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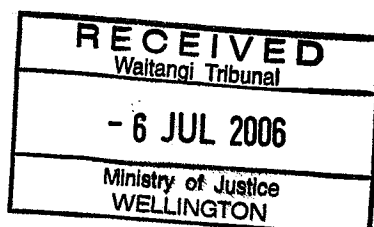
WAI 262

The flora and fauna and cultural intellectual property claim

Statement of Issues

*Te Rōpū Whakamana i te Tiriti o Waitangi
Waitangi Tribunal*

Hongoingoi / July 2006



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WAI 262 STATEMENT OF ISSUES

INTRODUCTION

This statement of issues is structured in the following way. Each part addresses a subject raised in the statements of claim. It is divided into a definition of the subject matter, then a summary of the relevant parts of the statement of claim and of the Crown's response. Next each part is broken into 3 major components of issues as follows:

- I. *Definition.* Any definition used in this document is intended for the purpose of the Wai 262 statement of issues only. The definitions are not intended to be exhaustive summaries of the concepts or mātauranga concerned.
- II. *Summary of the relevant parts of the Statements of Claim and the Crown's Response.* The first and first amended statements of claim are noted as necessary. Each claimant group's position is then summarised using the final amended statements of claim. The Crown's statement of response is then summarised. These summaries are intended to provide contextual information only. They are not intended to replace the statements of claim or response or limit the Tribunal's investigation into aspects of those statements.
- III. *First Component - Crown's Obligations.* Issues regarding the Crown's obligations in respect of Māori rights and to provide for the use, control, development, regulation, and to protect or preserve the subject matter of the part, and whether New Zealand law and policy meets those obligations.
- IV. *Second Component - Existing Law.* This component asks whether specific laws and policies have been obstacles to or infringed any of the Crown's obligations set out in the first component. This component considers all relevant New Zealand statutory provisions, common law doctrines and international treaties to which New Zealand belongs. As this second component in part depends on the answers to the issues in the first component, it should be read with that qualification.
- V. *Third Component - Future Law.* This component asks whether laws and/or policies ought to be created to provide and protect what has not been provided for or protected. This component in part depends on the answers to the issues in the first and second components.

Definition: Kaitiaki¹

For the purposes of this statement of issues, kaitiaki in respect of taonga works, biological and genetic resources in indigenous and/or taonga species, the environment, te reo Māori, tikanga Māori and mātauranga Māori, means the individual(s), whānau, hapū or iwi (as the case may be) whose relationship of kaitiakitanga and tino rangatiratanga with those taonga gives rise to an obligation and a corresponding right to:

- protect
- preserve
- control
- regulate
- use
- develop and/or
- transmit

those taonga and the relationship of kaitiakitanga with them; and kaitiakitanga is intended to have a corresponding meaning.

For the purposes of this statement of issues 'tino rangatiratanga' includes the right of kaitiaki to make and enforce laws and customs in relation to their taonga.

¹ In this document, the term 'kaitiaki' refers to all dialectical cognates of the word, such as the word kaitieki in Te Reo o Ngāti Porou.

PART ONE: INTELLECTUAL PROPERTY ASPECTS OF TAONGA WORKS

I. Definition

1.1.1 Taonga works include artistic and literary works such as carving, weaving, waiata, patere, oriori, haka, moteatea, painting, crafts, written works, graphic works, dramatic works, musical works, oral traditions, performing arts, symbols, images and designs, artefacts and the mauri of those taonga works, where the work reflects in some way the culture and/or identity of the kaitiaki of the work and includes the knowledge, skill, cultural or spiritual values upon which the work is based.

II. Relevant Parts of the Statements of Claim and the Crown's Response

The statements of claim refer to the following aspects of taonga works:

The claimants contend that:

1.2.1 Reference to indigenous, cultural and customary heritage rights in this claim is deemed to include all rights (including intellectual and property rights) past, present and future in relation to taonga o te Iwi Māori (Claims 1.1(a) para 2.2). The term taonga and rights pertaining to taonga in the claims is comprehensive and inclusive: 'Taonga' in this claim refers to all elements of the claimants' estates, both material and non-material, tangible and intangible' (Claim 1.1(g), para 3.1; see also 1.1(d), paras 3, 1.1(f), paras 3.1-3.4, 1.1(e), paras 12, 15, 25-29, 34, 45, 50-51).

1.2.2 Te tino rangatiratanga o te Iwi Māori incorporated and incorporates:

- (a) Decision-making authority over the conservation, control of, and proprietary interests in natural resources including indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 2.5(a)).
- (b) The right to determine indigenous cultural and customary heritage rights in the knowledge and use of indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 2.5(b)).
- (c) The right to protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna (Claim 1.1(a) para 2.5(e)).

1.2.3 In relation to o rātou taonga katoa, Crown policies and practices have allowed uses and development of these taonga in isolation of the original creator's cultural and spiritual concepts which has resulted in the loss and/or damage of both the taonga themselves and the knowledge associated with these taonga (Claim 1.1(a) para 5.3(d)).

The claimants further contend that:

- 1.2.4 In December 1993 the New Zealand Government signed an international agreement known as the General Agreement on Trade and Tariffs: Trade Related Aspects of Intellectual Property Rights known as the GATT:TRIPS agreement (Claim 1.1(a) para 14.2).
- 1.2.5 The GATT:TRIPS agreements seek to establish an international uniform and universally applicable intellectual property standard. The effect of these standards is to allow the international commodification of indigenous flora and fauna me o nga taonga katoa o te iwi Māori without reference to Māori as the original owners of these taonga (Claim 1.1(a) para 14.5).
- 1.2.6 The GATT:TRIPS agreement places greater emphasis on the economic values of intellectual property at the expense of other values important to indigenous peoples such as communal knowledge systems and the cultural and spiritual relationship that indigenous peoples have with their natural environments (Claim 1.1(a) para 14.6).
- 1.2.7 The GATT:TRIPS agreement does not provide that it must be consistent with the Crown's obligations to Māori under the Treaty (Claim 1.1(a) para 14.7).
- 1.2.8 Any international laws, conventions or other legal instruments morally or legally binding on the New Zealand Government which are inconsistent with the Crown's obligations to Māori under the Treaty and which are enacted or otherwise adopted by or on behalf of the Crown, are in breach of the Treaty (Claim 1.1(a) para 14.8).
- 1.2.9 The GATT:TRIPS agreement replicates on an international level the Crown's omissions in meeting its obligations to Māori under the Treaty domestically. (Claim 1.1(a) para 14.9). The Treaty imposes an obligation upon the Crown to put in place mechanisms to ensure it can meet its obligations to Māori under the Treaty prior to entering into any international agreements (Claim 1.1(a) para 14.10).
- 1.2.10 The Crown has a duty under the Treaty to develop with Māori processes and procedures whereby Māori may negotiate directly with the Crown on the impact of these policies, practices and legislation on Māori rights to indigenous flora and fauna me o rātou taonga katoa. (Claim 1.1(a) para 14.11).
- 1.2.11 On 13 July 1994, the GATT (Uruguay Round Bill) ('the GATT Bill') was introduced to the House by the Minister for Trade Negotiations. The GATT Bill sought to give effect to the International GATT:TRIPS agreement (Claim 1.1(a) para 15.1).
- 1.2.12 The claimants assert the GATT Bill procedurally and substantively prejudiced the guarantees to Māori under the Treaty to their indigenous flora and fauna me o rātou taonga katoa. This is because prior to the New Zealand government enacting the GATT Bill:

- (a) there was insufficient assessment by the Crown of its impact upon Māori guarantees under the Treaty to their indigenous flora and fauna me o rātou taonga katoa;
 - (b) there was inadequate consultation with Māori as to its effect upon their guarantees under the Treaty to their indigenous flora and fauna me o rātou taonga katoa;
 - (c) the Crown must put in place mechanisms to ensure it can meet its obligations to Māori under the Treaty (Claim 1.1(a) para 15.2).
- 1.2.13 The GATT Bill was divided into separate bills during its final stages in the House. In essence it provided for amendment to statutes including The Trade Marks Act. It also provided for the enactment of a new Geographical Indications Act and Designs Layout Act (Claim 1.1(a) para 15.3).
- 1.2.14 In enacting the GATT Bill the Crown adopted a procedure that is inconsistent with its guarantees to Māori under the Treaty to their indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 15.5).
- 1.2.15 The GATT Bill was enacted by the Crown with inadequate consultation and negotiation with Māori as to its impact upon their flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 15.6).
- 1.2.16 The Crown continues to develop practices, policies and legislation which will have an adverse impact upon Māori rights to indigenous flora and fauna me o rātou taonga katoa. Some examples include the Crown's failure to support te Iwi Māori in the adoption of the United Nations Draft Declaration on the Rights of Indigenous Peoples as a mechanism to recognise and protect the right of Māori to self-determination as Indigenous Peoples of Aotearoa. This is in breach of the Crown's duties under the Treaty (Claim 1.1(a) para 17.1 (k)).
- 1.2.17 In recent years there has been increasing importance and recognition in the international arena on the rights of indigenous peoples. These developments and international instruments include:
- (a) The United Nations Convention on Biological Diversity, Rio de Janeiro, June 1992 - Article 8(j) the importance of maintaining and respecting the right to indigenous and traditional peoples' knowledge to preserving bio-diversity. New Zealand is a signatory (Claim 1.1(a) para 18.1 (d));
 - (b) The Mataatua Declaration of the Cultural and Intellectual Property Rights of Indigenous Peoples 1992 - prepared and ratified at the first international conference on cultural and intellectual property rights of indigenous peoples by 150 indigenous representatives from 60 United Nation member states. The declaration states that indigenous peoples are the exclusive owners of their cultural and intellectual property and are the guardians of their traditional knowledge. It also states that indigenous peoples have the right to protect and control the dissemination of their traditional knowledge and manage the commercialisation of any

traditional plants and medicines and that there is insufficient existing protection of indigenous peoples' intellectual and cultural property rights;

- (c) This declaration has been formally presented at the United Nations (UN Commission on Human Rights E/CN:41/Sub.2/AC.4/CRP.5, 26 July 1993) (Claim 1.1(a) para 18.1 (f));
- (d) The Treaty for Life Forms Patent - Free Pacific (and related protocols) (draft), Fiji, 11 July 1995 - this draft Treaty and its protocol seek to establish the Pacific as a life forms patent-free zone. It is concerned with prohibiting the collection of human genetic material from Indigenous Peoples and the prospecting for biological materials that is occurring throughout the Pacific (Claim 1.1(a) para 18.1 (g)).

1.2.18 There was insufficient or no assessment or consideration given by the Crown to these international instruments and their impact upon the Crown's obligations to Māori under the Treaty to actively protect Māori interests to their indigenous flora and fauna me o rātou taonga katoa prior to entering into the GATT:TRIPS agreement or the subsequent GATT Bill enacting legislation (Claims 1.1(a) para 18.2, 1.1(d), para 6.6.2, 6.7).

Ngāti Kuri/Te Rarawa/Ngāti Wai

1.2.19 The collective amended claim refers to examples of taonga works such as whakairo, Māori cultural images, designs and symbols, and associated cultural heritage rights (Claim 1.1(a), para 2.9). The First Amended Statement of Claim for Ngāti Kuri/Te Rarawa and Ngāti Wai refers to works in this category within the broad claim to 'the exercise of mātauranga Māori' (Claim 1.1(g) para 6.2.7-6.2.8). Also relevant are 'whakapapa, and systems of knowledge about whakapapa, including systems of learning, transmission, respect for, and preservation of whakapapa'. (Claim 1.1(g) para 7.2).

Ngāti Porou

1.2.20 The Ngāti Porou amended statement of claim states an incidence of the Treaty guarantee over taonga includes 'documentation of Ngāti Porou mātauranga me nga tikanga in any medium (whether photographic, audio only, audio visual, written or otherwise recorded and whether by analogue or digital means) and wherever expressions (or reproductions of copies thereof) of Ngāti Porou mātauranga me nga tikanga are stored, collected or otherwise housed.' (Claim 1.1(e) para 29).

1.2.21 The ASOC also states:

- (a) 'mātauranga me nga tikanga including all those things other than land and fisheries that make up Ngāti Porou culture and heritage including, without limitation, whakapapa, karakia, oral traditions (oral arts, oral history), nga korero, nga moteatea (including waiata tangi, patere, oriori), nga haka and other Ngati Porou performing arts and composition generally, te kauae

runga and te kauae raro,... Ngāti Porou naming traditions generally (including in relation to landscapes, seascapes and landforms)' and nga maramataka and nga korero tatai whetu (Claim 1.1(e) para 25)

- (b) 'Artistic work ...includes without limitation... nga moteatea (including without limitation waiata, tangi, patere, oriori), nga haka and other Ngāti Porou composition and performance arts generally, written literature, history and other documented text generally (whether in analogue or digital form), nga mahi a Toi (including nga mahi a whakairo, nga mahi a raranga and nga mahi a Ta moko), Ngāti Porou visual arts, Ngāti Porou imagery, symbols and designs generally associated with Ngāti Porou mātauranga mo nga tikanga.' (Claim 1.1(e) para 34)

1.2.22 Ngāti Porou contend that they were guaranteed te tino rangatiratanga over, and full, exclusive and undisturbed possession of all taonga, including:

- (a) Ngāti Porou artistic works. This guarantee included the right and obligation of Ngāti Porou to exercise mana motuhake in relation to Ngāti Porou artistic works including, without limitation, the right to control, the right of access, and the right of guardianship, maintenance, collection, custody, documentation, storage, housing development and revitalisation of Ngāti Porou artistic works (Claim 1.1(e) para 36).
- (b) Ngāti Porou cultural taonga. This guarantee included the right and obligation of Ngāti Porou to exercise mana motuhake in relation to their cultural taonga including, without limitation, the right of control and access to, and the right of guardianship of, cultural taonga including the whakapapa, mana, mauri, ihi and wehi of those taonga (Claim 1.1(e) para 44).

Ngāti Kahungunu

1.2.23 At 1840 Ngāti Kahungunu collectively and individually held a body of knowledge and skills including knowledge in respect of indigenous flora and fauna, arts, crafts, history, waiata, language and all other cultural property and traditions of Ngāti Kahungunu ("Ngāti Kahungunu cultural knowledge") (Claim 1.1(d), para 9).

1.2.24 Ngāti Kahungunu cultural knowledge is and always has been a taonga of Ngāti Kahungunu in respect of which Ngāti Kahungunu are kaitiaki (Claim 1.1(d), para 10).

1.2.25 Pursuant to Article 2 of the Treaty of Waitangi Ngāti Kahungunu are guaranteed tino rangatiratanga over, and full exclusive and undisturbed possession of, all taonga including recognition and protection of Ngāti Kahungunu cultural knowledge (Claim 1.1(d), para 11).

1.2.26 As a consequence of the guarantee the Crown is under a continuing obligation (Claim 1.1(d), para 12):

(a) To actively protect the exercise by Ngāti Kahungunu of tino rangatiratanga and kaitiakitanga in regard to Ngāti Kahungunu cultural knowledge; and

(b) To actively protect Ngāti Kahungunu cultural knowledge.

1.2.27 In breach of its obligations the Crown has undermined and/or prevented the exercise of tino rangatiratanga and kaitiakitanga by Ngāti Kahungunu in respect of Ngāti Kahungunu cultural knowledge through (Claim 1.1(d), para 13):

(a) Implementing a legislative framework for intellectual property which fails to adequately protect and/or recognise Ngāti Kahungunu cultural knowledge including (but not limited to) all or part of the following:

Patents Act 1953
Designs Act 1953
Trademarks Act 1953
Plant Variety Rights Act 1987
Copyright Act 1994
Crown Research Institutes Act 1992
Medical Practitioners Registration Act 1969
Medicines Act 1981

(b) Adopting all or part of international instruments which adversely affect the ability of Ngāti Kahungunu to exercise tino rangatiratanga or kaitiakitanga in respect of their cultural knowledge without either consultation with or obtaining permission from Ngāti Kahungunu;

(c) Failing to implement into domestic legislation and policy aspects of international instruments which would otherwise give effect to the Crown's obligations under the Treaty of Waitangi by protecting and recognising Ngāti Kahungunu cultural knowledge (Claim 1.1(d), para 13.3).

1.2.28 In breach of its obligations the Crown has failed to actively protect Ngāti Kahungunu cultural knowledge through (Claim 1.1(d), para 14):

(a) Implementing legislation and policy which have contributed to and/or facilitated the loss of Ngāti Kahungunu cultural knowledge, including the legislative framework for intellectual property;

(b) The Crown, in breach of the principles of the Treaty, has failed to adopt or develop an intellectual property regime that recognises and protects Ngāti Kahungunu cultural knowledge and which is consistent with the principles of the Treaty of Waitangi.

(c) Adopting either partially or wholly international instruments which do not protect Ngāti Kahungunu cultural knowledge.

- (d) Failing to implement aspects of international instruments (set out in paragraph 13.3 of the SOC) which would have the effect of protecting Ngāti Kahungunu cultural knowledge.

12.2.29 As a result of the breaches Ngāti Kahungunu have:

- (a) Been denied the right to exercise tino rangatiratanga over and in respect of Ngāti Kahungunu cultural knowledge;
- (b) Been denied the right to exercise kaitiakitanga over and in respect of Ngāti Kahungunu cultural knowledge;
- (c) Suffered damage to and loss of Ngāti Kahungunu cultural knowledge;
- (d) Been denied the exercise of a development right in respect of Ngāti Kahungunu cultural knowledge (Claim 1.1(d), para 15).

Ngāti Koata

1.2.30 Ngāti Koata contend that they were guaranteed “tino rangatiratanga o o rātou whenua, o rātou kainga me o rātou taonga katoa”.

1.2.31 Ngāti Koata define “Me o rātou taonga katoa as including, without being limited to, mātauranga, ... Māori cultural images, designs, symbols and associated indigenous, cultural and customary heritage rights in relation to such taonga.”

1.2.32 Reference to “indigenous, cultural and customary heritage rights” includes intellectual (and property) rights past, present and future in relation to taonga of Ngāti Koata (Claim 1.1(f), para 2.7).

1.2.33 Specifically, Ngāti Koata contend that the Treaty guarantees of tino rangatiratanga assure Ngāti Koata authority to:

- (a) Ensure protection, enhancement and transmission of the cultural and spiritual knowledge and concepts found in o rātou taonga katoa; and

- (b) Make decisions about and benefit from the application, development, uses, study and sale of o rātou taonga katoa.

1.2.34 Ngāti Koata contend that the Crown, in breach of the principles of the Treaty of Waitangi and its obligations thereunder, has made and enacted legislation and adopted policies which failed to protect Ngāti Koata tino rangatiratanga and kaitiakitanga in respect of Maori cultural property, including images, designs and symbols, from unauthorised use in all media and every medium.

