Contemporary Issues in Māori Law and Society

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This article is the first of what is hoped to be a regular feature in the Waikato Law Review reviewing and commenting upon significant recent developments in Māori law and society. It is not intended to be an exhaustive review; but rather it explores a select range of diverse issues concerning Māori law and society that arose in the course of the year. It begins by considering the impact of the involvement of the Court of Appeal in the Matauri X litigation regarding the powers of Māori incorporations. Part Two considers some important issues that have arisen in relation to the Foreshore and Seabed and Māori Fisheries. Part Three reflects upon concerns that were voiced during this year's government consultation process with Māori concerning freshwater, and that discussion flows easily into a consideration of recent amendments to the Resource Management Act 1991. The final part contemplates an interesting development in the area of Treaty of Waitangi claims in the context of Transpower's proposed new transmission line.

I. Māori Incorporations and the case of Matauri X

Māori incorporations have long provided an option for the management, development and use of multiply-owned Māori Land. A Māori incorporation acts by and through a Committee of Management. A recent Court of Appeal decision continues a deliberation of issues concerning the powers of Māori incorporations to borrow money and to mortgage its land, and the powers of a Committee of Management.

The Committee of Management of Matauri X, a Māori incorporation, borrowed more than $3 million from Bridgecorp Finance Limited for the purpose of investing in Eternal Springs, a water bottling business in Whakatāne. Matauri gave as security a mortgage over its land in the spectacularly beautiful Matauri Bay in Northland. Matauri defaulted on the loan and Bridgecorp seeks to rely upon its security. Matauri has continued to argue that the loan was void, having been beyond its powers. At first instance, that argument was rejected. Fisher J held that the loan was valid and that Matauri had the power to enter it.[1] Matauri challenged that decision and the Court of Appeal was called upon to determine the extent of Matauri's borrowing powers.[2] Ultimately, because a relevant transitional provision of Te Ture Whenua Māori Act 1993 had not been referred to the High Court in its deliberations, the matter was referred back for further deliberation. In the

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1 *Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2004] 2 NZLR 792 (HC).

2 *Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2005] 3 NZLR 193 (CA).

meantime some important lessons have emerged from the judgments of both Courts regarding Māori governance generally.

By way of general background to Māori incorporations, the process of incorporation vests land into a corporate body with full legal personality operated by a Committee of Management. The Committee makes decisions to develop the land in the best interests of collective landowners who are connected by kinship though often scattered to the four winds. Those decisions must also be made in accordance with the fundamental objectives of the Te Ture Whenua Māori Act 1993. While incorporations hold legal title to land, the owners retain the beneficial ownership and therefore their link to their ancestral land. External institutions such as banks have a definite corporate body to deal with – making the prospect of financial lending to incorporations more likely.

A. The 'Progressive Emancipation' of Incorporations

Prior to Te Ture Whenua Māori Act 1993 (Te Ture Whenua Māori), legislation limited the powers of incorporations to the objects specified in the order of incorporation. Such objects often included farming, forestry, coal mining, and alienation by sale and lease. Section 271(2) of the Māori Affairs Act 1953 had explicitly required that the order of incorporation define the object or objects for which the body corporate was established and every object had to relate exclusively to the land. Matauri X (Matauri) was incorporated in 1967 under this section. Its original objects included a provision to alienate land by sale, lease or otherwise of the land or of any portion thereof. So, alienation was technically possible, but the objects did not expressly include mortgage. The Court of Appeal took the view that, had the 1953 Act still been in force, Matauri's proposed investment would have been unlawful, being beyond the objects and powers of Matauri.[3]

With the enactment of the Māori Affairs Amendment Act in 1967 came new provisions dealing with Māori incorporations such as section 48 which expressly authorised incorporations to 'alienate, mortgage, charge, or otherwise dispose of or deal with the assets from time to time invested in it in the same manner if it were a private person of full capacity'. The Court of Appeal concluded that this provision, while empowering a Māori incorporation to grant mortgages, clearly only applied in circumstances where the mortgage was security for a debt incurred in furtherance of the incorporation's objects.[4] Accordingly, an investment like Eternal Springs and the Bridgecorp loan would have been no more permissible under the 1967 Act as under the 1953 Act.

Incorporations are continued under the Te Ture Whenua Māori Act 1993 with substantial increases in their objects and powers. Under this Act, incorporations and Committees of Management have been given greater flexibility with regard to the commercial development of their land. A key example of this greater flexibility, or in Fisher J's words, the 'progressive emancipation' of Māori incorporations, is section 253 which provides as follows:

> Capacity and powers of incorporation – Subject to this Act and any other enactment, and the general law and to any express limitations or restrictions imposed by the Court in the order of incorporation or

3 Ibid, 197.

4 Ibid, 198, para 18.

> included in its constitution pursuant to section 253A of this Act, every Māori incorporation has, both within and outside New Zealand, in addition to the powers conferred on it by this Part of this Act–
> (a) full capacity in the discharge of the obligations of the trust in the best interests of the shareholders, to carry on or undertake any business or activity, do any act, or to enter into any transaction; and
> (b) for the purposes of paragraph (a) of this section, full rights, powers, and privileges.

Another example of the greater flexibility enjoyed by incorporations under the 1993 legislation is that Māori incorporations can hold land for investment purposes, and such investment lands are not affected by the restrictions of Te Ture Whenua Māori.[5] However, corpus land, or land that does form part of the incorporation, is classified as Māori Freehold Land and section 150B Te Ture Whenua Māori imposes restrictions on how and to whom it can be alienated.

Matauri has maintained its argument that its investment in Eternal Springs went beyond its objects. According to Fisher J, however, section 253 of Te Ture Whenua Māori gives an incorporation the capacity to undertake any business or activity, do any act, and enter into any transaction, *unless the legislation or order of incorporation positively prevented it from doing so*. Incorporating principles of company law, Fisher J expressed his view that an ultra vires doctrine limiting a corporate entity's powers by reference to objects stated in its constitution no longer had any place in the modern legal world. To limit commercial activities of an incorporation or a company would place it at a distinct disadvantage to operate effectively in the commercial world. Based on this line of reasoning Fisher J concluded that section 253 of Te Ture Whenua Māori effectively allows existing incorporations to act in ways which go beyond their empowering objects.

Applying this to Matauri, Fisher J found that there were no express limitations or restrictions for the purpose of section 253, and that the mortgage was valid:

> It is true that one of the objects of Te Ture Whenua Māori Act is to halt the dispossession, alienation and fragmentation of Māori land. But another is to place the destiny of Māori land in the collective hands of its owners and their duly appointed representatives. In this Act Parliament has recognised Māori as adults capable of coming together to determine the way in which their own land will be dealt with in a modern world. If that includes mortgaging the land, that is their prerogative. But everyone knows that if money borrowed on mortgage is not repaid, the mortgagee takes the land. One cannot have it both ways. Matauri X had the power to borrow on mortgage but cannot escape the consequences.[6]

But, in reaching his decision, Fisher J had not considered the transitional provision, section 358A, that had been inserted by Te Ture Whenua Māori Amendment Act (No 2) 1993. Section 358A applied to Matauri, as an incorporation that had been established under or continued in existence by the Māori Affairs Amendment Act 1967. Under this provision, incorporations may apply for an order redefining or adding objects by resolution passed at a general meeting of shareholders. But more significantly, until the making of any such order, *the objects of the incorporation shall continue to be the objects specified in its order of incorporation*.

In addition, the Court of Appeal was of the firm view that Matauri's objects did not include, as an object, alienation in the sense of mortgaging. The Court referred the matter back to the High Court for further determination, resisting the invitation to form a view in relation to issues of ratification, ultra vires and the 'indoor management rule'.

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5 Sections 256(4), 256(4A).

6 *Bridgecorp* [2004] 2 NZLR 792, 794 (HC).

