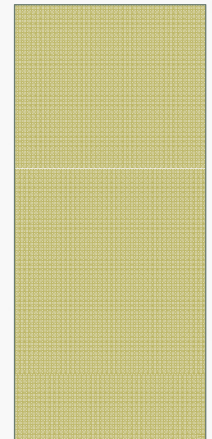


TE REO MĀORI IN WESTERN LEGAL CONTEXTS

TAI AHU



PRESENTATION STRUCTURE

1. The Legal Māori Corpus;
2. Māori as a language of statutory expression;
3. Purpose of Māori use in statutes
4. Approaches to statutory incorporation
5. Cases: taonga, kaitiakitanga
6. Final points

THE LEGAL MĀORI CORPUS

Criteria for inclusion into the corpus

1. Source texts to be printed in te reo Māori between 1835-2009;
2. Source texts to be printed to be read or distributed to three or more Māori speakers;
3. Source texts to have the communicative function of explaining, clarifying, challenging and using Western legal concepts

THE LEGAL MĀORI CORPUS – SOURCE TYPES

- Language of the Crown
- Māori community generated language
- Statutory language
- Language of agreement and obligation
- Court and tribunal language
- Language of Māori governing bodies

THE LEGAL MĀORI CORPUS

- Where the customary meaning of a Māori word is being relied on to *translate* a Western legal concept (the “translation” purpose);
- Where the customary meaning of a Māori word is being relied on to *describe* one or more aspects of a Western legal concept (the “descriptive” purpose); or
- Where a Māori word is being used in order to *incorporate* its customary meaning into a Western legal context, such as a statute (the “incorporation” purpose).

19TH CENTURY STATUTORY TRANSLATION

Ko Nga Ture o Ingarangi (1861) – trans. Francis Dart Fenton

“...considerable difficulty [is] found in the attempt to present in an intelligible manner the precise definitions, nice distinctions, and technicalities of the Law, through the medium of a rude language, which, though far from poor in expression or defective in structure, is better adapted for narration or description of natural objects, than for dealing with abstract subjects. How far this difficulty has been overcome the judgment of those who are skilled in the Māori tongue must determine. The plan of placing the Māori and English in opposite pages, making the paragraphs correspond with each other, has been adopted for this reason, among others; - that in case of obscurity in the Māori a reference to the English, on the opposite page, may at once afford the means of correcting misapprehension, by shewing [sic] what was intended to be conveyed...”

19TH CENTURY STATUTORY TRANSLATION

Ko Nga Ture o Ingarangi (1861) – trans. Francis Dart Fenton

“...it should be stated that the materials of this Book were first compiled in English, and then wrought into their present shape in Māori , of which the English given is a translation: this will explain an apparent redundancy of style in the latter which might otherwise be inexcusable. The merit of intelligibility to the Māori reader has been thought of more importance, in a work of this kind, than that of a strict conformity to the rules of English composition...”

MĀORI AS A LANGUAGE OF STATUTORY EXPRESSION – 19TH CENTURY

1845-1900

Statutory: 112 source texts (598,427 words)

Non-statutory: 258 source texts (approx 17% of corpus)

Minimal use between 1845-1860

Statutory: 3 source texts (9,604 words)

Non-statutory: 15 source texts (approx 6% of corpus)

- Arms Importation Ordinance 1845

Increasing use between 1861-1885

Statutory: 50 source texts (220,655 words)

Non-statutory: 133 source texts (approx 20% of corpus)

- Native Lands Act 1862, Native Lands Act 1865
- Māori Representation Act 1867

Continued use between 1886-1900

Statutory: 59 source texts (368,168 words)

Non-statutory: 110 source texts (approx 16% of corpus)

- Native District Regulations Act 1858/Native Circuit Courts Act 1858

MĀORI AS A LANGUAGE OF STATUTORY EXPRESSION 20TH CENTURY

- Gradual decline between 1901-1925:
 - Statutory: 17 source texts (192,113 words)
 - Non-statutory: 53 source texts (approx 15% of corpus)
- Very limited use between 1926-1950
 - Statutory: 1 source text (7,828 words)
 - Non-statutory: 31 source texts (approx 3% of corpus)
- No use between 1951-1975
 - Statutory: **no source texts**
 - Non-statutory: 39 source texts (0% of corpus)
- Resurgence between 1976-2011
 - Statutory: 13 source texts (44,252 words)
 - Non-statutory: 553 source texts (approx 2% of corpus)

1. THE INCORPORATION OF MĀORI INTO STATUTES

- The change in purpose has given rise to a new set of challenges
 - No organised or consistent approach to statutory incorporation
 - No guidelines for statutory incorporation
 - Artificial selection (Richard Dawson)
 - Uncertainty of interpretation
 - The hijacking of Māori terms by the political and legal process

STATUTORY INCORPORATION OF MĀORI CONCEPTS - PIECEMEAL APPROACH

1. A Māori word or concept is referred to in statute and no definition is provided
 - taonga (Property (Relationships) Act 1976)
 - iwi (Treaty of Waitangi (Fisheries Claims) Settlement Act 1992)
 - kaitiakitanga (pre-1997 amendment, RMA 1991).

