THE DOMESTIC AND INTERNATIONAL PROTECTION OF MĀORI CULTURAL PROPERTY

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INTRODUCTION

"Some calm spectator, as he takes his view,

In silent indignation, mix'd with grief,

Admires the plunder, but abhors the thief"

Lord Byron, The Curse of Minerva; The Complete Works, Jerome J. Cann ed., Oxford 1811.

In 2009, an exquisite, intricately carved, 19th century Māori pare (lintel) appeared in the catalogue of an upmarket London antique dealer with a vague provenance.[1] This came to the attention of Ken Hall, the curator of the Christchurch Art Gallery, who was able to identify it as formerly part of the New Zealand display in the British Empire and Commonwealth Museum. Hall discovered that although the museum had valid title to the pare, the director had disposed of it to the auction house in breach of the Museum Regulation guidelines. The private Sydney Museum of Primitive Art purchased the pare from the London auction house for 7600 pounds. However, "it was not what they expected", so the Sydney museum then sold the pare to Dunbar Sloane, an auction house in Auckland. The pare's provenance did not mention its prior housing in the British museum, and was decidedly vague on details. Te Papa was alerted to this sale, but without proof of false title, was unable to prevent it. It sold on September 14 2010 to a private buyer for $32,000.

Hall said of the matter, "It is of a huge concern that taonga received into a museum's care can be allowed to vanish, without the true provenance, onto

[1] As reported by Sally Blundell in "Treasure Hunt", *The New Zealand Listener*, April 16-22 2011, 22-25.

the open international art market."[2] Chris Finlayson, Minister of Culture and Heritage, expressed his concern to Jeremy Hunt, his British counterpart, that "objects of New Zealand provenance were not offered back to the original donors prior to their disposal".[3]

The fate of this pare exemplifies the many problems surrounding the legal protection offered to Māori cultural property[4] by domestic and international law. Māori cultural property has been collected by Pākehā since colonial times, and was in high demand by colonising powers looking to fill their museums with exotic treasures and wealthy private collectors. Even the New Zealand government itself seized Māori cultural property for displays at world exhibitions, to demonstrate the cultural wonders of New Zealand. Despite the large scale of this problem, Māori people have been offered little effective legal protection of their cultural property, and much of it remains alienated from the iwi that created it.

The pare was somehow able to leave New Zealand, despite being "a very important piece of carving".[5] It was disposed of by a British museum without regard to the Māori people who created it and their strong spiritual and ancestral connection to it. This spiritual and ancestral connection between Māori and their cultural property is of prime importance to this discussion and cannot be overlooked.

Traditional Māori beliefs see the source of artistic talent as traceable back to the divine.[6] "The development and elaboration of the arts is credited to the artist, but the origin of the art form is credited to the divine."[7]

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[2] *Ibid.*
[3] *Ibid.*
[4] This dissertation will only discuss moveable cultural objects, not including kōiwi tangata/Māori skeletal remains or toi moko/tattooed Māori heads. It will also refrain from discussing any intellectual property issues.
[5] Roger Fyfe, senior curator of anthropology at Canterbury Museum, as quoted by Sally Blundell, "Treasure Hunt", *The New Zealand Listener*, April 16-22 2011, 22-25.
[6] Hirini Moko Mead, *Tikanga Māori: Living by Māori Values*, Huia Publishers, Wellington, 2003. 255.

The artistic talent itself is seen as tapu and is treasured and preserved by handing it down through ancestral lines.[8] The artist and the object are also tapu during the creation process, and upon completion, a ceremony is necessary to lift the tapu. Therefore artistic works are treated with enormous respect.[9] Ancient works in particular command the most respect, and Māori people are often reluctant to even touch such works.[10]

Māori also see taonga held in the care of museums as asleep until they are reunited with iwi.[11] Furthermore, Māori view some taonga, such as whakairo (carvings) and pounamu, as tūpuna.[12] The taonga have their own whakapapa, can be linked to a specific whānau or hapū and will carry the mana of the ancestor.[13] Māori cultural property is therefore regarded as very special by Māori people and in need of specific legal protection.

The care and protection of Māori cultural property is an issue that New Zealand parliaments have attempted to address over the last 100 years. It has been fraught with difficulty and failure.

The current legislation that provides protection to Māori cultural property is the Protected Objects Act 1976 (POA). It was radically amended in 2006. The POA as amended has the same goals as its predecessors, but is more ambitious in its overarching purpose. The 2006 amendment changed the title of the Act, from the Antiquities Act to the POA, and amended most of the substantive provisions.

These amendments are the latest in a series of legislative attempts to curb the flow of New Zealand cultural objects out of New Zealand, a problem that began with gusto during colonial times. The first legislation to this

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[7] *Ibid,* 259.
[8] *Ibid*, 259.
[9] *Ibid,* 88-89
[10] *Ibid,* 88-89
[11] *A Guide to Guardians of Iwi Treasures*, Te Papa National Services, ISSN 1175-6462 Issue No. 8, June 2011.
[12] Ancestors – *Ibid.*
[13] *Ibid.*

effect was the Māori Antiquities Act 1901, which even during its debate in the House of Representatives was seen as being enacted too late to solve the problem.[14] The later Historic Articles Act 1962 sought to widen the legislative scope in order to protect more types of cultural objects.[15] The Antiquities Act 1975 again widened the scope of the protection offered, and substantially enhanced the protection offered to Māori artefacts. Its major innovation was to override the prevailing common law doctrine of finders law, to instead declare that the Crown has prima facie ownership of any Māori antiquity found.[16]

The Amendment Bill to the POA was a Private Member's Bill put forward by the Hon Judith Tizard in 2005. She remarked during the second reading of the bill that the illicit trade in cultural objects is a significant problem in New Zealand, which is best addressed through the use of international agreements.[17] At the time, New Zealand was party to the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, but legislative change was needed to implement the treaties into law.[18] Both Conventions were attached to the Act as schedules, and many of the amendments changed New Zealand law to comply with their requirements. It was widely acknowledged that the Antiquities Act did not sufficiently address issues arising from illicit trade and export restrictions, nor did it allow New Zealand to recover cultural property from overseas institutions. This will be discussed in Chapters three and four.

In 2006, one significant shortcoming of the Antiquities Act was identified during debate as its lack of ability to effectively determine ownership of discovered Māori objects. [19] Although one of the main reasons for the amendment was to create new, easier and more accessible administrative

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[14] NZPD vol 119, 350, 11 October 1901
[15] NZPD vol 332, 2512, 7 November 1962
[16] Section 11(1) The Antiquities Act 1975, still retained in the 2006 amendments.
[17] Hon Judith Tizard 5/04/2006 624 NZPD 19616
[18] Hon Judith Tizard 5/04/2006 624 NZPD 19617
[19] Hon Mahara Okeroa 2/08/2006 633 NZPD 4645

processes to ensure that Māori could claim ownership over objects[20], there was in fact little debate on the Bill's position in regards to Māori cultural objects, or taonga tūturu. This is a problem that Hone Harawira, MP for Te Tai Tokerau, noted during the Second Reading. He asserted that the lack of legislative protection of and focus on Māori cultural objects was a problem because:

> *"this is Aotearoa, and protected objects come primarily from the saving of taonga, which in this country are primarily Māori."*[21]

Chapter one outlines the domestic legal protection offered to Māori cultural property within New Zealand by Acts of Parliament and the internal policies of Te Papa and the Ministry of Culture and Heritage. Chapter two analyses the effectiveness of this protection, discusses concerns raised by Māori in this area and suggests changes that would offer more effective protection. Chapter three outlines the protection offered to Māori cultural property at international law through international conventions and the application of private international law. Chapter four explores the problems created by the lack of a special status for indigenous cultural property at international law and discusses the failures of the international protections offered. It then suggests improvements and alternatives to the current systems. The final section concludes by assessing the total efficacy of the current laws and reflecting on the progress made by New Zealand in the area of Māori cultural property.

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[20] Hon Mahara Okeroa 2/08/2006 633 NZPD 4646
[21] Hone Harawira 10/05/2006 631 NZPD 967

CHAPTER ONE: THE DOMESTIC LEGAL PROTECTION OF MĀORI CULTURAL PROPERTY

Māori cultural property is protected in New Zealand by two Acts of parliament, and the internal policies of the national museum and the Ministry of Culture and Heritage. This Chapter discuss these policies and will set out and explain the applicable legislative provisions in detail.

The Purpose of the Protected Objects Act 1975

The POA currently provides the core legal protection for Māori cultural property in New Zealand. The overall purpose of the POA is set out in Section 1A. The Act strives to "provide for the better protection of certain objects by—

> *(a) regulating the export of protected New Zealand objects; and*
> *(b) prohibiting the import of unlawfully exported protected foreign objects and stolen protected foreign objects; and*
> *(c) providing for the return of unlawfully exported protected foreign objects and stolen protected foreign objects; and*
> *(d) providing compensation, in certain circumstances, for the return of unlawfully exported protected foreign objects; and*
> *(e) enabling New Zealand's participation in—*
>> *(i) the UNESCO Convention; and*
>> *(ii) the UNIDROIT Convention; and*
> *(f) establishing and recording the ownership of ngā taonga tūturu; and*
> *(g) controlling the sale of ngā taonga tūturu within New Zealand.*"

Defining Māori Cultural Property

The POA aims to achieve these purposes by protecting specific types of objects. Schedule 4 of the POA sets out the nine categories of objects that it

protects. These categories cover many different types of objects, including natural science objects, art objects and archaeological objects. This dissertation focuses on the fourth category of objects protected: taonga tūturu.

Ngā taonga tūturu are defined in section 2 of the POA as:

> *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.*

The taonga tūturu category replaces the previous category of *artefacts* under the original Antiquities Act 1975. The earlier definition stated that an artefact was a–

> "*chattel, carving, object or thing which relates to the history, art, culture traditions of the economy of the Māori or other pre-European inhabitants of New Zealand and which was or appears to have been manufactured or modified in New Zealand by any such inhabitant, or brought to New Zealand by an ancestor of any such inhabitant, or used by any such inhabitant, prior to 1902.*"[22]

The current 2006 definition is wider than the previous, in terms of time. Under the current definition, the taonga tūturu only needs to be 50 years old before it may be protected, rather than in existence prior to 1902.

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[22] Antiquities Act 1975, s2.

However the scope of the definition of what sort of taonga tūturu may be protected has been narrowed. A taonga tūturu must be an object, and must relate to Māori. Under the previous definition, it could be a "chattel, carving object or thing" and could relate to any pre-European inhabitant of New Zealand. It is unclear from the Parliamentary debates why these changes were made.

It is important to note that the legislation is not retrospective, and therefore no object found before 1 November 2006 can be retrospectively defined as taonga tūturu when it did not meet the earlier definition of artefact.[23]

There are separate and specific rules that apply to taonga tūturu. For example, ngā taonga tūturu is the only category of objects exempt from the Schedule 4 proviso that an object will not be protected by the POA if it is already represented by at least two comparable examples permanently held in New Zealand public collections.

