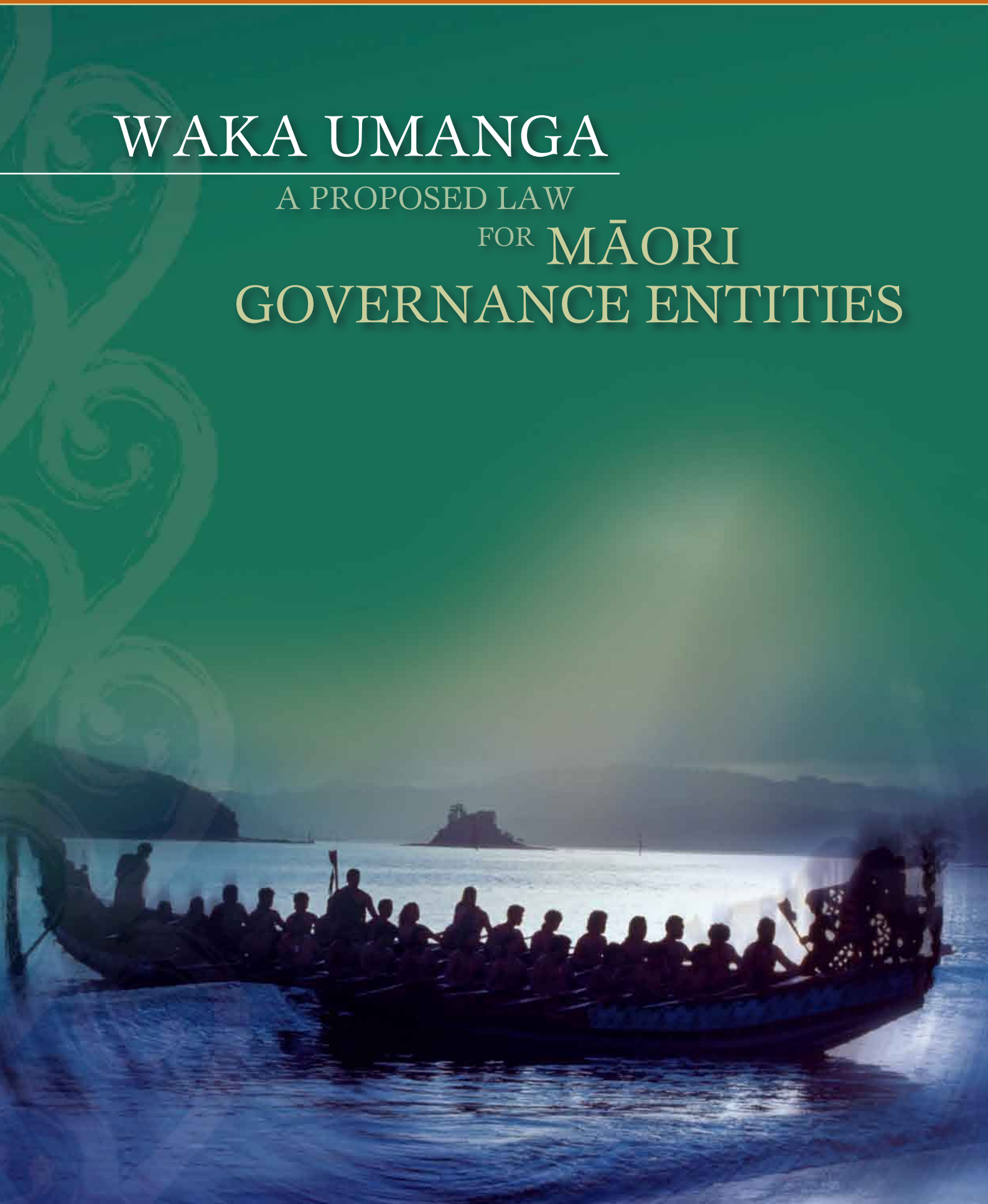




WAKA UMANGA

A PROPOSED LAW FOR MĀORI GOVERNANCE ENTITIES





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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Waka Umanga

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TABLE OF CONTENTS

Waka Umanga: A Proposed Law for Māori Governance Entities	3
Foreword	8
Acknowledgements.....	9
PART 1 OUTLINE.....	11
Chapter 1: Summary	12
Overview	12
Benefits	13
Legislative Framework	14
The five main proposals.....	14
Membership.....	17
Waka Tūmaha (General-Māori groups)	17
Dispute Resolution	17
Intervening or winding up a waka umanga	18
Looking ahead	18
Chapter 2: Vision	19
The main conclusions.....	19
Our vision.....	20
The development of the project	21
The structure of the report.....	22
Chapter 3: Transition	24
Why a new model is needed.....	24
Transition to a waka umanga	29
Taxation and charitable status.....	30
Costs and benefits.....	31
PART 2 PRINCIPLES.....	35
Chapter 4: Key issues for tribes.....	36
Introduction	36
Why provide for tribes?	36

Previous provision for tribes – Runanga Iwi Act 1990	37
The distinction between the tribe and the entity.....	38
How is the tribe identified?	39
Protection for minorities	41
The role of tikanga Māori.....	41
Who is the primary beneficiary?	42
How are members determined and what are their rights?	44
Boundaries between tribal groups.....	52
Mandating tribal entites	52
Access to legal process	54
Chapter 5: The issue for general-Māori groups.....	57
Relationships with tribes.....	58
Defining the issue.....	60
Basis for recognising tribes.....	63
The basis for recognising general-Māori groups	64
The need for special provisions.....	65
Application to other groups.....	65
Chapter 6: Principles and purposes	67
Autonomy.....	67
Cultural match and mandated vision.....	68
Community empowerment and participatory democracy	69
Consensus and assisted dispute resolution.....	70
Fair process, protection of minorites and access to law	70
Choice	71
Diversity	72
Economies of Scale.....	72
Rationalisation	73
Early entity development	74
Recognition	74
Good governance.....	75
The purposes of the proposed Waka Umanga Act.....	76
PART 3 STRUCTURE	79
Chapter 7: Formation.....	80
Introduction	80
The entities that may be formed	80
Guidelines for forming waka pū	81
The process for managing objections.....	88
Comments on the objections process.....	90
General-Māori groups.....	91
Why the Māori Land Court?	91
Relationship with section 30 Te Ture Whenua Maori Act 1993	91
Why fifteen applicants are required.....	92
Other tribal groups may object.....	92
Procedure.....	92
Chapter 8: Registration and Recognition	94
Introduction	94
Registration	94
The effect of recognition	105
Later changes to constitutions.....	107

Chapter 9: Dispute resolution	109
Introduction	109
The problem	110
Kairongomau	112
Facilitation	118
Mediation	118
Arbitration	119
The Māori Land Court	120
Costs	126
Amendments to Te Ture Whenua Maori Act	126
Chapter 10: Court interventions and wind up	127
Introduction	127
The court's powers of intervention	128
Applications to the court for wind up	131
The court's powers on wind up	133
Amalgamations	136
The role of the Registrar of Waka Umanga	137
Chapter 11: Secretariat	138
Introduction	138
The purpose of a Secretariat	139
Structure, membership and funding	141
New Zealand models	142
A Canadian model	143
Conclusion	143
PART 4 GOVERNANCE	145
Chapter 12: Overview	146
Chapter 13: The waka umanga and its rünanganui	149
Introduction	149
Status of the waka umanga	149
Purposes of the waka umanga	150
Powers of the waka umanga	151
The rünanganui	151
Chapter 14: The rünanganui representatives	154
Introduction	154
Selection of representatives	154
Who may be a representative on the rünanganui	160
Conditions of office	169
Chairperson and deputy chairperson	170
Chapter 15: Duties and Roles of Representatives	172
Introduction	172
Conflicts of interest	176
Liabilities and indemnities	187
Chapter 16: Internal communication	188
Introduction	188
Communication and requests for information	188
Consultation	194
Major transactions	195
General meetings	198

Governance statement	202
How is the information to be provided?	204
Chapter 17: Accountability	205
Introduction	205
Long-term planning	206
Annual plan.....	209
Annual report.....	210
Financial management.....	211
Chapter 18: The functions of the rünanganui.....	219
Introduction	219
Meetings of the rünanganui	219
Irregularities in decisions	224
Committees of the rünanganui.....	225
Code of conduct.....	231
Decision-making code	232
Chapter 19: The corporate office.....	234
Introduction	234
Employment of a chief executive	234
Relationships between the rünanganui and the corporate office.....	237
Ethics and values in the corporate office.....	238
Chapter 20: Subsidiary organisations	240
Introduction	240
Establishment of subsidiaries.....	241
Relationship between the rünanganui and its subsidiaries.....	242
Relationships between subsidiaries and the tribe	243
Constitutions	244
Governors	244
Planning, monitoring and reporting	247
Relationship between management of the waka umanga and subsidiaries	251
Ethics, values and conflict of interests.....	251
Disputes between the waka umanga and its subsidiaries.....	251
APPENDICES	253
Appendix 1: Terms of reference	254
Appendix 2: Glossary as used in text.....	256
Appendix 3: Bibliography.....	258
Part 2 Principles.....	258
Part 3 Structure.....	261
Part 4 Governance	264
Appendix 4: List of consultees	267

15 May 2006

The Hon Mark Burton
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

I am pleased to present to you Report 92 of the Law Commission *Waka Umanga: A Proposed Law for Maori Governance Entities*, which we submit to you under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Geoffrey Palmer', with a horizontal line underneath.

Sir Geoffrey Palmer
President

FOREWORD

In 2002, the Law Commission's study paper, *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase*¹ recommended that a new model settlement entity be created by statute to receive Māori settlement assets, as the Commission found significant deficiencies with the legal models currently available to Māori.

This recommendation was well received by Government, but not taken up. In the meantime, the Maori Fisheries Act and related legislation was passed, and a number of Treaty settlements were effected by specific legislation. Generic legislation therefore appeared urgent, as there were ongoing concerns as to the differing legislative or policy requirements on Māori groups, depending on which agency was involved.

