LYN CARTER

Ko Aoraki te maunga
ko Waitaki te awa
ko Murihiku te whenua,
Ko Te Rau Aroha toku marae kei raro i te maunga Motupohue
ko te whanau Wybrow toku whanau, nga uri o Temuka raua ko Pi
ko Lyn Carter ahau

I am Ngai Tahu, Ngati Mamoe, Te Rapuwai and Pakeha descent. I completed my PhD in 2003 with the Department of Maori Studies, University of Auckland. It examined modern iwi governance systems and their effect on whakapapa as an organisational framework in Maori societies. I am currently conducting further research into aspects of contemporary Maori identity.

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I am of Ngati Raukawa ki Waikato, Ngai te Rangi ki Tauranga and Pakeha descent. I grew up in the Ngai Tahu takiwa, along the shores of Lake Wakatipu. I teach Maori Land Law; Law and Indigenous Peoples and Property Law at the University of Otago. I will spend 2006 on research and study leave at the University of Victoria, BC, Canada, embarking on an interdisciplinary PhD provisionally entitled "Law and Landscape: An Indigenous Consideration of National Parks in Aotearoa/New Zealand and Canada". In my spare time I am a keen waka ama paddler.

"FREEING THE NATIVES": THE ROLE OF TREATY OF WAITANGI SETTLEMENTS IN THE REASSERTION OF TIKANGA MAORI

LYNETTE CARTER* AND JACINTA RURU**

Mo tatau, a mo ka uri a muri ake nei
For us and our children after us

INTRODUCTION

Aotearoa/New Zealand encompasses a landscape of mountains, rivers, valleys, and flat plains ringed by salt water, whose tangata whenua (first peoples) are Maori. For hundreds of years Maori interacted alone with the island environments, personifying the topography in accordance with their worldview and introducing practices that conformed to a series of working principles that upheld that worldview. Since the settlement of Pakeha (English colonials) in Aotearoa in the 19th Century, however, new laws and policies have been introduced and implemented whose predominant usage has stifled the worldview and environmental management practices of tangata whenua. The landscape of Aotearoa/New Zealand became a contested place – a place where "conflicts in the form of opposition, confrontation, subversion, and/or resistance engage actors whose social positions are defined by difference, control of resources, and access to power".[1] The place transformed into a new landscape; the old grounds of tangata whenua were overlaid with a new language and new owners and new managers. Despite the guarantee in te Tiriti o Waitangi/the Treaty of Waitangi to tangata whenua for continued "chieftainship over their lands, villages and all their treasures",[2] they became for the most part imprisoned –

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1 S Lowe and D Lawrence-zúñiga. *The Anthropology of Space and Place: Locating Culture*, Blackwell Publishing, Oxford, 2004, 18.

2 Article 2 of the Treaty of Waitangi (English version). The Treaty was signed in 1840 between over 500 Maori rangatira (leaders) and the British Crown. The

incarcerated – in a pre-contact time unable to participate in the post-1840 development of Aotearoa/New Zealand.

In recent times, the Crown, as the central administrative agency for the new state of Aotearoa/New Zealand, has accepted that "the historical grievances of Maori about Crown actions that harmed whanau, hapu and iwi are real".[3] It has implemented a Treaty of Waitangi settlement process to confront the effects of colonisation by providing tangata whenua with "fair", comprehensive, final and durable settlements of historical claims. Settlements aim to provide the foundation for a new and continuing relationship between the Crown and the claimant group based on the principles of the Treaty of Waitangi.[4] Settlements thus often contain Crown recognition of wrongs done, financial and commercial redress, and redress recognising the claimant group's spiritual, cultural, historical or traditional associations with the natural environment.

The issue that interests us is whether Treaty settlement legislation is providing an avenue for tangata whenua to reassert tikanga Maori in a contemporary manner and thereby leading to the recasting of a more accurate view of the landscape as a place where tangata whenua values are given overt, modern recognition. By combining a consideration of the disciplines of Anthropology and Law we argue that tangata whenua must be able to modernise the application of their worldview and integral cultural concepts. To this end we view settlement legislation not simply as a means to settle historical grievances, but also as a means for actively protecting the "dynamic"[5] nature of tikanga Maori, thus enabling hapu (sub-tribe) and iwi (tribe) to operate in today's world on their own terms. We explore these issues by case-studying one of the first major Crown-Iwi settlement packages: the Ngai Tahu Claims Settlement Act 1998 ("NTCSA").[6]

Maori and English versions of the text of the Treaty are included in Appendix 1 of Section B.

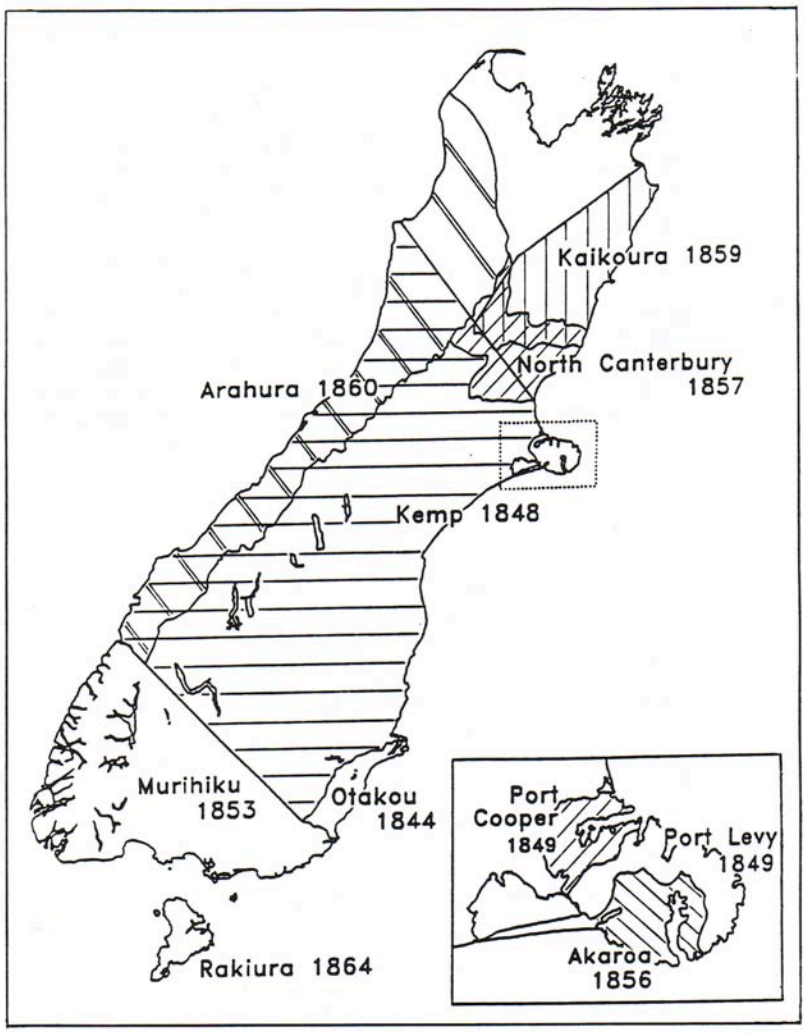
3 Office of Treaty Settlements *Ka tika ä muri, ka tika ä mua. Healing the past, building a future* (available to view and download at the Office of Treaty Settlements website: www.ots.govt.nz), 3.

