

SIMON FITNESS



My name is Simon Gerardus Francis Fitness. I was born in Hamilton, in May 1981, the second of four children.

On my father's side, I am a 6th generation New Zealander. My early ancestors emigrated to New Zealand from England in the early 1850s settling in the Razorback/Bombay area before moving to Ngaruawahia in the early 1900s. I have English, Irish and Swedish links through my father.

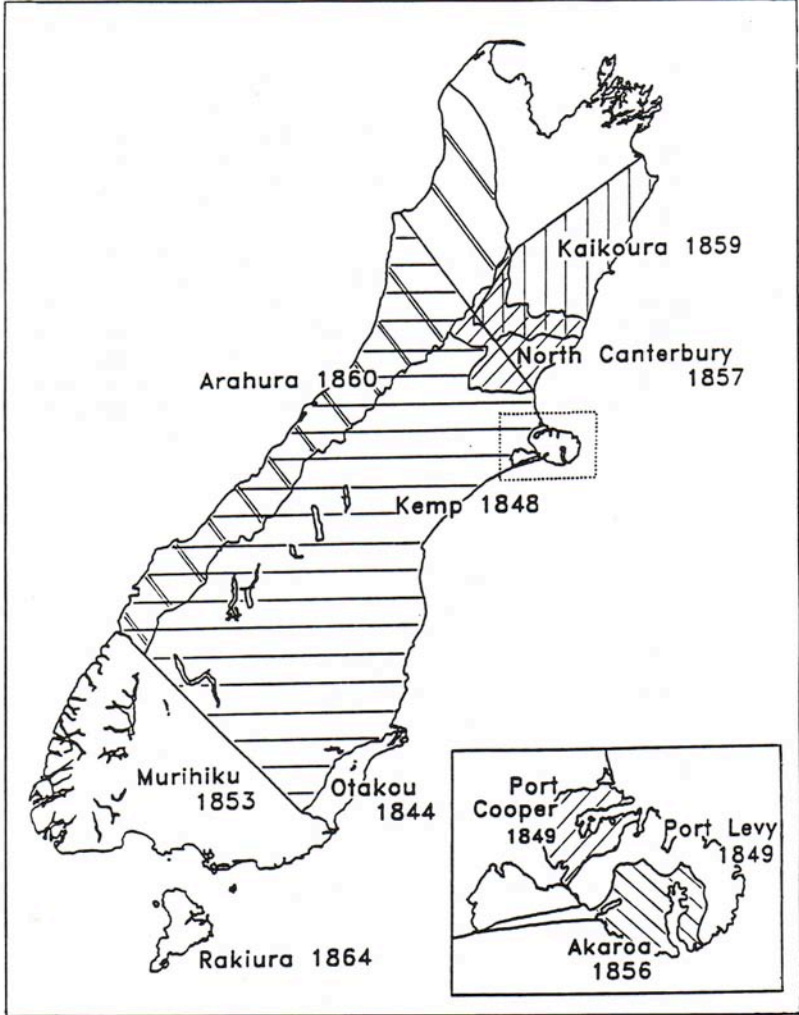
My mother is Dutch. Her parents, my Oma and Opa, emigrated to New Zealand in 1950 wanting to get far away from war torn Europe. While I do not speak any Dutch, I am particularly proud of this part of my heritage and would love to visit the Netherlands some time in the near future.

I have a great interest in my family tree and heritage though with a relatively diverse cultural background I would not describe myself as anything but a New Zealander.

Moving to Auckland when I was 10, I attended Sacred Heart College, in Glen Innes. College was a very formative period for me. Sacred Heart provided me with a wide range of public speaking, sporting, religious, academic and leadership opportunities. I thank Sacred Heart for much of what I am today. Leaving the College in 1999, I am now in my fourth year at Auckland Law School. I am also completing a BA in Ancient History.

