convert communal title to individual title in order to facilitate Pakeha access to land, the processes adopted in the Court led to the destruction of the backbone of the traditional Maori society, that is, our relationship with the land.

Turning to the latest Ture Whenua Maori Act, however, we see a new philosophy being adopted by the Crown whereby it is sought to retain the remainder of Maori land in Maori hands. This approach goes against the grain of all previous pieces of Maori land legislation but for many iwi, hapu, and whanau, has come far too late.[33]

Much work remains to be done by those with a knowledge of history and a sense of justice, and perhaps it will only be through constitutional change that the ultimate realities of manawhenua are re-established. With the Crown's historical reluctance to accept its obligations under the Treaty (both texts) and the general ignorance of the New Zealand populous over the treatment of Maori in the past, it may prove again to be another long and arduous journey.

Ka Whawhai Tonu Maatou
Ake Ake Ake

S Te Marino Lenihan (BA)
Ngai Tuahuriri, Ngai Tahu Whanui

Tangata Whenua Representation in the Context of the Resource Management Act 1991

Who represents tangata whenua? This question is becoming increasingly crucial in today's climate of Crown settlements, resource allocation, and resource management. One area where the problem arises is in the context of the Resource Management Act 1991 ("RMA").[1]

The question raises complex issues which cannot be resolved in any single discipline of thought. Statutory bodies operating within their mandate cannot respond to constitutional challenges by tangata whenua who assert a right to define themselves. Tangata whenua, in accordance with tikanga Maori, cannot accede to

33 Webster, "Legislation Notes: Te Ture Whenua Maori Act 1993" (1994) 7 Auckland U L Rev 715. Less than 3 million of the original 66 million acres of land under mana Maori is left in Maori hands.

1 Resource Management Act 1991, ss 6(e), 7(a), and 8.

an externally imposed definition of who they are.

The challenge is to approach the question in a manner which recognises the validity of both competing world views. In the resource management context, this would require tangata whenua and local authorities to work together towards a resolution which provides for both the laws of the local authority, and the laws of the tangata whenua (tikanga Maori).

Tangata whenua are guided by tikanga which could be loosely described as a holistic notion of sustainable management. The local authority is guided by a number of competing environmental concerns - of which Maori concerns are only one. Although both frames of reference are valid in their own right, they do not sit easily together.

The reality is that the conceptual foundation[2] and economic base[3] supporting local authorities are widely accepted and recognised as representing the societal norm, whereas the conceptual foundation and economic base supporting tangata whenua[4] are generally poorly understood in wider New Zealand society.

The Resource Consent Process

One example where local authorities have to decide who represents tangata whenua is in the resource consent process.

In assessing whether or not to notify the public that a consent has been applied for, a local authority officer must consider whether tangata whenua "may be adversely affected".[5] Officers can determine this by perusing relevant iwi planning documents and, in particular, because of the sensitivity and uncertainty of waahi tapu locations, by directly consulting with tangata whenua,[6] or by requiring further information from the consent applicant with respect to consultation with tangata whenua.[7]

If a decision is made to notify the public of a consent application, the officer is then required to consider which "iwi authorities" and "other persons or authorities" are considered to be appropriate recipients of consent notification.[8]

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2 As found in relevant legislation.

3 Provided through public rating.

4 Tikanga of hapu and iwi.

5 See Resource Management Act 1991, ss 94(1)(c)(ii), (2)(b), and (3)(c); note this analysis assumes that the other non-notification prerequisites under s 94 have been met with respect to activity status and the minor effect of the activity on the environment.

6 See *Worldwide Leisure v Symphony Group Ltd* [1995] NZAR 177. The Council's non-notification decision was set aside because the Council had unreasonably failed to consult with a local hapu. See also *Greensill v Waikato Regional Council*, Planning Tribunal, Wellington, 6 March 1995, W 17/95.

7 Resource Management Act 1991, s 92. In *Aqua King Ltd v Marlborough District Council* [1995] NZRMA 314, the concerns of iwi about their coastal waters and the use to which they are put were found to be within the definition of "effects on the environment", and could therefore properly be required as further information under s 92.