Found Taonga Tūturu

Section 11(1) of the POA protects taonga tūturu that are found after 1975 by regulating ownership. This protection is not available to the other categories of protected objects. The term "found" is defined in section 2 to mean taonga tūturu that are discovered or obtained in circumstances that do not indicate with reasonable certainty who has ownership of it, and that the last owner was not alive when it was found.

If a taonga tūturu is found, it is prima facie property of the Crown.[24] However, section 1(1) states that if a taonga tūturu is recovered from the grave of a known person, the matter shall be referred directly to the Māori Land Court to determine ownership. The Māori Land Court is a court of record with statutory jurisdiction, and primarily deals with Māori freehold

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[23] Guidelines for Taonga Tūturu - http://www.mch.govt.nz/nz-identity-heritage/protected-objects/taonga-t%C5%ABturu-0
[24] POA s11.

land.[25] Section 11(2) of the POA states that any interested person can apply to the Māori Land Court to claim ownership of the taonga tūturu. However until proper ownership can be determined, the Crown is responsible for the care and treatment of the object. [26] This subsection also notes "no right, title, estate or interest in any such taonga tūturu shall exist or be deemed to exist solely by virtue of ownership or occupation of the land from which the taonga tūturu was recovered." If a taonga tūturu is found in a customary marine title area, the object prima facie belongs to the title holder, under section 82 of the Marine and Coastal Area (Takutai Moana) Act 2011. However the right to apply to the Māori Land Court for ownership under section 11(2) of the POA is still available under section 82(5) of that 2011 Act.

Persons who do not bring a found taonga tūturu to the attention of the Ministry of Culture and Heritage are subject to a penalty. Section 11(3) imposes a 28 day time limit for the finder to notify the nearest museum, before a $10,000 penalty may be imposed.

Upon registration, the Ministry has developed its own policies in order to act in accordance with the POA, including developing processes to notify tangata whenua and other interested parties about the discovery of the found object, and informing them of the process for claiming ownership.[27] The Ministry will also publish public notices about the discovery and will call for claims of ownership to be lodged. If there are no ownership claims, the Ministry will award custody to an appropriate museum, if it is willing to assume care for the object. However the object remains in Crown ownership and ownership claims can still be made.[28]

If there is only one ownership claim, the Ministry will apply to the Registrar of the Māori Land Court for an order that confirms the

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[25] http://www.justice.govt.nz/courts/Māori-land-court
[26] POA, s11.
[27] Guidelines for Taonga Tūturu - http://www.mch.govt.nz/nz-identity-heritage/protected-objects/taonga-t%C5%ABturu-0
[28] *Ibid.*

ownership claim request, however the chief executive of the Ministry must be satisfied that the claim is valid.[29] If there is more than one competing ownership claim lodged, the chief executive of the Ministry must attempt to resolve the claims through consultation with the claimants. If these claims cannot be resolved, it falls on the Māori Land Court to investigate and determine ownership.[30]

Section 12 defines and outlines the jurisdiction of the Māori Land Court. The Māori Land Court has a wide jurisdiction over taonga tūturu found after 1975. It has the power to transfer ownership of newly found taonga tūturu, resolve claims for ownership, prohibit the damage or destruction of taonga tūturu, and prohibit their sale. It can also vest the object in any person as a trustee for safekeeping.

The only Māori Land Court case to apply section 12 of the POA is *Holden – Ngā Taonga Tūturu*.[31] Here, determination of ownership by the Māori Land Court was sought for several taonga tūturu discovered in 1979 and 1998. A toki (adze) and a whao (chisel) were found on a farm by the owner in 1979, but were not deposited with the national museum, Te Papa, until 2007. A haonga (stone cylander) was discovered on a residential property in 1998, but again not deposited with Te Papa until 2007. The court also considered the ownership of a waka fragment. The Ministry was satisfied that the taonga related to Māori culture, were manufactured or modified in New Zealand by Māori, had been used by Māori and were more than 50 years old. Therefore, they met the criteria to be defined as taonga tūturu under section 2 of the POA, and consequently the Māori Land Court had jurisdiction to determine their ownership under section 12.

The evidence of an archaeologist who carried out carbon dating where possible, and an expert from Te Papa was considered by the Court, as well as statements from the interested parties. The Court required satisfaction

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[29] *Ibid.*
[30] *Ibid.*
[31] Māori Land Court, 245 Aotea MB 230, 03/02/10

that the claimant was the true owner on the balance of probabilities. The judge was unable to determine ownership of the waka fragment, as it required further analysis before its age could be determined.[32] Therefore, the judge held that tribal affiliation was unclear and that it would remain in the custody of Te Papa until this can be resolved.[33] The tribal affiliation for the other taonga tūturu was identifiable on the basis of the evidence, and ownership was granted to the appropriate iwi, pending a decision by the iwi on where the taonga tūturu will be stored and how it will be cared for.[34]

Legislative Restrictions on the Property Rights of Private Owners of Taonga Tūturu

Sections 11 and 12, as discussed above, only apply to taonga tūturu found after 1976. Objects found or objects in private ownership before 1976 are not subject to the ownership rulings by the Māori Land Court, nor are objects that did not meet the definition of artefact in the Antiquities Act, and were found before 1 November 2006.

However, as well as facilitating the determination of ownership of taonga tūturu, the POA also purports to control their sale within New Zealand, and regulate their export from New Zealand.[35] Therefore, the POA places restrictions on the ability of private individuals to dispose of or sell objects that meet the definition of taonga tūturu under section 2 of the POA, regardless of when they were found.

Most importantly, section 13 prohibits disposal of a taonga tūturu by its owner, other than to a registered collector or public museum or through the offices of a licensed auctioneer or second hand dealer. Any individual

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[32] *Ibid*, [22]
[33] *Ibid*, [22]
[34] *Ibid*, [20]-[21].
[35] Guidelines for Taonga Tūturu - http://www.mch.govt.nz/nz-identity-heritage/protected-objects/taonga-t%C5%ABturu-0 . Export restrictions will be discussed in Chapters three and four.

who contravenes the provisions of section 13 is liable to a $10,000 fine, or a $20,000 fine in the case of a body corporate.[36]

It must be noted that this section makes an exception for gifts of taonga tūturu, whether during life or after death. Section 13(1) explicitly does not apply to "any disposition by any person to a relative of that person, whether by way of gift inter vivos, or pursuant to a testamentary disposition, or under the intestacy of that person, or by survivorship on the death of that person." However, the recipient of such a gift will in turn be bound by the restrictions of the POA.

An owner of a taonga tūturu is not required to register as a collector under the POA. However if the owner wishes to sell or purchase a taonga tūturu, then registration is necessary.[37] A registered collector must make his or her collection available for inspection by the Ministry at any reasonable time.[38] Furthermore, if taonga tūturu are sold privately, the Ministry must be notified within 14 days of the sale.[39]

Any auctioneers or second-hand dealers who wish to trade in taonga tūturu must obtain a licence from the chief executive of the Ministry under section 15 of the POA. The licence imposes conditions of any such sale on the auctioneer or dealer, including the duty to notify an authorised public museum of any taonga tūturu that is being offered for sale.[40] Also, the dealer or auctioneer is barred from selling a taonga tūturu that has not been issued a certificate of examination by an authorised public museum under section 16. Furthermore, the dealer or auctioneer must record the name and address of every vendor and purchaser of taonga tūturu, and forward these details to the Ministry within 28 days of the sale. [41] The

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[36] POA s 13(4)
[37] Guidelines for Taonga Tūturu - http://www.mch.govt.nz/nz-identity-heritage/protected-objects/taonga-t%C5%ABturu-0
[38] POA, s 14(3)(b)
[39] POA, s 14(3)(c)
[40] POA, s 15(2)(a)
[41] POA, s 15(2)(f)

Ministry holds a central database for protected objects in New Zealand, and a register of all Crown owned taonga tūturu, as per section 7F of the POA.

Museum of Te Papa Tongarewa Act 1992

Although the framework of the national museum, Te Papa Tongarewa (Te Papa) does not explicitly protect, or set out to protect taonga tūturu, its status as the guardian or kaitiaki of so many taonga tūturu makes the way in which it cares for such objects worthy of discussion. There are over 40,000 Māori cultural items currently held in Te Papa[42], so its strategy for the preservation, protection and care of these items is of great importance.

Te Papa was established in 1992 under the Museum of New Zealand Te Papa Tongarewa Act. It is an autonomous Crown entity and receives approximately half of its funding from the Crown.[43] Its board is responsible for the running of the museum and is appointed by the Minister for Arts, Culture and Heritage, to whom the board reports on its performance.[44]

There are no references to the Tiriti o Waitangi/Treaty of Waitangi in the founding Act, nor is there any statutory requirement for Māori representation on the board. The only reference in the Act to Māori is in Section 8, which discusses performance of functions.

> *In performing its functions the Board shall—*
>
> > *(a) have regard to the ethnic and cultural diversity of the people of New Zealand, and the contributions they have made and*

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[42] Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Wai 262, 2011, Taumata Tuarua Volume 2, p 493, Arapata Hakiwai, oral evidence on behalf of the Museum of New Zealand Te Papa Tongarewa, 21st hearing, 26 January 2007 (transcript 4.1.21, p 429

[43] www.mch.govt.nz

[44] *Ibid.*

continue to make to New Zealand's cultural life and the fabric of New Zealand society:

(b) endeavour to ensure both that the Museum expresses and recognises the mana and significance of Māori, European, and other major traditions and cultural heritages, and that the Museum provides the means for every such culture to contribute effectively to the Museum as a statement of New Zealand's identity:

(c) endeavour to ensure that the Museum is a source of pride for all New Zealanders.

However, despite the lack of statutory recognition of Māori, there are several internal policies that promote and ensure Māori representation governance. First, the chief executive officer and the kaihautū (Māori leader) jointly lead the museum, ensuring partnership with Māori at the highest level.[45] These two leaders are supported by a Roopu Whakamana Māori team, which advises on tikanga Māori and biculturalism.[46]

The document that sets out principles, goals and a framework for the internal running of the museum, the *Concept for the Museum of New Zealand Te Papa Tongarewa*, states that it will "honour the principles" of the Treaty "in all that it does", and provide "effective Māori representation" on the board. Currently, the board is made up of two Māori members, and six Pākehā members.[47] In 1990, Te Papa produced the *Mana Taonga Policy*, which recognises the spiritual connection between Māori and taonga tūturu and allows iwi to decide how taonga are cared for in accordance with tikanga and custom. Finally, Te Papa's

[45] http://www.tepapa.govt.nz/AboutUs/Pages/organisationstructure.aspx
[46] *Ibid.*
[47] *Ibid.*

Bicultural Policy further affirms its commitment to a bicultural approach and to maintaining relationships with iwi.

CHAPTER TWO: ANALYSIS OF THE LEGAL PROTECTION OF MĀORI CULTURAL PROPERTY IN NEW ZEALAND

> *Māori traditionally kept their taonga tūturu hidden, often vesting them in the care of the earth, Papatūanuku. But… Papatūanuku can no longer keep their taonga safe."*
>
> Tauranga Moana Report, Wai 215, 2006.

