

## *Fisheries - A Case Study of an Outcome*

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### HE KORERO RUARUA

Ko te korero timatatanga he mihi ki a ratau kua wheturangitia. Na reira, ki nga mate, haere atu ra ki te huihuinga o te Kahurangi, ki te ara whaiti o Tahekeroa, kia oti atu ra kotou ki kora.

Engari tatau, nga toenga muka tangata nei, e whai atu ana ki muri i a ratau, e hapai ana nei i o ratau tumanako, e ngaki ana i o ratau werawera, e rapu ana kia pehea e ora, tipu tonu ai ra nga tikanga a Iwi, a hapu, whanau ranei. Tena tatau katoa.

Otira, tena tatau i tenei tau hou. Kei ki mai etahi, he tau tenei mo te reo rangatira. Taku e ki atu, ko nga ra, nga wiki, nga marama, nga tau katoa, te wa mo te reo Maori. Heoi ano, me mihi atu ki nga mahi, haunga ano nga tangata, e whakanuitia ana i to tatau reo rangatira.

The introductory words of respect and greeting, offered in my mother tongue, need no repeating. Sir Ivor Richardson, colleagues, fellow New Zealanders, visitors, greetings.

Acknowledging that most of us are not as fortunate to be as gifted as Shane Jones in both languages my comments this morning will be, predominately, in English. We should note the irony of that situation in this year, proclaimed to be a year of Maori language and the nature of the subject matter. Time, kohanga reo, hope for educational policies to give full credence to kura kaupapa Maori and the durability of the people and the language give hope that when my granddaughter is addressing a similar gathering she will do so without the same constraints.

### FISHERIES - AN OUTCOME?

We need to put the fisheries matters into the wider context of Maori people's endeavour as well as the prosecution and negotiation of claims under the Treaty of Waitangi. This is because to gain lasting insights and to learn from the fisheries experiences we have to be able to understand the underlying motivations of the people and their authorising environments.

In the next session we will discuss the question of where to from here? I would like to start our discussion on a similar vein. My grandfather used to say that a man who doesn't know where he is going will always get there. We need to understand what the

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\* Commissioner, Treaty of Waitangi Fisheries Commission - Te Ohu Kai Moana.

ultimate goal is for Maori people. We need to understand the various expressions of how that goal is achieved, including the extent to which the assertion of a property right is distinguishable from the need to distribute wealth irrespective of the origins of the assets. We also need to understand what resources can be deployed along the way and how the deployment can be optimised. We need these understandings to be able to hack through the jungle of prejudice, ignorance and envy to find some clear places to continue to grow our nationhood.

This discussion of the issues is in two parts. The first takes a general "bird's eye" view of the parameters of the search for the insights described above. The second takes a more detailed "worm's eye" view or case study of certain aspects of the Te Ohu Kai Moana experience in traversing the continuum of effecting robust settlement results.

## I THE PARAMETERS

### A *Survival is the End Goal*

Survival is the fundamental underlying driver. Everything we do is directed to that ultimate goal. It is not a goal peculiar to Maori people. It is the law of commerce and even expressly articulated in the mission statement of some large corporations. There is a particular complexion given to the term in the Maori context - we are talking about cultural survival. We can define culture as the different expressions of the shared interpretations, understandings and models for strategic guidance, that is tikanga Maori or tikanga Iwi. Survival means maintaining and growing that full cultural repertoire.

#### 1 *Cultural Integrity and Sovereignty*

The first imperative is our identity. This is easily expressed in the oral literature common to all Iwi, to all Maori people. The following are simple examples.

Ko wai koe?	Ko Waiapu te Awa
No hea koe?	Ko Hikurangi te Manuga
I ahu mai koe i hea, a,	Ko Ngati Porou te Iwi
E ahu ana koe ki whea?	

We establish our identity in terms of our kin group, icons and territory. These origins help us to organise the present and provide a basis for facing the uncertainties of the future.

Identity, being a relative concept, means being different from others. Maori from non-Maori, Iwi from Iwi, hapu from hapu and so on. There is a particular emphasis on the kin group as the basis for identity. In the words of the late John Rangihau, national and Tuhoe leader:<sup>1</sup>

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1 J Rangihau "Being Maori" in M King (ed) *Te Ao Hurihuri: Aspects of Maoritanga* (Reed Publishing Group, Auckland, 1992) 190.

