CONTEMPORARY ISSUES IN MĀORI LAW AND SOCIETY: MANA MOTUHAKE, MANA WHENUA

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Te Arikinui, Dame Te Atairangikaahu passed away on 15 August 2006 and thousands came to mourn her with eulogies beautifully articulating those attributes that saw her become beloved across cultures. During her reign as Māori Queen,[1] Te Arikinui headed the Kīngitanga, the King Movement, which had emerged from calls for tribes to unite as Māori in order to resist land alienation in the nineteenth century. Te Arikinui's passing is a defining moment in the history of this country and has inspired this review of recent developments in Māori law and society that have occurred during the course of the year to be in the context of two founding principles of the King Movement: *mana motuhake* and *mana whenua*. Mana motuhake encompasses the authority of distinctive and dynamic tribal groups to make their own choices and determine their own destiny. Mana whenua encompasses tribal authority exercised over land and signals the importance of land retention. The review begins with a background of the King Movement to provide some context for a discussion of current developments in Treaty of Waitangi claims processes. Aspirations of mana motuhake are evident in the midst of settlement negotiations concerning the Waikato River, and Ngā Kaihautū o Te Arawa, and figure in a recent Waitangi Tribunal report concerning Te Wānanga o Aotearoa. Issues about Māori governance have become prominent recently, and the review ends by considering the Law Commission's proposed Waka Umanga legislation that would standardise Māori governance entities and which might be viewed as posing a threat to mana motuhake. As regards mana whenua, the impacts of early native land laws designed to effect land alienation combined with vigorous Crown land purchasing policies are still evident in the provisions of Te Ture Whenua Māori Act 1993 aimed at land retention, and the application of some those provisions in recent Māori Land Court judgments are summarized in the latter part of this review. The effects of those early laws and purchase policies are also a particular feature of the long-awaited Waitangi Tribunal report on the Hauraki claims, also reviewed here.

I. TE KĪNGITANGA – THE KING MOVEMENT

The Kīngitanga began in the 1850s, some years after the arrival of Europeans, and largely as a unified response by a number of tribes to the upsurge of unauthorised land sales.[2] It was also designed to bring an end to intertribal warfare, and to achieve mana motuhake, or separate authority.[3] While the movement enjoyed the support of many tribes, it became centred in the Waikato region in the central North Island. Tribes from all over the country, including the South Island, had

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1 The term *Te Arikinui* means The Great Chief, though the term bestowed upon Dame Te Atairangikaahu at her coronation was *Kuini* or Queen.

2 See M King, *The Penguin History of New Zealand* (2003) chapter 15 for historical accounts of the King Movement.

3 D McCan, *Whatiwhatihoe: The Waikato Raupatu Claim* (2000) 32.

debated who should be offered the kingship, and those debates resulted in the reluctant agreement of Waikato chief, Pōtatau Te Wherowhero, who was raised up as King in 1858. Pōtatau was soon succeeded by his son, Tāwhiao and it was during Tāwhiao's term as King that the settler Government, seeing the Kīngitanga as a threat to its stability, sent its forces across the Mangatawhiri River in July 1863, labeling the Waikato people as rebels and subsequently confiscating Waikato lands and driving people away from their villages alongside their ancestral river.[4] Tāwhiao's people were embattled, weak and destitute, when he declared:

> Mākū anā hei hanga i tōku nei whare,
> Ko ngā pou o roto he māhoe, he patatē, ko te tāhuhu he hīnau.
> Ngā tamariki o roto me whakatupu ki te hua o te rengarenga,
> me whakapakari ki te hua o te kawariki.
>
> I shall fashion my own house,
> The poles within will be made of mahoe and patatē,
> and the ridge pole made of hīnau.
> The children within will be raised on the fruit of the rengarenga
> and strengthened on the fruit of the kawariki.

Tāwhiao is remembered for such visionary prophecies and this particular saying expresses leadership, responsibility and resourcefulness. The three specific trees that Tāwhiao would use to fashion his 'house' were not traditionally used to build houses. The two plants referred to were not commonly used as food. One could gather from this that, regardless of the humble resources available to him, Tāwhiao assumed responsibility for providing shelter and sustenance for his house of followers.[5] Issues about governance are addressed under separate headings below, and one could also interpret Tāwhiao's prophecy more broadly as a governance strategy that aligns with mana motuhake; that Māori affirm and draw upon their own unique knowledge base, leadership practices, and resourcefulness, to bring about their own future prosperity.[6]

A. Te Paki o Matariki – A Coat of Arms Prophesying Peace and Calm and Asserting Mana Motuhake

Symbols of the Kīngitanga demonstrate how Waikato has adopted traditions from other cultures whilst holding fast to concepts of tribal sovereignty. The King Movement itself, for example, is fashioned upon the English monarchy. Tāwhiao also imagined that his ambitions for his people could be reflected in a coat of arms and he commissioned one in 1870. It is known as *Te Paki o Matariki* – the widespread calm of Pleiades. The Matariki constellation rises just after the midwinter solstice – the time when Māori celebrate the dawning of the New Year and the coming of fine weather. In the context of the land wars and the confiscation that occurred during Tāwhiao's reign, by naming his coat of arms *Te Paki o Matariki,* he prophesied that peace and calm would return to Waikato and Aotearoa/New Zealand. There are many significant features of the coat of arms such as, for example, the presence of the Christian cross. Another is the inscription of words at the bottom – *Ko Te Mana Motuhake*.[7]

4 By Orders in Council under the New Zealand Settlements Act 1893, the Crown unjustly confiscated approximately 1.2 million acres of land from Tainui iwi.

5 P Papa and L Te Aho (eds), *He Kete Waiata A Basket of Songs* (2004) 76.

6 Amohaere Houkamau, Presentation to Waikato University Māori Land Law Class, August 2006 'Perspectives of Governance and Leadership (Past, Present and Future)'.

7 See C Kirkwood, *Tawhiao: King or Prophet* (2000) 110.

B. The Waikato Raupatu Settlement

The confiscation of lands in the Waikato became known as *raupatu*, land taken at the blade of a weapon, and became a notable feature of King Tāwhiao's reign. The settlement of major grievances that arose principally from those confiscations became a notable feature of the reign of Te Arikinui, Dame Te Atairangikaahu, as Māori Queen. The combined efforts of generations of leaders over many years seeking redress from the Crown culminated in the Waikato Raupatu Claims Settlement Act 1995. The Act incorporates an apology by the Crown to Waikato for the Crown's breach of the Treaty of Waitangi in its dealings with the Kīngitanga and Waikato. The settlement that ensued from direct negotiation with the Crown is said by some to represent a mere two per cent of the value of lands confiscated. Any more would have been unacceptable to non-Māori and the Government's imposition of an unofficial fiscal cap upon Treaty settlements in the nation's best interests overrode the entitlements of tangata whenua.[8] Making the best of a bad deal, Tainui Group Holdings Ltd, a limited liability company formed in 1998 to manage the commercial assets of the Waikato-Tainui people,[9] has recently announced a record net operating profit of $17.8 million for the year ended 31 March 2006, an increase of 43 per cent from the previous year, and representing a doubling of the initial value of the settlement from $170 million to $340 million. Distributions to its shareholder, the Waikato Raupatu Lands Trust, increased to $10.6 million from $7.4 million in 2005.[10] Many other iwi have watched the Waikato-Tainui experience closely and have followed its lead in submitting to the Crown's settlement agenda. The settlement process divided the people of Waikato on the issue of whether to accept what was viewed by many as a miserable offer by the Crown. As will be seen below, whether conducted through the Waitangi Tribunal, or via direct negotiations with the Crown, there is little, if any, room for any real 'negotiation' in these Treaty claims settlement processes, and they continue to erode the ability of iwi to exercise mana motuhake.