Throughout the legislative history of the protected objects regime, the definition of Māori cultural property has progressively been widened to include more types of objects. The current definition is arguably the most inclusive yet. However there is still scope for it to be widened further. This Chapter examines the taonga tūturu definition and attempts to resolve the uncertainty in the definition. It moves on to discuss three major suggestions for legislative change made by claimants in the *Ko Aotearoa Tēnei* report and examines the effect their implementation would have. Finally, it suggests broader policy and legislative solutions that would result in greater protection of Māori cultural property within New Zealand.

Interpretation of the Taonga Tūturu Definition

In 2006, in order to clarify the legal definition of taonga tūturu, the Ministry of Culture and Heritage published *Guidelines for Taonga Tūturu* in order to explain how the provisions of the POA are applied by the Ministry.[48] While the Ministry's *Guidelines* are not law, they are significant because they dictate the way in which the Ministry interprets

[48] Ministry of Culture and Heritage, *Guidelines for Taonga Tuturu*, 4.

the POA. This means that because the Ministry will decide what objects are taonga tūturu at first instance, their interpretation of the definition of taonga tūturu is important to Māori and collectors of taonga tūturu.

The *Guidelines* provide a list of objects that could be defined as taonga tūturu, but note that the list is not complete or defining. The list includes toki, whakahuia, kākahu (cloak), carved firearms, taiaha and patu, which are all objects that would easily be considered chattels. A chattel is any property other than real property.[49] The *Guidelines* are clear that "Waste and by-products of manufacturing such as flakes, shells, oven-stones and other 'scientific material' are not *taonga tūturu* unless there is evidence that the object had a secondary use".[50] However, this may not be the case in exceptional circumstances. Further, and most notably, the *Guidelines* state that "fixed and structural objects do not necessarily come under the Act. However objects such as whakairo/carvings are regarded as taonga tūturu once removed from the structure or site." This suggests that the Ministry does not consider that whare, even if removed from the marae site, come under the definition of taonga tūturu as they are 'structural objects'. It seems that only once the carved panels themselves are removed from the structure, presumably the whare, do they become taonga tūturu, according to the *Guidelines*.

These explanations in the *Guidelines* raise two major issues with the statutory definition of taonga tūturu. The first is whether whare which have been removed from the marae site are included in the definition of taonga tūturu, and whether it is appropriate that they are. The second is whether it was correct for waste and by-products to have been excluded from the taonga tūturu definition.

Whare Removed From the Marae Site

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[49] "chattel *n.*" *A Dictionary of Law.* By Jonathan Law and Elizabeth A. Martin. Oxford University Press 2009

[50] Ministry of Culture and Heritage, *Guidelines for Taonga Tuturu*, 4.

The POA definition requires a taonga tūturu to be an 'object'. This suggests that the object must be a chattel, rather than real property. This reasoning may be behind the *Guidelines* interpretation of the definition as excluding fixed or structural objects. Therefore, it is unclear whether whare removed from the marae site would be considered taonga tūturu. However, in property law, it is possible for a house to be regarded as a chattel in certain circumstances.

The classic English case of *Holland v Hodgson* held that articles not attached to the land other than by their own weight are not fixtures (and are therefore chattels) unless the circumstances show they were intended to be part of the land.[51] Further, that if a building is even slightly affixed to the land, it is a fixture unless it was intended to be a chattel.[52] The New Zealand Court of Appeal in *Lockwood Buildings Limited v Trust Bank Canterbury* considered this issue further, when a kit set show home, which was designed to be removed from the site, was nevertheless nailed to the foundations with connected electricity and water.[53] Cooke P held that even though the affixation was intended to be temporary, the house was a fixture.[54] Tipping J agreed, and suggested that even though the parties intended to move the house, this did not mean that the house remained throughout a chattel.[55] McKay J agreed with Tipping J. Therefore, it can be concluded that if a house is not affixed to the land, or was intended to be a chattel, then it is considered to be a moveable chattel by property law.

If whare, which have been removed from a marae and stored in a museum, are considered with these Court of Appeal judgments in mind, they are most certainly not fixtures. There was little, if any, affixation to the land, and they were easily removed and placed inside another building (a museum) or on a ship to be transported overseas. They were attached to

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[51] (1872) LR 7 CP 328, 335, Blackburn J.
[52] *Ibid.*
[53] [1995] 1 NZLR 22 (CA)
[54] *Ibid,* 4.
[55] *Ibid,* 6-7.

the land purely by their own weight (as in *Holland v Hodgson*) and while the creators may have intended them to be fixtures, they have certainly not been treated as such by the Crown and subsequent owners and caretakers.

Even if some whare were slightly affixed to the land, there is still scope for them to be considered chattels by property law. The Māori Land Court has demonstrated in some recent cases an emerging willingness to deem a fixed house a chattel in order to prevent changing the status of Māori freehold land.[56] For example, in the *Hills* case, the Māori Land Court held that despite a house being clearly fixed to the land, it could nevertheless be declared a chattel, as the only alternative would be to change the status of the land, which would then result in its sale. These cases show a willingness of the Māori Land Court to stretch the principles of property law in order to achieve its overarching purpose, which is retention of Māori land in the hands of Māori. Therefore, there is potential scope to do the same in the area of Māori cultural property.

The *Guidelines* also exclude structural objects from the Ministry's interpretation of the taonga tūturu definition. However this must be contrasted with the approach of the recently released report of the Waitangi Tribunal, *Ko Aotearoa Tēnei*[57], which assumes without discussion that whare are taonga tūturu. Considerations of fixed or structural aspects are not mentioned. For instance, it uses the wharenui Te Hau ki Tūranga as an example of the valued "items" held by Te Papa.[58] Ngāti Porou use their Ruatepupuke 11 whare as an example of a taonga

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[56] Hills, In re (Kaiapoi MR 873 blk XI Sec 71B) [2005] NZMLC 7 (2 February 2005)

[57] A Waitangi Tribunal report on the inquiry into the Wai 262 claim. This was the Tribunal's first whole-of-government inquiry, and one of the most far reaching. It examines "the place of Māori culture, identity and traditional knowledge in New Zealand's laws, and in government policies and practices". See: http://www.waitangi-tribunal.govt.nz/news/media/wai262.asp. This report will be discussed further in due course.

[58] *Ko Aotearoa Tenei*, 495.

tūturu that is held by an overseas museum.[59] This example is accepted by the Waitangi Tribunal without explanation or justification. Instances such as these clearly show the Waitangi Tribunal views whare which have been removed from the marae site as taonga tūturu under the current definition. Despite the examples given in the Ministry's *Guidelines*, the Tribunal does not attempt to discuss or explain its interpretation of taonga tūturu even though it seems to be at odds with the Ministry's interpretation.

Overall, I argue that the most appropriate interpretation of the taonga tūturu definition is that whare which have been removed from the marae site are included. Those that were removed from their sites by the Crown have been treated by the Crown and museums throughout as an object rather than a fixed structure, when being shifted from museum to museum and when displayed in exhibitions. They are often placed in exhibitions as objects to be admired, surrounded by other taonga tūturu. Given that the Crown has treated whare as if they were taonga tūturu, and that it is possible for a house to be considered a chattel in property law, they should be regarded as such.

Waste and By-Products

The *Guidelines* clearly explain that waste and by-products are not included in the taonga tūturu definition. However, claimants to the Wai 262 claim believe this is inappropriate and must be changed. For example, the Te Tai Tokerau claimants believed it is a mistake to exclude genuine taonga items such as flints and middens from protection under this definition. However the Waitangi Tribunal, in its Ko Aotearoa Tēnei report, noted that this definition was flexible, and that such items with scientific value can be protected.[60] The Ministry takes a 'case-by-case' approach to items that are potentially valuable, but are considered waste

[59] *Ko Aotearoa Tenei*, 497.
[60] *Ibid,* 506.

or by-products. The Tribunal found this approach appropriate, but suggested it be emphasised in the *Guidelines*.

Ko Aoteoroa Tēnei

The *Ko Aotearoa Tēnei* report examined the area of cultural property by separating taonga tūturu into two spheres. The first sphere consists of taonga tūturu that are held by the Crown in Te Papa, and the second consists of taonga tūturu that are found according to the POA.[61] The Tribunal also recognised two separate Treaty interests in taonga tūturu. Taonga that were taken from Māori, or were rediscovered then taken, give rise to a rangatiratanga (or ownership) interest for Māori.[62] However items that were gifted or sold by Māori only give rise to a kaitiaki (or guardianship) relationship. This consists of a moral right for iwi to have input into the item's care, but does not consist of an expectation for return of the object.[63] Despite a wilful alienation, the kaitiaki interest exists due to the ongoing cultural and spiritual interest between iwi and the taonga. Taonga tūturu have their own mauri and whakapapa that links them to tribal ancestors.[64] The Tribunal notes that this kaitiaki interest is a recognised and accepted concept already under the Resource Management regime, despite lands being in private ownership.[65]

Retrospective Application of the Protected Objects Act 1975

In *Ko Aotearoa Tēnei* most claimants argued that the POA should have retrospective effect in order to effectively protect taonga tūturu in New Zealand. Counsel for Ngāti Kahungunu argued in favour of retrospective application. The bulk of that iwi's taonga were found before the application of the current legislation, and have long been held by museums. There is

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[61] *Ibid,* 493.
[62] *Ibid,* 504.
[63] *Ibid,*.
[64] *Ibid.*
[65] *Ibid.*

no provision for the iwi to claim ownership of these taonga without retrospective application. The other claimants largely concurred.[66]

However, the Waitangi Tribunal placed a high value on private property. The report found that any "retrospective invalidation of pre-1975 ownership would be confiscatory and unfair on those who had acted in accordance with the laws of the day", again comparing this approach with land ownership principles.[67] The report then goes on to state that the constraints on what private owners can do with their taonga tūturu is a reflection of the kaitiaki interest held by Māori, and that this is sufficient to recognise the cultural connection present.[68]

Dismissing the idea of retrospective application of the law in this manner fails to take into account the practical realities of the regime for Māori. It is not difficult to find examples where the lack of retrospective application has failed iwi in their attempts to reunite with taonga tūturu, especially when these taonga tūturu are held by museums.

While Te Papa is a Crown Entity, other museums in New Zealand are not and are accountable to their trust boards or local authorities. Therefore, in the sense of responsibility to return wrongly acquired taonga tūturu, they are akin to private owners. Therefore, if an item was confiscated from iwi by the Crown or found before 1975, then gifted to a regional museums, there is no avenue under the Protected Objects regime for iwi to pursue a claim in regards to that item. This forces iwi to negotiate directly with museums, which is a highly unstable solution. In practice, these sorts of situations have often resulted in the item becoming the subject of a Treaty of Waitangi claim.

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[66] *Ibid,* 500.
[67] *Ibid,* 508.
[68] *Ibid,* 511.