8 Resource Management Act 1991, s 93(1)(f).

In deciding whether or not to grant consent, local authorities must balance any conflicting interests of tangata whenua groups against each other, and against other relevant concerns in the sustainable management equation. The uncertain scope of the duty to consult[9] makes it difficult for local authorities to understand who to consult with, and encourages competing claims between different groups, claiming to be the correct tangata whenua representative.

Barriers

There are certain barriers to resolving the issue of tangata whenua representation.

Competing Frames of Reference

While tangata whenua would generally agree that:[10]

> The Treaty requires to be recognised as fundamental to our constitutional system by reason of its status as a compact with the indigenous peoples of New Zealand and because of the vulnerability of the indigenous people and the increasing international concerns for their protection.

The local authority frame of reference is more likely to be that:[11]

> Clearly whatever version, or rendering is preferred the first Article must cover power in the Queen in Parliament to enact comprehensive legislation for the protection and conservation of the environment and natural resource. The rights and interest of everyone in New Zealand, Maori and Pakeha and all others alike, must be subject to that overriding authority.

These competing frames of reference present a paradox which has the potential to frustrate any attempt to resolve the representation issue. How can local authorities participate in a constitutional debate in which tangata whenua challenge their whole mandate to manage the environment? How can tangata whenua participate in a debate which squeezes constitutional questions about mana into the statutory cubby holes which local authorities operate from?

This barrier can only be resolved if each party relinquishes its entrenched conceptual position. Tangata whenua may challenge the fundamental constitutional mandate of local government to manage ancestral taonga, however the present political reality gives local authorities the legal mandate to control the "sustainable management" of the environment. Similarly, although local

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9 Beverly, *Consultation with tangata whenua under section 8 of the RMA* (1996) 1 BRMB 237.

10 Elias, "The Treaty of Waitangi and Separation of Powers in New Zeland" in Gray and McClintok (eds), *Courts and Policy: Checking the Balance* (1995).

11 *Ngai Tahu and Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

authorities may perceive tangata whenua representation difficulties as a complication in an already complex situation, they would acknowledge that historical reality, and statutory provisions should give tangata whenua concerns an elevated status.

Iwi Politics

Competing claims to mana whenua and kaitiakitanga could be described as a natural part of Maori society. The marae is a forum for debate over issues of inter-hapu and inter-iwi conflict. Whakapapa can be recited in different ways depending upon the link which the speaker is trying to establish. Although these may be ordinary phenomena in the Maori world, they are not widely understood in the Pakeha world. The added difficulty for tangata whenua is the interaction between traditional and contemporary representation structures.

To resolve these barriers, local authorities should acknowledge that external factors have complicated the representation issue.[12] Tangata whenua should also recognise the benefits of keeping representation debates quite separate to resource management issues.

Local Authority Politics

There is likely to be a wide range of opinion within any local authority as to the role of tangata whenua within the resource management process. Each opinion has the potential to affect the manner in which council personnel relate to tangata whenua and provide for their concerns in everyday decisions. It is important that consistent practices are implemented within a council, and indeed, between councils within a region, to prevent personal beliefs and preferences from clouding local authority duties.

Models of Resolution

Although the Runanga Iwi Act 1990 offered one model of resolving representation debates, that Act was repealed just six months after being passed. Since then the fundamental representation issue has not been tackled in any comprehensive manner. It is for this reason that local authorities, the Environment Court, Te Ohu Kai Moana, the Waitangi Tribunal, the Maori Land Court, and the Office of Treaty Settlements, regularly become embroiled in significant and complex representation disputes.

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12 Such as the Charitable Trusts Act 1957, the Maori Trust Boards Act 1955, the Runanga Iwi Act Repeal Act 1991, and the Resource Management Act 1991, itself.

Environment Court

The general approach taken by the Environment Court is to consider questions as to the adequacy of the consultation process undertaken by the local authority, but to refuse to make rulings on tangata whenua representation. Representation issues are seen to be internal matters within the jurisdiction of tangata whenua themselves, or the Maori Land Court.

