CONTEMPORARY ISSUES IN MĀORI LAW AND SOCIETY
CROWN FORESTS, CLIMATE CHANGE, AND CONSULTATION— TOWARDS MORE MEANINGFUL RELATIONSHIPS

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Whanaungatanga, the importance of relationships, is a key theme that permeates significant developments in Māori law and society that have occurred during the course of the year.[1] Māori have again called for a relationship with the Crown as their Treaty partner in which they can exercise rangatiratanga: the right for Māori to be self-determining and self-sustaining.[2] The Court of Appeal case which considered the nature of the Crown-Māori relationship twenty years ago provides a convenient starting point for this year's review which goes on to consider challenges by some Māori to the allocation regime that has been adopted in relation to Crown forest lands. Inextricably linked to concepts of whanaungatanga and rangatiratanga is the special relationship that Māori share with the environment and the resources within. This relationship includes rights and obligations of kaitiakitanga, or guardianship, over certain resources. Māori reaffirmed the importance of such relationships when they articulated their perspectives on climate change during a Crown initiated consultation process early in 2007, and again later in the year in relation to bioprospecting and mātauranga Māori. The issues raised in the latter process go to the heart of the Waitangi Tribunal claim to indigenous flora and fauna, the hearings for which have finally concluded after 17 years. The report of the Waitangi Tribunal on that claim is eagerly awaited. Other reports issued by the Tribunal this year, and reviewed here, are forthrightly critical of Crown Treaty Settlement Policies.

I. RANGATIRATANGA AND THE *LANDS* CASE REVISITED

This year marked the 20th anniversary of the Court of Appeal's decision that interpreted the principles of the Treaty of Waitangi: *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (the *Lands* case).[3] The *Lands* case and the stream of cases that followed[4] were responsible for

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1 This review covers the period from October 2006 to September 2007.

2 Rangatiratanga is a term sourced from the word 'rangatira' which means chief. Tino rangatiratanga is a term used in the Māori text of the Treaty of Waitangi 1840, the text that Māori signed. The word 'tino' is an intensifier. Tino rangatiratanga literally means unqualified exercise of chieftainship. The corresponding term used in the English version of the Treaty is 'full and exclusive possession' of all resources and things valuable to Māori. An alternative translation is sovereignty. In the Declaration of Independence of New Zealand 1835, the word used for sovereignty had been mana.

3 University of Otago, Faculty of Law, *'In Good Faith' Symposium,* 29 July 2007 available at <www.otago.ac.nz/law/symposium/>.

4 Those cases include: *Tainui Māori Trust Board v AG* [1989] 2 NZLR 513 (hereinafter the *Coal* case); *NZ Māori Council v AG* [1992] 2 NZLR 576 (hereinafter the *Broadcasting Assets* case); *New Zealand Māori Council v Attorney General* [1989] 2 NZLR 142 (hereinafter the *Forests* case).

what seemed to be positive practical consequences for Māori who have brought and continue to bring matters to the attention of courts calling into question the manner of their Treaty partner's actions. The State Owned Enterprises Act 1986 provided for certain state assets and resources to be transferred and then 'managed' by private sector boards. The focus of these new State Owned Enterprises (SOEs) was to be profit making, with any non-commercial activity required by government to be subsidised. Māori became concerned that the transfer of natural resources to SOEs would affect the Crown's ability to settle Treaty claims.

As a result of the *Lands* case, the Crown and Māori came to an arrangement as to how Treaty of Waitangi claims would be safeguarded. The Treaty of Waitangi (State Enterprises Act) 1988 reflects the terms of this arrangement. Crown land could be transferred but would be subject to provision for the resumption of the land on the recommendation of the Waitangi Tribunal so that it could be returned to Māori ownership. Subsequently, as a result of the *Forests* case,[5] the Crown and Māori negotiated an agreement that restricted the Crown's ability to sell Crown forest land. Under that agreement, the Crown would be able to sell cutting rights to trees on Crown forest land until the Tribunal recommended that the land was no longer liable to resumption for the purpose of transfer to Māori ownership.[6] This agreement was embodied in the Crown Forests Assets Act 1989, which Act also established the Crown Forestry Rental Trust (CFRT).[7] Rental payments received by the Crown from Crown Forest Licence holders is paid to CFRT who holds funds on trust for Treaty settlements concerning Crown forest licensed land. The interest earned on the accumulated rentals held by CFRT is used to fund certain Treaty claimants and research.

In addition to the systems established to safeguard resources for the purposes of Treaty settlements, the SOE cases are also responsible for the consideration of Treaty 'principles' at times when the Crown and its agents enter into new proposals, or make decisions on major issues – and this is likely to occur even where there is no equivalent to section nine of the State Owned Enterprises Act in an empowering Act. State Owned Enterprises, themselves, are conscious of the scope for review of proposals or decisions by way of judicial review in the Courts, and before the Waitangi Tribunal theoretically ensuring that Māori interests are taken into account in major decisions that affect Māori.[8]

And yet, despite all of this, twenty years after the celebrated *Lands* case,[9] it is questionable whether the protection mechanisms for lands, and those established later in relation to Crown Forests, are actually working at all for Māori in the context of the Crown's policies for Treaty Settlements. This year Māori protested against the proposed sales of land held by Landcorp in Whenuakite in the Coromandel, and Rangiputa in the Far North that should have been available for Treaty settlements. One commentator has described these proposed sales as inexplicable given that the land available nationwide for Treaty settlements is a tiny fraction of the territories under

5 The *Forests* case.

6 Treaty of Waitangi Act 1975, ss 8HA-8HI, as inserted by the Crown Forest Assets Act 1989, s40.

7 Crown Forests Assets Act 1989 s34.

8 The Treaty may found an application for judicial review where an empowering statute expressly enforces or promotes the principles of the Treaty either as binding restraints on decision-makers or as factors to be taken into account such as in the SOE Act (express reference review), and where a statute is silent but the context of the decision-making imports Treaty considerations (contextual review). According to *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 223, the Treaty or Treaty principles are of such significance that they should be presumed mandatory considerations in the context of a statutory power of decision and this has won support from academics and a number of judges.

9 *NZ Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

Māori claim. The Crown's relativity policy and soaring land values make many of the properties that might be available for settlement beyond reach.[10] The Government, in response has begun to review its policy around the land sales processes undertaken by state owned enterprise Landcorp saying that it aims to ensure that land with significant cultural value is properly protected.[11]

Such challenges to the Crown's Treaty settlement policies reflect the more inherent issue of rangatiratanga. In spite of the reassuring judicial language of partnership, mutual respect and obligation, and so on, if the result of the *Lands* case and the stream of cases that followed, is that the notion of Crown Sovereignty remains unchallenged and becomes so deeply entrenched in the law, or at least in Pākehā law, then, in the words of Ani Mikaere,

> tino rangatiratanga cannot be realised and tikanga Māori will forever be positioned as inferior to Pakeha law, tolerated to varying degrees and for different purposes … but ultimately subject to ... the stroke of the legislative pen, or to misinterpretation at the hands of the judiciary. [12]

These cautionary words are difficult to ignore in balancing the overall ramifications of the *Lands* case in relation to the tangata whenua systems of law and government that existed in this country prior to colonisation by the British.[13]

