the new national body, Ngāti Kahungunu criticised the sidelining of Ngā Ringa Whakahaere,<sup>226</sup> but said they had ‘chosen to support Te Paepae Matua in the absence of any other structure which could be utilised by the iwi to provide bottom up support for rongoa within Ngāti Kahungunu’. In their view, Te Paepae Matua provided a forum for practitioners to discuss common issues but at the same time recognised and allowed for the expression of separate tikanga among iwi. However, the iwi considered that Te Paepae Matua was not being funded sufficiently to succeed. They expressed ongoing support for the role that Ngā Ringa Whakahaere is playing, but noted that it would not receive any funding from 2010 because of the Ministry’s reluctance to fund a second national body.<sup>227</sup>

Counsel for Te Tai Tokerau claimants argued that Māori today have little control over rongoā. By this, the iwi meant that rongoā could be practised by anyone who

derived the knowledge from books and without any recourse to the tohunga or kaitiaki of that mātauranga. Nor did kaitiaki have any control over when and how they accessed the bush for their rongoā materials, and to this extent the Te Tai Tokerau claimants sought a ‘transformation in relationship’ between Māori and the Department of Conservation (see also section 4.5.7).<sup>228</sup> Counsel pointed to the findings of the Tribunal’s *Napier Hospital and Health Services Report* as support for their arguments about the taonga status of rongoā.<sup>229</sup>

While these claimants opposed commercialisation of rongoā, they said that the Treaty principles of development and options meant that practitioners would have the right to commercial development as long it occurred under kaitiaki control and in a manner in keeping with ‘the cultural imperatives associated with rongoā.’<sup>230</sup> Counsel criticised the devolution of responsibility for funding health services to the DHBS, picking up on the presiding officer’s suggestion to Mr Keelan during cross-examination that the Crown thereby risked diminishing its ability to actively protect Māori interests in rongoā.<sup>231</sup> In sum, said counsel, the Crown had shown no real commitment to sharing ‘authority with tangata whenua within the structures of health delivery.’<sup>232</sup>

Counsel made further submissions in July 2008, after we invited the claimants in April 2008 to respond to the Crown’s advice that a rongoā Māori advisory group had been established.<sup>233</sup> Counsel noted that it was now apparent a national rongoā body had in fact been launched. However, said counsel, Ngāti Wai had not been advised about the regional consultation hui that took place in late 2007 in Kaikohe and Whangarei. Nor were they advised of the actual launch in June 2008 of the new national body itself. Wrote counsel:

Ngatiwai are particularly concerned that as a claimant group who raised detailed evidence on rongoā Maori, they have been overlooked in the development of a national body initiative. They are unable to comment on the reasonableness of the objectives and functions of the national body.

Counsel added that Te Rarawa, including lead claimant Hema Nui a Tawhaki Witana, had not been consulted either. Haana Murray of Ngāti Kurī was approached

informally to participate but became concerned that the initiative would cut across the remedies being sought in Wai 262.<sup>234</sup>

In further submissions in June 2009, counsel advised that ‘Ngāti Wai claimants continue to be bypassed’ over the establishment of Te Paepae Matua. Te Rarawa and Ngāti Kurī representatives had participated, but considered that Te Paepae Matua was required to act in accordance with the objectives of the Wai 262 claimants. Ultimately, in the Te Rarawa claimants’ view, Te Paepae Matua ‘is *subject* to the findings and recommendations of this Tribunal on the appropriate decision-making role of Maori in relation to their matauranga and other taonga related to rongoā’ (emphasis in original).<sup>235</sup>

Counsel for Ngāti Koata criticised ‘the restrictions on what rongoā can be’ under the Medicines Act and the proposed ANZTPA regime, as well as what Ngāti Koata saw as the poor-quality (or complete lack of) consultation about *Taonga Tuku Iho* and ANZTPA. Counsel argued that the new national body was being developed under the Ministry of Health’s rules rather than as a Māori initiative. Counsel also made some general comments about the overall lack of ‘recognition of rangatiratanga or participation of the Treaty partners in the decisions made at the top level’ of the health system.<sup>236</sup> In their May 2009 submissions on the establishment of Te Paepae Matua, Ngāti Koata said they had not been invited to attend any hui on the subject and were consequently denied any participation in the process, despite being claimants in Wai 262.<sup>237</sup>

The closing submissions of counsel for Te Waka Kai Ora focused on ANZTPA, and attempted to draw a parallel between it and the Tohunga Suppression Act. Counsel further suggested that the commercial benefits that might be available from the use of rongoā would be able to be realised only by businesses, rather than traditional healers.<sup>238</sup>

## (2) The Crown

The Crown said that its approach to rongoā ‘must be made in the context of public safety, and to the extent the claimants seek Crown funding, funding constraints which are applicable to all government activity’. Like the Te Tai Tokerau claimants, the Crown also cited the findings of *The Napier Hospital and Health Services Report*,

albeit with a different emphasis. Counsel noted, for example, that the Tribunal had concluded that ‘health’ itself was not a taonga. He noted, too, the earlier Tribunal’s comment that the ‘principle of options’ both required ‘respect for tikanga Māori within the practices of public hospitals and other state services, subject to clinical safety’, and ‘encourage[d]’ Crown support of indigenous medical knowledge. In other words, there is no obligation on the Crown to ‘guarantee’ the ‘undisturbed possession’ of rongoā; it must simply ‘respect’ tikanga and ‘encourage’ Māori medical knowledge. This respect and encouragement had to be given ‘within the context of funding constraints and safety’.<sup>239</sup>

More specifically, Crown counsel said that the Ministry of Health had been responsive to healers’ concerns by not devolving rongoā contracts to DHBS, had developed a set of standards with Ngā Ringa Whakahaere, and had produced a rongoā development plan which that organisation’s manager, Mr Ross, had agreed included good goals. Moreover, the non-funding of rākau rongoā had been ‘consulted on and supported’ at the June 2004 Rotorua hui.<sup>240</sup>

The Crown said it had supported the provision and development of rongoā services through a range of initiatives, such as its key strategic policies (as expressed in *He Korowai Oranga*, *Whakatātaka Tuarua*, and *Taonga Tuku Iho*), the MPDS, the rongoā service contracts themselves, and so on. Counsel also pointed to the creation of the Māori Health Directorate within the Ministry of Health, the Treaty-related principle in the New Zealand Health Strategy, and the provisions for Māori involvement in decision-making in DHBS as set out under the New Zealand Public Health and Disability Act 2000. These emphasised both Māori participation in the health and disability sector and Māori well-being. Supporting rongoā practice and development was a means for the Ministry of Health to contribute to those goals.<sup>241</sup>

The Crown rejected the notion that the Medicines Act had adversely impacted upon rongoā. Counsel argued that existing rongoā practice was exempted, and any development or expansion would probably be ‘addressed in the ANZTPA rules consultation process’. Counsel noted the view of some claimants that the exemption under section 32 of the Medicines Act, involving ‘the preparation by

a practitioner for a particular patient’, was ‘more limited than the scope of Rongoā as they see it’. In other words, the Crown recognised that some claimants felt that ‘the practice of Rongoā could embrace manufacture of medicinal products on a commercial scale of some significance’. This raised issues around ‘the interface between practices emerging from traditional practice and issues of public safety and regulation’. Again, counsel noted the ongoing consultation over the ANZTPA rules.<sup>242</sup>

Responding to criticism about the failure to support Ngā Ringa Whakahaere as the national body, the Crown said that the ‘Ministry’s aims in identifying a national body are to strengthen leadership, support quality systems, establish quality assurance, foster regional and local networks and provide a vehicle for the review of the current traditional healing standards’. Ngā Ringa Whakahaere’s own lack of knowledge of the total number of rongoā practitioners meant ‘that the Ministry’s steps to identify a national body with which to engage is an important step in relation to the development of Rongoā contracts, monitoring of standards and improved ability to consult with stakeholders’.<sup>243</sup>

Responding to the claimants’ 2009 submissions on the establishment of Te Paepae Matua, the Crown rejected the suggestion that claimant iwi were somehow denied participation in the hui that led to the new body. While Wai 262 claimant iwi were not specifically invited, the hui were well publicised and open to all. The Crown also said that while it had supported the establishment process and now funds the operational aspects of Te Paepae Matua, the collective was not controlled by the Crown but by Māori – which they do in a way that meets the aspirations of rongoā whānau and accords with tikanga. The Crown has standard expectations around mandate, accountability, and the delivery of contracted services, but otherwise does not interfere. With respect to Ngāti Kahungunu’s concerns about funding, counsel said the Crown had so far provided \$300,000 (in 2008/2009), with 2009/2010 funding still to be finalised. Counsel did add, however, that the Ministry had reviewed its decision not to fund Ngā Ringa Whakahaere in 2010 and had decided instead to fund it ‘as a second national rongoā organisation in the 2009/2010 MPDS funding round’.<sup>244</sup>

**7.3.10 Analysis**

We turn now to describe the current state of Māori health, and suggest what rongoā has to offer. We then set out our analysis of the Crown's performance in four key areas. In assessing the Crown's performance, we have looked for signs of commitment, urgency, and – in the face of mainstream scepticism that echoes the early twentieth century – courage. Is the State setting aside the legacy of conflict between our founding cultures and knowledge systems, and allowing New Zealanders to take advantage of what they can offer in combination? Or does it still fall short? We make our conclusions and recommendations accordingly.

The evidence we heard about contemporary Crown rongoā policy raises four key issues:

- ▶ the sufficiency of rongoā funding;
- ▶ the exclusion of core aspects of rongoā from funding;
- ▶ the suitability of Crown health strategies and structures; and
- ▶ the development of a new national body.

Before presenting our conclusions on these central questions, however, we now take a step back to survey the wider picture of Māori health today and what rongoā has to offer.

**(1) The modern Māori health crisis**

During the twentieth century the disparities between Māori and non-Māori health decreased. Belich refers to the twentieth-century improvement in Māori health as a 'great mortality transition'.<sup>245</sup> After the Second World War, Māori life expectancy grew rapidly: whereas in 1951 the gaps in life expectancy between Māori and non-Māori men and women were 14 and 16 years respectively, these had narrowed to six and five years by 1980. In these post-war decades, jobs were plentiful and the Māori standard of living rose markedly. Belich observes that economically 'the period 1945–75 was something of a golden age for Maori'.<sup>246</sup>

But by 1997 – after more than a decade of socio-economic reform that disproportionately disadvantaged Māori – the life expectancy gap had widened again, to an average of more than nine years for men and women. The disparities have slightly reduced since, with the gaps decreasing to 8.6 years for men and 7.9 years for women

as at 2008 (see figures 7.1 and 7.2).<sup>247</sup> It would be wrong, however, to lay too much emphasis on further improvements in life expectancy as an indication of Māori well-being. As Professor Durie points out, 'while Māori are living longer, the added years are not necessarily enjoyable', due to disability and poor health.<sup>248</sup>

In fact, contemporary Māori health status is so bad it would be wrong to describe it as anything other than a further calamity, even if it represents an undoubted improvement on a century earlier. Compared with non-Māori, Māori today have much higher rates of heart disease, stroke, heart failure, lung cancer, diabetes (see figure 7.4), asthma, chronic obstructive pulmonary disease (see figure 7.3), infant mortality, sudden infant death syndrome (cot death), meningococcal disease, schizophrenia, and other illnesses. Māori males have much higher rates of motor vehicle accident deaths and suicides (in the latter case, after having had much lower rates of suicide until the 1980s). Māori have much higher rates of interpersonal violence and unintentional injury. They are less likely to consult a doctor, with cost and the lack of access to a vehicle being more common reasons among Māori than among non-Māori.<sup>249</sup> Māori also have worse oral health, and are less likely to visit a dentist. Māori have much higher rates of smoking, with 53 per cent of adult Māori women being smokers (see figure 7.5). Māori adults are much more likely to have potentially hazardous drinking patterns, and regular marijuana smoking is significantly more prevalent among Māori adults than non-Māori. Māori are also much more likely to be obese than non-Māori (see figure 7.6). Many of these illnesses and problems are practically at epidemic levels.<sup>250</sup>

It is well established that socio-economic status has a profound impact upon health. Poor housing, for example, is a key determinant of health status. Much higher proportions of Māori live in the most socio-economically deprived areas and, overall, Māori are much more disadvantaged across all the key socio-economic indicators: school completion, unemployment, personal income, receipt of welfare, household telephone and motor vehicle access, home ownership, household crowding, and so on. Negative socio-economic indicators go hand-in-hand with negative health statistics, and suggest that improved Māori health will require more than just better access to

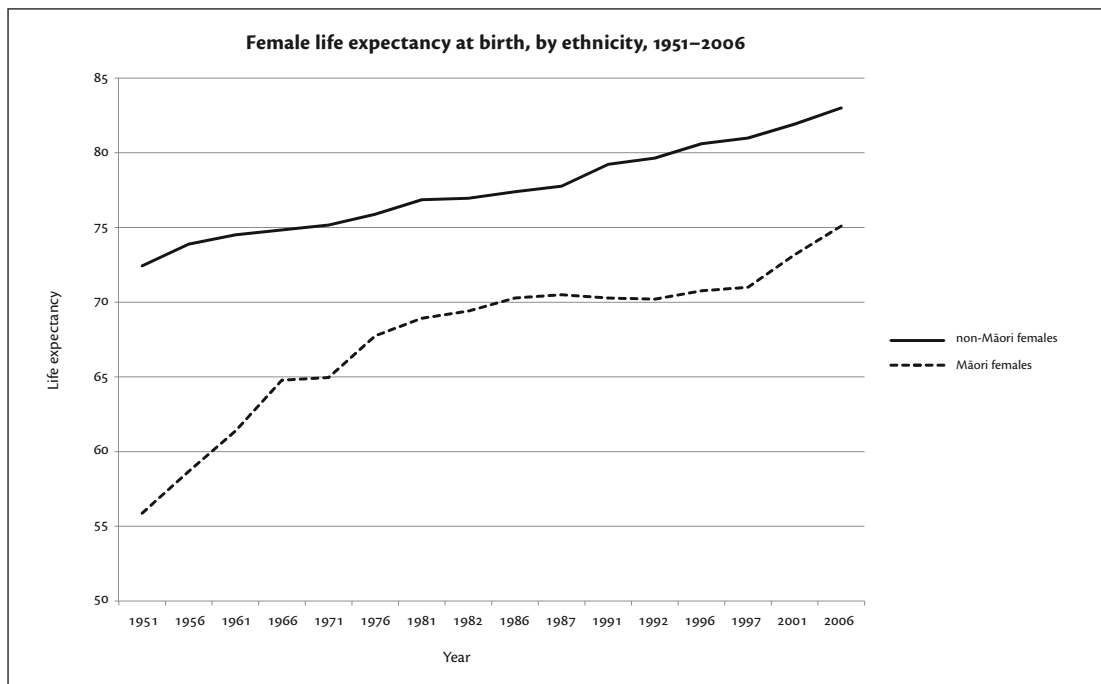


Figure 7.1

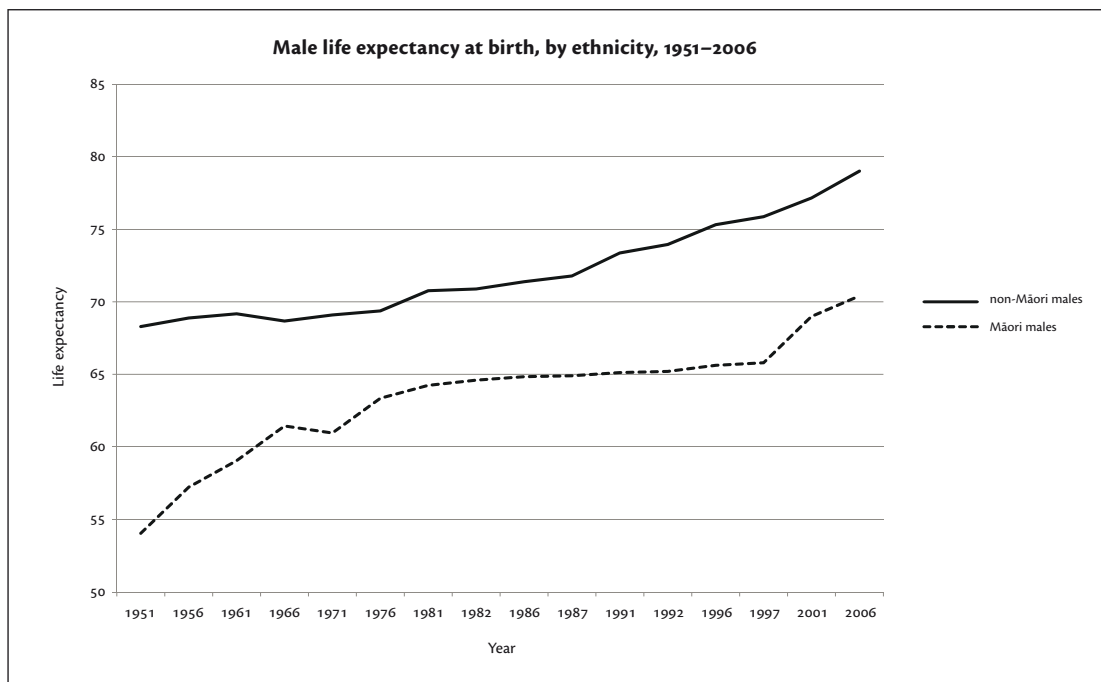


Figure 7.2

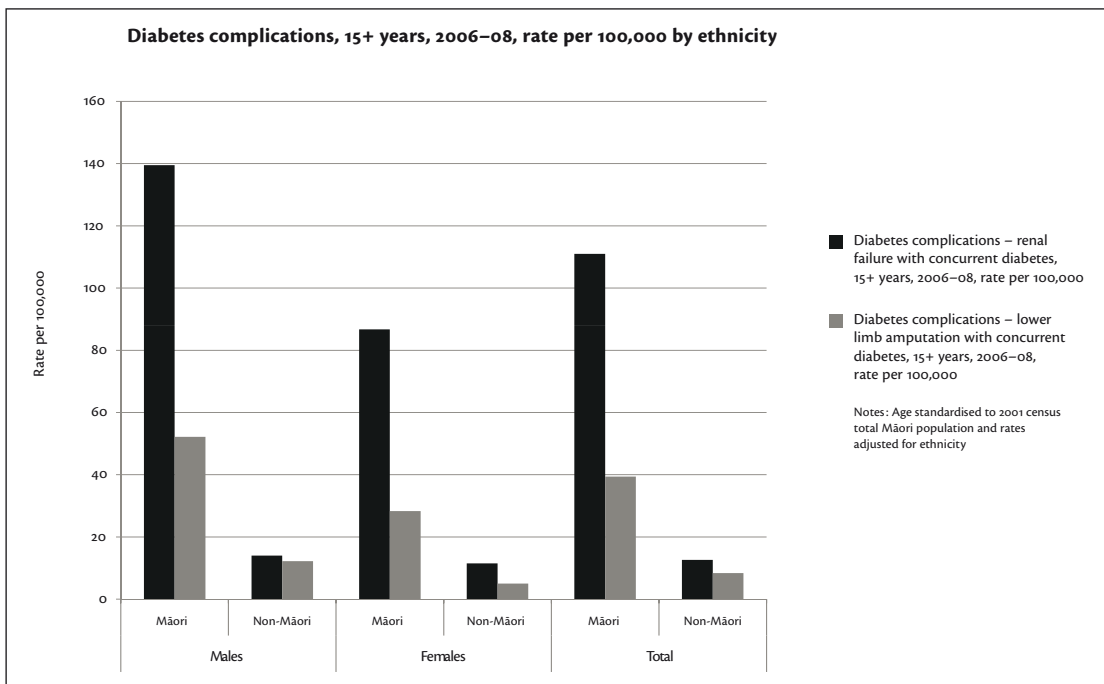


Figure 7.3

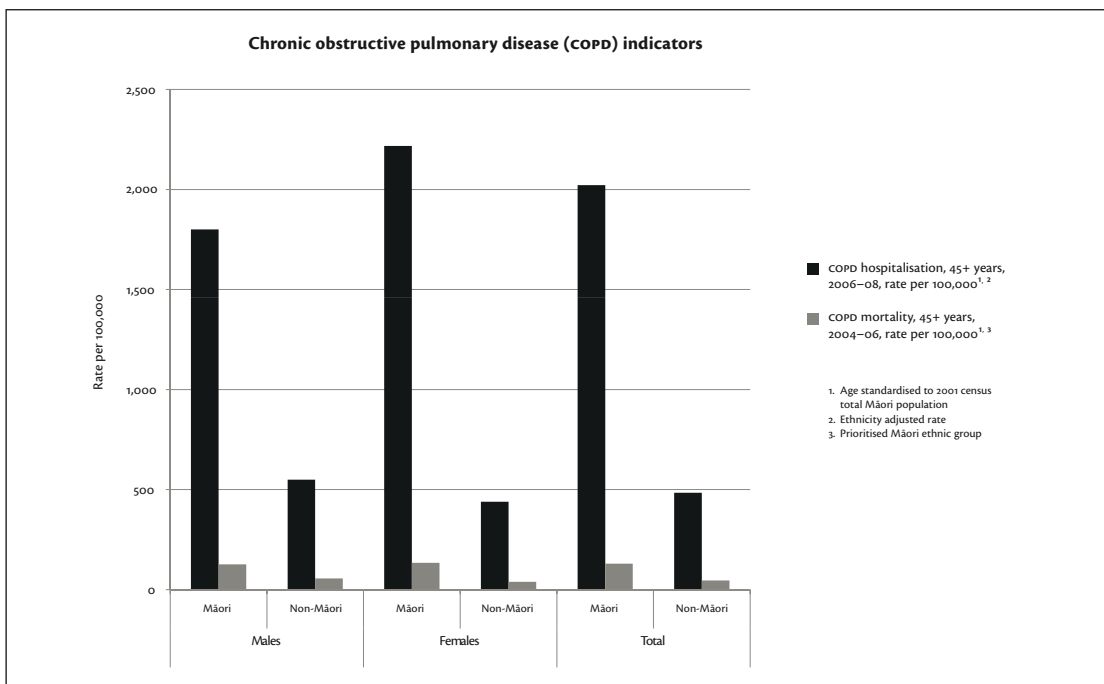


Figure 7.4



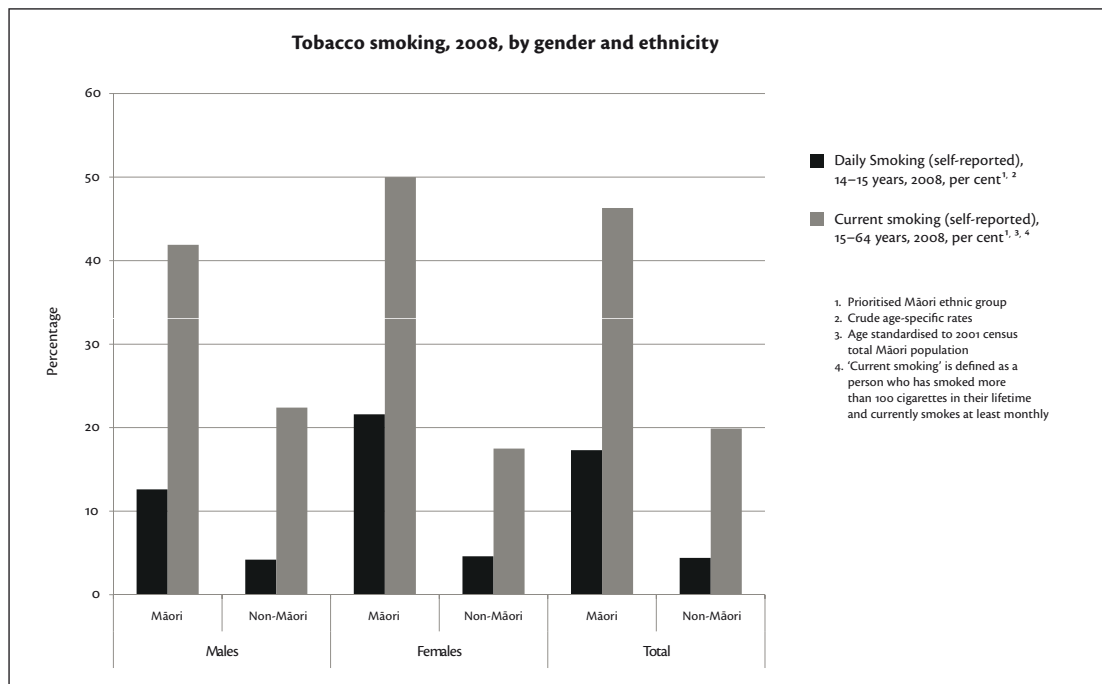


Figure 7.5

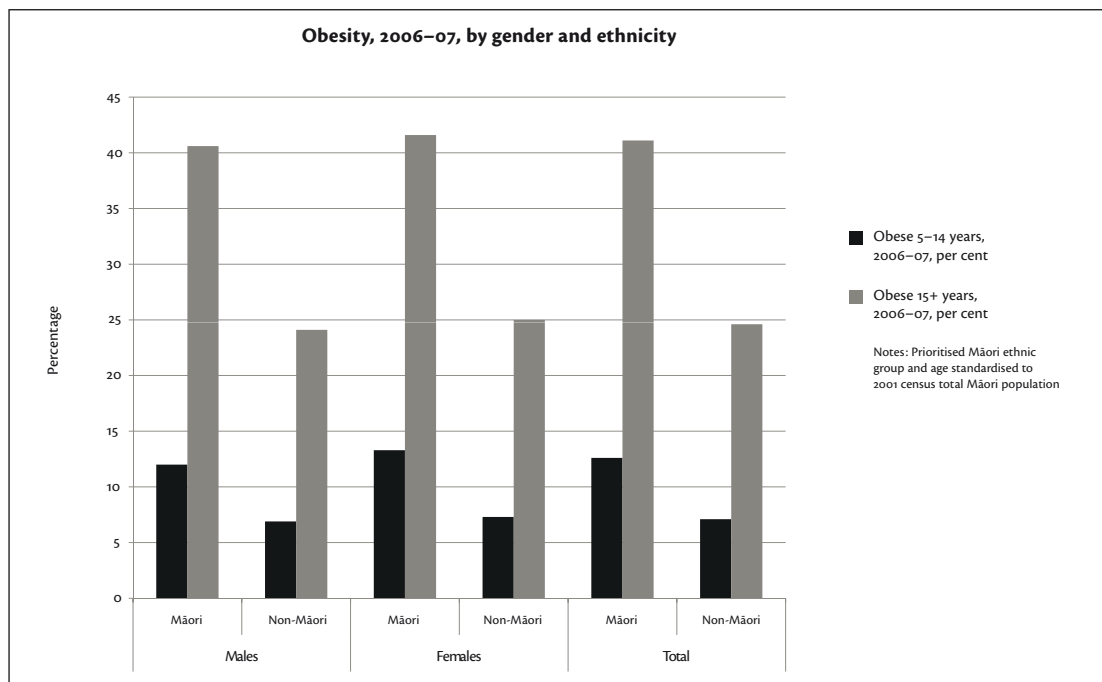


Figure 7.6

doctors. As Professor Durie puts it, ‘gains in health are more likely to come from improved standards of living than simply from improved health services.’<sup>251</sup>

However, we must avoid the simple conclusion that socio-economic status determines health; the picture is much more multi-faceted than that. There is, without doubt, a strong cultural dimension to health and well-being. To take one of Professor Durie’s examples, there are numerous cases of Pākehā women suffering from bulimia and associated anorexia nervosa, but this illness afflicts Māori women only rarely. In the same way, there are illnesses directly associated with Māori culture. The classic of these is ‘mate Māori’, which Professor Durie notes ‘remains a serious concept within modern Māori society’. It may reflect an actual mental disorder but could also derive from a specifically Māori cultural context, such as a belief in having breached tapu or the feelings of extreme whakamā.<sup>252</sup>

It has also been shown that higher socio-economic status does not necessarily lead to better health among Māori. The 1996/97 Ministry of Health ‘Taking the Pulse’ survey, for example, showed no clear relationship for Māori men and women between deprivation scores and self-reported health. Among the many reasons was the likelihood that ‘cultural factors also play a role,’<sup>253</sup> a conclusion that built on prior research by health academics.<sup>254</sup> In its 2002 Māori Health Strategy, *He Korowai Oranga*, the Ministry of Health also noted that ‘Across New Zealand, people with lower incomes suffer more ill health, but Māori whānau at all educational, occupational and income levels have poorer health status than non-Māori.’<sup>255</sup>

Furthermore, cultural factors weigh heavily for Māori when they seek health care. According to the 2002/03 New Zealand Health Survey, the most important reason among Māori women and the second-most important reason among Māori men for choosing a Māori health provider was: ‘I feel more comfortable talking to someone who understands my culture’. Other important reasons included the interest of Māori health providers in the impact of the patient’s illness on their whānau, as well as the willingness to spend more time discussing health problems.<sup>256</sup>

A strong sense of cultural identity may also be a positive influence on Māori health. Citing the 1993–2013 longitudinal study of 700 Māori households, *Te Hoe Nuku Roa*, Professor Durie has suggested that ‘a secure Māori identity appears to be positively correlated with good health and with better educational outcomes’, even in the face of adverse socio-economic conditions. This strength of identity will derive from ‘the capacity to access both cultural and physical resources, such as Māori land, Māori language, marae, and whānau.’<sup>257</sup>

Māori culture is therefore a key aspect of maintaining health, diagnosing health problems, and seeking treatment. This is not to suggest that there is a basic cultural solution to the current Māori health calamity, just as there is no clear cultural cause: the roots of ill-health are too varied for that. But cultural solutions must clearly be part of the mix of remedies. The Ministry of Health recognises this imperative, calling in *He Korowai Oranga* for Māori to receive ‘culturally appropriate health and disability services to improve whānau ora and reduce inequalities.’<sup>258</sup>

## (2) *What rongoā has to offer*

Given this wider background of the Māori health crisis, we consider that rongoā Māori has an important role to play – almost certainly a larger one than has been recognised to date. In short, expanded delivery of rongoā services is justified for the following four reasons.

First, rākau rongoā has undeniable medicinal properties. As we have set out in chapter 2, the healing qualities of native New Zealand flora are acknowledged and the use of natural products in medicines is growing worldwide. Mānuka, kawakawa, koromiko, and many other species yield proven cures for a range of ailments.

Secondly, the spiritual importance of healing is a reality for many Māori. Māori ideas about the role of the taha wairua in health remain the ‘bedrock’ Ngata spoke of in 1907. They have not simply been replaced by clinical, Western biomedical practices. Nor is spiritualism something foreign to mainstream medicine – we find ecumenical chaplaincy services in most hospitals, for example. And we have no doubt that many non-Māori New Zealanders have embraced a variety of ‘alternative’ healing and wellness regimes in recent years, such as yoga



Heeni Phillips delivers state-funded rongoā services to hundreds of people each year in Christchurch.

or Chinese medicine. Why should there be resistance to rongoā by virtue of its spiritual dimension?

Thirdly, expanding rongoā services may draw more Māori into the primary healthcare system. Consulting a tohunga will appeal to many Māori as a more culturally relevant and affordable healthcare option than visiting a general practitioner. Subsequent referrals from tohunga rongoā to mainstream providers could thus bring more Māori into contact with the general health system at an early stage, rather than, as is all too usual, at the advanced stage of an illness when its severity has become quite apparent. In other words, as Professor Durie observed in 1996, reflections on value for money need to include consideration of ‘the costs of no healing. . . . Early intervention might result in significant cost savings.’<sup>259</sup>

Fourthly, despite a lack of hard data the evidence suggests growing Māori demand for rongoā services. Demand may be growing not only because of rising cultural confidence but also because of disillusionment with the mainstream system’s inability to arrest the epidemic of lifestyle diseases among Māori. The Crown should in turn meet this demand with the provision of services.

Quite aside from these four key reasons, we might add that rongoā could instil within patients a better sense of connection to their culture and whenua, and a stronger sense of Māori identity – factors which could themselves lead to a greater sense of well-being. It goes without saying that the enhancement of rongoā services would also serve an important function in the preservation of traditional knowledge. A 2008 report for the Ministry of Health’s Māori Health Directorate has reached similar conclusions. The authors of *The Future of Rongoā Māori: Wellbeing and Sustainability* conclude that ‘[s]ustaining indigenous/Māori healing practices . . . serves to advance indigenous/Māori wellbeing at several levels, through alleviation of symptoms and enhanced wellness for individual clients, as well as the promotion of cultural values and traditions, and maintenance of environmental relationships for Māori, iwi, hapū and whānau collectives.’<sup>260</sup>

The benefits of quality rongoā services can be seen in the popularity of one of the Ministry of Health’s contracted rongoā providers. Kuia Heeni Philips has offered free rongoā services from a clinic in her suburban Christchurch home for over 20 years. Every few months

she and a band of volunteers make the long return trip to the West Coast to gather plants from an organic farmer, and then prepare rākau rongoā as pills, ointments, or liquids. In late 2008 she had seen 230 patients in the previous three months, from young people with skin complaints such as acne, eczema, and rashes to older people with respiratory problems, asthma, aches, and pains. Of the hundreds of people she sees each year, we can only speculate how many would have failed to seek out any help if their only option were a GP. Sometimes those arriving at Heeni's door need 'support, some homespun advice and healing'. As she explains, 'A cup of tea is a good rongoā – followed by kai, a good talk and warmth.'<sup>261</sup>

This emphasises our point that the cultural element of health is well understood by healers. Healers do not treat asthma with cups of tea, but apply Māori belief in the holistic nature of health, with emphasis on the spiritual aspect of well-being as well as the physical manifestations of sickness. Given the rise in Māori mental health problems over recent decades that Professor Durie describes,<sup>262</sup> rongoā Māori may well be one of the culturally appropriate health services that can assist in turning around some of the negative statistics. Mr McGowan argues in his thesis on rongoā that, to traditional healers such as Paul Mareikura:

the greatest sickness of the modern Maori was not one caused through poor diet, cigarettes, alcohol, drugs, and other modern causes of ill health. Those were certainly contributing factors, but they became so because of a much greater problem, the problem of isolation and alienation that was the lot of too many Maori. This was a situation in which the things that once gave strength and support had been too seriously disrupted, were too much out of reach to really be of help. That sort of situation could often be better dealt [with] by the *hui* that grew around a patient, than by the more direct methods of modern medicines.<sup>263</sup>

We believe that rongoā offers a community-based and cultural system of health and wellness that can lessen these problems of cultural dislocation.

### (3) *The Treaty interest*

It hardly needs to be added, but – quite apart from the weight of evidence about rongoā's ability to help address the Māori health crisis – the Crown should also adequately support rongoā because the Treaty obliges it to. Rongoā is a taonga; even Crown officials readily concede that. This much is apparent in the very title of the Crown's rongoā development plan, *Taonga Tuku Iho*, as well as in occasional statements affirming rongoā's taonga status by officials. In August 2008, for example, Ms Wall said of the launch of Te Paepae Matua that 'It's good to see that rongoā Māori is being held and nurtured as the taonga it is.'<sup>264</sup>

These acknowledgements do not seem to square with the position taken by Crown counsel in this inquiry – namely, that the Crown's obligation is merely to respect tikanga and encourage indigenous medical knowledge. Taonga status confers greater responsibilities on the Crown than that.

Rongoā is central to Māori identity and, as Mr McGowan says, is as much 'an expression of being Maori . . . as it is about healing sickness.'<sup>265</sup> It is also important to iwi identity, for its practice has always differed from place to place in accordance with the differing flora and fauna prevalent in or unique to tribal territories. Yet Māori access to native flora is today limited by the challenges of access and environmental degradation. Moreover, mātauranga rongoā has declined – largely because of changed lifestyles and urbanisation, but also because of mainstream negativity which the Government reflected (and so endorsed) in its suppression legislation. Suffice it to say, the Crown bears a responsibility to rongoā of active protection. A case for expanded State support for rongoā services scarcely need be made out on such grounds, but that duty exists nonetheless.

What's more, in 2010 New Zealand endorsed the 2007 United Nations Declaration on the Rights of Indigenous Peoples. Among other things, the Declaration asserts that 'Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.'<sup>266</sup>

Of course, the Crown is not solely responsible for the

maintenance of rongoā. Its obligation to rongoā should endure only as long as Māori demonstrate a continued desire to maintain and utilise mātauranga rongoā. At the moment, there are clear indications that rongoā remains very much in demand and that Māori interest in traditional healing is on the rise. Nevertheless, it is as well for Māori to remember their own obligation. Mr McGowan has written in this regard of:

[the] myth . . . perpetuated by academics, campaigners for *tinu rangatiratanga* and the like, who seem to see [rongoā] as one of the *taonga* taken from them by the *Pakeha*, but not knowing enough to be aware that rongoa Maori is very much alive and available to them if only they were ready to make themselves available to the world in which it belongs.<sup>267</sup>

#### (4) How well does the Crown support rongoā?

Having described the extent of the contemporary Māori health crisis, rongoā's potential to help address it, and the obligation the Treaty places on the Crown to support rongoā services, we turn now to assess the Crown's performance across the four key areas we have identified.

##### (a) THE SUFFICIENCY OF RONGOĀ FUNDING

Rongoā appears to be growing in popularity among Māori – partly as an assertion of Māori identity, but also because many feel disillusioned by what conventional medicine has to offer, or are wary of its cost. Sensing this mood, the Ministry of Health has slowly expanded the number of rongoā services it funds. It has, however, refused to be rushed, effectively pausing once during the late 1990s as it developed a set of quality standards to be used by service providers, a second time in the early 2000s as it developed its rongoā strategy, and again more recently because of the perceived need to form an authoritative national body.

We sympathise with this caution, but the question remains whether the Crown is committing enough funding to rongoā. Given the scale of the current Māori health disaster, spending of \$2 million – just 0.02 per cent of the country's total annual health expenditure of more than \$10 billion – seems wholly inadequate. While the

economic cost of poor Māori health has not been specifically measured, it is conservatively likely to run into hundreds of millions of dollars. The costs to New Zealand of obesity in 2004, for example, were estimated at \$460 million in direct health sector costs and \$370 million in lost productivity. The direct health costs of type 2 diabetes were estimated at \$600 million in 2008.<sup>268</sup> Obesity and diabetes are of course suffered by Māori in disproportionately high numbers.

There is no magic number that will indicate an appropriate level of funding. But the indirect cost of underfunding rongoā is likely to be significantly higher than the current direct cost of funding. The Crown's present level of spending seems to indicate a lack of commitment to the idea that rongoā can make a difference.

##### (b) THE EXCLUSION OF CORE ASPECTS OF RONGOĀ FROM FUNDING

Until 2004, the Ministry of Health funded ingested rākau rongoā as a component of its rongoā service contracts. Then, after discussing the matter at a hui of tohunga rongoā – and apparently gaining the healers' agreement – the Crown ended this funding on health and safety grounds. The Ministry claimed that it simply acceded to the contracted healers' wishes. But even if tohunga agreed with the change at the time, it is clear that the claimants – and particularly Ngāti Kahungunu – now strongly oppose it.

We know little of the circumstances that led to this aspect of rongoā funding being stopped, other than the few details supplied by the Crown. Ms Martindale was not certain of the reason, and Mr Keelan's suggestion that the idea came from healers themselves was rejected by the claimants; nor is it supported by a reading of the relevant hui minutes. We do not know if there was any particular incident that provoked the change, such as patients becoming sick from a batch of rākau rongoā. We are also sceptical of Ms Martindale's view that reduced access to native plants meant bigger batches of product were being stored in plastic milk bottles, for the circumstances she described were hardly new in 2004. Mr McGowan has described travelling groups of tohunga rongoā in the 1980s following the same practice: 'It was quite usual,

when one of these healing groups were coming to an area, for word to be sent out for the local people to save up their plastic milk bottles and soft drink bottles, for the *rongoa* that patients would be prescribed.<sup>269</sup>

In reality, it seems that the Ministry either decided to curtail funding while implementing the next stage of its *rongoā* plan (the establishment of an authoritative national *rongoā* body that could monitor quality standards), or it was looking to back out of responsibility for *rākau rongoā* during what was then an unfavourable political climate. Since contract funding levels did not drop at all, we fully accept that healers might not have resisted the change. But this does not alter what is a clear anomaly. Bizarrely, the Ministry was paying the same amount of money while officially withdrawing funding for a key aspect of the service. Mr Keelan did not dispute this suggestion.<sup>270</sup>

If health and safety was such a concern in 2004, it should also have been a concern in 2000 when *rongoā* contracts first began to expand significantly. Perhaps in 2004 it was simply convenient to use health and safety as a reason not to develop *rongoā* services further. Whichever way it is viewed, the decision to cease funding for *rākau rongoā* indicates a lack of courage or belief on the Ministry's part at a time of urgent need.

O'Connor's 2007 paper discusses the non-funding of *rākau rongoā* from a different perspective.<sup>271</sup> His concern is that the Ministry of Health mentions only elements of healing that sit easily alongside biomedical practices, concluding:

The kind of *Rongoa* that has been 'protected' by the Crown has been the forms of *Rongoa* that are complementary to Western medicine. The government is not actively suppressing other forms of *Rongoa*, but the ongoing 'protection' of 'un-complementary' forms has been left to healers who are not being resourced by the Crown which arguably, thereby, also imbues their concepts and practices with less legitimacy than funded *Rongoa*.<sup>272</sup>

Ironically, Pākehā observers have often fixated upon herbal remedies as a means of explaining *rongoā* in Western terms.<sup>273</sup> And yet such remedies are now officially excluded. Of course the Ministry knows full well that

its funding is spent on the preparation of *rākau rongoā* (which, after all, is covered in the *Standards*). It would have been a more honest approach, therefore, to maintain funding for *rākau rongoā* while health and safety issues were being addressed. The decision to officially end such funding risked slowing momentum at a time when demand for *rongoā* services was, by general consensus, growing steadily.

#### (C) THE SUITABILITY OF CROWN HEALTH STRATEGIES AND STRUCTURES

The devolution of responsibility to DHBS has not always helped the Crown fulfil its Treaty duties to *rongoā*. In 1999, the year before the DHBS were created, Ms Earp mentioned the reforms in her foreword to the published *Standards*. She wrote that questions were being asked as to 'how health sector reforms can improve [indigenous] health status and quality of life; and how the reform process can enhance service delivery'.<sup>274</sup> The New Zealand Public Health and Disability Act 2000 created the system of 21 DHBS and, in order to 'recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Māori' (section 4), required that each DHB:

- ▶ endeavour to ensure that there are at least two Māori members on its board (section 29(4));
- ▶ have the objective of reducing health disparities 'by improving health outcomes for Maori and other population groups' (section 22(1)(e));
- ▶ 'establish and maintain processes to enable Maori to participate in, and contribute to, strategies for Maori health improvement' (section 23(1)(d)); and
- ▶ 'continue to foster the development of Maori capacity for participating in the health and disability sector and for providing for the needs of Maori' (section 23(1)(e)).

In *He Korowai Oranga* in 2002, the Ministry of Health explained that:

Partnership with the Crown is one of the principles of the Treaty of Waitangi. DHBS have the primary responsibility for planning and funding health and disability services and improving Māori health. They are expected to work in partnership with iwi and Māori communities to ensure their

decision-making effectively leads to whānau ora improvement and supports the achievement of Māori health aspirations.<sup>275</sup>

However, the vast majority of contracts held by providers of rongoā services are with the Ministry, not with DHBS – reflecting, as Ms Wall agreed during cross-examination, that ‘rongoā practitioners find it easier to deal with the Ministry and . . . don’t really trust the DHBS.’<sup>276</sup> So, almost a decade after the major reform which created the DHBS, the bodies with the ‘primary responsibility’ for delivering on the Crown–Māori partnership in health are so distrusted by traditional Māori healers that the latter cling to the Ministry of Health for protection, despite its having no natural role in funding them. Moreover, the Ministry readily admits that it has little ability to direct the DHBS and even less ability to influence the PHOs, from whom the DHBS contract primary healthcare services. In other words, the reform process that Ms Earp anticipated in 1999 has done little to advance the cause of rongoā practice. In fact, in some respects, it has hindered it.