The Mātaatua meeting house of Ngāti Awa was involved in such a claim. It was taken from the iwi during the confiscation of Ngāti Awa land.[69] It was taken to Sydney for an exhibition, then sent to London where it was stored in the basement of the Victoria and Albert Museum until 1916, when it was re-discovered and returned to New Zealand.[70] It was then given to the Otago Museum by the government of the day.[71] Ngāti Awa formally requested in 1983 that the Minister of Internal Affairs intervene and return the wharenui to the iwi. However the government claimed this was impossible due to the statute of limitations and advised the iwi to negotiate directly with the trustees of the Otago Museum, and to include the wharenui in the iwi's Treaty of Waitangi claim.[72] The Museum, being only accountable to its trust board and local authority, was under no obligation to agree to this settlement. The negotiations eventually resulted in a payout from the government to the Otago Museum[73] and the Ngāti Awa Claims Settlement Act 2005 which returned the wharenui to Whakatāne and supplied $2 million for the transport and establishment costs.[74] It was finally reopened by Ngāti Awa on 17th September 2011.[75]

Te Papa has been involved in a similar situation recently. The Rongowhakaata meeting house, or Te Hau ki Tūranga, was confiscated by the government in 1867.[76] In the past, the iwi and Te Papa agreed on a

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[69] H.M Mead, "The Mataatua Declaration and the Case of the Carved Meeting House Mataatua", *U.B.C. Law Review* 69 1995, 71. The *Ko Aotearoa Tenei* report recommends assessing whether an object was willingly given or sold by "determining whether all those with a valid say under tikanga consented to the transfer, and whether, if there were specific terms of transfer, the recipient has honoured them", p 508.

[70] H.M Mead, "The Mataatua Declaration and the Case of the Carved Meeting House Mataatua", *U.B.C. Law Review* 69 1995, 73

[71] *Ibid,* 73.

[72] *Ibid,* 74

[73] An understanding reached through personal discussions with Professor Robert Hannah of Otago University, who was involved in this settlement by reason of his position of the Otago Museum's Board.

[74] Preamble, Background (14), Ngati Awa Claims Settlement Act, 2005

[75] http://www.ngatiawa.iwi.nz/cms/

[76] Rongowhakaata Meeting House - http://rongowhakaata.com/culture/te-hau-ki-turanga/whare-whakairo-history

formal written agreement for the care of the house.[77] However the return of the house to the iwi in Gisborne has been negotiated as part of the iwi's Treaty settlement[78]. Again, negotiation though Treaty of Waitangi claims was the only solution to the problem of returning the taonga to the iwi, and this depended on the willingness of Te Papa to return it. This is a precarious and unsustainable solution, considering that Te Papa alone houses over 40,000 taonga tūturu.

The report notes that Te Papa has "expressed a willingness to hand back wrongly acquired taonga to kaitiaki".[79] This is an example of why the current regime is far from perfect. Museums must be "willing" to return items, and if they are not, then there is no other avenue for iwi to pursue. Furthermore, the rhetoric offered by the Waitangi Tribunal upholding private property rights above the kaitiaki relationship of the iwi seems out of place in the context of museums.[80]

Another solution that iwi have resorted to is to allocate a certain amount of funds into a budget for purchasing taonga tūturu of significance to the iwi. The Trust Waikato has budgeted an annual amount for art and taonga purchases.[81] Waikato Museum of Art and History holds all of the Trust's purchases under a long term loan agreement in order to make the collection accessible to the people of the region.[82] For iwi who are unable to negotiate for the return of taonga tūturu through a Treaty of Waitangi claim, this is presumably the remaining option. It is a clear sign that the current regime is not effectively protecting taonga tūturu in New Zealand when iwi are driven to purchase back taonga tūturu that were unwillingly alienated from them.

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[77] http://www.waitangitribunal.govt.nz/scripts/reports/reports/814/51D27A16-2350-44FD-A87F-3B8FFB59CA75.pdf
[78] http://rongowhakaata.com/culture/te-hau-ki-turanga/whare-whakairo-history
[79] p 509
[80] See *Ko Aotearoa Tenei.*
[81] Trust Waikato – Preserving Art and Taonga of significance to the Trust region: Policy Manual Section 1.8, 21 June 2010
[82] *Ibid.*

One way to alleviate this problem would be to enact retrospective legislation. Retrospective laws "attach new consequences to actions or events that have already occurred",[83] and are oft bhy55555en regarded as contrary to justice and the rule of law.[84] However in reality, retrospective legislating occurs fairly often when it is warranted by the circumstances.[85] Samford argues that when legislation is "curative", its retrospective effect is often justified:

> *"The government introduces legislation to achieve certain policy or administrative goals, but sometimes the legislation fails to achieve those goals. The government may then decide to introduce further legislation to retrospectively cure the defects, thus ensuring not only that the goals will be achieved in the future, but that the goals are achieved from the outset."*[86]

A recent example of the government implementing curative legislation with retrospective effect is the recent Search and Surveillance Bill. Parliament passed this law under urgency in response to the Supreme Court judgements that police were engaging in unlawful filming of evidence.[87] It has retrospective effect on convictions that have used such filmed evidence.[88] As the government believed the previous law allowed the filming, the retrospective effect was viewed as acceptable because it is curative.

Since the 1901 Māori Antiquities Act, the government has attempted to curb the flow of taonga tūturu out of the country and to attribute ownership of taonga tūturu to the proper Māori owners. The legislation has undoubtedly failed in these aims. Before the POA, the common law

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[83] Charles Sampford, *Retrospectivity and the Rule of Law*, Oxford, 2006, 23.
[84] *Ibid,* 1.
[85] *Ibid,* 229.
[86] *Ibid,* 104.
[87] http://tvnz.co.nz/politics-news/covert-surveillance-bill-passes-through-parliament-4453593
[88] *Ibid.*

doctrine of finders law was in place, which defeated the aims of the government and also completely ignored its Treaty of Waitangi obligations. If the POA were to have retrospective effect, it would be purely to cure the defects of the previous legislation.

I argue that the intrusive effect on private property this would cause could be decreased by applying the retrospective effect of the law only to taonga tūturu that are held in museums. Therefore, the property rights of those individuals who purchased taonga tūturu in good faith and in accordance with the law of the time would not be disturbed. Rectifying a significant breach of the Treaty of Waitangi must be placed on a higher pedestal than protecting the rights of museums to hold what is in their collections. With this approach, all taonga tūturu that were found and subsequently donated to the museum, or that were unwillingly alienated from iwi would be subject to ownership claims under sections 11 and 12 of the POA.

Crown Prima Facie Ownership

The claimants in *Ko Aotearoa Tēnei* found issue with the provision for prima facie Crown ownership of newly found taonga tūturu. The Te Tai Tokerau claimants suggested that the tangata whenua of the area where the item was found should be given prima facie ownership.[89] Further, that the decision of whether the object is taonga tūturu, and who should have rightful ownership should be made by Māori under tikanga.[90]

However, the Waitangi Tribunal recommended in the *Ko Aotearoa Tēnei* report that this provision remain in place. When a taonga tūturu is found, it might require urgent care or restoration and interim Crown ownership is the best way to ensure that this occurs since it can be funded by the Crown.[91] Also, the report suggests that prima facie Crown ownership allows the Crown to facilitate a fair process for determining proper

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[89] *Ko Aotearoa Tēnei,* 500.
[90] *Ibid,* 500
[91] *Ibid,* 508.

ownership.[92] The Tribunal dismissed opposition to this concept as "semantic detail" that could be resolved by changing the wording to "interim Crown trusteeship" or similar.[93] This is indeed how the Ministry views the application of these provisions, as set out in its *Guidelines.*[94]

This arrangement has great value in the international context, which will be discussed in further chapters.

Te Papa Tongarewa Act 1992

As reported in *Ko Aotearoa Tēnei* the claimants raised issue with the relationships between iwi and the museums with taonga tūturu in their care. For example, counsel for Ngāti Kahungunu was concerned at the lack of legislative provision for Māori in the governance of Te Papa and the Auckland Museum.[95] Other iwi were also critical of this lack of legislative commitment to Treaty principles or partnership with Māori in the museum sector.

However, the Tribunal largely praised Te Papa's commitment to a bicultural policy, citing its internal policy documents discussed earlier.[96] The Tribunal reported that Te Papa provides good physical care, as well as spiritual care for taonga tūturu, as the museum has good relationships with iwi and staff knowledgeable in tikanga.[97] Furthermore, that it is willing to return wrongly acquired taonga tūturu to Māori.[98] While there is no formal arrangement for Māori consultation, the Mana Taonga policy of the Museum involves kaitiaki in decisions about their taonga.[99] The Tribunal concluded that as Te Papa displayed commitment to a

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[92] *Ibid,* 511.
[93] *Ibid.*
[94] Guidelines for Taonga Tūturu - http://www.mch.govt.nz/nz-identity-heritage/protected-objects/taonga-t%C5%ABturu-0 ,7.
[95] *Ibid,* 98.
[96] *Ibid,* 506.
[97] *Ibid.*
[98] *Ibid,* 511.
[99] *Ko Aotearoa Tēnei,* 511.

partnership with Māori, the lack of legislative requirement to do so was not a concern.[100]

The approach of other museums is not discussed by the report, presumably because they are not responsible to the Crown.[101] However it must be noted that although Te Papa is a Crown Entity, the Minister is not able to direct the board on matters of culture.[102] The Tribunal does suggest that Te Papa develop 'best practice guidelines' for private owners who wish to care for taonga spiritually according to the tikanga of the kaitiaki.[103] Such a document could also be developed for other museums to follow.

While the Tribunal was largely satisfied with Te Papa's commitment to a bicultural approach, this is only due to internal policies which are susceptible to change by the board of directors. Further, if an internal policy is breached by the museum, there is no avenue for Māori to hold Te Papa to account for the breach. It should therefore be explored further whether reference to Treaty Principles in the Te Papa Tongarewa Act would solidify this existing commitment and thus provide more security for concerned Māori.

A requirement to act in accordance with the principles of the Treaty of Waitangi was famously interpreted by the Court of Appeal in *New Zealand Māori Council v Attorney-General.*[104] This case interpreted a legislative provision in section 9 of the State-Owned Enterprises Act 1986 which stated "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi", and remains the primary authority on the content of the principles.[105] The full bench of five justices all included partnership, reasonableness and good faith as

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[100] *Ibid.*
[101] Or perhaps because the issue was not put to the Waitangi Tribunal by the claimants.
[102] http://www.tepapa.govt.nz
[103] *Ko Aotearoa Tēnei,* 512.
[104] [1987] 1 NZLR 641. Generally referred to as the *Lands* case.
[105] J Ruru, "Treaty of Waitangi principles 20 years on" (2007) NZLJ 87.

elements of the principles. Notably, Somers J also included an "implicit" right to redress for past breaches.[106] The provision has been interpreted further by subsequent cases, including a Privy Council decision which added "mutual cooperation and trust" to the principles.[107]

Therefore, if such a provision were added to the Te Papa Tongarewa Act, Māori would have the security of legislative protection of their relationship with the museum. A firm requirement for Te Papa to behave reasonably and in good faith with Māori would also provide iwi with an avenue for redress if the museum breaches these obligations, which the current internal policies do not provide. Further, a legislative requirement for Māori representation on the museum's board would further solidify Te Papa's commitment to adhering to the Treaty principles of partnership and mutual cooperation. While such an amendment would not necessarily change the museum's bicultural approach, it would provide Māori with security that the approach cannot easily change to exclude iwi.