4 Ibid at 84.

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

6 Other settlement legislation includes: Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, Ngaa Rauru Kiitahi Claims Settlement Act 2005, Te Uri o Hau Claims Settlement Act 2002, Pouakani Claims Settlement Act 2000, Ngati Turangitukua Claims Settlement Act 1999, Waikato Raupatu Claims Settlement Act 1995 and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

MAP SHOWING
NGAI TAHU CROWN PURCHASES
WHICH FORMED THE BASIS OF THE NGAI TAHU CLAIM
SETTLED IN 1998



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

PART I – NGAI TAHU AND THE SETTLEMENT PROCESS

The process for settling Crown breaches of the Treaty of Waitangi was formalised in 1985 when the Waitangi Tribunal was empowered to consider claims by tangata whenua that they had been prejudicially affected by legislation, Crown policy or practice, or Crown action or omission on or after 6 February 1840.[7] The following year, in 1986, Ngai Tahu[8] lodged their claim with the Tribunal, and in 1991 the Tribunal released its report, in three volumes, detailing the reasons for the claim and its recommendations for redress. It prefaced its report:[9]

> The narrative that follows will not lie comfortably on the conscience of this nation, just as the outstanding grievances of Ngai Tahu have for so long troubled that tribe and compelled them time and again to seek justice. The noble principle of justice, and close companion honour, are very much subject to question as this inquiry proceeds. Likewise, the other important equities of trust and good faith are called into account and as a result of their breach sadly give rise to well grounded iwi protestations about dishonour and injustice and their companions, high-handedness and arrogance.

Following the Tribunal's report, Ngai Tahu and the Crown commenced negotiations to settle these historical grievances.[10] Part of the settlement process first required Ngai Tahu to "establish an enduring tribal structure to manage its assets and its business and to distribute benefits to the Papatipu Runanga and the individuals comprising the tribal membership of Ngai Tahu".[11] It did this in 1996 via the Te Runanga o Ngai Tahu Act 1996. This Act defines who "Ngai Tahu" are, what their tribal boundaries are, and establishes a representative body corporate, Te

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7 Section 6 of the Treaty of Waitangi Act 1975, as amended by the Treaty of Waitangi Amendment Act 1985.

8 Ngai Tahu language dialect substitutes "ng" with a "k" so that "Ngai becomes Kai" and "taonga – taoka". The use of the "k" substitution is not consistent in most literature, including the Ngai Tahu legislation. We use the general dialectual "ng", but also use the "k" substitution when it is part of quoted material, or used in personal names, pronouns, and place names.

9 Waitangi Tribunal, *Ngai Tahu Report (Part 1) – WAI 27*, Brooker and Friend, Wellington, 1991, xiii.

10 For an excellent introduction to the settlement process: see *Healing the past*, supra n3.

11 Preamble of Te Runanga o Ngai Tahu Act 1996.

Runanga o Ngai Tahu.[12] It recognises Ngai Tahu as the iwi that holds mana whenua status (territorial authority) in the bottom two thirds of the South Island. It describes "Ngai Tahu Whanui" as those descendants of persons being members of Ngai Tahu iwi living in the year 1848 and whose names are recorded in the Ngai Tahu 1929 Census Book.[13] The primary descent groups of these peoples are Waitaha, Ngati Mamoe, and Ngai Tahu, "namely Kati Kuri, Kati Irakehu, Kati Huirapa, Ngai Tuahuriri, and Kai to Ruahikihiki".[14] Members of Ngai Tahu Whanui belong to one or more Papatipu Runanga (multi-hapu district councils).[15] There are currently 18 Papatipu Runanga. Each runanga elects a representative member of the central governing council, Te Runanga o Ngai Tahu. The 18 members of Te Runanga o Ngai Tahu represent Ngai Tahu Whanui.[16] A year later Te Runanga o Ngai Tahu signed a Deed of Settlement with the Crown. The following year Te Runanga o Ngai Tahu became responsible for implementing the Ngai Tahu Claims Settlement Act 1998.

The purpose of the NTCSA is to give effect to the settlement of all Ngai Tahu's historical claims. It contains an extensive Crown apology to Ngai Tahu, financial and commercial redress in the form of cash and assets, and cultural redress in forms ranging from vesting ownership in land to Ngai Tahu, providing for Ngai Tahu management of certain places, and providing recognition of Ngai Tahu relationships and traditional associations with particular landscapes. For example, the NTCSA transfers, or provides a right of first refusal to, certain properties and assets to Te Runanga o Ngai Tahu (including commercial properties, farm and forestry assets, and mahinga kai[17]); reinstates the Maori names

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12 For example, see sections 2, 5, 6, 9, 13, and 15 of Te Runanga o Ngai Tahu Act 1996.