Mr Keelan denied that the provision of rongoā services was being adversely affected by central government’s limited powers to control local decisions about the application of health funding. Locally funded rongoā services were increasing because of local demand, he said – that is, the market was encouraging PHOs to purchase traditional healing services. Mr Keelan undertook to provide us with reports documenting this market demand.<sup>277</sup> But we received only a note from Crown counsel stating that contracted rongoā providers reported an uptake of clients, a claim which could not be validated. Counsel also supplied a list of the PHOs that access traditional healing services, with the further qualification that ‘Because the contract is between the DHB and the PHO, the Ministry does not generally hold information relating to the detail of those contracts.’<sup>278</sup>

While we do not doubt that there has been an increase in demand for rongoā services, the DHB–PHO model may not be the best means of meeting this demand. Ms Wall agreed with counsel for Ngāti Kahungunu that ‘if the Ministry is going to succeed in its aim of developing rongoā Māori utilising funding coming through DHBS and ultimately through PHOs, it’s going to require quite

a lot of Ministry encouragement of DHBS.’<sup>279</sup> The DHBS’ lack of interest is unsurprising – they have limited funds and, we suspect, limited appetite for services that may be regarded as politically or clinically problematic.

#### (d) THE DEVELOPMENT OF A NEW NATIONAL BODY

The Ministry of Health justified curtailing the expansion of contracted rongoā services by saying an authoritative national rongoā body needed to be established first. The Ministry has clearly reasoned that such a body can take the provision of rongoā services to a new level by leading the formalisation of rongoā practice through registration, accreditation, monitoring, and evaluation (as Professor Durie envisaged in his 1996 paper on purchasing traditional healing services).

There is naturally a fair measure of reluctance amongst tohunga rongoā to submit to a regulated and formalised system. There is, for a start, a degree of opposition to registration, as was revealed by resistance to the mooted tohunga register in 1989.<sup>280</sup> While the stigma of the Tohunga Suppression Act may have contributed to this opposition (and perhaps still does), it is also clear that many healers prefer to downplay their skills and would never describe themselves as ‘tohunga.’<sup>281</sup> Adding their name to such a register would thus be seen as ‘self-promotion.’<sup>282</sup> There is also opposition to the idea of any Pākehā or bureaucratic control, particularly since healers feel that those sitting in judgement on their services would have no qualification to do so.

Quite aside from these concerns, many healers are also unwilling to submit to any form of overarching control, even from a body mandated by the wider healing community itself. This can be seen in the difficulty Ngā Ringa Whakahaere has had in attracting healers to affiliate to it. Mr Ross confirmed this type of opposition, adding in Ngā Ringa Whakahaere’s defence that there is no perfect model of a successful pan-Māori organisation.<sup>283</sup> We recognise the inherent contradiction in the exercise of tino rangatiratanga by local communities being yielded to a central organisation – the same problem faced by the Maori Councils when they regulated tohunga from 1900 to 1907.<sup>284</sup> Healers also have quite varied training and diversified practice. Indeed, such is the independence of healers that one GP told Rhys Jones, ‘I don’t think it’s

7.3.10(4)(d)

something that should be formalised. I think it's something that has to remain in the Māori reality.<sup>285</sup> Jones himself concludes in his thesis that:

a major conclusion of this study . . . is that seeking a consensus from healers as a national group is likely to be problematic. It makes more sense to develop initiatives at local level based on the attitudes of smaller groups of healers to the idea of inclusion within primary health care.<sup>286</sup>

These challenges notwithstanding, an authoritative national body is clearly necessary. If mainstream medicine is to have confidence in rongoā – and thus to accept an extension in its funding – it needs to see strong and knowledgeable professional leadership in the rongoā sector. And if such a body is to succeed, it must also be driven by healers themselves. As Professor Durie puts it:

Self determination is an important principle when accreditation and formalisation of traditional healing are under consideration. A bureaucratic response to demands for the inclusion of traditional healing in the public health system which does not recognise the significance of autonomy and decision making by traditional healers or their advocates, is unlikely to be tolerated.<sup>287</sup>

We agree. A national body imposed by the Crown will not garner the necessary support, and nor will regulation by Western-trained medical professionals. The latter would also make the essential nature of rongoā susceptible, as Professor Durie puts it, to being undermined or reinterpreted in biomedical terms.<sup>288</sup> Here we hark back to the influential findings of the Harvard Project on American Indian Economic Development that we referred to in chapter 5, to the effect that indigenous development and success corresponds to the degree of power or authority shared with indigenous communities.<sup>289</sup>

Our support for the creation of an authoritative national body is a pragmatic response. We are aware, as O'Connor puts it, of the extent to which such a body may serve to break down the inherent heterogeneity of traditional healing by creating at least a 'framework of symbolic order'. O'Connor suspects that rongoā practitioners with the greatest emphasis on spiritual healing will



Rongoā practitioner Atarangi Muru, here performing mirimiri, works independently of the Ministry of Health.

effectively become sidelined through the encouragement of a 'national model' or healing that – given the predominance of mainstream views – does not stray too far from biomedical principles.<sup>290</sup>

But without a national body we can foresee further stalling in funding, a lack of advocacy for healers' interests, and an absence of practitioners' voices from inevitable discussions on commercialisation and regulation of rongoā. In other words, a national body is likely to be good both for rongoā and for rongoā's relationship with the bureaucracy. It is a goal which should be realised, albeit with adequate adherence to the principle of self-determination.

The question thus arises as to whether the Ministry of Health has acted appropriately in facilitating the establishment of a new national body rather than helping Ngā Ringa Whakahaere to reach that status. Ngā Ringa



Whakahaere was, after all, an entirely Māori initiative. The Ministry argues that healers themselves called for a representative national body to be set up, and thus the matter was somewhat out of its hands. There is doubtless truth in this – although, given Ngā Ringa Whakahaere’s ambitions to speak for all rongoā practitioners, we doubt Mr Keelan’s assertion that it would not be affected by the creation of a new national body because of its ‘separate and specific roles’. Mr Ross certainly felt that his organisation was being deliberately sidelined. Mr McGowan felt that the extent to which the traditional teaching and knowledge base had been eroded meant that a national authority needed to grow slowly. Speaking in 2006, he suggested that ‘Ngā Ringa Whakahaere is a beginning of such a process. A bit like anything, like you can plant a tree to give shade, you don’t get shade for a few years, but that doesn’t mean it is not growing. We have got a lot of rebuilding to be done.’<sup>291</sup>

We suspect that the Ministry of Health became impatient with Ngā Ringa Whakahaere’s lack of progress towards representative status and, prompted by unaligned rongoā practitioners, concluded that it would be faster to start afresh with a new body. We cannot say with certainty how reasonable a course this was, but we are prepared to give the Ministry the benefit of the doubt. That is because we fundamentally agree that the lack of such a body was holding back the development of rongoā, and to that extent we surmise good intentions on the Ministry’s part.

We have insufficient information, however, to say whether Te Paepae Matua mō te Rongoā is the ‘truly representative, mandated national Rongoā body’ that Mr Keelan spoke of.<sup>292</sup> According to the Ministry’s own publicity, it was launched with the unanimous support of a hui of 150 rongoā practitioners and supporters from throughout the country.<sup>293</sup> We are also aware that claimants who originally made the case for Ngā Ringa Whakahaere, Ngāti Kahungunu, have now opted to join Te Paepae Matua and support its activities. This is a significant development, and shows that Te Paepae Matua may yet achieve a broadly representative status. If that occurs, then it will certainly be an impressive achievement. Of course at the moment the Ministry has a kind of leverage over it in a way that it never did with whare oranga affiliated to Ngā Ringa Whakahaere, since regional

representatives on Te Paepae Matua are initially restricted to currently contracted providers only.<sup>294</sup> Such providers have to comply with the 1999 *Standards* and the Ministry’s service specifications. We suspect Te Paepae Matua will soon need to attract a broader membership, given the number of healers operating quite independently of the Ministry’s purview.

If proper representative status can be achieved, then Te Paepae Matua could play an important role in formulating rules for the practice and commercial sale of rongoā under the proposed Natural Health Products Bill or whatever other regime succeeds the Medicines Act 1981. We do not believe it would be the only body the Government would need to involve in decision-making – iwi and organisations representing Māori healthcare professionals would also have a legitimate interest – but it could certainly be prominent in such a process. It could also play a leading role in setting standards for the delivery of quality rongoā services (leading to a reinstatement of funding for rākau rongoā), monitoring compliance, evaluating efficacy, lobbying over the rongoā interest in a healthy and accessible natural environment, and generally helping in the retention and transmission of mātauranga rongoā. With such a body in place, a corresponding expansion in the number of rongoā providers contracted by the health system is likely.

Where would this leave Ngā Ringa Whakahaere, and should the Government continue to provide it with MPDS funding? We note that the Ministry has now agreed to fund Ngā Ringa Whakahaere as a second national rongoā body in 2009/2010. If a significant number of non-contracted practitioners remain affiliated, then it makes sense to fund it to help their development. It is difficult for us to comment beyond this, however, because we received no information about the respective levels of support for it and Te Paepae Matua, nor on the extent to which the two bodies compete for the same role. If the groundswell of healers (whether contracted or not) clearly supports the new body, then the Crown will doubtless be unwilling to support a rival that pulls in another direction.

#### (e) ACCESS TO THE BUSH

As we have noted in section 7.1, we do not deal in this chapter with issues of environmental degradation and



Frances Haenga planting rongoā trees at Pokai Marae, Ruatōria, during Conservation Week 2009. There appears to be a growing Māori demand for rongoā services, which may in part stem from a sense of disillusionment with the mainstream health system.

access to taonga species in the conservation estate. But the point must be made that mātauranga rongoā cannot be supported if there are no rongoā rākau left, or at least none that can be accessed. As a practical necessity we believe that the Department of Conservation and the Ministry of Health should coordinate over rongoā policy. As we have explained in section 6.8.3(2), agencies operating in the same field must share a vision and strategy for mātauranga Māori.

### 7.3.11 Conclusion and reforms

We commend some aspects of the Crown's performance. It deserves praise for funding rongoā services in the first place. After its initial commitment in 1995, it was right to seek expert advice on the necessary criteria for purchasing traditional healing services, and thereafter to collaborate with Ngā Ringa Whakahaere on the publication of the *Standards*. Through its support for Te Paepae Matua, it also recognises that tohunga rongoā should regulate the activities of their peers, in the same way that the doctors on the Medical Council register doctors and set standards of medical conduct and competence. The Crown appears also to have facilitated the establishment of Te Paepae Matua rather than dictated it.

But there is no sense of abiding energy or purpose about the Crown's actions. Its support for rongoā has been consistently punctuated by delays while administrative arrangements or strategic thinking have been developed. It cannot exert any influence over the DHBS to contract more services. In 2004, it even took the regressive step of discontinuing official funding of rākau rongoā. In the meantime, of course, Māori health problems have festered. The Ministry of Health seems to have lacked the imagination or conviction to engineer a genuine breakthrough, or the ability to see the contradiction in its priorities.

There can only be two reasons for this. First, the Crown may lack belief in the efficacy of rongoā, as we have suggested in section 7.3.10(4). That is, it may lack conviction in the advantages to Māori health of its biomedical and spiritual qualities. It may not see the potential of rongoā to bring sick people into contact with the health system, or recognise the growing demand for rongoā services in the Māori community. If that is so, however, the Crown

does not reflect this in its public pronouncements. *He Korowai Oranga*, the Māori health strategy, for example, states that Māori approaches to health will be affirmed through 'a gradual reorientation of the way that Māori health and disability services are planned, funded and delivered in New Zealand'.<sup>295</sup>

The second possible explanation is that the scepticism that led to the stigmatisation of tohunga and the Tohunga Suppression Act 1907 is still working against rongoā. The Ministry may not itself subscribe to this narrow-mindedness, but it is probably acutely aware of it. The media run occasional stories about rongoā that invite a degree of ridicule, and then turn to the Skeptics Society for opinion. During the period of the last Government, an Opposition member of Parliament asked the Minister of Health in the House whether there was 'any clinical evidence that such healing is effective; or is this funding just political correctness gone mad?'<sup>296</sup> It was not long after this that the Crown withdrew funding for rākau rongoā. The two events may not be connected, but one can imagine the defensiveness that such attacks instil in Ministry staff.

The Crown's tendency to distance itself from rongoā can be seen in its suggestion that it does not need to understand the subject thoroughly. Crown counsel said that 'The Ministry holds the view that it is not the business of the Crown to have an intimate knowledge of Rongoā and its practice'. It considers this is the job of the national body.<sup>297</sup> But this misses the point. It is certainly true that Māori experts should define quality standards and undertake monitoring with Crown support, but that hardly means that the Crown need not learn about rongoā practice itself. The Crown's position suggests that it sees rongoā as something 'other' and outside its possible comprehension, rather than something the Crown ought quite properly to know about – not only because it funds it, but because the Crown must see itself as representative of Māori too.<sup>298</sup>

In our view, the Crown's defensive mindset must shift. It is time for the Crown to stress the positive benefits of rongoā, particularly to combat the ongoing crisis in Māori health. Of course, herbal remedies must be proven to be safe, but rongoā cannot be evaluated simply in clinical or biomedical terms. It is a holistic and culturally based approach to well-being that surely offers much to a people

whose health is mired in such difficulty. And, as we have suggested, any cursory examination of likely costs and benefits suggests potential savings to the taxpayer. We should not need to point it out, but the current Māori health crisis is a matter of national importance. It is a significant problem shared by us all. Solutions that may help must be taken seriously indeed.

What support do we consider necessary for rongoā beyond what is currently available? We are aware of the limits of the Ministry's role and the need for funders and providers to embrace rongoā services, and we agree that a successful and well-funded national body might increase the mainstream health system's willingness to engage rongoā practitioners and expand funding. But we think it likely that the Crown may have to continue to fund rongoā contracts from Ministry of Health funds for some time, as the devolved model may continue to work against rongoā providers. That is something the Crown must monitor carefully and amend if it means that the Treaty obligation set down in the New Zealand Public Health and Disability Act is unfulfilled.

In terms of developing contracted rongoā services, Rhys Jones identifies a constructive way forward – and one which may in fact be occurring already, to the extent that the Crown's list of PHOs providing rongoā services shows an upward trend. Jones's interviewees advocated the co-location of rongoā practitioners and Western-trained medical professionals, with the latter ideally being subcontracted by a Māori primary care provider contracted by a DHB (presumably including iwi healthcare services). As Jones explains:

The rationale for this type of configuration was that it would not only be beneficial for the patients involved, but it could also be catalytic in terms of establishing professional linkages, developing personal relationships, sharing of information, and joint educational activities. It is possible to imagine that, in the context of a Māori primary care provider, a model could be developed to enable this type of partnership to occur.

In this situation, the primary care provider would already have the regulatory requirements in place to allow it to be accountable to the funding agency for the delivery of a package of health care services. The contractual arrangements

would need to allow the provider organisation to have considerable autonomy in allocating its resources. They could then develop a funding formula in order to purchase services from local healers who were interested in working in that environment. Within this setting the traditional healers would be responsible to the organisation itself, and could be utilised to deliver health care without being excessively constrained by bureaucratic obligations. This arrangement could be seen as exempting healers from many of the professional obligations that would otherwise be required of them by the system, and substituting them with a form of accountability to the provider and the community.<sup>299</sup>

Jones cautions that there may be pitfalls in this model and much would need to be resolved to make it work, including 'some form of overarching national strategy for the incorporation of traditional healing into the health system' and some form of regulatory body using basic standards. Above all, it would be essential 'that all these processes are guided by, and have the support of, traditional Māori healers', for some may see it as falling short of the kind of autonomy they wish to maintain. 'On the other hand, it represents a workable model that could introduce rongoā Māori to a wider audience while remaining within a Māori reality. In the process it has the potential to augment existing health services and to reclaim a valuable Māori cultural asset.'<sup>300</sup>

These ideas have some appeal to us, and we urge the Ministry of Health and the broader Crown health sector to actively consider them.

Another approach would be to require every PHO centred in an area of significant Māori population to be required to include a rongoā service. There are many ways in which the health sector could be incentivised to grow the provision of rongoā services, and we urge the Ministry to identify and implement those that will work best.

All these ideas may not be far removed from some of the claimants' own aspirations. Mr Lihou said in 2000 that his 'vision' was:

for this kaupapa to be brought out of its current place and to become part of a major development model of a super clinic with all options open to the public.

I want acceptance of rongoa Maori in mainstream health.

My vision is to have health centres with total choice. For example, a patient would walk in and have a western doctor on the left and a rongoa healer on the right, each with equal weight and respect for each other's systems of healing.<sup>301</sup>

One danger of incorporating healing services into the mainstream system to this extent would be the bureaucratisation – and thus suffocation – of the practice of rongoā. The best that can be done is to be aware of that risk and strive to avoid it. But regardless of the exact form of the delivery, we reiterate that rongoā Māori could be playing a greater role in the general effort to turn around the shocking Māori health statistics. It is up the Crown to make this happen.

In summary, we recommend the Crown alter its mindset and recognise the positive benefits to Māori health that rongoā has to offer. We recommend it identify and implement ways of encouraging the health system to expand rongoā services. This may involve subcontracting by Māori primary healthcare providers, or the DHBS requiring primary healthcare organisations in areas with significant Māori populations to provide rongoā services, or some other model. In any case, the Crown must work in genuine partnership with Māori in identifying and implementing any such proposals (see section 6.8.3).

We also recommend the Crown support Te Paepae Matua adequately so that it can play an important role in the quality control of rongoā services. Further, we recommend the Crown should gather data about the use of and ongoing demand for rongoā services, the extent of referrals, and the like. Finally, we also recommend that the Department of Conservation and the Ministry of Health coordinate over rongoā policy, since mātauranga rongoā so depends on access to rongoā rākau.

We do not consider that rongoā is by any means the only answer to current Māori health problems. But expanding rongoā services would be an important step in addressing an acute problem that is, frankly, shared by all New Zealanders.

#### 7.4 SUMMARY OF RECOMMENDATIONS

The overall state of Māori health today is of great concern. In response to this the Crown has not promoted rongoā

with any urgency. It either lacks a belief in the efficacy of rongoā or is too conscious of the lingering scepticism that previously led to the stigmatisation of tohunga and the Tohunga Suppression Act 1907

The Crown's defensive mindset must shift. It must work in genuine partnership with Māori to support rongoā and rongoā services. It is time for the Crown to stress the positive benefits of rongoā and its potential to combat the ongoing crisis in Māori health.

We recommend the Crown take the following actions as a matter of urgency:

- ▶ Recognise that rongoā Māori has significant potential as a weapon in the fight to improve Māori health. This will require the Crown to see the philosophical importance of holism in Māori health, and to be willing to draw on *both* of this country's two founding systems of knowledge.
- ▶ Incentivise the health system to expand rongoā services. There are various ways in which this could be done – for example, by requiring every primary healthcare organisation servicing a significant Māori population to include a rongoā clinic.
- ▶ Adequately support Te Paepae Matua to play the quality-control role that the Crown should not and cannot play itself.
- ▶ Begin to gather some hard data about the extent of current Māori use of services and the likely ongoing extent of demand.

We also recommend that, given the extent of environmental degradation and the challenges of access to the remaining bush, the Department of Conservation and the Ministry of Health coordinate over rongoā policy. Mātauranga rongoā cannot be supported if there are no rongoā rākau left, or at least none that tohunga rongoā can access.

#### Text notes

1. Waitangi Tribunal, *The Interim Report of the Waitangi Tribunal in Respect of the ANZTPA Regime* (Wellington: Waitangi Tribunal, 2006); Waitangi Tribunal, *The Further Interim Report of the Waitangi Tribunal in Respect of the ANZTPA Regime* (Wellington: Waitangi Tribunal, 2006)

2. Mason Durie, *Whaiora: Māori Health Development*, 2nd ed (Auckland: Oxford University Press, 1998), p 7. Durie was partly drawing on the findings of earlier scholars such as Elsdon Best.
3. *Ibid*, pp 8–9
4. *Ibid*, p 9
5. *Ibid*, pp 15–17
6. *Ibid*, p 17
7. *Ibid*, pp 17–20
8. Tony O'Connor, 'Governing Bodies: A Māori Healing Tradition in a Bicultural State', PhD thesis, University of Auckland, 2007, pp 166–170
9. RC Cooper and RC Cambie, *New Zealand's Economic Native Plants* (Auckland: Oxford University Press, 1991), p 118 (cited in document K6 (David Williams, *Mātauranga Māori and Taonga*, report commissioned by the Waitangi Tribunal, 2001), p 120)
10. Document K11 (Robert McGowan, 'The Contemporary Use of Rongoa Maori (Traditional Maori Healing)', MSocSc thesis, University of Waikato, 2000), p vi
11. Durie, *Whaiora*, p 21
12. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 77
13. Durie has commented that, in the pre-European era, 'medicines taken by mouth may have been used less frequently apart from a few leaves which had stimulant properties': Durie, *Whaiora*, p 19. Ranginui Walker goes further than this, suggesting that 'It would appear the use of oral medication was copied from the missionaries. Once missionaries were seen testing native plants for their medicinal properties, the practice was readily adopted by the Māori': Ranginui Walker, *Ngā Pepa a Ranginui: The Walker Papers* (Auckland: Penguin Books, 1996), p 171.
14. See doc K6, pp 120–121 regarding Best. See Raeburn Lange, *May the People Live: A History of Maori Health Development 1900–1920* (Auckland: Auckland University Press, 1999), p 14; and Malcolm Joyce, 'Maori Healers in New Zealand: The Tohunga Suppression Act 1907', *Oceania*, vol 60, no 2 (1989), p 100 regarding Buck.
15. Document K6, p 120
16. Lange, *May the People Live*, p 14
17. Derek A Dow, "'Pruned of its Dangers": The Tohunga Suppression Act 1907', *Health & History*, no 3 (2001), p 49. Gilbert Mair wrote that the doctor, Thomas Hope Lewis, was 'bitterly disappointed at being outpointed by ignorant savages'.
18. Lange, *May the People Live*, pp 18–19; Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 79
19. Lange refers to Māori society at the end of the nineteenth century as being characterised by 'the survival of certain aspects of the traditional Maori culture, along with incomplete acceptance of certain aspects of the new, in circumstances that sometimes made such a transition dangerous from a health point of view': Lange, *May the People Live*, p 28.
20. *Ibid*, p 36
21. By contrast, Pākehā settlers turned routinely to rākau rongoā as needs dictated. Charles Heaphy, for example, wrote in 1842 that mānuka, kawakawa, and fernroot were 'of much dietary service in the "bush" and one soon becomes reconciled to their taste'. In reference to the experiences of an Otago physician in the 1840s, a 1922 account explained that '[w]hen his own scanty stock of drugs failed him he turned to the Māoris for some of their medical lore and remedies': quoted in Murdoch Riley, *Māori Healing and Herbal: New Zealand Ethnobotanical Sourcebook* (Paraparaumu: Viking Sevenses, 1994), pp 202, 234.
22. Lange, *May the People Live*, p 43.
23. RT Lange, 'The Tohunga and the Government in the Twentieth Century', *University of Auckland Historical Society Annual* (1968), p 14
24. Quoted in Lange, 'The Tohunga and the Government in the Twentieth Century', p 14
25. *Ibid*, p 16
26. Document K3 (David Williams, 'Crown Policy Affecting Maori Knowledge Systems and Cultural Practices', report commissioned by the Waitangi Tribunal, 2001), p 191
27. Lange, 'The Tohunga and the Government in the Twentieth Century', p 16
28. Some publicly sanctioned Pākehā medical practices during the influenza epidemic were also highly dangerous. For example, crowds gathered for zinc sulphate spray treatment and passed infection to each other in the waiting rooms; alcohol was added to cough medicines in the belief it killed germs; and some doctors prescribed kerosene sprinkled on sugar, or even taking up smoking: Geoffrey Rice, *Black November: The 1918 Influenza Pandemic in New Zealand* (Christchurch: Canterbury University Press, 2005), pp 92, 107, 152, 234, 246.
29. Lange, *May the People Live*, pp 48–49
30. *Ibid*, p 46
31. Joyce, 'Maori Healers in New Zealand', p 102
32. A related point was made by Robert McGowan in giving evidence for Ngāti Kahungunu. He observed under cross-examination that the structures of traditional Māori leadership had been undermined to such an extent by the early twentieth century that they were no longer effective. The resulting social breakdown allowed fraudulent healers to spring up like 'weeds' in an untended garden: Robert McGowan, under cross-examination by Crown counsel, 12th hearing, 7 May 2002 (transcript 4.1.12, p 176)

33. Derek A Dow, *Maori Health and Government Policy 1840–1940* (Wellington: Victoria University Press, 1999), p 92. Elsewhere, Dow notes that the number of native medical officers grew from under 30 in 1900 to 46 by 1909, which shows that the Liberal Government did make some effort in this regard: Dow, ‘Pruned of its Dangers’, p 54.
34. Lange, *May the People Live*, p 156
35. See Voyce, ‘Maori Healers in New Zealand’, p 103. Note that Voyce incorrectly refers to section 5 of the Indictable Offences Summary Jurisdiction Act 1894.
36. Lange, *May the People Live*, pp 243–244
37. *Ibid*, p 245
38. Document K3, pp 193–194. In fact, in Apirana Ngata’s view, ‘There was not one Council that dared to tackle the tohungas’: Apirana Ngata, 19 July 1907, NZPD, 1907, vol 139, p 521.
39. Document K3, p 193
40. Apirana Ngata, 19 July 1907, NZPD, 1907, vol 139, p 521
41. Lange, ‘The Tohunga and the Government in the Twentieth Century’, p 21; doc K3, p 194
42. Lange, *May the People Live*, p 244
43. *Ibid*, p 246
44. Maui Pomare, ‘Report of Dr Pomare, Health Officer to the Maoris’, undated, AJHR 1904, H31, p 60
45. Lange, *May the People Live*, p 220
46. Rua first made his prophecy on New Year’s Day 1906 but it was not picked up by the press until May: Judith Binney, Gillian Chaplin, and Craig Wallace, *Mihaia: The Prophet Rua and His Community at Maungapohatu* (Wellington: Oxford University Press, 1979), p 18; Peter Webster, *Rua and the Maori Millennium* (Wellington: Price Milburn for Victoria University Press, 1979), pp 163–165; Apirana Ngata, 19 July 1907, NZPD, 1907, vol 139, p 521. Webster records the date of King Edward VII’s arrival as 26 June 1906, although he also quotes the report from Crown land agent James Mackay – which he presumably relies upon – as naming the date as 25 June (pp 163, 165).
47. Binney et al, *Mihaia*, p 26
48. Webster, *Rua and the Maori Millennium*, pp 167, 176–178
49. *Ibid*, p 165
50. *Ibid*, pp 179–180
51. *Bills Thrown Out*, 1906, no 151, p 475. The first reading of the Bill was on 27 September 1906: NZPD, 1906, vol 137, p 825. See also Lange, *May the People Live*, pp 249, 328 (fn 58).
52. Lange, *May the People Live*, p 249
53. James Carroll, 19 July 1907, NZPD, 1907, vol 139, p 510
54. Document K3, pp 195–196
55. Lange, *May the People Live*, pp 250–253
56. Document K3, pp 201–202. One reason charges were seldom brought was that it was difficult to gather information for a prosecution from Māori (presumably, of course, apart from those who made the original complaints): Lange, ‘The Tohunga and the Government in the Twentieth Century’, p 29; Lange, *May the People Live*, p 255; Voyce, ‘Maori Healers in New Zealand’, p 113.
57. Lange, *May the People Live*, p 252; doc K3, p 202
58. Hunn to Hanan, 29 November 1962, AAMK, series 869, 1591c, file 19/10/6, Archives New Zealand (quoted in doc K3, p 201)
59. R Moore (quoted in doc K3, p 211)
60. Lange, ‘The Tohunga and the Government in the Twentieth Century’, pp 32–33
61. Lange, ‘The Tohunga and the Government in the Twentieth Century; Binney et al, *Mihaia*; Webster, *Rua and the Maori Millennium*; Voyce, ‘Maori Healers in New Zealand’; Lange, *May the People Live*; Dow, *Maori Health and Government Policy 1840–1940*
62. Dow, ‘Pruned of its Dangers’; doc K3; Māmari Stephens, ‘A Return to the Tohunga Suppression Act 1907’, *Victoria University of Wellington Law Review*, vol 32 (2001), pp 437–462; Māmari Stephens, ‘The Tohunga Suppression Act’, *New Zealand Law Journal*, no 11 (December 2007), p 406; Māmari Stephens, ‘Beware the Hollow “Calabash”: Narrative, Analogy and the Acts of Suppression’, *Terror in Our Midst? Searching for Terror in Aotearoa New Zealand*, ed Danny Keenan (Wellington: Huia, 2008), pp 181–193; Durie, *Whaiora*; Mason Durie, *Te Mana Te Kāwanatanga: The Politics of Māori Self-Determination* (Melbourne: Oxford University Press, 1998); Mason Durie, *Mauri Ora: The Dynamics of Māori Health* (Melbourne: Oxford University Press, 2001); Mason Durie, *Ngā Kāhui Pou: Launching Māori Futures* (Wellington: Huia, 2003); Mason Durie, *Ngā Tai Matatū: Tides of Endurance* (Melbourne: Oxford University Press, 2005); Richard S Hill, *State Authority, Indigenous Autonomy: Crown–Maori Relations in New Zealand/Aotearoa 1900–1950* (Wellington: Victoria University Press, 2004)
63. Keith Sinclair, *A History of New Zealand* (Harmondsworth: Penguin Books, 1959); James Belich, *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Auckland: Penguin Books, 1996); James Belich, *Paradise Reforged: A History of the New Zealanders from the 1880s to the Year 2000* (Auckland: Penguin Books, 2001); Michael King, *The Penguin History of New Zealand* (Auckland: Penguin Books, 2003)
64. Hirini Mead, *Tikanga Māori: Living by Māori Values* (Wellington: Huia, 2003), p 233
65. Durie, *Ngā Tai Matatū*, p 200; Durie, *Mauri Ora*, p 51

66. L Pihama (quoted in Stephens, 'Beware the Hollow "Calabash"', p 182)
67. See Dow, *Maori Health and Government Policy 1840–1940*, pp 41–42, for a summation of these arguments up to the 1990s.
68. Webster, *Rua and the Maori Millennium*, pp 222, 224
69. Voyce, 'Maori Healers in New Zealand', p 110. Voyce contends that the Act's characterisation as a coercive social control rather than a humanitarian measure is emphasised by the other measures aimed at social order the Liberal Government was pursuing at the time. These included the Habitual Drunkards Act 1906, the Habitual Criminals and Offenders Act 1906, and attempts to control tramps and swaggers, 'juvenile depravity', and women mothering children out of wedlock: Voyce, 'Maori Healers in New Zealand', p 109.
70. Document K3, p 194
71. Hill, *State Authority, Indigenous Autonomy*, p 59
72. Dow, 'Pruned of its Dangers', p 41
73. *Ibid*, pp 45–50, 56
74. Stephens, 'A Return to the Tohunga Suppression Act 1907', p 449
75. *Ibid*, pp 437–462
76. Webster, *Rua and the Maori Millennium*, p 224
77. Lange, *May the People Live*, p 254
78. Dow, 'Pruned of its Dangers', p 60. In fact, the reality was that Rua was actually a stickler for high standards of hygiene and sanitation in his Maungapōhātu settlement and, according to Lange, clearly 'understood the connection between poor sanitation and ill health': Lange, *May the People Live*, p 223.
79. Stephens, 'A Return to the Tohunga Suppression Act 1907', p 448
80. Lange, *May the People Live*, p 250
81. That is, the Tohunga Suppression Act 1907.
82. Document K3, p 210
83. Webster, *Rua and the Maori Millennium*, p 276
84. Dow, 'Pruned of its Dangers', pp 58, 64
85. Stephens, 'The Tohunga Suppression Act', p 406
86. Document K3, p 203
87. *Ibid*, pp 204, 215–216
88. Voyce, 'Maori Healers in New Zealand', pp 113–115. Williams, by contrast, cites this as an example of the Act forcing healers and prophets such as Ratana to distance themselves from 'tohunga-ism': doc K3, pp 199–200.
89. Lange, *May the People Live*, p 254
90. Stephens, 'A Return to the Tohunga Suppression Act 1907', pp 457–458
91. Voyce, 'Maori Healers in New Zealand', p 111
92. Stephens, 'A Return to the Tohunga Suppression Act 1907', p 457
93. *Ibid*, pp 459–460; Lange, *May the People Live*, p 252
94. Document s1 (Counsel for Ngāti Kahungunu, closing submissions, 16 April 2007), p 75
95. Document s1, pp 77–78, quoting doc K3, pp 201, 249 (counsel refers in error to p 254).
96. Document s1, p 78, quoting doc K3, pp 249, 250
97. Document s3 (Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, closing submissions, 5 September 2007), pp 281–282
98. Document s3, pp 282–283
99. Document s5 (Counsel for Te Waka Kai Ora, closing submissions, 20 April 2007), pp 12–15
100. Document T2 (Crown counsel, closing submissions, 21 May 2007), pp 116–118 (quoting Voyce, 'Maori Healers in New Zealand', p 111)
101. Document T2, p 118 (quoting Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 152). Ngata said that the Bill did not purport to deal with the 'genuine tohungaism' of the traditional authorities in tribal law, for 'that class of tohunga . . . no longer exists in New Zealand. This Bill deals with a bastard tohungaism': Apirana Ngata, 19 July 1907, NZPD, 1907, vol 139, pp 518–519.
102. Document T2, pp 119–120 (quoting Voyce, 'Maori Healers in New Zealand', p 114)
103. *Ibid*, p 120
104. Voyce, 'Maori Healers in New Zealand', p 110
105. Apirana Ngata, 19 July 1907, NZPD, 1907, vol 139, p 520
106. *Ibid*, p 520
107. WH Herries, 19 July 1907, NZPD, 1907, vol 139, pp 512–513
108. Dow, 'Pruned of its Dangers', p 54
109. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, pp 174, 177
110. *Ibid*, p 170
111. Lange, *May the People Live*, p 250
112. Voyce, 'Maori Healers in New Zealand', p 111
113. Apirana Ngata, 19 July 1907, NZPD, 1907, vol 139, p 520. The member of Parliament for Hutt, Wilford, may be taken as an example of a member who did not understand this distinction. Speaking before Ngata, he said that 'The tohunga is an excrescence, and wants eradicating; his influence is evil'. Wilford also argued that the contemporary tohunga was little different from that of the past, albeit 'more subtle in his methods' and with 'more devious ways of imposing on the credulity of those who



- come under his sway’: TM Wilford, 19 July 1907, NZPD, 1907, vol 139, pp 517, 518. But Ngata’s speech may have had some effect on Wilford, for in 1908 he told the House that ‘the flax-root and many of the remedies discovered by the Maoris are just as valuable in cases of sickness as many of the remedies that medical men prescribe’: quoted in Dow, ‘Pruned of its Dangers’, p 58.
114. David Williams, under cross-examination by counsel for Ngāti Kahungunu and Crown counsel, 13th hearing, 23 May 2002 (transcript 4.1.13, pp 232, 249)
  115. Dow, ‘Pruned of its Dangers’, p 57
  116. Hone Heke, 19 July 1907, NZPD, 1907, vol 139, p 513
  117. Pomare, ‘Report of Dr Pomare, Health Officer to the Maoris’, p 60
  118. Stephens, ‘A Return to the Tohunga Suppression Act 1907’, p 450
  119. Document K3, p 206
  120. David Williams, under cross-examination by Crown counsel, 13th hearing, 23 May 2002 (transcript 4.1.13, p 257)
  121. Stephens, ‘Beware the Hollow “Calabash”’, p 189
  122. Document E5 (Piripi Aspinall, brief of evidence, 31 July 1998), pp 17–18; doc H2(a) (Hunaara Tangaere II, brief of evidence, 6 August 1999), pp 3–5; doc I20 (Abel Clark, brief of evidence, undated), pp 5–6
  123. Mason Durie, under cross-examination by Crown counsel, 12th hearing, 6 May 2002 (transcript 4.1.12, pp 18–19); see also Durie, *Whaiora*, p 60
  124. Apera Clark, under cross-examination by Crown counsel, 10th hearing, 31 July 2000 (transcript 4.1.10, p 14)
  125. Document B11 (Himiona Munroe, brief of evidence, undated), pp 7–9; doc B12 (Bruce Gregory, brief of evidence, undated), p 8; doc J11(a) (Mere Whaanga, additional statement, undated, p 1)
  126. Document I24 (Charles King, brief of evidence, undated), pp 6–7
  127. David Williams, under cross-examination by counsel for Ngāti Koata, 13th hearing, 23 May 2002 (transcript 4.1.13, p 225)
  128. Voyce, ‘Maori Healers in New Zealand’, p 112
  129. Document H11 (Benjamin Hippolite, brief of evidence on behalf of Ngāti Koata, undated), p 16; doc H10 (Puhanga Tupaea, brief of evidence, undated), p 15; doc H12 (Priscilla Paul, brief of evidence, undated), p 7; doc H19 (Hori Elkington, brief of evidence, undated), p 4; doc H13(a) (Huia Elkington, supplementary brief of evidence, undated), p 2
  130. Document K11, p 39
  131. *Ibid*, p 125
  132. S Rolleston, ‘He Kohikohinga: A Maori Health Knowledge Base’, report for the Ministry of Health, 1989 (quoted in doc K3, p 214)
  133. Document K3, pp 211–212
  134. Document K3, p 216
  135. Durie says Ngā Ringa Whakahaere was established in 1993 (Durie, *Whaiora*, p 59), but Apera Clark says it was 1992 (doc I20, p 12). Ngā Ringa Whakahaere’s website says that it was established in 1993: <http://nrw.co.nz> (accessed 17 March 2011)
  136. Apera Clark noted in his 2000 evidence that previous ‘national’ organisations of traditional Māori healers had been Te Puna o te Ora Aotearoa, established in 1982, and Te Whakaahu Trust, established in 1986: doc I20, p 8.
  137. Durie, *Whaiora*, p 59
  138. Document I20, p 12
  139. Durie believes that, in the 1980s and 1990s, health issues were rivalled only by land as a topic of concern to Māori: Durie, *Whaiora*, pp 52–53; doc I20, attachment D (Mason Durie, ‘A Framework for Purchasing Traditional Healing Services: A Report for the Ministry of Health’, June 1996), p 24.
  140. Document R5(a) (Ministry of Health, *Standards for Traditional Māori Healing* (Wellington: Ministry of Health, 1999)), p iv. Four Regional Health Authorities and 23 Crown Health Enterprises were introduced under the Health and Disability Services Act 1993 to replace the pre-existing 14 Area Health Boards. The new structure allowed for a split in the health system between purchasing (by RHAs) and provision (by CHES) of health services.
  141. Document I20, attachment D, pp 1, 28, 35
  142. The Health Funding Authority had succeeded the Transitional Health Authority in 1998, which had in turn replaced the four Regional Health Authorities in 1996. The establishment of the Authority and the replacement of Crown Health Enterprises with Hospital and Health Services reflected the agreement of the coalition government of the day to shift away somewhat from a market model of health service delivery: doc R5, Wi Keelan, brief of evidence on behalf of Ministry of Health, 21 November 2006, p 4. See also Peter Quin, *New Zealand Health System Reforms* [electronic resource] (Wellington: Parliamentary Library, 2009), p 14.
  143. Document R5(a), p 4
  144. Document K3, pp 214, 216
  145. Durie, *Mauri Ora*, p 164
  146. Document P44, attachment G (Rhys Jones, ‘Rongoā Māori and Primary Health Care’, MPH thesis, University of Auckland, 2000), p 39
  147. Document K10 (Robert McGowan, brief of evidence, 7 February 2002), p 8
  148. Quin, *New Zealand Health System Reforms*, pp 18–19
  149. Document R5, p 7
  150. Theresa Wall, under cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 69)

151. Theresa Wall, under cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 69)
152. Document R5(f) (table showing funding from Māori Provider Development Scheme to Ngā Ringa Whakahaere, 31 January 2007)
153. Document R5, p 7. This is by no means the only rongoā course in existence – various unit standards and certificates involving rongoā can be found on the NZQA website, and these are offered by a number of providers. Some tuition offered by tertiary institutions may be less formal. McGowan, for example, conducted rongoā workshops during his 13 years as a continuing education officer at Waikato University's Tauranga campus: doc P14 (Robert McGowan, brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006), p 9.
154. Document R5, p 5
155. Wi Keelan, under cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 64)
156. Theresa Wall, under cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 30 January 2007 (transcript 4.1.21(a), pp 67–68)
157. Paper 2.453 (Crown counsel, memorandum in respect of requests of January Crown witnesses for further information, 26 February 2007), p 12
158. Theresa Wall, under cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 68)
159. Theresa Wall, under cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 67)
160. The clause in the rongoā service contract specifications dealing with exclusions states that 'Rākau Rongoā (the gathering, preparation, storage and supply, dispensing, and prescribing) is *excluded* from this contract. However, for any clinics providing Rākau Rongoā then, it must be in accordance with the Ministry of Health Standards for Traditional Māori Healing–June 1999 (refer Appendix II)' (emphasis in original): doc R5(b) (Ministry of Health, 'Rongoā Māori Traditional Healing Services', undated), p 6.
161. Document R5, p 6
162. Susan Martindale, under questioning by the presiding officer, 21st hearing, 1 February 2007 (transcript 4.1.21(a), p 205)
163. Document R5, p 6
164. Wi Keelan, under cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 30 January 2007 (transcript 4.1.21(a), pp 70, 72)
165. Wi Keelan, under cross-examination by counsel for Ngāti Kahungunu and under questioning by the presiding officer, 21st hearing, 30 January and 1 February 2007 (transcript 4.1.21(a), pp 70, 72, 205)
166. See doc R5(i) (minutes of rongoā providers service specification hui, Rotorua, 28–29 June 2004)
167. Document K11, p 115
168. Tony O'Connor, 'New Zealand's Biculturalism and the Development of Publicly Funded Rongoa (Traditional Maori Healing) Services', *Sites*, vol 4, no 1 (2007), pp 82, 85. O'Connor repeats these assertions in his subsequent PhD thesis, in which he says, for example, 'What ended up as representative of a Māori tradition of healing was a selective representation of knowledge and techniques drawn from the past and fashioned in response to the needs and interests of people in the present': O'Connor, 'Governing Bodies', p 174.
169. O'Connor indeed notes these factors: O'Connor, 'New Zealand's Biculturalism', pp 82–83.
170. This is a reference to 'Pathway One' of the strategy: 'Development of whānau, hapū, iwi and Māori communities.'
171. Ministry of Health, *He Korowai Oranga: Māori Health Strategy* (Wellington: Ministry of Health, 2002), pp 12–13
172. *Ibid*, p 15
173. Ministry of Health, *Whakatātaka: Māori Health Action Plan 2002–2005* (Wellington: Ministry of Health, 2002), p 15
174. Ministry of Health, *Whakatātaka Tuarua: Māori Health Action Plan 2006–2011* (Wellington: Ministry of Health, 2006), p 23
175. Document R5(c) (Ministry of Health, *Taonga Tuku Iho – Treasures of Our Heritage: Rongoā Development Plan* (Wellington: Ministry of Health, 2006)), p 2
176. *Ibid*, pp 3–5
177. *Ibid*, p 4
178. Document 125 (Dennis Lihou, brief of evidence, undated), pp 7, 8. Mr Lihou states that Te Puna o te Ora o Aotearoa 'eventually ceased to exist', but does not say when this happened. Koro Hemi was in any event Ngā Ringa Whakahaere's first patron: doc 125, pp 8, 13.
179. Document 120, p 8
180. Document 120, attachment D, p 32
181. Document R5(a), p iv
182. Document R5, pp 10, 11
183. Document R5(c), p 9
184. Document R5(g) (Ngā Ringa Whakahaere timeline analysis), p 1. Some healers associated with Ngā Ringa Whakahaere were also clearly resistant to any attempts to have them work in with