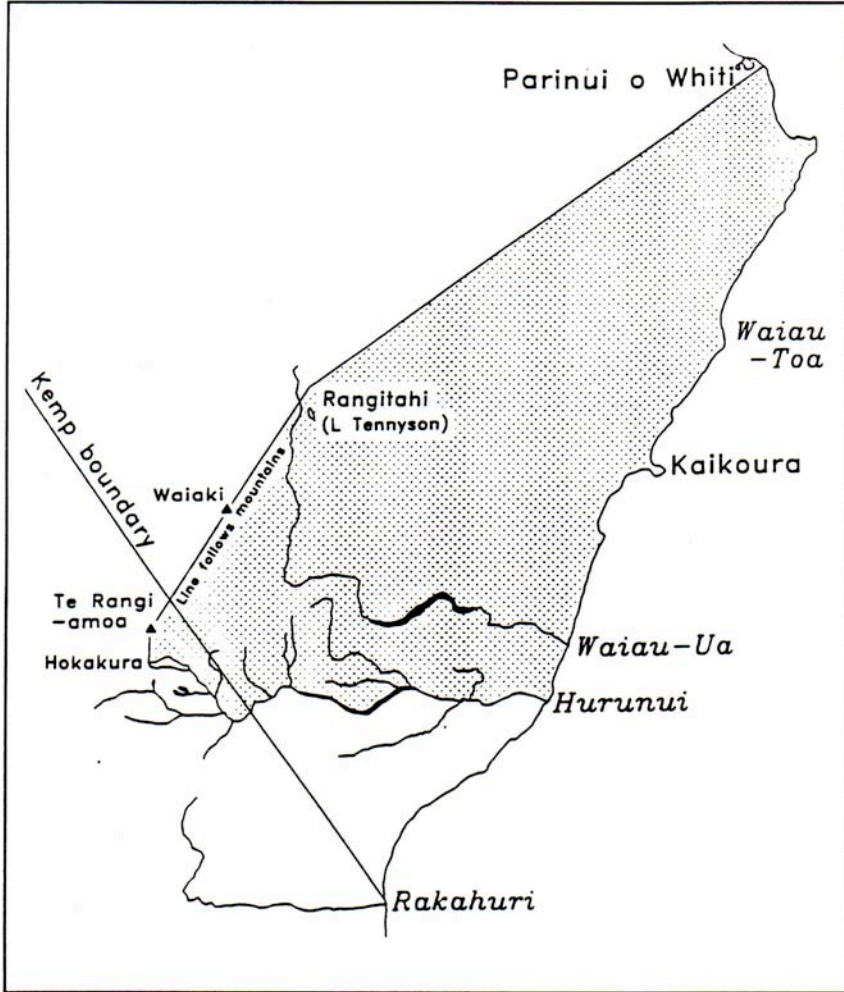
I am a strong Catholic. I am also an Officer in the New Zealand Army and enjoy pretty much any outdoor pursuits, especially rugby. At present I am a Summer Clerk at Chapman Tripp and look forward to a career in the law. Long-term, however, I would like to enter politics.

**LOCATION MAP 1
NGAI TAHU PURCHASES**



Source: Waitangi Tribunal, *Ngai Tahu Report*, Vol 1, 1991, 6.

**LOCATION MAP 2
KAIKOURA PURCHASES**



Source: Waitangi Tribunal, *Ngai Tahu Report*, Vol 2, 1991, 670.

MANA WHENUA AND THE NGAI TAHU WAITANGI TRIBUNAL CLAIM

SIMON FITNESS

Kei raro i te tarutaru, te tuhi o nga tupuna¹

*The signs (marks) of the ancestors are embedded below the roots of
the grass and herbs*

INTRODUCTION

“Mana Whenua” is a concept that has been the subject of a lot of discussion in both the courts and the Waitangi Tribunal in recent years. “Whenua” (land), is recognised in Te Ture Whenua Maori Act 1993 (“the Act”), as a taonga tuku iho of the Maori people.² However, “mana whenua” as a self-complete jural principle, is not universally accepted as an authentic, pre-European Maori construct.

In an authoritative text dealing with customary Maori land tenure,³ Norman Smith sets out the obligations that must be fulfilled in order to establish and maintain Maori mana over whenua. One of these obligations is the duty to “keep warm” the whenua within a rohe. This duty of maintaining warmth is linked to the principle of “ahi kaa”, a Maori concept defined in section 2 of the Act as “fires of occupation”.

There is general agreement amongst Parliamentarians, judges and academics that “ahi kaa” is a fundamental concept of Maori

¹ Waitangi Tribunal, *Te Roroa Report—WAI 38*, Brooker and Friend, Wellington, 1992, 49.

² Section 2(2) Te Ture Whenua Maori Act 1993. Although “Taonga tuku iho” is not defined in the Act it can be roughly translated as “something of great value handed from generation to generation of Maori since time immemorial”.

³ N Smith, *Maori Land Law*, Reed, Wellington, 1960, 111.

customary land tenure. In contrast, both the content and application of mana whenua are currently the subject of much debate.⁴

In this essay I discuss the content of “mana whenua”, and argue that it is a broad concept of which ahi kaa is an integral part. I also argue that mana whenua is the modern, common law equivalent of “rangatiratanga” as guaranteed under the Maori text of te Tiriti o Waitangi in 1840. I further argue that mana whenua must be accepted as reaching further back than 1850. My conclusion is that mana whenua ought to be given wider application by the Maori Appellate Court and the Waitangi Tribunal than is presently the case.

Mana Whenua – Traditional Maori Concept or Modern Invention?

