Contemporary Issues in Māori Law and Society
The Tangled Web of Treaty Settlements Emissions Trading, Central North Island Forests, and the Waikato River

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Aniwaniwa is the title of an elite art exhibition selected for display at the Venice Biennale in 2007.[1] Central to the work is the theme of submersion, as a metaphor for cultural loss. The name was chosen because it evokes the blackness of deep waters, storm clouds, a state of bewilderment, and a sense of disorientation as one is tossed beneath the waters, and it can also be a rainbow, a symbol of hope. Locally, Aniwaniwa refers to rapids at the narrowest point of the Waikato River by the village of Horahora, where artist Brett Graham's father was born and his grandfather worked at the Horahora power station. In 1947 the town and the original dam were flooded to create a new hydro-electric dam downstream. Many historic sites significant to Graham's people of Ngāti Korokī-Kahukura were lost forever, many of which have become the subject of a claim to the Waitangi Tribunal. This year will long be remembered for the flood of activity in the Treaty of Waitangi settlement landscape. This article, the fourth in a series that reviews and comments upon significant recent developments in Māori law and society, focuses upon a range of agreements that the Crown has entered into with Māori claimants who have confronted the Crown citing countless breaches of the Treaty of Waitangi that have been left too long in abeyance. There have been many agreements, at varying levels of finality, and each claimant would consider their grievances, losses, and their ensuing settlement as the most important. Without wanting to detract from that, the greater part of this article appraises two particular settlements notable for their innovation, and their consequences, in the context of a larger web of settlements. The two settlements, involving the Central North Island Forests and the Waikato River respectively, have been concluded following decades of unsuccessful earlier attempts to resolve. That they were concluded this year can be attributed to strong leadership, on the part of both the Crown and Māori. The theme of leadership permeates this article, and it seemed fitting to dedicate this article to a noble leader of great integrity and quiet strength, Monte Ohia,[2] whose sudden passing this year was heartbreaking for Māori across the nation. Firstly, this article turns to consider Māori responses to the Emissions Trading Scheme which was passed into law this year.

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1 At the time of writing, in September 2008, the exhibition had just opened for display at the Waikato Museum in Hamilton. The artists are Brett Graham and Rachael Rakena. The description of the work is taken from promotional material.

2 A descendant of Ngāti Pukenga, Ngāiterangi, Ngāti Ranginui and Te Arawa, Monte was raised in Tauranga and died at the age of 62 years, having dedicated much of his working life to education.

I. Māori Responses to the Emissions Trading Scheme

> This is one of the most critical issues facing this country and is at least similar to the Rogernomics policies of the 1980s.[3]

In order to protect New Zealand's reputation as a country with a clean and green environment, and our markets as global consumers are increasingly concerned about ethical and environmental issues, the Government has embarked upon a comprehensive strategy and action plan in response to climate change. After its first consultative process on climate change the Government settled on the Emissions Trading Scheme (ETS) as its preferred response to climate change issues.[4] The ETS seeks to reduce, over time, the emission of greenhouse gases into the atmosphere by putting a price on carbon dioxide and other greenhouse gases specified in the Kyoto Protocol.[5] It is intended that this will, in turn, change investment and consumption patterns. Forestry is the first sector to become subject to the scheme. The Government will devolve credits and liabilities for post-1989 forests back to forest owners. This is intended to create new incentives for planting trees, and flow on benefits for the environment, the forestry industry, and for mitigating emissions which that brings. New Zealand's economy is largely based around agriculture and emissions from agriculture make up nearly half of our annual greenhouse gas emissions. Measures aimed at the agricultural sector will come into effect when it is brought into the scheme in 2013.

In October 2007, the Government conducted a further thirteen consultation meetings specifically with Māori about the ETS.[6] A further consultation round about the impacts of the ETS on Māori was sponsored by Te Puni Kōkiri, the Ministry of Māori Development. This process comprised eight regional workshops held across the country from late January to early February 2008 at which the findings of a Government commissioned report: *Impact of Emissions Trading Scheme on Māori – High Level Findings*[7] were presented, and received with both concern and caution. The report found that climate change is one of the most critical issues facing this country and the proposed strategy is so pervasive that it is at least similar to the Rogernomics policies of the 1980s. Whilst the clear focus of the consultation discussions was on forestry, attention also turned to farming, fisheries and the huge social impacts that will weigh heavily on Māori.

Last year's review went into more detail about Māori responses to issues of climate change and contended that Māori support a sustainable approach to tackling issues raised by climate change. That feedback generally was centred in a framework of a Māori worldview which is based on a spiritual connection to this earth.[8] The relationship that Māori shares with the environment is fundamental to Māori law and society and 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 primal parents, Ranginui and

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3 Chris Karamea Insley, Managing Director, 37 Degrees South *Impact of Emissions Trading Scheme on Māori– High Level Findings*.

4 For details of Māori responses to the first consultative processes see Linda Te Aho, 'Contemporary Issues in Māori Law and Society – Crown Forests, Climate Change and Consultation – Towards More Meaningful Relationships' (2007) *Waikato Law Review* 138; 145-152, and 'Contemporary Issues in Māori Law and Society - Mana Whenua Mana Motuhake' (2006) *Waikato Law Review* 102.

5 Under the Kyoto Protocol New Zealand has committed to reduce greenhouse gas emissions to 1990 levels.

6 For the details of the scheme see the Climate Change (Emissions Trading and Renewable Preference) Act 2008.

7 The report was produced by Chris Karamea Insley, Managing Director, 37 Degrees South, and Richard Meade of Cognitus.

8 Above n 4.

Papatūānuku.[9] Feedback also made it clear that it is equally important for the Crown to recognise the growing Māori economy as well as the need for Māori to maximise opportunities that flow from changing policy frameworks. During the most recent consultative process on the ETS, Māori took the opportunity to once again lament that their particular interests were not being reflected in the overall discussion of climate change issues, and lobbied for a specific and distinctive voice at a national level. Recognising the need to be innovative going forward, Māori also reiterated the need for better information to make better choices about land use.

Such responses voiced during these consultation processes arise because, for far too long, the New Zealand Government has entered into international covenants and designed domestic policies that have ignored Māori laws and values and a world view which is holistic and prioritises the ancestors of the environment. It should not have been surprising that the New Zealand's Government's policies on climate change were met with suspicion and caution by Māori, and that Māori strongly asserted their rights to actively participate in shaping their own future in a manner which aligns with those laws, values and that world view. Naturally there were many questions and concerns raised about the impact of the Government's proposed policies on the Māori economy, their land use and property rights, and so on, which have been summarised here. However, it must be remembered that at almost every consultation gathering Māori emphasised that the obvious starting point for any discussion on an issue as significant as climate change has to be Māori knowledge systems, laws, values and ways of viewing the world.

A number of concerns that arose in earlier consultation meetings on climate change and the ETS were raised once again during the ETS Regional workshops.[10] The impacts of the scheme on Treaty settlements were still a concern, and many saw the scheme as an impairment of Māori property rights. Māori have commissioned their own research into the legal implications of the ETS on Treaty and Māori Property Rights and the nature of the right created by the ETS.

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.[11] Concern was voiced about the effect that the ETS will have on future Treaty settlements, and in particular, Māori criticised the Crown's position that it would not allocate free credits to Crown Forest Licensed Lands (CFLs). Under such a policy iwi who are yet to settle their Treaty claims would have limited ability to use their settlement lands for anything other than forestry, or they would have to buy deforestation credits which will, in turn, devalue commercial redress for future Treaty settlements. Māori who were yet to settle questioned the integrity of the settlement process going forward. On the other hand, the ETS will reduce land value. Māori will therefore be able to acquire more CFLs and more accumulated rentals.

