

PROTECTING TAONGA WORKS: DOES THE WAI 262 REPORT MEASURE UP?

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I Introduction

Ko Aotearoa Tēnei was a milestone “whole of government” report published by the Waitangi Tribunal in 2011 in response to the WAI 262 claim.² The WAI 262 claim, filed in 1991, was originally based on concerns over commercial exploitation of indigenous Māori plant species and traditional knowledge. However, the final report released twenty years later covered misappropriation relating to seven types of cultural and intellectual property taonga (treasures). This paper focuses on one of these taonga: taonga works. Taonga works are commonly termed “cultural expressions”. They are the Māori cultural expressions that manifest, for example, in artworks, song, dance and stories. I examine taonga works, their underlying mātauranga Māori (Māori knowledge) and the kaitiakitanga (guardianship) relationship surrounding the two.

The original WAI 262 claimants were concerned with two main issues. First, that the *kaitiaki* relationship between Māori and taonga was not adequately protected, resulting in misuse and misappropriation of taonga works and mātauranga Māori. Second, that these problems stemmed from the fact the Crown had undermined and denied the tino rangatiratanga (authority and control) guaranteed to Māori in Article II of te Tiriti o Waitangi, the te reo Māori (Māori language) text of the Treaty of Waitangi.

This paper provides a critique of the recommendations put forward by the Waitangi Tribunal in *Ko Aotearoa Tēnei* regarding taonga works, and questions whether those recommendations

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² Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (WAI 262, 2011).

responded to the claimants' concerns and fulfilled their objective of recognising tino rangatiratanga.

Part II of this paper begins by explaining the concept of taonga and its importance to Māori. Te Tiriti o Waitangi signed between the Crown and Māori in 1840 illustrates how integral kaitiakitanga and rangatiratanga are to Māori. Part III then introduces the original WAI 262 claim, and points to those same concepts as central to what the WAI 262 claimants sought. Part IV canvasses current intellectual property laws and their inadequacy in preventing both misappropriation of taonga works by others and giving effect to the guardian relationship between kaitiaki (guardians) and taonga works. Part V then sets out the reforms proposed by the Waitangi Tribunal in *Ko Aotearoa Tēnei* to address the current law's failings.

The core focus of this paper is the critique of the Tribunal's recommendations contained in Part VI. The critique moves from the practical to the conceptual. First, I evaluate the mechanical reforms proposed by the Waitangi Tribunal in terms of their implementation and improvement upon existing intellectual property laws. Second, I explore whether the proposed reforms recognise the kaitiaki relationship by providing legal protection and giving control over taonga works to kaitiaki. Third, I consider the issue of property rights, and whether the Western model can be used effectively to benefit Māori, or whether we must look beyond its constraints to different, *sui generis* property rights to protect taonga works. This section also discusses the property rights of (non-Māori) third parties, and the public domain restraint on such rights in taonga works. Finally, I examine the Tribunal's overall approach to the claim. The forward-focusing skew of the report and the pragmatic nature of its recommendations are my main focus.

Lastly, Part VII reflects back on the original concerns of the claimants and how adequately the recommendations respond to those concerns. I conclude that the proposed reforms in *Ko Aotearoa Tēnei* do not answer the concerns of the original claimants as to recognition of rangatiratanga and, more specifically, do not adequately protect kaitiaki relationships to taonga works. Ultimately, true protection for taonga works and their mātauranga Māori and the recognition of Māori rangatiratanga and kaitiakitanga over them cannot be accommodated in the Western legal property system.

II What are Taonga and Why Do They Matter?

A The Treaty and Rangatiratanga

As with all issues arising between Māori, the indigenous peoples of Aotearoa New Zealand, and the Crown, one must first look to the Treaty between them signed in 1840: te Tiriti o Waitangi. Article I of the Māori text of te Tiriti o Waitangi grants the Crown kāwanatanga - the right to govern. Māori assert that this was not an agreement to hand over sovereignty, as proclaimed in the English text, which Māori have always retained.³ Article II of the Maori text guarantees “te tino rangatiratanga o ... ratou taonga katoa”: highest Māori authority and control over all of their treasured things.⁴ This again contrasts with the English text, which promised to protect Māori in their exclusive and undisturbed “possession” of their property.⁵ However, the rangatiratanga of Māori iwi (nations) had previously been affirmed in the Declaration of Independence (He Wakaputanga o te Rangatiratanga o Nu Tirenī) in 1835.

Te Tiriti o Waitangi is seen by Māori as guaranteeing Māori autonomy and sovereignty and partnership with the Crown as equals.⁶ The Waitangi Tribunal considered that the Māori language version of Article II more appropriately fitted the nature of taonga and mātauranga Māori, as they are shared and cannot be “possessed”.⁷ It is also in line with kaitiaki obligations to protect taonga. The Court of Appeal in *NZ Maori Council v Attorney-General* has espoused further “principles” arising from this Treaty relationship, including a duty on the Crown to actively protect Māori interests.⁸ Therefore, the guarantees in the Treaty illustrate that protecting taonga is an intrinsically important part of expressing rangatiratanga, and is an obligation shared by the Crown.

³ H Kawharu *The Treaty of Waitangi 1840 - Translation of Maori text by Prof. Sir Hugh Kawharu, Footnotes.* (www.govt.nz, 31 January 1997).

⁴ Kawharu, above n 3, Article 2.

⁵ Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity. Te Taumata Tuatahi* (Wai 262, 2011) at 43-33.

⁶ Kawharu, above n 3, in footnotes; Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity. Te Taumata Tuarua Volume 1* (Wai 262, 2011) at 2 and 14.

⁷ Waitangi Tribunal *Te Taumata Tuarua Volume 1*, above n 6, at 78-79.

⁸ *NZ Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), affirmed in *NZ Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31. See also *Ngai Tahu Maori Trust Board v Director-General of Conservation* (1995) 3 NZLR 553 (CA); *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, 1 NZLR 1056.

B Concepts Linked to Taonga Works

Taonga are treasures - both tangible and intangible - given status by virtue of their relationships to ancestry and tradition under tikanga Māori (Māori custom). They are controlled, protected and preserved by kaitiaki. They are also embedded with whakapapa (genealogy, including ancestors) and illustrate a kōrero (an important story or lesson), which combine to fuel the mauri (life-force) of the taonga.⁹ Underlying all taonga is mātauranga Māori (Māori traditional knowledge), which is held in common by kaitiaki and passed down through generations. Encompassing this web of relationships is the fundamental belief that there are inextricable links and reciprocal obligations between whānau (family) and nature, captured in the term whānaungatanga (which is concerned with kinship relationships).

Kaitiakitanga guides the obligations of kaitiaki in their special role, and is one aspect of rangatiratanga under tikanga Māori. Summarising the Waitangi Tribunal's description, Jessica Lai explained this concept as:¹⁰

... Māori stewardship or guardianship over their people, lands, villages and taonga. It is an obligation that arises from their kin relationship, not only to people, but also to things that are believed to have a kin relationship according to Māori myths, legends and belief systems. It can, thus, encompass land, waters, plants, wildlife and cultural works; and also intangible things such as language, identity, culture and mātauranga Māori. The obligation includes the care of both the physical and spiritual, requiring the nurturing of mauri (the life force). Those that have the mana (authority, power or supernatural force) to carry the responsibilities are called kaitiaki, which may be an individual, whānau (family), hapū or iwi. The kaitiaki are not only responsible for the taonga works, species or the mātauranga Māori, they are also entitled to the benefits of the cultural and spiritual sustenance therefrom. This can include the economic benefits, if the commercialisation is in accordance with mātauranga Māori.

