

## LEGISLATION NOTES

### The Ngai Tahu (Pounamu Vesting) Act 1997

This note provides an overview of the property and environmental management implications of the Ngai Tahu (Pounamu Vesting) Act 1997 (the “Pounamu Vesting Act”).<sup>1</sup> The Pounamu Vesting Act is a short and simple statute which transfers ownership of pounamu (also known as greenstone and New Zealand jade) to Te Runanga o Ngai Tahu.<sup>2</sup> Despite its apparent simplicity, the Pounamu Vesting Act raises interesting and complex management issues.

#### Introduction

In October 1997 the Government of New Zealand returned the ownership of the South Island deposits<sup>3</sup> of pounamu to Ngai Tahu as part of the settlement of Ngai Tahu claims against the Crown for breaches of the Treaty of Waitangi. Pounamu, a taonga (treasure) of Ngai Tahu peoples, with spiritual and material significance, was never intended to be sold as part of the land sales to the Crown in 1860. However, the Crown assumed ownership and control of this resource as part of the colonisation of New Zealand. The Pounamu Vesting Act 1997 seeks to redress, in part, this Crown breach of the Treaty of Waitangi.

There is a substantial art and tourist related industry based around pounamu, primarily situated on the West Coast of the South Island, but also extending throughout New Zealand. At present there is an effective vacuum in management policy, as Ngai Tahu grapples with the issues arising from the change in ownership. For those in the industry this is of great concern as there is no guarantee of continued supply of the stone beyond the period of existing licences issued by

- 1 This work is based on the author's forthcoming PhD thesis: “Are Treaty of Waitangi Settlements Achieving Their Aims? A case study of the New Zealand Ngai Tahu settlement and the return of pounamu (greenstone/New Zealand jade)”.
- 2 The legal entity that represents the wider Ngai Tahu group or whanui: s 6 of the Te Runanga o Ngai Tahu Act 1996.
- 3 In fact only the natural deposits of pounamu occurring within Ngai Tahu's tribal area were returned to Ngai Tahu by the Pounamu Vesting Act. However, this accounts for the vast majority of the known deposits of pounamu occurring in New Zealand. There are reputed to be small occurrences outside Ngai Tahu's tribal area, notably on D'Urville Island and in the Nelson area. These deposits are not of gem grade.

the Crown under the (previous) Mining Act 1971. The majority of licences actually being worked for the extraction of pounamu to supply the industry expire by the end of the year 2000.

## What is Pounamu?

### *Pounamu as defined in the Pounamu Vesting Act*

The Pounamu Vesting Act defines “pounamu” as including the lithic resources of bowenite,<sup>4</sup> nephrite (also known as jade<sup>5</sup>), semi-nephrite, and serpentine occurring in its natural condition in three areas described in the Schedule to the Act.<sup>6</sup> These serpentine areas are in the Milford/Dart River area, the Cascade River area, and the Pounamu Ultramafic Belt. Traditionally, Ngai Tahu referred to pounamu<sup>7</sup> as including nephrite, bowenite,<sup>8</sup> and sometimes aotea (which is neither nephrite nor serpentine and appears to be particularly valued by South Westland whanau).<sup>9</sup> Aotea is not included in the Pounamu Vesting Act.

It appears from archaeological records that serpentine<sup>10</sup> may have been used by early Maori in the South Island for tools and decoration for a very limited period.<sup>11</sup> Serpentine was replaced by nephrite as soon as it was discovered by Maori and any traditions relating to serpentine were discontinued several hundred years before contact with Europeans.<sup>12</sup> Accordingly, the inclusion of serpentine in the areas specified in the Pounamu Vesting Act goes beyond traditional Ngai Tahu usage. The inclusion of these serpentine areas was a practical response to the fact that in these areas, nephrite and serpentine occur together and it is impossible to isolate nephrite without affecting the serpentine also occurring there.<sup>13</sup> Pounamu industry representatives have indicated that there is the potential to develop a serpentine tile industry in New Zealand (the tiles being used for wall façades on public buildings and in the home, eg, bathrooms) and therefore,

4 Bowenite is a variety of serpentine but for the purposes of this discussion, the term “serpentine” will be used to refer to all types of serpentine *except* bowenite.