Maori concepts have often had their application narrowed in New Zealand law as the result of courts trying to reconcile them with English common law concepts. “Ahikaa”, for example, is most often defined as “physical occupation”. “Rangatiratanga” is interpreted as referring only to “property rights” and not the fuller dominion that attaches to sovereignty. Sometimes a preferred translation can be linked to the difficulty of finding analogous terms. At other times it is a means of resolving a power conflict between two competing systems of law.

The “fundamental disjunction between the two systems”⁵ is not, however, the major barrier to recognition of mana whenua as a fundamental principle of Maori custom law. The barrier to greater legal recognition is the lack of acceptance of mana whenua by the Maori Land Court as a legitimate concept of Maori custom law. The earliest judicial negation of mana whenua as an authentic principle of Maori custom law is that of Chief Judge Fenton in 1890:⁶

There is no such thing as mana of land. Mana is personal. A chief may or might have had ... sufficient mana to greatly influence his power of managing ... withholding from sale of land, but this power is derived from his position as pater populi, enabling him to protect what he thinks to be the interests of his

⁴ See discussion of “Directions, memoranda on procedure, evidence and issues in the inquiry into the Ngati Awa, Tuwharetoa, and other claims of the Eastern Bay of Plenty as at end October 1994, *WAI 46*, Doc #2.59, 11 Nov 1994” and discussion in T Bennion ed., *Maori LR*, November 1994, 4.

⁵ *Supra* n3 at 111.

⁶ See comments of Chief Judge Fenton in PP 1890 G1, 15, *ibid* at 111.

tribe. He may have no interests in a piece of land, yet be able to retain it from sale None of the old Judges recognised such a thing as land mana as conferring a title of land recognisable by the Court.

If Chief Judge Fenton is correct then “mana whenua” is a self-contradictory term. However, his reasoning confuses three totally different perceptions held by Maori. The first is the attribution of mana by tangata whenua (people of the land: Maori) to land as Papatuanuku (earth mother). The second is the attribution of mana (power/authority) by tangata whenua to humans. The third is the exercise of mana over others living on the land, by rangatira. While the first two are natural, inherent qualities of land and people, the authority of the rangatira is more practical, being dependent on group acceptance and group strength. The exercise of mana on the land by rangatira, included an ability to allocate land rights to others.

The precedent force of the statement made by Chief Judge Fenton is at least partially responsible for the later view expressed by Smith, that unless founded upon one of the five recognised ‘take’ to whenua,⁷ no direct proprietary interest could be claimed by a group.⁸

The Ngai Tahu Claim

The legitimacy of mana whenua as a pre-existing Maori customary principle has also been raised in the Waitangi Tribunal claims process. In 1986 the Ngai Tahu Trust Board lodged a general claim with the Waitangi Tribunal challenging the move by the Crown to transfer significant areas of Crown pastoral leases and other Crown lands into the hands of State Owned Enterprises. In the months that followed a series of detailed amendments were lodged specifying land, fisheries and inland water claims.

The major grievances of Ngai Tahu were: the Crown’s past failure to meet contractual obligations; disputes over the geographical areas included in certain purchases; inadequate compensation, and denying access to and protection of, mahinga kai (food resources) and pounamu (greenstone).⁹ Ngai Tahu also claimed that the earlier

⁷ Take raupatu (conquest), take tuku (gift), take taunaha (discovery), take takahi (walking the land), take tupuna (ancestry).

⁸ Supra n3 at 111.

⁹ Waitangi Tribunal, *Ngai Tahu Report (Part 1)*—WAI 27, Brooker and Friend, Wellington, 1991, 8-10.

purchase by the Crown of Kaikoura and Kaiapoi from Ngati Toa exerted unfair pressure on Ngai Tahu to sell on unfavourable terms.¹⁰

The Ngai Tahu claim prompted several northern South Island iwi to lodge counter claims based on their holding mana whenua over areas of land included in the claim.¹¹ Kurahaupo-Rangitane stated that they had occupied and enjoyed Kaikoura and Arahura Blocks in 1840, and that the Crown had wrongly deprived them of possession by purchasing from Ngai Tahu without the consent or agreement of the chiefs and people of Kurahaupo-Rangitane. The Waitangi Tribunal referred the conflicting claims to the Maori Appellate Court. The Court was asked to determine:¹²

- Which Maori iwi, according to customary law principles or “take” and occupation or use, had rights of ownership in respect of all or any portion of the land contained in those respective deeds at the dates of those deeds.
- If more than one iwi held ownership rights, what area of land was subject to those rights and what were the iwi boundaries?

Application of Mana Whenua to the claims

The challenge to Ngai Tahu mana whenua by other northern South Island iwi came before the Maori Appellate Court in 1990 by an indirect route. It was by way of a suit taken by Ngai Tahu (*Ngai Tahu*) against the Crown, seeking recognition of its own mana whenua.¹³ There were, in fact, four claimants seeking recognition of mana whenua. They were Ngai Tahu, Rangitane Ki Wairau, Te Runanganui O Te Tau Ihu o Te Waka a Maui Incorporated (representing the tribes of Nelson and Marlborough) and Ngati Toa.