As had been foreshadowed during the initial consultation process on climate change, concerns were raised once again that the proposed ETS would impact on iwi such as Ngāi Tahu who had

9 According to creation stories, Māori are direct descendants of Ranginui (sky father) and Papatūānuku (earth mother) who, in the beginning, were bound together, their children cocooned in their embrace in a world of darkness and unfulfilled potential. After much debate and deliberation, one of the children, Tāne Mahuta, braced his shoulders against his mother and used his legs to force his father upwards, separating Ranginui from Papatūānuku. Into the world of light emerged the siblings. They included: Tawhirimātea, the revered ancestor of winds; Tangaroa, the revered ancestor of the seas; and Tāne Mahuta, the revered ancestor of the forests and all life within.

10 Feedback from the Consultation Process with Maori on the ETS is contained in a report by Indigenous Corporate Solutions collated by the writer for the Ministry for the Environment and for Te Puni Kōkiri entitled *Key Themes from Emissions Trading Scheme Consultation Hui with Māori* 2008.

11 Waitangi Tribunal, *Motunui-Waitara Report* (1983).

land returned pursuant to a Treaty Settlement with the Crown. When Ngāi Tahu settled its claim over a decade ago part of the redress comprised forest lands that were transferred to the iwi subject to cutting licences. At the time, Ngāi Tahu envisaged that when those licences expired, they could consider converting the land to other uses such as dairying. Insofar as the ETS constrains or penalises such conversion, Ngāi Tahu claims compensation for the loss of value of their settlement. Ngāi Tahu also claims that during the settlement negotiations the government knew that it was preparing to commit to the Kyoto Protocol but did not inform Ngāi Tahu of the potential impacts of that commitment to the value of their settlement. The Honourable Douglas Graham, the Minister responsible for that settlement has publicly refuted this view. The present Government has responded by suggesting that its offer of free carbon units to forest owners under the ETS is compensation for such losses.

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, 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) which explicitly recognises that land is of special significance to Māori people, promotes retention. 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, Māori once again requested information about how the proposed policies would 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. Māori asked, once again, how this situation could be recognised and provided for in law. They also sought information such as a comparative analysis of the options of farming and forestry.

Another key issue discussed during consultation about the ETS was the lack of recognition of the indigenous forest estate in New Zealand. The world is recognising the preservation and non-harvest of indigenous forest, and recognising that there is a value in indigenous forest. Māori urged that such value needs recognition in New Zealand.

As a result of the respected and recognised leadership of Ngāti Porou leader, Dr Apirana Mahuika, Ngāti Tūwharetoa's Timoti te Heuheu,[12] and Paul Morgan of the Federation of Māori Authorities, the Crown, in response to the issues raised by Māori, substantially increased its offer of free carbon credits to forest owning iwi as a separate process to Treaty settlements following a strong and sustained lobby remarkably supported by most, if not all, iwi in the land.

Another result of the consultation process is that there is a core group of Māori across the country who are far better informed about climate change and the ETS. However, while the process has helped Māori to understand the basic elements of the policies, there remains a lack of analysis of the specific impacts of the policies on Māori, details which Māori have consistently asked for since the first consultation round. Māori clearly seek active, on-going engagement, at a national level, and at a region specific level in order for Māori perspectives to be accorded higher priority in policy and decision making.

12 Brother of Paramount Chief, Tumu te Heuheu, see n 21 below.

II. The Tangled Web of Treaty Settlements

> …despite an initial united Maori front against the fiscal envelope policy, iwi Maori are succumbing one by one to the pressure to join the queue of those willing to settle. Perhaps they fear missing out on the ever shrinking envelope, or perhaps they are proceeding on the misapprehension that something is better than nothing.[13]

This year has seen an astounding number of Māori claimants joining the Treaty settlement queue and a correspondingly astounding number of agreements signed at various levels between the Crown and claimants notably since the Deputy Prime Minister and Minister of Finance, Dr Michael Cullen, took on the additional role of Minister in Charge of Treaty of Waitangi Negotiations.[14] Two particular settlements, relating to the Central North Island Forests and the Waikato River respectively, stand out for their innovation, and their consequences, in the context of a larger web of settlements. As regards the settlement of the Central North Island Forests, it seems to me that a driving factor behind the pace in which such a large scale forestry settlement was reached is the pending general elections, and behind the unity demonstrated on the part of Māori was a desire to avoid the legal carnage that followed the nationwide fisheries settlement, otherwise known as the Sealord Deal. Some of the impacts of that deal provide a convenient introduction to the CNI settlement.

A. *Lessons learned from the Sealord Deal*

Under the Sealord Deal of 1992 the Crown provided $150 million which assisted Māori to buy a half-share of Sealord Products Ltd, one of the largest commercial fisheries operators in the country. Māori received 10 per cent of existing fishing quota and became entitled to 20 per cent of any new quota. The Treaty of Waitangi Fisheries Commission (TOKM) was established and would be accountable to both the Crown and Māori. TOKM was charged with developing an allocation model for the distribution of the fisheries settlement assets to Māori. The process by which the deal was negotiated became the subject of intense criticism, as did the imposition of the settlement, by statute, on all Māori, whether they signed up to it or not. These issues and the various proposed allocation models released for consultation by TOKM became the subject of harrowing litigation over a 15 year period. Ani Mikaere suggests that if there is a single word that encapsulates the effect of the fisheries settlement on Māori, it is division: 'The bitter struggle over allocation has set iwi against iwi, iwi against hapū, and rural Māori against urban Māori'.[15]

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13 Ani Mikaere, 'Treaty Settlements: Full and Final, or Fatally Flawed?'(1997) 17 *New Zealand Universities Law Review* 425, 455.

14 See the Office of Treaty Settlements website for details: www.ots.govt.nz.

15 Ani Mikaere, above n 13, 447. See also Stephanie Milroy, 'The Māori Fishing Settlement and the Loss of Rangatiratanga' [2000] 8 *Waikato Law Review* 63.

B. The CNI Settlement

1. Background

Although the landmark settlement concluded in respect of historical claims of Central North Island iwi to the Central North Island Forests Lands (the CNI settlement)[16] appears to have avoided some of the bitterness experienced during the fisheries debacle, its history has been fraught. As a result of the *New Zealand Māori Council v AG* (*Lands*) case,[17] 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 whereby Crown land could be transferred out of Crown hands, 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.

Then, incredibly, merely two years after the *Lands* case, in 1989, the Government announced its intention to sell the Crown's commercial forestry assets. Māori once again objected that the transfer of Crown forests land out of Crown ownership would jeopardise Treaty of Waitangi claims and would be inconsistent with the principles of the Treaty of Waitangi.[18] In the *New Zealand Māori Council v AG (Forests)* case,[19] the Court of Appeal recommended that negotiations ensue to resolve the dispute in the spirit of partnership and in accordance with the principles of the Treaty of Waitangi. On 20 July 1989, the Crown and the New Zealand Māori Council (NZMC) and Federation of Māori Authorities Incorporated (FOMA) entered into the 1989 Crown Forests Agreement, pursuant to which the Crown Forest Assets Act 1989 was passed and the Crown Forestry Rental Trust was established. The Agreement provided that the Crown could sell its forest assets, but would retain ownership of the land, with protection mechanisms implemented by the Crown Forest Assets Act to safeguard Māori claims to the land. The parties agreed to jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims to Crown Forest Land and to make recommendations for the return of that land within the shortest reasonable period. Early attempts by Māori to reach a collective multi-iwi settlement in respect of the CNI Forests Land did not succeed. In 2006, the Crown entered into a deed of settlement with the Affiliate Te Arawa Iwi/Hapū which included some CNI Forests Land.[20]

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16 See Te Aho, 'Contemporary Issues' (2007), above n 4, for a fuller discussion of events that lead to this landmark settlement which is recorded in the Deed of Settlement dated 25 June 2008 between the CNI Forests Iwi Collective and the Crown (the CNI Deed of Settlement).