II. Crown Forest Assets – claims to the Kaingaroa Forest

In the year past, claims and challenges relating to the allocation of Crown Forest Assets have been hotly contested both in the courts and in the Waitangi Tribunal. Under particular scrutiny has been the Crown practice of using deeming legislation to avoid the process of settling claims to Crown Forest Licensed Land via the Waitangi Tribunal as envisaged under the Crown Forest Assets Act 1989.[14]

A. Te Pūmautanga o Te Arawa – the Affiliate Te Arawa Settlement

I have outlined in previous reviews some of the historical background of the claimant group which comprises a number of iwi and hapū of Te Arawa[15] that opted to pursue direct negotiations with the Crown to settle their historical Treaty of Waitangi claims rather than via the Waitangi Tribunal. The cluster of hapū and iwi, once known as Ngā Kaihautū o Te Arawa (Ngā Kaihautū), has more recently taken on the name Te Pūmautanga o Te Arawa (TPT). TPT had been part of earlier attempts to negotiate a collective settlement with all iwi in the Central North Island with interests in the Kaingaroa Forest. Those attempts failed and mandate issues in relation to TPT, who continued to negotiate directly with the Crown, became the subject of two consecutive Waitangi

10 Rawiri Taonui 'Comment: Going, going, gone' *Sunday Star Times – National News* 18 March 2007 available at <http://www.maoriparty.com/index.php?option=com_content&task=category&sectionid=1&id=59>.

11 Press statement, New Zealand Government 'Landcorp comment' 28 February 2007 available at <http://www.scoop.co.nz/stories/PA0702/S00546.htm>.

12 A Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Māori' in *Waitangi Revisited – Perspectives on the Treaty of Waitangi* (2005) 330, 342.

13 Māori society was collectively organised with whakapapa (genealogy) forming the backbone of a framework of kin-based descent groups led by rangatira – leaders for their ability to weave people together. Māori societies developed tikanga Māori, which to use a phrase coined by Ani Mikaere in 'The Treaty of Waitangi and Recognition of Tikanga Māori', ibid, was the 'first law of Aotearoa/New Zealand' by which Māori governed themselves.

14 The *Forests* case.

15 A confederation of tribes in the Central North Island in and around Rotorua.

Tribunal reports.[16] Ultimately, the Tribunal found that the approximately 24,000 affiliates of Te Arawa iwi and hapū who remained loyal to Ngā Kaihautū (now TPT) had exercised their tino rangatiratanga and those groups were open to negotiate their claims with the Crown. They did so, and went on to ratify a Deed of Settlement with the Crown. It is expected that legislation to perfect that settlement will be introduced into Parliament in late 2007.

The Affiliate Te Arawa Deed of Settlement provides for a comprehensive settlement of historical claims for the affiliates of Te Arawa who chose to settle (the TPT Settlement). It provides for an apology by the Crown, and cultural redress that includes the return of sites of significance such as mountain peaks and geothermal resources. The settlement also promises financial and commercial redress, the most controversial aspect of which is the proposed transfer of Crown Forest Licensed Land predominantly in the Kaingaroa Estate (Settlement Licensed Land). The legislation will deem certain events to have occurred and TPT becomes entitled to accumulated rentals relating to the Crown Forestry Licences as a Confirmed Beneficiary. In addition, TPT may also purchase further Crown forest land on a commercial basis if the settlement legislation is passed by Parliament (Deferred Licensed Land). In relation to Deferred Licensed Land, the settlement legislation will deem certain events to have occurred and the *Crown* will be entitled to accumulated rentals as a confirmed beneficiary. This aspect of the settlement has attracted the most heated debate. The Crown has indicated that it intends to use the accumulated rentals to further Māori development.

B. Forests and Fiduciary Duties – NZMC v AG (High Court)[17]

In the High Court the New Zealand Māori Council (NZMC), Federation of Māori Authorities (FOMA), and Tumu Te Heuheu, Ariki of Ngāti Tūwharetoa, sought to prevent the Crown obtaining the accumulated rentals pursuant to the agreement it reached with TPT. In addition, Tūwharetoa and other interested iwi contended that their contingent rights are gravely affected by the Crown's actions of allocating parts of the Forest Estate without having first dealt with cross claims. All declarations sought by the plaintiffs were declined, but the Court, albeit cautiously, expressed some concerns about the Crown's proposed actions.

As against the Crown, the plaintiffs alleged that:

1. By using 'deeming legislation' to avoid having all cross claimants' entitlements to Crown Forest land determined by the Waitangi Tribunal, the Crown breached an agreement made in July 1989 with NZMC and FOMA who represented Māori generally;
2. That July Agreement was embodied in the Crown Forests Assets Act 1989, and the Crown settled a Trust Deed establishing the Crown Forestry Rental Trust. The plaintiffs further alleged that the Crown's actions of circumventing the Tribunal process also breached a statutory duty implicit in the Crown Forests Assets Act.
3. By seeking to obtain the benefits of funds as a 'Confirmed Beneficiary' the Crown would also be in breach of the Trust Deed.
4. The Crown is acting in breach of its fiduciary duty to the plaintiffs by

16 For a fuller outline of the historical background see Waitangi Tribunal, *The Te Arawa Mandate Report* (Wai 115, 2004) and *Te Arawa Mandate Report Te Wāhanga Tuarua* (Wai 1150, 2006) 2 as cited in L Te Aho, 'Contemporary Issues in Māori Law and Society: Mana Motuhake, Mana Whenua' (2006) *Wai L Rev*. 102, 106-107.

17 *NZMC v AG* [2007] High Court Wellington CIV 2007-485-000095 (Unreported, Gendall J, 4 May 2007).

a. failing to act in good faith, fairly, reasonably and honourably by entering into the Settlement Deed with TPT when extant claims were before the Waitangi Tribunal and future claims may also be brought, and where the Waitangi Tribunal had made no recommendation so as to confirm entitlement to rental proceeds as Confirmed Beneficiaries on both TPT and the Crown;
b. contracting to receive the rental proceeds in breach of the Trust;
c. avoiding the payment of compensation to claimants; and
d. ousting the jurisdiction of the Waitangi Tribunal.[18]

The plaintiffs sought declarations to that effect, together with orders seeking to restrain TPT from obtaining land, and the Crown from obtaining rental proceeds or trust funds. Gendall J began by revisiting the *Lands* case and the *Forests* case. Both cases had been initiated by the NZMC, and both resulted in the establishment of mechanisms aimed at protecting resources held by the Crown for the purpose of settling Treaty of Waitangi claims for all Māori. Essential to the plaintiffs' case was the claim that the TPT Settlement and the envisaged legislation would thwart the protection mechanisms around Crown Forestry Assets. Previous settlements such as those in relation to Waikato-Tainui and Ngāi Tahu which involved Crown Forestry Assets have already bypassed the Waitangi Tribunal process with the use of deeming legislation. One of those settlements involved a Deferred Licensed Land purchase, a prominent feature of the TPT Settlement, but neither had involved the Crown seeking to obtain benefits of funds for itself as a Confirmed Beneficiary. The use of the deferred selection of licensed Crown forest land from outside the settlement quantum enables TPT to obtain more land than it would otherwise have been able to acquire, said to recognise the importance of Māori rebuilding land holdings through Treaty Settlements. The Deferred Licensed Land is land which the Crown has recognised as being within the tribal region of TPT – this has been challenged by neighbouring tribes.

