

NGA TUHITUHI KEI ROTO

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OBITUARY



Karina Raewyn Roimata Williams
1962 - 2005

Haere atu ra e te rangatira, e Karina
Puritia te aka tupuna
O tapuwae ki te ara wairua o ratou ma
Waiho matou ki muri
Me o matou hupe roimata
Nga whatinga pouri katoa i wehea nei e koe

Engari,
Kahore koe ki te ngaro i te tirohanga kanohi
Ko te aroha me te mahara e mau tonu ana
A te wa
Ka tutakitaki ano tatou

A Tribute to My Friend and Colleague Karina Williams

On 2 September 2005, Judge Karina Williams passed away after a short illness. It is impossible to express what a tragic loss her early passing has been – not only for her whanau – but also for those involved in the law, where Karina made such an outstanding contribution and had proved to be an exceptional role model.

Judge Williams, whose tribal affiliations were Tuhoe, Te Whakatohea, Tainui, Te Aupouri and Ngaitai iwi, was from Ruatoki. She was educated at St Cuthbert's College in Auckland. Proud of her Maoritanga, it was here that her advocacy for Maori began. One of her achievements at school included being Head Girl.

Judge Williams was the daughter of Tawhirimatea and Kaa Williams, who are both well known for their own outstanding contributions, notably in the field of education. Within her family environment, Karina not only committed herself to study but also to sport and music, excelling at all levels.

Later a representative netball player for Auckland, she went on to coach South Auckland teams for many years. She also taught and composed for kapa haka groups.

At Law School she met the other Maori who would be her friends and colleagues for the next two decades. Later on, many of them also ended up working in South Auckland with her.

Judge Williams practised as a barrister in South Auckland Chambers and later Friendship Chambers, working with other lawyers who shared her concern about social justice issues. Known for being both staunch and hugely competent, she became a trailblazer and role model for other Maori, and other women. She never forgot her roots – even after long working weeks she frequently travelled to hui at weekends during the Whakatohea Treaty settlement negotiations.

Her appointment to the bench in 2003 was met with widespread approval. There was a strong sense that she would prove to be outstanding in the work she was to take on. Her appointment was to the Manukau District Court – in the heartland of South Auckland where she had worked for so many years as a criminal lawyer, youth advocate, District Inspector for Mental Health and Tenancy Tribunal Adjudicator. Despite her success, she was always reminded, both by her work and by

her own life, of the disadvantage suffered by Maori and Pacific peoples. She always strove to make a difference.

Even in the relatively short time that she was to serve as a Judge, Judge Williams showed judicial leadership. Her running of the Family Violence Court proved legendary: her ability to communicate with parties produced truly meaningful results. It is of interest that the success of this specialist court (currently one of only two in the country) has meant that it is soon to be rolled out into courts in other parts of New Zealand.

Judge Williams also maintained strong links with the community after her appointment to the bench, continuing to involve herself in various advisory and trustee roles.

Despite everything she achieved, Judge Williams said that her proudest achievement was motherhood. Those who know her teenage daughter, Kataraina, can easily see that she has her mother's special combination of intelligence, courage and ability.

Invited to give a speech a few months before her passing, Judge Williams spoke in detail of her family background, and modestly described herself as "an extremely ordinary person who has been fortunate to have had extraordinary opportunity and support".

Judge Karina Williams passed away just days short of her 43rd birthday. Her loss is immeasurable. The Manukau and Waitakere District Courts were all-but-closed for her tangihanga, attended by over 1000 mourners. The wide range of people present – from all walks of life – spoke of the impact she had had in so many different parts of the community.

Judge Williams is survived by her parents, Tawhirimatea and Kaa Williams, three siblings, her partner Richard Te Hunia and daughter Kataraina. She rests next to her great grandfather, Rev. Mutu Kapa, in Mangere.

Judge Lisa Tremewan

Karina Williams – Rainbow Judge – My Little Mate

Cruelly sawn off by cancer at 43, Karina's legacy will long endure. Her wicked smile and humour, her passion for South Auckland youth, her disdain of posers, her desperate need for a fag after a long meeting or heavy court session, her short legs in control of the dirty great big ancient blue gas guzzling Mercedes, the fun she had with a beer, a fag, music and a dance, her ragged moth-eaten but comfortable office chair, the dark blue pinstriped suit, her thick black hair, her total loyalty to friends, her high moral standards, her love for her daughter (her "baby"), her mana and the love and friendship so many of us shared with her.

Nearing the end of her battle, riddled with disease, Karina sought solace in traditional Maori spiritual healing, at the same time continuing with the horrible chemotherapy which finally proved too tough for her weakened body. In character, near the end, angry with friends sceptical of her ability to survive much longer, she decided only family and closest friends such as Laverne King and Ida Malosi could visit. That didn't help the grieving process for the rest of us although the extended tangi did – to an extent. Had I been asked to write about KW a year ago, I would have struggled to find words through the pain. The writing process was in the hands then of the brilliant and professional Catriona MacLennan whose accurate and perceptive tributes to our little mate were appreciated by all.

Born and raised in the small settlement of Ruatoki in the eastern Bay of Plenty, Karina regarded herself as a bit of a rat-bag as a kid, requiring her schoolteacher parents to send her to posh Auckland St Cuthbert's College to "straighten her out" (her words not mine). Not too many brown faces around her there and no te reo offered. New Zealand's premier Maori girls boarding school, Queen Victoria School, was two buses away but 20 minutes on the bike. She biked to her lessons through rain and shine, supported by her school which recognised her strengths and elected her Head Girl in her 7th form year. Her take on this was "I had a very perceptive Principal who fixed me up by giving me responsibility". Pity she didn't take the smokes away at the same time!

Karina lived and worked in her professional life as a barrister and Judge in South Auckland. Thirteen years as a criminal and youth court barrister/advocate plus tenancy adjudicator, firstly in South Auckland chambers at Otahuhu with Beecs, Paddy O'D, Ema A, Jonny Moses, Lisa T, Jo Baddeley, Colleen Newton, Peter McCoskery and others, before starting up Friendship Chambers at Manukau when the court

shifted there with me, Catriona McL, Panama L, John Adams, Colleen N, Simativa Perese, Justin Graham, Rosaline Fuata'i, Mary Tualotalava.

Her commitment to getting young Maori from South Auckland into law was legend. She mentored Maori law students and lawyers. She pressed them to accept responsibility for their race and to work in South Auckland. She was the soul mate, mentor and surrogate mother of a few errant old white males as well! She was the proverbial mother hen whenever we travelled on Mental Health District Inspectors' or Judges' meetings away from Auckland. On one such trip, a colleague was renamed "Nonu" by Karina, after an incident involving Jerry Collins and some of his mates in a Wellington bar at 3:00 am – details omitted!

Her appointment as a Judge was always going to happen. It was something she had to do as part of her journey and, in particular, to serve Maori youth in South Auckland. Her swearing-in was a Kapa Haka competition between Tuhoe (probably the loudest), Te Whakatohea, Tainui, Te Aupouri, and Ngaitai.

Karina sang like a princess and played netball like Irene van Dyke despite being a third her size. She played for Auckland. I caught her one day at Manurewa playing tennis. Apart from having trouble getting her breath she wasn't too bad.

She coached and composed for Kapa Haka groups and worked on the Mangere Bridge School Board, where they all loved her. She was humble. She was sensible. She was a young Maori woman, aware of her huge abilities, but modest to the extreme.

There were personal worries in her life and a few of us shared her agonies, helpless in the main to do anything but support her. Her daughter, Kataraina, is on her own interesting journey. At the age of 13, she is set for a tennis career which is what Karina and Kataraina's father, Richard, both wanted. She too goes to St Cuthbert's. My vocal ribbing of her decision to send her to a posh private school was countered by her argument that a brown girl from South Auckland needs every opportunity in this world compared with "you white middleclass honkies and your kids". I saw her discriminated against in the only Tenancy Tribunal case I had in front of her, many years ago. The male lawyer on the other side behaved badly – until a brilliant Williams "rocket" put him firmly in his place.

She knew what it was like to be young with brown skin and to be pulled up for warrant and licence checking “just because of what you look like”. When older, her brown face driving a flash Merc also continued to attract Police attention – “must have stolen it”!

Mental Health patients loved her in her role of District Inspector. Her empathy and genuine concern for those under disability transferred transparently to all. We worked together as the South Auckland DI’s. Never scared to question the bureaucratic gobbledy gook, she liked to preface questions with “Sorry, I’m just a little brown girl who knows stuff all, but what exactly are you talking about?!!”

This last year has been rough for her friends, her parents, her daughter Kataraina. The pain has probably become more acute in some ways. What a terrible waste. Such talent. What a future. She started up the Manukau Family Violence Court with Chief Judge Johnson and John Adams (the Judge!). “Binning wife bashers helped no one” she reckoned. Improve their behaviour. Stop them drinking, stop the cycle, then we might get somewhere in the long term.

She wasn’t just loved. She was adored. The respect for her from counsel and colleagues was total. She and her Judge soul mate, Ida Malosi (“Scary Ida”), shared the same love and respect. I have kept all the personal emails we exchanged. I often re-read them. I kept her texts and phone messages. Memories of Karina keep her with me in my work and life, as they do for so many others.

“Rainbow Judge”? Russell Johnson described her as such at her burial – a reference to the multi-ethnic makeup of Judges in the Manukau District Court and the end of dominance of mainly white males (“Yeah right” she might say!).

Ka kite. Haere ra my little mate.

Judge Phil Recordon



Foreword

The launch of a new periodical is invariably done with enthusiasm and the sense of excitement that comes from thinking up and presenting a novel publication that goes beyond established criteria for good, legal writing. That was the atmosphere in which *The Journal of Maori Legal Writing* was launched in 2005.

The challenge faced in this second edition is to sustain the enthusiasm and quality of the inaugural issue, develop a clearer sense of long-term purpose and settle into the mundane rhythm of soliciting, reviewing, editing and compiling material.

I draw an analogy with parenting. The matamua, or first born is greatly anticipated, and the hopes of the whanau and iwi are placed on this fresh new life. The second child (and subsequent others), whilst still keenly awaited and welcomed, benefits from experience gained from rearing the first. Standards and boundaries have been set, and there are clear expectations to emulate.

This Journal is a forum in which Maori and non-Maori have an outlet to provide sustained legal analysis of issues affecting Maori in our legal system. It provides a forum for academics, students and others to debate at an intellectual level, issues that are relevant to us as Maori and indigenous peoples. As it develops, a more global scope will be possible.

This volume begins and ends with tributes to two different lives that have each had a significant impact within legal circles in Aotearoa/New Zealand – a poroporoaki to the inimitable Judge Karina Williams, and an essay from a retiring (but far from shy) academic, Professor Jim Evans. Their presence is an unlikely metaphor for the diversity of faces and skills required to assist Maori who are negotiating the contemporary legal landscape – the young Maori woman who worked at the coalface and the older Pakeha man, who worked with similar dedication, albeit behind the scenes. With people like these working in our field, there is hope for our collective futures in Aotearoa.

Much has happened since the inaugural edition. Few could have foreseen the long-term ramifications of the Court of Appeal's *Ngati Apa* decision of 2003 that underpinned the first edition. The subsequent legislation

prompted protest on the ground, with the Hikoī, and also brought international attention and notoriety with the visit of Rodolfo Stavenhagen. Stavenhagen, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, has released his report to the Economic and Social Council of the United Nations. That report, stating that serious human rights breaches exist against Maori in Aotearoa/New Zealand, is appended to this volume.

New Zealand's political sphere has also been indelibly affected by the foreshore and seabed debate, prompting the formation of the Maori Party, which has since evolved into a more permanent force in Parliament and the political process. The emergence of new Maori leadership in the form of Hone Harawira, Tariana Turia and Pita Sharples is undoubtedly evidence of attempts by Maori to throw something positive up on the wake of the foreshore tide.

This edition of the Journal deals with a number of important contemporary topics.

Section A, is an article by University of Otago legal academic Jacinta Ruru and Auckland Maori studies anthropologist, Lyn Carter, on "Freeing the Natives": The Role of the Waitangi Settlements in the Reassertion of Tikanga Maori'. The authors discuss a timely issue in relation to the application of tikanga Maori to development rights; and the effects of codification of tikanga Maori in statute on the iwi of Ngai Tahu.

Section B, is a regular feature of the Journal – a showcase of legal writing by undergraduate law students on a given theme or concept of tikanga. This year the subject is the relationship between the concepts of ownership, rangatiratanga and kaitiakitanga. Ngaroma Tahana discusses her iwi, Te Arawa's historical relationship with their lakes, and foreshadows their recently announced settlement with the Crown concerning these resources. Blair Keown and Anna Shackell write as non-Maori about the common law notion of "ownership" and its interface with Maori concepts that seek to fulfil the same purpose as that historically linked to ownership.

Finally, Section C, deals with further developments that have taken place in relation to the foreshore and seabed since the landmark legislation, The Foreshore and Seabed Act 2004.

"Reflections on *Nireaha Tamaki v Baker*", is an article written by recently retired emeritus Professor Jim Evans of the University of Auckland's,

Faculty of Law. Professor Evans argues that the debacle over the foreshore and seabed following the *Ngati Apa* decision in 2003 could have been avoided if the Privy Council had been clearer in its deliberations in *Nireaha Tamaki v Baker*, way back in 1901.

It is fitting I think, to conclude this edition of the Journal with Professor Evan's contribution. He has been a prominent teacher, thinker, researcher and valued colleague at the Faculty of Law, in Auckland, for many years. It was with great sadness that we farewelled him when he retired from teaching in 2005.

I end on a personal note of farewell to both Jim and Karina –

As a former student of Professor Evans' in the 1990s, and more recently as colleague and friend teaching Jurisprudence, I have found Jim to always be kind and supportive. University education has changed much in the past decade, and he is the last of the pre-email, card catalogue, look-it-up-in-hard-copy staff to retire. A large and irreplaceable chunk of the institutional memory of the Law School goes with him.

Likewise, my experience of Karina Williams was similarly positive. I remember her seeking me out and asking if I required any help, when I was a brand new solicitor negotiating the grubby interior of the old Otahuhu District Court some years ago. She was professional but approachable – as comfortable with tattooed gang members as she was with judges and lawyers. I recall my great relief at seeing a friendly face, and I imagine that she maintained a similar disposition to her clients. We miss her.

Kei raro i te tarutaru, te tuhi o nga tupuna



KHYLEE QUINCE

FACULTY OF LAW

SECTION A

THE ROLE OF THE WAITANGI SETTLEMENTS IN THE REASSERTION OF TIKANGA MAORI



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.



JACINTA RURU

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.

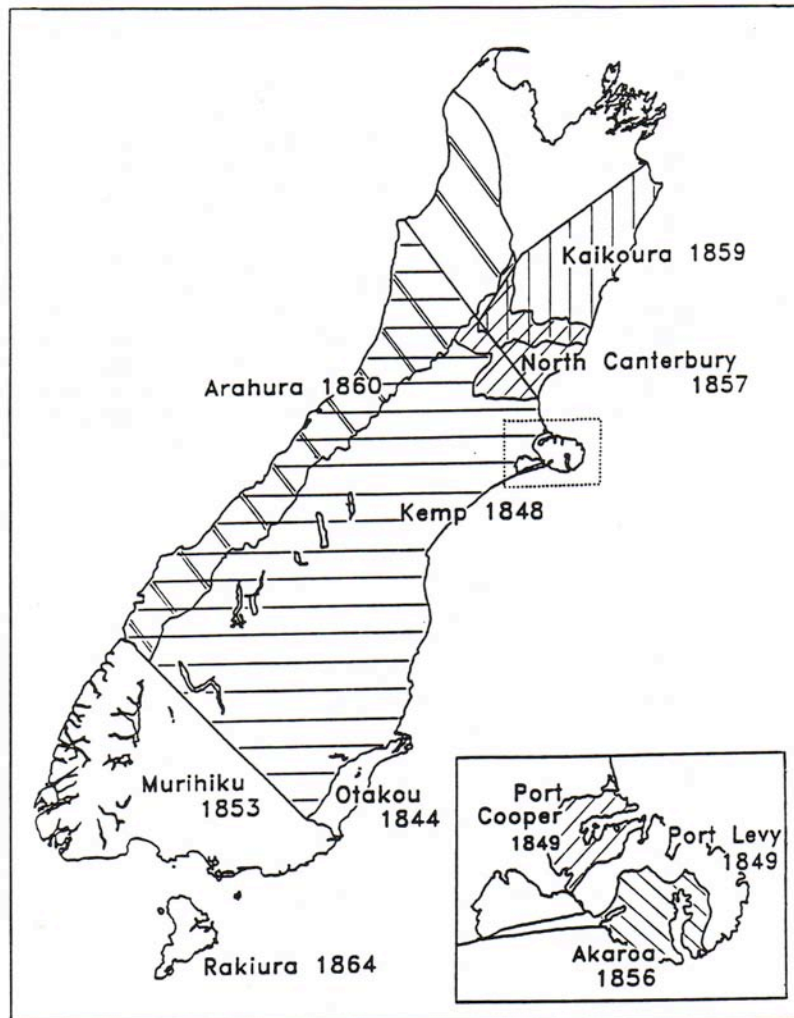
³ Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua. Healing the past, building a future* (available to view and download at the Office of Treaty Settlements website: www.ots.govt.nz), 3.

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 Kiiitahi 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 Tahu⁸ 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

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 kai¹⁷); reinstates the Maori names

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 sites¹⁸ 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 runanga²² established Kai Tahu ki Otago Ltd, which is responsible for facilitating consultation on resource management matters.

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 Runanga 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 Runanga 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 taoka²³ (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

²³ The dialectal 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

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-to-day 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 consciousness 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

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

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

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 traditional 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 urupā (burial grounds) and wāhi 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

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

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.

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 NTCSA 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*

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

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 apologises 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

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.

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



NGAROMA TAHANA

Ka karanga nga hau o te muri
Ka karanga nga hau o te tonga
Kei te whakapuke nga ngaru i te moana Rotoiti kite a Ihenga
Kei te here nga potiki a Hinehopu i te matarae i o rehu

A he uri ahau o Hinehopu. My family hails from the shores of Lake Rotoiti, which is the home of Ngati Pikiao. Lake Rotoiti is one of several Arawa lakes. The lakes are an integral part of Te Arawa identity and remain strong cultural and economic forces for Te Arawa.

My family have always had a strong commitment toward iwi nation building. As the middle child of three, I attended Hato Hohepa Boarding School. While at school my commitment toward building community strength was further reinforced. The strength of being a Maori woman and social obligations owed to others and to the environment, were highlighted by the teachers at Hato Hohepa.

Before attending Auckland Law School, I lectured in marketing and tourism at Waiariki Polytechnical Institute in Rotorua. I am now a solicitor in the Local Government and Environment Team at Simpson Grierson, specialising in resource management, public law and Maori land matters.

My family and school background, together with my studies in law, have left me with a sense of obligation to do my best to contribute toward a more balanced society in Aotearoa/New Zealand. That society will be one in which tikanga Maori is overtly recognised and respected by others. This essay, written while I was a student of Maori Land Law in 2004, is part of that effort. Noho ora mai.

TIKANGA MAORI CONCEPTS AND ARAWA RANGATIRATANGA AND KAITIAKITANGA OF ARAWA LAKES

NGAROMA TAHANA

INTRODUCTION

Rangatiratanga and kaitiakitanga are conventional principles of Tikanga Maori (Maori custom law) applicable to land. As such, they can be contrasted with common English legal conceptualisations of “ownership” as either an enforceable bundle of rights or a series of incidents of title.

This essay offers a tikanga-based view of “ownership” of the Rotorua Lakes by the Te Arawa people. The lakes are in the central North Island of Aotearoa/New Zealand, an area traditionally claimed by the Te Arawa iwi. The underlying assertion of this essay is that Tikanga Maori offers an alternative conceptual basis for land (including lakes) use and control in Aotearoa/New Zealand that is as legitimate as that offered by English-based New Zealand law, and, arguably, one which is more enduring.

Part 1 of this essay discusses Tikanga relating to whenua/land/territory in Aotearoa/New Zealand. It is explanatory in nature. Part 2 includes a brief reference to Te Tiriti o Waitangi (te Tiriti), the Native Land Court and the New Zealand legal system and their impact on Te Arawa lakes ownership. Part 3 is the story of how the traditional tikanga relationships of my people to the Rotorua lakes have been fought for, maintained and eventually recognised under New Zealand law.

**PART I – TIKANGA MAORI – RANGATIRATANGA AND
KAITIAKITANGA IN CONTEXT**

Rangatiratanga and kaitiakitanga are best understood as part of a broader cultural context. According to Joe Williams, Chief Judge of the Maori Land Court, five tikanga provide the underlying value system for Maori custom law. They are:¹

- i Whanaungatanga – the centrality of relationships and in particular kin relationships to tikanga;
- ii Mana – the values associated with leadership;
- iii Kaitiakitanga – the obligation of stewardship;
- iv Utu – the value of balance and reciprocity; and
- v Tapu – the spiritual value in all things.

Acknowledgement of whenua (land) and its whakapapa (ancestral connections) are vital to the continuing cultural and physical survival of Maori people generally. The recitation of place names, iwi histories, whakatauki (proverbs) and waiata (songs) speak of the bond between tangata (people) and whenua. Examples that demonstrate this are set out below:

Taku aroha ki taku whenua I te ahiahi kauruku nei; He waka ia ra kia toia	My love, alas, for my native land As evening shadows draw nigh; Would there was a canoe being launched
Nga matarae ki Rautahi ra; Omanga waka Te Ruawai,	At the headland at Rautahi yonder; Where oft sped the canoe, Te Ruawai'
Ka hokai au, kei marutata, i.	Urged onward by me, ere the fall of eventide.
Moea iho nei e au Ko Manuhiri, ko Te Wharekura; Oho rawa ake nei ki te ao, Au anake te tuohu nei.	In my dreaming I saw Manuhiri and Te Wharekura Awakening to this world There was I alone, bowed down.

¹ J Williams, "He Aha Te Tikanga Maori", New Zealand Law Commission, Wellington, 1996.

E hia hoki! E kuika nei,
Matua ia ra e tahuri mai?
'Wai e mea ka rukupopo

Ka whakamate ki tona whenua, i.

He whenua, he wahine
ka mate ai te tangata
Te oranga o te tangata, he whenua
Ko Papatuanuku te matua
o te tangata
Whatu ngarongaro he tangata,
toi tu he whenua

O friend! In this great longing,
Is there no one who will share it?
For there is no one more
melancholy
Than he who yearns for his own
native land.

Men die for land and women
The welfare of people is the land
Papatuanuku is parent to people
People disappear, land remains

These examples provide a glimpse of a Maori worldview in which the environment is perceived through the inter-relationship between the spiritual and physical dimensions of being. The concept of “whenua” is central to this perception. Its significance is best described in emotional language expressing the passion with which my people have traditionally viewed their lands.

Whakapapa and Whanaungatanga

Whakapapa (genealogical connections) and Whanaungatanga (kinship) are key concepts holding the Maori worldview together.² The whakapapa link between the primordial parents Ranginui and Papatuanuku and their offspring explains the connection between everything contained in the universe.³ In the creation stories, after the separation of the parents by their atua (deity) children, Papatuanuku took physical form as the earth. This explains the connection in traditional Maori thinking that whenua is "ukaipo" (the breast suckled in the night).⁴ Two things arise from this “mother” perception of land as whenua. First,

² New Zealand Law Commission, *Maori Custom and Values in New Zealand Law*, 2001, 30.

³ P Hohepa and DV Williams, *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession*, New Zealand Law Commission, Wellington, 1996, 14.

⁴ Ministry of Justice, *He Hinatore ki te Ao Maori*, Government Press, Wellington, 2001. Part 1 “Traditional Maori Concepts” discusses a number of relevant Maori concepts.

is an obligation to treat Papatuanuku/whenua/earth⁵ with the respect owed to a mother by her dependant children. Second, is that imbued with this mother – earth perception, “whenua” is the main source of Maori identity as tangata whenua (people of the land). This attachment is permanent and ongoing. Home territories are referred to as turangawaewae (standing place for the feet), and significant land features become identity links to land.⁶ Group identity as hapu and iwi allows us to speak with collective authority for our lands and territories.

Te reo Maori (Maori language) reflects the relationship between tangata and whenua by using the possessive marker “o” to indicate the superior status of Papatuanuku/whenua. The understanding inherent in the language is that people do not control the relationship between whenua and tangata, even though they may control relationships amongst themselves. It says, “we belong to the land” – the land is not a chattel that belongs to us.⁷

The continuing relationship between Maori and whenua is also reflected in birthing and burial processes.⁸

Te whenua (the land) nourishes the people, as does the whenua (placenta) of the woman. Maori are born of the whenua (placenta) and upon birth the whenua and the pito (umbilical cord) are returned to the whenua (land). Burying the whenua and the pito within the whenua (land) of the whanau (family) establishes a personal, spiritual, symbolic and sacred link between the land and the child, where their whenua (placenta)

⁵ In this essay I have used “()” to indicate translated terms which carry different cultural values, and “/” to signify that even though different languages are used to refer to a thing the ideas and values conveyed remain Maori.

⁶ For example, a common pepeha from the Ngati Pikiao region which notifies this association between land and people to others is:

Ka karanga nga hau o te muri,
Ka karanga nga hau o te tonga,
Kei te whakapuke nga ngaru o te moana Rotoiti kite a Ihenga,
Kei te herenga Potiki a Hinehopu i te Matarae i o Rehu.

⁷ Supra n4 at 25.

⁸ NZ Law Commission, supra n2 at 51; see also E Best, *Maori Marriage Customs*, Auckland Institute Lecture Series, 5 October 1903, 59. Best claims “when a child is born to a Pakeha, the doctor or nurse burns the afterbirth, the Maori did not do this it would be against the mana of that child, it would destroy the child’s mauri. Burning a corpse did not destroy its mana as its mauri was already gone, but burning the whenua of a child born alive was destroying its mana, the mauri of the living child would be gone. Therefore the whenua was never burnt, but buried in the whenua and so the child’s mana and mauri were preserved.”

is part of the whenua (land). This follows on from the law of utu (reciprocity) of what is given is returned or that taken is retrieved.

The interrelatedness of Maori with the environment included waterways as well as dry land. The Waitangi Tribunal has described the relationship of tangata whenua and their waterways as:⁹

The river system was possessed as a taonga (treasure) of central significance to Atihaunui. ... The river was conceptualised as a whole and indivisible entity, not separated into beds, banks and waters, nor into tidal and non-tidal, navigable and non navigable parts. Through creation beliefs, it is a living being, an ancestor with its own mauri, mana and tapu.

To attribute taonga status to whenua and wai (water) not only recognises the Maori worldview in purely conceptual terms but also highlights the importance of physical resources to the Maori economy.

Mana

Mana has been variously defined as “authority, control, influence, prestige, power and psychic force”.¹⁰ Mana was a force that drove the development of the world through the phases of Te Po (darkness) and through to Te Ao Marama (the world of light).¹¹ The ultimate source of mana is the atua children of Ranginui and Papatuanuku. Mana is also an attribute of humans. Although expressed through successful individual endeavours, it is also a manifestation of direct ties to the “whenua” through whakapapa.

Rangatiratanga

“Te tino rangatiratanga” derives from Article II of te Tiriti.¹² There are two language texts of Te Tiriti/the Treaty. Under Article II of the Maori text, Maori retained “te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa”.¹³ Over five hundred Maori signed the

⁹ Waitangi Tribunal, *The Whanganui River Report – WAI 167*, GP Publications, Wellington, 1999.

¹⁰ HW Williams, *A Dictionary of the Maori Language*, 7th edn, Legislation Direct, Wellington, 2000, 172.

¹¹ R Taylor, *Te Ika a Maui*, Wertheim and MacIntosh, London, 1855, 13-14.

¹² See Appendix 1 of this Section.

¹³ Ibid, Maori text of Te Tiriti o Waitangi.

Maori version of te Tiriti. Under the English text Maori were guaranteed “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession”. A close translation for “tino rangatiratanga” is “absolute chieftainship”. In 1840 rangatiratanga was exercised by rangatira, as the recognised heads of the hapu and iwi.

That the rangatira who signed te Tiriti reserved the right to make decisions over our lands, our communities and matters related to the preservation and advancement of our culture, is indisputable. As noted by Richard Hill and Vincent O’Malley:¹⁴

The rangatira (chiefs) of the hapu were traditionally chosen on the basis of both descent lines and demonstrated leadership skills, and were usually expected to guide their people towards consensus-based decisions rather than make unilateral ones. In negotiations leading up to the signing of the Treaty the chiefs had been assured that their mana (prestige, authority) would be protected and enhanced through allying their fortunes with those of the British Crown. The recognition of the right of rangatiratanga (chieftainship, generally interpreted by Maori as autonomy) contained in the Treaty’s Article Two suggested to them that little would change for their people after annexation by Britain.

Roger Maaka and Augie Fleras, while citing other notable authors, describe the Maori perception of tino rangatiratanga as follows:¹⁵

The principles and practice of tino rangatiratanga conjure up a host of reassuring images for restoring “independent Maori/iwi authority” to its rightful place in a post-colonising society (Mead 1997). The essence of rangatiratanga is sovereignty driven: For some, this sovereignty prevails over the entirety of Aotearoa, for others, it entails some degree of autonomy from the state, for still others, it consists of shared jurisdictions

¹⁴ R Hill and V O’Malley, *The Maori Quest for Rangatiratanga/Autonomy 1840-2000*, Occasional Papers Series 4, Treaty of Waitangi Research Unit, Wellington, 2000, 2.

¹⁵ R Maaka and A Fleras, “Politicizing Customary Rights: Tino Rangatiratanga and the Re-Contouring of Aotearoa New Zealand”, paper delivered at the Conference on Indigenous Rights, Political Theory and Reshaping Australian Institutions, Australian National University, 1997.

within a single framework. To one side are claims for control over culture under tino rangatiratanga (Smith and Smith 1996); to the other are arrangements for economic development as a spearhead for cultural growth and political autonomy (Mahuta 1996). To be sure, the relationship between rangatiratanga and sovereignty is complex and poly-textured: That is, tino rangatiratanga serves as a precursor *of* Maori assertions for sovereignty; it also provides the basis *for*, derives *from*, and is strengthened *by* claims to self-determination. In all cases, however, tino rangatiratanga is inseparable from Maori challenges to the once undisputed sovereignty of the Crown as sole source of authority.

While rangatiratanga has received little statutory recognition, it is the underlying rationale for most land claims and litigation brought by Maori claimants against the Crown for breaching the Principles of the te Tiriti.¹⁶

In the above discussion I have tried to highlight the mutually interdependent nature of the concepts of “mana”, “tino rangatiratanga” and “whenua”. Exercising authority of this nature is legitimised amongst Maori, by according mana whenua status to different groups of tangata whenua who live in particular areas.¹⁷

Kaitiakitanga

“Kaitiakitanga” is a term used to describe the mutual guardianship relationship that exists between Maori and their lands/territories. Whanaungatanga obliges humans who share acknowledged whakapapa to respect each other. Papatuanuku, as common ancestor and source of mana and physical nourishment and sustenance, is deserving of respect above all other things. In this regard, whakapapa and whanaungatanga place an obligation on people to accord respect to the land and kawai tupuna (ancestors) while simultaneously providing a foundation for traditional Maori land tenure and kaitiakitanga.¹⁸ Kaitiakitanga involves

¹⁶ See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 662 (CA); *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301.

¹⁷ A number of statutes, including the Resource Management Act 1991 and the Conservation Act 1987, include definitions of “mana whenua” as being the iwi with authority in an area. Later statutes such as the Hauraki Gulf Marine Park Act 2000, refer to tangata whenua in relation to their areas but not to mana whenua.

¹⁸ P Clarke, “Te Mana Whenua o Ngati Whatua o Orakei”, (2000) AULR, 571.

the obligation of the kaitiaki to guard and protect.¹⁹ Tangata whenua, as kaitiaki, carry a group obligation to manage their territorial resources, for their future generations.

The granting of individual ownership of pieces of land by awarding individual, legally sanctioned titles under New Zealand law does not release kaitiaki from their protective role. As Durie notes, however, it makes the task far more difficult.²⁰ Kaitiakitanga places an obligation on Maori to maintain a strong link between the natural world and successive generations, and to ensure the generations to come inherit a productive livelihood.²¹

PART II – TIKANGA MAORI AND RECOGNITION OF TE ARAWA LAKES OWNERSHIP UNDER NZ LAW

Western philosophy has a different idea of whenua/land to that traditionally held by Maori. It is based on concepts of “ownership” that have developed in another time and place and which have only recently been transplanted into Aotearoa/New Zealand. In this section I will discuss the ongoing relationship of Te Arawa with our lakes to illustrate one of many ongoing iwi-whenua associations. Despite the advent of Tikanga Pakeha (English-based laws) we still understand our relationship as being principally that of kaitiaki. That relationship is forged upon the bond that exists between tangata and whenua.

Tikanga Maori and the Treaty of Waitangi

Te Tiriti o Waitangi was signed in 1840 between chiefs and the Crown in order to establish an English colony and guarantee protection of Maori property and sovereignty. Article 2 of the Maori version provides that Maori should have “te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa”. Literally translated this means that Maori were guaranteed chieftainship (sovereignty) in respect of their land, homes and all other precious things. In the English version of te Tiriti Maori were guaranteed “full exclusive and undisturbed possession of the lands and estates, forests, fisheries and other properties which they may collectively or individually possess”. There has been a lot of debate over which text ought to prevail. Whether one accepts the English or

¹⁹ NZ Law Commission, *supra* n2 at 40.

