

CHAPTER 2

TO PROTECT AND SERVE: FINDING NEW WAYS TO PROTECT TE REO MĀORI AS CULTURAL PROPERTY

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Language matters to culture, and how words are protected, archived and used also matters. In New Zealand, the protection of the Māori language (te reo) is an ongoing issue. This chapter identifies how culture and cultural property can be protected in law and then considers how tangible and intangible taonga (treasures) have received specific and innovative legal protection. Current protections for te reo are weak, but recent settlements under the Treaty of Waitangi process have revealed how legal personality has become an idea of currency in protecting taonga Māori. Extending legal personality to te reo Māori is one such possibility, explored in this chapter.

La langue est importante pour la culture, et la manière par laquelle les mots sont protégés, archivés et utilisés est tout aussi capitale. En Nouvelle-Zélande, la protection de la langue māori (te reo) constitue une problématique constante. L'auteur identifie d'abord comment la culture et les biens culturels peuvent être juridiquement protégés avant d'examiner comment les taonga (trésors) matériels et immatériels ont bénéficié d'une protection juridique spécifique et innovatrice. Les protections actuelles du te reo sont faibles, mais le récent règlement de griefs découlant du Traité de Waitangi a révélé à quel point la personnalité juridique est devenue idée courante quand il s'agit de protéger les taonga māori. L'extension de la personnalité juridique au te reo māori s'offre ainsi comme une possibilité qu'explore ici l'auteur.

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I INTRODUCTION¹

Culture is a human phenomenon; the product of generations of people doing, saying, writing, thinking, eating, acting, singing, playing, and being together. There can be no line a people may cross that tells them exactly when a cultural practice or a whole culture has died or forever changed. People just forget. And then they forget that they ever knew. Cultures and cultural practices are difficult to protect. By comparison, the tangible products of those cultures and practices can be more easily protected by way of property rights. At what point, then, can a cultural output be considered a sufficient subject for cultural property protection? Are the protections currently afforded to cultural property sufficient?

In the New Zealand context, recent developments have suggested certain Māori cultural expressions or outputs are now being understood and protected in new or unusual ways. Examples include legislative protection of the Ngāti Toa Rangatira haka Ka Mate and the establishment of a trust to protect Ngāti Whakaue ancestor Pūkaki. The use of the Treaty of Waitangi settlement process to protect natural and intangible entities of extraordinary cultural importance (rivers and national parks) by way of the attribution of legal personality shows another possibility.² If such natural yet culturally significant entities can be protected with legal personality, why not similarly protect the Māori language, which is perhaps the pre-eminent and best recognised cultural taonga (treasure) of the Māori? With these, and other, developments in mind, this chapter joins with other recent calls to explore ascribing legal personality as a protection to the Māori language itself as a special kind of non-ownable cultural entity that can be protected, despite its intangible nature.

This chapter will identify how culture and cultural property can be protected in law, moving on to consider how tangible and intangible taonga have received specific and innovative legal protection.

II HOW IS CULTURE USUALLY PROTECTED AT LAW?

Cultural practices do not receive much specific protection within the existing New Zealand legal framework. While there is recognition of rights to culture at international law,³ those rights are only incorporated into New Zealand law by way

1 The earlier part of this chapter has been adapted from my draft chapter entitled "Rights to Culture, Language and Education – A Tricephalos" in Margaret Bedgood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights in Aotearoa New Zealand* (Thomson Reuters, 2017) chapter 15.

2 See Tony Angelo and Elisabeth Perham "Let Te Reo Speak: Granting Legal Personality to Te Reo Māori" (2015) 46 VUWLR 1081.

3 Rights to culture can be found in several international instruments. The following are those that are relevant for New Zealand: *Universal Declaration of Human Rights* GA Res 217A, III (1948), article 27 (while the Declaration has no force of law, some of its provisions may be considered to reflect

of section 20 of the New Zealand Bill of Rights Act (NZBORA). In addition, some provisions in New Zealand law provide limited and indirect protection of rights to culture, sometimes by way of special protections extended to cultural property.