5 Beck, R., *New Zealand Jade* (1984), Ch 1.

6 Ngai Tahu (Pounamu Vesting) Act 1997, s 2.

7 Ngai Tahu have many names for pounamu depending on its colour, appearance and type. For example, kahurangi, kawakawa, inanga, tangiwai (bowenite only), auhunga, kahotea, raukaraka and totoweka. See Beck, R., *New Zealand Jade: The Story of Greenstone* (1970) at 55–57.

8 Beck, *supra* note 5 at 8.

9 Personal communication, Poutini Ngai Tahu individuals, August 1998.

10 See footnote 4 for use of “serpentine” in this discussion.

11 Beck, *supra* note 5, Ch 5.

12 *Ibid.*

13 Hawke, J., *Hansard*, 25 September 1997 (1997) at 4595.

the addition of serpentine is a potential “cash cow” for the iwi.<sup>14</sup> The question remains, therefore, whether serpentine has the same value as pounamu (nephrite and bowenite) for Ngai Tahu today and whether any customary values may inhibit the commercial exploitation and use of serpentine in this manner.

### *Origins of pounamu*

There are many Maori traditional accounts of the origins of pounamu, often referring to ancestors being turned into pounamu and to the mauri, or spiritual force, of pounamu being derived from the atua (god) Ngahue.<sup>15</sup> Ngai Tahu kaumatua (respected elder) Teone Taare Tikao (1850–1927)<sup>16</sup> recounted the following history of pounamu:<sup>17</sup>

*Tama*, in the *Tairea* canoe, arrived very early in the South Island. The *karakia* (invocation) for this canoe was not right, and although it safely crossed the stormy sea, the crew was turned to *pounemu* (greenstone) and it was wrecked on the land that it reached. This was Westland, and when she was lost a great wave carried her with a rush up the Arahura River, where, at a place called Hohonu, there she lies turned into a block of *pounemu*, which no one can lift or shift away.<sup>18</sup>

14 Personal communication, Pounamu Industry representatives, August 1998.

15 For example, see New Zealand Geographic Board, *Place Names of the Ancestors: A Maori Oral History Atlas* (1990) at 83–85; Brailsford, B., *Greenstone Trails: The Maori Search for Pounamu* (1984) at 6; Stack, C., *South Island Maoris: A Sketch of their History and Legendary Lore* (1898, reprinted 1984) at 77–78; Taylor, W., *Lore and History of the South Island Maori* (1950) at 186–187; Beck, supra note 5.

16 Teone Taare Tikao was a well respected rangatira (chief) of Banks Peninsula. As a boy he trained as a tohunga (priest, expert) gaining a vast and detailed knowledge of his culture at a time when much of this knowledge was lost. He was also a great visionary and leader of his people. At one stage he was leader of the Kotahitanga pan-tribal movement which attempted to establish a dual parliamentary system. In his later years Teone Taare Tikao began to write down the legends and history of his iwi and it was during these later years of his life that he spoke with Herries Beattie.

17 Beattie, H. & Tikao, T., *Tikao Talks: Ka Taoka o te Ao Kohuta: Treasures from the Ancient World of the Maori told by Teone Taare Tikao (1850–1927)* (1939, reprinted 1990) at 60 (original emphasis). James Herries Beattie (1881–1972) collected and recorded a vast amount of information about the life and culture of the southern Maori peoples throughout his lifetime. He published ethnological works on this subject throughout his career. Notably, in 1920 Beattie was employed by the Otago Museum to travel around the South Island to collect information about southern Maori, such as their traditions, history and place-names. The information collected during this latter project has recently been edited by Dr Atholl Anderson: Beattie, J. H. (1920) in Anderson, A., *Traditional Lifeways of the Southern Maori* (1994). The original manuscripts are held by the Hocken Library, Dunedin.