2. A Māori word occurs in statute and a definition is provided
 - a) The definition provided is 'straight codification'
 - Eg. "Kai tiaki means guardian" TTWMA
 - Eg. "Tipuna means ancestor" TTWMA
 - Eg. "Whanaunga means a person related by blood" TTWMA

 - b) The definition calls for interpretation according to tikanga Māori (eg various provisions in TTWMA 1993)
 - Whāngai means a person adopted in accordance with tikanga Māori.

TWO NEW ZEALAND APPROACHES

Two approaches:

1. Flexible approach: where a Māori word is used and can be interpreted by the judge according to his or her general linguistic knowledge (a matter of statutory interpretation);
2. Where a word incorporates Māori custom (matter of foreign law requiring evidence of content)

ORIGINS OF FLEXIBLE APPROACH

Fothergill v Monarch Airlines [1981] (HL) Lord Wilberforce:

“...I am not willing to lay down any precise rule on this subject. The process of ascertaining the meaning must vary according to the subject matter. If a judge has some knowledge of the relevant language, there is no reason why he should not use it: this is particularly true of the French or Latin languages, so long languages of our courts. There is no reason why he should not consult a dictionary, if the word is such that a dictionary can reveal its significance: often of course it may substitute one doubt for another...They [the parties] may call evidence of an interpreter, if the language is one unknown to the court, or of an expert if the word or expression is such as to require expert interpretation. Between a technical expression in Japanese and a plain word in French there must be a whole spectrum which calls for suitable and individual treatment.” at 273-274.

ORIGINS OF FLEXIBLE APPROACH

Fothergill endorsed in 'Māori Fisheries Case' (1998) HC Paterson J interpretation of 'iwi'. at p. 75.

"I am satisfied that there was before the Court a sufficient degree of expertise on these matters to come to an overview which is adequate for the purposes of this case" [p. 24]

Points to note:

- Deference to importance of statutory context

However:

- The fragility of Māori language?
- The status of te reo as a 'taonga' to be protected under the Treaty (*Broadcasting Assets Cases* and the *Te Reo Maori Claim – Wai 11*)
- Or the Crown's duty to actively promote Māori culture

TAONGA – PROPERTY (RELATIONSHIPS) ACT 1976

Property (Relationships) Act 1976:

family chattels—

(c) does not include—

- (i) chattels used wholly or principally for business purposes;
- (ii) money or securities for money;
- (iii) heirlooms;
- (iv) taonga.

Page v Page 21 FRNZ 275, at para 46:

“While I have not considered the meaning of “taonga” in the context of the Act, it seems to me that its ordinary and everyday use would encompass without difficulty the artworks of the mother in this case” Durie J.

TAONGA CONTINUED...

Perry v West 23 FRNZ 204 HC Laurenson J at p. 211:

"...taonga are not confined to objects or possessions but can include cultural property, and as a Māori notion must be seen within the context of Māori cultural values"

"

Sources:

1. Williams dictionary: "property, anything highly prized"
2. Treaty of Waitangi: "o ratou taonga katoa"
3. Waitangi Tribunal Reports

Although it is a Māori word, it describes a relationship between a person or persons and property, and I see no reason why it cannot apply to a person of any ethnic or cultural background" at [89]

1. OBSERVATIONS RELATED TO TAONGA

Broad meaning not inconsistent:

- “highly prized or treasured thing”
- “personal attachment”

However: such a broad definition could contravene the purpose of the Act.

Possible narrower meanings?

“living descendants are trustees of the taonga by right of whakapapa or genealogical descent” – (Hirini Moko Mead)

1. a highly prized or valued possession held by a person as a kaitiaki; or
2. a valued possession held in accordance with tikanga Māori and highly prized by the whanau, hapu or iwi (Jacinta Ruru)

2. OBSERVATIONS RELATED TO TAONGA

Problems with the Court's approach:

- Very broad and vague definitions;
- No analysis of the different senses of taonga according to Māori values;
- No recognition that Māori values can ascribe expansive meanings or narrow meanings to terms;
- A need for the protection of the Māori language in a new, developing context

TAONGA CONT...

Kininmonth v Kininmonth:

- Husband argued an interest in a family house property was 'taonga'
- *“On the evidence before me I cannot find that the respondent’s interest in Maketu is a taonga. I do not accept that that concept can be relied upon in respect of a non-Maori asset such as an interest in a family bach or for that matter to real property. The relationship component of taonga in my view is quite different to the concept of relationship in other cultures and has no application here”* at [26]

KAITIAKITANGA

1 October 1991 to 16 December 1997

- **Kaitiakitanga** means the exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself
Rural Management Limited v Banks Peninsula District Council
 - Given general statutory application
- **Kaitiakitanga** means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship

ISSUES

- Judges role is to interpret the meanings of Māori words in a statute according to:
 - Natural and ordinary usage
 - Statutory context
 - Parliamentary intention
 - Consistency with tikanga Māori?
 - There is not necessarily a tension between doing this on the one hand and considering Māori values as part of that process;

HOWEVER:

- Not real set of guidelines for legislative drafters to alert them as to the potential consequences;