

1. THE FOUNDATIONS OF THE WAI 262 CLAIM

1.1 Research Scope

The research commission requires that this report should focus upon the following matters:

- ▶ the nature and extent of Treaty rights held by Iwi and Hapu in:
- ▶ indigenous flora, fauna, timbers and other species and the knowledge relating thereto;
- ▶ moveable cultural heritage objects; and
- ▶ physical taonga, valued traditional knowledge, other than that set out in sub-paragraph (i) above and including but not limited to knowledge of and relating to whakairo, and other symbols and images.
- ▶ the past, present and proposed policies and practices, and past and present acts and omissions of the Crown and its agents such as the former Department of Scientific and Industrial Research which are relevant to those matters granted urgency by the Waitangi Tribunal in a memorandum dated 11 October 1995 and a copy of which is annexed hereto;
- ▶ the extent to which such policies, practices, acts and omissions were and are in breach of the Crown's Treaty obligations to protect Maori Treaty rights if such Treaty rights are proven.

The extensive nature of this inquiry and the broad focus specified in the commission necessitates a selective approach to the questions which are then posed as requiring research:

- ▶ What evidence is there that traditionally Maori exercised rangatiratanga/kaitiakitanga/full ownership rights over each of the categories set out in paragraph 2(a) above?
- ▶ Did Maori traditionally hold and exercise rights as kaitiaki over indigenous flora, fauna, timbers and other species?
- ▶ Did Maori have rights to control, and access rights of, the conservation, utilisation, ownership, management, propagation, sale and dispersal of indigenous flora, fauna, timbers and other species?
- ▶ What uses and practices did Maori have for indigenous flora, fauna, timbers and other species, physical taonga, valued traditional knowledge, and cultural heritage objects?

- ▶ What evidence is there that Maori had rights to protect, enhance and transmit cultural, medicinal and spiritual knowledge of and about their indigenous flora, fauna, timbers and other species, physical taonga, valued traditional knowledge, and/or cultural heritage objects?
- ▶ Is there historical evidence that Maori developed their uses of indigenous flora, fauna, timbers and other species, as technological developments were made from time to time, and if so, how? If not, what evidence is there as to why not. For example, is there evidence that Maori traditionally used the genetic resources of indigenous flora, fauna, timbers and other species?
- ▶ Is there contemporary evidence that Maori have developed and/or sought to develop or are developing their uses of indigenous flora, fauna, timbers and other species as technological developments have been made from time to time?
- ▶ What traditionally did Maori regard as the cultural, spiritual and economic significance of: i) indigenous flora, fauna, timbers and other species; ii) cultural heritage objects; and iii) physical taonga, and valued traditional knowledge?
- ▶ What systems did Maori traditionally have to determine what knowledge was valued knowledge, how was such valued knowledge protected, conserved, managed, utilised, transmitted to whom was such knowledge transmitted, and for whose benefit was such knowledge used?
- ▶ Which Maori groups (ie: whanau/hapu/iwi) in traditional Maori society had the rights described above?

Based on the answers to the above:

- ▶ to what extent do modern Maori societies continue to uphold the cultural, spiritual and economic significance of indigenous flora, fauna, timbers and other species, physical taonga, valued traditional knowledge and cultural heritage objects; and
- ▶ what impact have the policies, practices, acts and omissions of the Crown and its agents had on the ability of Maori to exercise the rights (if proven on the evidence) set out above, in relation to their indigenous flora, fauna, timbers and other species and their physical taonga, valued traditional knowledge and cultural heritage objects?

1.2 Current Relevant Laws

The present laws and policies relevant to the creation of reserves for the protection of flora and fauna, to the protection of plant and animal species, and to the management of indigenous species by various governmental and non-governmental bodies are set out in chapters 1 and 2 of the report for the Waitangi Tribunal by P Dengate Thrush¹. A brief analysis of current intellectual property laws and legislative reform proposals is contained in chapter 3 of that report. The focus of this report therefore is a commentary on what evidence is presently available as to traditional Maori exercising of rangatiratanga and kaitiakitanga rights in relation to taonga mentioned in this claim, on how that evidence may be confirmed by living experts and on how the past and present policies of the Crown appear to be inconsistent with Treaty of Waitangi obligations.