The Court declined all declarations sought based on the well-established principle that the Court cannot intrude upon the legislative process. The issues raised from the Deed of Settlement were non-justiciable. In other words: 'as a matter of Parliamentary Sovereignty, the Courts cannot presume to tell Parliament what it can or cannot do'.[19]

Despite the result, Gendall J cautiously expressed some reservations about the Crown's actions. Firstly, his Honour commented that although the reasons behind the Deferred Licensed Land purchase seem alluring at first sight, it should be remembered that TPT are buying that land with the accumulated rental funds from their settlement land. He questioned why the Crown should receive the rentals from the Deferred Licensed Land, and went on to suggest that the Crown might consider coming to some arrangement whereby the funds from the Deferred Licensed Land might be held pending the determination of competing claims, and then distributed to successful claimants. Secondly, Gendall J commented at length about what he saw as the plaintiffs' true cause of action: fiduciary duties owed by the Crown to Māori. The *Lands* case has made it clear that the Treaty created fiduciary duties on the Crown in favour of Māori who have corresponding fiduciary duties. According to later cases, such obligations are to be recognised irrespective of a specific statutory provision such as s 9 of the State Owned Enterprises Act 1986. Gendall J went further to say that the fiduciary duties exist not only because of the partnership relationship pursuant to

18 The plaintiffs also claimed that the trustees of the Crown Forestry Rental Trust (CFRT) would be in breach of duties if they were to distribute rental proceeds in any way other than required by the Trust Deed. The Court dismissed the claims against the CFRT trustees outright and focussed upon the claims against the Crown.

19 *NZMC v AG*, above n 17, para 89.

the Treaty, but also because of the vulnerability of Māori in the sense that they are subject to the Crown's ultimate power to legislate. The nature of the fiduciary relationship determines the existence and scope of the fiduciary duties, but typically they include a duty to act fairly, not to act unconscionably, to act in good faith or utmost good faith, and a duty of undivided loyalty. Fiduciaries are not allowed to place themselves in positions where their interests and duty conflict, nor should they profit from their position of trust, or be allowed to benefit from their own breach of duty. Gendall J formed the opinion that if the Crown secures benefits for itself at the expense of its fiduciary partners (all Māori) through a process other than by a Waitangi Tribunal declaration, or with the consent of the claimants before the Tribunal to share in such benefits, then that would be inconsistent with its fiduciary duties.[20]

Those statements were not essential to the decision of the case before him and ultimately Gendall J recognised that TPT's entitlements had been fairly negotiated and it would be wrong for those entitlements to be impeded because of a challenge to the Crown retaining Crown rental funds for itself: 'Te Arawa's interests and entitlements cannot, in justice, be disturbed.'[21]

C. The case on appeal – a political compact

In their notice of appeal, the plaintiffs reformulated the relief sought as a judgment or declarations from the Court of Appeal that the transfer to TPT of Crown forest land is inconsistent with the fiduciary duty of the Crown; the transfer to TPT of Crown forest land without a recommendation of the Waitangi Tribunal is in breach of the Crown's contractual obligations and statutory duty to the cross-claimants and to Māori; and the issues arising from the Settlement Deed are justiciable.

The Court of Appeal dismissed the appeal and declined to make any of the declarations sought.[22] While the Court agreed with the appellants that the 1989 Act regime did not contemplate the proposed arrangements in the Deed of Settlement, the deviation from that regime will ultimately become lawful if authorised by an Act of Parliament. The Deed of Settlement is a political compact and the courts will not grant relief which interferes with or impacts upon actions of the executive preparatory to the introduction of a bill to Parliament, because to do so would intrude into the domain of Parliament. Because of this principle and the essentially political nature of the Settlement Deed, the issues relating to the Settlement Deed were not justiciable. The Court also went on to disagree with Gendall J's obiter statements that fiduciary duties, sourced from the Treaty itself, can form the basis of an action in New Zealand courts. Rather the Court of Appeal reaffirmed the law as developed from the *Lands* case:

> the Crown's duty to Maori is analogous with a fiduciary duty …The law of fiduciaries informs the analysis of the key characteristics of the duty arising from the relationship between Maori and the Crown under the Treaty … But it does so by analogy, not by direct application.[23]

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20 Ibid, para 103(3).

21 *NZMC v AG,* ibid, para 98.

22 *New Zealand Maori Council & Ors v A-G & Ors* [2007] NZCA 269 per William Young P, O'Regan and Robertson JJ.

23 *NZMC v AG,* ibid, para 81.

III. Treaty Settlement Processes Generally

These cases seeking to halt the Government's current Treaty settlement policies concerning Crown forest assets are reminiscent of the *Lands* case and the other SOE cases that followed a generation ago. Whilst the courts in more recent times did venture to make some guarded statements about the way in which the Crown has gone about crafting these settlements, it has been the Waitangi Tribunal that has played the leading role in the ongoing debate concerning the Crown's Treaty Settlement Policies generally. Two recent Waitangi Tribunal reports illustrate the problems that arise when different claimant groups have overlapping or competing claims, and are also indicative of a Tribunal more forthright in condemning certain Crown settlement policies and more prescriptive in recommending ways to improve those policies.

A. The TPT Settlement and the Waitangi Tribunal

Not only was the TPT settlement the subject of the court cases reviewed above, it has also been the subject of inquiry by the Waitangi Tribunal. The first two Tribunal reports on the settlement focussed on mandate issues.[24] The Tribunal's third report on the settlement was released shortly before the Court of Appeal hearing.[25] The Tribunal, led by Judge Fox, strongly criticised the approach of the Office of Treaty Settlements (OTS), the Crown agency responsible for negotiating Treaty Settlements.[26] It was particularly critical of OTS's policy of negotiating with TPT without engaging with the other iwi and hapū of Te Arawa which did not participate in the TPT negotiations. Even so, the Tribunal concluded:

> … we do not think the tribes of the Te Arawa Waka who have supported the … settlement should suffer for OTS's failures, so we do not recommend that the settlement not proceed at this stage. But we believe that it must be varied. [27]

The Tribunal's position was to shift, however, following a further hearing that focussed specifically on the forestry issues in the settlement. In its final report on the TPT settlement[28] the Tribunal formed the view that while the iwi and hapū affiliated to TPT deserve a settlement, the Tribunal could not endorse the settlement in its current form. Prejudice would result to those iwi and hapū who were not part of the settlement if the settlement went ahead. Delaying the settlement would, on balance, cause less prejudice given that the disadvantage would be to a smaller group.

Accordingly the Tribunal recommended that the settlement be varied and delayed pending the outcome of a forum of Central North Island (CNI) iwi. The Tribunal noted the failed attempts to negotiate a collective settlement with all CNI iwi with interests in the Kaingaroa Forest Estate dating back to 1990. Despite those failed attempts and the fact that settlements involving Kain-

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24 Waitangi Tribunal, *Te Arawa Mandate Report* (Wai 115, 2004) and *Te Arawa Mandate Report Te Wāhanga Tuarua* (Wai 1150, 2006) 2 reviewed in L Te Aho, 'Contemporary Issues in Māori Law and Society: Mana Motuhake, Mana Whenua' (2006) *Wai L Rev*. 102, 106-107.

25 Waitangi Tribunal, *Report on the Impact of the Crown's Treaty Settlement Policy on Te Arawa Waka* (Wai 1353, 2007).

26 For a recent review of Treaty of Waitangi Claims Processes, see L Te Aho, 'Contemporary Issues in Māori Law and Society: Mana Motuhake, Mana Whenua' (2006) *Wai L Rev*. 102, 104-106.