13 Section 7 of Te Runanga o Ngai Tahu Act 1996.

14 Section 2 of Te Runanga o Ngai Tahu Act 1996 as amended by s 9(2) of Ngai Tahu Claims Settlement Act 1998.

15 Section 8(3) of Te Runanga o Ngai Tahu Act 1996. The Papatipu Runanga are owned and managed by Ngai Tahu Whanui.

16 A collective term for the main iwi of Ngai Tahu. Ngai Tahu Whanui are descendants of all living members of Ngai Tahu listed in the 1848 census and published in the proceedings and findings of the Ngai Tahu Census Committee, 1929 – commonly known as "The Blue Book". The Blue Book is the basis of the contemporary Ngai Tahu beneficiary register. See section 6 of Te Runanga o Ngai Tahu Act 1996.

17 "Mahinga kai" means, for the purpose of a joint management plan, the customary gathering of food and natural materials and the places where those resources are gathered". See section 167 of the Ngai Tahu Claims Settlement Act 1998.

of certain conservation areas; creates mechanisms for nohonga sites[18] to be established; appoints Te Runanga o Ngai Tahu representatives to statutory boards; vests lake beds in Te Runanga o Ngai Tahu, and acknowledges Ngai Tahu's cultural, spiritual, historic, and traditional association with certain landscapes, flora and fauna.[19]

Today, less than a decade after settlement, Te Runanga o Ngai Tahu is a prominent leading iwi entity in Aotearoa/New Zealand. Its commercial arm, Ngai Tahu Holdings Group, is a formidable business player in the South Island with investments in property, seafood and tourism. Te Runanga o Ngai Tahu is a major advocate in the education sector, having developed, for example, Memorandums of Understanding with the major tertiary institutions in the South Island. It has its own print (Te Karaka) and radio (Tahu FM) media forms. Its associate company, He Oranga Pounamu, has 31 affiliated providers offering a range of health and social services from its Tamariki Ora (children's health) programme through to gambling prevention programmes. It avidly protects its perceived legal interests, taking cases to the highest levels, including the United Nations.[20] In the past decade the 18 papatipu runanga have also become significant contributors to their local communities. For example, the three runanga that have connections with the Otago area established the first community law centre in the country solely focused on providing free legal advice to Maori residing in the Ngai Tahu area on issues relating to Articles One and Two of the Treaty of Waitangi.[21] As another example of innovation, in 1997 four runanga[22] established Kai Tahu ki Otago Ltd, which is responsible for facilitating consultation on resource management matters.

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[18] "Nohoanga entitlements are created and granted for the purpose of permitting members of Ngai Tahu Whanui to occupy temporarily land close to waterways on a non-commercial basis, so as to have access to waterways for lawful fishing and gathering of other natural resources". Section 256(2) and sections 255-268 of the Ngai Tahu claims Settlement Act 1998.

[19] For a discussion of the settlement see J Dawson, "A Constitutional Property Settlement Between Ngai Tahu and the New Zealand Crown", *Property and the Constitution,* J McLean ed., Richard Hart Publishing, Oxford, 1999.

[20] In 2005 Te Runanga o Ngai Tahu voiced its opposition to the Foreshore and Seabed Act 2004 to the United Nations Committee on the Elimination of Racial Discrimination. The Committee's Report can be viewed on its website at: http://www.ohchr.org/english/bodies/cerd/index.htm (accessed 23 May 2005).

[21] Te Runanga o Otakou, Kati Huirapa Rünanga ki Puketeraki, and Te Runanga o Moeraki established the Ngai Tahu Maori Law Centre, funded by the Legal Services Agency, in 1992.

[22] Te Runanga o Otakou, Kati Huirapa Runanga ki Puketeraki, Te Rünanga o Moeraki and Te Runanga o Hokonui.

The over-riding philosophy of Te Runanga o Ngai Tahu is now expressed as: "Mo tatau, a, mo ka uri a muri ake nei. For us and our children after us". Its mission is: "to prudently manage the collective taoka[23] (treasures) of Ngai Tahu for the maximum benefit of this and future generations". It strives to reflect the values of Ngai Tahu in everything it does, and explains these values as encompassing: "whanaukataka (family); manaakitaka (looking after our people); tohukataka (expertise); kaitiakitaka (stewardship); and manutioriori/kaiokiri (warriorship)".[24]

Such success and commitment suggest that Treaty settlements can "free the natives" to become once again firmly connected to their original place. In this article we explore this perception by considering the theories of people and place in the context of the NTCSA.

PART II – PEOPLE AND PLACE

In landscapes throughout the world, including in many areas of Aotearoa/New Zealand, different groups of people have become connected to places within the same vicinity. This connection has often led to contestation, but all places are essentially local and multiple, meaning: "Places are not inert containers. They are politicised, culturally relative, historically specific, local and multiple constructions."[25] It follows then that the management of a place is socially constructed and politically driven. Key sites can be "interpreted and manipulated in political situations"[26] by different groups of people depending on their perceived connections. The same place can be manipulated in accordance with the value that each interest group places upon it, but because of the many different values – economic, political, cultural, and authoritative – the "total spatial arrangements form a general network of communication".[27] The interaction between the

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[23] The dialectual change from "ng" to "k" is evident here in that "taonga" becomes "taoka", and later in that "whanaungatanga" becomes "whanaukataka", "manaakitanga" – "manaakitaka", "tohungatanga" – "tohukataka", "kaitakitanga" – "kaitiakitaka" and so forth. The legislation confuses this further by using both general and dialect Maori.

[24] See Te Runanga o Ngai Tahu website at: http://www.ngaitahu.iwi.nz/Main/Home.

[25] M Rodman, "Empowering Place: Multilocality and Multivocality" in *The Anthropology of Space and Place – Locating Culture*, supra n1 at 205. Original emphasis.

[26] H Kuper, "The Language of Sites in the Politics of Space", *The Anthropology of Space and Place: Locating Culture*, supra n1 at 252.

[27] Ibid at 259.

groups forces the differing values into a competition for vocalised "space" and therefore competition over the intention and function of the management processes that are eventually put in place.