The Environment Court suggests that local authorities defer to the expert "advice" of qualified officers in terms of representation, but does not go so far as to suggest that those officers should be responsible for deciding those issues.[13] No guidance is provided as to how those officers should proceed apart from an indication that wide consultation is to be preferred in uncertain cases of conflict, and that Councils should deal with representation problems in a reasonable manner. The problem is recognised as being for tangata whenua to resolve, and the onus is placed on them to keep Councils informed of different representative mandates.

Maori Land Court

The Maori Land Court is the only forum which has been mandated by the Government to consider and decide the tangata whenua representation issue. Section 30 of Te Ture Whenua Maori Act 1993 empowers the Court to give advice or make a determination as to representatives of a class or group of Maori. A number of general principles have been developed by the Maori Land Court in this context:[14]

(i) *He ritenga ano* - acknowledging that history has not impacted uniformly on all Maori, for example in terms of language, traditions, and religion, and that these differences should be considered and reflected in any representation model.

(ii) *He rourou* - remembering that representation is not just an assertion of rights, but is more an expression of obligations, and the aim is to address the interests of all parties instead of adopting a representation model which leads to an increase in conflict.

(iii) *He au rere tonu* - recognising that Maori society has undergone dynamic social and economic change so that the Native Land Court methods of determining Maori title in the 19th Century should not be considered binding on today's models of representation.

13 *Uruamo v Carter Holt Harvey Ltd*, Planning Tribunal, 24 May 1996, A 43/96; noted [1996] BCL 766.

14 *In re Tararua District Council* [1994] MB 138 Napier.

(iv) *Marae* - recognising the significance of marae in terms of fulfilling ancestral obligations by providing for current and future generations, and therefore looking upon marae as the practical expression of customary authority.

(v) *Customary authority* - recognising that customary authority is the sanctioned exercise of power. Instead of remaining as a static snapshot of the 1840s, customary authority is likely to have adapted to the changing social and economic dynamics caused by various colonial pressures. Customary authority cannot be a naked exercise of power - it is a sanctioned exercise of power which is bound by conventions or upheld by values.

On appeal, the Appellate Court made the general comment that the Resource Management Act 1991 gives recognition to the people of the land, and there is no reason why there could not be more than one tangata whenua in any given area.

Maori Appellate Court

The Maori Appellate Court has jurisdiction to consider matters concerning Maori custom or usage, customary ownership, occupation and use of land or fisheries, and Maori tribal boundaries.[15] The Court uses principles with respect to customary title that include: discovery, ancestry, conquest, and gift, all of which required support by actual occupation.

The Maori Land Court and Maori Appellate Court, which are statutorily mandated to determine different representational problems, place much weight on tikanga Maori, but are often forced to make pragmatic decisions. These Courts have a difficult task, and the durability of their judgments very much depends upon political acceptance by tangata whenua outside the courtroom.

Te Ohu Kai Moana

Te Ohu Kai Moana[16] is charged with the statutory duty of identifying beneficiaries of the fisheries settlement and developing models for fisheries allocation.[17] There continues to be much debate as to the various definitions of "iwi." The process which is used to formally recognise iwi organisations for the purpose of vesting pre-settlement fisheries assets is concerned with two issues of accountability:[18]

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15 Treaty of Waitangi Act 1975, s 6A.

16 The Treaty of Waitangi Fisheries Commission.

17 Treaty of Waitangi (Fisheries Settlement) Act 1992, ss 15 and 17.

18 Te Ohu Kai Moana, *Mandate Recognition of Iwi Organisations* 1996.

(i) The provision for full participation by iwi members in a regular electoral process; and

(ii) The constitution which enshrines the first provision and includes a clear process for constitutional amendments.