My being Maori is absolutely dependent on my history as a Tuhoe person as against being a Maori person .... I have a faint suspicion that Maoritanga is a term coined by the Pakeha to bring the tribes together. Because if you cannot divide and rule, then for tribal people all you can do is unite them and rule. Because then they lose everything by losing their own tribal histories and traditions that give them their identity.

There is an earnest desire by Maori people to have control over the maintenance and growth of that cultural repertoire, that is, cultural sovereignty. This is an integral part of rangatiratanga. Tribal expressions of that ambition take many forms. One that I am familiar with is the Ngati Porou vision statement:

Ko te whakapumau i te  
 Mana motuhake o Ngati Porou  
 i roto i tona Mana Atua,  
 Mana Tangata, Mana Whenua<sup>2</sup>

## 2 *Economic Sovereignty and Economic Development*

The second imperative is economic development. We must have the physical means to sustain the cultural integrity. That is economic sovereignty. This means overcoming the Pakeha power of veto over our lives. Taking charge of our destiny means laying a pathway to the future based on our inherited intellectual and physical capital. Thus economic development is a means to an end. It requires access to that physical capital.

The inevitable trade-offs that economic development generates will be made in a framework that includes the cultural survival imperative. For example, growth or basic needs. However, one thing is clear: with the very limited resources and infinite calls on them we must ensure that the most sustainable and efficient combination of elements possible, considering the goals, is employed. The key is control and the point in the decision chain which is best able to measure the opportunity costs of the decision.

All the international work in this area supports the New Zealand experience:<sup>3</sup>

The more control natives are given over development and the more efficiently they produce, the faster they will become self sufficient.

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2 To assert the sovereignty of Ngati Porou, through our spirituality, our people, and our physical resources.

3 WC Stevens *Factors Determining Success and/or Failure for Economic Development Projects on Indian Reservations in Canada* (John F Kennedy School, of Government, Harvard University, 1988).

For an indigenous flavour:<sup>4</sup>

E Koro, you cannot lead a haka from Wellington.

The nexus between the cultural and economic activities is accountability. Accountability for stewardship and results must be a permanent feature of the whole process. Appropriate economic development will build in rigorous accountability mechanisms so that the deciders are the same people who bear the opportunity costs decisions. Without that proximity the incentive structures become misaligned.

We must also be concerned to distinguish between the internally generated spontaneous development from within a community and the exogenous induced development. The latter is directed to accelerating the rate of growth and change. Hence it must be based on sound foundations composed of the knowledge base of the people affected.

### 3 *Property Right or Wealth Distribution*

Property right or wealth distribution is the next key factor to be understood. The answers are to be found in the cultural factors, legal issues, history of previous ownership and circumstances of transfer. In the case of the fisheries assets, Te Ohu Kai Moana and the Iwi may well be in the process of defining the nature and extent of the rights, juxtaposed as they are. There are differing views on how well the process is going and who is best equipped to make the decision. I would observe that rarely are such important questions capable of resolution on a simple two dimensional plane. There are a number of significant discussions to be concluded on the matter.

### 4 *Implementation Issues*

#### (a) *Rights of Participation*

Answering the threshold question concerning property right or wealth distribution identifies the set of potential beneficiaries or recipients. For example, the Canterbury Storm Relief Fund is only available to those in the affected area. The "ownership" is thus defined and the public good is geographically specific in intensity but spread over the nation on a mutually reciprocating basis. We expect the same treatment when our regions are hit by such events of need. Housing, health, education and welfare services are similar activities. Multilateral aid programmes operate in a similar way. Those situations are quite different from one where there is a specific basis for the definition of the "ownership" or participation. In the latter situation the cultural and legal factors will produce a different definition. These issues should not be obfuscated by the fact that the subsequent implementation issues are the same. For example, the funds paid to Ngati Whatua o Orakei belong to that group and that group alone in recognition of the denial of their property rights. Having made that distinction with the Crown it is up to Ngati Whatua o Orakei to determine how, what, where, when and to whom the benefits

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4 Personal advice by Pine Taiapa, master carver, to Koro Dewes and Api Mahuika.

will be distributed. Similarly Ngati Tuwharetoa's share of fishing licence fees and Te Arawa's fund concerning the bed of their lakes. Thus, having settled the general and specific rights of participation the issues then become how the optimum result is defined and achieved.