Taonga works, more specifically, are cultural and artistic expressions manifested in artwork, carving, song, dance, haka, skin etching, weaving, stories, and prayer, to name a few. Within

⁹ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 44-45.

¹⁰ Waitangi Tribunal *Te Taumata Tuarua Volume 1*, above n 6, at 17, as summarised in JC Lai *Māori Traditional Knowledge and the Wai 262 Report: A Coherent Way Forward?* (University of Lucerne, Switzerland, i-call Working Paper No. 03, 2012) at 8-9.

each of these works is mātauranga Māori traced through generations to create a work of taonga status. The kin relationship between kaitiaki and taonga mean that taonga works and mātauranga Māori hold status far beyond mere objects or knowledge. They are essential to preserve and sustain Māori culture itself.¹¹

III The Essence of the WAI 262 Claim

The original claim, submitted by six individuals in 1991, focused on concerns over the commercial exploitation of indigenous flora and fauna and the use of knowledge associated with their properties. However, the final Tribunal report in response extended to cover: taonga works and intellectual property (the focus of this paper), genetic and biological resources of taonga species, relationships with the environment, taonga and the conservation estate, Te Reo Māori, rongoā Māori medicine and health, control of mātauranga Māori, and international instruments.

Specific to taonga works, the claimants asserted that the kaitiaki relationship to taonga must be actively protected by the Crown and that New Zealand's intellectual property regime did not achieve this.¹² Their key concerns were the misuse and misappropriation of taonga works and mātauranga Māori by non-kaitiaki, and the inability of kaitiaki to commercially benefit from use of their own cultural creations in accordance with tikanga.¹³ As put by Maui Solomon, a Māori barrister involved in the claim, "the WAI 262 claim [sought] to give Māori the ability to define for themselves the parameters of their cultural and intellectual property rights and to control how those rights are developed."¹⁴

At a broader level, however, a common grievance ran beneath all aspects of the claim: the Crown has undermined and denied tino rangatiratanga guaranteed to Māori in Article II of te Tiriti o Waitangi. Any level of authority or control over taonga was wrestled from Māori upon

¹¹ For example see Waitangi Tribunal *Te Taumata Tuarua Volume 1*, above n 6, at 87 and 224 (referring to a quote from Murray Hemi).

¹² Waitangi Tribunal, *Te Taumata Tuatahi*, above n 5, at 30-31.

¹³ At 39.

¹⁴ Maui Solomon "Māori cultural and intellectual property rights" (Institute for International Research conference speech, Auckland, 24 February 1997).

colonisation and imposition of British law upon them. Despite the improved relationship between Māori and the Crown in recent decades, and recognition of the Treaty/te Tiriti as vesting rights in Māori, little legal protection or Māori oversight has been provided for taonga works.¹⁵ This lacuna is likely, in part, due to the relative newness of intellectual property in Western law. However, it is also created because sovereignty of the Crown is still seen as absolute and supreme. According to David V. Williams, the question of whether the Crown has honoured the guarantee of tino rangatiratanga goes directly to the legitimacy of its government in New Zealand.¹⁶ In order to somewhat fulfil that guarantee, the claimants therefore wanted rangatiratanga and kaitiakitanga to be recognised moving forward.

IV Problems with Current Intellectual Property Protections

Ko Aotearoa Tēnei canvassed existing intellectual property laws in New Zealand including trade mark, copyright, patents, and industrial design rights. The Tribunal concluded that such laws were inadequate to prevent misuse of taonga works by non-Māori. This section outlines those laws, and illustrates the tensions between kaitiakitanga and Western property concepts.

A Current Intellectual Property Laws

1 Trade marks

The Trade Marks Act 2002 allows registration of signs and symbols as personal property, which indicate the origin of a good or service, and affords rights to exclude others from using that sign for similar products or services.¹⁷ Eligibility requires that the trademark is for commercial or trade use, and has a “distinctive character”.¹⁸ As a result of the issues raised during the WAI 262 claim process, new powers were enacted enabling the Māori Trade Marks Advisory

¹⁵ Taonga more broadly, such as land, water bodies, and fisheries, have had rights recognised and redress granted through Waitangi Tribunal settlements and co-management structures with the Crown. For example, see Waitangi Tribunal *Ngai Tahu Sea Fisheries* (Wai 27, 1992); Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010; Office of Treaty Settlements, *Te Whakatauna o Nā Tohe Raupatu Tawhito (Ngāi Tūhoe Deed of Settlement)*, 4 June 2013.

¹⁶ Interview with Dr David Vernon Williams, BA/LLB (VUW), BCL (Oxon), PhD (Dar es Salaam), Dip Theol (Oxon), Professor of Law at the University of Auckland (Caitlin Anyon-Peters, 30 August 2017).

¹⁷ Trade Marks Act 2002, s 9.

¹⁸ Section 16.

Committee to advise the Commissioner as to whether the proposed use or registration of a trademark is, or appears to be, derivative of a Māori sign, and is, or is likely to be offensive to Māori.¹⁹ Trademark registration lasts only 10 years, though this can be renewed.²⁰

2 Copyright

Under the Copyright Act 1994, “original works” can be registered for protection and include a range of artistic, musical, written and aural works.²¹ Copyright does not confer exclusive use, but restricts commercial use or copy of the work to the copyright-holder.²² A work must be original, but only fails this criterion if it copies or infringes on the copyright of another work.²³ There must be an identifiable author.²⁴ There is no specific consideration of Māori elements. Copyright only remains in place for 50 years past the life of the creator.²⁵

For industrial designs, the Designs Act 1953 gives copyright protection to original elements of a design. The period of copyright can be between 5 and 15 years.²⁶ Again, no reference is made to Māori elements or knowledge incorporated in such designs.

3 Patents

The Patents Act 2013 grants a right of exclusive exploitation to creators of new inventions.²⁷ For a patent to be granted, the invention must be “novel” and contain an “inventive step” compared with existing public information.²⁸ The invention must also be “useful”. A patent will not be granted, however, if the invention is contrary to public order or morality.²⁹ The term of a patent is 20 years only.³⁰

¹⁹ Section 178.

²⁰ Sections 57-59.

²¹ Copyright Act 1994, s 14.

²² Section 16.

²³ Section 14.

²⁴ Section 18.

²⁵ Sections 22-25.

²⁶ Designs Act 1953, s 12.

²⁷ Patents Act 2013, s 18.

²⁸ Sections 6-8 and 14.

²⁹ Section 15, matching New Zealand’s obligations under the TRIPS agreement – World Trade Organisation, *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (adopted on 15 April 1994, entered into force 1 January 1995).

³⁰ Section 20.

The purpose of patents is to “promote innovation and economic growth while providing an appropriate balance between the interests of inventors and patent owners and the interests of society as a whole.”³¹ Uniquely, as a result of the then pending WAI 262 claim, another of the 2013 Act’s purposes was drafted to “address Māori concerns relating to the granting of patents for inventions derived from indigenous plants and animals or from Māori traditional knowledge”.³² A specific Māori Advisory Committee also exists to advise the Commissioner of Patents whether an invention claimed is derived from Māori traditional knowledge or from indigenous plants or animals, and whether the commercial exploitation of that invention is likely to be contrary to Māori values.³³

B Conflict Between Property Rights and Kaitiakitanga

The Waitangi Tribunal noted tension between Western concepts of “property” and “exclusive ownership” versus control and protection in kaitiakitanga.³⁴ Western property rights do not sufficiently protect, and can even legitimise infringement upon, the use of taonga in accordance with tikanga Māori.³⁵ As a result, they are typically considered incompatible opposites.³⁶ This sentiment was reflected in the Tribunal’s refusal to consider ownership claims for taonga, distinguishing it altogether from kaitiakitanga.³⁷

Taonga is both tangible and intangible, and its physical and non-physical aspects are seen as interdependent and indivisible.³⁸ Intangible taonga such as mātauranga Māori and oral traditions are thus difficult to attribute to a particular individual, or physical form.³⁹ Property

³¹ Section 3(a)(i).