27 Waitangi Tribunal, *Report on the Impact of the Crown's Treaty Settlement Policy on Te Arawa Waka* (Wai 1353, 2007) 11.

28 Waitangi Tribunal, *Final Report on the Impacts of the Crown's Settlement Policies on the Te Arawa Waka and Other Tribes* (Wai 1353, 2007).

garoa forest lands have already been effected using the deeming legislation complained of in the courts, the Tribunal formed the view that that the time is ripe to attempt such a collective approach again. It proposed that a forum of CNI iwi be constituted, the aim being to negotiate, according to tikanga, high-level guidelines for the allocation of Crown Forest Lands, similar to the Māori Fisheries Commission.[29]

The Tribunal also took the opportunity to send a clear message to the Crown about its Treaty Settlement policies:

> Future settlements cannot proceed like this. In particular, the Crown must seek to redress the imbalance in information and resources between the negotiating parties. It cannot continue to 'pick favourites' and make decisions on tribal interests in isolation, based on inadequate information'.[30]

B. Tāmaki Makaurau and the Waitangi Tribunal

Tāmaki Makaurau is the original name for the area now more commonly known as Auckland. Literally, Tāmaki means lovers and rau means hundred. The origins of the name, then, appropriately describe Tāmaki Makaurau *as a place* desired by many because of its rich resources and accessibility, and many battles were fought for its possession.[31] In its report on the Tāmaki Makaurau settlement process[32] the Tribunal, led by Judge Wainwright, heavily criticised the OTS approach of negotiating with one claimant group in isolation from those with overlapping claims in the wider Auckland area. The Tribunal recommended that the proposed settlement with Ngāti Whatua o Orakei not proceed and that OTS should work with other tangata whenua groups to negotiate settlements for them.

Just as the 1987 *Lands* case provided a platform for this review, it provided a platform also for the findings of the Tribunal which cited a key passage from one of the judgments:

> The responsibility of one Treaty partner to act in good faith and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as … to be able to say it had proper regard to the impact of the principles of the Treaty.[33]

IV. Climate Change

He tau kotipū
A year cut short is a year of early winter.

This concise proverb reminds us that an unexpected frost, heralding an early winter, upsets the yearly cycle of life. Unexpected adversity is more difficult to deal with than adversity known in advance.[34] In its attempt to deal with the challenges of climate change sooner rather than later, the

29 Waitangi Tribunal, ibid, 68-69.

30 Waitangi Tribunal, ibid, 67.

31 A W Reed, *The Reed Dictionary of New Zealand Place Names* (2002 ed) 482-3.

32 Waitangi Tribunal, *Tamaki Makaurau Settlement Process Report* (Wai 1362, 2007).

33 *New Zealand Maori Council v A-G* [1987] 1 NZLR 641, 682 (CA) (per Richardson J), cited in Tamaki Makaurau Report, ibid at 100.

34 P Grace, and W Grace, *Earth, Sea, Sky: Images And Maori Proverbs From The Natural World Of Aotearoa New Zealand* (2003) 46.

Crown, via its lead Ministries,[35] unveiled its policy framework discussion documents on climate change in February 2007 and embarked on a consultation process. In its attempt to fulfil some of its responsibilities under the Treaty of Waitangi, that wider process included a process specifically for Māori that would involve twelve regional consultation hui held across the country. In response, Māori have come together to address the significant challenges posed by climate change.

A. Overview

The Kyoto Protocol provided an early step towards coordinated international action on climate change and the New Zealand Government has affirmed it resolve to meet its commitments. Government officials distributed five consultation documents relating to the Government's work programmes on issues such as energy, sustainable land management, and transport. The documents explore alternatives to a carbon tax such as a more narrowly-focused tax, emissions trading, voluntary agreements, and other measures such as discouraging the conversion of land use from forestry to farming given that New Zealand's economy is largely based around agriculture and emissions from agriculture make up nearly half of our annual greenhouse gas emissions.

Having been presented with the Government's agenda, Māori provided their feedback about climate change issues and the solutions proposed by government officials from their own perspectives. At every hui, tangata whenua affirmed that climate change is an important and urgent issue, that human action – and inaction – will be judged by future generations, and that balance must be restored in the environment. It became clear that for Māori this conversation has come quite late because climate change has been part of the Māori awareness for a long time. However, equally as prevalent was the desire for further and better information about the economic impacts and opportunities that might flow from the proposed policies on climate change. During the hui, tangata whenua expressed their own values and unique stories in relation to the problems and issues in their own regions. It became clear that different tangata whenua groups require different information and different solutions in relation to the issues in their respective regions, and tangata whenua reserved their right to engage directly with the Crown on their own behalf. Without wanting to detract from that in any way, some common themes did emerge from the consultation hui and these are summarised below.

B. Common themes emerging from the climate change consultation process[36]

1. *Prioritising Māori Values and a Māori World View*

The relationship that Māori share with the environment cannot be overstated. It is reflected through whakapapa, ancestral place names, and tribal histories. The regard with which Māori holds the environment reflects the close relationship that Māori have with their ancestors, being direct descendants of Ranginui and Papatūānuku.

At the hui held in New Plymouth, Whanganui Māori reminded the Government of the valuable information already contained in various Waitangi Tribunal Reports about this Māori world view. In the *Motunui-Waitara Report* (Wai 6, 1983), for example, the Tribunal found that as at

35 Ministry for the Environment, Ministry of Agriculture and Forestry, and Ministry of Economic Development.

36 This summary is an adaptation of a document entitled 'Climate Change Consultation Hui Summary of Key Themes' a summary commissioned by the lead Ministries on climate change issues and collated by the writer on behalf of Indigenous Corporate Solutions Limited in March 2007.

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. This holistic world view was promoted at every hui and Māori warned against dealing with taonga in a compartmentalised way. Time and again, it was argued that there needs to be more linkage between climate change issues, the Government's Water Programme of Action, and the claims to flora and fauna (Wai 262).

Strong feelings that a Māori world view in relation to climate change is not being adequately considered, and that the proposed policies do not go far enough to protect the environment were a recurring message. Māori agree that climate change is a real and important issue: it will affect their lands, waterways, flora and fauna, and food sources, and consequently their rights and responsibilities in relation to rangatiratanga and kaitiakitanga. A Māori world view which is holistic and focuses on caring for all aspects of our environment is a model for sustainability and should be accorded higher priority in policy and decision making. This can only occur, Māori said, with improved analysis, better Māori input into policy development, and ongoing quality engagement.

2. *Te Tiriti o Waitangi*

The Treaty of Waitangi obliges the Crown to protect Māori people in the use of their resources to the fullest extent practicable, and to protect them especially from the consequences of the settlement and development of the land.[37] Māori frequently referred to their Treaty relationship with the Crown and asserted rights and guarantees affirmed in the Treaty.

That Māori were not properly consulted in the Kyoto process may be a Treaty breach. Also under the Kyoto rules only forests established from 1990 onwards can be counted as creating new carbon sinks and therefore eligible for carbon credits. Clear boundaries in the proposed policies, such as this 1990 date, flow directly from the Kyoto Protocol, yet there had been insufficient consideration of tangata whenua issues when the New Zealand Government entered that arrangement.

Further analysis is needed on Treaty impacts – particularly for those iwi who have settled. In Ngāi Tahu for instance, the point was also openly made that if Ngāi Tahu's ability to use land (such as forest land) that has been returned pursuant to a Treaty Settlement with the Crown is to be constrained or penalised by the Government's proposed policies – that could well lead to litigation or a claim to the Waitangi Tribunal for a contemporary Treaty breach.