B. Importing Principles of Company Law

Throughout the High Court judgment, principles of company law were imported and applied to Te Ture Whenua Māori. While the Companies Act and Te Ture Whenua Māori 1993 were indeed passed in the same year, the two statutes have fundamentally different purposes and premises, and it is inappropriate simply to import principles of company law without a deeper appreciation of the different purposes of those statutes. The purpose of the Companies Act 1993 is squarely focussed upon business risk and allowing wide discretion in matters of business judgement whilst also providing some protection for directors, shareholders and external parties. In contrast, Te Ture Whenua Māori explicitly recognises that land is a taonga tuku iho of special significance to Māori people and that retention of it should be promoted. In support of that object and principle, the occupation, development and utilisation of land for the benefit of its owners, their whānau and their hapū is to be facilitated. The High Court decision turned on the interpretation of section 253 Te Ture Whenua Māori, and Fisher J made much of the similarities between that section and section 16 of the Companies Act both of which deal with the capacity of companies and incorporations respectively to enter into contracts and transactions.

Though the sections share similar wording, they differ in two important respects. First, section 253 is expressly subject to Te Ture Whenua Māori, and therefore its kaupapa, or objectives. At most, Māori Freehold Land currently constitutes just 6 per cent of the total landmass of Aotearoa. This comes as a result of 'endless legislative tinkerings' designed to alienate Māori land from Māori collective tenure – hence the emphasis on retention. Equally as damaging was the interpretation of that legislation which was sometimes broad enough to embrace Māori custom – such as section 30 of the Native Land Act 1865 for example – but not interpreted in that manner by courts. As a result of a long and complicated legislative history, the land that does remain in Māori hands is typically fragmented and uneconomic – hence the provisions in the Act allowing for trusts and incorporations to administer and develop lands on behalf of multiple owners.

While some restrictions on alienating land by incorporations have been relaxed (largely as a result of the 2002 amendment) there is a high threshold to achieve for the sale of corpus lands. Section 150B Te Ture Whenua Māori requires that that a 75 per cent majority of the landowners must agree to the alienation; and an option of sale or purchase must be offered firstly to the preferred group of alienees. Accordingly, while retention is not absolute, if there is an interpretation of the legislation that promotes retention whilst at the same time providing for the use and development of that land, surely that interpretation must be preferred.[7] In terms of the clear purpose of the Act, it does not seem consistent for there to be such a high threshold to achieve for the alienation of corpus land by sale, when those lands could so easily be alienated by mortgage.

C. Powers of Management Committees

The power of the Management Committee was another central issue in the Matauri decision. The effect of Fisher J's point of view is that the Management Committee has a significant amount of power very much akin to a Board of Directors operating under the Companies Act 1993. Te Ture Whenua Māori establishes a framework of accountability that the Committee of Management must provide to the shareholders and the Māori Land Court has a supervisory role.

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7 *Brown v Māori Appellate Court* [2001] 1 NZLR 87.

Turning back to the Matauri situation, Matauri's Management Committee comprised a Chairperson and six others as members, one of whom was also Secretary. The Chairperson sent a letter to the Committee members advising that he had accepted an offer from Bridgecorp in June 2001 which would involve the use of valuable land as security to raise funds for the investment in Eternal Springs. The joint venture operation required Matauri X Incorporation to raise a first mortgage of $2 million. The Committee met on two subsequent occasions during June that year and at the second meeting the Committee endorsed and supported the proposal, including the loan. That same day the Chairperson and Secretary signed the necessary documents on behalf of the incorporation with the affixing of the seal. At a further Management Committee meeting in August 2001 these actions were formally ratified. The Annual General Meeting of the shareholders also voted in favour of the action. When the joint venture failed, one of the issues was whether the Management Committee had in fact authorised this transaction. Could the incorporation be bound by the actions of its Chairperson and its Secretary?

Fisher J held that section 270(1) Te Ture Whenua Māori makes the decisions of a Management Committee binding on the incorporation, and no person dealing with the incorporation is bound to inquire further to see whether the Committee had been authorised or restricted by any resolution of the shareholders: section 271. A Committee of Management only requires that three members of a Management Committee concur on a decision to make it effective; and under section 270(5) Matauri is able to enter into contracts in the same manner as if it were a limited liability company. The Incorporation's common seal can be affixed to a document in the presence of any two members of the Committee. In developing these points, Fisher J also applied another principle of company law, the 'indoor management rule', and the basic principles of ratification; if a Board subsequently adopts unauthorised acts of an agent the action becomes fully valid. The Committee had ratified the decision and so had the shareholders.

The Court of Appeal declined to delve into these issues, preferring to refer the case back to the High Court for further determination in light of section 358A. The Court of Appeal cautioned that 'while Matauri X has had a victory in this battle, it may yet lose the war'.[8]

D. Lessons

In relation to the activities of incorporations, the Matauri litigation may herald a shift in the emphasis from the retention principle of Te Ture Whenua Māori (at least by courts other than the Māori Land Court), towards emphasising use and development in the 'modern commercial world.' The significance of this is that the Committee of Management has a large amount of power which must be carefully monitored by owners. Beneficial owners may provide their Committees of Management with guidelines that can be stipulated in redefined objects or constitutions. For example, owners can stipulate that retention is paramount, and that any commercial development must occur within a framework of retention. Matauri is an example of a typically 'asset rich, cash poor' Māori incorporation. In order to fulfil the retention objective, in the Act at least, alternative avenues exist for incorporations to raise finance other than mortgaging land, such as raising security over leasehold, or stock, or other assets.

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8 *Bridgecorp* [2005] 3 NZLR 193 (CA) para 47.

The Matauri litigation does not end in the Court of Appeal. Bridgecorp has been granted leave to appeal to the Supreme Court to determine whether the borrowing and granting of the mortgage to Bridgecorp was within the powers of Matauri.[9]

II. Foreshore and Seabed Act 2004

Nā wai te koau ka ruku ki te aromaunga e peka.

Reweti Kohere has recorded this saying that a bird flying along a narrow valley would not turn back even if one tried hard to turn it. The bird is unswerving in its path to its chosen destination.[10]

The enactment of the Foreshore and Seabed Act 2004 has ignited further issues relating to Māori customary rights in Aotearoa. The Act was passed hastily in the wake of the unanimous decision of five Court of Appeal judges that the Māori Land Court has the jurisdiction to determine whether the foreshore and seabed are Māori customary land under Te Ture Whenua Māori. Despite widespread and passionate opposition, and in defiance of strong recommendations made by the Waitangi Tribunal,[11] the Act came into force on 17 January 2005 and has since drawn criticism from the United Nations Committee on the Elimination of Racial Discrimination.

The Court of Appeal's decision in *Attorney General v Ngati Apa*[12] draws together a long history of legal action concerning the determination of status of foreshore and seabed as Māori customary land under Te Ture Whenua Māori. Litigation had initially been brought by Māori groups in the Marlborough Sounds dissatisfied with the management of local marine farming activities in the top of the South Island.[13] Court orders were sought declaring the land below mean high-water mark in the Marlborough Sounds, out to the limits of the territorial sea, to be Māori customary land, as defined by Te Ture Whenua Māori. The Attorney General and other interested parties opposed the application relying upon an earlier Court of Appeal decision, *Re Ninety Mile Beach*.[14]

While the Foreshore and Seabed Act may trump the Court of Appeal decision in many respects, *Ngati Apa* still serves to clarify some 100 years of precedents involving judges going back and forth over customary rights issues. For instance, Elias CJ clarified that the *Ninety Mile Beach* case is wrong, largely because it is based on the discredited authority of *Wi Parata v Bishop of Wellington*.[15]

The Court of Appeal also determined that upon the Crown's acquisition of sovereignty under the Treaty of Waitangi, it acquired territorial authority ('imperium') over New Zealand, not ownership. Therefore any Crown title (radical title) is burdened by pre-existing Māori customary proprietary rights. This means that Māori customary rights endure until they are extinguished in accordance with law.[16] Customary title continued after British Crown's assertion of sovereignty in

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9 *Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2005] NZSC 31.

10 R Kohere, *He Konae Aronui Maori Proverbs and Sayings* (1951).

11 Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071 2004).

12 [2003] 3 NZLR 643 (CA).

13 *Re Marlborough Sounds Foreshore and Seabed* 22A Nelson MB 1(MLC), Hingston J; *Re Marlborough Sounds Foreshore Decision of the Maori Land Court* [2002] 2 NZLR 661 (HC), Ellis J.

