



# **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...

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- ▶ **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

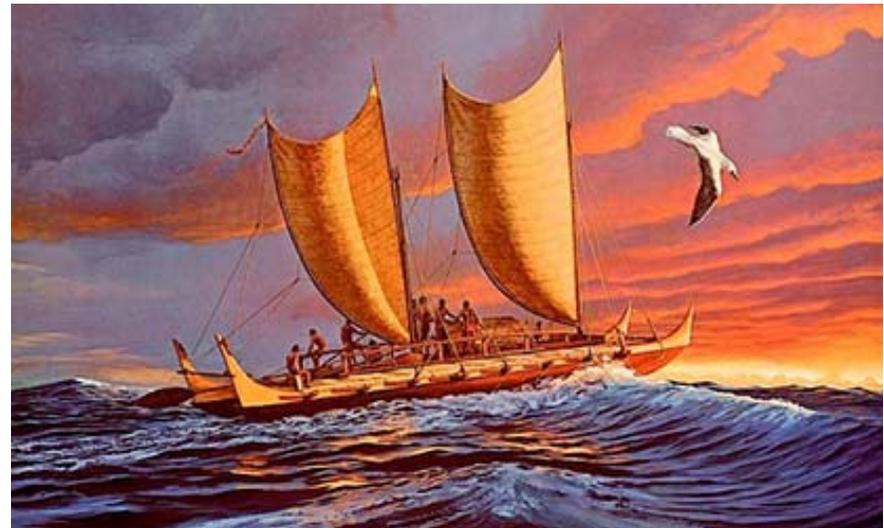


# Two founding cultures...

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- ▶ **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

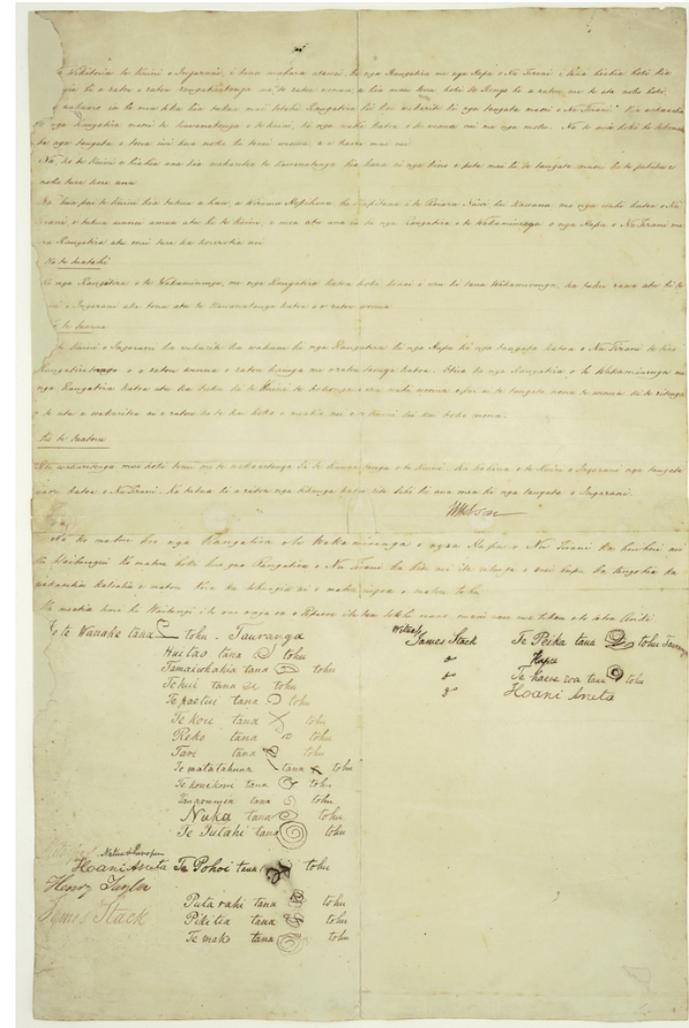
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- ▶ **Kupe's people  
(c. 1000AD)**
- ▶ Developed concept of 'kaitiakitanga'
- ▶ And so became Maori



# 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...

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- ▶ One culture privileged
- ▶ The other sidelined



# The Wai 262 claim...

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- ▶ 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...

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- ▶ **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....