*(b) Distribution for Optimum Results*

Distribution of the benefits must be carried out with the view to achieving the optimum results. Definition of that elusive state of grace will depend on the nature of the resources and the situation of the participating community. However, there are certain attributes that are essential to achieve optimum results.

For instance, the methodology and structures which establish the system of trade-offs must be appropriate to the values of the community. It is a universal characteristic to readily and intentionally sacrifice an economic good for a perceived one and vice versa. The sale of land versus maximum financial return in Maori society or the sale of an electoral vote in western democracies. The lesson from our own and overseas experience is to create in the image of the community by allowing the community to do the creating, not the biblical approach of creating in the image of the exogenous influence. If we accept, as we must, that institutions are the product of collective action, then it is critical that we also recognise that the same societal institutions which effectively channel effort into productivity, pay off the capital invested and organise the division of labour, will also determine the paths of the development.

Also, the deployment of resources in a manner that secures the appropriate economies of scale and scope is an important part of obtaining optimum results. In the Maori fisheries area it has been argued that the most efficient results are gained by deployment to two or three centralised agencies, perhaps even to the regional level. This argument is based on the view that economies of scale in the industry require a minimum critical mass for efficient revenue generation and that the capital accumulated will also provide further economies of scale.

There are a number of limits on the ability to strike that level, the principal one being lack of information. Reliable information on a wide sample does not exist in the New Zealand fishing industry to authoritatively establish the point at which the marginal revenue contribution is zero, that is, where the law of diminishing returns makes the production of additional outputs uneconomic. Further, the New Zealand experience suggests that smaller, focused companies are at least as good, if not better, at providing a return on shareholder funds.

This is an open question still and will take a lot of work if it is to be answered. The outcomes would need to be measured against the overall imperatives of survival discussed above. The argument itself tends to run counter to the opportunity-cost-driven deployment that has been supported in overseas development experience. However, there is clear value to be gained in cooperative endeavour on the use of information or particular resources such as market penetration. Perhaps even some rationalisation on product development and production.

One point is agreed. Given that the resources and knowledge set the upper bounds on economic development, education in the broadest sense is the most effective long term investment of economic resources. A number of Iwi are acting accordingly.

(c) *Capital or Income*

If the law allows the choice, deciding between a distribution of capital or income very much depends on how the optimum results are defined. Given that one of the components of cultural survival is economic sovereignty there will be a bias toward capital distributions. In situations where wealth redistributions are predominant the emphasis is likely to swing in the other direction.

The tension between capital distribution and maintaining the capital source of funds can only be resolved in the context of the resource pool and the definition of optimum results. One of the factors will be the effect of economies of scale and scope compared with the diseconomies and incentive alignment of the decision makers as discussed above. The choice between permanent or temporary distributions involves similar issues.

(d) *Uncertainty and Time*

Both sets of decisions above demonstrate the need to deal with the effects of uncertainty and time. It must be noted that even a decision to do nothing is still an allocation of resources - the allocation is away from the opportunity that was otherwise offered. Furthermore, all decisions will be made without perfect information and the cost of gathering the information to eliminate the uncertainty must be taken as included. Use of probabilistic decision analysis will provide the means to address these issues.

Some form of decision analysis is required to avoid default decisions that are not optimal. It is also needed to avoid decisions that are based on incorrect assumptions or invalid conclusions. In essence, this process involves assigning a probability and a value to an event or outcome. It thus enables the options to be prioritised and a decision made accordingly.

## 5 *Implementation*

"Innovation is one per cent inspiration, ninety-nine per cent perspiration."<sup>5</sup> Development is a dead issue unless the implementation is done properly. This will involve institutional capacity, organisational design, asset identification, ownership identification, dispute resolution, performance reviews, accountability mechanisms. All of these factors are locality-, resource- and, most importantly, people-specific.

Having worked through the parameters that apply and the strategic decisions, these tactical assessments and operational decisions provide the basis for the development. There are a large number of good and bad models to learn from.