- government priorities. For example, Te Whare Whakapikiora o te Rangimarie Trust maintained ‘strong opposition to many government-designed policies or strategies’, according to Dennis Lihou: doc 125, p18.
185. Document R5(h) (attendance register and minutes of rongoā practitioner hui, Whakatane, 27 June 2003), p 8
186. Document R5(i), p 14. O’Connor records that the Ministry observed in a 2004 publication that the ‘majority of healers’ supported Ngā Ringa Whakahaere, but he adds that Ngā Ringa Whakahaere’s ‘support has fluctuated significantly over the years’: O’Connor, ‘New Zealand’s Biculturalism’, p 77.
187. Document R5(j) (agenda and minutes of Ministry of Health rongoā provider hui, Tauranga, 4–5 May 2006), pp 8–9
188. Document R5(o) (terms of reference for the Rongoā Māori Advisory Group, undated)
189. Document P17 (Mark Ross, brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006), pp 2, 5
190. This means of course that only six of 41 Ngā Ringa Whakahaere-affiliated providers had a government contract.
191. Mark Ross, under questioning by the presiding officer, 17th hearing, 4 September 2006 (transcript 4.1.17, pp 49–50)
192. Document R5, p 11
193. Theresa Wall, under cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 74); Wi Keelan, under questioning by the presiding officer, 21st hearing, 1 February 2007 (transcript 4.1.21(a), p 206)
194. Paper 2.479 (Crown counsel, memorandum), pp 4–5
195. Ministry of Health, Māori Health Directorate, ‘Laughter, Tears and Waiata at Rongoā Celebration’, *Ngā Kōrero*, no 5 (August 2008), pp 10–11
196. Paper 2.508 (Crown counsel, memorandum in respect of Te Paepae Matua mō Te Rongoā, 7 August 2009), p 4
197. Document R5(p) (letter from Theresa Wall, Deputy Director-General, Māori Health to registrar, Waitangi Tribunal, 15 May 2009), pp 1–3
198. Susan Martindale, under cross-examination by counsel for Te Waka Kai Ora, 21st hearing, 31 January 2007 (transcript 4.1.21(a), pp 169–170)
199. Australia New Zealand Therapeutic Products Authority, ‘About the trans Tasman therapeutic products agency project’, Australia New Zealand Therapeutic Products Authority, <http://www.anztpa.org/about.htm> (accessed 6 March 2009)
200. Susan Martindale, under cross-examination by counsel for Te Waka Kai Ora, 21st hearing, 1 February 2007 (transcript 4.1.21(a), p 182)
201. Waitangi Tribunal, *Interim Report in Respect of the ANZTPA Regime*; Waitangi Tribunal, *Further Interim Report in Respect of the ANZTPA Regime*
202. Document R5, p 12
203. Paper 2.459 (Crown counsel, memorandum in respect of request of Ministry of Health for further information, 5 April 2007), p 2
204. Australia New Zealand Therapeutic Products Authority, ‘Postponement of the ANZTPA Establishment Project’, Australia New Zealand Therapeutic Products Authority, <http://www.anztpa.org> (accessed 6 March 2009)
205. Ministry of Health, ‘Public Consultation on Natural Health Products’, media release, Wellington, 19 March 2010
206. Ministry of Health, *The Development of a Natural Health Products Bill: Consultation Paper* (Wellington: Ministry of Health, 2010), p 9
207. Document 111 (Ngairie Culshaw, brief of evidence, undated), p 5
208. Raukura Robinson, under cross-examination by counsel for Ngāti Kuri, Te Rarawa, and Ngāti Wai, confidential transcript (2 April 1998, tape 15, side A), p 14
209. Document 120, p 11
210. Document H8 (Alfred Elkington, brief of evidence, undated), p 16; doc C2 (Houpeke Piripi, brief of evidence, undated), p 29
211. Robert McGowan, under cross-examination by Crown counsel, 17th hearing, 4 September 2006 (transcript 4.1.17, p 74)
212. Document 11 (Murray Hemopo, brief of evidence, undated), p 3
213. Document P18 (Philip Rasmussen, brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006), p 2
214. Philip Rasmussen, under cross-examination by Crown counsel, 18th hearing, 28 September 2006 (transcript 4.1.18, pp 383–384)
215. Document P18, p 5
216. Philip Rasmussen, under cross-examination by Crown counsel, 18th hearing, 28 September 2006 (transcript 4.1.18, p 392)
217. Philip Rasmussen, under questioning by the presiding officer, 18th hearing, 28 September 2006 (transcript 4.1.18, p 410)
218. Paul Morgan, under cross-examination by Crown counsel, 18th hearing, 27 September 2006 (transcript 4.1.18, p 309)
219. Tamati Clarke, under questioning by the presiding officer, 17th hearing, 4 September 2006 (transcript 4.1.17, p 29)
220. Dennis Lihou, under cross-examination by Crown counsel, 10th hearing, 1 August 2000 (transcript 4.1.10, p 99)
221. Mark Ross, under questioning by the presiding officer, 17th hearing, 4 September 2006 (transcript 4.1.17, p 55)
222. Document S1, pp 80–82

223. Paper 2.503 (Counsel for Ngāti Kahungunu, memorandum regarding update on rongoā issues, 19 June 2009), pp 4–5
224. Document s1, pp 82–83
225. Ibid, pp 85–87
226. Ibid, pp 83–84
227. Paper 2.503, pp 3–5
228. Document s3, pp 274–276
229. Ibid, pp 270–271
230. Ibid, pp 271–272
231. Ibid, pp 283–284
232. Ibid, p 287
233. Paper 2.481 (Waitangi Tribunal, memorandum-directions of the Chairperson, 11 April 2008)
234. Paper 2.489 (Counsel for Ngāti Wai, Ngāti Kuri, and Te Rarawa, memorandum, 21 July 2008), pp 4–5
235. Paper 2.504 (Counsel for Ngāti Wai, Ngāti Kuri, and Te Rarawa, memorandum, 30 June 2009), pp 2–5
236. Document s4 (Counsel for Ngāti Koata, closing submission, 18 April 2007) pp 70–71
237. Paper 2.499 (Counsel for Ngāti Koata, submission, 29 May 2009), p 3
238. Document s5, pp 15, 24
239. Document T2, pp 112–113
240. Ibid, pp 113–114, 123
241. Ibid, pp 115–116, 121
242. Ibid, pp 122–124
243. Ibid, pp 114–115
244. Paper 2.508, pp 2–5
245. Belich, *Paradise Reforged*, p 471
246. Ibid, p 474
247. Statistics New Zealand, 'New Zealand Period Life Tables: 2005–07', *Hot Off the Press*, 10 November 2008, p 7
248. Durie, *Mauri Ora*, p 17
249. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 340
250. Ministry of Health, *Tatau Kahukura: Māori Health Chart Book* (Wellington: Ministry of Health, 2006)
251. Durie, *Mauri Ora*, p 37
252. Ibid, pp 24–25
253. Ministry of Health, *Taking the Pulse: The 1996/97 New Zealand Health Survey* (Wellington: Ministry of Health, 1999), pp 163–165
254. Neil Pearce, Eru Pomare, Stephen Marshall, and Barry Borman, 'Mortality and Social Class in Maori and nonMaori [sic] New Zealand Men: Changes Between 1975–7 and 1985–7', *New Zealand Medical Journal*, vol 106, no 956 (26 May 1993), pp 193–196. The authors suggested that a substantial proportion of excess Māori mortality was still directly related to ethnicity rather than social class (p 196).
255. Ministry of Health, *He Korowai Oranga*, p 3
256. Ministry of Health, *Tatau Kahukura*, p 68
257. Durie, *Whaiaora*, p 197
258. Ministry of Health, *He Korowai Oranga*, p 19
259. Document 120, attachment D, p 34
260. Annabel Ahuriri-Driscoll, Virginia Baker, Maria Hepi, and Maui Hudson, *The Future of Rongoā Māori: Wellbeing and Sustainability. A Report for Te Kete Hauora, Ministry of Health* (Christchurch: Institute of Environmental Science and Research, 2008), p 6
261. Ministry of Health, Māori Health Directorate, 'Aunty Heeni Hoping for a Visit', *Ngā Kōrero: Mai i Te Kete Hauora*, no 6 (November 2008), p 7
262. Durie, *Mauri Ora*, pp 18–20
263. Document K11, p 66
264. Ministry of Health, Māori Health Directorate, 'From the Deputy Director-General', *Ngā Kōrero: Mai i Te Kete Hauora*, no 5 (August 2008), p 2. Ms Wall and Mr Keelan did not describe rongoā as a taonga when giving evidence, but they were not prompted to do so. Te Puni Kōkiri's witness, Tipene Chrisp, who was called to give evidence about te reo Māori but was also responsible at Te Puni Kōkiri for Māori health issues, agreed, however, with counsel for Te Waka Kai Ora that rongoā is a 'significant' taonga for Māori: Tipene Chrisp, under cross-examination by counsel for Te Waka Kai Ora, 21st hearing, 25 January 2007 (transcript 4.1.21, p 352).
265. Document K11, p 27
266. United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295, article 24
267. Document K11, p 117
268. Richard Jaine, *Report on New Zealand Cost-of-Illness Studies on Long-Term Conditions* (Wellington: Ministry of Health, 2009), pp 16–17
269. Document K11, p 87
270. Wi Keelan, under cross-examination by counsel for Ngāti Kahungunu and under questioning by the presiding officer, 21st

- hearing, 30 January and 1 February 2007 (transcript 4.1.21(a), pp 70, 205)
271. O'Connor, 'New Zealand's Biculturalism', p 78. The same can be said for O'Connor's PhD thesis, which also refers in passing to the 'contentious decision' to omit herbal remedies: O'Connor, 'Governing Bodies', p 76.
272. O'Connor, 'New Zealand's Biculturalism', p 85
273. As McGowan puts it, the common tendency to refer to rongoā as 'herbal medicine' is 'yet another illustration of Western researchers describing Māori beliefs in terms of their own understandings and practices, rather than accepting the description of their medicine in the words and concepts of those to whom the medicine belongs': doc K11, p 15.
274. Document R5(a), p iv
275. Ministry of Health, *He Korowai Oranga*, p 15
276. Theresa Wall, under cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 69)
277. Wi Keelan, under questioning by the presiding officer, 21st hearing, 1 February 2007 (transcript 4.1.21(a), p 212)
278. Paper 2.453, p 12. The Crown memorandum also noted that the Wairoa PHO was allocating 15 per cent or \$33,000 of its Services to Improve Access funding in 2006/07 to coordinating local rongoā services, although to our mind this did not help make Mr Keelan's point either.
279. Theresa Wall, under cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 30 January 2007 (transcript 4.1.21(a), p 68)
280. Document K3, pp 215–216
281. *Ibid*, p 216
282. Document P44, attachment G, p 41
283. Mark Ross, under questioning by presiding officer, 17th hearing, 4 September 2006 (transcript 4.1.17, pp 49, 53)
284. We realise the district Māori Councils, with their village kōmiti, were a different proposition from a national rongoā body, but this does not undermine the point.
285. Document P44, attachment G, p 96
286. *Ibid*, p 139
287. Document I20, attachment D, p 24
288. *Ibid*, p 35
289. Stephen Cornell, *Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States*, JOPNA no 2006–02, Native Nations Institute for Leadership, Management and Policy 2006, pp 16–17
290. O'Connor, 'New Zealand's Biculturalism', pp 77, 85
291. Robert McGowan, under questioning by Roger Maaka, 17th hearing, 4 September 2006 (transcript 4.1.17, p 87)
292. Document R5, p 9
293. 'Laughter, Tears and Waiata at Rongoā Celebration', *Ngā Kōrero*, no 5, August 2008, p 10
294. Paper 2.479, p 5
295. Ministry of Health, *He Korowai Oranga*, p 3
296. Heather Roy, 4 November 2003, NZPD, 2003, vol 613, p 9630
297. Document T2, p 114
298. Here we are simply reiterating the point we have made in respect of te reo (in chapter 5) and mātauranga Māori generally (in chapter 6).
299. Document P44, attachment G, pp 140–141
300. *Ibid*, pp 141–142
301. Document I25, p 22

#### Figure notes

**Figure 7.1:** Māori Health, 'Statistics: Health Status Indicators', fig 7, Ministry of Health, <http://www.maorihealth.govt.nz/moh.nsf/indexma/life-expectancy> (accessed 8 June 2011)

**Figure 7.2:** Māori Health, 'Statistics: Health Status Indicators', fig 7, Ministry of Health, <http://www.maorihealth.govt.nz/moh.nsf/indexma/life-expectancy> (accessed 8 June 2011)

**Figure 7.3:** Māori Health, 'Statistics: Health Status Indicators', tbl 20, Ministry of Health, <http://www.maorihealth.govt.nz/moh.nsf/indexma/diabetes> (accessed 8 June 2011)

**Figure 7.4:** Māori Health, 'Statistics: Health Status Indicators', tbl 19, Ministry of Health, <http://www.maorihealth.govt.nz/moh.nsf/respiratory-disease> (accessed 8 June 2011)

**Figure 7.5:** Māori Health, 'Statistics: Risk and Protective Factors', tbl 7, Ministry of Health, <http://www.maorihealth.govt.nz/moh.nsf/indexma/tobacco-smoking> (accessed 8 June 2011)

**Figure 7.6:** Māori Health, 'Statistics: Risks and Protective Factors', tbl 11, Ministry of Health, <http://www.maorihealth.govt.nz/moh.nsf/indexma/body-weight> (accessed 8 June 2011)

#### Whakataukī notes

**Page 598:** Constitution of the World Health Organization (signed 22 July 1946; entered into force 7 April 1948), preamble

**Page 599:** Definition of 'mauri' from Te Taura Whiri i te Reo Māori, *He Pātaka Kupu: Te Kai a te Rangatira* (Auckland: Te Taura Whiri i te Reo Māori, 2008), p 444



*To jaw, jaw is always better than to war, war.*

—Attributed to Sir Winston Churchill, 1954

THE MAKING OF INTERNATIONAL INSTRUMENTS



*Ko te kai a te rangatira, he kōrero.*  
Discussion is the food of chiefs.





## THE MAKING OF INTERNATIONAL INSTRUMENTS

### 8.1 INTRODUCTION

Over the last two decades, as the world has become increasingly globalised, New Zealand has negotiated, signed, and ratified a plethora of binding and non-binding international instruments with other sovereign states. Mostly these have involved bilateral or multilateral arrangements over trade, investment, and tax, but others have also addressed a broad range of issues from biodiversity and climate change to international security and human rights.

In the course of our inquiry the parties referred to a wide variety of these instruments, including agreements, treaties, conventions, declarations, arrangements, and agendas. The Crown made a basic distinction between legally binding instruments, such as treaties or agreements, and non-binding instruments, such as declarations.<sup>1</sup> We use the term ‘international instruments’ to refer to the full spectrum of arrangements and the term ‘international processes’ to refer to the various means by which they are developed, including the interaction between states and non-state actors such as indigenous peoples. Where we use a specific term like ‘international agreement’, therefore, we are referring to a particular kind of instrument.

International instruments regulate the relationships between sovereign states. Where they are either ‘self-executing’ treaties or part of peremptory international law (known as *jus cogens*), their adoption will automatically affect the rights and obligations of a country’s citizens. In most cases, however, they must first be incorporated by a state’s legislature into domestic law to have effect. However, even non-binding international instruments may exert a variety of effects on states that accede to them for they can have very persuasive political or moral force. More importantly, they have the potential over time to become part of customary international law.<sup>2</sup>

Broadly speaking, the claimants in this inquiry argued that the Crown had excluded them from meaningful participation in the development of New Zealand’s positions on international instruments affecting Māori interests. They argued that, even though official Crown policies professed a commitment to consult tangata whenua over these matters, the Crown had in fact failed to adequately consult or engage with them. They said that where consultation occurred, it was in reality an afterthought designed to give the appearance of proper engagement.

The Crown, for its part, acknowledged a duty to consult and engage with tangata whenua when their interests are affected. It also acknowledged a duty to act in good faith towards its Treaty partner in respect of international agreements. In general terms, the

Crown argued that existing policies and practices fulfilled those obligations. It asserted that it has the right to speak for New Zealand in international processes and emphasised the importance of New Zealand speaking with one voice.

In this chapter we consider those arguments. We do not do this to ascertain whether the substantive result of New Zealand's stance in international forums was Treaty consistent (we do that elsewhere, most particularly in chapters 1 and 2). Rather, we focus on the process of Crown engagement with Māori over international instruments, to determine whether that process was Treaty consistent.

We do this in part because it was a matter of extensive discussion and debate between the parties in our hearings, but mostly because we expect international engagement over those same matters – human rights, the environment, biodiversity, global warming, trade, conflict and diplomacy, and indigenous rights – to increase in the future rather than tail off. Whatever has occurred in the past, it will be important that future engagement occurs on a proper Treaty footing.

## 8.2 SOME EXAMPLES OF INTERNATIONAL INSTRUMENTS

We set out here four examples of international instruments in order to show the past and current significance of such treaties both to Māori specifically and New Zealand overall. To provide background for the outline of the broad claimant and Crown positions that we set out in section 8.4, we also relate some of the specific claim and counter-claim about the extent of Crown consultation with Māori over them.

### 8.2.1 The Convention on Biological Diversity

The Convention on Biological Diversity (CBD) was adopted during the United Nations Earth Summit in Rio de Janeiro in 1992. It was as a global response to the rapid loss of the Earth's biodiversity, and nearly 200 states are now party to it.<sup>3</sup> Since we have thoroughly introduced the CBD in section 2.5.2, we note the key details here only. The CBD is a legally binding agreement concerned with the protection of all forms of biodiversity (that is, ecosystems,



Delegates at the United Nations Earth summit in Rio de Janeiro in 1992. This summit led to the adoption of the Convention on Biological Diversity, to which nearly 200 states are now parties.

species, and genetic resources) in the common interests of all humankind. One of the main reasons why New Zealand has a particular interest in the CBD is article 8(j), under which each contracting party shall:

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

In other words, the CBD requires New Zealand to 'respect, maintain and preserve' mātauranga Māori that is 'relevant for the conservation and sustainable use of biological diversity'. In addition, Māori also have an interest in article 1, which provides for the 'fair and equitable sharing of benefits arising out of the utilization of genetic resources' and in articles 15, 20, and 21 concerning financial benefits and transfers. Ambiguities in the original wording of article 15 have subsequently been clarified by the Bonn Guidelines of 2002 and the Nagoya Protocol of 2010, which fully articulated the concept of 'access and

benefit sharing'. Essentially this means that the holders of traditional knowledge should receive benefits where that knowledge is used for commercial or research purposes.

The evidence presented to us shows that the Crown engaged with Māori in the lead-up to the Rio summit. For example, a round of national meetings took place advising stakeholders, including the National Māori Congress (which represented 45 iwi) of the outcomes of negotiations leading to the CBD.<sup>4</sup> The National Māori Congress participated in the final drafting session of the CBD and was part of the New Zealand delegation to the 1992 UN Conference on Environment and Development where the CBD was signed by New Zealand and 150 other states.<sup>5</sup> It appears, therefore, that the Crown engaged substantively with Māori in light of the significant Māori interests at least until the signing of the CBD in 1992. The Department of Conservation (DOC) was designated the relevant lead agency for the purposes of implementation, with other departments also taking on responsibilities.

However, the claimants said that the Crown had not, since 1992, engaged with Māori in relation to the ongoing international work programme of the CBD, and nor had Māori been part of the New Zealand delegation to CBD meetings.<sup>6</sup> The claimants referred in particular to negotiations on the development of the Bonn Guidelines.<sup>7</sup> Aroha Mead, who had worked at Te Puni Kōkiri on international negotiations and had since become an academic, gave evidence in support of the Ngāti Porou claim. She argued that the Crown had adopted a 'dismissive view that it is acceptable to develop and articulate views on issues of major significance to Maori . . . without Maori input, even though they know it will be criticized by Maori.'<sup>8</sup> In reply the Crown said, amongst other things, that its genuine attempts to consult 'Maori stakeholders' had not always been successful, and that the consultation required under its own engagement strategy (see section 8.3.2) applied to binding agreements rather than the non-binding guidelines being developed through ongoing CBD processes.<sup>9</sup>

### 8.2.2 The Agreement on Trade-Related Aspects of Intellectual Property Rights

We have already discussed the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS

Agreement) in chapters 1 and 2. Again, we do not repeat the detail of the Agreement here but merely note its salient features in the context of Wai 262. Essentially, the TRIPS Agreement sets international minimum standards for the protection of intellectual property (IP), and provides the framework for New Zealand's domestic IP law. The Agreement was part of broader negotiations leading to the establishment of the World Trade Organization (WTO) in January 1995 and is legally binding on all 153 of the WTO's member states. The Māori concern with the TRIPS Agreement is that its minimum standards and compulsory requirements remove New Zealand's latitude to adequately recognise kaitiaki interests in respect of taonga works and mātauranga Māori. We have concluded that members may impose protections that are greater than or additional to those minimum standards, and that the TRIPS Agreement thus imposes a floor rather than a ceiling on IP law. But it is nonetheless clear that New Zealand's ability to conduct international trade imposes a series of conditions that inevitably have some impact on Māori interests.

The claimants said that, before New Zealand became a party to the TRIPS Agreement, there was insufficient assessment of and inadequate consultation with Māori about its effect on Treaty guarantees in relation to indigenous flora and fauna. Likewise, they argued that there was inadequate consultation and insufficient assessment of Treaty interests before the Crown enacted legislation (also in 1994) giving effect to the Agreement. There was also insufficient time allowed for Māori to consider the impact of that legislation before it was enacted. The claimants said they had sought the inclusion of a Treaty protection clause in the legislation before it was enacted, but this was rejected. In the claimants' view, the Crown had failed in its Treaty obligation to 'put in place mechanisms to ensure it can meet its obligations to Maori under the Treaty' before becoming party to and implementing the Agreement.<sup>10</sup>

In response to the claimant concerns, the Ministry of Economic Development said that the TRIPS Agreement 'concentrated the range of possible options or mechanisms' available to the Crown for responding to Māori concerns but had not 'foreclosed the Crown's ability to

develop law and policy to address these issues.’<sup>11</sup> The Ministry said that Māori had provided input on the Bill introduced to implement the TRIPS Agreement by way of submissions to Parliament’s Commerce Select Committee. According to the Ministry, the committee’s view was that the Bill did not adversely affect Māori interests. At the committee’s request, the Ministers of Commerce and Trade Negotiations gave an assurance that Māori would be consulted before any broader intellectual property law reforms were introduced. The Ministry of Economic Development said that the Ministry of Commerce (as it was then) subsequently consulted Māori through national hui in late 1994 and through the establishment in 1995 of Māori focus groups aimed at developing ‘acceptable solutions to issues of concern for Māori’ in terms of patent and trade mark law reform.<sup>12</sup>

In general terms, the Ministry said it consulted with all stakeholders when it was developing intellectual property rights policy or legislation, and consulted specifically with Māori on issues known to be of particular interest or concern to them. It did this through ‘formal hui, targeted Focus Groups, and/or the appointment of expert working groups to advise the Ministry on the particular issues of relevance to Māori.’<sup>13</sup>

The Ministry also emphasised that the TRIPS Agreement was negotiated under a ‘single undertaking’ approach as part of the WTO negotiations. This meant that parties ‘were not in a position to pick and choose which agreements they would accept’. Rather, they were required to ‘accede to all of the multilaterally agreed legal texts’ as a condition of WTO membership.<sup>14</sup> Furthermore, it was not possible for individual parties to derogate from the minimum international standards set out in the TRIPS Agreement, so New Zealand was unable to include a reservation specifically safeguarding its ability to adopt measures in favour of Māori.<sup>15</sup>

### 8.2.3 The Declaration on the Rights of Indigenous Peoples

We have referred to the United Nations Declaration on the Rights of Indigenous Peoples (DRIP) in several chapters. The declaration addresses the individual and collective rights of indigenous peoples in relation to their culture, identity, language, employment, health, education, and

other issues. It is seen as groundbreaking in its acknowledgement of collective as well as individual rights: as former UN Special Rapporteur for indigenous peoples Rodolfo Stavenhagen has written, the declaration departs from other human rights instruments by recognising that ‘the rights holders are not only individual members of indigenous communities but the collective unit, the group, indigenous peoples as living societies, cultures and communities.’<sup>16</sup>

Simply, DRIP represents the most important statement of indigenous rights ever formulated. Such has been the international unanimity over it that, despite the initial reservations of some states – including New Zealand – we could well be witnessing the beginnings of customary international law based upon it. Again, as Stavenhagen puts it:

The strongest argument for the Declaration is that it was adopted by an overwhelming majority of 143 states, from all the world’s regions, and that as a universal human rights instrument it binds all UN member states morally and politically to comply fully with its contents. Just as the Universal Declaration of Human Rights has become customary international law, so the Indigenous Rights Declaration can become customary international law over time as well, if

Pita Sharples, the Minister of Māori Affairs, at the United Nations Permanent Forum on Indigenous Issues in New York in April 2010. The minister announced that New Zealand would reverse its earlier position and support the Declaration on the Rights of Indigenous Peoples.





The New Zealand delegation, led by Minister of Māori Affairs Pita Sharples, perform a waiata on the opening day of the ninth session of the United Nations Permanent Forum on Indigenous Issues, New York, April 2010.

– as is possible and likely – national, regional and international jurisprudence and practice can be nudged in the right direction.<sup>17</sup>

In the context of the Wai 262 claim, article 31(1) of DRIP is of particular relevance. It acknowledges the right of indigenous people to ‘maintain, control, protect and develop their . . . sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora’. It states that ‘[t]hey also have the right to maintain, control, protect and develop their intellectual property’ over such things.

The United Nations General Assembly adopted DRIP

in 2007 by a majority vote of 143 votes in favour to four against (New Zealand, Australia, the United States, and Canada), with 11 countries abstaining.<sup>18</sup> In 2010, New Zealand reversed its position and endorsed the declaration,<sup>19</sup> as indeed now have the other three opponents. New Zealand’s opposition had concerned articles about self-determination and territorial integrity for indigenous peoples, as well as apparent support for indigenous claims to lands now in private ownership.<sup>20</sup> After the Government’s change of position, the Prime Minister told Parliament on 20 April 2010 that:

it is important to understand that the Declaration on the Rights of Indigenous Peoples is just that—it is a declaration.

It is not a treaty, it is not a covenant, and one does not actually sign up to it. It is an expression of aspiration; it will have no impact on New Zealand law and no impact on the constitutional framework.<sup>21</sup>

Despite this caveat, we have no doubt that New Zealand's endorsement of DRIP is a significant development.

The Crown's initial position in the 1990s had been that the draft DRIP was clearly of major significance to Māori and that engagement was necessary.<sup>22</sup> There was, however, an issue as to the appropriate domestic agency to lead the engagement process,<sup>23</sup> with the role being swapped at various points between 1994 and 2003 between the Ministry of Foreign Affairs and Trade (MFAT) and Te Puni Kōkiri.<sup>24</sup> During our hearings, witnesses alleged a lack of consultation on DRIP. For example, Tracey Whare and Claire Charters, experts on international instruments who both gave evidence on behalf of Ngāti Kahungunu, said that they were not aware of any unified Māori view on the declaration because 'There has been no opportunity to develop one through consultation.'<sup>25</sup> This, they said, was despite numerous Māori attempts to engage the Crown in discussions.<sup>26</sup>

The Crown denied a lack of consultation with Māori on DRIP:<sup>27</sup> MFAT, in its evidence, said the Crown knew the Māori position on the draft because Māori 'had been consulted extensively over the earlier period,'<sup>28</sup> referring to a series of 14 outreach encounters between 1997 and 2003.<sup>29</sup> In 2004 and 2005 New Zealand tabled two texts of suggested amendments to the draft DRIP working group<sup>30</sup> and, the Crown asserted, 'Maori were consulted' about these before presentation to Cabinet.<sup>31</sup> When asked during cross-examination whether there had been any consultation with Māori prior to the submission of suggested amendments to the working group, Mr Gerard van Bohemen of MFAT (then chief legal adviser and head of the MFAT's legal division) referred to a hui at Victoria University in August 2003, although he was not able to say what exactly had been discussed at this workshop.<sup>32</sup> Māori attendees disputed that the workshop was consultation, and stated that participants had attended in their personal capacity and were only able to consider proposed amendments over a period of 24 hours due to late distribution

of the working text.<sup>33</sup> Tracey Whare and Claire Charters asserted that no consultation had taken place since 2002.<sup>34</sup>

What is clear is that, at some point around 2003, dialogue over DRIP broke down in light of the different Crown and Māori views on substantive matters, despite the fact that the Crown recognised the necessity and desirability of further dialogue and discussion with interested Māori.<sup>35</sup> In the absence of suitable domestic mechanisms for the Treaty partners to engage, the dialogue moved into international forums with apparent frustration on the part of the claimants and Crown alike.<sup>36</sup> At the same time, the failure to deal with differences in a nuanced way reflected poorly on New Zealand's reputation. A number of official delegations were unclear about why the Crown was opposing the declaration and the concerns of Māori participants.<sup>37</sup>

#### 8.2.4 The Australia New Zealand Therapeutic Products Authority

We have discussed the Australia New Zealand Therapeutic Products Authority (ANZTPA) in the previous chapter (see section 7.3.7). We do not repeat that detail here but note the following. ANZTPA arose from an agreement entered into by the Australian and New Zealand governments in 2003 to establish a trans-Tasman regulatory regime for therapeutic products. The Government's legislation to implement the agreement was due to come before the House in October 2006. This prompted the Ngāti Kahungunu and Te Waka Kai Ora claimants to seek urgent interim findings from us on the basis that they had not been adequately consulted and their interests in rongoā would be adversely affected.<sup>38</sup> Rongoā seemed likely to be subject to ANZTPA's regulation where Māori were retailing products as dietary supplements.

Our conclusion was that the regulation of rongoā for sale was fine in itself, and that any actual prejudice to Māori depended wholly on the rules of the new regime, which had yet to be worked out. As it happened, the Government found itself short of numbers to pass the legislation in 2007 and the adoption of a trans-Tasman authority currently remains on hold, as far as we are aware. But it is clear, in any event, that consultation with Māori about ANZTPA had been quite inadequate: only

one consultation hui had been held, in July 2006. This was called with very limited notice and was only a few months before the legislation was due to pass and a whole two and a half years after the Government had signed up the agreement. Even Ministry of Health witnesses conceded under cross-examination that consultation with Māori had ‘not been [of] the required standard.’<sup>39</sup>

### 8.3 CROWN ENGAGEMENT POLICIES AND PRACTICES

Before going further we set out here the policies that the Crown has adopted to engage and consult with Māori over the processes – both in New Zealand and internationally – through which New Zealand has formed its position on international instruments.

#### 8.3.1 MFAT’S outreach activities and strategy

MFAT said that, prior to 1990, Crown engagement with Māori in relation to international instruments had been limited to contact with individuals known to be interested in international issues and ‘occasional’ discussions with iwi or iwi organisations. However, in 1990 MFAT established the Kaupapa Māori Division to ‘build relationships with key Maori organisations, iwi and individuals, and to provide advice to the Ministry’s business units on Maori perspectives regarding cultural and policy issues.’<sup>40</sup> In 1995 MFAT also elaborated a ‘Framework for Responsiveness to Maori’, which its witness described as ‘a tool to enhance the Ministry’s understanding of Maori interests’ and as providing ‘a broad outline of the basis for working with Maori and the expected benefits.’<sup>41</sup>

MFAT provided evidence in 2007 of a series of outreach encounters with Māori in many parts of New Zealand between 2001 and 2006,<sup>42</sup> through which the Ministry began to build relationships with Māori. While exact numbers were not clear from the documents provided, it appears that in most of these years between four and six ‘kanohi ki te kanohi’ (face to face) meetings were held. Some of these meetings were held with iwi, while others were more generally with Māori in a town or city, or with individuals or specific organisations. These meetings were very general in content, covering such matters as MFAT’S role, and broad topics such as trade or human rights.<sup>43</sup>

Meetings were also held during this period to provide information about specific processes or instruments, such as World Trade Organization negotiations in 1999, and TRIPS, draft DRIP, Asia Pacific Economic Cooperation, and General Agreement on Trade in Services processes, among others.<sup>44</sup>

For MFAT, Mr van Bohemen said that, although this programme of outreach meetings was ‘by no means a comprehensive coverage of all iwi, it represents a concerted effort to reach out to a significant number of iwi and to build relationships.’<sup>45</sup>

Some of these outreach activities took place under the auspices of a Māori outreach strategy, apparently developed in 2003, which set out objectives for Māori outreach and a programme of outreach activities for that calendar year. The strategy was designed to respond to ‘a growing interest amongst Māori on a number of policy and representational issues’ falling within the Ministry’s responsibilities, and growing interest internationally about Māori and Māori culture. It noted MFAT’S desire to respond to Māori interests ‘while recognizing the constraints on resources.’<sup>46</sup>

The strategy’s ‘Broad Objectives’ were:

- To assist in establishing and developing a relationship with Māori
- To engage effectively with Māori sector interests on Foreign Affairs and Trade policy development
- To share and disseminate information with Māori on the work of MFAT
- To have effective consultation in a timely and adequate fashion on those matters of policy that require consultation
- To assist with raising awareness of Māori opinion and views on MFAT issues<sup>47</sup>

The strategy set out a work programme aimed at achieving its objectives. Under this work programme, the Kaupapa Māori Division aimed to: help other divisions to identify issues of interest to Māori and opportunities for outreach; support and encourage divisions to undertake engagement and consultation as appropriate; and facilitate a programme of ‘kanohi ki te kanohi’ regional visits

to allow MFAT to share information and make contacts for further consultation.<sup>48</sup>

The strategy also envisaged MFAT working with Te Puni Kōkiri to coordinate outreach activities, taking advantage of national and regional hui to learn about Māori opinions, establishing Māori industry/sector focus groups, and being 'prepared to maximise any outreach opportunities as they arise (responding to rather than avoiding opportunities to speak at Māori events and hui)'.<sup>49</sup>

From 2005, MFAT began to shift direction in its outreach activities. The Kaupapa Māori Division was reviewed that year and in 2006 it was replaced by a Māori Policy Unit. This shed some of the Kaupapa Māori Division's responsibilities such as cultural awareness training and caring for MFAT's Māori artworks, allowing it to focus more directly on its core function. As with the Kaupapa Māori Division, this was 'to build relationships with Māori stakeholders ranging from individuals to iwi to Māori economic entities and in that context to provide advice on consultation with Māori in a broad sense'.<sup>50</sup>

At the same time, MFAT's outreach activities were also refocused. Mr van Bohemen explained that the Ministry decided to place more emphasis on 'a whole-of-government approach' to engagement with Māori over specific issues. Under this revised approach, MFAT would continue its relationship building, but efforts would be made to coordinate engagement across all departments so that iwi were not 'overtax[ed]' by multiple approaches. At the same time, the Ministry would undertake 'a more concerted programme of relationship building with a wide range of Maori audiences' including iwi, iwi organisations, Māori businesses, pan-tribal organisations, academics, and commentators.<sup>51</sup>

Mr van Bohemen explained that the purpose of MFAT's outreach activities was on general information and relationship building, not detailed consultation or discussions over specific international instruments. He said:

it has not been their [that is, of the Kaupapa Māori Division or the Māori Policy Unit] role to undertake detailed consultation on specific international instruments under negotiation or to which New Zealand is considering becoming a party. Responsibility for detailed consultation of that kind

rests with the relevant policy division within the Ministry, or more usually with the domestic agency which has responsibility for the issues covered by the instrument. Because it is usually in relation to the domestic policy context that issues of interest or concern to Māori are most relevant.<sup>52</sup>

We now consider Crown policy in relation to that 'detailed consultation on specific international instruments'.<sup>53</sup>

### 8.3.2 The Māori Engagement Strategy

The Māori outreach strategy aimed to support relationship building between MFAT and Māori, and its outreach activities provided for Māori participants to be informed about MFAT's activities. But it did not set guidelines for formal engagement with Māori over international processes and instruments of specific interest to them. That function was served by the Strategy for Engagement with Māori on International Treaties, which was developed by MFAT and Te Puni Kōkiri in 2000 and subsequently received Cabinet approval.<sup>54</sup>

The objectives of this Māori engagement strategy are to:

- ▶ 'identify areas of developing international law of relevance to Māori interests and the Crown's Treaty of Waitangi relationship' – in particular, new international treaties potentially relevant to Māori;
- ▶ 'ensure that issues of relevance to Māori in international treaties are identified early, and that engagement with Māori on a particular treaty is appropriately tailored according to the nature, extent and relative strength of the Māori interest'; and
- ▶ 'ensure that engagement with Māori is effective and efficient in its use of government resources'.<sup>55</sup>

The strategy makes the lead agency in any international process responsible for determining the nature and degree of engagement with Māori. Such engagement may range from raising awareness by providing information, 'right through to full consultation.' The nature and degree of engagement will be determined case by case and will depend on 'the nature, degree and strength of [the] Māori interest'.<sup>56</sup>

The strategy recognises Māori interests in (among



other things) intellectual and cultural property; foreign investment; genetic resources; kōiwi tangata and moko mōkai; New Zealand flora and fauna; use of natural physical resources; indigenous rights; national language; human rights; immigration; employment; and education. It says that:

In general terms, Māori involvement would be expected on any treaty action affecting the control or enjoyment of Māori resources (te tino rangatiratanga) or taonga as protected under the Treaty of Waitangi.

It also says that there will not be a need to involve Māori in discussions on all treaties, but rather ‘the focus must be on ensuring that this occurs on international treaties concerning issues of relevance to Māori.’<sup>57</sup>

The strategy also hints at a need to balance Māori interests alongside others, while acknowledging that sometimes the Māori voice will be persuasive:

In developing the government’s position on international treaties, other interested parties as well as Māori will need to continue to be engaged and have their interests considered. In some cases Māori concerns will be one of the most important factors in developing the government’s position (for example international treaties dealing with the rights of indigenous peoples).<sup>58</sup>

The strategy also notes that there are many opportunities for Crown engagement during various phases of treaty-making. These begin before a decision has been made to enter negotiations for the treaty, and continue through the treaty-making process. Further opportunities may arise when a treaty is tabled in the House, accompanied by a National Interest Analysis, under Standing Order 384, and will arise during public consultation on any legislation necessary to give effect to obligations assumed under the treaty.<sup>59</sup>

Under a heading of ‘ongoing engagement’, the strategy also says that every six months MFAT will distribute to iwi and Māori organisations a report on international treaties currently under negotiation. The aim of this information is to ensure that ‘Māori are, wherever possible, kept

informed of developments in the government’s participation in the international legal framework’. The strategy says that this report will also be forwarded to Parliament’s Foreign Affairs, Defence and Trade Select Committee.<sup>60</sup>

The strategy also notes that engagement over treaties will enable the development of ongoing relationships, and that such engagement should extend beyond initial consideration of international treaties to also encompass implementation of such treaties.<sup>61</sup>

It is important to be clear that this strategy applies only to ‘international law’, with a focus on international treaties.<sup>62</sup> Mr van Bohemen, in his evidence, said that it applies to ‘formal international agreements’, which he defined as instruments that are ‘legally binding under international law’. Crown counsel defined it as applying to ‘treaties and other formal international agreements.’<sup>63</sup> In other words, the strategy does not require the Crown to consult Māori over non-binding instruments. Some, though by no means all, of the international processes that concerned the claimants were non-binding.

As far as we are aware, the Māori engagement strategy remains in force. Indeed, as a Cabinet document, it imposes obligations not only on MFAT but other agencies charged with leading New Zealand’s role in international processes.

In 2001 MFAT wrote to iwi leaders noting that Cabinet had recently approved the strategy and providing a list of international treaties under negotiation.<sup>64</sup> The letter noted that while the lists would be provided for information only, the objective was to:

ensure that Maori groups are, wherever possible, kept informed in a systematic way of developments in the Government’s participation in the international legal framework. Their provision also affords an opportunity for Maori to provide comment to the Government as it develops its position on treaties being negotiated, or treaties that are being considered for possible ratification, where Maori judge them to be of interest. In such situations, it can be helpful for the lead department to have the implications of a possible treaty action for Maori interests drawn to their attention, in advance of final decisions being taken.<sup>65</sup>

We were presented with evidence that MFAT provided the six-monthly reports to iwi and Māori organisations until 2002. It is not clear what happened beyond that, but it appears that, to the extent that these reports were produced at all, they were much more sporadic.

#### 8.4 CLAIMANT AND CROWN ARGUMENTS

We now turn to the Crown and claimant arguments in respect of the Treaty compliance of the Crown's policies and processes. These arguments were usually made in the context of specific instruments, but some general themes emerged, which we set out below. We have of course already mentioned some of the parties' arguments in setting out the disagreements between them over the CBD, the TRIPS Agreement, DRIP, and ANZTPA above.

##### 8.4.1 The claimants' concerns

In closing submissions the claimants all submitted that the Crown had essentially ignored Māori in developing its positions on international instruments. Counsel for the Te Tai Tokerau claimants, for example, contended that engagement with Māori on instruments of great relevance to them – such as the TRIPS Agreement, the CBD, and the draft DRIP – had been 'either inadequate or totally absent'.<sup>66</sup> Counsel for Ngāti Kahungunu likewise argued that the Crown had acted 'without any input from Maori, and certainly without any formal consultation'. He added that the evidence of the Crown witness had confirmed that consultation only occurred when 'the Crown was attempting to ratify the instruments into New Zealand law'.<sup>67</sup> Counsel for Ngāti Porou said that the lack of consultation was despite Māori making 'repeated requests for engagement, consultation and dialogue'.<sup>68</sup>

Counsel for Ngāti Koata stated that Mr van Bohemen had 'conceded' under questioning that MFAT's outreach activities had been merely 'a series of outreach encounters' rather than the 'concerted outreach effort' to engage with iwi he had described in evidence.<sup>69</sup> Moreover, argued the claimants, the Crown lacked the detail of whatever outreach had occurred. Counsel for Ngāti Koata contended that:

a consistent theme throughout Mr Van Bohemen's evidence was that he did not know what analysis/consultation etc was undertaken with Māori. . . . The absence of a consistent framework for consultation or engagement [with] Māori does not enhance confidence in these processes.<sup>70</sup>

Nor could the Crown say when consultation would occur in future, argued the claimants. Counsel for Ngāti Koata said that the Crown made 'constant reference' to a 'domestic conversation' and 'proper engagement'. But 'when will this conversation begin?', asked counsel. Māori were 'constantly waiting'.<sup>71</sup>

Counsel for Ngāti Koata was also critical of the way the Crown makes the initial decision as to whether Māori need to be consulted over a particular international instrument. Counsel submitted:

The fact that the Ministry considers the 'preliminary' issue of whether Māori involvement is required based on their assessment of the strength and nature of [the] Māori interest in a particular area is unsatisfactory. Clearly Māori have strong interests in many areas where [there] is currently no engagement taking place. . . .<sup>72</sup>

The claimants also criticised what they saw as the general lack of coordination between government agencies and those agencies' absence of institutional knowledge about earlier rounds of consultation. For example, counsel for Ngāti Koata submitted that a reliance on Te Puni Kōkiri advice about whom to consult was 'a consistent theme in the presentation of the Crown evidence'.<sup>73</sup> However, counsel pointed out, the Te Puni Kōkiri witness could not comment on international instruments and there was now no capacity or institutional knowledge remaining at Te Puni Kōkiri on the subject. Counsel also noted Mr van Bohemen's reference to high staff turn-over at MFAT causing a reliance on paper files for knowledge of recent outreach events. Counsel concluded that:

This disjointed approach and reliance on TPK for a Māori view . . . is prejudicial to Māori in general and does not reflect the Treaty relationship. . . . There is clearly no

‘whole-of-government’ approach to matters such as this, despite the various sweeping statements made in this regard by Crown witnesses.<sup>74</sup>

Counsel for the Te Tai Tokerau iwi also said that MFAT had ‘consistently ignored the advice provided to it by TPK regarding implementation of MFAT’s engagement strategy with Maori’.<sup>75</sup>

Finally, we note the remedies that the claimants requested. Counsel for Ngāti Kahungunu called for ‘the broad and active participation of Maori in policy development’;<sup>76</sup> and counsel for the Te Tai Tokerau claimants said there needed to be ‘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’.<sup>77</sup> Counsel for Ngāti Porou cited the evidence of Aroha Mead that the Crown offered no encouragement to Māori participation in CBD processes and even deliberately excluded them.<sup>78</sup> In this regard counsel for the Te Tai Tokerau claimants said that Māori should both be part of official delegations to international forums *and* represented independently so that ‘their voice and concerns are clearly heard and not diluted by “unfriendly” Crown officials’.<sup>79</sup>

#### 8.4.2 The Crown’s response

In its 2002 statement of response the Crown made the general comment that, in the international arena, it is for the Crown to speak for New Zealand. With respect to various international instruments New Zealand had acceded to, counsel said that:

‘permission’ from Maori to sign, ratify or bring [them] into force . . . was neither sought nor given [but] decisions about when and how to participate in international affairs and in the international legal community are incidents of the exercise in the national interest of sovereignty by the Crown . . .<sup>80</sup>

For MFAT, Mr van Bohemen added:

In the international arena New Zealand must speak with one voice – coherency is vital – and MFAT’s role is to be that

‘voice’. Distilling a ‘NZ Inc’ position for the purposes of international engagement is a core function of MFAT, whether or not the subject matter under consideration is within MFAT’s core expertise.<sup>81</sup>

Mr van Bohemen also emphasised that, as a small player in international processes, New Zealand has limited influence. It cannot force its position on other participating states; rather, ‘in order to have any influence at all . . . New Zealand must act in concert with as many other likeminded states as possible’. He said that New Zealand cannot impose its own negotiating timetables, nor unilaterally delay negotiations to suit demand for engagement with New Zealand stakeholders.<sup>82</sup>

In broad terms, the Crown did not accept the allegation that it had failed to consult or engage with Māori on matters of interest to them. It acknowledged that various instruments had the potential to affect Māori, but maintained that it had consulted using a range of methods. For example, prior to ratifying the TRIPS Agreement it had released a discussion document aimed at Māori and held four consultation hui,<sup>83</sup> and during negotiations on the draft DRIP it had ‘sought and received’ Māori views.<sup>84</sup> The Crown also argued that engagement was sometimes not warranted. Under cross-examination Mr van Bohemen took issue with what he saw as the ‘presumption’ of counsel for the Te Tai Tokerau claimants that ‘on all matters relating to ABS or traditional knowledge . . . the Ministry must consult you, consult Māori on every aspect of it, each time’.<sup>85</sup>

The Crown also said that since 1990 MFAT has had formal arrangements for engaging with Māori and providing advice on Māori perspectives on policy and cultural issues.<sup>86</sup> These initiatives have included those outlined in section 8.3: the establishment of the Kaupapa Māori Division within the Ministry and its later replacement by the Māori Policy Unit, and the development of the Framework for Responsiveness to Māori, the Māori engagement strategy, and the series of outreach activities.<sup>87</sup> The Crown also noted the adoption of a procedure whereby binding bilateral and multilateral treaties of particular significance are presented to the House of Representatives following

assessment of a National Interest Analysis by Cabinet. Mr van Bohemen said that this process enables referral to a select committee which may seek public submissions (including from Māori) in appropriate cases.<sup>88</sup>

In response to the claimants' allegations that the Crown had attempted to exclude Māori from participation in international negotiations over the CBD, the Crown asserted that:

No decision has been taken to consciously exclude Māori from CBD processes . . . There is no evidence in the material released to Ms Mead under the Official Information Act supporting this claim.<sup>89</sup>

Overall, the Crown said it did in fact consult Māori on numerous occasions on a range of international agreements and issues. Further, the Crown said that it had acted reasonably and in good faith where it had obligations to consult with Māori and recognise and protect Māori interests, and that it was doing all that was reasonably necessary in the dynamic world of international relations.<sup>90</sup>

## 8.5 ANALYSIS

International relations are no longer confined to formal political or even economic arrangements between nation states. As the MFAT evidence shows, its focus as a ministry is now inwards as much as outwards. This is because the many international instruments, and the long processes of negotiating and renegotiating their content and implementation, have the potential to affect New Zealanders in almost all aspects of their lives. MFAT accepts that it has to find out how New Zealanders might be affected, and then the best way to protect a variety of interests so that our society as a whole will benefit.

