



When two worlds meet

Indigeneity and Intellectual Property

Address to WIPO Seminar

30 March 2015

Justice Joe Williams, New Zealand High Court

Two founding cultures...



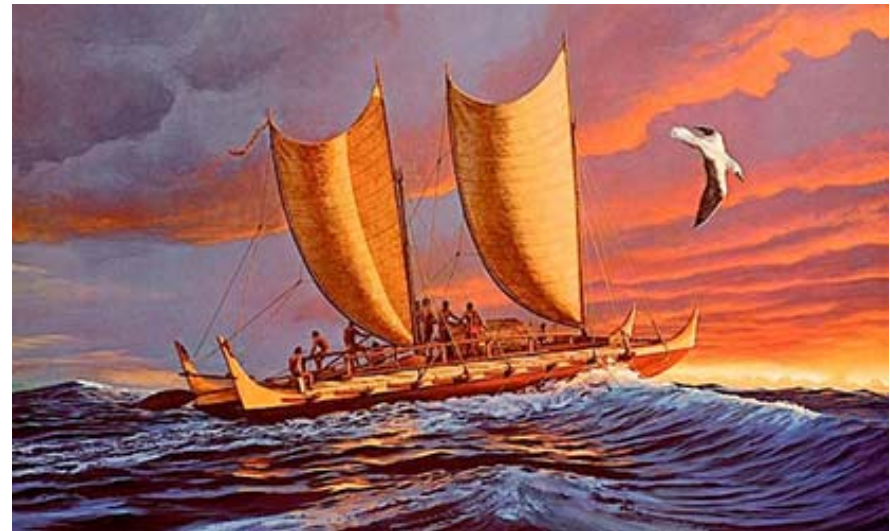
- ▶ **Cook's people (1769)**
- ▶ Develop theory of autonomous individual citizen, exercising free choice within constraints of the rule of law
- ▶ Express relationship with environment through property rights
- ▶ Express relationship with each other through contract



Two founding cultures...

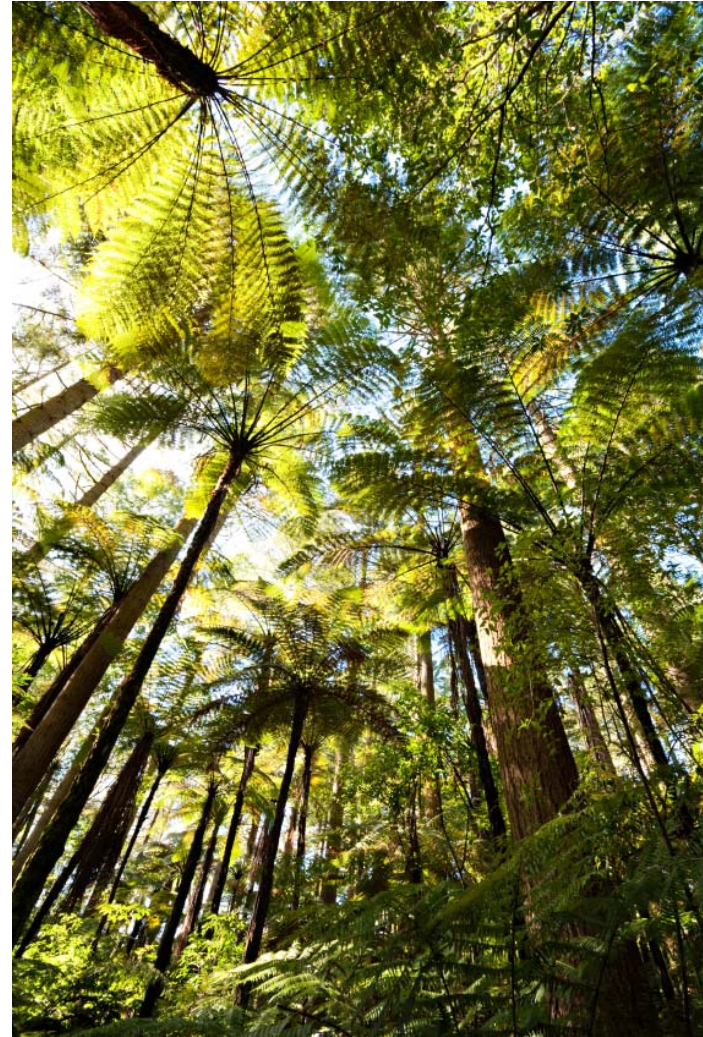
- ▶ **Kupe's people
(c. 1000AD)**

- ▶ Polynesian culture driven by kinship.
- ▶ Relationships with environment expressed through kinship
- ▶ Relationships with each other controlled through kinship