²⁰ M Durie, *Te Mana Te Kawanatanga – The Politics of Maori Self-Determination*, Oxford University Press, Auckland, 1998, 23.

²¹ S Hayes, “Defining Kaitiakitanga and the Resource Management Act 1991”, (1998) 8 AULR 893-899 at 894.

Maori version as prevailing, however, there is clear recognition in both of protection for Maori rights in the fisheries and respective waterways.²²



Tikanga Maori and the Native Land Court

The Native Land Court was established in 1862 in order to change communal title held under tikanga Maori into a form of title cognisable by the English common law. According to early Native Land Court records sources of rights under which Maori could lay customary claim were:²³

1. Take tupuna - ancestral right by descent
2. Take raupatu - conquest
3. Take tuku - gift
4. Take taunaha – discovery

The translation of Maori concepts and principles into existing English terms hid the complex relationships that Maori had with their lands and reduced them to four English legal conceptualisations. The notion of individual ownership quickly replaced the broader concept of a group of people existing on the land and collectively drawing their identity and wellbeing through acknowledging their reciprocal relationships with each other and their obligations and dependence to the land. The notion of being able to completely extinguish one's whakapapa link to the land through the process of "sale" replaced the conceptualisation of incorporating newcomer's into existing arrangements without displacing oneself in the process because "ahi ka roa" (the long burning fire) remained alight.²⁴ Later on, the introduction of the Torrens System of land tenure into Aotearoa/New Zealand in 1953 cemented this. It provides that proof of ownership of land is complete upon registration of

²² See Appendix 1 of this Section for the full text of Te Tiriti o Waitangi and a translation.

²³ N Smith, *Maori Land Law*, Reed Publishing, Wellington, 1960.

²⁴ Examples of this can be found in Pompallier, *Early History of the Catholic Church in Oceania*, JH Brett, Auckland, 1888, 49; W Martin, *The Taranaki Question*, WH Dalton, London, 1861, 33 and D Alves, *The Maori and the Crown an Indigenous Peoples Struggle for self-determination*, Greenwood Press, Westport, 1999, 6.

title with the Land Transfer Office and that the title of a bona fide purchaser for value is sacrosanct.²⁵

PART III – TIKANGA MAORI AND THE TE ARAWA LAKES OWNERSHIP

Te Arawa has continuously asserted our position under tikanga Maori as being protected by te Tiriti even though we were not signatories and despite investigations carried out by the Native Land Court which sought to dispossess us of our lakes and lands. The reaction of Te Pokiha Taranui, a member of Ngati Pikiāo,²⁶ to the selling of land and the workings of the Native Land Court are recorded in the Dictionary of New Zealand Biography.²⁷

He [Te Pokiha] was not in favour of the sale of land to Europeans. In 1871 he spoke to an assembly at Kawatapu-a-Rangi against the fees and surveys of the Native Land Court. He was furious when land he believed belonged to Ngati Pikiāo was awarded to Ngati Whakaue, and threatened to occupy the land and commence cultivation.

Similarly, a petition taken by rangatira to the Native Affairs Select Committee of Parliament in 1874 gives a clear indication of Te Arawa's concerns during the early years of the Court's operations.²⁸

The Arawa people have from the foundation of the colony consistently refused to lease or sell their lands; while all the other great tribes have divested themselves of the greater portion of their tribal lands, the Arawa country has remained almost untouched in the hands of the aboriginal owners. When the Native Land Court was established, the tribe refused to take advantage of it for a long time, ultimately, upon the repeated assurances of the Government that the survey and investigation of titles to their lands would not facilitate leases or sales, they allowed one or two pieces to be

²⁵ *Frazer v Walker* [1967] NZLR 1069.

²⁶ Te Pokiha Taranui belonged to Ngati Pikiāo of Te Arawa. He later took the name Te Pokiha (Fox), probably after his baptism by CMS missionaries at Rotorua.

²⁷ S Oliver, "Taranui, Te Pokiha ? – 1901", *Dictionary of New Zealand Biography* <<http://www.dnzb.govt/dnzb/>> 28 July 2004.

²⁸ V O'Malley, *The Crown and Te Arawa, circa 1840–1910*, Report commissioned by the Whakarewarewa Forest Trust, Rotorua, 1995, 248.

surveyed and put through the court. At once trouble and confusion arose. Men of no standing in the tribe began to lease or sell without the knowledge or consent of the acknowledged leaders of the people. The result was, that at subsequent sittings of the Court no lands were allowed to be put through. Then the tribe complained to the Government, and asked that their lands should be entirely tied up, so that in future no sales or lease could take place. The Government did this, but at the same time land buyers and surveyors were sent into the district on Government account, and commenced leasing, selling, and surveying on all sides.

Te Arawa authority over the lakes was acknowledged by Parliament in the Thermal Springs Districts Act 1881.²⁹ The basis of that legislation was “the Fenton Agreement”. Chief Judge Fenton had been called upon by the ministers of the Crown to negotiate with Te Arawa hapu to obtain government control of land at Rotorua for a township, despite opposition from iwi leaders to alienation.³⁰ Fenton signed the agreement on behalf of the Crown. Having achieved the Crown’s objectives in writing, his position as Chief Judge ensured the land a clear passage through the Native Land Court.³¹ The Fenton Agreement was the catalyst for

²⁹ The Thermal Springs Districts Act 1881 provided for the settlement and establishment of Rotorua township. It was enacted in response to Te Arawa refusal to sell land considered favourable for tourism. Section 5 of the Act states:

As soon as may be after the issue of an proclamation under this Act, and after the land has passed through the Native Land Court, the Governor may make arrangements with the Native proprietors for rendering available the territory of the district for settlement by Europeans, and he may from time to time exercise any of the powers following within the district:

(a) Treat and agree for the gratuitous cession or for the purchase, or for the lease of any land which he deems necessary for the purposes of this Act, and enter into any contract which he thinks fit; ...Treat (c) and agree with the Native proprietors for the use and enjoyment by the public of all mineral or other springs, *lakes*, rivers, and waters; (emphasis added).

³⁰ DV Williams, *Te Kooti Tango Whenua – The Native Land Court 1864-1909*, Huia Publishers, Wellington, 1999, 239.

³¹ In reaching the agreement the Crown’s negotiators openly recognised Te Arawa’s ownership of the lakes and the land. As far as Te Arawa was concerned their contract was now complete. They had agreed to allow part of their land to be opened up for settlement and had made a considerable area available as public reserves. These were, in effect, gifts from the owners to those who would ultimately settle there. There was also an essential aspect in the gifting of these reserves, that the township would become more desirable to would-be investors, thus ensuring the best possible prices for the land and leases. The owners waited with confidence on the understanding that government would handle all matters

individualising land in the area and set the tone for the Crown assuming greater ownership of lands within Arawa territory.

During the late 19th century, the Crown began to assume greater rights in the lakes, which Te Arawa viewed as a breach of te Tiriti guarantees and earlier recognition of Te Arawa ownership. The concern of Te Arawa and other iwi at the Crown's encroaching entitlements over several North Island lakes is recorded by the Waitangi Tribunal:³²

Generally the law was the instrument used by the Crown to assert control and in many cases the ownership of New Zealand's waterways. From the mid nineteenth century it is apparent that the Crown was attempting to establish itself as the owner of New Zealand waterways. In pursuing this policy a pattern is apparent. English common law presumptions were asserted insofar as they could be relied upon to secure rights for the Crown.

This assumed ownership was illustrated by the Government's efforts to promote tourism through the introduction of trout which had a significant impact on the customary fisheries of Te Arawa. The Rotorua region is an attractive hunting ground for sportsmen and in 1883 rainbow trout were introduced to the lakes in an attempt to attract more visitors. By 1889 brown trout had also been put into the lakes. The trout destroyed most of the indigenous fish that lived there and "in an indirect way sparked off a prolonged court case to determine the ownership of the beds of the lakes."³³

related to leasing and that in due course they, as owners, would reap the benefits of regular rentals. The Crown breached the Agreement by failing to maintain responsibility for the leasing scheme and by disposing of the gifted reserves. These breaches later formed the basis of a claim to the Waitangi Tribunal by Ngati Whakaue. See *Ngati Whakaue Endowment Lands Claim – WAI 94* settled in 1993. In similar fashion, Te Arawa was denied ownership of their lakes.

³² B White, *Theme Report Q Inland Waterways: Lakes*, Waitangi Tribunal, Wellington, 95.

³³ See *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321. Also see D Stafford, *The Romantic Past of Rotorua*, AW and AH Reed, Wellington, 1976, 44. The case arose out of a number of Te Arawa receiving convictions for fishing without a licence. On each occasion the offenders argued that it was their customary right as owners of the lakes. In addition they claimed that Te Arawa never agreed to the introduction of the trout which had destroyed the indigenous species Te Arawa would traditionally have caught.

In 1908 submissions were made to the Stout-Ngata Native Land Commission by Te Arawa, stating that:³⁴

Te Arawa had come to regard the Thermal Springs Districts Act 1881 as the ‘Magna Charta’ of their liberties; the Act assumed in us a right to the properties enumerated, for which the Government had to treat with us, and that clearly included the Rotorua lakes.

It was further contended that lakes were within the ambit of properties guaranteed to Māori under te Tiriti/the Treaty. The memorandum appealed for Te Arawa to be able to take any fish from the lakes for food, as of right. The commission’s recommendations were reflected in the Native Land Amendment Bill 1908³⁵ which allowed Te Arawa 20 fishing licences at a cost of 5 shillings each. The Crown’s resolution was not acceptable and Te Arawa set about obtaining due recognition for the “ownership” of their lakes and fisheries.

The Native Land Court Inquiry

Around 1910 an application was made to the NLC for an investigation of title to the Rotorua lakes.³⁶ From the outset the application was met with Crown resistance; the first blow struck when the Chief Surveyor refused outright to supply the necessary plans. In response, Te Arawa (on advice from Ngata) requested the matter be shifted to the Supreme Court. Around the same time a plea was made on Te Arawa’s behalf to the English Attorney-General to intervene and support the rights assured by te Tiriti/the Treaty. The Attorney-General’s reply indicated that there could be no intervention in a matter that was to come before the Privy Council.³⁷ Commentators have since concluded that no evidence has been uncovered as to what Privy Council case the Attorney-General’s office was referring to and in White’s words “it remains a mystery”.³⁸

³⁴ “Te Arawa Memorandum on general matters affecting the Arawa Tribe for the information and consideration of the Native Land Commission, now sitting at Rotorua” [1908] AJHR 5.

³⁵ The fishing licences were not provided for in the statute. The Fisheries Amendment Act 1908 was enacted specifically for this purpose.

³⁶ Manutu Māori, *History of the Rotorua Lakes Settlement and resource materials*, Manutu Māori Research Unit, Wellington, 1990, 13.

³⁷ Letter from the English Attorney General’s office to the Government dated 21 July 1911.

³⁸ *White*, supra n32 at 108.

The proceedings filed with the Supreme Court were shifted³⁹ to the Court of Appeal and became known as the *Tamihana Korokai* case.⁴⁰ The Court of Appeal unanimously rejected the Crown contention that the lake bed was Crown land. It held that the plaintiff had a right to go to the NLC to have the title investigated, and that the NLC could only be prevented from performing its duty under the Native Land Act, on proof that the lands were freed by proclamation or otherwise from the customary title or where there was a Crown title to the land. Following the *Tamihana Korokai* decision a second application was lodged with the NLC. It was not, however, until 1918 that the hearing began. The delay was a consequence of both the First World War and, according to White, an instruction to the Lands Department to not furnish the Court with the necessary information.⁴¹

Ngati Pikiiao Lakes Ownership

During the NLC inquiries, evidence was given by various hapu members to prove Ngati Pikiiao's ownership stakes in Lake Rotoiti. The evidence submitted comprised description of various land marks and pou (stakes) that delineated the hapu divisions and ownership of the lake according to tikanga Maori.⁴² But the language used to describe the incidents of title was framed in terms of English legal concepts. Tiera Tikao described the divisions between the different groups with rights in Rotoiti stressing that divisions were "owned exclusively by each hapu" and that, "unless by special permission," one hapu could not fish on the grounds of another. All the points he mentioned were on the lake shore; the dividing boundaries extend from the midpoint of the lake to the shoreline.⁴³

Our elders have always told us that the tauas of both sides [of the lake] only went as far as the middle of the lake and no further. If it is found by one party that the other party's nets or tauas go over the centre of the lake there are objections made.

Tikao went on to recount how a battle had been fought in defence of a fishing ground on a sand bar, and that two men had been killed as a

³⁹ The significance of the outcome and its likely further application in other areas of Aotearoa/New Zealand rendered the case important enough to be moved to the Court of Appeal.

⁴⁰ *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321.

⁴¹ *White*, supra n32 at 10.

⁴² *Ibid* at 96.

⁴³ *Ibid*.

consequence. Hapu were allowed to travel over parts of the lake belonging to other hapu, so long as they were not fishing or exploiting other resources. However, it would appear that such concession depended upon the hapu concerned being at peace with each other. Further, groups from other iwi would be prevented from travelling on the lake unless they had a valid reason to be there – such as travelling to a tangi or hui – “if they came for no reason at all of course it would be assumed that they came to claim the lake”.⁴⁴ These points reiterate the exclusive nature of the entitlements held by Te Arawa hapu to the lakes.

In 1918 the status of the lands abutting Lake Rotoiti was clearly in Pikiāo ownership; the titles to all blocks in the immediate vicinity of Rotoiti having been awarded to hapu of Ngati Pikiāo by the NLC.⁴⁵ This evidence would have strengthened their iwi claim to title in the lakes had the inquiry continued. Although the Crown continued to search for evidence to limit iwi claims, White remarks that “Salmond’s search for evidence of ‘limited rights’ had been in vain”.

The Outcome of the Native Land Court Investigation

Te Arawa was well positioned to prove they held ownership in the lakes. White suggests that the strength of their evidence was unmatched by any other tribe.⁴⁶

The conception that Te Arawa had of themselves as being the owners of the lakes – informed largely by the existence of clearly demarcated areas of the lake and that particular hapu had the exclusive rights to fish in these divisions – is somewhat unusual in the context of other lakes in New Zealand. In the course of the present author’s research pertaining to the North Island lakes, no evidence of such clearly defined open water boundaries has been uncovered. Similarly in the case of other lakes, no evidence appears to exist of punitive action being taken against people taking fish who did not have the right to do so.

Unfortunately the inquiry was stopped before the Court decided on the Arawa evidence. The hearing ceased when Judge Wilson died in November 1918 during the flu epidemic. Although a replacement

⁴⁴ Ibid.

⁴⁵ Minutes of the Rotorua Lakes Case: Application for Investigation of Title to the Bed of Rotorua Lake, cl 174, Native Affairs, Wellington, 1918, 137.

⁴⁶ White, *supra* n32 at 119.

appointment was made in early 1920 the Crown was hesitant to resume the inquiry. Additional pressure was put on the Government from the Department of Tourist and Health Resorts and the Department of Lands. In a letter of complaint to the Crown Law Office, Richard Knight from the Department of Lands counselled that every effort should be made to close the matter “while the conditions were favourable”.⁴⁷ The Crown’s indecisiveness is illustrated in the letter:

It’s all very fine for your Chief to say don’t do this or that. Any one could say as much. Why doesn’t he tell us exactly what to do? Apparently he is relying upon tiring the Natives out and so disheartening them with delay and expenses that they will at length chuck up the sponge. He seems to be trying to bluff them that he has a royal flush. Suppose they see him? What then! That *de novo* stunt of his is staggering – what about us poor blighters having to go through this again.

The Solicitor General responded with a letter advising that the litigation should be substituted with a political outcome as opposed to a judicial one:⁴⁸

It is advisable that the continuance of this litigation be put to an end if possible by some settlement with the Natives. I think it is probable that the final result of the litigation will be the making of freehold orders by the Native Land Court giving them title to these lakes as being Native freehold land. As a matter of public policy it is out of the question that the Natives should be permanently recognised as the owners of the navigable waters of the Dominion. It would not seem to be a matter of serious difficulty to avoid this result by making some form of voluntary settlement with the Natives and vesting these Lakes by Statute in the Crown.

Shortly after, government officials were appointed to meet with Earl, the solicitor acting for Te Arawa in the investigations, “and his dingbats to finally and formally dispose of the affair”.⁴⁹ The proposal was presented at a series of hui in which the Crown promoted settlement as being the

⁴⁷ Letter from R Knight of the Lands Department at Auckland to J Prenderville, dated 21 October 1919, cl 174/2, Native Affairs, Wellington, cited in *White*, supra n32 at 116.

⁴⁸ Letter from Solicitor General to Under-Secretary of Lands, dated 29 April 1920, clo Opinions, Vol 7, LINZ, cited in *White*, supra n32 at 117.

⁴⁹ Knight to Prenderville, 21 May 1920, cited in *White*, ibid at 117.

only way out. To support their position officials stated that even if the Court found in Arawa's favour the lakes could still be taken by proclamation.⁵⁰ They also reminded Te Arawa that "the Government had a long purse but it wished to save the Maoris any further expense by coming to some mutually agreeable settlement."⁵¹

Ngati Pikiāo opposed a Te Arawa wide settlement and sought to have their claim settled separately. When they were refused one of the chiefs questioned how it was that the Crown had accepted a gift of land for a scenic reserve from Ngati Pikiāo without the consent of the whole of Te Arawa, but could not treat separately with Ngati Pikiāo in about their lakes? The Government officials reiterated the government call for "one settlement" while also repeating the "cost of litigation" factor. Unsurprisingly, in an official letter Bell described Ngati Pikiāo as "the bad eggs of the Arawas," and "the mob who joined the Hauhaus in 1866." In the same document, he recounted how Earl had said "that they were fools not to come in with the others and that he would have nothing more to do with them if they did not amend their ways."⁵² Because the Crown would not shift from their "one settlement" policy, Earl, on behalf of Ngati Pikiāo, tried to secure a higher amount whereby the money could be distributed by the Te Arawa wide body that was to be formed as part of the agreement, to aggrieved hapu. However, Tania Thompson makes the point that without any titles to the lakes there would be little basis for a fair distribution of any funds.⁵³ The Crown rejected Earl's endeavour concluding that an amount had been set and this was to remain unaltered.

So in a sad twist of events Te Arawa, including Ngati Pikiāo, abandoned the opportunity to have their "day in court" and instead agreed to

⁵⁰ A number of parallels can be drawn with the current Government's response to the *Ngati Apa Attorney-General v Ngati Apa* [2003] 3 NZLR 643 decision over the foreshore and seabed. Numerous hui, submissions, hikoī and a Waitangi Tribunal Report have been unsuccessful in stopping the enactment of the Foreshore and Seabed Act 2004 which vests ownership of the foreshore in the Crown with the potential for Maori to gain minimal entitlements if they can satisfy a series of onerous tests and if the Crown agrees. On these grounds one might rightfully conclude that history is repeating itself, this time at a national level.

⁵¹ Notes of meeting, 31 January 1921, 226 box 5B, LINZ Wellington, cited in *White*, supra n32 at 120.

⁵² Knight to Prenderville, 9 February 1921, cl 196/72, NA Wellington, cited in *White*, *ibid*.

⁵³ T Thompson, *Interim Report: Rotorua Lakes Research*, A Report commissioned for the legal firm of O'Sullivan, Clemens, Briscoe and Hughes, 1993, 19.

negotiate with the Crown.⁵⁴ In essence this agreement was a last ditch attempt by Te Arawa to seek some form of recognition for their traditional relationship with their lakes. There is no doubt that the financial strain of continuing litigation contributed to this decision. Even so, several individuals sold their land interests to fund Arawa's accumulated legal expenses.

The 1922 Lakes Agreement

In 1922, a battle-weary Te Arawa reached a forced agreement with the Crown that pre-empted the NLC making a decision about ownership of the lakes. This agreement was enshrined in the Native Land Amendment and Native Land Claims Adjustment Act 1922. Under the Act the Crown was deemed to own the 14 lakes⁵⁵ to which it applied.

The Te Arawa Maori Trust Board ("the Board") was established by statute. The Board received a fixed annuity of £6000 from the Crown and from 1922.⁵⁶



Lake Rotoiti

Source: Department of Conservation

Although the Board's legislative function was to administer the lakes annuity, consistent with its role of kaitiaki of Arawa iwi interests, it became a one stop shop for Te Arawa's social, economic, cultural and political activities. Over the years its services have included a wide range of activities covering welfare grants, education, training, farming and property investment in response to developing iwi interests and needs. Payments for tangihanga and expenses incurred in the fulfilment of other iwi related obligations have also been covered.⁵⁷ During the early days the annuity could be spread across a wide range of iwi activities. However, no adjustment for

⁵⁴ Whether Te Arawa would have had a positive Court decision legislated over is conjecture, but many Te Arawa feared such an outcome.

⁵⁵ The lakes covered by the 1922 Act are Rotoehu, Rotoma, Rotoiti, Rotorua, Okataina, Okareka, Rerewhakaaitu, Tarawera, Rotomahana, Tikitapu (the Blue Lake), Ngahewa, Tutaeinanga, Opouri/Ngapouri, and Okaro/Ngakaro.

⁵⁶ The Te Arawa Maori Trust Board was established to manage the annuity on the tribe's behalf.

⁵⁷ Personal communication with Arapeta Tahana, past Chairman of the Te Arawa Māori Trust Board, on 14 August 2004.

inflation has ever been made to the annuity, although in 1977 it was increased to \$18,000 per year. Therefore, over time Board funding of iwi activities has reduced significantly.

The Board was also responsible for distributing fishing licences to each of the hapu representatives or elected fishermen. By statute the Board received 40 trout licenses for a nominal fee and the rights to take indigenous fish were preserved. A special board to control and administer Lake Rotokakahi (the Green Lake) was also established. Throughout the 1918 NLC inquiry into the ownership of the Rotorua lakes, witnesses appearing in support of the Te Arawa application repeatedly stressed the economic significance of the lakes to Te Arawa. Captain Gilbert Mair, a Pakeha who had lived amongst Te Arawa for most of his adult life, informed the Court “that birds and rats aside, the Rotorua district is sterile country that is unsuitable for cropping and therefore fishing was of the utmost importance to Te Arawa.”⁵⁸ This importance extended beyond mere subsistence to include a trade economy. Fish and koura were bartered with iwi from other districts. In reaching an agreement in 1922, Te Arawa were adamant that their fishing rights were upheld.

Dissatisfaction with the 1922 Agreement

The 1922 agreement never sat comfortably with Te Arawa and remained a point of contention for the tribe particularly in relation to the annuity which was never adjusted according to inflation. Te Arawa were aggrieved that their control over tourism on the lakes had been wiped out. This dissatisfaction formed the basis of a Waitangi Tribunal claim.⁵⁹ In 1987, the Board lodged a claim before the Waitangi Tribunal and began discussions with the Crown on the settlement of the lakes. No progress was made until the Government agreed in 1997 to allow resolution of the Te Arawa lakes claim to be separated from other claims of Te Arawa before the Tribunal. Given that the grievances were relatively clear and the evidence of injustices claimed recorded in Government documents, a decision was made to bypass the Tribunal hearing process and enter into direct negotiations with the Crown. The Board's Deed of Mandate to negotiate a settlement for the lakes claim on behalf of all Te Arawa was recognised by the Government in December 1998.

⁵⁸ *Thompson*, supra n53 at 33.

⁵⁹ *Te Arawa Lakes Claim – WAI 240*. This claim, once lodged went straight to direct negotiation with the Crown.

Crown Recognition of Te Arawa Lakes Ownership 2004

The Crown offer was accepted in principle by Te Arawa iwi negotiators and is reflected in the Te Arawa Lakes Historical Claims and Remaining Annuity Issues (hereafter called “the Deed”) signed on 15th October 2004. Te Arawa has ratified the Deed through a series of hui (meetings) and postal ballots. The Te Arawa Lakes Settlement Bill is currently before the Select Committee who are scheduled to report back in August 2006. The Lakes Settlement process is scheduled for completion by December 2006. The key elements of the Bill include:⁶⁰

1. Formal apology from the Crown;
2. Title to the lake beds;
3. Financial redress package;
4. Statutory embodiment of Rotorua Lakes Strategy Group;⁶¹ and
5. Cultural redress package acknowledging Te Arawa's cultural, historical and traditional associations with the lakes.⁶²

The transfer of the title of the lakebed will be subject to the preservation of the rights of existing users such as public, commercial and any other third parties.⁶³ Under the Bill some elements of the 1922 agreement between the Crown and Te Arawa will continue. These include provision to purchase 200 fishing licenses annually, the right to take indigenous fish which includes koura and provision for Te Arawa to manage the customary and non-commercial fishing,⁶⁴ and the preservation of burial

⁶⁰ *Deed of Settlement of the Te Arawa Lakes Historical Claims and Remaining Annuity Issues*, 15 October 2004.

⁶¹ The Rotorua Lakes Strategy Group will comprise two members each from Te Arawa Governance Entity, Rotorua District Council (RDC) and Environment Bay of Plenty (EBOP). Te Arawa negotiators initially sought 50% representation on this Group but neither RDC nor EBOP would agree to a 25% representation. Various other agencies such as Department of Conservation and Eastern Fish and Game Council are also involved in the management of the lakes. Te Arawa remains a minority decision-maker .

⁶² This will include the provision for the Governance Entity to manage customary and non-commercial fishing of certain species in the Te Arawa Lakes, amendment of place names, and access to paru and other indigenous plants.

⁶³ The Deed lists motorised and non-motorised watercraft operation, aircraft and hovercraft operation, organised sporting and recreation events, guided and scenic tours, training and educational activities, scientific research, water take and control, nature conservation, vegetation control and maintenance, and works for avoidance of flooding as existing types of commercial activities. See Te Arawa Lakes Deed of Settlement: Cultural Redress Schedule Part 1: Subpart C: Existing Types of Commercial Activities, 74.

⁶⁴ *Deed of Settlement*, supra n60 at 58.

grounds and the administration of Lake Rotokakahi (the Green Lake) will continue to be carried out by a special board.

Clearly the Crown offer entails a commitment to uphold the right of Te Arawa to take indigenous fish which includes the koura. However, the extent of this right is limited to customary and non commercial taking by Te Arawa for individual and customary consumption. The Bill also allows for Te Arawa to manage the customary and non-commercial fisheries (with the exception of trout) in their rohe, similar to the rights set out under the Fisheries (Kaimoana Customary Fishing) Regulations 1998.

No rights⁶⁵ are created by the Bill in respect of commercial fisheries nor does the Bill affect:⁶⁶

1. the deed of settlement between Māori and the Crown dated 23 September 1992 in relation to Māori fishing claims;
2. the Treaty of Waitangi (Fisheries Claims) Settlement Act; or
3. the Maori Fisheries Act or the operation of, or distributions under, the Te Wai Maori Trust established under section 92.

Although, under the Bill, Te Arawa can recommend to the Minister that fishing of certain species (such as koura) be allowed,⁶⁷ any such fishing will still be administered by the Minister of Fisheries pursuant to the Fisheries Act 1996.⁶⁸ It is unclear in the Bill whether commercial fishing could proceed without Te Arawa recommending that particular species. Consent must be obtained from Te Arawa for any new commercial activity. Although the rights of commercial parties are to be protected under the Bill, these rights extend only to existing companies such as launch operators. It is unlikely that Te Arawa would have a right to veto commercial fishing which remains unaffected by the Bill administered under the Fisheries Act 1996.⁶⁹ However, under the Bill, Te Arawa can advise the Minister “on the conditions that should be imposed, including as to season, methods and areas.”⁷⁰

⁶⁵ Ibid at 37.

⁶⁶ Ibid at 14.

⁶⁷ Ibid.

⁶⁸ Ibid clause 11.21 at 58.

⁶⁹ Ibid.

⁷⁰ Ibid at clause 11.23.

Conclusions on Te Arawa Lakes Ownership

There is no doubt that Ngati Pikiāo and other Te Arawa hapu hold a strong affinity with our lakes. Historically, we vehemently guarded and executed tino rangatiratanga over the lakes and its fisheries. This is well recorded in korero tawhito (oral history), Land Court minutes and government documents. Even with the loss of ownership after the 1922 Agreement, Te Arawa maintained this affinity and continued to exercise their role as kaitiaki.⁷¹

The foregoing analysis illustrates that lake ownership of Te Arawa iwi according to customary law and independently, according to tikanga, is clearly made out.⁷² Additionally though, Maori customary law incorporates the right to develop and this should extend to commercialisation of the resources that are owned.

CONCLUSION

The Ngati Pikiāo/Te Arawa relationship with our lakes is defined by tikanga. To this day this relationship remains an integral part of Te Arawa identity. This article has shown that there is a continuing tension between legal principles introduced by Pakeha and tikanga as practiced by Te Arawa in relation to their lakes. That the legal system falls short of giving true consideration to tikanga values and principles was evident during the drawn out proceedings to determine lake ownership in the 1900's. These misgivings, combined with government eagerness to establish a tourist destination and the negative attitude of Crown officials, contributed to the eventual transfer of lakes ownership to the Crown.

⁷¹ Te Arawa exercise their role as kaitiaki through the practice of rahui, promoting customary practice in relation to taking koura, actively opposing resource consents that are likely to have detrimental effects on the lakes, maintaining relationships with key agencies (ie. Department of Conservation) and generally looking after the lakes.

⁷² The Government does not acknowledge this overtly in the Deed, which states: "Nothing in this Deed: extinguishes any aboriginal title, or customary rights, that Te Arawa may have; is, or implies, an acknowledgement by the Crown that any aboriginal title, or any customary right, exists," *Deed of Settlement*, supra n60 at 14.

Despite the loss of legal ownership, Te Arawa continue to carry out our kaitiakitanga obligations and to acknowledge our whakapapa connection to the lakes. With the return of the lakes, Te Arawa looks forward to exercising rangatiratanga over the lakes in a more effective manner. It will be interesting to see whether the legal recognition given to tikanga under the Te Arawa Settlement Act enables Te Arawa to truly give effect to their rangatiratanga.



BLAIR ANTE KEOWN

I was born and raised in Auckland. My background represents a fusion of cultures. My mother is of Croatian descent. Her father was originally from Drvenik, a small village on Dalmatia's Adriatic Coast. He came to New Zealand in 1926, eventually settling in Thames where he raised a family with my Nana, originally of Swiss heritage. My father's family has been in New Zealand for well over a century after emigrating from County Antrim in Northern Ireland. My great-grandfather was a decorated soldier of the New Zealand Expeditionary Force having served in the Boer War. I have one older brother who is currently making his way through Europe having completed a two year stint in London.

I was educated at Sacred Heart College. I have just completed my BCom/LLB (Hons) degree, and am currently in the middle of a two year position as a Judges' Clerk at the Auckland High Court. Criminal law is my particular area of interest and it is in this area that I intend to practice upon completing my clerkship.

My five years at university were immensely enjoyable. At Law School I was a member of the Auckland University Law Students' Society Executive in 2005 and editor of Verbatim. I was also given the opportunity to represent the University of Auckland in Negotiation at both the New Zealand and Australian Law Students' Association conferences.

Outside of university I am a keen sportsman. I play premier club cricket for Auckland University. I also enjoy running, fishing and golf, albeit only when time permits.

In 2004 I took Maori Land Law in order to broaden the scope of my law degree. It was a course that took me well outside my comfort zone. This article, initially written for Maori Land Law, is the revised product of my efforts in that course.

OWNERSHIP, KAITIAKITANGA AND RANGATIRATANGA IN AOTEAROA/NEW ZEALAND

BLAIR KEOWN

“The land and the people” is an evocative phrase that has strong connections with many periods of New Zealand’s cultural history. We can no longer afford to use such a phrase innocently; we need to be aware of the various conceptual battles that have preceded its present comfortable sense of timelessness and shared reality.¹

INTRODUCTION

The concepts of “ownership” on the one hand and “kaitiakitanga” and “rangatiratanga” on the other come from fundamentally different philosophical and jurisprudential bases. It is thus, hardly surprising that there is tension and conflict between them. In terms of New Zealand law, there is an ongoing struggle taking place between the two distinct ideologies. It is being resolved by a legal system that asserts an overall and general Pakeha dominance with Maori concepts and values filling the gaps. This paper attempts to explore why Maori can only be a “gap-filler” under New Zealand law. The emphasis will be on the development of the principle of ownership as a product of Christian doctrine. A contrast will be drawn to the fundamentally different Maori worldview and the principles of rangatiratanga and kaitiakitanga that stem from it. Finally I will consider the extent to which these two competing ideologies find reflection under the current legal framework in New Zealand and suggest means for progress into an integrated system of law.

PART 1 - PAKEHA AND MAORI CONCEPTS

The Pakeha system of ownership and real property rights can be seen as a blanket with the Maori concepts of kaitiakitanga and rangatiratanga only operating in those areas where there are holes or where the blanket simply provides no cover. The difficulty lies in the fact that two fundamentally different worldviews are trying to be resolved within a framework that has been developed in accordance with one worldview that is now widely prevalent and has the power to enforce its ideology.

¹ R Horrocks, “A History of Competing Meanings”, J Phillips ed., *Te Whenua Te Iwi: The Land and the People*, Port Nicholson Press, Wellington, 1987, 73.