17 [1987] 1 NZLR 641.

18 It should be noted that there is opposition to the notion of principles of the Treaty which as Professor Jane Kelsey has long argued were devised to avoid issues of interpretation which might otherwise have been resolved by using established canons of interpreting international treaties such as contra proferentum; that is, interpreting against the party who drafted the words, thereby placing the responsibility for accuracy of language upon the drafting party (and in the case of the Treaty the drafters were the agents of the Crown). According to Kelsey the Court of Appeal rewrote the Treaty relationship by fashioning the principles of the Treaty' see Jane Kelsey, A Question of Honour Labour and the Treaty 1984-1989 (1990) 217.

19 [1989] 2 NZLR 142.

20 Te Aho, 'Contemporary Issues' (2006) above n 4, 106-7; and (2007) above n 4, 144-145.

As is further recorded in the background to the CNI Deed of Settlement, the NZMC, FOMA, and Te Ariki, Dr Tumu te Heuheu, paramount chief of Ngāti Tūwharetoa,[21] raised concerns through proceedings heard by the High Court in April 2007 that the Crown had, in this settlement, (though not for the first time), departed from the 1989 Crown Forests Agreement, the Crown Forest Assets Act and the terms of the Crown Forestry Rental Trust. The High Court found that the Affiliate Te Arawa Iwi/Hapū interests could not, in justice, be disturbed. It also expressed an opinion that if the Crown were to take for itself accumulated rental funds from certain licensed lands pursuant to the Original Affiliate Te Arawa Iwi/Hapū Deed, then the Crown would be acting inconsistently with its fiduciary duty to Māori.[22] On appeal, the Court of Appeal held that the Crown had acted lawfully[23] and disagreed with the High Court judge's obiter statements that fiduciary duties, sourced from the Treaty itself, can form the basis of an action in New Zealand courts.[24] In November 2007, the Supreme Court granted leave to appeal.

Debate about the basis and extent of fiduciary duties owed by the Crown to Māori in the Supreme Court would have been of extreme interest in the Māori world at least. However, in the meantime, a deal was struck, forestalling any real possibility of a Supreme Court deliberation of fiduciary duties. In June 2007, the Waitangi Tribunal, following an urgent inquiry into the impacts of the Crown's Treaty settlement policy on Te Arawa Waka and other tribes found that by offering the Crown Forest Land to the Affiliate Te Arawa Iwi/Hapū, the Crown had prejudiced the Crown Forest Land claims of other CNI Iwi. The Crown had breached the principles of the Treaty of Waitangi by failing to act honourably and with the utmost good faith, and by failing to actively protect the interests of all CNI Iwi. The Tribunal further found that the Crown's deeming itself to be a confirmed beneficiary of certain of the accumulated rentals, without consultation and in disregard of its 1989 commitments, was a breach of the principles of the Treaty of Waitangi. Headed by Judge Caren Fox, the Tribunal considered that the Affiliate Te Arawa Iwi/Hapū deserved a settlement, but boldly recommended that the settlement be varied and delayed pending the outcome of a forum of CNI Iwi that would consider, according to tikanga,[25] guidelines for the allocation of CNI Forests Land. The Tribunal considered it critical that decisions on allocation of CNI Forests Land were made by CNI Iwi themselves, on their own terms, answerable to one another.[26]

In response, and led by Dr Tumu te Heuheu, the paramount chief of Ngāti Tūwharetoa, the CNI iwi formed a collective, and proposed engaging in negotiations with the Crown to reach a

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21 Ngāti Tūwharetoa is one of the CNI iwi whose tribal domain extends in and around the shores of Lake Taupō in the central North Island and is headed by one of at least two recognised customary leaders, Te Ariki Dr Tumu te Heuheu (the other being King Tuheitia, reigning Māori King).

22 *NZMC* v AG (Unreported) (High Court Wellington, 4 May 2007) CIV 2007 485-95, Gendall J.

23 *NZMC* v AG [2008] 1 NZLR 318.

24 Ibid, paragraph 81.

25 Tikanga, in this context can be interpreted to mean the laws and values of the various CNI iwi. Tangata whenua systems of law and government existed in this country prior to colonisation by the British. Māori society was collectively organised with whakapapa (genealogy) forming the backbone of a framework of kin-based descent groups, such as iwi and hapū led by rangatira – leaders for their ability to weave people together. Māori societies developed tikanga Māori, the first law of Aotearoa/New Zealand by which Māori governed themselves: Ani Mikaere 'The Treaty of Waitangi and Recognition of Tikanga Māori' in Michael Belgraves, Merata Kawharu and David Williams (eds) *Waitangi Revisited - Perspectives on the Treaty of Waitangi* (2005) 330, 341-342. Tikanga varies from tribe to tribe and is dynamic, so this process will be watched with interest.

26 Waitangi Tribunal, *Final Report on the Impacts of the Crowns Settlement Policies on the Te Arawa Waka and other Tribes* (2007).

more holistic and hopefully enduring settlement of the CNI Forests Land. The Affiliate Te Arawa Iwi/Hapū via the trustees of their representative entity, Te Pūmautanga o Te Arawa Trust (TPT), agreed to work with the newly formed collective (the Collective). The Crown acknowledged the generosity of TPT and its constituent members in agreeing to re-negotiate their settlement, and the significant contribution made by TPT towards the resolution of the historical claims of other CNI Iwi over the CNI Forests Land.

On 21 February 2008, Terms of Agreement were signed that recorded, among other things, the intention of the Collective to design allocation proposals that would result in CNI Iwi determining how to allocate Crown Forest Land on the basis of mana whenua and in accordance with tikanga. The Terms of Agreement also recorded the Crown's promise to preserve the value of the TPT settlement and other settlements of CNI Iwi, such as Ngāti Manawa and Ngāti Whare which would now be renegotiated. An agreement in principle quickly followed and the Deed of Settlement was signed in June 2008. The settlement will be 'on account' with respect to iwi groups who are yet to negotiate their individual comprehensive settlements.[27]

2. *Redress*

The redress package involves 176,000 hectares of CNI Crown forest licensed land, and the associated accumulated rentals and ongoing rentals being vested in a Trust Holding Company, CNI Iwi Holdings Ltd. The Collective's proportion of these assets by value will be 86.7 percent, and the Crown's proportion will be 13.3 percent which will be available for meeting other historical claims to the Central North Island forest land. The shareholders of CNI Iwi Holdings Ltd will be the member iwi of the Collective and the Crown, all with equal votes. The Collective's share of the Crown forest land is valued at $196 million. The Collective's share of the accumulated rentals will be $223 million. On the basis of that value alone, this is the single biggest settlement ever entered into by the Crown. The accumulated rentals do not form part of the redress package, neither do any New Zealand Units (carbon credits) allocated to forest owners under the ETS.[28] It could be that this is an attempt to avoid relativity provisions in the Waikato Tainui and Ngāi Tahu settlements.[29]

The Collective will also receive ongoing rental streams from the Crown forest licences for the remaining period of the licences, which is about 35 years. Total annual rentals from the Crown licences are currently about $15 million a year.