Further Policy Solutions

The *Ko Aotearoa Tēnei* report provides recommendations relevant to the broader issues in this area. While several of the proposed solutions have merit, and should be implemented, it can be argued that the report does not go far enough in suggesting changes to the Protected Objects regime. More reform is needed in order to effectively protect taonga tūturu in New Zealand.

The Tribunal recommends overall Crown-Māori partnership in the culture and heritage sector.[108] As Māori culture is what makes New Zealand culture unique, this is an admirable policy for the sector to keep in mind. It is of further importance due to the Crown's need to adhere to the

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[106] [1987] 1 NZLR 641, 694.
[107] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 517. Judgment of Lord Woolf.
[108] *Ko Aotearoa Tēnei,* 513.

principles of the Treaty of Waitangi. To this aim, the Tribunal recommends the establishment of:

> *"A body of Māori experts [to] share in decision-making with the chief executive of the Ministry for Culture and Heritage on:*
>
> - *applications for export of Māori objects;*
> - *customary ownership of newly found taonga; and*
> - *whether individual examples of 'scientific material' should qualify for protection as taonga tūturu."*[109]

This body would have a particularly beneficial effect when deciding on scientific material. As the exclusion of such material from the definition of taonga tūturu under the POA is of particular concern to some Māori, having a body of Māori experts to examine such a question would provide authority to their decision and security to Māori who wish to protect such items.

The Tribunal also recommends that the Crown establish a restitution fund to help kaitiaki reacquire their taonga on the open market, which would help to repair the damage done by the "defective" past regimes.[110] As some iwi have already created such a fund on their own initiative,[111] a Crown contribution would undoubtedly be most welcome and allow iwi to purchase more valuable objects. However, unless the Crown is willing to contribute a very significant amount to such a fund, this would hardly significantly repair any damage, as so many taonga tūturu are now overseas, in the care of museums or are not likely to be released from private collections. Nonetheless, this is a viable solution that will help iwi recover those taonga tūturu that do become available on the private market.

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[109] *Ibid,* 514.
[110] *Ibid,* 513.
[111] Trust Waikato – Preserving Art and Taonga of significance to the Trust region: Policy Manual Section 1.8, 21 June 2010

However, in order to effectively rectify the damage done by the past regimes, in an addition to the limited retrospective application of sections 11 and 12 of the POA as outlined above, I argue that there should be a right of first refusal for iwi when a taonga tūturu comes up for sale in New Zealand. So as not to adversely affect the art market, the iwi should be required to purchase the taonga tūturu at current market value. The above-mentioned Crown fund would allow iwi to achieve this.

This concept is in practice in current legislation. The Te Ture Whenua Māori Act 1993 restricts an owner of Māori freehold land in his or her ability to dispose of it. Section 147A provides that a block of Māori freehold land can only be sold if a right of first refusal is first given to the preferred classes of alienees. Section 4 provides that the preferred classes of alienees consists of children, whaunaunga (persons related by blood), other owners who are also hapū members or their trustees, and descendants of former owners who were or are hapū members. Further, section 148(1) prohibits the owner of an interest in Māori freehold land from disposing it to anyone outside of the preferred class of alienees.

Similarly, the POA could be amended to prohibit any disposal of taonga tūturu unless a right of first refusal is given to the appropriate iwi. Which iwi is the appropriate iwi could be easily determined by making minor amendments to the present regime. The vendor of the taonga tūturu could be required to notify the Ministry of Culture and Heritage of the proposed sale. Then, the recommended body of Māori experts and the chief executive could notify iwi who could then come forward to claim their right of first refusal. If no iwi come forward, the vendor could be free to sell. If more than one iwi come forward, then the section 12 POA jurisdiction of the Māori Land Court could be extended to determine proper ownership in this situation.

CHAPTER THREE: THE PROTECTION OF MĀORI CULTURAL PROPERTY OUTSIDE NEW ZEALAND

There are three key components to the protection of Māori cultural property outside of New Zealand. The first component is the relevant provisions of the POA; the second is the international conventions attached to the POA in Schedule 2, and the third is the approach of private international law to multi-jurisdictional cultural property disputes. This Chapter explains the workings off all three components, and uses an example of a New Zealand case to demonstrate the third component.

The Protected Objects Act 1975

The POA imposes restrictions on the export of taonga tūturu and other protected objects in Section 5. In order to export a protected object, the owner[112] must apply to the chief executive of the Ministry for permission. The chief executive will consider the application in accordance with the guidance provided by sections 7-7H. Section 7A provides that:

> *The chief executive may not grant an application for permission to export if the chief executive determines that the object—*
>
> *(a) is—*
>
> *(i) a protected New Zealand object; and*
>
> *(ii) substantially physically authentic and—*
>
> *(A) made or naturally occurring in New Zealand; or*
>
> *(B) made with New Zealand materials; or*
>
> *(C) used by New Zealanders; or*

[112] The applicant must have undisputed title to the object, or if the object is held in trust, all of the trustees must support the application. POA s 6(1).

(D) related to New Zealand; and

(b) is—

(i) associated with, or representative of, activities, events, ideas, movements, objects, persons, or places of importance to New Zealand; or

(ii) important to New Zealand for its technical accomplishment or design, artistic excellence, or symbolic, commemorative, or research value; or

(iii) part of a wider historical, scientific, or cultural collection or assemblage of importance to New Zealand; and

(c) is of such significance to New Zealand or part of New Zealand that its export from New Zealand would substantially diminish New Zealand's cultural heritage.

When considering the application to export, the chief executive must consult two expert examiners in the field relevant to the particular application.[113] The expert examiners must also have regard the matters outlined in section 7A.

If the export is allowed, the exporter will be given a certificate of permission, and must conform to any terms and conditions that the chief executive imposes.[114] If any person exports or attempts to export a protected object without permission or without reasonable excuse in the circumstances, they will be liable to a fine not exceeding $100,00 or a term of imprisonment not exceeding 5 years or both.[115] Section 10 provides that in the event of an attempted export in breach of the POA, the object shall be forfeited to the Crown. This forfeit does not depend on the seizure of the

[113] POA s 7B.
[114] POA s 5(1).
[115] POA s 5(2).

object.[116] Where the object is seized, it shall be delivered to the chief executive, who will provide custody for the object and has discretion to direct that the object be returned to the owner.[117]

Further, the chief executive must establish and maintain a register of objects of national significance.[118] The register must include, but is not limited to, any protected object that has been the subject of a refused application to export.[119] It may also include objects that are of such significance to New Zealand or part of New Zealand that its export from New Zealand would substantially diminish New Zealand's cultural heritage, or objects that the owner submits for inclusion in the register.[120] The register is not available for public inspection.[121] A registered object may not be permanently exported.[122] If this does occur, the chief executive may take any appropriate action that he or she thinks fit to seek to have the object returned to New Zealand.[123]

International Conventions

Schedule 2 of the POA, which was amended in part to comply with international law, attaches two international conventions to the Act. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970) is the first (UNESCO Convention). The UNESCO Convention was created in order to respond to the increase in the illegal trafficking of artefacts after World War II.[124] It establishes a process for states party to request the return of illegally exported cultural property.

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[116] Section 10(1B), POA
[117] Section 10(2), POA
[118] Section 7F,(1) POA
[119] Section 7F(2)(a), POA
[120] Section 7F(2)(b), POA
[121] Section 7F(3), POA
[122] Section 7G(1), POA
[123] Section 7G(2), POA
[124] Jodi Patt, "The Need to Revamp Current Domestic Protection for Cultural Property", *Northerwestern University Law Review*, 96 3 2002, 1219.

The text defines cultural property as "property, which on religious or secular grounds, is specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art or science".[125] The result of this definition is that the state must specifically designate the individual object as important before the theft or illegal export before it is recoverable under the UNESCO Convention.

If a contracting state wishes to recover such an object, Article 7(2)(b)(ii) requires the request to be made to the state where the object is situated, through diplomatic offices. States party will "take appropriate steps to recover and return" the item, and the requesting state will pay "just compensation to an innocent purchaser" holding valid title to the object.[126] However this provision is only applicable to the theft of publically owned cultural property, illegally exported archaeological and ethnographic objects or those taken from museums, churches and similar institutions.[127] Therefore, its scope is very limited.

The UNESCO Convention's primary focus is to impose duties on member states to prevent illegal trafficking of cultural property, rather than direct enforcement. Article 7(a) requires member states to assist in preventing museums and similar institutions from procuring illegally exported cultural property. Article 7(b) requires states party to prohibit the importation of cultural property stolen from a museum or monument in another state party.[128] Further, Article 5 requires contracting states to set up national services for the protection of cultural heritage, including drafting laws, establishing a national inventory of cultural property, supervising archaeological excavations and promoting education in the area of cultural heritage.

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[125] Article 1, UNESCO Convention
[126] Article 7(b)(ii) UNESCO Convention
[127] *Ibid.*
[128] Article 7(b) UNESCO Convention

The success of the Convention has been marred by the decidedly unenthusiastic response by art market states. There are 200 states party to the Convention, but only a few art market states that have signed and were very slow to do so[129]. The most significant art-market countries that have joined include the United States (1983), and recently, Britain (2002) and Switzerland (2003).[130] Most members of the European Union are not signatories.[131]

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT 1995) is the second Convention attached to Schedule 2 of the POA (UNIDROIT Convention). It resulted from the reluctance of art-market states to ratify the UNESCO Convention, and was intended to "fill the gaps" left by the UNESCO Convention.[132] It concerns restitution and returns of stolen and illegally exported cultural objects and allows both private individuals and states to bring claims for the return of stolen cultural property that is present in another country.[133] It also attempts to clarify the extent to which importing nations are obliged to respect other nations' export laws. It fills the gap in the UNESCO Convention, which failed to deal with compensation and recovery effectively.[134]

The UNIDROIT Convention applies to all stolen objects and illegally exported objects. Chapter II sets out provisions relating to stolen objects, and defines a stolen object in Article 3 as an object that "has been unlawfully excavated or lawfully excavated but unlawfully retained."[135]

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[129]http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha

[130] http://portal.unesco.org/la/convention.asp?KO=13039&language=E, accessed 12/07/2011

[131] http://portal.unesco.org/la/convention.asp?KO=13039&language=E, accessed 12/07/2011

[132] Jodi Patt, "The Need to Revamp Current Domestic Protection for Cultural Property", *Notherwestern University Law Review*, 96 3 2002, 1227

[133] Theresa Papademetriou, "International Aspects of Cultural Property", *International Journal of Legal Information*, 24:3, 1996, 296

[134] *Ibid.*

[135] Article 3, UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995,

Any individual or institution can claim the return of a stolen object. To do so, the claim must be filed in a court of the country in which the object is situated.[136]

Article 7(1) states that the provisions under Chapter II do not apply if either the export of a cultural object is no longer illegal at the time of the requested return, or if the object was exported during the lifetime of the person who created it or within 50 years of their death. Article 7(2) provides an exception to this provision by allowing the Chapter II provisions to apply if the "cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community."