II. Treaty of Waitangi Claims Processes

A. Waitangi Tribunal

Waikato chose to progress its raupatu settlement with the Crown by way of direct negotiations rather than via the Waitangi Tribunal. Under the Tribunal process, any Māori person who claims to be prejudicially affected by the actions, policies or omissions of the Crown in breach of the Treaty of Waitangi may make a claim to the Waitangi Tribunal.[11] Contemporary claims such as those that relate to Te Wānanga o Aotearoa[12] arise as a result of alleged contemporary breaches of

8 A Mikaere, 'Settlement of Treaty Claims: Full and Final or Fatally Flawed?' (1997) 17 NZULR 425.

9 Tainui is the name of the waka (canoe) that travelled to Aotearoa from Hawaiki. Tribal confederations that affiliate to the Tainui waka are Waikato, Maniapoto, Raukawa, and Hauraki. The raupatu settlement centred around Waikato but affected all of these tribal groups. Also, while the governance structure that facilitated the raupatu settlement, the Tainui Maori Trust Board, contained representatives mainly from Waikato, it was also representative of certain hapū from Raukawa and Maniapoto in particular who are named beneficiaries of the Waikato Raupatu Lands Trust – hence the reference to Waikato-Tainui.

10 Available <www.tgh.co.nz>, accessed 21 September 2006.

11 Treaty of Waitangi Act 1975 s 6.

12 The recent Waitangi Tribunal Report concerning Te Wānanga o Aotearoa is referred to in section G below.

the Treaty,[13] while historical claims relate to Treaty breaches dating back to 6 February 1840, and focus primarily on the loss of ancestral lands via Crown purchases, land confiscation, early Native Land Court transactions, public works takings, and land consolidation and development schemes. Historical claims require claimants, most commonly through oral histories, to convey to the Waitangi Tribunal how they established their interests in a particular area, and how those interests were maintained. Claimants must also demonstrate that they suffered harmful consequences as a result of a Treaty breach by the Crown. Evidence such as this, together with the various research reports presented in relation to a claim, is gathered over a number of years.[14] Based on this information the Waitangi Tribunal decides whether, on the balance of probabilities, that claim is well founded and reports its findings.[15] The Tribunal cannot resolve or settle claims – it can only make recommendations. The Crown is not generally bound to follow those recommendations, and to date, the Crown has not implemented many of the Tribunal's recommendations made in favour of claimants.

B. Direct Negotiations

Where a claimant group lodges a claim with the Tribunal and is able to satisfy the Crown that it is the correct claimant group to make a claim, the Crown may agree to negotiate directly with the claimants to achieve settlement.[16] The major advantage of direct negotiations is that it is usually a speedier and less expensive process for claimants. According to the Chief Negotiator for Te Atiawa:

> Knowing what I know now about the Tribunal process, I'd cut that out and get into direct negotiations. There is benefit in going through the Tribunal but you've got to make a decision on whether that benefit outweighs the loss of asset, and if you can get your asset quicker and make money off it, it probably outweighs the value of taking the time to go through the Tribunal.[17]

The direct negotiations process has, however, a number of serious shortcomings. The Crown's marked advantage in terms of bargaining power means that it unilaterally decides the conditions of negotiation, and claimants are expected to negotiate within those conditions if they want their claim resolved.

> Well in our experience the whole notion of negotiation itself requires to be looked at. Very often, there is no negotiation, but rather there is a statement that this is the Crown's policy, and this is what you have to live with.[18]

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13 Contemporary claims are those that relate to Crown acts or omissions occurring on or after 21 September 1992. This arbitrary date reflects the date on which the former National Government confirmed its general policy for settling Treaty of Waitangi claims. Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (2nd ed, 2002) 7.

14 For example, the Hauraki claims discussed below were first lodged in 1988, the first Tribunal hearing was held in 1998 and the resultant report was issued in 2006.

15 Treaty of Waitangi Act 1975, s 13. See also G Melvin, *The Claims Process of the Waitangi Tribunal: Information for Claimants* (2000); and Waitangi Tribunal Practice Note, *Guide to Practice and Procedure of the Waitangi Tribunal* (2000).

16 If either party prefers not to negotiate, or the negotiations fail, claimants may still apply to the Tribunal for a hearing.

17 Crown Forestry Rental Trust, *Māori Experiences of the Direct Negotiations Process* (2003) para 1.4.

18 Ibid, at para 1.3 per Professor Hirini Mead, chief negotiator for Ngāti Awa; see also para 5.5, per Greg White, chief negotiator for Ngāti Tama; and para 1.4 per Peter Adds on behalf of Te Atiawa for similar statements about the notion of negotiation.

One such condition of negotiation that has caused particular unrest within Māoridom is the Crown's preference to settle with 'large natural groupings' or clusters of hapū and iwi. This policy forces Māori into clusters rather than allowing Māori to choose suitable alliances for themselves.[19] Other disadvantages when compared with the Tribunal process are that anonymous Government officials rather than independent Tribunal officers make decisions about settlement, and claimants can be denied the opportunity to air the grievances that they have carried for many years.[20] Unofficially, the Crown has also set a limit on the overall amount it is willing to spend on settling Treaty claims (the 'fiscal envelope') and early settlements such as the Waikato Raupatu and Ngāi Tahu settlements serve as benchmarks.[21] Both claims were initially thought (by the claimants at least) to be worth billions of dollars, and both settlements were for approximately $170 million, these experiences illustrating that claimants must be prepared to compromise considerably. Yet despite such significant shortcomings of the direct negotiations process, a number of claimant groups have resolved to negotiate directly with the Crown to settle their historical claims.[22]