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5 Attributed to Thomas Edison.

## II THE SPECIFICS

The settlement of claims against the Crown is three dimensional. Iwi and the Crown, with Iwi represented by a form of organisational leadership; Iwi and Iwi, if the settlement is not desegregated at the earlier stage and possibly with all claims if the Crown adheres to the current policy proposals; and Iwi to hapu, whanau and individual.

This part of the address discusses the three dimensions with particular reference to fisheries issues. The more generic discussion above is applied to specific issues.

### A *Iwi and the Crown*

Where resources are involved, this can be seen as the resource acquisition stage. The record of the fisheries relationship between Iwi and the Crown or individual members and the Crown is, at best, mixed. It has been beset from time to time by increasingly less clumsy denials by the Crown of either the existence or the validity of any rights in the fishery.<sup>6</sup> The effluxion of time has been characterised by a constant reiteration by Maori leaders of their people's claims and recourse to whatever forum or audience was available. This form of legal guerrilla warfare by Maori leaders and monolithic defence of the bastions of colonialism by the Crown and the legal system has continued from 1842 to the present. At the heart of the arguments are the questions of ownership and control.

#### 1 *Ownership*

In respect of ownership, ownership by or on behalf of Maori people has increased in quantum leaps in the last five years. Despite that the commercial fishing owners of the quota in the 580,000 tonne total allowable commercial catch ("TACC") are comfortable in the assurance that the Treaty of Waitangi (Fisheries Settlement) Act 1992 has removed the direct threat to their business assets. Maori ownership of the commercial assets in quota has leapt from being barely noticeable in 1990 to a point where Iwi have a strong stake in the commercial assets of the fishery. The first step is the 57,000 tonnes held by Te Ohu Kai Moana. That base was expanded through Aotearoa Fisheries Ltd's<sup>7</sup> use of capital, both financial and human, to purchase Fletcher Fishing's inshore business and then Skeggs Fishing, which are now integrated into Moana Pacific Fisheries Ltd. Moana Pacific, New Zealand's largest inshore fishing company, holds 8,000 tonnes of quota. In 1992, the purchase of Sealord from Carter Holt Harvey resulted in the 50% ownership in a going concern that included 148,000 tonnes of quota.

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6 For a compelling description of the process see JV Williams "Te Mana Motuhake me te Iwi Maori: Indigenous Self Determination" unpublished LLM thesis (University of British Columbia, 1988).

7 Aotearoa Fisheries Ltd (in liquidation) was a wholly owned commercial company of the Maori Fisheries Commission established under s 12 of the Maori Fisheries Act 1989.

The transfer from the Crown of the quota has not been without its moments. The Maori Fisheries Act 1989 ("the Act") provided the quota to be transferred in four tranches of 2.5%, at six month intervals, of the TACC existing at the time of the transfer. The transfers were due to commence on 31 March 1990. The Act also provided for cash to be paid where the Crown was unable to transfer quota and for the Maori Fisheries Commission to signal, within 21 days of the offer, whether it wanted cash or quota from each such instalment.<sup>8</sup>

The Commission was placed under extreme time and resource pressures from its commencement. For instance, it was called together for the first time on 27 February 1990 and at the same time presented with notice of the first tranche. It has no offices or staff of its own and a deadline of three weeks to respond to the Crown's offer. The default option was that the Crown's offer would stand. The Commission also had less than a month to establish Aotearoa Fisheries Ltd, find directors that met the statutory criteria who would agree to take the position, obtain ministerial approval to the articles and appointments and prepare the company to receive at least 50% of the quota or cash that was transferred from the Crown.<sup>9</sup>

The Commission and the Company then set about two years of intense negotiations with the Crown to see that the value of the package was not eroded by disproportionate quota cuts and unrealistic equivalent values. By and large those efforts were successful and gained the eventual cooperation of the Crown officials. The Company went on to generate revenue from leasing its quota and to acquire the companies referred to above as well as 49% of a small Bay of Plenty fishing company in a joint venture with Iwi. With one important exception in respect of quota aggregation, Moana Pacific, 100% owned by Maori owned interests, is as free of bureaucratic entanglement as any other seafood company in New Zealand. It has 230 employees and a large number of other contractors and expects to report a profit and pay a dividend to its shareholders. In addition to a number of other initiatives with Iwi, the Company has two three-year scholarships to the Australian Maritime College in Tasmania.