One example of domestic protection of cultural heritage and property is provided by the Cultural Property (Protection in Armed Conflict) Act 2012, which was enacted so that New Zealand could accede to the First and Second Protocols to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.⁴ Among other things, the Act creates offences for the unlawful removal of cultural property from occupied territory, and dealing in such property. It also enables the New Zealand Customs Service to seize property imported into New Zealand from occupied territory. The 2012 Act defines "cultural property" in such a way that leaves no doubt as to the importance of cultural objects to a universal notion of cultural heritage. Further, the definition under section 4(1) of the Act restricts the notion of cultural property to the very tangible:

4 Meaning of cultural property and enhanced protection property

- (1) In this Act, **cultural property** means, irrespective of origin or ownership,—
 - (a) movable or immovable property of great importance to the cultural heritage of every people:
 - (b) buildings whose main and effective purpose is to preserve or exhibit movable property mentioned in paragraph (a):
 - (c) centres containing a large amount of property mentioned in paragraph (a) or buildings mentioned in paragraph (b).

Protection is also provided for cultural objects under the Protected Objects Act 1975. This legislation is now a reflection of New Zealand's commitments under the

customary international law); International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), articles 15 and 27; and Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), articles 30 and 31.

4 The Convention for the Protection of Cultural Property in the Event of Armed Conflict 249 UNTS 215 (opened for signature 14 May 1954, entered into force 7 August 1956), the Protocol for the Protection of Cultural Property in the Event of Armed Conflict (Hague Cultural Property Protocol) 249 UNTS 358 (opened for signature 14 May 1954, entered into force 7 August 1956) and the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (Second Hague Cultural Property Protocol) (opened for signature 26 March 1999, entered into force 9 March 2004) are found in schedules 1, 2 and 3 of the Cultural Property (Protection in Armed Conflict) Act 2012. New Zealand ratified the Convention in 2008 and the two Protocols in 2013.

United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property⁵ and the International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects.⁶

This Act is also influenced by the strongly universalistic understanding of the right to culture, as reflected in the UNESCO and UNIDROIT Conventions' focus on the notion of national culture and the wellbeing of humanity and civilisation and its progress. The Protected Objects Act 1975 also reflects the notion that cultural property must be tangible (and, therefore, potentially ownable) by defining a protected New Zealand object as:⁷

... an object forming part of the movable cultural heritage of New Zealand that—

- (a) is of importance to New Zealand, or to a part of New Zealand, for aesthetic, archaeological, architectural, artistic, cultural, historical, literary, scientific, social, spiritual, technological, or traditional reasons; and
- (b) falls within 1 or more categories of protected objects set out in Schedule 4

However, section 2(1) of the Act also reflects a highly particular notion of culture and its property, like in the definition of "taonga tūturu" being also tangible, physical expressions, or outputs, of Māori culture:

taonga tūturu means an object that—

- (a) relates to Māori culture, history, or society; and
- (b) was, or appears to have been,—
 - (i) manufactured or modified in New Zealand by Māori; or
 - (ii) brought into New Zealand by Māori; or
 - (iii) used by Māori; and
- (c) is more than 50 years old

5 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 823 UNTS 231 (opened for signature 14 November 1970, entered into force 9 May 1972). The Convention was adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at its 16th session in Paris on 14 November 1970.

6 The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (opened for signature 24 June 1995, entered into force 1 July 1998) was adopted by International Institute for the Unification of Private Law (UNIDROIT) in Rome on 24 June 1995.

7 Protected Objects Act 1975, section 2(1).

Despite this focus on the tangible and physical, the protection of cultural property also extends into the regime of intellectual property protection, and this area of law in New Zealand has been amended in some ways so as to "interface" with some aspects of traditional knowledge claims, which in some instances gives rise to cultural property based on cultural outputs that are not limited to the fully physical and tangible.⁸

III TAONGA: BEYOND THE TANGIBLE

A second example of the protection of tangible and intangible expressions of culture can be seen in intellectual property law, whereby trade mark laws can be used to prevent others from inappropriate use of both tangible and intangible cultural outputs. In the New Zealand context, the Trade Marks Act 2002 has been used in such a way.⁹ Section 17 of the Trade Marks Act 2002 creates just such a mode of exclusion:

17 Absolute grounds for not registering trade mark: general

- (1) The Commissioner must not register as a trade mark or part of a trade mark any matter—
 - (a) the use of which would be likely to deceive or cause confusion; or
 - (b) the use of which is contrary to New Zealand law or would otherwise be disentitled to protection in any court; or
 - (c) the use or registration of which would, in the opinion of the Commissioner, be likely to offend a significant section of the community, including Māori.
- ...

