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Ko Aotearoa Tenei: Law and Policy Affecting Maori Culture and Identity

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Abstract: In July 2011 what is commonly known as the Wai 262 Report was released. After a protracted series of hearings, dating back to 1997, the New Zealand Waitangi Tribunal has at last reported on the some of the wide range of issues canvassed in those hearings. Three beautifully illustrated volumes contain a large number of recommendations in what is described as a whole-of-government report. This article notes earlier comments on Wai 262 in this journal and reframes what is often known as the 'Maori renaissance' from which this claim emerged in 1991. The Tribunal decided not to discuss historical aspects of the evidence presented, except for the Tohunga Suppression Act 1907, as this was not 'an orthodox territorial claim' allowing the Crown to negotiate with iwi for a Treaty Settlement. Of great significance for this readership, the Tribunal staunchly refused to entertain any discussion of 'ownership' claims to Maori cultural property. Rather, the Tribunal focussed on 'perfecting the Treaty partnership' between the two founding peoples of Aotearoa New Zealand. Its report is concerned with the future and with the Treaty of Waitangi when the nation has moved beyond the grievance mode that has dominated the last quarter century. The partnership principles are pragmatic and flexible. Very seldom indeed can Maori expect to regain full authority over their treasured properties and resources. The eight major topics of the chapters on intellectual property, genetic and biological resources, the environment, the conservation estate, the Maori language, Maori knowledge systems, Maori medicines and international instruments are briefly summarised. The author is critical of this Tribunal panel's timidity in refusing to make strong findings of Treaty breach as the basis for practical recommendations—the approach usually adopted in previous Tribunal reports on contemporary issues. The article then notes that the Wai 262 report featured significantly in 2012 hearings on Maori claims to proprietary rights in freshwater resources. It featured not to assist the freshwater claimants, however, but as a shield wielded by the Crown to try to deny Maori any remedy.

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The low bar of partnership consultations encouraged by the Wai 262 report was congenial for Crown counsel seeking to undermine Maori claims to customary rights akin to 'ownership' of water. The 2012 Tribunal panel, under a new Chief Judge, restrictively distinguished the Wai 262 report and found in favour of Maori rights to water. In conclusion, the article notes the irony of a government following neo-liberal policies in pursuing a privatisation strategy and yet relying on 'commons' rhetoric to deny Maori any enforceable rights to water; and of indigenous people arguing for ownership property rights to frustrate that government's policies.

MAORI AND CULTURAL PROPERTY CONCERNS

Readers of the *International Journal of Cultural Property* will be familiar with a number of cultural property concerns raised by the Maori indigenous peoples of Aotearoa-New Zealand in recent years. In the journal's first year of publication in 1992, there was a case note by O'Keefe on an unreported High Court of New Zealand case concerning a preserved Maori head (*mokomokai*) offered for sale at a London auction house. Sir Graham Latimer of the New Zealand Maori Council successfully sought letters of administration to assist in the recovery and return of the mokomokai for burial in New Zealand.[1] A 1996 paper by Paterson included comments (i) on the return of a carved meeting house known as Mataatua from the Otago Museum to the Ngati Awa tribe (this return was agreed to 70 years after it had been "loaned" to the New Zealand Government for overseas exhibitions); and (ii) on litigation in England seeking possession of an antique Maori carving illegally smuggled out of New Zealand.[2] Another Paterson paper in 1999 included more detailed comment on the return of the Mataatua meeting house and also contained discussion of two Waitangi Tribunal reports. One recommended the government should actively protect and promote the use of the Maori language. Another found the government in breach of its obligations for allowing burial chests to be taken from Maori sacred sites in 1902 and handed over to a museum where they remain.[3] This article's title introduced readers to the important Maori concept of *taonga*. This term is to be found in the original Maori language text of the Treaty of Waitangi agreed to between Maori and the British Crown in 1840. The crucial Article 2 guaranteed to the Maori continuing full authority over *taonga*. The word is generally translated as "treasures," but it is accepted that it covers "all dimensions of a tribal group's estate, material and non-material" and that it includes heirlooms, sacred sites, ancestral lore, genealogy and language.[4]

Self-evidently, the boundaries of other law systems between tangible and intangible property, and the lines drawn in other cultural knowledge systems between physical and metaphysical notions, do not connect or correlate with Maori

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understandings of *taonga*. An excellent discussion of "the entangled agencies of *taonga*" by a Maori scholar, Baker, was published in 2008 on the ancestral significance of a land and water feature called Te Pahitaua.[5] A more wide-ranging review of Maori perspectives on *taonga* and Maori cultural knowledge systems was foreshadowed in a number of articles published in this journal's special issue in 2009 on "Pacific Discourses About Cultural Heritage and Its Protection." Several articles referred to a long-running inquiry of the Waitangi Tribunal known as the Wai 262 inquiry.[6] This claim was called the "Flora, Fauna and Intellectual Property" claim, though my reports for this inquiry prefer the broader term "matauranga Maori" (Maori cultural knowledge). One of the 2009 articles, that by Recht, described the claim as intended "to establish a broad basis of protection for indigenous knowledge"; van Meijl wrote of the "(mis-)appropriation of Maori cultural heritage" and of concerns about "political strategies to demarcate ethnic boundaries between Maori and non-Maori"; Goldsmith observed that "as soon as a property claim destabilized the nature/culture boundary, the possibility of using IPR discourse enters the fray." He concluded his piece with an insightful comment: "The question, then, is not just who owns nature or culture, in part or in whole, but who has the right to define which of these is which and how much of each is ownable." Busse's epilogue prefers Goldsmith's approach to that of van Meijl and places the discussion in the context of "hegemony of property and possibilities of resisting that hegemony."[7]