18 Note that “pounemu” is an old dialectical spelling of pounamu.

From a geological perspective, pounamu is formed in the Southern Alps.<sup>19</sup> Millions of years ago certain igneous rock types flowed between sedimentary rock layers beneath the earth's surface. These rocks were then subject to intense folding and pressure, causing the crystals to realign, twist and entangle in a process known as felting.<sup>20</sup> It is the process of felting that gives nephrite its characteristic hardness. If re-crystallisation is not complete, softer semi-nephrite is formed. Serpentine does not display this re-crystallisation and felting, and therefore is not true nephrite.<sup>21</sup>

In the Southern Alps the felted layers of pounamu, known as pods, have been subject to erosion and glacial action over many years, causing the pods to break up. Individual boulders and stones of pounamu are then washed down the rivers and streams that cut through the Southern Alps.<sup>22</sup> Some pounamu pebbles are washed out to sea, tumbled by wave action, carried on the tides and finally washed up on the West Coast beaches. Punakaiki seems to be the northern limit for beach-found pounamu.<sup>23</sup>

There are seven major fields of pounamu in New Zealand, all of them situated close to the alpine fault in the South Island: Nelson, Westland, South Westland, Wakatipu (including the Dart), Wanaka, Livingstone and Milford.<sup>24</sup> The major sources, both today and in pre-European times, are the West Coast fields. The Wakatipu source was also important in pre-European times.<sup>25</sup>

### The Ngai Tahu Claim

In 1986 Ngai Tahu lodged a claim with the Waitangi Tribunal alleging a number of historical breaches of the Treaty of Waitangi.<sup>26</sup> The Tribunal upheld the majority of Ngai Tahu's claims in 1991 saying:<sup>27</sup>

19 Brailsford, *supra* note 15 at 1, 10.

20 *Ibid*; Beck, *supra* note 7 at 59–60; Beck, *supra* note 5 at 143–144.

21 *Ibid*.

22 Brailsford, *supra* note 15; Hanna, N. & Menefy, D., *Pounamu: New Zealand Jade* (1995). Pearce claims that most of the pounamu found in Westland was deposited not by rivers but by ice during periods of glaciation: Pearce, G., *The Story of New Zealand Jade* (1971), at 15.

23 Brailsford, *supra* note 15 at 14.

24 Hanna & Menefy, *supra* note 22; Beck, *supra* note 5, Ch 2.

25 Beck, *supra* note 5 at 44.

26 The Ngai Tahu claim was known as the "Nine Tall Trees", referring to the eight major land purchases (with the three Banks Peninsula purchases considered as one), and the mahinga kai (those places where food was produced or procured, which includes an extensive range of resources in and on the land, forests, lakes, rivers, sea and air). Note that Ngai Tahu's sea fisheries claims were dealt with separately by the Tribunal: Ngai Tahu Sea Fisheries Report 1992 (Wai 27); 5 WTR.

27 Waitangi Tribunal, *Ngai Tahu Report 1991* (Wai 27), Vol 3 at 1051; 4 WTR 527.

The Tribunal has found on the evidence before it that many of the Claimants' grievances arising out of the eight Crown purchases including those relating to mahinga kai, have been established. Indeed the Crown has properly conceded that it failed to ensure Ngai Tahu were left ample lands for their present and future needs. The Tribunal cannot avoid the conclusion that in acquiring from Ngai Tahu 34.5 million acres, more than half of the land mass of New Zealand for £14,750 and leaving them with only 35,757 acres, the Crown acted unconscionably and in repeated breach of the Treaty of Waitangi.

The Tribunal held that Ngai Tahu was therefore "clearly entitled to very substantial redress",<sup>28</sup> which would be likely to comprise "a mixed set of remedies which reflect not only the nature and extent of the grievances but present day realities".<sup>29</sup>

Specifically in relation to pounamu, the Tribunal upheld Ngai Tahu's claim that the Crown had failed to protect its right to retain possession and control of all pounamu in its tribal area. This was held to be a breach of the Treaty principle requiring the Crown to protect Ngai Tahu's right to retain pounamu as a taonga and to respect Ngai Tahu's tino rangatiratanga (authority) over taonga, contrary to Article II of the Treaty.<sup>30</sup> The Tribunal made a number of specific recommendations regarding pounamu, including that all Crown-owned pounamu situated in the Ngai Tahu rohe (tribal area) be returned to Ngai Tahu, subject to all existing mining licences.<sup>31</sup>

### The Ngai Tahu Settlement

Negotiations for a comprehensive settlement of all Ngai Tahu claims began in September 1991. Both Ngai Tahu and Crown negotiators describe the progress of these initial negotiations as very slow, and hampered by the fact that the Crown had no policy framework from which to work.<sup>32</sup> Negotiations broke down in August 1994, around the same time that the National government announced its "Fiscal Envelope" policy which capped the amount the Crown would pay in settlement of *all* Maori historical grievances at \$1,000 million.