1.3 The kaupapa of the claim

The starting point for this report and its associated documentation must be an acknowledgment of the kaupapa laid down in the first two paragraphs of the Statement of Claim:

1. THAT the Declaration of Independence and the Treaty of Waitangi clearly reaffirm that the authority of te tino rangatiratanga o te iwi Maori is unable to be subordinated to any other sovereign power, and that any actions, inactions and policies of the Crown which seek to so subordinate it are in breach of the Treaty of Waitangi
2. THAT te tino rangatiratanga o te Iwi is the absolute sovereign authority residing within and exercised by te Iwi Maori o Aotearoa prior to the arrival of colonial government in this land, that it is an authority defined in the Declaration of Independence in 1835, and reaffirmed in the Treaty of Waitangi.

Whilst the kawanatanga power vested in the Crown has its linguistic origins in Biblical Maori written prior to 1840, the actual exercise of any power or authority in Aotearoa (New Zealand) by British officials did not commence prior to 1840. The rangatiratanga of hapu, on the other hand, pre-dated 1840 by many centuries and had been reaffirmed in the

1. Ibid

Wakaputanga o te Rangatiratanga o Nu Tireni – the 1835 Declaration of Independence – and then again in the Treaty of Waitangi in 1840.

The paramountcy of rangatiratanga as the basis for Treaty-based claims has been constantly invoked by iwi and hapu throughout colonial rule. In recent times it has been reaffirmed by national hui such as the Turangawaewae hui in September 1984 and the Hirangi hui in January 1995. The 1984 hui resolutions included the following:

TE MANA O TE TIRITI:

1. Ko te Tiriti o Waitangi he pukapuka e whakapuaki ana i te turanga o te Maori hei tangata whenua mo Aotearoa.
2. Ko te Tiriti o Waitangi hei kaupapa muru i nga nawe e pa ana ki nga whenua, ki nga wai, ki nga taunga-ika a ki nga tikanga a te iwi Maori.
3. E whakaae ana tenei hui ko to tatou mana tangata, mana wairua, mana whenua kei runga ake i te mana o te Tiriti o Waitangi no te mea ko te Tiriti o Waitangi he taura kau no te mana Maori Motuhake.²

The text in English read:

STATUS OF THE TREATY OF WAITANGI

1. The Treaty of Waitangi is a document which articulates the status of Maori as tangata whenua of Aotearoa.
2. The Treaty of Waitangi shall be the basis for claims in respect to the land, forests, water, fisheries and human rights of Maori people.
3. the Treaty of Waitangi is a symbol which reflects Te Mana Maori Motuhake. We declare that our Mana Tangata, Mana Wairua, Mana Whenua, supersedes the Treaty of Waitangi.

The 1995 hui resolutions commenced with this reaffirmation:

- (1) The following be reaffirmed as basis for tino rangatiratanga:
 - (a) The Treaty of Waitangi is the constitution of New Zealand
 - (b) From 1840 the right of the Crown to exercise kawanatanga depended on not breaching tino rangatiratanga reserved perpetually to Maori
 - (c) The right of the government to exercise kawanatanga is lost if tino rangatiratanga is not provided for
 - (d) Any change to tino rangatiratanga or kawanatanga as provided for by the Treaty requires the prior consent of all iwi.³

2. A Blank, M Henare, and H Williams (eds), *He Korero Mo Waitangi 1984*, Ngaruwahia, 1985, pp 2–3

3. M H Durie and S Asher (eds), *The Hirangi Hui: A Report Concerning the Government's Proposals for the Settlement of Treaty of Waitangi Claims and Related Constitutional Matters*, Turangi, 1995, para 9.32

Consistent with this basic kaupapa, the Wai 262 claim does not rely on principles of the Treaty which have been developed since 1987 by superior courts and the Waitangi Tribunal. Nor does it rely upon British imperial law notions of Aboriginal title to support the exercise of tribal customary rights. Rather, the claim is based firmly upon the rights of te iwi Maori as tangata whenua – the indigenous people of these islands. In the literature reviewed by this report there is reference to examples of co-management regimes which are a feature of relationships between indigenous peoples and the national government in Australia, Canada and elsewhere. Such co-management regimes may be relevant to outcomes based on the Treaty principle of partnership and they have been noted for that reason. However, the emphasis of the report, guided by the kaupapa of the claim, is on evidence which will support the right of indigenous peoples to self-determination and autonomous development. This is in line with general developments of international law on the rights of indigenous peoples in relation to intellectual property issues in documents such as the Mataatua Declaration of Cultural and Intellectual property Rights, Whakatane, 1993 and the ‘symbolic’ Treaty for a Lifeforms Patent-Free Pacific and related protocols on biological prospecting and human genetic research in the Pacific, Fiji, 1994⁴.