Ko Aotearoa Tenei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity (hereinafter the *Wai 262 Report*) has now been published, and a review of this report is a major focus of this article. It is a matter of considerable regret, in my view, that Goldsmith's important question about what is "ownable" still remained unanswered in that report. As to "who has the right to define," there was a clear answer. The New Zealand government retains all major levers of power and control in defining law and policy affecting Maori culture and identity. This right to govern is subject to an overarching, but variable, "principle of partnership" obligation to build relationships with Maori and to balance Maori interests with those of others. I turn to the details of the *Wai 262 Report* shortly and then I will discuss the Waitangi Tribunal's *Stage 1 Report on the National Freshwater and Geothermal Claim*. The latter report was issued in interim form in August 2012 prior to a government-imposed deadline on decisions about the partial privatization of a state-owned enterprise whose major assets comprise hydroelectricity generation operations on dammed rivers. The report was formally published in December. It offers some intriguing insights into claims about water resources that go a considerable way in responding to the inquiry about whether a cultural and natural resource such as flowing water in a river is "ownable." It also raises some intriguing questions about the use by indigenous Maori of customary property right notions to resist neoliberal policies and state hegemony. I will preface my remarks on these two reports with some background information.

THE MAORI *RENAISSANCE*

It is a trite observation to assert that from the 1970s there has been a Maori cultural and political "renaissance" in the country that many of us now prefer to call Aotearoa, or Aotearoa-New Zealand, rather than just New Zealand. Trite it may be, but the perspective is misleading. It is not so much that there was a rebirth of Maori culture in that decade, but rather that Maori political movements finally broke free from the smothering blanket of the succession of assimilationist policies that governments had imposed since the outset of colonial rule. Those government policies were variously labeled in different era as amalgamation, assimilation, adaptation, and integration. What they all had in common was an assumption, clearly articulated in the Hunn Report 1960 that pressure had to be applied to Maori in order to force them to become "modern." The government "should not permit Maori the freedom to choose the pace and direction of their own future. Pakeha did not wish to coexist with a backward people. Maori must progress—all Maori must progress—according to the norms of the integration philosophy. The only choice to be left to Maori was not a choice to be made in a collective way by hapu or whanau. Individuals could choose whether they wished to be fully assimilated and detribalised or whether they desired to retain some vestiges of Maori culture."[8] In the 1970s many Maori made it clear that there were other alternatives, other choices, and that Maori had the right to self-determine their own destiny.

Despite the government policies of the past and a sharp population decline in the nineteenth century, Maori had not succumbed to the "dying couch of the race," which a Wellington province superintendent in 1866 thought colonists should provide so that the "annihilation" of the race was "as easy and as comfortable to them as possible."[9] Rather, though a marginalized people with whom most colonists after the 1870s had little contact, Maori continued to maintain their traditional cultural practices. Theirs was not a static society, however, and Maori evolved their cultural knowledge systems in response to many new influences. They maintained their language, too, in rural locations. However the surge of post-World War II urban migration into Pakeha dominated cities saw a drastic decline in the use of Maori language and of language acquisition by children.

Thus it is not surprising, and is highly pertinent to the Wai 262 claim, that the Maori Language Petition 1972 was the first of the seminal moments when Maori protests at last made a significant impact on the wider community. It was followed by the Maori Land March, that covered the full length of the North Island to present a "Memorial of Right" to Parliament in 1975, and then protest land occupations at Bastion Point (Takaparawhau) and the Raglan golf course (Whaingaroa) in 1977 and 1978. Confrontations, led by younger Maori known as Nga Tamatoa at annual state celebrations for the Treaty of Waitangi, were framed by chants of "the treaty is a fraud" throughout the 1970s. That chant reflected the views of radicalized Maori. Despite the honorable intentions of their ancestors in agreeing to the treaty of Waitangi, the 130 years of colonial government since then tended to confirm the view of

colonists that the treaty had never been intended to be more than "a praiseworthy device for amusing and pacifying savages for the moment."[10]

The blissful ignorance of most Pakeha prior to 1972 about anything Maori was oddly aligned with a complacent confidence that, at a time of civil rights campaigns and decolonization struggles elsewhere, New Zealand enjoyed the "best race relations in the world." By the 1980s, that complacency was well and truly gone. All branches of government—executive, legislative, and judicial—scrambled to provide redress mechanisms for historical Maori land and fisheries grievances, to "take account of" Maori values in decision-making, to make the Maori language an official language and to frame a whole range of official discourse within the parameters of "principles of the Treaty of Waitangi." These treaty principles were invented by judges interpreting a phrase in the State-owned Enterprises Act 1986—the statute that began New Zealand's rapid adoption (by a Labour Party government) of neoliberal policies and then the privatization of state assets.[11] The fracturing of the "we are all one people" mythology in the 1970s and 1980s was a forceful emergence into national debates of long-held and strongly held collective Maori world views (habitually overlooked or discounted by Pakeha in the past), rather than the rebirth of Maori world views, which the renaissance metaphor implies. The filing of the Wai 262 claim in 1991 was an important further step aimed at ensuring that never again would Maori world views be disregarded in governance of the polity of Aotearoa-New Zealand.

A LONG-AWAITED REPORT

The *Wai 262 Report* was released at a public ceremony on a marae at Ahipara (in the far north of the country) on 2 July 2011. It was a long time coming and the occasion was a day of intense emotions—especially laments for the dead. Only one of the original claimants (Saana [Haana] Murray) was alive to see the report and she passed away not long afterward. Many others involved in this project had also died without seeing the three beautiful volumes—*taonga* in their own right—that were published. Some of them were honored, as Maori like to honor the dead, with their portraits included in the published report: seven of the lead claimants, three of the tribunal members (including the first presiding officer), and four of the lawyers.[12]