C. Ngā Kaihautū o Te Arawa

One such claimant group consists of a number of hapū and iwi of Te Arawa[23] that decided to pursue direct negotiations to settle their historical Treaty of Waitangi claims. The cluster of hapū and iwi has become known as Ngā Kaihautū o Te Arawa (Ngā Kaihautū). Formerly, Ngā Kaihautū had been part of the so-called VIP project – a project initiated by prominent tribal figures in the volcanic interior plateau of the central North Island to advance the settlement of Treaty claims relating to the substantial amount of forestry land in the district. The Minister in Charge of Treaty of Waitangi Negotiations sought to progress the VIP claim as part of a more comprehensive settlement project with the tribes of the central North Island, subject to mandate. The original VIP project became divided and some iwi and hapū withdrew from direct negotiations choosing instead to progress their claims via the Waitangi Tribunal. A large number of Te Arawa iwi and hapū continued to deal with Crown officials and in April 2004 the Crown formally recognised the mandate of Ngā Kaihautū o Te Arawa Executive Council (the Council) to negotiate the settlement of all Te Arawa claims.[24] The Crown's decision to recognise the Council's mandate became the subject of the Waitangi Tribunal's *Te Arawa Mandate Report 2004*. Many iwi and hapū were vehemently opposed to being part of the larger cluster. The Tribunal found that the Crown had failed to adequately identify and address critical issues surrounding representation and the accountability of the executive council and that the mandating process had not allowed the people of Te Arawa adequate opportunity to debate and discuss these important matters. Accordingly, the Tribunal recommended a process by which the Council could reconfirm its mandate, and, while a number of those recommendations as to process were very specific, the Tribunal also recognised that it was for the iwi and hapū of Te Arawa themselves to decide how best to develop a reconfir-

19 Waitangi Tribunal, *The Te Arawa Mandate Report* (Wai 1150, 2004). See also Mikaere, above n 8.

20 Although, in the case of Ngā Kaihautū o Te Arawa, part of the direct negotiations settlement process involved time spent over two days where oral histories were recounted before Government Officials and recorded, providing claimants with the opportunity to publicly express their grievances and to record their history on their own terms.

21 Mikaere, above n 8 at 426.

22 Mikaere, ibid at 454, 455 for stinging criticism of those that are 'succumbing one by one' to the 'Crown-driven agenda' in the fear of missing out on the ever-shrinking fiscal envelope.

23 A confederation of tribes in the central North Island in and around Rotorua.

24 Waitangi Tribunal, *Te Arawa Mandate Report Te Wāhanga Tuarua* (Wai 1150, 2005) 2.

mation strategy which accorded with tikanga.[25] The opportunity remained, however, for the claimants to return to the Tribunal if the Crown failed to make an adequate response to the Tribunal's recommendations. The Council decided not to follow all of the Tribunals recommendations as to the reconfirmation strategy, choosing instead to determine its own process. A number of claimants returned to the Tribunal, arguing at a further hearing in January 2005, that the reconfirmation process was flawed. In its report issued in March 2005, the Tribunal found that although the reconfirmation process departed from the Tribunal's suggestions as to process, the Crown had not breached the Treaty of Waitangi in its monitoring of the reconfirmation process. Those Te Arawa groups who reconfirmed the Council's mandate have exercised their tino rangatiratanga[26] and they were open to negotiate their claims with the Crown. But the Tribunal also recognised that the Council's mandate had clearly diminished. The withdrawal of certain large iwi and hapū[27] from the Council's mandate together with the non-participation of others from the outset[28] means that just over half of Te Arawa have reconfirmed their support for the Council's mandate. With the significant overlap between core Te Arawa claims the Crown's negotiations strategies seriously disadvantage groups who choose to remain outside the Council. The Crown's insistence on limiting settlements and its refusal to negotiate concurrently with or to afford priority status to certain groups that decided not to participate in Ngā Kaihautū's cluster (as recommended by the Tribunal in the 2004 report) has created intense division within the Te Arawa confederation and will inevitably lead to new Treaty breaches and prejudice, and further division.

In the meantime, Ngā Kaihautū have accepted the Agreement in Principle signed by the Council and the Crown in August 2005. The cultural redress contained in the Crown's settlement offer involves the return of sites that the Ngā Kaihautū tribes have identified as being culturally significant. Also offered are statutory acknowledgements and overlay classifications over certain geothermal fields and over the Waikato River from Huka Falls to Atiamuri which are said to provide stronger levels of protection than are provided for in the Resource Management Act 1991. Economic redress includes a quantum offer of $36 million and rights of first refusal to buy back certain Crown forest lands and other properties. The Council and its supporters are clear that the benefits to be gained outweigh succumbing to the Crown imposed settlement framework. Reminiscent of the experiences of Waikato Raupatu and Ngāi Tahu, this settlement with the Crown is viewed, pragmatically, as making the best of a bad deal.[29]

25 Māori laws, ethics, and customs.

26 Tino rangatiratanga is a term that is sourced from the word 'rangatira' which means chief. It is a term used in the Māori text of the Treaty of Waitangi 1840 that literally means unqualified exercise of chieftainship, and the corresponding term used in the English version of the Treaty is 'full and exclusive possession' of all resources and things valuable to Māori. An alternative translation is sovereignty. In the Declaration of Independence of New Zealand 1835, the word used for sovereignty had been mana.

27 Ngāti Whakaue, Ngāti Wahiao and Ngāti Rangiwewehi.

28 Ngāti Makino, Waitaha, and Tapuika.

29 Roger Pikia, representative for Ngāti Tahu-Ngāti Whaoa on the Ngā Kaihautū o Te Arawa Executive Council, Minutes of Hui-a-iwi Mangahoanga Marae, 19 March 2006.

D. The Claim to the Waikato River

> Waikato taniwharau!
> He piko he taniwha, he piko he taniwha.
> Waikato, of a hundred chiefs! At every bend, a chief.[30]

The Crown's offer of a statutory acknowledgement to Ngā Kaihautū o Te Arawa overlaps with Waikato's claim regarding its tupuna awa (ancestral river) and illustrates the prejudice that can be suffered as a result of the Crown's Treaty of Waitangi Settlement policies that encourage a first in, first served approach rather than an approach which views the river as an ancestor and therefore indivisible. The nature of the special relationship between the Waikato people and their ancestral river can be seen in the following statement by the late Te Kaapo Clark, respected Tainui elder:

> 'Spiritually the Waikato River is constant, enduring and perpetual. It brings us peace in times of stress, relieves us from illness and pain, cleanses and purifies our bodies and souls from the many problems that surround us …'[31]

In 1987 the late Sir Robert Mahuta filed a statement of claim on behalf of himself, and of the members of Waikato-Tainui, the Tainui Māori Trust Board and Ngā Marae Topū claiming that he was prejudiced by the acts, policies and omissions of the Crown:

- by which the ownership and the mana of the Waikato River is denied to Waikato Tainui;
- by which the waters of the Waikato River are desecrated, polluted and depleted;
- in failing to recognise and protect Waikato-Tainui fisheries and lands in the Waikato River;
- by which Waikato-Tainui fisheries in the Waikato River have been depleted by pollution, over-fishing, and spiritual desecration; and
- in providing a legislative framework for land use planning, water use planning, and resource planning which fails properly to take into account Waikato Tainui concerns for the Waikato River and which is inappropriate for the protection of Waikato-Tainui rights guaranteed by the Treaty.