Therefore, after consulting with the relevant Government departments, Te Ohu Kaimoana and the Chief Judge of the Māori Land Court, the Commission decided in 2004 to initiate a project to take our earlier recommendations to the next step of proposed legislation. In particular, we worked with Te Puni Kōkiri, the Ministry of Māori Development, which was developing its own Māori governance proposals.²

This report builds on and extends the findings in our earlier paper but also addresses the vexed issue of how tribal entities obtain both their mandate from their own people and recognition from Government and other agencies. We have also recommended that the statutory framework be extended to what we have referred to as general-Māori groups, which may or may not have a tribal basis but which represent Māori living in a certain area or who have a particular Māori focus.

Legislation would provide clarity both in the process of formation of governance entities and the minimum requirements for sound commercial and administrative functions, with flexibility to base these on cultural values. While certain core obligations will be set out in a statute, there will also be broad scope for groups to adapt those requirements to their own circumstances within their own charters.

We have received widespread support for these proposals in discussions with Māori and in response to our draft report, but with a range of views expressed in relation to some of the details. These will need to be further discussed if legislation is to proceed.

Our view is that Government has a responsibility to provide an accessible, generic model appropriate for the management of Māori collectively-owned assets. This, however, will be voluntary, so the ultimate test will be the extent to which Māori groups decide to take up the options that a statute would provide.



Sir Geoffrey Palmer
President

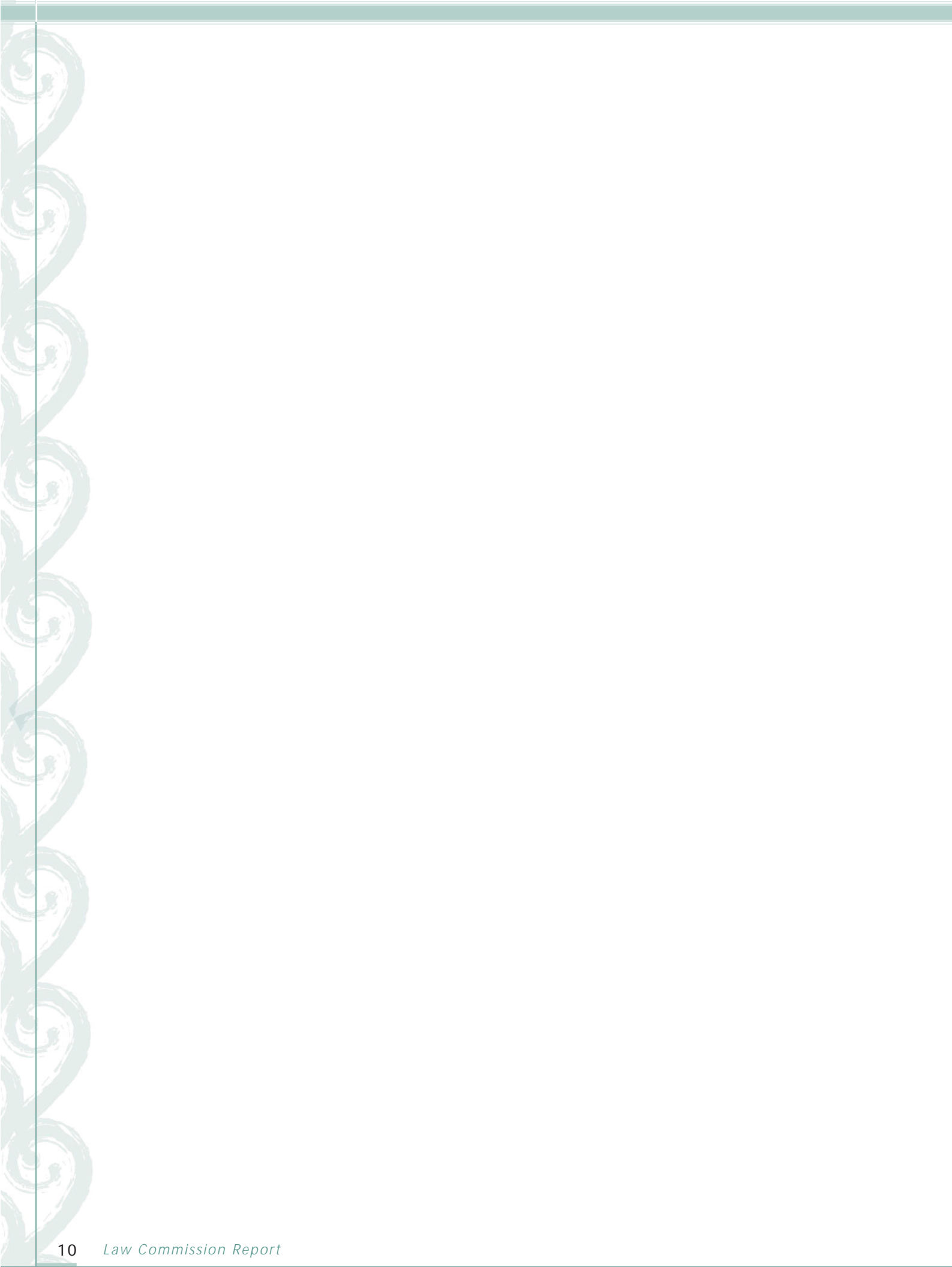
1 NZLC SP13 is an advisory report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court.

2 Te Puni Kōkiri *Nga Tipu Whakaritorito: A New Governance Model for Māori Collectives* (November 2004).

ACKNOWLEDGEMENTS In preparing this report, the Commission has had discussions with Government agencies (in particular Te Puni Kōkiri, the Ministry of Economic Development and the Office of Treaty Settlements), Te Ohu Kaimoana and Judges of the Māori Land Court. We have also had many discussions with Māori tribal and other leaders, academics both from New Zealand and overseas and others working in the area of governance.

We are particularly indebted to the Ngāti Paoa Māori Entities Project for their paper on Kaupapa Māori Authorities (February 2004) and to David Gray, their Kaitiaki-a-Rohe, for his advice on early drafts of our paper.

The Commissioners responsible for this project are Helen Aikman QC and Hon Justice Eddie Durie. They were assisted in the research, writing and editing by Elizabeth Thomas, Rutherford Ward, Eru Lyndon, Gloria Hakiwai, Margaret Thompson, and Zoe Prebble.