While an absolute prohibition, this provision is certainly limited in the protection it can offer Māori cultural outputs because it only precludes registration of a trade mark potentially offensive to Māori, rather than use of the relevant sign or symbol in the first place.¹⁰

8 Susy Frankel "Ka Mate Ka Mate' and the Protection of Traditional Knowledge" in Rochelle Cooper Dreyfuss and Jane C Ginsburg (eds) *Intellectual Property at the Edge – The Contested Contours of IP* (Cambridge University Press, Cambridge (UK), 2013) 193 at 193.

9 Trade Marks Act 2002, section 3 states that one of its own purposes is to "address Māori concerns relating to the registration of trade marks that contain a Māori sign, including imagery and text". It also establishes, under section 178, an advisory committee to provide advice to the Commissioner "whether the proposed use or registration of a trade mark that is, or appears to be, derivative of a Māori sign, including text and imagery, is, or is likely to be, offensive to Māori".

10 Susy Frankel "Trademarks and Traditional Knowledge and Cultural Intellectual Property Rights" in Graeme B Dinwoodie and Mark D Janis (eds) *Trademark Law and Theory* (Edward Elgar, Cheltenham, 2008) 433 at 458.

A third type of protection of Māori culture (and of the right to such culture) is offered by legislation passed in settlement of Treaty of Waitangi claims.¹¹ Some settlement legislation offers specific protection of certain cultural practices and outputs, including the tangible and intangible, often negotiated as part of the cultural redress sections of Treaty settlements. The Haka Ka Mate Attribution Act 2014 is an example of such enactment, as well as an example of protection of a limited aspect of traditional knowledge as a potential means of encouraging cultural creativity and innovation.¹² It was passed to put into effect part of the Deed of Settlement signed between the Crown and Ngāti Toa Rangatira, and identifies the haka as a taonga of the Ngāti Toa Rangatira people.¹³ The schedule of the Act sets out the following understanding of the intangible nature of the haka:¹⁴

The haka Ka Mate is a taonga of Ngati Toa Rangatira. While it is the intellectual creation of the Ngati Toa Rangatira chief Te Rauparaha, in creating it he drew upon the body of knowledge and values Ngati Toa Rangatira refer to as "matauranga Maori". In Maori thinking, such a composition does not "belong" to the composer per se, but instead is a taonga of the iwi to which the composer affiliates. It is they who give life and form to the words.

Thus, this legislation identifies not only the nature of the taonga or cultural expression (the haka itself), but also its author, the connection between the iwi and the taonga, as well as the values of the iwi in determining appropriate use and performance of the haka. This Act then acknowledges, and gives some limited right of attribution and remedy to, a people for the inappropriate use of their taonga. The acknowledgment of the iwi and the process of creation, and the uses of the haka, create a more fully rounded picture of the intangible cultural property and the culture from whence it sprang. Not fully a creation of the New Zealand intellectual property scheme, the Act is nevertheless a *sui generis* regime that creates a degree of interface between intellectual property protection and protection of traditional knowledge that also protects, to a limited degree and indirectly, the right to culture.¹⁵ The then

11 More specific discussion of the Treaty of Waitangi and the rights examined in this chapter will be provided below.

12 Frankel, above n 8, at 197.

13 Haka Ka Mate Attribution Act 2014, section 3.

14 Ibid, schedule "Statement relating to Ka Mate", section 3(2).

15 Frankel, above n 8, at 207.

Attorney-General Chris Finlayson hinted at this, and that the issue of protecting *Ka Mate* went beyond Ngāti Toa:¹⁶

What we have here is, I believe, exciting legislation. It is the very first tentative step by the Crown towards recognition of traditional cultural expressions.

Central to the new protection enacted in the 2014 Act is the ordinary and longstanding understanding that "taonga" as protected under article 2 of the Treaty of Waitangi necessarily includes intangible cultural creations that are of special significance to Māori people.