Negotiations between the Crown and Waikato regarding the Waikato River disintegrated and the comprehensive claim was deliberately withdrawn from the negotiations for the Waikato Raupatu Settlement. Despite this, the Waikato River is referred to in the Deed of Settlement of 22 May 1995 as meaning:

> The Waikato River from the Huka Falls to the mouth and includes its waters, banks and beds (and all minerals under them) and its streams, waterways, tributaries, lakes, aquatic fisheries, vegetation and floodplains as well as its metaphysical being.

Also in that Deed of Settlement the Crown acknowledged that raupatu was a breach of the Treaty of Waitangi and that the claim in respect of the River arises as a result of raupatu.

Waikato's parliament, Te Kauhanganui, confirmed the appointment of two co-negotiators to settle the claim to the River via direct negotiations with the Crown. A central focus of those negotiations currently taking place is described as 'Te Mana o te Awa'; seeking recognition of the status of the Waikato River to Waikato-Tainui as a tupuna awa. As an ancestor of Waikato-Tainui, the River has its own mana and is the lifeblood of the ancestor. For that reason, the claim seeks 'ancestral title' in the River from the Huka Falls to Port Waikato, just as had occurred when cer-

30 This proverbial saying pays tribute to the strong leadership in the many communities that live along the banks of the Waikato River, and also alludes to the metaphysical nature of the River.

31 Statement of Evidence of Te Kaapo Clark of Ngāti Korokī Kahukura, prepared on behalf of Waikato-Tainui for the Watercare Hearing before the Franklin District Council, Tuakau, December 1996.

tain sacred sites, such as Taupiri Mountain, were returned to the tribe. The river, like the mountain and certain landholdings, would be vested in the name of the first Māori King, Pōtatau Te Wherowhero. *Mana Whakahaere* or operational responsibility would remain with iwi and hapū with mana whenua rights along the river. Aspirations for mana whakahaere include the protection of customary rights, roles and responsibilities for monitoring and protection, and restoration and enhancing the health and wellbeing of the Waikato River. Waikato would seek to make the river inalienable from Karapiro to Port Waikato (the recognized confiscation area), while other tribes along the river would be free to exercise mana whakahaere and make their own decisions with regard to inalienability.[32]

(1) *Who owns the water? A question revisited*

According to Māori cosmogony, water has a mauri or life force of its own. Waterways are the veins of Papatūānuku, the Earth Mother, and iwi and hapū often align their very identity with their waterways. Indeed, according to Māori oral tradition, the Waikato River is life-giving water that Tongariro sent to the Maiden Taupiri. On this view of the world, waterways are connected, requiring integrated management of whole catchments. Too often, however, decisions about water have not prioritised Māori spiritual or cultural values, ideas, knowledge or wisdom. This was a point lamented during the Crown's consultation process with Māori on freshwater reviewed last year.[33] That review explored the question of who might own water.[34] In the context of the Waikato River negotiations, the Crown is unwavering in its position that any vesting of ancestral title in the rivers must be restricted to parts of the riverbed. Because of privately-owned land rights to the bed, the Crown claims not to have continuous title to the riverbed and therefore adopts the position that it cannot offer continuous title. As to ownership of the water, the Crown maintains that it does not own the water. Rather, it has authority and control over the river which is delegated to local authorities. For these reasons, past settlements such as the Te Arawa Lakes Settlement include the transfer of lakebeds,[35] yet tangata whenua have long reiterated their belief that the freshwater resource must belong to Māori. And while during the freshwater consultation process some iwi declared that they assumed ownership rights and merely wished to engage with the Crown to discuss co-management, others called for direct and immediate engagement with the Crown to discuss ownership. It was for reasons relating to ownership that many iwi were opposed to the Government's proposals for transferable water rights, as being too akin to property rights. The Crown's policy on freshwater that foreshadows privatising water will have a significant impact on the negotiations for the Waikato River. This is undoubtedly one of a number of factors contributing to the slow progress of the negotiations[36] – the anticipation around having some form of ancestral title vested in the name of King Pōtatau in time for Te Arikinui's fortieth Coronation anniversary celebrations in May 2006 proving unrealistic.

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32 This information about the aspirations of the claim was presented at a public meeting held at Pōhara Marae, 5 August 2006 by the River Claim Management Team led by Donna Flavell.

33 L Te Aho 'Contemporary Issues in Māori Law and Society' (2005) 13 Wai L Rev 145, 158-163.

34 Ibid, 161.

35 Te Arawa Lakes Settlement Bill, Part 2.

36 See Crown Forestry Rental Trust, above n 17 for criticisms about the length of time negotiations took in relation to Ngāti Awa at para 1.3; in relation to Ngāti Tama, para 1.5; and in relation to Rangitaane o Manawatu, para 1.6.

(2) *Guardianship Trust*

Waikato-Tainui's approach to negotiations is to assume ownership of the river, and to seek the return of the authority and control over the river, then work closely with local and regional authorities who would most likely continue to handle consent operational activities and associated costs, with a 'Guardianship Trust' providing direction to those authorities. Monetary compensation is being sought for the desecration and pollution of the river, which would be available to the envisaged Guardianship Trust to promote the health of the river. The framework of such a trust is a point for further deliberation, with the Waikato River Negotiation Team undertaking extensive research into various forms of joint management, both in Aotearoa and overseas, to inform the negotiations. Last year's review advocated the Orakei model[37] as best practice for such a Guardianship Trust. Under the Orakei model a reservation incorporating land, including foreshore, is jointly administered through a Reserves Board comprised of three representatives of the Ngāti Whatua o Orākei Māori Trust Board and three representatives from Auckland City Council. By statute, the land is managed, financed and developed at the expense of the Auckland City Council in view of the land, including foreshore, being kept for public as well as hapū enjoyment. The chairperson (and the casting vote) is reserved for a Ngāti Whatua representative in recognition of the hapū's title and mana whenua. This type of model recognises the mana of Ngāti Whatua as tangata whenua.