When two systems collide² and one has to yield, under New Zealand law this yielding party is Maori. Orthodox formalism dictates that custom law is trumped by the common law and by statutory power. Contemporary political developments have done little to alter this.

The crucial difference for the purposes of this paper is that Western conceptions of land and particularly “ownership” hail from a heavily Christian indoctrinated mindset while Maori concepts of land are firmly rooted in a Maori worldview. The question is one of emphasis: independence or interdependence? In this sense, the Western mindset can be described as a fusion of theocentric and anthropocentric views³ where “individual” identity is central to the perception of humans as the dominant beings of the natural world. By contrast, Maori ideals of “collective” identity dictate that humans are but one aspect of an environment that exists in a natural balance. The mechanics of this fundamental philosophical difference have been articulated by the Hon. Justice Durie writing extra-curially:⁴

Our society is basically secular and individualistic. We believe humankind has authority over nature which entitles us to make large-scale modifications to the natural environment for personal and corporate gain...Traditional Maori society would seek development from the opposite approach. People do not have authority over nature because they are part of it. They belong to it.

Attempts to bring together these two widely different ideologies about land into a single coherent legal framework can lead to either equal consideration being given to both ideologies or one ideology assuming precedence over the other. In the present case, I think that the Western individualistic concept of “ownership” has assumed a position of dominance in the wake of a process of colonisation that reinforced preconceived notions of settlers. As the Ministry of Maori Affairs noted in the early 1990s:⁵

Immigrants brought with them attitudes that were part of and stemmed from a host of assumptions about their racial and

² See further K Bosselmann, *When Two Worlds Collide*, RSVP Publishing, Auckland, 1995.

³ Ibid at 4.

⁴ E Durie, “The Law and the Land”, supra n1 at 7.

⁵ Manatu Maori, *Customary Maori Land and Sea Tenure*, Ministry of Maori Affairs, Wellington, 1991, 12.

cultural superiority which in turn produced feelings of antagonism and prejudice towards Maori customs and the laws of land tenure.

This superiority has strong parallels with the European philosophy towards land that prevailed at the time. Often described as an “anthropocentric view”, it is suggested that the current legal framework for the protection of property rights in New Zealand represents a tangible representation of a world that is designed to suit humanity. Early western scholarship supports this:⁶

God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being.

This attitude manifested itself in the work of a number of then contemporary scholars. John Locke’s labour theory provided an illustration of the idea that working the land invested one with “rights to it”:⁷

Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right.

Accepted biblical dogma provided authority for the view that ownership of land was a God given right with humans actually required to assert dominance over the land and “subdue” it in order to establish any rights to it:⁸

Na ka manaakitia raua e te Atua, a ka meaa te Atua ki a raua,
Kia hua, kia tini, kia kapi hoki te whenua i a korua, kia mate

⁶ J Locke, *Two Treatises of Civil Government*, G Routledge, London, 1887, 129.

⁷ Ibid at 130.

⁸ Genesis 1:28

hoki ona tara I a korua: ko korua hei rangatira mo te ika o te monana, mo te manu hoki o te rangi, mo nga mea ora katoa ano hoki o te rangi, mo nga mea ora katoa ano hoki e ngokingoki ana I runga i te whenua.

And God blessed them, and God said unto them, be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

In this requirement of Western ownership can be seen strong influences of the work ethic of the Puritan branch of Christianity.⁹ Land was not thought of as common to all. It had to be set apart by individuals who through labour, toil and exploitation could subsequently lay claim to it. Scriptural doctrine commanded that ownership be a strictly individual and private construct. Ownership evolved into a synonym for the product of one bringing an object within one's own private dominion. This philosophy continues to find legal recognition through the concept of ownership to the present day.

By comparison, Maori attitudes to land and the natural environment stem from a diametrically opposite starting point. This has occurred on two levels. First, the concepts of whanaungatanga and whakapapa which form the basis of tikanga emphasise collective organisation over individual importance. Second, the relationship that Maori enjoy with the land is based on an idea of balance and reciprocity that is plainly absent from Western thinking.

Papatuanuku te matua o te tangata
Mother Earth is man's parent.¹⁰

The above proverb succinctly captures the relationship with land that Maori enjoy. Maori attitudes toward land are not influenced by Christian ideas of individual subjugation but by an intricate Maori worldview that has strong associations with their own cosmology and creation stories.¹¹

⁹ For a general treatise on the Puritan tradition see J Ball, *A short treatise, contayning all the principall grounds of Christian religion*, 11 edn, R Bishop, London, 1637.

¹⁰ PM Ryan, *Reed Dictionary of Modern Maori*, 2nd edn, Reed Books, Auckland, 1997, 18.

¹¹ R Walker, "Maori Myth, Tradition and Philosophic Beliefs", supra n1 at 42.

The sons of Rangi and Papa separate the earth and sky to establish the third state of existence known as Te ao marama (the world of light). It is in this period that the first human was created out of the earth mother by Tane to establish Te ira Tangata (the life principle), the descent of man, and the world as we understand it today...Maori myths, prohibitions, and taboos relating to nature establish the Maori world view that man is not above nature. He is expected to interact with and relate to nature in a meaningful way.

The idea is that Maori see themselves as part of the land. Land is their metaphysical relative through the intricate web of whakapapa (genealogical connections) that connect them to the land and the corresponding whanaungatanga (familial) obligations that regulate their relationships with it. Within this ideological framework Maori did not own the land, they simply belonged to it. There was no widespread belief that man was to tame the land. Instead man was to live in harmony with it. Ownership in a Maori sense can therefore be seen as a dichotomy:¹²

In the beginning land was not something that could be owned or traded. Maoris did not seek to own or possess anything, but to belong. One belonged to a family that belonged to a hapu that belonged to a tribe. One did not own land. One belonged to the land.

This begs the question as to what constitutes ownership in the Maori sense of the word. One of the great problems of articulating Maori concepts in terms of European understandings is the associated loss of context when Maori concepts are divorced from their philosophical base.¹³ This is exacerbated further when transposed into an English thinking and/or speaking context that is part of a totally different worldview. By the time a concept as broad as ownership has manifested itself in a legal framework it has already been reduced from a multidimensional concept to a series of outputs or incidents. In Maori however, such similarly broad concepts are allowed to retain their initial integrity. The inevitable difficulty becomes one of trying to compare two fundamentally different concepts that have been subjected to differing degrees of distillation into component parts. It is this complexity that goes to the very heart of the relationship between ownership in the European sense and rangatiratanga and kaitiakitanga.

¹² *Durie*, supra n4 at 78.

¹³ N Tomas, "Implementing Kaitiakitanga under the RMA", (1994) 1 NZELR 39.

It is against this philosophical, cultural and social background that the current legal framework as it reflects ownership, rangatiratanga and kaitiakitanga falls to be determined. In keeping with this paper's general theme of Maori as a "gap filler" under New Zealand law, ownership as a blanket legal principle will be examined first in its own right. Consideration will then be given to the extent to which the blanket of legal ownership provides for the operation, promotion and protection of rangatiratanga and kaitiakitanga.

PART II – EXAMINING “OWNERSHIP”, “RANGATIRATANGA” AND “KAITIAKITANGA”

Ownership

Ownership in a strict Western sense is the product of a lengthy development from custom that can be traced over many centuries.¹⁴

The concept itself has been defined as, “the bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others”.¹⁵ In New Zealand this has translated into the “bundle of rights” that ownership of an estate in land is said to combine under the doctrines of tenure and estates that are an inherent and inherited part of New Zealand land law.¹⁶ However this definition is functionally unsatisfactory. Isolating core ideas and the principles to which they give rise, and creating a hierarchy amongst those principles is essential to the proper workings of a western legal system. In fact the concept of law itself is built upon such a process.¹⁷ In the interests of clearer analysis, ownership is better examined in terms of the actual incidents to which it gives rise. This is essentially the approach that has been adopted by Honore in his jurisprudential discussion on ownership¹⁸ and it is this approach that will form the analytical framework for the discussion to follow.

¹⁴ A Erueti, “Maori Customary Law and Land Tenure: an analysis”, *Maori Land Law*, Boast et al ed., Butterworths, Wellington, 1999, 27.

¹⁵ *Blacks Law Dictionary*, 8th edn, B Garner ed., Thompson-West, St Paul, 2004, 1138.

¹⁶ *Veale v Brown* (1868) 1 NZCA 153; *Rural Banking and Finance Corp of NZ Ltd v Official Assignee* [1991] 2 NZLR 356.

¹⁷ For further discussion on the role of the term “ownership” as a link between “conditioning facts” and a set of “legal consequences” see A Ross, *Tutu* (1957) 70 HLR 812, 819.

¹⁸ A Honore, “Ownership”, *Oxford Essays in Jurisprudence*, AG Guest ed., Oxford University Press, London, 1961, 107.

In defining ownership as the “greatest possible interest in a thing which a mature system of law recognises”,¹⁹ Honore acknowledges that it is fashionable to speak of ownership as if it were just a bundle of rights.²⁰ However, maybe for the same reasons that I have previously offered, the author then proceeds to examine the legal incidents of ownership that are common to many different western systems of law and which tend to remain constant across time.²¹ At the centre of these incidents is the right to exclusive possession. This provides the foundation upon which the superstructure of ownership rests. From this cornerstone of ownership flow various “rights”, including the rights to “use” and “manage”, the “right to the income” of the thing and the “right to the capital”. “Transmissibility” is another important incident as is the corresponding “prohibition of avoiding harmful use”. On this basis ownership can be seen as a set of isolated and well-defined “rights” that can be given legal protection.

Incidents of Ownership under Current New Zealand Law

1. Exclusive Possession

Exclusive possession provides that an owner of a fee simple estate has the unqualified right to exclusive physical control over the land. The underlying rationale is clear. Exclusive possession is essential for the establishment of ownership in a western sense because it is a strictly individual construct. It reflects the very notion of exclusion from the commons that has been the traditional hallmark of ownership. Honore argues that protection of the right to possess can be achieved only when there are other rules allotting exclusive physical control to one person rather than another.²² Such rules appear in the indefeasibility provisions of the Land Transfer Act 1952²³ which provide a registered proprietor of a fee simple estate with a title that is guaranteed against all adverse claims. There are numerous other examples in the common law, of legal rules that determine who has rights to exclusive physical control and in what circumstances.²⁴

¹⁹ Ibid 108.

²⁰ Ibid 113.

²¹ Ibid 108-109.

²² Ibid 114.

²³ Land Transfer Act 1952, sections 62 and 63.

²⁴ See for example the finder's cases: *Parker v British Airways Board* [1982] 1 All ER 834; *Tamworth Industries v Attorney General* [1991] 3 NZLR 616 and also relativity of title and adverse possession: *McDonnell v Giblin* (1904) 23 NZLR 660.

2. *Rights to Income and Capital*

This incident recognises the economic and exploitative value of land as a transferable commodity. It is the result of “subduing” the land that permits one to enjoy the income that is derived from foregoing personal use of the land. It also recognises the authority and power of the “subduer” to alienate the thing, destroy, consume or waste it. The power of alienation is important as it allows the complete extinguishment of any obligations or rights over the land upon sale. Alienation is final. It severs all legally protectable links between the seller and the land. An enduring relationship with the land is only possible to the extent that commercial ties to that land remain.

3. *Transmissibility*

The final incident worthy of mention is what Honore defines as the process by which the tenant in fee simple acquired a heritable right.²⁵ This characteristic of ownership allows for land to be passed from generation to generation. Honore notes that ownership is characterised by indefinite transmissibility.²⁶ While in theory this is clearly the case, experience indicates that the state can alter this through legislation. Honore’s pure system of ownership does not seem to take account of the existence of the positivist state and its powers of intervention that form the backdrop for any discussion of legal principles in a Westminster modelled democracy.

4. *Prohibition of Harmful Use*

As with all rights and privileges there are associated obligations. In the case of ownership there is the prohibition against using land in a manner that is injurious to a neighbour. The modern law of nuisance and other similar duties in negligence cover this area adequately under New Zealand law. It is worth noting that the prohibition is not one of injuring the land but of using the land in a manner that is injurious to a fellow human. The consideration here is the avoidance of interfering in the private dominion of another. Sustainability and conservation only enter the equation to the extent that conduct contrary to these two ideas interferes with the personal autonomy of another landowner.

A mixture of statutory provisions and common law doctrines and rules provides a settled legal framework in New Zealand that satisfies the

²⁵ *Honore*, supra n18 at 120.

²⁶ *Ibid*.

criteria provided by Honore. This leads me to the irresistible conclusion that traditional European conceptions of ownership, founded on the dominance of mankind over nature, are strongly supported under New Zealand law. Exclusive possession is protected, owners of a fee simple estate are entitled to its use and enjoyment, succession laws and powers of sale allow the transmissibility of land, while the law of negligence and nuisance places restrictions on the extent to which exclusive possession is exercised. Hence the concept of ownership is firmly entrenched in the western mindset and provides the backbone of real property rights in New Zealand.

Analogous Maori Concepts

Having established the centrality of ownership in legal thinking, it becomes necessary to determine what room if any, there is for Maori concepts of land. My discussion emphasised rangatiratanga and kaitiakitanga as analogous principles, with the focus on the position and protection each enjoys within the existing legal framework that operates in Aotearoa.

1. Rangatiratanga

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua. (Maori Text)

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession... (English Text)²⁷

The English version of Article Two of the Treaty of Waitangi purportedly provided for the undisturbed use and possession of Maori land by Maori. The words “te tino rangatiratanga” were used in the Maori version to convey the meaning of undisturbed possession of

²⁷ Te Tiriti o Waitangi / The Treaty of Waitangi. See Appendix 1 of this Section for the the full text of both versions and commentary. In this article “Te Tiriti” is used as a general reference to both texts and specific references to either text will be clearly indicated.

properties.²⁸ The consistency of the two versions of te Tiriti hinged upon the phrase “undisturbed use and possession” as being an accurate description of rangatiratanga.

The Reed Dictionary of Modern Maori²⁹ and the Ngata English-Maori Dictionary³⁰ both define the term “rangatiratanga”, as “ownership”. By contrast the Williams Dictionary³¹ suggests a broader notion of “breeding and greatness”. Instinctively, I am left with the feeling that the concept of rangatiratanga is far broader than that of simple ownership. Moreover “te tino rangatiratanga” denotes a concept more akin to “sovereignty” than to the ideas of “kawanatanga” or “governorship” expressed in Article One or the idea of “undisturbed use and possession” articulated in the English version of Article Two. This view is confirmed by Keith Sorrenson who maintains:³²

To the Maori chiefs who signed the Treaty rangatiratanga was far more than a guarantee of their possession of land and other properties; it was also a guarantee of their autonomy and authority, above all their mana, as chiefs; even in some recent interpretations a guarantee of Maori sovereignty.

The Waitangi Tribunal had narrowed its initial view of “te tino rangatiratanga” as the sovereignty of lands and now considers it in terms of tribal self-management. It has also been suggested that what should be included in the concept of rangatiratanga remains unsettled.³³ Regardless, recent developments have made it clear that kawanatanga, under Article Two, was viewed as transferring absolute political and legal authority to the British Crown with rangatiratanga surviving merely as a protection of Maori customary practices. This protection would continue over land only as long as it remained legally under Maori

²⁸ M McDowell and D Webb, “Treaty of Waitangi”, *The New Zealand Legal System: Structures processes and legal theory*, 2nd edn, Butterworths, Wellington, 1998, 197.

²⁹ Ryan, *supra* n10 at 608

³⁰ H Ngata, *English-Maori Dictionary*, Learning Media, Wellington, 1993, 31.

³¹ H Williams, *A Dictionary of the Maori Language*, 7th edn, Government Printer, Wellington, 1971, 323.

³² MPK Sorrenson, *25 Years of C.A.R.E.*, Citizens Association for Racial Equality, Auckland, 1989, 159.

³³ *Towards a Better Democracy: Report of the Royal Commission on the Electoral System*, Government Printer, Wellington, 1986, para 3.101. See also P Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd edn, Brookers, Wellington, 2001, 47-48.

control. As Tomas states, in the context of the British guarantee of the full and undisturbed possession of Maori lands, forests and fisheries, from the Crown's point of view:³⁴

It reserved to Maori a form of diminished property right which, though deserving of respect, could not stand in the way of Parliament's right to pass laws with regard to land or any other resources.

The extent of this parliamentary right to pass laws was neither conveyed nor explained to the Maori who signed te Tiriti. Likewise the full implications of the Crown's exclusive rights were never fully communicated either by the text itself or by subsequent explanations of its intended meaning.³⁵ In this regard rangatiratanga, although a concept far broader than the European construct of ownership, has been confined to applying only where the land is legally under the control of Maori. Furthermore, rangatiratanga has effectively been defined in terms of a limited sub-set of the incidents that are recognised as making up "ownership", by Honore. This is conceptually inconsistent as it is rangatiratanga by definition that should dictate when land is legally under Maori control. Instead it is legal control, a concept sufficiently analogous to ownership that dictates when rangatiratanga can be exercised.

In terms of the overarching theme of this paper legal ownership represents the blanket, which permits rangatiratanga to operate only where the blanket has holes. What in essence should be the situation and was in accordance with Maori customary understandings at the time of the signing of te Tiriti has been reversed to reflect English understandings of their own superior position.

It is undeniable that rangatiratanga posed a threat to the European concept of ownership. Rangatiratanga after all embraced the concept of Maori ownership within its ambit. Indeed Maori ownership seems to be a contradiction in terms of the European sense of the word. Maori ownership was based on the communality of Maori society and therefore provided for a host of use, management, occupation and access rights to reflect the multiplicity of uses land could be put to and the multiplicity

³⁴ N Tomas, "Land, Sovereignty and Tino Rangatiratanga" in Greenwood et al ed., *Work in Flux*, University of Melbourne: Department of History, Melbourne, 1995, 34.

³⁵ *McDowell and Webb*, supra n28 at 198.

of persons that may require such uses. This is clearly at odds with the notion of exclusive individual possession around which the superstructure of European ownership was built.³⁶

The connotations of the word ownership in English usage and particularly the notion of exclusive right needs emphasis because it is so much at variance with Maori custom.

Not only was the notion of exclusive possession missing from the Maori concept of ownership, but the finality of alienation, the exploitative value of land and the individual ownership unit was similarly absent. This proposed inherent difficulties for land hungry settlers.³⁷

In that sort of climate there was very little tolerance for the complexities of Maori land laws and so, among the Pakeha officials, there were few who saw any point in allowing Maori to continue operating under traditional Maori rules of land use and control.

Arguably, this mentality has continued down to the present day.³⁸

Starting from the proposition that the title to all land in a British possession vested in the Crown, and that a subject could hold land only by or through a grant from the Crown, it seemed to follow that the only source of Maori property rights over land in the absence of a specific grant was legislation.

Matters are obviously more complex than this. However, the general theme has remained consistent: rangatiratanga and implicitly Maori ownership operate only to the extent allowed by the legislature. As McHugh states.³⁹

There is an old Maori adage which says: “‘Let’s assimilate’ is what the shark said to the kahawai before he ate him for breakfast”. That saying is a graphic metaphor for the legislation

³⁶ Manatu Maori, *Customary Maori Land and Sea Tenure*, Ministry of Maori Affairs, Wellington, 1991, 16.

³⁷ Ibid 12.

³⁸ New Zealand Law Commission, *The Treaty of Waitangi and Maori Fisheries. Maitaitai: Na Tikanga Maori me te Tiriti o Waitangi: Preliminary Paper No.9*, NZLC PP9, March 1989, 54.

³⁹ P McHugh, *Maori Land Laws in New Zealand*, University of Saskatchewan Native Law Centre, Saskatoon, 1983, 39.

affecting the land of New Zealand's native people, the Maori. In the legislation we see an ongoing battle between the shark and its prey.

The principle piece of legislation affecting Maori land in the present day is the Te Ture Whenua Maori Act 1993 ("the Act"). While the preamble indicates the desirability of reaffirming the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in te Tiriti, the Act itself reduces the incidents of rangatiratanga and Maori ownership to palatable portions. The Act does give a degree of recognition to a separate system of Maori land ownership but this is merely a diluted form of rangatiratanga. While section 129 of the Act provides for the various statuses of land in New Zealand and section 131 empowers the Maori Land Court to determine the status of any parcel of land, these provisions rarely give rise to any practical consequences that equate with Maori ideas of rangatiratanga. Hinde, McMorland and Sim record that:⁴⁰

The investigation and ascertainment of the title to Maori customary land, and its conversion into freehold land, took perhaps longer than was anticipated, but is now practically complete.

There is little Maori customary land remaining in Aotearoa.⁴¹ All other land has been converted into freehold title under European concepts of ownership. It is highly doubtful then, that the Act has the practical ability to undo the past, particularly given the retention of the inherent jurisdiction of the High Court to review decisions of the lower courts.⁴²

We are left with a legal framework, therefore, that in theory recognises a limited concept of rangatiratanga with regard to Maori land but which in actual practice defers to the dominant concept of ownership. This too is hardly extraordinary for the current situation as Tomas explains is one of two competing sovereign peoples:⁴³

⁴⁰ G Hinde et al, *Land Law in New Zealand*, Butterworths, Wellington, 1997, 25.

⁴¹ Conversely, some Maori would argue that the whole of Aotearoa will remain Maori land until Maori choose to give it away. For a contemporary illustration of legislation aimed at reducing Maori rangatiratanga see the Foreshore and Seabed Act 2004 which vests ownership of the last potential bastion of Maori customary land in the Crown.

⁴² See *Grace v Grace* [1995] 1 NZLR 1 where it was held that the Court would not be justified in reading into Te Ture Whenua Maori Act 1993 an exclusion, in relation to Maori freehold land, of the inherent jurisdiction of the High Court.

⁴³ *Tomas*, supra n34 at 39.

Each holds title to land according to its own set of ideas, each draws on the land as the basis of a different and often competing identity. The relationship between the two peoples and the relationship between Maori title and Crown title to land cannot be resolved in isolation of each other.

Given this competition, the fact that the Crown is empowered with parliamentary sovereignty appears to be conclusive of the matter. As Nicholas Harris claims, “any co-existence of ultimate authority is considered entirely inconsistent with the Western doctrine of sovereignty”.⁴⁴ The swift legislative response to the decision in *Ngati Apa v Attorney-General*⁴⁵ is indicative of this attitude as well as the extent to which Maori concepts such as rangatiratanga routinely fall at the mercy of the legislature and judiciary.

The foregoing should not be interpreted as a *fait accompli*. The tension will continue into the future as the dialogue between Maori and the Crown continues around te Tiriti, its enforceability and the extent to which the New Zealand government is bound by the agreement made in 1840. Maori see this as part of an ongoing process that has been incorporated into their whakapapa and worldview and see the legal process as a layer over the land. This is not however the definitive word as far as their own worldview and their own recognition of rangatiratanga is concerned. They see the Crown as “partner” with an enduring Tiriti obligation of good faith which enables Maori to regularly reign in Crown actions.

2. *Kaitiakitanga*

Unlike rangatiratanga, kaitiakitanga does not directly conflict with the concept of ownership. Neither is it a principle directly recognised by te Tiriti. It is a principle whose legal recognition derives directly from inclusion in statute.

In attempting to outline the mechanics of the concept of kaitiakitanga one again runs the risk of removing the concept from its philosophical base. Kaitiakitanga is at the heart of Maori dealings with land and resources. According to the New Zealand Law Commission “kaitiakitanga” is:⁴⁶

⁴⁴ N Harris, “Ko Ngaa Take Ture Maori”, (1996) 8 AULR 205.

⁴⁵ [2003] 3 NZLR 643.

⁴⁶ New Zealand Law Commission, *Maori Custom and Values in New Zealand: Study Paper 9*, NZLC SP9, Wellington, 2001, 40.

A term coined in relatively recent times to give explicit expression to an idea which was implicit in Maori thinking but which Maori had hitherto taken for granted.

As with rangatiratanga, any attempt to rationalise kaitiakitanga in terms of European one-dimensional thinking is problematic. While kaitiakitanga is often referred to as “guardianship” it transcends this role. Kaitiakitanga is essentially derived from the interaction of whakapapa (genealogical connection to the land) and whanaungatanga (complex personal relationships on the land). At the level of land administration it defines the role-relationship that exists between certain participants who by virtue of whakapapa are destined to protect, maintain and guard particular resources. This role-relationship is not confined to individuals. Kaitiaki can be metaphysical beings such as taniwha, the spirits of dead ancestors or indeed living creatures. It thus follows that the kaitiaki relationship can exist independently of the legal ownership of the land. Kaitiaki relationships do not cease upon the passing of title under the Land Transfer Act; they are enduring.

Tied to the notion of kaitiakitanga is the concept of “mauri”, which provides that every resource has its own spiritual integrity and that the role of the kaitiaki is to protect and maintain that integrity. Imposition of rahui, or restrictions and prescriptions on the types of behaviour that were to be observed in relation to land and resources were all part and parcel of the role of the kaitiaki. Failure to observe this role would result in whakama (shame) and a diminution of the mana (authority/status) of the kaitiaki. Additionally, there would be flow-on effects within the wider community to which the kaitiaki belonged.

European attempts to define kaitiakitanga as “guardianship” or “stewardship”, two concepts arising out of feudal England as opposed to contemporary Maoridom, miss the point.⁴⁷ According to Metiria Turei:⁴⁸

Both terms tend to cloak the concept of kaitiakitanga in Pakeha terms of lesser importance and entirely different origins. The role of the kaitiaki is considerably more significant than simply that of a guardian or steward.

“Stewardship” is essentially a term based on the Christian principle that

⁴⁷ *Tomas*, supra n13.

⁴⁸ M Turei, “Defining Kaitiakitanga and the Resource Management Act 1991” (1997) 8 AULR 893, 898.

man should only take what is needed.⁴⁹ This is but a slice of what kaitiakitanga represents. “Guardianship” too, implies a sense of protection that is not completely representative of kaitiakitanga. At a functional level, the kaitiaki dynamic encapsulates ideas not just of physical sustainability and pragmatic environmental development, but broader intangible notions of spiritual integrity, restoration of mana and maintenance of sacred relationships. Despite the inadequacy of guardianship and stewardship to embody the concept of kaitiakitanga it is these “analogous” terms to which kaitiakitanga has been equated under New Zealand law.

The primary piece of legislation that governs the use of land and resources in New Zealand is the Resource Management Act 1991 (“RMA”). Under section 6 of the RMA it is provided that all persons exercising functions and powers under the Act shall recognise the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. Moreover, section 7 provides that all persons exercising functions and powers under the Act shall have regard to kaitiakitanga among other things. While these provisions provide legislative recognition of the concept of kaitiakitanga, it is merely a token gesture. In both sections 6 and 7 the word “shall” is used instead of the imperative “must”. The effect of this is to reduce kaitiakitanga to one of a range of considerations that should be regarded when making decisions under the Resource Management Act. This is wholly unsatisfactory as it represents the subordination of a fundamental Maori concept to a mere consideration that in theory should be regarded but in practice is often ignored. This unfortunate reality has been acknowledged by Turei who concedes:⁵⁰

The assistance of s 7 seems futile in relation to kaitiakitanga as a real chance of partnership between the treaty signatories was ignored with this intentional subordination of the central tenet of Maori resource management.

Indeed there are many examples of this in the application of the Resource Management Act in case law. One such example is *Haddon v Auckland Regional Council*⁵¹ a case concerning the transfer of sand from Pakiri beach to build up the shoreline at Mission Bay in Auckland.

⁴⁹ 2 Cor. 9:6: “But this I say: He who sows sparingly will also reap sparingly, and he who sows bountifully will also reap bountifully.”

⁵⁰ *Turei*, supra n48 at 895.

⁵¹ (1993) NZRMA 49.

While the Tribunal recognised the link between the hapu and the sand as well as a limited form of kaitiakitanga, it ultimately concluded that the extraction of sand was within the overarching principle of sustainable management required by the Resource Management Act. This decision highlights a major concern of Maori in regard to ownership, kaitiakitanga and the Resource Management Act. While a particular activity may be sustainable in satisfaction of the terms of the Act there is no mechanism for ensuring that the particular activity or purpose is a good one in terms of tikanga Maori (Maori law). The overarching ethic of sustainable management simply dwarfs any practical effect that kaitiakitanga may have under the RMA.⁵² An owner of land can do anything they wish on their land provided it is sustainable. If the activity is sustainable then that is generally the end of the inquiry with kaitiakitanga in isolation having no practical ability to regulate the activity. We are presented with a situation where ownership acts as a broad spectrum antibiotic that reduces Maori values such as kaitiakitanga to a discretionary matter that can either be given weight or ignored depending on the decision maker. The engrafting of an ethic of negotiated alternatives onto Part II of the Resource Management Act throughout the 1980s has represented only a small step in the right direction. It has however provided some hope that the avenue of social and political discourse previously mentioned will continue to remain open to Maori.

CONCLUSION

On their face, Maori and Pakeha attitudes to land and resources seem irreconcilable. Both perspectives enjoy the historical antiquity that centuries of cultural, spiritual and social development provide. Pakeha attitudes to land are heavily influenced by their ancestral link to early Christian notions of subordination and individuality. Maori heritage has suggested the inverse approach with a worldview based on interdependence and environmental co-operation.

A truly integrated system of property rights appears problematic and perhaps unachievable. However the Tiriti obligation of good faith and the notion of partnership inherent in our nation's founding document have provided an opportunity for rigorous and potentially fruitful

⁵² "Sustainable Management" does not directly limit activities on the land. It focuses on the adverse effect of those activities on the physical environment and ensures that they are short term or minimal, and in compliance with existing regional and district plans.

political dialogue between Maori and the Crown. To date this is an opportunity that the Crown has failed to grasp. Parliamentary sovereignty has stripped Maori of any genuine bargaining leverage that they may have previously possessed, leaving them to rely precariously on the officious “kindness” of government. Ownership has proved decisive. It provides the glue that binds the law of real property in New Zealand together. At the same time the concepts of rangatiratanga and kaitiakitanga which can be seen as the glue that binds Maori real property together have been subordinated to a point where their recognition is merely a matter of discretion. From a continual avoidance to give effect to the recognition of rangatiratanga that Article Two of te Tiriti was to purportedly protect, to the subordination of the fundamental concept of kaitiakitanga under the Resource Management Act, the New Zealand land law experience has given real credence to the old saying “a man’s home is his castle” juxtaposed with the notion of Maori “weeping for the land” as so often noted in the korero of the great Maori leader, Sir James Henare.



ANNA SHACKELL

I am a born and bred Hamiltonian. My whakapapa is a mixture of the various cultures of the British Isles. My Mother, Ali Shackell, was born in England and immigrated to New Zealand in the late 1950s as a small child. My Father, Phil Shackell, was born in New Zealand, as were his parents and grandparents. My immediate family includes my parents, younger brother and sister, Ian and Megan, and my husband Michael.

I have very strong ties to my family and have become the person I am through their love and support. I also have very strong ties to the Baha'i Faith, which provides me with guidance and is the basis of all my beliefs.

While at Law School I took Maori Land Law, initially because there was no exam. However the paper was so brilliantly taught that it turned out to be one of the most enjoyable papers I have done at University. The research component of this course significantly deepened my understanding of Maori culture and the basis for the grievances that are now being aired through the Waitangi Tribunal.

I graduated from Auckland University with bachelor's degrees in Science and Law, in June 2005. I was admitted as a Barrister and Solicitor in February 2006. I joined Clendon Feeney in March this year and am really enjoying the work and the fantastic people that I have met.

It is a firm belief of mine that all New Zealanders should have an understanding of the Maori mindset and the basis behind Treaty grievances. It is only through this understanding that the wrongs of the past can be compensated and the people of New Zealand can move forward together as a united and multicultural people.

OWNERSHIP, RANGATIRATANGA AND KAITIAKITANGA
DIFFERENT WAYS OF VIEWING LAND ENTITLEMENTS IN
AOTEAROA/NEW ZEALAND

ANNA SHACKELL

INTRODUCTION

This essay examines the relationship between the concept of “ownership” on one hand and the concepts of “kaitiakitanga” and “rangatiratanga” on the other. Rangatiratanga and kaitiakitanga are intricately related, both emanating from the same fundamental spiritual values. Ownership, however, provides a direct contrast to the other two concepts in that the building blocks that comprise it are significantly different. Rangatiratanga and kaitiakitanga have a clear link to spirituality or wairua, which derives from a Maori worldview. Rangatiratanga centers around the idea of individual and group authority that is derived from the gods, and kaitiakitanga is based on an acceptance of reciprocal relationships existing between humans and the world around them due to their common wairua origins. Ownership, as a concept, seems to have different meanings depending on the commentator. However, the idea of possessing an individual title that allows for the exclusion of all others by the “owner” is central to the concept of ownership.

In this essay the use of these concepts in statute law (the Land Transfer Act 1952 highlights ownership and the Resource Management Act 1991 specifically includes “kaitiakitanga”) will be discussed. This will reveal the problems associated with using Maori concepts in a law whose roots are so deeply embedded in English legal concepts.