³² Section 3(d).

³³ Section 226.

³⁴ DV Williams “Ko Aotearoa Tenei: Law and Policy Affecting Maori Culture and Identity” (2013) 20 IJCP 311 at 317; B Garrity “Conflicts Between Maori and Western Concepts of Intellectual Property” (1996) 8 AULR 1193 at 1196; Waitangi Tribunal, *Te Taumata Tuarua Volume 1*, above n 6, at 33 and 270.

³⁵ Garrity, above n 34, at 1026.

³⁶ Concerns raised by the Crown in *Te Taumata Tuatahi*, above n 5, at 40-41; Williams, above n 344 at 325; L Huria “Wai 262 – The Intellectual Property Claim Reviewed” (2012) 6 NZIPJ 852 at 860; Lai *Maori Traditional Knowledge*, above n 10, at 9 and 30.

³⁷ Waitangi Tribunal, *Te Taumata Tuatahi*, above n 5, at 43 and 51; Williams, above n 34, at 311; S Woods “Patents, PVRs and Pragmatism: Giving Effect to Wai 262” (2014) 19 Canta LR 97 at 125.

³⁸ STM Lenihan, “Whaia kia tata, Whakamaia kia tina: A Time For Change: Intellectual Property Law and Maori” (1996) 8(I) Auckland U L Rev 211, cited in Garrity, above n 34, at 1196.

³⁹ A lacuna in the law noted by the Waitangi Tribunal in *Te Taumata Tuatahi*, above n 5, at xviii; M De Beer “Protecting Echoes of the Past: Intellectual Property and Expressions of Culture” (2006) 12 Canta LR 94 at 100; Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 39.

rights, however, only vest in tangible things; intellectual property rights only exist for the manifestation or product of an individual's ideas and knowledge.⁴⁰

There is also a fundamental conflict in the purpose and values of each. The kaitiaki relationship espouses intrinsic obligations on those linked by whakapapa to taonga and who hold the mana (authority or power) to protect them.⁴¹ This kaitiaki relationship is perpetual and passed down through generations to preserve mātauranga Māori.⁴² Taonga works, in turn, are often passed down through whānau; their status and mauri strengthening with age and ancestry.⁴³

Intellectual property rights, on the other hand, are based around the economic and commercial value of a product or design.⁴⁴ They balance the creator's right to profit from the "fruit of his labour" against public rights to use those creations for economic growth.⁴⁵ This results in originality requirements; exclusion if in the public domain; and limitation periods for holding rights.⁴⁶

Intellectual property also requires that there be an identifiable individual who is the rights-holder (the author or creator).⁴⁷ Taonga are often held in common by a group of Māori. The original creator of the work could be a century old, or there might be multiple contributors or additions to the work from iwi members. Multiple individuals or groups can also have an interest in a taonga work.

⁴⁰ Property rights and interests are apportioned according to physical components, according to DV Williams "Maori Claims to Energy Resources" (1992) *Paper to the Energy and Natural Law Association Conference on Maori Claims and Rights to Natural Resources* 3 as cited by Garrity, above n 34, at 1196.

⁴¹ Garrity, above n 34, at 1196.

⁴² Waitangi Tribunal *Taumata Tuatahi*, above n 5, at 39; P Kuruk "The Role of Customary Law Under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge" (2007) 17 *Ind Int'l & Comp L Rev* 67 at 72 and SK Verma "Protecting Traditional Knowledge: Is a Sui Generis System an Answer?" (2004) 7 *JWIP* 765 at 770 as cited in Woods, above n 37, at 101.

⁴³ The mauri of taonga is not dependent on age, and also comes from the invocation of ancestors and embedding of kōrero, Waitangi Tribunal *Taumata Tuatahi*, above n 5, at 44-47.

⁴⁴ Garrity, above n 34, at 1196 and 1201-1202; De Beer, above n 39, at 96.

⁴⁵ Garrity, above n 34, at 1201-1202.

⁴⁶ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 62-63.

⁴⁷ De Beer, above n 39, at 96-97; DL Fernando, "Intellectual Property and the Protection of Indigenous Culture in the United States and New Zealand: An Effective Solution for Indigenous Communities?" (2013) 12 *Cardozo Pub L Pol'y & Ethics J* 149 at 155; S Frankel "Branding Indigenous Peoples' Traditional Knowledge" in AT Kenyon, M Richardson and WL Ng-Loy (eds) *The Law of Reputation and Brands in the Asia Pacific* (Cambridge University Press, Cambridge, 2012) 253.

Patents and Copyright further require novelty or originality. Although new taonga work can be created, their status comes from the kōrero it tells and the whakapapa that it invokes. This means that taonga can be derived from other works or knowledge with many contributors. A third party could also use copyright so that a modern ‘original’ is excluded from commercial use by its own kaitiaki.

Measures currently in place for trademarks and patents go some way to answering Māori concerns where a third party seeks to exploit taonga works. Prior to registration, their respective Advisory Committees must consider whether Māori aspects of a design are offensive (trademarks) or contrary to Māori values (patents). However, the advice of these committees is non-binding on the relevant Commissioner. Furthermore, “offensiveness” denotes a high level of harm caused by Māori aspects of a design.⁴⁸ This means that mere inappropriate use, according to traditional tikanga values, might not warrant denial of a trademark application. The “contrary to Māori values” test for patents is more inclusive, but the recommendatory nature of the committees undermines their potential potency.

V Ko Aotearoa Tēnei Report *Recommendations*

The following proposed reforms put forward by the Waitangi Tribunal in *Ko Aotearoa Tēnei* are pragmatic adjustments to New Zealand’s intellectual property system aimed at preventing misuse of taonga works by third parties.⁴⁹ It should be noted, however, that none of the recommendations for taonga works contained in the report have been implemented by the government to date.⁵⁰ In fact, no official government response has ever been given to the report.

⁴⁸ “Offensiveness” is defined as something more than mere bad taste, and likely to cause outrage and should be censured, in the IPONZ Trade Marks Practice Guidelines (26 January 2010).

⁴⁹ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 51.

⁵⁰ However, the government has, for example, enacted the Haka Ka Mate Attribution Act 2014, which affords some enhanced protection to the kaitiaki of the haka Ka Mate as part of a negotiated historical Treaty settlement.

A Taonga Works and Taonga-derived Works

The Tribunal first distinguished between taonga works and taonga-derived works on the basis of a kaitiaki relationship.⁵¹ Taonga works are those that have kaitiaki, whakapapa, and a kōrero, which form the mauri flowing through the work. An example of a taonga frequently misappropriated is tā moko: the unique skin art form. As described by contemporary *tohunga* (spiritual leader) Mark Kopua, the design of each tā moko tells the story of the wearer's whakapapa, identity, and immense mana within their tribe.⁵² The entwined kōrero of Mataora and Uetonga, the Māori legend that describes the origins of tā moko, signifies the righteousness and integrity of the wearer.⁵³ Not only does the design etch history into the wearer's skin, but mātauranga of the tattooing method and ritual is passed down through generations.

Taonga-derived works, on the other hand, were considered works with a generic Māori element, potentially drawing upon taonga or mātauranga. An example was the stylised koru used as the logo for Air New Zealand. The Tribunal thought that such works generally demanded less protection than taonga works because they are not infused with the same mauri or whakapapa.⁵⁴ For this reason, taonga-derived works do not have kaitiaki with responsibility or authority over them. The Tribunal weighed the public interest in encouraging innovation drawing on Māori culture, and concluded that only limited protections ought to be enforceable for taonga-derived works. Although the Tribunal classified the Article II Treaty guarantee as a "constitutional right", they considered that the Crown's actions were constrained by what is "reasonable" in weighing the rights of Māori against the rights and interests of others who might be impacted.⁵⁵

⁵¹ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 44-47.