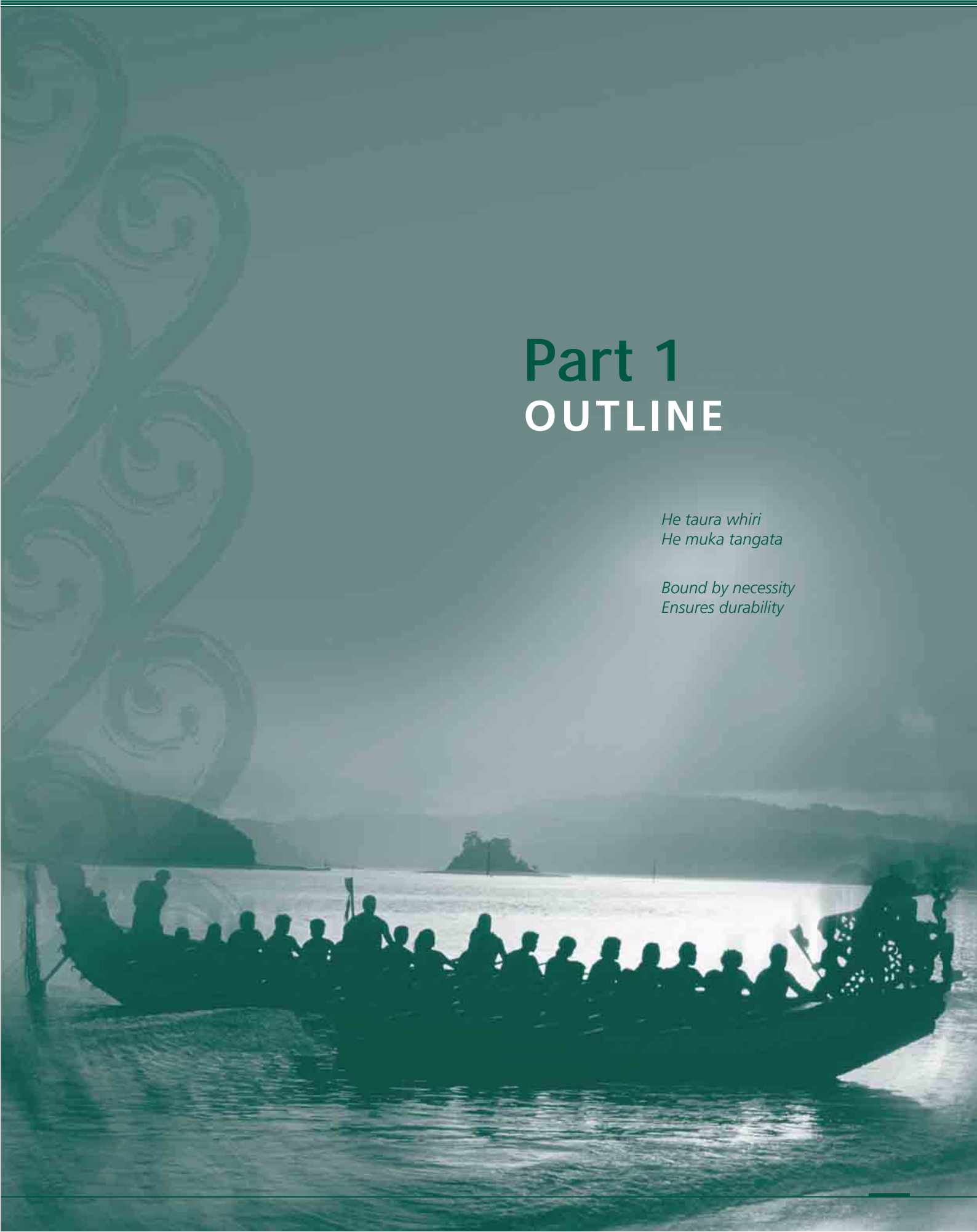


Part 1

OUTLINE

*He taura whiri
He muka tangata*

*Bound by necessity
Ensures durability*



Chapter 1

Summary

OVERVIEW

- 1.1 The rebuilding of Māori institutions is a matter of longstanding concern for both Māori and the Crown. There are two vital issues. The first is the lack of a legal framework to represent and manage the interests of tribes and other Māori collectives in a way suitable both for them and those with whom they deal. The second is the lack of a legal framework for tribal restructuring to ensure that entities are developed by the people themselves against a background of their own culture and that enables the ready resolution of formation disputes.
- 1.2 Our main proposal is to provide for a legal entity specifically shaped to meet the organisational needs of Māori tribes and other groups that manage communal Māori assets. An important objective is to reduce the overall time and cost to groups in forming entities by providing a formation process and a model which can be adapted to suit the needs of individual tribes. It will also provide orthodox legal obligations and certainty for those seeking to deal with Māori representational bodies. The Law Commission considers Government has a responsibility to provide such a process and a model, but that Māori groups can choose whether to adopt them.
- 1.3 The proposals also achieve four further objectives:
 - a process for forming entities and resolving formation disputes;
 - recognition of tribal authorities;
 - establishing good governance standards; and
 - ongoing support by way of an independent national Secretariat.
- 1.4 The Law Commission recommends that legislation is introduced to provide for a new legal governance model, called “waka umanga”, which could be adopted by Māori entities managing collectively-owned assets. Waka describes a vehicle for a community undertaking, or umanga. We propose that the statute is called the **Waka Umanga Act**, with the dual title of the **Māori Corporations Act**.³
- 1.5 The term “tribe” is used throughout the report to refer to iwi, hapū or a confederation of these groups. While economies of scale will encourage tribal confederations, the model will also allow hapū to rebuild their own waka umanga in time. The proposal also covers general-Māori groups, a term used in the report for groups that associate together on other than a kin basis. We refer to tribal waka umanga as “waka pū” and general-Māori waka umanga as “waka tūmaha”.

³ A dual title was also used with Te Ture Whenua Maori Act 1993 or the Maori Land Act 1993.



- 1.6 In developing these proposals, the Law Commission consulted widely and distributed a draft report to interested groups at the end of 2005. The majority of the submissions were in favour of the overall proposal, but included many matters of detail which have influenced the final recommendations. The Commission recognises that some details will need to be further refined and consulted on in preparing draft legislation, but considers the need for reform is urgent.

BENEFITS

Benefit to Māori

- 1.7 Registration under the proposed Act provides tribes and general-Māori groups with a stamp of approval; a certificate that they have been formed by fair and proper processes after engaging widely with those likely to be affected. It acknowledges that they have a representative structure and charter that meets democratic and commercial objectives. In addition, tribal bodies can be recognised as the lawful representative of the associated tribal groups.
- 1.8 More particularly, the proposed Act would enable Māori to develop institutions that fit with their culture, traditions and vision and provide for a corporate entity honed to their particular needs. The proposals ensure fair process in entity formation and provide systems for managing the debilitating formation disputes likely to arise. There are also proposals for internal dispute resolution after entities have been formed.

Public benefit

- 1.9 While the proposals are aimed at Māori groups, they also have a public benefit in providing an effective legal structure for tribal and other groups to fully participate in the commercial and social life of the community. In addition, for reasons given in the report, the proposals are expected to speed the Treaty claims process, reduce the cost to government in determining appropriate tribal representatives and make the settlement of Treaty claims more durable in being developed independently by Māori themselves. They also encourage the proper management of substantial assets administered by tribes and general-Māori groups.

Cost benefit

- 1.10 The proposals for resolving formation disputes are expected to result in substantial cost savings to government as well as significant savings to Māori. The resolution of representation structures has been the major expense and block to finalising outstanding Treaty of Waitangi matters. The proposed processes and ability of parties to access the Māori Land Court would be much more cost effective than the current dispute resolution mechanisms involving the High Court, the Waitangi Tribunal and often very considerable funding from agencies such as the Legal Services Agency, Crown Forest Rental Trust and Office of Treaty Settlements, as well as the parties themselves.

- 1.11 Government funding would be needed initially to assist entity formation through the Secretariat and Māori Land Court, estimated to be less than \$4 million in total. These costs will reduce when waka umanga are established and paying their own way. They will be offset by the saving in services currently delivered through different agencies, including Te Puni Kōkiri, Ministry of Economic Development, Office of Treaty Settlements and other departments.

LEGISLATIVE FRAMEWORK

- 1.12 The statutory framework will provide the outer hull of the waka, ensuring responsible and accountable governance by the rūnanganui (the governing council) but, inside this, tribes would have considerable freedom to work out their own structures and the rules by which they operate. These would be described in the charter of the waka umanga.
- 1.13 The Waka Umanga Act would enable a group to:
- adopt a structure which promotes transparency, accountability, stewardship of assets and internal dispute resolution mechanisms;
 - gain corporate status and perpetual succession;
 - gain recognition that its charter meets the requirements for legitimacy and credibility with third parties, and is appropriate for running successful business operations; and
 - gain recognition as the legitimate representative of a specified group for prescribed purposes.
- 1.14 The group should settle its own representational framework according to its traditions and vision for the future. The group must decide the terms on which they combine for economic reasons or to meet government or legislative requirements.
- 1.15 The Act would provide:
- a settled process for entity formation with maximum community involvement including the development of a formation scheme plan;
 - the guidance of the Māori Land Court, if necessary, on process; and
 - prompt dispute resolution with ultimate recourse to the courts.
- 1.16 The charter of a waka umanga would be devised by the tribe to reflect the particular size, resources, assets, responsibilities and aspirations of the group while complying with the standard requirements of the Act. The Act would provide default schedules that could be adopted or adapted for this purpose.

THE FIVE MAIN PROPOSALS

A new legal entity

- 1.17 Tribes, and their modern counterparts of urban collectives and the like, are important in maintaining Māori cultural identity and in managing assets and resources for the benefit of the group. Their functions are at once social, cultural, commercial and political. The available legal structures are inadequate for managing all these wide-ranging affairs. The unique characteristic of a waka umanga (compared to existing legal structures such as trusts, companies and incorporated societies) is recognition of a core responsibility to safeguard the interests of present and future generations of members of that tribe while also accommodating normal commercial dealings.

- 1.18 Also, it is hard for existing entities to cater for traditional tribal structures with their autonomous hapū, fluid confederations, and changing and uncertain membership. Nor for balancing group and individual interests as is necessary for both tribes and modern collectives where members are neither investors nor passive beneficiaries but expect, and are entitled to, full rights of participation and engagement.
- 1.19 A Registry of Waka Umanga would be established, within the Companies Office of the Ministry of Economic Development, to assist the new entities to link into the national economy.
- 1.20 Many groups already have well established structures and the Law Commission recommends that the Waka Umanga Act contains transitional provisions for existing entities who wish to opt into aspects of the new legislation. These groups should be able to modify their structures over time and use the new Act where a new or replacement entity is sought.

Process for forming entities and resolving disputes

- 1.21 Crown policies for the negotiations of Treaty settlements tend to govern the shape that tribes take. A more independent formation process is needed to ensure that structures are made to fit the culture of the tribes. In addition, tribal restructuring often generates disputes about which there are usually intense feelings. These can be exacerbated by the Crown's negotiation policies and are probably the main reason for delay in the settlement of claims. There is no mechanism for the ready resolution of these disputes, a fact that in itself encourages disputation. In addition, there is no ready access to law to resolve complaints of unfair process or concerns of minority groups.
- 1.22 The Commission proposes some essential steps to be undertaken by groups forming a waka umanga, such as developing agreed objectives, providing for different constituencies and determining the rules for consultation in accordance with fair process and natural justice. If there are complaints of procedural unfairness, the Māori Land Court would review the formation processes. The Court would not decide the merits of competing proposals but could give directions to allow group decisions to be consensually developed and democratically determined, subject to any appeal to the High Court.
- 1.23 The Waka Umanga Act would also promote unity by allowing for smaller groups, such as hapū, to have a voice with a wider aggregation. This is because a waka umanga could take a variety of forms. It could be a stand alone group. It could be a confederation, whether or not all the different parts were also waka umanga. It could be part of a confederation which is not itself a waka umanga. It could be a coalition of several confederations. Entities already set up for specific commercial or charitable purposes could also come together under the umbrella of one waka umanga.

Recognition of tribal authorities

- 1.24 Tribal authorities are currently undermined by the ability of external parties to choose the tribal representatives they deal with and by the ability of tribal members to promote competing representative institutions. Equally, the lack of

a certified body to represent the tribe creates uncertainty for commercial, local government and other interests wishing to treat with the tribe, and for those who are obliged by statute to consult with it.

- 1.25 To promote stability for tribal governance and certainty for third parties, the Act would provide for the statutory recognition of qualifying tribal corporations as the legitimate representatives of their associated tribal groups. A recognised waka umanga would be authorised to represent the tribe for certain purposes as prescribed in the charter. For instance, the charter might provide that certain resource management or other local matters must be considered at a hapū level, but specify other matters that will be dealt with at the federal or iwi level.
- 1.26 In settlement negotiations, the Crown would not be required to settle with any particular waka umanga recognised as representative. It might not, for example, meet the Crown's preferences in terms of size for a "large natural grouping".⁴ However, the Crown may not settle with any other group purporting to represent that tribe. There would be a strong incentive for the groups concerned to combine under the Waka Umanga Act in such a way as to meet the requirements of the Crown while retaining the integrity of distinct groups. As a result, the concept of legitimate representation would be a significant step towards simplifying mandating issues.

Establishing good governance standards

- 1.27 It is necessary to protect the interests of both the group and the individuals who are entitled to benefit from the entity. It is also valuable to encourage third party investment in and collaboration with Māori commercial operations. For those reasons, the Law Commission proposes a framework for good governance for tribes and other groups, which could be incorporated into the charters of the representative entities. While there is wide scope for groups to design their own governance systems, they must also contain standard core obligations.
- 1.28 The charter must ensure that the management of the waka umanga is accountable to the tribe and does not take on an independent life as a corporate body. The report contains suggestions drawn from existing legislation and literature as to good governance practice in relation to matters such as: the selection and duties of representatives on the rūnanganui; planning; financial management; role of the chief executive; and relationships with subsidiary organisations. Most of these can be included in schedules to the statute. These would set default standards, as with the Companies Act 1993, but which could be adapted by groups to suit their particular situation.