Subject to the prior rights of individual iwi, the settlement provides for the Collective to obtain Crown owned properties by way of deferred selection or rights of first refusal. The Deed of Settlement also records the Crown's willingness to discuss the potential availability of other Crown assets and interests (such as dams for example) and its support for the Collective exploring joint ventures with State enterprises in the Central North Island region.

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27 The Affiliate Te Arawa Iwi and Hapū have completed this process, but other CNI iwi yet to settle include Ngāi Tūhoe, Ngāti Tūwharetoa, Ngāti Whakaue, Ngāti Whare, Ngāti Manawa, Ngāti Rangitihi, and Raukawa. Together the CNI iwi groups have more than 100,000 members.

28 The Collective will receive separately an allocation of New Zealand Units (carbon credits) under the Climate Change (Emissions Trading and Renewable Preference) Act as the Central North Island forest land is pre-1990 exotic forest land.

29 As these tribes were the first to risk entering into full and final comprehensive settlements with the Crown, they successfully negotiated relativity clauses by which they are entitled to additional financial redress if the Crown exceeds the unofficial fiscal cap of $1 billion set aside for Treaty Settlements.

The Collective decided amongst themselves that the percentages of rental proceeds would be distributed as follows:[30]

Ngāi Tūhoe	27.2987
Ngāti Manawa	6.2378
Ngāti Tuwharetoa	26.8837
Ngāti Whakaue	3.7479
Ngāti Whare	4.8891
Raukawa	14.7452
The Affiliate Te Arawa Iwi/Hapu	16.1976

Interestingly, despite many Māori opposing the notion of a fiscal envelope these percentages are more or less those that the Crown would have come up with according to its own fiscal benchmarks used for settlements and which are usually confidentially disclosed to each iwi once they reach the negotiating table. The Collective decided to allow for the percentages to be disclosed to the other members, and once disclosed, the larger iwi groups in the Collective sacrificed percentage shares to boost the allocation to Ngāti Manawa and Ngāti Whare. In reaching this resolution, the Collective acknowledged the spirit of generosity shown by Tūhoe, Tūwharetoa, TPT, and Raukawa. Rangitihi did not garner the necessary level of support from its iwi members to join the Collective, but have an opportunity to do so within a specified timeframe.

3. *Custom designing allocation and dispute resolution processes*

Fundamental to the CNI Deed of Settlement and the ensuing draft legislation is the inclusion of processes custom designed by the CNI iwi for the allocation of the Central North Island forests and for resolving disputes according to strict timelines. In essence the process involves three stages: Firstly, exclusive interests and overlapping interests are identified according to tikanga.[31] Member iwi who have overlapping interests will work under their own agreed process to come to formal agreement on allocation. If the iwi involved cannot reach agreement themselves, then either respected experts from within the Collective's membership, who have the support of interested iwi, will become involved to assist with a mediated solution, or the matter will go directly to adjudication. If the matter goes to mediation but no agreement is reached, then the Collective will appoint an adjudication panel authorized to make a binding decision. Initially it was agreed amongst the Collective's members that no external advisors (such as lawyers or historians) would play a part in the processes, however during the select committee process the Collective decided to allow lawyers to present on behalf of Iwi to the adjudication panel but not to have the right to cross examine. Schedule 2 of the CNI Forests Land Collective Settlement Act 2008 which sets out the tikanga based resolution process in full is attached as an appendix to this article.

4. *Observations*

The leadership of Dr Tumu te Heuheu for the Collective and Dr Cullen for the Crown, together with the generosity and risk taken by TPT was necessary for the successful stitching together of this settlement. It will be interesting to see whether the CNI model will become a trend for multi-tribal collectives who might jointly secure Treaty settlement assets with a plan to sort through issues such as allocation according to their own terms. The effectiveness of the CNI allocation process on the basis of mana whenua and tikanga remains to be seen. Statesman, Monte Ohia, to

30 *CNI Forests Land Collective Settlement Act* 2008, Schedule 3.

31 See above n 25. Tikanga varies from tribe to tribe and is dynamic, so this process will be watched with interest.

whom this article is dedicated, once said that tikanga is easily (and often) manipulated to achieve certain agendas.[32] A disquieting question on the minds of TPT beneficiaries will be whether they will ultimately secure the equivalent of land holdings that were relinquished under their original settlement. Positively for TPT, a new Deed of Settlement, with enhancements in recognition of their patience and generosity in the CNI process, was signed in the days prior to the signing of the CNI Deed, and legislation has now been passed to perfect that settlement.[33] The other CNI iwi that have been swept up in the wake of the CNI Settlement have seized the opportunity to secure priority in the queue for comprehensive settlements to be addressed and have this year entered into terms of negotiation, agreements in principle, and Deeds of Agreement with the Crown to settle those claims.[34]

C. Waikato River – Ancestral River of Life

Tōku awa koiora me ōna pikonga he kura tangihia o te mātāmuri.
The river of life, each curve more beautiful than the last.

1. *An overarching visionary statement*

These lovely words are taken from a famous lament by the second Māori King, Tāwhiao, in which he recorded his adoration for his ancestral river and the significance of the river as a treasure for all generations. The Kīngitanga (King Movement) involved conscious efforts by a number of tribal groups to unify under strong leadership to deal with the effects of British settlement. It was during Tāwhiao's term as King that the settler Government, seeing the pan tribal King Movement as a threat to its stability, sent its forces across the Mangatawhiri River in July 1863, labelling the Waikato people as rebels and subsequently confiscating Waikato lands and driving people away from their villages alongside their ancestral river.[35] This short excerpt from the lament has been embraced as part of the vision for the restoration and protection of the health and wellbeing of the Waikato River pursuant to the Waikato Tainui River Settlement.

To fully appreciate the context of these words, the full text of the lament which illustrates Tawhiao's reverence for all aspects of his tribal domain; its lands, its mountains, sacred places and, of course, the ancestral river - then pristine and abundant, warrants repeating:[36]

Ka matakitaki iho au ki te riu o Waikato
Ano nei he kapo kau ake maaku
Ki te kapu o taku ringa
Ka whakamiri noa i toona aratau
E tia nei he tupu pua hou
Kia hiwa ake te Tihi o Pirongia
Ina he toronga whakaruruhau moona

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32 Presentation to the Ambassadors for Māori Opportunity, Waikawa, 2003.

33 Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008.

34 See the OTS website for details as to progress, above n 14.

35 By Orders in council under the New Zealand Settlements Act 1893, the Crown unjustly confiscated approximately 1.2 million acres of land from Tainui iwi.

36 See *Tawhiao, King or Prophet* (2000) V as read aloud in Parliament by the Honourable Nanaia Mahuta, MP at the First Reading of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Bill Thursday 25th September 2008.