The Crown's Statement of Response

- 1.2.35 The Crown broadly admits that types of work referred to in the Ngāti Porou SOC are taonga of Ngāti Porou, but that once performed or published they are 'no longer wholly retained or possessed by the claimants nor capable of absolute protection by the Crown' (SOR 2.256, para 138).
- 1.2.36 With specific reference to the existing law of copyright in New Zealand, the Crown states (SOR 2.256, para 141):
- (a) The Crown also accepts that in respect of such works in their non-physical/intangible form, there exist limited statutory rights of copyright (including where applicable moral rights) in respect of the work, provided that they fall within the statutory definition of an original artistic, literary, dramatic or musical work, and except to the extent that authorisation may be given to others to reproduce, adapt, play, sing or recite or perform that work.
 - (b) Accepts that Māori traditional cultural knowledge or mātauranga Māori may be regarded by some or all Māori as taonga (SOR 2.256, para 101).
 - (c) Accepts that those kinds of artistic, graphic, literary, dramatic and musical works listed in paragraph 34 of the Ngāti Porou Statement of Claim may be regarded by the claimants as taonga (SOR 2.256, para 138).
- 1.2.37 The Crown does not specifically refer to whether education systems are or are not a taonga, but notes, by way of non-exclusive example, that English law in 1840 did not in general recognise private property or proprietary rights in: folklore, oral history and oral traditions (SOR 2.256, paras 43.2.2) or information per se (SOR 2.256, paras 43.2.3). The Crown accepts, to the extent that such property, resources, property rights or interests are directly linked to taonga that are within the contemplation of Article 2 of the Treaty, that Treaty principles may be relevant to decisions taken by the Crown in relation thereto (SOR 2.256, para 44).

Part One: Intellectual property aspects of taonga works

III. First component issues

- 1.3.1 (a) Must the Crown protect taonga works from use by persons other than the kaitiaki or in a manner inconsistent with the customs and values of those kaitiaki?
- (b) If so, in what circumstances does New Zealand law and policy provide such protection?
- 1.3.2 (a) Must the Crown provide for the regulation, control, use and development by kaitiaki of their taonga works?
- (b) If so, in what circumstances does New Zealand law and policy ensure this activity?
- 1.3.3 (a) Must the Crown ensure the preservation of intellectual property aspects of taonga works in the hands of kaitiaki and the transmission of those works from generation to generation among kaitiaki?
- (b) If so, in what circumstances, does New Zealand law and policy provide for such preservation and transmission?

IV. Second component issues

Copyright - New Zealand Law

- 1.4.1 Has and does the copyright law of New Zealand provide adequate protection for taonga works? (The following questions are asked in relation to the current Copyright Act 1994. Specifically:
- (a) Does the law of copyright in New Zealand allow for the recognition of kaitiakitanga?
- (b) Does the concept of authorship as defined in section 5 of the Copyright Act 1994 prevent copyright protection from applying to certain taonga works? If yes, why and what are those works?
- (c) Do the categorisations of works required for copyright protection in section 14 of the Copyright Act 1994 make it difficult for some aspects of the said taonga works to obtain copyright?
- (d) Does the originality requirement in section 14 of the Copyright Act 1994 prevent copyright law protecting taonga works?
- (e) Does the fixation requirement in section 15 of the Copyright Act 1994 prevent copyright law protecting the taonga works?

- (f) Does the duration of copyright limited to life of the author plus 50 years (and in some situations 50 years mean that elements of taonga works inappropriately) fall into the public domain?
 - (g) Does the right to assert authorship of (sections 94-97) provide appropriate protection for the rights of kaitiaki to claim authorship of taonga works?
 - (h) Does the right to object to derogatory treatment (sections 98-101) provide adequate protection for customary uses and authorisation of customary uses of taonga works?
 - (i) Do the rights against false attribution of a work (sections 102-104) provide adequate protection for kaitiaki against false attribution of taonga works?
 - (j) Do the protection of performers' rights in Part IX of the Copyright Act provide adequate protection for performers of taonga works?
- 1.4.2 If the answer to one or more of the above parts of question 1 is "no" does that mean that copyright is not applicable to aspects of traditional knowledge in taonga works and is this a breach of the principles of the Treaty?
- 1.4.3 Does the provision of copyright protection to third parties ever wrongly prevent the control, use, regulation, development, transmission and/or preservation of taonga works by the kaitiaki?

Explanatory Note re Pending Legislation: At the time of issuing the statement of issues, law reform in relation to digital issues is pending. If a Digital Copyright Act (or similarly named legislation) is passed during the period after the issue of the SOI and before completion of the Report in this inquiry that and any other current legislation and policy will be considered.

Copyright – International Agreements

- 1.4.4 New Zealand is a member of three multi-lateral international treaties that provide minimum legal standards that its members must comply with in relation to copyright.
- 1.4.5 Trade Related Intellectual Property Rights Agreement, Annex 1C of the World Trade Organization Agreement, was signed 15 April 1994 at Marrakesh and came into effect 1 January 1995 ('TRIPS Agreement').
- 1.4.6 The Berne Convention for the Protection of Literary and Artistic Works 1886. New Zealand ratified the 1928 revision of this Convention, known as the Rome Revision ('Berne Convention').

Explanatory Note: The Rome revision appears to be referred to in the statements of claim as the Rome Convention of 1928. There is not a separate intellectual property Convention called the Rome Convention 1928. There is the Rome Convention of 1961 on matters related to copyright primarily in relation to sound recordings, but New Zealand is not a member of this Convention. New Zealand has not ratified the most recent revision of the Berne Convention completed in Paris in 1971. However articles 1-21 of that revision are incorporated in to the TRIPS agreement, to which New Zealand does belong.

1.4.7 Universal Copyright Convention ('UCC').

Explanatory Note: New Zealand does belong to this Convention. It has not been referred to in any of the statements of claim and at present its importance has been superseded by both the Berne Convention and TRIPS. Historically it may have been relevant in New Zealand and therefore is relevant to the claims. It is also relevant for relationships between New Zealand and members of the Universal Copyright Convention who are not members of the Berne Convention and/or the TRIPS agreement.

1.4.8 New Zealand has also made international commitments in relation to copyright in the following free trade agreements ('FTAs'):

- (a) New Zealand and Thailand Closer Economic Partnership (NZTCEP) - 2005
- (b) New Zealand and Singapore Closer Economic Partnership (NZSCEP) - 2001
- (c) Trans-Pacific Strategic Economic Partnership (Trans-Pacific SEP) - 2005 Brunei/Chile/New Zealand/Singapore (expected to come into force on 1 January 2006).

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

- (a) protect taonga works from use by persons other than the kaitiaki or in a manner inconsistent with the customs and values of those kaitiaki?
- (b) provide for control, use, regulation and/or development by kaitiaki of their taonga works?
- (c) ensure the preservation of taonga works in the hands of kaitiaki and the transmission of those works from generation to generation among kaitiaki?

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

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

Trade Marks, Name Registraton Systems, Passing Off and Registered Designs – New Zealand

1.4.12 Has and does the trade mark law of New Zealand provide adequate protection for taonga works? (The following questions need to be asked in relation to the current Trade Marks Act 2002).

- (a) Does the law of trade marks in New Zealand allow for the recognition of kaitiakitanga?
- (b) Does the requirement of distinctiveness for trade mark registration prevent taonga works (particularly symbols and designs) from being registered by kaitiaki?
- (c) Do the requirements of proprietorship for trade mark registration prevent taonga works (particularly symbols and designs) from being registered by kaitiaki?
- (d) Are there any other requirements of the trade mark registration system that prevents its use by kaitiaki?
- (e) Is the use of the trade mark registration system by third parties in relation to taonga works (particularly design and symbols) a breach of the treaty?

14.13 Do the name registration systems, such as domain names and company names, provide adequate protection for taonga works? Specifically:

- (a) Do the laws and regulations relating to name registration systems in New Zealand allow for the recognition of kaitiakitanga?
- (b) Do the requirements of proprietorship for name registration systems prevent taonga works from being registered by kaitiaki?
- (c) Do any other requirements of the name registration systems prevent taonga works from being registered by kaitiaki?
- (d) Is the use of the name registration system by third parties in relation to taonga works a breach of the Treaty of Waitangi or its principles?

- 1.4.14 (a) Does the law of passing off provide protection for taonga works?
- (b) Does the law of passing off in any way hinder the protection of taonga works?
- 1.4.15 (a) Does the law of registered designs in New Zealand allow for the recognition of forms of kaitiakitanga of intellectual property rights?
- (b) Do the requirements for design registration prevent taonga works from being registered by kaitiaki?

Explanatory Note re Pending Legislation: The Geographical Indications Act 1994 has not and will not come into force. At the time of issuing the statement of issues law reform in relation to Geographical Indications is pending. If a Geographical Indications (Wines and Spirits) Registration Bill (or similarly named legislation) is passed during the period after the issue of the SOI and before completion of the Report in this inquiry that, and any other current, legislation and policy will be considered.

Trade Marks, Name Registration Systems, Passing Off and Registered Designs – International

- 1.4.16 New Zealand is a member of two international multilateral treaties in relation to trade marks and designs:
- (a) Trade Related Intellectual Property Rights Agreement, ('TRIPS Agreement').
- (b) Paris Treaty for the Protection of Industrial Property 1883 ('Paris Convention') New Zealand is a member of the London revision and Stockholm revision of this Convention and of those parts included in the TRIPS agreement.

Explanatory Note: New Zealand is not a member of the Trademark Law Treaty 1994, the Nice Agreement on the International Classifications of Goods and Services (although it adheres to its principles), the Madrid Agreement 1891 or the Madrid Protocol 1989. Should New Zealand ratify any of these or other relevant international treaties during the period after the issues of the SOI and completion of the Report in this inquiry they will be considered.

- 1.4.17 New Zealand has also made international commitments in relation to trade marks and designs in the following free trade agreements ('FTAs'):
- (a) New Zealand and Thailand Closer Economic Partnership (NZTCEP) - 2005

- (b) New Zealand and Singapore Closer Economic Partnership (NZSCEP) - 2001
- (c) Trans-Pacific Strategic Economic Partnership (Trans-Pacific SEP) - 2005 Brunei/Chile/New Zealand/Singapore (expected to come into force on 1 January 2006).

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

- (a) protect taonga works from use by persons other than the kaitiaki or in a manner inconsistent with the customs and values of those kaitiaki?
- (b) provide for protection, preservation, control, use, development and/or regulation by kaitiaki of their taonga works?
- (c) ensure the preservation of taonga works in the hands of kaitiaki and the transmission of those works from generation to generation among kaitiaki?

1.4.19 Alternatively, if the answer to 1.4.18 (a), (b) and (c) is “not necessarily” do the TRIPS Agreement, Paris Convention and FTAs, or any part of them, enhance the control, use, development, transmission and/or preservation of taonga works?

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

V. Third component issues

Copyright

1.5.1 If New Zealand copyright law is in whole, or in part, inconsistent with the Treaty of Waitangi, can it be made Treaty consistent by amendment in particular areas? Such areas include:

- (a) Should the definition of ownership be amended to reflect kaitiakitanga?
- (b) Should the definitions of authorship be amended to include taonga works otherwise excluded from the definitions?
- (c) Should there be a new category of copyright work to accommodate taonga works not otherwise protected?
- (d) Should the definition of originality be amended to make taonga works protectable where it otherwise excludes taonga works?

- (e) Should the fixation requirements be amended to make taonga works protectable where those requirements otherwise exclude taonga works?
 - (f) Should the duration of copyright be amended to make taonga works protectable where it otherwise excludes taonga works?
- 1.5.2 If the answer to any of the parts of 1.5.1 above is “yes”, what should the amendments include?
- 1.5.3 If New Zealand copyright law is in whole, or in part, inconsistent with the Treaty can it be made Treaty consistent through a discrete (*sui generis*) form of protection (including mechanisms both legal and non-legal and custom law) for taonga works?
- 1.5.4 If the answer to 1.5.3 is “yes” what protection should be developed?

Trade Marks, Name Registration Systems, Passing Off & Registered Designs

- 1.5.5 If New Zealand trade mark law, name registration systems and the doctrine of passing off are in whole, or in part, inconsistent with the Treaty, can it be made Treaty consistent by amendment in particular areas? Such areas include:
- (a) Should the definition of ownership of a trade mark, or the concept of ownership of goodwill as applied in passing off cases, be amended or changed to reflect kaitiakitanga?
 - (b) Does the requirement of distinctiveness for trade mark registration prevent taonga works (particularly symbols and designs) from being registered by the kaitiaki?
 - (c) Do the requirements of proprietorship for trade mark registration prevent taonga works (particularly symbols and designs) from being registered by the kaitiaki?
 - (d) Do the requirements of the law of the doctrine of passing off prevent it from being used to protect goodwill in taonga works?
 - (e) Are there any other requirements of the trade mark registration system that prevent its use by kaitiaki?
 - (f) Is the use of the trade mark registration system by third parties in relation to taonga works (particularly design and symbols) a breach of the Treaty?
 - (g) Are there any other requirements of any name registration systems that prevent their use by kaitiaki?
 - (h) Is the use of the any name registration system by third parties in relation to taonga works a breach of the Treaty?

- 1.5.6 If New Zealand trade mark law and the doctrine of passing off is, in whole or in part, inconsistent with the Treaty, can it be made Treaty consistent through a discrete (*sui generis*) form of protection (including mechanisms both legal and non-legal and custom law) for taonga works?
- 1.5.7 If the answer to 1.5.6 is “yes” what protection should be developed?
- 1.5.8 If New Zealand name registration systems are in whole, or in part, inconsistent with the Treaty, can it be made Treaty consistent through a discrete (*sui generis*) form of protection (including mechanisms both legal and non-legal and custom law) for taonga works?
- 1.5.9 If the answer to 1.5.8 is “yes” what protection should be developed?
- 1.5.10 If New Zealand registered design law is in whole, or in part, inconsistent with the Treaty, can it be made Treaty consistent by amendment in particular areas including:
- (a) Should the requirements of ownership in design rights be amended to recognise kaitiakitanga?
 - (b) Should the requirements for design registration allow registration of taonga works by the kaitiaki?
- 1.5.11 If New Zealand registered design law is in whole, or in part, inconsistent with the Treaty, can it be made Treaty consistent through a discrete (*sui generis*) form of protection (including mechanisms both legal and non-legal and custom law) for taonga works?
- 1.5.12 If the answer to 1.5.11 is “yes” what protection should be developed?

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

Note: This Part is concerned with the biological and genetic resources of indigenous and/or taonga species only. Other aspects of claims relating to flora and fauna are addressed in Part Four.

I. Definitions

- 2.1.1 Biological and genetic resources of indigenous and/or taonga species include flora, fauna, human genetic resources and claims of cultural and identity based uses of these genetic resources of indigenous and/or taonga species.
- 2.1.2 Taonga species are those species of flora and fauna that the claimants identify as having particular cultural or spiritual significance to them and include those species listed in Schedule One.

II. Relevant Parts of the Statements of Claim and the Crown's Response

- 2.2.1 The early collective statements of claim refer to the following aspects of biological and genetic resources of indigenous and/or taonga species.
- 2.2.2 The claimants argue that te tino rangatiratanga o te Iwi Māori incorporated and incorporates (Claim 1.1, p.1):
 - (a) The right to control and make decisions about the propagation, development, transport, study or sale of indigenous flora and fauna
 - (b) The right to protect, enhance and transmit the cultural, medicinal, and spiritual knowledge and concepts in the life cycles of indigenous flora and fauna.
- 2.2.3 The claimants argue that such recognition vested in Iwi all rights relating to the protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation and restrictions upon the use of indigenous flora and fauna and the genetic resource contained therein (Claim 1.1, para 11).
- 2.2.4 In relation to kumara, claimants argue that:

the actions and inactions of the Crown removed and removes the ability of the Māori to preserve biodiversity within indigenous flora and fauna and thus deny Māori control of those intellectual cultural property rights in flora which are an inherent part of te tino rangatiratanga o te Iwi Māori as it applies to indigenous flora (Claim 1.1, p. 12).
- 2.2.5 In relation to pohutakawa, claimants assert that:

the actions, omissions and policies of the Crown and its agents led to, and continue to prevent Māori exercising kaitiakitanga in relation to the species

pohutakawa, and are therefore a denial of te tino rangatiratanga o te Iwi Māori as it applies to indigenous flora (Claim 1.1, p. 12):

- (a) the action of the Crown in vesting proprietary rights in species or varieties of species, or 'new' cultivars discovered or bred is contrary to the Treaty and is a denial of te tino rangatiratanga o te Iwi Māori as it relates to indigenous flora.
- (b) specifically, the granting of a plant variety right by the Crown and its agents in accordance with the Plant Variety Rights Act 1987 deprives te Iwi Māori of access to and control over the discovery, genetic development, and plant breeding technologies which are part of the right to development inherent in the exercise of te tino rangatiratanga.
- (c) the particular grant of Plant Variety Restriction (PVR) over the pohutakawa is contrary to the Treaty of Waitangi and a denial of te tino rangatiratanga o te Iwi Māori as it relates to indigenous flora (Claim 1.1, p. 15 and Claim 1.1(a), 7.3(c)-(d), 7.4 (d)-(e)).
- (d) the action of the Crown in seeking the passage of the Protection of Animals Act 1880 and the Plant Variety Rights Act 1987 were acts *ultra vires* the power of kawanatanga granted to the Crown in the Treaty (Claim 1.1, p. 15).
- (e) actions and inactions of the Crown have removed the ability of Māori to preserve biodiversity within indigenous flora and fauna and thus deny Māori control over those intellectual cultural and property rights which are inherent part of te tino rangatiratanga o te Iwi Māori (Claim 1.1, p.15).

2.2.6 In relation to koromiko, claimants argue that:

actions and inactions of the Crown remove the ability of Māori to preserve biodiversity within indigenous flora and fauna and thus deny Māori control over those intellectual cultural and property rights which are inherent part of the te tino rangatiratanga o te Iwi Māori (Claim 1.1, p.18).

2.2.7 In relation to puawananga, claimants argue that (Claim 1.1, p.20):

- (a) the action and inaction of the Crown in permitting the selling, disposal and export of the species puawananga and thereby subjecting it to the application of new techniques of genetic engineering is a denial of the conservation, property and development rights inherent in te tino rangatiratanga o te Iwi Māori as it applies to indigenous flora.
- (b) the actions and inactions of the Crown remove the ability of Māori to preserve biodiversity within indigenous flora and fauna and thus deny Māori control over those intellectual cultural and property rights which are inherent part of the te tino rangatiratanga o te Iwi Māori.

2.2.8 In relation to indigenous forests claimants argue that (Claim 1.1, p.21):

the actions and inactions of the Crown remove the ability of Māori to preserve biodiversity within indigenous flora and fauna and thus deny Māori control over those intellectual cultural and property rights which are inherent part of the te tino rangatiratanga o te Iwi Māori.

2.2.9 In relation to pupuharakeke, claimants argue that:

actions and inactions of the Crown remove the ability of Māori to preserve biodiversity within indigenous flora and fauna and thus deny Māori control over those intellectual cultural and property rights which are inherent part of the te tino rangatiratanga o te Iwi Māori (Claim 1.1, p.24).

2.2.10 Claimants argue that reference to indigenous, cultural and customary heritage rights in this claim includes all rights (including intellectual and property rights) past, present and future in relation to taonga o te Iwi Māori (Claim 1.1(a) para 2.2).