Provision of ongoing support by way of a Secretariat

- 1.29 The Law Commission proposes that waka umanga are supported by a Secretariat in order to promote and maintain best practice, and to provide training at a national level. Some Māori groups that wish to become waka umanga will not have the experience or resources to undertake formation without support, and most would benefit from ongoing assistance and sharing of experience and ideas.

⁴ Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: Healing the Past, Building a Future – a Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Summary Edition, Wellington, 2004).

- 1.30 The Secretariat would be funded by Government initially, and later by subscription from users. It would become directly accountable to the members and would need to work in close collaboration with existing organisations providing support to Māori entities, including the Federation of Māori Authorities.

MEMBERSHIP

- 1.31 Waka umanga must have clear criteria to determine their own members. Criteria for membership and voting rights would be defined in the charter, and would usually involve descent from common ancestors. For certain purposes, it may also require active association with the tribe. Within the constraints imposed under the Government's Treaty settlement policy, the Maori Fisheries Act and the general law relating to human rights and natural justice, tribes should have the ability to tailor voting systems and rights to access benefits to those who are active tribal members, wherever they may live. Structures are needed that can accommodate both group interests and individual interests.

WAKA TŪMAHA (GENERAL- MĀORI GROUPS)

- 1.32 The proposed waka umanga legislation aims to meet the particular needs of Māori tribes. However, it should also be available to other Māori groups holding significant collectively-owned assets for the reasons set forward in this report. Most such groups are found in urban centres but they may also be church or rural based.
- 1.33 The waka umanga model provides more fully for such groups than existing legal models. Under the proposed legislation, their charters could be structured to provide for accountability to, and participation by, the whole of the affected community of interested people, and not merely those who have formally subscribed. For such groups, the waka umanga model would provide greater accountability to the community, and more flexibility than existing legal models, because of its capacity to maintain Māori identity while managing community enterprises. However, we do not propose that waka tūmaha would be recognised as the legitimate representative of the associated community. In the final analysis, they can represent only those who have subscribed as members or active participants.
- 1.34 In addition, the proposals for general-Māori groups could be of interest to other groups in civil society including Pacific Island groups. Although designed for Māori needs, they should be available to any group that finds them relevant.

DISPUTE RESOLUTION

- 1.35 Every waka umanga must have an internal dispute resolution mechanism. The actual form this takes would be up to each group but we advocate the appointment of a kairongomau or peace-maker.
- 1.36 This person would act in much the same way as an ombudsman, with the objective of ensuring members are treated fairly by the rūnanganui (governing council) and its staff. Kairongomau would promote resolution of disputes, propose improvements to management practice and consider requests for information withheld from members, and would make recommendations rather than binding decisions. They may also deal with membership issues. Kairongomau could be appointed from within the group, or from a list provided by the Secretariat, but must be independent of the rūnanganui.

- 1.37 The Law Commission also encourages the use of formal mediation or arbitration for disputes that have not been resolved informally. The Secretariat could suggest people with appropriate skills in tikanga as well as mediation skills. Where mediation has not worked, the Māori Land Court could hear the matter and appoint expert assessors from various fields to assist it. It could also transfer significant legal or commercial matters to the High Court or decline jurisdiction if not satisfied the internal dispute mechanisms had been properly utilised.
- 1.38 Where outside parties are involved, plaintiffs could file in either the Māori Land Court or the general courts, and defendants would be entitled to apply to transfer proceedings to either court. Disputes involving subsidiary companies, trusts or incorporated societies would continue to go to the general courts even if operating under a waka umanga confederation. Under the proposed Waka Umanga Act, an appeal would lie from the Māori Land Court to the High Court, but the High Court would retain ability to refer significant questions of tikanga to the Māori Appellate Court.

INTERVENING OR WINDING UP A WAKA UMANGA

- 1.39 The Waka Umanga Act must also provide for circumstances when a waka umanga becomes dysfunctional or insolvent. The Law Commission recommends that two types of application could be made to the Māori Land Court: an application for a court intervention or for wind-up. Court intervention could be more appropriate where, for example, the membership wish to maintain the waka umanga although the rünanganui has not complied with the Act or its charter. In other situations, such as where the debts of the entity exceed its available assets, there may be no alternative but to wind-up the waka umanga. Any remaining assets could be held in trust until a successor is formed.
- 1.40 A group of members, a creditor or the Registrar of Waka Umanga could apply to the Māori Land Court to wind-up the waka umanga. The process in the Māori Land Court in response to an application for wind-up would largely follow the provisions in the Companies Act 1993, but with differences to recognise the representative nature of a waka umanga and its stewardship of collective assets for future generations.⁵

LOOKING AHEAD

- 1.41 Urgent consideration of the Waka Umanga Act proposal by all interested people is needed given the increasing pace of settlements. In committing to this new legislative initiative, Māori are entitled to some reasonable certainty that their efforts will not be wasted. The issues are urgent and serious. Entities formed under the proposed Waka Umanga Act will steer the canoes and shape the lives of future generations of Māori.

⁵ The wind-up provisions of the Waka Umanga Act would not apply to companies, trusts and incorporated societies included in a waka umanga confederation, as these would retain existing legal processes.



Chapter 2

Vision

THE MAIN CONCLUSIONS

- 2.1 Māori are engaged in a major rebuilding of their traditional and modern institutions. Re-establishing tribal organisations, in particular, has been a long desired goal. It has now been made possible through the settlement of Treaty claims.
- 2.2 The development represents a turning point in Māori history. But it also points to the need for careful thought and clear legal policy. The structures that are formed will shape the allegiances and obligations of traditional communities and how individuals identify, whether as members of tribal or urban groups, for generations to come. The new institutions will also have a significant role in maintaining relationships with the wider community and propelling individual Māori into general society as competent entrepreneurs.
- 2.3 In considering this development, the Law Commission reached two main conclusions:
 - First, Māori need access to a customised legal entity shaped to their particular requirements. To that end, we propose statutory provision for a Māori corporation, which we call a **waka umanga**. The term describes a vehicle (waka) for a community undertaking (umanga). “Umanga” refers to operations or affairs generally, not just business in the commercial sense, as these waka will combine community representation, community imperatives and the necessary machinery for responsible and accountable governance;
 - Second, access is needed to legal processes to ensure that these institutions are developed by Māori themselves, transparently and with the full involvement of the people. This report sets out a process with ready mechanisms for settling disputes and with provision to formally recognise the representative status of the new institutions.
- 2.4 Māori organisations are likely to manage assets from several sources, including land claim settlements, fisheries settlements and possibly aquaculture allocations. They may range from small hapū groups to large iwi confederations. The tribal institutions may also represent their people before central and local government in undertaking functions in resource management, foreshore and seabed administration or the delivery of social services under devolution schemes.
- 2.5 These institutions have a mix of cultural, social, economic and political functions that go beyond the purposes for which the available legal structures were designed. On the commercial side, their structures do not provide the market

discipline associated with freely transferable shares and do not always satisfy commercial lending criteria. But nor are they non-profit organisations. There is also a need for transparent and democratic representation, and responsible and accountable governance to safeguard the interests of present and future generations. For the more particular reasons below, these institutions cannot be squeezed into the slots provided by existing legal entities without distorting their true nature and role.

- 2.6 The second main conclusion relates to the process by which new Māori entities are formed. Government-mandating requirements for claim negotiations and legislation relating to fisheries assets frequently determine how Māori communities are grouped for eventual settlements, the institutions that are developed as a result, and the purpose for which the institutions are established. Under principles of cultural ownership, however, Māori should settle their own representational structures according to their own traditions and vision for the future. They must also decide the terms on which they combine for economic reasons or to meet Government or legislative requirements.
- 2.7 A further problem concerns the frequent dissension within the constituent groups when forming collectives of sufficiently economic size. This problem needs to be managed by a settled process for entity formation, with maximum community involvement. As a backstop, however, ready access is required to mechanisms for prompt dispute resolution, with ultimate recourse to the courts.
- 2.8 Official recognition of the representative status of a newly formed institution should also be provided for, so that a corporation which has been acknowledged as having a mandate can legitimately claim to represent the members of that group.
- 2.9 To give effect to these proposals we recommend legislation to settle a process for entity formation and provide for a special form of entity designed for Māori needs. We propose that the statute be called the Waka Umanga Act, with the alternative title of Maori Corporations Act.
- 2.10 The process that the Act would provide and the formation of an entity under the Act would be optional. While optional, it serves to enable groups:
 - to adopt a structure which promotes transparency, accountability, stewardship of assets and internal dispute resolution;
 - to gain corporate status and perpetual succession;
 - to gain recognition that its charter meets the requirements for legitimacy and credibility with third parties and is appropriate for running business operations; and
 - to gain recognition as the legitimate representative of a specified group for prescribed purposes.

OUR VISION

- 2.11 Our aim was to lay the legal foundations for the following outcomes.
 - An accessible guide for Māori groups in forming entities that can accommodate their particular traditions and preferences, according to their particular size, resources, form of assets and responsibilities and that has regard to relationships within the group.

- A structure that reduces the overall time and cost to groups in forming entities, and the time and cost to government and statutory bodies seeking the early identification of Māori representational bodies.
- A structure that empowers groups to develop entities of appropriate scale, according to fair processes, that are managed and controlled by themselves, with provisions for prompt resolution or determination of disputes.
- A structure that promotes relationships between entities and members, characterised by democratic representation, transparency, accountability, strategic stewardship and optimum community engagement.
- A structure that empowers entities in the stewardship and management of their collective resources, rights, roles and responsibilities, and that contributes to the national economy and to Māori economic, social and cultural advancement.
- A structure that facilitates the establishment and operation of Māori entities that have standing and credibility to operate effectively in both Māori and Pākehā worlds, and will enjoy productive relationships with members, other Māori organisations, local communities, local and central government, funders of service delivery programmes, financial institutions and commercial businesses.
- A structure that contributes to the durability of Treaty claim settlements by ensuring that governance arrangements are developed by the people themselves against a framework of core obligations.