Chapter III of the UNIDROIT Convention sets out provisions relating to illegally exported objects. These are defined as " cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage".[137] This category of objects is separate because illegal export is seen as a crime against the state whose export laws have been breached.[138] A cultural object which has been temporarily exported under a permit issued according to the law but which has not been returned in accordance with the terms of the permit is deemed to be illegally exported.[139]

The return of an illegally exported cultural object can be requested by a contracting state, and the request made to a court of another contracting state, if the requesting state establishes that:

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http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf, accessed 12/07/2011

[136] Article 8(1) UNIDROIT Convention

[137] Article 1(b) UNIDROIT Convention

[138] Monique Olivier, "The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property", *Golden Gate Law Review*, 26:3, 2010, 633

[139] Article 5(2) UNIDROIT Convention

"the removal of the object from its territory significantly impairs one or more of the following interests:

(a) the physical preservation of the object or its context;
(b) the integrity of a complex object;
(c) the preservation of information of, for example, a scientific or historical character;
(d) the traditional or ritual use of the object by a tribal or indigenous community,

or establishes that the object is of significant cultural importance for the requesting State."[140]

In the case of cultural property exported illegally, the Convention requires the national court or authority to enforce the laws of the foreign state whose export laws were breached.[141] It is necessary for the Convention to explicitly state this, as states will normally not enforce the public or punitive laws of another state in the absence of a treaty, as this interferes with the principle that states cannot legislate outside of their own jurisdictions.[142] Article 5(3) requires that the requesting state establish the violation of its export law, and show that the loss of the object affects its physical preservation and/or its integrity and/or the preservation of information of a scientific or historical character and/or the traditional or ritual use of the object by a tribal or indigenous community.[143]

Articles 3(3) and 5(5) impose a time limit on any claims of three years from the time when the claimant knew the location of the cultural object and the identity of the possessor, and fifty years from the time of the theft.

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[140] Article 4 UNIDROIT Convention
[141] Theresa Papademetriou, "International Aspects of Cultural Property", *International Journal of Legal Information*, 24:3, 1996, 298
[142] Derek Fincham, "How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property", *Colombia Journal of Law & The Arts,* 32:1 2009, 138. However see
[143] Article 5, UNIDROIT Convention

A significant innovation of the UNIDROIT Convention was to find cooperation between common law and civil law principles on the property rights of the bona fide purchaser. Many civil law jurisdictions adhere to the principle of "possession represents title"[144] However the UNIDROIT Convention does not recognise the title of a bona fide acquisition of a stolen object, as Article 3 states that "the possessor of a cultural object which has been stolen shall return it".[145] However, as a compromise, the Convention does provide for fair and reasonable compensation to the bona fide purchaser when that purchaser has carried out due diligence in the purchase.[146] Compensation is paid by the requesting contracting State.[147]

Article 4(4) provides conditions for a purchaser to have carried out due diligence. Circumstances that should have warned the purchaser that more research into the matter was needed can be considered. While the Convention does not provide specific examples, recent cases have provided guidance such as if the time of the sale is unusual,[148] if there are indications that the object was recently excavated[149], or if the objects belong to a class of objects that should be treated with suspicion.[150] Chief Judge Bauer of the American Federal Court of Appeals has described such a situation:

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[144] Article 2279 of the French Civil Code, see Lyndel V. Prott, "Unesco and Unidropt: a Partnership against Trafficking an Cultrual Objects", *Unif. L. Rev.* 59 1996, 67
[145] Article 3, UNIDROIT Convention
[146] Article 4, UNIDROIT Convention
[147] Article 4, UNIDROIT Convention
[148] Reid v Metropolis Police Comr. [1973] 1 Q.B. 551, 551.
[149] e.g. caterpillars crawling on it (reported about the sale of the Sevso treasure), see Derek Fincham, "How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property", *Colombia Journal of Law & The Arts,* 32:1 2009, 136.
[150] For example, floods in the Jircoft region of Iran means that antiquities from the area should be treated with suspicion, as many were uncovered by the floods and looted. See Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd, [2007] EWBC (QB) 705. see Derek Fincham, "How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property", *Colombia Journal of Law & The Arts,* 32:1 2009, 136.

> *"'All the red flags are up, all the red lights are on, all the sirens are blaring'… In such cases, dealers can (and probably should) takes steps such as a formal IFAR search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like."*[151]

The provisions are self-executing. However the international response has again been less than successful. Only 32 states have ratified the UNIDROIT Convention, none of which are major art market nations. Switzerland has signed but not ratified, as has France. Furthermore, the provisions of both Conventions are not retrospective, meaning that they are not applicable to theft or illegal imports that occurred after the date of entry into force of the Conventions in both states party to the dispute.

Only 144 states are party to the UNESCO Convention, and 29 states are party to both. New Zealand and Nigeria are the only common law countries to have signed both Conventions, but Nigeria has not implemented relevant legislation as New Zealand has.

Indigenous Cultural Property Under the Conventions

There is no mention in the UNESCO Convention of indigenous or tribal cultural property. Therefore, despite having a special status in New Zealand law, taonga tūturu do not enjoy such a status under the UNESCO Convention.

There are four mentions of indigenous cultural property in the UNIDROIT Convention. The first is in the Preamble, where the states parties express deep concern of the damage caused by the illicit trade in cultural objects to "the cultural heritage of national, tribal, indigenous or other communities". The second is in Article 3(8) which provides that"

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[151] Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, 917 F.2d 278, 294 (7th Cir. 1990)

> *"a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use, shall be subject to the time limitation applicable to public collections."*

The third is in Article 5(3), discussed above, and the last is an exception to Article 7(1) in Article 7(2), also discussed above. Therefore, under the UNIDROIT Convention, taonga tūturu only enjoy a longer limitation period than other cultural objects.

Private International Law

As there are so few states party to the above Conventions, it is likely that a dispute over the title of a taonga tūturu will be determined in a foreign court, having regard to conflict of law rules. This will be the case if one or more of the states involved in the dispute are not party to the above Conventions.

When a case involving the laws of a foreign jurisdiction comes to be heard in a court, the court will apply conflict of law rules in order to determine under which law the case should be heard. Under conflict of law rules, property must first be classified as either moveable or immovable property.[152] This distinction is determined according to the *lex situs*, being the law of the place where the property is situated at the time of the transfer.[153] If the property is determined to be moveable property, the foreign court will then consider the assignment of the property according to the *lex situs*. The Court will only recognise an assignment of property as

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[152] *Drummond v Drummond* (1979) 6 Bro Parl Cas 601; *Trotter v Trotter* (1828) 4 Bli NZ 502; *Re Fitzgerald* [1904] 573 (CA). Note that this rule applies even if the domestic law of the *situs* does not classify property in this manner, i.e. classifies according to real or personal property. See *Macdonald v Macdonald* 1932 SC (HL) 79.

[153] *Drummond v Drummond* (1979) 6 Bro Parl Cas 601; *Trotter v Trotter* (1828) 4 Bli NZ 502; *Re Fitzgerald* [1904] 573 (CA)

resulting in good title if the *lex situs* would also do so.[154] If the property was stolen or if for some other reason the owner did not consent to the property being situated in the jurisdiction that it was in at the time of the transfer, this is of no consequence to the application of the *lex situs*.[155] Cultural property is not distinguished from ordinary objects under these rules.

Attorney-General of New Zealand v Ortiz

In 1978 the New Zealand government became aware of a taonga tūturu in the catalogue of the London auction house Sotheby's. The taonga tūturu was a carved door, which had been lost for hundreds of years, and was found in 1972 by "a Māori tribesman" who sold it to a British dealer. The dealer imported the door illegally to London and sold it to George Ortiz. Ortiz purchased the door knowing that it was exported without permission, but with an assurance from the dealer that he held valid title. In *Attorney-General v Ortiz*, the New Zealand government requested the return of this door and claimed ownership of it.[156]

As The United Kingdom was not party to the UNESCO or UNIDROIT Conventions, the House of Lords looked to conflict of law rules in order to decide what law to apply. The *lex situs* was the New Zealand Historic Articles Act 1962. The Court considered whether the *lex situs* gave the New Zealand government ownership of the door, and also whether the provisions of this Act were foreign penal, revenue and/or public laws and therefore unenforceable in England.[157]

Section 12 of the Historic Articles Act 1962 stated that an article knowingly exported in breach of the Act "shall be forfeited to Her Majesty". Lord Denning MR held that this did not mean there was an automatic

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[154] *Castrique v Imrie* (1870) LR 4 HL 414 at 429; *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496
[155] *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496
[156] *Attorney-General of New Zealand v Ortiz* [1984] A. C. 1
[157] *Attorney-General of New Zealand v Ortiz* [1984] A. C. 1, 15.

forfeiture, and that the forfeiture would only take place once the goods are seized.[158] He explained that were this to be interpreted as resulting in an automatic forfeiture upon illegal export, it would breach an important rule of international law:

> *"no country can legislate so as to affect the rights of property when that property is situated beyond the limits of its own territory. It is a direct infringement of the territorial theory of sovereignty."*[159]

Lord Denning MR was unwilling to assume that New Zealand would breach international law by legislating beyond its jurisdiction in this manner, and therefore interpreted the section to mean that an illegally exported object was liable to forfeiture.[160]

However, even supposing that it did provide for automatic forfeiture, Lord Denning MR held that the English courts would be unable to enforce the law. The courts cannot enforce the penal, revenue or public laws of another state as this would be enforcing the sovereign authority of another government.[161] A law providing for automatic forfeiture would be classed as a public law, and such a law cannot be enforced outside a state's own territory.[162]

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[158] *Ibid,* 17.
[159] *Ibid,* 19.
[160] *Ibid,* 19.
[161] *Ibid,* 20.
[162] *Ibid,* 24.

CHAPTER FOUR: ANALYSIS OF THE LEGAL PROTECTION OF MĀORI CULTURAL PROPERTY OUTSIDE OF NEW ZEALAND

> *"How can nations or cultural communities tell the story of their own heritage for their own people when some of the essential aspects of that narrative are in the possession of others?*
>
> Jack Lohman, "Repatriation in the Service of Society and its Development", *UTIMUT: past heritage – future partnerships, discussions on repatriation in the 21st century,* International Work Group for Indigenous Affairs 2008, 28.

Since colonisation, most alienated Māori cultural property has disappeared over time into the international art-market and overseas private collections. Therefore, this is where effective legal protection is most crucial. Unfortunately, the existing legal protection ignores that indigenous cultural property has a different status from cultural property in general, and therefore fails to protect it effectively. This Chapter assesses the efficacy of the legal protections outlined in Chapter three, and makes suggestions for improvements in all three of those components. It suggests that the English courts have changed their approach to cultural property disputes since *Ortiz*, and argues that the amendments to the POA would result in a favourable outcome for New Zealand were a case like *Ortiz* to be litigated again. It subsequently recommends that the New Zealand government reassess its repatriation policies, and test the new law by requesting repatriation of a taonga tūturu. It proposes the creation of a new convention for indigenous cultural property. Finally it criticises the approach taken by private international law to multijurisdictional cultural property disputes and suggests a new approach.