The Court began by clearly setting out its jurisdiction to deal with the matter. The Treaty of Waitangi Act 1975 directs the Court to make decisions as to the boundaries between iwi rohe. In order to do this it must take account of Maori custom relating to ownership of lands.

¹⁰ Ibid at 8.

¹¹ See Location Map 1.

¹² Supra n9 at 25.

¹³ *Re a claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Trust Board*, 12/11/90, Maori Appellate Court, Te Waipounamu District, Case Stated 1/89, 4 South Island Appellate Court Minute Book, folio 673, 1.

This includes “customary take” and “occupation” or “use”.¹⁴ The Court recognised four principal customary take as being developed prior to the arrival of Europeans in New Zealand. They were:¹⁵

- Discovery (taunaha whenua)
- Ancestry (take tupuna)
- Conquest (take raupatu)
- Gift (take tuku)

These four take do not, on their own, give rise to any proprietary rights. It is only when the take are supported by physical occupation of the land that proprietary rights result.¹⁶ Ahi kaa is the essential ingredient required to both establish and maintain these rights. Thus, if a hapu/iwi left an area and did not return within three generations,¹⁷ was defeated in battle and the victors remained and occupied the land or gifted it to others, the prior occupants would lose their rights.

The Maori Appellate Court in *Ngai Tahu* stated unequivocally, however, that in its view, and despite many claimants including references to mana whenua in their evidence, the term “mana whenua” had only become notable in the 1850s.¹⁸ In its view, the more appropriate term to use in relation to land was “rangatiratanga”, particularly as te Tiriti o Waitangi (Maori Text) had used that word.¹⁹

If the Maori Appellate Court view prevails, the result of excluding mana whenua as a legitimate basis for Maori customary claims is dire for future parties. In *Ngai Tahu* the Court ruled that post Tiriti/Treaty land rights can no longer be acquired by take raupatu, yet that the other incidents of title remain intact.²⁰ This creates problems. Take taunaha as a means of acquiring new title was obsolete by 1840. No land can reasonably be claimed to have been discovered after this time and any land discovered prior to 1840 would now be subject to take tupuna. The Court’s pronouncement therefore implies that the

¹⁴ See section 6A of the Treaty of Waitangi Act 1975.

¹⁵ Supra n13 at 3.

¹⁶ Supra n3 at 88.

¹⁷ Supra n13 at 2.

¹⁸ In direct contrast to this, Waerete Norman, a noted Maori expert on tikanga Maori as it applies in the Muriwhenua region has stated that similar circumstances in the Muriwhenua region during pre-European times gave rise to “mana whenua”. See W Norman, “The Muriwhenua Claim”, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, IH Kawharu ed., Oxford University Press, Auckland, 1989, 201-202.

¹⁹ Supra n13 at 1.

²⁰ Ibid at 4.

only two take that can be recognised post 1840, as the basis of customary Maori land rights, are take tuku and take tupuna. This leaves a clear gap in Maori custom law. If a hapu or iwi came into occupation of land after 1840, either through raupatu or another means not covered by take tuku or take tupuna, they would be unable to establish a clear claim in accordance with Maori custom law. This could dispossess iwi of otherwise legitimately gained proprietary rights, especially if it is aligned to the current Court practice of fixing hapu and iwi boundaries at 1840.

Even prior to 1840, when take raupatu was an accepted take, without mana whenua as a source of rights there is still a gap in Maori custom law. This became apparent in *Ngai Tahu* when the Court turned its attention to the Ngati Apa claim to mana whenua over lands in the vicinity of Kawatiri (Westport).²¹ The Court found that Ngati Apa had settled at Kawatiri after fleeing south and being taken in by the local hapu. Because Ngati Apa were unable to claim take tupuna, take tuku or take raupatu, the Court, having discounted mana whenua, found that there was insufficient evidence to establish support of more than a right of residence.²²

In *Ngai Tahu* the Court's observations concerning "rangatiratanga" could equally apply to "mana whenua". It considered several deeds of sale, including one in 1853 under which Ngati Toa ceded all rights to the "Northern part of the South Island" to the Crown. The Court found that Crown payments for land did not limit the Court's ability to consider Maori custom law relating to rights of ownership, when determining recompense. Also crucial was the Court's finding that the deeds of sale were not a reliable means of determining iwi boundaries.²³

The very fact that within the space of 13 years the Crown entered into a number of agreements which overlapped, thereby purchasing in some cases the same lands from different tribes, is evidence that the status of the respective deeds in determining 'ownership' was questionable.

The Court correctly ruled that the favoured treatment received by Ngati Toa, as the recognised spokesperson for Ngati Awa, Ngati Koata, Ngati Rarua, Rangitane and Ngai Tahu, in the 1853 deed

²¹ Ibid at 19-20.