The origins of the claim are usually traced to a Commonwealth Science Council on Ethnobotany organized by the Department of Scientific and Industrial Research at Christchurch in 1988. There were intense debates about the Department's decision to dispose of tubers derived from rare ancient stocks of plants first brought to these islands when Maori migrated here many centuries ago. In 1991, six Maori claimants from various tribes, assisted by lawyer Moana Jackson and scientists Oliver Sutherland and Murray Parsons, combined together to lodge a claim for recognition of the customary rights associated with the natural resources of indigenous flora and fauna and of all *taonga*. At the outset, seven iconic representative plant

and animal species were named (kumara, pohutukawa, koromiko, puwananga, pupu harakeke, tuatara, and keruru) and all indigenous forests.[13] The scope of the claim widened following an international conference held in New Zealand that proclaimed *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* (1993). Then the General Agreement on Tariffs and Trade (now World Trade Organization) Uruguay Round concluded in 1994 with a convention binding on member nation states by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Forthwith the New Zealand government prepared Bills on intellectual property rights to implement TRIPS by amending numerous acts, but without any form of prior consultation with Maori. As a result, in 1995 the Waitangi Tribunal agreed to an "urgent hearing" of the claim in 1995. After preparation of some commissioned reports, claimant witnesses began to give evidence at hearings in 1997. For reasons too numerous to mention, and relegated to an appendix in the report's narrative of the inquiry,[14] it was not until 2011 that the urgent hearing was completed with the publication of a comprehensive "whole of government" report from the tribunal to the government.

Although the claim was originally framed in terms of the seven iconic *taonga* mentioned above, the submissions of the claimants included wide-ranging challenges to the authority of the state to make decisions concerning *taonga* of importance to Maori. The concept of "tino rangatiratanga" (full authority and self-determination) in the Treaty of Waitangi was relied on to assert that in many instances all decision-making concerning *taonga* of importance to Maori should be made by Maori alone.

THE SCOPE OF THE REPORT

Under a 1985 amending act, the tribunal was granted a retrospective jurisdiction to inquire into and make recommendations on claims from 1840 to the present. In the period from 1991 to 2011, most of the tribunal's time, energy, and resources were devoted to inquiries and reports—district by district—on historical claims of Maori against the Crown. Historical claims have been or are due to be settled in the near future by settlements entered into by the governance entities of "large natural groupings" of tribes following negotiations with the government's Office of Treaty Settlements (within circumscribed parameters determined by that office). Despite the extensive amount of historical evidence adduced at many Wai 262 hearings, the tribunal noted that the claims "are not the orthodox territorial claims in which iwi negotiate with the Crown to reach full and final settlements."[15] The tribunal therefore chose to focus almost exclusively on contemporary aspects of the flora, fauna, and intellectual property claims and to craft a set of recommendations for future relationships between Maori and the Crown based on principles of the treaty, most especially the principle of partnership. It also refused to report on radical assertions in the Statements of Claim that sought a review of the nation's current constitutional arrangements and recognition of the Treaty of Wait-

angi in the foundation of the constitution: "The broader question of constitutional arrangements is for another forum at another time."[16]

As indicated earlier, the *Wai 262 Report* also deliberately eschewed discussion of "ownership" of any of the *taonga* that were the subject of the claim. As will be discussed further below, this came to be a highly controversial feature of the report during the 2012 freshwater and geothermal resources inquiry. Rather, the tribunal focussed on "kaitiakitanga"—a fundamental norm for Maori and for resource management law. This term is defined for state law purposes in the Resource Management Act 1990 (as amended in 1997): "'**Kaitiakitanga**' means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship." The tribunal's discussion of its key concepts describes "the values of kaitiakitanga" rather more broadly: "to act unselfishly, with right heart and mind, and with proper procedure. . . . [K]aitikitanga responsibility can be understood not only as a cultural principle but as a system of law. . . . In each chapter of this report, we refer to kaitiaki obligations and the taonga they relate to."[17]

The statement refusing to rely on ownership concepts is found in a chapter on the environment and reads:

> The final point to be made about the Treaty is that although the English text guarantees rights in the nature of ownership, the Maori text uses the language of control—tino rangatiratanga—not ownership. Equally, kaitiakitanga—the obligation side of rangatiratanga—does not require ownership. In reality, therefore, the kaitiakitanga debate is not about who owns the taonga, but who exercises control over it."[18]

PERFECTING THE PARTNERSHIP

Even with the omissions and exclusions noted, the report covers a huge range of issues and is rightly described by the tribunal as a "whole-of-government" report. Jones, a Maori legal scholar who formerly worked as a tribunal staff member and assisted in the report writing, comments in his lengthy published summary of the report that "for me, the most significant aspect of the report is that it articulates a vision of law and policy-making that is genuinely based on two founding cultures—what the tribunal refers to as 'perfecting the Treaty partnership.'"[19] The two founding cultures of the nation are described by the tribunal in its introduction as the cultures of "Kupe's People" and of "Cook's People." There are various oral tribal traditions about Kupe—an ancestral figure who some centuries ago led amazing long-distance voyages in a canoe named Matawhaorua to discover a new land, which came eventually to be known as Aotearoa. In the second story of discovery, it is the eighteenth-century English naval mariner James Cook who features as the key figure—though the name New Zealand derives from explorations by Dutch ships a century earlier. The meeting of the two founding cultures was formalized in the Treaty of Waitangi 1840.

Now, in the second decade of the twenty-first century, progress has been made in the settlement of historical grievances arising from many instances of treaty breaches that prejudiced Maori claimants. The tribunal asserts that:

> Nation building is nothing if not a constant work in progress and after a generation of hard work, New Zealand is beginning yet another transition. New Zealanders are unconsciously and organically building a new and unique national identity … [based on] the extraordinary natural beauty and wealth of these islands, and the partnership between our two founding cultures.

Rather than emphasize the great power of the State and the relative powerlessness of the indigenous peoples, in New Zealand

> we emphasise, through the partnership symbol, that our indigenous law is built on an original Treaty consensus between formal equals. . . . There are signs that [the partnership framework] is changing from the familiar late-twentieth century partnership based on the notion that the perpetrator's successor must pay the victim's successors for the original colonial sin, into a twenty-first century relationship of mutual advantage in which, through joint and agreed action, both sides end up better off than they were before they started. This is the Treaty of Waitangi beyond grievance.