1.4 Assumptions and Presumptions

In considering this claim, the Tribunal should be concerned to ensure there is no repetition of the unfortunate saga resulting from the Government’s decision to legislate in 1986 to create individual transferable quota property rights in fisheries. Prior to 1986, clear evidence of Maori traditional practices and Treaty rights was presented to Tribunal hearings on Waitara (North Taranaki) and Manuka (Manukau Harbour) fisheries during hearings between 1982 and 1984. The *Motunui–Waitara Report 1983* and the *Manukau Report 1985* vindicated Maori claims to fishing rights and yet the Government proceeded with its unilateral imposition of ITQ rights to commercial fisheries in the Fisheries Amendment Act 1986.⁵

This ill-advised model of legislating in defiance of Treaty of Waitangi based claims, and then attending to Treaty claims only when forced to do so by court orders or Tribunal recommendations, ought not to be re-

4. A T P Mead, ‘Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific’, paper presented to Inaugural Indigenous Peoples of the Pacific Workshop on the United Nations Draft Declaration on the Rights of the Indigenous Peoples, Suva, 2–6 September 1996

5. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1983, Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, Wellington, Government Printer, 1985

peated in the area of intellectual property law reform. The urgent hearing for which this report is being prepared provides an opportunity for claimants and the Crown to arrive at a more satisfactory dispute settlement process. The Ministry of Commerce in 1994 produced a *Maori Consultation Paper*⁶. The resulting hui indicated widespread distrust of the Government's proposals themselves as well as the consultation mechanisms being employed⁷. The Government sensibly decided not to proceed further with intellectual property law reform in the meantime. It is now possible therefore to consider the full implications of the Wai 262 claim without the immediate threat of legislation being passed which is arguably inconsistent with the Treaty rights of iwi and hapu.

The basic foundation of the claim in te tino rangatiratanga o te iwi Maori requires a reassessment of the usual assumption by Crown representatives and officials that English law rules, doctrines and presumptions will always apply unless Maori can prove customary associations and entitlements. In the history of the law of real property (land law) the position has been assumed by the Crown that Maori customary land was Crown land subject, however, to native Aboriginal title unless and until that title was lawfully extinguished by the Crown. This left Maori with the burden of proving their title by providing evidence to the Aborigines Protectorate, Native Land Purchase Officers, the Native Land Court, Maori Land Boards, etc, of their customary associations with particular blocks of land. From a tino rangatiratanga perspective, however, the radical title to land and to all taonga lies with the hapu of te iwi Maori and the burden of proof should properly be on the Crown to establish its rights (and the rights of companies and citizens relying on state law) by proof of proper extinguishment of native title if it is asserted that that has occurred. As Chief Judge Durie wrote in a paper delivered to an Australian audience:

Were one to adopt the Maori perspective, one would find it difficult to understand why it is that under the Australian Native Title Act 1993, and the various state enactments, Australian Aboriginals must establish their right to land on evidence of past and continuing customary associations, and why it is that the Crown does not have a larger burden of establishing its right, without reliance on legal presumptions still clanking in medieval chambers, or without recourse to legal fictions. Maori claimants have contended that if anyone is to have the benefit of an assumption in this case, it ought to be them.⁸

6. Ministry of Commerce, *Intellectual Property Law Reform Bill: Maori Consultation Paper*, Wellington, Business Policy Division, Ministry of Commerce, 1994

7. '[Ministry of Commerce] Intellectual Property Law Reform [Maori Consultation] Hui: Oral Submissions [and Hui Resolutions]; letter to Mark Steele (Ministry of Commerce) from Haami Piripi (Te Puni Kokiri), 6 January 1995

8. E T Durie, 'Native Title Re-established', International Bar Association, 25th Biennial Conference, Melbourne, 13 October 1994, p 17

Likewise, with respect to matauranga Maori concerning indigenous flora and fauna, cultural property and related taonga, it is arguable that there is a fatal flaw in the underlying assumptions made by P Dengate Thrush in his report commissioned by the Waitangi Tribunal. When discussing patentability, he states:

It will be appreciated that, because of the requirements of novelty and the 'found in nature' exceptions, it is not possible for anyone to patent any of the species referred to in the [Wai 262] claim.⁹