E. The Hauraki Report

Whereas Ngā Kaihautū o Te Arawa and Waikato opted to negotiate directly with the Crown to settle their historical claims, Hauraki Māori chose to put their case to the Waitangi Tribunal. The Hauraki Māori Trust Board first lodged its Treaty claims in 1988, and the Waitangi Tribunal's inquiry began 10 years later in 1998. The resultant report is one of the Tribunal's biggest since its establishment in 1975 and traces the history and relationship between Hauraki Māori and the Crown and gives the Tribunal's findings on the many claims arising from this history. The Hauraki inquiry district comprises the southern part of Tikapa Moana (the Hauraki Gulf and its islands), the Coromandel Peninsula and the lower Waihou and Piako Valleys. By the early nineteenth century, Hauraki was occupied by an 'intricate patchwork of iwi groups' including those that trace their origins from before the arrival of the great waka (canoes), and those who trace their origins from those waka. The sixteenth century saw the settlement of the Marutuahu tribes, of Tainui origin. The Tribunal report deals with some 56 claims made by different tribes, all relating to the process of colonisation under the British Crown, the extraction of resources such as gold and kauri and the purchase of all but 2.6 per cent of the land in the district, a state of landlessness comparable to the Waikato and Taranaki regions.[38] The Tribunal examined Crown laws relating to Māori land and land purchase policies during the nineteenth and early twentieth centuries and concluded that as a result of deliberate laws and policies the Hauraki Māori have been marginalised in their own tribal areas by the transfer of land and resources to others (including other Māori).[39] Hauraki land was acquired by the Crown under pre-emptive (monopoly) right, and vendors had been badly advised, particularly in the sale of gold mining lands. Issues relating to gold were a central feature of the Hauraki claims and the Tribunal, predictably, found that gold, apart from land, was not considered

37 Ibid, 164-165.

38 'Hauraki Hoping to Get Land Back' New Zealand Herald, 20 June 2006.

39 Waitangi Tribunal, *Report on the Hauraki Claim* (Wai 686, 2006) Executive Summary, xlvii.

a taonga in Māori culture. While Hauraki Māori quickly understood the importance of gold in the commercial economy, many of the negotiations for the freehold involved breaches of Treaty principles while some cession agreements involved elements of pressure and coercion. Moreover, because of strategic importance of Hauraki lands to the Crown in relation to their military action against the Kīngitanga, large areas of land were confiscated during the raupatu of the 1860s and received minimal compensation. Hauraki had suffered the impacts of a legislative regime that lead to public works takings and the desecration and destruction of their wāhi tapu and taonga. Accordingly, the Tribunal concluded that 'a substantial restitution was due, and the quantum should be settled by prompt negotiation'. The Hauraki iwi are in the process of establishing a mandated body for the purposes of negotiations with the Crown to settle its claims.

The Hauraki claim demonstrates that Waitangi Tribunal processes take time. The Māori Purposes Bill which is currently being considered by the Māori Affairs Select Committee, among other things, limits the jurisdiction of the Waitangi Tribunal to inquire into historical claims submitted after 1 September 2008.[40] The arbitrary imposition of a final filing date for claims for historical breaches will seriously prejudice claimants who have not yet conducted their historical research, and there are many such claimants.[41]

F. Claims Processes and the Erosion of Mana Motuhake

When the King movement was established in the late 1850s, various tribes pledged mountains symbolizing their support – an attempt to come together willingly to resist the vigorous Crown land purchasing policies and early native land laws designed to effect the alienation of their land. In Hauraki, the Kohukohunui and Rātāroa mountains on the western side of the Firth of Thames, and Te Aroha and Moehau on the eastern side were pledged.[42] As a result of the settler Government perceiving the King Movement as a threat to its authority, tragically, both Waikato and their Hauraki kin were forced to endure the confiscation of vast tracts of their land, and all of the prejudicial consequences that followed. The Waitangi Tribunal's report on the Hauraki claim is yet another illustration of the corrosive impact of colonisation upon Māori laws and rights that existed in this country prior to colonization. Having endured that history, the very processes designed to resolve the grievances that arose from historical Crown breaches of the Treaty, while offering avenues for economic prosperity for the next generations of Māori, create new grievances. The recent Tribunal reports and experiences of direct negotiation reviewed here illustrate that Crown-driven Treaty settlement processes that impose negotiation frameworks and fiscal constraints, that compel certain tribal aggregations, and that now seek to impose unrealistic timeframes for the filing of historical claims, continue to seriously prejudice the ability of Māori to exercise mana motuhake.

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40 The Māori Purposes Bill is an omnibus piece of legislation that amends four statutes: Te Ture Whenua Māori Act 1993; Treaty of Waitangi Act 1975; Māori Fisheries Act 2004; Māori Commercial Aquaculture Claims Settlement Act 2004.

41 Te Hunga Roia Māori o Aotearoa (Māori Law Society) Submission: Māori Purposes Bill, 15 August 2006, lists seven inquiry districts that will be severely prejudiced, having not started their research. Three inquiry districts will be prejudiced where research has been commenced but is incomplete; and four districts have had their inquiries partly heard, but not all historical breaches are dealt with.

42 Available <www.teara.govt.nz>.

G. The Aotearoa Institute's Claim Concerning Te Wānanga o Aotearoa

Reminiscent of the Crown's reaction to the establishment of the Kīngitanga those many years ago, the tale of Te Wānanga o Aotearoa as told to the Waitangi Tribunal is another example of the Crown attempting to deny the authority of Māori to draw upon their own distinctive knowledge base, leadership practices, and resourcefulness, to ensure their own future prosperity. Wānanga provide innovative courses and methods of delivery of education that reach out to those (mainly Māori) who the primary and secondary education systems have failed. The success of the wānanga concept saw Te Wānanga o Aotearoa (TWOA) in particular grow rapidly. However, neither the Crown nor TWOA was fully prepared for such growth. With a shift in Crown tertiary education policy from access and participation to quality and relevance came greater emphasis on specialization and differentiation. To this end, the Crown imposed a cap on the growth of all Tertiary Education Institutions. This disproportionately impacted upon TWOA and in February 2005 TWOA announced a major and unpredicted financial difficulty. Allegations of financial impropriety at TWOA followed and the Government appointed a Crown observer who, shortly afterwards, was appointed as Crown manager in order to stabilize TWOA's financial situation. The Crown decided to restrict payments of money to TWOA that were intended for capital expenditure, fearing that TWOA would use the payments to fund its shortfall in cashflow. The Aotearoa Institute, the parent body from which TWOA developed, lodged an urgent claim with the Tribunal alleging that by these actions the Crown was taking over control of TWOA, thus denying its tino rangatiratanga over is present and future direction. In December 2005 the Waitangi Tribunal issued its report on the Aotearoa Institute Claim[43] setting out its finding that wānanga are expressions of the educational aspirations of Māori and that they are established by iwi to teach by Māori methods and in a Māori way all those who wish to learn by those methods and in that way. The Aotearoa Institute's claim was well founded. The Crown had breached the principles of the Treaty in failing to protect the rangatiratanga of TWOA as a wānanga, with resulting prejudice to the claimants by attempting to define wānanga in such a way as to confine wānanga to the teaching of the Māori language and knowledge to a predominantly Māori student body, and attempting to force TWOA to comply with that mistaken definition.[44]

III. MĀORI GOVERNANCE – GENERAL

The Waitangi Tribunal's formal acknowledgement of the invaluable contribution made by wānanga illustrates what might be achieved if Māori are encouraged to draw upon their own resourcefulness to enable their own future success. The Tribunal's report also serves as a reminder of the importance of good governance. The Council of TWOA is its governing body and was first constituted in 1993. In mid 2002, the Crown appointed a development advisor to assist the Council to develop its governance role in accordance with good governance practice. The advisor identified two barriers to implementing a more robust governance structure; the reluctance of the chief executive officer to view good governance as important, and members of the council, many of whom were long-serving, having had limited exposure to good governance practices.[45] Ensuring

43 Waitangi Tribunal, *The Report on the Aotearoa Institute Claim concerning Te Wānanga o Aotearoa* (Wai 1298, 2005).

44 Ibid, paras 5.2 and 5.3.

45 Ibid, para 3.3.

that governance systems are in place to regulate important operational matters is critical where governance boards are dominated by managerial expertise.[46] It is possible that the damaging media coverage of the events that became the subject of the Aotearoa Institute's urgent claim, and the upheaval that followed for staff and students, may well have been avoided, or at least mitigated, had TWOA's Council implemented robust governance systems early on.