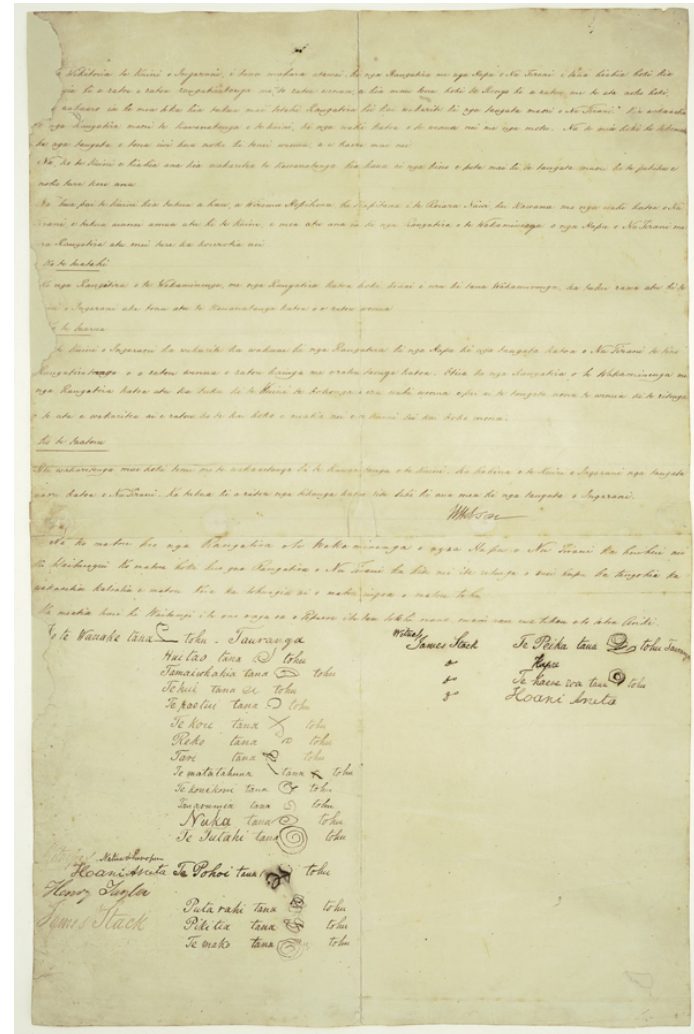
Two founding cultures

- ▶ **Kupe's people
(c. 1000AD)**
- ▶ Developed concept of 'kaitiakitanga'
- ▶ And so became Maori



Two founding cultures sign a Treaty in 1840

- ▶ **The Treaty exchange**
- ▶ ‘Sovereignty’ to Britain in exchange for
 - ▶ Rangatiratanga (tribal autonomy) over taonga (treasured things)
 - ▶ Exclusive and undisturbed possession of their property
 - ▶ Rights of British subjects



The reality...

- ▶ One culture privileged
- ▶ The other sidelined



The Wai 262 claim...

- ▶ 10 year national inquiry into the alleged use, abuse and misappropriation of traditional knowledge, traditional cultural expressions and traditional relationships with the natural world.



The Wai 262 claim...