⁵² Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 30.

⁵³ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 29.

⁵⁴ Though the Tribunal thinks such works can still be significant, have a story of their own, and those who feel a connection to the work, Waitangi Tribunal *Te Taumata Tuatahi Volume 1*, above n 6, at 85.

⁵⁵ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 48; Waitangi Tribunal *Te Taumata Tuatahi Volume 1*, above n 6, at 15.

B General Standards for Intellectual Property Law

The Tribunal proposed general standards and objection mechanisms to import into intellectual property law, preventing derogatory or offensive use of taonga works. The Tribunal was strong in its stance that taonga should not be able to be used in a derogatory manner, neither by virtue of existing or future private intellectual property rights, nor because it is already in the public domain. This was also extended to taonga-derived works. An example considered offensive was putting a chief's tā moko on a toilet seat. The mechanism would enable anyone to object to offensive or derogatory use, prevent intellectual property registration, and sanction those who breached the standard.⁵⁶ Retrospective application was perhaps the strongest recommendation the Tribunal made for taonga works.

If use of a taonga work was not, however, derogatory or offensive, then limitations on use were loosened. The Tribunal considered any restriction on use of taonga-derived works below this threshold was unreasonable. So too would impinging upon pre-existing use of taonga works in the public domain or under intellectual property rights. This approach was both for practical ease within the existing intellectual property framework, and because they “[did] not think that confiscating those rights can be justified, even to protect Treaty interests.”⁵⁷

For *future* non-derogatory use of taonga works, they proposed a duty of consultation or consent for kaitiaki only.⁵⁸ “The right of kaitiaki should prevail over ... [public] interest where the circumstances justify it.”⁵⁹ The Tribunal also referred to “closely held mātauranga Māori” as warranting consultation for commercial use.⁶⁰

Overall, however, private and non-commercial use of taonga were excluded from the reach of the recommendations. Again, they took the approach of “reasonableness” to prevent intrusion on personal choice.

⁵⁶ Waitangi Tribunal *Te Taumata Tuarua Volume 1*, above n 6, at 93.

⁵⁷ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 49-50.

⁵⁸ Waitangi Tribunal *Te Taumata Tuarua Volume 1*, above n 6, at 93.

⁵⁹ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 50.

⁶⁰ Defined only as attached to an iwi or hapū, Waitangi Tribunal *Te Taumata Tuarua Volume 1*, above n 6, at 85.

C Taonga Works Commission

The second key reform put forward was for a general taonga works commission (the Commission) to carry out adjudicative, facilitative, and administrative functions. It would slot into the current legal system and work alongside government departments.

First, the Commission would hear complaints of misuse of taonga, taonga-derived works, and mātauranga Māori. As adjudicator, the Commission would determine whether something is taonga or taonga-derived; who is the appropriate kaitiaki; and remedies. Complaints were predicted to be mostly over non-derogatory, commercial use.⁶¹ The Commission would replace existing advisory committees. Its decisions, however, would be binding.

Second, “best-practice guidelines” issued by the Commission would guide the “use, care, protection, and custody of taonga works”.⁶² The guidelines would be designed to assist users with “culturally appropriate practices” and would “explain why the practices are followed”.⁶³ It would issue declaratory rulings as to whether proposed use of a taonga work would be derogatory or offensive. This process would be “quick, informal, and inexpensive.”⁶⁴

Third, a kaitiaki register operated by the Commission was recommended. Registration would be voluntary, to respect tapu (sacred) knowledge, and both individuals and groups could apply. The Tribunal saw the register as giving some protection to a large portion of taonga works already within the public domain. Registration would bring other works into that same domain (at which point, arguably, intellectual property rights would no longer be available). However, registration would not confer any legal rights on kaitiaki. The register would notify the public at large of an interest in certain taonga, and simplify claims of kaitiaki relationships.

⁶¹ Which the Tribunal asserted only kaitiaki had the right to complain about, Waitangi Tribunal *Te Taumata Tuarua Volume 1*, above n 6, at 93.

⁶² Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 53.

⁶³ Waitangi Tribunal *Te Taumata Tuarua Volume 1*, above n 6, at 95.

⁶⁴ At 93.

VI Critique of the Ko Aotearoa Tēnei Recommendations

The following critique is the focus of this paper and looks at both practical and conceptual implications of the report's proposed reforms. This section evaluates whether the WAI 262 claimant's concerns were actually met, and whether rangatiratanga can be accommodated within a Western legal property system.

Overall, the recommendations put forward by the Waitangi Tribunal are a step in the right direction for Māori, and propose a palatable, practical system for the Crown to put in place. However, in my view they did not go far enough. Little actual control was given to kaitiaki, and defensible legal rights were not afforded to them. The reforms comfortably fit into the Western legal and political framework – one which has historically and systematically oppressed Māori and their interests – yet gaps that undermine kaitiaki obligations remain.

Furthermore, the recommendations went immediately to the “middle ground”, rather than setting a benchmark for the Crown.⁶⁵ As strongly asserted by Percy Tipene, Chair of Te Waka Kai Ora (an adjunct claimant): “[t]he claim was really about tino rangatiratanga or Māori control of things Māori, and the report goes nowhere near dealing with that.”⁶⁶ Ultimately, the recommendations do not fulfil the claimant's objective of recognising tino rangatiratanga, as guaranteed by Article II of Te Tiriti o Waitangi.

A Practical Problems with the Recommendations

The general standards and the Commission are pragmatic solutions, which essentially replace existing advisory committees. However, practical difficulties are evident, and there is doubt that they would afford much more protection than already exists under the current intellectual property regime.

⁶⁵ Also noted by Williams, above n 34, at 323.

⁶⁶ Te Waka Kai Ora “A Watered Down WAI 262” *NZNewsUK* (online ed, London, 6 July 2011).

1 *Taonga works versus taonga-derived works*

At the outset, the Tribunal draws a distinction between taonga and taonga-derived works. Jessica Lai points out that the difference might not be so simple,⁶⁷ nor truly mindful of rangatiratanga. How does one decide at what point non-Māori influences in a work divorce it from taonga status? In reality, works at issue are more likely to be derivative than solely drawn from taonga, meaning this distinction would have a large impact on protections and redress for use of that work.

Aside from the lack of specific criterion provided by the Tribunal, Lai points out three key problems with imposing such a distinction at all. First, opinions are diverse, and there is likely to be disagreement as to the distinction between a taonga and a taonga-derived work. Indeed, there is some incentive for Māori to prove taonga status, as the model proposed affords them greater protection and grounds for complaint (where the threshold of offensiveness is not met).⁶⁸

Second, there is a question of how this distinction could adapt to evolving Māori culture. Taonga are often old and passed through generations, but can also be created new, and influenced by other cultures and modern Māori development. Lai asks how 'Māori' a work must be to not cross the line as a taonga-derived work.⁶⁹ One might argue that the modern rendition of a kaitiaki relationship does not depend on how traditional a taonga work is, but rather whether it is still imbued with whakapapa and kōrero.

The final point raised by Lai is the role of the creator. She asks whether the author of the work in question must be Māori for it to be considered taonga.⁷⁰ On its face, it would seem reasonable to answer in the affirmative. However, Lai argues that such a distinction is arbitrary. Only taonga works would require consultation or consent beyond situations of offensive or

⁶⁷ JC Lai "Maori Traditional Cultural Expressions and the Wai 262 Report: Looking at the Details" (University of Lucerne, Switzerland, i-call Working Paper No. 02, 2012) at 11-12; JC Lai "Māori Culture in the Modern World: Its Creation, Appropriation and Trade" (University of Luzern, Switzerland, i-call Working Paper No. 02, 2010) at 36-37.