14 [1963] NZLR 461.

15 (1877) 3 NZ Jur (NS) SC 72; see *AG v Ngati Apa* [2003] 3 NZLR 643 (CA) at para 13 per Elias CJ.

16 *AG v Ngati Apa* (CA), ibid, 651.

1840 and was not extinguished by any general or specific legislation; any such extinguishment must occur as a result of plain and clear legislative provision.[17] The Foreshore and Seabed Act 2004 contains such provisions in relation to the foreshore and seabed.

A. The Waitangi Tribunal Report on the Government's Proposals

The Waitangi Tribunal considered the Crown's unilaterally-announced policy on the foreshore and seabed as a matter of urgency. In strong words the Tribunal concluded that the Crown's policy amounted to a serious breach of the Treaty of Waitangi[18] and very serious prejudice to claimants.[19] The Government's policies had also failed in terms of wider norms of domestic and international law that underpin good government: the Rule of Law; and the principles of fairness and non-discrimination.[20] The Tribunal recommended that any pathway forward should be determined by consensus between the Treaty partners who needed to engage in dialogue. And as legal rights had effectively been taken away, compensation is essential.

The Government's unswerving response to the Tribunal report was to label it as 'flawed.' Despite widespread opposition to the Bill and the strong recommendations of the Tribunal, the Government proceeded to obtain the enactment of the Foreshore and Seabed Act 2004 (the Act).

B. Features of the Foreshore and Seabed Act 2004

The Act in section 13 vests all of the full, legal and beneficial ownership of the public foreshore and seabed in the Crown so that the Crown holds it as its absolute property. The object of the Act is to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all the people of New Zealand, including the protection of the association of whānau, hapū and iwi with areas of the public foreshore and seabed. That protection apparently comes in the form of customary rights orders, territorial customary rights findings, foreshore and seabed reserves, and the continued right to direct negotiations.

Customary Rights Orders

Customary rights orders are available under sections 48 to 50, and are designed to recognise a particular activity, use or practice in a specific area of 'public foreshore and seabed'. Section 47 sets out powers and procedures of the Māori Land Court and the application of Te Ture Whenua Māori 1993. Applications under section 48(1) are made to the Chief Registrar. They are then referred to the Chief Judge who directs the application to the appropriate Māori Land Court Judge to hear and determine.

Section 50 outlines the situations in which the Māori Land Court can make a customary rights order. The Court needs to be satisfied that the order applies to a whānau, hapū or iwi; and that the activity use or practice for which the applicant seeks a customary rights order:

- is and has been since 1840 integral to tikanga Māori;

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17 The case is not without its critics; for a range of responses to the case see New Zealand Law Journal, November 2003 issue.

18 Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071 2004) 129, para 5.1.3.

19 Ibid, 138, para 5.2.

20 Ibid, 136, para 5.2.1.

- has been carried out in a substantially uninterrupted way by the applicant groups since 1840;
- continues to be carried on, exercised or followed in the same area of the public foreshore and seabed in accordance with tikanga Māori; and
- is not prohibited by law.

Early applicants for customary rights orders under section 50 will test the legislation.[21] As yet there are no guidelines or practice notes to assist applicants, and the haste in which the legislation was enacted means that amendments are likely to be made.

Before an application can be notified, Schedule 1 requires applicants to particularise in writing the customary rights sought to be recognised as well as the tikanga governing the right and the scale, extent, and frequency of such rights, which potentially could span from very broad concepts of mana motuhake (separate authority) and kaitiakitanga (guardianship) to more specific rights such as harvest, extraction, and access.

It seems that the Court will utilise similar processes to that of Waitangi Tribunal inquiries, which in turn raises a raft of questions such as who are the appropriate claimants, and associated mandate issues. Claimants who have no Tribunal report bear a heavy burden in terms of collating the necessary information. Claimants will also have to navigate areas of overlap with Māori fisheries issues and marine farming regimes.

Quite apart from the evidentiary burden, concerns have also been voiced about the incorporation of the '1840 rule' into the Act fixing the date for which Courts will ascertain customary rights to 1840. This rule poses problems for those iwi who acquired their customary tenure after 1840.

Customary rights orders will not carry any rights of exclusive occupation. Rather, under section 52 a customary rights order confers a right on the whānau, hapū, or iwi to carry out a 'recognised customary activity' in accordance with the Resource Management Act 1991 and to enable protection of a recognised customary activity under the Resource Management Act. For reasons better explained in Part V below, many Māori have long been sceptical about the interpretation and implementation of Resource Management Act provisions with regard to their interests and values being 'taken into account' or 'recognised and provided for' in decisions concerning resource consents.

Fortunately, from an applicant's point of view, access to funding from the Special Aid Fund of the Māori Land Court has been preserved for customary rights orders. Part 4 of the Act provides for groups of natural persons with a 'distinctive community of interest' to apply to the High Court for customary rights orders.

D. Territorial Customary Rights Findings

Section 33 of the Act allows an application to the High Court for a finding that a certain group (which may or may not be Māori) has had exclusive use and occupation of a part of the public foreshore and seabed since 1840. The procedure for applications for 'territorial customary rights findings' includes a power for the High Court to refer any question of tikanga Māori which arises with regard to an application under section 33 to the Māori Appellate Court: section 35. The High Court may take into account other matters including:

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21 As at the date of writing (November 2005) two applications have been publicly notified: Te Whakatōhea and Te Makati Whānau Trust.

- customary rights orders made by the Māori Land Court;
- the applicant group's overall territorial association with the area;
- evidence of non-commercial customary fishing activity; and
- any other evidence or information that the Court considers to be reliable, whether or not that evidence would otherwise be admissible.

These provisions of the Act contain an odd mixture of common law themes. The stringent requirement of exclusivity since 1840 is one example: section 32(1). The requirement of continuous ownership of contiguous land in order to acquire territorial customary rights findings to adjoining foreshore is another,[22] given that this requirement is sourced from *Re Ninety Mile Beach*, the reasoning in which case was so strongly criticised by the Chief Justice in *Ngāti Apa*.[23]

Though claimants to the Waitangi Tribunal are able to apply for and access legal aid funding with regard to the costs of legal counsel, the Legal Services Act does not seem to allow legal aid for territorial customary rights findings. This could prove to be a real barrier for claimants given the likelihood that applicants will utilise similar processes to that of Waitangi Tribunal inquiries to collate the necessary evidential basis for their applications.

E. Foreshore and Seabed Reserves

Where a territorial customary rights finding is made by the High Court under section 33, the applicants may enter discussions regarding redress or seek to establish a foreshore and seabed reserve. Such reserves are intended to acknowledge the exercise of kaitiakitanga whilst ensuring that the area is to be held 'for the common use and benefit of the people of New Zealand', and that no charges or fees will be payable for the use of the reserve by the public. This concept seems to be modelled upon the Orakei Reserves Board. More detail about this Board is contained in Part V below, in the context of recent amendments to the Resource Management Act that provide for joint management agreements.

F. Direct Negotiations

To avoid doubt, section 101 of the Act preserves the right of claimant groups and the Crown to enter agreements to settle historical Treaty of Waitangi claims. It is understood that two major coastal iwi, Te Whānau a Apanui and Ngāti Porou, both of the East Coast of the North Island, are engaged in such negotiations currently. Whilst some iwi seem to have acquiesced by initiating applications under the Act, many Māori continue to perceive that the legislation is discriminatory. This perception has the support of the United Nations Committee on Elimination of Racial Discrimination.

G. The Committee on Elimination of Racial Discrimination

This international committee reviewed the compatibility of the Foreshore and Seabed Act 2004 with the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. In Decision 1(66) published on 27 April 2005, the Committee noted its concern at the apparent haste with which the legislation was enacted and that insufficient consideration may

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22 Foreshore and Seabed Act 2004 s 32(2).

23 Above n 15.

have been given to alternative responses to the *Ngāti Apa* decision, which might have accommodated Māori rights within a framework more acceptable to both the Māori and all other New Zealanders. Bearing in mind the complexity of the issues involved, the Committee formed the view that:

> the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Māori, in particular in its extinguishment of the possibility of establishing Māori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress.