Ki tooku tauawhirotanga
Anaa! Te ngoto o toona ngawhaa i ona uma kiihai i arikarika
A Maungatautari, a Maungakawa
Ooku puke maunga, ngaa taonga tuku iho.
Hoki ake nei au ki tooku awa koiora me oona pikonga
He kura tangihia o te mataamuri
E whakawhiti atu ai i te koopu mania o Kirikiriroa
Me oona maara kai, te ngawhaa whakatupu ake o te whenua momona
Hei kawe ki Ngaaruawaahia, te huinga o te tangata
Araa, te pae haumako hei okiokinga mo taku upoko
Hei tirohanga atu ma raro i ngaa huuhaa o Taupiri
Kei reira ra, kei te orokohanganga o te tangata
Wahia te tuungaroa o te whare, te whakaputanga mo te Kiingi

The interpretation of translator extraordinaire, the late Ngahina Te Uira, is equally as beautiful:[37]

I look down on the valley of Waikato
As though to hold it in the hollow of my hand
And caress its beauty
Like some tender verdant thing
I reach out from the top of Pirongia
As though to cover and protect its substance with my own
See, how it bursts through the full bosoms of Maungatautari and Maungakawa
Hills of my inheritance
The river of life, each curve more beautiful than the last
Across the smooth belly of Kirikiriroa, its gardens bursting with the fullness of good things
Towards the meeting place at Ngaaruawaahia
There on the fertile mound I would rest my head and look through the thighs of Taupiri
There at the place of all creations
Let the King come forth

Obviously, any overarching visionary statement for the restoration of the Waikato River had to be in the indigenous language of the land. This excerpt was chosen following a review of the numerous references to the ancestral river in traditional songs and sayings and having reflected upon the various statements of elders in the various collations of oral history. Those responsible for shaping the vision sought assistance from expert wordsmiths such as tribal leader, Tom Roa,[38] who proffered the visionary statement, and who explained the appropriateness of the excerpt in the following way: [39]

> The word 'tōku' means 'my' and personalises each person's/group's relationship with the river; 'koiora' encapsulates the health, wellbeing and life in each of the visions that were suggested in the brainstorm-

37 *Tawhiao King or Prophet*, Ibid, 76.

38 Chairman of Te Kauhanganui (Waikato-Tainui Tribal Parliament) and Senior Lecturer, University of Waikato School of Māori and Pacific Development.

39 This explanation has been paraphrased in minor ways.

> ing process ; 'pikonga' in its bends – is reminiscent of a most famous tribal saying[40] and again of those who inhabit and care for its catchment; 'kura' emphasises the river as a treasure; 'tangihia' can be interpreted as 'saluted' and 'celebrated'; and 'mātāmuri' can refer to these 'latter' times/generations relative to Tawhiao's generation… as well as those to come.

2. *A new era of co-management*

Previous reviews have elaborated on the background to the Waikato River claim which arose from the Crown's invasion and war by land and by the Waikato River, and subsequent confiscation of Waikato lands in the 1860s which denied Waikato-Tainui their rights and interests in the Waikato River.[41] The river claim was excluded from the 1995 land settlement with Waikato-Tainui and was set aside for future negotiation. In another landmark settlement that occurred during the course of the year, the Waikato River settlement was signed on 22 August 2008 between Waikato-Tainui and the Crown in relation to the Waikato River (the Waikato River Settlement). The Crown accepts that it failed to respect, provide for and protect the special relationship Waikato-Tainui have with the River as their ancestor; and accepts responsibility for the degradation of the River that has occurred while the Crown has had authority over the River.

A notable feature of the settlement is that it is not about ownership, but rather the focus is on the notion of co-management across a range of agencies and a unity of commitment to focus on the health and wellbeing of the Waikato River. To this end, the Deed of Settlement and the ensuing legislation centres around a Vision and a Strategy which have been developed following public consultation by the Guardians Establishment Committee (GEC) on which Waikato-Tainui and the Crown, along with other iwi and regional stakeholders, were represented.[42] The GEC is a forerunner to permanent guardians who will be appointed in time and whose scope will apply to the Waikato River and its catchment from Taheke Hukahuka (the Huka Falls near Lake Taupō) to Te Pūaha o Waikato (the Waikato River mouth which flows into the Pacific Ocean) and its catchments. The make-up of the Guardians is still subject to negotiation but will involve members appointed by Waikato-Tainui and other river iwi, and an equal number of members appointed by the Crown, one of whom will be nominated by regional authority, Environment Waikato. In order to support Waikato-Tainui with their relationship with the Waikato River and the exercise of mana whakahaere (authority and rights of control) from Karāpiro to Te Pūaha o Waikato (the lower catchment) a Waikato River Statutory Board will be established and will have functions aimed at ensuring the Waikato River is managed in a manner that implements the Vision and Strategy. It will be made up of members appointed by Waikato-Tainui and local, district, and regional authorities. When issues affecting the major tributary, the Waipā River, are being discussed a representative of neighbouring iwi, Ngāti Maniapoto, will be involved.

40 *Waikato Taniwharau, He Piko He Taniwha, He Piko He Taniwha! Waikato, of a hundred chiefs! At every bend, a chief*. This well known and oft-cited proverbial saying pays tribute to the strong leadership in the many communities that live along the banks of the Waikato River, and also alludes to the metaphysical nature of the River.

41 Te Aho, 'Contemporary Issues' above n 4 (2007), 156-7; and (2006), 108-110.

42 The writer was appointed by Waikato-Tainui as one of its four members on a committee of 16.

3. *Resource Management Frameworks*

Previous reviews have commented on Māori expectations as to the management of natural resources and the ineffectiveness of the Resource Management Act 1991 from a Maori perspective despite the inclusion of statutory provisions which deal with Māori interests.[43] Prue Kapua, experienced practitioner in the resource management field, recently wrote that:[44]

> Māori expected to be a key participant in the resource management process when this Act came into force. The reality is quite different…The dealing, particularly by the Environment Court, with the Māori interest in the last fifteen years has generally not been positive for Māori.

It is for this reason, according to Kapua, that resource management issues are an integral part of the process that Māori go through in respect of Treaty settlements. The Waikato River Settlement is no exception. The very resources that are caught by the provisions in the Act form the basis for Article 2 of the Treaty of Waitangi,[45] so it should come as no surprise that Māori seek a more active role in that process. Under the terms of the settlement the Vision for the Waikato River it is intended to operate at the highest level possible to set the direction for enhancing the health and wellbeing of the river. The Vision and Strategy will be a National Policy Statement for the purposes of the Resource Management Act and a Statement of General Policy for the purposes of conservation legislation and will operate across other statutory frameworks such as fisheries frameworks. This means that local authorities will be required to give effect to the Vision and Strategy when preparing or changing plans and policy statements, to have regard to the Vision and Strategy when considering a resource consent application, and to have particular regard to the Vision and Strategy for designations and heritage orders. The Director-General of Conservation will be required to implement the Vision and Strategy when preparing Conservation Management Strategies and Plans. Other decision-makers under a range of other relevant legislation will also be required to have particular regard to the Vision and Strategy.

4. *Other redress*

The settlement includes other aspects of co-management such as a 'Kīngitanga Accord' which sets out the joint commitments of the parties to an enhanced relationship, to support integrated co-management and to protect the integrity of the settlement. The Accord includes commitments to:

- develop and agree portfolio-specific accords with the Minister of Conservation, Fisheries, Land Information, Environment, Arts, Culture and Heritage, Local Government, Agriculture, Biosecurity, Energy and with the Commissioner of Crown Lands, and
- explore accords between Waikato-Tainui and other Ministers and agencies after the deed is signed, and to support Waikato-Tainui to establish memoranda of understanding with councils and other relevant agencies.

For marginal strips and river-related Crown-owned land, the settlement provides for the Crown and Waikato-Tainui to discuss:

- the protection or gifting of sites of significance to Waikato-Tainui, and
- provisions for management or co-management of sites with Waikato-Tainui.

In addition to the Statutory Board and the Guardians, the settlement includes provisions for the establishment of a Waikato River Trust to manage a contestable 'cleanup' fund for restoring and

43 Te Aho, 'Contemporary Issues in Māori Law and Society (2005) *Waikato Law Review* 145, 161-166.

44 P Kapua, 'Review of the Role of Māori under the Resource Management Act 1991' [2007] *Resource Management Theory and Practice* 92,106-108.