**PART I – OWNERSHIP, KAITIAKITANGA AND RANGATIRATANGA AS
DISCRETE CONCEPTS**

Ownership

The concept of ownership brings up a number of associated words, such as “exclusivity”, “controllability” and “possession” to name a few. It is a concept that is applied to many different circumstances and attributed

different meanings. James Turner¹ states that law regulates social relations by creating subjective rights, which allow one person to prevent another from doing something. In this sense, ownership is a subjective right and a set of rules governing what other people may or may not prevent the owner from doing to the thing owned. It is also what the owner may prevent others from doing or not doing in relation to the thing. In other words, for Turner, ownership is a preventative concept that determines relations between people and not between the owner and the thing owned. Conversely, John Salmond says ownership “denotes the relationship between a person and any right that is vested in him”.² For Salmond, therefore, what a person owns is a right. His idea of “right” extends to all classes of rights, and not only to rights, but to liberties, powers and immunities. Consequently, Salmond’s conception of ownership can be seen as a relationship between a person and what he owns, which is a right. However, Salmond goes on to say that ownership in its wide sense is about rights, but that in the narrow sense of the word, people generally speak of ownership of material things. In his view this is the original and most common meaning of the word ownership, which he calls “corporeal ownership”. Corporeal ownership can be distinguished from “incorporeal ownership”, which is the ownership of rights. For Salmond, the distinction is justified on the basis that corporeal ownership cannot be used in all circumstances, such as in cases where money is owed. Here, the person due does not own the money but owns a right to it. Turner, on the other hand, maintains that ownership is a relationship between people, and concerns only rights in rem (rights against the world). The person who owns “the thing” is protected by the law against all other people and this is their exclusive right and hence, it is a relationship between the owner and all other people.

Antony Honore³ describes ownership as a series of legal rights, duties and incidents that a mature system of western law recognises as capable of being held by someone. It is because these systems recognise distinct interests in things that the concept of ownership arises. Honore states that there are common incidents of ownership that do not vary significantly between mature western systems. In nearly all systems, there will be things that these standard incidents do not apply to, but it

¹ J Turner, *Some Reflections on Ownership in English Law*, Canadian Bar Review, Vol XIX, 1941, 342.

² G Williams, *Salmond on Jurisprudence*, 11th edn, Street and Maxwell, London, 1957, 300.

³ A Honore, “Ownership”, *Oxford Essays on Ownership*, A Guest ed., Oxford University Press, 1961, 107.

would be incorrect to say that those systems do not recognise ownership. Honore states eleven common incidents which he regards as essential ingredients of a mature system of ownership. Systems which do not recognise them and vest them in a single person do not have what he calls a “liberal concept of ownership”, but have a “primitive” or “modified version of ownership”.

In Honore’s view, ownership is comprised of the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to security, right to the capital, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary. Therefore, in the context of land, in order for ownership of land to exist in a mature system, it must be possible to have exclusive possession of the land, have personal use and enjoyment of it, decide how to use the land and who will use it, have the rights to any income reaped from the land, the right to the capital value of the land including the power to sell, consume or destroy it, the right to remain the owner of the land so long as one remains solvent, the right to give the land to others by inheritance or gift, no set term on how long one can own the land for, liability to the interest in the land to be taken away for debt, and the ability to recognise rights lesser than ownership such as leases.

If a system recognises that things can be owned, then there must be rules that regulate how ownership is acquired and lost, and the way competing claims to a thing are ranked. The word “title” is often used to refer to a document evidencing the strongest entitlement. In New Zealand, in relation to land, this means a certificate of title issued under the Land Transfer Act 1952. In a sense, to have good title to land is to have the right to maintain or recover possession of land against all other persons.⁴ An owner, therefore, has some advantage over all other people, which will endure after all other rights in respect of the same property have ceased to exist, such as a lease or an easement. Turner⁵ suggests that this is the central pillar of ownership in English law.

All commentators who speak about ownership talk about the concept as an abstract one which has a different meaning for different people. For some commentators, only material objects such as land can really be owned. Other commentators speak of owning rights over material objects and not of actually owning the objects themselves. It is

⁴ G Hinde, D McMorland and P Sim, *Butterworths Land Law in New Zealand*, Butterworths NZ Limited, Wellington, 1997, 53.

⁵ *Turner*, supra n1 at 352.

misleading to think of ownership of a thing as exclusively being a relationship between the object and the owner, and it is also misleading to think of ownership as owning rights rather than things.⁶ Ownership is not just a bundle of rights. It also includes the relationship between the owner and the rest of the world. Honore concludes with a basic model of ownership that is a “single human being owning, in the full liberal sense, a single material thing”.⁷ This propounds the seemingly universal idea that ownership is a concept that involves individuals and objects that submit to their authority and that this relationship is indefeasible against all other people.

Kaitiakitanga

When European settlers arrived in New Zealand, they brought with them a law that was basically individualistic. Humans had authority over nature and were entitled to make large-scale modifications to the natural environment for personal and corporate gain. European settlers held views of ownership of land akin to the aforementioned concepts. This included ideas of individual exclusivity and the ability to exert authority over land owned in any way the owner desired in order to reap an income from it, sell, lease or otherwise. These ideas were in direct contrast to those of traditional Maori society. Therefore, right from the very beginning, Maori and Pakeha transactions and relations progressed from very different starting positions. For Maori, people did not have authority over nature or land, because they are part of it, and therefore belonged to it.⁸ This idea of belonging to the land is transmitted in the creation stories in which Papatuanuku, the personification of earth, is the Primordial Mother who married Ranginui and brought forth the gods and humankind. “Whenua” is the term given to land or earth, and it is also the term given to the after-birth or placenta. Therefore the use of the term “whenua” is a constant reminder that people are born out of the womb of the primeval mother.⁹ As children of Mother Earth, Maori love and respect her as a living organism who provides support for all her children, whether they be human, animal or plant. People live in a symbiotic relationship with all living organisms and contribute to the welfare of other species that belong to the primeval mother. Maori

⁶ Honore, *supra* n3 at 134.

⁷ *Ibid* at 146.

⁸ E Durie, “The Law and the Land”, *Te Whenua Te Iwi, The Land and the People*, J Phillips ed., Wellington, 1987, 78.

⁹ M Marsden, *The Woven Universe: selected writings of Rev Maori Marsden*, C Royal ed., Estate of Rev. Maori Marsden, Otaki, New Zealand, 2003, 45.

Marsden¹⁰ has stated that people are the conscious mind of Mother Earth and, as such, they must enhance and maintain her life support system. Consequently, people do not own or exercise authority over mother earth. They belong to her and are recipients of her life-giving forces, and are therefore guardians.

The term Kaitiakitanga means guardianship, preservation, fostering, protecting and sheltering.¹¹ Kaitiakitanga is not simply a word with a single meaning and translation. It is about a relationship between humans and the environment, humans and the spiritual world, and between each other. The term Kaitiakitanga has been described by Merata Kawharu¹² as not being an old customary Maori word. It is a word that has come into use through Maori developing aspects of their culture due to opportunities created to define and justify their rights through the Waitangi Tribunal Claims process. In order to do this, words that encapsulated a wide range of ideas, responsibilities, rights and relationships were used. However, the underlying fundamental values and ideas that comprise kaitiakitanga have existed in Maori society since time immemorial. Kaitiakitanga incorporates the spiritual, environmental and human spheres and is a way of thinking, acting and behaving. Kawharu¹³ states that Kaitiakitanga contains a core of primary beliefs that includes the concepts of rangatiratanga and mana whenua, spiritual beliefs pertaining to tapu, rahui and mauri and social protocols such as manaaki, tuku and utu. Therefore, kaitiakitanga can be applied not only in relation to the environment, but also to people. Resources, be they human, material or non-material, were managed and developed, and concepts such as kaitiakitanga provided guidelines for use, explanations of the way things are, and how they ought to be.¹⁴ The exercise of Kaitiakitanga is carried out by “kaitiaki”, who are not only guardians or protectors, but also administrators and managers. Kaitiakitanga is about a two-way relationship between the kaitiaki and the resource, such that in the natural environment, the kaitiaki must care for and manage the resource and maintain its sustainability in order to receive the benefits of the resource.

¹⁰ Ibid at 46.

¹¹ Ibid at 67.

¹² M Kawharu, *Dimensions of Kaitiakitanga: An Investigation of a customary Maori principle of resource management*, Thesis submitted for Doctorate of Philosophy in Social Anthropology, Oxford University, 1998, 6.

¹³ Ibid at 8.

¹⁴ Ibid at 11.

The kin group that carries out the kaitiakitanga responsibilities can be the iwi, hapu, or a whanau unit within the hapu. These groups of individuals had responsibilities of managing resources so as to ensure survival and political stability in terms of retaining authority over an area.¹⁵ Whakapapa provided the framework for kaitiakitanga to operate. In order to act as a kaitiaki, a group would have to show their association and ties to the specific land and water resources through their whakapapa. People who can establish such connections are the tangata whenua of the particular area and have mana whenua in the land. Cleve Barlow¹⁶ states that mana whenua is the power associated with the possession of land and the power associated with the ability of the land to produce the bounties of nature. Therefore, mana whenua is concerned with the authority of people over land, but also the authority of the land over people, as humans are not in any way superior to the land, as it is the land that sustains the people. The role of humans in this reciprocal relationship is to sustain the resources through their role as kaitiaki.

Consequently, the concept of kaitiakitanga involves the management of land and the use of land. These are similar to the incidents of ownership described by Honore. Kaitiakitanga is vastly different, however, in that it has a spiritual core that regulates how people interact with the land. In traditional Maori society, no one individual or kinship group owned land in the sense that they held all rights in the land to the exclusion of all others.¹⁷ Different people exercised different rights over the land. The concept of kaitiakitanga, which centers around a reciprocal relationship between people and the land, regulated the way these rights were exercised. Therefore, land was not something that was owned or traded. It was something that the people belonged to, and through this gift of belonging that sustained all life, humans were vested with the obligation of kaitiakitanga.

Rangatiratanga

It is stated by Kawharu¹⁸ that no discussion of kaitiakitanga in the contemporary world can occur without first looking at the relationship between the Treaty of Waitangi, and more specifically, the concepts of rangatiratanga and kaitiakitanga. This is because both concepts come from the same body of values that define tribal and hapu status, identity,

¹⁵ Ibid at 14.

¹⁶ C Barlow, *Tikanga Whakaaro: Key Concepts in Maori Culture*, Oxford University Press, Auckland, 1991, 61.

¹⁷ R Boast et al, *Maori Land Law*, 2nd edn, Lexis Nexis, Wellington, 2004, 42.

¹⁸ *Kawharu*, supra n12 at 53.

rights and responsibilities.¹⁹ Ranginui Walker²⁰ states that the word rangatiratanga is a “missionary neologism”, and that prior to missionary arrival, the term “mana” was used instead to convey the same range of values.²¹ “Rangatiratanga” was used in Article Two of te Tiriti o Waitangi (Maori text) and is translated in the English version to mean rights of possession. However, it is argued by many commentators that rangatiratanga means more than mere possessory rights. While its literal translation is “chieftainship”, it also invokes a wider way of thinking and acting in accordance with that status.²² The term rangatiratanga has its stem in the word rangatira, which means a person of high rank – a chief.²³ Rangatira had authority over people, resources and lands, but existed in a reciprocal relationship with them all. Adding the suffix “tanga” to rangatira invokes relationships with gods, ancestors, lands and resources.²⁴ Rangatiratanga was, therefore, chieftainship and authority. Although spiritually endowed, this was also a powerful political tool.

Rangatiratanga can be understood in terms of an individual or a group. In terms of individual rangatiratanga, it is a system of authority derived from the gods, which is bestowed on the Rangatira. Kawharu²⁵ states that although this is known as mana, it came to also be known as rangatiratanga after contact with missionaries. Rangatiratanga is not only derived from the gods, but also through the application of the rangatira’s responsibilities of managing the land and resources and allocating rights of use to various people within the group. Because the relationship between the hapu and their chief is reciprocal, the rangatira was the beneficiary of his or her people’s support and confidence. A chief’s administrative and charismatic authority would not survive without the support of the people.²⁶ Therefore, the hapu exercised its group rangatiratanga over its leaders as a balance against their individual rangatiratanga, supporting them in their leadership and gaining from that leadership at the same time. On this basis, rangatiratanga closely links to kaitiakitanga. There is an important distinction that needs to be made, however, between the two. It is that while rangatiratanga is about power

¹⁹ Ibid.

²⁰ R Walker, “The Treaty of Waitangi: as the focus of Maori protest”, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, IH Kawharu ed., Oxford University Press, Auckland, 1989, 264.

²¹ R Walker, *Struggle Without End: Ka Whawhai Tonu Matou*, Penguin, Auckland, 1990.

²² *Supra* n20 at 319.

²³ B Biggs, “Humpty Dumpty and the Treaty of Waitangi”, *ibid* at 310.

²⁴ Kawharu, *supra* n12 at 54.

²⁵ Ibid.

²⁶ Ibid at 57.

and authority, kaitiakitanga is about the practical expression of that authority through the administration or management of people, land or resources.

In the context of land, therefore, the greatest difference between the concepts of rangatiratanga and ownership is that ownership is concerned with individual rights whereas rangatiratanga is so intertwined with the group's interests as to be part of the collective group rights and authority.

PART II – THE DEVELOPMENT OF NEW ZEALAND LAW – ALL-IN-TOGETHER

When Europeans first began arriving in New Zealand, “sales” of land were made by Maori to settlers. These land gifts were called “tuku whenua”. The concept of sale and its underlying meanings were completely foreign to Maori who believed that these early European arrivals were making a gift in order to live and share the land with them.²⁷ While it may have been clear to Maori that they were gifting the land, this was not necessarily the view held by non-Maori or the newly established governing powers. Many early settlers thought that the land at the center of the transactions was being completely alienated by Maori.²⁸ In their view, all of the incidents of title identified by Honore were being passed to them in the deal of sale and purchase. But for Maori, “tuku” can best be likened to a form of lease, which is only one of the eleven incidents described by Honore. However, unlike a lease in the European world, tuku is a dimension of kaitiakitanga that is guided by the principle of reciprocity. In accordance with this principle, donors and receivers had continuing responsibilities to each other, and established or affirmed new relationships widely recognised within Maori society. When government arrived in New Zealand after the signing of te Tiriti, these early sales were validated by the passing of laws, and new sales were made with official government agents. It became clear very quickly that a sale did not mean the sharing of a sense of belonging to the land. It meant exclusive possession, which allowed land to be used as a commodity capable of being divided, allotted, possessed and traded.²⁹ Once the land was given, there was no returning

²⁷ *Durie*, supra n8 at 78.

²⁸ M Mutu, “Defining Maori Terminology Used in Hearings of The Waitangi Tribunal and Resource Management Planning”. Seminar paper presented at Waipapa Marae, University of Auckland, 1994. Cited in *Kawharu*, supra n12 at 47.

²⁹ *Durie*, supra n8 at 78.

of it in the manner of *tuku* or gifting that was the only proper way in Maori society.

Under English Common Law, the Crown has radical title of the entire territory and subjects can only derive their individual titles from the Crown and no one else. The Land Transfer Act 1952 (LTA) sets out how land is generally dealt with in New Zealand. It reflects ideas of ownership of land as being an exclusive, individual concept. It is a system of title by registration.³⁰ An indefeasible title represents the greatest security a person can have. Once a certificate of title is registered, it is virtually unchallengeable. Only the Crown in Parliament can remove individual property rights, and there are constraints as to how the Crown may do this.³¹ The underlying concepts of this Act are completely foreign to traditional *tikanga* Maori concepts. In Maori society, it is the *hapu*, rather than the individual, that has authority, and individual rights are obtained through *whakapapa* and *whanaungatanga* connections. *Rangatiratanga* and *mana whenua* are concerned with the territorial occupation, power and authority of the group. This concept is not concerned with who “owns” the territory in an LTA sense. The fact that other people have a registered title to the land does not affect the *rangatiratanga* and *mana whenua* of the *hapu*. In Maori eyes, the Crown’s actions are constrained by the Treaty of Waitangi, and courts are in breach of the Treaty by not recognising the guarantees under it. One of these guarantees is that Maori have the unqualified exercise of *rangitiratanga* over their lands, villages and *taonga*.

The *Te Ture Whenua Maori Act 1993* recognises land as a *taonga tuku iho*, or treasure that has been handed down through the generations. Under this Act, the role of the Crown is to facilitate the use and administration of Maori land. However, the relationship between the Maori land system and the land transfer system is problematic.³² In theory there is no Maori Land Title System and Maori land very clearly comes within the LTA. In reality there is a dual system of recording titles in New Zealand – the Land Transfer System and the separate system run by the Maori Land Court. It has been held by Justice Hammond³³ that on the question of primacy between the two systems, “the Land Transfer Act trumps the Maori Affairs legislation”. The *Te Ture Whenua Act* itself also clearly brings Maori land under the Land Transfer Act. This means that an equitable interest cannot be recorded on

³⁰ *Breskvar v Wall* (1971) 126 CLR 376 at 385-6.

³¹ For example see the Public Works Act 1981.

³² *Boast*, supra n17 at para 15.2.4.

³³ *Registrar-General of Land v Edward Marshall* (HC Hamilton, AP 30/94).

Land Transfer titles even though such orders are made by the Maori Land Courts. As mentioned above, rangatiratanga is not affected by other people owning the land and therefore in such cases can be seen as an equitable interest. However, because of its equitable nature, it cannot be registered in the Land Transfer System, even though the Maori Land Court may record that a hapu has rangatiratanga and mana whenua over a particular piece of land.

The Resource Management Act is the first Act to legislate for kaitiakitanga and has wide-ranging implications for the involvement of Maori groups in resource management policy and application. The Act does not deal with ownership rights directly but rather with the management of resources including use, development and protection. Sections 6, 7 and 8 of the Act provide a uniform set of criteria that include references to distinctively Maori values and the Treaty of Waitangi. However, the Act has been criticised by the Waitangi Tribunal in its *Ngawha Geothermal Resource Report 1993* as being inadequate.³⁴ Kawharu³⁵ has stated that the weakness of the Treaty provision (s8) and the kaitiakitanga provision (s7(a)), the lack of specific recognition of the relationship between rangatiratanga and kaitiakitanga, definitional problems and the failure to include the concept of “mauri” have caused mixed feelings about the Act.

The incorporation of te Tiriti into the law is important as it shows a recognition of tribal authority, or in the words of the te Tiriti, “rangatiratanga”. It should be noted that the Act refers to Treaty principles rather than the actual words of “kawanatanga” and “rangatiratanga” as set out principally in te Tiriti. Principles are developed from reading the two texts of Te Tiriti and the Treaty together, and authoritative statements have been made by the courts that the “Treaty principles” should be relied on rather than the words.³⁶ This has been criticised by Maori as the principles are only the practical expression of the Tiriti Articles, and it is the Articles that give rise to the rights and responsibilities of the two parties.³⁷ Principles have largely been developed in the political and judicial arena. While they may be important to Maori, it is kawanatanga and rangatiratanga that are more fundamental. Consequently, it has been argued by Kawharu,³⁸ that principles should not be seen to replace the Articles of te Tiriti in the

³⁴ *Ngawha Geothermal Resource Report – WAI 304*, 1993, 144-145.

³⁵ *Kawharu*, supra n12 at 154.

³⁶ *NZMC v Attorney General* [1992] 2 NZLR 576.

³⁷ *Kawharu*, supra n12 at 161.

³⁸ *Ibid.*

Act, even where laws have made specific reference to them. Another criticism of s8 is whether the words “to take into account” requires those exercising functions under the Act to actively provide for te Tiriti guarantees. Peter Nuttall and James Ritchie³⁹ have stated that “to take into account” is non-specific, and decision-makers are under no obligation to provide for Tiriti guarantees. However, there is no single viewpoint and therefore it is difficult for Maori to obtain any certainty regarding their specific rights under this Act.⁴⁰ Consequently, while the concept of rangatiratanga is inherently present in the Act through the inclusion of te Tiriti in section 8, the role it plays is uncertain.

One of the main criticisms of section 7(a) of the Resource Management Act is the definition of kaitiakitanga. In 1995, the definition was amended to restrict its application to Maori, and more specifically, to tangata whenua. The definition now states that kaitiakitanga is “the exercise of guardianship by tangata whenua of an area...”. This prevents the term being co-opted by Regional Councils who have described their role as being that of kaitiakitanga, thus displacing the Maori claim.⁴¹ This example shows the dangers of misinterpreting cultural concepts, which can occur when they are not properly interpreted in law.⁴² As has been seen, kaitiakitanga has a very broad interpretation and means more than simply guardianship. It is applicable not only within the social sphere but refers to Maori perspectives on the use, management and control of natural resources. Therefore, the definition given in the Act is only a partial acknowledgement of the concept’s meaning. Moreover, it is not for the Crown to define Maori spiritual values, enshrine them in legislation and then apply that definition to all tangata whenua. The meanings and application of kaitiakitanga would have differed amongst hapu. This is because the concepts that inform it have been alive for centuries and while central ideas may be uniform, regional differences would have occurred. Consequently, to define a concept that is multifaceted and has regional differences with one meaning that is applicable to all creates ambiguity. It would be more beneficial to give the term kaitiakitanga status in the Act, but without providing an absolute definition. This would enable

³⁹ P Nuttall and J Ritchie, *Maori Participation in the RMA: An analysis of the Provision made for Maori Participation in Regional Policy Statements and District Plans Produced under the RMA*, Tainui Maori Trust Board, University of Waikato, Hamilton, 1995.

⁴⁰ A Mikaere, “Maori Issues”, [1994] *NZ Recent Law Review*, 265.

⁴¹ *Rural Management Ltd v Banks Peninsula District Council* [1994] NZRMA 412 at 414.

⁴² *Mikaere*, supra n40 at 266.

Maori to apply their own interpretations if and when necessary. However, this in turn may give rise to other difficulties of having to choose between different interpretations given by competing groups. Either way, the problems associated with providing legal definitions on one hand while not compromising their wider cultural meaning on the other, remain.

CONCLUSION

The concepts of Rangatiratanga and kaitiakitanga are closely intertwined. Rangatiratanga provides an umbrella of authority and power under which kaitiakitanga can be exercised. Rangatiratanga is about collective group rights and territorial rights. Kaitiakitanga refers to the nature of the relationship between people and the land from which their authority arises and on which they exert their power. The notion of ownership is fundamentally different from the way land was treated in traditional Maori society. Ownership is about a series of individual, private rights that are held by people and which can be traded. In Maori society, land was not a commodity that was traded. Rather, it was “whenua” – something that every person had a spiritual connection to and was in a reciprocal relationship with.

New Zealand law regarding ownership of land is encapsulated in the LTA. Under this Act, land is the subject of individual, private ownership that is indefeasible. Although the concepts of kaitiakitanga and rangatiratanga are present in the Te Ture Whenua Maori Act 1993, they have been trumped by the LTA. In the RMA, both Maori concepts have important implications. Because the RMA is not concerned with the ownership of land, Maori concepts have greater application within the RMA process of decision-making. While there are criticisms of the RMA, it has set a precedent in recognising tangata whenua rights. Although, challenges lie ahead, regarding how to give greater recognition and provision to rangatiratanga and kaitiakitanga in the RMA, the ultimate goal of sustained management for future generations is one that is shared by Maori and the rest of New Zealand society.

APPENDIX TO SECTION B

Te Tiriti o Waitangi and the Treaty of Waitangi (Source: Claudia Orange, The Treaty of Waitangi, Allen and Unwin, Wellington, 1987, 257-259.)

Te Tiriti o Waitangi (Maori Text)

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira - hei kai wakarite ki nga Tangata maori o Nu Tirani - kia wakaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu - na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanaranga kia kaua ai nga kino e puta mai ki te tangata maori ki te Pakeha e noho ture kore ana.

Na kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei amua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o to wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te tuatahi

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu - te Kawanatanga katoa o o ratou wenua.

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu - ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te

hokonga o era wahi wenua e pai ai te tangata nona te wenua - ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini - Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

[signed] W. Hobson Consul & Lieutenant Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu. Ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Note: This treaty text was signed at Waitangi, 6 February 1840, and thereafter in the north and at Auckland. It is reproduced as it was written, except for the heading above the chiefs' names: ko nga Rangatira o te Wakaminenga.

The Treaty of Waitangi (English text)

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and secure to them the enjoyment of Peace and Good Order has deemed necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the first

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over the respective Territories as the sole sovereigns thereof.

Article the second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon

between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[signed] W. Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

Note: This English text was signed at Waikato Heads in March or April 1840 and at Manukau on 26 April by thirty-nine chiefs only. The text became the "official" version.

Editors Note: Most Maori signed the Maori text of Te Tiriti which retains "tino rangatiratanga" or "absolute authority" to Maori hapu. The English text, however, cedes "sovereignty" absolutely, to the Crown of England. The debate about how the two fit together in a constitutional democracy is ongoing and the relationship between Maori and the Crown is constantly being reviewed. Although not legally recognised, the Treaty/te Tiriti remains the hallmark by which many New Zealanders, Maori and Pakeha alike, evaluate the justice of Crown actions.

SECTION C

THE FORESHORE AND SEABED

NIREAHA TAMAKI v BAKER

**UNDERSTANDING NEW ZEALAND'S LEGAL HISTORY
SINCE 1840**

and

**UPDATE ON FORESHORE AND SEABED
DEVELOPMENTS SINCE 2004**



JIM EVANS

Tena koutou katoa. I have sometimes stood on a busy street corner, watching the pedestrians crossing with the lights and thought in awe of the vast number of human generations that stand behind each of them. Behind that again is three billion years of evolution from the first replicating cells on earth. Each of us is a result of that extraordinary process.

To get down to the particular – all sides of my family have been in New Zealand for at least four generations; in some cases for five or six. Among the older generations many were involved in firing clay. One great, great, grandfather on my mother's side, Rice Owen Clark, began to make pipes to drain land in Hobsonville in the 1860's. Then he branched out into bricks. His daughter, my great grandmother, who had learnt the business from him, later persuaded her husband and their sons to set up a competing works in New Lynn, which started in 1902. In 1929, the two businesses amalgamated. As an offshoot of her family's brickworks, my great aunt, Briar Gardner, made pottery at New Lynn from the 1920's to the 1950's. On my father's side, my grandfather set up a brickworks in Masterton, and then moved to Christchurch where he set up another brickworks. In later generations, engineers have featured prominently in my family. My father and three of my uncles (two by marriage) were engineers, one of my brothers is an engineer and three of my nephews are. My elder brother and I are lawyers, but we are mavericks!

My father worked as an engineer in England, in Sri Lanka (where I was born in 1941), and in the Manawatu. In Sri Lanka he helped reconstruct two ancient irrigation schemes, one of them 75 km of a canal originally constructed by King Daaskelliya in AD 459. In the Manawatu, my father designed a flood control scheme for the Manawatu River. Throughout my childhood in Palmerston North, my mother ran a tennis club from our house for any young people who wanted to come. My parents both managed to live lives devoted in various ways to public service, in a time before simple-minded economists deemed such lives impossible.

I have spent the past 38 years teaching in the Faculty of Law at Auckland University, pondering issues of jurisprudence, both generally and as they affect New Zealand society. During this time, my wife Jill, who is an artist, and my children, Mark and Sarah, have provided balance against this rather single-minded pre-occupation. Jill and I have one grandchild, and two more due.

REFLECTIONS ON *NIREAHA TAMAKI v BAKER*

JIM EVANS*

Anyone who wants to understand New Zealand history since 1840 needs to understand the decision in *Wi Parata v The Bishop of Wellington*¹ in 1877 and its subsequent influence on the country's legal history. In that case Prendergast CJ, in delivering the judgment of a Supreme Court (the equivalent of the current High Court) at Wellington, consisting of himself and Richmond J, held that Maori had no title in their land that could be recognised under the common law, a view contrary to that taken in earlier New Zealand cases. (I shall call this finding the basic finding in *Wi Parata*, since there were several others.) This article is about the history of that ruling, but it approaches that topic indirectly, through a close study of the judgment of the Privy Council in *Nireaha Tamaki v Baker*² in 1901, the first Privy Council case to consider *Wi Parata*.

In recent times *Nireaha Tamaki* has been treated as holding that the basic finding in *Wi Parata* was wrong. For example, in *Attorney-General v Ngati Apa*³ (the foreshore case) Elias CJ, speaking of *In re the Ninety-Mile Beach*,⁴ a decision over-ruled by the Court in *Ngati Apa*, said:⁵

Re the Ninety-Mile Beach followed the discredited authority of *Wi Parata v Bishop of Wellington* which was rejected by the Privy Council in *Nireaha Tamaki v Baker*.

Tipping J also commented on *Nireaha Tamaki v Baker* in *Ngati Apa*. His remarks occur in the course of discussing the significance of the Land Claims Ordinance of 1841 (an enactment of the New Zealand Legislative Council). So to give the context, and because it will be important later, let me first set out the relevant text of this ordinance:

And whereas it is expedient to remove certain doubts which have arisen in respect of titles of land in New Zealand, be it

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¹ (1877) 3 NZ Jur (NS) SC 72.

² [1901] AC 561.

³ [2003] 3 NZLR 645.

⁴ [1963] NZLR 461.

⁵ *Supra* n3 at 13.

therefore declared enacted and ordained, that all unappropriated lands within the said Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony, are and remain Crown or Domain lands of Her Majesty, Her heirs and successors, and that the sole and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by her said Majesty, Her heirs and successors ...

Commenting on this Ordinance, Tipping J said:⁶

I note that in its judgment in [*Nireaha Tamaki v Baker*] the Privy Council said that the 1841 Ordinance did not “create a right in the Native occupiers cognizable in a Court of Law”. This observation is, however, apt to be misunderstood. What Their Lordships were saying was not that the “Native occupiers” had no rights, but simply that the ordinance itself gave them no rights. It did, however, clearly recognise pre-existing rights. Again, with great respect, I do not consider this important distinction was sufficiently recognised in the *Ninety-Mile Beach* case.

By “pre-existing rights” he meant rights under the common law.

However, *Nireaha Tamaki* was not always so understood in New Zealand legal history. The first case to consider it in New Zealand was *Hohepa Wi Neera v Bishop of Wellington*,⁷ a decision of the Court of Appeal in 1902. That case was an attempt by a person not bound by the judgment in *Wi Parata* to re-litigate the facts involved in that earlier case. Let me describe those facts briefly. In 1848 a number of Maori chiefs had ceded land at Porirua to the Governor to be transferred to Bishop Selwyn, then Bishop of New Zealand, to assist the founding of a church school at Porirua. It was duly transferred in trust in 1850. In 1877 the current trustee was the Bishop of Wellington. By 1877 no such school had ever been built and as only a few Maori remained in the area it was then pointless to build a school. *Wi Parata v the Bishop of Wellington* was an action by Wi Parata, a chief of Ngatitōa, one of the tribes involved, to recover the land from the Bishop. In the current case Wi Neera claimed as successor of a person involved in the original cession whom Wi Parata had not represented.

⁶ Supra n3 at 214.

⁷ (1902) 21 NZLR 655 (CA).

In the course of the argument of counsel in the Court of Appeal in *Hohepa Wi Neera*, Williams J remarked that native rights in land “are not rights known to the law of England”. Stout CJ then added, “*Tamaki v Baker* says that”.⁸ In his judgment Stout CJ then stated:⁹

The important point in [*Nireaha Tamaki v Baker*] bearing on this case seems to me to be that it declares that *Wi Parata v The Bishop of Wellington* was rightly decided, though it disapproves of certain dicta in the judgment.

Summarising the effect of *Nireaha Tamaki*,¹⁰ Williams J stated:

[This] action has evidently been brought upon a misconception of the real effect of the decision of the Privy Council in the case of *Nireaha Tamaki v Baker*. .. [That case] decided that by virtue of “The Native Rights Act 1865,” a suit could be brought upon a Native title, and therefore that a Native holding under such a title, if his title was put in jeopardy by an officer of the Crown acting outside his statutory authority, could bring a suit to restrain the officer from so acting.

Justice Williams view was that *Nireaha Tamaki* held only that a right of native title was created by the Native Rights Act 1865. All five judges in *Hohepa Wi Neera* agreed that the law on native title stated in *Wi Parata* was still valid and, because the events in the case in front of them had occurred before 1865, it governed that case. They dismissed the action on this ground.

So here, then, are two puzzles. The first is, “What exactly was decided in *Nireaha Tamaki v Baker*?”, and the second, “How is it that different judges could understand the case so differently?” A third puzzle arises from considering the overall historical picture: “Independently of *Nireaha Tamaki v Baker*, if (as I shall argue) the basic finding in *Wi Parata* was always wrong, how is it that it was regarded as good law in New Zealand for nearly 110 years?”¹¹ This article is concerned with these puzzles.

⁸ Ibid 660.

⁹ Ibid 667.

¹⁰ Ibid 670. The whole summary is worth reading, as it is the root of much later understanding of *Nireaha Tamaki v Baker*.

¹¹ The basic finding in *Wi Parata* was first challenged in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

When I set out to write this paper I believed that the Privy Council in *Nireaha Tamaki* had held that native title was a right under the common law existing from the foundation of the colony. However, as I worked backwards and forwards through the judgment of Lord Davey, who delivered the judgment of the Privy Council, I was forced to recognise that the issue was not so straightforward. In the end I have concluded that the Privy Council did not decide that native rights existed from the start of the colony, although Lord Davey favoured that view; but neither did it hold that the rights were created by the Native Rights Act 1865. It simply left the source of native rights undecided. The problem with the case is that Lord Davey failed to make this clear.