No reasoned argument is put forward to substantiate this conclusion. It is just 'obvious' or 'common sense', one gathers, that English law derived assumptions must apply. In Treaty jurisprudence no such presumption ought to be permitted. There are a number of Tribunal reports – eg, *Muriwhenua Fishing, Ngai Tahu Sea Fisheries, Mohaka River, Ngawha Geothermal Resource, Te Whanganui-a-Orotu* – in which it is stated that the Crown is not entitled to rely upon common law presumptions which may be inconsistent with Treaty principles.¹⁰ It would seem therefore that the 'public domain' notion cited by Dengate Thrush may not be sufficient to dismiss the validity of claims based on te tino rangatiratanga. On the contrary, in the face of a Treaty-based assertion that matauranga Maori in respect of flora, fauna and cultural property is a taonga then counsel appearing before the Tribunal will need to argue whether the burden of proof should pass to the Crown to prove that the 'radical title' to the intellectual property rights of te iwi Maori have been explicitly and lawfully extinguished. Implicit expropriation of hapu or iwi rights by English law or European international law notions such as 'public domain' and the 'common heritage of humankind' may not suffice to displace the explicit Treaty rights.

A similar line of argument has been advanced by A Te P Mead in her contribution to a Workshop of Indigenous Peoples of the Pacific, Suva, 1996. She criticises conventional understandings of intellectual property rights in these words:

But there is a *terra nullius* perspective implicit in the intellectual property requirement to demonstrate *human intervention* or innovation (value-added) in that intellectual property rights laws do not acknowledge existent customary indigenous knowledge or indigenous ownership. Nor do they agree that indigenous knowledge and processes

9. P Dengate Thrush, *Indigenous Flora and Fauna of New Zealand*, Waitangi Tribunal Research Series, 1995, no 1, p 53

10. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988; Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992; Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992; Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993; Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker's Ltd, 1995

are scientific and technological. Nor do they accommodate a connection between indigenous peoples and their lands and heritage. In short, they do not regard existent indigenous knowledge as being an intellectual property and deserving of protection, rather they consider such knowledge as 'common' and define *human intervention* based on what non-indigenous peoples 'add' to what has existed for generations.¹¹

Her explanation of 'a *terra nullius* perspective' is that she has co-opted the term to describe the mindset of colonisers and their descendants who refuse to acknowledge the existence of indigenous inhabitants.

With respect to Maori land rights, 'a *terra nullius* perspective' was assumed by the Colonial Secretary, Earl Grey, and the 1844 Parliamentary Select Committee during the first years of New Zealand's colonisation. They asserted that rights to land depended upon the use of human labour upon the soil so that most areas of the country were taken to be 'waste land'. These should be deemed to be demesne lands of the Crown which could be made available to settlers without reference to Maori.¹² That doctrine did not last long. Maori customary associational rights to **all** lands were recognised, albeit circumscribed by Crown assertions of a monopoly 'pre-emption' right to control colonisation and land dealings with Maori.¹³

In 1986 the Government and Parliament assumed a monopoly right to create new property rights to fisheries based on common law and international law doctrines which paid no regard to Treaty rights and which bestowed quota rights only on those who could prove substantial 'use-rights' in the form of a record of commercial fishing immediately prior to the 1986 legislation. The Waitangi Tribunal in its *Muriwhenua Fishing and Ngai Tahu Sea Fisheries* reports vindicated the prior Treaty rights of Maori to fisheries.¹⁴

Now in relation to indigenous flora, fauna, timbers, other species, moveable cultural heritage objects, and valued traditional knowledge the same sort of question arises as to the Treaty rights of Maori.

The assumption of this report is that if questions are framed from an assumption:

- (a) that the Crown and Parliament have a monopoly right to legislate; and
- (b) that Maori only have rights in respect of matters upon which they can prove they have exercised some precise 'use-rights' which in-

11. A T P Mead, 'Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific', paper presented to Inaugural Indigenous Peoples of the Pacific Workshop on the United Nations Draft Declaration on the Rights of the Indigenous Peoples, Suva, 2–6 September 1996

12. P Adams, *Fatal Necessity*, Auckland, 1977, Ch 6

13. *The Queen v Symonds* (1847), New Zealand Privy Council Cases, Wellington, 1938, pp 387–398

14. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988; and Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992

volve 'novel, non-obvious and useful' variations of indigenous flora, fauna, etc, then the Government and its advisers are in danger of again embarking on policies which may be impeached as Treaty breaches.

International trade agreements and other international law obligations based on trade liberalisation and universalisation of intellectual property law regimes must be measured against other developing principles of international law on the rights of indigenous peoples to self determination and to the protection of their traditional values, as well as being measured against the tino rangatiratanga guarantees which are of the essence in the Treaty of Waitangi. An appropriate question for the Tribunal, in the light of the documentation available to me, is whether minimal consultation with some Maori at a few hui or as minority members of advisory committees taking place **after** the executive branch of Government has entered into international law obligations, is consistent with a constitutional framework based on the Treaty of Waitangi.