Governance broadly refers to how an organisation is run, including the processes, systems and controls that are used to safeguard and grow assets. Māori governance takes into account the special relationship that Māori have with certain resources, and objectives of Māori governance will most likely involve identifying a vision and values founded in tikanga Māori. While visions and values will often be similar across groups, Māori are diverse and dynamic so each will create their governance realities to reflect their own historical background – thus maintaining the authority to determine for themselves their pathway forward.

The ways in which Māori have expressed collective unity are many and varied – the Kīngitanga is but one enduring example. The types of governance entities used by Māori to achieve their visions have also been many. Māori Trust Boards currently regulated by the Māori Trust Boards Act 1955 have represented a number of tribes for decades. Charitable trusts have also been popular, mostly because, if approved by the Inland Revenue Department, they are not taxed on their charitable income. Some groups, usually non-tribally based, have opted to use incorporated societies which are based on subscription, and some Māori entities, such as Rūnanga, have been established under their own legislation either as a result of or as a precursor to Treaty of Waitangi settlements. Company structures created under the Companies Act 1993 are most popular for the advancement of commercial objectives, and as far as the administration of Māori land is concerned, trusts and incorporations under Te Ture Whenua Māori Act 1993 continue to play a major role.

IV. Trusts and Incorporations under Te Ture Whenua Māori Act 1993

As a result of a long and complicated legislative history, Māori freehold land currently constitutes just 6 per cent of the total landmass of Aotearoa, and the land that does remain in Māori hands is typically fragmented and uneconomic. For these reasons Te Ture Whenua Māori Act 1993 (Te Ture Whenua Māori) explicitly recognises that land is of special significance to Māori people and that retention of it should be promoted and the Act contains provisions for trusts and incorporations to administer and develop lands on behalf of multiple owners.

The 'progressive emancipation' of Incorporations under Te Ture Whenua Māori was reviewed last year in the context of Matauri X whose Committee of Management had given as security a mortgage over its land.[47] Upon default, the finance company sought to rely upon its security. The ensuing litigation brought to light the substantial increases in the objects and powers of incorporations under Te Ture Whenua Māori, available upon application following the passing of an appropriate resolution by shareholders.[48] In the light of this litigation, the Mangatawa Papamoa Blocks Incorporation successfully applied to the Māori Land Court to have its objects deleted from its 1957 Order of Incorporation allowing the incorporation to pursue a much wider range of

46 *AWA v Daniels* (1992) 7 ACSR 759.

47 Te Aho, above n 33 at 145-150.

48 See *Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2004] 2 NZLR 792 (HC) and *Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2005] 3 NZLR 193 (CA).

business activities to further the interests of their shareholders.[49] Mangatawa Papamoa lands are situated on the eastern side of the beautiful Tauranga harbour and, like the people of the Waikato, suffered land confiscation under the New Zealand Settlements Act 1863. Customary title was extinguished in the whole confiscated block, but some Mangatawa Papamoa lands within the block were returned after confiscation by way of Crown Grants. In the 1950s, these lands were administered under Part XXIV of the Māori Affairs Act 1953 by which blocks of Māori freehold land were vested in the Board of Māori Affairs for 'development purposes', and in Mangatawa's case, for farming.[50] Mangatawa Papamoa Blocks Incorporation (the Incorporation) was formed in 1957 under the Māori Affairs Act 1953. The main business of the Incorporation has been agricultural and horticultural, so it is vulnerable to fluctuations in the market and in the weather. But the lands are situated in the rapidly-developing Tauranga/Papamoa area and there is increasing pressure on the Incorporation to develop the land to fulfill its potential. The Incorporation had been bound by the objects as set out in the 1957 Order of Incorporation confining it to farming, agricultural or pastoral business, selling or leasing the land, or mining. These objects potentially restricted the Incorporation from broadening its business activities and investments. One block of land owned by the Incorporation comprising almost 51 hectares was purchased in 1966 and is known as the Asher Block. Confident of the potential to massively increase the revenue and shareholder value, the Committee of Management is currently planning to develop a multi-million dollar retirement village on an area of approximately eight hectares of its land on the Asher Block. This development is likely to involve a joint venture partner providing venture capital, and a very long-term lease (more than 100 years) under Te Ture Whenua Māori. Unlike the case of Matauri, the Mangatawa Papamoa land is not used as a security against any loan, the balance of land (once the land needed for the developed is partitioned out) is not intended to be alienated, but rather will remain under Māori freehold title.[51] With the original objects deleted, section 253 of Te Ture Whenua Māori gives incorporations like Mangatawa Papamoa greater flexibility for this type of commercial development of land. Accordingly, at the Incorporation's 2005 annual general meeting, the shareholders approved the omission of the objects. In percentage terms, those who voted in favour of the relevant resolution held 30.98 per cent of the shares and those who voted against 3.69 per cent. Based on this show of support, the Incorporation applied to the Māori Land Court to remove the objects from the Order of Incorporation. In determining whether to grant the application the Court applied the following principles:

1. The shareholders of the incorporation must have had sufficient notice of the resolution to omit the objects and sufficient opportunity to discuss and consider it.
2. The relevant information necessary for the shareholders to make an informed decision must be provided to them.
3. The shareholders must have passed the special resolution for omission of the objects at a duly notified and constituted annual or special general meeting.
4. That there are no compelling reasons for not granting the application.[52]

Section 17(2)(a) Te Ture Whenua Māori requires the Court to seek to ascertain and give effect to the wishes of the owners and here, despite some opposition, the owners passed a resolution to

49 *In re Mangatawa-Papamoa Inc* (2006) 84T Waikato-Maniapoto MB 185.

50 For a full discussion of the history of the Mangatawa Papamoa blocks, see Waitangi Tribunal, *Te Maunga Railways Land Report* (Wai 315, 1994).