- ▶ **The place of Maori culture in modern NZ**
- ▶ **Who owns and controls...**
 - ▶ *The Maori culture*
 - ▶ Maori World view
 - ▶ Cultural concepts
 - ▶ *Products of culture*
 - ▶ *Sources of culture*

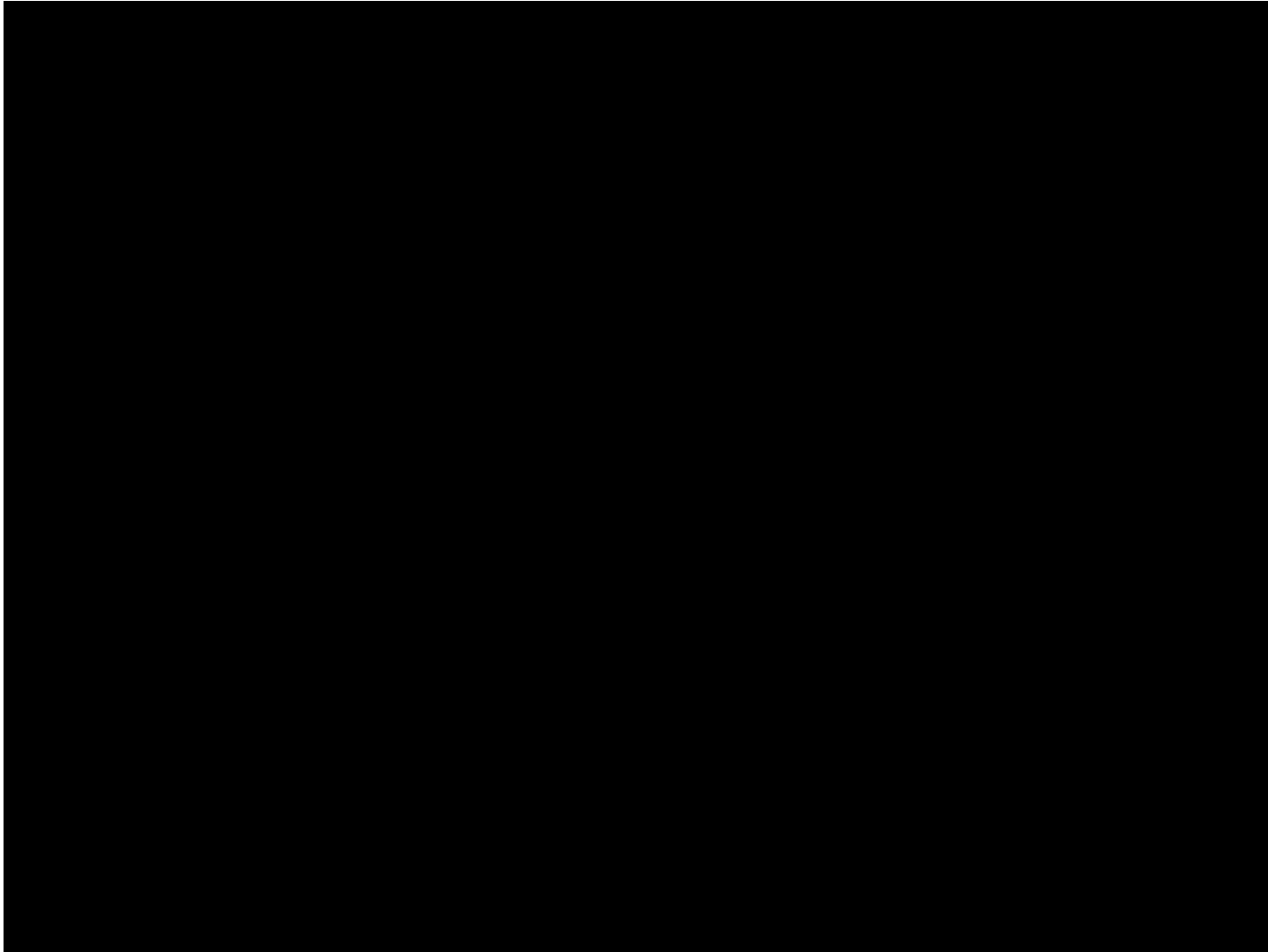


The Wai 262 claim....