The Committee recommended that the implementation of the Act be closely monitored, as well as its impact on Māori and the developing state of race relations in New Zealand. It also recommended that steps be taken to minimize any negative effects, especially by way of a flexible application of the legislation and by broadening the scope of redress available to Māori.

III. Māori Fisheries Act 2004

Criticism levelled at the haste in which the Foreshore and Seabed Act was enacted certainly cannot apply to the Māori Fisheries Act, which came into force in September 2004 after more than fifteen years of harrowing debate. The Act provides a long-awaited scheme of allocation to iwi of assets from the Treaty of Waitangi fisheries settlement. Very simply, the allocation scheme provides for allocation to iwi of inshore quota in proportion to the coastline of that iwi, while deepwater quota is to be allocated 25 per cent as to coastline and 75 per cent as to the population of the iwi.

The continuing administration of the settlement assets will be carried out by Te Ohu Kai Moana Trustee Limited (TOKMTL) and will include determining the appropriate classification of quota, allocating and transferring settlement assets, determining coastline entitlements and maintaining an iwi register recording matters related to mandated iwi organisations. The allocation to an iwi will be made through a 'Mandated Iwi Organisation', and the Act sets out the requirements that must be fulfilled before TOKMTL will recognise an organisation as a mandated iwi organisation.

A noteworthy inclusion in the Act is the set of provisions allowing for reorganisation of specified mandated iwi organisations. This review highlights these provisions that are causing a stir amongst Māoridom in relation to tribal organisation and identity, with reference to the case of Rongomaiwahine.

A. *The Case of Rongomaiwahine as a 'Withdrawing Group'*

Rongomaiwahine is the principal ancestor of the people of the Māhia Peninsula, on the East Coast of the North Island. Rongomaiwahine's first husband was Tamatakutai. In a well-rehearsed story involving the partaking of pāua roe and subsequent deception,[24] Tamatakutai was drowned and, in time, Rongomaiwahine took Kahungunu for her husband. Because of the mana of Rongomaiwahine, the people of Rongomaiwahine hold strongly to their separate identity. Some identify themselves as both Rongomaiwahine and Ngāti Kahungunu, but those who are descended from Rongomaiwahine's first daughters identify themselves only as Rongomaiwahine.

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24 The story is best told in the words of a descendant of Rongomaiwahine, acclaimed author and historian, Mere Whaanga, 'Ngāti Rongomaiwahine' *Te Ara: the Encyclopaedia of New Zealand* <www.teara.govt.nz>.

In 1943 the chiefs of Rongomaiwahine asserted this identity petitioning the Government seeking exclusive use and benefit over their tribal fishing grounds. The petition stated:

> in ancient days these fishing grounds were always the 'rahui' or reserved property of the said Rongomaiwahine Tribe and the neighbouring tribes dare not encroach upon such property for fear of being attacked and killed by the owners.

The Māhia Peninsula is predominantly a fishing area. Seafood of all kinds, including fish, continues to be an important part of the diet of Rongomaiwahine people. The turmoil created by the Government's proposed introduction of a Quota Management System (QMS) in the 1980s would prove to have severe consequences for this iwi.

The Māori text of the Treaty of Waitangi guaranteed 'te tino rangatiratanga' (sovereign authority) in respect of our fisheries, and the English text contains a guarantee of full, exclusive and undisturbed possession of our fisheries.

Māori were granted a court injunction preventing the Government's proposed QMS on the basis that the system directly conflicted with the Treaty. Ensuing negotiations resulted in an interim fisheries settlement in 1989, followed by the final settlement embodied in legislation in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The Act had, in the words of one commentator, a 'turbulent passage' through Parliament [25] because no Māori member of the House supported it, and there was considerable opposition to the settlement and the means by which it was achieved amongst Māori generally.[26] Treaty rights in respect of the commercial fishery were extinguished, there was a lack of consultation with iwi, there was lack of detail about the terms of the settlement, and the timeframe for what consultation did take place was rushed. Many Māori were unhappy about the alleged lack of mandate of some of the signatories. Nevertheless, iwi are bound by the settlement whether they supported it or not.

For the coastal iwi of Rongomaiwahine, the consequences of that settlement have been particularly severe. Apart from the very first year of quota leasing under the Settlement Act, Rongomaiwahine has never received and utilised its own fisheries entitlements under its own identity. Following some 12 years of unsuccessful attempts (including legal action) Rongomaiwahine, led by their kuia, Miniata Westrupp, approached the Māori Affairs Select Committee to address their concerns. For their efforts, Rongomaiwahine is identified in the Act as a 'withdrawing group'. Withdrawing groups may, if they so choose, withdraw from the first mandated iwi organisation, called the 'joint mandated iwi organisation' or JMIO. For the purposes of the Act, Rongomaiwahine is defined as 'a member of Ngāti Kahungunu', Ngāti Kahungunu Iwi Incorporation being the relevant JMIO.

'Tukuna matou kia haere, i roto i te rangimārie.'

This collective plea to 'allow us to go, in peace' resounded from a hui of Rongomaiwahine people in September 2004 following the enactment of the Māori Fisheries Act. Section 20 requires that the constitutional documents of Ngāti Kahungunu's Iwi Incorporation provide for Rongomaiwahine, if it so chooses, to withdraw. (This requirement is in addition to the matters required for the constitutional documents of a mandated iwi organisation under section 17.)

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25 A Waetford, 'Treaty of Waitangi (Fisheries Claims) Settlement Act 1992' (1993) 7 Auck Univ L Rev 402.

26 See S Milroy, 'The Māori Fishing Settlement and the Loss of Rangatiratanga' (2000) 8 Waikato L Rev 63 for an excellent discussion of the fisheries settlement.

Rongomaiwahine would become, upon completion of its withdrawal, an iwi for the purposes of the Act.

B. Provisions that Apply to the Withdrawal Process

While this review considers the withdrawal provisions as they apply to Rongomaiwahine, the following provisions apply, for the most part, to the other withdrawing groups identified in the Act, notably Ngāti Hine (Northland), and iwi groups in Hauraki and Te Arawa (Eastern Bay of Plenty). The constitutional documents of the JMIO must provide the process that the withdrawing group must undertake in order to withdraw, and the process for determining, consistently with the Act, the amount of the notional iwi population that must be attributed to the withdrawing group. The documents must also provide for the division of settlement assets. And, in order to complete the withdrawal process, the withdrawing group must have a Mandated Iwi Organisation recognised by TOKMTL in accordance with the Act. In order for any iwi to secure Mandated Iwi Organisation status, it must satisfy the criteria in sections 12 and 13 which include the necessity of having an asset-holding company.

In determining the withdrawing group's notional iwi population and the proportion of settlement assets that the withdrawing group must receive, any relevant information may be used, including the relevant data from the census of 2001 or 2006, but no other census data. The preference of Rongomaiwahine is to use the 2001 figures which reflect people's declarations as to iwi affiliation unconfronted by any political pressure concerning fisheries allocation that will inevitably surround the 2006 census.

Should the withdrawing group choose to withdraw it must commence the process of withdrawal, in accordance with the process provided for under the Act, within 5 years of the recognition of the JMIO as a Mandated Iwi Organisation under the Act.

Even if the withdrawing group withdraws, TOKMTL will distribute, allocate and transfer settlement assets to the JMIO as if the withdrawing group had not withdrawn from the JMIO.

The JMIO must not transfer any assets or make payments to the withdrawing group under the Act until the withdrawing group has completed the process of withdrawal and any such transfer of assets must be free of charge to the withdrawing group (other than reasonable administrative costs) and treated as if it were between wholly-owned asset-holding companies of the JMIO. After it has completed the process of withdrawal, the withdrawing group's Mandated Iwi Organisation will have all the voting rights of a mandated iwi organisation with some exceptions in respect to the appointment or removal of members to certain committees.