⁶⁸ A point also raised by Woods, above n 377, at 122-123.

⁶⁹ Lai "Maori Traditional Cultural Expressions", above n 67, at 12.

⁷⁰ At 12.

derogatory use. Although a work itself might not have kaitiaki if by a non-Māori creator, mātauranga Māori infused in its design could have kaitiaki who would be denied the same scope for input or redress by virtue of its immediate authorship.

Arguably, any misuse of an aspect of Māori culture, whether taonga or taonga-derived, affects that culture in negative ways. Johnson Whitehira has argued that cultural appropriation is a good thing, to encourage free exchange, but this means that protection is especially necessary.⁷¹

If Maori go and borrow things from Pakeha culture, like photography or whatever, we're not going to affect that larger culture itself. It's too massive. But if non-Maori start using Maori things in uninformed ways, then they're actually going to dilute that culture.

Therefore, protection of all Māori-influenced works and oversight of their use is arguably necessary, and is in line with the oversight and control implicit in kaitiakitanga and rangatiratanga.

2 Offensive or derogatory use

The Tribunal takes an appropriately strong stance to protect the integrity of taonga expressions used in an offensive manner. However, there is practical uncertainty in the standard of offensiveness proposed, and whether it improves upon current intellectual property regulations. A conceptual problem is that a standard of offensiveness aims to balance Māori interests against those of the public where it is arguable that those interests are not equal.

The meaning of “offensive” or “derogatory” was not defined by the Tribunal. Lai suggests that the test for offence might therefore mirror that already used in trade mark law: something more than mere bad taste, and likely to cause outrage and so should be censured.⁷² Offensiveness is a high threshold, and taonga-derived works, particularly, could not be

⁷¹ John McCrone “Sharing the taonga: who owns Maori intellectual property?” Stuff.co.nz (online ed, New Zealand, April 9 2016).

⁷² IPONZ Trade Marks Practice Guidelines (26 January 2010), cited in Lai “Maori Traditional Cultural Expressions”, above n 67, at 15.

interfered with where this test is not met.⁷³ Problems arise when use of a work is merely inappropriate, according to tikanga values, and so would not invoke automatic protection. One could argue that the goal of kaitiakitanga is to ensure that taonga and mātauranga Māori are used respectfully, in accordance with tikanga, not just to prevent “outrageous” use. Seamus Woods comments on a parallel recommendation by the Tribunal in *Ko Aotearoa Tēnei* for patenting taonga species that “it represents a minor adjustment to a criterion that is not a truly substantive requirement of Plant Variety Rights protection in the same sense as newness, distinctness, homogeneousness and stability, and thus any interference...would be comparatively minor.”⁷⁴ Thus, in reality, the standard maintains the current status quo of intellectual property laws, and so its effectiveness would be much the same.

Another question is who the use must be offensive to. Where a taonga-derived work has no kaitiaki, determining who might be offended, and to what level, becomes difficult.⁷⁵ Is it all Māori, or the hapū or iwi of origin? Where a non-Māori complains to the proposed Commission, is it from their point of view as well? These questions remained unanswered by the Tribunal’s recommendations, and leave a wide scope for discretion on the part of the Commission making such decisions.

A conceptual tension also exists between the public interest in protecting freedom of expression and fostering economic growth (asserted by the Crown),⁷⁶ versus the kaitiaki obligation to ensure use of taonga works is consistent with tikanga and the rangatiratanga authority upon which it rests. Lai points to inconsistency in the Tribunal’s assertion that protecting taonga works should generally be favoured, but that some things that “challenge our sensitivities” as social commentary should not be censored.⁷⁷ Ultimately, the Tribunal felt constrained by “reasonableness”.⁷⁸

⁷³ This disparity between offensiveness and inappropriateness was raised in D Brown and G Nicholas “Protecting Indigenous Cultural Property in the Age of Digital Democracy: Institutional and Communal Responses to Canadian First Nations and Maori Heritage Claims” 17 J Material Culture (2012) 307 at 309 cited in Fernando, above n 47, at 162.

⁷⁴ Woods *Patents*, above n 37, at 114-115.

⁷⁵ Lai “Maori Traditional Cultural Expressions”, above n 67, at 16.

⁷⁶ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 40.

⁷⁷ Lai “Maori Traditional Cultural Expressions”, above n 67, at 16.

⁷⁸ Waitangi Tribunal *Te Taumata Tuarua Volume 1*, above n 6, at 86.

Balancing Māori rights against the rights of others detracts from rangatiratanga authority, though I acknowledge that such authority cannot be absolute in all circumstances. However, the balancing act undertaken by the Tribunal misses the nature of Māori interests in taonga works; being essential to perpetuate Māori culture and linked spiritually to Māori through whānaungatanga. It therefore overlooks the damage that can be done by misuse: not purely economic or creative, but spiritual, cultural, and familial.⁷⁹ Therefore, the public's commercial interest is perhaps not equal to nor a 'reasonable' constraint upon Māori rights to control use of taonga works, especially where consequences of limited protection can cause lasting harm.

3 The Proposed Commission

The Commission and kaitiaki register recommended allow for perpetual interests to be recognised over taonga, and can also accommodate collective interests. The Commission would be left to deal with the finer issues of determining the taonga status of a work, and validity of kaitiaki relationships. However, as noted by Woods, the Tribunal did not attempt to offer objectives that might guide such decisions.⁸⁰ Furthermore, the efficacy of the adjudicative rulings of the Committee and the kaitiaki register it would administer is debateable.

The Commission's role in deciding taonga and kaitiaki status is relevant both for adjudicating complaints and for disputes over kaitiaki registration.⁸¹ Woods highlights that these determinations rest on inexact considerations such as the "depth" of the kaitiaki relationship.⁸² Applicants could be incentivised to highlight the importance of a work or its mātauranga Māori in order to gain maximum scope for protection. Financial redress might further increase the potential for dispute and division (as occurs in the Treaty settlements context). The Commission's ability to determine the validity of a claim has significant ramifications where kaitiaki are publically recognised.

⁷⁹ Brown and Nicholas, above n 73 at 309 cited in Fernando above n 47, at 157. This is also true in respect of third party property rights in taonga works, KC Stone "MED Traditional Knowledge and Intellectual Property – the Policy Interface" (International Bar Association Conference, 20 October 2004) cited in C Elliot "IP for traditional knowledge" [2011] NZLJ 252.

⁸⁰ Woods, above n 37, at 117-118.

⁸¹ At 117-118.

⁸² At 122-123.

The power of the Commission to issue declaratory rulings as to whether intended use is offensive is also questioned by Lai.⁸³ The Tribunal stated that this should be a fast and inexpensive method. Parties could avoid offensive use, future disputes, and can initiate consultation where necessary. However, Lai is unsure as to how in-depth investigations into kaitiaki interests could be with the aim of efficiency overhead.⁸⁴ Kaitiaki must be traceable through whakapapa, which can span multiple generations, possibly across hapū or iwi. Any mistake by the Commission would risk not only future grievance from overlooked kaitiaki, but that potential users could later find themselves in the wrong. Binding rulings could be a way to avoid this problem.