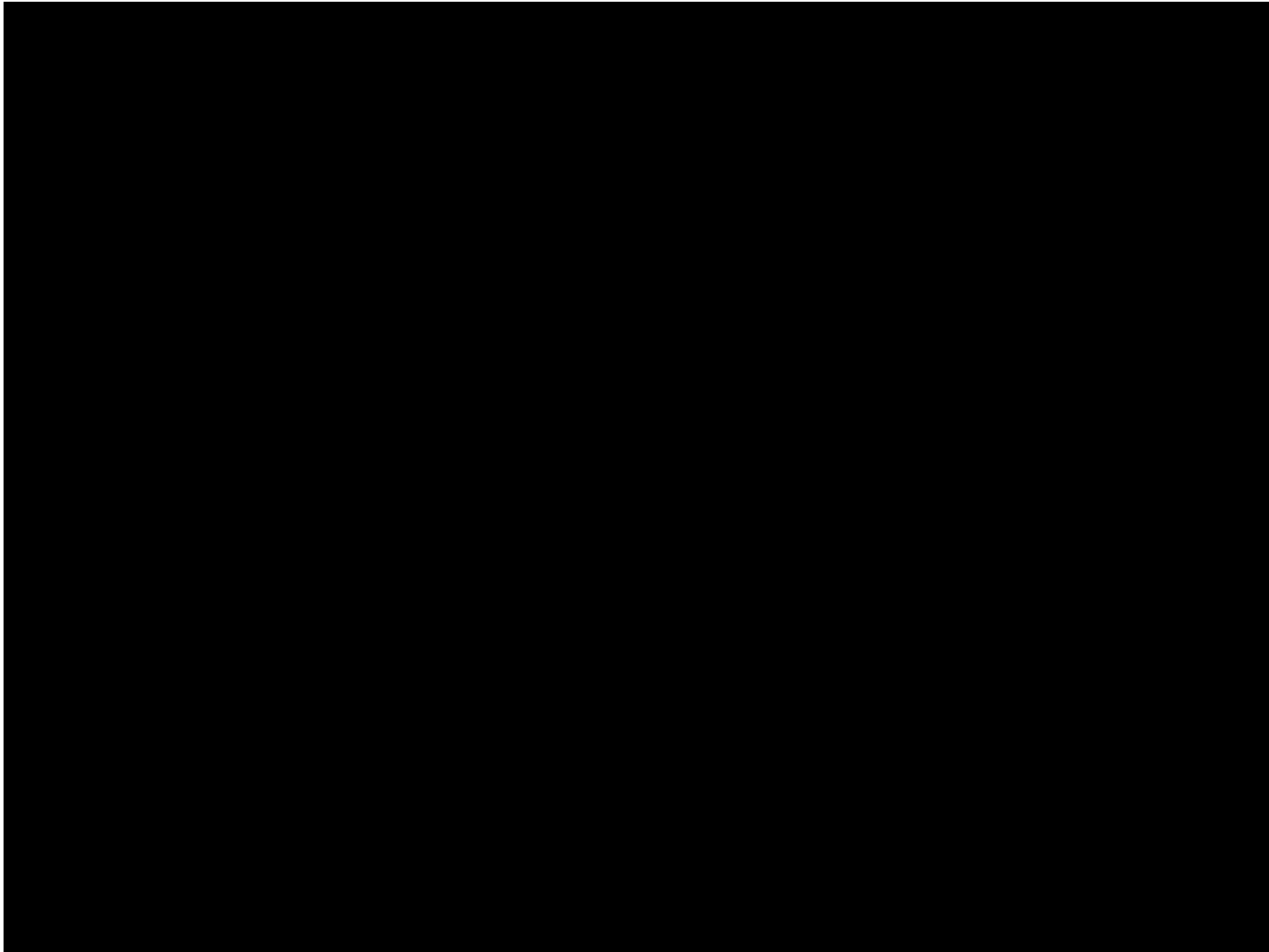
- ▶ And so in part only an inquiry into the way NZ's intellectual property regime coped or failed to cope with Maori culture
 - ▶ Copyright
 - ▶ Trademarks
 - ▶ Patents
 - ▶ Plant Variety Rights