C. Dispute Resolution

Part 5 of the Act provides a process for dispute resolution including extending the jurisdiction of the Māori Land Court to deal with matters referred to that Court for determination. Such matters include coastline entitlements, mandate and quota allocation. Under section 187, if a dispute arises in relation to the withdrawal process provisions, a party to a dispute may apply to the Māori Land Court under section 26C(d) of Te Ture Whenua Māori Act 1993 for a determination by order in accordance with Te Ture Whenua Māori. Any application under section 187 must be notified to every affected party.

Where parties are seeking a determination of the Māori Land Court, the judge addressing the matter may determine the issue, refer the matter to the Court for hearing and determination, call a

judicial conference, give directions, or defer or dismiss the application: section 26F Te Ture Whenua Māori. A judge may also refer the matter to mediation where appropriate. The Chief Judge or the Court, where the matter has been referred to the Court for hearing, may also appoint one or more additional members who have knowledge of relevant tikanga Māori or other expertise to assist the Court.

D. Designing a Withdrawal Process

Apart from the provisions summarised above, the Act has left the task of designing the withdrawal process largely up to the JMIO. While the apparent lack of direction has drawn some criticism – an alternative view is the Act leaves the parties relatively free to custom-design a process that works for them. The problem is that the whole issue of withdrawal is contentious, to say the least. Whether based on reasons of whakapapa and history or reluctance of losing a proportion of a very valuable asset, many members of JMIOs do not support the concept of withdrawal.

The Act does not require agreement, nor does it require that the parties work together. Nevertheless, there is nothing in the Act that *prevents* the parties working together. The JMIO wields most of the power in terms of providing a withdrawal process, and the benefits of holding resources from past allocation of fisheries assets, but the JMIO cannot receive allocation of assets under the Act unless a withdrawal process is provided.

If a withdrawing group is dissatisfied with the proposed withdrawal process, it may invoke the dispute resolution process under section 187 which will undoubtedly delay allocation. So there is some incentive for the parties to work together to come up with a mutually acceptable withdrawal process, and according to Judge Milroy of the Māori Land Court the provisions of the Māori Fisheries Act and Te Ture Whenua Māori Act, 'make it clear that, except in certain limited circumstances, the Court is to be seen as a last resort rather than the first port of call.'[27]

A withdrawal process would need to address how to determine coastline issues and the amount of the notional iwi population that must be attributed to the withdrawing group. Issues around definition of who is entitled to vote will also need to be dealt with. For example, for the purposes of voting; is Rongomaiwahine all of the descendants of Kahungunu and Rongomaiwahine, or just those who have maintained ahi kā in the Māhia Peninsula region? Should voters be limited to those who are registered with the proposed mandated iwi organisation of the withdrawing group? These will be important issues when the withdrawing group embarks upon the process of voting to determine whether it chooses to withdraw, and on issues around its own Mandated Iwi Organisation.

The significance of these issues cannot be underestimated, for instance, descendants of both Kahungunu and Rongomaiwahine are now faced with balancing a myriad of complicated issues involving their often indivisible whakapapa with Rongomaiwahine's continued struggle for independence. Of wider interest, these provisions foreshadow renewed dynamism concerning tribal reorganisation. Any determination of these matters in terms of the Māori Fisheries Act would also need to take into account settlements that are reached in terms of aquaculture.

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27 Te Pouwhenua, April 2005.

IV. Waimāori – Tangata Whenua Responses to the Government's Proposals on Freshwater for a Sustainable Future

From *waitai* (tidal waters) to *waimāori* (freshwater), I turn now to reflect upon the Government's consultation process with tangata whenua regarding the Government's proposals for sustainable management of freshwater. In places I use the eloquent words of the hui participants themselves to illustrate the significance of the relationship between tangata whenua and their waters. The potential for the Government's proposals to shatter that relationship cannot be ignored. Traditionally, waimāori is highly treasured by Māori and goes to the heart of our identity. For these reasons I emphasise here the need for Māori to scrutinise the Government's proposals and to ensure that Māori are involved in every future step of planning and policy in relation to freshwater.

'E kore a Parawhenua e haere ki te kore a Rakahore.'

I begin however with reference to ancient genealogy indicating that Tāne wedded Hinetuparimaunga, the mountain woman. Their offspring were Pūtoto and Parawhenuamea. Parawhenuamea is the personified form of water, and particularly of mountain streams.[28] A literal translation of the above proverb is 'Parawhenua will not venture out in the absence of Rakahore', meaning that mountain springs and streams would not be able to flow if it were not for the rock from which they issue – a plea to consider our natural environment in a holistic way, and an appropriate platform for this part of the review.

In February 2005, as part of a wider consultation process, a series of hui was conducted throughout the country in order to consult specifically with tangata whenua about the notorious problems of declining quality and over-abstraction of freshwater. The consultation was co-ordinated by the lead ministries involved, the Ministry for the Environment and the Ministry of Agriculture and Forestry. Also present at the hui were representatives from Te Puni Kōkiri and the Ministry of Economic Development.

At each of the hui, tangata whenua expressed their own values and unique world views in relation to freshwater.[29] Tangata whenua groups clearly require their own solutions to the problems in their respective rohe, and reserve their right to engage directly with the Crown on their own behalf. Without wanting to detract from that, there are some relatively common issues that emerged from the consultation hui. They are summarised below:

A. *Prioritising Māori values, Māori world view and the Treaty of Waitangi*

'… if the river is rested, it will heal itself.'[30]

According to a Māori world view, waterways are said to be the veins of Papatūānuku, some say that all water originates from the pain of separation of Ranginui and Papatūānuku. Water has a mauri or life force, which, given the current state of freshwater in this country, needs to be

28 A W Reed, *Reed Book of Māori Mythology* (R Calman, ed, 2004), 325.

29 Minutes of these hui were made available at <www.mfe.govt.nz>. Also available from that site are associated documents and reports, including the Discussion Document distributed during the consultation process, which document explains the problems facing freshwater and proposes some solutions.

30 Quotation taken from the Waitara consultation hui.

restored. Such restoration could occur by way of rāhui, by reserving or prohibiting use. All waterways are significant given that iwi and hapū often align their very identity with their waterways. The longest river in the land, Waikato, is a pre-eminent example. It is said to contain the life-giving water that the ancestral mountain Tongariro sent to the Maiden Taupiri. People that traditionally lived alongside its banks descend from and take their tribal name from this ancestral river.

Concepts such as mauri and rāhui could play a valuable part in any new policy or legislation to restore waimāori to its pristine condition. Too often, decisions about water have not prioritised Māori spiritual or cultural values. For too long pākehā values and systems have dominated those decisions – detrimentally. It is time to embrace Māori wisdom – ancient wisdom that treasures water, and that sees waterways as being connected – requiring, in turn restoration, protection and integrated management.

B. Te Tiriti o Waitangi – The Treaty of Waitangi

The call by iwi for more effective recognition of their values and their authority as tangata whenua echoed throughout the consultation hui:

> Māori (particularly in the context of the RMA) shouldn't be seen as anti-development, or as problematic but we are kaitiaki – to protect the whenua, the awa and sacred sites and this is affirmed in Te Tiriti o Waitangi. As we move forward, we must be in partnership. Any water programme of action must see water as a taonga in the context of the Treaty and this benefits all of us, not just Māori. The [Resource Management Act] seemed to set us apart as world leaders in this area, let's not let that go. Don't just consult with us; allow us to participate. Don't let Māori be relegated to a second tier level of consultation when Māori are the Treaty partner.[31]

The Māori world view condensed into the preceding few paragraphs illustrates why, almost without exception, waimāori was considered to be a taonga under the Treaty of Waitangi, protected under Article Two.

Many Māori feel that the problems of declining water quality and over-abstraction are a result of the Crown's failure in its duty of kāwanatanga and that Māori have been prohibited from exercising their obligations of kaitiakitanga, or guardianship. They have been voicing these sorts of concerns by way of Waitangi Tribunal processes for decades.