The kaitiaki register would provide clear, public information about interests in taonga works. However, Woods points out that a public register often elicits dispute between groups over who has the best claim (i.e. who is the appropriate kaitiaki).⁸⁵ Multiple parties can be kaitiaki of taonga or mātauranga Māori. However, differing interests or ideas as to appropriate use could result in disagreement. The Tribunal stated that kaitiaki would have registration as of right where there are no objections but it is unclear what would happen if conflict occurred between registered and unregistered kaitiaki over redress. As discussed in Part VI (A)(2) above, registration of kaitiaki affords them no positive, defensible rights.

A further issue with the kaitiaki register is its public nature. To guide third parties to consult with kaitiaki over taonga use, publication is necessary. On the other hand, tapu (sacred) taonga or mātauranga Māori are unlikely to be registered as disclosure would breach tikanga Māori.⁸⁶ The Tribunal accedes that the register would therefore best suit taonga works and mātauranga Māori already in the public domain. A publically-recognised interest in taonga works has advantages if disputes arise or consultation is required. However, Woods points out that kaitiaki might be put in the “awkward position of having to decide whether to sit on their secrets or rely on alternative IP [intellectual property] mechanisms such as the tenuous shield of trade secrets should they wish to engage with the Western sphere.”⁸⁷

⁸³ Lai “Maori Traditional Cultural Expressions”, above n 67, at 21.

⁸⁴ At 21.

⁸⁵ Woods, above n 377, at 117.

⁸⁶ Waitangi Tribunal Ko Aotearoa Tēnei: *A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity. Te Taumata Tuarua Volume 2* (Wai 262, 2011) at 722.

⁸⁷ Woods, above n 37, at 119.

B Recognising the Kaitiaki Relationship

The proposed reforms are pragmatic yet they fit within the existing intellectual property framework, and, ultimately, control of taonga is left in the hands of the Crown. However, kaitiakitanga is fundamentally about guardianship and protection of taonga, which demands some level of control and oversight of their appropriate use.

1 Protections for kaitiaki

The binding, advisory function of the Commission in place of existing advisory committees would be a fairly proactive protection. It is much stronger and wide-reaching than the current recommendatory committee functions legislated for trademarks and patents.

However, no positive protections are afforded to kaitiaki. All measures are “negative” protections: to prevent offensive misuse of taonga works by third parties.⁸⁸ There are no concrete legal rights proposed that would allow them to defend a claim in court or to seek a remedy. Woods also comments that there are no rights to commercial benefits.⁸⁹

One might argue that the duty of consultation with kaitiaki is an adequate protection. On the other hand, what redress can kaitiaki seek if a commercial party ticks the consultation box and then proceeds to use a taonga in a disrespectful manner? The key point made by Woods is:⁹⁰

It is not enough to rely on an inability of third parties to obtain IP [intellectual property] rights to prevent the misuse of mātauranga Māori or taonga species that are taken to the market; rather, the positive ability to pursue third parties for remedies must exist.

As noted earlier in this piece, intellectual property rights and principles of kaitiakitanga are different, but they are not entirely irreconcilable. In an analysis of the protections recommended for taonga species, Woods argues that positive, *sui generis* rights that complement the intellectual property system can be vested in kaitiaki without disrupting it nor

⁸⁸ As noted by Woods, above n 37, at 125.

⁸⁹ At 125.

⁹⁰ At 127.

stifling third party use.⁹¹ Rights enforcing consent-seeking and benefit-sharing are possible examples. In the end, proper protection of the guardianship role of kaitiaki and their authority over taonga requires positive and proactive mechanisms beyond the confines of Western intellectual property law.

2 *Maintaining the status quo*

The proposed Commission would essentially supplant and extend the role of the current trademark and patent advisory committees. The public domain would still void the majority of claims to taonga, and no specific protection was given to mātauranga Māori (only its material products). In other words, the Tribunal's proposed changes were formed to fit into the existing intellectual property system; to maintain the status quo.⁹²

Solomon who was involved in the claim, strongly stated that the opposite approach should be taken:⁹³

It is critically important to the claimants that any remedies are built on a foundation of tikanga Maori, of Maori customary values. Just tweaking the edges of the existing legislative regime and IPR [intellectual property rights] system will not be acceptable to the claimants. It is true that aspects of the IPR system can be accommodated within a tikanga Maori framework. However, because of the ideological difference between IPR and Indigenous peoples' rights and responsibilities . . . we need to start from first principles. That means viewing any system of protection from a Maori cultural viewpoint, not something imposed from the outside.

Despite the Tribunal's acknowledgement that the intellectual property system does not cater to the kaitiaki relationship nor protect taonga works and mātauranga Māori well, their recommendations do not push the boundaries of that system at all.

⁹¹ At 129.

⁹² A comment also made by Woods, above n 37, at 129.

⁹³ Maui Solomon, "Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities" in M Riley (ed) *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions* (AltaMira Press, 2004) 221 at 240.

Williams comments that the Tribunal's future-focused approach meant that the existing power imbalance between the state and Māori was not highlighted.⁹⁴ It is arguable that this imbalance is reflected in the fact that the Western property system was accepted as the appropriate vehicle to protect taonga works, yet positive rights are not seen as necessary. I would argue that they are indeed essential to address this imbalance and historical undercutting of Māori rangatiratanga authority (as asserted by the claimants). As noted by Johnson Whitehira, "while the desire is for a free exchange, the reality is still that Pakeha represent the dominant culture."⁹⁵

3. *Control in whose hands?*

The *Ko Aotearoa Tēnei* report began with a strong statement that "it is no longer possible to deliver tino rangatiratanga as full authority in all cases in which taonga Māori are in play".⁹⁶ While this might be true, practically speaking, it set the tone that full authority would not be the starting point from which the Tribunal built its proposed reforms.

The recommendations formed a continuum of input and control by Māori: from maximal where use is derogatory or offensive, to minimal where a work is not used offensively, is taonga-derived, or is in the public domain already. In an interview with Professor David V Williams, he commented that the part of the continuum that gives Māori total control over taonga that are of the utmost importance would be rather small; there would be a larger portion in the middle that involves serious partnership dialogue; but ultimately there is quite a lot where the government can get on without much input from Māori – where tino rangatiratanga would not play any role at all.⁹⁷

Thus, in reality, there would be little actual control over the use of mātauranga Māori, or sanctions for its misuse, put directly into the hands of kaitiaki, or Māori more generally. Furthermore, the Commission recommended would be a government body, thus susceptible

⁹⁴ Williams, above n 34, at 318.

⁹⁵ John McCrone "Sharing the taonga: who owns Maori intellectual property?" Stuff.co.nz (online ed, New Zealand, April 9 2016).

⁹⁶ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 24.

⁹⁷ Interview with Dr David Vernon Williams, above n 16.

to political tides and the primacy of the Western legal system.

C The Issue of Property Rights

As a consequence of the lack of positive rights afforded to kaitiaki, the Waitangi Tribunal failed to discuss legal rights to facilitate kaitiaki protection. A point of real concern for Williams was the Tribunal's refusal to consider ownership rights for Māori.⁹⁸ Susy Frankel, a prominent advisor to the Waitangi Tribunal regarding the WAI 262 claim, argued that rights over Māori cultural heritage must "interface" with existing law, rather than being created in a completely separate system, where there are no means to address clashing interests.⁹⁹ The Tribunal essentially adopted a Western mind-set of property rights and was therefore constrained by its limits. It also suggests a view that the current legal framework must not be disturbed. Although I am not convinced that exclusive ownership is the answer, I conclude that we must step outside the parameters of Western property concepts to look at rights in line with tikanga Māori to better serve kaitiaki and give meaningful recognition to rangatiratanga.