Understanding "taonga" as including intangible matters reflects a traditional position reinforced by Paora Tapsell: "taonga can be tangible, like a cloak, or intangible, like a song."¹⁷ This perception is not frozen in time, for as Parehau Richards points out, it is also possible to view electronic files, sound recordings and other outputs as comprising taonga in a modern context.¹⁸

Such understandings are possible in part because the Māori language itself, the cultural wellspring from which the haka welled up, has been broadly accepted as a taonga pursuant to article 2 of the Treaty. The Waitangi Tribunal report in 1986 set the context for the emergence of the first Māori Language Act 1987,¹⁹ and the finding endorsed at Privy Council level that the Māori language is a taonga for the purposes of article 2.²⁰

This status raises a question: if taonga such as *Ka Mate* can be protected by means of a special regime that recognises that the haka itself can never be merely a written or oral work, but something that transcends its particular form, why cannot some kind of special protection also be given to the Māori language, without which such taonga could surely not exist?

16 Christopher Finlayson "Ngāti Toa Rangatira Claims Settlement Bill, Haka Ka Mate Attribution Bill – Third Reading" (16 April 2014) 698 NZPD 17389.

17 Paul Tapsell "Taonga: A Tribal Response to Museums" (PhD Thesis, University of Oxford, 1998) at 4.

18 Parehau Richards "E heke mai ki ahau nei e! Roka Paora's Contributions to Tukunga Iho o Te Whānau-a-Apanui and Te Reo o Te Whānau-a-Apanui" (PhD Thesis, Victoria University of Wellington, 2016) at 25, citing Amiria Salmond "Transforming translations (part I) The owner of these bones" (2013) 3(2) HAU: Journal of Ethnographic Theory 1 at 16-17.

19 Note that the Māori Language Bill was introduced to Parliament before the report was released.

20 See *New Zealand Māori Council v Attorney-General* HC Wellington CP942/88, 3 May 1991 [*New Zealand Māori Council v Attorney-General* 1991]; and *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA), [1994] 1 NZLR 513 (PC) [*New Zealand Māori Council v Attorney-General* 1987/1994].

IV *TE REO MĀORI: A TAONGA ABLE TO BE PROTECTED?*

There are some difficulties in crafting a regime of special protection for the Māori language (te reo). What exactly is it that can be protected? Arguably, the existing Māori language legislation protects the right to use the language, but even in view of Te Ture mō Te Reo Māori 2016 (Māori Language Act 2016), such rights of use are very limited, restricted to a limited set of forums, and restricted only to certain oral, not written, uses. Some legal measures facilitate the use of the language in schools,²¹ in broadcasting,²² or in Parliamentary debate,²³ in creating a space within which the language can flourish. Unsurprisingly, none of these measures provides direct protection of the language; its lexicon, its grammar, its syntax; its distinctive linguistic qualities. Nevertheless, it is clear that while a language based output can be a taonga (as with *Ka Mate*), the language itself is a taonga that requires protection. Can the language be subject to the kinds of cultural property based protections mentioned thus far?

A primary difficulty in ascribing cultural property protection to the Māori language as a taonga is the degree to which language itself, as opposed to the creations of the language, can be viewed as "cultural property". This is indeed the approach to language that intellectual property would take; a language is not property even if expressions of it can be. There is no such difficulty in understanding a "taonga" in either Māori or Māori English (the form of New Zealand English spoken mainly by Māori) as being intangible and tangible, both wellsprings of cultural expression or output as well as the cultural expressions or outputs themselves. Nor, in the language of the Treaty of Waitangi, is possession of taonga problematic. For example, the Māori language construction in article 2 of the Treaty states:

Ko te Kuini o Ingarangi ka wakarite ka wakaae ki nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirani te tino rangatirantanga o o ratou wenua o ratou kainga me o ratou taonga katoa.