For the decision in *Ngati Apa*, the fact that there is not a finding in *Nireaha Tamaki* that a right of native title existed under the common law from the foundation of New Zealand as a colony is of small moment. At least two Privy Council decisions did hold this as a *ratio decidendi*¹² within twenty years after 1901,¹³ and one of these was on appeal from New Zealand.¹⁴ However, Lord Davey's failure to make himself clear in *Nireaha Tamaki* turns out to be a very important part of the historical story. For, the partially correct, and partially distorted, understanding of *Nireaha Tamaki* that began in the New Zealand courts in *Hohepa Wi Neera* in 1902 played a major role in consolidating the understanding of native title that prevailed in New Zealand for the following 85 years.

¹² Throughout this paper, I mean by *ratione decidendi* a legal proposition that is used as a premise in an argument employed in a judgment to decide some aspect of the case. This notion of *ratio* yields, first and foremost, *rationes* (for there may be several) of a judgment, and only secondarily *rationes* of a case; but all the Privy Council cases mentioned in this article contained only one judgment, so no distinction between a *ratio* of a judgment and a *ratio* of a case is needed for these cases. I have defended this understanding of *ratione decidendi* in "On Case Law Reasoning" (1985) *Juridical Review* 85. A similar view is taken by Neil MacCormick, in *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford, 1978) 82-86.

¹³ See *Manu Kapua v Para Haimona* [1913] AC 761 at 765; and *Amodu Tijani v Secretary of Southern Nigeria* [1921] 2 AC 399 at 404. I have not included *Wallis v Solicitor General for New Zealand* [1903] AC 173, because in that case the Court spoke of the rights as being secured by the Treaty of Waitangi (179 and 187-188), a clear mistake. I do not rely on *St Catherine's Milling & Lumber Company v The Queen* (1888) 14 App Cas 46 or *Attorney-General (Quebec) v Attorney-General (Canada)* [1921] 1 AC 401 as Privy Council support for the proposition of law stated in the text, as in both cases the native rights in question depended on a royal proclamation of George III in 1763 (see pages 54 and 409, respectively).

¹⁴ *Manu Kapua*, supra n13.

The argument in the article is divided into two parts, followed by a brief conclusion. In the first part I will clarify what was and was not decided in *Nireaha Tamaki*; in the second I will show how Lord Davey's failure to make himself clear turned out to be so significant.

WHAT WAS DECIDED IN *NIREAHA TAMAKI V BAKER*?

Let us start with the facts of the case. In 1871, the Native Land Court made orders that titles should issue to two different groups of Maori for, in the one case, a block of land known as Kaihinu No. 2, and in the other case a block known as Mangatainoka. In both cases title was to issue only when a proper survey of the land had been furnished to the Chief Judge. No survey of either was ever produced, but Kaihinu No. 2 was later surrendered to the Crown. A dispute arose between the Crown and the Maori owners of Mangatainoka as to whether a piece of land containing 5184 acres was in Kaihinu No. 2 or in Mangatainoka.¹⁵ In 1893, the respondent, who was the Commissioner of Crown lands for the Wellington province, acting under the authority of the Land Act 1892, advertised for sale a block of 20,000 acres, called Kaiparoro, that contained most of the disputed 5184 acres.¹⁶ The appellant, who represented members of Rangitane, the owners of Mangatainoka, issued proceedings seeking a declaration against the Commissioner that the disputed land was not Crown land and an injunction to restrain the Commissioner from selling it. As the right of the appellant and others to receive a certificate of title under the order of 1871 had lapsed, because of the absence of a survey, the appellant had to rely on the tribe's customary title. In response to this claim based on native title, the Commissioner, relying on *Wi Parata v the Bishop of Wellington*,¹⁷ which had held, as we have seen, that native title could not be recognised by the courts and had also held that the courts had no jurisdiction to investigate whether or not a native title had been properly extinguished by the Crown, pleaded that the Court had no jurisdiction to enquire whether the land in dispute in this case had or had not been properly vested in the Crown.

Among several legal issues identified for argument prior to trial, two, originally numbered (3) and (4), had been argued before the Court of Appeal. They were: "(3) Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding? (4) Has the Court

¹⁵ See the New Zealand Court of Appeal decision in *Nireaha Tamaki v Baker* (1894) 12 NZLR 483, 484.

¹⁶ Ibid at 485.

¹⁷ *Supra* n1.

jurisdiction to inquire whether, as a matter of fact, the land in dispute has been ceded by the native owners to the Crown?" In 1894, the New Zealand Court of Appeal had answered "No" to both questions,¹⁸ applying the law laid down in *Wi Parata*.

I shall now state in a series of propositions some things it is plain the Privy Council did and did not decide.

The Privy Council decided:

1. The respondent's authority to sell on behalf of the Crown derived solely from statute.¹⁹
2. An aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in pursuance of an Act of Parliament, but really outside the statutory authority.²⁰
3. If the appellant could succeed in proving that he and the members of his tribe were in possession and occupation of the lands under a native title that had not been lawfully extinguished, he could maintain such an action to restrain an unauthorised invasion of his title.²¹

The Privy Council did not decide:

1. Whether or not the appellant could rely on his native title in an action directly against the Crown.²²
2. Whether any prerogative power to extinguish native title survived the introduction of a statutory scheme for exercising the Crown's exclusive right of acquiring such title.²³

All these propositions are clearly supported by the text. Although some of them were occasionally ignored in discussions of the case within New

¹⁸ Supra n15 at 488.

¹⁹ Supra n2 at 575.

²⁰ Ibid 576.

²¹ Ibid 578.

²² Idem.

²³ Supra n2 at 576. I take it the statutes Lord Davey there refers to are the Native Lands Act 1865 and its successors, the effect of which he has described on 569ff, together, perhaps, with the Land Acts prior to 1892, which he refers to on 570.

Zealand, for the most part they were accepted. The older view of the case and the modern view of it differ primarily on the nature of the title referred to in proposition 3 above. The two options are: (1) It was a “title” only under international law, binding only on the conscience of the Crown, but later given recognition in domestic law by statute (the older view); (2) it was a title under the common law that existed from the foundation of the colony (the modern view)? However, at least so far as the older cases are concerned this point was closely related to another: namely, the correct interpretation of a *dictum* in the judgment of the Privy Council in which it appears to give limited support to the judgment in *Wi Parata*. I will now discuss each of these issues in turn.

We can take up first a point that arises from the interpretation of *Nireaha Tamaki* by Williams J in *Hohepa Wi Neera* in 1902. One thing Williams J stated in that case was that *Nireaha Tamaki* held that: “by virtue of ‘The Native Rights Act 1865,’ a suit could be brought upon a Native title”.²⁴ That, I think, is right. More dubious, however, is his attempt to derive support from *Nireaha Tamaki* for his view that such rights *had* no status in domestic law apart from that statute or later statutes. This view appears in the following passage:²⁵

In the present case, however, we have to deal with transactions which took place before New Zealand became a self-governing colony [they occurred between 1848 and 1850], and long before the statutes now regulating the rights of Natives and the ascertainment of title to and the disposition of Native lands were in existence. [He then stated the effect of that part of the Land Claims Ordinance 1841 that I have set out above, and continued:] This Act [ie the Ordinance], as stated by the Privy Council in *Tamaki v Baker*, was a legislative recognition of the rights guaranteed by the Crown by the Treaty of Waitangi, but would not of itself be sufficient to create a right in the Native occupiers cognizable in a Court of law. There were [at the time of the events at issue in the present case] no statutes regulating the acquisition of Native rights of occupancy by the Crown, whether by purchase, gift from the Natives, or otherwise. If the question arose in any particular case whether native rights had been ceded to the Crown, it must have been for the Governor of the colony to say whether they had been ceded or not, and whether the Crown had accepted such cession. No Court would have had jurisdiction to consider the question.

²⁴ Supra n7 at 670.

²⁵ Idem.

Plainly, Williams J viewed the rights guaranteed by the Treaty as rights under international law, and not as rights under domestic law. That is why he says no court could consider a claim based on such rights until they were backed by statute. However, that is not the view expressed by Lord Davey. It is worth contrasting the passage above with Lord Davey's actual comment on the Land Claims Ordinance of 1841:²⁶

No doubt this Act of the Legislature did not confer title on the Crown, but it declares the title of the Crown to be subject to the "rightful and necessary occupation" of the aboriginal inhabitants, and was to that extent a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi. It would not of itself, however, be sufficient to create a right in the native occupiers cognizable in a Court of Law.

Some comment is needed on the difference between these two views. Since the Crown's title is plainly a title at common law, Lord Davey must also have been thinking of the right of occupation, to which he says the 1841 Ordinance declares the Crown's title to be subject, as potentially a right at common law. Additionally, he must have seen at least this one right among the rights "confirmed and guaranteed" by the second article of the Treaty of Waitangi as potentially a right at common law. (I say "potentially" in both cases, for a reason that will appear below.) So, Lord Davey is here stating that those who framed the Ordinance assumed this right of occupation to be part of the common law. Since he does not dissent from this view, we can conclude he was inclined to think it correct. But does he endorse it? If he does, why does he choose the particular word "declares", instead of "enacts" in speaking of the Ordinance? After all, the enacting part of the Ordinance began, "be it therefore declared, *enacted* and ordained.. [my emphasis]". If the assumption about the common law made by those who framed this Ordinance was false, would the Ordinance not at least *make* the law that which it declares, *enacts* and ordains? And why does he say, in the last sentence of the paragraph, that the Ordinance would not *of itself* be sufficient to create a right recognisable in the courts?

Lord Davey does not make these points clear. However, we need to keep in mind that the Ordinance was enacted by the New Zealand Legislative Council, which had only a limited, delegated law-making power that

²⁶ Supra n2 at 567.

was, by virtue of a specific statute,²⁷ subject to the terms of the Royal Charter that the Crown had issued on 16 November 1840 and to any Royal instructions. By the statute, any laws made had to be consistent with the laws of England and could be disallowed by the Crown. To create a new structure of native rights that did not already exist at common law would almost certainly have been beyond the law-making power of the Legislative Council. In any event, for whatever reason, Lord Davey clearly read that part of the Ordinance that states the Crown's title to be subject to the occupational right of the "aboriginal inhabitants" as purely declaratory. But that being so, he must have recognised that the declaration in the Ordinance could be inaccurate: that those who framed it might have been wrong about the common law. The sense of the final sentence in the passage above is, then, that the ordinance would not be sufficient to create such a right *if it were to turn out that none existed*. On this view, in this passage Lord Davey does not commit the Judicial Committee²⁸ to the position that such a right exists at common law.

Does he commit it to that position elsewhere in the judgment? The most important passage comes later. Since it discusses the Native Rights Act 1865, I will set out first his Lordship's useful summary of that Act.²⁹

By the Native Rights Act, 1865, of the Colonial Legislature.. it was enacted (s. 2) that every person of the Maori race within the Colony of New Zealand, whether born before or since New Zealand became a dependency of Great Britain, should be taken and deemed to be a natural-born subject of Her Majesty to all intents and purposes whatsoever; (s. 3) that the Supreme Court and all other Courts of Law within the Colony ought to have and have the same jurisdiction in all cases touching the persons and the property whether real or personal of the Maori people, and touching the titles to land held under Maori custom or usage, as they have or may have under any law for the time being in force in all cases touching the persons and property of natural-born subjects of Her Majesty; (s. 4) that every title to and interest in land over which the native title shall not have been extinguished shall be determined according to the ancient custom or usage of the Maori people so far as the same can be

²⁷ 3 & 4 Vict C 42.

²⁸ For those new to these matters, the "court" we call the Privy Council is strictly the Judicial Committee of the Privy Council: technically, it "advises" the sovereign on the order to be made in a particular case.

²⁹ Supra n2 at 568.

ascertained. And (s. 5) that in any action involving the title to or interest in any such land, the judge before whom the same shall be tried shall direct issues for trial before the Native Land Court.

It is worth comment that, like the Land Claims Ordinance of 1841, the Native Rights Act 1865 states that it is passed to remove doubts. Its substantive portion begins: “Be it therefore declared and enacted”. So, like the Ordinance, it also leaves open whether it is declaring law or making new law. However, its authority to make new law was undeniable.

Here now is the central passage in Lord Davey’s judgment on the status of native title.³⁰ The numbers in square brackets are mine:

[1] The right [ie of native title], it was said, depends on the grace and favour of the Crown declared in the Treaty of Waitangi, and the Court has no jurisdiction to enforce it or entertain any question about it. [2] Indeed, it was said in the case of *Wi Parata v Bishop of Wellington*, which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of Law can take cognizance. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of the 3rd and 4th sections of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that “a phrase in a statute cannot call what is non-existent into being.” It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence. By the 5th section it is plainly contemplated that cases might sometimes arise in the Supreme Court in which the title or some interest in native land is involved, and in that case provision is made for the investigation of such titles and the ascertainment of such interests being remitted to a Court specially constituted for the purpose. The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction and effect of the Native Rights Act; and one is rather at a loss to know what is meant by such expressions [as]

³⁰ Ibid at 577.

“native title,” “native lands,” “owners,” and ‘proprietors,’ or the careful provision against sale of Crown lands until the native title has been extinguished, if there be no such title cognizable by the law, and no title therefore to be extinguished. Their Lordships think that the Supreme Court are bound to recognise the fact of the “rightful possession and occupation of the natives” until extinguished in accordance with law in any action in which such title is involved, and (as has been seen) means are provided for the ascertainment of such a title. The Court [ie the Supreme Court when it eventually hears the case] is not called upon in the present case to ascertain or define as against the Crown the exact nature or incidents of such title, but merely to say whether it exists or existed as a matter of fact, and whether it has been extinguished according to law. If necessary for the ascertainment of the appellant’s alleged rights, the Supreme Court must seek the assistance of the Native Land Court; but that circumstance does not seem to their Lordships an objection to the Supreme Court entertaining the appellant’s action. Their Lordships, therefore, think that, if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the lands in dispute under a native title which has not been lawfully extinguished, he can maintain this action to restrain an unauthorized invasion of his title.

If one reads [1] above as a separate argument from [2], the text reads as if Lord Davey proceeds immediately to discuss [2] and - since he never signals that he is returning to [1] - simply leaves that point hanging. On this reading it will seem that in this passage the Judicial Committee concedes the first point, or, at least, does not question it. At a later point in its judgment the Privy Council gives some limited approval to the decision in *Wi Parata*. This reading of the present passage is compatible with believing that this limited approval was of the finding in that case that native title depended “on the grace and favour of the Crown”, the limited approval being that this was correct prior to the Native Rights Act 1865.³¹

I think, however, that this reading is wrong. When Lord Davey speaks of “this argument” (singular) he means, I think, the argument in [1], of which he treats [2] as a subordinate part: the overall argument he turns to address is that native title depends entirely on the grace and favour of the Crown, for which one reason advanced in *Wi Parata* was that no body of

³¹ See the discussion below of the Privy Council’s *dictum* on *Wi Parata*.

customary law exists that could determine title. When he states that this overall argument goes too far, he means that the claims it makes on behalf of the Crown are extravagant. It might be that native title can not be relied on in an action directly against the Crown, that he leaves open; it might be that a Crown grant of land cannot be attacked after it is made, on that he expresses a tentative view later; but it does not follow that Maori have no title that can be relied on in any way in a court of law, whenever the Crown contends their title is extinguished. When he then immediately goes on to say that it is rather late in the day for such an argument to be addressed to a New Zealand court, he means that whatever might have been argued in the early stages of the colony such an argument is now precluded by statute. He then proceeds immediately to discuss the relevant statutory provisions: sections 3 and 4 of the Native Rights Act 1865.

In *Wi Parata* Chief Justice Prendergast had been scathing about these provisions.³² However, Prendergast CJ did acknowledge that section 3 purported to require the Court to determine questions of native title according to “the Ancient Custom and Usage of the Maori people”. He then immediately remarked, “But a phrase in a statute cannot call what is non-existent into being”. In the context of his discussion this remark is more a gratuitous criticism of the Act (and of traditional Maori society) than a premise of his argument, for he ultimately avoids most of the obligation laid on the courts by the statute by saying that the Crown, not being named in the statute, is clearly not bound by it. (Here he applies a presumption of interpretation that the Crown is not bound by a statute unless this is expressly stated or implied.) Hence, he says, the statute does not remove the Crown’s prerogative right to conclusively determine when native title has been extinguished.³³ However, Lord Davey treats the remark quoted above as an attempt to get rid of the obligation, unequivocally imposed on Courts by sections 3 and 4 of the Act, to determine questions touching the titles to land held under Maori custom and usage according to that custom and usage.

Of course, if Prendergast CJ had been right that no such body of custom and usage existed, then obviously no court could fulfill the obligation imposed by the statute. But I take his Lordship’s position to be that courts have a duty to attempt to adjudicate on this basis, if necessary referring questions of fact to the Native Lands Court under section 5 of the Act, and that a mere assertion by a judge, based on no evidence, that no such body of custom and usage exists is not sufficient to eliminate

³² Supra n1 at 79.

³³ Ibid at 80.

that obligation. (In any event, the statute itself only required that titles or interests in land be determined according to such custom and usage, “so far as the same can be ascertained”.³⁴)

Lord Davey then goes on to remark that prior Imperial and Colonial legislation dealing with land, a summary of which he has given earlier,³⁵ is consistent with this understanding of the Native Rights Act, for that legislation commonly assumed the existence of a right of native title at common law. Indeed, much of it, he says, would make no sense if there were no native title in fact or if it were not recognisable by the law. Of course, it is basic law, which Lord Davey would have understood, that a wrong assumption by the legislature about the existing state of the law does not make the law that which it was wrongly assumed to be.³⁶ However, I take his Lordship’s point to be that the earlier legislation provides important background to the Native Rights Act 1865. For, assuming it were not already the law in 1865 that native title should be recognised in the courts, the 1865 Act explicitly *enacts* the law assumed in the earlier legislation. His Lordship, therefore, concludes that (as a consequence of this enactment) the Supreme Court is bound to recognise the fact of the “rightful possession and occupation of the natives” until extinguished in accordance with law in any action in which such title is involved. The balance of the passage then makes clear why such title is involved in the present case.

If this account is right, even in this passage Lord Davey does not commit the Privy Council to the view that a right of native title existed under the common law prior to the Native Rights Act 1865. His position is that though it seems likely that such a right exists under the common law (for he signals in many places that he favours that position³⁷), it is unnecessary to rule on that point for the purpose of the present case, because the Native Rights Act 1865 has put the issue beyond argument. Further, there is, I think, nowhere else in his judgment that Lord Davey

³⁴ Section 5.

³⁵ 576-571.

³⁶ This follows from the constitutional premise that the only way Parliament can make law is to enact a statute or act under the authority of a statute; it cannot make law by displaying a false understanding of the existing law. The authority for this proposition is old: see eg *Dore v Gray* (1788) 2 TR 358, 365. The point is briefly touched on in *Wi Parata v the Bishop of Wellington* supra note 2 at 79 as it applies to merely declaratory acts, but Prendergast CJ there fails to observe that the Native Rights Act 1865 is not merely declaratory.

³⁷ In addition to the passage at 567 discussed in the text above, supra n26, see 579-580.

commits the Judicial Committee to the view that native title exists at common law.

We can turn now to the dictum in which the Privy Council gave limited support to the decision in *Wi Parata*. Near the end of his judgment Lord Davey comments that the decision in *Wi Parata* was that the Court has no jurisdiction by *scire facias*³⁸ or other proceeding to annul a Crown grant for matter not appearing on its face. He then immediately remarks:³⁹

If so, it is all the more important that the natives should be able to protect their rights (whatever they are) before the land is sold and granted to a purchaser.

In fact, Lord Davey's account of the finding in *Wi Parata* is inaccurate: the finding was that the Court has no such jurisdiction *except*, possibly, by *scire facias* or other proceeding by or on behalf of the Crown to annul a Crown grant for matter not appearing on its face.⁴⁰ However, Lord Davey's mistake indicates the concern that was in his mind when he made these remarks on *Wi Parata* near the end of his judgment. It was a concern to protect the reliability of a crown grant of land. This concern had been stressed in argument before the Court by counsel for the respondent, who had asserted that the doctrine that it is for the Crown alone to decide whether the title of natives in the Colony has or has not been extinguished "has become the foundation of all titles to land in the Colony".⁴¹ Immediately after the comment quoted above, Lord Davey remarks that the *dicta* in *Wi Parata* go beyond what was necessary for the decision, and comments specifically on the limited effect the case gave to section 3 of the Native Rights Act 1865. He then continues:

As applied to the case then before the Court, however, their Lordships see no reason to doubt the correctness of the conclusion arrived at by the learned judges.

³⁸ *Scire facias* means literally "to cause him to know". The proceeding could be used to require a party to show cause why a warrant or grant should not be revoked on the grounds set out in the writ.

³⁹ *Supra* n2 at 579.

⁴⁰ Although *scire facias* was technically a proceeding by the Crown, Attorney Generals often allowed it to be used to facilitate a private challenge to a Crown grant (in a manner similar to relator proceedings). By the second half of the nineteenth century conventions existed about when an Attorney-General should give such consent: see Parke B in *The Queen v Eastern Archipelago Co* (1853) 23 LJQB 82, 99.

⁴¹ At 565.

The “conclusion” he refers to is clearly the conclusion, which he has just mistakenly attributed to the Court in *Wi Parata*, that a court has no jurisdiction by *scire facias* or other legal proceeding to annul a Crown grant for matter not appearing on its face. However, the difficulty with this *dictum* is that the Court in *Wi Parata* used three different arguments⁴² to support its, slightly different, finding that a Crown grant could not be challenged except, possibly, in *scire facias* or other proceeding by or on behalf of the Crown. If we ignore Lord Davey’s mistake we can no doubt understand him as giving tentative approval to one or more of these grounds. The problem is he does not make clear which of them he is supporting. Still, it is not too difficult to work this out. The first two grounds that Prendergast CJ relied on in *Wi Parata* for his relevant finding were substantive. If correct, they would have blocked any proceedings at all by the plaintiff, regardless of their procedural form. They were: (1) that at the commencement of the colony the only rights of Maori to occupation, and the only duties of the Crown to protect them, were rights and duties *jure gentium* (ie international law), and not under the common law; and (2) that transactions by the Crown with the Maori for surrender of native title were akin to acts of state and could not be investigated in the courts. If Lord Davey intended to endorse either or both of these findings, then he must have taken the view that prior to the 1865 Act Maori had no title that could be recognised at common law. The dictum was often read that way by New Zealand judges in the years immediately after the decision in *Nireaha Tamaki*.⁴³ However, it is most unlikely that he intended to endorse these findings. Firstly, they are irrelevant to the concern about the stability of Crown grants that plainly was on his mind when he made these comments. Secondly, for him to have endorsed these findings would be inconsistent with the whole tenor of his judgment. As I have tried to show in the analysis above he leans towards favouring the existence of native title at common law, but he is careful not to make any ruling about this either way.

The third ground Prendergast CJ relied on for his relevant finding came later in his judgment and was separated from the earlier two by several other arguments and comments. It was purely procedural: it was that the

⁴² In an addendum to this article, I have included a structural analysis of the judgment in *Wi Parata v Bishop of Wellington* that will help clarify the arguments employed in it.

⁴³ See Stout CJ, in *Hohepa Wi Neera*, supra n7 at 667, Williams J, *ibid* at 671; “Protest of Bench and Bar” (1903), reported in (1938) 1 NZPCC 730, per Stout CJ at 732, Williams J at 749.

only *process* by which a Crown grant could be avoided for a matter not appearing on its face was a writ of *scire facias* or other similar proceeding taken by, or in the name of, the Crown. However, behind this rule of procedure lies the substantive concern that Crown grants, particularly crown grants of land (for there could be Crown grants of patents, licences, and the like), should be reliable: they should not be challenged unless the Crown had agreed to the process. It is, I think, clear that it was only this finding, particularly as it applied to Crown grants of land, to which Lord Davey intended to give tentative support.

HOW THE JUDGMENT'S LACK OF CLARITY PROVED SIGNIFICANT

It is not fair to blame the Privy Council for not ruling on whether native title was recognisable under the common law. Such a ruling was not needed to decide the case in front of them, and, more importantly, the issue had not been argued in detail before the Court.⁴⁴ However, it is fair to complain about the obscurity of the judgment. Lord Davey could have made clear that the Court was not endorsing the *Wi Parata* view on this point - the view that had been followed in the judgment on appeal - and identified the point as one that might need careful consideration in a future case. As things turned out, it is likely that would have had a significant effect on the course of subsequent New Zealand legal history.

In 1901, the New Zealand authorities on the status of native title were delicately balanced. In *R v Symonds*,⁴⁵ in 1847, Chapman J and Martin CJ in the Supreme Court had stated clearly that native title was a right under the common law,⁴⁶ although this statement was not a *ratio* of their decisions. In 1872, this view of the law was employed by the Court of Appeal as a *ratio* of its decision in *In re the Landon and Whitaker Claims Act 1871*.⁴⁷ In a later case in the same year, the Court of Appeal assumed this view of the law, although not as part of a *ratio*.⁴⁸ Then, as we have already noted, in 1877 Prendergast CJ and Richmond J in *Wi Parata* in the Supreme Court held that native title was not recognisable in the courts, claiming that had been the law applied in the courts from

⁴⁴ See the argument of counsel *supra* n2 at 564-566.

⁴⁵ Printed in 1 NZPCC 1840-1932 (1938) 387.

⁴⁶ Chapman J 390-392, Martin CJ 393 (citing Kent), 394, and 395.

⁴⁷ (1872) 2 NZCA 41, 49. The finding is a *ratio*, because to reach its decision the Court had to determine whether the lands in question were "crown lands", in the sense of the 1866 Act, notwithstanding the existence of the native title.

⁴⁸ *R v Fitzherbert* (1872) 2 NZCA 143, 172.

the beginning of the colony.⁴⁹ In 1894, the *Wi Parata* view on this point was followed in the New Zealand Court of Appeal in *Nireaha Tamaki v Baker* itself.⁵⁰ Edwards J then gave limited support to the *Wi Parata* view as one of five judges in the Court of Appeal in 1896 in *Teira Te Paea v Roera Tareha*.⁵¹ Then, apparently on the basis of that sole finding, as one of five judges in the Court of Appeal in *Mueller v The Taupiri Coal-Mines Limited*⁵² in 1900, he said:

.. as was held in [*Wi Parata*] and in *Teira Te Paea v Roera Tareha* transactions with the Natives for the cession of their title to the Crown are to be regarded as acts of State, and are therefore not examinable by any Court.

Since the Court of Appeal had made no such finding in *Teira Te Paea*, all we can extract from this is a finding by one judge out of five in two Court of Appeal cases approving the judgment of the (lower) Supreme Court in *Wi Parata*.

If any Privy Council decision before 1901 from another jurisdiction than New Zealand had held that native title was a right under the common law that would have been binding in New Zealand, but I know of no such decision.⁵³ According to the understandings of the time, even a high English decision would have been considered binding, but, again, I know of no such decision.

Given this state of the authorities, how did the matter stand in terms of general principle? It is quite plain, I think, that on this front the better arguments supported the *Symonds* view. Here are five points that favour it:

1. Basic considerations of justice require that a country acquiring a new territory respect the territorial possession of existing inhabitants.

⁴⁹ Supra n1 at 78 and 79. This was despite the fact that Richmond J had been a member of the court in *In re the Lundon and Whitaker Claims Act 1871*: supra n47 at 44.

⁵⁰ (1894) 12 NZLR 483, 488.

⁵¹ (1896) 15 NZLR 91, 114.

⁵² (1900) 20 NZLR 89, 123.

⁵³ See the remarks, supra n13.

2. This concern was stated at the very beginnings of the tradition of learning we now call International Law.⁵⁴ By the nineteenth century it had evolved into established doctrines and practices. With regard to native people judged not to have a developed system of law and to need the protection of the Crown or, as in the US after independence, the State the law was that “discovery” and settlement gave a claim to sovereignty as against other European states but the title of the Crown or state to land in the colony was subject to a right of occupation by the native inhabitants. Only the Crown or State had the right to acquire title from the native people.⁵⁵ Well before 1840, English common law accepted the rule that general principles and customary rules of international law (although not treaties) applied within domestic law when relevant,⁵⁶ and the judges in *Symonds* got the international law on native title right.⁵⁷ By the 1870’s, common lawyers tended to view international law as just a structure of custom operating between nations (primarily European or “civilized” nations) and this view then sometimes restricted the reception of international law within domestic common law.⁵⁸ However, the old reception rule was certainly in force in 1840 and it was never abolished: indeed there was no sound case for abolishing it.
3. By 1840, the view that because of International Law native title was a right under the common law had been widely relied on in British colonial practice,⁵⁹ a point that may not have been decisive as a matter of law, but which was at least relevant in the courts.

⁵⁴ Francisco de Vitoria, *De Indis (Of the Indians)* trans JP Bate, (Carnegie Institute, Washington, 1917).

⁵⁵ See the extensive review of European practice in *Johnson v McIntosh* (1823) 8 Wheat 543 and J Story, *Commentaries on the Constitution of the US* (1833) 3-20. The latter was clearly a major source for Chapman J’s judgment in *Symonds*.

⁵⁶ See H Lauterpacht, “Is International Law Part of the Common Law?” (1939) 25 *Transactions of the Grotius Society* 51; *Trendtex Corporation v Central Bank of Nigeria* [1977] QB 529; F Hackshaw, “Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi” in IH Kawharu, ed, *Waitangi: Maori and Pakeha Perspectives*, Oxford University Press, Auckland, 1989, 92, 94-96.

⁵⁷ *Story*, supra n54; Keith and Anderson JJ in *Attorney-General v Ngati Apa*, supra n3, [136] – [140]. For the application of this law in *Symonds* see supra n46, 390-392, 393-394.

⁵⁸ See *Hackshaw*, supra n56.

⁵⁹ See P McHugh, “Aboriginal Title in New Zealand Courts” [1984] *Canterbury Law Review* 235, 238-239; *Story*, supra n54.

4. The view that native title would become a right under the common law had been assumed in the framing of the Treaty of Waitangi,⁶⁰ so that to abandon it was to overturn a central promise that the Crown intended to make to Maori in the Treaty.

5. A general principle that local law continued (subject to a new sovereignty) upon the acquisition of new territory by the British Crown was established in English common law well before 1840.⁶¹ One important ground for that principle was a concern to protect local property rights. This law did not apply in full to native people who were judged not to have a developed system of law - we have already noted the modified recognition of property rights that applied to such native people - but no good reason existed why the principle should be abandoned altogether in the case of such native people.⁶²

So far as I can see, the only argument in favour of the *Wi Parata* view was that it protected the reliability of Crown grants of land. That concern features extensively in the support of New Zealand judges and lawyers for the *Wi Parata* view in the thirty or so years after that decision.⁶³ Plainly, it was also a concern in the colonial community. Alex Frame, in his biography of John Salmond, quotes the Hon Mr Carroll, speaking in the House of Representatives in support of the Native Land Bill in 1909:⁶⁴

.. it is provided [in the Bill] that the Native customary title shall not be available against the Crown .. This principle is essential to the security of the title of all Crown land and private land in the Dominion. It is a most important step, as it removes all possibility of future litigation with regard to Native-land titles.

⁶⁰ See the comment by Chapman J in *Symonds* supra n44 at 390. See also P McHugh, "Constitutional Theory and Maori Claims" in IH Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives*, Oxford University Press, Auckland, 1989, 25, 30-32.

⁶¹ The leading authority is *Campbell v Hall* (1774) 1 Cowp 204; Lofft 655. Extensive additional authority is listed in *McHugh*, supra n60, footnotes 117, 120 and 121.

⁶² See Lord Haldane in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 407.

⁶³ See eg Richmond J, delivering the decision of the Court of Appeal in *Nireaha Tamaki v Baker*, supra note 50 at 488; "Protest of Bench and Bar" supra n43, per Stout CJ at 746, per Edwards J at 757; Salmond as Solicitor-General in *Tamihana Korokai v Solicitor General* (1912) 32 NZLR 321, 331-332.

⁶⁴ *Salmond: Southern Jurist*, Victoria University Press, Wellington, 1995, 113.

The concern, I take it, was that if Crown grants could be challenged after they were made, Maori other than those from whom the Crown had obtained a title might seek to upset that title after a Crown grant – so titles generally would be unstable. However, it was always wrong to believe that this concern could support the *Wi Parata* view of native title. A concern to secure the stability of a Crown grant of land was no doubt one proper justification for the cautious rules about the availability of *scire facias* and other like remedies to challenge a Crown grant *after* it had been made. But that concern was irrelevant to the status of native title *before* such a grant was made, as Lord Davey correctly pointed out. The views taken about the status of native title in *Wi Parata*, that (1) native title was a right only under the *jus gentium* and (2) negotiations by the Crown for its surrender were akin to acts of state that could not be questioned in the domestic courts, were either right or wrong on their merits. For a court to have held explicitly that these things were so merely because it was considered expedient that they should be so, would clearly have been improper. Thus, for a court to be influenced by this consideration without any explicit holding was equally improper.

In fact, the findings by Prendergast in *Wi Parata* on the two points noted above were unsound. The finding that native title is a right only under the *jus gentium* misunderstood the judgments in *R v Symonds* and ignored a *ratio* of a Court of Appeal decision that had held it is a right under the common law.⁶⁵ Prendergast CJ also misunderstood the American authorities that had been relied on in *Symonds*, which clearly were concerned with a right under domestic law. This is plain enough in all the cases and texts, but it is made clear beyond question in a passage in *Johnson v McIntosh* in which Marshall CJ speaks of “the Indian title” as “entitled to the respect of all courts”.⁶⁶ Plainly, he is not speaking of courts under international law, for in 1823 there were none.