The Te Atiawa Tribe of Taranaki, for example, brought a claim more than twenty years ago that the Crown's failure to properly control discharge of sewage and industrial waste onto or near significant traditional fishing grounds and reefs; and the ensuing pollution of the fishing grounds, were inconsistent with the principles of the Treaty of Waitangi. In one of its earliest reports (*Motunui-Waitara Report* Wai 6 1983), the Waitangi Tribunal upheld those claims. In the Tribunal's view, the Treaty of Waitangi obliges the Crown to protect Māori people in the use of their fishing grounds to the fullest extent practicable, and to protect them especially from the consequences of the settlement and development of the land. This protection would involve at one level the physical protection of the fishing grounds from abuse and deterioration as a result of pollution or destruction. At another level the protection envisaged by the Treaty involves recognising the rangatiratanga of the Māori people to both the use and the control of their fishing grounds in accordance with their own traditional culture and customs and any necessary modern

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31 The words of a participant at the North Harbour Hui.

extensions of them. The Motunui-Waitara claim encompasses three very common themes that arose during the consultation hui:

- the impact that poorly controlled disposal of sewage has on water, and Māori preference for land based disposal of effluent;
- the loss and deterioration of food species and mahinga kai as a result of pollution; and
- the call for recognition of tangata whenua rights confirmed by the Treaty, particularly in relation to regulation and restriction of use.

More recently, *The Wanganui River Report*, in 1999 dealt briefly with another common theme that arose throughout the hui, the impacts of hydro-electricity projects on freshwater. The essence of the Whanganui Report was whether Māori interests in the river were extinguished, and if so, whether that had been done in accordance with the principles of the Treaty.

The Tribunal found that as at 1840, the Whanganui River and its tributaries were possessed by Te Atihaunui-a-Paparangi as a taonga of central significance. The river was conceptualized 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, the river is a living being, an ancestor with its own mauri, mana, and tapu. The Tribunal also found that the extinguishments of the river interests of Te Atihaunui-a-Paparangi arose from acts and policies of the Crown that were inconsistent with the principles of the Treaty of Waitangi.

Based on these findings, the Tribunal recommended that the Crown negotiate with Atihaunui having regard to two proposals; firstly, that the river in its entirety be vested in an ancestor or ancestors of Atihaunui. Any resource consent application in respect of the river would require the approval of the recommended trustee, the Whanganui River Māori Trust Board. An amendment to the regional plan relating to the river would be needed. The second option was for the Whanganui River Māori Trust Board to be added as a 'consent authority' in terms of the Resource Management Act to act with the current consenting authority. Both would need to consent to any application for the consent to be exercised. Negotiations currently continue between the Crown and the people of Whanganui in relation to issues concerning the ancestral river.

Recently, however, a determination of the Environment Court has been hailed as a victory for the Whanganui people who have battled for decades to protect the health and wellbeing of their ancestral waterways. In 2001, Genesis Power Limited was granted resource consent to continue to divert water for hydro-electricity operations from the ancestral rivers of Whanganui, Whangaehu and Moawhango on the west coast of the North Island for a further 35 years. Local iwi, Ngāti Rangi appealed to the Environment Court objecting to the 35 year resource consent contending that, for a number of reasons, relevant diversions were culturally unacceptable. Reduced flows and water levels, increased siltation, and consequent changes to the ecological system inhibited their fishing and other cultural practices.

The Environment Court released its findings in May 2004 allowing the appeals to the extent that the term of consent is reduced from 35 years to 10 years subject to conditions as to minimum flows.[32] In balancing the various matters under the Resource Management Act the Court acknowledged that it had some difficulty in weighing the metaphysical matters against physical and scientific matters, but went on to determine that the diversion of waters did have considerable deleterious effects on cultural and spiritual values of the Māori people in the area. This was

32 *Ngati Rangi Trust v Manawatu-Wanganui Regional Council*, Environment Court A067/2004, noted (2004) 5 BRMB 153, [2004] BRM Gazette 77.

reflected by the immense depth of feeling apparent from Māori witnesses. However, Genesis' evidence as to strategic significance and the value of the relevant hydroelectric generating stations was also accepted. The shortened term provided time for both parties to work through complex and difficult issues together. Genesis has appealed the decision.

C. Who owns the Water? Issues of Ownership and Co-Management

This year, the people of Te Arawa[33] accepted the Crown's settlement offer acknowledging the Crown's historical breaches of the Treaty of Waitangi and recognising Te Arawa's relationships. The settlement package includes the transfer of 13 lakebeds, and financial redress of $10 million. Te Arawa is to have a formal role in the strategic management of all the lakes in conjunction with the others involved in a proposed Lakes Forum which will include representatives of groups with a statutory interest in the lakes.[34]

While the settlement offer includes the transfer of *lakebeds*, during the consultation hui on freshwater, tangata whenua time and time again asserted their belief, that the *freshwater resource* belongs to Māori. While some iwi declared that they assumed ownership rights and merely wished to engage with the Crown to discuss co-management, others called for direct and immediate engagement with the Crown to discuss ownership. It was for reasons relating to ownership that many iwi were opposed to the Government's proposals for transferable water rights, as these seemed too akin to property rights.

These Government proposals contemplating the introduction of 'market mechanisms' such as tendering for and auctioning of water have the potential to further shatter tangata whenua relationships with water. To the credit of the lead ministries the proposals, as presented during the consultation process on freshwater, were early thoughts presented to canvass Māori ideas and feedback as part of a much broader consultation process. They were, however, met with a large degree of scepticism and disillusionment regarding governmental consultation generally, particularly as the hui were held in the wake of the foreshore controversy. According to hui participants, too often Māori views, values, and submissions were simply ignored. Māori pleaded for better quality engagement in all policy and planning processes.

D. Local Authorities and the Resource Management Act 1991

With one or two notable exceptions, Māori lamented the poor performance of regional and district councils in terms concerning relationships with tangata whenua. Across the nation Māori were unhappy that their concerns about water always seem to be overridden by industry concerns:

> The Resource Management Act has always provided the opportunity for Māori to participate at planning level, but it never happens because there is no willingness, we have no political weight. So we are shut out, and we become one voice amongst any other constituencies.[35]

In Murihiku, however, the Ngāi Tahu report and the legislation recognising Ngāi Tahu, were seen as a key underpinning of a positive working relationship involving their 'roopu Taiao', an

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33 A confederation of tribal groups that affiliate to the Te Arawa waka or canoe, and who reside in and around the Central North Island.

34 Te Arawa, the Eastern Fish and Game Council, the Rotorua District Council, Environment Bay of Plenty and the Department of Conservation.

35 Quotation from the Whanganui hui.

environmental forum made up of representatives from tangata whenua and councils that has a charter of understanding and that meets regularly to discuss policies and consents.

Many Māori shared their view that councils should be accountable for the cumulative negative effects on our waters resulting from those councils' decisions in granting resource consents over many years. Many also complained that the use of non-notified application processes resulted in iwi missing the opportunities to participate in resource management processes, and that regional councils lacked the ability to enforce the provisions of the Resource Management Act 1991 (RMA).

The purpose of the RMA in section 5 is to promote 'sustainable management' of the natural and physical resources, and that is defined to mean their use, development, and protection in a way, or at a rate, that enables people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety while:

(a) sustaining the potential of physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 6 requires all persons exercising functions under the Act to recognise five matters of 'national importance'. The first four refer to the protection of coastal marine areas, wetlands, lakes and rivers, outstanding natural features, and indigenous traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. Also, those persons shall have regard to eight matters under section 7, the first being 'kaitiakitanga' – the 'exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship' according to section 2. The seven other matters include the efficient use and development of resources, protecting the heritage value of sites and buildings, and enhancing amenity values and the environment. There is specific provision for protecting the habitat of trout and salmon, but no specific reference is made to indigenous fish. In achieving the purpose of the RMA with regard to the above principles, section 8 requires that those with responsibilities shall 'take into account' the principles of the Treaty of Waitangi.[36]

These provisions of the RMA have not been effective for Māori. Many hui participants disclosed stories of blatant breaches of the RMA that cause negative impacts on waimāori. Practitioners complained that councils seemed to place too much emphasis on *mitigating* and *remedying* damage rather than *avoiding* damage. Ultimately, Māori seek strong legislative direction from central government directing local councils to engage more effectively with tangata whenua, and to enable tangata whenua to participate at all levels of local government on freshwater issues: for example at governance level there could be regional tangata whenua water boards, at management level the development of iwi management plans and at regulatory level, a system akin to the honorary fishing officers could be established.