²² Ibid at 20.

²³ Ibid at 6.

referred to above, was not an acknowledgement of rangatiratanga over the territories conceded.²⁴

In order for Rangitane's adverse claim (based on "mana whenua" but reconstituted by the Court as "rangatiratanga"), to be substantiated, the group had to establish that it had maintained rangatiratanga over the lands in question, up until the time of the signing of the deeds of sale.²⁵

Rangitane argued that it had customary title to the Wairau and as far south as Waiau-toa prior to 1828 and before Te Rauparaha lead his raupatu of the area. Rangitane stated that the Waiau-toa had long been recognised as its boundary with Ngai Tahu, and further, that Tapuae-o-eunuku was their sacred mountain. Rangitane also argued that it had defeated Ngai Tahu in battle in the late 1700s at Matariki on the north bank of the Waiau-toa. Ngai Tahu rebutted Rangitane claims by pointing out that it had subdued Rangitane north of Waiau-toa, treating them as a subject people. Later when Rangitane became fractious, Ngai Tahu had completely defeated them in battle beneath the Pa at Pukatea (Whites Bay). According to Ngai Tahu, after this battle Rangitane were confined to Wairau where they were later overrun by Ngati Toa.

Ngai Tahu were able to produce independent documentation to show that in 1848 they claimed Parinui-o-whiti as their iwi boundary. In 1857, a report by Crown land purchase agent, Donald McLean, stated:²⁶

The Rangitane, now almost extinct ... might possibly maintain some kind of claim as far south as Waipapa or Waiau-toa. They seem, however, to have been hemmed in on both sides by Ngati Toa and Ngai Tahu ... South of Waipapa, ... the Ngai Tahu title is incontrovertible.

This documentary evidence, while not proof of take, was evidence that regardless of any claim laid by Rangitane, nearly thirty years after their defeat by Ngati Toa they continued to be restricted to an area outside of that claimed by Ngai Tahu. The Court found that even if Rangitane could establish a take, their claim must fail because

²⁴ Ibid at 6.

²⁵ Ibid at 6-11.

²⁶ Ibid at 9.

they could not re-establish ahi kaa within the lands over which they claimed to hold mana whenua.

What is of note in the approach taken by the Court with respect to rangatiratanga over the lands claimed by the Rangitane, is that by focusing on the need for ahi kaa it has, inadvertently perhaps, conducted an inquiry into mana whenua. Therefore, it may well be that future recognition of mana whenua will be as the common law equivalent of the Tiriti concept of “rangatiratanga”.

A similar investigation was carried out by the Court regarding the Ngati Toa claim to mana whenua.²⁷ It stated that while Ngati Toa may have ventured as far south as Kaiapoi, possibly even to Akaroa, there was little evidence that it exercised ahi kaa south of the Wairau. The Court’s discussion of ahi kaa is worth noting.

In attempting to establish take raupatu, Ngati Toa needed to establish ahi kaa. Evidence was put forward of an isolated group of Maori in the area of Waiau-toa who were apparently of Ngati Toa descent, being descended from Tuhere Nikau. The Court ruled, however, that as no traditions by which the Ngati Toa linked themselves to Waiau Toa were advanced, the mere existence of a handful of isolated people, whom it was uncertain even maintained links to their original iwi, was insufficient to establish ahi kaa. As ahi kaa is a central aspect of mana whenua, this observation gives a clear guideline as to the criteria necessary for mana whenua to be recognised.

A second important result of this judgment is the Court’s ruling that Ngati Toa had not merely established control of an area in Wairau but had begun cultivating areas of land to a degree sufficient to demonstrate rangatiratanga and ahi kaa. This occurred despite the period of only twelve years elapsing between the raupatu and 1840. This approach shows that the Court is willing to apply Maori customary principles flexibly.²⁸ If the Court is prepared to take a flexible approach to ahi kaa, why then does it still maintain a rigid stance on mana whenua?

The remainder of the *Ngai Tahu* case was dealt with in a conventional manner. The Court first considered whether Ngai Tahu had one or more of the necessary take and found that prior to the invasion of the northern iwi they held customary title. This was based on a

²⁷ Ibid at 11-19.

²⁸ New Zealand Law Commission, *Maori Custom and Values in New Zealand Law: Study Paper 9*, Wellington, 2001, 3.

combination of take that could not be separated due to the duration and nature (intermarriage, conquest, ancestry) of Ngai Tahu occupation of the lands in question. Having established “take” the Court then looked to “ahi kaa”. It found that although Te Rauparaha and his allies had defeated Ngai Tahu at Kaikoura, Omihi and in the second campaign at Kaiapo, they had then left the Ngai Tahu domain.