The first scuffles for space in Aotearoa/New Zealand occurred within Maori society. Maori used whakapapa and tikanga as an organisational and regulatory framework that allowed the relationships between iwi, hapu and whanau and their environment to prosper and continue. Whakapapa and whanaungatanga tell us who the people of a place are. In its simplest definition it means "genealogies" or lists of names that act as keys to unlocking the way Maori understand how the world operates and maintains stability. Everything in te Ao Maori (the Maori world) – spiritual or physical – has a whakapapa that traces connections to a founding ancestor. Implicit in whakapapa are notions of kinship, descent, status, authority and property. Apirana Mahuika has defined whakapapa as the:[28]

> determinant of all mana rights to land, to marae, to membership of a whanau, hapu, and, collectively, the iwi. Whakapapa determines kinship roles and responsibilities to other kin, as well as one's place and status within society.

Two primary functions of whakapapa are to connect groups to known landscapes and to establish the ongoing basis from which tribal mana (authority and power), identity, and activity in the present can be validated by the past. Whakapapa-based organisational practices are appropriate to descent-based groups whose attachment to each other and their lands is, literally, umbilical. Hapu practice "kaitiakitanga"[29] (guardianship over their whenua – land), "whanaungatanga" (kin-shaped relationships; connections among groups or individuals), "rangatiratanga" (self-governance) and "manaakitanga" (hospitality to visitors). Laws, lore, customs, rules, and traditions that are known collectively as "tikanga" establish how the principles of whakapapa are observed. "Kawa" are rules and regulations which had regional and hapu variations. The dual dimensions of tikanga and kawa are known as "ira atua" – the spiritual dimension, or the social controls based on beliefs, values, and customs; and "ira tangata" – the physical or human

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[28] A Mahuika, "Commentary, Whakapapa is the Heart", *Kokiri Ngatahi – Living Relationships. The Treaty of Waitangi in the New Millennium*, K Coates and P McHugh eds, Victoria University Press, Wellington, 1998, 219.

[29] In some Ngai Tahu Regulations, the term has been replaced by "tangata tiaki". See the South Island Customary Fisheries Regulations, *Customary Fisheries Regulations in the South Island. A User Guide,* "tangata tiaki/kaitiaki", 3.

dimension. By taking this idea further it could be said, therefore, that the ira tangata is the pragmatic dimension, or how things are done on a day-today basis. The ira tangata dimension, therefore, encompasses the economic well-being of a group. For tikanga to be successfully used in any future iwi development processes, a balance needs to be struck between the two dimensions so that modern challenges can be met while cultural integrity is maintained.

The major scuffles for space in Aotearoa/New Zealand, however, occurred after the signing of the Treaty of Waitangi in 1840. More and more places became politicised spaces as Pakeha began to refashion the landscape into a new-look Britain. In the conflict for control and power in contested places, colonisers, including Pakeha colonisers, often sought to legitimate their actions by prescribing "ethnic types" to the first occupiers. For example, an "ethnic group" is said to share a set of common characteristics that can be generalised as: collectivity within a larger society; having a real or putative shared ancestry; memories of a shared historical past; cultural focus on one or more symbolic elements; shared territory and shared language.[30] The ethnic group is situated in a place that is often part of an ethnographically created image isolated from a more mobile "west".

Pakeha ideology institutionalised the "ethnic" definition of iwi to produce a pattern of characteristics that fixed a group into a rigid temporal and spatial context. The anthropologist Arjun Appadurai refers to this as the "boundedness of cultural units" and the "confinement of the varieties of human consciousedness within these boundaries".[31] He defines this "problem of place" as the problem of the culturally defined locations to which ethnographies have referred:[32]

> What it means is that natives are not the only persons who are from certain places, and belong to those places, but they are also those who are somehow *incarcerated*, or confined in those places.

"Place" then becomes a "metonymic prison that incarcerates natives"[33] and is in effect a created reality that locates "natives" in a place that is

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30 See for example, J Hutchinson and A Smith, *Ethnicity*, Oxford University Press, Oxford, 1996, 15-31, for various definitions of ethnicity.

31 A Appadurai, "Putting Hierarchy in its Place," *Cultural Anthropology,* Vol 3, (1), *Place and Voice in Anthropological Theory*, February 1988, 37.

32 Ibid at 37. Original emphasis.

33 Ibid.

"distant from the metropolitan west".[34] Appadurai suggests that there are two ways in which "natives" are imprisoned in their places. First, the natives are in a place that anthropologists, explorers, and missionaries came to, and hence it is these people who are the mobile ones, while the natives are confined temporally and spatially regardless of any other reality. Second, there is the notion that the actual culture binds natives to a place: "they are confined by what they know, feel, and believe. They are prisoners of their "mode of thought".[35] The ethnographic descriptions have frozen cultures into place and time both spatially and culturally. This in effect creates the notion of "native societies" as isolated in thought and action from the "west", because in essence they are part of an image created by an anthropologist who may have studied them. The prescribed characteristics and behaviour become the way that "natives" are observed and perceived. This makes it difficult for them to be considered anything but the created image, and it makes it difficult for their knowledge, values and beliefs to be incorporated into contemporary contexts.

The NTCSA provides an avenue to challenge these perceptions and resurrect a more accurate picture of people and place in Aotearoa/New Zealand. Most importantly it has given Ngai Tahu Whanui, in particular, Te Runanga o Ngai Tahu, the voice to reclaim their tangata whenua status in the politicised spaces. There remain parallels with the new definition of "iwi" to that of "ethnicity" in so far as iwi are also said to share a set of common characteristics defined as: descent from an eponymous ancestor (having a real or putative shared history); hapu (shared collectivity); marae (cultural focus on one or more symbolic elements); belonging historically to a takiwa (shared territory); shared language and an existence traditionally acknowledged by other iwi (collectivity within a larger society).[36] However, the Kaiwhakahaere of Te Runanga o Ngai Tahu, Mark Solomon, has noted that "there was nothing that came out under that Act that was not debated on our marae".[37] The definition of "iwi" as applied to Ngai Tahu was thus a process in which they had some (albeit not total) control. It is Crown policy to only enter into settlement negotiations with mandated iwi. The

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34 Ibid.

