Ko Aotearoa tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Volume 1 & 2. (Waitangi Tribunal 2011)

Ko Aotearoa Tenei(2011) commonly referred to as WAI 262 is the report on indigenous flora and fauna, and cultural and intellectual property by the Waitangi Tribunal. The original claim was lodged with the Tribunal in 1991 and although the claim deals with issues facing many Māori across Aotearoa, there was a specific focus on the claims of Te Rarawa, Ngāti Kuri, Ngāti Wai, Ngāti Porou, Ngāti Kahungunu, and Ngāti Koata.

The report discusses and makes recommendations on how to protect and support mātauranga Māori, artistic and taonga works and ultimately natural resources. *"Mātauranga rongoā cannot be supported if there are no rongoā rākau left, or at least none that tohunga rongoā can access"*(Tribunal 2011:657). This is a large and complex topic and took more than 20 years to be completed. The findings and recommendations are still being considered by the Crown.

While we acknowledge the connection between issues such as intellectual property of waiata and the health of te reo Māori to the health and management of the natural environment, in this briefing of WAI 262 we have chosen to outline recommendations that have specific relevance to the governance and policy mechanisms of natural resources and the protection of biodiversity in Aotearoa as this aligns with our research with the Biological Heritage National Science Challenge.

A brief of the recommendations on natural resource governance and policy-

Core recommendations for change

Department of Conservation (DOC):

Overall the report discusses that partnerships between DOC and kaitiaki must be the default approach to conservation management and be a 'will obligation'. The Tribunal found that while the Conservation Act 1987 contains strong requirements for the Crown to give effect to its Treaty obligations, the principles are not reflected adequately in DOCs policies and day to day work. The specific recommendations outlined on the next page are hoped to identify and respond to statutory barriers to genuine partnership.

▶ See next page for specific reccomendations for DOC.

Crown–Māori Relationship Instruments (CMRI) :

A document providing guidelines and advice for Government and State Sector Agencies.Published by Ministry of Justice and Te Puni Kōkiri in 2006.

▶ The guidelines should be amended to allow statements that reflect the full range of Treaty principles articulated by the courts and the Tribunal (also recommend that the guidelines acknowledge that Crown policy instruments cannot override requirements that are set down by statute).

Hazardous Substances and New Organisms Act 1996 (HSNO):

Iwi, hapū and whānau Māori need to have a greater role in issues surrounding the effects of hazardous substances and new organims on the environment, people and communities. It is hoped the recommendation below will create more opportunities for this.

▶ The Act should be amended to include a new paragraph in section 5 (Principles relevant to purpose of Act) that requires all those exercising functions, powers, and duties under the Act to recognise and provide for the relationship between kaitiaki and their taonga species.

Methodology Order 1998 (HSNO Act):

This order details how the Environmental Protection Authority (was ERMA) makes its risk assessments. Claimants of this report argued that the current order has allowed the government and its agent the EPA (was ERMA) to ignore tikanga Māori and opposition to experiments and applications such as DNA modification.

▶ Sections 25 and 26 should be amended so that when evaluating risks automatic privilege is not given to only physical risks.

✓ Implemented

— Partial

✗ Not Implemented

Resource Management Act 1991(RMA):

The report is clear in the need for Iwi involvement to be *compulsory* under the RMA system. The key recommendations to help achieve this focus on enhancing iwi plans, national policy statements and other control mechanisms. While it is acknowledged that other Tribunal reports have recommended strengthening *Section 8* - so that decision makers under the RMA must *give effect to* the Treaty principles - this report notes that strengthening alone will not affect real change and thus the recommendations specified on the following page will also need to be implemented. However, it also clear that many of these recommendations hinge on the capacity of iwi to achieve them, therefore funding and support from the government will be crucial to success. The report is very critical of past leadership or lack of it, from central government in the RMA sphere, which they say has resulted in some local authorities losing focus on the need for iwi engagement in environmental management - thus the Crown has neglected its Treaty obligations and reforms are needed.

▶ See next page for specific reccomendations for RMA.

Ngā Kaihautū Taiao:

Ngā Kaihautū Tikanga is the statutory Māori advisory committee for the EPA, while it has independence from the EPA it does not have decision making power and its role is purely advisory. The report noted that it is not clear how this statutory advisory committee interacts with Kaupapa Kura Taiao (Māori advisors internally at EPA) and whether the two groups are effective together.

▶ Should maintain its advisory role to EPA (was ERMA), but also appoint two of its members to the Authority itself. ✗

▶ Should give advice not only when the Authority requests it, but when Ngā Kaihautū considers an application to be relevant to Māori interests. ✗

Wild life Act 1953

The Crown has ignored its obligations under Te Tiriti o Waitangi to safeguard kaitiaki interests in protected species by vesting ownership of such species in itself and this needs to be remedied.

▶ Sec 57(3) amended so that no one owns protected wildlife, and that instead the Act provides for shared management of protected wildlife species in line with the partnership principle. (Furthermore, it should be amended so that the Crown does not own taonga works derived from protected wildlife, but instead allows 'tangata whenua to have lawful ownership of the taonga, crafted from natural materials, that sustain culture and tradition.') ✗

This Brief was produced by the **S07/ Adaptive Governance and Policy Group** as part of the Bioheritage Challenge.