2.2.11 Te tino rangatiratanga o te Iwi Māori incorporated and incorporates:

- (a) Decision-making authority over the conservation, control of, and proprietary interests in natural resources including indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 2.5(a)).
- (b) The right to determine indigenous cultural and customary heritage rights in the knowledge and use of indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 2.5(b)).
- (c) The right to protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna (Claim 1.1(a) para 2.5(e)).

2.2.12 The alleged conduct or omissions by or on behalf of the Crown in relation to te tino rangatiratanga o te Iwi Māori includes:

- (a) The selling, disposal, and export of species of indigenous flora and fauna and/or their genes representing the genetic resources of Aotearoa by the Crown and its agents or by other parties encouraged/permitted/sanctioned by actions or omissions of the Crown in a manner contrary to the Treaty of Waitangi (Claim 1.1(a) para 4.2(g)).
- (b) The sale, disposal, patenting, and issuing of proprietary rights in species of indigenous flora and the sale for export of indigenous timbers by the Crown and its agents in a manner contrary to the Treaty of Waitangi (Claim 1.1(a) para 4.2(h)).

2.2.13 Crown policies on patenting and the passage of the Plant Variety Rights Act 1987 have denied Māori those proprietary interests in indigenous flora which are inherent in the exercise of te tino rangatiratanga. Plant variety rights have been

gained for seven varieties of native plants including a one variety of Pohutukawa (Claim 1.1(a) para 5.3(c)).

2.2.14 In relation to nga taonga katoa of the claimants, Crown policies and practices have allowed uses and development of these taonga in isolation of the original creator's cultural and spiritual concepts which has resulted in the loss and/or damage of both the taonga themselves and the knowledge associated with these taonga (Claim 1.1(a) para 5.3(d)).

Claimants contend that:

2.2.15 In December 1993 the New Zealand Government signed an international agreement known as the General Agreement on Trade and Tariffs: Trade Related Aspects of Intellectual Property Rights known as the GATT:TRIPS Agreement (Claim 1.1(a) para 14.2).

- (a) The claimants assert the GATT:TRIPS agreement procedurally and substantively prejudices the guarantees to Māori under the Treaty to their indigenous flora and fauna me o rātou taonga katoa. This is because prior to entering into the GATT:TRIPS agreement:
 - (i) there was insufficient assessment by the Crown of its impact upon Māori guarantees under the Treaty to their indigenous flora and fauna me o rātou taonga katoa;
 - (ii) there was inadequate consultation with Māori as to its effect upon their guarantees under the Treaty to their indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 14.3).
- (b) In entering into the GATT:TRIPS agreement the Crown adopted a procedure that is inconsistent with the guarantees to Māori under the Treaty to their indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 14.4).
- (c) The GATT:TRIPS agreements seek to establish international uniform and universally applicable intellectual property standards. The effect of these standards is to allow the international commodification of indigenous flora and fauna and nga taonga katoa of the claimants without reference to Māori as the original owners of these taonga (Claim 1.1(a) para 14.5).
- (d) The GATT:TRIPS agreement places greater emphasis on the economic values of intellectual property at the expense of other values important to indigenous peoples, such as communal knowledge systems and the cultural and spiritual relationship that indigenous peoples have with their natural environments (Claim 1.1(a) para 14.6).
- (e) The GATT:TRIPS agreement does not provide that it must be consistent with the Crowns obligations to Māori under the Treaty (Claim 1.1(a) para 14.7).

- (f) Any international laws, conventions or other legal instruments morally or legally binding on the New Zealand Government which are inconsistent with the Crown's obligations to Māori under the Treaty and which are enacted or otherwise adopted by or on behalf of the Crown, are in breach of the Treaty (Claim 1.1(a) para 14.8).
- (g) The GATT:TRIPS Agreement replicates on an international level the Crown's omissions in meeting its obligations to Māori under the Treaty domestically (Claim 1.1(a) para 14.9).
- (h) The Treaty imposes an obligation upon the Crown to put in place mechanisms to ensure it can meet its obligations to Māori under the Treaty prior to entering into any international agreements (Claim 1.1(a) para 14.10).
- (i) The Crown has a duty under the Treaty to develop with Māori processes and procedures whereby Māori may negotiate directly with the Crown on the impact of these policies, practices and legislation on Māori rights to indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 14.11).

2.2.16 On 13 July 1994 the GATT (Uruguay Round Bill) ('the GATT Bill') was introduced to the House by the Minister for Trade and Negotiations. The GATT Bill sought to give effect to the International GATT:TRIPS Agreement (Claim 1.1(a) para 15.1).

- (a) The claimants assert the GATT Bill procedurally and substantively prejudiced the guarantees to Māori under the Treaty to their indigenous flora and fauna me o rātou taonga katoa. This is because prior to enacting the GATT Bill:
 - (i) there was insufficient assessment by the Crown of its impact upon Māori guarantees under the Treaty to their indigenous flora and fauna me o rātou taonga katoa;
 - (ii) there was inadequate consultation with Māori as to its effect upon their guarantees under the Treaty to their indigenous flora and fauna me o rātou taonga katoa;
 - (iii) the Crown must put in place mechanisms to ensure it can meet its obligations to Māori under the Treaty (Claim 1.1(a) para 15.2).
- (b) The GATT Bill was divided into separate bills during its final stages in the House. In essence it provided for amendment to the following statutes, including the Patents Act. It also provided for the enactment of a new Geographical Indications Act and Designs Layout Act (Claim 1.1(a) para 15.3).
- (c) In enacting the GATT Bill, the Crown adopted a procedure that is inconsistent with the guarantees to Māori under the Treaty to their

indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 15.5).

- (d) The GATT Bill was enacted by the Crown with inadequate consultation and negotiation with Māori as to its impact upon their flora and fauna me o rātou taonga katoa (Claim 1.1(a) para 15.6).
- (e) There was insufficient assessment by the Crown of its impact upon Māori guarantees under the Treaty to their indigenous flora and fauna me o rātou taonga katoa and the ability of the Crown to fulfil its obligations to Māori (Claim 1.1(a) para 15.7).
- (f) There was insufficient time allowed for Māori to consider the impact of the GATT Bill on Māori rights to indigenous flora and fauna me o rātou taonga katoa prior to its enactment (Claim 1.1(a) para 15.8).
- (g) Claimants had sought the inclusion of a Treaty protection clause into the GATT Bill, but this was rejected (Claim 1.1(a) para 15.9).
- (h) The GATT Bill substantively prejudices Māori guarantees under the Treaty to their indigenous flora and fauna me o rātou taonga katoa. (Claim 1.1(a) para 15.10)

2.2.17 After the enactment of the GATT Bill, the Ministry of Commerce drafted an Intellectual Property Rights Law Reform Bill ('IPRLR Bill') which was introduced to Parliament in 1995. The Minister of Commerce promised adequate consultation would be undertaken in regards to this Bill (Claim 1.1(a) para 16.1).

2.2.18 The Crown continues to develop practices, policies and legislation that will have an adverse impact upon Māori rights to indigenous flora and fauna me o rātou taonga katoa. Some examples include:

- (a) Patentability of Biotechnology and Bio-prospecting - Ministry of Commerce has been gathering views from interested parties on the technical issues relating to biotechnology patenting (Claim 1.1(a) para 17.1(h)).
- (b) Development of Conservation Bio-prospecting Policy - the Department of Conservation has developed a bio-prospecting policy to guide its decisions on approaches from Crown research institutes to access Crown estate lands and gather samples (Claim 1.1(a) para 17.1(i)).
- (c) The United Nations Draft Declaration on the Rights of Indigenous Peoples - the Crown's failure to support te Iwi Māori in the adoption of the Draft Declaration as a mechanism to recognise and protect the right of Māori to self-determination as Indigenous Peoples of Aotearoa, is in breach of the Crown's duties under the Treaty (Claim 1.1(a) para 17.1(k)).

2.2.19 In recent years there has been an increasing recognition in the international arena on the rights of indigenous peoples. These developments include:

- (a) The United Nations Convention on Biological Diversity, Rio de Janeiro, June 1992 - Article 8(j) acknowledges the importance of maintaining and respecting the right to indigenous and traditional peoples' knowledge as to how to preserve bio-diversity. New Zealand is a signatory (Claim 1.1(a) para 18.1(d)).
- (b) The Mataatua Declaration of the Cultural and Intellectual Property Rights of Indigenous Peoples 1992 - prepared and ratified at the first International Conference on Cultural and Intellectual Property Rights of Indigenous Peoples by 150 indigenous representatives from 60 United Nations member states. The declaration states that indigenous peoples: are the exclusive owners of their cultural and intellectual property; are the guardians and have the rights to protect and control the dissemination of their traditional knowledge; manage the commercialisation of any traditional plants and medicines; and have insufficient existing protection of their intellectual and cultural property rights.

This declaration has been formerly presented at the United Nations (UN Commission on Human Rights E/CN:41/Sub.2/AC.4/CRP.5, 26 July 1993) (Claim 1.1(a) para 18.1(f)).

- (c) The Treaty for Life Forms Patent Free Pacific (and related protocols) (draft), Fiji, 11 July 1995 - this draft Treaty and its protocol seek to establish the Pacific as a life forms patent-free zone. It is concerned with prohibiting the collection of human genetic material from indigenous peoples and the prospecting for biological materials that is occurring throughout the Pacific (Claim 1.1(a) para 18.1(g)).

2.2.20 There was insufficient or no assessment or consideration given by the Crown to these international instruments and their impact upon the Crown's obligations to Māori under the Treaty to actively protect Māori interests to their indigenous flora and fauna me o rātou taonga katoa prior to entering into the GATT:TRIPS agreement or the subsequent GATT Bill enacting legislation (Claim 1.1(a) para 18.2).

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Contend that:

2.2.21 Indigenous flora and fauna includes the genetics resources contained therein and the environment in which they reside (Claim 1.1(g) para 3.7).

2.2.22 The gene codes of indigenous flora and fauna and other natural resources are taonga covered by Article 2 of the Treaty of Waitangi (Claim 1.1(g) para 7.3).

- 2.2.23 Tino rangatiratanga incorporates a right of development that permits the claimants to conserve, control, utilise and exercise rights over their indigenous flora and fauna me o rātou taonga katoa. (Claim 1.1(g) para 3.3)
- 2.2.24 Te tino rangatiratanga incorporated and incorporates (Claim 1.1(g) para 3.4):
- (a) The right to determine indigenous cultural and customary heritage rights in relation to the knowledge and use of indigenous flora and fauna me nga taonga katoa of the claimants;
 - (b) The right to participate in, and benefit from, and make decisions regarding the application of existing and future technological advances as they relate to the breeding, genetic manipulation and other processes relevant to the use of indigenous flora and fauna me nga taonga katoa of the claimants.
- 2.2.25 Recognition of the claimants' interests vested in the claimants all rights and responsibilities relating to the protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation and restrictions upon the use of indigenous flora and fauna and the genetic resources contained therein (Claim 1.1(g) para 3.6).
- 2.2.26 The Treaty guarantee of te tino rangatiratanga incorporated and incorporates the right to participate in, benefit from, and make decisions about the application of existing and future technological advances as they relate to the breeding, genetic manipulation, development, transport, study or sale of indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(g) para 3.4.4-5).
- 2.2.27 The Crown has an obligation to actively protect the genetics of indigenous flora and fauna and other natural resources from modification which is not in accordance with the customs, laws and values of the kaitiaki of the indigenous flora and fauna. This includes protection from the genetic modification of other species which have, will, or are likely to impact on the genetics, wellbeing and mauri of indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(g) para 7.5).

Ngāti Porou

Include in their claim:

- 2.2.28 Mātauranga mo nga tikanga including all those things other than land and fisheries that make up Ngāti Porou culture and heritage including, without limitation ... traditional medicinal and therapeutic treatments (including he rongoa, he mirimiri, he awhi and he karakia) (Claim 1.1(e) para 25).
- 2.2.29 Flora and fauna including indigenous and adapted flora and fauna, their ecosystems, habitats, genetic material and associated nga mātauranga mo nga tikanga o Ngāti Porou; specifically (but not limited to): kumara; parareke; tikouka; totara; New Zealand flaxes (*Phormium* spp) (Aohanga, Awana, Takiriaurau,

Turingawari, Taniwha, Ruawai, Tapamangu, Parekoretawa, Tana-a-wai, Te Tatau, Tarere, Wharariki, Potaka); Ngutukaka (Kaka Beak); Kiekie; Toropata; Paru for nga mahi-a-raranga; Manuka; Kanuka; Koromiko; Matai; Whinau; Kereru; Tuatara; Pingao; Toetoe; Kawakawa; Tutu; Mamaku; and Tui (Claim 1.1(e) para 50, 51).

Ngāti Kahungunu

2.2.30 Contend that, pursuant to Article 2 of the Treaty of Waitangi, they were guaranteed tino rangatiratanga over, and full exclusive and undisturbed possession of, all taonga, including indigenous flora and fauna within their rohe, recognition and protection of Ngāti Kahungunu cultural knowledge, and Ngāti Kahungunu rongoa. This guarantee included the right and obligation of Ngāti Kahungunu to fulfil their kaitiaki responsibilities in regard to this taonga (Claim 1.1(d) para 4, 11, 17).

Ngāti Koata

2.2.31 Define o rātou taonga katoa as including, ... whakairo, rongoa Māori, biodiversity, genetics, wahi tapu and pa sites (Claim 1.1(f) para 2.6 and 3.3).

2.2.32 Also define taonga to include indigenous flora and fauna, their ecosystems, habitats and genetic material within their rohe (Claim 1.1(f) para 3.2).

2.2.33 Ngāti Koata contend that the Treaty guarantee of tino rangatiratanga assures Ngāti Koata authority to (Claim 1.1(f) para 2.3):

- (a) make decisions about, participate in, and benefit from the application of existing and future technological advances as they relate to the breeding, genetic manipulation and other processes relevant to the use of indigenous flora and fauna;
- (b) control and make decisions about the propagation, development, transport, study or sale of indigenous flora and fauna;
- (c) protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna.

2.2.34 Ngāti Koata contend that the Crown, in breach of the principles of the Treaty and its obligations thereunder, has implemented legislation and policy which has delegated decisions related to indigenous flora and fauna within the Ngāti Koata rohe without the permission of Ngāti Koata, and to the detriment of Ngāti Koata authority under the Treaty of Waitangi (Claim 1.1(d): 4.4(i)).

The Crown's Statement of Response

The Crown:

- 2.2.35 Acknowledges that certain individual species of flora and fauna may, to certain Māori, depending on the circumstances, constitute a taonga that is protected by Article 2 of the Treaty Waitangi (SOR 2.256, para 85).
- 2.2.36 Denies that all indigenous flora and fauna are, by virtue only of their indigeneity, taonga within the contemplation of Article 2 (SOR 2.256, para 85).
- 2.2.37 Denies that the kumara or the kiore are species of indigenous flora and fauna (SOR 2.256, para 86).
- 2.2.38 States that Article 2 rangatiratanga rights cannot be claimed generically but must be both species specific and specific as to the individual, hapū or iwi asserting the rights (SOR 2.256, para 40).
- 2.2.39 Denies that tino rangatiratanga ... me o rātou taonga katoa can be said to apply in general circumstances that are devoid of specific facts or context (SOR 2.256, para 40).
- 2.2.40 Recognises that Māori are entitled to exercise tino rangatiratanga over property and resources owned or controlled by them (SOR 2.256, para 45).
- 2.2.41 Denies that the promise of tino rangatiratanga ... me o rātou taonga katoa contained in Article 2 of the Treaty was intended to, or did in fact, guarantee to Māori rights and/or interests in property or resources where the existence of that property or those resources was known neither to Western nor to Māori science in 1840. By way of non-exclusive example the Crown refers to genes, chromosomes and deoxyribonucleic acid (SOR 2.256, para 41).
- 2.2.42 Notes, by way of non-exclusive example, that English law in 1840 did not in general recognise private property or proprietary rights in: the human form (whether specific or general) (SOR 2.256, para 43.2.5); and human or animal tissue, genes or DNA (SOR 2.256, para 43.2.6).
- 2.2.43 Accepts, to the extent that such property, resources, property rights or interests are directly linked to taonga that are within the contemplation of Article 2 of the Treaty, that Treaty principles may be relevant to decisions taken by the Crown in relation thereto (SOR 2.256, para 44).
- 2.2.44 Accepts the right of Māori to enjoy the benefits of scientific and technological advances and discoveries since 1840 and the right of Māori to enjoy the benefits accruing from the law's recognition of new forms of property rights, if and when such recognition occurs. It states that all such rights stem from Article 3 of the Treaty and are in principle no different from the rights enjoyed by all New Zealand citizens (SOR 2.256, para 46).

- 2.2.45 Denies, except as admitted above, that the claimants have rights of development arising from the Treaty of Waitangi (SOR 2.256, para 47).
- 2.2.46 Denies that the content of rangatiratanga rights contained in Article 2 of the Treaty should be determined by reference to or by analogy with those rights that the claimants may perceive as attaching to indigenous peoples generally (SOR 2.256, para 50).
- 2.2.47 Denies, by way of non-exclusive example, that a right to self-determination (Article 4 of the Draft Declaration on the Rights of Indigenous Peoples), a right to autonomy or self-government in relation to certain matters (Article 31 of the Draft Declaration on the Rights of Indigenous Peoples), and a right to special measures to control, develop and protect their human and other genetic resources (Article 29), are rights recognised, or conferred on Māori, by Article 2 of the Treaty of Waitangi (SOR 2.256, para 50).
- 2.2.48 Denies (subject to paras 45 and 88 of the Statement of Response) that the claimants have exclusive rights, whether they be termed as ownership rights, rights of exclusive control or otherwise, in relation to indigenous flora and fauna. It denies, in particular, that the claimants have, or ought to have, by virtue of Article 2:
- (a) an exclusive right to make decisions about or an exclusive right to participate in or benefit from the application of existing and future technological advances as they relate to the breeding, genetic manipulation and other processes relevant to the use of indigenous flora and fauna;
 - (b) exclusive rights of control, veto or decision-making about the propagation, genetic derivation, development, transport, study or sale of indigenous flora and fauna;
 - (c) exclusive rights to make decisions about or rights to participate in or benefit from the decision-making processes about the application, development, use, trade and sale of indigenous flora and fauna;
 - (d) exclusive rights to identify and benefit from medicinal or therapeutic qualities inherent in indigenous flora and fauna (SOR 2.256, para 89).

Biological and genetic resources of indigenous and/or taonga species

III. First component issues

- 2.3.1 Is the relationship between Māori and biological and genetic resources in indigenous and/or taonga species such that it gives rise to:
- (a) legal rights to biological and genetic resources of indigenous and/or taonga species?
 - (b) customary rights in biological and genetic resources of indigenous and/or taonga species?; and/ or
 - (c) rights in biological and genetic resources of indigenous and/or taonga species as a matter of treaty principle?
- 2.3.2 (a) Must the Crown protect biological and genetic resources of indigenous and/or taonga species from use by persons other than the kaitiaki or from use in a manner inconsistent with the customs and values of those kaitiaki?
- (b) If so, in what circumstances does New Zealand law and policy provide such protection?
- 2.3.3 (a) Must the Crown provide for the protection, control, use, development, regulation and/or transmission by kaitiaki of biological and genetic resources of indigenous and/or taonga species?
- (b) If so, in what circumstances does New Zealand law and policy ensure such protection, control, use, development, regulation and/or transmission?
- 2.3.4 (a) Must the Crown ensure the preservation of biological and genetic resources of indigenous and/or taonga species in the hands of kaitiaki and the transmission of those resources from generation to generation among kaitiaki?
- (b) If so, in what circumstances, does New Zealand law and policy provide for such preservation and transmission?