It was not until February 1996 that moves were made to re-establish settlement talks.<sup>33</sup> Given the failure of the first round of negotiations, there was an obvious

28 Ibid.

29 Ibid Vol 3 at 1052; 4 WTR 528. The Tribunal also noted the need for an appropriate tribal structure with a legal personality: ibid Vol 3 at 1052-1053; 4 WTR 528-529.

30 Ibid Vol 1 at 127-130; 3 WTR 319-322.

31 Ibid Vol 3 at 1061-1062; 4 WTR 537-538.

32 Sandra Cook, Ngai Tahu negotiator, Lecture, Faculty of Law, University of Otago, 19 May 2000.

33 The Waitangi Tribunal's *Ngai Tahu Ancillary Claims Report* was released in May 1995, and previously, the Tribunal had released its *Ngai Tahu Sea Fisheries Report 1992*.

need for the Crown to demonstrate its good faith in a tangible way. The first step, from Ngai Tahu's point of view, was to establish a tribal legal entity having power to contract with the Crown and generally to administer the tribe's affairs.<sup>34</sup> This achieved by the passage of the Te Runanga o Ngai Tahu Act in April 1996, the parties were able to progress settlement negotiations to the stage of a Deed of "On-Account" Settlement, signed on 14 June 1996. Amongst other things, the Deed provided for the return of pounamu to Te Runanga o Ngai Tahu.

The return of pounamu to Ngai Tahu at this stage of the settlement negotiations was particularly important and symbolic. Pounamu is a taonga of Ngai Tahu, representing the mana (status, authority) of the tribe. As noted above,<sup>35</sup> pounamu also represents the ancestors of Ngai Tahu through various tribal histories and is therefore integral to Ngai Tahu identity. In pre-European times, pounamu was the hardest material known to Maori and accordingly was highly valued as a material for tools, weapons and adornment.<sup>36</sup> For this reason, it was traded throughout the North and South Islands. Tipene O'Regan (Ngai Tahu settlement negotiator) describes pounamu as "a treasure that will help to sustain our ancient culture as few things can".<sup>37</sup>

Accordingly, the promise of the return of pounamu signified to Ngai Tahu the Crown's acceptance of its rangatiratanga in relation to the resource and their role as kaitiaki (caretaker) of the stone, and so was an essential element in a settlement package intending to restore Ngai Tahu's mana as a people. The return of pounamu at the beginning of the second phase of negotiations was also particularly significant to the wider Ngai Tahu whanui, or tribal group, and assisted the Ngai Tahu negotiating team in convincing the wider whanui that the Crown was acting in good faith and that a final settlement was indeed possible. As stated by Ngai Tahu:<sup>38</sup>

The Ngai Tahu Negotiating Group believes that the delivery by the Crown on its promise to return Pounamu is a very significant pointer to the future. It demonstrates the Crown's determination to act honourably in resolving the Ngai Tahu Claim. It bodes well for the overall settlement, should Te Runanga o Ngai Tahu decide to accept the offer.

Whilst the Crown acknowledged pounamu's beauty, for it pounamu was more trouble than it was worth. Pounamu had a low monetary value (it cost the Crown

34 Previously, the tribe's affairs were administered by the Ngai Tahu Maori Trust Board, under which the tribe was accountable to the Minister of Maori Affairs rather than members of the tribe (Maori Trusts Boards Act 1955), and later, Te Runanganui o Tahu Incorporated.

35 See text at notes 15 and 17.

36 Beck, *supra* note 5 at 2.

37 Te Runanga o Ngai Tahu, *1997 Annual Report* (1997) at 25.

38 Te Runanga o Ngai Tahu, *Te Karaka Special Edition: Crown Settlement Offer Consultation Document from the Ngai Tahu Negotiating Group*, (1998) at 13.

more to administer the relevant mining licences than it collected in royalties from those licences) and the Crown found it extremely difficult to monitor existing licences and the resource generally.<sup>39</sup> The Crown believed that Ngai Tahu would be a better manager of pounamu — Ngai Tahu valued it in a way that the Crown would never do.<sup>40</sup> Furthermore, local Ngai Tahu were better placed to keep a watchful eye on pounamu deposits than the Crown administration could ever be.