Prendergast CJ’s finding that transactions by the Crown with Maori for the surrender of native title are akin to acts of state and hence could not be investigated in the courts was based on three cases that, when examined, provide no support at all for that proposition. Two of them merely held that treaty rights cannot be relied on in domestic courts.⁶⁷ So far as relevant, the third held only that the Crown’s *annexing* of territory was an act of state and could not be challenged in a domestic

⁶⁵ *Supra* n47.

⁶⁶ (1823) 8 Wheat 543, 592.

⁶⁷ *Rustomjee v the Queen* (1876) 45 LJQB 249; *Nabob of Arcot v East India Co* (1793) 4 Br CC 181, 29 ER 841.

court.⁶⁸ It said nothing about the law that came into force when a common law country acquired new territory, whether by annexing it or by any other method. As Paul McHugh has pointed out, this finding by Prendergast CJ also had the odd result that it treated the Crown as involved in an act of state when negotiating with its own citizens.⁶⁹

Such was the emotional commitment to the *Wi Parata* view of native title among New Zealand judges in the early years of the twentieth century that even if Lord Davey had signaled clearly that this view was questionable, it is not clear that it would have been overturned in the New Zealand Court of Appeal. However, if the signal had been given, it is likely that early on the issue would have been properly researched and fully argued before the Court of Appeal. Sooner or later a case in which it was directly relevant would have gone to the Privy Council itself for a definitive ruling.

A comment is now needed on *Wallis v Solicitor-General for New Zealand*,⁷⁰ which went to the Privy Council in 1903, for that might seem to have been just such a case. In fact, this was not a case in which the status of native title should have been relevant. The proceeding was an application by Anglican Bishops to vary the terms of the charitable trust that had been disputed in *Wi Parata* to permit them to use the money they had accumulated from renting the land to establish a school in an entirely different area. As the reader will recall, the trust had been established by a grant from Governor Grey in 1850, following a gift for the purpose of the trust from the Maori owners. Even if, as the Privy Council clearly assumed in its decision, the beneficial interest in the trust came from the Maori owners rather than the Crown, the settlers of the trust were not required parties, or even appropriate parties, to such an action. The Solicitor-General was a party, not because the Crown was deemed the donor, but only because of the Solicitor-General's role as defender of charities on behalf of the public. He had, however, chosen to attack the trust and assert that the land had reverted to the Crown, an argument accepted by the Court of Appeal. That the Court of Appeal had even considered this argument in these proceedings was one ground of the Privy Council's complaint about the procedure that had been allowed in the Court of Appeal.⁷¹ However, given that the Court of Appeal had held that the trust was void and that the land had reverted to the Crown,

⁶⁸ *Doss v Secretary for State for India* (1875) 19 LR Eq 509.

⁶⁹ P McHugh, *The Maori Magna Carta*, Oxford University Press, Auckland, 1991, 110.

⁷⁰ [1903] AC 173.

⁷¹ *Ibid* 186.

the nature of the Crown's original interest in the land became relevant in the Privy Council. Thus, by an odd turn of fate, this case might have provided an opportunity for a clear announcement on native title in the Privy Council. As things turned out, Lord MacNaghten, who delivered the decision of the Judicial Committee, made bad mistakes about both native title and the Court of Appeal's view about it that produced confusion rather than clarity.

One mistake was to assert that the legal basis of native title derived from the Treaty of Waitangi,⁷² rather than from the common law (which the English version of the Treaty had expressed), a view that was plainly wrong, given that treaties are not a source of law in domestic law within legal systems based on English law. Lord MacNaghten's second bad mistake was to fail to understand that the judges in the Court of Appeal had assumed that Maori had no legally recognisable interest in the land, so that in their view the beneficial interest came from the Crown to whom the land had reverted through failure of the objects of the trust. In the Court of Appeal the Attorney-General had stated that the Crown was concerned that if the Court were to allow the Bishops to vary the trust and build a school in another area that would prevent the Crown from carrying out its *moral* obligation as owner of the land to the original donors, a consideration taken into account by the Court of Appeal. Because Lord MacNaghten assumed that the Crown had no interest in the land, he misconstrued the Court of Appeal's consideration of this concern as undue deference by the Court to the executive.⁷³ Consequently, he made adverse comments about the independence of the Court of Appeal that provoked wrath in New Zealand. Lord MacNaghten had been a member of the Privy Council in *Nireaha Tamaki*, so, if the judgment in that earlier case had been clear, it is unlikely he would have made these bad mistakes.

The sequel to the Privy Council judgment in *Wallis* was the well-known "Protest of Bench and Bar",⁷⁴ made against it two months later in Wellington. In this protest, the New Zealand judges who spoke misunderstand the basis of the Privy Council decision almost as badly as it had misunderstood the basis of the Court of Appeal's decision. Williams J did, however, manage to recognise that the difference between the two courts lay partly in different perceptions of who was, in law, the donor of the land: the Maori owners or the Crown. He then considered the various possibilities under which the Maori donors might

⁷² Ibid 179 and 187-188.

⁷³ Ibid 186-189; cf "Protest of Bench and Bar" supra n43 at 754-756.

⁷⁴ Supra n43.

have had a legally recognisable interest in the land, and rejected each of them. However, because the basis of native title had been so carelessly stated in *Wallis*, and had been left so murky in *Nireaha Tamaki* (which he discussed), he failed to consider the possibility that its foundation lay in the common law.⁷⁵ This whole muddle merely entrenched the New Zealand view about native title.

In 1909, the New Zealand legislature significantly reduced the range of cases in which native title could be relied on.⁷⁶ Perhaps that would have happened anyway, even if it had been recognised that native title existed under the common law; but at the least it would have been more difficult. In any event, despite the statute, cases in which the status of native title was relevant continued to occur.

The first case of importance after that date was *Tamihana Korokai v Solicitor-General*, in 1912.⁷⁷ The plaintiff had lodged a claim with the Native Land Court to the bed of Lake Rotorua. Through the Solicitor-General the Crown claimed that the bed of the lake was Crown land. The issue was whether that claim precluded the Native Land Court from hearing the plaintiff's claim. All five judges in the Court of Appeal held that it did not, the basis of their decision being that the only way the Crown could preclude such an action was by issuing a formal proclamation under section 95 of the Native Land Act 1909 that the land was free from native customary title: a mere assertion by the Solicitor-General would not do.

However, it is not the decision, but the way the case was argued and the grounds of the judgments that are of interest here. With the possible exception of Cooper J, who seems to have entertained the idea that rights of native title existed before the statutes,⁷⁸ but who also relied on the statutes, all the lawyers involved treated native title as having only a statutory basis. This included counsel for the plaintiff, who argued that domestic legislation had given effect to the rights guaranteed by the Treaty of Waitangi.⁷⁹ He relied on *Nireaha Tamaki* in support, although he suggested that the judgment in that case “did not depend on the Native Rights Act, 1865, alone, but also on the whole of the Native land

⁷⁵ Ibid 747-750.

⁷⁶ Native Land Act 1909 ss 84-89 and 100.

⁷⁷ (1912) 32 NZLR 321.

⁷⁸ Ibid 353.

⁷⁹ Ibid 328.

legislation.”⁸⁰ On the other side, John Salmond, as Solicitor-General, argued as follows:⁸¹

In *Nireaha Tamaki v Baker* the Privy Council considered two distinct questions: 1 Is Native title available against the Crown? 2 Is Native title a ground upon which any action may be brought in the Supreme Court? They found it unnecessary to decide the first question, as they decided there was no claim against the Crown, so the judgment of this Court [ie the judgment of *Nireaha Tamaki* in the Court of Appeal] on that question stands. The second question was answered in the affirmative, the sole ground of the decision being the Native Rights Act 1865.

This argument is technically correct, except that it ignores the conflicting finding on the status of native title in the earlier Court of Appeal in *In re the Landon and Whitaker Claims Act 1871*,⁸² which later in his argument Salmond dismisses as a dictum.⁸³ However, Salmond’s argument is also inclined to be misleading as suggesting, wrongly, that the Privy Council precluded any other basis for native title than the Native Rights Act 1865.

All five judges grounded their decision on the plaintiff’s statutory rights, although it was not now the right to rely on native title in the Courts that they referred to, for that had been severely restricted by the Native Land Act 1909;⁸⁴ it was the right to have a claim to native title investigated by the Native Land Court.⁸⁵

The New Zealand understanding of the law on native title was now firmly set in a pattern. The basic ideas were: (1) the Treaty is not binding in domestic law, although it gave rights under the *jus gentium* and created a moral obligation on the Crown, and (2) that obligation had been fulfilled by domestic legislation. As it happens, a decision that, had it been carefully studied in New Zealand, ought to have changed that fixed understanding was given by the Privy Council on an appeal from New Zealand the very next year. The case, *Mana Kapua v Para*

⁸⁰ Ibid, 337.

⁸¹ Ibid 332.

⁸² Supra n47.

⁸³ Supra n77 at 332.

⁸⁴ Sections 84 and 88(2).

⁸⁵ Supra n7, Stout CJ at 344-345, Williams J at 348, Edwards J at 349, Cooper J at 353, and Chapman J at 356-357.

Haimona,⁸⁶ turned on the effect of an Order in Council made on 2 September 1865 that confiscated land of a tribe that had been in rebellion, but excluded land of loyal Maori. Viscount Haldane, who delivered the judgment of the Court, held that the Order left that part of the land that represented the interests of loyal Maori in the hands of those Maori. He said:⁸⁷

Their Lordships are of the opinion that the Order in Council of September 2, 1865, did not extinguish the native title of any loyal inhabitant.

Since the Native Rights Act 1865 did not come into effect until 26 September 1865, he is clearly speaking of a native title at common law. In 1874 a Crown grant was made of a portion of the total area of land covered by the 1865 Order to 88 loyal Maori from two different tribes. This represented their share of the total area covered by the original confiscation order. Lord Haldane described the condition of this land prior to the Crown grant as follows:⁸⁸

Prior to the grant.. the land in question had been held by the natives under their customs and usages, and these appear not to have been investigated. As the land had never been granted by the Crown, the radical title was, up to the date of the grant, vested in the Crown subject to the burden of the native customary title to occupancy.

Although the Native Rights Act 1865 was in force at the time of this grant Lord Haldane did not rely on it for this finding; indeed that Act is not mentioned in the judgment. So, again he is relying on the position at common law. The dispute in the case was about the proper principle to be applied in partitioning this land between the 88 loyal Maori. A variety of special tribunals had ruled on this before the case reached the Privy Council. Some of them had followed the principle of dividing the land according to the ancient holdings of the two tribes to which these Maori belonged; others had ignored these holdings and treated equally those of equal tribal blood. Lord Haldane held that because the loyal Maori had held the land under customary title up to the date of the grant the former was the correct principle.⁸⁹ Thus, the Court's finding that native title in the land existed prior to the grant was a *ratio* of the case.

⁸⁶ [1913] AC 761.

⁸⁷ Ibid 764.

⁸⁸ Ibid 765.

⁸⁹ Ibid 766-768.

This finding was not noticed in New Zealand.⁹⁰ One reason, no doubt, was that it was imbedded in an argument about the effect of an Order under the New Zealand Settlement Act 1863 - the legislation used to effect confiscations of land from rebel Maori - and issues under that Act must already have been arcane by 1914. Another reason was that by that time little in New Zealand case-law would have led lawyers to look for authority outside the established orthodoxy, as *R v Symonds* was not readily available.⁹¹ In any event, no one did. Indexes indicate that the case was not cited in a reported judgment in the New Zealand Law Reports until 1990.⁹²

In the meantime the old approach continued unabated. Almost exactly a year after *Mana Kapua*, in *Waipapakura v Hempton*, in 1914, Stout CJ said:⁹³

...it is clear from the decision of the Privy Council in *Nireaha Tamaki v Baker* that, until there is some legislative proviso as to the carrying-out of the treaty, the Court is helpless to give effect to its provisions. .. In that case their Lordships relied upon the provisions of the Native Rights Act, 1865.

In 1921, in the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria*,⁹⁴ Viscount Haldane gave a detailed judgment the whole of which was about the nature and status of native title. In the course of his judgment he stated⁹⁵: “A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners...”. He meant the rights of an indigenous people holding under a system of tenure analogous in many ways to the Maori system. Again, this case was not noticed in New Zealand. It was cited in *In re the Bed of the Wanganui River*, in 1962, but not on the status of native title; it was not then cited again until *Te Weehi v Regional Fisheries Officer* in 1986 - the first case in New Zealand to challenge the old orthodoxy.⁹⁶

⁹⁰ John Salmond was, however, counsel for the Crown before the Privy Council (although he was not called on), so he at least ought to have appreciated the significance of the finding.

⁹¹ It was not printed in New Zealand until 1938 when it was published in New Zealand Privy Council Cases 1840–1932, H F Von Haast ed.

⁹² In *Te Runanga o Muriwhenua Inc v AG* [1990] 2 NZLR 641, 645. I have searched the indexes to the New Zealand Law Reports to 1963 and Lexis-Nexis, which has the New Zealand Law Reports from 1958 and other sources.

⁹³ (1914) 33 NZLR 1065, 1071.

⁹⁴ [1921] 2 AC 399.

⁹⁵ Ibid 407.

⁹⁶ [1986] 1 NZLR 680. I have searched the same sources as in n92.

Between 1914 and 1963 the established orthodoxy had been repeated in at least two cases.⁹⁷ When the Court of Appeal was asked to consider a claim by two Maori tribes to the foreshore of Ninety-mile Beach in 1963,⁹⁸ given that the foreshore had not been included in the Crown grants of adjacent land, it was this orthodox view that eventually determined the case. The Maori Land Court had held that before 1840 the two tribes had owned the foreshore of the beach according to their custom and usage, but it then stated a case for the opinion of the Supreme Court on whether the Maori Land Court had jurisdiction to issue a freehold title in the circumstances. In the Court of Appeal, counsel for the appellants (the Maori tribes) vigorously defended the position that the Maori Land Court had such jurisdiction. He argued that according to the established cases:⁹⁹

Whatever were the native rights as at the Treaty, they were to be protected and preserved, and, while the Crown may have become owner of all the land, it was under a recognised obligation to give the Maoris a freehold title to what could be proved to have been held according to their custom and usage.

Pushed by the Court as to whether this was a recognised obligation, morally or legally, he responded:¹⁰⁰

I say, legally, resting on the Native Land Act 1862 and the Native Rights Act 1865.

The three judges agreed that this, and later, legislation had given Maori a right to have their claims to title investigated by the Native Land Court, by then renamed the Maori Land Court.¹⁰¹ However, they also held that if a title had been granted to high-water mark following such an investigation this extinguished all claims in the area, including those to land below high-water mark. In short, the statutory right was satisfied by the investigation by the Maori Land Court, following which the Court could determine where the boundary should be, and this then settled the title to land on both sides of high-water mark. Once the statutory right

⁹⁷ *Te HeuHeu Tukino v Aotea District Maori Land Board* [1939] NZLR 107, 120; *In re the Bed of the Wanganui River* [1955] NZLR 419, 425, 432, 441, 462-463, 470.

⁹⁸ *In re Ninety-Mile Beach* [1963] NZLR 461.

⁹⁹ *Ibid* 463.

¹⁰⁰ *Idem*.

¹⁰¹ *Ibid*, North J at 468-472, T A Gresson J at 475-478.

had been exhausted, no other right remained.¹⁰² One of the judges, T A Gresson J, also relied on s 147 of the Harbours Act 1878, which precluded a “grant” of the shore of the sea without an Act of the General Assembly.¹⁰³ But, since, if Maori had a title at common law, they needed no grant from the Crown, this argument also depended on the premise that no title existed at common law.

It was not until scholars began to work over the history again with care in the late 1970’s and early 1980’s that the misunderstandings by New Zealand courts that had prevailed since *Wi Parata* in 1877 were recognised.

CONCLUSION

The judgment in *Wi Parata* on the status of native title was unprincipled and wrong. Notwithstanding its defects, this judgment took a powerful hold on the minds of New Zealand judges and lawyers. Plainly, one reason for that was that the position it took was congenial to colonists: it gave the Crown autocratic power in dealing with Maori claims and it allayed the fears of settlers about potential challenges to titles that were based on a Crown grant. However, another influence was the current view of international law as a body of custom between civilized nations having little or nothing to do with domestic law. This led judges into the mistake of treating general principles and customs of international law as having the same status within the common law as rights under treaties.

Given the importance of the issue, the mistake in *Wi Parata* needed to be corrected by a higher court. When the New Zealand Court of Appeal confirmed the *Wi Parata* position in *Nireaha Tamaki*, it was important that the mistake be corrected in the Privy Council.

That almost happened. Lord Davey’s instinct was that the drafters of the relevant Imperial and Colonial legislation had been correct to assume that Maori had a legal right under the common law. But it did not quite happen. Judicial caution and the fact that the issue had not been argued fully held Lord Davey back from asserting this, and careless drafting of his judgment caused him not to make his position plain. The result was an obscure judgment that if not read with great care could be interpreted as holding that *Wi Parata* was right to the extent that it held no native title existed without statutory authority. That interpretation was taken by

¹⁰² Ibid, North J at 473, T A Gresson J at 478-4479. Gresson P concurred with both of the other judges.

¹⁰³ Ibid at 479-480.

New Zealand courts and it rapidly became entrenched. After 1903, and certainly after 1914, a New Zealand lawyer looking only at the reported New Zealand cases, and not having access to *R v Symonds*,¹⁰⁴ would have found it hard to see any other possibility. In any event, no one did. The Privy Council decisions of 1913 and 1921 that were contrary to the New Zealand law were simply not noticed within New Zealand. So, for eighty-five years after the decision in *Nireaha Tamaki*, New Zealand courts, its administrators, and its politicians continued to deal with issues of native title on the basis of a serious legal mistake. Courts began to correct that mistake in 1986, and the Court of Appeal definitively corrected it in *Attorney-General v Ngati Apa*¹⁰⁵ in 2003; but outside of the courts its influence continues, as the political sequel to *Ngati Apa* showed.

I do not want to suggest that the judgment in *Nireaha Tamaki* was solely responsible for this history: the aberrant judgment of Prendergast CJ in *Wi Parata* and the inability of New Zealand judges in the early twentieth century to question his view of the law bear more responsibility. Lord MacNaghten's careless decision in *Wallis* also contributed. But small things can sometimes make a large difference in human history. From that point of view, it is interesting to reflect how different New Zealand legal history might have been if Lord Davey's judgment in *Nireaha Tamaki* had been clear.

¹⁰⁴ See supra n91.

¹⁰⁵ Supra n3.

Addendum

A Structural Analysis of *Wi Parata v the Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72

Wi Parata v the Bishop of Wellington is a hard case to understand. The following analysis of its structure may help those wanting to study it with care. (In the account below, I refer to the text by page, column, and line, separated by points: eg 76.2.16 means page 76, column 2, line 16. Lines are counted from the top of the page, except when “up” is used when they are counted from the bottom of the page; footnotes are ignored in both cases.)

The proceedings were an application by *Wi Parata*, a Ngatitōa chief. They sought a declaration that land gifted by the tribe to Bishop Selwyn, Bishop of New Zealand, to assist the establishing of a school at Witireia, and subsequently transferred by the Crown to Bishop Selwyn, be declared to be part of native lands lawfully reserved for the use and benefit of the Ngatitōa tribe, and for other related declarations, including a declaration that the Crown grant of the land to the Bishop be declared void. The second defendant to the proceedings was the Attorney-General representing the Crown. He entered a demurrer claiming that the pleadings disclosed no cause of action because a grant from the Crown could not be declared void for a matter not appearing on its face, except after the issue of a writ of *scire facias*. The first defendant, the Bishop, had also entered demurrers. The case was an argument on the points of law raised by the demurrers.

The court upheld most of the demurrers and dismissed the plaintiff’s action. Prendergast CJ gave four grounds for the decision and then sketched three “obstacles” to the plaintiff succeeding that were not relied on as grounds for the decision. Two distinct reasons were given for one of the grounds, both involving points of law, and incidental comment was inserted between some of them. The four grounds were:

1. (76.2.16 – 77.1.4) The pleadings do not allege that the trusts imposed on the Bishop by the Crown grant of 1850 were any different to those expressed in the deed of cession by the Maori

owners. (The deed was not produced, but the fact that there had been a deed was stated in the Crown grant.)

Comment: Plainly, the deed of cession by the Maori owners was not available at the time of this case. The pleadings refer to an oral agreement and allege that the trusts imposed on the Bishop by the Crown grant were contrary to this oral agreement. The problem was that there could be no guarantee that the oral agreement coincided with the (unavailable) deed to which the Crown grant itself referred. If there had been a difference, then obviously the deed would have prevailed over the oral agreement. Without a pleading that there never had been a deed, the oral agreement could not properly be asserted. Alternatively, if the plaintiffs wished to bring evidence about the contents of a lost deed they needed to plead those contents. The pleadings did neither of these things. As it happens, we know from *Hohepa Wi Neera v the Bishop of Wellington*¹ and *Wallis v Solicitor-General*² that a deed (or letter) of cession by the Maori owners did in fact exist, for by the time of these later cases it was available. It is salutary to discover that its terms conformed broadly to those stated in the Crown grant and were inconsistent with the alleged oral agreement that was pleaded in *Wi Parata*. Because there was always a danger that might be so, this ground for the decision was sound and would have been sufficient on its own to dispose of the case.

2. (77.1.5 – 80.2.14) The court has no jurisdiction to avoid a Crown grant either on the ground that the Crown has not conformed in its grant to the terms on which the aboriginal owners have ceded their rights in the land or that the native title has not been extinguished, except perhaps in proceedings by *scire facias* or similar proceeding, on the prosecution of the Crown itself. Two reasons are given:

- 2.1 (77.1.16 – 78.2.16up) The only rights and duties relating to native title that existed from the foundation of the colony were rights and duties under *the jus gentium* (ie international law) only.

Prendergast CJ then states that the reason for this is that no body of law or custom capable of being understood and administered by the courts of a civilized country existed among Maori. He goes on to state that the Treaty of Waitangi makes no difference to this finding

¹ Supra n7.

² Supra n68.

(78.1.12up – 78.2.8) and that this finding conforms to previous decisions of the court (78.2.9 – 78.2.16up).

2.2 (78.2.15up – 80.2.14) Transactions with natives for the cession of their title to the Crown are acts of state, or akin to acts of state, and therefore not examinable in the courts.

Having stated this supposed law, and given these two reasons for it, Prendergast CJ argues that the Native Rights Act 1865 makes no difference to it (79.1.19up - 80.1.16up). He then argues that this law is supported by the policy of some recent legislation (80.1.15up – 80.2.14). Then follows some extraneous argument criticising Chapman J in *Symonds* for saying that the American courts would allow a Crown grant (or its equivalent) to be challenged in a suit by a native Indian on the ground that the native title had not been extinguished.

Comment on this last point: Prendergast CJ may have been right that the American courts would not have allowed a challenge to a State grant on the ground that the native title had not been extinguished; but Chapman J was right to believe that the American authorities treated the Indian right of occupancy as capable of protection in the courts. In *Cherokee Nation v State of Georgia*,³ the case relied on by Chapman J, the Cherokee failed in the US Supreme Court because the court held by a majority of three to two that the Cherokee were not a “foreign nation”, as that term was used in the Constitution, and therefore the Supreme Court did not have original jurisdiction to hear the case. However, there are many indications in the judgments that if the case had come up through the Courts in a regular way, and the evidence supported the pleadings, the Court would have protected the Indian title.

3. (81.1.13 – 81.1.9up) The pleadings allege that at the time of the gift by the Maori the lands were part of a reserve set aside by the Government for the exclusive use of Ngatitōa, but they do not disclose any power in the Governor to create such a reserve. (It is not entirely clear whether this is separate ground for the decision or just a passing observation, but I have treated it as the former as it seems to be self-contained.)

³ (1831) 5 Peters 1.

Comment: This point depends on the finding in the earlier case, *R v MacAndrew*,⁴ that the Governor had no power in the early period of the colony to set aside reserves for Maori, except perhaps with the advice of the Legislative Council. This point is not developed with any care in *Wi Parata*, but the suggestion seems to be that the native title in the land had been extinguished sometime before the Maori made the gift to the Bishop and that the reserve of the relevant land to the tribe made by the Governor at that time was invalid. So, the tribe had no interest in the land at the time of the gift.

4. (81.1.6up – 82.2.15) The *procedure* followed was inappropriate: a Crown grant cannot be avoided for a matter not appearing on its face, except on a writ of *scire facias*, or similar procedure, taken in the name or on behalf of the Crown.

Comment: This is the finding that I argue in the text was the only finding of the court in *Wi Parata* on *scire facias* to which the Privy Council in *Nireaha Tamaki* gave tentative approval.

Then follow the three “obstacles” that are expressed but not relied on. They are: (1) even if the alleged (oral) trust for children of Ngatitōa only were established, the trust, being charitable, could be applied *cy pres* (ie to analogous purposes) (82.2.16 – 83.1.10); (2) the same applies to the different trust referred to in the Crown grant (83.1.11 – 83.2.10); (3) in any event, in law the Crown was the donor, not Ngatitōa (83.2.11 – 83.2.16).

⁴ (1869) 1 NZCA 172.

UPDATE ON FORESHORE AND SEABED DEVELOPMENTS SINCE 2004

Editor's Note

Section A of the first volume of *Te Tai Haruru – Journal of Legal Writing*, focused on ownership of the foreshore and seabed of Aotearoa/New Zealand, and the ongoing tug-of-war between various hapu and iwi and the Crown for dominance and control of those areas. See *Te Tai Haruru* (Vol 1) 9-86.

Since the publication of the first Journal, significant legal developments have taken place.

In 2003, the Court of Appeal (then our highest domestic court), in *AG v Ngati Apa* [2003] 3 NZLR 643, held that Maori could apply to the Maori Land Court to have their title to the foreshore and seabed of Aotearoa/New Zealand investigated. Until then, various New Zealand courts had held that Maori customary title had been extinguished by the passing of statutes that awarded property rights in those areas to other people. So for example, the vesting of land in local harbour boards under the Harbours Act 1955 and the extension of New Zealand's territorial zone under the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, had, by a sidewind, both been held to extinguish any Maori customary entitlements.

In *Ngati Apa*, the Court of Appeal overruled a long line of precedent, beginning with *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, which had held that Maori had no customary interests capable of being given legal protection. The Court held that the assertion of Crown title did not extinguish Maori property rights. That could only be achieved through clear and plain statutory language. The extent of Maori property rights was left undetermined in *Ngati Apa*. That determination would depend on the specific facts raised by each hapu and iwi group before the Maori Land Court in subsequent hearings. In reaching this decision, the Court relied on *Nireaha Tamaki v Baker* [1901] AC 561, a decision of the Privy Council. The preceding legal analysis of *Nireaha Tamaki* provided by Emeritus Professor Jim Evans, shows how New Zealand's legal history may have been vastly different had Lord Davey been clearer in his judgment in that case.

The *Ngati Apa* decision raised a huge public debate about the extent and nature of the rights Maori could legitimately claim under customary

ownership. It also prompted a racist backlash against Maori, whose collective entitlements as hapu and iwi were feared to be at the highest level of exclusivity provided for under individual, fee simple ownership. Public fear was fuelled by competing political parties for whom Maori served as a political football for scoring points against each other in the lead up to the upcoming election. Following a strong anti-Maori speech delivered at Orewa in 2004, National Party popularity leapt overnight from single to double figures in public rating polls.

Instead of allowing the judicial process to take its course, the Labour government announced that it would introduce legislation to settle foreshore matter and protect the rights of “all” New Zealanders. The government’s policy for achieving this (discussed in Vol 1) was roundly rejected by Maori as undermining hapu and iwi mana and rangatiratanga. In April 2004, a hikoi of Maori and Pakeha protesters began in the Far North. It reached Wellington on 5 May. The hikoi of around 15,000 people, rejected the government proposals. In response, the leaders of the hikoi were publicly lambasted by the Prime Minister as “haters and wreckers”.⁵

In January 2004, the Waitangi Tribunal held an urgent inquiry into the government’s policy. Excerpts from the Tribunal Report are included in this Section. (Appendix 1, page 147) In its report, the Tribunal was highly critical of the Crown’s proposed settlement. It found that the Crown intended to remove the property rights of Maori, enact a regime for recognising fewer rights in its place, and intended to provide no compensation for the removal of those uninvestigated rights. The Tribunal suggested ways in which the interests of both Crown and Maori could be reconciled in light of the Principles of the Treaty of Waitangi.

In November, the government passed the Foreshore and Seabed Act 2004. The Act, effectively reinstates the effect of *Wi Parata*, in statute. Under section 13 of the Act the full legal and beneficial ownership of the “public” foreshore and seabed is vested in the Crown and held by the Crown as its absolute property. Maori view this as another attempt at confiscating their lands. As such, it will carry forward as a major grievance to be settled in the future. In the meantime the security of the Crown’s title remains a question of political force and dominance, and statutory interpretation. The Act also contains a general right of public access and navigation over the foreshore and seabed. However this general right is subject to existing private rights of ownership to areas of

⁵ TVNZ News, 4 May, 2004.

foreshore, which are preserved. Therefore, those individuals and groups who already held rights in the foreshore, retain them. This excludes most Maori hapu and iwi, whose rights in these areas have never been fully investigated.

Under the Act, minimal interest rights are given to Maori. And the threshold of proving those interests is almost impossible to achieve.

Under section 33, the High Court can issue a territorial customary rights order to a specific area that has been used exclusively by a group since 1840, so long as the group also owns the contiguous land, and the use has been substantially uninterrupted since 1840. If others have used the area then the right is terminated. No account is to be taken of any spiritual or cultural associations unless they are attached to a specific practice.

This codification of the “1840’s rule” locks Maori interests into preserving practices that existed at the time of colonisation. It takes no account of the encroachment of the Crown into these areas in the past, or the forced exclusion of Maori from the areas through the application of various statutory regimes.

Notwithstanding the above, if Maori hapu and iwi are able to satisfy the standards set, the High Court can recommend that they enter negotiations with the Crown. There is no reciprocal obligation on the Crown to enter negotiations with Maori, or to provide redress of any kind to Maori should they choose not to enter into negotiations. Alternatively, the High Court can provide for the establishment of a management body to administer the area of foreshore as a reserve held for the common use and benefit of the people of New Zealand. The benefit this will give to local hapu and iwi is unclear. Under section 38, the Act prohibits Maori seeking redress under any other Act, or applying to the Court to review any redress offered by the Crown.

The Maori Land Court’s jurisdiction is severely curtailed under the Act. Whereas, in theory, before the passing of the Act it could issue fee simple title to areas of the foreshore, it can now only protect Maori access to plant life found within the foreshore area. Under sections 48-53 of the Act, the Maori Land Court is now only able to issue Customary Rights Orders to specific areas that are proven to be integral to tikanga Maori, in order to protect practices that are not based on cultural or spiritual associations alone, not prohibited by, or inconsistent with any other law, not fisheries related, and not for the taking of mammals and

animals. Those few practices that are not extinguished by this severe neutering of customary rights, may be protected and commercially exploited.

This jurisdiction is backward looking and narrow. Effectively, it excludes access to sea resources except seaweed, flax and pingao. The statute provides no compensation for legislative non-recognition of Maori custom law property rights under New Zealand law.

The racist nature of the legislation led Te Runanga o Ngai Tahu, the Treaty Tribes Coalition and the Taranaki Maori Trust Board to ask the United Nations Committee on the Elimination of Racial Discrimination to report on the matter. In March 2005, the Committee issued its decision. The Decision is included in this Section. (Appendix 2, page 153) The Committee stated that the foreshore and seabed legislation discriminated against Maori, particularly in its extinguishment of the possibility of establishing Maori customary title over the foreshore and seabed and its failure to provide a guaranteed right of redress. The Committee suggested that the Crown resume dialogue with Maori and try to find ways of lessening its discriminatory effects, including where necessary through legislative amendment.

In response, the Prime Minister criticised the Committee, stating it “sits on the outer reaches of the UN system” and had followed “a most unsatisfactory process”.⁶ She also stated that those who opposed the legislation were taking more from the Report than it actually contained.

In November 2005, Rudolfo Stavenhagen, Special Rapporteur for the United Nations Human Rights Commission, visited New Zealand to investigate the situation of human rights and fundamental freedoms of Maori as the indigenous people of Aotearoa/New Zealand. His full report is included in this Section. (Appendix 3, page 155) Amongst his recommendations is the following:

92. The Foreshore and Seabed Act should be repealed or amended by Parliament and the Crown should engage in treaty settlement negotiation with Maori that would recognise the inherent rights of Maori in the foreshore and seabed and establish regulatory mechanisms allowing for the free and full access by the general public to the country’s beaches and coastal area without discrimination of any kind.

⁶ National News, 1pm, 14 March 2005.

The Labour government has not initiated any discussions with Maori about amending or repealing the legislation. For Maori, this legislation undoes the potential benefits augured by the *Ngati Apa* case and marks the re-entrenchment of *Wi Parata* in New Zealand law. The question left begging is how far the Crown will go in giving itself rights and authority that, in Maori eyes, it has no legitimate claim to, while relying on majority opinion to justify divesting its Maori citizens of their legitimate rights. It has become glaringly obvious to the major international legal watchdog, the Human Rights Commission, that the Crown is in breach of the fundamental laws that it expects its own citizens to uphold. If Maori continue to hold the Crown to account it is only a matter of time, next generation or the one after that, before that account will be brought forward for settlement, again.