As Te Ohu Kai Moana intends to vest pre-settlement fisheries assets in representative iwi organisations, a number of policies have been developed to clarify requirements for the constitutions of those organisations.[19]

Waitangi Tribunal

The issue of representation also arises where there are cross-claimants before the Waitangi Tribunal.[20] While challenges to authority or mandate are outside its jurisdiction, the Tribunal allows competing evidence to be presented in the course of hearings, but defers the problem to either the cross-claimants themselves for resolution, or to the Maori Land Court for judicial determination.[21]

Office of Treaty Settlements

The issue of mandate and representation is crucial for the Office of Treaty Settlements ("OTS"). Mandating has been identified as part of the "pre-negotiations" phase of the process for settling Treaty of Waitangi claims.[22] Before direct negotiations commence, negotiators must demonstrate support from the claimant group by obtaining a "Deed of Mandate" from iwi. The OTS assesses whether a Deed of Mandate meets the Crown's requirements by considering a number of factors.[23] This process leaves much room for challenge. What if individual members of a claimant group disagree that the negotiator has mandate? Apart from having their objections "taken into account", what lines of challenge are open to objectors at different stages of the negotiations process?

The High Court has held that where a "multi- faceted approach" had been taken with respect to procuring mandate, including facets of both democracy and tikanga Maori, the Court would not intervene. It was noted that the matter was not justiciable because the settlement process was an "ongoing political process as opposed to a distinct matter of law".[24] It would seem that the mandating process of the OTS does not provide adequately for dissenting Maori, and has the potential to incur a whole new raft of grievances.

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19 Ibid, 3 and 6.

20 Treaty of Waitangi Act 1975, s 6 entitles any Maori to bring a claim against the Crown.

21 Pursuant to s 6A(2) of the Treaty of Waitangi Act 1975.

22 Office of Treaty Settlements, *Mandating Processes*, excerpt from standard letter 24 Feburary 1997 sent to claimants who are contemplating negotiation of claim settlements.

23 Ibid.

24 Noted in case summary of *Greensill v Tainui Maori Trust Board*, [1995] Maori LR.

Each of the institutional responses above inappropriately compromises customary Maori practices relating to mandate and representation. The main problem is that mainstream institutions are required to resolve tangata whenua representation issues in order to comply with their statutory responsibilities, but apart from a section 30 determination, no process or guidelines for resolution are provided.

Towards Resolution

The main problem in the resource management context is that local authorities regularly define who tangata whenua are by making everyday decisions about who to consult with. But who are the tangata whenua referred to in ss 6(e), 7(a), and 8 of the RMA? No answers are provided in that Act, and no single Maori resolution process is available, so therefore it is up to local authorities and tangata whenua to resolve this question.

Although the actual mechanics of a resolution process should be developed by the parties themselves, the following broad principles may be useful:

(i) Right of tangata whenua to be heard when local authorities are deciding"who to consult with";
(ii) Local authorities to demonstrate reasonableness in their own decision making process;
(iii) Consultation between conflicting tangata whenua representatives and local authorities, with an emphasis on tangata whenua defining their own representative bodies;
(iv) Recognition of the benefits of local authorities and tangata whenua working together co-operatively;
(v) Open-mindedness, willingness, and ability to implement any agreed solutions;
(vi) Interim representation position to provide stability while the resolution process is in progress; and
(vii) Reliable background information as a basis of any representation decision.

Section 30 Determination

Although an application to the Maori Land Court under Te Ture Whenua Maori Act 1993, might appear attractive to parties who are in various stages of confusion or frustration, an application cannot be made unless "reasonable steps" have already been taken to identify relevant tangata whenua without success.[25]

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25 Te Ture Whenua Maori Act 1993, s 30(2).

In the face of many competing claims, the Maori Land Court is unlikely to give a clear determination of "tangata whenua status". It is more likely to provide a pragmatic solution which would be just as achievable and acceptable outside the courtroom. In R*e Tararua District Council* although the matter was resolved judicially, the result was the same as had been achieved out of court previously.[26] This suggests that parties who bring s 30 applications may be expecting more out of the judicial process than is realistically available.

Conclusion

The question of tangata whenua representation and mandate is increasingly important in today's legal and political climate. The resource management context is one of many contexts in which the vexatious question of representation and mandate arises.

Although bodies have formulated various statutory formulas and policy approaches, none of these has really resolved the question. The parties have much to offer each other, and if the issue really is sustainable management of our environment, whether that be from a statutory viewpoint or a Maori viewpoint, political differences should be secondary.

Nau te rourou, naku te rourou
Ka ki te kete, ka ora te Iwi

Cheryl Holloway LLB (Hons)
Ngati Kuri

26 Supra at note 14.