45 Ibid, 105.

protecting the health and wellbeing of the Waikato River. The Crown's initial contribution to this fund, through the Waikato-Tainui settlement, will be $7 million per year for 30 years. A further $50 million will be paid to the Waikato Raupatu River Trust for initiatives for restoring and protecting the relationship of Waikato-Tainui with the Waikato River (including its economic, social, cultural and spiritual relationships) and the protection and enhancement of significant sites, fisheries, flora and fauna (in the lower reaches of the Waikato River). Other financial redress includes an immediate contribution of $20 million to the Waikato-Tainui endowed college for much needed research initiatives. Once the settlement is finalised the Crown will provide the Waikato Raupatu River Trust $1 million per year for 30 years to fund the participation of Waikato-Tainui in the co-management processes in the settlement, and will fund a study to identify the operating costs of the Guardians of the Waikato River and Waikato River Statutory Board to inform the finalisation of the Crown's commitment to fund the operation of the two new entities.

Other redress includes a right of first refusal in respect of the Huntly power station and the coal mining permit under the Waikato River. The Crown will also be required to engage with Waikato-Tainui on the disposition of or creation of certain property rights or interests in the Waikato River.

D. Divide and Rule

1. *Severing the ancestor - upper and lower catchments*

The Crown's Treaty settlement processes are notorious for causing division as Māori become embroiled in turbulent battles over the allocation of settlement assets, boundaries and so on. In 1992 Ani Mikaere forewarned that: [46]

> …future generations of Māori who seek justice under the Treaty will face their most trenchant opposition from those Māori for whom the settlement has bought power and prestige. It will be the Māori powerbrokers who will act as buffers between Māori claims for tino rangatiratanga (the right for Māori to govern themselves) and the Crown.

The Waikato-Tainui River Agreement in Principle was initially opposed by the nearby Raukawa Trust Board who lodged an urgent claim to the Waitangi Tribunal citing prejudice to their interests in the river. Tribal relations between Raukawa and Waikato-Tainui became strained. The Crown's response was to enter into joint negotiations with Raukawa and Te Arawa (who raised similar concerns directly with the Crown) in respect of the 'upper catchment' from Karāpiro to Huka Falls.[47] Those negotiations have culminated in a Deed of Agreement in relation to a Co-Management Framework signed on 4 September 2008 which largely mirrors the provisions of the Waikato- Tainui Deed in terms of co-management, but only in respect of Raukawa and Te Arawa, and for a total of approximately $30 million in financial redress for each tribal grouping – the bulk of which is to be paid in annual instalments of $1m.

46 Ani Mikaere, above n 13, 447.

47 Tūwharetoa is not currently included.

2. *Oppression continues*

The Crown's unbending practice of 'picking favourites' to engage with, in isolation of neighbouring iwi, and choosing when and how it engages, has once again wreaked havoc in the relationships between iwi and hapū.[48] Hauraki, part of whose tribal domain is included in the Waikato Tainui settlement as part of the wider catchment of the River, and Ngāti Korokī Kahukura, have lodged urgent claims with the Waitangi Tribunal. A previous review has referred to Ngāti Korokī Kahukura,[49] who claims that their interests are prejudiced by the Crown's current approach of settling the River claims by cutting the ancestral river in half into an upper and a lower catchment and by determining a boundary line that severs the heartland of their tribal domain. That domain spans the confiscation line. North of the confiscation line, Ngāti Korokī Kahukura's interests are represented by Waikato-Tainui. South of the confiscation line is an unsettled area, in more ways than one. To add insult to injury, the Crown, for the sake of convenience is allowing neighbouring iwi to use Ngāti Korokī Kahukura's most significant and sacred site at Karāpiro as their boundary.

> In the early 19th century, there was tension between Ngāti Korokī, Ngāti Hauā, and Ngāti Maru who had moved south from Hauraki after Hongi Hika's war parties had arrived there. There were two great rapids in the upper River: Aniwaniwa, 'a rock channel about 30 feet wide, which carried the whole river, boiling and frothing as it fought to free itself from the narrow channel', and Karāpiro, just below Te Tiki o te Ihingarangi, a famous wāhi tapu. Just before the Karāpiro rapids stood a huge rock, 'standing proud above everything else in the vicinity', close to the mouth of the Hauoira Stream. The rock marks the place where, in 1830, at the Battle of Taumatawīwī Te Waharoa, the great warrior chief of Ngāti Hauā, burnt at the base of the rock the bodies of the warriors who had been killed in that battle against Ngāti Maru so they would not fall into enemy hands. It is from the battle that Karāpiro got its name: Karā (rock) piro (smell). This site and the rock remain a wāhi tapu for Ngāti Korokī and Ngāti Hauā [50]

The rock that formed the centrepiece of that major battle was detonated and destroyed in order to create the Karāpiro Dam which lies squarely within the Ngāti Korokī Kahukura tribal area. The same site was further desecrated to facilitate international rowing competitions on Lake Karāpiro. A memorial stands in the Karāpiro Domain acknowledging the site and its historical significance. There has been a recent proposal to re-detonate the rocks in anticipation of the World Rowing Championships to be held at Karāpiro in 2010. It should not be surprising that members of Ngāti Korokī-Kahukura would seek meaningful engagement regarding any further transgressions of sacred sites within their rohe, and to ensure that Ngāti Hauā was a key part of any such engagement in relation to Karāpiro given their shared history.

3. *Recognising iwi*

Against that background, Ngāti Korokī Kahukura initially sought to have its entire tribal rohe included within the Waikato-Tainui Settlement, extending the scope of the Waikato River Statutory Board to Arapuni, which would have included the Karāpiro domain entirely within one statutory body under the umbrella of the Waikato-Tainui confederation in which Ngāti Korokī Kahukura is represented as well. This proposal was raised during the GEC consultation process on the Vision and Strategy for the Waikato River. Despite support from neighbouring iwi, the Crown did not respond to this proposal.

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48 Waitangi Tribunal, *Tamaki Makaurau Settlement Process Report* (2007) and Waitangi Tribunal, *Final Report on the Impacts of the Crowns Settlement Policies on the Te Arawa Waka and other Tribes* (2007).

49 Te Aho, above n 43, 166-7.

50 This entire passage is taken from a Statement of Evidence of Te Kaapo Tuwhakaea Clark, prepared on behalf of Waikato-Tainui for the Watercare Hearing before the Franklin District Council, Tuakau, December 1996.

The Crown's current Deed of Agreement with the Raukawa Trust Board and others purports to include Ngāti Korokī Kahukura's tribal domain under the mantle of the Raukawa Trust Board the present representative entity for Raukawa. The Deed does not explicitly recognise the rights and interests of Ngāti Korokī Kahukura, despite their attempts to be proactive in ensuring their separate identity remains intact, and despite agreement from all neighbouring iwi that Ngāti Korokī Kahukura has the dominant interests as tangata whenua in its tribal domain, thus avoiding cross claimant and overlapping issues. The impact of this is that external decision makers and developers could mistakenly (but understandably), or deliberately, seek to rely upon the Deed to determine that the appropriate body to engage with on environmental and resource management issues is the Raukawa Trust Board – a serious undermining of the mana of Ngāti Korokī Kahukura. Unmentioned in the official account of the building of Karāpiro is an effect of the rising lake waters that caused particular distress to Ngāti Koroki-Kahukura. Their burials were all along the banks of the Waikato River. As the dam at Karāpiro was completed and the River flooded in 1947, the elders tried to ensure the safety of their wheua (bones), but the authorities did not listen. Having researched the impacts of Hydro-Electric Power: The Waikato River Dams, historian Anne Parsonson wrote of:[51]

> [T]he sense of helplessness of the elders trying to secure some protection for their tupuna in the face of the monocultural arrogance of a government department in the 1940s.