1 Ownership rights

A fundamental gap in the Tribunal's report is that they refused to consider the possibility of Māori ownership rights.¹⁰⁰ In my view, this undermines the Tribunal's decision to reject them. As discussed in Part IV, the notion of exclusive individual ownership does not align with tikanga Māori,¹⁰¹ and thus might not be necessary to give rangatiratanga authority and control over taonga. However, one must question whether ownership rights would be the most appropriate

⁹⁸ Williams, above n 34, at 311, 317 and 323

⁹⁹ JC Lai, *Indigenous Cultural Heritage and Intellectual Property Rights. Learning from New Zealand?* (Springer International Publishing, Switzerland, 2014) at 225 citing S Frankel "A New Zealand perspective on the protection of mātauranga Māori (traditional knowledge)" in CB Graber, K Kuprecht, JC Lai (eds) *International trade in indigenous cultural heritage: legal and policy issues* (Edward Elgar, Cheltenham, 2012) 439 at 440-441 and 450. Dengate Thrush also wrote a report for the Tribunal asserting that European legal principles should apply to the management and ownership of Maori resources and concluded that Māori resources and traditional knowledge could not qualify for useful patent protection in De Beer, above n 39, at 112 citing PD Thrush "Indigenous flora and fauna of New Zealand" in *Waitangi Tribunal Research Series* (Brookers, 1995/1).

¹⁰⁰ Ownership was rejected as inappropriate by the Tribunal in respect of taonga species on the basis that the English text of the Treaty of Waitangi did not guarantee ownership, a cultural relationship could not justify ownership rights, and the public interest that weighs against Māori interests, Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 50, 85 and 88.

¹⁰¹ Fernando above n 47 at 155; Frankel, above n 47.

option for kaitiaki in the current legal system.

Ownership rights would have to go beyond current limited-term intellectual property rights to give any greater protection. Exclusive ownership would give absolute control to kaitiaki over taonga works and mātauranga Māori: it would enable them to dictate use of taonga works to align with tikanga Māori and prevent exploitation without consent. It would also enable Māori to gain benefits of commercial use. Ultimately, ownership would recognise the authority of kaitiaki to the fullest extent of rangatiratanga.

On the other hand, exclusive ownership could choke the free exchange of ideas between cultures and the development of modern Māori culture more broadly. Taonga works and mātauranga Māori are not like land, a fixed and stable form of property, where ownership would be the only way to exercise actual authority over its use. In addition, exclusive ownership ascribes taonga works and mātauranga Māori economic value only.¹⁰² The concept of ‘ownership’ also does not align with the shared nature of mātauranga Māori. One might even argue that some dissemination is necessary to preserve Māori culture and to combat ignorance in non-Māori.

An alternative to exclusive ownership could be positive use-rights, such as benefit-sharing or compulsory consent-seeking. Less-defined taonga-derived works could be accommodated where the elements they draw upon have these rights attached. Mātauranga Māori could also be protected as these rights focus on the way in which it is used, rather than rights vested in a tangible product. Ultimately, rights that afford control and oversight are more appropriate to recognise rangatiratanga and enable kaitiaki protection than exclusive ownership.

2 Third party rights

As raised in Part IV, third party rights have the potential to exclude Māori from having control, input, or use of works and knowledge, and to commercially benefit from them.¹⁰³ Williams

¹⁰² Garrity, above n 34, at 1196.

¹⁰³ Elliot, above n 79, at 252.

further stated:¹⁰⁴

... the ideas of “owning” and “commercialising” mātauranga, whether by Māori themselves or by third parties, is clearly at odds with a guardianship ethos; indeed, in many instances, affording such treatment to Māori TK [traditional knowledge] will be deeply offensive to Māori culture.

The Waitangi Tribunal viewed third party rights as legitimate in the public interest.¹⁰⁵ This contrasted with their repeated agreement that intellectual property rights do not adequately protect taonga works from inappropriate use by third parties. One might argue that if Māori cannot or should not have ownership rights in taonga works to facilitate cultural exchange and economic development, then equally, third parties should not have them either. The above proposed use rights might instead operate bilaterally.

My conclusion is that the issue of third party rights returns to the ultimate power imbalance between Māori and the Crown and recognising rangatiratanga. Michael Goldsmith summarises this tension well: “[t]he 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.”¹⁰⁶ By stepping beyond exclusive ownership rights towards use-rights in line with tikanga Māori, perhaps we can cater to both Māori and non-Māori interests yet still give effect to rangatiratanga over taonga works.

3 Public domain theory

Taonga works and mātauranga Māori already in the public domain would not be protected by intellectual property laws, nor were they seen as warranting protection by the Tribunal beyond offensive or derogatory use.¹⁰⁷ The underlying principle is that works that are in the public domain are available for use by anyone, in any way, to encourage creative and economic

¹⁰⁴ Williams, above n 34, at 101.

¹⁰⁵ Evidenced by its reluctance to interfere with intellectual property rights held by others where taonga works are not used in a derogative or offensive way, as discussed in Part VB of this paper.

¹⁰⁶ M Goldsmith “Who Owns Native Nature? Discourses of Rights to Land, Culture, and Knowledge in New Zealand” (2009) 16 IJCP 325 cited in Williams, above n 344, at 313.

¹⁰⁷ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 48-50.

development.¹⁰⁸ However, maintaining ‘public domain theory’ would void a large part of the oversight and control of taonga by Māori.¹⁰⁹

Kristen Carpenter, Sonia Katyal, and Angela Riley argue that non-indigenous groups are the ones who actually commercially exploit and benefit from indigenous cultural expressions in the public domain.¹¹⁰ In response to this point, Lai raises important questions:¹¹¹

...Why is there an automatic presumption (by so many) that indigenous TCEs [traditional cultural expressions] and TK [traditional knowledge] should succumb to public domain arguments, merely because it is in the interest of non-indigenous people? ... If courts and other legal systems are now willing to accept the different levels and types of land property rights, they should also be able to recognise that different understandings of intangible cultural heritage may mean that the heritage is not part of the public domain and not free for all to use.

The concept of the public domain is a “cultural construct” of Western intellectual property in itself.¹¹² Therefore, public domain theory should not be a legitimate bar to Māori claims to taonga works. To remove this barrier does not necessarily mean removing taonga works and mātauranga Māori from the public sphere altogether. It would merely recognise that kaitiaki control of taonga works is justified across the board to preserve their cultural integrity and mauri for future generations.

D The Tribunal’s Overall Approach to the WAI 262 Claim

The final section of this analysis critiques three aspects of the Tribunal’s overall approach to the claim: first, its dismissal of past grievances; second, its insistence on a future-oriented focus; and third, the cautious, pragmatic nature of the recommendations. These factors echo throughout the *Ko Aotearoa Tēnei* report, contributing to the Tribunal’s inadequate response to the claimants’ original concerns.

¹⁰⁸ De Beer, above n 39, at 118.

¹⁰⁹ Jessica Lai further asserts that the Tribunal accepts the Western public domain as “the only one relevant for assessing classical IP [intellectual property] interests”, Lai, above n 67, at 8.

¹¹⁰ KA Carpenter, S Katyal and A Riley “Clarifying cultural property” (2010) 17 IJCP 581 at 590.

¹¹¹ Lai, *Indigenous Cultural Heritage*, above n 99, at 68.

¹¹² S Frankel “From Barbie to Renoir: intellectual property and culture” (2010) 41 VUWL 1 at 9.

1 *Dismissal of past grievances*

The Tribunal specifically dismissed past grievances, and instead stated that the report would focus solely on the future partnership between the Crown and Māori.¹¹³ As a consequence the report lacked context.

Only by understanding the magnitude and severity of a problem can the solution address it appropriately. During my interview with him, Williams spoke of historical examples such as the past suppression of te reo Māori and the thwarting of language initiatives, the historical lack of protection and appropriation of taonga works, and the sale and display of mokomokai (preserved heads) internationally.¹¹⁴ These examples illustrate repeated injustices related to taonga works and the cultural harm that results.