IV. Second component issues

Patents - New Zealand Law

- 2.4.1 Has and does the patent law of New Zealand provide adequate protection for biological and genetic resources of indigenous and/or taonga species? (The following questions relate to the current Patent Act 1953). Specifically:
- (a) Do the requirements of invention and patentable invention (including novelty, obviousness, anticipation, prior publication and utility) prevent copyright patent protection from applying to biological and genetic resources of indigenous and/or taonga species of kaitiaki? If yes, why and what are those resources?
 - (b) Do the requirements for applications for patents prevent patent protection from applying to biological and genetic resources of indigenous and/or taonga species of kaitiaki? If yes, what aspects of patent law and in relation to which resources?
 - (c) Does the 20-year duration of patent prevent patent protection from applying to biological and genetic resources of indigenous and/or taonga species of kaitiaki?
 - (d) Do the requirements of disclosure of patented information conflict with the customary uses of biological and genetic resources of indigenous and/or taonga species? If yes, in what way?
- 2.4.2 If the answer to one or more of the above parts of question is “yes” does that mean that the Crown has failed to meet its obligations and is in breach of any rights, guarantees or expectations under the Treaty?
- 2.4.3 Does the granting of patents to third parties ever wrongly prevent the control, use, transmission and/or preservation of biological and genetic resources of indigenous and/or taonga species by the kaitiaki?

Explanatory Note re Pending Legislation: At the time of issuing the statement of issues law reform in relation to patents and plant variety rights are pending. If a Patents Bill and/or Plant Variety Rights Bill (or similarly named legislation) is passed during the period after the issue of the SOI and before completion of the Report in this inquiry that and any other current legislation and policy will be considered.

Patents - International Agreements

- 2.4.4 New Zealand is a member of three multilateral international treaties that its members must comply with in relation to patents.

- (a) Trade Related Intellectual Property Rights Agreement, ('TRIPS Agreement');
- (b) The 'Paris Convention';
- (c) Patent Co-Operation Treaty ('PCT').

Explanatory Note: New Zealand is not a member of the Patent Law Treaty 2000. Should New Zealand ratify this or any other relevant international treaties during the period after issue of this SOI and completion of the Report in this inquiry they will be considered.

2.4.5 New Zealand has also made international commitments in relation to patents in the following free trade agreements ('FTAs'):

- (a) New Zealand and Thailand Closer Economic Partnership (NZTCEP) – 2005;
- (b) New Zealand and Singapore Closer Economic Partnership (NZSCEP) – 2001;
- (c) Trans-Pacific Strategic Economic Partnership (Trans-Pacific SEP) - 2005. Brunei/Chile/New Zealand/Singapore (expected to come into force on 1 January 2006).

2.4.6 Do the TRIPS Agreement, Paris Convention, PCT and FTAs, or any part of them, adversely affect the ability of New Zealand law and policy to protect biological and genetic resources of indigenous and/or taonga species from use by persons other than the kaitiaki or in a manner inconsistent with the customs and values of those kaitiaki?

2.4.7 Do the TRIPS Agreement, Paris Convention, PCT and FTAs, or any part of them, adversely affect the ability of the Crown provide for the use, protection, control, regulation and development by kaitiaki of their biological and genetic resources of indigenous and/or taonga species?

2.4.8 Do the TRIPS Agreement, Paris Convention, PCT and FTAs, or any part of them, adversely affect the ability of the Crown to ensure the preservation of biological and genetic resource in the hands of kaitiaki and the transmission of those works from generation to generation among kaitiaki?

2.4.9 Has New Zealand fully utilised the TRIPS agreement, the Rio Convention on the Preservation of Biological Diversity (and any other international agreements) to provide for the protection, control, use, regulation, development and transmission of biological and genetic resources of indigenous and/or taonga species as required under and analysis of the first component?

Plant Variety Rights – New Zealand Law

- 2.4.10 Has and does the Plant Variety Rights Act 1987 of New Zealand provide adequate protection for biological and genetic resources of indigenous and/or taonga species?
- (a) Do the definitions of 'plant' and 'variety' prevent plant variety protection from applying to biological and genetic resources of indigenous and/or taonga species of kaitiaki? If yes, why and what are those resources?
 - (b) Do the requirements for applications for plant variety rights (including that the variety be new, distinct, homogenous and stable) prevent plant variety protection from applying to biological and genetic resources of indigenous and/or taonga species of kaitiaki? If yes, what requirements and in relation to which resources?
 - (c) Does the duration of plant variety rights prevent such rights from applying to biological and genetic resources of indigenous and/or taonga species of kaitiaki?
 - (d) Do the requirements disclosure of plant variety information conflict with the customary uses of biological and genetic resources of indigenous and/or taonga species? If "yes", in what way?
- 2.4.11 If the answer to one or more of the above parts of question 1 is "yes" does that mean that patent law is not applicable to aspects of biological and genetic resources of indigenous and/or taonga species and is this a breach of any rights, guarantees or expectations under the Treaty?
- 2.4.12 Does the provision of plant variety rights to third parties ever wrongly prevent the protection, preservation, control, use, development, regulation and/or transmission of taonga works by the kaitiaki?

Plant Variety Rights – International Agreements

- 2.4.13 New Zealand is a member of three multilateral international treaties in relation to plant variety rights.
- (a) 'TRIPS agreement';
 - (b) Union for the Protection of New Varieties of Plants 1962 and 1978 ('UPOV');
 - (c) Rio Convention on the Preservation of Biological Diversity 1992 ('Rio Convention').
- 2.4.14 New Zealand has also made international commitments in relation to plant variety rights in the following free trade agreements ('FTAs'):

- (a) New Zealand and Thailand Closer Economic Partnership (NZTCEP) – 2005;
- (b) New Zealand and Singapore Closer Economic Partnership (NZSCEP) – 2001;
- (c) Trans-Pacific Strategic Economic Partnership (Trans-Pacific SEP) - 2005 Brunei/Chile/New Zealand/Singapore (expected to come into force on 1 January 2006).

2.4.15 Do the TRIPS Agreement, UPOV, Rio Convention and FTAs, or any part of them, adversely affect the ability of New Zealand law and policy to protect biological and genetic resources of indigenous and/or taonga species from use by persons other than the kaitiaki or in a manner inconsistent with the customs and values of those kaitiaki?

2.4.16 Do the TRIPS Agreement, UPOV, Rio Convention and FTAs, or any part of them, adversely affect the ability of the Crown to:

- (a) provide for the control, regulation, use and development by kaitiaki of their biological and genetic resources of indigenous and/or taonga species?
- (b) ensure the preservation and protection of biological and genetic resources of indigenous and/or taonga species in the hands of kaitiaki and the transmission of those works from generation to generation among kaitiaki?

2.4.17 Has New Zealand fully utilised the TRIPS Agreement, Article 8(j) of the Rio Convention (or any other international agreements) to provide for the protection, preservation, control, regulation, use, development and transmission of biological and genetic resources of indigenous and/or taonga species as required under and analysis of the first component?

V. Third component issues

2.5.1 If New Zealand patent and plant variety rights laws are in whole, or in part, inconsistent with the Treaty, can they be made treaty consistent by amendment in particular areas? Issues include:

- (a) Should the definition of invention and requirements of patentable invention be amended to include biological and genetic resources of indigenous and/or taonga species otherwise excluded from the definitions?
- (b) Should the definition of invention and requirements of patentable invention be amended to have express exclusions of biological and genetic resources of indigenous and/or taonga species?

- (c) Should the requirements of registerable plant varieties be amended to have express exclusions of the biological and genetic resources of indigenous and/or taonga species?
 - (d) Should the duration of patents be amended to make biological and genetic resources of indigenous and/or taonga species protectable where it otherwise excludes biological and genetic resources of indigenous and/or taonga species?
 - (e) Should the duration of plant variety rights be amended to make biological and genetic resources of indigenous and/or taonga species protectable where it otherwise excludes biological and genetic resources of indigenous and/or taonga species?
- 2.5.2 If the answer to any of the parts of 1 above is “yes” what should the amendments include?
- 2.5.3 If New Zealand patent and plant variety rights laws are in whole, or in part, inconsistent with the Treaty, can they be made treaty consistent through a discrete (*sui generis*) form of protection (including mechanisms both legal and non-legal and custom law) for biological and genetic resources of indigenous and/or taonga species?
- 2.5.4 If the answer to 2.5.3 is “yes” what protection should be developed?

PART THREE: TIKANGA MĀORI, MĀTAURANGA MĀORI & TE REO MĀORI

I. Definition

3.1.1 For the purposes of this statement of issues:

- (a) *Te Reo Māori* means the Māori language used in its various forms and idioms, including nga mita, nga tatai me nga mauri o nga reo huhua o ia iwi, o ia hapū.
- (b) *Tikanga Māori* means the customs, laws, practices, traditions and values of kaitiaki that comprise, underpin and inform Māori culture and its many distinctive tribal cultures.
- (c) *Mātauranga Māori* means the Māori knowledge of kaitiaki together with the systems for the organisation, transmission, dissemination, and protection of such knowledge and further includes te reo Maori, tikanga Maori and taonga works.

II. Relevant parts of the Statements of Claim and the Crown's response

The Claimants contend that:

3.2.1 The Crown, in breach of the principles of the Treaty of Waitangi, has implemented legislation and policy that has denied the claimants their rights to exercise tino rangatiratanga and kaitiakitanga over their cultural knowledge. The claimants claim that the following pieces of legislation are examples of the Crown's assumption of varying degrees of control over cultural knowledge:

- (a) New Zealand Institute Act 1867
- (b) Criminal Code Act 1893
- (c) Indictable Criminal Summary Jurisdictions Act 1894
- (d) Indictable Offences Summary Jurisdiction Act 1894
- (e) Māori Councils Act 1900
- (f) Māori Antiquities Act 1901 and 1975
- (g) The Tohunga Suppression Act 1907
- (h) Science and Art Act 1913
- (i) National Art Gallery and Dominion Museum Act 1930
- (j) Forests Act 1949
- (k) Archives Act 1957
- (l) National Library Act 1965
- (m) Water and Soil Conservation Act 1967
- (n) Gaming and Lotteries Act 1977
- (o) Reserves Act 1977
- (p) Town and Country Planning Act 1977
- (q) National Parks Act 1980
- (r) Fisheries Acts 1983, 1996 and their predecessors
- (s) Environment Act 1986
- (t) Conservation Act 1987

- (u) Resource Management Act 1991
- (v) Museum of New Zealand Te Papa Tongarewa Act 1992
- (w) Historic Places Act 1993 and its predecessors
- (x) Te Ture Whenua Māori Act 1993
- (y) Arts Council of New Zealand Toi Aotearoa Act 1994
- (z) Geographical Indications Act 1994
- (aa) Layout Designs Act 1994
- (bb) Archives, Culture and Heritage Reform Act 2000
- (cc) Māori Purposes Acts

(SOC 1.1(d): 13.1, SOC 1.1(e): 31.1, SOC 1.1(f): 4.11, SOC 1.1(g): 6.2)

3.2.2 Wai 262 claimants claim the Crown, in breach of the principles of the Treaty, has implemented legislation and policy which has denied the claimants their right to exercise tino rangatiratanga and kaitiakitanga over both their cultural taonga and their artistic works:

- (a) New Zealand Institute Act 1867
- (b) The Antiquities Act 1901
- (c) The Māori Antiquities Act 1908
- (d) National Art Gallery and Dominion New Zealand Act 1913
- (e) Science and Art Act 1913
- (f) The Historical Articles Act 1962
- (g) Local Government Act 1974
- (h) The Antiquities Act 1975
- (i) Conservation Act 1987
- (j) Resource Management Act 1991
- (k) The Museum of New Zealand Te Papa Tongarewa Act 1992
- (l) Historic Places Act 1993 and its predecessors
- (m) The Proposed Protection of Moveable Cultural Heritage Bill, published by the Department of Internal Affairs in 1995
- (n) The Taonga Māori Protection Bill
- (o) The Historical and Cultural Heritage Management Report for the Parliamentary Commissioner for the Environment

(SOC 1.1(a), 17(a, d), 1.1(d): 13.1; SOC 1.1(e): 40; SOC 1.1(f): 4.11; SOC 1.1(g): 6.2)

3.2.3 The Crown, in breach of the principles of the Treaty, has implemented legislation and policy that has denied the claimants their right to exercise tino rangatiratanga and kaitiakitanga over the systems of transmission of cultural knowledge including the transmission of Te Reo Māori:

- (a) Crown representation in 1840
- (b) Native Trust Ordinance 1844
- (c) Native Exemption Ordinance 1844
- (d) Resident Magistrates Courts Ordinance 1846
- (e) The Education Ordinance 1847
- (f) Native Districts Regulation Act 1858
- (g) Native District Circuits Courts Act 1858

- (h) The Native Schools Act 1858
- (i) Native Lands Act 1862
- (j) The Native Schools Act 1867
- (k) The Native Schools Amendment Act 1871
- (l) The Native Schools Code 1880
- (m) School Attendance Act 1894
- (n) Reform Administration 1912
- (o) Native Land Amendment Act 1913
- (p) Māori Social and Economic Advancement Act 1945
- (q) Licensing Acts 1948 and 1953
- (r) Currie Commission on Education 1962
- (s) Integration Policies, including the Hunn Report 1962
- (t) Māori Welfare Act 1962
- (u) Māori Affairs Amendment Act 1967
- (v) Māori Language Act 1987
- (w) English only policy
- (x) Amalgamation policy
- (y) Assimilation policies
- (z) Adaptation policy
- (aa) Urbanisation policies, including operation re-location policies and pepper-potting

(SOC 1.1(d): 13; SOC 1.1(e): 31.1; SOC 1.1(f): 4.11; SOC 1.1(g): 6.2)

Ngāti Wai, Te Rarawa and Ngāti Kuri

3.2.4 'The object of this claim is to acknowledge, respect and restore the tino rangatiratanga and mauri or life force embodied in the laws, customs and values of the claimants in relation to their indigenous flora and fauna *me o rātou taonga katoa*.' (Claim 1.1(g) para 2.8).

3.2.5 Mātauranga Māori (Māori knowledge systems) relates to:

- (a) the knowledge held by Ngāti Kuri, Te Rarawa and Ngāti Wai pertaining to indigenous flora and fauna *me o rātou taonga katoa*; and
- (b) the systems for the transmission, dissemination, and protection of mātauranga Māori, including te reo, wananga, conservation practices, and customs, laws and values (Claim 1.1(g) para 6.1).

3.2.6 The claimants claim that in its denial of the rights of manaakitanga, kaitiakitanga and te tino rangatiratanga, the Crown has failed to provide for and protect the existing systems of mātauranga Māori exercised by Ngāti Kuri, Te Rarawa and Ngāti Wai, including but not limited to:

- (a) Specific legislation and policies which prevented the effective exercise by tohunga of mātauranga Māori; the introduction and continued support of an education system which minimised the importance of, failed to actively protect, and denied the exercise and transmission of mātauranga Māori; conservation practices; health practices; religious practices; political and

constitutional structures; systems relating to justice, intellectual property and other portfolios and participation in international fora in a manner which minimises the importance of and denies the exercise of mātauranga Māori.

- (b) 'Such practices, acts and omissions by the Crown has resulted in a significant loss of mātauranga Māori and consequent effects on the health and wellbeing of the people the claimants represent, and those of generations who have gone before them and are yet to come.' (Claim 1.1(g) paras 6.1-6.3).

3.2.7 Through its denial of the rights of manaakitanga, kaitiakitanga and te tino rangatiratanga, Ngāti Wai, Te Rarawa and Ngāti Kuri claim the Crown has failed to provide for and protect the existing systems of mātauranga Māori exercised by Ngāti Kuri, Te Rarawa and Ngāti Wai, including but not limited to the transmission of knowledge by tohunga and the transmission of systems of knowledge for the transmission of mātauranga including te reo Māori (Claim 1.1(d) para 6.1-6.2).

3.2.8 Crown legislation, education policy, actions and omissions have resulted in a 'significant loss' of mātauranga Māori 'consequent effects on the health and wellbeing of the people the claimants represent, and those of generations who have gone before them and are yet to come.' (Claim 1.1(d) para 6.3).

Ngāti Porou

3.2.9 'Ngāti Porou mātauranga me nga tikanga generally as used in this ...claim includes all those things other than land and fisheries that make up Ngāti Porou culture and heritage including (without limitation) whakapapa, karakia, oral traditions (oral arts, oral history), nga kōrero, nga moteatea (including waiata tangi, patere, oriori), nga haka and other Ngāti Porou performing arts and composition generally, te kauae runga and te kauae raro, Ngāti Porou cosmology, spirituality, philosophy, conceptions of time, justice, nature, physics, environmental management ethics generally, Ngāti Porou naming traditions generally (including in relation to landscapes, seascapes and landforms), traditional medicinal and therapeutic treatments (including he rongoa, he mirimiri, he awahi and he karakia) and nga maramataka and nga korero tātai whetu.' (Claim 1.1(e) para 25).

Treaty Breach:

3.2.10 As a consequence of the guarantee ... above, the Crown is under a continuing obligation (claim 1.1(e), para 30):

- (a) to actively protect the exercise by Ngāti Porou of its tino rangatiratanga and kaitiekitanga in relation to Ngāti Porou mātauranga me nga tikanga generally; and
- (b) to actively protect Ngāti Porou mātauranga me nga tikanga.

3.2.11 In breach of its obligations ... the Crown has undermined and or prevented the exercise of Ngāti Porou tino rangatiratanga and kaitiakitanga in respect of Ngāti Porou mātauranga me nga tikanga.

Particulars of Breach:

3.2.12 The Crown, in breach of Treaty of Waitangi and its principles, has:

- (a) implemented certain laws and policies ... which have denied Ngāti Porou the exercise of tino rangatiratanga and kaitiakitanga over Ngāti Porou mātauranga me nga tikanga (claim 1.1(e), para 31);
- (b) adopted all or part of certain international instruments ... which adversely affect the ability of Ngāti Porou to exercise tino rangatiratanga or kaitiakitanga in relation to Ngāti Porou mātauranga me nga tikanga;
- (c) failed to implement ... international treaties and instruments ... which would otherwise give effect to the Crown's obligation under the Treaty of Waitangi by protecting and recognising Ngāti Porou mātauranga me nga tikanga;
- (d) failed to protect Māori imagery in film and in particular sold the National Film Unit archival material to Television New Zealand without the prior consultation and agreement of Ngāti Porou;
- (e) failed to officially recognise Ngāti Porou place-names to landscapes, seascapes and landforms that hold cultural significance for Ngāti Porou. Examples include: Uawa, Te Rua-a-torea, Kahukura, Kawakawa mai Tawhiti and Wharekahika;
- (f) implemented legislation and policy ... which has caused, contributed to or otherwise facilitated the loss, dilution, misuse, expropriation, misrepresentation or unauthorised exploitation of Ngāti Porou mātauranga me nga tikanga;
- (g) failed to work in collaboration with Ngāti Porou to implement a ...heritage policy and legislative framework that recognises and actively protects Ngāti Porou mātauranga me nga tikanga; and
- (h) implemented certain legislation and policies which have resulted in the destruction and or modification of Ngāti Porou flora and fauna which has in turn restricted access to Ngāti Porou flora and fauna required to transmit and or use Ngāti Porou mātauranga me nga tikanga.