The Tribunal may also wish to take on board the point made recently by the Clerk of Parliament. A press report of his remarks read as follows:

The Clerk of Parliament, Mr David McGee, says a significant proportion of law-making in New Zealand – relating to international agreements – is undemocratic.

He says that the executive, the cabinet, is empowered to enter into international agreements without reference to Parliament. When it is referred back to Parliament for its blessing, it is a fait accompli.

'I think that is not unsatisfactory, it is insupportable and anti-democratic', Mr McGee said in Wellington at the Australasian Study of Parliament Group.

If a law is to have effect in New Zealand, Parliament should be consulted before such agreements are reached, not after.

Mr McGee hoped some sort of legislation along those lines would ensue.

If that procedure was adopted, the Parliament could hold hearings on the proposed international obligation and involve the public in consideration of whether New Zealand should enter into it.

'One problem with treaties overseas is the rarefield atmosphere in which they are negotiated and endorsed – conferences of ministers,

conferences of diplomats, conferences of senior officials seem to be held at the most exotic venues around the world', Mr McGee said.

'Hardly the stuff of the involvement of the ordinary person who expects to be involved in legislation presented by Parliament by coming along and making submissions to a select committee.

'I suggest that the ordinary person should be involved before the Government assumes the international obligation.'¹⁵

In the case of iwi and hapu who are entitled to rely upon the Treaty of Waitangi, the argument against the executive Government continuing to operate as if it is entitled to enter into binding international law obligations on a unilateral basis is even more compelling. The Wai 262 claim invites the Tribunal to advise the Crown on the appropriate constitutional priority of respect for matauranga Maori concerning indigenous flora and fauna of lands, fisheries, forests, and all ecosystems and of respect for moveable cultural heritage objects and physical taonga.

This report is charged with the task of indicating to the Tribunal where the evidential basis for the assertions contained in the Statement of Claim may be found. However, it is important to define clearly the manner in which it seeks to respond to the questions posed in the Tribunal commission. It does not provide evidence of traditional use-rights in order to 'prove' that there are or were customary rights which are the equivalent of 'ownership' rights. Nor does it purport to provide a full and comprehensive account of the manner in which hapu of te iwi Maori exercised their rangatiratanga by their kaitiakitanga of each of the categories set out in paragraph 1 of the commission. Rather, it refers to a number of written accounts on the central importance for Maori of whakapapa – which is a great deal more than merely human genealogical tables of descent, as whakapapa connects people to all the realms and manifestations of life-forces. It mentions accounts of the kaitiakitanga relationship of hapu with the entire spectrum of beings and entities which 'western' thinking might divide into the natural and supernatural. It notes the fact that the oral culture of Maori is replete with whakapapa understandings of the holistic interconnectedness of humanity within the ecosystems of Papatuanuku and it points out the absence in matauranga Maori of anthropocentric claims to 'full ownership' over flora, fauna, etc. It outlines some recent examples of Maori continuing to assert rights to kaitiakitanga and customary use of indigenous flora and fauna. The evi-

15. *New Zealand Herald*, 29 October 1996; see also Ministry of Justice, 'Briefing Paper for the Minister of Justice', October 1996, p 51

dence contained in and attached to this report seeks to provide the prima facie case that the assertions of the Wai 262 Statement of Claim are well-founded.

I would presume that it is then the responsibility of the Crown – without reliance on merely implicit assumptions of New Zealand law or on common law presumptions – to provide the Tribunal with evidence as to how, if at all, the relationships of the tangata whenua with the indigenous flora and fauna have been subsumed lawfully and consistently with the Treaty so as to support claims to ‘full ownership’ of such resources now being vested in the Department of Conservation, Crown Research Institutes, patent/copyright/trade mark holders, etc. Likewise, it is up to the Crown to show how, if at all, it is proper to claim that whare whakairo, waka tupapaku, koiwi, mokaikai, etc, are now rightfully in the ‘full ownership’ of a museum in New Zealand or overseas. It is up to the Crown to show why, if at all, knowledge about rongoa Maori ought to be made available to pharmaceutical companies to develop medicinal products without any regard for the karakia and other traditional practices associated with gathering such material. It is up to the Crown to show that indigenous organisms or native species might be genetically modified or manipulated and bio-prospecting carried out without undermining the Crown’s duty of active protection for Maori relationships with all taonga.

I am aware that these assumptions may need to be tested by legal arguments put to the Tribunal. That will be the task of counsel and such arguments are not advanced any further in this report.