This sentence, by way of possessive pronouns, unambiguously reflects that lands, settlements and "taonga" are capable of possession. The English language version of article 2 affirms this likewise:

21 See for example sections 155 and 155A of the Education Act 1989 which establish Kura Kaupapa Māori and the Kura curriculum: Te Aho Matua. See also: "Official Version of Te Aho Matua o Ngā Kura Kaupapa Māori and an Explanation in English Pursuant to Section 155A of the Education Act 1989" (22 February 2008) 32 *New Zealand Gazette* 2597 at 733-746.

22 Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003.

23 Douglas Kidd (22 July 1997) 562 NZPD 3192. Standing Orders of the House of Representatives 2017, SO 108 (previously SO 105) has been in operation since 1985.

The Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess.

The courts have accepted intangible matters such as the Māori language and familial organisation²⁴ as taonga, and thus belonging to Māori people within the language of the Treaty.²⁵ This acceptance does not easily translate into viewing the Māori language itself as "cultural property". Hence, legislative Māori language protections have rightfully avoided the notion that the Māori language can be owned, while at the same time fully accepting the language as a taonga capable of belonging, and possession, with all that implies as derived from the text of the Treaty.

In accordance with de-emphasising the notion of te reo as ownable cultural property, Te Ture mō Te Reo Māori 2016 uses the following language in the purposes section:

3 Te korahi mete aronga o tēnei Ture

...

(2) Ko te aronga o tēnei Ture—

(a) he whakaū i te mana o te reo Māori hei—

...

(ii) taonga hoki mā ngā iwi me ngāi Māori ...

3 Scope and purpose of this Act

...

(2) The purpose of this Act is—

(a) to affirm the status of the Māori language as—

...

(ii) a taonga of iwi and Māori ...

24 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; and *New Zealand Māori Council v Attorney-General* 1987/1994, above n 20.

25 In regard to language as taonga, see *New Zealand Māori Council v Attorney-General* 1991, above n 20; and *New Zealand Māori Council v Attorney-General* 1987/1994, above n 20. For familial organisation, see *Barton-Prescott v Director-General of Social Welfare*, above n 24, at 184.

In these provisions, in the use of the future possessive particle "mā" and the English "of", the emphasis appears less on the notion of possession of the language than control of its development.²⁶

One important issue can muddy the waters in understanding how the Māori language can be considered both a matter fit for ownership by Māori and one that entirely transcends the notion of ownership. That issue is how te reo has been treated primarily as a subject of national public policy for several decades, even as there has been growing acceptance of te reo as a matter of private and Māori community interest to individuals, whānau and hapū, quite apart from the Crown.²⁷

Te reo Māori is not accepted by many Māori to be a matter for Crown interference. The language must be protected primarily with regard to its private use, and the home is the centre for language transmission. Māori communities must be responsible for its survival and its maintenance. The Crown, to the extent that it must have a role, can only ever be a facilitator, to provide funding, assistance, but no more, in the fight for revitalisation. Thus, the Crown is to be viewed as separate from Māori communities in the endeavour to maintain and develop the language.²⁸

While survival of te reo Māori can also be viewed as primarily a matter of national public concern; the success of Māori language revitalisation will still depend on the substantial co-operation, engagement and involvement of the Crown, as the Crown is also Māori.²⁹ Furthermore, Māori is also a language of the civic sphere and of national public importance, as well as a language of the private sphere.³⁰

In truth, there is no point to belabouring the differences between these two positions: te reo Māori is simply a phenomenon that crosses that public/private divide to the extent such a division is even relevant for any practical purpose. Given

26 Had the focus been on actual possession, arguably different pronouns would have been used, such as "nō", denoting physical ownership more strongly.

27 For an account of this public management, see Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) [*Ko Aotearoa Tēnei*].

28 Te Paepae Motuhake *Te Reo Mauriora – Te Arotakenga o te Rāngai Reo Māori me te Rautaki Reo Māori – Review of the Māori Language Sector and the Māori Language Strategy* (Te Puni Kōkiri, Wellington, 2011) at 43.

29 Waitangi Tribunal *Ko Aotearoa Tēnei*, above n 27, Volume 2 at 451.

30 See further Māmari Stephens "A House with Many Rooms: Rediscovering Māori as a Civil Language in the Wake of the Māori Language Act (1987)" in Rawinia Higgins, Poia Rewi and Vincent Olsen-Reeder (eds) *The Value of the Māori Language: Te Hua o te Reo Māori* (Volume 2, Huia Publishers, Wellington, 2014) 53.

that dual nature, it might be useful to briefly allude to another mode of cultural protection that had attempted to mediate between these two imperatives.