Consequences of Treaty Breaches:

3.2.13 As a result of the breaches of the Treaty of Waitangi set out in paragraphs 3.2.10 to 3.2.12:

- (a) Ngāti Porou have been denied the right to exercise their tino rangatiratanga over and in relation to Ngāti Porou mātauranga me nga tikanga;
- (b) the denial referred to above (in part) has resulted in the inability of Ngāti Porou to control the access ... to Ngāti Porou mātauranga me nga tikanga;
- (c) the denial referred to above has left Ngāti Porou unable to properly participate in the housing and care of Māori imagery in film including the inability of Ngāti Porou to re-unite or repatriate these images with their whanau and hapu;
- (d) the denial referred to above (in part) has resulted in the renaming of and or the failure to legally recognise Ngāti Porou landscapes, seascapes and landforms including Te Rua-a-torea (Ruatoria), Uawa (Tolaga Bay), Kahukura (Tikitiki), Kawakawa-mai-Tawhiti (Te Araroa) and Wharekahika (Hicks Bay);
- (e) Ngāti Porou have suffered diminution of cultural value, and loss of Ngāti Porou mātauranga me nga tikanga; and
- (f) Ngāti Porou have been denied the exercise of a development right in respect of Ngāti Porou mātauranga me nga tikanga.

3.2.14 Te Reo o Ngāti Porou has always been, is and will continue to be of fundamental importance to the identity, well-being, and mana motuhake of Ngāti Porou. Te Reo o Ngāti Porou is a taonga tuku iho of Ngāti Porou in respect of which Ngāti Porou have te tino rangatiratanga. Te Reo o Ngāti Porou is the essential means of cultural identity, cultural expression and knowledge transmission to Ngāti Porou of Ngāti Porou and Māori culture and heritage (Claim 1.1(e) para 19).

3.2.15 Ngāti Porou's Treaty rights protect and place them and the Crown under an ongoing obligation to maintain and protect Ngāti Porou taonga, including Te Reo o Ngāti Porou. The Crown is obliged to actively protect the exercise by Ngāti Porou of their tino rangatiratanga and kaitiekitanga in regard to Te Reo o Ngāti Porou; and to actively protect Te Reo o Ngāti Porou.

3.2.16 The Crown has breached the Treaty of Waitangi and its principles by failing in its duties of active protection. Ngāti Porou claim that Crown language and education policies and various enactments breached the Treaty and hindered the retention, use and development of te Reo o Ngāti Porou, which in turn has hindered Ngāti Porou's obligations to protect their taonga (Claim 1.1(e) paras 20-23).

Crown Treaty breaches have led to, inter alia:

3.2.17 the loss of fluency in Te Reo o Ngāti Porou by the majority of Ngāti Porou, particularly younger members, and a consequent loss of mātauranga Māori; the loss of skilled marae oratory; loss and diminution of nga moteatea and nga haka; a loss of knowledge of whakapapa; and the loss of traditional whare wananga, including without limitation, Te Rawheoro and Tapere nui a Whatonga, their knowledge systems and their styles of learning; and loss of control, access to and guardianship of Te Reo o Ngāti Porou oral and written traditions that are held by the National Archives, the National Library of New Zealand, other museums, educational institutions, libraries, organisations and private individuals (Claim 1.1(e) para 24).

Ngāti Kahungunu

3.2.18 At 1840 Ngāti Kahungunu collectively and individually held a body of knowledge and skills including knowledge in respect of indigenous flora and fauna, arts, crafts, history, waiata, language and all other cultural property and traditions of Ngāti Kahungunu ('Ngāti Kahungunu cultural knowledge'). (Claim 1.1(d), para 9)

3.2.19 Ngāti Kahungunu cultural knowledge is and always has been a taonga of Ngāti Kahungunu in respect of which Ngāti Kahungunu are kaitiaki (Claim 1.1(d) para 10).

3.2.20 Pursuant to Article 2 of the Treaty of Waitangi Ngāti Kahungunu are guaranteed tino rangatiratanga over, and full exclusive and undisturbed possession of, all taonga including recognition and protection of Ngāti Kahungunu cultural knowledge. (Claim 1.1(d) para 11).

3.2.21 Pursuant to Article 2 of the Treaty of Waitangi Ngāti Kahungunu are guaranteed tino rangatiratanga over, and full exclusive and undisturbed possession of, all taonga including recognition and protection of Ngāti Kahungunu cultural knowledge.

3.2.22 As a consequence of the guarantee above the Crown is under a continuing obligation (Claim 1.1(d) para 12):

(a) To actively protect the exercise by Ngāti Kahungunu of tino rangatiratanga and kaitiakitanga in regard to Ngāti Kahungunu cultural knowledge; and

(b) To actively protect Ngāti Kahungunu cultural knowledge.

3.2.23 In breach of its obligations the Crown has undermined and/or prevented the exercise of tino rangatiratanga and kaitiakitanga by Ngāti Kahungunu in respect of Ngāti Kahungunu cultural knowledge including (Claim 1.1(d) para 13):

- (a) Implementing legislation and policy which have denied Ngāti Kahungunu the exercise of tino rangatiratanga and kaitiakitanga over Ngāti Kahungunu cultural knowledge;
- (b) Adopting all or part of international instruments which adversely affect the ability of Ngāti Kahungunu to exercise tino rangatiratanga or kaitiakitanga in respect of their cultural knowledge without either consultation with or obtaining permission from Ngāti Kahungunu;
- (c) Failing to implement into domestic legislation and policy aspects of international instruments which would otherwise give effect to the Crown's obligations under the Treaty of Waitangi by protecting and recognising Ngāti Kahungunu cultural knowledge.

3.2.24 In breach of its obligations the Crown has failed to actively protect Ngāti Kahungunu cultural knowledge including (Claim 1.1(d) para 14):

- (a) Implementing legislation and policy which have contributed to and/or facilitated the loss of Ngāti Kahungunu cultural knowledge;
- (b) Implementing legislation and policy which has led to the destruction or substantive modification of indigenous flora and fauna which has in turn led to the loss or scarcity of the raw materials required by Ngāti Kahungunu to pass on and/or utilise Ngāti Kahungunu cultural knowledge;
- (c) Implementing legislation and policy without either adequate consultation with or the permission of Ngāti Kahungunu which adversely affects Ngāti Kahungunu cultural knowledge;
- (d) Without either consulting with or obtaining permission from Ngāti Kahungunu, adopting either partially or wholly international instruments which do not protect Ngāti Kahungunu cultural knowledge;
- (e) Failing to implement aspects of international instruments which would have the effect of protecting Ngāti Kahungunu cultural knowledge.

3.2.25 As a result of the breaches Ngāti Kahungunu have (Claim 1.1(d) para 15):

- (a) Been denied the right to exercise tino rangatiratanga over and in respect of Ngāti Kahungunu cultural knowledge;
- (b) Been denied the right to exercise kaitiakitanga over and in respect of Ngāti Kahungunu cultural knowledge;
- (c) Suffered damage to and loss of Ngāti Kahungunu cultural knowledge;
- (d) Been denied the exercise of a development right in respect of Ngāti Kahungunu cultural knowledge.

Ngāti Koata

3.2.26 Ngāti Koata contend that they were guaranteed “tino rangatiratanga o o rātou whenua, o rātou kainga me o rātou taonga katoa”.

3.2.27 Ngāti Koata define “me o rātou taonga katoa” as including, without being limited to, mātauranga, ... cultural and customary heritage rights in relation to such taonga.(Claim 1.1(f), para 2.6)

3.2.28 Specifically, Ngāti Koata contend that the Treaty guarantees of *tino rangatiratanga* assure Ngāti Koata authority to (Claim 1.1(f), para 2.3 f, i):

- (a) Ensure protection, enhancement and transmission of the cultural and spiritual knowledge and concepts found in o rātou taonga katoa; and
- (b) Protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna.

3.2.29 Ngāti Koata contend that the Crown, in breach of the principles of the Treaty of Waitangi and its obligations thereunder, has made and enacted legislation and adopted policies which (Claim 1.1(f), para 4.11(a, d, e, h):

- (a) Failed to protect Ngāti Koata from the loss and misuse of Te Reo Maori;
- (b) Failed to assist Ngāti Koata in promoting and actively fostering education in traditional mātauranga Maori;
- (c) Failed to actively protect Ngāti Koata composition and performing arts; and
- (d) Imposed restrictions upon the access to and guardianship of Te Reo Maori as an integral tool for understanding and transmitting Ngāti Koata traditional knowledge.

The Crown's Statement of Response: Tikanga Māori, Mātauranga Māori

The Crown

- 3.2.30 States that Article 2 rangatiratanga rights cannot be claimed generically but must be both species specific and specific as to the individual, hapū or iwi asserting the rights (SOR 2.256: 40).
- 3.2.31 Denies that tino rangatiratanga ... me o rātou taonga katoa can be said to apply in general circumstances that are devoid of specific facts or context (SOR 2.256: 40).
- 3.2.32 Recognises that Māori are entitled to exercise tino rangatiratanga over property and resources owned or controlled by them (SOR 2.256: 45).
- 3.2.33 Denies that the promise of tino rangatiratanga ... me o rātou taonga katoa contained in Article 2 of the Treaty was intended to, or did in fact, guarantee to Māori property and/or proprietary rights and/or interests of a kind that was not known to, recognised, or capable of protection by English law in 1840 (SOR 2.256: 42).
- 3.2.34 Notes, by way of non-exclusive example, that English law in 1840 did not in general recognise private property or proprietary rights in:
- (a) flora (except to the extent that such rights arose as an incident of the ownership of the land upon which the flora grew) or in undomesticated fauna (SOR: 43.1);
 - (b) landscapes and scenery per se (SOR: 43.2.1);
 - (c) folklore, oral history and oral traditions (SOR: 43.2.2);
 - (d) information per se (SOR: 43.2.3);
 - (e) language per se (SOR: 43.2.4);
 - (f) the human form (whether specific or general) (SOR: 43.2.5); and
 - (g) human or animal tissue, genes or DNA (SOR: 43.2.6).
- 3.2.35 Denies, except as admitted above, that the claimants have rights of development arising from the Treaty of Waitangi (SOR 2.256: 47).
- 3.2.36 Denies that the content of rangatiratanga rights contained in Article 2 of the Treaty should be determined by reference to or by analogy with those rights that the claimants may perceive as attaching to indigenous peoples generally (SOR 2.256: 50).
- 3.2.37 Acknowledges that the exercise of tino rangatiratanga by Ngāti Porou and Ngāti Koata over wahi tapu, pa sites and other sites of cultural significance is guaranteed by Article 2 of the Treaty of Waitangi for so long as the land upon those sites exist remains in their possession (SOR 2.256: 131).
- 3.2.38 States that, to the extent that it is under any duty that requires it to enable an individual, hapū or iwi for whom a particular item of cultural property is a taonga

- to retain that taonga for so long as they wish, it meets that obligation through the criminal law and the law of personal property (SOR: 127).
- 3.2.39 States that, to the extent that it is under any duty that requires it to facilitate the return of cultural taonga to an individual, hapū or iwi which has previously chosen to sell, divest, gift or otherwise alienate or part with possession of that taonga, any such duty must be balanced with the property rights of others, but it has enacted mechanisms by which such return can be achieved in appropriate circumstances (SOR: 128).
- 3.2.40 States that, to the extent that its duty of active protection in relation to a moveable cultural taonga is seen as conflicting with the exercise by Māori of tino rangatiratanga in relation to that taonga, it has taken and will continue to take all reasonable steps to achieve an appropriate balance, taking into account both the particular Māori interest and whatever national interest may exist in that taonga (SOR: 129).
- 3.2.41 States that, to the extent that it can be said to be under some additional or general duty of active protection in relation to moveable cultural taonga, the nature of that duty will vary according to the taonga in question, its current legal ownership and the circumstances in which its original owners parted with possession of it. The Crown does not respond to and denies, due to the absence of any particularised allegations of breach, claims relating to moveable cultural taonga (SOR: 130).
- 3.2.42 States, in relation to the specific allegations in the Ngāti Porou and Ngāti Koata claims concerning the loss of tino rangatiratanga over wahi tapu, pa sites and other sites of cultural significance, that such loss is the direct or indirect result of the alienation of the land on which the particular sites exist, and therefore has insufficient knowledge and cannot plead or otherwise respond to them (SOR: 132).
- 3.2.43 States that, through its current legislation, policies and practices (the details of which can be expected to be given in evidence) it is meeting any obligation it may have of active protection in relation to such sites (SOR: 133).
- 3.2.44 States, with particular regard to allegations in the Ngāti Porou claim that the Crown has failed to protect Ngāti Porou artistic works from alienation, abuse, dilution, misrepresentation, unauthorised exploitation, expropriation and misuse, that it would be inconsistent with the promise contained in Article 3 of the Treaty for the Crown to legislate or otherwise act to:
- (a) deprive either Ngāti Porou or a Ngāti Porou artist of the right of alienation or authorisation referred to above (SOR: 140, 141);
 - (b) limit the use by persons of artistic works lawfully in their possession or control, except to the extent of the moral rights retained by the artist (SOR: 142).

The Crown's statement of response: Te Reo Māori

- 3.2.45 Recognises the status of the claimants and of Māori in general as kaitiaki of te reo Māori and of nga reo Māori and acknowledge the finding of the Waitangi Tribunal in its *Te Reo Māori Report* that 'by the Treaty the Crown did promise to recognise and protect the language' (SOR: 102).
- 3.2.46 States that through its current legislation, policies and practices it is meeting any such promise (SOR: 103).
- 3.2.47 States that any recognition or protection by it of te reo Māori of necessity occurs in a country where English is also an official language, where the majority of citizens speak, read and write English only, and where, in accordance with a widely accepted tenet of international law, freedom of expression is recognised as a fundamental human right (SOR: 104).
- 3.2.48 States that all language forms part of the common heritage of mankind and the use by any person of any language accordingly involves the exercise by that person of a common right (SOR: 105).
- 3.2.49 Denies that it has an obligation under the Treaty to prevent 'misuse' of te reo Māori, or that the claimants, Māori or the Crown have or should have legally enforceable rights of control (in the nature of monopoly rights or a power of veto) over te reo Māori (SOR: 106).

Part Three (A): Tikanga Māori & Mātauranga Māori

III. First component issues

- 3A.3.1 (a) Must the Crown protect tikanga Māori and mātauranga Māori from use by persons other than kaitiaki or in a manner inconsistent with the values, and prescriptions underpinning tikanga Māori and mātauranga Māori?
and
- (b) If so, in what circumstances has New Zealand law and policy provided such protection?
- 3A.3.2 (a) Must the Crown provide for the the control, use, development and regulation of tikanga Māori and mātauranga Māori by their kaitiaki?
- (b) If so, in what circumstances has New Zealand law and policy ensured such control?
- 3A.3.3 (a) Must the Crown ensure the preservation of tikanga Māori and mātauranga Māori in the hands of their kaitiaki and transmission of tikanga Māori and mātauranga Māori from generation to generation among kaitiaki?
- (b) If so, in what circumstances does New Zealand law and policy provide for such preservation and transmission?

IV. Second component issues

- 3A.4.1 (a) Did or do Crown policy, practices or legislation, such as (but not limited to):
- (i) Māori Antiquities Acts 1901 and 1975 and amendments;
 - (ii) The Antiquities Act 1975 and amendments;
 - (iii) Protected objects legislation or policy;
 - (iv) Relevant museum legislation and policies,
- protect the kaitiaki's relationship with their tikanga Māori and mātauranga Māori and their taonga works or taonga in museums or other institutions?
- (b) If not, what amendments should be made to ensure such protection?
- (c) Which specific New Zealand legislative or policy instruments contribute to the protection of tikanga Māori and mātauranga Māori from use by persons other than kaitiaki or in a manner inconsistent with the values, and prescriptions underpinning tikanga Māori and mātauranga Māori?
- 3A.4.2 Is the overall effect of these instruments sufficient to meet any obligations identified in the first component?

3A.4.3 Which specific New Zealand legislative or policy instruments contribute to the development, regulation, control and/or use of tikanga Māori and mātauranga Māori by their kaitiaki?

3A.4.4 Is the overall effect of these instruments sufficient to meet any obligations identified in the first component?

3A.4.5 Which specific New Zealand legislative or policy instruments contribute to the preservation of tikanga Māori and mātauranga Māori in the hands of their kaitiaki and transmission of tikanga Māori and mātauranga Māori from generation to generation among kaitiaki?

3A.4.6 Is the overall effect of these instruments sufficient to meet any obligations identified in the first component?

V. Third component issues

3A.5.1 (a) Does New Zealand law and policy need to be amended to bring it into line with any Crown obligations identified in the analysis in the first component?

(b) If the answer to paragraph (a) is “yes,” what should the amendments include?

(c) If New Zealand law and policy is in whole, or in part, inconsistent with the Treaty, can it be made Treaty consistent through discrete (*sui generis*) forms of protection (including mechanisms both legal and non-legal and custom law) for tikanga Māori and mātauranga Māori?

(d) If the answer is “yes”, what protection should be developed?

Part Three (B): Te Reo Māori

These issues are divided into two sections, relating to the distinctiveness (i) and use (ii) of Te Reo Māori. The text is derived from a joint memorandum from Crown and claimant counsel (Wai 262, #2.308, 21 June 2006).

(i) Distinctiveness

IV. First component issues

- 3B.3.1(i) (a) Does the Crown have obligations under the Treaty of Waitangi/Te Tiriti o Waitangi to protect and promote Te Reo o Ngāti Porou, o Ngāti Kahungunu, o Ngāti Koata, o Ngāti Kuri, o Ngāti Wai, o Te Rarawa?
- (b) Does the Crown have obligations under the Treaty of Waitangi/Te Tiriti o Waitangi to actively protect Te Reo o Ngāti Porou, o Ngāti Kahungunu, o Ngāti Koata, o Ngāti Kuri, o Ngāti Wai, o Te Rarawa as an essential means of cultural identity, cultural expression, and knowledge transmission to the particular iwi?

V. Second component issues

- 3B.4.1(i) If the answer to either (a) or (b) is “yes”, has the Crown met these obligations?

VI. Third component issues

- 3B.5.1(i) (a) Does New Zealand law and policy need to be amended to bring it into line with any Crown obligations identified in the first component?
- (b) If New Zealand law and policy is in whole or part inconsistent with the Treaty, can it be made Treaty-consistent through legislative and policy amendment or through a discrete (*sui generis*) form of protection (including mechanisms both legal and non-legal and custom law), or a combination of both?
- (c) If the answer to paragraphs (a) and (b) is “yes,” what legislative or policy amendment or discrete (*sui generis*) protection or, a combination of both, should be developed to ensure Treaty consistency and kaitiakitanga?