51 Mangatawa Papamoa Blocks Incorporation Information for Shareholders, April 2006.

52 *In re Mangatawa Papamoa Inc*, above n 49 at para 43.

omit the outdated objects following a robust consultation process. In light of the opposition to the proposal by some shareholders, the Court noted some of the provisions in Te Ture Whenua Māori that may protect shareholders in respect of individual development proposals, such as the right under section 253A for shareholders to insert further limitations on the powers of the Incorporation if they so wish. The objects were outdated and an impediment to future development. There were good reasons to omit the objects and no compelling reasons not to. Accordingly, the Court ordered that the objects be omitted as requested.

Like the Mangatawa Papamoa Incorporation, the Tuaropaki Trust was also originally developed for farming. It is a particularly successful ahuwhenua trust under Te Ture Whenua Māori. Ahuwhenua trusts promote and facilitate the use and administration of land in the interests of the beneficial owners. The Tuaropaki lands were amalgamated in 1952. Currently there are 1700 owners of the 2,700 hectares of Māori freehold land at Mokai in the central North Island. The Tuaropaki Power Company Ltd operates a significant geothermal power station on its land, and a major extension to the power station was opened in February 2006. It also operates a geothermal-heated greenhouse. The Trust put forward a draft trust order to the Māori Land Court for approval proposing variations to the objects clause to reflect the Trust's current and future operations.[53] It also sought the appointment of a custodian trustee to improve business efficiency and the appointment of associates to the Trust as a means of identifying potential responsible trustees. The Māori Land Court confirmed the proposed variations to the objects clause and the appointments sought. It also confirmed the variations sought to increase directors' fees. However, the Court did not confirm proposed variations regarding the removal of court approval of trustee and directors' fees and stated that the 'statutory framework provided in the Act ensures that the Court retains an essential supervisory role'. It has been suggested that by its application 'the trust is pushing at the limits of the trustee provisions of Ture Whenua Māori 1993'.[54]

These two recent Māori Land Court cases demonstrate the increasing desire of Māori governance entities like Mangatawa Papamoa Incorporation and Tuaropaki Trust to remould their structural frameworks and processes to reflect their own unique development needs. It is a theme that is also reflected in recent cases concerning applications to change the status of Māori freehold land to general land.

A. Māori Land Court Decisions on Changing the Status of Māori Land to General Land

The Parininihi ki Waitotara Incorporation (PKW) is another particularly successful entity that recently sought an order to change the status of Māori land in order to on-sell that land to the lessees who had whakapapa connections to the land and to PKW.[55] Some shareholders who did not want any further loss of their lands opposed the application. The issue before the court was whether PKW had met the requirements of section 137 Te Ture Whenua Māori, and that depended upon whether the alienation of land was 'clearly desirable' for the purpose of rationalisation of the land base or any commercial operation of the Māori Incorporation under section 137(c) and whether that rationalisation involved the acquisition of other land by the incorporation under section

53 *In re Tuaropaki E* (2005) 82 Taupo MB 206-211.

54 See Māori LRev, March 2006, 1.

55 *In re Parininihi ki Waitotara Inc – Section 53 Block IX, Opunake Survey District* (2005) 159 Aotea MB 146, noted in Māori LRev, Nov 2005, 3.

137(d). PKW had provided no valuation to show that the land was marginal, nor had it provided a detailed inquiry into historical and cultural considerations relevant to the land despite those opposing the order arguing that the land was historically and culturally significant. The Court was of the view that PKW was almost exclusively concerned with commercial imperatives, and that 'permanent alienation of Māori Freehold land is a serious step that the Court does not undertake lightly.' The Court took the opportunity to outline appropriate processes for PKW to follow:

- It must only sell land over which it is custodian where there is a clear and compelling business case and only after due and proper inquiry that there are no cultural and historical impediments to alienation.
- It must provide owners the opportunity to acquire the land on terms agreeable to both parties, particularly in districts ravaged by effects of land loss through confiscation or where little Māori freehold land remained.
- It must undertake a careful process of consultation and discussion with both the shareholders in general and those claiming interest in the former titles prior to incorporation.

The Court made it clear that under section 137 acquisition of replacement land is mandatory, a point reaffirmed in another recent case: *Re Whangaruru Whakaturia 1D6B9*.[56] This case also involved an application under section 137 to change the status of land from Māori freehold land to general land. All but one of the beneficial owners and trustees supported the application. The Trust's intention was to sell the land as general land and use the proceeds for purchase of other Māori land. The Court stated that the five requirements in section 137 were cumulative and that section 137(1)(c) requires that: 'the sale of land in question must be an option that obviously recommends itself to a reasonable and objective trustee of Māori land as a strategy for the elimination of unnecessary assets in order to render the land holdings of the trust or its business operation more efficient'.

All of these Māori Land Court cases illustrate the tension in Te Ture Whenua Māori between the need for retaining Māori land in Māori ownership, and the desire for Māori owners to exercise their own authority. The balance in the two change of status cases reviewed above came down in favour of the retention principle, the Court making it clear that section 137 is an exceptions process designed to allow trustees to avoid the usual protections against absolute alienation. But the requirements are to be strictly adhered to, unless there are peculiar and specific factual circumstances, such as in the case of *Te Reti*[57] which again involved an application to change the status of land from Māori freehold land to general land. The land in question had been received as a property settlement between de facto partners, based on the assumption that the land was general land. The change of status was sought as a precursor to sale with the intent to apply the proceeds of sale to the family trust that had been established for the benefit of descendants. The Māori Land Court had issued directions requiring notice to preferred alienees and to obtain an affidavit from the former de facto partner as to whether she objected and no objections were received. On these facts, the Court allowed the status of the land to be changed.

As noted earlier, one of the central reasons for establishing the King Movement was to provide a unified force to resist early native land laws designed to effect land alienation and the accompanying Crown land purchasing policies. These recent cases demonstrate the continued importance of those provisions of Te Ture Whenua Māori Act 1993 aimed at land retention. The cases also

56 *In re Whangaruru Whakaturia 1D6B9* (2005) 102 Whangarei MB 259, noted in Māori LRev, Oct 2005, 1.

57 *In re Te Reti A37 Block* (2005) 159 Aotea MB 133, noted in Māori LRev, Oct 2005, 2-3.

illustrate, however, the growing desire of collective Māori owners to determine the way in which their land will be dealt with in a modern world.

V. Standardising Māori Governance Entities: Waka Umanga

> The tribunal must firmly emphasise that it is not the function of this tribunal nor indeed, and with respect, the right of the Crown to determine the structure that Ngāi Tahu may require for their present and future needs. That must be a matter for Ngāi Tahu.[58]

The Law Commission proposes the establishment of new legal entities called Waka Umanga that would be designed to meet the organisational needs of tribal and other Māori groups that manage communally held assets, principally to assist the ready resolution of Treaty settlements processes.[59] The term describes a vehicle (waka) for a community undertaking (umanga). This proposal to standardise Māori governance entities might well pose a threat to mana motuhake, if past experience is anything to go by.