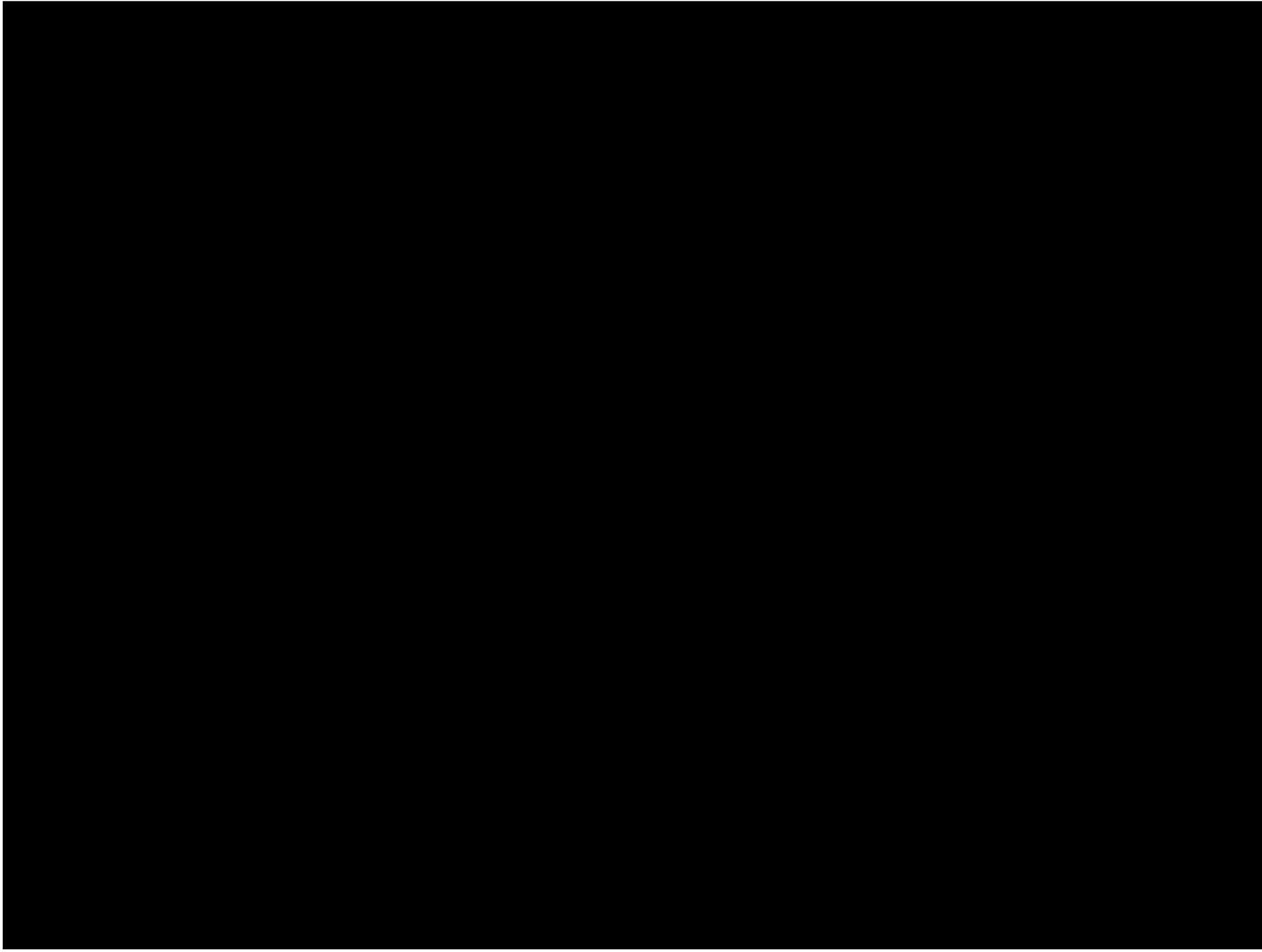
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- ▶ And so in part only an inquiry into the way NZ's intellectual property regime coped or failed to cope with Maori culture
  - ▶ Copyright
  - ▶ Trademarks
  - ▶ Patents
  - ▶ Plant Variety Rights