THE DEVELOPMENT OF THE PROJECT

- 2.12 This report follows on from earlier work the Law Commission did on governance of post-settlement assets. In August 2002, the Commission published its study paper⁶ as an advisory report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court. It noted that none of the present legal structures catered adequately for Māori tribal and community needs in a post-settlement environment and focused on the need for a customised legal entity shaped to Māori requirements. It recommended that a new model entity be created by statute, and considered that these statutory entities should commit to certain core obligations. These would require that the entities be properly representative of, and accountable, to their constituencies, that they operate transparently and exercise appropriate stewardship, and that they have adequate mechanisms for internal dispute resolution. It was also recommended that groups should be able to use the entity for purposes beyond the management of post-settlement assets.
- 2.13 The Commission's recommendations had not been taken forward by any government agencies, so the Commission resolved to do that itself. On the one hand, there was wide support for the recommendations and on the other, the need for new legislative frameworks was increasingly apparent. Ongoing progress towards Treaty settlements, new requirements for greater engagement between Māori and local government, proposals for iwi organisations in the Maori Fisheries Act 2004, proposed allocations of marine farming space to iwi and the prospect for Māori group involvement in foreshore and seabed administration all prompted further action.

⁶ New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase: An Advisory Report for Te Puni Kōkiri* (NZLC SP 13, Wellington, 2002).

- 2.14 As a result, following consultations with affected government departments and statutory bodies in July 2004, the Commission initiated a self-referred project to advance the earlier recommendations. The project terms of reference are set out in Appendix 1.
- 2.15 In undertaking this further project, it was apparent that more emphasis was needed, not simply on the form of the entity, but also on the process by which new entities should be formed. We resolved to consider, as part of our terms of reference, the “mechanisms for the approval or recognition of entities” as it appeared that approval and recognition are currently overly influenced by government-mandating policies. In addition, there are inadequate provisions for dispute resolution or access to the courts during the formation process.
- 2.16 We therefore found it necessary to propose alternative processes consistent with established principles. We consulted on these with the affected agencies, Te Puni Kōkiri, the Office of Treaty Settlements, Te Ohu Kaimoana, the Māori Land Court and the Ministry of Economic Development, as well as many Māori tribal and community leaders.
- 2.17 In November 2004, Te Puni Kōkiri produced a discussion document on Māori governance, which also sought to address the limitations of existing governance models.⁷ Whilst the model they proposed has clear similarities with that of the Law Commission, there were some significant differences. We have also been able to develop our proposals in considerably more detail.
- 2.18 In relation to the formation of a new legal entity, we propose a process which involves the community and allows for those dissatisfied with the process to seek the intervention of the Māori Land Court. Once any such objections have been dealt with, a tribal entity can be recognised as the legitimate representative of that tribe. The Te Puni Kōkiri model would allow any group that meets certain minimum requirements to register, but not to describe itself as the representative of that group. Both the Commission and Te Puni Kōkiri propose that the Companies Office be responsible for registration of the new entities.
- 2.19 The two models also differ in relation to provisions relating to disputes and winding up, with the Commission proposing the Māori Land Court undertakes this role, unless there is reason to transfer to the High Court, while the Te Puni Kōkiri model proposed going straight to the High Court.
- 2.20 Despite these differences, there is a lot of common ground and the Commission and Te Puni Kōkiri hope to continue to work together to ensure that legislation providing for a new Māori governance entity becomes a reality in the near future.

THE STRUCTURE OF THE REPORT

- 2.21 The first two chapters of Part 1 have identified the Law Commission’s vision for waka umanga and outlined the development of this report (Chapter 2). Chapter 3 addresses the problems with existing entities and transitional issues for existing entities which decide to become waka umanga, or to take advantage of aspects of the legislation while retaining their existing corporate status. It also contains a brief discussion on the taxation status of existing entities and the costs and benefits of the new proposals.

7 Te Puni Kōkiri *Nga Tipu Whakaritorito: A New Governance Model for Māori Collectives* (2004).

- 2.22 Part 2 considers the issues to be addressed and the principles and purposes for waka umanga. Chapter 4 addresses those matters in relation to tribal groups and Chapter 5 in relation to urban and other groups not founded on the basis of traditional tribes. Chapter 6 considers the key principles to be applied to both waka pū created for tribes and waka tūmaha created for general-Māori groups like urban organisations. It also outlines the purposes of the Waka Umanga Act.
- 2.23 Part 3 picks up on the issues and principles and sets out our proposals as to how waka umanga are established and the roles of the Māori Land Court and Secretariat in assisting their formation and ongoing operations. Chapter 7 considers the process by which waka umanga may be formed for tribes and for other groups that manage communal Māori assets. Chapter 8 deals with their registration and recognition. The management of disputes in the ongoing life of a waka umanga is considered in Chapter 9, while Chapter 10 deals with their winding-up. Support is proposed for the formation and ongoing operations of waka umanga by the establishment of an independent Secretariat. This is discussed in Chapter 11.
- 2.24 Part 4 provides guidance on the development of an appropriate charter or constitution, and other steps that should be taken to ensure sound governance. It focuses on the core obligations with which waka umanga would be expected to comply. It considers the status, powers and purposes of a waka umanga (Chapters 13 and 14); the eligibility, selection, duties and liabilities of representatives on the council or rūnanganui (Chapter 15); communications with members and decision-making on significant issues at general meetings of members (Chapter 16); planning, reporting, financial management and accountability (Chapter 17); meetings, committees, ethical codes and decision-making protocols (Chapter 18); the role of the chief executive and the relationship between the chief executive and the rūnanganui (Chapter 19); and relationships with subsidiary organisations established by the waka umanga (Chapter 20).

Chapter 3

Transition

WHY A NEW MODEL IS NEEDED

- 3.1 The Law Commission's earlier study paper⁸ found that there were deficiencies with existing legal models used by Māori entities for governance purposes. Most legal entities adopted by Māori groups were designed for very different commercial or private purposes, or for a bygone era. While Māori groups have managed to make these models work, often very successfully, none cater adequately for the multi-purpose objectives of tribal entities. Nor are they specifically based on Māori values and aspirations.
- 3.2 Entities such as companies, trusts and incorporated societies often have limited accountability and transparency requirements, and there is usually no internal dispute resolution mechanism. Most disputes need to be determined by the High Court, which can involve groups in long and expensive litigation, and often fails to deal adequately with the underlying issues.
- 3.3 Although existing entities do not provide adequately for the overarching governance needs of a tribe, they will continue to have a place, particularly as subsidiaries of the main tribal entity, to pursue the tribe's specific commercial, social and charitable purposes. Those entities which are already managing tribal assets may also choose to continue, although overtime many may opt to become waka umanga.
- 3.4 The major problems with existing models as governance entities are summarised as follows.

Incorporated societies

- 3.5 The Incorporated Societies Act 1908 prohibits the pursuit of pecuniary gain as an objective. This means that additional structures are required for any commercial enterprises, even when the size of the entity or particular enterprise does not otherwise justify separate legal structures.
- 3.6 Membership of an incorporated society is based on subscription or individual contract, whereas membership of tribe generally arises from birth, by ascription.⁹

⁸ New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase: An Advisory Report for Te Puni Kōkiri* (NZLC SP 13, Wellington, 2002).

⁹ A multi-tribal urban group is, however, more akin to an incorporated society in that it too is based on subscription.

Unlike an incorporated society, a tribe cannot refuse membership to, or expel, a legitimate tribal member.

Companies

- 3.7 Companies established under the Companies Act 1993 can offer flexibility, with clear rules regarding management, governance, reporting and accounting, and well-established rules on the obligations of office holders and others to the company and the shareholders. But the holding of individual shares in an entity is inappropriate for a tribal entity, given that assets are held by tribes for the benefit of the collective. It is the tribe itself that is the shareholder, not the individual members. Members' interests in tribal assets are held not just for themselves but for future generations, and are not alienable or transferable. Unlike most companies, tribal entities are not formed for the primary purpose of making a profit for their members, but have many social, cultural and environmental objectives as well. However, companies will continue to be useful subsidiaries for the management of the tribe's commercial objectives.

Co-operative companies

- 3.8 There is also provision for co-operative companies under the Co-operative Companies Act 1996. The principal activity of such companies must be a co-operative activity, and a majority of the shareholders must participate in the company's co-operative business.¹⁰ Such companies are still based on individual shareholding and are therefore no more suitable than conventional companies as governance entities for collectively-owned assets.

Private trusts

- 3.9 The essence of a trust is that the trustees have legal ownership of the property of the trust on behalf of the beneficiaries, who have no direct entitlement as members of a body corporate. Although trust deeds can be designed to try to promote participation, essentially the structure of trusts is not democratic and reverses the traditional ethic that tribal membership requires all members to be involved and for leaders to be directly accountable. Tribal members are not mere passive beneficiaries. Therefore, while a private trust can be easy and relatively cheap to establish, its basic structure does not reflect the accountability and transparency requirements of a collective entity and may cause considerable ongoing legal expense.
- 3.10 Trusts are not corporate bodies in their own right, unless incorporated under the Charitable Trusts Act 1957. This means that where there are several responsible trustees, as is usually the case with tribal trusts, all significant legal documents have to be signed by all trustees whose own names are shown on share registers and titles to land, even though they hold the property as fiduciaries.

¹⁰ Co-operative Companies Act 1996, ss 2, 3 and 5.

This is very cumbersome and causes additional legal expense every time a trustee has to be replaced or is unavailable. To enforce the terms of the trust, beneficiaries must apply to the High Court to review the decisions of the trustees.¹¹

- 3.11 Private non-charitable trusts are also subject to the legal “rule against perpetuities” which means most private trusts cannot last more than 80 years.¹² Although in the case of some Treaty settlement trusts, this restriction has been removed by the settlement legislation,¹³ this does not avoid the other fundamental objections to trusts as vehicles for holding tribal assets.