One can understand why canvassing every past instance of misappropriation of taonga works would be arduous and unnecessary, as this was not an historical settlement claim. The issue of Crown recognition of rangatiratanga is ultimately a conceptual one to resolve going forward. However, the original claimants looked to history to assert that the Crown had consistently undermined and denied tino rangatiratanga. The claim process itself also continued for 20 years. Therefore, for the Tribunal to ignore past evidence of this pattern ignores the power imbalance between Māori and the Crown. That in itself must be addressed for a true partnership to be built; for a “Treaty of Waitangi beyond grievance” to be realised.¹¹⁵

2 *Future-oriented partnership focus*

The Tribunal’s focus on partnership between the Crown and Māori going forward presents two further opposing issues. On the one hand, Williams strongly argues that the modern partnership between the Crown and Māori was the incorrect starting point. On the other hand, if one accepts the Tribunal’s approach, they still fail to answer the question: what does tino rangatiratanga look like in the post-Treaty settlement partnership context?

¹¹³ The only exception being consideration of the Tohunga Suppression Act 1907 in respect of rongoa Māori traditional medicine, Waitangi Tribunal, *Ko Aotearoa Tēnei*, above n 2, at ch 7.2.

¹¹⁴ Interview with Dr David Vernon Williams, above n 16.

¹¹⁵ Williams, above n 34, at 318; Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 16-17.

Williams returns to the point of historical grievance and stresses that the starting point should be Kupe's people (Māori) and Cook's people (European colonisers), who live in the land together, and to look from that point forward as to the future partnership between the two.¹¹⁶ He argues that one must not start with tino rangatiratanga in the modern context. I view his comments as referring to the partnership that was supposed to be established upon the signing of the Treaty of Waitangi. Instead, Māori were subordinated and oppressed, and their rangatiratanga denied by the coloniser, and so, any contemporary partnership must aim to redress the balance. Instead, the Tribunal took a 'clean-slate' approach to partnership.

However, despite the Tribunal's forward-looking approach, they still failed to lay out what the partnership should look like. This is evident from their introduction: "[t]he broader question of constitutional arrangements is for another forum at another time."¹¹⁷ Continuing inequality between Māori and the Crown was not raised. Tino rangatiratanga seemed to have little room in their continuum of input and control over taonga works and any obligation on the Crown to recognise Māori authority was left open. Therefore, the report provided no guidance to the government as to their ongoing obligations to Māori and how true partnership might be achieved.

3 *Cautious approach*

The critique of *Ko Aotearoa Tenei* so far has come to the conclusion that the recommendations contained within it do not go far enough. However, there is a persistent tension between the Waitangi Tribunal being a government body and their ability to be radical, versus their duty to set a precedent for recognition of Māori interests.

On the one hand, the Tribunal is an Executive body – a permanent Commission of Inquiry – that relies on the Crown for its existence. It is not a pro-Māori body as some think.¹¹⁸ The Tribunal has been pragmatic in the past, such as in the Foreshore and Seabed claim,¹¹⁹ and its

¹¹⁶ Interview with Dr David Vernon Williams, above n 166.

¹¹⁷ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 19.

¹¹⁸ As pointed out to in an interview with Dr David Vernon Williams, above n 16.

¹¹⁹ Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004).

purpose is to practically apply “principles” of the Treaty of Waitangi.¹²⁰ Thus to expect a strong approach might be too much to ask.

On the other hand, in my view the Tribunal went straight for the “middle ground” with its recommendations, rather than setting the bar for government action.¹²¹ Rahui Katene comments that the legitimacy of the Tribunal representing Māori interests comes from its face-to-face engagement with claimants; its ability to hear their story.¹²² Furthermore, the Tribunal has previously taken a strong stance as to the Treaty rights of Māori (and obligations of the Crown) in its reports on fisheries and pollution claims.¹²³ These claims were contemporary and ongoing issues, like WAI 262.

As a consequence of the Tribunal’s approach, the government has since used the *Ko Aotearoa Tēnei* report against Māori claimants. In the Mighty River Power Claim in 2012 the Crown used *Ko Aotearoa Tēnei* as a shield to assert that the Tribunal had explicitly rejected ownership claims in favour of partnership principles.¹²⁴ Whether or not the Tribunal represents Māori, or is merely subservient to the Crown, their recommendations profoundly impact the scope of future claims and what the Crown views as ‘legitimate’ Māori interests.

At the outset, the Tribunal aimed for pragmatism.¹²⁵ They would surely recognise that the government would opt for compromise on their recommendations anyway. Their pragmatism is evident in the lack of positive rights proposed for kaitiaki; confinement to a Western property framework; limits on intervention to be “reasonable” where the public interest “outweighs” Māori interests; and acceptance that the majority of control and authority over taonga works and mātauranga Māori would remain in the hands of the Crown. Ultimately, I believe that their pragmatism came at the expense of any meaningful recognition for rangatiratanga.

¹²⁰ Treaty of Waitangi Act 1975, preamble.

¹²¹ In agreement with Williams, above n 34, at 323.

¹²² Rahui Katene “Maori should dare to take the leap of faith in planning survival” Dominion Post (online ed, New Zealand, 12 July 2011).

¹²³ Waitangi Tribunal *Motunui-Waitara Report* (Wai 6, 1983); Waitangi Tribunal *Muriwhenua Fishing Claim* (Wai 22, 1988) and Waitangi Tribunal *Ngai Tahu Sea Fisheries* (Wai 27, 1992), as noted by Williams, above n 34 at 322.

¹²⁴ Williams, above n 34, at 325; Waitangi Tribunal *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).

¹²⁵ Waitangi Tribunal *Te Taumata Tuatahi*, above n 5, at 19; Williams, above n 34, at 322.

VII Conclusion

This paper analysed the Waitangi Tribunal's proposed reforms in relation to taonga works and related mātauranga Māori in their response to the WAI 262 claim. Those recommendations were critiqued through the lens of what the original claimants sought, and what tino rangatiratanga and kaitiakitanga demand to protect taonga works.

First, this paper gave an overview of the original WAI 262 claim, and went on to outline the current intellectual property regime and its drawbacks. The conclusion reached by both the Tribunal and this paper is that current intellectual property rights and mechanisms are not enough to prevent misuse and misappropriation of taonga works and mātauranga Māori by third parties, and also do not meet the needs of kaitiaki. This paper further pointed out that property rights in taonga works can exclude Māori from their use and commercial benefit.

Secondly, the paper briefly described the proposed reforms put forward by the Waitangi Tribunal. The substance of the paper was a critique of those recommendations. The critique looked at four key aspects of the recommendations' weakness: practical problems; legal recognition of the kaitiaki relationship; property rights; and the overall approach to the claim. The conclusion that this paper comes to is that the recommendations of the Waitangi Tribunal in *Ko Aotearoa Tēnei* did not answer the concerns of the original claimants as to recognition of tino rangatiratanga. Furthermore, they did not significantly improve upon the existing intellectual property system to protect kaitiaki relationships to taonga works. The proposed recommendations left control and oversight of taonga use very much in the hands of the Crown and its government. Furthermore, the Tribunal overall took a pragmatic approach at the expense of setting a benchmark for kaitiakitanga recognition. As well as erroneously setting aside past grievances, they refrained from addressing what the future partnership between the Crown and Māori should look like and how tino rangatiratanga could be given effect to. Finally, this paper reaches the conclusion that Māori rangatiratanga over taonga works cannot be fully accommodated within a Western legal property system. Instead a *sui generis* system of rights built on tikanga Māori is necessary to protect taonga works and the mātauranga Māori that underlies them.