The Crown's unilateral policy of deciding who it will engage with (recognised river iwi) and who it will not engage with, in relation to the Waikato River has the effect of forcing Ngāti Korokī Kahukura to be subsumed under the umbrella of a tribal entity in which Ngāti Korokī Kahukura has no representation and whose mandate explicitly excludes Ngāti Korokī Kahukura.

Such a policy represents the perpetuation of a long history of superficial observations of Māori tribal structure by Europeans and the rigid and static structural models created by 19th Century ethnologists. Historian Angela Ballara argues that the Māori political and social system was always dynamic, continuously modified like its technology in response to such phenomena as environmental change and population expansion. The greatest of these changes took place in response to the arrival of Europeans. In the changing circumstances of the 19th century Māori adapted their lifestyle and self-conceptualisation as the need arose.[52] According to Ballara:[53]

> Ngati Koroki of Waikato, though often listed as a 'tribe associated with' the Waikato iwi Ngati Haua, have also been described as a hapu of Ngati Haua, when in fact Koroki was Haua's father. These 'aberrant' assessments, apparently ignoring known whakapapa, derive from the kind of relationships the earlier hapu have been perceived to have developed with later descent groups.

The haste and piecemeal fashion in which the Crown has acted in its Treaty settlement policy in relation to the Waikato River has not allowed tribal groups such as Ngāti Korokī Kahukura to advocate the view that they are a river iwi in their own right and should be engaged directly in relation to addressing their unique concerns, concerns that gave rise to all other neighbouring iwi unanimously supporting their right to engage directly with the Crown. That support was recorded in a Waitangi Tribunal Memorandum-Directions.[54] This type of support is unprecedented and

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51 Ann Parsonson, *Waikato River Claim Report* (A confidential working document to assist the negotiating team following the 1995 Settlement), 329.

52 A Ballara, Iwi: The dynamics of Māori tribal organisation from c.1769 to c.1945 (1998), 19, 21.

53 Ibid, 133.

54 Waitangi Tribunal, Memorandum-Directions of the Deputy Chairperson Dated 9 September 2008.

should allay any concerns of creating difficult precedents. Nevertheless, the discussions with the Crown that followed typified the frustrating experience that Māori must endure when such discussions are conducted by faceless officials who seem to do everything they can to not let Māori get what is rightfully theirs.

In reaching its conclusion and recommendation that the TPT settlement ought to be delayed so that issues of other affected iwi might be addressed, the test adopted by the Waitangi Tribunal was one of relative prejudice.[55] Ultimately, the generosity of TPT in agreeing to delay its settlement was rewarded and the multi-iwi CNI Settlement was achieved. In a similar vein, Ngāti Korokī Kahukura is urging the Crown to reconsider its position regarding at least the upper catchment to address the impacts of its settlement policies on other iwi.

III. Observations and Conclusions

Oh what a tangled web we weave …[56]

Māori responses to the government's preferred Emissions Trading Scheme are generally centred in a framework of a Māori worldview which is based on a spiritual connection to the planet and which recognises the growing Māori economy and the need for Māori to maximise opportunities that flow from changing policy frameworks. Having successfully lobbied for a distinctive voice at a national level, Māori supported the Emissions Trading Scheme in return for a substantially increased offer from the Crown of free carbon credits to forest owning iwi. For some, that is not enough. And, despite widespread support from Māori, the scheme impacts negatively on the value of concluded Treaty settlements that involved the transfer of Crown Forest lands, giving rise to new Treaty grievances and newly lodged claims.

This year is an election year in Aotearoa/New Zealand and it is difficult not to believe that many of the agreements reached between Crown and Māori this year are an attempt to bolster support for the incumbent Labour Government amongst Māori as it embarks on its election campaign proper, given that its performance in eight of the past nine years in the area of Treaty Settlements has been disappointing. Such was the haste in which many of the agreements and final settlements were reached it is inevitable that they will have flow on effects and give rise to new Treaty grievances that will also have to be addressed in time. The plight of Ngāti Korokī Kahukura, for instance, illustrates how, by settling one claim according to its self imposed policies and procedures, the Crown seals the fate of certain tribal groups as irrelevant in the settlement landscape. Those Māori already in the settlement queue will continue to confront the Crown's ongoing habit of taking what is not theirs, but will inevitably surrender to the Crown's fiscal benchmarks on the basis that something is better than nothing. It will be interesting to see how the allocation process embedded in the CNI settlement, said to be sourced in tikanga, will play out, given that tikanga varies across tribes, and can often be manipulated to achieve certain agendas.

Against the dark background of the settlement landscape, there have been some bright moments such as the heralding of a new era of co-management and unity of purpose to restore and protect the health and wellbeing of the ancestral Waikato River, and the multi iwi unity and strong leadership shown in the reclamation of the Central North Island forests.

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55 Waitangi Tribunal, *Final Report on the Impacts of the Crowns Settlement Policies on the Te Arawa Waka and other Tribes* (2007).

56 Sir Walter Scott, Marmion: A Tale of a Flodden Field, Canto vi, Stanza 17.

This article began by referring to *Aniwaniwa*, the celebrated art exhibition which draws upon submersion as a metaphor for cultural loss at the hands of the Crown, and ends with the reminder that the most spectacular rainbows seem to happen when half of the sky is still dark with clouds and the observer is at a spot with clear sky in the direction of the Sun. Aniwaniwa is a Māori word meaning rainbow, often a sign of better weather to come, a symbol of hope for the future.

APPENDIX ONE: SCHEDULE TWO OF THE CNI FOREST LAND COLLECTIVE SETTLEMENT ACT 2008

A. Tikanga based resolution process for CNI forests land

(2) The test of mana whenua is the mana that iwi traditionally held and exercised over the land, determined according to tikanga including, but not limited to, such factors as—
  (a) take whenua; and
  (b) demonstration of ahi kaa roa, ahi tahutahu, or ahi maataotao.

(3) Evidence of mana whenua may be derived from whatever sources of knowledge that each iwi considers relevant, including—
  (a) oral korero, including whakapapa, waiata, and tribal history; and
  (b) written sources, including Native Land Court evidence and decisions, research reports, and other records.

(4) The members of the CNI Iwi Collective will be provided with maps depicting the claims of all iwi. The maps will be confidential to the company and the iwi and may not be disclosed to third parties or used for any other purpose.

(5) By 30 September 2009, the board of the company will identify—
  (a) the areas of CNI forests Land in which a particular iwi has exclusive mana whenua interests; and
  (b) the extent to which there is agreement on allocation of particular areas of CNI forests land to particular iwi. Agreements must be in writing, signed by authorised representatives of the governance entities of each of the iwi that had claimed mana whenua interests; and
  (c) areas of land for which agreement has not been reached, and the iwi that are claiming that land; and
  (d) areas of land that the Crown has advised are or may be subject to claims by any other CNI claimant to the Crown agreed proportion.

(6) The company will record in its draft allocation agreement the agreed allocations under subclause (5)(a) and (b).

(7) All land for which allocation is not agreed will be the subject of the Stage 2 process of negotiation between iwi kanohi ki te kanohi, provided that land that may be subject to the Crown agreed proportion cannot be included in the Collective's allocation agreement or proceed through the resolution process unless and until the Crown has confirmed that the land is not part of the Crown agreed proportion.

5 *Stage 2: Kanohi ki te kanohi negotiation: 1 October 2009 to 30 June 2010*

(1) Following Stage 1, iwi will embark on kanohi ki te kanohi negotiations with iwi with whom they have overlapping claims, to reach agreement on allocation of the land in question.