V PŪKAKI

On a modern 20-cent coin figures an image of the carved representation of Pūkaki, the famous Ngāti Whakaue-Te Arawa tūpuna, which originally stood at the gateway to the Pukeroa Pa at Ōhinemutu in Rotorua.³¹ In 1877, Pūkaki was gifted to Francis Fenton in recognition of a Crown undertaking to develop the Rotorua township. In the wake of the Tarawera eruption, the development collapsed and the Crown proceeded with a compulsory acquisition of Ngāti Whakaue lands. Fenton gifted Pūkaki to an officer at the Auckland Museum where the carving remained for the next 120 years.³² In 1997, the Crown, Ngāti Whakaue and the Auckland Museum signed a memorandum of understanding, paving the way for the return of the taonga to Rotorua. As part of the repatriation, a charitable trust was established to provide for the "care, conservation and custody" of the carving.³³ This trust was established, not in response to a Treaty duty (although not incompatible with such), but because of the agreed relationship between Fenton and Ngāti Whakaue that evolved in later years.³⁴

While private trusts provide a crucial legal structure for the vestment of property, the Pūkaki Trust is not simply the possessor of a legal title to the carving, but a statutory charitable trust with legal personality responsible for the carving. There is no demand on the Pūkaki Trust Board to be particularly dynamic; it faces audit every ten years, and is fairly limited in its scope, but arguably it does exactly what it was set up to do: to protect Pūkaki as a significant cultural property for all of New Zealand, not specifically for its own people.

VI PUBLIC PRIVATE PARTNERSHIP?

The tension between the public and private nature of a taonga can be clearly seen in the recently enacted Ture mō Te Reo Māori 2016. The key provisions of the Act establish Te Mātāwai to be accountable to iwi and Māori. Te Mātāwai is an independent statutory entity³⁵ with 13 members selected by regional groups of iwi

31 Paul Tapsell "Partnership in Museums: A Tribal Maori Response to Repatriation" in Cressida Fforde, Jane Hubert and Paul Turnbull (eds) *The Dead and Their Possessions: Repatriation in Principle, Policy and Practice* (Routledge, London, 2001) 284 at 284.

32 Rotorua Lakes Council "Pukaki" <www.rotorualakescouncil.nz>.

33 Pukaki Trust Deed, clause 3.

34 See Richard P Boast "Recognising Multi-Texturalism: Rethinking New Zealand's Legal History" (2009) 37 VUWLR 547.

35 Despite the recommendation of the Parliamentary Select Committee to ensure Te Mātāwai be identified as a Crown entity for the purpose of the Crown Entities Act 2004, no such amendment

(or iwi clusters), four by Te Reo Tūkutuku (Māori language stakeholders) and two by the Minister for Māori Development on behalf of the Crown.³⁶

In addition, two Māori language strategies are to be established pursuant to the Act: the Maihi Māori; and the Maihi Karauna. The latter is to be the responsibility of the Crown, overseen by Te Taura Whiri i te Reo Māori, and issued by the Minister for Māori Development. That strategy will focus the government's own priorities for developing and revitalising te reo Māori on a national basis.³⁷ The Maihi Māori is to be the responsibility of Te Mātāwai on behalf of iwi and Māori and will focus on providing objectives, policies and related matters for iwi and Māori relevant to the Māori language and supporting its revitalisation.³⁸

It seems that the Māori language is at once both a private and public taonga, one that is possessed, and yet not owned by the peoples for whom it is of transcendent importance. It is a wellspring, or fount of culture, from which cultural products, both tangible and intangible, can be created. The Māori language also comprises the sum total of those outputs by virtue of its lexicon, its grammar, the aggregation of its texts, and the domains, both civic and private, where it is used and heard.³⁹

Given the nature of the complex phenomenon of language, the notion of cultural property is arguably simply too limiting as a means of providing sufficient protection.

VII LEGAL PERSONALITY FOR TE REO MĀORI?