E. Education and Resourcing

Conscious of the need to protect the resources for the future, the Government was also frequently called on to do more to *educate* people around water usage and recycling, thus changing the culture and attitude of New Zealanders with respect to valuing water more. There were also calls

36 Waitangi Tribunal, *The Whanganui River Report* (Wai 167, 1999), 311.

for better education and public relations about the role of Māori, targeted at councillors, local authorities and farmers,[37] to improve awareness that Māori are more than protestors, Māori are landowners with economic development aspirations. Oral histories about rivers and streams could be collated and integrated into school curricula.

F. Support for Proactive Regeneration

Māori, in general, supported any initiatives towards the proactive regeneration of waimāori and more recycling and conservation of water. Specifically these include stronger commitment to and resourcing of iwi management plans, national standards (as to quality and minimum flows and levels) subject to those standards being high (such as, for example, drinkable water within a certain timeframe). A common request was for the Crown to resource a national forum designed by Māori for Māori to discuss issues relating to the future of waimāori and that there be some opportunity to be consulted in te reo Māori.

G. Objections to Market Mechanisms

It is fair to say that Māori across the county were consistent in their opposition to the idea of market mechanisms such as auctioning and tendering of water. The main reasons for this opposition seemed to be lack of resourcing for Māori in particular to be able to compete against the wealthy (such as power generation companies, Meridian and Genesis), and that such mechanisms would allow the 'rich to get richer and the poor to stay poorer'. Māori also opposed the idea of transferring consents or permits on the basis that to allow this would be too akin to the creation of property rights, and this would contravene their rights under the Treaty of Waitangi.

V. Recent Amendments to the Resource Management Act 1991

The foregoing section illustrates a strong perception amongst Māori that despite the potential in the Resource Management Act 1991 (RMA) to provide for Māori interests and to allow for meaningful participation, that potential has gone unfulfilled. Will the recent amendments to the RMA make a difference? As demonstrated in the quoted passages from the freshwater consultation hui, prior to the recent amendments to the RMA, it was largely up to individual councils to determine how Māori participated in the planning process, if at all. This inconsistency in approach was one of the driving factors for reviewing the Act. This part of the review briefly overviews those recent amendments to the Act, that were 'intended to improve certainty and clarity for consultation and iwi resource planning'. It will analyse how those amendments affect Māori and share some best practice examples for effective participation in resource management processes.

Section 36A clarifies the existing legal position by confirming that neither an applicant nor a consent authority has a duty to consult any person in respect of applications for resource consents and notices of requirement.

Section 35A imposes mandatory duties on councils to keep records as to contact details, planning documents, and area in relation to kaitiakitanga, for each iwi and hapū within their

37 Particularly with regard to irrigation, fencing waterways and riparian planting. Excellent initiatives encouraged by Fonterra such as the Clean Streams Accord are not widely advertised, and may not be readily implemented.

regions. It also requires the keeping of records as to contact details for any groups that represent hapū for the purposes of the Act. The First Schedule requires councils, during the preparation of proposed policy statements or plans, to consult with tangata whenua through iwi authorities.

The intention of these recent RMA amendments is to improve processes for consultation with iwi and hapū in the development of plans and policy statements. Relatedly, the Local Government Act 2002 requires councils to provide opportunities for Māori to participate in decision-making processes.[38]

While it is encouraging to see a mandatory requirement to consult 'tangata whenua' regarding the preparation of policies and plans in the RMA, there is a concern that councils are only required to deal through iwi authorities. Given that hapū signed the Treaty, and that some iwi authorities may be poor representatives in the often technical area of resource management issues, iwi authorities may not be the best entities with which to engage for the purposes of consultation. A preferred model is consultation via an entity specifically established to address resource management issues such as the Te Mana Taiao model operating successfully in the regions of Murihiku (Southland), Māhia Peninsula and Wairoa, and Raukawa.[39] This model brings together, as a consultative forum, representatives selected by tangata whenua for tangata whenua with both the expertise needed and the passion for environmental and resource management issues.

Fortunately, regardless of the technical legal position, consultation can still be provided for, and achieved, in relation to iwi, hapū and other groupings as illustrated by the draft brochure 'Resource Consents – Consultation in the Māhia Region.'[40] This brochure outlines some background information about the RMA and the resource consent process, while also identifying the tangata whenua groups that ought to be consulted as part of a resource consent application in their district. The brochure notes the approach of the Wairoa District Council that if the nominated body for consultation recommends against a consent, the consent will be notified and a hearing held, and goes on to clarify that:

> For resource consent purposes Te Mana Taiao o Rongomaiwahine act as kaitiaki (guardians) of Māhia's natural and cultural environment. Where subdivisions are concerned, tangata whenua must be consulted as to environmental impacts, and the potential for cultural and social impacts. With regards to land use activities, such as earthworks, tangata whenua should be consulted in respect of the possible impacts on archaeological sites and sites of cultural significance.

Thanks to the joint efforts of the Wairoa District Council and Te Mana Taiao o Rongomaiwahine this is a best practice model that other tangata whenua groups may find useful in their own tribal areas.

A. *Joint Management Agreements and the Ngāti Whatua o Orākei Experience*

New sections 36B to36E provide the power to make joint management agreements. These sections provide a new framework for public authorities, iwi authorities, and groups that represent hapū to enter into joint management agreements about natural or physical resources. The framework is aimed at developing and encouraging collaborative projects between councils and

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38 For a review of major reforms delivered in the Local Government Act 2002 see K Palmer, 'Local Government Law and Resource Management' [2004] NZ L Rev 751, 752-756.

39 The Te Mana Taiao model is the brainchild of Willie Te Aho, CEO Indigenous Corporate Solutions Ltd.

40 It is important to note that as at October 2005 the brochure was still in draft form, though it had been approved by Te Mana Taiao o Rongomaiwahine.

Māori. There are a number of successful joint management models already operating where title to resources such as lakebeds, and the foreshore may be vested in tangata whenua and there is joint management and protection of public use rights.

The joint management arrangement between Ngāti Whatua o Orākei and the Auckland City Council is a pre-eminent example. Under section 8 of the Orakei Act 1991, almost fifty acres of land was set aside as a Māori reservation 'for the common use and benefit of the members of the hapū and the citizens of the City of Auckland'. The reservation comprises the Takaparawhau and Okahu Parks and part of the foreshore encompassing the original papakāinga.[41] The fee simple title to the land is registered in favour of the Ngāti Whatua o Orākei Māori Trust Board. The reservation is jointly administered by the hapū and the Auckland City Council through a body known as the Orākei Reserves Board which comprises three representatives of the Ngāti Whatua o Orākei Māori Trust Board and three representatives from Auckland City Council. By statute, the land is managed, financed and developed at the expense of the Auckland City Council in view of the land, including foreshore, being kept for public as well as hapū enjoyment. The chairperson (and the casting vote) is reserved for a Ngāti Whatua representative in recognition of the hapū's title and mana whenua. In the words of Sir Hugh Kawharu, Chairperson of the Orākei Reserves Board:[42]

> ... from the trauma and the ashes the Crown restored title to Orakei's 150 acre 'Whenua Rangatira'… The arrangement has worked successfully and without untoward incident since its inception in 1992 … It is a benign but efficient regime; and here at least the mana of Ngati Whatua stands tall, intact and protected ... [P]ublic access to the foreshore of Okahu Bay has been unrestricted from the day title returned to Ngati Whatua.

The inclusion of the provisions that might enable more collaborative management models combining Māori knowledge and experience and western knowledge is a welcome addition to the RMA.

B. Observations

While it may now be explicit that there is no duty on councils and applicants to consult with Māori specifically in relation to resource consents, there are duties and guidelines for consultation with Māori in relation to local government decision-making processes. So, Māori are encouraged to be more proactive in working with councils at earlier stages of resource management processes, such as in the drafting and review and monitoring of plans and policies.