The Ngai Tahu (Pounamu Vesting) Act was passed by Parliament on 25 September 1997,<sup>41</sup> shortly after the Crown made its final settlement offer to Ngai Tahu,<sup>42</sup> and came into effect on 29 October 1997.

### **Ngai Tahu's Forthcoming Management Plan**

Whilst most minerals are allocated by the Crown under the Crown Minerals Act 1991, pounamu is now managed by Ngai Tahu. Ngai Tahu is currently developing a pounamu management plan which will presumably provide mechanisms for access to the resource. In March and April 1999, Ngai Tahu's social and cultural arm, Ngai Tahu Development Corporation, undertook extensive consultations with Ngai Tahu members and the general public to ascertain the extent of private interest in pounamu and stakeholder views, both from within the iwi (tribe) and outside, on how pounamu should be managed. Matters discussed at the tribal gatherings and public meetings included: the value of pounamu to the iwi and the wider New Zealand public; whether cultural values should restrict the commercial use of pounamu; mechanisms for any public access to pounamu; the appropriate limits for a customary take; conservation of pounamu; collecting pounamu in National Parks — for commercial purposes or for cultural purposes; and who within the iwi should manage pounamu.<sup>43</sup> The results of this process are being taken into account by Te Runanga o Ngai Tahu in developing its policy on pounamu management. Importantly, Ngai Tahu has indicated that its customary values will inform this process.<sup>44</sup> A draft management plan is expected to be released this year (2000).

39 Personal communication, Crown Official, Ministry of Economic Development (formerly Ministry of Commerce), April 2000.

40 Ibid.

41 Act No 81 of 1997.

42 The Crown's final settlement offer was made on 23 September 1997. For a detailed discussion of the settlement and consequent legislation, the Ngai Tahu Claims Settlement Act 1998, see Dawson, J., "A Constitutional Property Settlement Between Ngai Tahu and the New Zealand Crown", in McLean, J. (ed), *Property and the Constitution* (1999) at 224–238.

43 O'Regan, G. & Gibbs, M., "Pounamu Project: Consultation on Iwi and Community Values", [www:http://ngaitahu.iwi.nz/pounamu](http://ngaitahu.iwi.nz/pounamu), May 1999.

44 Ibid.

## Return of Ownership

The principal purpose of the Pounamu Vesting Act was to vest ownership of all Crown-owned pounamu occurring in its natural condition in Ngai Tahu's tribal area<sup>45</sup> and the adjacent territorial sea, in Te Runanga o Ngai Tahu (s 3). Accordingly, Te Runanga o Ngai Tahu now owns and controls the vast majority of, but not *all*, pounamu in its tribal area.

Because the Pounamu Vesting Act vests ownership of pounamu *occurring in its natural condition*, pounamu collected or mined before October 1997 (when the Act came into force) is not affected by the Act.<sup>46</sup> Such pounamu remains the property of the owner at the time the legislation was enacted. This upholds one of the Crown's general policies that settlements will not affect existing private property rights.<sup>47</sup>

Secondly, the Pounamu Vesting Act vests only *Crown-owned* pounamu in Ngai Tahu.<sup>48</sup> Not all pounamu occurring in its natural state is Crown-owned. Except for gold and silver,<sup>49</sup> early land alienations generally did not reserve mineral rights to the Crown and accordingly, minerals on or under these Victorian titles are owned by the proprietor of the land.<sup>50</sup> Later, under successive Land Acts,<sup>51</sup> the Crown began reserving to itself the rights to minerals on the alienation of land, and since 1949 any Crown alienation has reserved all mineral rights including rights to pounamu.<sup>52</sup> Therefore, Victorian titles are not affected by the Pounamu

45 As defined by s 5 of the Te Runanga o Ngai Tahu Act 1996.

46 Ngai Tahu (Pounamu Vesting) Act 1997, s 3.

47 Office of Treaty Settlements, *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals* (1994); Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (1999).