All Blacks and Ka Mate



Fiat and Ka Mate

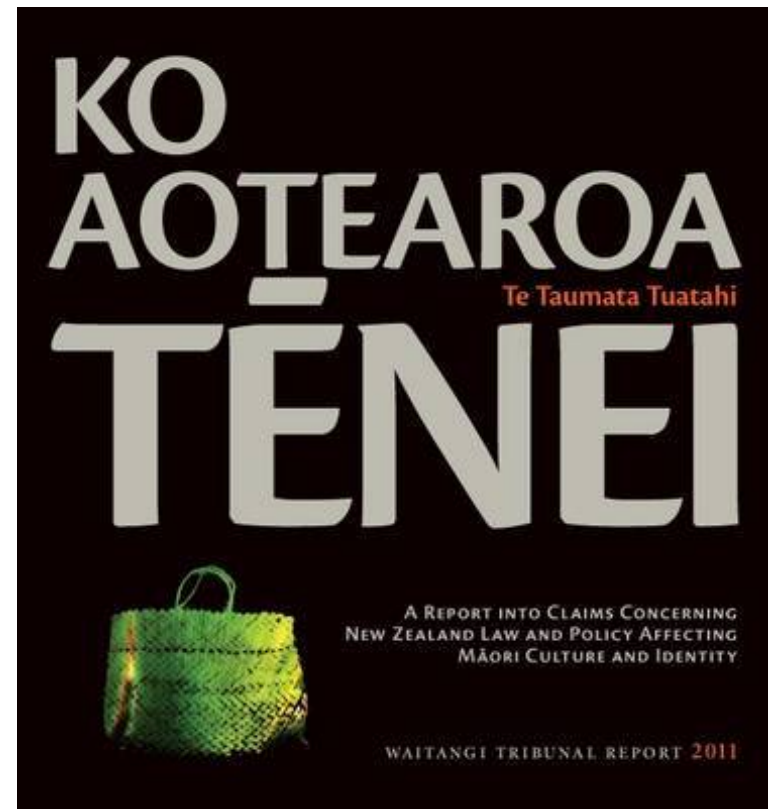


Our findings...

The secret of successful translation is not to try to cast one system within the frame of the other,

but to acknowledge that property and kaitiakitanga are different ways of solving the same problem

and to manage the meeting point between them.



Our findings: *Ko Aotearoa Tēnei...*

- ▶ **A question of balance**

- ▶ *Kaitiaki interests must be recognised and balanced alongside property rights and other interests*

- ▶ **Building a framework at the crossroads**

- ▶ *Economic disparity*
- ▶ *Growing Māori population*
- ▶ *A choice about the Treaty relationship*



Taonga works – copyright and trademarks

- ▶ **Who owns and/or controls**

- ▶ *Taonga works (TCE)*
- ▶ *Taonga-derived works (TCE?)*
- ▶ *Matauranga Maori (TK)*



Taonga works

- ▶ A **taonga work** is a work, whether or not it has been fixed, that is in entirety an expression of matauranga Maori; it will relate to or invoke ancestral connections, and contain or reflect traditional narratives or stories. A taonga will possess mauri and have living kaitiaki in accordance with tikanga Maori