How councils will go about engaging Māori participation in planning and policy development and the management of resources is uncharted territory. However the best practice examples referred to above not only illustrate how some of the new principles and guidelines in the Resource Management Act can operate in practice, they also highlight the importance of working relationships; and the potential for Māori and local government to custom-design collaborative planning tools.

There are many ways to achieve good environmental results. Participating in formal legal processes is by no means the only way. For Māori there is strength in unity – and where possible

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41 I H Kawharu, 'Orakei', in *Waitangi Revisited* 158 (2004).

42 As quoted in P Sneddon, 'Rangatiratanga and Generosity: Making the Connections', Philanthropy New Zealand Conference, 2004.

hapū and iwi groups should work together particularly on issues of regional or national significance. Māori must work proactively with Councils to develop clear and consistent processes for more effective participation by Māori, at all levels of decision-making. Sharing information about best practice models is to be encouraged between tangata whenua, councils, industry and community groups.

VI. Transpower's Proposed Transmission Line – Is this State-Owned Enterprise Acting 'On Behalf of the Crown'?

This final section briefly considers an interesting point of jurisdiction that emerges from a recent decision of the Chairperson of the Waitangi Tribunal in relation to state-owned enterprises.

Transpower proposes to introduce a 200 kilometre long 400kV transmission line between Whakamaru and Otahuhu. A portion of the preferred route passes through the rohe of Ngāti Korokī-Kahukura in and around the town of Cambridge in the central North Island. The current transmission line already runs close to a marae and established urupā (burial ground). The new proposed route, announced in mid-2005, will directly encroach upon other burial sites.

Sadly for Ngāti Korokī-Kahukura, this is not the first time that they have been directly affected by the nation's electricity needs. Rocks that formed the centrepiece of a very significant and sacred site, were detonated and destroyed in order to create the Karapiro Dam which lies squarely within our tribal area.[43] The same site was further desecrated to facilitate international rowing competitions on Lake Karapiro. A memorial stands in the Karapiro Domain acknowledging the site and its historical significance. It is not surprising, then, that members of Ngāti Korokī-Kahukura would seek meaningful engagement regarding any further transgressions of sacred sites within our rohe. It is argued that Transpower has refused to adequately consult with mandated hapū representatives regarding the designated route.

Relevantly, section 6(1) of the Treaty of Waitangi Act 1975 confers jurisdiction on the Waitangi Tribunal to hear claims by Māori who claim to be prejudicially affected by any policy or practice adopted or proposed to be adopted by the Crown or any act done or admitted by or on behalf of the Crown which is inconsistent with the principles of the Treaty of Waitangi. The claimants of Ngāti Korokī-Kahukura sought to have a claim heard under urgency in the Waitangi Tribunal alleging that the establishment of the transmission line was an act carried out by Transpower on behalf of the Crown, and that in failing to adequately consult, the so-called Treaty principles of active protection and good faith were breached.

In a decision dated 31 August 2005, the Chairperson of the Waitangi Tribunal dismissed the application for urgency on the basis that hearing rights and opportunities to consider Treaty principles existed in accordance with Resource Management Act processes which were yet to be played out.[44]

Despite the finding in relation to urgency, the Chairperson's decision raises an important point concerning the jurisdiction of the Waitangi Tribunal in relation to state-owned enterprises. Based on the terms of the Public Finance Act 1989 and the State-owned Enterprises Act 1986, which statutes clearly distinguish between a state-owned enterprise and the Crown, both the Crown and

43 I am a descendant of Ngāti Korokī-Kahukura.

44 Wai 1294.

Transpower asserted that Transpower is not, technically speaking, the Crown. Therefore, they argued, the Tribunal did not have jurisdiction to consider the claim, let alone do so under urgency.

The Chairperson rejected this argument on the basis that Transpower is required to work closely with the shareholding ministers and through them, the Crown, in undertaking the project and building relationships with Māori. While the relationship is not one of agency, the Chairperson determined that Transpower undertakes its mission in the public interest as a socially responsible Crown-owned company. Its business is carried out in the Crown's name. Accordingly, for the purposes of section 6 of the Treaty of Waitangi Act 1975, the Chairperson concluded that the transmission project is a policy or practice promoted by Transpower on behalf of the Crown and jurisdiction was therefore established.

The decision is clearly based on the particular facts of the case, but gives rise to what could be a major development in the area of Treaty claims. Many state-owned enterprises, such as the likes of Mighty River Power Ltd, exercise control over resources that are the subject of Treaty claims, such as the Waikato River and geothermal resources. The Chairperson's decision appears to provide a further option for trying to ensure that state-owned enterprises act consistently with the principles of the Treaty of Waitangi in their day-to-day operations.

The Chairperson optimistically observed that the project is at an early stage and there is still room for dialogue between the parties.

VII. Summary and Conclusion

Historically, the application and interpretation of successive Māori land statutes has shattered Māori customary land tenure and social structures, but the Te Ture Whenua Māori Act 1993 introduced a new philosophy that would restore some sense of balance. The Matauri litigation seems to signal the perturbing possibility that the retention principle, so fundamental to that statute, may be overridden by the interests of the 'modern commercial world'.

As regards the Foreshore and Seabed Act 2004, while some attempts have been made to provide for some Māori customary rights, the legislation remains tainted by its extinguishment of the possibility of establishing Māori customary title over the foreshore and seabed and its failure to provide a guaranteed right of compensation.

Staying with matters concerning the sea, the significance of issues around tribal reorganisation for the purposes of fisheries allocation cannot be overstated. Māori social organisation has always been dynamic, and the provisions regarding tribal reorganisation for the purposes of allocation of fisheries assets under the Māori Fisheries Act 2004 provide a modern day example of that dynamism while introducing a new set of complicated issues for certain iwi groups that must now balance often indivisible whakapapa with the desire for independence.

Turning inland to issues relating to fresh rather than tidal waters, there can be no doubt that the problems of declining water quality and over-abstraction are being felt keenly throughout the country. According to Māori, at least, these problems, and problems concerning the environment and the management of resources generally, are a result of decision-makers failing to prioritise Māori spiritual or cultural values and can be improved by better quality of engagement with iwi and hapū as tangata whenua, rather than superficial 'consultation'.

This review illustrates that the potential has long existed, whether in statutes such as the Resource Management Act 1991 or in situations concerning the transmission of electricity, to provide for Māori interests and to allow meaningful participation by Māori. Regrettably, that

potential has gone unfulfilled in too many cases. It will be interesting to observe just how councils will go about engaging Māori participation in planning and policy development, and the management of resources, in the light of recent amendments to the Resource Management Act and the Local Government Act 2002.

One lesson to be learned across the diverse range of issues covered in this review is that there has always been the potential for Māori world views, interests, values and rights to be recognised and provided for by decision makers; for dialogue to occur, and for building positive working relationships – whether they be between Māori and local government, Māori and the Crown (including entities that act on the Crown's behalf), Māori and industry or, as between Māori and Māori. Examples in this review provide evidence of this. The challenge is the willingness to fulfil that potential.

Glossary of Māori terms

Papatūānuku	Earth mother
Ranginui	Sky Father
Tāne	Revered Ancestor of forest, flora and fauna
Parawhenuamea	Personification of mountain streams and springs
Ahi kā	'site of burning fires', continuous occupation
Hapū	subtribe
Hui	meeting, assembly
Iwi	tribe
Kaitiakitanga	guardianship, stewardship
Kaupapa	purpose, objectives
Kōrero	dialogue
Kuia	female elder
Mana	prestige, power, authority
Mana motuhake	separate or independent authority
Mana whenua	customary authority and title exercise by a tribe or sub-tribe over land and other taonga within the tribal district
Māori	the indigenous peoples of Aotearoa/New Zealand
Mauri	life force, life principle
Pākehā	people of European descent
Pāua	shellfish, abalone
Rāhui	reserve, preserve
Tangata whenua	people of the land
Taonga	treasured, prized possessions
Taonga tuku iho	treasured, prized possession handed down (from ancestors)
Tikanga Māori	laws, ethics and customs of the Māori
Tapu	sacred
Waimāori	freshwater
Waitai	tidal waters, saltwater
Waka	canoe, or kinship group based on affiliation to canoe
Whānau	family, descent group
Whenua	land