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Department of Conservation (DOC):

- Establish a national Kura Taiao Council and conservancy-based Kura Taiao boards (to formalise partnerships through statute). ✗
- Undergo a general review of Conservation legislation (aimed at bringing together mātauranga Māori and te ao Pākehā approaches to conservation). ✗
- Provide an expanded role for the Pātaka Komiti (from advisory to joint decision making in regards to bioprospecting and statutory co-management of customary use of species- Joint decisions made on the basis that first, survival of the species; and, secondly, that iwi have a right to exercise kaitiakitanga and maintain their culture). ✗
- Amend the Conservation General Policy (CGP) and the General Policy for National Parks to make customary harvest and access a 'will' responsibility (provided appropriate conditions are satisfied, with a presumption in favour of customary practices and removal of the requirement that there be '*an established tradition before customary use may be permitted*). —
- The partnership principle should be made a 'will' obligation (specifically, in in CGP and General Policy of National policy). ✗
- Give tangata whenua interests in taonga a 'reasonable degree of preference' when making decisions about commercial activities. (policies and practices to be amended). * ✗
- DOC must formalise its policies for consultation with tangata whenua about concessions within their rohe. * ✗
- Treaty principles as articulated by the Tribunal to be given due consideration (although they do not bind the department as a matter of law). ✗
- Amend the CGP and the General Policy for National Parks to reflect the full range of Treaty principles that apply in law. —
- Treaty principles must not be set in stone (they can and must evolve to meet new circumstances and this is recommended for general policies going forward). ✗

Resource Management Act 1991 (RMA):

Recommendations to enhance iwi resource management plans (IRMP) :

- Plans must be prepared by iwi in consultation with local authorities (LA). ✗
- Plans must identify places and resources of significance, opportunities for sec 33, sec 36b and sec 188. ✗
- A formal statutory negotiation process needs to occur between iwi and LA to confirm the plans. ✗
- Once agreement has been reached, plans are binding like any other plan or policy statement. ✗
- District and regional plans must give effect to agreed parts of the iwi plan. ✗
- Where agreement cannot be reached there are 3 methods given for mediation (agree to disagree, formal mediation, refer to environment court) ✗
- Iwi should be funded to participate in IRMP processes (and other processes, the Ministry for the Environment must be committed to building Māori capacity to participate in RMA processes and in the management of taonga.) ✗
- To achieve the objectives of the plan and process each group must engage in good faith and respect. —
- Iwi, hapū, and other kaitiaki must use the IRMPs to express their aspirations for kaitiakitanga. ✓

Recommendations to Improve mechanisms for delivering control more generally:

- LA should not be allowed to unilaterally revoke transfers of power under section 33. ✗
- Sec 33(4) and special consultative procedures should only be triggered by significance of the proposed transfer (not automatically as it is now). ✗
- Sec 33 & 36b conditions should be reviewed to encourage transfer, control or partnership. ✗
- LA must be required to explore options for delegation to kaitiaki. ✗
- LA must regularly review their activities (to see whether they are appropriately using sec 33 & 36b and to be reported to Parliamentary Commissioner for the environment) ✗
- The annual report by commissioner to Parliament should record the performance of every local authority in making delegations to kaitiaki (as well as the steps kaitiaki have taken in administering resources over which power has been delegated) ✗
- The Ministry for the Environment must be required to actively explore options for kaitiaki to be designated as HPAs under section188.(they should also annually report to Parliament). ✗
- The Ministry for the environment must develop national policy statements on Māori participation in resource management processes including: ✗
  - policies for achieving consistent IRMPs
  - use of mechanisms for transfer of control, partnership and joint management.
  - and any other measures by which Māori can influence environmental decision making.

Other recommendations that are significant but less specific to natural resource governance:

- The Department of Conservation and the Ministry of Health are recommended to coordinate over rongoā policy.
- Kaitiaki Registry: for kaitiaki to be able to formally notify their interests in a particular species or mātauranga Māori.
- Advisory committee for the Commissioner of Patents.
- An expert Commission to have functions in relation to taonga works and to maintain kaitiaki register and publish best practices guidelines for the use, care, protection and custody.
- A Crown- Māori partnership entity in the culture and heritage sector to guide agencies in the settings of policies and priorities concerning mātauranga Māori.
- The Crown to shift its defensive mindset and work in genuine partnership with Māori to support rongoā and rongoā services.
- Each of the advisory committees recommended to assist in preparation of adequate ethical guidelines and codes of conduct relevant to their field.

✓ Implemented
— Partial
✗ Not Implemented

* The 2018 Supreme Court Case Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation discusses aspects of concessions and commerical activity: **See here.**

LINKS AND EXTRA INFO:

Adaptive Governance and Policy S07 Group: See Here.

In 2019 the Government announced a partial review of conservation and national parks policies: See here.

TPK and Hon Nanaia Mahuta announced the Government's potential Wai 262 work programme at the Iwi Chairs Forum on 28 August in Heretaunga.: See here.