The Protected Objects Act 1975

The New Zealand government has shown awareness of the bleak international situation for Māori cultural property, and has reacted appropriately in its legislative amendments to the POA. There are few actions the New Zealand government can take to protect Māori cultural property in the international sphere, and the actions taken so far are nearing the limit of the government's ability to influence this area.

The export provisions of the POA were significantly amended in 2006 in order to comply with New Zealand's international obligations under the UNESCO and UNIDROIT Conventions.[163] This has resulted in private New Zealanders having the ability to request the return of stolen taonga tūturu from another state party to the UNIDROIT Convention, without the aid or acquiescence of the New Zealand government, which is positive for Māori.

The increase in penalties for attempted or actual illegal export has also been a positive change. The penalties of the previous provisions were too low to provide an effective deterrent, and were therefore increased to the level of those provided for by the Trade in Endangered Species Act.[164]

The concept of prima facie ownership of taonga tuturu by the Crown was incorporated through the 2006 amendments to the POA. The term 'prima facie ownership' is regarded by the government, as expressed by Hon Mahara Okeroa during the Second Reading of the Bill, only as "a legal mechanism to ensure that taonga are handled appropriately until custody or ownership can be awarded".[165] Despite the protestations of some Māori claimants to the Waitangi Tribunal, this is a necessary safeguard for taonga tūturu, as demonstrated by the outcome of *Ortiz.* In that case, the court refused to recognise the New Zealand government's ownership of the

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[163] Hon Judith Tizard, Assosiate Minister for Arts, Cultural and Heritage, First Reading, 5/04/2005, 19616
[164] *Ibid.*
[165] Hon Mahara Okeroa 2/08/2006 633 NZPD 2963.

carved door because it was not clear under the legislation. The amendments attempt to make this clear.

A New English Approach

The amendments were also necessary to solve the problems in the previous legislation that were exposed by *Ortiz*. However, it seems that a new approach to such cases may be emerging in the English courts.

In *Iran v Barakat Galleries*[166], eighteen carved items of pottery, uncovered in what Iran claimed were unlawful excavations, were at issue. Barakat Galleries had possession of these items in London and claimed they were purchased in France, Germany and Switzerland under laws that gave good title. The court considered, as in *Ortiz*, first whether Iran had gained ownership of the object under Iranian law, and secondly whether the court could enforce that law. The Court answered both issues in favour of Iran. The Court of Appeal noted that this case "raises questions which were left unsettled" by *Ortiz* and that since that case, the United Kingdom had ratified the UNESCO Convention of 1970.[167]

While the lower court held that Iran did not have title to the objects and in any case refused to enforce Iranian law as it was public in character (citing *Ortiz*), the Court of Appeal noted:

> *"it is important to bear in mind that it is not the label which foreign law gives to the legal relationship, but its substance, which is relevant. If the rights given by Iranian law are equivalent to ownership in English law, then English law would treat that as ownership for the purposes of the conflict of laws."*[168]

The Court of Appeal agreed with Lord Denning MR in *Ortiz*, that public and penal laws of another state should not be enforced in the English

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[166] Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd., [2007] EWHC (QB) 705
[167] *Ibid,* 3.
[168] Ibid, 80.

courts. Export restrictions of a state may belong to this category.[169] However the court also emphasised that it was not enforcing a public law of export restrictions, but protecting the ownership rights of the state, which should be treated as any other private owner.

> *"when a state owns property in the same way as a private citizen there is no impediment to recovery*".[170]

The Court of Appeal then held that as Iranian law provided for the seizure of all illegally excavated objects by the government, the antiquities became the property of the Iranian government as soon as they were found.[171] The Court held that this founds a cause of action under English law, as an owner with an immediate right to possession to a chattel has the right to sue for conversion.[172] Therefore, this case was distinguished from *Ortiz* on the basis that Iran had immediate possession, rather than New Zealand's provision, which merely rendered the object subject to forfeit.

Nevertheless, this judgement seems to be completely at odds with the House of Lord's judgment in *Ortiz*, which emphasized the illegality at international law when states attempt to enforce their own public laws outside of their jurisdictions. In *Barakat*, the Iranian legislation is almost the same as New Zealand's legislation in *Ortiz*, yet the Court came to the opposite result.

It is also of significance that the Court of Appeal noted that the items formed part of the national heritage of Iran, a consideration that was not mentioned in *Ortiz*. The Court stated that "there is an international recognition that states should assist one another to prevent the unlawful removal of cultural objects including antiquities".[173]

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[169] *Ibid,* 128.
[170] *Ibid,* 136, citing *King of Italy v de Medici* (1918) 34 TLR 623.
[171] *Ibid,* 80.
[172] *Ibid,* 86.
[173] *Ibid,* 155.

The New Zealand government has reacted appropriately to the result in *Oritz* by providing for clear prima facie Crown ownership when taonga tūturu are found. The next step for the government is to make another request for the return of a taonga tūturu to test whether this is equivalent to ownership at English law, as in *Barakat*. The result is likely to be positive, especially considering England's ratification of the UNESCO Convention. Such a test case by the New Zealand government would set a positive precedent for the repatriation of taonga tūturu, a long overlooked issue.

Repatriation Policy

While the legislative amendments to the POA have provided more effective protection and represent the limit of the government's ability to protect Māori cultural property outside of New Zealand through legislation, there is scope for the government to improve its policy in this area. The *Ko Aotearoa Tēnei* report has suggested that the government adopt a policy for repatriation of taonga tūturu. However the Tribunal warns that any such policy must not interfere with "the delicate negotiations for the repatriation of kōiwi tangata".[174] Ngāti Porou objected to this governmental focus on kōiwi tangata because the iwi has few kōiwi tangata overseas, but many taonga tūturu. While Te Papa has a government funded repatriation scheme for kōiwi tangata, which is carried out by its Repatriation Advisory Panel,[175] there is no such scheme in place for the repatriation of taonga tūturu.

Such a high importance placed on kōiwi tangata shows the government places a much greater priority on them compared to taonga tūturu, which should be reviewed. The current policy is disadvantaging iwi in the position of Ngāti Porou. Those taonga tūturu that fall through the cracks of the international conventions (as discussed below) are realistically only

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[174] *Ibid,* 497.
[175] http://www.tepapa.govt.nz/AboutUs/Repatriation/pages/overview.aspx

recoverable through government-to-government negotiations. Thus the government should fund a similar repatriation scheme through Te Papa, which could work alongside the current Repatriation Advisory Panel so as not to disrupt any current negotiations. This group could be responsible for carrying out a test repatriation case, as mentioned above.

The effectiveness of the UNESCO Convention

A positive aspect of the UNESCO Convention from the point of view of protecting taonga tūturu, is that it addresses the issues surrounding cultural property from a cultural nationalism perspective.[176] This means that the Convention assumes that cultural objects should be situated in the country in which they were created, or their source country.[177] This is a positive assumption for indigenous people who are trying to recover cultural objects taken during colonisation.

However, this perspective has been widely criticised, most notably by the Bizgot Group's Declaration on the Importance and Value of Universal Museums 2002, which was the first meeting of the word's leading museums.[178] The Declaration acknowledges that illegal traffic in art should be discouraged, but also states that objects acquired in the past should be viewed from the perspective of the time period during which they were acquired, which suggests that repatriation is not viewed favorably by this influential group.[179]

Because the UNIDROIT Convention was created in order to address the deficiencies of the UNESCO Convention, it is clear that the latter has

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[176] See the Preamble of the Convention which states that cultural property is a basic element of national culture. The opposite point of view is cultural internationalism, which assumes that cultural property should be spread around the world's museums for everyone to study and enjoy. This is the view most often held by museums and antiquities dealers.
[177] Christine Knox, "They've Lost Their Marbles: 2002 Universal Museums' Declaration, the Elgin Marbles and the Future of the Repatriation Movement", *Suffolk Transnational Law Review,* 29:2 2006, 323.
[178] *Ibid,* 325.
[179] *Ibid.* 323.

numerous shortcomings.[180] It has not effectively protected the cultural property of contracting states due to its being "weak and without the teeth to prevent the illegal trade or punish those who engage in it."[181]

The most notable shortcoming for the effective protection of taonga tūturu is found in Article 7. Article 7 states that the Convention only protects publically owned cultural property, illegally exported archaeological and ethnographic objects or those taken from museums or churches, and that a state must make the request for return. This narrow scope means that only certain objects are protected, and that private individuals have no claim under the provisions. Accordingly indigenous peoples must have the state claim the artefacts on their behalf.

Indigenous peoples generally do not hold sufficient political power or influence to persuade a government to prioritise and make such a claim.[182] If the state does indeed make such a claim for the return of an indigenous cultural object, it often results in the government's control of the object.[183] Furthermore, when indigenous peoples are represented in such a manner by another group, this perpetuates the notion that indigenous peoples are victims and unable to protect and speak for their own rights, or determine their own interests.[184] In the situation of the UNESCO Convention's provisions, indigenous peoples are in this position by default, as they are restricted by the framework from representing their own interests.

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180 Jodi Patt, "The Need to Revamp Current Domestic Protection for Cultural Property", *Northerwestern University Law Review*, 96 3 2002, 1228

[181] Nina R. Lenzner, "The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention provide an effective remedy for the shortcomings of the UNESCO convention?", *University of Pennsylvania Journal of International Business Law*, 15, 1994, 478

[182] Kimberly Alderman, "Ethical Issues in Cultrual Property Law Pertaining to Indigenous Peoples", *Idaho Law Review,* 45, 2009, 18.

[183] *Ibid.*

[184] *Ibid,*19.

Moreover, the lack of any mention of indigenous cultural property fails to recognise the special legal status required to effectively protect taonga tūturu.

The Effectiveness of the UNIDROIT Convention

The UNIDROIT Convention is an improvement on the UNESCO Convention in that it acknowledges that indigenous cultural property needs to have a separate status. Yet its provisions do not effectively protect taonga tūturu at international law.

Fincham has identified three main benefits of the UNIDROIT Convention for the protection of cultural property in general.[185] The first benefit is that the diligent good faith purchaser will be given compensation under Article 4(1). This provision encourages purchasers to research the provenance of the object before they make the sale, and effectively punishes those who do not as they will not receive compensation.[186] Thus, it is less likely that purchasers will buy items with an unclear provenance.