Charitable trusts

- 3.12 Charitable trusts are any trusts established for charitable purposes,¹⁴ and need not be registered under the Charitable Trusts Act 1957. This Act, however, enables charitable trusts to be incorporated as a board, thus giving them a corporate identity and perpetual succession.¹⁵
- 3.13 Using a charitable trust as a governance body can be very problematic and cumbersome, particularly if the entity wishes to undertake any commercial ventures. Variation to the terms of the trust is often difficult, especially if this is not provided for in the deed of trust, and may need to be submitted to the Attorney-General and approved by the High Court,¹⁶ and complaints by beneficiaries about the administration of the trust rely on the Attorney-General’s discretion to investigate.¹⁷ Also, unless incorporated as a board under the Charitable Trusts Act 1957, such trusts are subject to the same practical problems of administration as private trusts.
- 3.14 In the event of a charitable trust being wound up, its assets must continue to be utilised for charitable purposes. This creates the potential for the alienation of communally-owned assets such as Treaty settlements.
- 3.15 It is not necessary for an entity to be a trust in order to obtain charitable status, as other non-profit corporations such as incorporated societies and companies may also be registered as charitable entities¹⁸ and be granted charitable status by

11 Trustee Act 1956, s 66.

12 Perpetuities Act 1964, s 6 sets out a statutory default period for a trust’s existence of 80 years. Alternatively, the trust deed may state that its dispositions of property must not vest later than 21 years after the death of an identifiable person who is living at the time of the disposition, but this option is unlikely to be suitable for a trust for collectively-owned Māori assets.

13 See for example: Nga Rauru Kiitahi Claims Settlement Act 2005, s. 19; Ngati Ruanui Claims Settlement Act 2003, s 19; Ngati Awa Claims Settlement Act 2005, s 19; and Ngai Tahu Claims Settlement Act 1998, s 466.

14 See Charitable Trusts Act 1957, s 38 and Charities Act 2005, s 5 which restates the traditional definition of these as including “every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community”.

15 The position in relation to charitable entities has been very complex. However, when the Charities Act 2005 comes fully into force, all entities, be they private trusts, charitable trusts or other bodies wishing to be treated as “charitable entities” must be registered with the Charities Commission, and meet the criteria set out in that Act.

16 Charitable Trusts Act 1957, ss 32-36.

17 Charitable Trusts Act 1957, s 58.

18 Charities Act 2005, ss 4 and 13.

the Inland Revenue Department, provided all their purposes are charitable.¹⁹ Such charitable entities, if approved by the Inland Revenue Department, are not taxed on their charitable income.²⁰

- 3.16 Recent legislative amendments have also extended the definition of charitable purposes to include groups that would otherwise satisfy the “public benefit” criteria were they not related by blood,²¹ which makes it much easier for many Māori-based trusts to comply. Charitable entities, although not necessarily charitable trusts, will continue to be an important vehicle for the delivery of non-commercial objectives of waka umanga.

Māori trust boards

- 3.17 Māori trust boards were established under statute from 1922 onwards.²² The groups represented by each trust board were defined by statute and do not necessarily represent current views as to the identity of that tribe. Boards are ultimately accountable to the Minister of Māori Affairs,²³ rather than their own people. This undermines the autonomy of tribal entities, as they are not free to govern their own structure or affairs.²⁴ Trust boards may also not adequately reflect the desired membership of a tribal entity.
- 3.18 Existing trust boards have, however, often represented the tribe for many years. As a result, some enjoy widespread acceptance and may provide the basis for a new tribal entity. They have also long enjoyed favourable tax status, although recent amendments to the Income Tax Act 2004 mean that other entities can claim a similar status.²⁵

Incorporations and trusts under Te Ture Whenua Maori Act 1993

- 3.19 Incorporations under Te Ture Whenua Maori Act 1993 are based on individual shares in Māori land and produce dividends for shareholders, who may have very unequal shareholdings. Likewise, most forms of trust under this Act (pūtea, whānau, ahu whenua and whenua tōpū trusts) are based on trust ownership of Māori land. By contrast, tribal entities may hold many different types of assets on behalf of the tribe as a whole.
- 3.20 In general, tribes receiving Treaty settlements from the Crown have been reluctant to receive land as Māori freehold land because of the restrictions under which it must be held, which can deter investment and reduce flexibility.

¹⁹ Charities Act 2005, ss 5 and 13.

²⁰ When ss CW34(1B) and CW35(1)(ab) Income Tax Act 2004 come into force (see ss 2(3), 65, 66 and 68 Charities Act 2005) exemption from income tax will only be available where the entity is registered as a charitable entity under the Charities Act 2005.

²¹ Charities Act 2005, s 5(2)(a). Marae situated on Māori reservations may also be charitable (s 5(2)(b)).

²² Māori trust boards are currently regulated by the Maori Trust Boards Act 1955.

²³ Maori Trust Boards Act 1955, ss 32 and 33, under which the Minister of Māori Affairs can set up investigations into the affairs of any Board.

²⁴ The Office of Treaty Settlements will not approve trust boards as settlement entities, partly for this reason.

²⁵ Income Tax Act 2004, Part HI (Maori Authorities) and Schedule 1, Part A provides that Māori authorities (widely defined in s HI 2 of that Act) shall have a basic income tax rate of 19.5%. They may also claim charitable status for some assets: Maori Trust Boards Act 1955, s 24B.

- 3.21 While land incorporations and trusts are not suitable vehicles for the multi-purpose objects of a tribal entity, there will often be considerable overlap in membership of these entities and tribal entities, which may be the basis for joint activities in some areas. In addition, as discussed later in this report, the experience which the Māori Land Court has gained dealing with entities under Te Ture Whenua Maori Act 1993 will be of relevance to the tribal entities proposed in this report.

Mandated iwi organisations

- 3.22 The Maori Fisheries Act 2004 and Maori Commercial Aquaculture Claims Settlement Act 2004 provide for the establishment of mandated iwi organisations and related organisations,²⁶ to hold fisheries and aquaculture assets or to administer customary rights under the Foreshore and Seabed Act 2004.
- 3.23 While these organisations may have many of the characteristics required for a tribal entity, they are also highly prescribed by legislation. Mandated iwi organisations must represent one of the iwi set out in Schedule 3 of the Maori Fisheries Act 2004, rather than a tribal grouping of self-choice. Schedule 3 is a legislative prescription of what the tribe is to be for that purpose, and with limited exceptions, does not allow for any evolution or change of group identification. In the same way, the Government's current "large natural groupings" Treaty settlement policy and the Waitangi Tribunal's regional grouping of claims do not necessarily represent the way tribes wish to coalesce to hold collectively-owned assets.
- 3.24 Mandated iwi organisations must also meet the requirements of the 11 kaupapa (principles) set out in Schedule 7 of the Maori Fisheries Act 2004. These include strict rules as to who can become a member, elections, voting rights, accountability, and governance. There is a substantial body of Māori opinion that these requirements are too prescriptive and may be too onerous, particularly for many smaller groups. There is also legitimate concern that there could be a multiplicity of organisations representing Māori of a given area for different purposes depending on the nature of the assets involved. These concerns need to be addressed in legislation.

Private statutory recognition

- 3.25 There have been a number of Māori entities which have been established by individual statute, either as a precursor to, or result of, a Treaty settlement.²⁷ The establishment of these tribal bodies is very dependent on busy government legislative programmes and a settlement between the tribe and the Crown may be subjected to further scrutiny and change by a select committee.²⁸ Although a generic entity Act proposed in this report would also be a creature

26 Maori Fisheries Act 2004, ss 13, 27, 21, 28, 40, and 130; Maori Commercial Aquaculture Claims Settlement Act 2004, ss 32, 33, and 45; Foreshore and Seabed Act 2004, ss 33 and 43.

27 For example, Te Runanga o Ngai Tahu Act 1996 and Te Runanga o Ngati Awa Act 2005.

28 Although governments have encouraged select committees not to tamper with a deed of settlement already reached, ultimately Parliament is sovereign and a hard-won settlement could founder if dramatic changes are made to a bill at this stage. The process also provides another opportunity for any disaffected groups to try to upset the settlement. The Commission's view is that it is preferable for the concerns of these groups to be considered much earlier in the process.

of statue (in the same way as a company or incorporated society or any other corporate body is), a tribal entity established by its own Act is much more dependent on the Crown and Parliament for its existence.

TRANSITION TO A WAKA UMANGA

- 3.26 Although the Commission believes that none of the existing legal structures is adequate for the long-term governance needs of Māori groups, many groups already have well established structures which they will not wish to change, at least in the immediate future. Mandated iwi organisations are presently being formed for the purposes of the Maori Fisheries Act and many of these would not seek immediate change either. It is therefore important that the legislation contains provisions for existing entities to opt in to some aspects of the new legislation or to register as an entity under that legislation without the need to go back to the drawing board.
- 3.27 Existing entities may wish to incorporate some of the suggestions and recommendations in Part 4 on governance, or Chapter 9 on dispute resolution, into their existing constitutions. Membership of the proposed Secretariat should also be open to such groups. In addition, the proposed provisions facilitating transfer of cases between the High Court and Māori Land Court could enable trusts and incorporated societies facing internal disputes to access the Māori Land Court, without the need for reform of their basic legal structure.
- 3.28 If existing groups wish to formally register under the new legislation, changes to their legal structure may be required, but many of the formation steps set out in Chapter 7 will be unnecessary if the groups already have a clear mandate. They will still need to satisfy the Registrar of Waka Umanga that their charter meets the requirements of the Act and could still face objections against registration in the Māori Land Court, but such objections are unlikely to be extensive if the entities are already recognised by their people as their legitimate voice.²⁹
- 3.29 The Act should therefore contain provisions for groups already registered as companies or incorporated societies to transfer their registration from one register within the Companies Office to the register of waka umanga with a minimum of difficulty and cost. Similarly, entities which are registered as charities with the Charities Commission and have charitable tax status should be able to transfer this status to the new waka umanga.
- 3.30 A straightforward transfer will not, however, be possible for trust boards established under the Maori Trust Board Act 1955. Most trust boards will need significant alteration to their constitutional documents, and also to ensure they have an appropriate mandate, before they can apply to become waka umanga. At the point of registration, the existing trust board entity will need to be disestablished by an amendment to the Maori Trust Boards Act 1955.
- 3.31 This will either require specific or general legislation such as a Maori Purposes Act, which may not always be easy to achieve within a reasonable time frame.³⁰ An alternative is that the Waka Umanga Act authorise the promulgation of

²⁹ We have been advised that difficulties in transferring charitable status have been a deterrent to the formation of a new entity.