Ngai Tahu argued that within two years of these defeats they had sought battle with Ngati Toa north of Parinui o Whiti. They also claimed to have continued to fish and hunt over the northern portion of their claimed lands as well as living in the areas. The Court was not satisfied that such occupation was to the exclusion of other iwi. It noted that the land could not be considered kainga tautohe (land over which rights are enjoyed by more than one iwi), as Ngati Toa withdrew northwards and there was no evidence of any sharing between Ngai Tahu and any other iwi. Ngati Toa also claimed proprietary rights south of the Wairau valley based on evidence that some of their principal chiefs had been killed there and that they had exterminated the Ngai Tahu residents. These claims were rejected on the basis that they did not establish ahi kaa and were an attempt to import a take that was not recognised by the Court.

The Court ultimately ruled that while in 1840 no iwi could establish rangatiratanga over the lands in the Kaikoura deed, Ngai Tahu had reoccupied the land and rekindled ahi kaa, after 1840.²⁹ This was permissible as the rekindling of ahi kaa was not the result of conquest but rather due to the release of Ngai Tahu slaves taken by Ngati Toa, who subsequently reoccupied their former homes.

With regard to the claims of Ngati Rarua and Ngati Tama to portions of the Arahura purchase, the Court ruled that both iwi had a claim to areas of the West Coast for a period after 1827 by virtue of take raupatu. The claim of Ngati Tama was lost, however, after the group was defeated by Ngai Tahu in battle at Tuturau, where their chief Te Puoho was killed and the rest of his taua enslaved. With regard to the claim of Ngati Rarua, there was dispute as to whether their claim ought, more appropriately, to be based on take tuku. It was suggested that they were in fact in friendly occupation with local iwi. The Court found that this was irrelevant however, as Ngati Rarua withdrew north after the defeat of Te Puoho and thus abandoned the land and lost any rights they may once have held³⁰.

²⁹ Supra n13 at 15.

³⁰ Ibid at 18-20.

Once again it is noted that had the Maori Appellate Court acknowledged mana whenua as put forward by the claimants, rather than supplanting it with rangatiratanga via the Treaty, the outcome in this case as far as land rights is concerned, would have been the same.³¹

Where to now?

In the *Ngai Tahu* case³² the Court held that “mana whenua”, or “mana-o-te-whenua” is a modern concept that came into vogue with the advent of the Kingitanga movement. According to the Court, mana whenua arose as a traditional veto mechanism by which members of the Tainui confederation, resisting ongoing pressure from Crown purchasing agents to sell their land, and fearful of law changes aimed at taking their land, granted their paramount rangatira, Potatau, “mana-o-te-whenua” (authority over the land). The purpose of this was to legitimate the referral of all future land purchase requests from the Crown to Potatau, who, because he held mana-o-te-whenua would be responsible for making decisions about the land. The Court found no evidence to suggest that the transfer of mana-o-te-whenua had any adverse effect on the rights of the occupants of the land who maintained their ahi kaa.

Four years later, in 1994, the view of mana whenua as a modern concept was reaffirmed by the Maori Land Court in the case of *Ngati Toa Rangatira*.³³ In *Ngati Toa Rangatira* the Court had to determine a number of issues relating to iwi representation, including who had the right to speak on behalf of Ngati Toa in Crown consultation processes. The Court followed the *Ngai Tahu* approach and ruled that the tikanga surrounding mana-o-te-whenua could not demonstrate any proprietary ownership rights being held by any one group appearing before it.³⁴

A similar conclusion seems to have been reached in the general courts by the Court of Appeal in *McRitchie Kirk v Taranaki Fish and*

³¹ Ibid at 25; The decision of the Maori Appellate Court was delivered to the Waitangi Tribunal on 15 November 1990. The decision of the Maori Appellate Court is binding on the Waitangi Tribunal – see section 6A (6) of the Treaty of Waitangi Act 1975.

³² Ibid at 4.

³³ *Ngati Toa Decision*, MAC 8 December 1994, 21 Nelson MB 1.

³⁴ Ibid at 9-10.

Game Council.³⁵ In this case, the defendant, McRitchie, was a member of the local hapu. He was caught fishing for trout in the Mangawhero River in breach of fisheries regulations. The Wanganui River has always been an important source of food for the hapu. As a member of the hapu, McRitchie was often required to fish for hui (official gatherings). The Court of Appeal accepted that in asserting “mana whenua”, the hapu sought recognition “of the power and influence associated with the possession of their taonga ... and its capacity ... to produce food”.³⁶ Additionally, in seeking recognition of tino rangatiratanga, Maori were asking for “acceptance of their mana or authority to control the resource”.³⁷ This subtle distinction indicates a perceived disparity in the Courts between “mana whenua” and “ownership rights”. Rangatiratanga, due to its presence in Te Tiriti o Waitangi/the Treaty of Waitangi, is widely accepted as being a claim for ownership and especially control rights. Mana whenua, however, is either viewed as a less fulsome right than rangatiratanga, as in *McRitchie*, or is completely displaced by rangatiratanga as the proper basis for a claim as in *Ngai Tahu*.³⁸