48 Ngai Tahu (Pounamu Vesting) Act 1997, s 3.

49 A Crown prerogative right to all gold and silver appears to have been first asserted within the lands of the Realm of England in the Case of Mines in 1567 and was applied in New Zealand as part of the English common law system: Ackroyd, P., "Mining Legislation and the Reservation of Mineral Resources in New Zealand" (1988) NZLJ 41. See also Ward, A., *The National Overview: Waitangi Tribunal Rangahaua Whanui Series*, A Report Commissioned by the Waitangi Tribunal (1997), Vol 2, Ch 10 for a discussion of sub-surface resources in land held under customary title.

50 Ibid; Hinde, G. W., McMorland, D. W., Campbell, N. R. & Grinlinton, D. P., *Butterworths' Land Law in New Zealand* (1997) at 893 (para 12.008); Beyer, C., "The Ownership of Minerals in New Zealand" in Kelly, E. (ed), *Mineral and Petroleum Development in New Zealand: The Commercial Framework* (1987).

51 Land Act 1892, s 121 (resumption of land); Land Act 1924, s 135 (resumption of land); Land Act 1924, s 153 (reservation of land from sale); Land Act 1948, s 59 (all minerals reserved to the Crown).

52 Section 59 of the Land Act 1948: Somerville, R., "An Analysis of New Zealand's New Mining Law: The Crown Minerals Act 1991", *Resource Management* (1991), Vol 2, B3-B18 (28/10/93), esp at B7.



Vesting Act and any pounamu in or on such land remains those land owners' private property. Once again private property rights are protected.

The third "exception" to Ngai Tahu control of pounamu is a temporary one. Following the recommendations of the Waitangi Tribunal,<sup>53</sup> the Pounamu Vesting Act (s 4) preserves any existing rights and privileges under the Crown Minerals Act 1991 (or its predecessors).<sup>54</sup> Accordingly, all existing mining licences continue until they expire, and the Crown continues to collect the royalties from these licences which it then passes on to Te Runanga o Ngai Tahu.<sup>55</sup> At present, the only existing mining licences being actively worked for the extraction of pounamu for industry expire in November 2000.<sup>56</sup>

Finally, Te Runanga o Ngai Tahu does not own the pounamu situated in the Arahura River on the West Coast of the South Island. This pounamu was initially vested in Te Runanga by the Pounamu Vesting Act and subsequently transferred to the Mawhera Incorporation.<sup>57</sup> This reflects the recommendation of the Waitangi Tribunal<sup>58</sup> and a long-standing arrangement between Te Runanga o Ngai Tahu (and its predecessor the Ngai Tahu Maori Trust Board) and the Mawhera Incorporation.<sup>59</sup>

### Pounamu — A Private Property Right?

A number of resource management implications arise from the fact that Te Runanga o Ngai Tahu now has *private property rights* in pounamu.

#### *The Arahura River and the Mawhera Incorporation*

One implication of the return of pounamu as private property is that Te Runanga o Ngai Tahu can transfer its property rights. As noted above, Te Runanga o Ngai Tahu has transferred the pounamu occurring in the Arahura River, a particularly

53 Waitangi Tribunal, *supra* note 27, Vol 3 at 1061–1062; 4 WTR 537–538.

54 See the definition of "existing privilege" in s 106 of the Crown Minerals Act 1991.

55 Ngai Tahu (Pounamu Vesting) Act 1997, s 4; see also Bradford, M., *Hansard*, 25 September 1997 (1997) at 4590.

56 Crown Minerals policy for the decade preceding the Ngai Tahu settlement had been to issue no permits to mine pounamu until the settlement of Ngai Tahu's claims. This practice is now confirmed by s 5 of the Ngai Tahu (Pounamu Vesting) Act 1997.

57 A Maori Incorporation governed by Part XIII of Te Ture Whenua Maori Act 1993 and the Maori Incorporations Constitution Regulations 1994.

58 Waitangi Tribunal, *supra* note 27, Vol 1 at 127–130; 3 WTR 319–322.

59 Personal communication, Te Runanga o Ngai Tahu representative, May 1998; see also Recital F, Ngai Tahu (Pounamu Vesting) Act 1997.

significant pounamu bearing river for Poutini (West Coast) Ngai Tahu, to the Mawhera Incorporation.