It will be clear from this and earlier chapters that Māori interests in trade and economic development, natural resources, the protection and transmission of Māori culture and traditional knowledge, indigenous rights, and environmental protection, are all profoundly affected by international instruments. In the current globalised commercial (and to some extent political) world, some effects on these interests will occur not because of Crown action

but because of Crown obligation. That is why there must be a commitment to permanent engagement on international issues. The claimants' view is that Crown consultation with them is haphazard at best, non-existent at worst, so that they are unable to have their interests properly identified and protected, or sometimes considered at all. The Crown, on the other hand, maintains that it is doing enough to meet its Treaty responsibility of consulting Māori and protecting their interests – where justified – in the international arena. Having set out the parties' views of these matters, we now assess those concerns in light of the principles of the Treaty. We ask the question: are the principles of the Treaty relevant to the making of international instruments? Our answer is 'yes'. We then assess the Treaty compliance of the Crown's current policies and systems for deciding New Zealand's position on such instruments. As will become clear, our view is that a promising start has been made, but that the present system falls short of meeting Treaty standards. We then make recommendations that we think will assist the Crown and claimants to meet their Treaty obligations to each other in this difficult but vitally important arena.

### 8.5.1 Are the principles of the Treaty relevant to making international instruments?

In article 1 of the Treaty of Waitangi, the Crown acquired *kāwanatanga* (the right to govern), which involved, among other things, the power to make policies and laws for the government of this country. Included in this, we think, was the right to represent New Zealand abroad and to make foreign policy. For a long time after 1840, this right was exercised in London. New Zealand gradually took responsibility for its own foreign policy in the first half of the twentieth century. Ultimately, a more home-grown international personality was developed, called 'NZ Inc' in today's language by the MFAT witness in our inquiry.

But the right to govern was acquired in an exchange with Māori tribal leaders and their peoples, in which the Crown guaranteed to protect Māori interests, including their full authority over their own affairs, or *tino rangatiratanga*. In this report, we are not concerned with any past failures of the Crown to honour this bargain as it related to the making of foreign policy and international

instruments. Rather, our role is to determine whether the present regime for deciding these matters is Treaty compliant.

Certainly, we can say that once the power to make such decisions was transferred from London to Wellington, the opportunity for Māori to have their proper say became much greater. We should not underestimate the importance of that opportunity. As the MFAT witness told us, New Zealand is a small country that depends for the fostering and protection of its interests on the making of rules that bind or influence more powerful nations to act in agreed ways. Without this process of making international rules, our interests might receive little or no consideration and protection. Māori, in their turn, depend on their interests being adequately identified, understood, and addressed in this international rule-making. From our discussion of the CBD, the TRIPS Agreement, and DRIP above, it will be clear that Māori are sometimes vitally affected by the agreements that are made. And, as will also be clear, the Crown accepts that it has a Treaty duty to consult Māori and protect their interests, at least in the making of binding agreements.

In this context, the Treaty of Waitangi entitles Māori interests to a reasonable degree of protection, when those interests are affected by the international rules that the New Zealand Government negotiates or signs up to. This is not a small Treaty obligation for the Crown. It requires the Crown actively to protect those interests, if and when they are found to exist. We recognise, of course, that the Crown is not all-powerful (or even very powerful) in the international arena, so we would add the qualification that Māori interests must be protected to the extent that is reasonable and practicable in the international circumstances.

We would also note, as we have done elsewhere in this report, that it is for Māori to say what their interests are, and to articulate how they might best be protected – in this case, in the making, amendment, or execution of international agreements. That is what the guarantee of tino rangatiratanga requires. It is for the Crown to inform Māori as to upcoming developments in the international arena, and how it might affect their interests. Māori must then inform the Crown as to whether and how they see their interests being affected and protected. This is

necessarily a dialogue: Māori and the Crown must always be talking to one another, whether it is occasional consultation as needed or something more regular, fixed, and permanent. We return to this point below. Here, we note that there must be a conversation, so that where Māori interests are affected by possible or proposed international instruments, those interests can be readily identified and understood, and a means of protection devised.

Finally, we think that, as in other situations discussed in this report, the degree of priority to be accorded the Māori interest depends on the scale of its importance to Māori and the nature and extent of likely impacts on it. Ultimately, this has to be ascertained by a properly informed Crown and then balanced against any valid interests of other New Zealanders and of the nation as a whole, if those interests are in tension. As we have said elsewhere, conflict between Māori and New Zealand interests is not to be assumed.

In sum, the Treaty requires the identification and active protection of Māori interests when they are likely to be affected by international instruments. Māori must have a say in identifying the interest and devising the protection. But the degree of protection to be accorded the Māori interest in any particular case cannot be prescribed in advance. It will depend on the nature and importance of the interest when balanced alongside the interests of other New Zealanders, and on the international circumstances which may constrain what the Crown can achieve. The Crown's duty of active protection becomes ever more urgent in light of the widening reach and rapid evolution of international instruments.

What does this mean in practical terms for the Crown's engagement with Māori over these instruments? Considering the broad spectrum of international matters, it would be impractical and undesirable for the Crown to engage in full-scale consultation with Māori over every international instrument. Such an approach would also be unduly burdensome on Māori. There will therefore be circumstances in which very little engagement is required, other than perhaps the provision of information.

There will also be occasions in which Māori interests are at play, but wider interests are to the fore. This may occur, for example, in respect of biosecurity. In other instances, the Māori interest may be a specialised one.

Investment or export agreements could be an example. Without wanting to be prescriptive, such circumstances may justify a very general level of engagement, such as informing and seeking views from the Federation of Māori Authorities, which tends to speak for iwi business interests. There will, however, be some occasions where Māori interests are significantly affected and intensive consultation and discussion is required. There will also be occasions in which the Māori Treaty interest is so central and compelling that engagement should go beyond consultation to negotiation aimed at achieving consensus, acquiescence or consent. DRIP would seem to be one such example. There may even be times when the Māori interest is so overwhelming, and other interests by comparison so narrow or limited, that the Crown should contemplate delegation of its decision-making powers, or delegation of its role as New Zealand's 'one voice' in international affairs; negotiations over the repatriation of taonga might be an example.

The Treaty partners need to be open to all of these possibilities, not just some, and to decide which applies on the basis of the duties of good faith, cooperation, and reasonableness that each owes the other. As the previous paragraph shows, there can be no one-size-fits-all approach. Rather, the Treaty standard for Crown engagement with Māori operates along a sliding scale on the principles we have articulated above. The operation of that scale is by its nature imprecise and is dependent upon the relationship of the Treaty partners to be effective in practice. In considering the possible trigger points on such a sliding scale, the Crown will need to consider when to engage with Māori on matters Māori perceive as important to them. In practical terms, we think that the more significant the Māori interest, or the more specific the Treaty interest, the likelier it is that the Crown should be engaged at the more active end of the spectrum, working together with Māori to ensure that Māori interests are accorded sufficient priority. Success will only be achieved if the Crown engages early with Māori in relation to international instruments, and talks with the right people about the nature and extent of the Māori interests, and how New Zealand's participation might need to be managed.

We turn next to consider whether the Crown's current regime for decision-making about international instruments meets its Treaty obligations.

### **8.5.2 Do the Crown's policies and practices comply with the Treaty?**

As we see it, many of the underpinnings for Crown compliance with the Treaty already exist. The Māori engagement strategy and MFAT's outreach programme were both developed in good faith and with the genuine intention of informing and consulting Māori about international issues of relevance to their interests. In its Māori outreach programme, MFAT has sought to establish and develop relationships with Māori, so as to enable effective, timely, and adequate engagement where required.<sup>91</sup> This was supposed to lay a general foundation for engagement. The Māori engagement strategy tried to achieve early identification of specific international issues relevant to Māori, and then engagement tailored to the 'nature, extent and relative strength' of the Māori interest.<sup>92</sup> As part of securing these objectives, the framers of the strategy tried to avoid starting from zero each time, by maintaining ongoing relationships with Māori and a continuing flow of information to them about relevant international instruments. All of these features were positive developments, and moved the Crown towards complying with Treaty principles.

We also acknowledge that the Crown has to operate in a complex and rapidly changing international environment. There is no doubt that New Zealand is a small player with limited influence in international processes. In this context, the Crown has to evaluate all of New Zealand's many and varied interests so as to arrive at a national position. It then has to find the best way to advance that position when more powerful currents may be pulling it elsewhere. In this environment, engagement with Māori, or with any sector of New Zealand society, is not always going to be perfect. But, as we have said, Māori are not just another interest group; Māori are the Crown's Treaty partner and their interests are always entitled to active protection, to the extent reasonable in all the circumstances. The test of reasonableness is particularly

important in the international arena, where New Zealand has to act, as we were told, with ‘likeminded’<sup>93</sup> states and tailor its goals to what can realistically be achieved.

The evidence discussed in the earlier sections of this chapter convinces us that there is work to be done if the Crown’s engagement with Māori on international processes and instruments is to be made fully Treaty-compliant. This work concerns both the scope of the Crown’s policies and objectives, and their implementation. In essence, the Māori engagement strategy represents a beginning of attempts to give effect to Treaty principles, not an end. It has three major flaws, two conceptual and one of execution.

First, the strategy is confined to consultation about legally-binding instruments only. We can see no principled reason why this should be so. We take the Crown’s position to be that it will only consult in respect of non-binding agreements if it subsequently decides to implement an agreement through domestic legislation or policy. In our view, that is no substitute for earlier engagement. As Mr van Bohemen said, New Zealand does not sign up to non-binding instruments unless it intends to abide by them. This was his explanation for the Crown’s reluctance to sign up to DRIP.<sup>94</sup> Also, we were told that New Zealand’s approach is to negotiate for non-binding instruments to be as certain and ‘hard-edged’ as possible.<sup>95</sup> But, where the Crown knows of possible interests in need of protection, its ‘best option is to seek to ensure that international developments do not prejudice the government’s ability to implement domestic policies of its choice, including in response to the outcome of this [Wai 262] Claim.’<sup>96</sup> Clearly, to provide a reasonable degree of protection of Māori interests in the international arena, the Crown must take account of the ways in which non-binding instruments may impact upon (or provide opportunities for) Māori. To be most effective, this needs to occur at every stage of the instruments’ development, not afterwards. This was clear to us from both the claimants’ and the Crown’s evidence about the CBD and DRIP. We note that, in practice, the Crown has not always maintained the strategy’s distinction between binding and non-binding instruments. It did seek to consult about DRIP from

time to time. We are not concerned here with the alleged flaws in that consultation, but rather with the point that it occurred despite the strategy, not because of it.

The second conceptual failure is that the strategy is confined to consultation. As we have said above (section 8.4.1), consultation will not always be sufficient. The strategy provides for the Crown’s engagement to be tailored to the ‘nature, extent and relative strength’ of the Māori interest.<sup>97</sup> We agree with that proposition. We think, however, that there has been a failure of vision in carrying it out. Limiting engagement with Māori to consultation cannot always do justice to the full nature, extent, or relative strength of the Māori interest. Such a policy does not give effect to the Treaty partnership and the tino rangatiratanga guarantee. The evidence that we heard about DRIP and article 8(j) of the CBD convinced us that there are times when the Crown’s position on matters of core importance to Māori must be developed by consensus, and – preferably – by a negotiated agreement with Māori. Such instances will not be the norm, but they will occur. A decision-making framework that cannot accommodate such situations is not Treaty compliant.

Also, we have concerns about how the strategy is carried out in practice, in terms of providing consistent and full information to the right people at the right time, so as to consult effectively with Māori when their interests are (sometimes vitally) affected. We do not see a need to assess the details of each international instrument complained of, in terms of the nature, extent, and quality of engagement over it. We heard examples of engagement that was too general in nature, and of meetings that were targeted at limited numbers or ranges of participants, or were not adequately advertised. We also heard of engagement processes that occurred over too short a timeframe for Māori to consider and respond to the Crown’s position; and we heard examples of consultation that did not follow formal process for the Crown to consider and respond to diverse Māori views and to explain itself. We even heard examples of a basic dearth of consultation, such as over the CBD work programme. Whether fully justified or not, all these complaints hint at poor quality engagement and poor relationships, either of which is

fatal to achieving the Crown's intention in engaging in the first place.

It appears to us that the combined result of the Crown's decision not always to consult on non-binding instruments, and the limits to the effectiveness of the consultation that did occur, was that Māori have sometimes been excluded from effective engagement. This includes for international instruments in areas where their interests were small but discrete (such as ANZTPA), tailored but significant (such as the CBD work programme), or major and substantive (such as DRIP).

The use of diverse approaches to engagement is not necessarily problematic where there is clarity about the rationale for diverse forms of engagement; as we have said, the nature of that engagement should be determined by the nature and degree of the Māori interest, in accordance with the sliding scale we earlier outlined. But we did not receive any clear evidence of such a strategy nor of a consistent Crown approach in practice. The evidence of the various Government departments, including Te Puni Kōkiri, left us uncertain as to how the Crown decides what level of engagement is justified by the nature or strength of the Māori interest. Our recommendations that follow in the next section address these and other problems.

### 8.5.3 Conclusion

In the Treaty of Waitangi, the Crown acquired kāwanatanga, the right to govern, which included the right to make foreign policy and to represent the new bicultural nation on the international stage. In return, the Crown promised actively to protect Māori interests and tino rangatiratanga, or full Māori authority over their own affairs. In the modern international arena, this is no small obligation. International instruments affect the rights and lives of all New Zealanders in sometimes profound ways. Specifically, Māori interests in trade and economic development, culture, traditional knowledge, natural resources, and the environment are often at stake. When that is the case, the Treaty obliges the Crown and Māori to engage with one another on the basis of good faith, reasonableness, and cooperation. The Crown must work out a level of protection for Māori interests, as identified and defined by Māori, that is reasonable when balanced where necessary against other valid interests, and in the sometimes

constrained international circumstances in which it must act. A one-size-fits-all prescription is not possible. Māori interests exist on a sliding scale. The Crown has already recognised that it must afford them protection on the basis of their nature, extent, and relative strength. We agree, adding that sometimes this will be satisfied by a general exchange of information and ideas, but at other times will require consultation or even negotiated agreement on what New Zealand's position is to be. That is what the Treaty requires.

The Crown accepts that it must protect Māori interests in the international arena, and that it must engage with Māori about how to do so. To that extent, it complies with the Treaty. Its current policies and practices have the potential to become fully Treaty compliant but they are not yet so. We identified three key flaws: the Māori engagement strategy is restricted in its coverage to binding instruments; the strategy sets consultation as the maximum form of engagement; and the Crown's consultation is sometimes poorly executed, so as to limit its effectiveness, and therefore its capacity to protect Māori interests to a reasonable extent. We were left unsure how the Crown decides the extent of the Māori interest and the level of engagement required. Improvement in practices, however, will not help if the Crown only has to engage on binding instruments, and then limits its engagement to consultation at most. For these reasons, the current policies and practices for entering into or modifying international instruments do not comply with Treaty principles.

We turn next to our recommendations for the reform of this system so as to remove the prejudice to Māori.

### 8.6 REFORMS

In the previous chapters of this report, we have already dealt with many substantial issues arising from international instruments, including the TRIPS Agreement and the CBD in particular. We have recommended reforms that will see the Māori Treaty partner take their proper place in domestic policy-making and decision-making about the Māori interests that are affected by those instruments. Here, we focus on how Māori interests are to be identified, balanced against other interests, and protected in the making of the instruments themselves.



We begin with some fundamental propositions. New Zealand must speak with one voice internationally, and that voice must be the Crown's except where – by agreement – the Crown is prepared to step aside. It is this very control over foreign affairs that affirms the corresponding obligation to protect Māori interests where they cannot, by definition, do so themselves. They are, in effect, shut out, except as advisers in Crown delegations or NGO invitees of international bodies. But, even where they are present in a non-state capacity or as part of an official delegation, it is the Crown which speaks for New Zealand. In exercising its responsibilities, the Crown already accepts that it must consult Māori where necessary and protect their interests. It follows that there is a need for forums to identify those interests and to ensure robust discussions as to what New Zealand's position should be at the international level when they are affected.

There will naturally be some subjects where the national position is fully aligned with the Māori position, or can be readily made to do so, and other situations where they are opposed. Much of the evidence we heard from Gerard van Bohemen, Aroha Mead, and others was about honest disagreements as to what New Zealand's position should be. Their evidence also showed that there are no forums for the Crown and Māori to work through issues; having determined that they disagreed about DRIP, long years followed without engagement and with nowhere for Māori to turn if the Crown was not interested in talking to them. These kinds of problems can be remedied by the partnership mechanisms we recommend in this section. Ultimately, all that can be done is to ensure that there are sites for the necessary conversations to occur where needed and that, through those conversations, the Crown is constantly reminded of the importance of the Treaty interest in its considerations.

#### 8.6.1 Partnership and engagement mechanisms

In section 8.5.1, we referred to a sliding scale of Māori interest and Crown engagement in relation to international instruments. The adoption of a sliding scale reflects our desire for a practical approach in a conceptually complex area. In practical terms, the result of the sliding scale is that the Crown must, as Treaty partner, be willing to contemplate more than consultation with Māori in some

circumstances. It must be willing to accept that some matters are of such central importance to Māori that it is appropriate, in the light of the Treaty relationship, to move only with Māori acquiescence or consent. Indeed, in the light of the centrality of some aspects of Māori culture to New Zealand identity, it is possible to contemplate circumstances in which it may be necessary to place the Māori voice as the New Zealand voice in the international arena. We doubt that there will be many, but they are as much a reality on the sliding scale as the situations at the other end of the spectrum, where Māori interests are not affected in any special way by a proposed international instrument. Māori too, therefore, must be willing to accept that the Treaty partnership does not need to be manifested in all international relations. It needs only to be expressed in matters of obvious Treaty importance.

There is a huge variety of subjects and matters dealt with in international instruments. At the beginning of any particular process, the Government needs an initial view as to whether there is a Māori interest affected by a particular instrument, how strong that interest might be, and what form of engagement would therefore be appropriate. In previous chapters, we have suggested that the Crown use specialist advisory committees to inform it as to the nature and extent of the Māori interest, and to assist with or participate in the making of decisions. Because of the scope of matters raised in the international arena, we do not think that a single committee could help the Government make its initial choices. Different lead agencies can, of course, be advised by their own Māori units or advisory committees, where those exist. As a general rule, we would propose that the lead agency consult with Te Puni Kōkiri before coming to a view on whether there is a Māori interest, the likely nature and strength of that interest, and the degree of engagement that its priority might justify. In light of the evidence from Te Puni Kōkiri, their capacity to perform this additional or enhanced role will need to be evaluated.

The Crown must then decide who to talk to and how. It is difficult to engage the wider Māori voice in discussions over international matters and related national policies and programmes for domestic implementation. In practice, particularly in the absence of other mechanisms, it is easier for the Crown to approach known experts and

those with particular views. This will sometimes be sufficient. But there will be many occasions where it is necessary to go beyond the 'usual suspects' and ensure wide consultation with relevant Māori organisations and networks. Where it is likely that there may be a spectrum of Māori views, the relevant lead agency must consider the breadth and depth of invitations to tribal or community leaders.

More will be needed than for the Crown to identify experts and stakeholders, when the Minister has advised that the Māori interest is a significant one, requiring (at a minimum) consultation. As we said in chapter 6, true partnership comes through forums that include Māori experts and specialists alongside representatives of the wider Māori perspective. Forums should be created as sites for the necessary conversations to occur between interested Māori and the Crown, when consultation or negotiated agreement on international instruments is required. We do not want to see repeated the long period in which the Crown and Māori could not talk with each other about DRIP. These forums will always be valuable, even in an instance like DRIP, where positions appeared to be entrenched and deeply oppositional. The evidence showed that there was a great deal of the declaration about which the parties were relatively close together if not in actual agreement, and those issues could have been fully worked through. After all, MFAT faces such situations regularly in the international arena, and is particularly equipped to negotiate. Such forums might also be useful for developing Crown policies on how to engage with Māori in the future in relation to international instruments, and assessing the extent to which these policies are upheld in practice (see the set of working principles for such partnership in action which we proposed in section 6.8.3).

We have recommended some such forums in the context of particular subjects in earlier chapters. For matters related to bioprospecting, for example, the Kura Taiao Council could be used as the forum for engagement over international instruments dealing with this matter. The use of these forums may well be a starting point for wider consultation with iwi, which will be necessary for issues of such universal importance and relevance as DRIP. To that end, we repeat our suggestion made in section 6.8.3(4)

and elsewhere that Māori may need to consider forming electoral colleges to nominate working partnership bodies with which the Crown can engage. While we do not make this a formal recommendation, since it is for Māori to decide, not the Crown, we find it difficult to see how Treaty partnership is to be achieved without some such development at Māori instigation.

In practical terms, the adoption of the sliding scale we have referred to should ensure that the Crown's balancing of Māori interests against other valid interests, and the constraints of the international context, is done reasonably and in good faith as part of the Treaty relationship. For example, the question would need to be asked: has the Crown not only engaged in good faith to find out Māori views but actually listened, taken those views into account, and understood that the more significant the issue for Māori, the more weight should be accorded to their views? The Crown already knows the best practice standards for consultation and is aware of its obligations in this respect. But, as we have said, there may be occasions where the Māori interest is so great that the Crown should not move without Māori agreement.

In sum, we recommend that the Crown identify all existing or proposed Māori bodies that could also be used as forums for dialogue about New Zealand's position on relevant international instruments. If there are areas in which no such forums exist, the Crown should develop a policy for calling together forums for consultation or negotiation, instrument by instrument. We also express our hope that Māori will assist this process by creating electoral colleges to appoint Māori representatives to partnership forums as needed.

In addition to the Crown's role in representing New Zealand in international processes, Māori sometimes have a role to play independently of the Crown in the deliberations of international bodies. We turn to that issue next.

### **8.6.2 Independent Māori participation on the world stage**

As we have said, the Treaty means that New Zealand speaks with one voice in international affairs, and that voice is the Crown's. We have also said that the Crown's right of kāwanatanga is qualified by its guarantee of active

protection of Māori interests, and of Māori authority (tino rangatiratanga) over their own affairs. These findings do not mean that Māori cannot have an independent voice on the world stage, where their affairs are very much at stake. We do not need to determine whether this is a right arising under the Treaty, since the Crown already accepts that Māori can and should have a voice at this level. There is nothing novel or threatening about it. Various UN bodies and international agencies have long welcomed participation from indigenous peoples, seeking their direct input on matters of relevance to them.<sup>98</sup> This was explained in the evidence of Aroha Mead, Mark Steel, and others.

Formally, the Crown accepts that Māori can and should sometimes participate in an NGO capacity, and as advisory experts in its own delegations. Informally, we detected some ambivalence, especially about independent NGO participation. The results have been mixed: witnesses told us of Māori involvement in some international processes, and of tension between NGO attendees and official delegations, and within delegations. It is widely recognised, however, that NGO participation in international forums increases the quality of the international debate. Māori NGOs, in particular, are seen internationally as innovators. We think that New Zealand has much to gain from Māori contributing their ideas and views in international processes, while recognising that the official New Zealand position will have been worked out in partnership at home, and is presented abroad by the Crown, unless the Crown is prepared to step aside by agreement.

In order to meet its Treaty obligations, the Crown needs to be guided by two considerations: first, it should be generous in its support of Māori seeking to sustain an independent voice in international forums where their opinion is sought; and, secondly, that the policies around any funding should be transparent. We recommend that the Crown adopt a set policy, following negotiation with Māori interests, for funding independent Māori engagement in international forums.

### 8.6.3 Transparency and accountability

A principled approach to Crown–Māori engagement in international instruments needs to be supported with processes by which those who bear the burden

of upholding Treaty obligations may be held accountable for their adherence to them. As the Māori interest increases, the accompanying accountability mechanisms need to strengthen. Systems for accountability vary and the following range is illustrative of those that might be appropriate along the scale. Our primary recommendation is that the Crown and Māori, having established effective partnership forums in which international affairs and particular instruments can be discussed, should also devise mechanisms for the Crown to report on how it has balanced interests and the choices that it has made. This will ensure that the balancing exercise is transparent and transparently fair. In addition, we have some particular recommendations which we think should assist in this respect.

#### (1) *Improved reporting to iwi and Māori organisations*

In the first instance, particularly in an area where the Māori interests are minor, a simple means of accountability is transparency of decision-making against clear criteria. Revised policies for engagement with Māori, together with regular reporting about decisions, are an important first step. The Māori engagement strategy currently provides for six-monthly reporting to Māori organisations but it was not clear from the evidence we received that this has always happened in practice. While at the moment the MES simply requires a report of upcoming international instruments, this could be expanded to include reporting of Crown engagement with Māori over these instruments and the outcomes. Such reporting would be a helpful transparency measure and appropriate for matters at the lower end of the sliding scale.

We also agree with the Māori engagement strategy that inter-departmental communication and co-operation, and clear inter-departmental processes, are essential in furnishing high quality reports. MFAT already keeps a list of potential recipients of such reports. However, we suggest that other government departments, in particular Te Puni Kōkiri, may, due to their special expertise, have more appropriate lists. They should therefore be consulted by MFAT and the respective lead agency.

**(2) Accountability to the Māori Affairs Select Committee**

Another important accountability mechanism is reporting to an external body about engagement between the Crown and Māori over international instruments. We therefore recommend that MFAT report annually on its activities under the Māori engagement strategy to a responsible high-level public forum that has an interest in and knowledge of te ao Māori. In our view, the most appropriate forum would be the Māori Affairs Select Committee which has, for example, also received briefings on DRIP.<sup>99</sup> The report should highlight the range of international instruments, the various Māori interests, and the steps taken in each case to inform, consult, negotiate, or otherwise engage with Māori in accordance with the sliding scale of Māori interest and the related obligation to engage. The report should be prepared by MFAT in conjunction with Te Puni Kōkiri, whose advice and sign-off should be obtained.

**(3) Wider parliamentary consideration of Treaty interests**

The wider Parliament has the power to consider certain international treaties, including those that are subject to New Zealand ratification, accession, acceptance, or approval. Where it does so, a National Interest Analysis must be prepared, as we have noted (see section 8.4.2.)<sup>100</sup> The National Interest Analysis requirements include consideration of 'economic, social, cultural, and environmental effects' and a statement on consultations which have been carried out or are proposed with the community.<sup>101</sup> There is no specific reference to Māori interests or any requirement to analyse matters of Treaty of Waitangi importance.<sup>102</sup>

We are aware that the Law Commission recommended that the National Interest Analysis include consideration of whether the international agreement 'has any effect upon rights provided by the Treaty of Waitangi'.<sup>103</sup> This recommendation, which was designed to ensure Māori participation and consultation, was not acted on.<sup>104</sup> We consider it to be imperative that National Interest Analyses now include a Treaty assessment. We therefore recommend that where such international agreements are being considered by Parliament specific reference should be made to the Māori interests. Engagement with Māori

in accordance with revised government policies (including, but not limited to consultation) must be set out and evaluated. This would bring the National Interest Analysis procedure into line with Cabinet requirements in relation to domestic legislation.<sup>105</sup>

**(4) Statutory enforcement**

In some cases, the significance of the international instrument for Māori will mean that a statutory requirement for enforcement may be appropriate. Such a provision could arise in several ways. For example, legislation giving effect to an international instrument could include requirements for the relevant department or agency to engage with Māori over implementation or further international engagement. Alternatively, the Foreign Affairs Act 1988 could be amended to specify that one of the Ministry's duties is to engage with Māori on international instruments and set out the circumstances that should trigger such engagement.

We would not, however, want to see an overly rigid set of legislative requirements put in place. As we recommended earlier, the Crown should work with Māori to build partnership forums to improve engagement over the Crown's position on particular international instruments. This itself will hold the Crown accountable to a higher standard of engagement. Also, as we have said, Māori owe Treaty duties to the Crown of reasonableness and cooperation. The result, we trust, will be effective dialogue, improved relationships, and the degree of protection of Māori interests that is reasonable in the circumstances. This will depend on relationship-building and quality processes on the ground, and cannot simply be legislated into existence.

**(5) Accountability to international organisations**

There are also international forums where it may be appropriate for the Crown to report on its engagement with Māori on international instruments, if it does not already do so. For example, in United Nations forums that focus on the rights of indigenous peoples, the Crown could adopt a practice of including reports on engagement with Māori on various international instruments. In addition, the Crown could outline these matters in its

periodic reports on various international human rights instruments or in the context of the United Nations Human Rights Council Universal Periodic Review<sup>106</sup> and Māori could be given an opportunity to respond. In each of these areas the Crown should outline the steps that it has taken in accordance with its revised policies to engage with Māori and to be explicit about how it has taken account of, incorporated, or otherwise adopted their views.

Finally, in the absence of an effective forum for upholding these standards, there is always the possibility of a fresh claim to this Tribunal or an appeal to the political processes of the day.

### 8.7 CONCLUSION

In this chapter, we have considered the issue of how the Crown identifies, weighs, and protects Māori interests when it negotiates international instruments, some of which have been so crucial to Māori that they have been the subject of extensive discussion in this report. For us, the key point is that the far-reaching nature of the TRIPS Agreement, the CBD, and other instruments is such that it may no longer be Crown actions that affect Māori but Crown obligations. In other words, with each instrument that it signs up to, the Crown has less freedom in how it can provide for and protect Māori, their tino rangatira-tanga, and their interests in such diverse areas as culture, economic development, and the environment. The Crown needs to be very careful, therefore, in what it signs up to, and to do so in a manner that provides a reasonable degree of protection for Māori interests.

There is no doubt of the Crown's Treaty right to enter into international instruments. When it acquired kāwanatanga rights under article 1 of the Treaty, the Crown obtained the right to make foreign policy and to represent New Zealand abroad. In return, the Crown promised actively to protect Māori interests and their tino rangatiratanga – full authority – over their own affairs. In this chapter, we found that this obliges the Crown to identify early any Māori interests that might be affected by proposed instruments, and to balance those interests against others' so as to afford them a reasonable degree

of protection. What is reasonable in the circumstances will, in this context, include the constraints on what can be achieved by a small country acting with 'likeminded'<sup>107</sup> states in the world arena.

Māori interests in international instruments exist on a sliding scale. For some instruments, the interest will be small and the level of engagement correspondingly minor. For others, consultation will be needed so that the Māori interest may be properly understood and fairly balanced. In these situations, engagement through high-quality consultation ought to result in the degree of protection to which the Treaty entitles the particular Māori interest at stake. In situations where Māori interests are so central to the entire instrument, such as DRIP, or to a part of it, such as article 8(j) of the CBD, then the Māori interest – when given its due weight – may require more than consultation. It may require the Crown to negotiate with Māori and to proceed only with their agreement. At the far end of the spectrum, it may even be appropriate for the Crown to step aside – by agreement – and allow the Māori Treaty partner to speak for New Zealand. The repatriation of taonga seemed to us an example of when this might be justified.

The Crown's present policies and practices are not compliant with the Treaty. We found that a good beginning has been made, in the form of the Māori outreach programme and the Māori engagement strategy, but that there are some key flaws. The Crown accepts that it needs to consult Māori and protect their interests, but too often this comes at the end of an international process rather than at the beginning or throughout the negotiation and implementation phases. Also, the strategy is confined to consultation on binding instruments, and to consultation as the maximum form of engagement. While the claimants' criticisms of particular consultations may not all be justified, they hint at poor quality engagement and poor relationships. All these things have hampered achievement of the Crown's intention to identify and protect Māori interests. The Treaty is not being kept, and Māori interests are being prejudiced in the making of international instruments.

But, as we have said in this chapter, many of the underpinnings exist for Treaty compliant policies and practices.

The Māori engagement strategy was supposed to achieve early identification of specific international issues relevant to Māori, and then engagement tailored to the ‘nature, extent and relative strength’ of the Māori interest.<sup>108</sup> This simply needs to happen. In order to bring it about, we recommended that the Crown engage with Māori over all instruments that might affect their interests, whether binding or non-binding, on a sliding scale according to the nature and strength of those interests. The initial identification of a Māori interest, and of the appropriate level of engagement, should be proposed to the lead agency by the Minister of Māori Affairs, based on the expert advice of Te Puni Kōkiri.

Sometimes, the Māori interest will be so small that the provision of general information will suffice. In other cases, the interest will be relatively small or confined, justifying informing likely experts or stakeholders and discussing it with them. When the interest is judged to be more substantial, the Treaty principle of partnership requires forums for consulting experts, known stakeholders, and also wider Māori opinion. We recommended that the Crown work with Māori to create partnership forums, where none exist. Sometimes, full consultation with iwi will be required, even to the extent of negotiating their agreement. We suggested that Māori need to consider creating electoral colleges as a good way to meet that contingency, so that the Crown may have surety as to the negotiating face of its Treaty partner in areas of specialised interest.

Accountability mechanisms are also required, to ensure that the Crown has balanced interests in a fair and transparent manner. We recommended that the Crown should report its actions (and the outcomes) regularly to Māori organisations – an expansion of the reporting provided for under the Māori engagement strategy – and also to the Māori Affairs Select Committee. We also recommended that Parliament specifically address Māori interests and Treaty issues when it considers international agreements under standing orders. The National Interest Analysis should be brought into line, in this respect, with Cabinet requirements for domestic legislation. The Foreign Affairs Act 1988 may need to be amended to provide a legislative schema for protecting Māori interests, although we think

the true protection will come from quality engagement and careful accountability rather than by legislative fiat. Finally, we suggested that the Crown consider reporting its identification and balancing of interests, and its degree of protection for the Māori interest concerned, in the international forum concerned. We also recommended that direct Māori participation in such forums, either as NGOs or as expert advisers in official delegations, should be encouraged and assisted more proactively by the Crown. NGOs are known to improve the quality of international debate, and the Crown has long agreed in principle to Māori participation at that level. We recommended that more be done in practical terms to bring it about.

Finally, we think that indigenous rights and the role of the indigenous voice in international forums are areas where New Zealand should be leading the world. The special place we accept Māori to hold in our systems of governance is a foundation for our national identity and cohesion. It is part of the reason why, despite our diversity, we do not have outright conflict between our two founding peoples or with the immigrants who came afterwards. This absence of such conflict should be a matter to be proud of and something to be held out to other states as a way forward, particularly for those states that have not been able to resolve internal differences peacefully.

## 8.8 SUMMARY OF RECOMMENDATIONS

We summarise our recommendations in this chapter as follows:

- ▶ We recommend the Māori engagement strategy be amended to require engagement over both binding and non-binding instruments, and that it provide for engagement beyond consultation where appropriate to the nature and strength of the Māori interest. As a starting point for that engagement, we would propose that the lead agency responsible for an international instrument consult with Te Puni Kōkiri before coming to a view whether there is a Māori interest, the likely nature and strength of that interest, and the degree of engagement that its priority might justify.
- ▶ To enable consultation or negotiation to take place, we recommend that the Crown develop a policy

to identify relevant bodies that already exist which could also serve as partnership forums for the discussion of international instruments, and to create them as necessary (instrument by instrument) where they do not exist. We also suggest that Māori consider the appointment of electoral colleges so that such forums may be readily constituted on matters of specialised interest. As this suggestion is for Māori alone, we do not make it a formal recommendation.

- ▶ We also recommend that the Crown adopt a set policy, following negotiation with Māori interests, for funding independent Māori engagement in international forums.
- ▶ In order to ensure that quality engagement takes place and is effective, we recommend that the Crown adopt a series of mechanisms to ensure accountability. These include regular reporting to iwi and Māori organisations, as well as to Parliament's Māori Affairs Select Committee. When Parliament considers an international instrument agreement under standing orders, we recommend – as the Law Commission did before us – that the National Interest Analysis include consideration of whether the instrument has any effect on Treaty rights and interests. Statutory enforcement might also be appropriate, and we recommend that the Crown consider situations where this may be required. Finally, we suggest that the Crown consider reporting its engagement with Māori, and the outcomes, to the relevant international body or forum, where it does not already do so.

#### Text notes

1. Document R34 (Gerard van Bohemen, brief of evidence on behalf of the Ministry of Foreign Affairs and Trade, 8 January 2007), pp 13–14
2. Customary international law is an independent source of binding international law sitting alongside the general principles of international law and the content of international treaties. Customary international laws are unwritten rules of international law reflecting the consistent conduct of states behaving in accordance with international consensus that compliance is legally required. Examples of areas where customary international law is applied include crimes against humanity and engagement in warfare. Non-binding declarations can thus become part of customary international law over time where general consensus builds about their application in the international community. See S James Anaya, *Indigenous Peoples in International Law*, 2nd ed (Oxford: Oxford University Press, 2004), pp 61–72.
3. Secretariat of the Convention on Biological Diversity, 'List of Parties', The Secretariat Programme, <http://www.cbd.int/convention/parties/list> (accessed 2 August 2010)
4. Document P30(a) (Aroha Mead, brief of evidence in support of Ngāti Porou, 16 August 2006), p 7
5. Ibid, p 18; Secretariat of the Convention on Biological Diversity, 'The Convention on Biological Diversity', The Secretariat, <http://www.cbd.int/convention/> (accessed 24 October 2010)
6. Document P30(a), pp 17–18
7. Ibid, pp 23–25, 45
8. Document P30(f) (Aroha Mead, supplementary brief of evidence in support of Ngāti Porou, 17 September 2006), p 7
9. Document R34, pp 49, 55–56, 61, 101–102
10. Claim 1.1(a) (Haana Murray, Hema Nui a Tawhaki Witana, and others, amended statement of claim, 10 September 1997), pp 27–31. In a critique of TRIPS prepared for the claimants, Malcolm McNeill said that Māori had 'attempted unsuccessfully to challenge and influence the local GATT reforms' and had 'protested both their content and their legitimacy, but were denied any input into them': doc A17 (Malcolm McNeill, 'A Critique of GATT: TRIPS', 2 February 1997), p 11.
11. Document R16 (Mark Steel, brief of evidence on behalf of the Ministry of Economic Development, 21 November 2006), p 22
12. Ibid, pp 23–24
13. Ibid, pp 11–14
14. Ibid, p 16
15. Ibid, p 18
16. Rodolfo Stavenhagen, 'Making the Declaration Work', *The United Nations Declaration on the Rights of Indigenous Peoples*, ed Claire Charters and Rodolfo Stavenhagen (Copenhagen: International Work Group for Indigenous Affairs, 2009), p 363
17. Ibid, p 356
18. United Nations, 'United Nations Declaration on the Rights of Indigenous Peoples', United Nations (<http://www.un.org/esa/socdev/unpfi/en/declaration.html> and <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=vm&term=ares61295> (accessed 18 May 2011)). One more 'yes' vote was later added, making the total of votes in favour number 144.