35 Ibid at 37.

36 Refer to the list of "Essential Characteristics" in the Runanga Iwi Bill. SNZ, Vol 3, No. 125 1990, 1756.

37 Cited in L Carter, *Whakapapa and the State – Some case studies in the impact of central government on traditionally organised Maori groups*. Unpublished PhD Thesis, University of Auckland, 2003, 154.

Crown also prefers to negotiate with large tribal groups rather than with individual hapu or whanau. The rationale for such a policy is, first, it makes the settlement negotiations easier to manage, and, second, it helps deal with the problem of overlapping claims. Consequently the NTCSA mandates the Ngai Tahu Whanui as the correct iwi voice for the bottom two thirds of the South Island.

But is the voice free to express tikanga Maori in a modern context? Does tikanga Maori even have the capacity to be expressed in the contemporary world?

A people's "worldview" contains the underlying beliefs and values of how they know the world to operate, and how they understand their place within it. "Tikanga" are the concepts and principles developed over time that allow a people's values and beliefs to be integrated into decision-making processes. "Kawa" are the rules and practices for interaction that result from those concepts and principles. Tikanga concepts and principles of interaction are dynamic and can be adjusted or replaced when times call for such redirection. Kawa naturally adjusts as well in order to carry out the decision-making processes. But the worldview containing the set of beliefs and values that underpin societies and how they operate does not markedly change over time.

The challenges and changes that face Maori today are no more complex than they were in the 19th Century. Tikanga is just as capable of being adjusted to meet contemporary challenges. What is necessary to understand is the way that cultures develop and grow through successive generations. All cultures go through cycles of compromise and transition that continually discard knowledge that is no longer relevant. What remain stable and relevant throughout are the underlying beliefs and values that guide tikanga processes. Tikanga provides a set of guidelines that maintains the cultural integrity of Maori groups. Simultaneously, tikanga continues to provide the same guidelines for sustaining management processes and knowledge in culturally relevant ways. As Hirini Mead states:[38]

> Tikanga are not frozen in time … It is true however that tikanga are linked to the past and that is one of the reasons why they are valued so highly by the [Maori] people. They do link us to the ancestors to their knowledge base and their wisdom. What we have today is a rich heritage that requires nurturing, awakening

[38] H Mead, *Tikanga Maori – Living by Maori Values,* Huia Publishing, Wellington, 2003, 21.

> sometimes, adapting to our world and developing further for the next generations.

The New Zealand Law Commission has similarly acknowledged that "tikanga Maori should not be seen as fixed from time immemorial, but as based on a continuing review of fundamental principles in a dialogue between the past and the present".[39] The Law Commission stressed that there is "no culture in the world that does not change"[40] and that a change can occur without detriment to its basic underlying values.[41] According to the Commission, it is therefore, important to accept that there is a continuing need for Maori to maintain and adapt tikanga and "value in looking to the past; but only to the extent that it sheds light upon the present and the future".[42] The Commission concluded that in order to realise the Treaty of Waitangi promise to provide a secure place for Maori values within Aotearoa/New Zealand society, this "must involve a real endeavour to understand what tikanga Maori is, how it is practiced and applied, and how integral it is to the social, economic, cultural and political development of Maori".[43]

Likewise, Justice Eddie Durie of the High Court has explained:[44]

> Maori customary law has conceptual regulators that have remained important for many Maori. The way that these conceptual regulators are expressed in today's society is not identical to the way that they were expressed before the Treaty of Waitangi, at the time of the Treaty of Waitangi over 160 years ago, or as they will be expressed in 160 years from now. Change has occurred within Maori society to produce a different set of standards that are acceptable, but the underlying values remain the same. Tikanga Maori has always been very flexible, but the values that the tikanga is based on are not altered.

The NTCSA has provided tangata whenua from the bottom two thirds of the South Island with a legal voice. According to tikanga Maori, they

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39 *Maori Custom and Values in New Zealand Law*, supra n5.
40 Ibid at 3.
41 Ibid at 5.
42 Ibid.
43 Ibid at 95.
44 E Durie "Constitutionalising Maori", *Litigating Rights – Perspectives from Domestic and International Law*, G Huscroft and P Rishworth eds, Hart Publishing, Oregon, 2002, 259.

have a right to express this voice in a modern context. To what extent does the NTCSA allow for this to happen?

PART III – TIKANGA AND PLACE

The NTCSA contains several significant, and legislatively novel, elements recording the Crown's acknowledgment of Ngai Tahu's tikanga – its cultural, spiritual, historic, and traditional association with many landscapes and flora and fauna species using devices such as statutory acknowledgments and Topuni.[45]

Statutory acknowledgments and Topuni are landscape-focused devices. Sixty-five places are statutorily acknowledged in the Act's schedules. They include mountains such as Aoraki/Mount Cook, Hananui/Mount Anglem, lakes such as Hoka Kura/Lake Sumner, Kuramea, Lake Catlins, rivers such as Hekeao/Hinds River, Kakaunui River, lagoons and wetlands such as Karangarua Lagoon and Punatarakao Wetland) and hills and rocky outcrops like Bluff Hill and Tokata/The Nuggets. Fourteen conservation estate areas are overlaid with a Topuni cloak. For each site – whether it has been statutorily acknowledged or been cloaked with a Topuni – the relevant schedule records a history which imbues the area with a distinct Ngai Tahu perspective. For example, Schedule 38 statutorily acknowledges Makaawhio (Jacobs River). Ngai Tahu's association with this river is recorded in ten paragraphs. It begins with legend:

> According to legend, the Makaawhio River is associated with the Patupaiarehe (flute playing fairies) and Maeroero (ogres of the forest). It is said that Tikitiki o Rehua was slain in the Makaawhio River by the Maeroero.

The schedule emphasises the importance of the legend:

> For Ngai Tahu, traditions such as this represent the links between the cosmological world of the gods and present

[45] "Topuni" are areas of land identified under s238 NTCSA. They are administered under the National Parks Act 1980, the Conservation Act 1987 and the Reserves Act 1977. Their management regime includes Ngai Tahu values. "Ngai Tahu values" means Te Runanga o Ngai Tahu's statement of the cultural, spiritual, historic, and tradtional association of Ngai Tahu with the Topuni under section 237 NTCSA. Note: other settlement statutes have since adopted many of these devices, for example: see Pouakani Claims Settlement Act 2002, Te Uri o Hau Claims Settlement Act 2002, and Ngati Ruanui Claims Settlement Act 2003.