The Mawhera Incorporation was established<sup>60</sup> in 1976 to administer certain Maori Reserve land, which had previously been administered by Crown agencies, sometimes contrary to the wishes and interests of the beneficial owners.<sup>61</sup> When the land in question was transferred to the newly formed Incorporation, land owners were allocated shares in the Incorporation commensurate with the value of their land being transferred. These shares can be bought and sold within a preferred class of descendants of the original land owners.<sup>62</sup>

Over time, shares in the Mawhera Incorporation have changed hands resulting in a situation today where certain individuals and whanau (family) groups have accumulated substantial shareholdings in the Incorporation. Given that most decisions of the Incorporation are made by share vote, these individuals and groups now control the Incorporation. Accordingly, the Mawhera Incorporation does not necessarily represent the wider Poutini Ngai Tahu group.

In addition, because rights to the land and other assets held by the Incorporation are dependant on shareholding, those whanau and individuals who sold their shares in times of economic need no longer have rights to Incorporation property. This situation is problematic considering that the Arahura River, its beds and banks, and the pounamu it contains, have been vested in the Incorporation.<sup>63</sup> There are quite a number of tangata whenua (indigenous people of the land) who claim a customary or birth right to walk up the River and collect pounamu as their ancestors did and their families continue to do today. If they do not own shares in the Mawhera Incorporation, a walk up the River without permission could be an act of trespass, and to collect pounamu in a traditional way could be theft. Accordingly, many Arahura tangata whenua have no legal right to exercise what they believe to be their customary right to collect pounamu on the Arahura River.

60 Constituted by s 3(1) of the Mawhera Incorporation Order 1976, no 1976/127. The Order was made pursuant to s 15A of the Maori Reserved Land Act 1955 and came into effect from 31 May 1976. The Incorporation was originally governed by the provisions of Part IV of the Maori Affairs Amendment Act 1967 and is now governed by Part XIII of Te Ture Whenua Maori Act 1993 and the Maori Incorporations Constitution Regulations 1994.

61 See generally Sheehan, B. (Chairman), *Report of Commission of Inquiry into Maori Reserved Land* (1975).

62 Sections 148 and 261 of Te Ture Whenua Maori Act 1993.

63 Section 27 of the Maori Purposes Act 1976; ss 324–326 of the Ngai Tahu Claims Settlement Act 1998; and the Pounamu Vesting Act 1997.

### *Enforcement*

A further implication of Ngai Tahu's rights to pounamu being private property rights relates to enforcement mechanisms.

Theft of pounamu is an ongoing problem. Pounamu is generally located in rugged inaccessible country. However, it is relatively simple to saw up large boulders in situ and helicopter out chunks of rock. The black market in pounamu is well established (indicating the Crown's lax attitude toward policing this mineral in past years) and continues to account for a large proportion of the trade in pounamu for the carving industry.

As pounamu is the private property of Te Runanga o Ngai Tahu, the legal mechanisms available to the iwi for enforcement are the usual private property based civil and criminal actions, notably conversion and theft.<sup>64</sup> Where pounamu is located in or on land with special status, such as National Park land or reserve status land, additional avenues may be available under applicable legislation.<sup>65</sup> Ngai Tahu's present policy is that, apart from the existing mining licences, no pounamu may be collected except with the prior permission of the local kaitiaki Runanga.<sup>66</sup> This essentially allows for a customary take of the stone. Anyone taking pounamu without this prior approval is committing an act of theft. This includes collecting small beach and river pounamu pebbles, known as "floaters". West Coasters, both Ngai Tahu and non-Ngai Tahu, have a well developed tradition of walking the beaches and rivers in search of floaters and taking home what they find. For some Pakeha, this tradition goes back five or six generations. West Coasters appear reluctant to stop this practice, despite the threat of criminal action. This issue is a sensitive one which must be handled carefully by Ngai Tahu in its management plan.