There is a group of Iwi who own part of the 32% balance of Moana Pacific. These Iwi took up a general offer to Iwi to take a position which now provides them and the Company with significant mutual benefits.

Sealord, a much bigger company with 630 employees, is in a similar position in respect of no direct Crown involvement in managing the Company although there are statutory restrictions on quota transfer which run for a further year. Sealord, New Zealand's biggest quota holder, is a major player in the seafood industry from the catching sector through to market development. It too is looking closely at joint venture opportunities with Iwi in the education and business development areas.

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8 Maori Fisheries Act 1989, ss 40-42.

9 Section 12 of the Maori Fisheries Act 1989 stipulates 3 months from commencement of the Act, 20 December 1989.



Ownership by the Maori owned interests of the commercial quota assets is now well established. Maori interests are also well represented in the infrastructure for management of the fisheries resource. In general, that is a matter to be worked out between all the participants and the Crown in the exercise of its ordinary governance functions. In addition, some direct access to the management decision processes is provided in the requirement on the Crown to consult with "Maori" on certain matters and for representation on the Fishing Industry Board and its committees. In addition, Te Ohu Kai Moana was successful in having a candidate elected to the council of the Fishing Industry Association. The Fishing Industry Association now has two Commissioners and a member from each of Moana Pacific and Sealord on its council of 12 members.

## 2 *Customary Fisheries*

By contrast, ownership of the customary resource is a mess. The gradual diminution of the customary position reached its lowest point with the repeal of the last surviving statutory remnant of the recognition of tangata whenua rights to their fisheries. We have descended to this from 1877, when "Nothing in this Act shall ... affect ... any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights ... secured to [Maori] thereunder";<sup>10</sup> to 1983, when "Nothing in this Act shall affect any Maori Fishing rights";<sup>11</sup> to the complete repeal in 1992 and the power to make regulations recognising and providing for customary food gathering.<sup>12</sup>

The result is that the Crown must now negotiate with Iwi to develop rules for the management of customary fisheries. In what is typical of the debate for the last 150 years neither set of negotiators is ready to concede that they are not operating from an ownership basis nor is there an apparent willingness to share control. The Crown is not able to put decision makers into the negotiations nor is it yet able to offer consistent agreement on the framework for the negotiations. The proper intersection in what must be seen as an additive process, not the destructive distributive snapshot approach forced on the parties by the Crown's myopia, has yet to be found.

The issue of customary fisheries is one of the most important components in effecting a robust settlement with tangata whenua. They form one of the cornerstones of the cultural survival framework. Despite this it is also one of the most under resourced.

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<sup>10</sup> Fish Protection Act 1877, s 8.

<sup>11</sup> Fisheries Act 1983, s 88(2).

<sup>12</sup> Fisheries Act 1983, s 89 (1)(mb) as inserted by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

*B Iwi and Iwi*

*1 Ownership*

The ultimate ownership of the assets held by Te Ohu Kai Moana is to be vested in Iwi. There remains a lot of work to determine when, how and how much. The assets themselves may be dealt with differently depending on their nature and when they were acquired, that is prior to or after the August 1992 settlement. The first category of assets includes the 57,000 tonnes of quota, shares in Moana Pacific and some cash. These assets together have a book value of some \$200 million. The second category of assets includes the shares in Sealord, some cash and 20% of the TACC for each new species added to the quota management system, for example southern blue whiting and kahawai. The value of those assets is at least \$300 million.

The timing and principles for allocation of the first category is the subject of court action. Therefore any discussion must be somewhat circumspect. However, following an extensive consultation process there are a number of clear directions for Te Ohu Kai Moana to be cognisant of. The Maori community requires the following:

- allocation of ownership of the assets;
- allocation to Iwi or Iwi organisations;
- allocation in a way that does not divide Maori ie
  - the final model must enjoy wide support
  - the model must be politically acceptable to the Maori community;
- allocation dispute resolution mechanisms must be in place early and be able to deal with a wide range of disputes;
- allocation must take account of organisational readiness of the receiving organisation and provide for time to be taken, if necessary, to build the capacity needed between the determination of ownership and final vesting;
- allocation principles must incorporate the mana moana concept and demonstrably include alternative principles expressed in terms of a distribution on the basis of other economic, social and demographic factors;
- the decisions made at a general meeting of Te Ohu Kai Moana in 1992 remain relevant, with some flexibility to be applied in terms of the disposition of non-quota assets.