(2) The process will be kanohi ki te kanohi between iwi:
  (a) the iwi involved will determine the tikanga that applies to the process; and
  (b) the governance entity of each iwi will appoint their representatives to engage in the Stage 2 process; and
  (c) the expectation is of korero rangatira (open principled trustworthy dialogue by rangatira with authority to commit their iwi); and
  (d) no expert advisors, including lawyers and historians, are permitted to participate directly in the kanohi ki te kanohi negotiations.

(3) The iwi concerned in each process will endeavour to reach consensus on the allocation of the CNI forests land in question, having regard to the strength of the mana whenua interests. Innovative solutions that reflect tikanga, whanaungatanga, manaakitanga and kotahitanga, and the complexity of mana whenua interest could include, but are not limited to—
  (a) joint or multiple ownership as tenants in common, either divided in equal shares or proportionally according to the respective interests of the iwi; and
  (b) subdividing land and allocating the subdivided portions to each iwi; and
  (c) agreeing to ‘exchange’ interests in more than 1 block, so that exclusive interests can be granted to each of the blocks; and
  (d) one iwi becoming the owner, but acknowledging the relationship of other iwi with the land in an agreed manner; and
  (e) agreeing not to transfer title of the land from the company, but acknowledging mana whenua interests in a manner agreed by the iwi.

(4) Minutes of each hui will be taken and confirmed by the iwi participating.

(5) Agreements reached during Stage 2 must be signed in writing by the authorised representatives of each iwi.

(6) Throughout Stage 2, the company will obtain regular reports from iwi on the progress of negotiations, and consider whether it can facilitate the resolution of any disputes with the agreement of the iwi concerned.

(7) The iwi involved in each kanohi ki te kanohi process may request the appointment of mediators to assist in the Stage 2 process, as set out in clause 5(7) to (9).

6 *Stage 3: Finalising Allocation Agreement: 1 July 2010 to 30 June 2011*

(1) On completion of Stage 2, the company will record in its draft allocation agreement—
  (a) the agreements reached on allocation during Stage 2; and
  (b) any remaining areas of land for which agreement has not been reached.

(2) The board of the company may only alter the agreements reached between iwi with the consent of the iwi concerned.

(3) For remaining areas of dispute, the iwi involved in the dispute will decide whether to refer the dispute to—
  (a) mediation, to endeavour to reach agreement; or
  (b) adjudication, in order to determine the dispute (whether or not mediation has been attempted first).

(4) If the iwi involved in the dispute cannot reach agreement on which process to follow under subclause (3), the board of the company will decide.

(5) If agreement is not reached through mediation by 30 November 2010, then the dispute will be determined by adjudication.

(6) Following determination of the dispute, the decision reached will be recorded in the allocation agreement.

Mediation: to be completed by 30 November 2010

(7) The company may appoint 1 or more mediators to mediate the dispute between the iwi who—
   (a) should be fluent in te reo Mâori, and have knowledge of, and be skilled in, Tikanga based dispute resolution; and
   (b) must be independent of the dispute; and
   (c) are nominated by the iwi concerned and are appointed with their consent.

(8) The mediator will decide, in conjunction with the iwi concerned, the process to be followed in the mediation.

(9) The mediator will not have power to determine the dispute, but may offer advice of a non-binding nature.

Adjudication: To be completed by 25 June 2011

(10) If the dispute is referred to adjudication, the company will appoint an adjudication panel that comprises at least 3 members to determine the dispute. The company will have complete discretion to decide who the members of the panel should be, subject to the following requirements:
   (a) the panel members must be fluent in te reo Mâori, and be knowledgeable on matters of Tikanga, including in particular how mana whenua is held and exercised by iwi; and
   (b) panel members must be independent of the dispute, and not be members of the iwi involved in the dispute.

(11) The adjudication panel may seek legal advice on process, or legal or other expert advice on any other matter.

(12) The adjudication panel will hear the claims of the iwi to the land at issue.

(13) The adjudication panel will have complete discretion to determine the process and timetable for the hearing, subject to the following requirements:
   (a) the iwi will provide an agreed joint statement to the adjudication panel outlining the nature of the dispute; and
   (b) each iwi will have the opportunity to provide a written submission to the adjudication panel stating their mana whenua interests and their position concerning the dispute; and
   (c) the iwi involved will file written evidence; and
   (d) each iwi claimant is entitled to a right of reply; and
   (e) there is a right to question witnesses; and
   (f) lawyers are not permitted to appear before the adjudication panel unless all parties agree; and
   (g) a decision will be reached by 25 June 2011.

(14) The adjudication panel will reach a decision on allocation of the land at issue, in accordance with the mana whenua test set out at clause 4(2). The adjudication panel will have power to—
   (a) allocate the land to 1 iwi; or
   (b) allocate the land to more than 1 iwi in joint or multiple ownership as tenants in common in a block, either divided in equal shares or proportionally according to the respective interests of the iwi; or

(c) subdivide the block and allocate the subdivided portions to individual iwi; or
(d) allocate the land to 1 iwi, but acknowledge the relationship of the other iwi with the land in a specified manner; or
(e) implement any other solutions proposed by 1 or more of the parties, subject to any modifications required by the adjudication panel.

(15) A decision with reasons will be given. The decision of the adjudication panel will be final and binding on all the parties.

7 *Allocation agreement*

(1) The board of the company will complete the allocation agreement by 1 July 2011.
(2) The allocation agreement will be final and binding.
(3) After 1 July 2011, on receiving a written request from a governance entity, the company will transfer the CNI forests land to that governance entity or nominee in accordance with the allocation agreement within a reasonable time, provided that—
(a) the Crown consents to the transfer, if the transfer is prior to the expiry of the Crown initial period; and
(b) the ongoing licence rentals from the land will continue to be paid to the company and distributed according to the agreed proportions until the final allocation date (as defined in the deed of trust). After the final allocation date, they will run with the land.
(4) If for any reason aspects of the allocation agreement are not finalised, or are subject to litigation, that will not prevent transfer to iwi of CNI forests land for which final agreement has been reached.
(5) If agreement is reached not to transfer areas of the CNI forests land, or iwi do not request a transfer in writing, then the company will retain title, subject to the vested beneficial entitlement of iwi in accordance with the allocation agreement and the provisions of the deed of trust.

V. Glossary of Māori Terms

Hapū	subtribe
Hui	meeting, assembly
Iwi	tribe, people
Kanohi ki te kanohi	face to face
Mana	prestige, power, authority
Mana whenua	customary authority and title exercised by a tribe or sub-tribe over land and other taonga within a tribal district
Mana whakahaere	Operational responsibility over land and other taonga within a tribal district
Māori	the indigenous peoples of Aotearoa/New Zealand
Papatūānuku	Earth mother
Rangatira	Chief, leader who has an ability to weave people together
Ranginui	Sky Father
Raupatu	confiscation
Tangata whenua	People of the land (Māori)
Taonga	Treasure
Tāwhiao	Second Māori King

Tikanga Māori	laws, ethics and customs of the Māori. Tangata whenua systems of law and government existed in this country prior to colonisation by the British. Māori society was collectively organised with whakapapa (genealogy) forming the backbone of a framework of kin-based descent groups, such as iwi and hapū led by rangatira – leaders for their ability to weave people together. Tikanga Māori has been described as 'the first law of Aotearoa/New Zealand'. Tikanga varies from tribe to tribe and is dynamic.
Waahi tapu	sacred site
Whakapapa	genealogy
Whanaungatanga	relationships
Whenua	land