Tony Angelo and Elisabeth Perham simply identify legal personality as comprising a legal fiction used to identify the subjects of the law, with the bearers of legal rights, duties and other relations known as legal persons. In their view:⁴⁰

appears to have been made. Te Mātāwai is included as a public entity for the purposes of section 5 of the Public Audit Act 2001.

36 Te Ture mō Te Reo Māori 2016, section 20.

37 Ibid, section 10.

38 Ibid, section 11.

39 As an aside, these characteristics of the Māori language make archival and descriptive information about the language particularly valuable; without such language based resources, the survival of the language would be at an even greater risk. Māori is well served for dictionaries and electronic resources. One such resource is the Legal Māori Resource Hub <www.legalmaori.net>. This resource includes archival images, as well as a corpus and dictionary focusing on the development of Māori as a legal language. For an understanding of the extent of Māori language resources available, see Dr Peter Keegan's very useful, and up-to-date resource, the Annotated Working Bibliography on Māori Language Revitalization <www.maorilanguage.info/mao_lang_abib.html>.

40 Angelo and Perham, above n 2, at 1095-1096.

... a legal response involving the grant of legal personality to te reo will foster a steady and continuous facilitation of revitalisation efforts which is less vulnerable to policy shifts. The need for such stability is justified by the central role of te reo Māori in relation to Māori culture and identity.

It is true that legal personality, while innovative, may not be the only way to create legal protection for a complex taonga such as te reo Māori, as stated by Salmond:⁴¹

There is nothing that the law can do with legal personality that it cannot do without it but there are many things legal personality can do better and more easily than would otherwise be possible.

Nevertheless, the use of legal personality to protect matters of special interest to Māori has taken on momentum in recent years. The Treaty settlements era has seen significant use and development of innovative legal solutions to what might have been insoluble problems arising by dint of the clash of worldviews. Some of these solutions have involved ascribing legal personality to an entity requiring protection that is, due to its cultural significance, simply un-ownable.

In one example, Te Urewera, formerly a national park and now a protected area, assumed its own legal identity in the 2014 Tūhoe Treaty settlement. The Whanganui River has also been ascribed legal personality. Both subjects of these mechanisms are natural entities, and tangible to the extent that, like other natural features, they are observable, and able to be identified and mapped. These entities also have an intangible aspect, in that both the river and Te Urewera have extraordinary cultural and spiritual importance: both are conceptualised as having definable identities, and as having peoples who belong to both entities (rather than the entity belonging to the people). There is a real and ancient relationship between people and place; a particular sense of people owing duties to the entities to ensure the survival and replenishment of both.

Indeed, it is the intangible, rather than tangible, aspects of these entities that predisposed them to legal personality-based solutions for the purpose of Treaty settlements. The deed of settlement in the Whanganui settlement identified the river as Te Awa Tupua, and recognised the Whanganui River, or Te Awa Tupua, as:⁴²

41 P J Fitzgerald *Salmond on Jurisprudence* (12th ed, Sweet & Maxwell, London, 1966) at 318.

42 Ruruku Whakatupua: Te Mana o Te Awa Tupua (deed of settlement signed by the Crown and Whanganui Iwi, 6 August 2014, Raranga Marae) at [2.11]. See also Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, section 12.

... an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements.

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, the Act that, as a part of the Whanganui River settlement, creates legal personality for the Whanganui River (Te Awa Tupua), further sets out the nature of the relationship between the river as an entity and its peoples:⁴³

Tupua te Kawa

Tupua te Kawa comprises the intrinsic values that represent the essence of Te Awa Tupua, namely—

Ko Te Kawa Tuatahi

- (a) *Ko te Awa te mātāpuna o te ora*: the River is the source of spiritual and physical sustenance:

Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River.

Ko Te Kawa Tuarua

- (b) *E rere kau mai i te Awa nui mai i te Kahui Maunga ki Tangaroa*: the great River flows from the mountains to the sea:

Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.

Ko Te Kawa Tuatoru

- (c) *Ko au te Awa, ko te Awa ko au*: I am the River and the River is me:

The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being.