19. United Nations Department of Public Information, 'Press Conference on Ninth Session of Indigenous Forum' (media release, 19 April 2010)
20. Document T1, p 70
21. Hansard (20 April 2010) 662 NZPD 10238
22. Document R34, pp 88, 93–94; Gerard van Bohemen, cross-examination by counsel for Ngāti Kahungunu and Ngāti Koata, 21st hearing, 22 January 2007 (transcript 4.1.21, pp 73–76, 98–99)
23. Gerard van Bohemen, cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 22 January 2007 (transcript 4.1.21, pp 75–76)
24. Document R33(i) (Te Puni Kōkiri, 'Māori Heritage and Indigenous Issues', undated), p 3; doc R33(bbb) (Te Puni Kōkiri, memorandum on draft DRIP workshop, 23 November 1994); doc R33(eee) (Te Puni Kōkiri, briefing to Minister of Māori Affairs, 19 May 1997); doc R34, p 94
25. Document P13 (Tracey Whare and Claire Charters, updating evidence on behalf of Ngāti Kahungunu, 11 August 2006), p 6
26. Ibid, pp 6–8
27. Gerard van Bohemen, cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 22 January 2007 (transcript 4.1.21, pp 68–69)
28. Gerard van Bohemen, cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 22 January 2007 (transcript 4.1.21, p 73)
29. Document R34, p 94; doc R34(zz) (Ministry of Foreign Affairs and Trade, documents relating to consultation with Māori on DRIP between 1997 and 2003, undated). Document 34(zz) contains lists of attendees for some meetings, and other information on the five meetings from 2001 to 2003.
30. Document R34, p 88; doc R34(r) (Ministry of Foreign Affairs and Trade, self-determination proposal of Australia, New Zealand, and the United States, 2005); Gerard van Bohemen, cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 22 January 2007 (transcript 4.1.21, pp 69–70)
31. Document R34, p 88
32. Gerard van Bohemen, cross-examination by counsel for Ngāti Kahungunu, 21st hearing, 22 January 2007 (transcript 4.1.21, pp 68–70)
33. Document R34(zz), pp 10, 14, 24
34. Document P13, pp 6–8
35. Document R34(zz), pp 12, 13, 17; Gerard van Bohemen, cross-examination by counsel for Ngāti Koata, 21st hearing, 22 January 2007 (transcript 4.1.21, pp 98–99)
36. Document P13, pp 8–9
37. Document P13, pp 10–11, 112–114; Claire Charters, under questioning by Pam Ringwood and Roger Maaka, 18th hearing, 28 September 2006 (transcript 4.1.18, pp 359, 363)
38. Waitangi Tribunal, *The Interim Report of the Waitangi Tribunal in Respect of the ANZTPA Regime* (Wellington: Legislation Direct, 2006), p 1
39. Susan Martindale, under cross-examination by counsel for Te Waka Kai Ora, 21st hearing, 1 February 2007 (transcript 4.1.21(a), p 182)
40. Document R34, pp 16–17
41. Ibid, p 17
42. Document R34, p 18; docs R34(nn)–(vv) (Ministry of Foreign Affairs and Trade, documents relating to MFAT outreach activities)
43. Document R34(nn), pp 86–89; doc R33(ddd) (Te Puni Kōkiri, invitation to draft DRIP workshop, undated)
44. Document R34(nn), pp 30–58, 104–108, 144–149
45. Document R34, p 18
46. Document R34(oo) (Ministry of Foreign Affairs and Trade, 'Maori Outreach Strategy', 2003), p 1
47. Ibid, pp 1–2
48. Ibid, p 2
49. Ibid, p 3
50. Gerard van Bohemen, oral evidence on behalf of the Ministry of Foreign Affairs and Trade, 21st hearing, 22 January 2007 (transcript 4.1.21, p 10); doc R34, p 18
51. Document R34, p 18
52. Gerard van Bohemen, oral evidence on behalf of the Ministry of Foreign Affairs and Trade, 21st hearing, 22 January 2007 (transcript 4.1.21, pp 10–11)
53. Gerard van Bohemen, oral evidence on behalf of the Ministry of Foreign Affairs and Trade, 21st hearing, 22 January 2007 (transcript 4.1.21, p 10)
54. Paper 2.256 (Crown counsel, statement of response, 28 June 2002), p 28; doc R34, p 17; doc R34(ff) (Ministry of Foreign Affairs and Trade, 'Strategy for Engagement with Māori on International Treaties', 2007, p 5; doc R34(qq) (Ministry of Foreign Affairs and Trade, form letter to Māori organisations and iwi on strategy for Māori engagement on international treaties, 28 November 2001). Mr van Bohemen told us that Cabinet approval was given in 2000 (transcript 4.1.21, p 11), but other sources suggest it was in 2001.
55. Document R34(ff), p 5
56. Ibid



57. Document R34(ff), p 6
58. Ibid
59. Ibid, pp 6–7
60. Ibid, p 7
61. Document R34(ff)
62. Ibid, p 5
63. Gerard van Bohemen, oral evidence on behalf of the Ministry of Foreign Affairs and Trade, 21st hearing, 22 January 2007 (transcript 4.1.21, p 11); doc R34, p 13; paper 2.256, p 28
64. Document R34(qq)
65. Ibid, pp 1–2
66. Document s3 (Counsel for Ngāti Kurī, Ngāti Wai, and Te Rarawa, closing submissions, 5 September 2007), p 22
67. Document s2 (Counsel for Ngāti Kahungunu, closing submissions, 17 April 2007), p 23
68. Document s6 (Counsel for Ngāti Porou, closing submissions, 23 April 2007), p 54
69. Document s4 (Counsel for Ngāti Koata, closing submissions, 18 April 2007), p 89
70. Ibid, p 92
71. Ibid, pp 90–91
72. Ibid, pp 92–93
73. Ibid, p 89
74. Ibid, pp 90, 94
75. Document s3, p 149
76. Document s2, p 23
77. Document s3, p 23
78. Document s6, p 59
79. Document s3, p 147
80. Paper 2.256, pp 27–28
81. Document R34, p 8
82. Ibid, p 10
83. Paper 2.256, pp 23–28
84. Ibid, p 25
85. Gerard van Bohemen, oral evidence on behalf of the Ministry of Foreign Affairs and Trade, 21st hearing, 22 January 2007 (transcript 4.1.21, p 23)
86. Gerard van Bohemen, oral evidence on behalf of the Ministry of Foreign Affairs and Trade, 21st hearing, 22 January 2007 (transcript 4.1.21, p 10)
87. Document R34, pp 16–18
88. Ibid, pp 15–16
89. Ibid, p 102. Ms Mead submitted two Official Information Act requests in July 2006 seeking details of any consultation undertaken by the Crown with Māori over CBD processes since January 2003. The Crown responded to these requests on 30 August and 19 September 2006, supplying hundreds of pages of material (see documents P30(h) and P30(j)). The interpretation of the released documents was of course a subject of dispute between the Crown and claimants.
90. Document R34, pp 16–18; Gerard van Bohemen, oral evidence on behalf of the Ministry of Foreign Affairs and Trade, 21st hearing, 22 January 2007 (transcript 4.1.21, pp 9–10); paper 2.256, pp 23, 25–28
91. Document R34(oo), pp 1–2
92. Document R34(ff), p 5
93. Document R34, p 10
94. Ibid, p 89
95. Ibid, p 9
96. Ibid, p 10
97. Document R34(ff), p 5
98. Document P30(a), p 14. Also see, for example, the World Bank Operational Policy and Bank Policy on Indigenous Peoples (OP/ BP 4.10) of 2005, which continues a policy of early involvement of indigenous peoples in World Bank projects as demonstrated in Operational Directive 4.20 of 17 September 1991. It requires, wherever possible, the active participation of indigenous peoples in its development processes. See <http://go.worldbank.org/1BZABS9UU0> and <http://www.worldbank.org/oed/indigenouspeople/docs/IP1.pdf> (accessed 24 March 2011).
99. ‘Declaration on the Rights of Indigenous Peoples: Introductory Comments to the Māori Affairs Select Committee’, paper to Māori Affairs Select Committee, BRF/IP/1, undated.
100. Standing Orders of the House of Representatives, 2008, SO 388(2)
101. Standing Orders of the House of Representatives 2008, SO 389(1)
102. Standing Orders of the House of Representatives, 2008, SO 389
103. Law Commission, *The Treaty Making Process: Reform and the Role of Parliament* (Wellington: Law Commission, 1997), p 73 (emphasis in original removed)
104. Document K2 (Robert McClean and Trecia Smith, ‘The Crown and Flora and Fauna: Legislation, Policies, and Practices,

1983–98, report commissioned by the Waitangi Tribunal, 2001), p 37. We note that Maori participants at an outreach hui in Whakatane in 2005 called for greater Maori input into the National Interest Analysis process: doc R34(nn), pp 2–3.

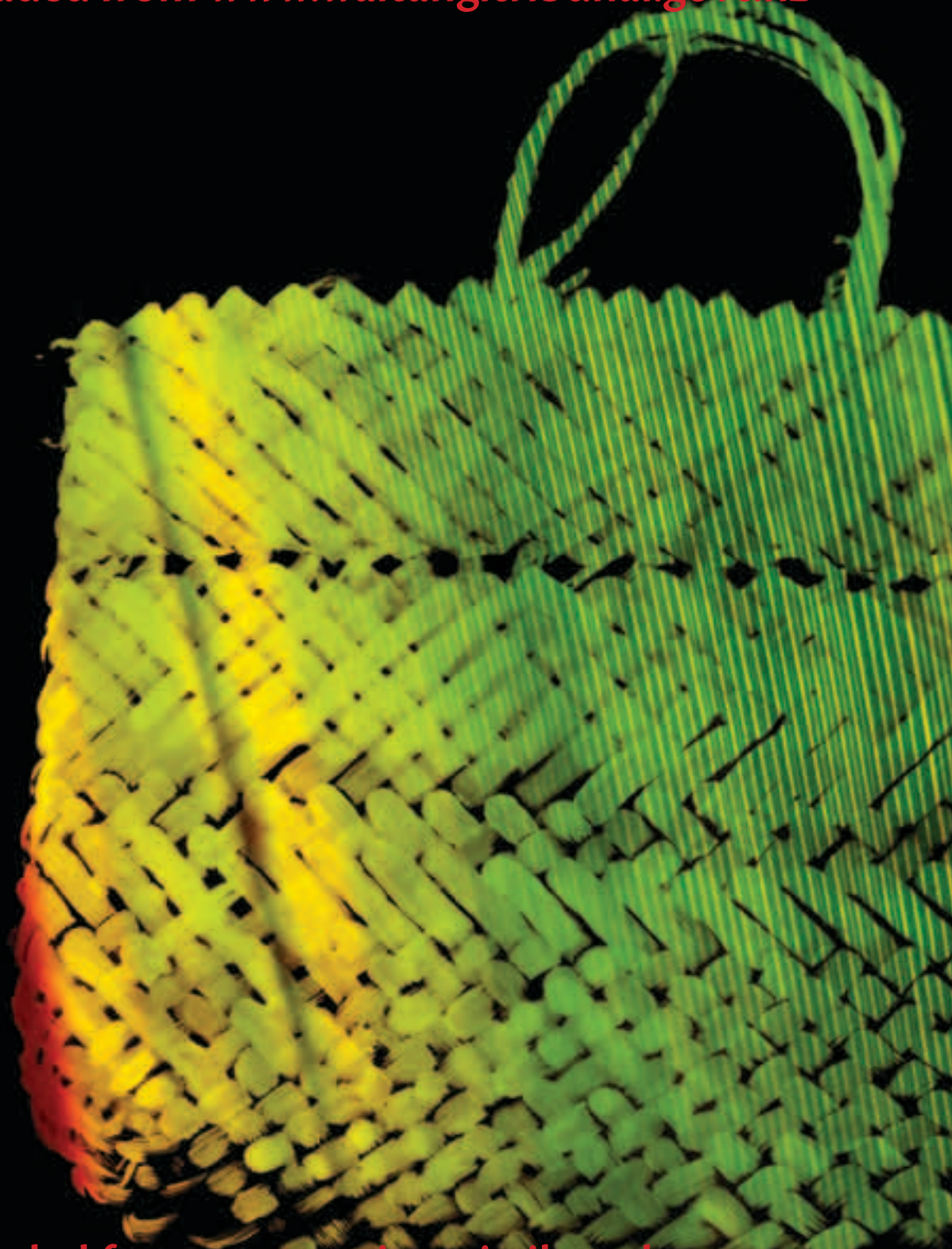
105. Cabinet Office, *Cabinet Manual 2008* (Wellington: Department of the Prime Minister and Cabinet, 2008), p 95
106. Ministry of Foreign Affairs and Trade, *New Zealand Handbook on International Human Rights*, 3rd ed (Wellington: Ministry of Foreign Affairs and Trade, 2008), pp 30–31
107. Document R34, p 10
108. Document R34(ff), p 5

## Whakataukī notes

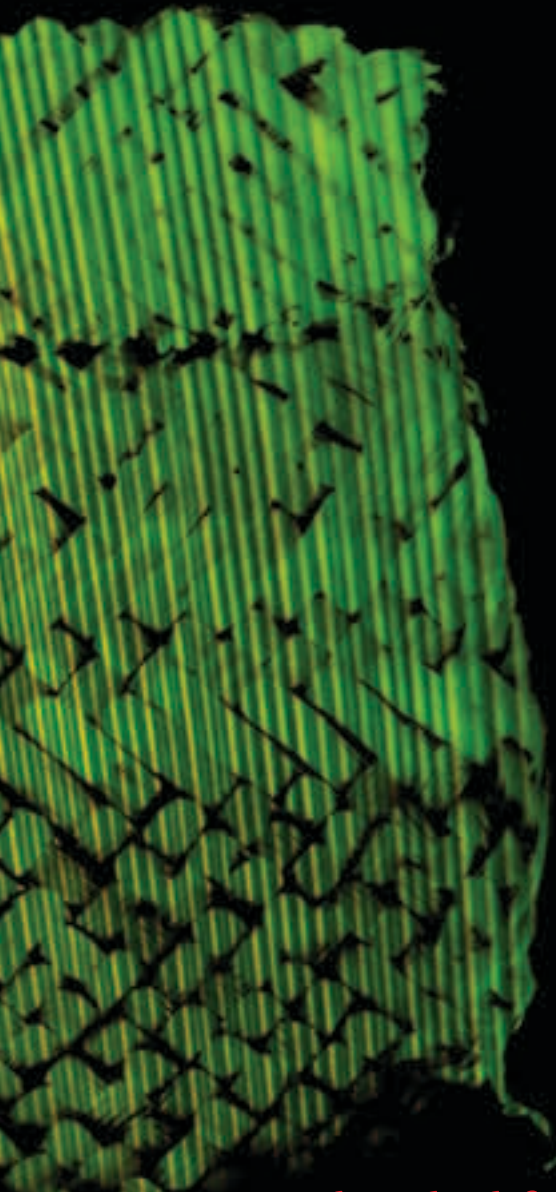
**Page 666:** ‘Churchill Urges Patience in Coping with Red Dangers’, *New York Times*, 27 June 1954, p 1. Harold MacMillan may have said this in Canberra in 1958 rather than Churchill in 1954.

**Page 667:** Source unknown





CONCLUSION



*Kia mau ki ngā kwei o te kete kōrero a T roa.*

Grasp the handles of this basket,  
for it is filled with the insights of long deliberation.



## CONCLUSION

### 9.1 FINDING A PLACE FOR MĀTAURANGA MĀORI IN NEW ZEALAND LAW AND POLICY

Over the 171 years since the Treaty of Waitangi was signed, paving the way for two peoples to live side by side in New Zealand, the Crown has largely supported and promoted one of our two founding cultures at the expense of the other. At times the official attitude to Māori culture has been suppressive; at others it has been simply neglectful. Steady changes in the way the Crown regards its Treaty obligations over the last few decades have begun to turn these attitudes around. But on any reading there are still many areas – intellectual property (IP) law, cultural harvest, traditional healing, to name just a few – where Māori cultural perspectives are on the outer. The key problem for kaitiaki is that they have little or no control over their relationships with taonga. Sometimes, the Crown exercises that control; sometimes, it is others, such as commercial interests or property owners; only very rarely is it kaitiaki. In short, there is little room in current New Zealand law and policy for mātauranga Māori and for the relationships upon which it is founded.

We have in this report recommended ways in which this can and should change, and we set out a summary of those recommendations below. Sometimes we recommend a new framework, body, or fund while at others we recommend legislative amendments. But on many occasions what we believe is needed more than anything is a change in mindset – a shift from the ‘old’ approach that valued only one founding culture to one in which the other is equally supported and promoted, and the advantage New Zealand would hold by its embrace of both (along with newer cultures from other lands) is widely recognised.

In taking such steps the Government would be fulfilling its Treaty duties while also acting in the best interests of all. In some cases, it would be falling into line with international trends (exemplified by the world-wide adoption of the Declaration on the Rights of Indigenous Peoples); in others – particularly in the accommodation of indigenous interests in contemporary IP law – it has an opportunity to be truly innovative. The resolution of this claim is actually a chance for New Zealand to be recognised as a world leader in the challenging arena of indigenous peoples’ rights.

In making this shift, the Crown will need to accept its own core role in the preservation and transmission of mātauranga Māori. While it is Māori who must keep their culture alive, the Crown has a great responsibility too. This stems only partly from its past failures to protect mātauranga Māori. It relates also to the accepted role of the State in educating the nation’s young and the fact that few opportunities exist today for Māori to learn their culture in the settings where it was traditionally handed down. Moreover, it

arises from the fact that Māori culture is our *national* culture – it helps give all New Zealanders a sense of who they are. It may well also be that Māori live healthier and more productive lives when they are secure in their own cultural identity and when their identity has a secure place in the national story.

In accepting this role the Crown can no longer view Māori culture as ‘other’. It must embrace the idea that it represents Māori too and be prepared to take on more of a Māori complexion and outlook. Doing so will of course not lessen the need for the Crown and iwi to engage as Treaty partners. In fact, the adoption of true forms of partnership is crucial to the protection of *mātauranga* Māori and the exercise of *kaitiakitanga*. Partnership requires an acceptance of shared responsibility through the Crown bringing its support to the table and Māori their motivation. In other words, *kaitiaki* communities must be empowered through their joint efforts with the Crown; grassroots commitment must not be stifled by official control.

The Treaty interest must of course be balanced with other interests, such as those of regional museums, copyright holders, mountain clubs, and nurserymen. But to a large extent those other interests are already taken into account in current law, policy, and practice; it is high time to elevate the Treaty interest to its rightful place alongside them. It is also important to acknowledge that Treaty interests are as often as not in alignment with those of other sectors of the community. To protect the *kaitiaki* interest in *taonga* is in many cases also to protect the *taonga* for all New Zealanders.

The broad scope of issues in the Wai 262 claim demands corresponding action by the Crown: not only must it make a whole-of-government response, but it must also be broad-minded in doing so. But the hurdles are not so difficult to overcome: our recommendations are practical and realistic. They reflect both what the Treaty demands and what our society will bear.

## 9.2 OUR RECOMMENDATIONS

In order that the parties may see the full range of our proposed reforms, we summarise them here, chapter by

chapter, as well as the overall scope of legislative change, new entities, and new arrangements that would be required. We begin by setting out the claimants’ submissions on the path to the overall resolution of the Wai 262 claim.

### 9.2.1 The claimants’ submissions on relief

In our statement of issues we asked the parties whether existing legislation needed to be amended to address any shortcomings in the Crown’s protection and support of Māori rights in the areas identified in the Wai 262 claim. In closing, the claimants all made submissions on the kinds of mechanism they believed were needed to deliver overall relief, and sought recommendations from the Tribunal to this effect. By and large, we have chosen a different path to that sought by the claimants. Before we summarise our recommendations to the Crown, therefore, we first set out how the claimants advocated that the Wai 262 issues should be resolved and our reasons for adopting a different approach.

In closing, the Te Tai Tokerau claimants asked the Tribunal to make some urgent interim findings that the Crown’s current protection of *mātauranga* was defective and placed *mātauranga* at risk of misappropriation. On this basis they then advocated a two-stage process for the resolution of the Wai 262 claim, which they collectively called an ‘Ethical Framework for Resolution’. Under this proposal they sought Tribunal recommendations for, first, a Crown-funded process of communication and consultation amongst other iwi, led by the Wai 262 claimants, on the issues raised in the claim, a process which they called ‘*Kānohi Ora*’. Following that, they sought a ‘Process of Engagement’ between representatives of *kaitiaki* (forming a ‘*Taumata*’) and the Crown that would be designed to identify the means of resolving the claim issues. Counsel explained that this approach was needed because ‘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.’<sup>1</sup>

Ngāti Kahungunu preferred in closing not to seek recommendations for specific legislative changes, viewing these as both premature, since the Tribunal had not



determined which statutes breached the Treaty and needed amendment, and inappropriate, since other iwi would have a 'great interest' in the issues and thus 'wider consultation' would be needed. Moreover, counsel argued, the importance of the issues meant that – in keeping with the submission of the Te Tai Tokerau claimants – 'ad hoc amendments to particular legislation would not be a sensible way to proceed'.<sup>2</sup> Counsel therefore proposed that Māori and other interested parties 'play a central part in the solutions to be developed' through a 'two tiered process'.<sup>3</sup> Under this proposal, eight Crown-funded 'working groups' would develop solutions to issues ranging across the themes of the Wai 262 inquiry<sup>4</sup> under the supervision of an overall 'coordinating group' comprising representatives of the Wai 262 claimants, the Crown, other iwi, Crown Research Institutes, and the public.<sup>5</sup>

Ngāti Koata also felt that it was not for the Tribunal to define the remedies for the prejudice suffered by them. Counsel submitted that it was 'for Ngāti Koata to design and reach agreement with the Crown as Treaty partner' and the Tribunal should only be prescriptive where 'obviously clear circumstances' required an immediate Ngāti Koata 'right of veto' (such as over tuatara on Takapourewa).<sup>6</sup> As part of the broader process of identifying legislative reforms, counsel advocated – like Ngāti Kahungunu – the establishment of a 'coordinating body to take forward and develop proposals for remedial measures'. Counsel thus proposed the enactment of a 'Māori Law Reform Commission' to 'produce for iwi and the Crown proposals to reform the law of Aotearoa to provide full and balanced relief' from any Crown Treaty breaches found by the Tribunal. Counsel envisaged the commission establishing working parties of Crown and Māori representatives, who would be 'delegated specific law reform tasks'.<sup>7</sup>

Ngāti Porou also declined to propose specific amendments, arguing that this approach would pre-empt 'a more detailed dialogue with the Crown and those other iwi that are not represented in this inquiry'.<sup>8</sup> But here Ngāti Porou departed from the other iwi in an important respect. Counsel opposed the idea of establishing a pan-Māori commission (or presumably one of the other collective approaches), which he submitted would 'represent

the waste of 16 years of effort and resources'. Instead, counsel argued for the mana to be returned to 'those who have, by whakapapa and membership of the relevant iwi or hapu, inherited the right to exercise the role of owner and kaitiaki'. Ngāti Porou favoured 'a series of more general findings and recommendations' to inform engagement between the Crown and Ngāti Porou that would identify and provide 'the protections sought by Ngāti Porou' in respect of both its mātauranga and te reo ake o Ngāti Porou. Counsel submitted that 'if a resolution on the issues raised in this claim is not achieved within 12 months then leave should be reserved for the parties to return to the Tribunal for further directions'.<sup>9</sup>

In response to the recommendations in our pre-publication release of the Te Reo Māori chapter in October 2010, counsel for Ngāti Porou repeated that the discussions leading to measures to protect te reo ake o Ngāti Porou 'must occur between the Crown and Ngāti Porou. Ngāti Porou does not support the establishment of structures or entities that come between iwi and the Crown'.<sup>10</sup> Likewise, counsel for Ngāti Koata rejected our prescription for the protection of te reo Māori and reiterated that it was 'for Ngāti Koata to design and reach agreement with the Crown on the processes by which decision making authority will be returned to Ngāti Koata'.<sup>11</sup>

For the sake of completeness we mention that the Crown, for its part, suggested in closing that the claimants' reluctance to provide the Tribunal with detailed views on remedies meant that 'the rights or interests are not readily able to be nussed out or articulated at this juncture'. Wrote counsel, 'That being the case, the Crown does not consider that findings of breach of rights can be sustained'.<sup>12</sup>

### 9.2.2 Our approach

We have set out our responses to the difficult issues presented to us. They include relatively detailed reform proposals, which we offer in the form of recommendations. After all that has passed in this inquiry we believe it would have been an abdication of responsibility to fail to offer our view of the many pathways forward in each of the claimed categories. In the end, though, these are recommendations, not orders or directions. It will be for the

Crown and iwi to negotiate their way through the challenges presented by Wai 262. In our recommendations we have sought to do no more than assist the negotiation by demonstrating that it is possible to give realistic and tangible shape to law and policy reform. We hope that this will provide useful guidance to the parties.

Having related the claimants' preferences for overall recommendations and explained our preferred approach, we turn now to the detail of our recommendations across the chapters. In setting these out here we of course do not replicate all the contextual justification for our remedies. The reader should refer to the individual chapters to see both the balancing processes we undertook in each case to reach our conclusions and, of course, the exact and authentic wording of our recommendations.

### 9.2.3 Protecting the kaitiaki relationship with mātauranga Māori and taonga works

In chapter 1, we consider whether New Zealand's intellectual property (IP) law protects the Māori Treaty interest in mātauranga Māori, taonga works, and taonga-derived works. We conclude that it does not – indeed, it was never intended to do so. It would be possible now to adapt or extend the scope of current IP mechanisms so as to provide a degree of protection for the Māori interest, and in some instances we recommend doing this. But our overall view is that IP laws are not designed to and therefore cannot be the sole means of protecting the relationship of kaitiaki with their mātauranga Māori and taonga works, protection that goes to the heart of the Treaty guarantee of tino rangatiratanga – authority and control – over taonga. We also note that New Zealand's international obligations, particularly under the minimum-standards-setting TRIPS Agreement, would support rather than prevent the creation of a *sui generis* system for protecting the kaitiaki relationship. Such a *sui generis* system would not conflict with New Zealand's TRIPS Agreement obligations. From the point of its creation, however, the new system would have to work with IP law so as to protect the kaitiaki relationship in future uses. Our recommendations reflect that need for the two systems to work together.

The changes we recommend would have a positive effect on creativity, research, and economic development, partly by providing early certainty for prospective users

and partly by acknowledging upfront that the kaitiaki interest will not necessarily trump others: all interests will be balanced in a principled, transparent way. Indeed, New Zealand has an opportunity to lead the world in this field. It also has the opportunity to determine how to protect its own particular interests before internationally designed protections for traditional knowledge and traditional cultural expressions are imposed which might not fully suit this country's circumstances.

In essence, we are recommending changes that will give weight to the kaitiaki interest in appropriate circumstances. This includes the creation of an objection-based, case-by-case system. Its practical outcome should be to provide a balanced way to prevent any derogatory or offensive public use of mātauranga Māori, taonga works, or taonga-derived works, and to provide an effective way for commercial users to consult kaitiaki or seek their consent where the kaitiaki relationship warrants it. The core mechanism to bring this about would be a commission composed of experts in mātauranga Māori, IP law, commerce, science, and stewardship of taonga works and documents, assisted by a secretariat drawn from the same areas of expertise. A very important function of such a commission would be to educate prospective users of taonga works and mātauranga Māori, and to facilitate early consultation between aspiring users and kaitiaki. In our view, the earlier the engagement, the better. The commission could achieve these ends by drawing up guidelines for best practice, making declaratory rulings where these are sought, and developing a register of kaitiaki for particular works. We expect it would become the first port of call for prospective users, providing them with essential advice and guidance. In these ways, the system would focus on providing early certainty and ought to avoid undue interference in research, creativity, beneficial uses, and the mutual enriching of our cultures.

But there will be circumstances in which early certainty cannot be achieved. The commission would then adjudicate disputes. An objection-based system, in which the commission balances the kaitiaki interest, the interests of existing and prospective IP owners, and the interests of the community in development and beneficial uses, would be a principled and transparent way to determine how much protection should be accorded the kaitiaki

interest in any particular case. In legislating for the commission process, we recommend that anyone should be able to object to offensive or derogatory public uses of taonga works, taonga-derived works, and mātauranga Māori. We also recommend that only kaitiaki could make other kinds of objection to commercial use, and then only for taonga works and mātauranga Māori. The commission's decisions should be enforceable in the courts. Kaitiaki would need to demonstrate their status, either through the register or before the commission, with opportunity for others to challenge that status.

As part of the objection-based system, we recommend that the commission play a role in current trade mark and design registration processes where the question of offensiveness to Māori is the issue. The commission should replace the Māori trade marks advisory committee, and it should not simply provide advice to the commissioner. Rather, its conclusions should be binding on the commissioner.

Overall, these recommendations require legislation to establish a system for balancing Māori Treaty interests against other interests in the use of taonga works, taonga-derived works, and mātauranga Māori, to interface with current IP laws and processes.

#### **9.2.4 Protecting the kaitiaki relationship with mātauranga Māori and taonga species**

In chapter 2, we consider the processes of research into taonga species, leading to exploitation of those species. We conclude that bioprospecting, genetic modification, and application for IP rights are all part of a continuum from research to commercial exploitation. As such, they already have frameworks governing ethics, the balance of specified interests, and the protection of rights. Māori Treaty rights, however, are not adequately protected in this system. Nonetheless, those frameworks are sufficiently robust to take on board a new set of rights to be held by kaitiaki communities and individuals, who will bring different and valuable perspectives to decision-making around the conduct of research into taonga species in New Zealand. We note too that the interaction between kaitiakitanga and Western science does not need to be one of confrontation: many CRIS explained their positive, productive interactions with iwi.

Kaitiakitanga and western law's concept of ownership are two different cultural ways of deciding a community's rights in its resources. Kaitiakitanga emphasises relationships and obligations, while ownership emphasises rights. Both are powerful in New Zealand today. The Treaty of Waitangi guaranteed kaitiaki tino rangatiratanga over their taonga. We conclude that it is not appropriate to see the kaitiaki relationship with taonga species as one of exclusive ownership (as promised in the English version of article 2). Only in the most rare and exceptional cases, such as the relationship of Ngāti Koata to tuatara within their rohe, would we say kaitiaki might be justified in claiming an interest in each living specimen of a taonga species. Instead, we conclude that where there is a risk that bioprospecting, GM, or IP rights may affect kaitiaki relationships with taonga species, those relationships are entitled to a reasonable degree of protection. Just what is reasonable is a matter for case-by-case analysis. It requires a full understanding of the level of protection required to keep the relationship safe and healthy, as well as a careful balancing of all competing interests. No one interest should have automatic priority.

For bioprospecting on Crown land (where many taonga species now survive), we recommend that DOC take the lead in consulting with Māori to design a Treaty-compliant system, in accordance with section 4 of DOC's governing Act. This would involve using existing pātaka komiti which currently advise DOC on cultural harvesting. These komiti would advise DOC on applications for bioprospecting as well. But to give effect to the Treaty partnership, we recommended that where kaitiaki relationships are affected, the pātaka komiti and regional conservator should balance interests together and make the decision jointly. The komiti would, in addition, provide guidelines and early advice for aspiring prospectors. We also point out that the issue of kaitiaki rights in respect of taonga species and mātauranga Māori is far from unique to New Zealand. We refer extensively in our discussion of bioprospecting to intense debate on the issue in international forums, as well as to the specific provisions of the Convention on Biological Diversity. The recent adoption of the Nagoya Protocol marks a further significant step forward in international policy developments.

For the question of genetic resources and their

modification, again there are existing structures that could be adapted to provide more fully for protection of the kaitiaki relationship. ERMA's legislation and systems have successfully introduced Māori perspectives into a sophisticated multi-disciplinary balancing process. As things are weighted at present, however, the Māori interest does not prevail unless corroborated by science – science has the trump card. To correct this imbalance, we recommend four changes. First, the Methodology Order, which automatically prioritises physical risk over cultural risk, should be amended to bring it into line with the HSNO Act 1996. Secondly, the Act itself should be amended to require everyone acting under it to recognise and provide for the relationship between kaitiaki and their taonga species. Thirdly, the current specialist Māori committee called Ngā Kaihautū Tikanga Taiao should not only provide advice at the request of ERMA, but should do so proactively in order to ensure that the Authority is always alerted to the existence of a Māori interest requiring its consideration. Fourthly, Māori should sit at the decision-making table in partnership so that their voice is not only heard but is also effective in the balancing of interests. To achieve this, Ngā Kaihautū should appoint at least two members of the Authority itself.

In terms of IP rights – in this instance, patents and plant variety rights (PVRs) – we considered the effect of the IP regime on the kaitiaki interest, current Crown reform proposals, and the effect of New Zealand's international obligations including the TRIPS Agreement.

We addressed patents first. The Crown proposes to create a Māori committee to advise the Commissioner of Patents about whether inventions are derived from mātauranga Māori or use taonga species in some way, and whether the proposed use of either is consistent with Māori values. It would be open to the committee to advise that the invention does not meet the requirements of patentability because mātauranga Māori in some way affects novelty or other criteria. The committee would also advise whether the patent has an unacceptable impact on the kaitiaki relationship with taonga species and therefore should not be patentable. As with pātaka komiti and Ngā Kaihautū, a Māori advisory committee for patents could be the lynchpin for identifying and protecting Māori interests. But it is our view that the Crown's proposal does

not go far enough. The committee should not be reactive (that is, providing advice only when asked) but should be able to advise the commissioner as it sees fit. It should prepare guidelines and protocols to help applicants decide when, and how, to engage with kaitiaki. To assist early engagement and avoid conflict, we recommend that a voluntary register of kaitiaki interests be kept. We also recommend that the law include a requirement for patent applicants to disclose any use of mātauranga Māori or taonga species (and their place of origin) when a patent application is first made, and that there be appropriate consequences for failure to disclose.

When the commissioner comes to decide an application that raises Māori issues, he or she should be required to take formal advice from the committee and to balance interests in partnership by sitting jointly with the committee's chairperson (or delegate). Where the use of an invention would be inconsistent with protecting kaitiaki relationships with taonga species, the commissioner should have explicit power to refuse patents on the internationally accepted grounds of *ordre public*. We therefore recommend the Patents Act be amended to include an *ordre public* provision alongside the current morality provision. As noted, however, no one interest would have automatic priority: a principled, transparent balancing of the kaitiaki relationship, the effect of IP ownership on it, and the interests of the wider community must take place.

For PVRs, we note Crown proposals that discovered varieties should no longer qualify for a PVR and that the commissioner should have more control over plant variety names. We add that PVR legislation should include a power to refuse a PVR on the ground that it would affect kaitiaki relationships with taonga species. The Commissioner of Plant Variety Rights would need to be adequately informed as to the Māori interest, and to balance it against those of the applicant and any other interests. To achieve this consistently with the partnership principle, we recommend that the Māori advisory committee should play the same role for PVRs as for patents, including joint decisions on PVRs where the kaitiaki relationship is at stake. We also note that PVRs can be obtained overseas without having to take into account the kaitiaki relationship, but our view is that this will not continue indefinitely. Here, as elsewhere, we have the

opportunity to lead the international community or risk eventually being constrained by it.

Finally, we observe that – as for taonga works – there may be some difficulties in identifying kaitiaki. Our proposed register will assist.

In sum, we are recommending that existing (or already proposed) structures be adapted to provide for a Crown–Māori partnership in decisions about research and exploitation of mātauranga Māori and taonga species. DOC and Māori should design a bioprospecting regime together, possibly using the current pātaka komiti to balance interests jointly with regional conservators. Ngā Kaihautū should advise ERMA proactively on GM applications affecting kaitiaki relationships, and should appoint at least two members of the Authority that makes the decisions. The Commissioners of Patents and Plant Variety Rights should be advised (again, proactively) by the Māori committee that the Crown already plans to create, but such a committee would need assistance from an executive unit and greater powers and functions than are currently proposed. Where Māori interests are at stake, the respective commissioner should sit jointly with the chair (or delegate) of the Māori committee, so that Māori contribute effectively to the balancing of all valid interests and the final decision is made in partnership.

Legislation should be amended to provide for the expanded roles, functions, and powers of these bodies. Also, the relevant laws need to be amended to give the kaitiaki relationship formal protection. But, as with our recommendations in respect of taonga works, we consider that a key role for these bodies would be to facilitate and enable early engagement, best practice, and certainty by developing guidelines, advising potential applicants, creating and maintaining kaitiaki registers, and so forth. This would be just as important, if not more so, as the formal advisory and decision-making powers.

### 9.2.5 Protecting Māori interests in the environment

In chapter 3, we find that management of New Zealand's environment has largely been entrusted to local authorities, although the Crown retains significant powers to lead or direct through national policy statements, national environmental standards, and the ability to 'call in' particular decisions.

We find that, as this Tribunal has said before, the Crown cannot absolve itself of its Treaty responsibilities when it delegates authority to local government. Those Treaty responsibilities include active protection of the kaitiaki interest in the environment and its taonga, as key components of te ao Māori. Kaitiaki nurture and care for the environment and its resources, not necessarily by forbidding their use but by using them in ways that enhance kin relationships, including the relationships with taonga themselves. But there are many other valid interests to consider, including the best interests of the environment itself. The RMA regime is designed to balance these interests, but as currently applied does not sufficiently protect kaitiaki interests. We find that after a proper balancing, the Māori interest will sometimes be of such priority that kaitiaki control of a taonga is appropriate. In other cases, where kaitiaki should have a say in decision-making but other voices should also be heard, a partnership arrangement is needed. In all other situations, kaitiaki will need to be able to influence decision-making, and the kaitiaki interest must be accorded an appropriate level of priority. This, we find, is what a Treaty-compliant system of environmental management entails.

The RMA was a beacon of hope to Māori when it was first enacted. But iwi influence in resource management generally remains inconsistent, reactive, and reliant on the meagre resources available to iwi and their relationships with particular local authorities. The RMA provides for Māori authority or influence so that they can carry out their kaitiakitanga. But these provisions are not being used or, in the case of iwi management plans, are being used to little effect. As a result, the framers' intentions are not being met and the RMA system is not Treaty compliant.

It follows that tools are already to hand to remedy this problem and have been for some time. In particular, section 33 of the RMA permits local authorities to delegate management of iconic taonga to iwi authorities. This allows for kaitiaki control of taonga where that is appropriate. Section 36B provides for partnership between local and tribal authorities in the joint management of taonga. And section 188 allows incorporated bodies (including tribal bodies) to become heritage authorities for particular sites. This also allows for kaitiaki control where that

is appropriate. What is necessary, we consider, is for the Act to be amended to make iwi involvement in decision-making a compulsory and formal component of the RMA system.

We say that the lynchpin of a Treaty-compliant RMA system would be enhanced iwi management plans, which we call iwi resource management plans (IRMPs). Through these plans, iwi would identify the areas over which Māori control, partnership arrangements, or influence is sought – that is, places and resources of particular importance to kaitiaki. They would identify specific section 33, section 36B and section 188 HPA opportunities, and they would set out the iwi's general resource management priorities in respect of taonga and resources within their rohe. Once an iwi finalises its IRMP, we say that a formal statutory negotiation process should take place between iwi and local authority representatives to confirm it. Once agreement is reached, the IRMP would bind local government just like any other district or regional plan or policy statement. If they cannot agree, options include 'agreeing to disagree' or referring matters to mediation or to the Environment Court for determination. In this way, the IRMP would infuse local authority planning instruments with kaitiaki priorities and values.

We also say that local authorities should be required to actively explore opportunities for delegation to kaitiaki under section 33 and partnership under section 36B, and the Ministry for the Environment should likewise be required to actively consider opportunities for delegation under section 188. These provisions, we say, should be made easier to use so that they do not impose unnecessary barriers to partnership or transfer of power. We also say that local authorities and the Ministry should be required to report annually on their use of these provisions. Specifically, local authorities should report to the Parliamentary Commissioner for the Environment, and the Ministry for the Environment should report to Parliament.

Currently, control or partnership arrangements are coming about outside the RMA system through Treaty settlements or customary rights (foreshore and seabed) settlements. The settlements show that partnership is clearly feasible in environmental management, but we think that proper Māori participation in the RMA system should not

be limited to what can be won in settling historical claims. It ought to be available to all Māori groups through the RMA, as originally intended.

For iwi to participate fully in IRMP and other RMA processes, we consider that the Ministry for the Environment must step up with funding and expertise. Iwi capacity to engage and to prepare robust and professional IRMPs must be enhanced. On the Crown's side, the Maruwhenua unit within the Ministry also needs enhancement so that it can become the face of the Crown's effort to reform the RMA system and assist iwi to prepare effective IRMPs and kaitiaki to take up greater responsibilities under the Act.

Finally, we conclude that a lack of central government leadership has contributed to the Crown's neglect of its Treaty responsibilities. It should use national policy statements to achieve nationally consistent implementation of IRMPs, the use of kaitiaki control or partnership mechanisms, and other means by which Māori can influence environmental decision-making.

#### **9.2.6 Protecting Māori interests in the conservation estate**

In chapter 4, we find that the default arrangement for Crown–Māori relations in the conservation estate should always be partnership. We also conclude that DOC is amenable to this result, but laws, policies, and structures need to change. Partnerships, however, are not necessarily predicated on equal power. In this case, DOC will almost always be the more powerful partner, because it brings greater resources and a statutory mandate to the table. But the Crown and Māori both want their stewardship of the conservation estate to bring about the mutual survival of mātauranga Māori and taonga in the environment. We think that these common goals can only be met by shared decision-making about taonga, based on the Treaty principle of partnership.

To achieve this, we recommend a suite of legislative, structural, and policy reforms, designed to bring about responsible power-sharing. We think that our recommended changes should result in a new approach to conservation management, incorporating mātauranga Māori into decision-making and reconciling any differences between kaitiakitanga and the Western preservationist approach. Conservation outcomes will be enhanced

while protecting and supporting mātauranga Māori. This would be a win-win-win result for the Crown, iwi, and the environment.

As a starting point, we recommend a general review of conservation legislation, aimed at bringing together and reconciling the differing approaches to conservation represented by mātauranga Māori and te ao Pākehā. Such a review could identify and respond to any statutory barriers to genuine partnership and the full exercise of kaitiakitanga, so vital to the survival of mātauranga.

We also make specific recommendations for partnership to be formalised in law and policy. We recommend that partnerships should be formalised through the establishment of a national Kura Taiao Council and local conservancy-based Kura Taiao boards, to sit alongside the New Zealand Conservation Authority and conservation boards. These new bodies should advise the Minister and the Director-General, and set Kura Taiao strategies and plans at national and regional levels, which would form part of any relevant conservation management strategy or plan or national park plan. Any inconsistencies would have to be worked through jointly by the Māori bodies and their partnership structure equivalents. Within this overall partnership framework, decisions could be made about kaitiaki control, partnership or influence in relation to individual taonga. We note that there are many forms of partnership and many interests at play in relation to each. In some cases, we say, the kaitiaki interest would be so significant as to justify outright control; in others, influence would be sufficient. But for all, the starting point must be partnership.

We recognise the cost implications of the new bodies we recommend, but consider it our duty to make recommendations that will remedy non-compliance with the Treaty. We also note that a full partnership with Māori will harness volunteer time, expertise, finances, and land that would otherwise remain untapped.

We also recommend amendment to DOC's guiding policies. Partnership should be made a 'will' obligation in the Conservation General Policy (CGP) and the General Policy for National Parks, as should the obligation to actively protect kaitiaki interests in taonga. We say that other DOC policies and practices should also encourage joint decision-making and management of taonga.

Further, we find that the CGP and the General Policy for National Parks do not adequately reflect the principles of the Treaty of Waitangi as they have been defined in law, and that this is important in light of DOC's statutory obligation to 'give effect to' those principles. We say that the CGP and General Policy for National Parks must be amended to reflect the full range of relevant Treaty principles as articulated by the courts and must also reflect due consideration of the principles defined by the Tribunal. We also note that Treaty principles are not set in stone but rather can and must evolve to meet new circumstances. We say that this too must be adequately reflected in general policies.

The Government's guidelines for Crown-Māori Relationship Instruments need amendment to allow statements about Treaty principle that reflect the full range of principles defined by both the courts and the Tribunal. We acknowledge, in this context, that there is a role for the Executive in helping departments to define the Treaty responsibilities that are relevant to their functions. But we say that the Executive must provide this guidance in a manner that is consistent with the terms of the Treaty and with any views expressed by the courts.

Although we do not want to trespass on the Tribunal's district inquiries, we note with approval the return of title and shared management arrangements adopted for conservation land in some Treaty settlements. We offered our opinion that there is nothing to fear in such arrangements, including for national parks, as the Australian example shows.

On more particular matters, we consider that provision should be made for full statutory co-management of customary use. DOC and pātaka komiti should make joint decisions on the basis of two principles: that survival of the species is paramount; and that iwi have a right to exercise kaitiakitanga and maintain their culture. To enable responsible power-sharing, the CGP and General Policy for National Parks will need to set their presumptions in favour of customary use provided certain conditions are met. The policies will also need to be amended to provide for harvest in places other than traditional harvest sites and to support customary use, again subject to the health of the species. The Wildlife Act should also be amended so that no one owns protected wildlife, and

so that tangata whenua can own taonga works that are crafted from natural materials (including protected wildlife). The vesting of ownership in the Crown in 1953 was inconsistent with the Crown's obligation to safeguard kai-tiaki interests in protected species. Finally, following the *Whales* case, we consider that DOC should give a 'reasonable degree of preference' to tangata whenua interests in taonga when allocating concessions for commercial activities in the conservation estate. DOC should also develop a nationwide policy on consultation with tangata whenua over concession applications.

In sum, we recommend the review and amendment of the various conservation laws and the amendment of conservation and national parks policies to provide for partnership and other Treaty principles. Partnership structures should be established at two levels – a national Māori council and regional boards – to partner the Conservation Authority and conservation boards, and to advise the Minister and Director-General. We also urge the Executive to take a more open approach to Crown–Māori relationships, one that is based on the full range of relevant Treaty principles.

### 9.2.7 Protecting Te Reo Māori

In our inquiry, we initially intended to consider claimant concerns about the wellbeing of tribal dialects. In doing, so, however, we quickly realised that it was impossible to consider dialects in isolation from the general health of te reo. Indeed, some claimants presented evidence about the overall picture of the Crown's support for and protection of te reo. While the Crown objected, it also provided evidence of this kind. It said this was necessary context for considering the narrow issues on the table. But it was clearly more than context: the principal Crown witness agreed that any injury to te reo Māori was also an injury to tribal dialects because the two were so intimately connected.