The Waitangi Tribunal, probably guided by the earlier Maori Appellate Court decisions, has recently stated that not only was mana whenua a 19th century attempt to frame Maori authority in terms of English law, but that it was an unhelpful innovation which did “violence to cultural integrity”.³⁹ The Tribunal’s view is not however, consistent. In the *Te Roroa Report*, the manner of its rejection of mana whenua clearly envisages it existing prior to its adoption by the Kingitanga movement in the 1850s:⁴⁰

Traditions record that Manumanu had mana whenua over Waipoua, meaning that he neither owned the land nor had authority appropriate to existing rights of usufruct.

The view that mana whenua existed as a working concept of Maori custom law prior to the 1850s has several proponents. Claudia

³⁵ *McRitchie Kirk v Taranaki Fish and Game Council* [1999] 2 NZLR 139.

³⁶ *Ibid* at 156.

³⁷ *Ibid*.

³⁸ *Supra* n13 at 4. Despite the claimants’ use of the term “mana whenua” when presenting their claims, the Maori Appellate Court stated that the more appropriate term to use in relation to land was “rangatiratanga” and reconstrued the applications accordingly.

³⁹ Waitangi Tribunal, *Rekohu (Chatham Islands) Report, (Part I)—WAI 64*, Brooker and Friend, Wellington, 2001, 28.

⁴⁰ Waitangi Tribunal, *Te Roroa Report — WAI 38*, Brooker and Friend, Wellington, 1992, 5.

Orange cites as one of the reasons for the assurance of tino rangatiratanga in Te Tiriti, the concern of Maori that if they signed a treaty the “mana of the land might pass from them”.⁴¹ In 1985, two major hui held at Turangawaewae and Waitangi issued statements to the effect that mana and rangatiratanga had never been ceded and could never be ceded and declared that Maori “Mana Tangata, Mana Wairua, Mana Whenua, supersede the Treaty of Waitangi”.⁴² For mana whenua to supersede te Tiriti/Treaty, it must have been in existence in 1840.

In line with Orange, Waerete Norman in her writings on Muriwhenua, agrees that the concept of mana whenua pre-dates European contact.⁴³ Norman states that mana whenua refers to the physical dimension of the collective title of the group as secured by ahi kaa. It is described as an alternative basis for establishing land rights that is linked to mana tupuna (rights inherited through and validated by whakapapa). The ambit of mana whenua in this sense, therefore, extends beyond the confines set by the Maori Land Court. It is more than mere authority, it is synonymous with control over land, and is akin to sovereignty being vested in a group and exercised by rangatira within an area. Norman’s usage of mana whenua advocates a right to land that is broader than mana tupuna.

In Norman’s depiction, ancestral land is the place where tupuna were born, lived, died, and left their mark by reference to whakapapa. The stronger claim to land rests with those who not only have whakapapa links but also have the added link of continuing to live on the land. Mana whenua thus seems to be related to “ahi kaa” and “ahi tere” in that people can have mana tupuna within the area to which they whakapapa but can only have mana whenua if they maintain their links with the land.

Given the regular assertion by the Waitangi Tribunal that it is Maori interpretations of Maori concepts that matter it is odd that the Maori Appellate Court should consistently adopt such a minimalist and restrictive interpretation of mana whenua. In my view, the concept has the potential to be highly influential in determining questions of

⁴¹ C Orange, *The Treaty of Waitangi*, Allen and Unwin, Wellington, 1987, 58.

⁴² A Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s*, Oxford University Press, Auckland, 1997, 90.

⁴³ W Norman, “The Muriwhenua Claim”, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, IH Kawharu ed., Oxford University Press, Auckland, 1989, 201-202.

agency - who had mana and rangatiratanga, over people and taonga - and how this might be transmuted into authority to speak and claim proprietary rights. Orange states:⁴⁴

In 1840 Maori had known the connection between mana and rangatiratanga and of both with taonga; they still did, and still claimed them on the grounds of an indistinguishable right.

Notwithstanding the Maori Appellate Court's outright denial of mana whenua as a traditional concept, the door to its greater recognition remains open.

Both the Courts and the New Zealand Law Commission recognise that definitions adopted in the application of Maori customary law will vary between iwi.⁴⁵ The rejection of mana whenua as a proprietary right by the Maori Appellate Court in *Ngai Tahu* and *Ngati Toa* may be limited to their facts in future cases. In *Ngati Toa* the rejection of mana whenua was explicitly linked by the Court to the fact that the information put forward by the claimants was by Tainui kaumatua – thus the link to the Kingitanga set out in the earlier *Ngai Tahu* case.⁴⁶

Conversely, a development toward recognition may also be noted in the preliminary views on the meaning of mana whenua for the Chatham Islands claims written by Chief Judge Durie (as he then was), when he stated that mana whenua may have two meanings. One of these meanings was that of Judge Fenton, the other related to long-term ancestral connections with the land.⁴⁷ This statement indicates a move towards recognition of a wider definition of mana whenua which takes traditional concepts such as those discussed by Waerete Norman, into account.