(ii) *Use of Te Reo Māori*

First component issue

- 3B.3.1(ii) Does the Crown have an obligation under the Treaty of Waitangi/Te Tiriti o Waitangi to protect Te Reo Māori from use in a manner inconsistent with tikanga Māori underpinning Te Reo?

Second component issue

- 3B.4.1(ii) Has the Crown met these obligations?

Third component issues

- 3B.5.1(ii) Does New Zealand law and policy need to be amended to bring it into line with any Crown obligations?
- 3B.5.2(ii) If New Zealand law and policy is in whole or in part inconsistent with the Treaty, can it be made to be consistent through legislative and policy amendment or through a discrete (*sui generis*) form of protection (including mechanisms both legal and non-legal and custom law) for te reo Māori or a combination of both?
- 3B.5.3(ii) If the answer is “yes,” what legislative and policy amendments, or discrete (*sui generis*) protection (including mechanisms both legal and non-legal and custom law) or, a combination of both, should be developed to ensure Treaty consistency and kaitiakitanga?

PART FOUR (A): RELATIONSHIP OF KAITIAKI WITH THE ENVIRONMENT

I. Definition

4A.1.1 “Environment” means the natural environment and includes ecosystems and their constituent parts and all natural resources [and species of flora and fauna].

The kaitiaki’s relationship with the environment includes the values, knowledge, customary law and practice relating to the use, control, development, maintenance, preservation, regulation and management of the natural environment of an identified rohe and the indigenous and/or taonga species of flora and fauna that inhabit that rohe.

II. Relevant Parts of the Statements of Claim and the Crown’s Response

4A.2.1 The final statements of claim refer to the following aspects of environmental issues:

Ngāti Kuri, Te Rarawa and Ngāti Wai

Ngāti Kuri, Te Rarawa and Ngāti Wai contend that:

4A.2.2 Taonga includes whakairo, rongoa, wāhi tapu, natural resources (including silica sands, rivers, foreshore and seabeds, dryland, moana, minerals, metals etc), pa sites and cultural images, designs and symbols and associated indigenous, cultural and customary heritage rights in relation to such taonga (Claim 1.1(g) para 3.8).²

4A.2.3 Tino rangatiratanga incorporates:

- (a) a right of development that permits the claimants to conserve, control, utilise and exercise rights over their indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(g) para 3.3).³
- (b) decision-making authority over the conservation, control of, kaitiakitanga and proprietary interests in all natural resources including indigenous flora and fauna me o rātou taonga katoa;
- (c) decision-making authority over issues in an international context and international fora which impact and effect or are likely to impact or effect indigenous flora and fauna me o rātou taonga katoa;
- (d) the right to control and make decisions about the propagation, biological and genetic derivation, development, transport, study or sale of indigenous flora and fauna me o rātou taonga katoa;

² See also Claim 1.1a para 2.9

³ See also Claim 1.1 paras 2-11

- (e) the right to protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna me o rātou taonga katoa;
- (f) a right to environmental well-being dependent upon the nurturing and wise use of indigenous flora and fauna me o rātou taonga katoa;
- (g) the right to participate in, benefit from and make decisions about the application, development, use, trade and sale of indigenous flora and fauna me o rātou taonga katoa; and
- (h) the right to protect, enhance and transmit the cultural and spiritual knowledge and concepts found in indigenous flora and fauna me o rātou taonga katoa (Claim 1.1(g) para 3.4).⁴

4A.2.4 Ngāti Kuri, Te Rarawa and Ngāti Wai contend that the exercise of tino rangatiratanga as it relates to indigenous flora and fauna me o rātou taonga katoa was and is a recognition of the claimants' interests in the continued existence of flora and fauna and associated cultural taonga as interconnected threads of te ao turoa (Claim 1.1(g) 3.5).⁵

Ngāti Porou

Ngāti Porou contend that:

4A.2.5 Taonga includes:

cultural taonga including, without being limited to: moveable cultural taonga such as artefacts, weaponry, whakairo, taruke, tipuna whare, whare karakia, and immovable cultural taonga including those landforms, landscapes and seascapes of sites of cultural significance to Ngāti Porou (such as Hikurangi Maunga, Waiapu Awa, Te Toka a Taiau, Te Toka a Kahuteaiterangi (Te Motu o Paieka), Uepohatu Pa, Huturangi's Pool, Tapere nui a Whatonga, Te Rawheoro, Whangaokena and Te Whetumatarau) (Claim 1.1(e) para 43).⁶

4A.2.6 They were guaranteed te tino rangatiratanga over, and full, exclusive and undisturbed possession of all taonga, including:

- (a) Ngāti Porou flora and fauna. This guarantee included the right and obligation of Ngāti Porou to fulfil their Kaitieki responsibilities in regard to Ngāti Porou flora and fauna (Claim 1.1(e) para 52);
- (b) Ngāti Porou mātauranga mo nga tikanga of and Ngāti Porou flora and fauna which have medicinal, therapeutic and or other beneficial qualities (Claim 1.1(e) para 57.2);

⁴ See also Claims 1.1 paras 2-8, 1.1(a) para 2.5

⁵ See also Claims 1.1 and 1.1(a) para 10

⁶ Gina Rudland, counsel to Ngāti Porou claimants in the Wai 262 claim, advised the Tribunal of the withdrawal of claims to the specific named landforms listed in para 4A 2.5 in the Wai 262 inquiry (Paper 2.285(a), p.2.

- (c) the rights of Ngāti Porou to benefit commercially from Ngāti Porou mātauranga mo nga tikanga of and from Ngāti Porou flora and fauna generally (Claim 1.1(e) para 57.3);
- (d) the right of Ngāti Porou to commercially develop their use of Ngāti Porou flora and fauna by the imposition of significant costs (including without limitation the cost of research and development venture capital and marketing costs and the cost involved with registration of patents) associated with commercial exploitation of Ngāti Porou flora and fauna (Claim 1.1(e) para 57.5).

Ngāti Kahungunu

- 4A.2.7 Indigenous flora and fauna, their ecosystems, habitats and genetic material (“indigenous flora and fauna”) within the Ngāti Kahungunu rohe are and always have been a taonga of Ngāti Kahungunu in respect of which Ngāti Kahungunu are kaitiaki (Claim 1.1(d), para 3).
- 4A.2.8 Pursuant to Article 2 of the Treaty of Waitangi, Ngāti Kahungunu were guaranteed tino rangatiratanga over, and full exclusive and undisturbed possession of, all taonga, including indigenous flora and fauna, within their rohe. This guarantee included the right and obligation of Ngāti Kahungunu to fulfil their kaitiaki responsibilities in regard to indigenous flora and fauna within their rohe (Claim 1.1(d), para 4).
- 4A.2.9 As a consequence of the guarantee the Crown is under a continuing obligation (Claim 1.1(d), para 5):
- (a) To actively protect the exercise by Ngāti Kahungunu of tino rangatiratanga and kaitiakitanga in regard to indigenous flora and fauna within their rohe; and
 - (b) To actively protect indigenous flora and fauna within the Ngāti Kahungunu rohe.
- 4A.2.10 In breach of its obligations the Crown has undermined and/or prevented the exercise of tino rangatiratanga and kaitiakitanga by Ngāti Kahungunu in regard to indigenous flora and fauna through implementation of legislation and policy which prevents or hinders Ngāti Kahungunu from exercising tino rangatiratanga and kaitiakitanga in regard to indigenous flora and fauna within their rohe including (Claim 1.1(d), para 6):
- (a) Vesting ownership and control of indigenous flora and fauna in the Crown;
 - (b) Facilitating the introduction of exotic species of flora and fauna into the Ngāti Kahungunu rohe;
 - (c) Vesting ownership and control of exotic species of fauna in Acclimatisation Societies;
 - (d) Restricting Maori from exercising harvesting rights in regard to indigenous flora;
 - (e) Facilitating settlement, agriculture and horticulture to the detriment of Ngāti Kahungunu tino rangatiratanga and kaitiakitanga in respect of indigenous flora and fauna within the Ngāti Kahungunu rohe;
 - (f) Implementing legislation and policy in regard to indigenous flora and fauna within the Ngāti Kahungunu rohe without either adequate consultation with or the permission of Ngāti Kahungunu;

- (g) Failing to consult with or obtain permission from Ngāti Kahungunu before permitting or facilitating the introduction of exotic flora and fauna into the Ngāti Kahungunu rohe;
- (h) Adopting international instruments which either wholly or partially adversely affect the ability of Ngāti Kahungunu to exercise tino rangatiratanga and kaitiakitanga over indigenous flora and fauna within the Ngāti Kahungunu rohe without either consultation with or the permission of Ngāti Kahungunu;
- (i) Failing to implement into domestic legislation and policy, aspects of international instruments which are consistent with, or would otherwise give effect to, the Crown's obligations under the Treaty of Waitangi in respect of the exercise by Ngāti Kahungunu of tino rangatiratanga and kaitiakitanga in relation to indigenous flora and fauna within their rohe;

4A.2.11 The Crown has failed to meet its obligations to actively protect indigenous flora and fauna within the Ngāti Kahungunu rohe through (Claim 1.1(d), para 6):

- (a) Permitting and facilitating the introduction into the Ngāti Kahungunu rohe of exotic flora and fauna to the detriment of indigenous flora and fauna;
- (b) Permitting and encouraging the destruction or substantial modification of the habitats of indigenous flora and fauna, including bush areas, rivers, swamps, wetlands and lagoons, to the detriment of that indigenous flora and fauna through the implementation of legislation and policy which has facilitated settlement, agriculture and horticulture;
- (c) Failing to actively protect indigenous flora and fauna within the Ngāti Kahungunu rohe by not allowing or facilitating Ngāti Kahungunu to continue exercising tino rangatiratanga and kaitiakitanga in respect of indigenous flora and fauna.

Ngāti Koata

Ngāti Koata contend that:

4A.2.12 '*Me o rātou taonga katoa*' includes but is not limited to mātauranga, whakairo, rongoa Māori, biodiversity, genetics, wāhi tapu, pa sites and Māori cultural images, designs, symbols and associated indigenous, cultural and customary heritage rights in relation to such taonga (Claim 1.1(f) para 2.6).⁷

4A.2.13 The Treaty guarantee of tino rangatiratanga assures Ngāti Koata authority to:

- (a) make decisions over the conservation, control, protection, enhancement and development of natural resources including, without being limited to,

⁷ See also Claims 1.1 para 12, 1.1(a) para 3.7

the eco-systems of rivers, lakes, maunga, swamps, coast and coastal waters, seas and sea lands and islands within their rohe;

- (b) exercise a right of development which permits conservation, control, utilisation and exercise of rights over indigenous flora and fauna me o rātou taonga katoa within these eco-systems;
- (c) exercise indigenous cultural and customary heritage rights in the knowledge and use of indigenous flora and fauna me o rātou taonga katoa according to Māori law and custom (Claim 1.1(f) para 2.3);
- (d) a right to determine environmental well-being based upon the nurturing and wise use of indigenous flora and fauna;
- (e) make decisions about and benefit from the application, development, uses, study and sale of o rātou taonga katoa;
- (f) ensure protection, enhancement and transmission of the cultural and spiritual knowledge and concepts found in o rātou taonga katoa; and
- (g) exercise rangatiratanga to meet their obligations under the Treaty of Waitangi according to Māori custom and law, and where access to resources is granted in pursuance of that obligation, to maintain oversight and a decisive role in the nature, extent and continuation or otherwise of the access to and use of such resources (Claim 1.1(f) para 2.3).

4A.2.14 Ngāti Koata contend that the Crown, in breach of the principles of the Treaty of Waitangi and its obligations thereunder, has made and enacted legislation and adopted policies which failed to protect Ngāti Koata tino rangatiratanga and kaitiakitanga in respect of indigenous flora and fauna and environs ((Claim 1.1(f) paras 4.4-4.10).

The Crown's Statement of Response

The Crown:

- 4A.2.15 Does not specifically state that habitats are not a taonga, but does state that English law in 1840 did not recognise private property or proprietary rights in landscapes and scenery per se (SOR 2.256 para 43.2.1).
- 4A.2.16 Denies that the genetic material of indigenous flora and fauna per se constitutes me o rātou taonga katoa within the terms of Article 2 (SOR 2.256 para 98).
- 4A.2.17 States that Article 2 rangatiratanga rights cannot be claimed generically but must be both species specific and specific as to the individual, hapū or iwi asserting the rights (SOR 2.256 para 40).
- 4A.2.18 Denies that tino rangatiratanga ... me o rātou taonga katoa can be said to apply in general circumstances that are devoid of specific facts or context (SOR 2.256 para 40).
- 4A.2.19 Recognises that Māori are entitled to exercise tino rangatiratanga over property and resources owned or controlled by them (SOR 2.256 para 45).
- 4A.2.20 Denies that the promise of tino rangatiratanga ... me o rātou taonga katoa contained in Article 2 of the Treaty was intended to, or did in fact, guarantee to Māori property and/or proprietary rights and/or interests of a kind that was not known to, recognised, or capable of protection by English law in 1840 (SOR 2.256 para 42).
- 4A.2.21 Notes, by way of non-exclusive example, that English law in 1840 did not in general recognise private property or proprietary rights in flora (except to the extent that such rights arose as an incident of the ownership of the land upon which the flora grew) or in undomesticated fauna (SOR 2.256 para 43.1).
- 4A.2.22 Acknowledges that the Article 2 guarantee to Māori of tino rangatiratanga over their lands extends to the flora and fauna (whether 'indigenous' or not) existing on those lands for so long as those lands are possessed by them (SOR 2.256 para 85).
- 4A.2.23 Accepts, subject to the requirements of, and restrictions and prohibitions in, legislation in force at any material time (including legislation relating to the protection and conservation of endangered species), that the claimants have exclusive rights to conserve, utilise, facilitate the propagation of harvest, transport, study, trade and sell flora and fauna that exist on land owned by them (SOR 2.256 para 88).
- 4A.2.24 Denies (subject to paras 45 and 88 of SOR, SOR 2.256) that the claimants have exclusive rights (whether they be termed as ownership rights, rights of exclusive control or otherwise) in relation to indigenous flora and fauna. Denies, in particular, that the claimants have, or ought to have, by virtue of Article 2:

- (a) exclusive decision-making authority over the conservation or control of, or exclusive proprietary interests in indigenous flora and fauna;
 - (b) exclusive decision-making authority over issues in an international context and in international fora which affect or are likely to affect indigenous flora and fauna (SOR 2.256 para 89).
- 4A.2.25 Acknowledges that the exercise of tino rangatiratanga by Ngāti Porou and Ngāti Koata over wahi tapu, pa sites and other sites of cultural significance is guaranteed by Article 2 of the Treaty of Waitangi for so long as the land upon those sites exist remains in their possession (SOR 2.256 para 131).
- 4A.2.26 To the extent that the Ngāti Porou and Ngāti Koata claims concerning immovable cultural taonga relate to natural phenomena that exist without, and do not derive their significance from, human alteration or input (such as landforms, landscapes and seascapes) the Crown accepts that such things may be protected by Article 2 for so long as they remain as incidents of land that is in the possession of the claimants (SOR 2.256 para 134).
- 4A.2.27 Specifically denies that the Ngāti Porou and Ngāti Koata claimants have any development rights in relation to landforms, landscapes and seascapes other than:
- (a) rights that are attendant on their ownership of the relevant land; or
 - (b) rights that they share with all New Zealand citizens by virtue of Article 3 of the Treaty (SOR 2.256 para 135).
- 4A.2.28 States that to the extent that such things are protected by Article 2 of the Treaty, the Crown through its current legislation, policies and practices (the details of which are likely to be the subject of evidence to the Tribunal), is meeting any obligation it has actively to protect them.
- 4A.2.29 States that the way in which, and the degree to which, it meets any such obligation will vary (and has in fact varied) over time.
- 4A.2.30 States that to the extent that the protection of such things conflicts with private property rights or with Crown policies relating to the protection (through restrictions on access) of indigenous flora and fauna, the Crown is entitled by virtue of its sovereignty to seek a reasonable balance between that obligation and the wider national interest (SOR 2.256 para 111).
- 4A.2.31 Without prejudice to the position taken by the Crown, and in acknowledgement of the significance attributed by the Wai 262 claimants to the Tohunga Suppression Act 1907 and its relationship to the state of rongoa today (SOR 2.256 para 112), the Crown:
- (a) Notes the finding of the Waitangi Tribunal in the *Napier Hospital and Health Services Report* (2001) that ‘The removal of the Māori Councils’ power to regulate medical tohunga and the partial suppression of

tohunga by legislation from 1907, was in breach of the principles of partnership and active protection'. States that this finding was made without the benefit of evidence or submissions from the Crown on the issue (SOR 2.256 para 113).

- (b) States that to the extent that it is under an obligation actively to protect mātauranga Māori, the Crown was and is by virtue of its sovereignty entitled to seek to achieve a reasonable balance between any such obligation and the wider national interest, in particular where that obligation was reasonably perceived, by reference to the standards prevailing at any particular time, to conflict with the State's wider duties to protect all its citizens (including Māori) from practices that: may endanger health or life; are non-consensual; are fraudulent; or otherwise involve activities regarded as criminal in nature (SOR 2.256 para 114).
- (c) States that no practitioners of rongoa Māori were prosecuted under the Act (SOR 2.256 para 115).
- (d) States that, except as herein admitted, the Crown denies each and every allegation pertaining to the Tohunga Suppression Act 1907 (SOR 2.256 para 116).

Part Four (A): relationship of kaitiaki with the environment

III. First component issues:

- 4A.3.1 (a) Must the Crown protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?
- (b) If so, does New Zealand law and policy provide such protection?
- 4A.3.2 (a) Must the Crown provide for control and regulation by kaitiaki of their relationship with the environment?
- (b) If so, does New Zealand law and policy ensure such control?
- 4A.3.3 (a) Must the Crown ensure the preservation and development of the relationship with the environment in the hands of kaitiaki and the transmission of that relationship from generation to generation among kaitiaki?
- (b) If so, does New Zealand law and policy provide for such preservation, development and transmission?