3. *Government Coordination and Leadership*

At every hui there were calls for the Government to lead by example, not just in small ways such as reducing the size of its vehicle fleet. The Department of Conservation and Landcorp are large pastoral owners. Solid Energy uses and mines coal. It was urged that these organisations should be leading by example in their business practices. There were also requests for Government to take a more coordinated approach in its response to climate change. For example, where Māori want to relocate to rural areas, there is need for coordination between the Ministries of Social Development, Housing, Health and Immigration as well as ensuring that local government act consistently with central government policy.

37 Waitangi Tribunal, *Motunui-Waitara Report* (Wai 6, 1983).

4. *Consultation*

(a) Consultation process generally

The Treaty of Waitangi requires that the Crown consult with Māori on important issues.[38] However, at every hui, participants expressed scepticism and disillusionment about governmental consultation generally. It was said that too often Māori views, values and submissions are simply ignored, the Foreshore and Seabed debacle often cited as an example of that.[39] Accordingly there were calls for consultation that better reflects the Treaty relationship. The strategy of government officials coming in to areas, giving a presentation, then leaving and Māori making recommendations to Government which may or may not be followed was heavily criticised. Climate change, it was said, was not created by Māori, but by Western civilization and its greed.

(b) Information, timeframe, representation, and resourcing

While there was some acknowledgement of the Government's efforts to consult, criticisms levelled at the lack of availability of information, the complexity, volume, and lack of relevance to Māori, were voiced at almost every hui.

(c) Consultative forum

Whilst the proposed process of nominating representatives from each hui to attend a Māori Reference Group for Māori across the country to caucus and discuss the issues was seen as a positive step, some hui felt that more than one representative was needed from each rohe. Further there was a need for continuing consultation with such a group well versed in these complicated issues. Advocating ongoing dialogue was a key feature of many of the hui held and some hui proposed models for ongoing consultative groups as well as models of good consultation practice such as the Public Works Act process accepted by Land Information New Zealand and the National Māori network hui with the Environmental Risk Management Authority.

Some suggestions made for addressing the ongoing engagement of Māori in relation to climate change included that:

- Māori have input through to and beyond the papers and recommendations to the Ministers and Cabinet;
- There be a further consultation round on the actual policies prior to legislative confirmation process; and
- Māori reference groups that relate to natural resources be combined.

To its credit the Government accepted most of these suggestions. The Māori Reference Group that was established was resourced by the Government to meet in March 2007. At that hui the group presented a set of recommendations to relevant senior government officials from the lead Ministries. One of those recommendations sought a meeting with Ministers, and in July 2007 the Māori Reference Group met with relevant cabinet Ministers to discuss their concerns and recommendations. In September 2007, executive members of the Māori Reference Group met with iwi leaders in a forum to discuss issues and share information about the Government's proposed programme for dealing with climate change, focussing specifically on the anticipated release of the Govern-

38 The *Forests* case.

39 The Foreshore and Seabed Act 2004 was enacted hastily despite the widespread and passionate opposition of Māori, and in defiance of strong recommendations made by the Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071 2004).

ment's proposed emissions trading scheme. A summary of the outcomes of the September hui is set out below in section C of this part of the review.

(d) Other Concerns about consultation

In addition to the concerns summarised above, it was said that Māori are over-consulted, and that consultation should be more cohesive and include other policy issues such as the Water Programme of Action and the claims in relation to flora and fauna (Wai 262). Also, consultation ought to be carried out with landowners as well as tribal groups.

In the midst of all the criticism there was some acknowledgement of the efforts made by the lead Ministries with respect to the consultation hui on climate change, and where tangata whenua specifically requested additional meetings in their own tribal regions, or meetings with officials on specific issues such as forestry, those requests were met.

5. *The need for further and better Māori-specific information*

(a) Economic impacts and opportunities

Whilst many Māori were concerned about the impacts of climate change on the environment, there were frequent requests by Māori for a report on the economic impacts and opportunities from the proposed climate change policies that specifically affect Māori. Before Māori could truly engage, they need to know how the policies affect them and their choices for future land use. What incentives could be provided for Māori to retain their land in indigenous forests or to convert from pine to indigenous species? What are the benefits of organic farming? What research opportunities might arise from the policies in which Māori could play a lead role? What are best practice examples that might be applied to Māori situations?

(b) The distinctive nature of Māori land

As a result of a long and complicated legislative history, Māori Freehold Land currently constitutes just six per cent of the total landmass of Aotearoa/New Zealand, and the land that does remain in Māori hands is typically fragmented and uneconomic. For these reasons Te Ture Whenua Māori Act 1993/ Māori Land Act 1993 (Te Ture Whenua Māori) explicitly recognises that land is of special significance to Māori people, and promotes retention of Māori land in Māori ownership. Due to the limited flexibility that arises because of this principle, and because land use options are often limited given the location of much Māori land, several requests were made for better information about how the proposed policies impact on the management of Māori land. Māori have to generate their wealth from farm gate returns or forestry returns. They cannot rely on capital gains like other farmers in the country. Requests for information included, for example, a comparative analysis of the options of farming and forestry.

6. *The Need for Equity*

(a) Will Māori carry a disproportionate amount of the burden arising from these policies?

Māori argued the need for equity. It was said that inequities will arise if the proposed policies do not take into account the limited flexibility of Māori land. Māori also have a clear perception that Māori landowners and some iwi must already be carbon neutral given the vast amounts of forestland (both indigenous and exotic) in Māori ownership. What is the information relating to Māori and emissions per capita? Who is really responsible for the emissions?

(b) The imposition of 1990 as an arbitrary date for carbon credit eligibility

One of the more controversial issues that arose during the consultation process was the importing of the 1990 date from the Kyoto Rules as an arbitrary date for eligibility of carbon credits. Some of the largest tracts of Māori land are standing in forests. Māori forest owners felt they should be rewarded for continuing to hold their lands in forests, yet the imposition of 1990 as a cut-off date for carbon credit eligibility impacts adversely upon Māori.[40]

The 1990 date flows from the Kyoto Protocol and I have noted above the view that the Government did not properly consider its Treaty of Waitangi responsibilities when it agreed to the Kyoto Protocol, and that the Government failed to work with Māori in this international context. What can be done in New Zealand to provide for iwi who have pre-1990 forests? Do New Zealand's domestic policies have to be Kyoto based? Is it not preferable that our policies be climate based? It was argued that domestic policies ought to encourage the conversion from exotic to indigenous forests, and provide some credit or reward for Māori from such new indigenous forests regardless of whether they are established on pre-1990 forestland.

(c) Equity across industries

Māori are significant landowners and are involved in both forestry and agriculture. There were constant calls for industries to be treated equitably from the outset. The proposed policies privilege farming, and forestry bears an inequitably large part of the burden. The transport industry and energy efficiency must also be targeted.