³⁰ For example, s 6, referring to the Ngaitahu Māori Trust Board, was repealed by the 1996 Act.

regulations to the effect that once a waka umanga has been established to take over the functions of a trust board, and both the Minister of Māori Affairs and the trust board have consented to its dissolution, the trust board can cease operations and transfer its assets to the waka umanga prior to a formal dissolution by statute.³¹

- 3.32 Other entities which have recently been set up under their own statute may not wish to become waka umanga at all, as to do so would mean repealing the legislation under which they were created.³² They may, nevertheless, wish to be regarded as if they were waka umanga provided they can do so without compromising their existing identity. Once again, this might be achieved by a legislative amendment or by regulation under the Waka Umanga Act recognising that the particular entity may be regarded “as if it were a waka umanga”.

TAXATION AND CHARITABLE STATUS

- 3.33 The taxation status of a waka umanga will be a vital consideration for any group wishing to form an entity under the legislation. At present, the liability for taxation depends significantly on the form of the entity as well as its function. In the Commission’s view, this can lead to distortions in the way entities are established and undesirable uncertainty as to tax liability. It is therefore recommended that this be clarified in the legislation.
- 3.34 Many existing Māori entities qualify either as Māori authorities, which are taxed at 19.5%, or as charities, which are not taxed at all.³³ In addition, Māori trust boards can execute declarations of trust declaring any of their property to be held for charitable purposes, provided this has been approved by the Inland Revenue Department.³⁴ Various tribal entities established by statute have partially tax exempt status.³⁵

Recent Changes

- 3.35 In 2003, the rules relating to the taxation of Māori authorities were updated.³⁶ This included reducing the tax rate from 25% to 19.5%. The special rules are recognition of the statutory restrictions under which Māori authorities operate, including the restrictions involved in selling Māori land, and the fact that many members of Māori authorities are on a low marginal tax rate.
- 3.36 The rules in relation to the common law restriction on charitable trusts not being permitted to benefit a particular family were also relaxed. The Act now gives an extended meaning to “charitable purpose” to include trusts, societies, or institutions which would be charitable were it not for the fact that the

31 Such provisions, sometimes referred to as Henry VIII clauses, are generally frowned upon as usurping the proper role of Parliament (see Legislation Advisory Committee *Legislation Advisory Committee Guidelines* (2001 ed and 2003 supplement, Wellington, 2003) Ch 10.1.2, 180–182). But it is recognised they sometimes have a place to facilitate consequential amendments following the introduction of a new legislative scheme (Philip A Joseph *Constitutional Law in New Zealand* (2 ed, Brookers, Wellington, 2001) pp 447–448), particularly if they have a sunset clause.

32 For example, Te Runanga o Ngai Tahu Act 1996 and Te Runanga o Ngati Awa 2004.

33 Income Tax Act 2004, Schedule 1 Part A.2 and ss CW 34(1) and CW 35.

34 Maori Trust Boards Act 1955, s 24B.

35 For example, Te Runanga o Ngai Tahu Act 1996, s 30(1)(c) and Te Runanga o Ngati Awa Act 2005, s 11.

36 See Taxation (Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003.

beneficiaries are related by blood.³⁷ In addition, marae now have a charitable purpose if situated on Māori reservations and their funds are used only to administer and maintain the marae, or for charitable purposes.³⁸

- 3.37 Waka umanga and other entities wishing to have charitable status will also need to register with the Charities Commission.³⁹ As we note in this report, this may affect some of the rules set out in the charters of waka umanga and other entities regarding who is eligible to be a representative and how the income of the waka umanga is applied. The Charities Commission can also remove any entity from the register if there has been any serious wrongdoing by representatives.⁴⁰

Transition arrangements

- 3.38 Any transitional arrangements for entities wishing to become waka umanga will need at least to preserve their existing tax status. In order to do so, the Waka Umanga Act should provide that waka umanga are added to the list of Māori authorities set out in the Income Tax Act 2004.⁴¹
- 3.39 In addition, we have been advised that the general policy of the Office of Treaty Settlements is that a charitable trust is not regarded as a suitable legal vehicle for receiving Treaty settlement assets, even though the entity may be eligible to apply for charitable status after receiving the assets.⁴² This may create undue complications for pre-settlement entities including any waka umanga, and we therefore suggest that this matter be reconsidered. There will also need to be further discussions with the Inland Revenue Department and Charities Commission to clarify the tax status of waka umanga and other entities which are likely to receive Treaty settlement assets and wish to apply for charitable status.

COSTS AND BENEFITS

- 3.40 We anticipate that the proposals for resolving formation disputes will result in substantial cost savings to Government as well as significant saving to Māori. The resolution of representation structures is plainly the major block to finalising outstanding Treaty of Waitangi matters. Disputes under the present mandating regime are huge and take years to resolve, quite frequently involving pleas to the Waitangi Tribunal or fruitless litigation. The cost in money, time and human resources are very high.
- 3.41 A full analysis of the costs and benefits of our proposals will require information from Government departments and related agencies on the cost of their

37 Income Tax Act 2004, s OB 3A(1).

38 Income Tax Act 2004, s OB 3A(2). For Māori reservations see Te Ture Whenua Maori Act, Part 17.

39 Sections 65 and 66 Charities Act 2005 anticipate the bringing into force by Order in Council of a subsection to each of ss CW 34 and CW 35 Income Tax Act 2004; which will require entities wishing to have charitable income tax status to be registered under the Charities Act 2005. Current information is that these provisions will be brought into force on 1st October 2007 (personal communication, telephone discussion with the Charities Commission, 7 April 2006).

40 Charities Act 2005, ss 4 and 32(1)(e).

41 Eligibility to become Māori authorities is defined in s HI 2 Income Tax Act 2004. This definition includes trusts and incorporations formed under Te Ture Whenua Maori Act 1993, various organisations under the Maori Fisheries Act 2004, and companies and trusts managing Treaty settlement assets on behalf of Māori claimants when such management is intended under the deed of settlement of claim.

42 Personal communication by e-mail from Office for Treaty Settlements, 7 April 2006.

operations in relation to mandate, Treaty settlements and governance.⁴³ We have some general observations for the present.

- 3.42 The proposed waka umanga legislation would offer a ready system for resolving formation disputes as they arise and relieve government departments of the need to manage the process. The existence of an efficient process for resolution of issues should itself reduce the time taken to have structures in place for settlement negotiations. The system of autonomous, tribal entity formation would allow tribes to start the process immediately, not waiting until government is in a position to negotiate with the affected groups.⁴⁴ This will speed the settlement of all claims and reduce the time lag for each claim.
- 3.43 Further cost saving would arise in relation to legal services. Where a confederation is formed in advance of claim hearings by the Waitangi Tribunal, the confederation would need only one counsel to represent all. Presently, there are numerous lawyers to represent the different constituencies, sometimes quite small groups. Each lawyer is usually on legal aid and is present throughout most of or the entire hearing. Under our proposals, we expect that separate representation for constituent groups would only need to be funded where there is a local issue requiring particular consideration, and then only for the time necessary to present it.
- 3.44 Against these benefits are the costs of engaging the Māori Land Court to hear disputes and a Secretariat to assist groups in forming or in ongoing management. However, disputes would only go to court as a last resort. Our proposals require tribes to develop a formation scheme plan that can be readily judged for its completeness and fairness. If that is done along the lines proposed, many grounds for concern will disappear.
- 3.45 We would not therefore expect a large number of complaints to the Māori Land Court, notwithstanding the intensity of the current disputes. In the event that there are applications to that Court, they would not generally determine the substantive issue, which is usually an issue of tribal policy in any event, but determine only a fair process by which the issue can be fairly and democratically resolved. We would not expect the increased workload with these disputes to be much greater than the potential savings in workload from consideration of the disputes elsewhere, primarily in the Waitangi Tribunal.
- 3.46 Additional judges are already proposed for the Māori Land Court as a result of recent increases in its jurisdiction,⁴⁵ and if appointed should be able to absorb any additional work under the Waka Umanga Act. However, there may need to be additional non-judicial resources to fund the appointment of court-ordered mediation and investigations. These may be paid for by the waka umanga once established, but pending establishment there is no appropriate party to fund the assistance given.

43 For instance, the substantial expenditure by the Legal Services Agency and Crown Forest Rental Trust on mandate-related issues.

44 The Waitangi Tribunal's Rangahaua Whānui Reports suggest there are legitimate claims for all major tribes. The impact of land tenure reform, for example, affected all tribal districts.

45 Recent additions to jurisdiction are contained in the Maori Fisheries Act 2004, the Maori Commercial Aquaculture Claims Act 2004 and Foreshore and Seabed Act 2004. Māori Land Court judges also spend much of their time as presiding officers in Waitangi Tribunal claims.

- 3.47 At present, the Māori Land Court has a Special Aid Fund under s 98 Te Ture Whenua Maori Act administered by the Chief Registrar. This can pay for the reasonable legal costs and expenses of any person appearing before the Court, as well as persons appointed by the Court to assist, including counsel, accountants, persons conducting inquiries and mediators. It is likely that this fund or an equivalent will require additional appropriation to ensure the Court can undertake its role under the Waka Umanga Act.
- 3.48 Adequacy of resources for the Court will need to be monitored and further assistance given if necessary. However, we believe that the ability of parties to access the Māori Land Court will prove to be much more cost effective than current dispute resolution mechanisms involving the High Court and the Waitangi Tribunal, in relation to mandate issues, as well as informal mediation and mandating processes. These often call upon very considerable funding from agencies such as the Legal Services Agency, Crown Forest Rental Trust and Office of Treaty Settlements, as well as the parties themselves.
- 3.49 The proposed Secretariat would similarly provide one source of advice and support as compared with the array of services currently used and so contribute to the overall savings associated with forming a legal entity. The Secretariat would assist groups to undertake the formation process, prepare charters and become registered. It could then provide ongoing management advice if this function is wanted and supported by the established entities.
- 3.50 Government funding would be needed initially to assist entity formation by establishment of the Secretariat and the increased jurisdiction of the Māori Land Court, estimated to be less than \$4 million in total. These costs will reduce when waka umanga are established and funding the Secretariat themselves. These costs should be offset by the saving in advice to Māori on formation and ongoing management currently delivered through different agencies, including Te Puni Kōkiri, Ministry of Economic Development, Office of Treaty Settlements and Department of Internal Affairs. Many of these funds may be better channelled through the single agency of the Secretariat.
- 3.51 Apart from direct cost saving, there are public benefits from having legal certainty for tribes and other Māori groups participating in the commercial and social life of the community. As mentioned, the settlement of Treaty claims would be expedited. There would be no need for ad hoc legislation to establish a tribal authority after each settlement, although legislation setting out the terms of the Treaty settlement may continue to be required. The structure would promote the proper management of assets vested in tribes or similar bodies and Treaty settlements would be more durable. Local authorities and the public would have certainty each time consultation with a tribe was required or was sought.
- 3.52 The benefit to Māori would be considerable in enabling them to form structures best suited to their culture and traditions while gaining the benefits of corporate identity. They will be substantially relieved of the litigation and debilitating disputes of the past and have certainty for the future. Māori would gain an independent formation process overseen by the courts, and a representation structure and charter that meets democratic and commercial objectives. This should free them up to devote their energies to the development and prosperity of their people, for the ultimate benefit of New Zealand.