IV. Second component issues

- 4A.4.1 Has the Crown assumed regulatory control of the environment without making sufficient provision for the protection, preservation, control, use, development, regulation and transmission of the kaitiaki's relationship with the environment?
- 4A.4.2 The claimants claim that the following Acts (and their amendments) are examples of the Crown's assumption of varying degrees of control over aspects of the natural environment which have adversely affected the kaitiaki's relationship with the environment:
- (a) Animal Protection Act 1960
 - (b) Animal Welfare Act 1999
 - (c) Animals Protection Act 1880
 - (d) Animals Protection Act 1907
 - (e) Animals Protection Act 1914
 - (f) Biosecurity Act 1993
 - (g) Conservation Act 1987
 - (h) Crown Minerals Act 1991
 - (i) Crown Research Institutes Act 1992
 - (j) Environment Act 1986
 - (k) Forests Act 1949
 - (l) Geothermal Energy Act 1953
 - (m) Hazardous Substances and New Organisms Act 1996
 - (n) Immigration and Public Works Act 1870

- (o) Land Act 1948
- (p) Land Improvements and Native Lands Acquisition Act 1894
- (q) Land Settlement Promotion and Land Acquisition Act 1952
- (r) Lands for Settlement Act 1925
- (s) Local Government Act 1974 and its predecessors
- (t) Māori Housing Act 1935 and its successors
- (u) Māori Purposes Act 1949
- (v) Māori Social and Economic Development Act 1945
- (w) Marine Mammals Protection Act 1978
- (x) Marine Reserves Act 1971
- (y) National Parks Act 1980
- (z) Native Lands Act 1909
- (aa) Native Plants Protection Act 1934
- (bb) Naval and Military Settlers Act 1860
- (cc) New Zealand Loan Act 1863
- (dd) New Zealand Loan Appropriation Act 1863
- (ee) New Zealand Settlement Act 1863
- (ff) New Zealand Walkways Act 1990
- (gg) Petroleum Act 1953
- (hh) Protection of Animals Act 1867
- (ii) Protection of Animals Act 1873
- (jj) Protection of Certain Animals Act 1861
- (kk) Protection of Certain Animals Act 1865
- (ll) Public Works Act 1908
- (mm) Public Works and Land Settlements Act 1896
- (nn) Public Works Lands Act 1943
- (oo) Public Works Lands Act 1864 and successors
- (pp) Reserves Act 1977
- (qq) Resource Management Act 1991
- (rr) Servicemen's Settlement and Land Sales Act 1943
- (ss) Soil Conservation and Rivers Control Act 1941
- (tt) The Hawkes Bay Naval and Military Act 1861
- (uu) Town and Country Planning Act 1953
- (vv) Town and Country Planning Act 1977
- (ww) Trade in Endangered Species Act 1989
- (xx) Water and Soil Conservation Act 1967
- (yy) Wild Animal Control Act 1977
- (zz) Wild Birds Protection Act 1864
- (aaa) Wildlife Act 1953 and its predecessors

The following questions relate to the key Acts by which the Crown maintains modern regulatory control of the environment.

Resource Management Act 1991

4A.4.3 Does the Resource Management Act 1991 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

- (a) Does the recognition of the relationship of Māori with their ancestral land as a matter of national importance in section 6(e) :
 - (i) ensure the preservation, regulation and development of the kaitiaki's relationship with the environment in the hands of the kaitiaki; and/or
 - (ii) protect the transmission of that relationship from generation to generation among kaitiaki?

- (b) Does the requirement (section 7) for those people exercising functions under the act to take account of kaitiakitanga protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

- (c) Does the requirement in section 8 for those people exercising functions under the Act to take into account the principles of the Treaty of Waitangi:
 - (i) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;
 - (ii) provide for control and regulation by kaitiaki of their relationship with the environment?;
 - (iii) ensure the preservation and development of the kaitiaki's relationship with the environment in the hands of the kaitiaki; and/or
 - (iv) protect the transmission of that relationship from generation to generation among kaitiaki?

- (d) Does the recognition of customary activities in sections 17A and 17B:
 - (i) ensure the preservation, regulation and development of the kaitiaki's relationship with the environment (including wāhi tapu) in the hands of the kaitiaki; and/or
 - (ii) protect the transmission of that relationship from generation to generation among kaitiaki?

- (e) Does the ability of local authorities to transfer powers to other public authorities, specifically including iwi authorities, (section 33) provide for control, preservation, regulation, use and development by kaitiaki of their relationship with the environment?

- (f) Does the definition of 'heritage protection authority' in section 187:
 - (i) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?; and/or
 - (ii) provide for control, regulation and development by kaitiaki of their relationship with the environment?

- (g) Does the effect of heritage protection orders (section 193) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?
- (h) Do the consultation requirements relating to policy statements and plans that are set out in Schedule 1 (specifically as they relate to iwi authorities and tangata whenua):
 - (i) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;
 - (ii) provide for preservation, regulation and development by kaitiaki of their relationship with the environment?

Conservation Act 1987

4A.4.4 Does the relative size of the conservation estate and the conservation values protected in it mean that particular provision should be made in the legislative framework regulating this estate for:

- (i) protection of the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;
- (ii) provision for control, regulation and development by kaitiaki of their relationship with the environment?;
- (iii) preservation of the kaitiaki's relationship with the environment in the hands of the kaitiaki; and/or
- (iv) transmission of that relationship from generation to generation among kaitiaki?

4A.4.5 Does the Conservation Act 1987 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

- (a) Does the requirement in section 4 that the Act be interpreted and administered to give effect to the principles of the Treaty of Waitangi:
 - (i) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;
 - (ii) provide for control, regulation and development by kaitiaki of their relationship with the environment?;
 - (iii) ensure the preservation, regulation and development of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or
 - (iv) protect the transmission of that relationship from generation to generation among kaitiaki?

- (b) Does the requirement that membership of Conservation Boards be determined with regard to the interests of tangata whenua (section 6P) provide for control by kaitiaki of their relationship with the environment?
- (c) Does the ability of the Minister of Conservation to confer additional specific protection requirements to a described area or interest in land for a specified purpose (section 18) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?
- (d) Does the declaration in section 26ZH that Māori fishing rights are unaffected by Part 5B of the act:
 - (i) ensure the preservation, protection, regulation and development of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or
 - (ii) protect the transmission of that relationship from generation to generation among kaitiaki?
- (e) Does the ability to create Nga Whenua Rahui Kawenata under section 27A protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?
- (f) Do the sections in Part 3B relating to concessions for activities in conservation areas:
 - (i) ensure the preservation, protection, regulation and development of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or
 - (ii) protect the transmission of that relationship from generation to generation among kaitiaki?

Reserves Act 1977

4A.4.6 Does the Reserves Act 1977 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

- (a) Does the ability of the Minister to grant hunting or burial rights to Māori in relation to specific reserves (section 46):
 - (i) ensure the preservation, protection, regulation and development of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or
 - (ii) protect the transmission of that relationship from generation to generation among kaitiaki?
- (b) Does the requirement that any authorisation of afforestation must provide adequate safeguards for natural, historic and cultural features and indigenous flora and fauna (section 75(2)) protect the kaitiaki's

relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

- (c) Does the ability to create Nga Whenua Rahui Kawenata (section 77A) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

Local Government Act 2002

4A.4.7 Does the Local Government Act 2002 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

- (a) Does the statement in section 4 that Parts 2 and 6 of the Act that are intended to facilitate participation by Māori in local authority decision-making processes in order to take appropriate account of the Treaty of Waitangi provide for control, preservation, protection, regulation and development by kaitiaki of their relationship with the environment?
- (b) Does the statement in section 14(1)(d) that local authorities should provide opportunities for Māori to contribute in their decision-making processes provide for control, preservation, protection, regulation and development by kaitiaki of their relationship with the environment?
- (c) Does the requirement in section 77 that, when making significant decisions in relation to land or a body of water, a local authority must take into account the relationship of Māori with ancestral land, water, wāhi tapu, flora and fauna, and other taonga protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?
- (d) Does the requirement in section 81 that local authorities establish and maintain processes to develop Māori capacity to contribute to decision-making processes provide for control, preservation, protection, use, regulation and development by kaitiaki of their relationship with the environment?
- (e) Does the requirement for each local authority to have a long-term community plan that complies with section 93 provide for control, use, preservation, regulation and development by kaitiaki of their relationship with the environment?

Biosecurity Act 1993

4A.4.8 Does the Biosecurity Act 1993 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

- (a) Does the ability to establish a pest management strategy for organisms that may have an adverse effect on the relationship of Māori with ancestral lands, waters, sites, wāhi tapu, and taonga (section 57(c)(5)):
 - (i) ensure the preservation, regulation protection, and development of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or
 - (ii) protect the transmission of that relationship from generation to generation among kaitiaki?

- (b) Does the requirement that proposals for pest management strategies set out actual or potential effects on the relationship of Māori with their ancestral lands, waters, sites, wāhi tapu, and taonga (section 60(j)) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

- (c) Do the consultation requirements with regard to a national pest management strategy that are set out in section 73 (which specifically include consultation with tangata whenua):
 - (i) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?; and/or
 - (ii) provide for control, preservation, regulation and development by kaitiaki of their relationship with the environment?

Hazardous Substances and New Organisms Act 1996

4A.4.9 Does the Hazardous Substances and New Organisms Act 1996 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

- (a) Does the requirement in section 8 that all persons exercising powers and functions under the Act must take into account the principles of the Treaty of Waitangi:
 - (i) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;
 - (ii) provide for control, regulation and development by kaitiaki of their relationship with the environment?;
 - (iii) ensure the preservation of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or
 - (iv) protect the transmission of that relationship from generation to generation among kaitiaki?

- (b) Does the establishment of Nga Kaihautu Tikanga Taiao under Part 4A of the Act:

- (i) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;
- (ii) provide for control, regulation and development by kaitiaki of their relationship with the environment?;
- (iii) ensure the preservation of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or
- (iv) protect the transmission of that relationship from generation to generation among kaitiaki?

Crown Minerals Act 1991

4A.4.10 Does the Crown Minerals Act 1991 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

- (a) Does the requirement under section 4 that all persons exercising powers and functions under the Act must have regard to the principles of the Treaty of Waitangi:
 - (i) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?;
 - (ii) provide for control, regulation and development by kaitiaki of their relationship with the environment?;
 - (iii) ensure the preservation of the kaitiaki's relationship with the environment in the hands of the kaitiaki?; and/or
 - (iv) protect the transmission of that relationship from generation to generation among kaitiaki?
- (b) Do the requirements relating to entry on to Māori Land for minimum impact activity as set out in section 51 protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

Marine Mammals Protection Act 1978

4A.4.11 Does the Marine Mammal Protection Act 1978 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

- (a) Do the requirements in section 5 relating to applications for permits to take/import/export marine mammals or marine mammal products protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

Marine Reserves Act 1971

4A.4.12 Does the Marine Reserves Act 1971 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

- (a) Does the ability of iwi or hapū to apply for an Order in Council declaring an area to be a marine reserve (section 5) protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

Environment Act 1986

4A.4.13 Does the Environment Act 1986 provide effective protection of the kaitiaki's relationship with the environment? Specifically:

- (a) Does the requirement for the Commissioner for the Environment (section 17) and the Ministry for the Environment (section 32) to have regard to 'land, water, sites, fishing grounds, or physical or cultural resources, or interests associated with such areas, which are part of the heritage of the tangata whenua and which contribute to their wellbeing' protect the kaitiaki's relationship with the environment from use in a manner that is inconsistent with the customs and values of the kaitiaki?

Overall effect of statutory protections

4A.4.14 If the answer to any of the above questions (4.2.1-10) is "yes", is the overall effect of these protections sufficient to meet the Crown's obligations as determined in the first component?

4A.4.15 If New Zealand law and policy is in whole, or in part, inconsistent with the Treaty, can it be made Treaty consistent through discrete (*sui generis*) forms of protection for the relationship of kaitiaki with their environment.

4A.4.16 If the answer to 4A.4.14-15 is "yes", what protections should be developed?

International Agreements

4A.4.17 Does New Zealand's membership in any of the following international conventions illustrate or necessitate an assumption of regulatory control of the environment (or some aspect of it) by the Crown without effective provision for protection of the kaitiaki's relationship with the environment?

- (a) Convention on the Conservation of Migratory Species (Bonn Convention)
- (b) International Whaling Convention
- (c) Convention on the International Trade in Endangered Species
- (d) World Heritage Convention
- (e) Convention on Wetlands of International Importance (Ramsar Convention)
- (f) Convention on Biological Diversity
- (g) Convention of Nature in the South Pacific (Apia Convention)
- (h) Convention for the Protection of Natural Resources and Environment of the South Pacific
- (i) Stockholm Declaration

- (j) Rio Declaration
 - (k) Agenda 21
 - (l) Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)
- 4A.4.18 Does New Zealand's membership of the IUCN and the Global Environment Facility illustrate or necessitate an assumption of regulatory control of the environment (or some aspect of it) by the Crown without effective provision for protection of the kaitiaki's relationship with the environment?
- 4A.4.19 By not ratifying ILO Convention 169, is the Crown maintaining regulatory control of the environment without effective provision for protection of the kaitiaki's relationship with the environment?
- 4A.4.20 If the answer to any of the above questions (1-3) is "yes", is the overall effect of New Zealand's participation in these agreements such that the Crown is in breach of its obligations as determined under the first component?

V. Third component issues

- 4A.5.1 Does NZ environmental law and policy need to be amended to bring it into line with any Crown obligations identified in the analysis of the first components regarding the relationship with the environment. Including:
- (a) Should amendments be made to the following statutes?
 - (i) Resource Management Act 1991
 - (ii) Conservation Act 1987
 - (iii) Reserves Act 1977
 - (iv) Local Government Act 2002
 - (v) Biosecurity Act 1993
 - (vi) Hazardous Substances and New Organisms Act 1996
 - (vii) Crown Minerals Act 1991
 - (viii) Marine Mammals Protection Act 1978
 - (ix) Marine Reserves Act 1971
 - (x) Environment Act 1986
 - (b) If the answer to any of the above parts is "yes", what should be the form and content of those amendments?
 - (c) If New Zealand law and policy is in whole, or in part, inconsistent with the Treaty can it be made Treaty consistent through discrete (*sui generis*) or other forms of protection (including mechanisms both legal and non-legal and custom law) for the relationship of kaitiaki with their environment?
 - (d) If the answer is "yes", what protection should be developed?
- 4A.5.2 (a) Should the Crown take action to eliminate or minimise any effects on the kaitiaki's relationship to the environment that are inconsistent with the

Crown's obligations identified in the analysis of the first components in part four, and that arise from New Zealand's membership in any of the following international agreements?

- (i) Convention on the Conservation of Migratory Species (Bonn Convention)
- (ii) International Whaling Convention
- (iii) Convention on the International Trade in Endangered Species
- (iv) World Heritage Convention
- (v) Convention on Wetlands of International Importance (Ramsar Convention)
- (vi) Convention on Biological Diversity
- (vii) Convention of Nature in the South Pacific (Apia Convention)
- (viii) Convention for the Protection of Natural Resources and Environment of the South Pacific
- (ix) Stockholm Declaration
- (x) Rio Declaration
- (xi) Agenda 21
- (xii) Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)
- (xiii) IUCN (and the Global Environment Facility)

(b) If the answer to (a) is 'yes', what should be the nature of that action?

4A.5.3 Do the Crown's obligations, as identified in the analysis in the first component, require New Zealand to ratify ILO Convention 169?

PART FOUR (B): TAONGA SPECIES

I. Definition

4B.1.1 Taonga species are those species of flora and fauna that the claimants identify as having particular cultural or spiritual significance to them and include those species listed in Schedule One..

II. Relevant Parts of the Statements of Claim and the Crown Response

In addition to the claims regarding the relationship with the environment in Part Four(A) the claimants claim that:

4B.2.1 The Crown has failed to actively protect the indigenous flora and fauna within the rohe of the claimants by not allowing or facilitating the claimants to continue exercising tino rangatiratanga and kaitiakitanga in respect of the indigenous flora and fauna within the rohe of the claimants through implementation of legislation and policy. This includes, but is not limited to, that set out in the amended statements of claim (SOC 1.1(d): 7.3; SOC 1.1(e): 56.13; SOC 1.1(f): 4.7(h); SOC 1.1(g): 3.9, 5.1.1).

4B.2.2 The Crown, in breach of the principles of the Treaty, has implemented legislation and policy restricting Māori from exercising harvesting rights in regard to indigenous flora and fauna. This legislation includes (but is not limited to) part or all of the following:

- (a) Wild Birds Protection Act 1864
- (b) Animals Protection Act 1907
- (c) Native Plants Protection Act 1934
- (d) Forests Act 1949
- (e) Wildlife Act 1953
- (f) Marine Reserves Act 1971
- (g) Reserves Act 1977
- (h) Marine Mammals Protection Act 1978
- (i) National Parks Act 1980
- (j) Conservation Act 1987
- (k) New Zealand Walkways Act 1990

(SOC 1.1(d): 6.2.1-6.2.11, SOC 1.1(e): 56.5, SOC 1.1(f): 4.4(g), SOC 1.1(g): 5.1.6)

Domestic legislation and policy: exotic flora and fauna

4B.2.3 The Crown, in breach of the principles of the Treaty, has implemented legislation and policy that has facilitated the introduction of exotic species of flora and fauna. This includes (but is not limited to) part or all of the following:

- (a) Protection of Certain Animals Act 1861 and 1865
- (b) Protection of Animals Act 1867 and 1873
- (c) Animals Protection Acts 1880, 1907, 1914 and 1960

- (d) Wildlife Act 1953
- (e) Wildlife Protection Act 1960
- (f) Wild Animal Control Act 1977
- (g) Animal Welfare Act 1999

(SOC 1.1(d): 6.1.20-22; SOC 1.1(e): 56.3; SOC 1.1(f): 4.4(e); SOC 1.1(g): 5.1.7-8)

4B.2.4 The Crown, in breach of the principles of the Treaty, has failed to consult with or obtain permission from the claimants before it permitted and facilitated the introduction of exotic flora and fauna (SOC 1.1(d): 6.5; SOC 1.1(e): 56.8; SOC 1.1(f): 4.9(a); SOC 1.1(g): 3.2, 5.1).

4B.2.5 The Crown, in breach of the principles of the Treaty, has implemented legislation and policy that has vested the ownership and control of exotic species of fauna in Acclimatisation Societies. This includes (but is not limited to) part or all of the following:

- (a) Protection of Animals Acts 1867 and 1873
- (b) Animals Protection Acts 1880 and 1907
- (c) Conservation Act 1987

(SOC 1.1(d): 6.1.23; SOC 1.1(e): 56.4; SOC 1.1(f): 4.4(f); SOC 1.1(g): 5.1.7-8)

4B.2.6 The Crown, in breach of the principles of the Treaty has through legislation and policy permitted and facilitated the introduction exotic flora and fauna into the claimants' rohe to the detriment of indigenous flora and fauna. This legislation includes, without being limited to:

- (a) Animal Protection Act 1880, 1907, 1914, 1960
- (b) Animal Welfare Act 1999
- (c) Conservation Act 1987
- (d) Marine Mammals Protection Act 1978
- (e) Marine Reserves Act 1971
- (f) Native Plants Protection Act 1934
- (g) New Zealand Biodiversity Strategy
- (h) New Zealand Coastal Policy Statement
- (i) Protection of Certain Animals Act 1861, 1865, 1867, 1873
- (j) Reserves Act 1977
- (k) Wildlife Act 1953
- (l) Wildlife Act 1953 and its predecessors
- (m) Wildlife Animal Control Act 1977

(Claims 1.1(d) para 7.1; 1.1(e) para 56.11; 1.1(f) para 4.4(e); 1.1(g) 5.1.6-9)

Ngāti Kahungunu

4B.2.7 Ngāti Kahungu claim indigenous flora and fauna, their ecosystems, habitats and genetic material ("indigenous flora and fauna") within the Ngāti Kahungunu rohe are and always have been a taonga of Ngāti Kahungunu in respect of which Ngāti Kahungunu are kaitiaki(Claim 1.1(d), para 3).