We therefore decided to broaden our focus to the overall health of te reo Māori, which is addressed in chapter 5. Because of the appointment of a ministerial review panel to consider the very same issues, we released our chapter initially in pre-publication format in October 2010, in case it could be of assistance to that panel in its own deliberations. Since we traverse issues that were not officially at

stake during the hearings, however – both in that release and in this, our final report – our findings and recommendations should rightly be regarded as provisional. It is now for others to take these matters further.

We find te reo Māori to be approaching a state of crisis. In census, pre-school, and school statistics there are diminishing proportions and, in many cases, numbers of te reo speakers and learners. Older native speakers passing away are simply not being replaced. Having begun a process of revitalisation in the late 1970s, it seems that te reo is now in renewed and steady decline. Peaks in the revival, as measured by Māori participation, occurred at kōhanga reo in around 1993 and in Māori-medium schooling in around 1999. Thousands more learners would be in these forms of education if the peak proportions had been maintained. If the 2001 rate of te reo speaking in the entire Māori ethnic group had been maintained at the 2006 census, there would have been 8,000 additional Māori conversational speakers of te reo.

In looking for the reasons for this decline we saw repeated failures of policy. The most profound was the failure to train enough teachers to meet the predictable demand for Māori-medium education demonstrated by the surge in kōhanga reo enrolments in the early 1980s. The Government's 2003 Māori Language Strategy has been another failure. It is too abstract and has been constructed within a bureaucratic comfort zone. There have been genuine problems with its implementation due to a lack of leadership and commitment amongst the responsible Crown agencies. It is also an example of the lack of true partnership between Māori and the Crown in language policy: it is a well-meaning but essentially standard and pre-consulted Crown policy that does nothing to motivate Māori at the grassroots.

We identify a range of urgent measures to address these and other shortcomings. We recommend, provisionally, four fundamental reforms. First, we recommend that a revamped Te Taura Whiri (the Māori Language Commission) become the lead Māori language sector agency in order to address the problems caused by the lack of ownership and leadership. Secondly, we recommend that Te Taura Whiri function as a Crown–Māori partnership with equal numbers of Crown and Māori appointees to its board, since we are convinced that te



reo revival will not work if responsibility for setting the direction is not shared with Māori. We suggest that the Māori appointees to it could be chosen via an electoral college of Māori constituency members of Parliament and representatives of various Māori organisations with a clear interest in te reo (including iwi organisations, whose interest will be in tribal reo), and the Crown appointees could continue to be appointed by the Minister of Māori Affairs.

Thirdly, we recommend that Te Taura Whiri have increased powers to compel public bodies to contribute to te reo's revival and to hold key agencies properly accountable for the strategies they adopt. For instance, we recommend that Te Taura Whiri set targets for the training of te reo teachers, approve education curricula involving te reo, and approve the compulsory Māori language plans of central government agencies, State broadcasters, and public bodies in districts with a sufficient number and/or proportion of te reo speakers and schools with a certain proportion of Māori students. Fourthly, and in order to give iwi a central role in the revitalisation of te reo and encourage efforts to promote the language at the grassroots, we recommend that these regional public bodies and schools should have to consult iwi in the preparation of their plans.

In addition to these fundamental reforms, we make two further recommendations. One is that Te Taura Whiri offer a dispute-resolution service to kōhanga and kura whānau to ensure that the occasional interpersonal conflicts that occur disrupt children's learning as little as possible. The other is that given the need to monitor the ongoing health of te reo carefully, Te Taura Whiri report back to the community on progress every two years. In light of the strong desire in certain communities for local control, we also make a tentative suggestion that the kōhanga reo within each iwi's rohe be able to collectively opt (say with a 75 per cent majority) to secede from the Kōhanga Reo National Trust and come under the authority of the local iwi authority. That is of course a matter for Māori rather than the Crown.

In making these provisional recommendations we acknowledge that they may be seen as challenging and even resisted in certain quarters. In reality, however, they would only bring New Zealand into line with language

policies applied in comparable countries overseas. Given the significant spend on te reo policies now, they would not necessarily come at great extra cost. Reprioritisation could well address most new expenditure.

### **9.2.8 Protecting and transmitting mātauranga Māori controlled or held by the Crown**

While practically every Crown agency deals with mātauranga Māori to some extent, in chapter 6 we consider the performance of a dozen or so agencies for whom mātauranga Māori is a core aspect of their business. Across the fields of education, the arts, culture, heritage, broadcasting, science, and archives and libraries, these agencies engage with mātauranga in a variety of ways. Some are its custodians, some its owners; others fund it, while others again are responsible for transmitting it. As such, the Crown is practically in the seat of kaitiaki. This places particular obligations on the Crown to protect both the mātauranga itself as well as the interests of kaitiaki in it.

This can only be achieved through partnership with Māori, for neither Māori nor the Crown can succeed in protecting and transmitting mātauranga without the help of the other. That is the nature of the society we live in: Māori have the motivation to keep their mātauranga alive but the State has the resources and opportunities to ensure this happens. For instance, Māori children today often learn about their culture in schools rather than at their koro's knee; documents in archives and libraries may be the most complete sources of particular knowledge; and the State often provides the key financial support for the creation of taonga works. While there are reasonable limits on the Crown's obligation, and there is a need to balance Māori and other legitimate interests on a case-by-case basis, there is nonetheless a clear necessity for the Crown and Māori to work in partnership.

Our key overall recommendation, therefore, is for the establishment of viable partnership models between Māori and the Crown in the retention and transmission of mātauranga Māori. We recommend that a set of 10 principles apply to the construction of these working partnerships. The principles call for the according of an appropriate priority to mātauranga Māori vis-a-vis other Crown priorities; Crown agencies to act in a coordinated fashion in developing mātauranga policies; shared

decision-making with Māori over mātauranga objectives; the appropriate identification, in each case, of the representatives of the Māori partner; the provision of sufficient time and resources for meaningful Māori involvement; constructive Māori engagement in the objective-setting process; the application of a spirit of compromise by both partners in agreeing objectives; sufficient resources and time from each agency to achieve the agreed objectives; shared action, where possible, in programmes to implement these objectives; and shared evaluation and review of both the objectives and programmes.

We also make a series of sector- and agency-specific recommendations. Beginning with the overall culture and heritage sector – that is, the agencies dealing with taonga tūturu, documentary mātauranga, and the funding and presentation of Māori arts and culture – we recommend that Te Puni Kōkiri and the Ministry for Culture and Heritage take leadership roles to improve the current levels of coordination and collaboration between these agencies over mātauranga Māori. We also recommend the formation of a Crown–Māori partnership entity for the culture and heritage sector to guide agencies in the setting of policies and priorities concerning mātauranga Māori. We suggest the formation of an electoral college to identify representatives of the Māori partner to sit on this entity.

More specifically across the culture and heritage agencies, we recommend that Te Papa explore the next step in the evolving indigenous-settler partnership approach to cultural heritage. We observe that the innovative model developed for the co-governance of the Waikato River may provide the basis for a similar approach to managing taonga tūturu. We also recommend several changes to the provisions of the Protected Objects Act: that prima facie Crown ownership of newly discovered protected objects remain in place as a matter of practicality, but be statutorily renamed ‘interim Crown trusteeship’; that a body of Māori experts share in important decisions over taonga tūturu with the chief executive of the Ministry for Culture and Heritage; and that kaitiaki who reacquire taonga be exempted from having to register as collectors with the Ministry for Culture and Heritage. Furthermore, we recommend that Te Papa develop best-practice guidelines for private collectors of taonga who are willing to involve

kaitiaki in the care of the objects they own, and that – in recognition of the earlier and Treaty-deficient antiquities legislation under which so many taonga tūturu were exported overseas – the Crown establish a restitution fund to help kaitiaki to reacquire their taonga on the open market.

With respect to the funding and presentation of Māori arts and culture, we recommend that Māori and the Crown use both Creative New Zealand’s major research project on ‘The Health of Māori Heritage Arts’ and Te Puni Kōkiri’s comprehensive marae survey as information bases for identifying future funding priorities and criteria. On the broadcasting side, we recommend that TVNZ do more to fulfil its aim of being New Zealand’s ‘Māori content leader’. As such, we say it should feature Māori cultural programming on its mainstream channels and its shareholding ministers must accept that content leadership bears an associated cost. We also recommend that TVNZ cooperate with Māori Television over te reo and mātauranga Māori programming and scheduling, since we believe that competition in an area as important as te reo and mātauranga Māori is not yet a sensible model.

Finally, with respect to the culture and heritage sector, we make some recommendations about archives and libraries. Specifically, we recommend that there be some constraint on the commercial use of the mātauranga in documents and images held by the Crown through the operation of an objection-based approach, whereby the kaitiaki of mātauranga held by Archives New Zealand and the National Library could seek to prevent the commercial use of their mātauranga unless they have given consent or been consulted, as appropriate. The commission we recommend in chapter 1 would adjudicate. With respect to the TVNZ film and television archive, we recommend that TVNZ consult with Māori and produce thorough guidelines for its Māori department staff on handling requests for the use of mātauranga-laden footage. We explain that these reforms should not apply retrospectively, nor to mātauranga that is generically Māori and has no specific kaitiaki. While these reforms will not apply to private archives and libraries, we also recommend that Archives New Zealand and the National Library prepare generic guidelines about when it might be appropriate to consult

kaitiaki or seek kaitiaki consent for any private archives and libraries willing to offer them to users.

As with the culture and heritage sector, we recommend the establishment of a Crown–Māori partnership entity in the education sector to guide agencies in the setting of policies and priorities concerning mātauranga Māori. We suggest that Māori representatives to sit on it should be chosen via an electoral college. We also recommend that the Ministry of Education develop some specific indicators around mātauranga Māori in order to properly gauge its Māori-focused activities.

In the science sector we recommend the creation of a Māori purchase agent (that is, a body that will disburse money to researchers) as the appropriate expression of partnership. It would boost Māori research capacity and fund the preservation of mātauranga Māori and research that explores the interface between mātauranga and modern applications. We recommend that members of the purchase agent's board include a mix of those with expertise in mātauranga Māori and science, and note that the science sector might not lend itself to their selection through an electoral college. We recommend that once it has achieved its key objectives, this fund be reintegrated with the mainstream system. We also recommend that science sector agencies give greater prominence to the Vision Mātauranga policy framework or make mātauranga Māori a strategic priority in its own right.

Finally, we make some specific recommendations about Te Puni Kōkiri's Māori Potential Fund. We recommend that it be protected and remain in place; that its investments be evaluated, by both Māori and the Crown; and that it be allocated in partnership with Māori, with mātauranga experts and others from the community deciding equally and transparently with Te Puni Kōkiri on general funding priorities and specific applications. As such, we recommend the establishment of a board to allocate the fund comprised equally of Te Puni Kōkiri staff and representatives of the Māori community.

### 9.2.9 Protecting rongoā Māori

In chapter 7 we deal with two connected issues: the origins and impact of the Tohunga Suppression Act 1907 and the sufficiency of the Crown's current level of support for

rongoā Māori. We find that the Tohunga Suppression Act was fundamentally unjustified because it was an inappropriate response to the late nineteenth-century Māori health crisis; that it was unnecessary because there were other options available for dealing with tohunga whose activities were harmful; and that it was racist because it effectively banned all tohunga activities (not only those that might be harmful) and defined a core component of Māori culture as wrong and in need of 'suppression'. However, we also concluded that while the Act had some prejudicial impact on tohunga activities, it did not – and could not – get rid of the practice.

Turning to the contemporary situation, we note that tohunga have been seeking more state resources and that the Government has once again been forced to confront the practice of rongoā. It has also faced a crisis in Māori health – albeit this time one caused by 'lifestyle' rather than infectious diseases. We find that in response to this state of affairs, the Crown has not promoted rongoā with any urgency. It either lacks a belief in the efficacy of rongoā or is too conscious of the lingering scepticism that previously led to the stigmatisation of tohunga and the Tohunga Suppression Act 1907.

We think that the Crown's defensive mindset must shift. It must work in genuine partnership with Māori to support rongoā and rongoā services. It is time for the Crown to stress the positive benefits of rongoā and its potential to combat the ongoing crisis in Māori health. We therefore recommend that the Crown take several steps as a matter of urgency. First, the Crown should recognise that rongoā Māori has significant potential as a weapon in the fight to improve Māori health. This will require the Crown to see the philosophical importance of holism in Māori health and to be willing to draw on both of this country's two founding systems of knowledge.

We recommend that the Crown incentivise the health system to expand rongoā services. There are various ways in which this could be done, for example by requiring every primary healthcare organisation servicing a significant Māori population to include a rongoā clinic. Further, the Crown should adequately support the new national rongoā body, Te Paepae Matua mo te Rongoā, to play the quality-control role that the Crown should not

and cannot play itself, and begin to gather some hard data about the extent of current Māori use of services and the likely ongoing extent of demand.

Finally, we recommend that given the extent of environmental degradation and the challenges of access to the remaining bush, the Department of Conservation and the Ministry of Health coordinate over rongoā policy. Mātauranga rongoā cannot be supported if there are no rongoā rākau left, or at least none that tohunga rongoā can access.

### 9.2.10 Protecting Māori interests in the making of international instruments

In chapter 8 we address the obligations of the Crown to engage with Māori during the process of negotiating the content and implementation of international instruments, be they binding conventions and treaties or non-binding declarations and guidelines. In other words, we do not consider whether the substantive result of New Zealand's stance in international forums has been Treaty consistent (we do that elsewhere, most particularly in chapters 1 and 2). Rather, we focus on the process of Crown engagement with Māori over international instruments, to determine whether that process has been Treaty consistent.

We conclude that the Crown has the Treaty-based right to make foreign policy and represent New Zealand in international affairs, but that the Treaty also requires the active protection of Māori interests that may be affected by international instruments. The degree of protection to be accorded the Māori interest in any particular case cannot be prescribed in advance. Māori interests exist on a sliding scale. Where they are positioned on that scale will depend on the nature and importance of the interest when balanced alongside the interests of other New Zealanders, although conflict between the two should not be assumed. The protection the Crown can offer will also depend on the international circumstances which may constrain what the Crown can achieve.

The Crown already accepts that it must protect Māori interests in the international arena, and that it must engage with Māori about how to do so. But its current policies and practices have three key flaws: its Māori Engagement Strategy (MES) restricts consultation to

binding instruments; the MES also sets consultation as the maximum form of engagement; and the Crown's consultation is sometimes poorly executed, which limits its effectiveness and reduces its capacity to protect Māori interests to a reasonable extent. We therefore make several recommendations for the reform of this system so as to remove the prejudice to Māori.

First, we recommend the MES be amended to require engagement over both binding and non-binding instruments, and that it provide for engagement beyond consultation where appropriate to the nature and strength of the Māori interest. As a starting point for that engagement, we would propose that the lead agency responsible for an international instrument consult with Te Puni Kōkiri before coming to a view whether there is a Māori interest, the likely nature and strength of that interest, and the degree of engagement that its priority might justify.

To enable consultation or negotiation to take place, we recommend that the Crown develop a policy to identify relevant bodies that already exist which could also serve as partnership forums for the discussion of international instruments, and to create them as necessary (instrument by instrument) where they do not exist. We also suggest that Māori consider the appointment of electoral colleges so that such forums may be readily constituted on matters of specialised interest.

We also recommend that the Crown adopt a set policy, following negotiation with Māori interests, for funding independent Māori engagement in international forums.

In order to ensure that quality engagement takes place and is effective, we recommend that the Crown adopt a series of mechanisms to ensure accountability. These include regular reporting to iwi and Māori organisations, as well as to Parliament's Māori Affairs Committee. When Parliament considers ratifying or otherwise adopting or acting upon an international instrument, we recommend – as the Law Commission did before us – that the required 'National Interest Analysis' include consideration of whether the instrument has any effect on Treaty rights and interests. Statutory enforcement might also be appropriate, and we recommend that the Crown consider situations where this may be required. Finally, we suggest that the Crown consider reporting its engagement with

Māori, and the outcomes, to the relevant international body or forum, where it does not already do so.

### 9.2.11 New bodies and expenditure arising from our recommendations

- ▶ We have set out a summary of our recommendations. Often we recommend a change in approach rather than an outlay in expenditure. But we also recommend a number of initiatives that will carry a financial cost, particularly in the form of new or expanded entities and funds. In summary, these are: A *new commission*, supported by a *small new secretariat*, to decide objections to the use of mātauranga Māori, taonga works, and taonga-derived works on a case-by-case basis, as well as to make early declaratory rulings, develop guidelines, maintain a kaitiaki register, and provide advice, amongst other functions. The commission would, however, replace the Māori trade marks advisory committee.
- ▶ An *expanded role for DOC's pātaka komiti*, which already exist, to decide both customary use (chapter 4) and applications for bioprospecting (chapter 2) jointly with DOC.
- ▶ An *expanded role for ERMA's Ngā Kaihautū*, which already exists, for GM decision-making, including appointing at least two members to the Authority.
- ▶ A *new Māori advisory committee* to advise the Commissioner of Patents and the Commissioner of Plant Variety Rights, with a decision-making role (the chair to sit jointly with the commissioners), and other functions.
- ▶ *Assistance* for Māori to prepare IRMPS and to participate more effectively in RMA processes.
- ▶ A *new national Māori conservation council* called a *Kura Taiao Council*, and a *new regional Māori board* called a *Kura Taiao board* in each of the conservancies
- ▶ A *revamped Te Taura Whiri operating as a Crown-Māori partnership*, with its role expanded to include the approval of public sector language plans and targets and the provision of a dispute resolution service for kōhanga and kura whānau.
- ▶ A *Crown-Māori partnership entity in the culture and*

*heritage sector* to guide agencies in the setting of policies and priorities concerning mātauranga Māori, with sufficient resources for meaningful Māori involvement.

- ▶ A *body of Māori experts to share in important decisions over taonga tūturu* with the chief executive of the Ministry for Culture and Heritage.
- ▶ The establishment of a *restitution fund* to help kaitiaki to reacquire their taonga on the open market.
- ▶ A *Crown-Māori partnership entity in the education sector* to guide agencies in the setting of policies and priorities concerning mātauranga Māori, with sufficient resources for meaningful Māori involvement.
- ▶ An interim *Māori purchase agent in the science sector*, governed by a board of experts in mātauranga Māori and science, to boost Māori research capacity and fund the preservation of mātauranga Māori and research that explores the interface between mātauranga and modern applications.
- ▶ A *board to allocate Te Puni Kōkiri's Māori Potential Fund*, comprised equally of Te Puni Kōkiri staff and representatives of the Māori community.
- ▶ *Increased health sector funding* to incentivise the expansion of rongōā services.

We acknowledge, therefore, that there will be some unavoidable cost in our recommendations. We accept too that the Government's coffers are not full after the combined effects of worldwide recession and the devastating Christchurch earthquakes. But the new bodies and frameworks we propose will provide no more than the platform for the conversation the Treaty requires in IP, conservation, the arts, and other areas. Experience shows us that without such a platform, these conversations simply do not occur and we revert to the 'invisible Māori' dimension of the 1950s.

We would also be neglecting our duty if we were to issue a report that called for a lesser standard of compliance with Treaty obligations given the straitened financial conditions. The vulnerability of taonga and of mātauranga Māori requires commensurate action, and it is our job to point that out. The fact is that a lack of support for mātauranga Māori now will have serious consequences down the track. Every year the number of

kaumātua raised in village communities and taught by tohunga diminishes. It was not uncommon for us to hear reference to an elder being the last to practise a particular skill. In these circumstances the task of protecting Māori culture is urgent and cannot wait yet another decade. It is the Government's prerogative to set priorities, but it is its Treaty duty to actively protect taonga.

### 9.3 PERFECTING THE TREATY PARTNERSHIP

Experience shows that the Crown is prepared at times to share control of taonga with kaitiaki, protect mātauranga Māori, and support the transmission of that mātauranga to future generations. But that will be strongest by far when its exercise is directed to the settlement of historical Treaty claims. These settlements today are delivering to iwi joint management of rivers, lakes, and Crown land; title to areas of Crown land, including areas of cultural significance within the conservation estate; rights of cultural harvest and fossicking on conservation land; accords over the care of physical taonga works, both when held by the national museum and as re-found and subject to the Protected Objects Act; lump sum gifts towards the building of whare taonga; the restoration of traditional place names; a promise to record the authorship and significance of 'Ka mate' to Ngāti Toa; the restoration and redevelopment of marae; relationship agreements with a variety of government departments and ministers; and indeed the facilitation of access to services and work programmes across the whole of government.

In the context of historical Treaty settlements, therefore, the Crown is delivering to kaitiaki at least some of what claimant iwi are pursuing through this claim. Indeed, the range of cultural redress available under the settlement process has clearly expanded as the political urgency to settle claims has increased. This raises the question as to what would happen if the settlement process did not exist. The failure ever to invoke sections 33 and 188 of the Resource Management Act in favour of iwi suggests that there would be little on offer in a practical sense. No one should infer from this that recognition of kaitiaki interests should be contingent on the existence of a historical grievance: the very fact of these unused

provisions in the RMA shows that Parliament itself does not believe this.

The fact that historical Treaty settlements have become the principal vehicle for protecting mātauranga Māori and taonga leads to inevitable inconsistencies. It seems random and iniquitous, for example, that a haka might gain recognition but a mōteatea such as 'Pō Pō' might not. We say this not from any ignorance of Ngāti Toa's great concern over the commercial exploitation of 'Ka mate', but because we believe that all taonga works should be entitled to the same kinds of protection. We also see the likely unfairness of some settled groups missing out on forms of cultural redress which are now a standard feature of Treaty settlements, but which were strictly off the table at the time of their own negotiations, or smaller iwi missing out because they lack the political leverage to strike a good deal.

A key issue arising in Wai 262, therefore, is how and whether the kind of provision for kaitiakitanga and mātauranga Māori to be found in the settlements process can be normalised before that process is over. As policy thinkers have observed, settlements offer a 'relatively protected environment' in which to negotiate the ongoing Crown-Māori relationship. But how will the nation cope when 'the convenient levers for establishing these new relationships will be gone'?<sup>13</sup> The ideal solution is to begin that process of normalisation now. For one thing, this will help ensure the durability of earlier (and possibly less generous) historical settlements. Moreover, the lesson of settlements is that there is nothing to fear from supporting mātauranga Māori and according kaitiaki interests appropriate recognition. The ongoing level of bipartisan parliamentary support for settlement legislation is proof enough of that.

It is time to move forward. As a nation we should shift our view of the Treaty from that of a breached contract, which can be repaired in the moment, to that of an exchange of solemn promises made about our ongoing relationships. It is the historical settlement process itself that allows us to shift our attention in this way from the past to the future. Wai 262 is fundamentally a claim about how that future should look. The timing of our report's release may thus prove propitious. After decades

of profound social and political change, and a generation-long focus on the resolution of past grievances, we are now ready to enter a new stage in the relationship.

Altered demographics mean we must do this in any event. In the life of the nation Māori are now much more to the fore and there is no turning back from that. So, while the Treaty makes it a constitutional responsibility to adjust the Crown–Māori relationship, even without the Treaty the country would have a social and political responsibility to do so. The number of Māori is predicted to rise to over 800,000 by 2026,<sup>14</sup> which suggests that the total will nudge one million by mid-century.

But two centuries of interaction, as well as the rapid growth of Pacific and Asian populations, mean that demographic change is not simply about greater numbers of Māori. The nation is becoming more ethnically diverse than ever before, while at the same time some of the lines between Māori and Pākehā have become blurred. Inevitably, the Treaty relationship will become more complicated. This does not lessen its relevance, however: in societies such as Australia and Canada the issue of aboriginal rights is no less important for their broad multiculturalism. And, despite the ‘blur’ in the middle, our two founding cultures remain distinct. Through the Treaty they provide us with a shared identity, giving us, on the one hand, our sense and right of place in the Pacific and, on the other, the legacy of the West. Their gravitational pull will remain strong enough to draw newer cultures to them.

We acknowledge that some New Zealanders feel a sense of unease about these ideas. After all, they require us to jettison some long-held assumptions about who and what we are. But these assumptions are becoming more and more difficult to sustain anyway. History and the future both demand that we make the leap to acceptance of Māori culture and identity as a founding pillar of our national project. This is not just a matter of justice (though it is that, of course). Demographics, economics, and geo-politics suggest it is now a matter of necessity.

The signs are generally positive that we are now ready. There is a deep reservoir of goodwill between our cultures, and much commonality. Māori culture is increasingly being embraced in the Pākehā mainstream, in ways

that would have seemed almost inconceivable a generation ago. There is a growing community realisation that New Zealand wins when Māori culture is strong. We have the opportunity now to take this a stage further through genuine commitment to the principles of the Treaty. This implies not only kaitiaki control of taonga where that is justified; it also implies a genuine infusion of the core motivating principles of mātauranga Māori – such as whanaungatanga and kaitiakitanga – into all aspects of our national life.

Such a commitment will not only fulfil – at last – the promise that was made when the Crown and tangata whenua entered their partnership at Waitangi. It will also pave the way for a new approach to the Treaty relationship: as a relationship of equals, each looking not to the grievances of the past but with optimism to a shared future. It is, in other words, time to perfect the partnership.

#### Text notes

1. Document s3 (Counsel for Ngāti Kurī, Ngāti Wai, and Te Rarawa, closing submissions, 5 September 2007), p311
2. Document s1 (Counsel for Ngāti Kahungunu, closing submissions, 16 April 2007), p88
3. Ibid, p90
4. These were identified by counsel as mātauranga/education, environmental management, taonga, resource ownership, the Department of Conservation, rongoā, intellectual property, and international and legislative review: doc s1, pp92–93.
5. Document s1, pp91–93
6. Document s4 (Counsel for Ngāti Koata, closing submissions, 18 April 2007), p96
7. Ibid, pp102–103
8. Document s6 (Counsel for Ngāti Porou, closing submissions, 23 April 2007), p89
9. Ibid, pp89–92
10. Paper 2.540 (Counsel for Ngāti Porou, memorandum, 29 November 2010), p3
11. Paper 2.537 (Counsel for the Ngāti Koata Trust Board, submission on the Wai 262 Te Reo Māori chapter, 25 November 2010), pp1–2

12. Document T1 (Crown counsel, closing submissions, 21 May 2007), p 10
13. Institute of Policy Studies, ‘Post-Treaty settlements issues’, Victoria University of Wellington, <http://ips.ac.nz/events/completed-activities/Emerging%20Issues%20Programme/Post-Treaty%20settlements.html> (accessed 8 March 2011).
14. Statistics New Zealand, ‘National Ethnic Population Projections: 2006 (Base) – 2026 Update’, *Hot Off the Press* (Wellington: Statistics New Zealand, 22 April 2010), p 12; Statistics New Zealand, ‘Tables, National Ethnic Population Projections: 2006 (Base) – 2026 Update’, Excel spreadsheet, 22 April 2010, tbls 1m, 3m



Dated at *Wellington* this *28th* day of *June* 2011



J V Williams, presiding officer



RCA Maaka, member



PE Ringwood, member



K W Walker, member





## A BRIEF PROCEDURAL HISTORY OF THE WAI 262 INQUIRY

### 1.1 INTRODUCTION

This appendix sets out a brief procedural history of the Wai 262 inquiry. It outlines something of the origins of the Wai 262 claim, the path to hearings, and the two rounds of hearings. Details of the claim and the evidence are addressed in the report's chapters.

### 1.2 THE ORIGINS OF THE CLAIM

Counsel for Ngāti Porou, the late Gina Rudland, reminded us in 2006 that 'the Treaty claim to flora and fauna began in the 19th century, and, as the claimants allege, has continued thereafter'.<sup>1</sup>

Claimants told us directly, however, of recent triggers for their concern. In 1984, filmmaker and director Tama Poata and John Hippolite (both eventual Wai 262 claimants) saw Barry Barclay's documentary *The Neglected Miracle*.<sup>2</sup> Barclay's investigation into vanishing genetic diversity and the commercialisation of both indigenous knowledge and heritage seed varieties by transnational corporations sharpened Poata and Hippolite's perception of the links between and risks to indigenous flora and indigenous knowledge.<sup>3</sup> That awareness would infuse the Wai 262 claim.

In 1988, the Department of Scientific and Industrial Research (DSIR) convened an international workshop on ethnobotany.<sup>4</sup> The Christchurch-based workshop brought together Māori experts in rongoā Māori and mātauranga Māori, and DSIR and university-based scientists who had been active in researching the unique qualities of New Zealand's native plants.<sup>5</sup>

The book *Economic Native Plants of New Zealand* was launched at the workshop. It contained information on the chemical and economic properties of many native plants and surveyed the extensive efforts of research scientists.<sup>6</sup> Claimant counsel observed that Wai 262 was in part triggered by the claimants' discovery of the scientific research into indigenous plants and kūmara varieties that is described in the book.<sup>7</sup>

During the DSIR ethnobotany hui, Haana Murray and Hema Nui a Tawhaki Witana (Del Wihongi) also heard that the DSIR had sent its kūmara tuber collection (including four varieties of ancient kūmara brought to Aotearoa) to Japan for safe keeping in 1969 and ceased to maintain a New Zealand-based collection.<sup>8</sup> An outcome of the hui was the return of tubers from the DSIR kūmara collection in Japan. Several key DSIR staff were supportive of the return of the kūmara. Māori were closely involved in that process. The

repatriation was to have been funded by the Department of Māori Affairs, but funding was withdrawn after criticism from the Opposition, media coverage, and ministerial intervention. Funding was eventually sourced from a conservation trust by botanist David Bellamy.<sup>9</sup>

The significance of the workshop was recognised in a subsequent book.<sup>10</sup> The hui and book addressed many topics, including DSIR research into indigenous New Zealand plants and studies on the cultural use of plants by Māori and other Polynesian peoples. One article set out details of a DSIR research project, funded by German pharmaceutical company Bayer AG, on the antibiotic properties of over 350 native plants.<sup>11</sup> Dr Douglas Yen, an expert on kūmara (including the ancient varieties that Māori brought to Aotearoa from Polynesia), spoke about early Māori agricultural practices and his work in setting up the kūmara collection for DSIR. Linguist and te reo Māori scholar Professor Bruce Biggs recorded some of the links between Polynesian and Māori plant names. Haana Murray, later a Wai 262 claimant, prepared a paper on Māori perspectives and her bond with Parengarenga Harbour in the far north. She closed with a call for unity in the work of the researchers, conservationists, and Māori participants gathered at the workshop.<sup>12</sup>

Some Māori participants held concerns, however. For many, the hui was their first exposure to the full range of scientific research into native plants. Hema Nui a Tawhaki Witana, Haana Murray, John Hippolite, and others were worried about the extent of research, collection, and commercialisation of indigenous flora and fauna. This research sometimes drew on mātauranga Māori but, they later claimed, the researchers 'did not make a habit of seeking the consent of or working in partnership with Māori communities'.<sup>13</sup>

Māori at the ethnobotany workshop were concerned about the commercialisation of knowledge and the loss of the knowledge that remained. As a result, they made the following plea:

We request the DSIR and Plant Varieties Registrar that all DSIR experimentation relating to native plants cease, and that there be no further registrations of native plant varieties under the Plant Varieties Act, at least until after the DSIR

has completed a thorough consultation with the tangata whenua, concerning their wishes about the use of native plants.<sup>14</sup>

Other participants variously expressed 'grave concern' about the continuing and accelerated loss of plant species and genetic diversity. Many attendees stressed the need for the retention of traditional knowledge and sought more dialogue between scientists and communities. Scholars aimed to support and record traditional knowledge in the Pacific and encourage Pacific weaving practices (from Niue, for example) in New Zealand.

One of the Pākehā scientists involved in an international project on traditional uses of plants in Aotearoa and the Pacific spoke of the need for research to continue, but with more Māori and Pacific peoples involved. In his view, 'the moratorium on new work called for at this Hui has put a major dampener on proceedings'. He went on to say:

We can only make progress with the aid of others. We have encountered a whole spectrum, from those who are willing to share all they know to those who say their knowledge is sacred and not for us. We wish to make it clear we are not interested in gaining power or profit through knowledge and we are not trying to prise secrets from anyone.<sup>15</sup>

The DSIR director spoke of the department's concern over:

the low level of interaction between science and the Maori community. DSIR has a responsibility to consult with and listen to the people who are tangata whenua of this land in the design and delivery of science. We see this very much as a partnership. This Hui is an acknowledgement of that and one of several ways in which we are trying to improve the interaction.<sup>16</sup>

The ethnobotany hui helped scientists and those interested in mātauranga Māori to share ideas and concerns. It was the first chance some had had to speak with each other across disciplinary and cultural borders. Many spoke of the hui's spirit of goodwill and commitment to

the future health of taonga species.<sup>17</sup> That commitment took different forms, one of which was the lodging by the Wai 262 claimants of a Treaty claim with the Waitangi Tribunal.

Wai 262 was lodged with the Waitangi Tribunal on 9 October 1991. It has usually been identified as the Indigenous Flora and Fauna and Cultural and Intellectual Property Claim, although even this description fails to convey fully the depth and breadth of the claim issues.<sup>18</sup> The six named claimants represented Ngāti Porou, Ngāti Kahungunu, Ngāti Koata, and three iwi of Te Tai Tokerau: Ngāti Kuri, Ngāti Wai, and Te Rarawa. The claim is described in more detail in the introduction to this report. In brief, it was claimed that the Crown had denied Māori the full exercise of their tino rangatiratanga, described as ‘absolute authority’, over many aspects of life, but particularly those relating to natural resources, including indigenous flora and fauna. The claimants said that tino rangatiratanga entitled them to exercise control and decision-making authority relating to the conservation, use, and development of those resources. The claimants said that recognition of tino rangatiratanga ‘vested in Iwi all rights relating to the protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation and restrictions upon the use of indigenous flora and fauna.’<sup>19</sup>

The claim was registered as the 262nd claim on the Tribunal’s register in December 1991 and circulated to the Prime Minister, various other ministers, and several Crown agencies.<sup>20</sup>

### 1.3 THE FIRST PHASE OF THE INQUIRY

#### 1.3.1 Preparing the inquiry

In August 1995, claimant counsel sought an urgent Waitangi Tribunal hearing, in part because of proposed legislation on intellectual property (IP) and free trade: the General Agreement on Tariffs and Trade Bill and the Intellectual Property Law Reform Bill.<sup>21</sup> Claimant counsel were concerned that while these two major pieces of draft legislation would essentially draw New Zealand into the global trade regime, the Crown had not consulted fully with Māori about them. Counsel stated the proposed laws

posed a risk of significant and lasting prejudice to their clients.<sup>22</sup>

On 4 September 1995, a judicial conference was held to consider the application for urgency. Claimant counsel argued that the claimants were prejudiced by the two Bills.<sup>23</sup> Counsel also identified other concerns, in particular the exploitation of the genetic resources of native flora and fauna through biotechnology and bioprospecting, without Treaty rights being established; and proposed policy and legislation relating to Māori taonga such as artefacts.<sup>24</sup>

The Crown did not oppose the urgency application and wanted to see the claim resolved. However, it considered the scope of the claim would first have to be settled.<sup>25</sup>

Tribunal deputy chairperson Norman Smith convened the conference and called for further submissions from claimant counsel. In reply, claimant counsel noted that ‘the claimants’ application is more in the nature of a request for a priority hearing rather than an urgent one starting immediately.’<sup>26</sup> However, the claimants argued that irreparable harm had been suffered and that free trade and IP law that took no account of Māori interests and concerns was in development or in place.<sup>27</sup>

In February 1997, a judicial conference was set to discuss which aspects of the claim would be heard.<sup>28</sup> Claimant counsel argued that the scope of inquiry could not be set then, as draft research for the claimants had only just been lodged.<sup>29</sup> The application for urgency was granted, though it was subsequently agreed that the claim would be accorded priority, with all issues to be heard in one inquiry ‘once they have been adequately identified and researched.’<sup>30</sup> Further judicial conferences were held to discuss the issues for inquiry and to plan the production of evidence and hearings. Claimant counsel noted that the request for an urgent hearing stood, that all issues identified in the claim should be accorded urgency, but that funding for the production of evidence was one constraint.<sup>31</sup>

In March 1997 Judge Richard Kearney (presiding officer), Keita Walker, and John Clarke were appointed to hear the claim. Mr Clarke soon advised he had to withdraw from the panel, and he was replaced in August 1997 by Pamela Ringwood and Roger Maaka.<sup>32</sup> As a new

presiding officer was appointed in 2006 (a matter we discuss below), we refer to the Tribunal in this earlier stage of the inquiry in the third person. For developments since 2005, we refer to the Tribunal in the first person plural.

In September 1997, the claimants filed an amended statement of claim, which we discuss in the introduction to this report. It was at least as comprehensive as the first, and now included the matters cited in the 1995 application for urgency, such as the General Agreement on Tariffs and Trade and IP law reform legislation.<sup>33</sup> The claim related to:

te tino rangatiratanga o te Iwi Maori in respect of indigenous flora and fauna *me o ratou taonga katoa* (and all their treasures) including but not limited to matauranga, whakairo, waahi tapu, biodiversity, genetics, Maori symbols and designs and their use and development and associated indigenous, cultural and customary heritage rights in relation to such taonga. [Emphasis in original.]<sup>34</sup>

The amended claim defined the term ‘taonga’ as all of the elements of a tribal group’s estate, ‘material and non-material, tangible and intangible.’<sup>35</sup> Ngāti Porou filed a further amended statement of claim in 1998 to provide further particulars specific to Ngāti Porou.<sup>36</sup>

One week before the first hearing in September 1997, the Crown requested that the Tribunal consolidate all claims referring to flora and fauna so that the final report could adjudicate on any such claim on the Tribunal’s register.<sup>37</sup> The Tribunal regarded this request as impracticable, however – as did claimant counsel – and the Wai 262 inquiry proceeded as planned on its own terms, unencumbered by the logistical challenge such consolidation would have presented.<sup>38</sup>

### 1.3.2 Confidentiality of evidence

The transmission of confidential evidence was a central issue in early planning. The Wai 262 claimants were acutely aware that confidential information could enter wider circulation.<sup>39</sup> As counsel for the Te Tai Tokerau iwi put it:

the recognition and protection of indigenous knowledge is fundamental to this claim. The claimants need to have

confidence that their matauranga can be protected by the institution established to hear their grievances – and particularly when it is to be given on their own marae.<sup>40</sup>

Most submissions on confidentiality circulated between August 1997 (one month before the first hearing) and July 1998. The claimants’ essential point was that tapu knowledge requires careful use and controlled disclosure. They even went as far as to suggest that the very act of giving evidence could breach tikanga, and they proposed protocols around use of and access to their information.<sup>41</sup> The Crown, for its part, argued that the matter of confidentiality needed to be handled consistently and that the Crown had to be able to distribute evidence to those departments affected by the claim.<sup>42</sup>

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

### 1.3.3 Research

In the meantime, the production of research gathered momentum. In June 1994, patent attorney Peter Dengate Thrush was commissioned to write an exploratory research report on laws relating to flora and fauna and IP. That report was published in 1995.<sup>43</sup> In 1996 the Tribunal authorised counsel for Ngāti Porou to commission legal historian and lawyer David Williams to prepare a preliminary report on issues such as mātauranga Māori and taonga, aspects of the impact of Crown policies on indigenous knowledge, IP concepts, biodiversity, museum policy, and other matters. The report, *Matauranga Maori and Taonga*, was released to parties in 1997 and published in 2001.<sup>44</sup>

During 1998 and 1999, the Tribunal also commissioned research on a wide range of relevant topics to assist all parties in the inquiry. The reports by Dengate Thrush and Williams were mainly on IP legislation. In 1998 the Fulbright scholar and environmental historian Jim Feldman produced a report, commissioned by

the Tribunal, on Māori access to kererū.<sup>45</sup> A set of four Tribunal-commissioned overview reports was released and published in 2001. The overview reports, covering both historical and contemporary aspects of the claim, focused on Māori knowledge systems and cultural practices; flora and fauna; key ecosystems and conservation (including the establishment of national parks); and environmental and resource management law, Crown research science, and new organisms.<sup>46</sup> These reports are available on the Tribunal's website.

### 1.3.4 The first round of hearings

Fourteen weeks of evidence was heard in the first phase of the inquiry. The hearings were timetabled with regard to parties' readiness to proceed, research completion, and the balancing of limited resources across an expanding Tribunal inquiry programme. Aside from the testimony of kaumātua and other tribal authorities, claimant counsel also presented evidence from professional experts on Wai 262-related issues such as genetic modification, mātauranga Māori, and ethnobotany. In November 1998, for example, a number of international scholars gave evidence in Rotorua. These witnesses included the ethnobotanist Dr Darrell Posey, a pioneer in articulating the link between indigenous peoples and flora and fauna, as well as experts from Australia, the United States, and Peru: Alejandro Argumedo, Fred Fortier, Henrietta Marrie, Noemi Paymal, Stephan Schnierer, Tony Simpson, and David Stephenson Jr. These witnesses discussed matters such as the Convention on Biological Diversity (CBD), ethnobotany, traditional resource rights, and the 'inextricable' links between indigenous cultures and biodiversity.<sup>47</sup>

In addition, claimant counsel arranged for New Zealand experts to give evidence in May 2002. These were:

- ▶ Sir Hugh Kawharu (Ngāti Whātua), iwi leader and scholar;
- ▶ Professor Mason Durie (Ngāti Kauwhata, Ngāti Raukawa, and Rangitaane), a psychiatrist and scholar of Māori health and government policy;
- ▶ Mana Cracknell (Rongomaiwahine and Ngāti Kahungunu), who presented evidence on whakapapa and mātauranga Māori;
- ▶ Dr Peter Wills, a scientist and lecturer, who gave

evidence on genetics, genetic modification, and the philosophy of science;

- ▶ Angeline Greensill (Tainui hapū, Ngāti Porou) of Whāingaroa, a university lecturer and hapū leader, who spoke on mātauranga Māori, genetic modification, and resource management issues;
- ▶ Robert McGowan, a Pākehā expert on rongoā Māori issues; and
- ▶ Jim Elkington (Ngāti Koata), who spoke on resource management and other issues, in addition to earlier evidence for his iwi.

These witnesses discussed the relationship between mātauranga Māori and the modern world. They gave evidence to assist the Tribunal, the claimants, and the Crown to conceptualise the claims and explore the types of outcome that would be beneficial for all concerned.

Authors of the overview reports appeared before the Tribunal during May 2002.

The first phase of hearings, from 1997 to 2002, ran as shown in table 1.1.

While the Wai 262 claim covered every area of policy and law relating to flora, fauna, IP, research science, and cultural heritage from 1840 to the present, the scope of the inquiry remained in contention between Crown and claimant counsel. This disagreement repeatedly dogged efforts to expedite the inquiry. Ultimately, it led to the Tribunal instigating a statement of issues (SOI) process to clarify the focus of the remaining hearings and Tribunal report.<sup>48</sup>

By way of explanation, an SOI specifies the main issues in contention between claimants and Crown, and defines the key questions on which the Tribunal will hear evidence. Today, SOIs are developed after most of the research and other evidence has been filed but before hearings begin. In 2002, however, the SOI process was an innovation that arose out of a wider change of approach being developed in Tribunal district inquiries. As the Tribunal explained at the time:

The basis for the introduction into the Wai 262 inquiry, in May 2001, of the proposal for a Tribunal-generated statement of issues lies with the Waitangi Tribunal's general adoption at that time of a 'new approach' in its inquiry procedures. The Wai 262 Tribunal's renewed adoption of the

Table I.1: Hearings during phase 1 of the Wai 262 inquiry

Week	Date	Venue	Evidence from
1	15–19 September 1997	Tamatea Marae, Motutū, and Ngāti Wai Trust Board Office, Whangārei	Ngāti Kuri, Ngāti Wai
2	30 March–3 April 1998	Tamatea Marae, Motutū, and Ngāti Wai Trust Board Office, Whangārei	Ngāti Kuri, Ngāti Wai, Te Rarawa
3	27–30 April 1998	Te Rarawa Marae, Kaitaia, and Ngāti Wai Trust Board Office, Whangārei	Ngāti Kuri, Te Rarawa; Ngāti Wai; Dr David Williams
4	22–23 June 1998	Paparore Marae, Kaitaia	Ngāti Kuri, Te Rarawa
5	10–14 August 1998	Pākirikiri Marae, Tokomaru Bay	Ngāti Porou
6	23–25 November 1998	Heritage Hotel, Rotorua	International ethnobotany scholars (claimant-arranged)
7	19–23 April 1999	Uepohatu Marae, Ruatōria	Ngāti Porou
8	23–26 August 1999	Rāhui Marae, Tikitiki	Ngāti Porou
9	6–10 December 1999	Whakatū Marae, Nelson	Ngāti Koata
10	31 July–4 August 2000	Matahiwi Marae, Hastings	Ngāti Kahungunu
11	26–30 March 2001	Tamatea Rugby Club and Waipatu Marae, Hastings	Ngāti Kahungunu
12	6–10 May 2002	Awataha Marae, Auckland	Other expert evidence (for the claimants)
13	20–25 May 2002	Copthorne Hotel, Wellington	Waitangi Tribunal commissioned witnesses
14	4–7 June 2002	Waitangi Tribunal, Wellington	Waitangi Tribunal commissioned witnesses

concept of producing a statement of issues was made with a key objective of the new approach in mind: to create more focused, efficient and disciplined inquiries.