The second key benefit is the Convention's emphasis on the due diligence of purchasers.[187] The conditions for an enquiry to be duly diligent are laid out in Article 4(4). The provision allows consideration of circumstances that should have warned the purchaser that more research was needed. For example, if the sale takes place in a strange location, if the time of the sale is unusual, or if there are indications that the object was recently excavated.[188]

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[185] Derek Fincham, "How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property", *Colombia Journal of Law & The Arts,* 32:1 2009, 1135.
[186] *Ibid.*
[187] *Ibid,* 136.
[188] *Ibid,* citing Reid v Metropolis Police Comr. [1973] 1 Q.B. 551, 551, Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd, [2007] EWBC (QB) 705.

The third main benefit is the limited right of return.[189] A state will only be required to enforce the public law of another state if this serves the purpose of preventing damage to the interests listed in Article 5(3). Under this list, "the traditional or ritual use of an object" is considered important when requesting the return of an object, which will be relevant for many taonga tūturu.

However, the Convention also has many deficiencies. Article 18 prohibits reservations, which is thought to be a reason for the low number of signatory states.[190] While Article 5(3) limits the right of return of objects, Article 3(2) seems to work against this by requiring states party to recognise foreign ownership declarations.[191] This Article seems to encompass many situations where it would not be desirable to enforce foreign declarations, such as when a state has allowed the export of an object which has been purchased in good faith, but is then subject to an ownership declaration by that state.[192]

Another significant limitation of the Convention is that it only applies prospectively. This means that it does not offer protection to objects that were stolen or illegally exported prior to the state's ratification of UNIDROIT in both countries related to the dispute.[193] This severely limits its application, especially in the case of taonga tūturu, most of which were illegally exported or stolen long before New Zealand's ratification of the Convention. This is most often the case with indigenous cultural property; as such objects were mostly illegally imported during colonisation. Therefore, the effect of New Zealand's ratification of the UNIDROIT Convention could be compared to the old adage of shutting the barn door after the horses have fled.

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[189] *Ibid*, 138.
[190] *Ibid,* 139.
[191] *Ibid.*
[192] *Ibid,* 140.
[193] Jodi Patt, "The Need to Revamp Current Domestic Protection for Cultural Property", *Notherwestern University Law Review*, 96 3 2002, 1233

Therefore, Māori have no ability to request the return of any taonga tūturu stolen or illegally exported before 2006 under the Convention. If any taonga tūturu are stolen or illegally exported after 2006, there is a means for Māori to request their return, but only if they are situated in another contracting state, which is highly unlikely as most art-market states are not signatories. Therefore, its overall protection of taonga tūturu in the international sphere is negligible.

A New International Convention for Indigenous Cultural Property

Because of the shortcomings of both conventions on cultural property in the area of indigenous cultural property, and their failure to recognise the special status needed for such objects in order to effectively protect them in the international sphere, I propose that a separate international convention be created to address this problem.

There should be a separation between requests for repatriation on the grounds of a "living tradition", and other requests.[194] For example, the Rongowhakaata iwi have negotiated the return of their meeting house for its use in still living cultural traditions.[195] This is clearly distinguishable from situations like many in Italy where the Italian government requests the return of Roman artefacts from foreign institutions. In the latter situation, the artefacts are going from one museum to another, whereas in the former, the meeting house is going from a museum back to the people who created it and will be used for the cultural purpose for which it was made. The clear difference in these two situations suggests that indigenous cultural property be given a distinct status at international law though a separate convention.

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[194] Jack Lohman, "Repatriation in the Service of Society and its Development", *UTIMUT: past heritage – future partnerships, discussions on repatriation in the 21st century, International Work Group for Indigenous Affairs,* 2008, 28.
[195] http://rongowhakaata.com/culture/te-hau-ki-turanga/whare-whakairo-history

Developed nations have filled their museums with the cultural property of often colonised and oppressed indigenous peoples.[196] This has left indigenous peoples culturally poorer, especially considering their damaged sense of identity.[197] Even if indigenous peoples do not have a distinct legal claim on their cultural objects, they certainly have an ethical claim; as such objects are essential to cultural identity.[198] As Alderman states:

> *"There is pride, virtue and confidence for indigenous people when caring for such objects… taking away archaeological remains damages the collective psyche of a creator culture, and steals part of their identity".*[199]

The recent United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) protects, in Article 12, the right of indigenous peoples to "maintain, protect and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains".[200] When cultural objects are not in the possession of the indigenous peoples who created them, this right is denied. While not legally binding, the Declaration does represent a commitment on some level by United Nations member states to recognise the rights represented in the Declaration.[201]

The statement that indigenous peoples are unable to effectively care for or study their own cultural objects is a myth perpetuated by groups who have

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[196] Jack Lohman, "Repatriation in the Service of Society and its Development", *UTIMUT: past heritage – future partnerships, discussions on repatriation in the 21st century, International Work Group for Indigenous Affairs,* 2008, 26.

[197] *Ibid.*

[198] Kimberly Alderman, "Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples", *Idaho Law Review,* 45, 2009, 9.

[199] *Ibid*, 10.

[200] UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) *available at* http://www.un.org.esa/socdev/unpfil/en/declaration.html.

[201] Kimberly Alderman, "Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples", *Idaho Law Review,* 45, 2009, 10.

an interest in doing so.[202] Archaeologists, museums, collectors and dealers all benefit from the promulgation of this idea, as it keeps such objects in their hands.[203] An example from New Zealand demonstrates the lack of truth in this statement. The Mātaatua meeting house, confiscated from the Ngāti Awa people, was subject to significant damage by the various museums that assembled and disassembled it. It was only once the meeting house was returned to the iwi that it was restored and given a safe home.[204] The lobbying and influence of these interested groups results in international and national laws overlooking the needs of indigenous peoples in the cultural property debate.[205] A specific convention would go some way to stop this from occurring.

Furthermore, a specific Convention is necessary because the indigenous cultures whose culture is being damaged by the loss of cultural objects, often do not have the means or political influence to request repatriation.[206] They may be at an economic and political disadvantage in their state, and may be underrepresented politically.[207] They will often be a minority group.[208] Moreover, many nations do not recognise a distinction between the nation and the indigenous peoples within the nation. This often results in any repatriated objects being housed in a national museum, rather than being returned to the creator culture.[209]

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[202] *Ibid,* , 18.
[203] *Ibid,* 10.
A subject of much scholarly debate is whether museums should be subject to particular ethical rules, and what any such rules would require.
[204] Hirini Moko Mead, address at the opening of the Mataatua meeting house, 17/10/2011, http://www.ngatiawa.iwi.nz/cms/CMSFiles/file/Wharenui/Mataatua%20opening%20speech%20web.pdf
[205] Kimberly Alderman, "Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples", *Idaho Law Review,* 45, 2009, 10.
[206] *Ibid,*13.
[207] *Ibid,* 10.
[208] Kimberly Alderman, "Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples", *Idaho Law Review,* 45, 2009, 10.
[209] *Ibid.*

Such a convention would be similar to the UNIDROIT Convention, with several key differences. First, it should have retrospective effect, and apply to all indigenous cultural property that was not wilfully and legally alienated from the indigenous creator group at any time. As indigenous cultural property is often regarded by the culture as owned by the group, wilful alienation should mean that those who are authorised to speak for the group have acquiesced, or the entire group has acquiesced. The onus should be on the possessor to prove this. The due diligence and compensation clauses of the UNIDROIT Convention should be inserted to encourage purchasers to investigate the provenance of indigenous cultural property they intend to purchase. Compensation would be paid by the state where the indigenous culture is resident. The indigenous culture should have standing to request the return of their cultural property without any involvement of the state, and would be given full possession. The Convention should also require the state to fund such requests from its indigenous peoples. Finally, there should be no limitation period for such requests, to compensate for the often politically and economically marginal situation of many indigenous peoples as the result of colonisation.

Even if there is a new convention, its practical effect may be limited by the refusal of art-market states to ratify, as they have done with the previous conventions. Therefore, in many disputes, private international law would still be applied.

The Application of the lex situs when Determining Title to Māori Cultural Property

Until more states ratify the UNESCO and UNIDROIT Conventions, the application of the *lex situs* will remain the primary method for courts to resolve multijurisdictional disputes over ownership of taonga tūturu. There are many problems with this approach which make it an inappropriate system for determining title to taonga tūturu and other cultural property.

The application of different domestic laws to multijurisdictional disputes is undesirable as different states further different policy interests through their laws.[210] This means that there is no overarching policy that applies to all such disputes, and the results can often be unpredictable.[211]

Further, when courts apply conflict of law rules and apply the *lex situs* to cultural property disputes, this means that disputes over taonga tūturu are decided in the same manner as disputes over any kind of moveable property. This is extremely undesirable as many special considerations come into play with taonga tūturu which are likely to be ignored by the court.

The *Winkworth* case demonstrates the disadvantages of applying the *lex situs.*[212] Here, an artwork was stolen from its owner and smuggled into a European country where the thief sold it to a good faith purchaser. The purchaser then went on the sell the artwork through the auction house Christie's. The original owner sought to recover the artwork, but had no claim as the *lex situs* favoured the good faith purchaser. This is clearly an undesirable result if applied to a stolen taonga tūturu, as the iwi's spiritual and ancestral claims on the taonga tūturu would be ignored.

While application of the *lex situs* by foreign courts does provide simplicity and certainty to property disputes, it is inappropriate in the case of cultural property.[213] Although there has been little scholarly criticism over this system, it is clearly much more desirable in the case of taonga tūturu and other indigenous cultural property that the laws of the state with the closest connection to the object (*lex originis*) should govern the dispute.[214]

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[210] Derek Fincham, "How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property", *Colombia Journal of Law & The Arts,* 32:1 2009, 111.
[211] *Ibid.*
[212] *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496
[213] Derek Fincham, "How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property", *Colombia Journal of Law & The Arts,* 32:1 2009, 113.
[214] *Ibid,* 115.

This would prevent the smuggling of an object out of a country in order to escape the laws of that country.[215]

[215] *Ibid,* 116.

CONCLUSION

The New Zealand government's amendments to the POA have gone some way to curb the flow of cultural property out of New Zealand, and facilitate the determination of ownership of taonga tūturu. However considering that the New Zealand parliament has addressed this issue periodically since 1901, these latest efforts are indeed too little too late.[216] The illicit trade in cultural property and art is the second most profitable illegal trafficking industry in the world, second only to that of narcotics.[217] This is primarily because the national and international legal protections of such property are so ineffective. Furthermore, the collections of private owners are rarely subject to repatriation claims, and the often vague evidence around the acquisition of the items by such collectors discourages claims.[218] To protect the Māori cultural property caught up in this trade, and to facilitate its return to iwi, New Zealand must encourage the international community to overhaul the law in this area and come to a workable agreement. Moreover, the government must recognise the spiritual and ancestral connection Māori have to their taonga, and commit to its repatriation through policy initiatives.

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[216] Davies, Piers and Myburgh, Paul, "The Protected Objects Act in New Zealand: Too Little, Too Late?", *International Journal of Cultural Property* 15:321, 2008.
[217] Fox, Claudia, "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property", *American Universities Journal of International Law and Policy*, 9, 1993, 26.
[218] Robert K. Paterson, "Claiming Possession of the Material Cultural Property of Indigenous Peoples", *Connecticut Journal of International Law*, 16, 2001.

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