Thus we have implementation issues identified above with the addition of:

- how to formulate an acceptable compromise;
- who to transfer the assets to;
- when to transfer them;

- how to obtain participation in the disputes resolution process;
- how to validate the claims of representation once the beneficial ownership group is identified;
- how to calculate the entitlements;
- how to provide for the people who have not identified an Iwi affiliation;
- etc.

Te Ohu Kai Moana is working through these directives and the issues in order to take a further proposal back to Iwi. It is fair to say that the process has been bruisingly tough at times but it is of such fundamental importance that it just must be completed.<sup>13</sup>

In the consultation hui with Iwi there is a strong signal that they want a form of compromise that they can live with. The answer lies in finding solutions that offer more value than the distributive approach would offer.

### *C Access to the Assets Pending Determination and Vesting*

Meanwhile the assets must be utilised pending the transfer to their ultimate owners. Iwi have had the use of Te Ohu Kai Moana's quota from 1990. In this exercise of its various discretion's Te Ohu Kai Moana has leased the quota on the basis of a single fishing year and on a rental for that year. This has provided one or two debates and more than its share of revenue to the legal profession.

The underlying issue is, given that the assets will be devolved to Iwi, how is access to the revenue producing capacity of the quota to be provided for, to whom and for how much? Addressing these issues has provided some useful insights into the Iwi disposition in the industry and Iwi groups and Te Ohu Kai Moana have developed a set of principles and mechanisms that have gradually been refined over the four years concerned. Further, the significance of such earning capacity being released is often underestimated. As much as \$10 to \$15 million per year in potential gross earnings is released through the lease of the current quota.

Despite its acknowledged difficulties, the leasing process has produced some very interesting results. A survey conducted for Te Ohu Kai Moana has revealed that:

- 90% of the Iwi lease quota to their own fishers;
- 80% of the Iwi have reinvested some of their profits back into the business of fishing;
- the ventures were profitable;
- profits were used for a wide range of social and customary purposes, including marae, health, education, housing, education and language;

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13 We can take some solace in the New Testament whakatauaki - "E kore te rauo i mangungu, e kore e whatia" (A bruised reed cannot be broken).

- a particular benefit perceived by Iwi was improved communication with, knowledge and understanding of other Iwi.

### III WHAT LESSONS CAN BE LEARNED

The specific issues that are contained in the examples above contain issues that are generally applicable. Any further settlements will automatically require those same questions to be answered and the deciders should identify and close as many as possible at the outset. Principal among these is the Iwi to Iwi interface.

Our experience strongly supports the concept of minimum government or centralised intervention in the management of the resources. The companies, set free of policy constraint, will act in a profit maximising manner consistent with the need to demonstrate superior value to their stakeholders. The value will extend further than mere short term financial profits and run into long term relationships essential for business growth and therefore survival.

We are all too familiar with the Iwi and Crown argument and its structure. The Iwi and Iwi argument over property rights or fair share of wealth distribution is not a familiar one. It may have been inescapable in the context of fisheries but where it is avoidable in relation to other resources it must be circumvented. It is vital that the divisive force of such arguments be avoided even if it means less asset in the aggregate for distribution.

A matter of some urgency is the process for dispute resolution. There is a need for the whole process to be addressed from a strategic point of view and some rationalisations made so that the people concerned have an expeditious, efficient and affordable process that takes account of the nature of the issues and the participants.

On a positive note the evidence that exists on the benefits of leasing and the strong growth of Moana Pacific are examples of how Iwi and their enterprises, given the resources and the opportunity to focus on value growth, will perform very successfully.

Heoi ano, e hika ma, ka nui tenei mo tenei wa. Ka inoi atu te whakatauaki o taku tipuna a Riwai Te Uhunuioaterangi Rangihuna:

Waiho ko oku wheru, mauria ko oku painga.