- 4B.2.8 Pursuant to Article 2 of the Treaty of Waitangi, Ngāti Kahungunu were guaranteed tino rangatiratanga over, and full exclusive and undisturbed possession of, all taonga, including indigenous flora and fauna, within their rohe. This guarantee included the right and obligation of Ngāti Kahungunu to fulfil their kaitiaki responsibilities in regard to indigenous flora and fauna within their rohe (Claim 1.1(d), para 4).
- 4B.2.9 In breach of its obligations the Crown has undermined and/or prevented the exercise of tino rangatiratanga or kaitiakitanga by Ngāti Kahungunu in respect of Ngāti Kahungunu indigenous flora and fauna within the Ngāti Kahungunu rohe and has failed to actively protect Ngāti Kahungunu taonga species (Claim 1.1(d), para 6).
- 4B.2.10 The Crown in breach of the principles of the Treaty has failed to take appropriate steps to protect indigenous flora and fauna from actual or potential harm through contact with genetically altered flora and fauna (Claim 1.1(d), para 7).
- 4B.2.11 The Crown in breach of the principles of the Treaty has failed to allow Ngāti Kahungunu to exercise a development right in regard to taonga species (Claim 1.1(d), para 8.4).
- 4B.2.12 The Crown has failed to provide or facilitate a means to allow transfer of knowledge in respect of taonga species.
- 4B.2.13 As a result of the breaches, Ngāti Kahungunu have (Claim 1.1(d), para 8):
- (a) Been denied the ability to exercise the tino rangatiratanga and kaitiakitanga in regard to taonga species;
 - (b) Been denied the ability to exercise the right to development in respect of Ngāti Kahungunu taonga species.

The Crown's Statement of Response

Domestic legislation: flora and fauna

The Crown:

- 4B.2.14 States that where any loss by the claimants of access rights to indigenous flora and fauna is the direct or indirect result of the alienation of the land on which the particular flora and fauna exist, the Crown has insufficient information and does not plead or otherwise respond to the allegations (SOR 90.1).
- 4B.2.15 States that where such loss is the result of legislative restrictions on access it was and is by virtue of its sovereignty entitled to impose such restrictions in good faith and in what it reasonably perceived to be the wider national interest, and, in the absence of particularised allegations of breach cannot respond further (SOR 90.2).
- 4B.2.16 States that to the extent that its past actions are now considered to have resulted in an unjustifiable reduction in the ability of Māori to access indigenous flora and fauna for personal use, it is taking all reasonable measures (consistent with both the national interest and Treaty principles) to remedy that (SOR 91).
- 4B.2.17 Denies that there has been any breach of the Treaty by reason of its actions in creating restrictive designations (including but not limited to scenic reserves) for the protection of species of indigenous flora and fauna (SOR 99.1).
- 4B.2.18 Denies that there has been any breach of the Treaty by reason of its actions in the gazetting and establishment of protected species of indigenous flora and fauna (SOR 99.2).
- 4B.2.19 Denies that there has been any breach of the Treaty by reason of its actions in the sale and export of indigenous flora and fauna including indigenous timbers (SOR 99.4).
- 4B.2.20 Acknowledges (notwithstanding, and without prejudice to, the denials contained above), that some or all Māori may consider that they have a relationship with indigenous flora and fauna that differs from the relationship between other New Zealand citizens and that flora and fauna. The Crown states that in recognition of that belief it has, through its current legislation, policies and practices, sought to recognise Māori interests in relation to indigenous flora and fauna (SOR 100).

Domestic legislation: exotic flora and fauna

- 4B.2.21 States, in response to allegations regarding the introduction of exotic species of flora and fauna, that:

- (a) the introduction of exotic species had begun before 1840 and was, at that time and afterwards, generally supported by and of benefit to Māori (SOR 94.1).
- (b) the introduction of exotic species was an incident of colonisation that, to the extent it was specifically authorised or encouraged by the Crown, was reasonably believed to be in the national interest (SOR 94.2).
- (c) to the extent that the continued presence in New Zealand of certain exotic species is now considered to be detrimental to the environment generally and to indigenous flora and fauna specifically, the Crown is taking all reasonable measures (consistent with both the national interest and Treaty principles) to reduce or eradicate those species (SOR 95).

Part 4(B): Taonga Species

III. First component issues

- 4B.3.1 (a) Must the Crown protect taonga species from use in a manner that is inconsistent with the customs and values of the kaitiaki?
- (b) If so, has New Zealand law and policy provided such protection?
- 4B.3.2 (a) Must the Crown provide for the control, use, development and regulation by kaitiaki of taonga species?
- (b) If so, has New Zealand law and policy ensured such control?
- 4B.3.3 (a) Must the Crown ensure the preservation of knowledge and practices related to taonga species in the hands of kaitiaki and the transmission of that knowledge and those practices from generation to generation among kaitiaki?
- (b) If so, does New Zealand law and policy provide for such preservation and transmission?

IV. Second component issues

- 4B.4.1 Has the Crown assumed regulatory control of the environment without making sufficient provision for protection of (severally) Te Rarawa, Ngāti Kuri and Ngāti Wai's relationship with and kaitiakitanga over species such as those identified by Te Rarawa, Ngāti Kuri, Ngāti Wai as taonga species in Schedule 1?
- 4B.4.2 Has the Crown assumed regulatory control of the environment without making sufficient provision for protection of Ngāti Porou's relationship with and kaitiakitanga over species such as those identified by Ngāti Porou as taonga species in Schedule 1?
- 4B.4.3 Has the Crown assumed regulatory control of the environment without making sufficient provision for protection of Ngāti Kahungunu's relationship with and kaitiakitanga over the species such as those identified by Ngāti Kahungunu as taonga species in Schedule 1?
- 4B.4.4 Has the Crown assumed regulatory control of the environment without making sufficient provision for protection of Ngāti Koata's relationship with and kaitiakitanga over the species such as those identified by Ngāti Koata as taonga species in Schedule 1?

V. Third component issues

4B.5.1 Does NZ environmental law and policy need to be amended to bring it into line with any Crown obligations identified in the analysis of the first components regarding taonga species. Including:

(a) Should amendments be made to the following statutes?

- (i) Resource Management Act 1991
- (ii) Conservation Act 1987
- (iii) Reserves Act 1977
- (iv) Local Government Act 2002
- (v) Biosecurity Act 1993
- (vi) Hazardous Substances and New Organisms Act 1996
- (vii) Crown Minerals Act 1991
- (viii) Marine Mammals Protection Act 1978
- (ix) Marine Reserves Act 1971
- (x) Environment Act 1986

(b) If the answer to any of the above parts is “yes”, what should be the form and content of those amendments?

(c) If New Zealand law and policy is in whole, or in part, inconsistent with the Treaty can it be made Treaty consistent through discrete (*sui generis*) or other forms of protection for the relationship of kaitiaki with taonga species?

(d) If the answer is “yes”, what protection should be developed?

4B.5.2 (a) Should the Crown take action to eliminate or minimise any effects on the kaitiaki’s relationship with taonga species that are inconsistent with the Crown’s obligations identified in the analysis of the first component, and that arise from New Zealand’s membership in any of the following international agreements?

- (i) Convention on the Conservation of Migratory Species (Bonn Convention)
- (ii) International Whaling Convention
- (iii) Convention on the International Trade in Endangered Species
- (iv) World Heritage Convention
- (v) Convention on Wetlands of International Importance (Ramsar Convention)
- (vi) Convention on Biological Diversity
- (vii) Convention of Nature in the South Pacific (Apia Convention)
- (viii) Convention for the Protection of Natural Resources and Environment of the South Pacific
- (ix) Stockholm Declaration
- (x) Rio Declaration
- (xi) Agenda 21

- (xii) Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)
- (xiii) IUCN (and the Global Environment Facility)

(b) If the answer to (a) is “yes”, what should be the nature of that action?

4B.5.3 Do the Crown’s obligations, as identified in the analysis in the first component, require New Zealand to ratify ILO Convention 169?

PART FOUR (C): RONGOA

I. Definition

4C.1.1 Rongoa includes the medicinal properties of the flora and fauna used as rongoa or as components of rongoa, including the products therefrom (resulting from human and/or natural processes), where they are used by kaitiaki as rongoa; and further includes the tikanga, mātauranga, and practices utilised to create, transmit or protect rongoa, or that are otherwise associated with rongoa.

II. Relevant parts of the statements of claim and the Crown's response

4C.2 The relevant parts of the statements of claim and the Crown's response are recorded in Part Four (A). This Part is concerned with those aspects of rongoa not addressed in Part Four (A).

Ngāti Kahungunu

Ngāti Kahungunu contend:

4C.2.1 Rongoa (the Maori system of healing or Maori traditional healing) as practiced by Ngāti Kahungunu ("Ngāti Kahungunu rongoa") is and always has been a taonga of Ngāti Kahungunu in respect of which Ngāti Kahungunu are kaitiaki (Claim 1.1(d) para 16).

4C.2.2 Pursuant to Article 2 of the Treaty of Waitangi Ngāti Kahungunu are guaranteed tino rangatiratanga over and full and exclusive and undisturbed possession of all taonga including Ngāti Kahungunu rongoa (Claim 1.1(d) para 17).

4C.2.3 As a consequence of the guarantee set out in the ASOC (para 17) the Crown is under a continuing obligation (Claim 1.1(d) para 18):

(a) To actively protect the exercise by Ngāti Kahungunu of tino rangatiratanga and kaitiakitanga in regard to Ngāti Kahungunu rongoa; and

(b) To actively protect Ngāti Kahungunu rongoa.

4C.2.4 In breach of its obligations the Crown has undermined and/or prevented the exercise of tino rangatiratanga and kaitiakitanga by Ngāti Kahungunu in respect of Ngāti Kahungunu rongoa and has failed to actively protect Ngāti Kahungunu rongoa through (Claim 1.1(d) para 19-19.12):

(a) implementing legislation and policy (including the Tohunga Suppression Act 1907) suppressing the practice of Ngāti Kahungunu rongoa;

(b) denying Ngāti Kahungunu the exercise of their tino rangatiratanga and kaitiakitanga in respect of indigenous flora and fauna within the Ngāti Kahungunu rohe;

- (c) facilitating the destruction of and damage to indigenous flora and fauna used in rongoa within the Ngāti Kahungunu rohe;
- (d) failing to take appropriate steps to protect indigenous flora and fauna used in Ngāti Kahungunu rongoa from actual or potential harm through contact with genetically altered flora and fauna;
- (e) denying Ngāti Kahungunu the exercise of their tino rangatiratanga and kaitiakitanga in respect of Ngāti Kahungunu rongoa;
- (f) failing to protect Ngāti Kahungunu cultural knowledge in respect of Ngāti Kahungunu rongoa;
- (g) failing to allow Ngāti Kahungunu to exercise a development right in regard to Ngāti Kahungunu rongoa;
- (h) failing to provide or facilitate a means to allow transfer of knowledge in respect of Ngāti Kahungunu rongoa;
- (i) failing to support Ngāti Kahungunu rongoa;
- (j) implementing legislation and policy in respect of Ngāti Kahungunu rongoa within the Ngāti Kahungunu rohe without either adequate consultation with or the permission of Ngāti Kahungunu;
- (k) adopting international instruments either wholly or partially which adversely affect Ngāti Kahungunu rongoa without consultation with or the permission of Ngāti Kahungunu;
- (l) failing to implement into domestic legislation or policy certain aspects of international instruments that would enable the Crown to give effect to its obligations under the Treaty of Waitangi to actively protect Ngāti Kahungunu rongoa.

4C.2.5 As a result of these breaches, Ngāti Kahungunu have:

- (a) been denied the ability to exercise their tino rangatiratanga and kaitiakitanga in regard to Ngāti Kahungunu rongoa;
- (b) suffered decreased well-being and health, physically, mentally and spiritually;
- (c) been required to practice Ngāti Kahungunu rongoa without political or financial support from the Crown;
- (d) seen the practice of Ngāti Kahungunu rongoa discredited in the eyes of the public;
- (e) suffered the loss of aspects of Ngāti Kahungunu rongoa through the damage to and loss of indigenous flora and fauna within the Ngāti

Kahungunu rohe and through the damage to and loss of Ngāti Kahungunu cultural knowledge;

- (f) been denied the exercise of the right to development in respect of Ngāti Kahungunu rongoa (Claim 1.1(d) para 20).⁸

Ngāti Koata

- 4C.2.6 Ngāti Koata contend that they were guaranteed “tino rangatiratanga o o rātou whenua, o rātou kainga me o rātou taonga katoa”.
- 4C.2.7 Ngāti Koata define “Me o rātou taonga katoa” as including, without being limited to, mātauranga, ...rongoa Maori ...and cultural and customary heritage rights in relation to such taonga (Claim 1.1(f), para 2.6).
- 4C.2.8 Ngāti Koata contend that the Crown, in breach of the principles of the Treaty of Waitangi and its obligations thereunder, has made and enacted legislation and adopted policies which have failed to protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna.

⁸ See also Claims 1.1 para 6 and 1.1(a) para 4.2

Part 4(C): Rongoa

III. First component issues:

- 4C.3.1 (a) Must the Crown protect rongoa from use in a manner that is inconsistent with the customs and values of the kaitiaki?
- (b) If so, has New Zealand law and policy provided such protection?
- 4C.3.2 (a) Must the Crown provide for the regulation and control by kaitiaki of rongoa, including control over who may access rongoa?
- (b) If so, has New Zealand law and policy ensured such control?
- 4C.3.3 (a) Must the Crown ensure the preservation, development, use, control and regulation of the practice of rongoa in the hands of kaitiaki, the kaitiaki's access to rongoa, and the transmission of mātauranga in respect of rongoa from generation to generation among customary kaitiaki?
- (b) If so, does New Zealand law and policy provide for such preservation, access, development and transmission?

IV. Second component issues

Knowledge systems

- 4C.4.1 Has the Tohunga Suppression Act 1907 (or amendments) adversely affected the ability of kaitiaki to:
- (a) control, regulate, use or develop the knowledge systems of customary Māori healing?;
- (b) preserve and protect the knowledge systems of customary Māori healing?; or
- (c) transmit the knowledge systems of customary Māori healing from generation to generation among kaitiaki?
- 4C.4.2 Has Crown policy relating to funding of health services adversely affected the ability of the kaitiaki to:
- (a) preserve, protect, regulate, control, develop or use the knowledge systems of customary Māori healing?; or
- (b) transmit the knowledge systems of customary Māori healing from generation to generation among kaitiaki?

Practices associated with plant and other material

4C.4.3 Has the Crown's assumption of regulatory control of the environment adversely affected the ability of the kaitiaki to:

- (a) control, use, regulate or develop the practices associated with plant and other material used systems of customary Māori healing?;
- (b) preserve or protect the practices associated with plant and other material used systems of customary Māori healing?; or
- (c) transmit the practices associated with plant and other material used systems of customary Māori healing?

4C.4.4 Has the Medicines Act 1981 adversely affected the ability of the Crown to protect the practices associated with plant and other material used systems of customary Māori healing from use in a manner that is inconsistent with the values of the kaitiaki?

4C.4.5 Has the Medicines Act 1981 adversely affected the ability of kaitiaki to:

- (a) control, use, regulate or develop the practices associated with plant and other material used systems of customary Māori healing?;
- (b) preserve or protect the practices associated with plant and other material used systems of customary Māori healing?; or
- (c) transmit the practices associated with plant and other material used systems of customary Māori healing?

4C.4.6 Has Crown policy relating to funding of health services adversely affected the ability of the kaitiaki to:

- (a) control, use, regulate or develop the practices associated with plant and other material used systems of customary Māori healing?; or
- (b) protect, preserve or transmit the practices associated with plant and other material used systems of customary Māori healing?

Delivery of health services

4C.4.7 Has Crown policy relating to funding of health services adversely affected the ability of the kaitiaki to control, use, regulate, preserve, protect, transmit or develop the delivery of health services in accordance with the system of customary Māori healing?

4C.4.8 Has the Medicines Act 1981 adversely affected the ability of the kaitiaki to control, use, regulate, preserve, protect, transmit or develop the delivery of health services in accordance with the system of customary Māori healing?

V. Third component issues

4C.5.1 Does NZ law and policy need to be amended to bring it into line with any Crown obligations identified in the analysis of the first component. Including:

- (a) Should amendments be made to the Medicines Act 1981?
- (b) Should amendments be made to Crown policy relating to the funding of health services?
- (c) Should amendments, additional to any amendments identified in response to the questions posed in Part 4, be made to any of the following statutes?:
 - (i) Resource Management Act 1991
 - (ii) Conservation Act 1987
 - (iii) Reserves Act 1977
 - (iv) Local Government Act 2002
 - (v) Biosecurity Act 1993
 - (vi) Hazardous Substances and New Organisms Act 1996
 - (vii) Crown Minerals Act 1991
 - (viii) Marine Mammals Protection Act 1978
 - (ix) Marine Reserves Act 1971
 - (x) Environment Act 1986
- (d) If New Zealand law and policy is in whole, or in part, inconsistent with the Treaty can it be made Treaty consistent through discrete (*sui generis*) forms of protection (including mechanisms both legal and non-legal and custom law) for rongoa Māori?
- (e) If the answer is “yes”, what protection should be developed?
- (f) If the answer to questions (a)-(c) above is “yes”, what should be the form and content of those amendments?
- (g) Should the Crown take action to address any effects that the Tohunga Suppression Act 1907 (and amendments) has had on rongoa?
- (h) Should the Crown take action to protect mātauranga Māori associated with rongoa, additional to any actions identified in response to the questions posed in Part Three of this SOI?
- (i) If the answer to (d) is ‘yes’, what should be the nature of that action?

Schedule One

Taonga Species

Taonga species are those species of flora and fauna that the claimants identify as having particular cultural or spiritual significance to them, and can include the species listed below. They are derived from specific species listed in the first and first amended statements of claim, and the amended SOC for Ngāti Porou. The last four items were submitted by counsel for Ngāti Wai, Ngāti Kuri and Te Rarawa at a SOI workshop on 5 May 2006.

Kumara	<i>(Ipomoea batatas)</i>
Pohutukawa	<i>(Metrosideros spp)</i>
Koromiko	<i>(Hebe spp)</i>
Puawananga	<i>(Clematis spp)</i>
Tuna/eels	
Indigenous Forests	
Pupuharakeke	<i>(Placostylus hongii)</i>
Tuatara	<i>(Sphenodon punctatus)</i>
Kereru	<i>(Hemiphaga Novaeseelandiae)</i>
Whales/tohora	
indigenous fish species	
Freshwater and marine flora	
Ngutukaka (Kaka Beak)	
Kiekie	
Parareke	
Toropata	
Manuka	
Ti kouka	
Kanuka	
Koromiko	
Totara	
Matai	
Whinau	
Kereru	
Tuatara	
Pingao	
Toetoe	
Kawakawa	
Tutu	
Mamaku	
Tui	
Titi	
New Zealand flaxes	<i>(Phormium spp)</i>
Kiore	
Tuere	
Kawau	
Tipori	<i>(cordiline fruitecosa)</i>
Toheroa	
Kokowai	<i>(red ochre)</i>
Karengo	
Kuaka	