With these bold and optimistic words, the tribunal asks of the government's ministers and Maoridom's leaders, who are the report's primary audience:

> Are we ready to begin work on this more normalised relationship? Are we ready yet to perfect the Treaty partnership? Stripped of all its baggage, that is the real challenge posed by the Wai 262 claim.[20]

After these introductory remarks, in each chapter of the report, the tribunal makes a number of specific findings and recommendations that are based on a template for the application of treaty principles to each topic covered. The approach is avowedly designed to bring about significant changes in the way the government and Crown agencies go about their decision-making. The report seeks to challenge the status quo under which, often, even usually, Maori are excluded from meaningful participation in crucial decision-making concerning their *taonga*. However, while urging the government to make many significant changes in laws and policies favorable to *kaitiaki*,[21] the tribunal refused to accord Maori full authority over *taonga*. This pragmatic approach accounts for the extreme disappointment felt by many who had participated over the years in promoting the Wai 262 claim.[22]

Key tribunal statements on treaty principles include these:

> Most speakers of Maori would render this phrase, tino rangatiratanga, in its Treaty context, as a right to autonomy or self-government. . . .
>
> It is no longer possible to deliver tino rangatiratanga as full authority in all cases in which taonga Maori are "in play," as it were. After 170 years during which Maori have been socially, culturally and economically swamped, it will no longer be possible to deliver tino rangatira-

> tanga in the sense of full authority over all taonga Maori. Yet it will still be possible to deliver full authority in *some* areas. . . .
>
> Even where full authority tino rangatiratanga is no longer practicable, lesser options may be. Shared decision-making in the form of partnerships may still be possible . . . Partnerships can themselves be seen as a form of tino rangatiratanga in some circumstances. And in the few cases where even shared decision-making is no longer possible, it must *always* be open to Maori to influence the decisions of others where those decisions affect their taonga. This might be done through, for example, formal consultation mechanisms.
>
> Just what tino rangatiratanga can or should entail will now depend on the particular circumstances of the case. As long as law and policy makers keep firmly in mind the crucial point that the tino rangatiratanga guarantee is a constitutional guarantee of the highest order, and not lightly to be put to one side, we accept that flexibility in approach is both a necessary and a good thing in today's circumstances.[23]

This pragmatic nuancing of treaty guarantees into three levels of protection—full decision-making power, partnership with the Crown, influence through consultations—provides for a descending level of input from Maori for decisions about their *taonga*. As it turns out, in the chapters that follow full decision-making by Maori is rarely recommended; various types of partnership proposals are common; and consultation arrangements are recommended frequently—albeit with strong admonitions not to habitually disregard Maori interests when purporting to take them into account.

EIGHT MAJOR TOPICS

There are eight substantive chapters in the *Wai 262 Report*. They are:

1. "Taonga Works and Intellectual Property"
2. "Genetic and Biological Resources of Taonga Species"
3. "Relationship with the Environment"
4. "Taonga and the Conservation Estate"
5. "Te Reo Maori"
6. "When the Crown Controls Matauranga Maori"
7. "Rongoa Maori"
8. "The Making of International Instruments"

Chapter 1 concerned intellectual property rights in respect, for example, of names, visual art forms, and performance pieces that are derived from Maori cultural knowledge systems. More protection should be given for taonga works directly drawn from matauranga Maori. A lesser level of protection, or no protection at all except for a ban on derogatory or offensive use of *taonga*, is recommended for taonga-derived works. Consultation might be required in some circumstances when

there is commercial exploitation of taonga works, but the primary partnership vehicle should be a new commission with decision-making powers to replace the trademarks advisory committee within the Intellectual Property Office. Chapter 2 concerned genetic and biological resources and issues of bioprospecting and genetic modification in relation to perhaps 80,000 known indigenous species. With the single exception of the tuatara—an iconic and highly endangered ancient reptile species—"we do not think kaitiaki have rights in the genetic and biological resources of taonga species that are akin to Western conception of ownership."[24] The partnership instruments in this case involved modest recommendations such as the appointment of two Maori to the Environmental Risk Management Authority and the creation of a Maori body to advise the Commissioner of Patents.

The tribunal was rather more emphatic in its recommendations in chapter 3 concerning resource management law and environmental policy. In particular, the tribunal noted the signal failure of the quite numerous provisions concerning Maori interests in the Resource Management Act 1991 to be effective. The Act, for example, has always provided for the development of "iwi management plans" and for delegation of certain powers to iwi authorities.[25] With the exception of particular mechanisms developed as part of a negotiated treaty settlements—for example, the Ngati Porou-Crown Deed of Agreement in respect of foreshore and seabed claims[26]—those provisions in the act largely have remained dead letters. The tribunal called on the Crown to deliver real partnership for all iwi under the Resource Management Act. The tribunal expressed a number of concerns in chapter 4 about the management of the conservation estate—about one-third of the land area of the country. There was some praise for the Department of Conservation's efforts to build relationships with iwi. Yet while the department was comfortable enough with consultation processes, the tribunal opined that it was extremely reluctant to enter into any power-sharing arrangements. Strong criticism was also directed at the government's unilateral mandating of policies in its *Crown-Maori Relationships Instruments: Guidelines and Advice for Government and State Sector Agencies* (2006). These guidelines were described as "narrow and skewed to the interests of the Executive."[27]

Many New Zealand readers of the *Wai 262 Report* will be surprised with the findings of fact in chapter 5 on the plight of Maori as a living language. It has been "common knowledge" that as a result of the "Maori renaissance" since the 1970s and various Maori and government initiatives since then, the drastic decline in numbers of people competent in and using the language had been arrested. In fact, however, after a strong revival until the 1990s, the future health and viability of the language is now a serious issue again. A dramatic "Timeline: The Revitalisation and Renewed Decline of Te Reo Maori, 1970–2010" focuses attention on these important and alarming facts—particularly in the declining proportion of young Maori receiving an education in the language.[28] For this reason, the inquiry's focus moved from its initial concern with the Crown's lack of support for local dialects—especially te reo o Ngati Porou (the language of one of the claimant groups)—to recommendations that the national language commission—Te