The Waitangi Tribunal's new approach process involves the respective filing of particularised statements of claim, a Crown statement of response and a Tribunal statement of issues. The rationale is so that the parties' cases are clearly outlined, more specific points of agreement and disagreement identified, and the issues of the inquiry, together with the questions that the Tribunal would seek to have answered regarding those issues, would be clearly defined.<sup>49</sup>

The Tribunal had in fact made some effort before 2001 to rationalise the inquiry process. This included proposals

in 1997 to devise a 'schedule of issues'.<sup>50</sup> These ideas were not put into effect, but in 2001 the claimants were asked to file further particularised statements of claim as the first stage of an SOI process. At this stage, the claimants filed amended claims separately to assist in identifying specific issues in their respective rohe. Four separate amended claims were filed during September and October 2001.<sup>51</sup>

In 1997 Crown counsel had been directed to file a statement of response to the claims.<sup>52</sup> The Crown noted that it was unlikely to meet the initial deadline, in part because of a significant official information request from claimant counsel.<sup>53</sup> By April 2002, the Tribunal noted that the Crown's response was now well overdue, and directed that it be filed by 28 July 2002 so that the SOI could represent



the Crown's view.<sup>54</sup> The Crown replied that the matter had not been overlooked; rather, the Tribunal had made an 'inaccurate' assessment as to the scale of the work required.<sup>55</sup>

Despite its concern that its position not be 'frozen' into one single response, the Crown duly filed its statement of response on 28 July 2002.<sup>56</sup> The Crown saw the response as 'a starting, rather than an end, point in the dialogue between the Crown and the claimants on the issues raised by the claims.'<sup>57</sup> We have no trouble with this view: in fact, we have generally relied upon closing submissions for the parties' positions on matters within the inquiry.

It then remained for the Tribunal to complete its SOI. By February 2004, when this work was still ongoing, counsel for the Te Tai Tokerau iwi requested that the inquiry resume, noting the delays since the 2002 hearings.<sup>58</sup> Chief Judge Joe Williams, in his capacity as Tribunal chairperson, responded by stating that Judge Kearney was extremely ill and unlikely to be able to resume his duties as presiding officer. Chief Judge Williams advised, however, that a draft SOI was being prepared.<sup>59</sup>

After a long period of illness, Judge Kearney died in March 2005. His poor health undoubtedly contributed to the delay in finalising the SOI in the period after 2002. His death followed that in December 2001 of the Right Reverend Bishop Manuhua Bennett, whose place as *kau-mātua* assisting the Wai 262 Tribunal panel was taken by Tribunal member John Tahuparae. Mr Tahuparae himself died in October 2008.

## 1.4 THE SECOND PHASE OF THE INQUIRY

### 1.4.1 Defining the issues to be heard

In June 2005, Chief Judge Williams notified parties that the Tribunal's SOI was close to completion and would be circulated for discussion; a judicial conference would also be held to plan the remaining hearings for the inquiry.<sup>60</sup> In December 2005, Chief Judge Williams indicated that he would take over the Wai 262 inquiry as the replacement presiding officer.<sup>61</sup> He appointed himself formally to the role in April 2006.<sup>62</sup>

As we have said, Crown and claimant counsel disagreed on the scope of the issues for the inquiry. In brief, claimant counsel stressed the need for all issues to be

heard, and for the full range of Crown action since 1840 under claim to be addressed. For the Crown the scope of the Wai 262 claim was always at issue; in closing submissions counsel for the Crown observed: 'Throughout this hearing process, the Crown has sought particularity to try to pin down the meaning of the claim. . . . That need for specifics persists.'<sup>63</sup>

All parties recognised the flora and fauna claim as one of the most complex and comprehensive in the Tribunal's history. With the adoption of an SOI process, the management of that complexity obviously became a defining factor in the latter part of our inquiry. Ultimately – as we shall see below – it led us to narrow the scope of the inquiry still further, from one that considered Crown action since 1840 to a focus on contemporary law and policy. Our view was that the production of the report would be significantly delayed if a full inquiry into historical matters was pursued.

In December 2005 a draft SOI was released to the parties.<sup>64</sup> The SOI posed questions about a wide range of law and policy. It summarised the claimant and Crown positions in relation to each topic, then asked a series of linked questions about the Crown's obligations under the Treaty, the Treaty compliance of current and proposed laws and policies, and – if a breach of the Treaty had occurred – what form any remedies should take, including whether remedies should be aimed at altering current law or creating a *sui generis* (stand-alone, additional to the law) solution to Treaty inconsistencies in law or policy.<sup>65</sup>

The draft SOI effectively changed the emphasis of the inquiry to a focus on contemporary legislation, policy, and practice, rather than Crown action since 1840. We sought comments on it from the parties, and proposed a judicial conference. The Crown submitted that 'the focus of the claim must be on "contemporary" aspects and avoid overlapping with other Tribunal inquiries, including contemporary inquiries'. A historical focus would risk duplicating Tribunal investigations underway in regional inquiries (the National Park inquiry was listed as an example, given its emphasis on conservation issues).<sup>66</sup> The Crown later advised that it would need three weeks to present evidence for a contemporary inquiry. It noted that if the inquiry focused on 1840 to the present, the hearing of Crown evidence could extend to 10 weeks, with

significant delays and resource implications in terms of research.<sup>67</sup>

Aside from the issue of historical grievances, the Crown felt that some of the topics in the SOI remained too broad and, as a result, might overlap with previous Tribunal inquiries or ongoing contemporary claims. For example, it opposed the stated intention to assess the Crown's performance with respect to the revitalisation of te reo Māori, as the claimants had not asserted any failure to by the Crown to respond to the recommendations in the Tribunal's report on te reo Māori in 1986. The Crown also noted some overlap with current contemporary claims (for example, the Wai 1315 claim, which alleged that the Crown had failed to actively protect primary health organisations in their efforts to improve Māori health). The Crown expressed its view that concepts such as 'kaitiakitanga' and 'taonga species' needed to be explored in a practical way.<sup>68</sup>

The claimants, on the other hand, continued to argue that the inquiry should cover the entire period since 1840.<sup>69</sup> Counsel advanced various points in favour of a historical inquiry, noting that the inquiry had proceeded as a historical one: if historical cultural claims were not heard fully in the Wai 262 inquiry, they would not be heard anywhere.<sup>70</sup> Counsel for Ngāti Koata argued that the iwi had been encouraged to submit its historical issues before the Wai 262 inquiry by the Tribunal's Te Tau Ihu inquiry panel, rather than in that parallel district inquiry.<sup>71</sup>

We issued our final decision on the inclusion or not of historical issues in May 2006. We noted that 'the structure and approach of any inquiry is a matter for the Tribunal to settle' and that we wanted to report on these contemporary issues as a matter of priority.<sup>72</sup> We saw (and see) the claim as largely contemporary in character, but with significant historical content and context, and remained concerned about the extra time involved in a full-scale historical inquiry. The time and resources spent on further Crown, claimant, and Tribunal research (the reports on the record were overviews, part of a first stage of research), extra rebuttal evidence, and hearing time would cause an undue delay in an already overly protracted inquiry.

In our view, the overriding message from claimants was about defects in contemporary law and policy. The claims

are exceptionally attuned to – and affected by – contemporary policy development. A contemporary focus would 'most effectively contribute to the national dialogue over law and policy in relation to flora, fauna, [intellectual property,] and culture.'<sup>73</sup>

Despite claimant counsels' submissions, we believed that significant or discrete issues of historical loss were better dealt with in district inquiries and direct negotiations. We said that, once our report on contemporary claims was completed, parties wishing to have historical claims heard under the rubric of the Wai 262 claim should be able to make applications to do so. We made this comment with particular reference to Ngāti Koata, who had chosen not to have their historical claims relating to Wai 262 issues considered during the Te Tau Ihu inquiry. We recognised that Ngāti Koata's position was unfortunate but noted that, 'even where the historical statutory framework has national applicability, the story in each district is inevitably distinctive.'<sup>74</sup> Accordingly, we deferred a full-scale inquiry into the historical claims to allow the claimants an opportunity to choose to deal with these matters in district inquiries and direct negotiations wherever possible.<sup>75</sup>

Our final SOI benefited from a May 2006 discussion workshop with counsel.<sup>76</sup> The SOI included a revised definition of kaitiakitanga that took greater account of the concept of tino rangatiratanga. Other changes included an extended preambular summary of some of the claims, as supplied by counsel, and various wording changes. These included revisions to take account of the replacement questions agreed by Crown and claimant counsel regarding te reo Māori, narrowing their ambit.<sup>77</sup>

In the first half of 2006 we dealt with other interlocutory matters such as:

- ▶ plans for refresher or updating evidence;
- ▶ applications for admission as new claimants;
- ▶ applications from interested persons or groups;
- ▶ planning hearing time and legal assistance for interested persons or groups; and
- ▶ the timing of the hearing of Crown evidence.<sup>78</sup>

We discuss each of these matters in turn.

#### 1.4.2 The second round of hearings

Counsel for the original claimants and for the Crown agreed that updating or refresher evidence was required.<sup>79</sup>

Table I.2: Hearing during phase 2 of the Wai 262 inquiry

Week	Date	Venue	Main appearances
15	22–24 August 2006	Te Puaa Marae, Mangere	Ngāti Kuri, Ngāti Wai, and Te Rarawa
16	28–31 August 2006	Pākirikiri Marae, Tokomaru Bay	Ngāti Porou
17	4–6 September 2006	Waipatu Marae, Hastings	Ngāti Kahungunu; Wairoa-Waikaremoana Māori Trust Board
17	7–8 September 2006	Whakatū Marae, Nelson	Ngāti Koata
18	25–29 September 2006	Waitangi Tribunal, Wellington	Interested persons and groups; Te Waka Kai Ora
19	11–15 December 2006	Waitangi Tribunal, Wellington	Interested groups (continued): Crown Research Institutes, universities Crown evidence begins
20	18–22 December 2006	Waitangi Tribunal, Wellington	Crown evidence
21	22–26 January 2007	Waitangi Tribunal, Wellington	Crown evidence
22	29 January–1 February 2007	Waitangi Tribunal, Wellington	Crown evidence
23	5–8 June 2007	Ōrākei Marae, Auckland	Closing submissions (Ngāti Kahungunu; Ngāti Kuri, Ngāti Wai, and Te Rarawa; Ngāti Koata)
24	11–15 June 2007	Waitangi Tribunal, Wellington	Closing submissions (Ngāti Porou; Crown); claimant replies to Crown closings

We called for further submissions on the matter and ultimately heard almost two weeks of claimant evidence that updated previous evidence and addressed other aspects of the SOI.<sup>80</sup> The hearings in the second phase of our inquiry ran as shown in table I.2.

#### I.4.3 Applications for claimant status

Because we wanted to obtain the fullest possible picture of those Māori most affected by the policies and legislation at issue in the inquiry, we asked if new claimants should be admitted at this latter stage of hearings.

The Federation of Māori Authorities, the Te Tai Tokerau District Māori Council, the Wairoa-Waikaremoana Māori Trust Board, and Te Waka Kai Ora (an association of Māori involved in organic farming and horticulture) all applied to join the inquiry.<sup>81</sup>

Counsel representing claimant groups from Ngāti Whaoa, Ngāti Hikairo, and Te Aitanga a Hauiti filed a memorandum, but later advised that these groups preferred to pursue their claims in district inquiries.<sup>82</sup> We also heard from counsel representing a claimant group from Ngāti Rangitahi and later, when that group elected not to pursue a claim, we heard directly from David Potter of Te Rangatiratanga o Ngāti Rangitahi, who wished to represent himself in the inquiry.<sup>83</sup> A group of senior Māori artists and another group comprising senior rongoā practitioners also expressed interest, but in the event chose not to apply formally to join as claimants or as interested groups.<sup>84</sup>

Some counsel for the original Wai 262 claimants suggested that it would be best to hear all the new applicants as interested parties, as hearing new claims would

further delay the inquiry.<sup>85</sup> We had to assess the distinctiveness of the applications: were these claims so central to the underlying issues that they should be heard in the inquiry rather than be deferred to later district or generic inquiries?<sup>86</sup>

We declined the applications for claimant status from David Potter and the Te Tai Tokerau District Māori Council. The Federation of Māori Authorities was admitted as an interested party.<sup>87</sup>

In the end, we admitted two new claimants into the inquiry in 2006: the Wairoa-Waikaremoana Māori Trust Board and Te Waka Kai Ora.<sup>88</sup> We regarded their claims as distinctive from those already to hand, yet linked with the flora and fauna issues raised in the original Wai 262 claim.<sup>89</sup> Both were admitted on the basis that their participation was restricted to matters distinct to their claims (as opposed to general participation on the same basis as the original claimants), and that their submission of evidence and any questioning of witnesses would be by leave of the Tribunal.<sup>90</sup>

The Wairoa-Waikaremoana Māori Trust Board's evidence related to the effects of powerful organochlorine herbicides such as 2,4,5-T, 2-4D, and other chemicals on taonga species and on tangata whenua.<sup>91</sup> The ongoing pollution of waterways and their kai was claimed to be a breach of the Treaty protection guaranteed in article 2. The claimants asserted that the Crown did not respond quickly enough to international research on the risks associated with the chemicals and continued to license them until 1989, compounding Māori health problems.<sup>92</sup>

We directed that Te Waka Kai Ora's evidence and participation would be confined to the regime then being proposed to regulate rongoā Māori under an Australia New Zealand Therapeutic Products Authority.<sup>93</sup> Te Waka Kai Ora was heard in September and November 2006.

After claimant concerns that their interests in rongoā would be adversely affected, we issued two brief interim reports on the proposed Australia New Zealand Therapeutic Products Authority regime in 2006.<sup>94</sup>

#### 1.4.4 Interested persons and groups

Because of the scope of Wai 262 and the claim's potential impact on a wide range of sectors, we wanted to hear evidence from interested members of the public or

relevant organisations regarding the claim.<sup>95</sup> To this end, we appointed a senior barrister with expertise in Treaty of Waitangi issues and Waitangi Tribunal procedure (ex-Crown Law Office lawyer Peter Andrew) to represent these parties, at no charge to them, if they wished. Many took advantage of this offer.<sup>96</sup>

Some claimant counsel suggested we should notify those who had already filed a letter of interest regarding the claim but not extend our notification more widely, so as to avoid undue delay.<sup>97</sup> The Crown recalled a statement made by the presiding officer during the judicial conference that 'it is inappropriate for a commission of inquiry to turn people away without good reason.'<sup>98</sup> The Tribunal's registrar placed advertisements in the major daily newspapers, sent a copy of that advertisement to those on its Wai 262 distribution list, and placed information on its website.<sup>99</sup>

Evidence from interested persons and groups is discussed at relevant points in our report. The range of interested persons and groups included professional groups (such as the Designers Institute of New Zealand, the New Zealand Institute of Patent Attorneys, and the Association of Science Educators, which we discuss below), artists, designers, landscape architects, the New Zealand Vice-Chancellors' Committee (representing the research interests of universities), and Crown research institutes (CRIs).

Evidence was presented by Forest Herbs Limited, a natural medicines company that has researched and marketed the health-giving effects of native flora and sells its products internationally.<sup>100</sup> The Nursery and Garden Industry Association, representing the interests of scores of native plant nursery businesses, provided evidence on the long-standing tradition of plant collection and global exchange of flora for research and taxonomic purposes, and the growth of interest in and revenue from native plant propagation.<sup>101</sup> Additional evidence was heard from several other plant nurseries and forest restoration trusts. Dr Ron Close, a retired botanist, gave evidence on New Zealanders' growing love of the bush and the need for ongoing restoration work, as well as evidence on plant propagation.<sup>102</sup>

Fred Allen, named claimant for the Wai 740 (Protection of Indigenous Flora and Fauna) claim, sought to appear as an interested person, and was heard in that capacity.<sup>103</sup> Mr

Allen was involved in forest restoration and large-scale commercial indigenous plant propagation. Amongst other things, Mr Allen's claim concerns his wish to advance and extend forest restoration work, the establishment and enhancement of ecological restoration areas, and the general increase in biodiversity of indigenous flora and fauna in the Kapiti, Wellington, and Taranaki territory of his Te Āti Awa tūpuna.<sup>104</sup> The Wai 740 claim focuses on sustainability issues and the retention of mātauranga Māori in the context of native forest restoration. It also raises plant variety rights and other matters.

The Association of Science Educators represented the interests of science teachers, particularly at primary and secondary schools, and argued for the continuation of a robust science curriculum that engages students, includes material about native flora and fauna, and provides the basis for later scientific training.<sup>105</sup> CRIS gave evidence as interested parties.<sup>106</sup> They stressed their interest in the claim and their aspirations to further engage with Māori in research work. We also heard evidence from the Association of Crown Research Institutes, which represented the CRIS.<sup>107</sup>

Private sector research and technology company AgriGenesis Research provided another perspective on the local and internationally connected biotechnology scene.<sup>108</sup> We address bioprospecting research and patents in chapter 2, and the role of the Ministry of Research, Science and Technology in chapter 6. We also heard from Gerrard Otimi and Gregory McDonald, who gave evidence on their understandings of the Māori world and, in the case of Mr McDonald, of Pākiri Beach.<sup>109</sup>

#### 1.4.5 Crown evidence

We heard Crown evidence in Wellington at the offices of the Waitangi Tribunal from 11 to 15 and 18 to 22 December 2006, and 22 to 26 and 30 to 31 January 2007. The Crown provided significant evidence across three weeks, as befitted the Tribunal's first whole-of-government inquiry. We heard evidence from the chief executives, deputy secretaries, and senior staff of many Crown agencies.

The Crown witnesses regarding IP law issues were from the Ministry of Economic Development and the Ministry of Foreign Affairs and Trade. We address IP issues most directly in chapters 1 and 2.

The then acting general manager, policy, and leading regional conservators from the Department of Conservation briefed us on its activities; the policy manager at the Ministry of Fisheries, the deputy chief executive at the Ministry for the Environment, the deputy director of the Ministry of Agriculture and Forestry, and the chief executive of the Environmental Risk Management Authority also shared information about their work on New Zealand's biodiversity. We discuss these agencies most directly in chapters 3 and 4.

On the Crown's role regarding the arts and mātauranga Māori, we heard from the chief executive of the Ministry for Research, Science and Technology; the deputy secretary of the Ministry of Culture and Heritage; senior staff at Creative New Zealand and Te Waka Toi; the head of the Māori Department at TVNZ; and both the kaihautū and director (Mātauranga Māori) at the Museum of New Zealand Te Papa Tongarewa. This evidence was complemented by evidence on documentary mātauranga from the chief librarian and chief executive of the National Library and the chief archivist and chief executive of Archives New Zealand. On education matters, we heard evidence from the Secretary for Education and staff at the New Zealand Qualifications Authority. These agencies' contributions are assessed in chapter 6.

With regard to te reo Māori, we heard further evidence from the Ministry of Education, but the main evidence on te reo was from Te Puni Kōkiri, the Ministry of Māori Development. We consider the status of te reo Māori and the performance of government agencies concerned with its promotion in chapter 5.

The Ministry of Foreign Affairs and Trade provided evidence on a range of international issues and agreements, including the Convention on Biological Diversity. During hearings this was augmented by evidence from Te Puni Kōkiri on the same issues; that evidence was requested by claimant counsel. We discuss international IP and benefit-sharing obligations in chapters 1 and 2 and the role of Māori in the making of international instruments in chapter 8.

Staff at the Ministry of Health provided evidence on rongoā Māori policy, and staff from Medsafe joined Ministry of Health staff in providing evidence with regard to Te Waka Kai Ora's claims about the

regulation of therapeutic products. We consider the Tohunga Suppression Act 1907 and contemporary government support for rongoā Māori in chapter 7.

#### 1.4.6 Closing submissions

We heard closing submissions from counsel for the claimants and Crown between 5 to 8 and 11 to 15 June 2007. Claimant counsels' submissions in reply to the Crown's closing submissions were heard during 14 to 15 June and brought the hearings to a conclusion. We then began the task of writing this report.

#### Text notes

1. Paper 2.274 (Counsel for Ngāti Porou, memorandum regarding historical claims within the 262 inquiry, 24 March 2006), p 2
2. *The Neglected Miracle*, 16mm film, directed by Barry Barclay (Wellington: Pacific Films, 1985); Stuart Murray, *Images of Dignity: Barry Barclay and Fourth Cinema* (Wellington: Huia, 2008), pp 66–70; Barry Barclay, *Mana Tuturu: Maori Treasures and Intellectual Property Rights* (Auckland: Auckland University Press, 2005), p 35
3. Document E2 (Tama Poata, brief of evidence on behalf of Ngāti Porou, 31 July 1998), pp 5–7; doc H17 (Rosemary Hippolite, brief of evidence on behalf of Ngāti Koata, for hearing 6–10 December 1999), pp 8–9; Rosemary Hippolite, oral evidence on behalf of Ngāti Koata, 9th hearing, 6 December 1999 (transcript 4.1.9, p 19)
4. Doctors Warwick Harris, Oliver Sutherland, and Murray Parsons were some of the key workshop planners within DSIR. The workshop was the fourth in an international series inspired by a weavers hui in Te Teko, Bay of Plenty, in 1984; those weavers invited DSIR scientists along to collaborate on saving pingao stocks. The weavers' request initiated a wide programme of work that continues to this day at Landcare Research. RJ Tizard, 'Address on Behalf of the New Zealand Government and Official Opening of the Hui', *Nga Mahi Maori o te Wao Nui a Tane: Contributions to an International Workshop on Ethnobotany, Te Rehua Marae, Christchurch, New Zealand, 22–26 February 1988*, ed Warwick Harris and Promila Kapoor (Christchurch: DSIR, Botany Division, 1990), p 12; doc A15(i) (Marion McLeod, 'Plants: A Growing Issue', *New Zealand Listener*, vol 120, no 2511 (1988), p 28), p 4071.
5. The workshop was two years in the planning and is detailed in the subsequent proceedings: Warwick Harris and Promila Kapoor, eds, *Nga Mahi Maori o te Wao Nui a Tane: Contributions to an International Workshop on Ethnobotany, Te Rehua Marae, Christchurch, New Zealand, 22–26 February 1988* (Christchurch: DSIR, Botany Division, 1990); doc R35 (Dr Ashley Gould, 'Kumara in New Zealand: Some Issues and Observations', report commissioned by the Crown Law Office, 2007), pp 176–198; doc A15(i) (Marion McLeod, 'Plants: A Growing Issue', pp 4071–4073).
6. SG Brooker, RC Cambie, and RC Cooper, *Economic Native Plants of New Zealand* (Christchurch: DSIR, Botany Division, 1988). The book details the Māori use of native plants in the pre-European period and outlines the varied research programmes undertaken on native plants such as investigations into their use for compounds in steroids, perfumes, and antiseptics.
7. Document s3 (Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, closing submissions, 5 September 2007), pp 11–12; Dr Ron Close, under questioning by counsel for the claimants, 18th hearing, 25 September 2006 (transcript 4.1.18, p 70); Stephen Lewthwaite, under questioning by counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, 18th hearing, 27 September 2006 (transcript 4.1.18, p 66). Crown Law Office historian Dr Ashley Gould notes: 'There is no link between the present commercial lines and varieties assumed to have been present in New Zealand pre-contact': doc R35, p 15.
8. Document R35, p 11. Dr Gould's report contains much detail with regard to the development, dispersal, and return from Japan of the DSIR's kumara collection. The collection was set up by DSIR scientist Douglas Yen in the 1950s and 1960s. As Dr Gould observes, the report also records some of the important and often unrecognised work of horticultural scientists in New Zealand.
9. Document A15(i), p 4081 (Vanessa Stephens, 'Kumara Go-ahead Thanks to Bellamy', *Dominion*, 9 November 1988)
10. Harris and Kapoor, eds, *Nga Mahi Maori o te Wao Nui a Tane*
11. John Walker and Anthony Cole, 'Antibiotics from New Zealand Native Plants: A New Look at Maori Medicine', Harris and Kapoor, eds, *Nga Mahi Maori o te Wao Nui a Tane*, pp 146–151
12. Saana Murray, 'Nga Mahi Maori o te Wao Nui a Tane', Harris and Kapoor, eds, *Nga Mahi Maori o te Wao Nui a Tane*, pp 16–18. Mrs Murray is sometimes known as Haana.
13. Claim 1.1 (Hema Nui a Tawhaki Witana, Haana Murray, John Hippolite, Tama Poata, Kataraina Rimene, Te Witi McMath, statement of claim relating to the protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation, and restriction on the use and transmission of the knowledge of New Zealand indigenous flora and fauna and the genetic resource contained therein, 9 October 1991), pp 11–12
14. See 'Recommendation 13' of 'Summary of Recommendations' in Harris and Kapoor, eds, *Nga Mahi Maori o te Wao Nui a Tane*, p 174
15. Geoff Walls, 'From Harakeke to Pandanus: Commonwealth Science Council's Biological Diversity and Genetic Resource Project on Traditional Uses of Plants in Aotearoa and the Pacific: the Co-ordinator's View', Harris and Kapoor, eds, *Nga Mahi Maori o te Wao Nui a Tane*, p 166

16. Dr A J Ellis, 'Address on Behalf of the New Zealand Department of Scientific and Industrial Research', Harris and Kapoor, eds, *Nga Mahi Maori o te Wao Nui a Tane*, p 3
17. Document A15(i) (Marion McLeod, 'Plants: A Growing Issue'), p 4071
18. A fuller summary of the flora and fauna aspects of the claim can be found in the introduction to this report.
19. Claim 1.1, pp 1–2
20. Paper 2.1 (chairperson, memorandum–directions of the Tribunal, 12 December 1991); paper 2.2 (Waitangi Tribunal, confirmation of registration of the claim under Wai 262, 13 December 1991)
21. This request for urgency was supported by the Māori Congress; Professor Ranginui Walker, then Head of Māori Studies at the University of Auckland; Mataatua Declaration (on the Cultural and Intellectual Property Rights of Indigenous Peoples) Association; Te Runanga o Ngāti Awa; Indigenous Peoples Biodiversity Network (Canada); Cultural Survival (Canada); Traditional Resources Working Group (UK); and the GAIA Foundation (UK). See paper 2.7 (Crown counsel, memorandum in reply to the claimant counsel's submission on urgency, 4 September 1995); paper 2.8 (Māori Congress, request for urgent hearing, 4 September 1995); paper 2.13 (Professor RJ Walker, submission in support of urgency hearing for Wai 262); and paper 2.9(a) (counsel for the claimants, further submission on the request for a priority hearing, 8 September 1995). The New Zealand Māori Council also supported the claim throughout the inquiry: paper 2.312 (New Zealand Māori Council, memorandum of support for the Wai 262 claim, 29 June 2006).
22. Paper 2.4 (Counsel for the claimants, submission on urgency for hearing, 14 August 1995), p 8
23. Paper 2.6 (Counsel for the claimants, synopsis of submission for urgency of hearing, 4 September 1995)
24. Paper 2.9(a)
25. Paper 2.7, p 1
26. Paper 2.9(a), pp 4, 8
27. In November 1994, the then member of Parliament for Northern Māori, Tau Henare, proposed a Treaty clause for the Intellectual Property Law Reform Bill to ensure that Crown actions under the law were compliant with Treaty principles. The proposed amendment was lost by 42 votes to 40: paper 2.4, pp 5–6.
28. Paper 2.16 (chairperson, memorandum–directions regarding conference to be held on 11 February 1997, 5 February 1997)
29. Paper 2.17 (Counsel for the claimants, memorandum of issues to be discussed at the judicial conference dated 11 February 1997, 11 February 1997)
30. Paper 2.14 (deputy chairperson, memorandum–directions granting request for urgency, 11 October 1995); paper 2.18 (member acting with the authority of the chairperson, memorandum–directions relating to issues, timing, and hearing of evidence, 14 February 1997), p 1
31. Paper 2.23 (Counsel for the claimants, memorandum of regarding filing of submissions on issues for substantive hearing, dated 5 March 1997) pp 2–3, 6–7
32. Paper 2.21 (chairperson, memorandum–directions of the Tribunal regarding the composition of the Tribunal panel, 10 March 1997); paper 2.45 (chairperson, memorandum–directions of the Tribunal regarding the composition of the Tribunal panel, 6 August 1997)
33. Claim 1.1(a) (Haana Murray, Hema Nui a Tawhaki Witana, and others, amended statement of claim, 10 September 1997), pp 27–32
34. *Ibid*, pp 1–2
35. *Ibid*, p 2
36. Claim 1.1(b) (Tama Poata, Te Kapunga Dewes, and others, amended statement of claim on behalf of Ngāti Porou, 31 July 1998)
37. Paper 2.58 (Crown counsel, application for consolidation of flora and fauna issues in respect of overlapping claims, 11 September 1997)
38. Paper 2.251 (presiding officer, memorandum–directions of the Tribunal concerning forward planning for Wai 262, 30 May 2002), p 5; paper 2.254 (counsel for Ngāti Kahungunu, submission in response to Waitangi Tribunal memorandum of directions of 30 May 2002, 13 June 2002), p 3
39. Paper 2.96 (Counsel for the claimants, memorandum in response to the Crown's memorandum of 16 March 1998, 20 March 1998), pp 2–3
40. Paper 2.62(a) (Counsel for the claimants, memorandum of counsel following the judicial conference of 11 September 1997, 12 September 1997), p 4
41. See, for example, paper 2.81 (counsel for the claimants, memorandum on behalf of those claimants seeking knowledge protection, 24 December 1997). Papers relating to confidentiality of evidence include papers 2.49, 2.55, 2.60, 2.68, 2.69, 2.71, 2.73, 2.75, 2.76, 2.77, 2.78, 2.79, 2.80, 2.81, 2.82, 2.83, 2.84, 2.85, 2.86, 2.91, 2.92, 2.93, 2.94, 2.95, 2.96, 2.97, 2.98, 2.99, 2.100, and 2.102. Key submissions are paper 2.71 (counsel for the claimants, memorandum regarding confidentiality and cross-examination, 23 October 1997); paper 2.73 (counsel for Tama Poata of Te Whānau a Ruataupare, Ngāti Porou, and Kataraina Rimene of Ngāti Kahungunu, synopsis of submissions regarding the confidentiality of claimant evidence, 12 November 1997); paper 2.78 (counsel for Tama Poata of Te Whānau a Ruataupare, Ngāti Porou, and Kataraina Rimene of Ngāti Kahungunu, further submissions on the confidentiality of claimant evidence, 3 December 1997);

- paper 2.79 (counsel for Tama Poata of Te Whānau a Ruataupare, Ngāti Porou, and Kataraina Rimene of Ngāti Kahungunu, memorandum regarding proposed orders restricting access and use of evidence and knowledge led by claimants, 22 December 1997); doc B5 (counsel for the claimants, 'File Note on Tapu', 3 December 1997); and for the Crown: paper 2.76 (Crown counsel, memorandum on Tribunal directions concerning confidentiality, 3 December 1997). Claimant counsel noted their clients would exercise discretion as to what evidence they presented: paper 2.72 (counsel for the claimants, memorandum regarding the claimants' position on issues of confidentiality, 12 November 1997), para 7.
42. Paper 2.68 (Crown counsel, memorandum regarding instructions on the issue of confidentiality of evidence, 10 October 1997); paper 2.76
  43. Document A9 (Peter Dengate Thrush, 'Indigenous Flora and Fauna of New Zealand', report commissioned by the Waitangi Tribunal, 1995)
  44. Document K6 (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', report commissioned through claimant counsel, 2001). Other claimant research in 1997 included document A17 (Malcolm McNeill, 'A Critique of GATT:TRIPS', 2 February 1997).
  45. Document K7 (James Feldman, 'Treaty Rights and Pigeon Poaching: Alienation of Maori Access to Kereru, 1864–1960' (report commissioned by the Waitangi Tribunal, 2001)
  46. Document K3 (David Williams, 'Crown Policy Affecting Māori Knowledge Systems and Cultural Practices', report commissioned by the Waitangi Tribunal, 2001); doc K5 (Cathy Marr, Robin Hodge, and Ben White, 'Crown Laws, Policies and Practices in Relation to Flora and Fauna, 1840–1912', report commissioned by the Waitangi Tribunal, 2001); doc K4 (Geoff Park, 'Effective Exclusion?: An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912–1983', report commissioned by the Waitangi Tribunal, 2001); doc K2 (Robert McClean and Trecia Smith, 'The Crown and Flora and Fauna: Legislation, Policies and Practices, 1983–98', report commissioned by the Waitangi Tribunal, 2001). In addition, counsel for Ngāti Porou commissioned legal historian David Williams to produce a preliminary report on issues such as mātauranga Māori, aspects of the impact of Crown policies on indigenous knowledge, IP concepts, biodiversity, museum policy, and other matters of note. That report was released to parties in 1997 and published in 2001: doc K6.
  47. Document F13 (Dr Darrell A Posey, *Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities* (Gland and Cambridge: IUCN, 1996)), p109. The book *Beyond Intellectual Property* was also filed as evidence (doc F12, Darrell A Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996)). The growth in scholarship in this area (in part building on Posey's influential work) reflects the growing interest in indigenous peoples' relationships with the natural world and increased activity around the UN Convention on Biological Diversity, the UN Declaration on the Rights of Indigenous Peoples, and WIPo's work on traditional knowledge.
  48. Paper 2.314 (Waitangi Tribunal, statement of issues, July 2006)
  49. Paper 2.251, p 2
  50. Paper 2.52 (Waitangi Tribunal, schedule of issues, 3 September 1997), p 1
  51. Claim 1.1(d) (Apera Clark and others, amended statement of claim on behalf of Ngāti Kahungunu, 21 September 2001); claim 1.1(e) (Tama Poata, Te Kapunga Dewes, and others, amended statement of claim on behalf of Ngāti Porou, 19 October 2001); claim 1.1(f) (John Hippolite and others, amended statement of claim on behalf of Ngāti Koata, October 2001); claim 1.1(g) (Haana Murray and others, amended statement of claim on behalf of Ngāti Kuri, Te Rarawa, and Ngāti Wai, 20 October 2001)
  52. Paper 2.18; paper 2.25 (Counsel for the claimants, memorandum following judicial conference of 13 March 1997, 27 March 1997), p 4
  53. Paper 2.220 (Crown counsel, Crown statement of response and submission informing of inability to file statement of response by 19 December 2001, 19 December 2001)
  54. Paper 2.236 (presiding officer, memorandum–directions of the Tribunal, 16 April 2002), p 4
  55. Paper 2.239 (Crown counsel, memorandum in response to the Tribunal's memorandum–directions dated 16 April 2002, 23 April 2002), p 2
  56. Paper 2.235 (Crown counsel, memorandum concerning the proposed interim report, 12 April 2002), p 8
  57. Paper 2.256 (Crown counsel, statement of response, 28 June 2002), p 5
  58. Paper 2.256(b) (Counsel for Ngāti Kuri, Te Rarawa, and Ngāti Wai and on behalf of counsel for Ngāti Kahungunu, Ngāti Koata, Te Whānau a Ruataupare, and Ngāti Porou, memorandum in relation to the completion of the Wai 262 claim, 19 February 2004)
  59. Paper 2.257 (chairperson, memorandum–directions in respect of the future course of the Wai 262 inquiry, 5 March 2004)
  60. Paper 2.260 (chairperson, memorandum–directions in respect of establishing a timetable for the future course of the inquiry, 13 June 2005)
  61. Paper 2.262 (chairperson, memorandum–directions in respect of draft statement of issues and other matters, 20 December 2005)



62. Paper 2.277 (presiding officer, memorandum–directions following judicial conference of 22 March 2006, 13 April 2006)
63. Paper 2.4; paper 2.7, p 1; doc T1 (Crown counsel, closing submissions, 21 May 2007), p 8
64. The sections in the draft and final SOI were: intellectual property aspects of taonga works; biological and genetic resources of indigenous and/or taonga species; tikanga Māori, mātauranga Māori, and te reo Māori; and the relationship of kaitiaki with the environment; taonga species; and rongoa.
65. Paper 2.261 (Waitangi Tribunal, confidential draft statement of issues, December 2005)
66. Paper 2.266 (Crown counsel, memorandum in response to the memorandum–directions of the chairperson dated 16 February 2006, 15 March 2006), pp 2–3
67. Paper 2.275 (Crown counsel, memorandum in response to issues raised at the judicial conference on 22 March 2006, 24 March 2006), pp 2–3
68. Paper 2.282 (Crown counsel, memorandum in response to the memorandum–directions of the chairperson dated 13 April 2006, 3 May 2006)
69. Claimant counsel made a number of submissions in response to the draft statement of issues: papers 2.267 to 2.274, 2.278, 2.283 to 2.286, 2.288, and 2.303.
70. For example, paper 2.267 (counsel for Ngāti Kuri, Te Rarawa, and Ngāti Wai, memorandum on the draft statement of issues, 17 March 2006), pp 5–6; paper 2.269 (counsel for Ngāti Kahungunu, memorandum in relation to completion of the inquiry and draft statement of issues, 17 March 2006), p 4
71. Paper 2.301 (Counsel for Ngāti Koata, memorandum concerning the Waitangi Tribunal memorandum of directions, interested parties, and additional claimants, 8 June 2006)
72. Paper 2.279 (presiding officer, memorandum–directions in respect of historical claims, 2 May 2006), p 3
73. Paper 2.279, pp 4, 5, 6–7
74. Paper 2.279, p 6. The historical aspects of Ngāti Koata's claim regarding flora and fauna were subsequently addressed as fully as possible in the Waitangi Tribunal's *Te Tau Ihu* report on the Northern South Island claims, where claimant counsel had provided that panel with Ngāti Koata's Wai 262 evidence: Waitangi Tribunal, *Te Tau Ihu o Te Ika a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2007), vol 3, p 1037.
75. Paper 2.279, pp 6–7
76. Papers 2.282 to 2.288 suggested changes to the SOI prior to the workshop.
77. Paper 2.289 (presiding officer, memorandum of directions of the chairperson concerning various issues, 12 May 2006), p 2;
- paper 2.291 (Crown counsel, memorandum in response to the memorandum–directions of the chairperson dated 12 May 2006, 26 May 2006); paper 2.293 (counsel for Ngāti Koata, submissions regarding additional claimants, summaries of statements of claim, and te reo Māori, 26 May 2006); paper 2.294 (counsel for Ngāti Kuri, Te Rarawa, and Ngāti Wai, memorandum regarding the application by the New Zealand Māori Council, claimant summaries, and te reo Māori, 26 May 2006); paper 2.308 (Crown counsel, memorandum regarding te reo Māori issues, 21 June 2006); paper 2.309 (counsel for Ngāti Porou, memorandum regarding te reo Māori, 22 June 2006); paper 2.313 (presiding officer, memorandum–directions concerning various issues arising from judicial conference on 16 June 2006, 6 July 2006)
78. See, for instance, paper 2.289, p 3, and paper 2.313.
79. Paper 2.267, pp 16–17; paper 2.268 (counsel for Ngāti Koata, memorandum regarding the draft statement of issues, 17 March 2006), p 4; paper 2.269, p 6; paper 2.270 (counsel for Ngāti Porou, submissions for the judicial conference to be held on 22 March 2006, 17 March 2006), pp 3–4
80. Paper 2.277, p 2
81. Paper 2.295 (Counsel for Federation of Māori Authorities, Tai Tokerau District Māori Council, and Wairoa-Waikaremoana Māori Trust Board, memorandum seeking leave for claimants of Wai 621 and Wai 861 to have full claimant status in Wai 262, 26 May 2006)
82. Paper 2.305 (Counsel for the claimants, memorandum regarding additional claimants and issues of interest, 14 June 2006), pp 5–6; paper 2.310 (counsel for Ngāti Whaoa, Ngāti Hikairo, and Te Aitanga-a-Hauti, memorandum, 30 June 2006)
83. Paper 2.315 (David Potter and Andre Paterson, submission regarding the application by the Ngāti Rangitihī Wai 996 claimants to join the Wai 262 inquiry, 1 July 2006), p 1; paper 2.310, p 6; paper 2.305, p 5
84. Paper 2.310
85. Paper 2.293; paper 2.294; paper 2.299 (Counsel for Ngāti Porou, memorandum regarding the joinder of the Taitokerau District Māori Council et al, 7 June 2006)
86. Paper 2.313, p 3
87. Ibid, pp 3, 4
88. Ibid; paper 2.326 (presiding officer, memorandum–directions in respect of Te Waka Kai Ora's application for claimant status and other matters, 4 August 2006), p 1
89. Paper 2.313, pp 3, 4
90. Ibid, p 4
91. Document s7 (Counsel for the Wairoa-Waikaremoana Māori Trust Board, closing submissions, 18 April 2007), p 12

92. Claim 1.1(h) (Counsel for the Wairoa-Waikaremoana Māori Trust Board, additional claims to Wai 621 second amended statement of claim, 24 July 2006)
93. Paper 2.326, p 1. The ANZTPA agreement also concerned the regulation of certain medical components, such as artificial hip joints, and was to replace Medsafe New Zealand with a trans-Tasman regulatory agency.
94. Paper 2.396 (Waitangi Tribunal, *The Interim Report of the Waitangi Tribunal in Respect of the ANZTPA Regime* (Wellington: Waitangi Tribunal, 2006); paper 2.414 (Waitangi Tribunal, *The Further Interim Report of the Waitangi Tribunal in Respect of the ANZTPA Regime* (Wellington: Waitangi Tribunal, 2006). See also the archived website of the joint ANZTPA authority: <http://www.anztpa.org>).
95. Paper 2.318 (Waitangi Tribunal registrar, 'Indigenous Flora and Fauna and Intellectual Property Inquiry: Notice to Interested Persons or Groups' (public notice, Waitangi Tribunal, 24 July 2006))
96. Some parties employed their own counsel, for example, doc Q14 (Nursery and Garden Industry Association of New Zealand Inc, submission on the Wai 262 claim, 15 September 2006); doc Q16 (counsel for Horticulture New Zealand, submission on the Wai 262 claim, 15 September 2006); doc Q17 (Andre de Bruin, brief of evidence in support of Horticulture New Zealand, 15 September 2006); doc Q18 (Stephen Lewthwaite, brief of evidence in support of Horticulture New Zealand, 14 September 2006)
97. Paper 2.267, p 18; paper 2.269, pp 6–7
98. Paper 2.282, p 3
99. Paper 2.318. This notice was published in the *New Zealand Herald*, the *Dominion Post*, the *Christchurch Press*, and the *Otago Daily Times*. It was also posted to those on the Wai 262 distribution list.
100. Document Q13 (Counsel for Forest Herbs Research Limited, submission as an interested party, 15 September 2006)
101. Document Q14
102. Document Q5(b) (Dr Ron Close, brief of evidence, 31 October 2006)
103. Paper 2.372 (Frederick Allen, application to register as an interested person, 31 July 2006)
104. Document Q10 (Frederick Allen, brief of evidence, September 2006)
105. Document Q12 (New Zealand Association of Science Educators, submission as an interested party, 15 September 2006)
106. The CRIS were: Scion (New Zealand Forest Research Institute); Crop & Food Research (now Plant and Food Research); The Institutes of Geological and Nuclear Sciences Ltd and Environmental Science and Research; Landcare Research; National Institute of Water and Atmospheric Research; and Industrial Research Ltd. AgResearch did not apply to appear. The CRIS all wished to be regarded as interested parties to the inquiry; Crown counsel concurred and all CRIS were admitted as such: paper 2.328 (Warren Parker, submission regarding the Wai 262 process on behalf of Landcare Research New Zealand Limited, 7 August 2006); paper 2.325 (Paul Tocker, submission regarding the Wai 262 process on behalf of Crop & Food Research, 31 July 2006); paper 2.330 (Tom Richardson, submission regarding the Wai 262 process on behalf of Scion, 4 August 2006); paper 2.332 (presiding officer, memorandum–directions regarding CRIS having separate representation and presenting evidence alongside the Crown, 11 August 2006).
107. Document R10 (Dr Rick Pridmore, brief of evidence on behalf of the Association of Crown Research Institutes, 21 November 2006)
108. Document Q11 (SG Hall, submission on behalf of Genesis Research and Development Corporation Limited, 15 September 2006)
109. Document Q19 (Gregory McDonald, brief of evidence, 15 September 2006); doc Q22 (Gerrard Otimi, 'Maori Interdependent Economic Framework 1968–2008', presentation given as a brief of evidence, 26 September 2006)

APPENDIX II

## SELECT RECORD OF INQUIRY

### THE TRIBUNAL

The Tribunal constituted to hear the Wai 262 claim comprised the late Judge Richard Kearney, Roger Maaka, Pamela Ringwood, and Keita Walker. Following Judge Kearney's death, Chief Judge Joe Williams became presiding officer. The late Bishop Manuhuia Bennett and the late John Tahuparae advised the panel as Tribunal kaumātua.