Chief Judge Durie also stated that words must be used carefully so they do not develop a tyranny of their own, especially where the Maori thinking behind them has not been fully explored.⁴⁸ While Durie intended to warn against accepting mana whenua without

⁴⁴ Ibid at 301.

⁴⁵ Supra n27 at 8-9.

⁴⁶ Supra n32 at 9-10.

⁴⁷ See "Preliminary views on the meaning of "mana whenua" for the Chatham Islands claims: *WAI 64* and other transcripts, 13 Oct 1994. Chief Judge Durie" and discussion in T Bennion ed., "Preliminary views on the meaning of "manawhenua" for the Chatham Islands claims", *Maori LR*, October 1994, 5.

⁴⁸ Ibid at 5.

sufficient tikanga supporting it, his statement is equally applicable in the reverse. The Court must be wary of limiting mana whenua, because if it can be established that Maori scholars such as Norman are correct, the implications for hapu and iwi whose claims do not fall within currently recognised take, are dire. The likelihood of their ever being able to receive a proprietary remedy for Crown breaches is significantly decreased.

The statutory definition of mana whenua does not really assist in determining the nature of the concept. The Resource Management Act 1991,⁴⁹ Fisheries Act 1996,⁵⁰ Conservation Act 1987⁵¹ and Reserves Act 1977⁵² all give the definition as “customary authority of an iwi or hapu or individual in an identified area”. The use of the terms “authority ... *in* an identified area” as opposed to “authority ... *over* an identified area”, while possibly coincidental, seems to imply a right to speak and be consulted with regard to an area, rather than a right to control that area. The Waitangi Tribunal recently challenged this definition in the Rekohu Claim⁵³ because it equated tangata whenua status with those who hold mana whenua.

The narrow approach taken by the Courts and that argued for by academics is seemingly irreconcilable. Because of these differences, I believe that the most workable definition of mana whenua, albeit not perfect, may be that provided for by statute,⁵⁴ that mana whenua is the “customary authority of an iwi or hapu or individual in an identified area”. This definition is compatible with the approach of the Courts in that it allows arguments to remain within the bounds of established New Zealand law. It also gives enough leeway for those who agree with the approach of Norman to argue that “authority ... in an identified area” ought to be read as representing a more comprehensive right than mere influence, and could be the basis of a claim to greater proprietary rights.

⁴⁹ Section 2 (1) Resource Management Act 1991.

⁵⁰ Section 2 (1) Fisheries Act 1996.

⁵¹ Section 2 (1) Conservation Act 1987.

⁵² Section 2 (1) Reserves Act 1977.

⁵³ *Supra* n39 at 24-26.

⁵⁴ Section 2(1) Fisheries Act 1996; Section 2(1) Conservation Act 1987; Section 2(1) Reserves Act 1977; Section 2(1) Resource Management Act 1991.

CONCLUSION

It is of no significant advantage to consider the motivation of the Maori Appellate Court in making the decision that “rangatiratanga” is more appropriate than “mana whenua” as a basis of land claims and ought, therefore, to supplant it. What is relevant is the impact that this choice could have on future claims.

With the possible exception of the Ngati Apa claim, it is doubtful that any of the conclusions reached by the Court in *Ngai Tahu* would have been different had they been considered under mana whenua instead of rangatiratanga supported by ahi kaa. Yet the very existence of a possible situation where rights may be denied due to an error in definition ought to be sufficient basis for investigating whether there is a need for changing the current approach.

The supplanting of “mana whenua” with “rangatiratanga” is, if Norman is right, a rejection of a legitimate claim under tikanga to proprietary rights. If the Court is correct, then it is time to consider whether rangatiratanga can be expanded or an understanding of mana whenua adopted to fill the void in the application of tikanga demonstrated above. As the New Zealand Law Commission has recognised, Maori custom law is dynamic, therefore this development should be considered progress.⁵⁵

In my view, the present stance of the Maori Appellate Court in rejecting mana whenua through restricting it conceptually to a post European development of the term “mana-o-te-whenua” amounts to the rejection of a legitimate basis for claims under Maori custom law. This undermines the claims of Maori for self determination in relation to Maori land and risks perpetuation of injustice in cases where the take claimed cannot fit under the accepted concepts of take tuku and take tupuna, or where mana whenua is the only basis for the claim.

⁵⁵ Supra n28 at 2.