Taura Whiri—should be revitalized as a Crown-Maori partnership. As the report noted "there needs to be a mind-shift away from the pervasive assumption that the Crown is Pakeha, English-speaking and distinct from Maori." Aware of indigenous trappings now prevalent in events and ceremonials of national importance, including in sporting arenas, the tribunal's plea is this: "The Crown must lead by example: we cannot build our national identity on a superficial co-option of Maori culture."[29]

In chapter 6 on matauranga Maori, the tribunal considered the role of numerous Crown agencies and entities responsible for the protection, preservation, and transmission of Maori knowledge—including museums, archives, radio and television, education agencies, and major research funding bodies. Crown counsel had argued that responsibility for preserving and transmitting matauranga Maori ultimately lies with Maori themselves. Without downplaying that responsibility and acknowledging that the Crown's obligation to Maori must be constrained by limited funds, competing priorities and the wider public good, the tribunal in this chapter produced a comprehensive list of 10 partnership principles. It distinguished this set of high-level principles from "the principles of good behaviour" spelled out by the Court of Appeal in the SOE Lands case.[30] The tribunal's principles elaborated here are "principles for practical application in the context of modern government policies and programs. We suggest them as logical elements of a cooperative working partnership or genuine joint venture in the area of matauranga Maori."[31]

The chapter on traditional Maori medicine and healing—rongoa Maori—is the only instance in the report of an historical grievance being discussed. The Tohunga Suppression Act 1907, which imposed an effective ban on traditional Maori healing practices until its repeal in 1962, is scathingly criticized. The effective use of historical context in this chapter to illustrate the importance of contemporary issues before the tribunal could and should, in this reviewer's opinion, have been applied to the inquiry as a whole. Be that as it may, suppression was never completely achieved. Noting the importance of 'the philosophical importance of holism in Maori health," recommendations are made for recognition and support from the government enabling traditional healers to assist in addressing the current crisis in Maori health.[32] Given that the original reason for holding the Wai 262 hearings arose from the potential impact of an international instrument (TRIPS) on matauranga Maori and the importance of evidence given on soft and hard international law by the late Darrell Posey, the last chapter on international instruments is surprisingly slight. The tribunal discusses how the government consulted Maori in respect of four instruments: the United Nations Declaration on the Rights of Indigenous Peoples adopted in 2007 and eventually supported by New Zealand in 2010; the Convention on Biological Diversity (1992); TRIPS (1994); and the agreement to establish the Australia and New Zealand Therapeutic Products Authority (2003). The tribunal recommended to the Crown adoption of a Maori engagement strategy in respect both of binding and nonbinding inter-

national instruments, and the creation by Maori of an electoral college with which the Crown can work. Perhaps oddly, this chapter contains one of the most radical of the tribunal's applications of its "sliding scale" principles of partnership: "There may even be times when the Maori interest is so overwhelming, and other interests by comparison so narrow or limited, that the Crown should contemplate delegation of its role as New Zealand's 'one voice' in international affairs; negotiations over the repatriation of taonga might be an example."[33]

COMMENT AND CRITIQUE

The tribunal chairperson, Chief Judge Williams (now a high court judge), in his public comments about the *Wai 262 Report* was anxious to stress the report's future-oriented focus. It contained balanced partnership principles for the Treaty of Waitangi in the period we are now entering beyond historical grievance settlements. He thought the tribunal had been "ambitious but not unrealistic."[34] It is this reviewer's assessment that the tribunal was too intent on being pragmatic. It is certainly true that the long title to the act establishing the tribunal includes a requirement that it should make recommendations on claims relating to the "practical application of the Treaty." Over many years, when dealing with contemporary issues, the tribunal has been astute in making practical recommendations. Yet it has also been forthright, and at times distinctly radical, in the findings it has made about treaty breaches.

The 1983 report on the disposal of effluent from a proposed synthetic fuels plant at Motunui concluded with practical recommendations to dispose of effluent without despoiling the claimants' inshore fishing grounds. The report nevertheless jolted the then current orthodoxy on the treaty's "dubious status in international and municipal law." If there were doubts about the meaning of the treaty then "the rule of contra proferentem states that in the event of ambiguity a provision should be construed against the party which drafted or proposed that provision." Further, the guarantees of tino rangatiratanga in Article 2 "could be taken to mean 'the highest chieftainship' or indeed, 'the sovereignty of their lands.'"[35] Two major reports on Maori fishing rights in 1988 and 1992 concluded with practical recommendations encouraging negotiations between Crown and Maori that eventually led to a number of commercial outcomes for Maori now set out in the Maori Fisheries Act 2004. The tribunal's findings provided significant political leverage at the outset of those negotiations that proved extremely useful for the Maori negotiators. It found that over the years, numerous blatant and serious breaches have occurred of the treaty guarantee and the individual quota management system was in fundamental conflict with the treaty's principles and terms because it apportioned to non-Maori the full, exclusive, and undisturbed possession of the property in fishing that to Maori was guaranteed.[36] Crown policies in the past had made it impossible for iwi to continue their thriving and expanding busi-

ness and activity of sea fishing and had destroyed tribal rights of self-regulation or self-management of their fisheries resource.[37] Then again, in 2006 the tribunal made a clear distinction between its treaty findings and the options in its practical recommendations:

> It follows from chapter 2 of our report that a government whose intention was to give full expression to Māori rights under the Treaty in 2004 would recognise that where Māori did not give up ownership of the foreshore and seabed, they should now be confirmed as its owners. Pragmatically, however, we recognise that giving effect to te tino rangatiratanga is not currently on the political agenda. . . . We invite Ministers to consider whether, singly or in combination, any of the options set out below might achieve the essentials of what they want to achieve, and in a way that would be more compliant with the Treaty . . .[38]