Taonga work – ta moko



Taonga work – ta moko

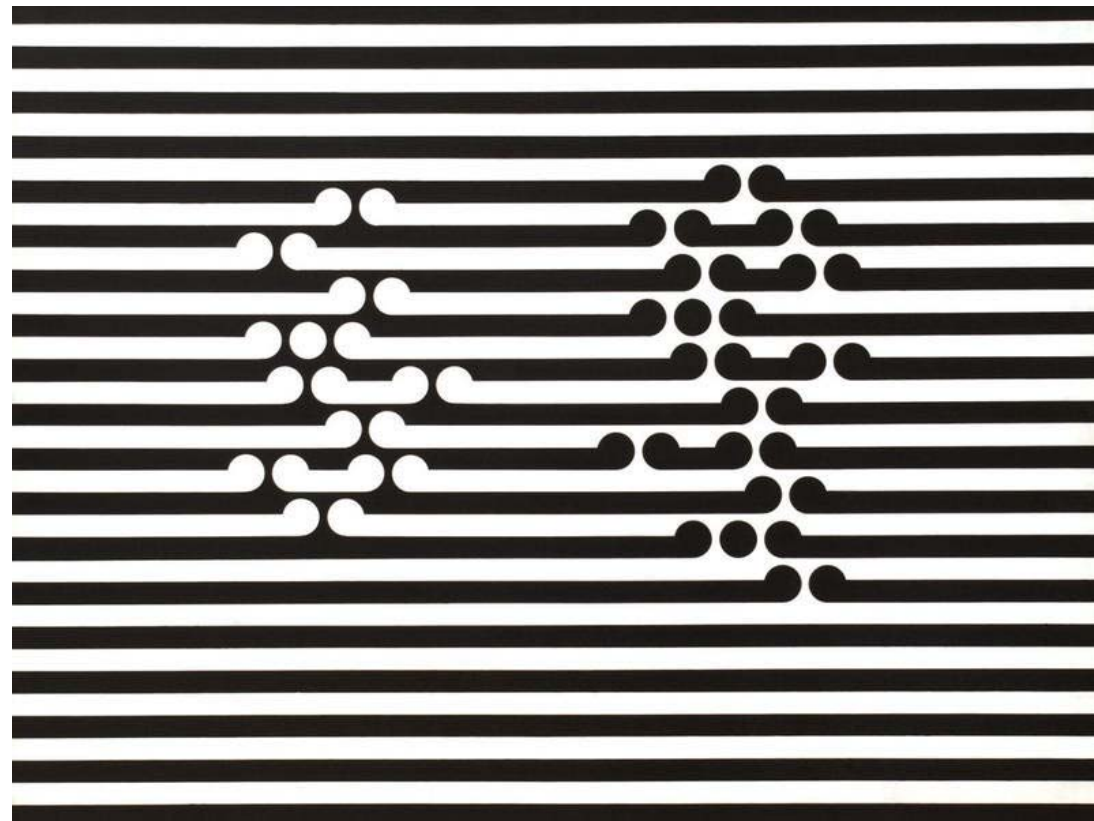


Taonga derived works

- ▶ A **taonga derived work** is a work that derives its inspiration from matauranga Maori or a taonga work, but does not relate to or invoke ancestral connections, nor contain or reflect traditional narratives or stories in any direct way. A taonga derived work is identifiably Maori in nature, but has neither mauri nor living kaitiaki in accordance with tikanga Maori.



Taonga derived work



Taonga works and matauranga Maori

▶ **Law should:**

- ▶ *Protect against offensive and derogatory uses*
- ▶ *Prevent unauthorised public and commercial uses without consultation and/or consent*
- ▶ *The extent of protection depends on extent of incursion into kaitiakitanga*
- ▶ *Establish a commission to develop best practice guidelines, receive objections, adjudicate disputes and provide for public registration of kaitiaki*



Taonga derived works

- ▶ **Law should** protect against offensive and derogatory uses



Taonga species – patents and PVRs

- ▶ **Who owns or controls**
 - ▶ *Genetic resources*
 - ▶ *Biological resources*
 - ▶ *Traditional knowledge about taonga species*
- ▶ **In Maori custom, the issue is not who owns the species but who has a relationship with it**
- ▶ **These relationships include both rights and obligations**



Taonga species

- ▶ A taonga species is a species of flora or fauna whose traditional relationship with a Maori kin group is such that the species has living kaitiaki



Taonga species

- ▶ **Law should provide:**
 - ▶ *Reasonable degree of protection for kaitiaki relationships*
 - ▶ *Reasonable control over uses of traditional knowledge*
 - ▶ *Balanced alongside other interests*
- ▶ **Treaty does not guarantee ownership, nor veto in all cases**



Proposed reforms

- ▶ Introduction of Maori capacity to assist Commissioner of Patents
- ▶ Providing for Maori Committee to initiate own inquiries and establish best practice guidelines to assist applicants
- ▶ New power in Commissioner (jointly with Maori expert) to refuse registration of patents and PVRs where inconsistent with kaitiaki relationship, utilising *ordre public* exclusion in TRIPS
- ▶ Providing for kaitiaki registration
- ▶ Providing for kaitiaki objection right, whether registered or not
- ▶ Requiring patentee to disclose use of matauranga Maori, with discretionary sanctions for failure



Perfecting the Treaty partnership

**Became a question of
balance at the meeting
point between two
worlds**

**Once we asked the right
questions, the
architecture designed
itself**