Nin Tomas – Editor

APPENDICES TO SECTION C UPDATE

APPENDIX 1

REPORT ON THE CROWN'S FORESHORE AND SEABED POLICY

WAI 1071 Summary
www.waitangi.tribunal.govt.nz

INTRODUCTION

The Process to Date

This report is the outcome of an urgent inquiry into the Crown's policy for the foreshore and seabed of Aotearoa–New Zealand. The many claimant groups represented in the inquiry comprised most of the coastal iwi.

The urgent inquiry was sought after the Crown announced its response to the Court of Appeal's decision in the Marlborough Sounds case. In that decision, the Court of Appeal departed from the previous understanding that the Crown owned the foreshore and seabed under the common law. This opened the way for the High Court to declare that Maori common law rights in the foreshore and seabed still exist and for the Maori Land Court to declare land to be customary land under Te Ture Whenua Maori Act 1993.

The Crown supported the claimants' application for an urgent inquiry, and the timeframes were all tailored to the Crown's requests. The changing needs of the Crown meant that a proposed hearing in November 2003 was adjourned, and we made time available in January. We tried to balance the need on the one hand for claimants to have sufficient time to prepare for a very significant hearing, and the need on the other for our report to be available to Ministers before planned legislation is introduced. The result was that the hearing took place over six days at the end of January 2004, and we have had four weeks in which to produce our report.

Terminology

From the outset, it is essential to be clear what we are talking about when we refer to the foreshore and seabed. First, what is the foreshore? It is the intertidal zone, the land between the high-and low-water mark that is daily wet by the sea when the tide comes in. It does not refer to the beach above the high-water mark. The seabed is the land that extends from the low-water mark, and out to sea.

The need to distinguish the foreshore from the adjacent dry land and seabed arises from the English common law, which developed distinct rules for that zone. In Maori customary terms, no such distinction exists.

We wanted to take our language out of the English legal paradigm. We raised with Sir Hugh Kawharu, a witness in our inquiry, whether there was a Maori term that clearly embraced the whole of the foreshore and seabed. Te takutai moana was a term that he felt may be variously understood by different groups in different situations. To some, it had more of an inshore connotation, whereas others might understand it as also connoting the high seas. The word papamoana, meaning simply the bed of the sea, did not seem to be as widely used.

We have therefore reluctantly resorted to the English terminology, foreshore and seabed. We recognise, and chapter 1, 'Tikanga', makes it very clear, that this terminology is culturally specific.

The Context

The Government's resolve to step in as soon as the Court of Appeal's decision was released to implement another regime very quickly, combined with the apparently widespread fear that Maori will control access to the beach, has led to an emotional response across the whole country. It is necessary to have an understanding of complex legal concepts to discuss foreshore and seabed in an informed way. Perhaps that is why the public discourse has generally been so unsatisfying, oversimplifying the issues and thereby distorting them. It appears to us that polarised positions (not necessarily underpinned by good information) have quickly been adopted, and real understanding and communication have been largely absent.

The Crown released the first version of its foreshore and seabed policy in August 2003. It elicited a storm of protest from Maori. In the following weeks, the Crown held a number of hui around the country to consult with Maori about the policy. We have heard a lot of criticism about the Government's consultation, but we decided early on that we would not

inquire into the alleged deficiencies of that process. We felt that to do so would only be to confirm what everybody already knew: the consultation process was too short; and it was fairly clear that the Government had already made up its mind. The policy was further developed between August and December 2003, but was not changed in any of its essentials.

The Nature of our Task

In embarking upon our report, we are conscious that while it is our job to consider the Crown's position on the policy, and the policy itself, in light of the Treaty, ultimately the Government is free to do what it wishes. Our jurisdiction is recommendatory only, and power to govern resides with the Government. We have no say in how much or how little regard is paid to our views. We hope that the Government will properly consider what we have to say and, if it is cogent, will be influenced by it.

As a quasi-judicial body standing outside the political process, we proceed in the expectation that governments in New Zealand want to be good governments, whose actions although carried by power are mitigated by fairness. Fairness is the value that underlies the norms of conduct with which good governments conform – legal norms, international human rights norms, and, in the New Zealand context, Treaty norms. We think that even though governments are driven by the need to make decisions that (ultimately) are popular, New Zealand governments certainly want their decisions to be coloured by fairness. In fact, we think that New Zealanders generally have an instinct for fairness, and that a policy that is intrinsically fair will, when properly explained, ultimately find favour.

We see it as part of our role in the present situation to ensure that the Government has before it all the matters it needs to know in order that its decision-making is fair. In the Waitangi Tribunal, consideration of what is fair is always influenced by the agreements and understandings embodied in the Treaty, but fairness in Treaty terms is not the only relevant norm. There is a fairness that can be distilled independently of the Crown's commitments under the Treaty, and we think that wider fairness has relevance in the present situation. This is an important theme of our report.

The Policy

The Crown told us that :

In brief, the Government's policy seeks to establish a comprehensive, clear and integrated framework which provides enhanced recognition of customary interests of whanau, hapu and iwi in foreshore and seabed, while at the same time confirming that foreshore and seabed belongs to, and is in principle accessible by, all New Zealanders.

We have closely examined the policy, and the Crown's claims for it. We have been unable to agree with any of the Crown's assertions about the benefits that will accrue to Maori. On the other hand, it does seem to us that the policy will deliver significant benefits to others – reinstatement of (effectively) Crown ownership, elimination of the risk that Maori may have competing rights, and the ability of the Crown to regulate everything.

As we see it, this is what the policy does:

1. It removes the ability of Maori to go to the High Court and the Maori Land Court for definition and declaration of their legal rights in the foreshore and seabed.
2. In removing the means by which the rights would be declared, it effectively removes the rights themselves, whatever their number and quality.
3. It removes property rights. Whether the rights are few or many, big or small, taking them away amounts to expropriation.
4. It does not guarantee compensation. This contradicts the presumption at law that there shall be no expropriation without compensation.
5. It understates the number and quality of the rights that we think are likely to be declared by, in particular, the Maori Land Court under its Act. We think that the Maori Land Court would declare that customary property rights exist, and at least sometimes these would be vested as a fee simple title.
6. In place of the property rights that would be declared by the courts, the policy will enact a regime that recognises lesser and fewer Maori rights.
7. It creates a situation of extreme uncertainty about what the legal effect of the recognition of Maori rights under the policy will be. They will certainly not be ownership rights. They will not even be property rights, in the sense that they will not give rise to an ability to sue. They may confer priority in competing applications to use a resource in respect of which a use right is

held, but it is not clear whether this would amount to a power of veto.

8. It is therefore not clear (particularly as to outcomes), not comprehensive (many important areas remain incomplete), and gives rise to at least as many uncertainties as the process for recognition of customary rights in the courts.
9. It describes a process that is supposed to deliver enhanced participation of Maori in decision-making affecting the coastal marine area, but which we think will fail. This is because it proceeds on a naive view of the (we think extreme) difficulties of obtaining agreement as between Maori and other stakeholders on the changes necessary to achieve the required level of Maori participation.

It exchanges property rights for the opportunity to participate in an administrative process: if, as we fear, the process does not deliver for Maori, they will get very little (and possibly nothing) in return for the lost property rights.

Treaty Breaches and Prejudice

These are fundamental flaws. The policy clearly breaches the principles of the Treaty of Waitangi. But beyond the Treaty, the policy fails in terms of wider norms of domestic and international law that underpin good government in a modern, democratic state. These include the rule of law, and the principles of fairness and non-discrimination. The serious breaches give rise to serious prejudice:

1. The rule of law is a fundamental tenet of the citizenship guaranteed by article 3. Removing its protection from Maori only, cutting off their access to the courts and effectively expropriating their property rights, puts them in a class different from and inferior to all other citizens.
2. Shifting the burden of uncertainty about Maori property rights in the foreshore and seabed from the Crown to Maori, so that Maori are delivered for an unknown period to a position of complete uncertainty about where they stand, undermines their bargaining power and leaves them without recourse.
3. In cutting off the path for Maori to obtain property rights in the foreshore and seabed, the policy takes away opportunity and

mana, and in their place offers fewer and lesser rights. There is no guarantee to pay compensation for the rights lost.

Recommendations

When considering what recommendations to make, we were mindful that many of the claimants accepted that, realistically, there was no prospect of a regime for achieving te tino rangatiratanga over the foreshore and seabed. On the whole, their aspirations were more modest. Most agreed that they would live with the status quo, post-Marlborough Sounds. All, however, said that their most preferred option was for the Government to agree to go back to the drawing board, and engage with Maori in proper negotiations about the way forward. We agree that this would be the best next step, and that is our strong recommendation to the Government.

However, like the claimants, we have sought to be pragmatic. We recognise that the Government may not wish to follow our recommendation. So we offer for consideration further options that we think would ameliorate the Crown's position in Treaty terms, and at the same time achieve the essential policy objectives of public access and inalienability. Our suggestions are premised on our view that (1) in terms of the legal status quo, the least intervention is the best intervention; and (2) it is critical that the path forward is determined by consensus.

Our Report

In many ways, the Marlborough Sounds case and the Government's response to it has proved to be a catalyst for new thinking about race relations in our country. Some of that thinking has been positive, but much of it seems to us to have been negative. We recognise that the Government, in coming now to finalise its approach to the foreshore and seabed, has some very difficult decisions ahead.

We have had the opportunity to analyze the issues closely and dispassionately. We sit outside the political arena, so we can test the arguments for their cogency, and probe the legal concepts underlying them, in a way that is neutral but, we hope, rigorous. We were grateful that from the outset, the Crown was keen to have our input, recognising we think that the time for consultation had been short, and that the temperature of public debate militated against genuine exchange of ideas.

We come to these issues with a desire to make a positive contribution. We hope that our report will be of interest and assistance both to Ministers and to the wider public, and that it is not too late for more informed discourse.

APPENDIX 2

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION DECISION ON FORESHORE AND SEABED ACT 2004

**Sixty-sixth session
17 February - 11 March 2005
Decision 1 (66): New Zealand CERD/C/DEC/NZL/1**

New Zealand Foreshore and Seabed Act 2004

1. The Committee has reviewed, under its early warning and urgent action procedure, the compatibility of the New Zealand Foreshore and Seabed Act 2004 with the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, in the light of information received both from the Government of New Zealand and a number of Maori non-governmental organizations and taking into account its general recommendation XXIII (1997) on indigenous peoples.
2. The Committee appreciates having had the opportunity to engage in a constructive dialogue with the State party at its 1680th meeting on 25 February 2005, and also appreciates the State party's written and oral responses to its requests for information related to the legislation, including those submitted on 17 February and 9 March 2005.
3. The Committee remains concerned about the political atmosphere that developed in New Zealand following the Court of Appeal's decision in the Ngati Apa case, which provided the backdrop to the drafting and enactment of the legislation. Recalling the State party's obligations under article 2, paragraph 1 (d), and article 4 of the Convention, it hopes that all actors in New Zealand will refrain from exploiting racial tensions for their own political advantage.
4. While noting the explanation offered by the State party, the Committee is concerned at the apparent haste with which the legislation was enacted and that insufficient consideration may have been given to alternative responses to the Ngati Apa decision, which might have accommodated Maori rights within a framework more acceptable to both the Maori and all other New Zealanders. In this

regard, the Committee regrets that the processes of consultation did not appreciably narrow the differences between the various parties on this issue.

5. The Committee notes the scale of opposition to the legislation among the group most directly affected by its provisions, the Maori, and their very strong perception that the legislation discriminates against them.
6. Bearing in mind the complexity of the issues involved, the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Maori, in particular in its extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress, notwithstanding the State party's obligations under articles 5 and 6 of the Convention.
7. The Committee acknowledges with appreciation the State party's tradition of negotiation with the Maori on all matters concerning them, and urges the State party, in a spirit of goodwill and in accordance with the ideals of the Waitangi Treaty, to resume dialogue with the Maori community with regard to the legislation, in order to seek ways of mitigating its discriminatory effects, including through legislative amendment, where necessary.
8. The Committee requests the State party to monitor closely the implementation of the Foreshore and Seabed Act, its impact on the Maori population and the developing state of race relations in New Zealand, and to take steps to minimize any negative effects, especially by way of a flexible application of the legislation and by broadening the scope of redress available to the Maori.
9. The Committee has noted with satisfaction the State party's intention to submit its fifteenth periodic report by the end of 2005, and requests the State party to include full information on the state of implementation of the Foreshore and Seabed Act in the report.

11 March 2005
1700th meeting

APPENDIX 3

**UNITED
NATIONS**



**Economic and
Social
Council**

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COMMISSION ON HUMAN RIGHTS
Sixty-second session
Item 15 of the provisional agenda

INDIGENOUS ISSUES

Human rights and indigenous issues

Report of the Special Rapporteur on the situation of human rights and
fundamental freedoms of indigenous people, Rodolfo Stavenhagen*

Addendum

MISSION TO NEW ZEALAND **

* The reason for the late submission of the present report is the need to reflect the latest information.

** The summary is being circulated in all languages. The report itself, which is annexed to the summary, is being circulated in the language of submission only.

GE.06-11836

SUMMARY

The present report is submitted in accordance with Commission on Human Rights resolution 2005/51 and refers to the official visit paid to New Zealand by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people from 16 to 26 November 2005, pursuant to the standing invitation of the Government of New Zealand to United Nations special procedures. He acknowledges the opportunity to engage with high Government officials, Maori leaders, indigenous and civil society organizations as well as with representatives of research centres and educational institutions, and expresses his gratitude to the people and Government of New Zealand for their hospitality and cooperation.

The relations between Maori, the indigenous people of New Zealand, and the Government are based on the Treaty of Waitangi signed in 1840. As a result of land sales and breaches of the Treaty by the Crown, Maori lost most of their land, resources, self-governance and cultural identity. A new approach since 1975 has led to numerous settlements of Maori land claims and the enactment of new legislation.

Maori, who possess a rich and vibrant cultural tradition, represent around 15 percent of a total population of about four million. While most of the Maori now live in urban centres, they maintain a close spiritual link with the land and the sea, especially in the areas where their iwi (tribes) are based.

The Special Rapporteur is encouraged by the Government's commitment to reduce the existing inequalities between Maori and non-Maori and to ensure that the country's development is shared by all groups in New Zealand society.

Despite the progress made, Maori are impatient with the pace of redress for breaches of the Treaty of Waitangi. Of particular concern to them is the Foreshore and Seabed Act, which extinguishes customary Maori property rights to the coastal areas and provides a statutory process for the recognition of customary or aboriginal title. The Government is applying various strategies to reduce the persistent inequalities between Maori and non-Maori regarding several social indicators such as health, education, housing, employment and income.

The Special Rapporteur concludes his report with a number of recommendations intended to help the parties concerned to bridge the existing gaps and consolidate the achievements obtained so far to reduce inequalities and protect Maori rights.

Annex

REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLE, RODOLFO STAVENHAGEN, ON HIS MISSION TO NEW ZEALAND (16 to 26 November 2005)

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INTRODUCTION

1. Pursuant to Commission on Human Rights resolution 2001/57 of 24 April 2001, which established his mandate, and to the standing invitation of New Zealand to United Nations special procedures, the Special Rapporteur visited New Zealand from 16 to 26 November 2005. The purpose of the visit was to gain a better understanding of the situation of indigenous people in New Zealand through discussions with the relevant parties on issues such as the treaty settlements process, the implications of the Foreshore and Seabed Act, public policies designed to reduce social inequalities between indigenous people and others, the provision of basic social services such as education, housing and health care to indigenous people, and the cultural revitalization of Maori.
2. The Special Rapporteur would like to express his gratitude to the Government of New Zealand, and especially to Te Puni Kohiri (the Ministry of Maori Development), for its invitation and cooperation, as well as to the Treaty Tribes Coalition and the numerous indigenous organizations and communities for their support, warm hospitality and the useful information provided.

I. SCHEDULE OF THE VISIT

3. The Special Rapporteur visited Auckland, Christchurch, Lake Taupo, New Plymouth, Parihaka, Rotorua and Wellington. He met, among others, with the Deputy Prime Minister, Michael Cullen; the Minister of Maori Affairs, Parekura Horomia; and the Minister of Customs and Youth Affairs, Nanaia Mahuta.
4. He held talks with a number of chief executives and senior officials of the Ministry of Maori Development, the Department of the Prime Minister and Cabinet, the Treasury, the Ministry of Foreign Affairs and Trade, the Ministry of Justice, the Ministry of Economic Development, the Ministry of Health, the Ministry of Education, the New Zealand Corporation, the State Service Commission, the Office of Treaty Settlements and the Crown Law Office. He met with the authorities of the Human Rights Commission, the Waitangi Tribunal and the Maori Land Court, as well as with the leadership of the Maori Party and academics from institutions of higher learning.

5. During his visit, the Special Rapporteur was hosted, among others, by Paramount Chief Tumu Te Heu Heu of Ngati Tuwharetoa at Lake Taupo. In Parihaka he attended a national hui (meeting) with leaders and representatives from all over the country. In Christchurch, he met with representatives of South Island iwi (tribes), including Kai Tahu, who hosted him at Tuahiwi Marae. In Hauraki he participated in a regional hui at Ngahutoitoi Marae, ending his regional visits in Rotorua at a hui hosted by Te Arawa at Tamatekapua Marae. He also met with members of the Maori Studies Department at the University of Auckland and with the Maori Women's Development Corporation. At Ngati Whatua Corporation he was briefed on Maori economic development activities.

II. HISTORICAL BACKGROUND AND CONTEXT

6. New Zealand (Aotearoa) is historically a bicultural country made up basically of two ethnic components, the Maori, who trace their ancestry to the original Polynesian inhabitants, and the descendants of the European colonists and settlers, known as Pakeha, who arrived in increasing numbers beginning in the nineteenth century. New Zealand is becoming a more multicultural society due to recent immigration from the Pacific Islands, Asia, Eastern Europe and Africa. Out of a total population of about four million, Maori, whose numbers dropped precipitously due to contact with Europeans, currently represent around 15 percent, most of whom currently live in urban centres. Maori possess a rich and vibrant cultural tradition, expressed through their close spiritual links with the land and the sea, a carefully maintained oral history, distinct forms of social organization and cultural values, as well as a variety of material and performing arts. Much of this was destroyed and diminished during the colonial period but has, in recent decades, undergone a significant rebirth, greatly enriching New Zealand society.
7. Britain annexed New Zealand in 1840 and signed an international treaty with a number of tribes (iwi) of the then sovereign Maori people of Aotearoa. The Treaty of Waitangi is considered a founding document of New Zealand, whereby the British Crown established its sovereignty and the Maori were guaranteed "full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess". The Crown thus recognised Maori's inherent property rights, customary use of lands and resources, cultural heritage and traditional chieftainship authority. There is a continuing controversy

regarding the interpretation of the text in its two distinct language versions, English and Maori, which has led to disputed meanings of the notion of "sovereignty" in the Treaty. To this day there is no agreement on a commonly understood meaning of the Treaty text.

8. During most of the nineteenth and part of the twentieth century Governments paid little attention to the Treaty of Waitangi. Historically, much legislation had a negative impact on Maori rights, including land legislation since 1862 that functioned to individualize Maori land to make it available for sale and as a result they lost most of their land. Most land in New Zealand was out of Maori ownership by 1900. Much of this legislation is now considered as breaching the Treaty of Waitangi.
9. In 1987 a landmark decision by the Court of Appeal described the Treaty as "part of the fabric of New Zealand society" and as "the country's founding constitutional instrument", based on legislation that prohibited "the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi." Whereas this decision did not seek to clarify the legal status of the Treaty within the overall constitutional framework of the nation, the Court of Appeal and the Crown have determined the general Treaty principles, which are referred to in recent legislation. While some Maori consider them as the clearest statement of their rights, others regard the Treaty itself, not the "Principles," as the source of their rights. Over 45 Acts of Parliament and other official documents refer to the Treaty and/or its principles, including references to the partnership between Maori and the Crown.
10. Not being directly enforceable under New Zealand law unless its provisions are explicitly incorporated into legislation, the Treaty is not a formal part of New Zealand domestic law. This makes it more difficult for Maori to invoke the Treaty provisions in defence of their rights before the courts and in negotiations with the Government. In view of the importance of the Treaty as a founding constitutional document and its unenforceability as a constitutional guarantee of human rights, the Special Rapporteur considers that the entrenchment of the Treaty of Waitangi in constitutional law is long overdue.

III. THE HUMAN RIGHTS SITUATION OF INDIGENOUS PEOPLE (MAORI) IN NEW ZEALAND: PRIORITY ISSUES

11. The Constitution Act of 1986 brings together some of the more important statutory constitutional provisions, but New Zealand does not have a written constitution. Over the years, the country has adopted a broad range of domestic human rights legislation to comply with international conventions to which it is a party. Among them are the New Zealand Bill of Rights Act 1990 (BORA) and the Human Rights Act 1993. The Government of New Zealand defines its international presence as a principled defender of human rights, and it cooperates closely with United Nations human rights bodies. It has also occasionally contributed to the United Nations Voluntary Fund for Indigenous Populations.
12. The Human Rights Commission is responsible for advocating and promoting respect for, and an understanding and appreciation of, human rights in New Zealand society and for encouraging the maintenance and development of harmonious relationships between individuals and among the diverse groups in New Zealand society. The Commission is charged with promoting better understanding of the human rights dimensions of the Treaty of Waitangi. Although its decisions are not judicially enforceable, the Commission can also resolve disputes relating to unlawful discrimination.
13. The Special Rapporteur considers that New Zealand's human rights legislation does not provide sufficient protection mechanisms regarding the collective rights of Maori that emanate from article 2 of the Treaty of Waitangi (their tino rangatiratanga). He also considers that the underlying legal and political fragility of Maori rights translates into a human rights protection gap that seems not to be sufficiently covered by existing legislation. For example, the Legal Services Act 2000 prevents any body of persons from obtaining funding under the Act to defend their rights in court, except under specified circumstances.
14. The inherent rights of indigenous peoples are referred to in New Zealand common law as customary rights and/or aboriginal title. Some Maori contend that their inherent rights (Treaty of Waitangi, art. 2) are more comprehensive than any limited legal expression thereof in English common law. The Waitangi Tribunal has in several of its reports acknowledged this perspective and some of the recent settlement of Maori claims acts passed by Parliament also

refer to such a wider conception of rights, which indeed coincides with the concept of indigenous rights currently evolving at the international level.

15. In New Zealand it is through the courts, parliamentary statute or administrative decision that aboriginal title and customary rights of Maori have been legally recognised and registered, very often in the form of individual fee simple ownership titles. Most Maori property rights to land are in fact acknowledged in this way, and there is extensive recognition of wider rights in addition to the land tenure system. The Te Ture Whenua Maori Act 1993 preserves the capacity of Maori to hold land collectively. Approximately 1.3 million hectares (of a total land area of 27 million hectares) is held on this basis. On the other hand, it has also been through the courts, parliamentary statute and administrative decisions that Maori have been dispossessed over the years of their inherent rights and that their aboriginal titles have been extinguished. It is precisely this process which led to increasing discontent and the well-known protest movements of recent decades, which led to the Government's establishment of the Waitangi Tribunal claims inquiries and then to the negotiated settlement processes that are currently taking place.
16. The Special Rapporteur considers that from a human rights perspective, Governments cannot unilaterally extinguish indigenous rights (whether they are referred to as aboriginal or customary title) through any means without the free, prior and informed consent of the concerned indigenous peoples. In the view of the Special Rapporteur, replacing an inherent right with a difficult judicial and administrative procedure leading possibly to the issuing of a "customary rights order," may amount to less than the full protection of human rights that the Government is duty-bound to comply with.

A. Political Representation

17. Maori, who are full and equal citizens of New Zealand, have been represented in Parliament since the nineteenth century when four seats were reserved for them. Later, Maori were able to become members of Parliament on the general list as representatives of the various political parties. Currently, Parliament has 21 Maori members of Parliament (about 17.3 per cent of the total seats). In the Mixed Member Proportional (MMP) system, in existence since 1993, there are seven Maori seats, elected only by Maori electors on the Maori roll. Fifty-five per cent of declared Maori voters are

currently on the Maori roll. A recent development is the emergence of the Maori Party, which at its first poll in September 2005 won four seats in Parliament. In the current Government there are six ministers of Maori descent. The Special Rapporteur considers that the MMP system, whatever its limitations, has broadened democracy in New Zealand and should continue governing the electoral process in the country to ensure a solid Maori voice in Parliament and guarantee democratic pluralism.

18. Whereas iwi and hapu (tribes and sub-tribes) are acknowledged traditional units of Maori social organization with whom the Government is settling Treaty claims, they have no formally recognised governance powers. In relation to historical Treaty settlements the Government's policy is to settle with large natural groups that include iwi, hapu and whanau (families). Some Maori political movements have advocated for tino rangatiratanga, that is, a degree of self-determination consistent with the Treaty of Waitangi.
19. New forms of Maori governance bodies have emerged from the settlement of claims process through the establishment, among others, of Trust Boards by the Government. A range of bodies currently participate in Treaty of Waitangi settlement negotiations, political decision-making and consultation with local and central government, for instance Te Runanga o Ngai Tahu, a governance body established at the request of the Ngai Tahu iwi. They also participate in the successful management of any monies or assets that arise from the settlement of claims. In consultation with Maori, both central Government and the Law Commission are considering options for improving the forms of legal entities available to Maori for governance purposes.
20. Local government includes regional, city and district councils. Little more than five per cent of members elected to local councils are Maori. The Local Electoral Act 2001 opens the possibility of establishing Maori wards or constituencies for electoral purposes, intended to encourage Maori representation at the local level, which is still rather low. The Local Government Act 2002 requires that local authorities must take into account the relationship of Maori and their culture and traditions when making significant decisions and provide opportunities for Maori to contribute to decision-making processes.
21. As other indigenous peoples elsewhere, Maori contend that political rights embrace levels of citizenship, which move beyond individual

rights to collective rights. Although they note issues arising with respect to individual participation in political processes, they emphasize their aspiration to retain or reclaim their decision-making capacity over certain intrinsic matters, including social and political organization, lands and resources, wider way of life, and their relationships as specific collectives with the Crown and the wider multi cultural polity.

B. Land Rights, Claims and Settlements

22. One of the more pressing current human rights concerns for Maori relates to land issues. In 2005, approximately 6 per cent of land remained in Maori ownership and 94 per cent of Maori ancestral land base has been appropriated by a variety of historical processes, including voluntary sale, fraudulent purchase, confiscation or alienations of land under the various Native Land Acts, and the individualization and fragmentation of title resulting from the Native Land Court. The Maori Land Act 1993, recognises that Maori land is a taonga (treasure) of special significance to Maori people. It is intended to promote the retention of land in the hands of Maori owners and to provide them with more management, use and development options, for which purpose it establishes the Maori Land Court, which deals with the contemporary consequences of the fragmentation of land ownership.
23. In the 1860s, the Government confiscated, by illegitimate military action, around 2 million acres of land belonging to the people of Taranaki, and persecuted those who resisted. The land was then sold or leased by the Government to non-Maori individual owners until well into the twentieth century. Taranaki was left with around 3 per cent of its original lands, many of the people becoming destitute and living in poverty.
24. In 1996 the Waitangi Tribunal published a report on the claims relating to these land confiscations, which found that eight Taranaki iwi were dispossessed of their land, leadership, means of livelihood, personal freedom, social structure and values. The result was the loss of both social and economic development opportunities. The Crown has reached settlements with four of the eight iwi, whereas one of the iwis was still working out a settlement in 2004. The people of Parihaka in Taranaki, who have been struggling for a just settlement of their losses and damages provided the Special Rapporteur with their story and complaints during a hui arranged for that purpose.

The Special Rapporteur saw that some of them live in poverty and have lost hope. Others are still engaged in a struggle for redress and compensation from the Government for past injustices and are hopeful that they will finally be heard. The Government informed the Special Rapporteur that it has held pre-negotiation discussions with one of the remaining Taranaki iwi.

25. The Waitangi Tribunal has registered 1,236 claims in 30 years, of which 49 have been settled by the Government, and another 35 partially settled. They include historical claims that cover half the land area of the country. The Government notes that 18 historical settlements have been reached, that another 25 groups are in negotiations with the Crown, and that at the present rate of progress it is possible to settle all historical claims by 2020. The Tribunal has reported so far on 428 claims, and has issued 90 reports.
26. Recommendations made by the Waitangi Tribunal are not generally binding on the Crown. The process is not therefore adjudicative, in the judicial sense, and whether it results in any redress at all depends on both the Government's and the claimants' willingness to reach an agreement. In relation to some Government-held forest land and State-owned enterprises, the Tribunal has binding "adjudicative" powers. In the view of the Special Rapporteur, such redress as may be negotiated in the historical claims process seems, on the basis of experience so far, to fall short of "just and adequate reparation or satisfaction for any damage suffered" (within the meaning of article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination). The Government of New Zealand does not consider that historical injustices, which largely occurred in the nineteenth century, fall within the scope of the obligation under the Convention to provide reparation for contemporary discrimination. In recent years the Crown has not always accepted the findings of the Waitangi Tribunal reports.
27. The overall land returned by way of redress through settlements is a small percentage of the land claims, and cash paid out is usually less than 1 per cent of the current value of the land. Total Crown expenditure on the settlement of Treaty breach claims over the last decade (approximately NZ\$ 800 million) is about 1.6 per cent of the government budget for a single year. The Special Rapporteur considers that the notion that Maori have received undue privileges from Treaty settlements, which has been floated in the media and by some politicians, lacks any substance whatsoever. As it continues to

play a significant role in the recovery of Maori human rights, the Tribunal should receive more funding to bring hundreds of outstanding claims to a satisfactory conclusion. Moreover, its findings should be judicially recognised and become binding on the Crown. Therefore, the Special Rapporteur is concerned about statements disqualifying the work of the Tribunal and demanding its dissolution.

28. Hauraki's original land area in the Auckland region was around 750,000 hectares, of which now there is only 2.6 per cent left. Hauraki Maori told the Special Rapporteur that various Acts and court decisions have been used by the Government since the end of the nineteenth century to dispossess them of their customary rights, appropriating them for itself and then selling or leasing the resource to private non-Maori enterprises. The Crown understands that Hauraki Maori were generally willing sellers of their land. Hauraki sociodemographic indicators (health, education, housing, incomes) are consistently lower than those for other New Zealanders. They also complain about their marginalization from local governance.
29. Hauraki Maori, represented by a Trust Board that includes around 14,000 members of 12 local iwi, have filed a number of claims against the Crown with the Waitangi Tribunal, which has not yet finalized its report. The Board provides a range of health, social and education services to its members, and also engages in economic activities such as fisheries, aquaculture and broadcasting. The Trust Board continues to seek a satisfactory settlement with the Government and hopes to achieve collective benefits for all its people. The Office of Treaty Settlements is in pre-negotiation discussions with other groups as well as with the Trust Board concerning a possible negotiation of a settlement of Hauraki Maori claims.
30. Once a claim under the Treaty of Waitangi has been lodged, there ensues a process of negotiation seeking to achieve a fair and just settlement of Crown historical breaches of the Treaty. Participation in negotiations is voluntary and all groups are free to withdraw at any time. The process is currently managed by the Office of Treaty Settlements within the Ministry of Justice, established in 1995. Treaty settlements return to tribes some of the economic and other resources needed for community development including, for example, forestry assets and farms and commercial buildings. The negotiation process involves several stages, and key elements of the

final settlement are an apology by the Crown for unconscionable actions committed against Maori and various forms of cultural and financial redress involving either cash or Crown assets. The Government does not provide full compensation for losses suffered historically by Maori, but negotiates a compromise. Settlements remove the jurisdiction of the courts and the Waitangi Tribunal in respect of the claims of a group. The Treaty settlement process is intended to be reparative and to provide redress for historical misconduct. It is therefore intimately connected to the right to a remedy for breaches of legal rights. Successive New Zealand Governments have accepted that Maori have a moral and political right to redress under the Treaty, but not a legal right.

31. Ngai Tahu lost most of their extensive landholdings and assets during the nineteenth century and were never given the resources and services that the Government had promised them. After filing unsuccessful claims against the Crown for many decades, a Waitangi Tribunal claim in 1986 led to a negotiated settlement in 1997 and the passage of the Ngai Tahu Claims Settlement Act in 1998. In addition to an apology from the Crown and cultural redress, Ngai Tahu accepted a payment of NZ\$ 170 million (much less than the real value of what the Government actually owed them according to informed sources), recognising the limitations on the amount of redress available. This allowed the tribe to establish an economic corporation which currently has interests in tourism, fishing and property. This financial security enables the tribe to deliver social benefits back to iwi members who are all the tribal descendants from the official census of 1848, wherever they may live today.
32. Treaty settlements that have been negotiated so far involve quantities of reparation that represent merely a fraction of the value of the land and resources lost by Maori during the colonial period. As at December 2005, \$748 million has been committed to final and comprehensive settlements with 18 claimant groups and several part settlements. Settlements currently cover more than half of New Zealand's land area, and more than half of the iwi that suffered confiscation, recognised as the most serious Treaty breach. The average settlement received by claimants is estimated to correspond to approximately one per cent of real value. Two of the groups who negotiated a settlement (Ngai Tahu and Tainui) received NZ\$170 million each, an amount that some Maori consider as insufficient to provide economic well-being for several thousand registered tribal

members, and successive generations to follow. Other settlements involve much lower figures.