In the case of the Motunui outfall and the Maori fishing rights saga, the tribunal's reports were pivotal in reversing policy directions previously decided upon by the government. The foreshore and seabed report's options were not adopted by the then government but played an important role in the reframed legislation—Marine and Coastal Area (Takutai Moana) Act 2011—passed by the successor government. My observation is that when the tribunal's findings clearly enunciate and stake out the high ground of treaty guarantees, then the government of the day may feel comfortable to find a negotiated middle ground to resolve a political impasse. In the *Wai 262 Report*, in my opinion, the report went directly to the middle ground by excluding historical context, by refusing to address constitutional issues and by rejecting claimant assertions about ownership of *taonga*. When the report was first released, it seemed evident to me that the Crown responses would first be to delay, and then to dilute or ratchet down the partnership proposals in any negotiations relevant to the tribunal's recommendations. In New Zealand politics, there is a built-in Pakeha majority, a short three-year electoral cycle, and only modest popular acceptance of concessions to Maori claims. Governments must necessarily be reluctant to be seen to concede too much to Maori—whatever the moral and legal merits of the Maori causes. This assessment proved to be entirely apposite to the government's handling of the most significant political issue of domestic politics in 2012.

PARTIAL PRIVATIZATION OF MIGHTY RIVER POWER

One of the key policy planks of the National Party in the 2011 general election was a pledge to revive the neoliberal trajectory of successive governments since the 1980s by the partial privatization of a number of state-owned enterprises. The policy was named the "mixed ownership model" and portended the sale of up to 49% of the shares in a number of economically strategic entities. The National Party was reelected in 2011 and quickly introduced the bill that became the Public Finance (Mixed Ownership Model) Amendment Act 2012. The first

enterprise to be put up for sale of 49% of shares was Mighty River Power. Much of the generating capacity of this enterprise depends on hydroelectricity plants on dammed rivers—especially the mighty Waikato River that lends the enterprise its name. Numerous Maori leaders and organizations expressed concern that to all intents and purposes, waters sacred to Maori were to be privatized. Mighty River Power had not ever paid anything to anyone for the right to use river water, but now it planned to return profits from water-powered generation not just to the government for the common good but to private shareholders. Were there any property rights that Maori had customarily exercised in relation to waters that might need to be taken into account before this government policy was implemented? This became the subject of an urgent hearing of the Waitangi Tribunal and then judicial review litigation leading to a decision of the Supreme Court in February 2013.

The government has staunchly denied any legally relevant connection between the property rights (if any) of Maori to waters and the sale of shares in a company that happens to use water in its operations. To refer back to quotations from the outset of this article, is the government's peremptory dismissal of Maori customary right claims another "(mis-)appropriation of Maori cultural heritage," another property claim that "destabilizes the nature/culture boundary"? The details of this legal and political contest cannot perforce be the focus of full attention in this article. What is of very great interest, however, is the manner in which the *Wai 262 Report* was used by Crown counsel at every step along the way in 2012 to oppose Maori proprietary claims to freshwater and geothermal resources. What also is doubtless of interest to readers is this paradox: Crown counsel sought the moral high ground by arguing for flowing water to be continued to be treated as a freely available commons-type of natural resource (at the same time as it pursued a neoliberal privatization program); while indigenous Maori used customary property rights arguments—seeking rights akin to "full-blown" ownership as understood in English law—in attempting to stymy state hegemony rolling over Maori property interests yet again.

THE USE OF WAI 262 AS A SHIELD TO PROTECT THE GOVERNMENT

Law students of a certain generation imbibed many of the revisionist approaches to the common law advanced by Lord Denning. One of his memorable phrases, concerning the doctrine of promissory estoppel in contract law, was that this doctrine was a shield not a sword. I would suggest that in 2012, when faced with the "swords" of arguments for customary property rights in waters that were skillfully developed for the New Zealand Maori Council by none other than Sir Edward Durie (the longest serving chairperson of the Waitangi Tribunal—now retired), Crown counsel were grateful to have to hand the *Wai 262 Report* as a sturdy "shield"

to defend the government's positions—albeit without any public response as yet from the government to that report's detailed recommendations. In essence, Crown counsel submitted that Maori claimants should be estopped from pursuing ownership claims to natural resource *taonga* because the *Wai 262 Report* had explicitly rejected that approach in favor of negotiated partnership principles based on *kaitiakitanga*. They informed the tribunal that the government was happy to continue ongoing discussions with certain prominent Maori in the Iwi Leaders Group on the Fresh Start for Fresh Water program. Anything more than that was not up for discussion let alone negotiations.

In February 2012, Crown counsel relied on the *Wai 262 Report* in the first instance to deny the need for an urgent inquiry. The tribunal rejected that argument and granted urgency in March. An urgent hearing was held—and this time with genuine urgency. Hearings were held in July and interim relief directions recommended at the end of that month. At all opportunities in prehearing judicial conferences, in filed submissions and in the examination of witnesses during the urgent hearing, the Crown relied heavily on the *Wai 262 Report* in attempting to refute ownership-type arguments advanced by most Maori claimants who participated in the inquiry.

The Crown's submissions did not convince the tribunal—now chaired by Justice Williams's successor, Chief Judge Wilson Isaac:

> In chapter 2 of this report, we found that Maori had rights and interests in their water bodies for which the closest English equivalent in 1840 was legal ownership. Those rights were confirmed, guaranteed, and protected by the Treaty of Waitangi, save to the extent that there was an expectation in the Treaty that the waters would be shared with incoming settlers. In agreement with the *Te Ika Whenua Rivers Report*, *The Whanganui River Report*, and *He Maunga Rongo*, we said that the nature and extent of the proprietary right was the exclusive right to control access to and use of the water while it was in their rohe. We also found that the Treaty conferred on both partners a right to develop their resources and properties to their mutual benefit. In agreement with the *Te Ika Whenua Rivers Report*, the *Whanganui River Report*, and *He Maunga Rongo*, we found that this included a development right in their properties, the water bodies of New Zealand.
>
> As discussed earlier in this chapter, the Crown's preferred option for recognising Maori rights and interests in water is the enhancement of the Maori role in water governance and management. In section 3.8.1, we found that the Crown's preferred option falls short of the Treaty guarantees in three ways:
>
> - it does not recognise or give effect to Maori residual proprietary rights where that is possible (or compensate for their loss where it is not);
> - it does not provide for the holders of those rights to obtain a commercial or economic benefit from their residual proprietary rights; and
> - it does not provide for the Treaty development rights of Maori in their water bodies.[39]