A. External attempts to standardise Māori

Driven by the Crown policy of devolution, the Government attempted to provide general legislation that purported to develop a standard classification of iwi and hapū affiliation in the Rūnanga Iwi Act 1990. Māori resoundingly rejected the Act as an affront to their tino rangatiratanga and the Act was repealed in 1991. Some of the elements of the repealed Act survived, however, in processes for registering iwi for the purposes of fisheries allocation models, with serious consequences. Last year's review highlighted certain provisions of the Māori Fisheries Act 2004 that specify who may become mandated iwi organisations for the purposes of receiving fisheries settlement assets.[60] The review also summarised the well-known story of Rongomaiwahine, the principal ancestor of the people of Māhia Peninsula. Because of her mana, Rongomaiwahine's descendants hold strongly to their separate identity. While some identify themselves as both Rongomaiwahine and Ngāti Kahungunu, those who are descended from Rongomaiwahine's first husband identify themselves only as Rongomaiwahine. The consequences of the Crown refusing to identify Rongomaiwahine as an iwi separate from Kahungunu has meant that Rongomaiwahine has, for all but one fishing season, been denied its commercial fishing rights in its own tribal area since the national fisheries settlement of 1992.[61]

This is but one example of the dangers that can occur when external attempts are made to define iwi and hapū. Every iwi is unique in terms of tribal history, population, geography, and aspirations. Each will have its own notions of tino rangatiratanga and mana motuhake. The Law Commission's proposal is to allow tribes to form their own waka umanga with a set of standard obligations but also enable tribes to develop the model in a way that fits with their own culture, traditions and requirements. Yet, given Māori experiences of the Crown-driven direct negotiations processes,[62] Māori have good reason to suspect that the Crown will ultimately require the adoption

58 Waitangi Tribunal, *The Ngai Tahu Claim: Supplementary Report on Ngai Tahu Legal Personality* (Wai 27, 1991).

59 Law Commission, *Waka Umanga: A Proposed Law for Maori Governance Entities*, Report 92 (2006).

60 Te Aho, above n 33.

61 This became the subject of a debilitating history of litigation. See for example *Te Hau v Treaty of Waitangi Fisheries Commission*, unreported, High Court, Wellington 3 April 2000 (CP 12/00) Doogue J.

62 See Part II, section B above.

of waka umanga with certain criteria as a prerequisite to the settlement of Treaty Claims, thereby removing any real choice.

B. Towards the timely resolution of Treaty settlement

It is clear that the proposed Waka Umanga legislation is intended to assist the speedy resolution of Treaty claims.[63] Like the Rūnanga Iwi Act 1990 before it, since repealed, the proposed legislation would enable certain entities to become the 'legitimate representative' of a tribe making it easier for the Crown to deal with claimants. Another significant feature of the Law Commission's proposal is its heavy emphasis upon providing systems for managing internal dispute resolution. Disputes would be dealt with by an expanded Māori Land Court, which has faster and less expensive procedures than those of the High Court. The emphasis on speed parallels the proposed new deadlines for lodging historical Treaty claims proposed in the Māori Purposes Bill mentioned briefly above.[64]

C. The Advantages of the Law Commission's Proposal

The Law Commission's report emphasises its view that existing legal structures such as trusts and companies are inadequate to deal with the wide-ranging social and economic operations of Māori tribal organisations in a modern world, and that the need to legislate to provide a legal entity specifically shaped to meet those organisational needs is urgent. The report also recognises the public benefit in reducing the overall time and cost of forming a suitable post-settlement legal entity by providing a model with standards that ensure responsible and accountable governance. Meeting competing needs is a delicate balance, and was an issue of great concern for Ngāti Awa who during their negotiations process with the Crown went to great lengths to design a governance structure that:

> meets the needs of our people and meets the concerns of tino rangatiratanga, and that is also supported by an Act of Parliament, rather than relying on present laws dealing with Trusts … only to find that … the Crown may not accept it. The Crown's new governance structure can be set, namely the people vote for it and therefore mandate it, but it's really not the most suitable kind of organisation that the people need.[65]

The chief negotiator for Ngāti Awa favoured the Crown developing models from which iwi could choose, so as to avoid the debates and delay that occurred with regard to their post-settlement governance structure, and the Law Commission's proposal seems to address that point of view. It also seems to address the concerns of Ngāi Tahu encapsulated in the quotation that introduces this part of the review. The intelligence and experience of the Law Commissioners involved, particularly the Honourable Justice Durie, combined with the consultation process that the Commission underwent before finalising its proposal, gives mana to the report. The justifications for the legislation are persuasive and seem sincere. Recommendations such as the inclusion of appropriate conflicts of interest policies are insightful. And other initial doubts about standardising Māori organisations such as whether and how the legislation could provide for minority interests,[66] and whether the proposal addresses the reality that the success of any organisation is dependant upon the quality

63 Law Commission, above n 59 at 13.

64 See above n 40 and accompanying text.

65 Crown Forestry Rental Trust, above n 17 at 8.

66 Law Commission, above n 59 at 48-50.

of the *people* involved are also addressed.[67] The report explicitly recognises the need for iwi to be able to shape their own future structures to reflect their own uniqueness in terms of tribal history, population, geography, their approaches and aspirations as to their particular relationships with the Crown, other iwi and each other. By allowing an iwi to choose whether or not it adopts a waka umanga, the Law Commission's proposal recognises that different tangata whenua groups may well require quite different structures consistent with their own notions of tino rangatiratanga and mana motuhake. The concern that remains is about how the Crown will act in response to the Law Commission's proposals and recommendations. The notion of a 'legitimate representative' and the proposal's emphasis on speed appeases the Crown agenda of hastening the resolution of Treaty claims processes. Just as the Crown unilaterally imposes its own criteria and timeframes for the resolution and 'negotiation' of Treaty claims, it may well determine to require the adoption of waka umanga upon certain specified criteria as a prerequisite to the settlement of Treaty claims, thereby removing any real choice.

VI. Summary and Conclusion

When King Tāwhiao determined to fashion his own house from his own resources it was an assertion of mana motuhake, the separate and independent authority of Māori to make their own choices in order to create their own prosperity. Those choices may involve entering into coalitions or aggregations willingly to protest against Crown policies or to progress Treaty claims. Or those choices may involve adopting governance models based on Crown objectives, or custom designing models. Problems arise however when Māori do not have a meaningful choice – where Treaty settlement processes are overly prescribed, when Māori are forced into unnatural groupings or the disincentives of making their own choice are so great that that there is no real choice. Māori are still managing the delicate balance inherent in the Te Ture Whenua Māori Act 1993 between the need for retaining Māori land in Māori ownership, and the desire for Māori owners to exercise their own authority in terms of development. In all of these circumstances, Māori must be free to affirm and draw upon their own unique knowledge base, leadership practices, and resourcefulness, to make these choices, work through these tensions, and ensure their own future prosperity.

67 Ibid, 244-245.