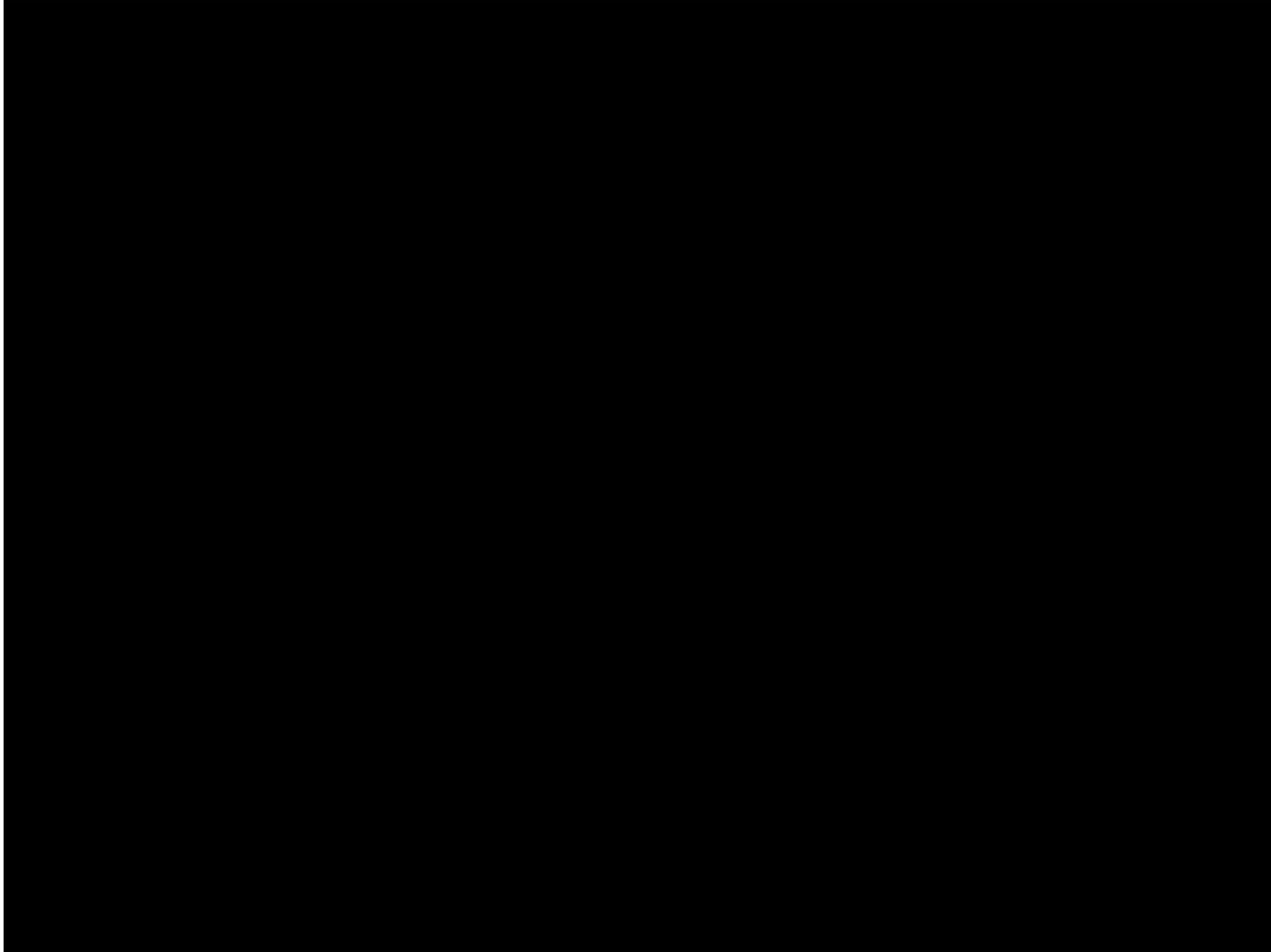
# All Blacks and Ka Mate

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# Fiat and Ka Mate

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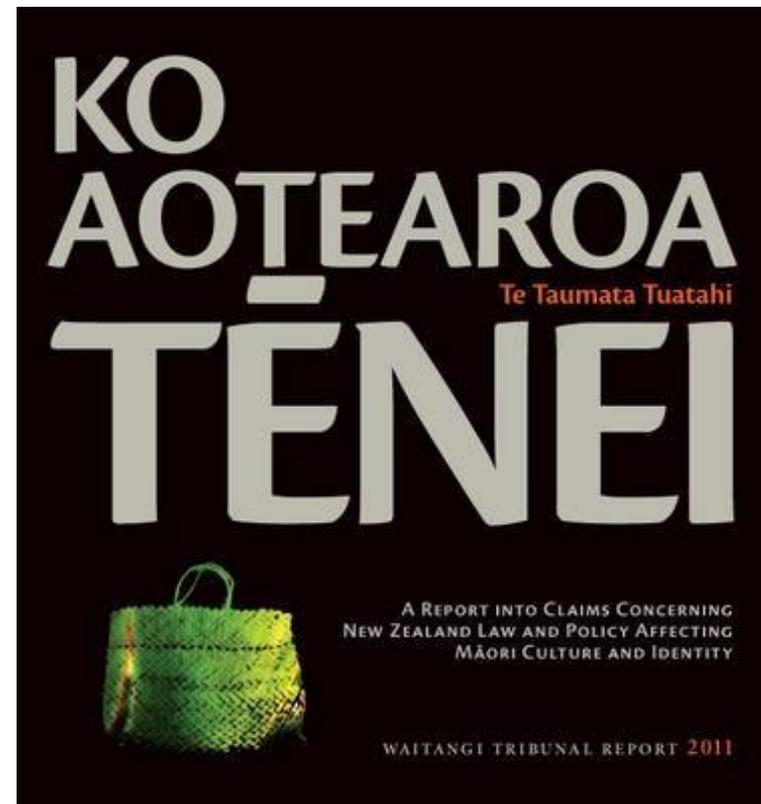
# Our findings...