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Claimant counsel had submitted that the subject matter of Wai 262 was different or alternatively "that the Wai 262 Tribunal was simply wrong." Treading a fine line between outright rejection of the *Wai 262 Report* on the one hand or following the logic of that report to deny the water claimants any remedy at all on the other hand, the tribunal adopted the common law technique of restrictive distinguishing. It purported to agree with the previous reasoning, but found material differences of fact:

> In light of the Wai 262 Tribunal's analysis of issues across its whole report, we cannot accept the claimants' view that the Crown has misconceived the meaning of that report or the passages quoted from it. We accept the Crown's submission that the Wai 262 Tribunal rejected the concept of "ownership" as an appropriate vehicle for giving modern expression to the Treaty rights at issue in that inquiry. . . .
>
> The Tribunal took what it considered to be a practical approach and found that kaitiakitanga is the key Treaty right in all cases, no matter what the ownership status of the taonga. . . .
>
> We do not disagree with the findings and recommendations of the Wai 262 Tribunal.
>
> Rather, we consider them of vital importance to the future of this country and we urge the Crown to carry them out. No doubt, as Crown counsel foreshadowed, they will be the subject of further analysis and argument in stage two of our inquiry. But we also agree with the claimants that the subject matter of the Wai 262 inquiry is "highly distinguished" from our own. We are concerned with the specific issue of the exact nature and extent of customary and Treaty rights in water bodies, which was not the question before the Wai 262 Tribunal.[40]

It remains to be seen how the *Wai 262 Report* is viewed in the future. I do but note that the positive assessment of it in *Maori Law Review* by Jones (cited earlier) should now be compared with the assessment of the Freshwater Resources report by Ruru, another Maori legal academic. "I am going to make a bold sweeping statement," she wrote of the latter report. "[It] is the most legally significant Waitangi Tribunal report to date, ever. It grapples with the toughest issues at the heart of our legal system—ownership of property, commercial rights to benefit from that property and inherent rights to development."[41]

COMMONS

In the October 2012 issue of *Current Anthropology*, Wagner wrote on water and various notions of commons. He observed: "The term 'commons' has been appropriated over recent decades by individuals, corporations, and interest groups seeking to benefit from the positive emotional responses that the term seems to evoke." He went on to note that antiprivatization writers and activists routinely represent commons and commodification as diametrically opposed but that "social meanings of commodity relations are highly variable and not uniformly negative."[42] Certainly,

the usual distinctions between common property, public property, private property, open access systems, and public goods seem incapable of explaining the enthusiasm of New Zealand's conservative prime minister for open access to water when defending the government's plans to implement the mixed ownership model form of privatization of water-dependent state-owned energy generation enterprises. Not to be too blunt, the National Party has no prior record of fostering forms of common property, let alone communitarian property "of indigenous populations within the structure of a later-imposed property system" of the sort discussed by Harris.[43] Conversely, I suspect too that many antiprivatization activists will refrain from attacking "commodification" when based on the communal customary rights of indigenous peoples—talked up as ownership rights to water. If this species of commodification has the potential to hinder or even frustrate the hegemony of state power, then those opposing a government bent on implementing neoliberal dogma may well be quietly delighted.

It should be pointed out, however, that there were divergences in approach among the Maori claimants. Some of the lead claimants seem not ill-disposed to an allocation of shares to Maori authorities in the part-privatized companies as a commercial settlement to resolve matters. Many of the interested parties in support of the claim, however, preferred a Maori framework in which Maori concepts are not compared to common law thinking at all. "Maori rights and interests have spiritual as well as physical sources, and they embrace a reciprocal relationship with, and mutual obligations towards, the Maori environment as Maori understand it to be."[44] Commercial rights clearly could be included in this Maori epistemological framework but by regaining control over water uses and levying fees for certain uses perhaps, rather than by Maori participating by the acquisition of shares or other interests in assimilationist structures controlled by the state.

The freshwater resources proceedings are not the only instances of the present New Zealand government's penchant for commons-type rhetoric. In seeking solutions to negotiation blockages, some iwi have seen merit in agreeing to "no ownership" decision-making structures. The idea has been mooted for some time, for example, by Frame.[45] Under a political deal with Whanganui iwi signed in August 2012—at the height of the freshwater claims controversies—Crown ownership and control of the Whanganui river and riverbed will be replaced by a recognition of the river as "Te Awa Tupua"—a single and indivisible entity with a legal personality and legal standing in its own right. Te Awa Tupua has been declared "a living entity," which "is incapable of being 'owned' in any absolute sense," and its personality will be represented by "Te Pou Tupua"—two persons, one being an iwi appointee and the other a Crown appointee.[46] Further, after an impasse in treaty settlement negotiations concerning historical redress claims of Ngai Tuhoe to Te Urewera National Park, it was agreed in September 2012 that the Crown's settlement offer was no longer contingent on continued Crown ownership of all national parks. Rather, the Crown has acknowledged Tuhoe as *kaitiaki* and *tangata whenua* of Te Urewera, the national park designation will be withdrawn, and stand-

alone new legislation for the region will be passed. Then, as noted above, the insistence on absolute Crown ownership of the Foreshore and Seabed Act 2004 has been replaced by a regime under which no-one owns those lands, proven Maori customary rights may continue, and the government manages outcomes under the Marine and Coastal Area (Takutai Moana) Act 2011.