### COUNSEL

In the preparatory stages of the inquiry Maui Solomon, Gina Rudland, Tania Tetitaha, Kristen Kohere, and Martin Dawson appeared for the claimants and Brendan Brown QC appeared for the Crown.

The hearings were organised into two phases, the first from 1997 to 2002 and the second from 2006 to 2007. Counsel appearing were:

- ▶ For Ngāti Kuri, Ngāti Wai and Te Rarawa: Maui Solomon and Leo Watson, in phase 2 with Anne Haira and Jessica Andrew.
- ▶ For Ngāti Porou: in phase 1, Gina Rudland, Kristen Kohere, David Jenkins (deceased), and Michelle Vaughan; in phase 2, Gina Rudland (deceased), Matanuku Mahuika, Ebony Duff, and Nathan Milner.
- ▶ For Ngāti Kahungunu: Grant Powell, Kiri Tahana, Emma Pond, Susannah Sharpe, and, in phase 2, Angela Hansen.
- ▶ For Ngāti Koata: in phase 1, Martin Dawson (deceased), Kate Mitcalfe, Louise Taylor, Sarah McWilliams, Liz Cleary, and Liana Poutu; in phase 2, Tim Castle, Liana Poutu, and Paranihia Walker.
- ▶ For Te Waka Kai Ora: Annette Sykes and Jason Pou.
- ▶ For the Wairoa-Waikaremoana Māori Trust Board: Paul Harman.
- ▶ For the Crown: Brendan Brown QC, in phase 1 with Dr Briar Gordon, Rebecca Ellis, and David Soper, and in phase 2 with Virginia Hardy and Elizabeth Shaw.

In phase 2, the Tribunal appointed Peter Andrew to represent various interested parties, Jon Parker represented Horticulture NZ, and Jolene Patuawa-Tuilave (deceased) and RJ Wakefield appeared for Industrial Research Limited, Environmental Science & Research, and Crop & Food.

## SELECT RECORD OF PROCEEDINGS

## 1. CLAIMS

## 1.1 WAI 262

Del Wihongi, Haana Murray, John Hippolite, Tama Poata, Kataraina Rimene, and Te Witi McMath, claim concerning the protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation, and restriction on the use and transmission of the knowledge of New Zealand indigenous flora and fauna and the genetic resource contained therein, undated

(a) Haana Murray and others, amended statement of claim on behalf of Te Rarawa, Ngāti Koata, Whānau a Rua, Ngāti Porou, Ngāti Kahungunu and Ngāti Wai, 10 September 1997

(b) Tama Poata, Te Kapunga Dewes, and others, amended statement of claim on behalf of Ngāti Porou, 31 July 1998

(c) Apera Clark, amended statement of claim on behalf of Ngāti Kahungunu, 23 May 2000

(d) Apera Clark, amended statement of claim on behalf of Ngāti Kahungunu, 21 September 2001

(e) Tama Te Kapua Poata, Te Kapunga Matemoana Dewes and others, amended statement of claim for Ngāti Porou, 19 October 2001

(f) John Hippolite and others, amended statement of claim on behalf of Ngāti Koata, 24 October 2001

(g) Haana Murray and others, amended statement of claim on behalf of Ngāti Kuri, Te Rarawa, and Ngāti Wai, 20 October 2001

(h) Wairoa–Waikaremoana Māori Trust Board, additional claims to Wai 621 second amended statement of claim, 24 July 2006

(i) Manu Paul, particularised statement of claim on behalf of Te Waka Kai Ora, 26 July 2006

(j) Counsel for Ngāti Wai, notifying the addition of a lead claimant for Ngāti Wai, 29 May 2007

(k) Counsel for Ngāti Koata, notifying the addition of a lead claimant for Ngāti Koata, 8 May 2007

## 4. TRANSCRIPTS

4.1.1 Transcript of first hearing, held at Tamatea Marae, Motutū, and Ngāti Wai Trust Board, Whangārei, 15–19 September 1997

(a) Confidential excerpts from transcript of first hearing, held at Tamatea Marae, Motutū, 15–16 September 1997

4.1.2 Transcript of second hearing, held at Tamatea Marae, Motutū, and Ngāti Wai Trust Board, Whangārei, 30 March–3 April 1998

(a) Confidential excerpts from transcript of second hearing, held at Tamatea Marae, Motutū, and Ngāti Wai Trust Board, Whangārei, 30 March, 1–3 April 1998

4.1.3 Transcript of third hearing, held at Te Rarawa Marae, Kaitaia, and Ngāti Wai Trust Board, Whangārei, 27, 29, 30 April 1998

4.1.4 Transcript of fourth hearing, held at Paparore Marae, Kaitaia, 22–23 June 1998

4.1.5 Transcript of fifth hearing, held at Pākirikiri Marae, Tokomaru Bay, 10–14 August 1998

(a) Transcript of proceedings in te reo Māori

4.1.6 Transcript of sixth hearing, held at the Heritage Hotel, Rotorua, 23–25 November 1998

4.1.7 Transcript of seventh hearing, held at Uepōhatu Marae, Ruatōria, 19–23 April 1999

(a) Transcription of proceedings in te reo Māori

4.1.8 Transcript of eighth hearing, held at Rāhui Marae, Tikitiki, 23–26 July 1999

(a) Transcript of proceedings in te reo Māori

4.1.9 Transcript of ninth hearing, held at Whakatū Marae, Nelson, 6–10 December 1999

4.1.10 Transcript of tenth hearing, held at Matahiwi Marae, Hastings, 31 July – 4 August 2000

4.1.11 Transcript of eleventh hearing, held at Tamatea Rugby Clubrooms, Waipatu Marae, Hastings, 26–30 March 2001

4.1.12 Transcript of twelfth hearing, held at Awataha Marae, Auckland, 6–8, 10 May 2002

(a) Confidential excerpt from transcript of the twelfth hearing, held at Awataha Marae, Auckland, 6–8, 10 May 2002

4.1.13 Transcript of thirteenth hearing, held at the Copthorne Hotel, Wellington, 20–23 May 2002

4.1.14 Transcript of fourteenth hearing, held at the Copthorne Hotel, Wellington, 20–23 May 2002

4.1.15 Transcript of fifteenth hearing, held at Te Pua Memorial Marae, Auckland, 22–24 August 2006

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- 4.1.16** Transcript of sixteenth hearing, held at Pākirikiri Marae, Tokomaru Bay, 28–31 August 2006
- 4.1.17** Transcript of seventeenth hearing, held at Waipatu Marae, Hastings, Whakatū Marae, Nelson, 4–8 September 2006
- 4.1.18** Transcript of eighteenth hearing, held at Waitangi Tribunal Unit, Wellington, 25–29 September 2006
- 4.1.19** Transcript of nineteenth hearing, held at Waitangi Tribunal Unit, Wellington, 11–15 December 2006  
(a) Transcript of opening submissions from Crown counsel, Waitangi Tribunal Unit, Wellington, 13 December 2006
- 4.1.20** Transcript of twentieth hearing, held at Waitangi Tribunal Unit, Wellington, 18–22 December 2006
- 4.1.21** Transcript of twenty-first hearing, held at Waitangi Tribunal Unit, Wellington, 22–26 January 2007  
(a) Transcript of twenty-first hearing, held at Waitangi Tribunal Unit, Wellington, 30 January–1 February 2007
- 4.1.22** Transcript of twenty-second hearing, held at Ōrākei Marae, Auckland, 5–8 August 2007
- 4.1.23** Transcript of twenty-third hearing, held at Waitangi Tribunal Unit, Wellington, 11–15 June 2007

## SELECT RECORD OF DOCUMENTS

\* Document confidential and unavailable to the public without leave from the Tribunal

This listing comprises evidential documents not included in the bibliography, as well as the parties' closing submissions.

## A SERIES

- A1** Kerry-Jayne Wilson, comments on Wai 262 on behalf of the Ecology Group, Lincoln University, undated
- A6** Ministry of Commerce, 'Intellectual Property Law Reform Bill Māori consultation paper', 1994
- A9** Peter Dengate Thrush, 'Indigenous Flora and Fauna of New Zealand' (commissioned research report, Wellington: Waitangi Tribunal, 1995)

- A12** Forest Herbs Research Ltd, brief of evidence, 19 December 1996
- A13** Ronald C Close, brief of evidence on indigenous flora and fauna, 5 February 1997
- A14** S Natusch, brief of evidence, 5 February 1997
- A15**  
(a)–(j) David Williams, supporting documents for 'Mātauranga Māori and Taonga' (document A15, replaced by document K6)
- A16** Jim Rumbal, brief of evidence on behalf of Duncan & Davies Contracting Ltd, 3 March 1997
- A17** Malcolm McNeill, 'A Critique of GATT: TRIPS', 2 February 1997
- A19** W R Sykes, brief of evidence, 1 July 1997
- A21** Colin James Burrows, brief of evidence, 26 August 1997
- A22** Neville Howse, brief of evidence, 29 August 1997
- A23** C Mitchell, brief of evidence, 5 September 1997
- A25** M and G Gillier, brief of evidence, 28 August 1997
- A27**  
(b)\* Te Hema Nui a Tawhaki Witana, brief of evidence on behalf of Te Rarawa, undated
- A28** Aperahama Clark, brief of evidence, 16 September 1997
- A30** Laly Paraone Haddon, brief of evidence on behalf of Ngāti Wai, undated
- A31** Whetu Marama McGregor, brief of evidence on behalf of Ngāti Wai, undated
- A32\*** Raukura Robinson, brief of evidence on behalf of Ngāti Wai, March 1998  
(a)\* Raukura Robinson, second brief of evidence, undated
- A33** Hori Te Moanaroa Parata, brief of evidence on behalf of Ngāti Wai, undated
- A34** Richard Wisker, brief of evidence, 13 September 1997

**A35** Professor David Penny, comments on Wai 262, 18 September 1997

## **B SERIES**

**B5** Counsel for the claimants, 'File Note on Tapu', 3 December 1997

## **B8**

(a) Document bank to the report by James W. Feldman, supporting documents for 'Treaty Rights and Pigeon Poaching: Alienation of Maori Access To Kereru, 1864–1960' (document B8, replaced by document K7)

**B9** Wiremu McMath, brief of evidence on behalf of Ngāti Wai, 1998

**B10** Te Warihi Hetaraka, brief of evidence on behalf of Ngāti Wai, undated

(a) Te Warihi Hetaraka, brief of evidence on behalf of Ngāti Wai, undated

**B11** Himiona Peter Munroe, brief of evidence, undated

**B12** Bruce Gregory, brief of evidence on behalf of Te Rarawa, undated

**B13** Pā Henare Tate, brief of evidence in support of Ngāti Kuri, Ngāti Wai, and Te Rarawa, undated

## **C SERIES**

**C1** Ross Stirling Gregory, brief of evidence, undated

**C2** Houpeke Piripi, brief of evidence on behalf of Ngāti Wai, undated

## **D SERIES**

**D2** Rapata Romana, brief of evidence on behalf of Ngāti Kuri, undated

**D3** Niki May Lawrence, brief of evidence on behalf of Ngāti Kuri and Te Rarawa, undated

**D4** Rapine Murray, brief of evidence on behalf of Ngāti Kuri, undated

**D5** Mata Ra-Murray, brief of evidence on behalf of Ngāti Kuri, undated

**D6** Haana Waitai Murray, brief of evidence on behalf of Ngāti Kuri, undated

**D7** Merereina Uruamo, brief of evidence on behalf of Ngāti Kuri, undated

## **E SERIES**

**E1** Te Kapunga Matemoana (Koro) Dewes, brief of evidence on behalf of Ngāti Porou, 31 July 1998

**E2** Tama Te Kapua Poata, brief of evidence on behalf of Ngāti Porou, 31 July 1998

**E3** Wayne James Ngata, brief of evidence on behalf of Ngāti Porou, 31 July 1998

**E4** Iranui Ada Haig, brief of evidence on behalf of Ngāti Porou, 31 July 1998

**E5** Piripi Rairi Aspinall, brief of evidence, 31 July 1998

**E6** Maggie Ryland, brief of evidence on behalf of Ngāti Porou, 31 July 1998

## **F SERIES**

### **F1**

(b) Dr Darrell Addison Posey, brief of evidence on behalf of the claimants, undated

**F2(c)** Henrietta Lillian Marrie, brief of evidence, undated

**F3(b)** David Stephenson, brief of evidence, undated

**F4(b)** Alejandro Agumedo, brief of evidence, undated

**F6(c)** Stephan Schnierer, brief of evidence, undated

## **G SERIES**

**G4** Apirana Tuahae Mahuika, brief of evidence on behalf of Ngāti Porou, 12 April 1999

**G5** Rapata Rauna Tataingaoterangi Kaa, brief of evidence on behalf of Ngāti Porou, 9 April 1999

**G6** Laura Thompson, brief of evidence on behalf of Ngāti Porou, 9 April 1999

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G7 Reverend Eru Potaka Dewes, brief of evidence, 11 April 1999

G8 Hone Meihana Taumaunu, brief of evidence on behalf of Ngāti Porou, March 1999

G9 Mate Huatahi Kaiwai, brief of evidence, undated

G10 Joseph McClutchie, brief of evidence, 11 April 1999

G11 Hirini Te Aroha Pani Clarke, brief of evidence, 11 April 1999

G12 Tame Hauraki Te Maro, brief of evidence, 9 April 1999

**H SERIES**

**H2**

(a) Hunaara Tangaere II, brief of evidence, 6 August 1999

H3 Reverend Hoturangi Paora Weka, brief of evidence, undated

H8 Alfred Madsen Elkington, brief of evidence on behalf of Ngāti Koata, undated

H9 Terewai Grace, brief of evidence on behalf of Ngāti Koata, undated

H10 Puhanga Patricia Tupaea, brief of evidence on behalf of Ngāti Koata, undated

H11 Benjamin Turi Hippolite, brief of evidence on behalf of Ngāti Koata, undated

H12 Priscilla Paul, brief of evidence on behalf of Ngāti Koata, undated

H13 Huia Elkington, brief of evidence, undated

(a) Huia Elkington, supplementary brief of evidence, undated

H14 Kathleen Hemi, brief of evidence, for hearing 6–10 November 1999

H15 Ruruku Hippolite, brief of evidence, for hearing 6–10 November 1999

H16 James Hemi Elkington, brief of evidence on behalf of Ngāti Koata, undated

(b) Victoria University of Wellington, 'Application for Support of a Conservation Program: Zoological Society of San Diego Conservation Fund', undated

H17 Rosemary Sutherland Hippolite, brief of evidence, undated

H18 Te Atiawa Manawhenua ki Te Tau Ihu Trust, brief of evidence, 3 December 1999

H19 Hori Turi Elkington, brief of evidence, undated

**I SERIES**

I1 Murray Hemopo, brief of evidence, undated

I2 Pita Hukinga Walker-Robinson, brief of evidence, undated

I3 Sue Maude Wolff, brief of evidence, undated

I4 Sandy Adsett, brief of evidence on behalf of Ngāti Kahungunu, 2000

I5 Takirirangi Smith, brief of evidence, undated

I6 Wally Kupa, brief of evidence on behalf of Ngāti Kahungunu, 2000

I7 Te Atarangi Matuakore Allen, brief of evidence, undated

I8 Koea Pene, brief of evidence, undated

I9 Kate Parahi, brief of evidence on behalf of Ngāti Kahungunu, 2000

I10 Aggie Nuku, brief of evidence on behalf of Ngāti Kahungunu, 2000

I11 Ngaire Culshaw, brief of evidence, undated

I12 Ross Young Scott, brief of evidence, 2000

(a)–(b) Ross Young Scott, supporting documents

I13 Rerekohu Ahiahi Robertson, brief of evidence on behalf of Ngāti Kahungunu, 2000

I14 Alice Hopa, brief of evidence on behalf of Ngāti Kahungunu, 2000

I15 Frederick Roy Maadi Reti, brief of evidence, undated

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**I16** William David Blake, brief of evidence, undated**I17** Wero Karena, brief of evidence on behalf of Ngāti Kahungunu, 2000**I18** Piri Sciascia, brief of evidence on behalf of Ngāti Kahungunu, 2000**I19** Jacob Scott, brief of evidence on behalf of Ngāti Kahungunu, 2000**I20** Abel (Apera) George Clark, brief of evidence, undated**I21** Bevan Taylor, brief of evidence, undated**I22** Edryd Breese, brief of evidence, undated**I23** Waka Gilbert, brief of evidence on behalf of Ngāti Kahungunu, 2000**I24** Charles Kohitu King, brief of evidence, undated**I25** Dennis Iti Lihou, brief of evidence, undated**I26** Ruruarau Heitia Hiha, brief of evidence, undated**I27** Paora Ropiha (Monti) Paku, brief of evidence, undated**J SERIES****J2** Bevan Mohi Te Ata Hikoia Tipene-Matua, brief of evidence on behalf of Ngāti Kahungunu, 2001**J3** Murray Hemi, brief of evidence on behalf of Ngāti Kahungunu, undated**J4** Matthew Matuakore Petuha Bennett, brief of evidence, undated**J5** Niniwa Kahurangi Neva Munro, brief of evidence, undated**J6** Peter Joseph Chanel Flynn, brief of evidence, undated**J7** Brian Morris, brief of evidence, undated**J8** Joseph Te Rito, brief of evidence, undated**J9** Te Rina Sullivan-Meads, brief of evidence, undated**J10** Marei Boston Apatu, brief of evidence, undated**J11** Mere Joslyn Whaanga, brief of evidence on behalf of Ngāti Kahungunu, undated**(a)** Mere Whaanga, additional brief of evidence, undated**J12** Nigel William How, brief of evidence on behalf of Ngāti Kahungunu, 2001**J14** Ngahiwi Tomoana, brief of evidence, undated**J15** Toro Waaka, brief of evidence, undated**K SERIES****K2** Robert McClean and Trecia Smith, 'The Crown and Flora and Fauna: Legislation, Policies, and Practices, 1983–98', research report commissioned by Waitangi Tribunal, 2001**K3** David Williams, 'Crown Policy Affecting Māori Knowledge Systems and Cultural Practices', research report commissioned by Waitangi Tribunal, 2001**K4** Geoff Park, 'Effective Exclusion? An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912–1983', research report commissioned by Waitangi Tribunal, 2001**K5** Cathy Marr, Robin Hodge, and Ben White, 'Crown Laws, Policies and Practices in Relation to Flora and Fauna, 1840–1912', research report commissioned by Waitangi Tribunal, 2001**K6** 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, Valued Traditional Knowledge', research report commissioned through claimant counsel, 2001)**K7** James Feldman, 'Treaty Rights and Pigeon Poaching: Alienation of Māori Access to Kereru, 1864–1960', research report commissioned by Waitangi Tribunal, 2001**K8** James Hemi Elkington, brief of evidence, 5 February 2002**K9** Angeline Greensill, brief of evidence on behalf of the claimants, 5 February 2002**K10** Robert Edward McGowan, brief of evidence on behalf of Ngāti Kuri, Te Rarawa, and Ngāti Wai, 7 February 2002



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**K12\*** Mana Manuera Cracknell, brief of evidence on behalf of Ngāti Wai, Ngāti Kuri, and Te Rarawa, 6 February 2002

**K13** Sir Ian Hugh Kawharu, brief of evidence, 31 January 2002

**K14** Professor Mason Durie, brief of evidence, 31 January 2001

**K15** Peter Rowland Wills, brief of evidence, 8 February 2002

**M SERIES**

**M15** Dr Hirini Moko Mead, brief of evidence on behalf of Ngāti Porou, 17 May 2002

**(a)–(h)** Dr Hirini Moko Mead, supporting documents

**P SERIES**

**P1** Richard Renata Niania, brief of evidence, 11 August 2006

**P3** Haami Piripi, brief of evidence, 11 August 2006

**P4** Moana Maniapoto, brief of evidence, 11 August 2006

**P5** Catherine Davis, brief of evidence on behalf of Te Rarawa, 11 August 2006

**P6** Nellie Norman, brief of evidence, 11 August 2006

**P7** Himiona Munroe, brief of evidence, 11 August 2006

**P8** Ngahiwi Tomoana, updating brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006

**P9** Bevan Mohi Te Ata Hikoia Tipene-Matua, updating brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006

**P10** Ross Young Scott, updating brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006

**P11** Ngatai Huata, brief of evidence, 11 August 2006

**P12** Joseph Selwyn Te Rito, updating brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006

**P13** Tracey Whare and Claire Charters, updating brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006

**P14** Robert Edward McGowan, updating brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006

**P15** Tamati Mangu Clarke, brief of evidence, 11 August 2006

**P16** Maurice Wayne Black, brief of evidence, 11 August 2006

**P17** Mark Ross, updating brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006

**P18** Philip Lewis Rasmussen, updating brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006

**P19** Sandy Gauntlett, brief of evidence on behalf of Ngāti Kuri, Ngāti Wai, and Te Rarawa, 14 August 2006

**P20** Haana Murray, updating brief of evidence on behalf of Ngāti Kuri, 14 August 2006

**P21** Jacob Manu Scott, updating brief of evidence on behalf of Ngāti Kahungunu, 15 August 2006

**P22** Piri Sciascia, updating brief of evidence on behalf of Ngāti Kahungunu, 15 August 2006

**P24** Rei Mokena Kohere, brief of evidence on behalf of Ngāti Porou, 15 August 2006

**P25** Tate Pewhairangi, brief of evidence on behalf of Ngāti Porou, 10 August 2006

**P26** Mark Andrew Kopua, brief of evidence on behalf of Ngāti Porou, 15 August 2006

**P27** Hirini Te Aroha Pani (Syd) Clarke, brief of evidence on behalf of Ngāti Porou, 16 August 2006

**P28** Connie Pewhairangi, brief of evidence on behalf of Ngāti Porou, 16 August 2006

**P29** Dr Apirana Tuahae Mahuika, second brief of evidence on behalf of Ngāti Porou, 16 August 2006

**(a)** Dr Apirana Tuahae Mahuika, second corrected brief of evidence, 17 August 2006

**P30**

**(a)** Aroha Te Pareake Mead, brief of evidence in support of Ngāti Porou, 16 August 2006

**(b)–(i)** Aroha Te Pareake Mead, supporting documents

**P31** Hori Te Moanaroa Parata, brief of evidence, 18 August 2006

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**P32** Laly Paraone Haddon, brief of evidence, 18 August 2006

**P33** Maraea Teariki, brief of evidence, 18 August 2006

**P35** Piripi Walker, brief of evidence on behalf of Ngāti Koata, 18 August 2006

**P36** Gerrard Albert, brief of evidence, 18 August 2006

**P37** Frank Hippolite, brief of evidence, 18 August 2006

**P38** Benjamin Hippolite, brief of evidence, 14 August 2006

**P39** Te Arika Kawhe Wineera, brief of evidence, 18 August 2006

**P40** Hohi Ngapera Te Moana (Keri) Kaa, brief of evidence on behalf of Ngāti Porou, 20 August 2006

**P41** Campbell Wananga Dewes, brief of evidence, 20 August 2006

**P42** Gary Raumati Hook, brief of evidence, 21 August 2006

**P43** Professor Ian Brighthope, brief of evidence, 21 August 2006

**P44** Michael John Cushman, brief of evidence, August 2006

**P48** Angeline Ngahina Greensill, statement, 21 August 2006

**P49** Colleen Arihana Skerret-White, brief of evidence on behalf of the Te Arawa Confederation of Tribes, August 2006

**P50** Elizabeth Jane Kelsey, brief of evidence, 21 August 2006

**P51** Cletus Maanu Paul, brief of evidence, 21 August 2006

**P52** Gwenda Monteith Paul, brief of evidence, 21 August 2006

**P53** Kaa Kathleen Williams, brief of evidence, 21 August 2006

**P54** Hohepa Joseph Kereopa and Taurioterangi Pouwhare, joint brief of evidence in support of Te Waka Kai Ora, August 2006

**P56** Dr Jessica Violet Hutchings, brief of evidence, 21 August 2006

**Q SERIES**

**Q1** Victoria Campbell, brief of evidence as an interested party, 4 September 2006

**Q2** Black Bridge Nurseries, brief of evidence on the Wai 262 claim, 11 September 2006

**Q3** Ribbonwood Nurseries, brief of evidence, 12 September 2006

**Q4** Oratia Native Plant Nursery Ltd, brief of evidence, 13 September 2006

**Q5(b)** Dr Ron Close, brief of evidence, 31 October 2006

**Q6** New Zealand Flax Hybridisers Ltd, brief of evidence, 14 September 2006

**Q7** Michael Smythe, brief of evidence on behalf of the Designers Institute of New Zealand Inc, 15 September 2006  
**(a)** Designers Institute of New Zealand Inc, appendix to brief of evidence dated 15 September 2006, 15 September 2006

**Q8** Michael Smythe, brief of evidence on behalf of Creationz Consultants, 13 September 2006

**Q9** Dennis John Scott, brief of evidence, 15 September 2006

**Q10** Frederick C Allen, brief of evidence, September 2006

**Q11** SG Hall, brief of evidence on behalf of Genesis Research and Development Corporation Ltd, undated

**Q12** New Zealand Association of Science Educators, brief of evidence as an interested party, 15 September 2006

**Q13** Forest Herbs Research Ltd, brief of evidence on the Wai 262 claim, 15 September 2006

**Q14** Nursery and Garden Industry Association Inc, brief of evidence on the Wai 262 claim, 15 September 2006

**Q15** Paul Morgan, brief of evidence on behalf of the Federation of Māori Authorities, undated

**Q16** Horticulture New Zealand, brief of evidence as an interested party, 15 September 2006

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**Q17** Andre John de Bruin, brief of evidence in support of Horticulture New Zealand, 15 September 2006

**Q18** Stephen Lindsay Lewthwaite, brief of evidence in support of Horticulture New Zealand, 14 September 2006

**Q19** Gregory Paraone McDonald, brief of evidence, 15 September 2006

**Q20** New Zealand Institute of Patent Attorneys Inc, brief of evidence in relation to the indigenous flora and fauna and cultural intellectual property (Wai 262) enquiry, undated

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**S1** Counsel for Ngāti Kahungunu, closing submissions, vol 1, 16 April 2007

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#### **U SERIES**

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(a)–(g) Counsel for Ngāti Kuri, Ngāti Wai, and Te Rarawa, supporting documents and scenario assessment flow charts, 15 June 2007

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## GLOSSARY

The following list of words and terms excludes those defined where they occur in the text. In addition to evidence put before this inquiry, the following principal sources were consulted: 'Te Aka Māori-English, English-Māori Dictionary and Index', Auckland University of Technology, <http://www.maoridictionary.co.nz>; 'Ngata Dictionary', Learning Media Ltd, <http://www.learningmedia.co.nz/ngata>; Herbert W Williams, *Dictionary of the Maori Language*, 7th ed (Wellington: GP Print, 1997); 'The Encyclopedia of New Zealand', Ministry for Culture and Heritage, <http://www.teara.govt.nz>; and *Oxford Dictionary of English*, 2nd ed (Oxford: Oxford University Press, 2003).

### TE REO MĀORI TERMS

*ariki* senior leader, first born in a high ranking family, paramount chief

*atua* the gods, spirit, supernatural being

*haka* a vigorous dance accompanied by actions and words, performed by a group

*hāngi* earth oven

*hapū* clan, section of a tribe

*harakeke* *Phormium tenax* and *P cookianum* – New Zealand flax

*hau kāinga* the local people of a marae

*hauora* health

*Hawaiki* ancestral overseas Māori homeland

*hei tiki* carved figure worn around the neck

*horopito* *Pseudowintera colorata* – pepper tree

*hui* meeting, gathering, assembly

*ihi* essential force, power, a psychic force rather than mana

*iwi* tribe, people

*kahu kiwi* kiwi-feather cloak

*kai* food

*kaihautū* leader, helmsman

*kaimoana* seafood

*kāinga* home, village, settlement

*kaitiaki* guardian, protector; older usage referred to kaitiaki as a powerful protective force or being

*kaitiakitanga* the obligation to nurture and care for the mauri of a taonga; ethic of guardianship, protection

*kaitieki* Ngāti Porou term for guardian or protector

*kaiwhakahaere* supervisor, manager

*kākā* large native forest parrot

*kākaho* stem of the toetoe *Cortaderia* spp, used for lining the walls of buildings and for making kites

*kākahu* clothing, garment

*kākāpō* *Strigops habroptilus* – large, flightless, nocturnal parrot

- kanohi ki te kanohi* in person, face to face
- kānuka* *Kunzea ericoides* – white tea tree, closely related to the mānuka but taller
- kapa haka* group performance of traditional and contemporary Māori song and dance; includes waiata, poi, and haka
- kapu tī* cup of tea
- karaka* *Corynocarpus laevigatus* – a coastal tree cultivated by Māori for its orange berries, which contain seeds that are poisonous unless roasted
- karakia* prayer, ritual chant, incantation
- karanga* formal call performed by a woman as part of the pōwhiri or ceremonial welcoming onto a marae
- kārearea* *Falco novaeseelandiae* – New Zealand falcon
- kauae raro* earthly or general knowledge
- kauae runga* esoteric or specialised knowledge
- kaumātua* elder
- kaupapa* topic, policy, programme, agenda
- kauri* *Agathis Australis* – New Zealand's largest native tree, found naturally only in the Far North
- kawakawa* *Macropiper excelsum* – pepper tree
- kāwanatanga* government, governorship, authority
- kawenata* covenant
- kea* *Nestor notabilis* – mountain parrot
- kēhua* ghost
- kererū* *Hemiphaga novaeseelandiae* – New Zealand wood pigeon, known as kūkupa in the Far North
- kete* basket, bag
- kiekie* *Freycinetia baueriana* ssp *Banksii* – an epiphytic plant vital to the practice of weaving
- kina* *Evechinus chloroticus* – sea urchin or sea egg, a spiny invertebrate
- kiore* *Rattus exulans* – Polynesian rat
- kirituhi* skin etching in a generic Māori style that lacks the spiritual or whakapapa elements of tā moko
- kiwi* *Apteryx* spp –flightless nocturnal bird
- koha* gift
- kōhanga reo* language nest; pre-school aimed at immersing pupils in Māori language and culture
- kōiwi tangata* human remains
- kōkako* *Callaeas cinerea* – one of the endemic wattlebirds
- kōkōmako* *Anthornis melanura* – bell bird, also known as korimako, makomako, kōmako, and rearea
- komiti* committee
- kōrero* story, stories; discussion, speech, to speak
- kōrero tuku iho* body of inherited knowledge
- koro* grandfather
- koromiko* *Hebe salicifolia*, *H stricta*, and other species
- koroua* elder, grandfather
- korowai* cloak, a mark of rank and honour
- koru* spiral form; shaped like an unfolding fern frond
- kōura* *Paranephrops planifrons* and *P zealandicus* – freshwater crayfish
- kōwhai* *Sophora* – a small tree with several New Zealand species

## GLOSSARY

- kōwhai ngutukākā* *Clianthus puniceus* – kaka beak, a low-growing spindly shrub with clusters of beak-shaped flowers
- kōwhaiwhai* decorative scroll patterns painted on rafters in wharenuī
- kūaka* *Limosa lapponica* – bar-tailed godwit, a migratory wading shorebird
- kuia* female elder
- kūkupa* see *kererū*
- kūmara* *Ipomoea batatas* – sweet potato
- kura* school
- kura kaupapa Māori* primary schools where te reo Māori is the principal medium of instruction
- mahi* work, effort
- mamaku* *Cyathea medullaris* – black tree fern
- mana* authority, prestige, reputation, spiritual power
- mana moana* customary rights and authority over the waters in the rohe
- mana whenua, manawhenua* customary rights and authority over land and taonga; the iwi or hapū which holds mana whenua in an area
- mānuka* *Leptospermum scoparium* – a variety of tea tree
- Māoritanga* Māori culture, practices, and beliefs
- marae* enclosed space or courtyard in front of a wharenuī where formal welcomes and community discussions take place; also the area and buildings surrounding the marae
- Matariki* a star cluster also known as the Pleiades or the Seven Sisters; the pre-dawn rise of Matariki and the sighting of the next new moon in June is celebrated as the beginning of the Māori New Year
- mātauranga rangahau hauora* research knowledge relating to Māori health issues or deriving from Māori research methods
- mātauranga reo* knowledge of te reo
- mātauranga rongōā* traditional knowledge of healing and the healing qualities of plants
- mate atua* injury or illness without an obvious physical cause and attributed to supernatural causes
- mate tangata* injury or illness with obvious physical causes
- mate Māori* mental or physical illness with spiritual causes
- maunga* mountain
- mauri* the life principle or living essence contained in all things, animate and inanimate
- mirimiri* massage, called romiromi when the fingers are used and takahi when feet are used
- mita* dialect, tribal language
- moa* *Dinornis* spp – large extinct flightless bird which formed an important part of the diet of early Māori settlers
- moko* skin-etched designs on the face or body
- moko mōkai* preserved skin-etched Māori heads
- mokoroa* pūriri moth larvae, which live on the sap of pūriri and tītoki trees
- mōteatea* song-poem; traditional Māori chant, lament
- ngā iwi Māori* Māori tribes, people
- ngahere* bush, forest
- ngeri* a rhythmic chant with actions
- noa* ordinary, not restricted, a state of relaxed access

*oranga* health

*pā* fortified village, or more recently, a village

*paepae* the threshold of the meeting house where key oratorical exchanges take place

*Pākehā* New Zealander of European descent

*pakiwaitara* legend, ancient story, myth

*pānui* public notice, written communication

*papakāinga* original home, home base

*Papa-tū-ā-nuku* earth mother deity, partner of Rangi-nui

*pātaka* storehouse

*pātaka komiti* Māori committees which manage iwi access to plants and animals on DOC land for cultural harvest purposes

*patu* weapon, club

*pāua* *Haliotis* spp – abalone, a univalve shellfish

*peketua* *Leiopelma hochstetteri* – Hochstetter's frog

*pepeha* saying, proverb

*pīngao* *Desmoschoenus spiralis* – golden sand sedge, traditionally used for weaving and rope-making

*pipi* *Paphies australis* – common edible bivalve shellfish

*pītau* unfurling spiral form of a fern frond; perforated spiral carving design

*piupiu* traditional flax skirt made from strips of prepared and dyed harakeke, now used mainly for kapa haka performances

*pōhutukawa* *Metrosideros excelsa* and other species – the 'Kiwi Christmas tree'

*pōkeka* a rhythmic chant, often poetic, without actions

*poroporo* *Solanum aviculare* and other species – a member of the nightshade family

*Pou, poupou* pole, support; pole in a meeting house

*pou tokomanawa* main support post in a meeting house

*pounamu* Greenstone, nephrite

*pōwhiri* welcoming ceremony, especially onto a marae

*Puanga* Rigel, the brightest star in the constellation Orion

*puawānanga* *Clematis paniculata* – New Zealand clematis

*puka, pukanui* *Meryta sinclairii* – a coastal tree with large leathery leaves

*pūkeko* *Porphyrio porphyrio* – purple swamp hen, a member of the rail family

*puna kōhungahunga, puna reo* parent-led Māori-language early childhood playgroups

*punga* anchor

*pūpū harakeke* *Placostylus ambagiosus* – flax snail

*pūrākau* legend, ancient story, myth

*pure* rites of cleansing

*pūtaiao* science

*pūtea* fund

*rāhui* temporary ban, closed season, or ritual prohibition placed on an area, body of water, or resource

*rākau rongoā* herbal remedies

*rangatahi* young people

*rangatira* tribal leader



## GLOSSARY

*rangatiratanga* chieftainship, self-determination, the right to exercise authority; imbued with expectations of right behaviour, appropriate priorities, and ethical decision-making

*Rangi-nui, Ranginui-te-pō* sky father deity, partner of Papa-tū-ā-nuku

*rātā* *Metrosideros robusta* – northern rātā, a red-flowered forest tree

*rawa* development and use of resources

*Rehua* the star Antares in the constellation Scorpius; associated with summer

*rewarewa* *Knightsia excelsa* – New Zealand honeysuckle or bottlebrushes

*rohe* traditional tribal area, territory

*rongoā* traditional Māori healing; medicinal qualities

*ruatau* dual helix formation sometimes seen in kōwhaiwhai patterns, representing the interwoven nature of different forms of knowledge

*rūnanga* council, board, assembly

*tā moko* the Māori art form of skin-etching, which expresses the wearer's whakapapa and tribal identity and its spiritual significance

*taha wairua* spirit, spiritual aspect

*taiaha* long club fighting staff

*taiao* environment, nature

*takahē* *Porphyrio hochstetteri* – rare flightless endemic bird found in Fiordland

*tamariki* children

*Tāne-mahuta* male personification of the primordial forest ecosystem, one of the children of Rangi-nui and Papa-tū-ā-nuku

*tangata Tiriti* the people here by virtue of the Treaty of Waitangi, non-Māori New Zealanders

*tangata whenua* indigenous people of the land; local people with strong whakapapa links to the area

*tangi, tangihanga* funeral rites for the dead

*tāniko* weaving style used especially for cloak borders, made by finger weaving muka thread held between two vertical pegs into rectilinear patterns

*taonga* a treasured possession, including property, resources, and abstract concepts such as language, cultural knowledge, and relationships

*taonga tuku iho* treasured possessions handed down, heritage

*taonga tūturu* artefacts, moveable cultural heritage, cultural objects

*tapu* sacred, sacredness, separateness, forbidden, off limits

*taro* *Colocasia esculenta* – a tropical plant brought to Aotearoa by the Polynesian ancestors of the Māori

*tāruke kōura* crayfish trap

*tātai* genealogy, lines of ancestry

*tauiwi* non-Māori, foreigners, immigrants

*tau kōura* traditional method for catching crayfish

*tāwhara* the fruit of the kiekie

*te ao* the world

*te ao mārama* the world of light

*te ao tūroa* world, Earth, nature, light of day, the entirety of the natural world

*te reo ake o Ngāti Porou* language of Ngāti Porou

*te reo, te reo Māori* the Māori language

*Te Rerenga Wairua* departing place of spirits, Cape Reinga

*Te Tiriti o Waitangi* the Treaty of Waitangi  
*tekoteko* carved figure on a house  
*Ti Tawhiti* a dwarf variety of *Cordyline australis*, or cabbage tree, selected and developed by Māori and thought to have been brought to Aotearoa in ancestral canoes  
*tikanga* traditional rules for conducting life, custom, method, rule, law  
*tikanga Māori* Māori traditional rules, culture  
*tiki* carved figure  
*tino tangatiratanga* the greatest or highest chieftainship; self-determination, autonomy; control, full authority to make decisions  
*tītī* *Puffinus griseus* – muttonbird, sooty shearwater  
*toheroa* *Paphies ventricosa* – a large edible bivalve shellfish, now rare and protected  
*tohi* baptism  
*tohorā* whale  
*tohunga* expert  
*tōtara* *Podocarpus totara* and other species – tall forest tree  
*tuatara* *Sphenodon* spp – a reptile unique to New Zealand  
*tuatua* *Paphies subtriangulata* – edible bivalve similar to toheroa but smaller  
*tūi* *Prothemadera novaeseelandiae* – a native bird  
*tuku* to let go, release, give up  
*tukutuku* woven lattice-work panels  
*Tū-mata-uenga* god of war; atua representing the martial realm  
*tuna* generic name for eels of various species  
*tupuna, tipuna* ancestor, forebear  
*tutu* *Coriaria arborea* and *C sarmentosa* – native shrub with purple-black fruit  
*uri* descendant  
  
*wāhanga* section, division  
*wāhi tapu* sacred place  
*wāhi whakahirahira* place of great significance and importance  
*waiata* song  
*wairākau* leaf medicine, herbal remedy  
*wairua* spirit, soul  
*waka* canoe  
*waka kōiwi* burial chest  
*waka taua* war canoe  
*wānanga* tertiary institution; traditional school of higher learning  
*wehi* dread, fear, awe  
*whaikōrero* traditional oratory on the marae; formal speech-making  
*whakairo* carving, carved object; to ornament with a pattern  
*whakamā* embarrassment, shyness, shame  
*whakamana* to give authority to, enable, empower, authorise, legitimise  
*whakapapa* genealogy, ancestral connections, lineage  
*whakataukī* proverb, saying  
*whānau* family, extended family

GLOSSARY

*whanaungatanga* ethic of connectedness by blood; relationships, kinship; the web of relationships that embraces living and dead, present and past, human beings and the natural environment

*whare* house, building

*whare oranga* healing centre

*whare pora* weaving school

*whare taonga* treasure house, tribal museum

*whare whakairo* carved house

*wharenui* meeting house

*whare tupuna* ancestral house, meeting house

*whare whakairo* carved house

*whenua* land, placenta

*whītau* flax fibre

**SCIENTIFIC AND TECHNICAL TERMS**

*commensal* an association between two organisms in which one gains and the other derives neither benefit nor harm, for example between Polynesian settlers and the dogs and rats that accompanied them

*DNA* deoxyribonucleic acid, a self-replicating material which is present in nearly all living organisms as the main constituent of chromosomes, the carrier of genetic information

*ex situ* refers to genetic and biological resources located outside their natural habitat

*expression of vertebrate toxin genes* manipulation of genetic material to produce an organism with a much higher level of toxicity to vertebrates than occurs naturally in the organism

*extremophiles* micro-organisms that live in environments with extreme temperature, acidity, alkalinity, salinity, pressure, or chemical or toxin concentration

*fumerole* an opening in or near a volcano which emits hot gas

*Haast's eagle* an extinct species of eagle that once lived in the South Island

*in situ* refers to genetic and biological resources within their natural habitat

*jus cogens* a peremptory norm (Latin for 'compelling law'); the fundamental principles which form the norms of international law that cannot be set aside by agreement or acquiescence

*ordre public* public policy, referring in particular to threats to social order in relation to moral principles

*organochlorines* any of a large group of synthetic organic compounds with chlorinated aromatic molecules; includes many harmful pesticides such as dioxin, DDT, and dieldrin, which are slow to break down and persist in the environment or the body

*pathogenic determinants* disease-causing bacteria, viruses, or other micro-organisms that are highly infectious

*pathogenic micro-organisms* microscopic disease-causing organisms, including bacteria, viruses, and fungi

*phylogeny* the evolutionary development of a species or group of organisms

*recombinant DNA* DNA molecules that have been created by combining DNA from more than one source

*RNA* ribonucleic acid, present in all living cells, its principal role being to act as a messenger carrying instructions from DNA for controlling the synthesis of proteins

*sui generis* stand alone, unique, or particular to itself

*totipotent* cells capable of developing into a complete organism

*transgenic* the transfer of genes from one organism to another, including across species boundaries

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