(d) Disproportionate impacts of reacting to Government policies

In addition to the other factors outlined in this section on the need for equity, Māori also expressed concern that they will once again be disproportionately affected by Government policy simply because the Government fails to understand Māori realities. For instance, it was argued that Māori are disproportionately represented in lower income households and will be more vulnerable to likely increases in energy prices. There were strong calls for research to clarify and confirm these distinct Māori realities, and to ensure that such distinctions are reflected appropriately in any reshaped policies that go forward to relevant Ministers and Cabinet. The need to support low-income earners seems to have been addressed in the engagement document on forestry and emissions trading.[41]

7. *Impacts on Diverse Māori Realities – Questions and Proposals*

Other specific questions were raised and proposals made that were distinctively Māori and Government was urged to recognise this distinctiveness when making its decisions. How would the proposed policies affect lands that are subject to Ngā Whenua Rāhui Covenants?[42] What impacts would there be on the land banking of Crown land for the purposes of Treaty Settlements? Carbon credits will benefit the wealthy corporates, would some be set aside for Māori? It was suggested that the clearance of forests for papakāinga (housing) should be exempt from any penalty regime for deforestation – that there should be more and better information about thresholds and the impacts for different sizes of land blocks. What opportunities and incentives are available for

40 This issue is addressed in the Government's new policy on emissions trading released as this article went to print: *Forestry in a New Zealand Emissions Trading Scheme* Engagement Document September 2007 available at <http://www.maf.govt.nz/climatechange/background-reports-and-analysis/forestry-in-nz-emissions-trading-scheme/>.

41 MAF, ibid.

42 Voluntary covenants to protect native forest and other indigenous ecosystems on Māori-owned land.

research and development specifically for Māori in the energy sector: geothermal, tidal energy and wind farms? These issues seem to have been addressed in the Government's very recently released engagement document on forestry and emissions trading.[43]

8. *Issues specific to certain regions*

Tangata whenua expressed their own values and unique stories in relation to the problems and issues in their own regions. It became clear that some issues impact more on some areas than others and different tangata whenua groups require different information and different solutions in relation to the issues in their respective rohe. Often tangata whenua reserved their right to engage directly with the Crown on their own behalf.

For example, the costs of complying with the New Zealand Energy Strategy will make it more expensive for Northland Māori to relocate to Northland and build homes. Transport requirements, too, are quite different in the far north, with so many of their communities isolated. In the far south a key feature of the discussion was the inequitable burden that South Islanders bear in terms of the supply of energy relative to use, as compared with the North Island. It was asked: 'If there is a strategic benefit of NZ becoming carbon neutral, how will that benefit the regions?' Implications for oysters and muttonbirds and the impacts of climate change on Murihiku (Southland) were explained at the hui held in Invercargill, illustrating that not only is the New Zealand context important, so too are the implications at a regional level and for individuals.

9. *General questions and issues raised*

A number of questions and issues were raised that were not necessarily specific to Māori. The more frequently asked questions and issues expressed are summarised below:

1. Trading regimes are farcical and amount to licences to pollute which will not achieve the desired environmental outcomes. A more effective way of achieving those outcomes could be by each organisation having its own carbon balance sheet, with excess emissions being taxed.
2. Fears were expressed that taxes will increase and that some industries (such as forestry) will be doubly taxed. There is a need to measure agricultural emissions.
3. What are market based mechanisms and how do trading regimes work? What is the value of carbon credits? Could there be a possible weighting systems for tender arrangements?
4. More information is needed on the impact of climate change on human health.

C. Towards active engagement on climate change

In September 2007 executive members of the Māori Reference Group established for climate change met with an iwi leader's forum to discuss the possible impacts of climate change policies for Māori and how Māori might actively engage in the process going forward. The hui supported a suite of policies aimed at improving the well being of our environment and the people of Aotearoa/New Zealand. Based on an understanding that the Government was in the process of developing an emissions trading scheme this forum took the opportunity to emphasise some key points:

- Māori acknowledge that climate change is a critical issue and acknowledge that the consequences of leaving climate change unchecked are potentially disastrous, and
- Māori are committed to actively leading the response to this challenge with the Government, and with others in the community, including business.

43 Above n 40.

The hui acknowledged the work undertaken by the Māori Reference Group, the Māori Reference Group Executive, and the Iwi Leadership Forum and confirmed some key resolutions:

1. That the Māori economy ought to be recognised as a distinct sector;
2. That Māori must work together collectively and collaboratively to ensure maximum benefit sharing;
3. That any policies on climate change be fair and equitable for Māori and be based on a principled approach; and
4. That Māori and the Crown have a Treaty partnership and that Māori have Treaty rights in relation to climate change policy.

It is understood that the Government will be embarking upon a second round of consultation later in 2007 as requested by Māori during the first consultation process.

V. Rangatiratanga, kaitiakitanga, and natural resources

Hutia te rito o te pū harakeke
Kei whea te kōmako e kō?

This well-known and oft-cited traditional proverb urges conservation. If you destroy the harakeke (flax plant) from where will the bellbird sing?[44] The feedback on climate change asserted rangatiratanga and kaitiakitanga in relation to the environment generally, manifested in the requests that Māori be actively engaged in the protection of the environment and participate meaningfully in any opportunities that might arise from Government policies to confront climate change. Assertions of rangatiratanga and kaitiakitanga were more precise in the recently completed Waitangi Tribunal hearings on the claim by Māori to indigenous flora and fauna, and in the consultation process that was to follow on bioprospecting, intellectual property, traditional knowledge, and mātauranga Māori. The issues proposed for consultation are summarised in this part of the review, as are some recent judicial decisions that seem to recognise the spiritual connections of certain iwi with sites of special significance and tribal waters. This part of the review ends with a summary of a draft agreement in principle that Waikato-Tainui has reached with the Crown over their ancestral River.

A. The claim to indigenous flora and fauna, mātauranga Māori, and bioprospecting

This year Māori were asked to respond to discussion documents published by the Government entitled 'Bioprospecting: Harnessing Benefits for New Zealand' and 'Te Mana Taumaru Mātauranga: Intellectual Property Guide for Māori Organisations and Communities.' Both documents are currently the subject of formal consultation between the Crown and Māori. The discussion documents refer to issues concerning bioprospecting, intellectual property, traditional knowledge, mātauranga Māori, and relevant Government's international work programmes.

These issues were also the subject of the Treaty of Waitangi claim regarding indigenous flora and fauna brought by Ngāti Kuri, Te Rarawa, Ngāti Wai, Ngāti Porou, Ngāti Kahungunu and Ngāti Koata, Wai 262. Though hearings began in 1998, for a number of reasons they were not completed until 2007. The claim seeks recognition and protection for mātauranga Māori and rights in respect of indigenous flora and fauna and calls into question the protections given by the intellectual property regime, the Protected Objects regime, aspects of the education system, the envi-

44 Grace and Grace, above n 34, at 14.

ronmental decision-making regime, those parts of the health system that involve rongoa, and also the wider decision-making process including the way in which the Crown negotiates international instruments on behalf of New Zealand.

Almost as soon as the Waitangi Tribunal hearings were completed, the Government embarked on its consultation process seeking feedback on issues that went to the very heart of the Wai 262 claim. Given that there is currently no coordinated approach in place for bioprospecting activities (the search for and gathering of biological material that will then be examined for features of potential value), the Government has formed a preliminary view that there is a need for a better approach to bioprospecting. Consultation on whether Māori also consider there is a need for a better approach could also clarify some of the issues around Wai 262, and could clarify New Zealand's priorities in relation to the International Convention on Biodiversity (CBD); and the use of intellectual property rights in relation to traditional knowledge.