In conclusion, readers of this journal seeking further insights into contemporary Maori thinking on cultural property and related issues are referred to recent books by Durie and Mikaere included in the bibliography. I also include there the 2012 report *Ngapuhi Speaks*. After so many years holding historical claims hearings elsewhere in the country, the Waitangi Tribunal at last came to Waitangi itself in 2010 and 2011. It heard historical evidence about the Declaration of Independence and the Treaty of Waitangi (Maori text) signed at Waitangi in 1835 and 1840. *Ngapuhi Speaks* encapsulates evidence from elders of the local iwi (Ngapuhi nui tonu) to the tribunal.

ENDNOTES

1. O'Keefe, "Maoris Claim Head" commenting on *Re Tupuna Maori* (High Court of New Zealand, unreported) (Wellington, 19 May 1988, P580/88).
2. Paterson, "Protection of Cultural Property in Internal Law," 270 and 272, commenting on *Attorney-General of New Zealand v. Ortiz* [1984] AC 1 (House of Lords). See also Davies and Myburgh, "The Protected Objects Act."
3. Paterson, "Protecting *Taonga*," 112–113, discussing Waitangi Tribunal reports on "Te Reo Maori" and "Te Roroa."
4. Kawharu, "Translation of Maori Text," 320.
5. Baker, "Te Pahitaua."
6. The registry of the Waitangi Tribunal designates a claim number to each claim in sequence based on the date it was first lodged. The first claim registered in 1976 was denominated "Wai 1." The Wai 262 inquiry concerned the 262nd claim to be registered.
7. Recht, "Hearing Indigenous Voices," 242; van Meijl, "Maori Intellectual Property Rights," 345 and 351; Goldsmith, "Who Owns Native Nature?" 326 and 336; Busse, "Epilogue," 361–62.
8. Williams, "Crown Policy Affecting Maori Knowledge Systems," 81.
9. Williams, "Crown Policy Affecting Maori Knowledge Systems," 5.
10. New Zealand Ministry for Culture and Heritage, "The Treaty in Practice."
11. *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641 [SOE Lands Case]. See Kelsey, "Rolling Back the State," 280–81.
12. "Ko Aotearoa Tenei," Tuatahi, vi–vii. This report is published in three volumes. The first volume, "Te Taumata Tuatahi" (Tuatahi), summarizes all findings and recommendations. The other two volumes, "Te Taumata Tuarua, volumes 1 and 2" (Tuarua), cover the same chapter numbers and headings as the first volume, but each chapter includes more detailed analysis and commentary on submissions, evidence, and cited sources.
13. Sutherland, "Background to Wai 262," in "Wai 262, Taonga, Kaitiaki."
14. "Ko Aotearoa Tenei," Tuarua vol. 2, 719–34.
15. "Ko Aotearoa Tenei," Tuatahi, 17.
16. "Ko Aotearoa Tenei," Tuatahi, 19. (There is in fact a constitutional advisory panel currently seeking views on constitutional issues.)
17. "Ko Aotearoa Tenei," Tuatahi, 23.
18. "Ko Aotearoa Tenei," Tuarua vol. 1, 270.

19. Jones, "Treaty Based Partnership," 2.
20. "Ko Aotearoa Tenei," Tuatahi, 16–17.
21. Throughout the report the tribunal often refers to *kaitiaki* as those indigenous persons or groups with particular responsibilities for safeguarding specific *taonga*. See Waitangi Tribunal, "Ko Aotearoa Tenei," Tuatahi, 23, 25.
22. Jackson, "Interviews," in "Wai 262, Taonga, Kaitiaki."
23. "Ko Aotearoa Tenei," Tuatahi, 24.
24. "Ko Aotearoa Tenei," Tuatahi, 95.
25. Iwi is the largest natural grouping of Maori social formations. In New Zealand, the word is usually translated as "tribe" or "tribal confederation." Equivalent terms elsewhere would include "indigenous people" and "first nation." It is a strong preference of the New Zealand government to negotiate with iwi rather than the more close-knit operational entities of Maori societies known as *hapu* and *whanau*.
26. "Ko Aotearoa Tenei," Tuatahi, 113.
27. "Ko Aotearoa Tenei," Tuatahi, 130.
28. "Ko Aotearoa Tenei," Tuatahi, 170–76.
29. "Ko Aotearoa Tenei," Tuatahi, 167.
30. The SOE Lands Case refers to *New Zealand Maori Council v. Attorney-General* in 1987 when the Court of Appeal first defined the meaning of "the principles of the Treaty of Waitangi"—a phrase that now appears in many acts of the New Zealand Parliament.
31. "Ko Aotearoa Tenei," Tuarua vol. 2, 577–82.
32. "Ko Aotearoa Tenei," Tuatahi, 226–28.
33. "Ko Aotearoa Tenei," Tuatahi, 237. (This especially refers to repatriation of heads and other skeletal remains of Maori ancestors held in many overseas museum collections: see note 1 above.)
34. Williams, "Treaty Debates."
35. Waitangi Tribunal, "Motunui-Waitara Report," para 10.1–10.2.
36. Waitangi Tribunal, "Muriwhenua Fishing Claim," para 11.2–11.3.
37. Waitangi Tribunal, "Ngai Tahu Sea Fisheries," para 14.2.
38. Waitangi Tribunal, "Foreshore and Seabed," para 5.3.
39. Waitangi Tribunal, "Stage 1 Report: Freshwater Resources Claim," para 3.9.1.
40. Waitangi Tribunal, "Stage 1 Report: Freshwater Resources Claim," para 2.8.1(2).
41. Ruru, "Maori Rights over Water," 17.
42. Wagner, "Water and the Commons Imaginary," 620, 621.
43. Harris, "Is Property a Human Right?" 71.
44. Waitangi Tribunal, "Stage 1 Report: Freshwater Resources Claim," para 2.2.2(1).
45. Frame, "Property and the Treaty of Waitangi," 237 (with acknowledgments to Stone, "Should Trees Have Standing?")
46. "Whanganui Iwi and the Crown: Tutohu Whakatupua," clauses 2.4–2.9.

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