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**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...*

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- ▶ **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

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- ▶ **Who owns and/or controls**

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



# Taonga works

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- ▶ 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

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# Taonga work – ta moko

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# Taonga derived works

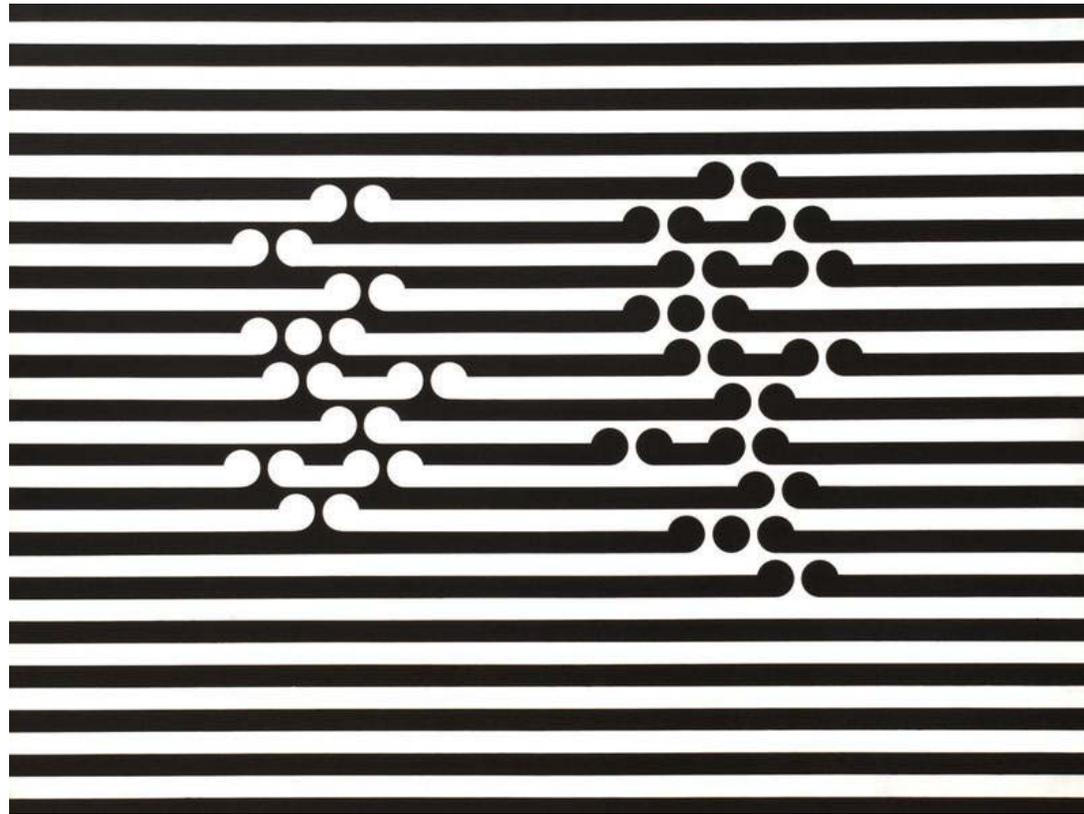
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- ▶ A **taonga derived work** is a work that derives its inspiration from matauranga Maori or a taonga work, but does not relate to or invoke ancestral connections, nor contain or reflect traditional narratives or stories in any direct way. A taonga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



# Taonga derived work

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# Taonga works and matauranga Maori

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## ▶ **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

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



# Taonga species – patents and PVRs

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- ▶ **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

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- ▶ **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

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- ▶ 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

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

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