Ko Te Kawa Tuawhā

- (d) *Ngā manga iti, ngā manga nui e honohono kau ana, ka tupu hei Awa Tupua*: the small and large streams that flow into one another form one River:

43 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, section 13.

Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the health and well-being of Te Awa Tupua.

The Act sets out that Te Awa Tupua is a legal person with the rights, powers, duties and liabilities of a legal person,⁴⁴ and that the rights, powers and duties of Te Awa Tupua are to be exercised on behalf, and in the name, of Te Awa Tupua by Te Pou Tupua.⁴⁵ Te Pou Tupua is a two-person agency, appointed jointly by the Crown and iwi. This body is described as "the human face" of Te Awa Tupua, thereby enhancing the notion that the river has personhood.⁴⁶ Te Pou Tupua is expected to behave as an agent for the river. Te Pou Tupua is to act and speak on behalf of Te Awa Tupua, uphold the status of Te Awa Tupua, and promote and protect its health and wellbeing, among other functions.⁴⁷

The Tūhoe Treaty settlement, enacted in 2014, has created a special legal status for Te Urewera. In doing so, the explanatory note of the settlement Bill paid particular heed to the intangible aspects of Te Urewera's identity and status, as it recognised "the mana and intrinsic values of Te Urewera by putting it beyond human ownership."⁴⁸ The new entity created by the 2014 Act, Te Urewera, has all the rights, powers, duties and liabilities of a legal person.⁴⁹ The intimate nature of the connection between people and place is evoked in section 3, the background section of the Act:

- (1) Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty.
- (2) Te Urewera is a place of spiritual value, with its own mana and mauri.
- (3) Te Urewera has an identity in and of itself, inspiring people to commit to its care.

Te Urewera and Tūhoe

- (4) For Tūhoe, Te Urewera is Te Manawa o te Ika a Māui; it is the heart of the great fish of Maui, its name being derived from Murakareke, the son of the ancestor Tūhoe.

44 Ibid, section 14(1).

45 Ibid, section 14(2).

46 Ibid, section 18.

47 Ibid, section 19.

48 Te Urewera-Tūhoe Bill 2013 (146-1) (explanatory note).

49 Te Urewera Act 2014, section 11.

- (5) For Tūhoe, Te Urewera is their ewe whenua, their place of origin and return, their homeland.
- (6) Te Urewera expresses and gives meaning to Tūhoe culture, language, customs, and identity. There Tūhoe hold mana by ahikāroa; they are tangata whenua and kaitiaki of Te Urewera.

In view of these developments, whereby natural entities with significant intangible aspects have been given legal personality, might the same path be viable for te reo Māori?

In some respects, some of the key steps towards such a development have occurred by virtue of the 2016 Act. Te Mātāwai is a Māori statutory body made up of representatives of language and iwi clusters that is now effectively responsible for the future development of te reo Māori. This entity was envisaged as being "an agent" albeit for iwi and Māori rather than for the language itself.⁵⁰ Crucially, given the public, private and collective nature of this taonga, this structure is designed to effect some degree of autonomy over the language for Māori and iwi, without devolving full Crown responsibility. Perhaps these measures will be sufficient to undo or roll back some of the perceived worst effects of public management that had overseen much of the decline of the language.

In conclusion, however, if the current regime does not see significant improvement in the health of te reo, legal personality should be considered. Granting legal personality to the language would send a clear message about the value of this taonga, and create a context for a Treaty-based administration of the language. A full appraisal of exactly what the downstream consequences of such a move would be must yet be carried out, but is beyond the capacity of this chapter. Whatever the future holds with regard to the protection of te reo Māori, such protections must recognise its unique position as a cultural entity that can be protected, not only in its intangible nature, but also in view of its more tangible or recognisable outputs; that can be possessed by peoples, but not owned; that has a pre-eminent public character, but is a matter also of pre-eminent private and collective-based usage. Legal personality may be a useful tool that can encompass such tensions and yet, by way of an effective agent, offer better and more direct protection than the current regimes for cultural property and rights and recognition.

50 Te Puni Kōkiri *Te Rautaki Reo Māori – Māori Language Strategy 2014* Summary (Wellington 2014) <www.tetaurawhiri.govt.nz/assets/MLS-documents/MLS-2014.pdf>.