> generations, these histories reinforce tribal identity and solidarity, and continuity between generations, and document the events which shaped the environment of Te Wai Pounamu and Ngai Tahu as an iwi.

Schedule 38 also notes Ngai Tahu's historical use of the area, including its use as a battleground, place for permanent settlements, and as a sentry lookout which has resulted in a number of urupä (burial grounds) and wähi tapu (sacred places) along the river – stated as "places holding the memories, traditions, victories and defeats of Ngai Tahu tupuna". The schedule states that the river was and still is the source of a range of mahinga kai, including tuna (eels), patiki (flounders) and inaka (whitebait). The schedule affirms:[46]

> The tupuna had considerable knowledge of whakapapa, traditional trails and tauranga waka, places for gathering kai and other taonga, ways in which to use the resources of the river, the relationship of people with the river and their dependence on it, and tikanga for the proper and *sustainable utilisation* of resources. *All of these values remain important to Ngai Tahu today*.

Statutory acknowledgements enable Te Runanga o Ngai Tahu to be notified of resource consent applications relating to an area statutorily acknowledged, and to ensure consent authorities, the Historic Places Trust, and the Environment Court have regard to the statutory acknowledgements when deciding on issues relating to a resource consent application.[47] In addition, the Minister of the Crown responsible for management of the statutory areas, or the Commissioner of Crown Lands, can enter into deeds of recognition in relation to these areas. Also Te Runanga o Ngai Tahu and any member of Ngai Tahu Whanui can cite statutory acknowledgements as evidence of the association of Ngai Tahu to the statutory areas. This means that the Ngai Tahu worldview, as recorded in the schedules, can constitute admissible evidence in court.

The significance of the Schedules is that they recognise in a legislative form the importance and function of whakapapa for Ngai Tahu whanui. As explained earlier in this article, the function of whakapapa is to connect groups to known landscapes. The NTCSA legitimises this cultural approach by cementing tangata whenua to specific places in a

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[46] Emphasis added.
[47] Section 215.

legalistically written form. The importance of the wording employed in the schedules also lies in the legislative recognition of the continuing value of tikanga in today's modern world. Schedule 38, for example, explicitly accepts that tangata whenua still need to interact with the landscape – that it remains important to Ngai Tahu to maintain the relationship by active utilisation as well as ceremonial observance.

The physical representations of whakapapa in mountains, rivers and other important landmarks serve as reminders of the group's governance status and why they hold the mana over particular areas.[48] This latter process is known as "ahi ka" (maintaining occupation of the land). The concept of ahi ka insists that being a blood relative does not give one much entitlement to anything, those entitlements being dependent on the fulfilment of duties and obligations toward maintaining whakapapa relationships, occupying the land, and ensuring that the benefits from it are maintained for future generations.

Specific devices also allow for expression of rangatiratanga and mana – self-determination and authority over particular areas and resources which are of collective interest to the iwi. For example, the Topuni device (a label that can only be attached to land within the conservation estate), requires the New Zealand Conservation Authority or any relevant conservation board to have particular regard to Ngai Tahu values on a specific site.[49] Ngai Tahu values are Te Runanga o Ngai Tahu's statement of the cultural, spiritual, historic, and traditional association of Ngai Tahu with the Topuni.[50] The statements are similar to those made for the statutory acknowledgments. For example, the Topuni for Aoraki/Mount Cook records the Ngai Tahu tradition of who Aoraki is and how it was formed, emphasising its "mauri" or life force. It states:

> To Ngai Tahu, Aoraki represents the most sacred of ancestors, from whom Ngai Tahu descend and who provides the iwi with its sense of communal identity, solidarity and purpose. It follows that the ancestor embodied in the mountain remains the physical manifestation of Aoraki, the link between the supernatural and the natural world. The tapu associated with

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[48] For a good introduction to the personification of the landscape: see the Waitangi Tribunal reports, including *Te Whanganui A Tara Me Ona Takiwa: Report on the Wellington District – WAI 145*, Wellington, 2003. Note: Tribunal reports are available online at http://www.waitangi-tribunal.govt.nz/reports/

[49] See sections 237, 239, and 241.

[50] Section 237.

> Aoraki is a significant dimension of the tribal value, and is the source of the power over life and death which the mountain possesses.

Te Runanga o Ngai Tahu and the Crown may agree on specific principles which are directed at the Minister of Conservation for avoiding harm to, or the diminishing of Ngai Tahu values in relation to each Topuni.

Statutory acknowledgements and Topuni have the potential to be of immense importance in providing a means for Ngai Tahu Whanui to reconnect with parts of the landscape. The legislation empowers tangata whenua to associate with places in a more than symbolic manner. The places are thus being overlaid with values that are both Pakeha and Maori. Prior to Pakeha arrival, the place was entirely encapsulated in a Maori worldview. Following the arrival of Pakeha many of the places became Pakeha domains. Today, legislation is changing the nature of the contested spaces by recognising that different groups can understand and operate within the same place in quite different ways. The challenge now is whether the implications of this new approach can be widely enough accepted by those with interests in the area to allow the group that has been marginalised under New Zealand law, tangata whenua, to "catch-up". Can they accept that Ngai Tahu Whanui, as with all other peoples, have a right to develop their management processes (tikanga) in a contemporary context?

Importantly, the understanding and sharing of "place" amongst groups is "forged in culture and history."[51] As a consequence, relationships are often voiced differently. The way that people understand the landscape and explain the existence of features such as mountains, rivers, and plains is expressed through the language that they use. Keith Basso explains in his work on Apache Indian culture and language that:[52]

> … whenever members of a community speak about their landscape – whenever they name it, or classify it, or evaluate it, or move to tell stories about it – they unthinkingly represent it in ways that are compatible with shared understandings of how, in the fullest sense, they know themselves to occupy it.