The consultation process with Māori involved Government officials from the Ministries of Economic Development (MED), Ministry of Foreign Affairs and Trade (MFAT) and Te Puni Kōkiri travelling to various locations around the country seeking feedback from Māori as to whether New Zealand needs a better approach and if so, what the priorities should be. MED was interested in seeking feedback on bioprospecting and also in sharing information about its work programme on intellectual property, mātauranga Māori, and traditional knowledge. MFAT was particularly interested in understanding what might need to be developed at an international level to ensure that New Zealand's approach has effect offshore and what New Zealand's priorities should be.

During the consultation process some counsel for claimant iwi in Wai 262 attended various hui. Counsel for the northern claimants, Ngāti Kurī, Te Rarawa, and Ngāti Wai, presented the following issues as those relevant to the bioprospecting debate:[45]

- Biological and Genetic Resources;
  That all indigenous flora and fauna (referred to as including associated biological and genetic resources of indigenous flora and fauna, and the habitats, ecosystems and environment of indigenous flora and fauna) within the respective rohe of Ngāti Kurī, Te Rarawa and Ngātiwai were and remain 'taonga' which are guaranteed protection under Article 2 of the Treaty of Waitangi.

- Matauranga Māori:
  That the customary systems of knowledge or matauranga (including tikanga and reo) of each of the respective iwi of Ngātiwai, Te Rarawa and Ngāti Kurī are taonga guaranteed protection under Article 2 of the Treaty of Waitangi, and includes rongoa and the taonga works derived from matauranga.

- Treaty Partnership:
  Local, national and international partnerships with Māori including co-management regimes between Kaitiaki and DOC.

- International:
  That the Treaty guarantee of tino rangatiratanga extends to the Crown protecting at an international level the rights and interests of Ngāti Kurī, Te Rarawa and Ngātiwai in relation to their indigenous flora and fauna and their environment, matauranga and customary laws and practices and the Crown has failed to recognise, actively protect and give effect to those rights and interests.

45 This extract from a presentation made by Maui Solomon and Leo Watson, counsel for claimants in the Wai 262 claim is incorporated as part of the minutes from the consultation hui held in Wellington. Available at <http://www.med.govt.nz/upload/51885/hui-minutes-Wellington.pdf>. Copies of minutes from each of the hui are available at <http://www.med.govt.nz/templates/ContentTopicSummary____30302.aspx>.

This particular feedback is indicative of the types of views expressed during the consultation process. As always, however, there is strong diversity in the views expressed by Māori. Some called for a moratorium on bioprospecting until the report on Wai 262 is released. Those Māori already engaging in bioprospecting activities seek a more protective framework in which they can continue their operations. There was also a strong call for Māori to have a lead role in bioprospecting rather than just participating in any new framework as guardians. Feedback from the consultation hui, the Māori Reference Group hui, and from the formal submissions process is now to be collated and Government officials expect to submit their report to the relevant Ministers by the end of 2007. The Waitangi Tribunal's report on the Wai 262 claim is eagerly awaited.

B. Waiuku Forest

For generations, Ngāti Te Ata has asserted rangatiratanga and kaitiakitanga over Waiuku Forest near the mouth of the Waikato River, and in a recent decision the Environment Court confirmed the status of the site as waahi tapu and declined an application by Crown Forestry to harvest pine trees in the forest.[46] Waiuku Forest is part of a large block of land confiscated from Māori in 1864 following the land wars. Certain parts of the block were returned to Māori in 1865, including four historical waahi tapu areas. However the blocks were later reclaimed in order to stabilise sand dunes, and for state forest purposes.

Crown Forestry (the Ministry of Agriculture and Forestry) lodged an application with Environment Waikato to harvest up to 305 hectares of plantation forestry within Waiuku Forest in December 2003. The Auckland/Waikato Fish and Game Council lodged a submission noting its concern that the spraying of post-harvest vegetation could remove food sources for game birds. Ngāti Te Ata opposed the application on the basis it contravened the Regional Plan and certain sections of the Resource Management Act 1991 (RMA). In May 2004 Environment Waikato declined the consent application on the basis the consent would not adequately fulfil several fundamental requirements of the RMA, specifically those matters referred to in sections 5, 6(e) and 7(a). Section 5 sets out the purpose of the RMA which 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'. They 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.

46 *Chief Executive of the Ministry of Agriculture and Forestry v Waikato Regional Council* [2006] Environment Court A133/2006 (Unreported, Sheppard J & Commissioner Stewart, 17 October 2006).

The Ministry of Agriculture and Forestry then lodged an appeal with the Environment Court. In October 2006 the court released its decision disallowing the appeal and declining the consent application. The court confirmed the status of the site as waahi tapu and concluded that the proposal would not adequately protect any physical remains of ancestral burials, or and intangible waahi tapu values of those areas. In the court's judgment,

> The extent to which the removal of trees from the four blocks would contribute to enabling people and communities to provide for their economic well-being and of their safety, and would sustain the potential of the forest to meet the reasonably foreseeable needs of future generations would be relatively slight: and
>
> The extent to which the disturbance of soil associated with the removal of trees would hinder the people and community of Ngati Te Ata from providing for their cultural well-being would be relatively considerable.[47]

C. Whanganui River

Ko au te awa, ko te awa ko au.
I am the river, the river is me.

This adage reflects the inextricable relationship that Whanganui people share with their tupuna awa.[48] Just as Ngāti Te Ata has long asserted its rangatiratanga over the Waiuku Forest land, the Whanganui River Māori Trust Board, Ngāti Rangi Trust, and Tamahaki Society continue to assert rangatiratanga and kaitiakitanga over their tupuna awa (ancestral river). These applicants applied successfully in the Court of Appeal for special leave to appeal against the High Court's decision that they lacked evidence to prove their cultural interests in the river were being infringed by Genesis Power and the Manawatu-Whanganui Regional Council.[49] The Tongariro Power Development project, commissioned in 1973, was devised in the 1950s as a means of generating electricity by using energy from the rivers and streams that flow through the mountains of the central plateau. In 2001, the regional council granted state-owned Genesis a 35 year resource consent to use water from the Whanganui River for the Tongariro Power Development project. That term was later reduced to 10 years by the Environment Court to allow the parties time for mediation over the rights Māori felt were being infringed. The decision was quashed by the High Court in August in 2006, which ruled that Māori had failed to produce evidence to support their case and that the Environment Court had incorrectly interpreted the Resource Management Act. This most recent ruling states that the dispute over resource consent raises important questions about how environmental disputes should be approached by the courts. The appeal court queried whether the High Court was correct in placing the onus on Māori to provide solutions to their grievances.

47 *MAF v WRC,* ibid, 65.

48 See Part IV.B.1 above for further discussion about this particular relationship.

49 *Ngati Rangi Trust, Tamahaki Inc Society and Whanganui River Māori Trust Board v Genesis Power Limited and Manawatu-Wanganui Regional Council* CA275/07 [2007] NZCA 378.