Ensuring compliance with any Ngai Tahu management policies or plan will be a major issue for the iwi. Te Runanga o Ngai Tahu is currently investigating other enforcement mechanisms including practical measures concerning the availability and supply of pounamu to the general population. They have employed a Pounamu Protection Officer, situated on the West Coast. In the absence of further legislation, the Pounamu Protection Officer only has the powers of an ordinary person and cannot, for example, undertake searches of individuals (or their property) alleged to be involved in pounamu theft. This remains the role of the police.

64 Query whether it is easier to enforce a private property right than to ensure compliance with the Crown Minerals Act 1991.

65 For example, see the powers of enforcement under Part VII of the National Parks Act 1980 and ss 93–105 of the Reserves Act 1977.

66 Te Runanga o Ngai Tahu, *1998 Annual Report* (1998) at 6.

Further, any enforcement mechanism must be able to deal with the fact that many in the industry already (legitimately) possess large stores of the stone and are able to freely trade this resource. There are interesting problems of proof — it is very difficult to identify the source of any particular piece of pounamu with any certainty.<sup>67</sup> Enforcement mechanisms need to account for such pounamu legitimately acquired prior to the commencement of the Pounamu Vesting Act or under an existing mining licence, together with any customary take of pounamu and the resulting trade in stone acquired customarily (for example, by Mawhera Incorporation shareholders).

### *Access and conservation*

A third implication of the return of pounamu as private property is that whilst Ngai Tahu now owns all natural deposits of the stone, those property rights do not extend to control of the land where deposits occur (except in the special case of the Arahura River).

This fact is significant when one considers that the majority of the deposits with commercial potential occur on land administered by the Department of Conservation, some of it in National Parks. For example, pounamu is found within the Fiordland and Mt Aspiring National Parks. Generally, under the National Parks Act 1980 (s 60) it is an offence to remove any stone or mineral from a National Park area except under authorisation of the Minister of Conservation or by any applicable bylaw. Accordingly, Ngai Tahu will have to negotiate case-by-case arrangements to take pounamu from National Parks.

In addition, arrangements will be required to access Crown-owned land.<sup>68</sup> In granting an access arrangement the relevant Minister (which for National Park land will be the Minister of Conservation) must have regard to the objectives of the Act under which the land is administered, the purpose for which the land is held by the Crown, any relevant policy statement or plan, and the interests of the mineral owner (amongst other things). Further, s 4 of the Crown Minerals Act requires that the principles of the Treaty of Waitangi be regarded in the exercise of powers and functions under the Act.<sup>69</sup> Accordingly, there is the potential for a conflict of values between Ngai Tahu's possible desire to collect pounamu in National Parks for cultural purposes, and even more so for commercial purposes,

<sup>67</sup> Although see Wood, J., "Forensic Tools Emerge to Detect Gold Theft" (1988) 48, *The New Zealand Mining Journal* 6 suggesting that advances in forensic mineral analysis are making it easier to prove theft of gold and other minerals such as pounamu.

<sup>68</sup> Section 61B of the Crown Minerals Act 1991.

<sup>69</sup> Similarly, s 4 of the Conservation Act 1987 requires this Act to be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi.

and the wider public's interest in preservation of the natural values for which National Parks have been established. It is also important to note that the Resource Management Act 1991 will regulate the environmental effects of any mining of pounamu.

### **Concluding Remarks**

The return of pounamu to Ngai Tahu was an integral part of the settlement of Ngai Tahu's historic claims against the Crown for breaches of the Treaty of Waitangi. Ngai Tahu now owns and controls the vast majority of the natural deposits of pounamu in its tribal area. However, pounamu found in or on land held under Victorian titles, any pounamu acquired prior to the Pounamu Vesting Act coming into force in October 1997, and existing mining licences are not affected by the Act. These private property rights are preserved.

This note has also highlighted some of the environmental management implications of the return of pounamu as a private property right. Mention has been made of the management implications of Ngai Tahu's ability to transfer the resource, issues of enforcement, access to the land where pounamu naturally occurs, and the potential for a conflict of values if collecting of pounamu is to take place in National Parks. All of these matters must be addressed in Ngai Tahu's forthcoming pounamu management plan. The issues raised illustrate that the conversion of a Crown-owned mineral to privately owned property has several implications requiring careful consideration before the return of pounamu is used as a precedent in the settlement of other historic grievances, both of Maori and indigenous peoples in other countries.

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