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[51] *Rodman*, supra n25 at 208.

[52] K Basso, *Western Apache Language and Culture – Essays in Linguistic Anthropology*, University of Arizona Press, Tuscon, 1990, 141.

In Aotearoa/New Zealand two different languages have been used to vocalise perceptions of place and cultural spaces within the contested environment. One has been the Maori language, expressed through stories centred on genealogical connections or whakapapa. The other language used to describe the Aotearoa/New Zealand landscape is the English language, which has been centred on colonial discourse of discovery, integration, appropriation, and expansion. In both cases landscapes are shaped by "linguistic performances" that assign space to particular groups within a shared environment. One important way of "voicing" landscapes is through placenames which affirm a pattern of cultural relevance and longevity. Landscapes become textualised as a map of the world through the way that placenames imbue the landscape with the values, knowledge, beliefs and ideologies of a particular worldview.

The NTCSA officially gives back to several places their Maori names.[53] It also makes a new policy insertion into the New Zealand Geographic Board Act 1946 that use of original Maori place names on official maps is to be encouraged.[54] This is an important linguistic recognition of the historical association of Maori and their prior occupation. The significance lies not simply in recording the Maori names – the Ngai Tahu Whanui have always known and used these names – but in the wider symbolism it has for all other peoples of Aotearoa/New Zealand. The renaming is a visual reminder that the landscape is not a recent space upon which humans have lived – it is not a mono-cultural place – but rather an environment endowed with a history that once knew a language and culture that has become, for the most part, foreign to many of the people who now inhabit it. The renaming thus validates the Ngai Tahu Whanui connection, and reminds us all of this connection.

Parts of the NTSCA have enabled Ngai Tahu Whanui to reassert their tino rangatiratanga and gain some active control over their future and their children's future. According to tikanga Maori, the accumulation of wealth ("tangohia") demonstrates that iwi and hapu have been able to assert some power, authority and control over their land and resources. Te Runanga o Ngai Tahu received $170 million as part of the Ngai Tahu settlement package. This has provided an economic base for commercial development of Ngai Tahu Whanui to occur. With the commercial success of Te Runanga o Ngai Tahu in the years following the Ngai

[53] For example, see sections 162, 165, 166, 269 and 271.
[54] Section 270.

Tahu settlement,[55] Ngai Tahu Whanui are once again exercising "manaakitanga" – the ability to demonstrate, and have others recognise and acknowledge their tino rangatiratanga. Manaakitanga continues to be a primary focus for all iwi and hapu because it allows for recognition of Ngai Tahu's continued occupation, control and authority (tino rangatiratanga) over land and resources (mana whenua), and enables them to plan for the needs of future generations (mana tangata). It also provides for separate development of Ngai Tahu control over land, resources and people (mana motuhake), and for delegated leadership of Rangatira and Ariki to be recognised (mana Ariki).[56]

PART IV – HOW SUCCESSFUL IS THE NTCSA IN PROVIDING FOR NGAI TAHU REASSERTION OF AUTHORITY OVER PLACE

While NTCSA gives recognition to the voice of the first peoples and their tikanga, it also restricts Ngai Tahu Whanui's place in this new order. For example, the Crown acknowledges the cultural, spiritual, historic, and traditional association of Ngai Tahu with "taonga species".[57] The term relates to: 64 birds, 53 plants, 6 marine mammals, 7 fish species, and 5 shellfish species.[58] Essentially the provisions provide Te Runanga o Ngai Tahu with the right to be advised and consulted with in relation to conservation management strategy reviews and management or conservation decisions. It includes deciding whether a recovery plan is necessary to protect taonga species. However, the Act makes it clear that the acknowledgement does not affect the lawful rights or interests of any other persons,[59] and that other legislative provisions retain legal effect, including the Wildlife Act 1953.[60] Moreover, section 296(3) of the NTCSA states:[61]

> Possession of specimens may be transferred between members of Ngai Tahu Whanui by way of gift, bequest, or other non-commercial transfer *but specimens may not be transferred by*

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55 The 2004 Annual General Report states that investment planning has increased total Ngai Tahu assets from $170 million to $441 million. See *Te Runanga o Ngai Tahu Annual General Report 2004*, 17.

56 See M Durie, *Nga Tai Matatu. Tides of Maori Endurance.* Melbourne, Oxford University Press, 2005, 8-9. The original refers to Maori - we have replaced "Maori" with "Ngai Tahu" to show application in localised context.

57 Section 288.

58 See section 287 and Schedule 97.

59 Section 291.

60 For example see section 296(2).

61 Emphasis added.

way of sale, whether to other members of Ngai Tahu Whanui or to any other person or entity.

This provision narrows the Ngai Tahu cultural, spiritual, historic, and traditional association with taonga species and denies economic associations. Exclusion of Maori economic development ensures that the place is manipulated in favour of the majority group's Pakeha value system.

While legislative recognition must be seen as a positive step, it is also important to recognise the underlying politics that ensure that those with power and control continue to limit the tangata whenua connection to land, especially contested places. At the time when the Crown and Ngai Tahu were negotiating the settlement, the Hon. Nick Smith, then Minister of Conservation, commented in the second reading before the House that, "From listening to talkback radio and a few of the conservation organisations, one would think that Ngai Tahu had horns, tails, and probably a fork".[62] In many ways, the NTCSA (and all settlement legislation) thus represents the best deal politically do-able within a context in which Pakeha resistance and majority power still prevails.

A second example epitomises public reaction to a right to economic development on high country stations: the building of a gondola between Caples Valley and across the Greenstone Valley from Kinloch to Milford. The NTCSA records the Deeds of Covenant entered into with the Crown relating to these Valleys. It gives ownership to Te Runanga o Ngai Tahu. Ngai Tahu Holdings Corporation and Skyline Enterprises are exploring the feasibility of building the gondola. There is vocal public opposition. The media in recent years have captured the controversy through headlines such as "Gondola Ignites Battles".[63] Environmentalists have been leading the opposition. The Royal Forest and Bird Protection Society of New Zealand website, shouts "Gondola be gone!" stating that the gondola "will destroy the natural character" of the Caples and Greenstone Valleys and notifying the public of its campaign to prevent these Valleys from "being spoilt".[64] The then ACT Member of Parliament, Gerry Eckhoff, countered this position stating "it is intriguing that Forest and Bird … has vowed to fight this proposal, but is silent over Project Aqua – which will have a much greater impact on

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62 (567) NZPD 7947 (31 March 1998).