D. Waikato River

Last year I reviewed the progress of the negotiations regarding Waikato's claim to its tupuna awa (ancestral river) in the context of the Crown's Treaty of Waitangi Settlement policies which policies have typically not viewed rivers as ancestors and therefore indivisible.[50] I shared the nature of the special relationship between the Waikato people and their ancestral river as seen in statements such as that by the late Te Kaapo Clark, respected Tainui elder:

> *Spiritually the Waikato River is constant, enduring and perpetual. It brings us peace in times of stress, relieves us from illness and pain, cleanses and purifies our bodies and souls from the many problems that surround us.*[51]

This year, Waikato-Tainui signed a draft Agreement in Principle with the Crown which focuses upon the health and wellbeing of the ancestral river and proposes a new era of co-management over the Waikato River.[52] Co-management is defined as including the highest level of good faith engagement; and consensus decision-making as a general rule, while having regard to statutory frameworks and the mana whakahaere (authority and rights of control) of Waikato-Tainui and other Waikato River iwi. The main redress items establish a framework for this to occur. Waikato-Tainui is in the process of consulting with its people and other Waikato River iwi on the draft document. The Crown is consulting with Environment Waikato and other relevant local authorities, other Waikato River iwi, other key stakeholders and the public generally. Following this consultation process an Agreement in Principle may be entered into.

A significant feature of the draft agreement is the proposal for two documents to be produced: a Vision for the Waikato River (the Vision) and a Strategy to achieve this Vision (the Strategy). The Vision will set the direction for enhancements to the health and wellbeing of the river and will operate across statutory frameworks such as the frameworks for Resource Management, Conservation, and Fisheries.

Another key feature of the draft document is the acknowledgement by the Crown that its raupatu (confiscation) in the 1860s denied Waikato-Tainui's rights and interests in the Waikato River; that it failed to respect, provide for and protect the special relationship Waikato-Tainui have with the River; and that degradation of the River has occurred while the Crown has had authority over the River causing distress to Waikato-Tainui.

The draft agreement also provides for the creation of certain statutory bodies which provide an insight into the model of co-management envisaged by the signing parties. A Guardians Establishment Committee is to be established after the signing of the Agreement in Principle whose membership will comprise equal members to represent Waikato-Tainui, and the Crown and regional community interests. For the longer term, the draft agreement also provides for the establishment of permanent Guardians of the Waikato River who will have an ongoing responsibility for the

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50 L Te Aho, 'Contemporary Issues in Māori Law and Society: Mana Motuhake, Mana Whenua' (2006) *Wai L Rev*. 102, 108-110.

51 Statement of Evidence of Te Kaapo Clark of Ngāti Korokī Kahukura, prepared on behalf of Waikato-Tainui for the Watercare Hearing before the Franklin District Council, Tuakau, December 1996 as cited in Te Aho, ibid.

52 'Draft Agreement in Principle between the Crown and Waikato-Tainui for the settlement of the historical claims of Waikato-Tainui in relation to the Waikato River', available at <www.beehive.govt.nz/Documents/Files/Waikato%20%River%Media%20Summary.doc > and <http://www.tainui.co.nz/riverclaim/images/Draft%20Agreement%20In%20Principle.pdf>.

Vision and the Strategy. The Guardians will comprise equal numbers of iwi (including Waikato-Tainui and other iwi with interests along the Waikato River should they wish to join); and Crown appointed members (including one appointed by Environment Waikato (EW)). The Guardians will be responsible for finalising the Vision and the Strategy, and for reviewing those documents at regular intervals. They will also have monitoring and reporting roles.

In practice, the draft agreement envisages that EW will give effect to the Vision in the preparation and change of regional policy statements and regional plans, insofar as the Vision relates to resource management issues affecting the Waikato River. The Vision and the Strategy will be deemed to be matters that decision makers must have regard to when issuing resource consent applications relating to the Waikato River; and the Minister for the Environment will have particular regard to the Vision and will engage with the Guardians to achieve co-management when considering whether to issue a national policy statement or recommending the making of any national environmental standards that relate to the Waikato River. The Director-General of Conservation will have particular regard to the Vision and will engage with the Guardians to achieve co-management when preparing any draft conservation management strategy, conservation management plan, national park management plan or fresh water fisheries management plan in respect of an area through which the Waikato River flows. The New Zealand Conservation Authority will do the same when approving or otherwise considering such plans. The Vision and any relevant provisions of the Strategy will be deemed to be plans under the Fisheries Act 1996. The Crown will consult with Waikato-Tainui in the development of any new legislation impacting on the Waikato River, and the parties will work together to identify other existing legislation that impacts on the Waikato River and consider whether and how the Vision and Strategy might be appropriately addressed under such legislation.

In addition to the Guardians, there is provision for the establishment of a Waikato River Statutory Board. The membership for this Board will be equal numbers of representatives of Waikato-Tainui and current EW councillors. The Board's purpose will be to assist with the implementation of the Vision and those parts of the Strategy that relate to EW's responsibilities by enabling Waikato-Tainui's effective participation in decision-making under the Resource Management Act and the Local Government Acts that affect the Waikato River.

At this stage, no financial redress has been agreed upon, and this is bound to be the subject of further negotiation between the Treaty partners.

VI. Summary and Conclusion

Tangi ana ngā tai
Rū ana te whenua
Listen to the roar of the sea
Feel the land tremble

Contained in the few words of this proverb is a warning that the intensity of the feelings of Māori cannot be ignored when it comes to their being dispossessed of their lands and resources.[53] A strong feature of the dialogue that has taken place between Māori and the Crown during the past year is the clear assertion by Māori of their right to be self-determining and self-sustaining, and as part of that, of the rights and obligations to exercise guardianship over such resources. On occa-

53 Grace, above n 34, 64.

sions those rights are afforded priority, but those occasions are relatively rare. This is part of the reason why Māori continue to call for a more meaningful relationship with the Crown as Treaty partner. This review began by revisiting the *Lands* case in which the Court of Appeal considered the nature of the Crown-Māori relationship twenty years ago. The case was also revisited in the Courts and the Waitangi Tribunal this year in relation to the Crown's Treaty settlement policies. For some the *Lands* case remains a cause for considerable concern as an undermining of rangatiratanga and the tangata whenua systems of law and government that existed in this country prior to colonisation. For others, concerns are more about the protection mechanisms established as a result of that case that seem illusory in the light of recent criticisms concerning the Crown's Treaty settlement policies, particularly those involving Crown forest lands. In the year past, Māori have reasserted their right to participate on their own terms and for their own purposes in recent debates on climate change and bioprospecting respectively, both as citizens of Aotearoa/New Zealand, and as tangata whenua, the indigenous people of this land.

VII. Glossary of Māori Terms

awa	river
hapū	subtribe
hui	meeting, assembly
iwi	tribe
kaitiakitanga	guardianship, stewardship
kaupapa	purpose, objectives
kōrero	dialogue
mana	prestige, power, authority
Māori	the indigenous peoples of Aotearoa/New Zealand
mātauranga Māori	customary systems of knowledge including tikanga and reo (language)
maunga	mountain
mauri	life force, life principle
Pākehā	people of European descent
papakāinga	place on which to establish homes
Papatūānuku	Earth mother
rangatira	Chief
Ranginui	Sky Father
raupatu	confiscation
reo	language
rohe	region, area
rongoa	remedy
tangata whenua	people of the land
taonga	treasured, prized possessions
tapu	sacred
tikanga Māori	laws, ethics and customs of the Māori
tino rangatiratanga	a term sourced from the word 'rangatira' meaning chief, and used in the Māori text of the Treaty of Waitangi 1840 literally meaning unqualified exercise of chieftainship. The corresponding term used in the English version

	of the Treaty is 'full and exclusive possession' of all resources and things valuable to Māori.
tupuna	ancestor
waka	canoe, or kinship group based on affiliation to canoe
whakahaere	governing
whakapapa	genealogy
whānau	family, descent group
whanaungatanga	relationships
whenua	land