33. Maori argue that the cultural redress is equally insufficient, because the mechanisms involved in the settlements do not always restore either symbolically or in actuality ancestral homelands to the claimant group. In the Special Rapporteur's view, it would be more practical to include management regimes according to customary precepts, as some of them do, acknowledging that Maori possess primary decision-making capacity over appropriate sites, thus enabling greater expression of Maori cultural and spiritual relationships.
34. Maori legal authorities told the Special Rapporteur that they consider it constitutionally improper to force claimants to waive their entitlement to the protection of the courts when they negotiate settlements, especially as it is achieved through coercion; until the claimants have waived their rights, the negotiations will not be finalized. They feel that the result is a largely imposed settlement package, which claimants cannot bring before an independent or judicial body for rigorous qualitative testing. The Government notes that settlements do not affect any ongoing rights of claimants, although their historical claims cannot be reopened. Claimants are not in any way coerced to accept a settlement, and are free at any point to end negotiations.
35. Claimants must incorporate as "Trust Boards" or similar bodies in order to receive and administer the assets of a settlement. This decision has met with some criticism from Maori who feel that it is more appropriate for Maori themselves to decide who is to represent them and how they are to be represented in negotiations. The New Zealand Law Commission, an independent publicly funded entity devoted to legal reform, is currently designing a new form of Maori legal entity to administer communally owned assets, particularly those received from Treaty of Waitangi land and fisheries settlements. Te Puni Kokiri (the Ministry of Maori Development) is carrying out similar work on behalf of the Government.
36. Under the Resource Management Act the protection of recognised customary activities on the foreshore and seabed is considered a matter of national importance. New Zealanders also attach the highest importance to environmental issues. The Special Rapporteur received a number of complaints regarding concerns about resource management in relation to the environment. For example, in

Kawerau a private paper mill was established in the 1950s which over the years not only was able to transform the local environment into a large forest plantation despite the opposition of numerous local Maori residents, but later began contaminating the local river with toxic waste disposal. The Ahu Whenua Trust lodged a complaint under the Resource Management Act and the Environment Act but has not yet received satisfaction. At the coastal site of Maketu a similar waste disposal built up in an estuary where the river had been diverted. Despite a Planning Court decision in 1990, the river has not yet been redirected.

37. Fisheries have been a major issue of concern to Maori. For over one hundred years, Maori had argued before the Crown, the Waitangi Tribunal and the courts that the guarantee of "full, exclusive possession ... of their fisheries" contained in the Treaty of Waitangi had never been given effect. Both the Waitangi Tribunal and the Government agreed there was some form of redress required. After complex negotiations, the Treaty of Waitangi Fisheries Deed of Settlement was signed in 1992.
38. As part of the 1992 settlement, the Crown agreed to a settlement amount for the development and involvement of Maori in the New Zealand fishing industry. The Settlement Act includes provisions for the Crown to pay \$150 million to enable Maori to purchase a half share in Sealord Products Ltd (New Zealand's biggest fishing company), holding 27 of the per cent New Zealand fishing quota. Twenty per cent of any new species quota was also promised as well as greater representation of Maori on statutory bodies on fisheries management. The Maori Fisheries Commission was restructured and renamed, making it more accountable to Maori and giving it more input to fisheries management.
39. In return, Maori agreed that all their current and future claims in respect of all sea or inland commercial fishing rights and interests were fully satisfied and discharged. It was also agreed that customary fishing rights would be recognised, protected and enforced by regulations and that the Fisheries Commission would develop a procedure to determine how the assets would be distributed.
40. In 1998 the Privy Council held that the obligations of the trust imposed by the Fisheries Settlement required the benefits of the

settlement to be allocated to iwi (tribes) for the benefit of all Maori. A revised model for allocation was subsequently enacted as the Maori Fisheries Act 2004. A minimum of 40 per cent of net profit of the fishing company is to be distributed, 80 per cent going to mandated iwi organizations in proportion to their populations and 20 per cent to the corporate trustee (Te Ohu Kai Moana) to fund its work on behalf of iwi.

41. In response to Maori claims regarding aquaculture, the Maori Commercial Aquaculture Claims Settlement Act 2004 commits the Crown to provide Maori with the equivalent of 20 per cent of aquaculture space in the coastal marine area.
42. During his conversations with Maori organizations, the Special Rapporteur was told that Maori constantly have to renegotiate their collective self-governance rights through the Treaty settlement process, which does not restore actual decision-making capacity and does not recognise collective citizenship. Short of the recognition of self-determination or even self-governance, Treaty settlement packages could meet Maori aspirations halfway by awarding tribal collectives actual decision-making capacity over ancestral or culturally significant sites and resources through unencumbered fee simple title being transferred over such sites. The Crown could recognise in such settlements that it has legally enforceable obligations to tribal collectives as citizens who possess a distinct composite of inherent and inalienable rights. Existing settlement acts could be amended so as to enable iwi to self-determine an appropriate corporate structure for receipt of assets.

C. Human Rights Implications of the Foreshore and Seabed Act

43. Over the past two years, an important human rights issue for Maori and all New Zealanders has been the controversy surrounding the adoption of the Foreshore and Seabed Act of 2004. The United Nations Committee on the Elimination of Racial Discrimination (CERD), which had carefully analysed the case after hearing Maori complainants and the Government of New Zealand, found in March 2005 that "... the legislation appears to the Committee, on balance, to contain discriminatory aspects against ... Maori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress." (CERD/C/DEC/NZL/1, para.6): Furthermore, the Committee expressed concern "at the apparent haste with which the legislation was enacted and that insufficient consideration may have been given to alternative responses ... " (ibid., para. 4). It also noted

"the scale of opposition to the legislation among the group most directly affected by its provisions, the Maori, and their very strong perception that the legislation discriminates against them" (ibid., para. 5).

44. On his mission to New Zealand the Special Rapporteur was briefed extensively by the Government, by numerous Maori organizations and members of the Waitangi Tribunal and by the Human Rights Commission about the background, complexities and implications of this legislation and has had the opportunity to study the documentation and weigh the different arguments.
45. Both foreshore (the area of land between the low and high tide marks) and seabed have long been a part of Maori environment, culture, economic activity and way of life, basically for marine farming and small-scale sand mining, more recently for tourism. Maori customary ownership, occupation and use of the foreshore and seabed, according to the Treaty of Waitangi, were never legally challenged in the courts. New Zealand's submission to CERD states that the "Government understood that foreshore and seabed in New Zealand was generally owned by the Crown". The government's understanding was based on existing legislation which provided for vesting of the foreshore and seabed in the Crown, and existing domestic case law, notably the 1963 Ninety Mile Beach decision of the Court of Appeal.
46. It was on this basis that the public right of access to the beaches was assumed and the development of certain private commercial activities occurred on the foreshore and seabed within the framework of existing statutes and regulations such as the Resource Management Act and its predecessors. Customary rights only become "aboriginal title" at common law, which requires a court decision or a specific statute. The Maori Land Court had not generally dealt with these issues under its jurisdiction. In 2003 the Court of Appeal (Ngati Apa case), overturning Ninety Mile Beach of 1963, ruled that it was arguable that customary title had not been extinguished either directly or by implication. The Court also declared that the Maori Land Court could determine whether defined areas of foreshore and seabed had the status of "Maori customary land." Maori tribes could also apply to the High Court for determinations on customary title to particular areas of the foreshore and seabed.

47. These developments prompted the Government to announce its foreshore and seabed policy in 2003, which became the subject of an urgent inquiry by the Waitangi Tribunal. The Tribunal, expressing its disagreement with the Crown's proposal, concluded that this policy would remove the ability of Maori to go to the High Court and the Maori Land Court for definition and declaration of their legal rights in the foreshore and seabed. The Tribunal considered that in removing the means by which the rights would be declared, it effectively removed the rights themselves, whatever their number and quality. The Tribunal also concluded that the proposal would remove property rights, which amounts to expropriation; not guarantee compensation; enact a regime that recognises lesser and fewer Maori rights in place of the property rights to be declared by the courts; and exchange property rights for the opportunity to participate in an administrative process.
48. Early in the debate on the foreshore and seabed issue, the Chief Commissioner of the Human Rights Commission stated that there are human rights dimensions to the issues of both customary rights and public access to the foreshore and seabed. The Government made some changes to the original bill, which in November 2004 was enacted by Parliament as the Foreshore and Seabed Act. According to the Government's submission to CERD in February 2005, the purpose of the Act is to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders and to recognise the rights and interests of individuals and groups in those areas. It does this by vesting the full legal and beneficial ownership of the public foreshore and seabed in the Crown, and by instituting a mechanism for the identification and protection of customary uses, activities and practices by order of the Maori Land Court or High Court.
49. Although the New Zealand Human Rights Commission had expressed concern over the unjustifiable extinguishment of Maori customary title to the foreshore and seabed and the absence of a guaranteed right of redress, it nevertheless noted a number of positive aspects in the Act, namely recognition of the strong cultural connection with the foreshore and seabed felt by all New Zealanders, the protection of public access, and rights of navigation, and the importance of non-alienation of areas of New Zealand's coastline.
50. The Act provides for the protection of important cultural sites by limiting access to the foreshore and seabed by way of ministerial

decision. It also defines "territorial customary rights" as pertaining only to judicially determined customary/aboriginal title and not to any group or individual claiming such a right. Nonetheless, the Human Rights Commission points out that potential Maori customary title over parts of the foreshore and seabed and fee simple title for Maori land under existing legislation have now been removed, without equivalent replacement.

51. There remains no guarantee of equitable redress for Maori groups for loss of customary title or criteria to guide compensation calculations and given that the Act is in its early stages of implementation, the nature of the negotiated redress is yet to be determined. In addition, the establishment of potential foreshore and seabed reserves, which is a positive development, must also be negotiated and in essence fails to provide Maori groups with an appropriate recompense for loss of customary title. By excluding existing freehold interests in the foreshore and seabed from the vesting of the foreshore and seabed in Crown ownership, the Commission considers that the Act limits the right to freedom from discrimination. The Commission also considers that parts of the legislation may also infringe the right not to be arbitrarily deprived of property, and the right to development. In fact, New Zealand's Attorney General recognises that the Act provides differential treatment and that this might entail prima facie breach of New Zealand's Bill of Rights Act, yet she still considers this differential treatment justified.
52. The Treaty Tribes Coalition considers that the Act exacerbates the prejudice that Maori have historically experienced, particularly in that redress for rights expropriated by the Act are not susceptible to judicial review; and that the Act extinguishes customary Maori property rights (as protected under the Treaty of Waitangi) and replaces them with the possibility to apply for "orders" from the courts to protect customary uses and practices if the claimant fulfils a number of difficult and potentially costly requirements. According to information received by the Special Rapporteur, six groups have applied to the Maori Land Court for customary rights orders.
53. The publication of the Foreshore and Seabed Bill triggered a controversial public debate in the country and the almost unanimous rejection of a vast majority of Maori organizations, which culminated in the autumn of 2004 with a protest march (hikoi) on the country's capital, Wellington, by an estimated 30,000 to 50,000 people. The debate was taken up by the media and became a political

issue during the 2005 elections. It polarized public opinion and brought to the surface a number of underlying racial tensions in the country. CERD felt compelled to state that "the Committee remains concerned about the political atmosphere that developed in New Zealand" (ibid.) and expressed its hope "that all actors in New Zealand will refrain from exploiting racial tensions." The Government of New Zealand rejects the view that the ongoing debate involves "escalating racial hatred and violence" and finds no factual basis for such a claim.

54. The "struggle without end" for Maori rights, as one author calls it, has found its latest expression in the human rights implications of the Foreshore and Seabed Act. On the other hand, some New Zealanders appear to approve of the view of "One law for all" (that is, no more special laws on Maori rights, understood as meaning Government should stop the alleged "pampering" of Maori). The political media have taken up these arguments and have reflected the view of those who would like to see an end to the alleged "privileges" accorded by the Government to Maori. The Special Rapporteur was asked several times whether he agreed that Maori had received special privileges. He answered that he had not been presented with any evidence to that effect, but that, on the contrary, he had received plenty of evidence concerning the historical and institutional discrimination suffered by the Maori people, evidence that he is concerned with in the present report.
55. Many Maori consider that through the Foreshore and Seabed Act the Crown, while arguing in favour of the interests of the general public in New Zealand, has breached the Treaty of Waitangi once again. Even as it includes certain mechanisms for a declaration of existing "customary rights", the Act clearly extinguishes the inherent property rights of Maori to the foreshore and seabed without sufficient redress or compensation, but excludes certain properties already held in individual freehold. The Government states that there are basic distinctions between the very limited existing freehold titles and the claimed customary interests. The Act provides a statutory process for the recognition of customary or aboriginal title founded on exclusive use and occupation, which the common law would have recognised. In the view of the Special Rapporteur, the Act can be seen as a step backward for Maori in relation to the progressive recognition of their rights through the Treaty Settlement Process over recent years.

D. Administration of Justice

56. Everyone charged with an offence has a right, under the New Zealand Bill of Rights Act 1990, to language interpretation if needed which includes the use of indigenous language, having documents served and filed in Maori. This right is also recognised in the Maori Language Act 1987. The courts must also have regard to the different traditions of ethnic groups who use the system. New legislation has been adopted following a report in 2000, by the Ministry of Justice, which found that this provision was underutilized, with only 14 per cent of survey respondents perceiving that it was used as frequently as it could be.
57. According to information provided to the Special Rapporteur, Maori are three times more likely to be apprehended for an offence than non-Maori, and four times more likely to be apprehended for violent crime. Prosecution rates are considerably higher for Maori than for non-Maori (88 against 18 per 1,000). Conviction rates are 50 per 1,000 for Maori compared to 12 per 1,000 for non-Maori. Although they represent 13 per cent of the population over 14 years of age, in 1988 Maori accounted for 40 per cent of all arrests, 41 per cent of all prosecuted cases, and 44 per cent of all people convicted, Maori make up around 50 per cent of the prison population. This pattern arguably represents the underlying institutional and structural discrimination that Maori have long suffered.
58. The Ministry of Justice and the Department of Corrections have initiated a number of programmes to address this issue. In partnership with Maori, these programmes have focused on engaging with local communities and Kaitiaki, groups that are recognised Maori guardians of resources in the geographical region of a prison. Reducing youth offending, and the over-representation of young Maori in the youth justice system, continues to be a priority for the Government. Though the Ministry of Justice does not believe that ethnicity is a main cause for crime, it considers that the current disparities justify targeted programmes and recommends that increased emphasis be placed on evaluation of ethnically targeted crime prevention and reduction programmes.

E. Language, Culture and Education

59. During the nineteenth and most of the twentieth century, cultural and educational policy was based on the premise that Maori would and should assimilate into the dominant English culture. A Maori cultural revivalist movement in the early part of the century had limited impact on the overall society. Only as a result of the social protest movements by Maori in the 1970s and 1980s did human rights issues become politically relevant and led to important changes in legislation, government policies and social awareness among the rest of society. In 1985 the Waitangi Tribunal declared the Maori language to be a treasure (taonga), to be protected under the terms of the Treaty of Waitangi. Maori was first recognised as an official language in the Maori Language Act 1987, which established the Maori Language Commission to promote Maori as a living language. It enables any witness, lawyer or party to speak Maori in courts, commissions of inquiry and tribunals.
60. During most of the last century, the use of the Maori language in schools was actively discouraged, in order to promote instead assimilation of the Maori into European culture as rapidly as possible. As a result of intense activity carried out by Maori women's organizations, the first language-nest (kohanga reo) pre-school Maori language immersion programme was established in 1981. The aim was to make every Maori child bilingual by the age of 5 years. By 1994 the programme had 809 schools, and it had 31 per cent of all Maori enrolments in 2003 but still suffers from an insufficient number of professional Maori teachers. In 2003 there were 61 Maori in total language immersion State schools (with almost 6000 students and 415 Maori teachers), 83 bilingual schools and numerous others with immersion classes and bilingual classes. The Government, through Te Puni Kokiri, provides ongoing financial support.
61. Thanks to efforts by Maori leaders, the Maori language became a university subject in 1951. Later, courses in Maori language were included in the curriculum of five universities and eight training school colleges. In 1990, three wananga (Maori education providers) were recognised under statute as tertiary education institutions and since 1999 have been provided with capital support from the Crown, following a Waitangi Tribunal claim. In 2004 there were 70,000 students enrolled in the three wananga. Maori participation in certificate (lower) level tertiary education has grown rapidly over

recent years. There were 94,400 Maori students in tertiary education in 2004, up 250 per cent from 1994. Maori students are moving to further study at higher rates than non-Maori, especially Maori women students, whose numbers increased fourfold between 1994 and 2004. Participation by Maori remains lower than the average for the tertiary education sector.

62. The Maori Students in Tertiary Education of Aotearoa complained to the Special Rapporteur that a limitation to their progress to higher programmes in tertiary education is the high burden of student debt and decreasing public funding to support Maori students. The recent policy change to remove interest from student loan repayments will be of significant help to Maori students.
63. Maori organizations acknowledge that Maori culture has been rapidly and pervasively revived. Maori education providers now operate at all levels, delivering instruction in Maori, and teaching Maori customary philosophies, rituals and laws. The defining feature is that cultural revitalization has been driven by Maori, for Maori, with State support, particularly in funding. Maori culture is also promoted to the wider community, including in broadcasting, the arts and national ceremonial occasions.
64. The Government currently has a strategy for involving iwi and Maori in the provision of quality service that meets their aspirations, increasing Maori participation and achievement across the educational sectors, and supporting the provision of Maori language and cultural education. Despite progress thus far, the schooling system has been performing on average less well for Maori than for non-Maori students, a problem which points to as yet unresolved issues concerning culturally appropriate educational methodologies. A major challenge for the educational system is to improve teacher training in the area of Maori education, including Maori teachers, and mainstream classrooms with Maori students.
65. The Maori Broadcasting Agency funds broadcasting services to promote Maori language and culture, including funding for a network of 21 iwi radio stations and radio news services in the Maori language. The Maori Television Service began broadcasting to the whole of New Zealand in March 2004. The State-owned Television New Zealand is required to ensure in its programmes the participation of Maori and the presence of a significant Maori voice. NZ On Air also supports Maori broadcasting by funding Maori

mainstream television programming and Maori language and culture programming on National Radio.

66. A 2004 study on Maori and the media found that newspaper and television are fairly unbalanced in their treatment of Maori people and issues. A minority of newspapers as well as television programmes included themes relevant to Maori. Often programmes portray Maori as unfairly having benefits which are denied to others. Some of the most prominent media often highlight the potential or actual Maori control over significant resources as a threat to non-Maori. Another recurrent issue is the portrait of Maori as poor managers, either corrupt or financially incompetent. In general, the study reported that "bad" news about Maori predominated over "good" news. In some media denigrations and insulting comments about Maori were reported. These findings are of special concern to the Special Rapporteur and highlight a systematic negative description of Maori in media coverage, an issue that should be addressed through the anti-racism provisions of New Zealand's Human Rights Act.
67. Another important issue relates to respect for and protection of traditional indigenous knowledge, an issue that the Ministry of Economic Development is considering in the intellectual property context. Changes were made to New Zealand's trademarks legislation to guard against the registration of trademarks based on Maori text and imagery likely to be offensive to Maori. However, the protection of Maori intellectual property rights is still in its early stages.

F. The Challenge: Reducing Inequalities

68. Maori are highly integrated into the wider national economy at all levels and make a significant and vital contribution to it, as workers, owners, investors and consumers. Maori household income was 72 per cent of the national average in 1998. The average incomes of employed Maori increased by 8 per cent in real terms over the period 1998-2003. The Maori unemployment rate fell from 18.6 per cent to 8.75, and Maori employment growth outstripped that of Europeans over the six years up to 2005. Though more Maori women are currently in paid employment or self-employed, their rates of employment and participation in paid work are still lower than those for Maori men and non-Maori. Still, their earnings are growing more rapidly than those of other categories.

69. The Ministry of Maori Development aims to improve outcomes for Maori and ensure the quality of government services delivered to Maori. It is engaged in realizing Maori potential by seeking opportunities for Maori to change their life circumstances, improve their life choices and achieve a better quality of life, recognising that Maori are supported by a distinctive culture and value system.
70. New Zealand as a whole ranks high on international human and social development indicators. The average living standards and levels of well-being of Maori reflect that situation to a great extent. Nevertheless, despite the Government's intention to reduce the inequalities in the country, persistent disparities between Maori and Pakeha continue to exist in a number of areas. Across a range of indicators, Maori women still experience poorer economic, health and social outcomes than other New Zealand women, but there has been progress.
71. The Ministry of Health reports that Maori at all educational, occupational and income levels have poorer health status than non-Maori. A recent study finds that Maori life expectancy is significantly lower (almost 10 years) than that of non-Maori, although they have made a significant gain in the most recent five-year period. Maori are 18 per cent more likely to be diagnosed with cancer than non-Maori but nearly twice as likely to die from cancer. Maori are twice as likely as non-Maori to be diagnosed as having diabetes and yet are nine times more likely to die from it. Maori women are still twice as likely to be diagnosed with cervical cancer as non-Maori women, although the incidence of cervical cancer among them has decreased. Maori continue to have a higher infant mortality rate compared to the total population, but the gap is closing. Maori have on average the poorest health status of any ethnic group in New Zealand, according to official statistics.
72. Maori women experience higher rates of partner and sexual violence than European women. The Government's Action Plan for New Zealand Women intends to improve outcomes for women, including Maori women. Approximately 45 to 50 per cent of battered women using Women's Refuge services are Maori. Where women are at risk, their children may also be at risk. Maori youth have higher rates of suicide than similar non-Maori age groups, a situation that may reflect higher family dysfunctions and social disorganization associated with a history of discrimination.

73. The Government has adopted a specific Maori health strategy designed to improve outcomes for Maori and reduce the inequalities. There are 240 Maori health providers that service Maori communities, and are also used by non-Maori. In order to monitor Maori health effectively, high-quality ethnicity data has to be available. The Government has reviewed programmes and policies targeted by ethnicity and produced guidelines to ensure future targeting is clearly identified with need, not race. As a result, some programmes have been retargeted based on socio-economic need rather than ethnicity. The Special Rapporteur considers that such a "quantitative" approach might lead to neglecting the specific contextual factors that have impacted the persistent inequalities suffered by Maori and make the aim of "reducing inequalities" more difficult to attain, and he suggests that special measures to rapidly improve outcomes "by Maori for Maori" may still be called for. Of course this should by no means imply that other at-risk populations deserve anything less. There is evidence that indicates that access to high-quality health services is not evenly distributed between Maori and non-Maori.
74. The Human Rights Commission reports that Maori and Pacific peoples are disadvantaged in terms of affordability and habitability of housing - they are four times more likely to live in overcrowded houses than the national average. It finds that despite some indications of improvement, significant racial inequalities continue to exist in health, housing, employment, education, social services and justice. Home ownership rates are much lower for Maori than for the general population and have declined from 52 to 44 per cent over a 10-year period, and this is likely to continue in the future. The proportion of Maori renting is correspondingly much higher.
75. The Social Report 2005 indicates that outcomes for Maori have improved since the mid-1990s, and have been greater than for Europeans. This includes indicators of life expectancy, suicide, participation in early childhood and tertiary education, school leavers with higher qualifications, employment, unemployment, low incomes and housing affordability. While the effect of this has been to reduce the disparity in outcomes between the Maori and non-Maori populations, indicators of well-being for Maori are still relatively poor in a number of areas, and in particular health, paid work and economic standard of living.

IV. CONCLUSIONS

76. On the basis of his conversations and observations the Special Rapporteur has reached the conclusions outlined below.
77. During the last three decades or so, ethnic relations in New Zealand changed from an assimilationist model (that undermined Maori cultural identity and governance structures) to a new bicultural approach based on the Treaty of Waitangi principles and the partnership between Maori and the Crown. The increasing assertiveness of Maori in demanding their long-denied rights and their claims for redress of past injustices led to inquiries and recommendations by the Waitangi Tribunal, negotiations leading to Treaty Settlements and the enactment of laws by Parliament when such settlements were finalized to the mutual satisfaction of the Government and Maori, with the sympathy and support of the majority of New Zealand society. Yet the legacy of the first 150 years of New Zealand was difficult to overcome, and many inequities continued to plague the relationships between Maori and Pakeha.
78. The inherent rights of Maori were not constitutionally recognised, nor were their own traditional governance bodies, which allowed Parliament to enact legislation by simple majority that modified this relationship according to the circumstances, a condition that the minority representation of Maori in the political process was unable to reform. Maori have the perception that all along they have been junior partners in this relationship.
79. Nothing illustrates this situation better than the complex land rights issue. Having been dispossessed of most of their lands and resources by the Crown for the benefit of Pakeha, Maori had to accept sporadic and insufficient redress, only to be faced with accusations that they were receiving undue privileges, which left in their wake resentments on both sides about perceived social and racial tensions. The latent crisis broke over the controversy concerning the Foreshore and Seabed Act 2004, whereby the Crown extinguished all Maori extant rights to the foreshore and seabed in the name of the public interest and at the same time opened the possibility for the recognition by the Government of customary use and practices through complicated and restrictive judicial and administrative procedures.

80. Despite social programmes, disparities continue to exist between Maori and non-Maori with regard to employment, income, health, housing, education, as well as in the criminal justice system. Although Maori collectives (iwi, hapu, whanau) are increasingly involved in the strategies designed to reduce these inequalities, as well as in those designed to promote economic development and Maori success in business, actual self-governance mechanisms based on the recognition of the right of indigenous peoples to self-determination have not yet been devised. There appears to be a need for the continuation of specific measures based on ethnicity in order to strengthen the social, economic and cultural rights of Maori as is consistent with the International Convention on the Elimination of All Forms of Racial Discrimination.
81. A return to the assimilationist model appears increasingly in public discourse, redirecting concern about collective rights and the place of Maori as a people within the wider society, to emphasis on the protection of the individual rights of all New Zealanders, including the rights to equal opportunity, due process of law and freedom from illegal discrimination on any grounds, including ethnicity or race.
82. These wider constitutional and societal issues need to be debated responsibly and democratically by all social and political actors concerned because their solution will determine the kind of society New Zealand will be in the future.

V. RECOMMENDATIONS

83. On the basis of the foregoing considerations, the Special Rapporteur makes the recommendations that follow to both Government and civil society.

A. Recommendations to the Government

Constitutional issues

84. Building upon continuing debates concerning constitutional issues, a convention should be convened to design a constitutional reform in order to clearly regulate the relationship between the Government and the Maori people on the basis of the Treaty of Waitangi and the internationally recognised right of all peoples to self-determination.
85. The Treaty of Waitangi should be entrenched constitutionally in a form that respects the pluralism of New Zealand society, creating

positive recognition and meaningful provision for Maori as a distinct people, possessing an alternative system of knowledge, philosophy and law.

86. The MMP electoral system should be constitutionally entrenched to guarantee adequate representation of Maori in the legislature and at the regional and local governance levels.
87. Iwi and hapu should be considered as likely units for strengthening the customary self-governance of Maori, in conjunction with local and regional councils and the functional bodies created to manage treaty settlements and other arrangements involving relations between Maori and the Crown.
88. The Legal Services Act should be amended to ensure that legal aid is available to Maori iwi and hapu as bodies of persons so as to afford them access to the protection mechanisms of human rights, and in order to eliminate discrimination against Maori collectives.

Human rights and the Waitangi Tribunal.

89. The Waitangi Tribunal should be granted legally binding and enforceable powers to adjudicate Treaty matters with the force of law.
90. The Waitangi Tribunal should be allocated more resources to enable it to carry out its work more efficiently and complete its inquiries within a foreseeable time frame.
91. The New Zealand Bill of Rights should be entrenched to better protect the human rights of all citizens regardless of ethnicity or race.
92. The Foreshore and Seabed Act should be repealed or amended by Parliament and the Crown should engage in treaty settlement negotiation with Maori that would recognise the inherent rights of Maori in the foreshore and seabed and establish regulatory mechanisms allowing for the free and full access by the general public to the country's beaches and coastal area without discrimination of any kind.

Treaty settlements

93. In all Treaty settlements, the right of Maori to participate in the management of their cultural sites according to customary precepts should be specifically acknowledged, thereby enabling greater expression of Maori cultural and spiritual relationships.
94. Existing settlement acts should be amended, and other such acts in the future should be framed, so as to enable iwi and hapu to self-determine an appropriate corporate structure for receipt and management of assets.
95. The Crown should engage in negotiations with Maori to reach agreement on a more fair and equitable settlement policy and process.

Environment

96. The Crown should take an active interest in supervising the compliance of the paper company in cleaning up the waste site at Kawerau and the waste disposal build-up at Maketu.

Education and culture

97. More resources should be put at the disposal of Maori education at all levels, including teacher training programmes and the development of culturally appropriate teaching materials.
98. Student fees should be lowered and allowances increased so as to stimulate the passage of more Maori students from certificate and diploma to degree level programmes in tertiary education.
99. Maori sacred sites and other places of particular cultural significance to Maori should be incorporated permanently into the national cultural heritage of New Zealand.
100. The Maori cultural revival involving language, customs, knowledge systems, philosophy, values and arts should continue to be recognised and respected as part of the bicultural heritage of all New Zealanders through the appropriate cultural and educational channels.

Social policy

101. Social delivery services, particularly health and housing, should continue to be specifically targeted and tailored to the needs of Maori, requiring more targeted research, evaluation and statistical data bases.

International indigenous rights

102. The Government of New Zealand should continue to support efforts to achieve a United Nations declaration on the rights of indigenous peoples by consensus, including the right to self-determination.
103. The Government of New Zealand should ratify ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

B. Recommendations to the Civil Society

104. Public media should be encouraged to provide a balanced, unbiased and non-racist picture of Maori in New Zealand society, and an independent commission should be established to monitor their performance and suggest remedial action.
105. Representatives and leaders of political parties and public organizations should refrain from using language that may incite racial or ethnic intolerance.

GLOSSARY OF MAORI TERMS

A

Ahi ka - Literal meaning, "Site of burning fires"; continuous occupation
Ahi mataotao - Literal meaning, "Die out or to be extinguished"
Ahi tere - Literal meaning, "Wandering fire", loss of customary lands by letting "Ahi ka" burn out
Aotearoa - Literal meaning, "Land of the Long White Cloud"; Original name of New Zealand
Ariki - High born chief
Arikinui - Paramount chief
Aroha - Love, concern, compassion, sorrow
Atua - Gods

I

Iwi - Tribe

K

Kaitiakitanga - guardianship

U

Ukaipo - Source of sustenance, offspring, descendant, blood relationship
Utu - Return for anything

H

Hapu - Subtribe
Hawaiki - Ancient homeland
Hui - Meeting, assembly

K

Kai - Food
Kaikorero - Speaker
Kainga - Home
Kaitiaki - Guardian, controller
Kanohi ki te kanohi - Face to Face
Karakia - Incantation, prayer, ritual
Kaumatua - Respected elder/ elders
Kaupapa - Rules/ norms
Kawa - Procedure/ protocols
Kawai tupuna - Revered ancestors
Korero tawhito - Ancient traditions, oral traditions

M

Mana - Prestige, power, authority

Manaakitanga - Hospitality

Mana whenua - Customary authority and title exercised by a tribe or sub tribe over land and other taonga within the tribal district

Manuhiri - Guests, visitors

Marae - Enclosed space in front of a house, courtyard, village common

Maunga - Mountain

Mauri - Life force, life principle

N

Noa - Free from tapu or any other restriction

P

Pa - Village

Parapara - Unclean waste

Pito - Umbilical cord, navel, end

Powhiri - Welcoming ceremony

R

Rahui - Reserve, preserve

Rangatira - Chief

Raruraru - Problems/Issues

Rohe - Boundary, district, area, region

Rangatiratanga - Chieftanship

T

Take - Cause, issue, matter

Taonga - Treasures, prized possessions

Tapu - Sacred, restricted, prohibited

Tangata whenua - People of the land

Taumata - Resting place of the kawai tupuna

Te hekenga mai o nga waka - The great migration

Te Ao Marama - World of life and light

Te Kore - The first phase of creation, period when there was nothing and the world was void

Te Po - The second phase of creation, a period of darkness and ignorance. Words associated with this are darkness or night

Te Ika a Maui - Literal meaning, "The Fish of Maui", the name given for the North Island

Tika - Rightness, correct, politically correct

Tikanga - Customs

Tino Rangatiratanga – Full Chieftanship

Tupuna/Tupuna - Ancestor/s
Tohu - Mark, sign, proof
Tohunga - Expert
Tuahu - A sacred place, consisting of an enclosure containing a mound and marked by the erection of rods or poles, which was used for the purposes of divination and other mystic rites
Turangawaewae - A place where you have the right to stand and be heard

U

Ukaipo – mother, sustenance
Uri – descendants
Utu – reciprocity, balance, return for anything

W

Wahi tapu - Sacred place
Waiata - Song/Sing
Wairua - Spirit
Waka - Kinship group, boat or canoe
Waka tangata - Womb, bearer of the next generation
Whaikorero - Make an oration, speak in a formal way
Whakapapa - Lineage, genealogy, to layer
Whakatauki/Whaka tauaki - Proverbs, sayings
Whanau - Family, descent group, to give birth
Whanaunga - Relative, blood relationship
Whanaungatanga - Relationships, kinship
Whare tangata - Womb, bearer of the next generation