63 *The Christchurch Press*, 23 September 2000, 10.

64 See The Royal Forest and Bird Protection Society of New Zealand website at: http://forestandbird.org.nz/conservation/gondola.asp (accessed 26 April 2005).

the environment than the gondola".[65] Many opinions are expressed in the editorial pages chastising Ngai Tahu. For example:[66]

> I fail to see why Ngai Tahu of all people should want to put a gondola through a valley that their ancestors used as a route to find greenstone. Ngai Tahu have already proven that with other so-called areas of cultural significance once the title has been secured it is promptly sold for profit. … Let's see Ngai Tahu give something back to New Zealand and look forward to a future of sharing our uniquely beautiful and special country.

Such views are prominent, and sad, for their misconception. The NTCSA attempts to connect Ngai Tahu back to the environment, and in doing so contestation over place is unavoidable. Because Ngai Tahu are moving forward and exploring avenues to use returned land, some are labelling them "greedy money-makers".[67] But, in the NTCSA, the Crown profoundly apologies to Ngai Tahu for taking all they had – their land – and seeks to settle these injustices by returning a smidgen of it. It is an odd logic to then ask Ngai Tahu to "give something back" to the country, or criticise them for using the land for commercial means when this is how others have already used most of the land in this country.

And so the problems of place and space remain. While there are issues arising from within iwi membership, in particular the notion that a centralised iwi body can be the "voice" for all situations regardless of hapu and whanau tikanga, the gondola example illustrates the existence of ongoing contention between iwi and the wider community. Other groups' perceptions of Ngai Tahu status and connectedness to place could be the telling factor in how successful settlement legislation is in allowing Maori to reimpregnate the landscape with a contemporary Maori worldview that has positive practical outcomes for them. It is wrong only to conceive of the connection as being locked into an ancient "spiritual" or "cultural" attachment which excludes the possibility of developing economic use rights. Other groups, including Pakeha, now have to reconsider their own issues of power and agency as control of

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[65] "Double-Standard on Southern Developments" press release, 5 March 2004: see ACT's website at www.act.org.nz/item.aspx?id=25367 (accessed 26 April 2005). "Project Aqua" is Meridian Energy's proposal to take water in the Waitaki catchment to generate electricity.

[66] K Christensen, "Valley for Sharing not Paring" *Christchurch Press,* 10 July 2001, 21.

[67] "Gondola – Beware the unholy alliance of big business and the press" *Southland Times,* 6 October 2000, 4.

place and space is being returned to more and more iwi in the settlement era. This is the real challenge.

CONCLUSION

A new landscape in Aotearoa/New Zealand is emerging through Treaty of Waitangi Crown-iwi settlements. Many provisions in legislation today provide the means for tangata whenua connections with their homelands to be given overt recognition. Current settlement legislation contains elements of Maori cultural affirmation, including wording taken from the Maori language lexicon. But using terminology to give something "a Maori flavour" and actually applying the concepts to provide positive practical outcomes are different things entirely. The application of tikanga processes will continue to be stifled unless tikanga Maori becomes the point of difference that allows alternate cultural preferences to emerge and play an active role in today's society. Current legislation highlights Maori spiritual involvement with the landscape. Maori involvement with the land, however, also included an economic context. Legislation therefore needs to recognise and include measures that ensure that Maori share in all the present and future economic development in Aotearoa/New Zealand: incorporating a combination of both the ira atua dimension and the ira tangata dimension in economic development management decisions.

Tikanga Maori concepts now appear in a raft of statutes. The most progressive of these inclusive statutes are the Treaty of Waitangi settlement Acts. These statutes are concerned with achieving reconciliation and providing a platform against which iwi and hapu can move forward politically, economically, and socially. While the case study of the NTCSA has illustrated that the framework is far from perfect for the real advancement of tikanga and Ngai Tahu rangatiratanga, it is at least allowing for some control and connection. Ngai Tahu are endeavouring to build a world "mo tatou, a, mo ka uri a muri ake nei." Future generations of Ngai Tahu want to develop as Ngai Tahu in the fullest sense with their culture and tikanga intact among the "complexities and opportunities that come with being Maori [Ngai Tahu] in a global society".[68] But problems remain and the discussion of taonga species and the gondola disputes highlight this. As many Maori have

[68] *Durie*, supra n56 at 2.

been at pains to establish: "we are not an interest group or a minority group, we are Tangatawhenua".[69]

The challenge now for society is to accept the dynamic nature of tikanga Maori in a like manner to how the Pakeha have had the right to develop their culture through the centuries. The maintaining of tikanga and kawa – working from within a Maori knowledge base – will be important for the future development of hapu and iwi groups if they are to move forward with their cultural integrity intact. For tikanga processes and legislative processes to work together compromises have to be made. Legislation such as the NTCSA is a step in the right direction, but more is required to ensure that tikanga remains a relevant framework from which to help shape future legislation and policy.

As this article has illustrated, Te Ao Maori is not a "pristine memorial to the past"[70] and tikanga is not a regulating process from a bygone age. For tikanga to be recognised and used effectively within the modern world there will need to be a greater recognition of the relinquishment of power to Maori, and greater acceptance of our contemporary worldview. With the law, and especially settlement legislation, now beginning to lead the way towards a more inclusive future, we hope that society follows with enthusiasm.

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[69] This is a statement by Nganeko Minhinnick, quoted in David Williams, "Purely Metaphysical Concerns", *Whenua – Managing our Resources*, M Kawharu ed., Reed Publishing Ltd, Auckland, 2002, 292.

[70] *Durie*, supra n56 at 3.

SECTION B

OWNERSHIP, RANGATIRATANGA AND KAITIAKITANGA