Part 2

PRINCIPLES

*He kete takoha,
He whetu kamokamo*

*Positive contribution
Reflects strength*

Chapter 4

Key issues for tribes

- INTRODUCTION**
- 4.1 New Zealand has had only limited success in making legal provision for tribes. Present policies to settle Treaty claims and consult with tangata whenua, and some arrangements to deliver services through tribes, call for a review of legal policy on tribal infrastructures. This chapter considers issues on tribal entity formation that inform the approach to be taken.
 - 4.2 “Tribe” is used in this report because of different views on whether “tribe” refers to “hapū” or “iwi” as the fundamental unit of Māori society. “Tribe” is therefore used for either a “hapū” or an “iwi”, and “hapū” or “iwi” are used only when a distinction is required.
 - 4.3 We do not consider the term “tribe” to have pejorative connotations. Tribes take many forms but anthropologists consider the term is appropriate for the Māori social organisation of compact groups characterised and fortified by common descent and acknowledging a tapestry of ancestral history, laws and institutions.⁴⁶
 - 4.4 This chapter considers the need to reflect Māori culture by looking at: why structures are needed for tribes; previous provisions for tribes; the distinction between the tribe and the entity; and how the tribe is identified. It also looks at particular issues which need to be considered in tribal formation: protections for minorities; the role of tikanga Māori (Māori custom and law); and the identification of the primary beneficiary, members and boundaries. The chapter also introduces issues relating to mandating, access to law and the management of disputes.

- WHY PROVIDE FOR TRIBES?**
- 4.5 Whether a specific legal structure and recognition is available to tribes is a policy issue which has been much debated in New Zealand over the years. This issue has also been debated overseas, including South Africa in the context of whether tribes impede national unity, but where eventually provisions for tribal leadership were entrenched in the constitution. Accommodation for similar traditional institutions is also commonplace in the constitutions or statutes of independent Pacific Island states. In the United States and Canada, considerable autonomy is given to many of the native nations.

46 See, for example, Joan Metge “Submission to Māori Affairs Select Committee on Rūnanga Iwi Bill 1990”.



4.6 Many Māori continue to look to tribal authorities as a positive way of improving their individual and collective performance. The restoration of tribal authority is woven into many Waitangi Tribunal claims. Further, tribes are integral to the maintenance and enjoyment of Māori culture, the right to which is recognised in the New Zealand Bill of Rights Act 1990.⁴⁷

4.7 Provision for tribes is a necessary consequence of Treaty claim settlements and the Maori Fisheries Act 2004. It is also integral to marine farming allocations, foreshore and seabed administration and statutory provisions to consult with tangata whenua.

4.8 The approach we take is that Māori tribes are organising for economic, social and cultural enhancement, whether for Treaty claim settlements or otherwise, and that Government should provide the legal framework to support this development. In the same way, the state provides for other special forms of collectives, like companies and incorporated societies, to meet the requirements of the general community. Our approach is also that the legal framework should leave tribes with maximum freedom to develop their own structures to suit their own cultural and other needs. This is consistent with the established and developing law of international human rights.⁴⁸

PREVIOUS PROVISION FOR TRIBES – RUNANGA IWI ACT 1990

4.9 We do not believe there is any inherent difficulty in providing a legal structure for tribal governance. Indeed, New Zealand has a history of providing for Māori tribes in a number of forms. However, the constitution of tribal entities requires a clear, principled and comprehensive policy.

4.10 The tribal rūnanga established by Governor Sir George Grey from the 1860s enjoyed some initial success but were probably intended to be temporary.⁴⁹ Tribal councils were established in 1900, tribal committees in 1945 and from the 1920s to the present, a bewildering array of tribal boards and trusts have been constituted by separate statutes making particular provisions for specific tribal groups.⁵⁰ It appears, however, that many of the boards and other bodies established were under-resourced or too overly prescribed to effectively represent their people on any regular basis.⁵¹ Further, the piecemeal approach of separate enactments was an impediment to consistent policy development.

47 Section 20 gives minority ethnic and other groups the right to enjoy their culture with others of their community.

48 See International Covenant of Civil and Political Rights Art 27, ILO Convention No 169, Draft Declaration on the Rights of Indigenous Peoples 1993.

49 See Alan Ward *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1995).

50 We located 18 statutes creating Māori Trust Boards and eight Treaty settlement statutes recognising seven tribal trusts and one tribal company. There are numerous statutory bodies holding specific properties, mainly created under Maori Purposes Acts.

51 See Waitangi Tribunal *Rēkohu Report: Wai 27* (Legislation Direct, Wellington, 2001) 220–224.

THE DISTINCTION BETWEEN THE TRIBE AND THE ENTITY

- 4.11 Eventually, the Runanga Iwi Act 1990 sought to provide generally for tribes but was repealed in 1991. This Act had the considerable advantage of providing a legal structure for tribes. As a result of its repeal, Māori were forced to rely on standard legal vehicles for tribal formation, which, as we have considered, were unsuited to their needs, or on ad hoc statutes for specific groups, a practice that defeats the objective of a coherent legal system. However, it attracted criticism for being overly prescriptive. It focused on iwi, gave standard criteria to identify iwi, limited the sorts of tribal structures that could be set up, and left important decisions of principle to the Māori Land Court. The approach in this report is that the grouping of tribal communities is for Māori to decide, and that Māori should have wide scope in devising their structures and constitutions.
- 4.12 A concern arising from the Runanga Iwi Act 1990 was that the tribes might become incorporated bodies, owing their existence to a statute that Parliament could amend as it wished. This is an old issue that was debated early in the twentieth century, for example in proposals to incorporate certain Māori churches or to seek registration of its marriage celebrants. However, the anxiety appears to stem from legislative control of tribal matters generally, particularly the effect that statutory reform had on the alienation of Māori land.
- 4.13 A related concern was that “corporate warriors” could take over the tribe, and be seen by both tribal members and others as representing the tribe itself, not as its servants. In our view, the position is abundantly clear that a tribal corporation is not, and cannot be, the tribe. To put the matter simply, a tribal corporation may be sued. It does not follow that the tribe is sued. The corporation may be wound up. The tribe is not wound up with it. While the corporation serves the tribe’s purposes, the tribe is not liable as a principal for what the corporation does. It is the corporation that is liable, not the tribe.
- 4.14 Although the creation of a legal structure can influence a people’s perception of their tribe, the issue is instructive in underlining the need for a distinction to be maintained at all times between a tribe and its representative entity. The charter of a tribal corporation must be devised by the tribe itself, and the corporation must remain accountable to the tribe, not take on an independent life of its own.
- 4.15 Since tribes exist in fact, the law must acknowledge the facts by which their existence is determined. This is an old principle and one that requires that the facts should be interpreted through the eyes of the affected people.⁵² Clearly, a tribe is much more than a club that may be formed and unformed with relative ease. It is essentially a body politic that, by dint of history, historical association with place and an accumulated, social and cultural infrastructure, exists as a corporate entity in an inherent capacity.
- 4.16 Consistently, from about the 1830s, the United States of America referred to tribes, or collections of bands, as “nations”. The existence of a corporate capacity was assumed or the courts assigned corporate status to the tribes for different purposes.⁵³ The same was initially assumed in New Zealand in the

52 As considered by the Privy Council with reference to the native title to land in *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399, 402–4 (PC).

53 See Felix S Cohen *Handbook of Federal Indian Law* (Reprint of 1942 Edition, Five Rings Press, Fort Lauderdale, 1986) 277.

Native Land Court Act 1862, which envisaged that in some cases, a tribe could take title to Māori land (a provision that was rarely used).

- 4.17 However, this assumption that a tribe has a corporate capacity is insufficiently particular for the precise structures needed for today's commercial world. Further provision is needed to enable tribal groups to engage in business and other matters through a representative medium. A tribal corporation is appointed to represent the tribe, manage its assets and run its programmes. Tribal corporations enable the tribe to engage in business, and to sue and be sued, without exposing the tribe, tribal leaders or sacred lands to liability, in the same way as limited liability companies were developed to protect their shareholders.
- 4.18 In addition, in drawing a distinction between the tribe and the entity that represents it, the other side of the coin must also be appreciated. It is also an established principle, well known to the managers of Māori land trusts and incorporations, that once an entity is established to represent a tribe, it would be contrary to good commercial management if tribal members were to interfere in its operations except in strict accordance with the entity's charter or rules. Once the entity is given a task and the rules and policies by which it will do it, members should not interfere on a daily basis on how it is done in fact.
- 4.19 This was illustrated in a recent case where an attempt was made to resolve an impasse by a tribal process in conflict with the legal rules that the entity was obliged to observe.⁵⁴ Accordingly, the distinction between tribe and the legal entity is also necessary to maintain the political and commercial integrity of the corporation and to protect third parties who may deal with it. This balance between recognising the tikanga of the tribe and exercising sound commercial practice will not always be easy to achieve, but is one which waka umanga and their members must be constantly conscious of managing.
- 4.20 The concerns of statutory control and the fear that "corporate warriors" will displace traditional, tribal leaders need to be addressed. These emphasise the need for a structure to ensure that the power of a tribal corporation to represent the tribe exists only to the extent that the tribe has agreed in a charter devised and approved by the people. These provisions should clarify that the corporation is the servant of the tribe, not its master, and that its managers are answerable to the tribe, through its elected representatives. Provisions for winding-up and regular charter review are also important in maintaining the distinction between tribe and entity and the nature of the relationship that exists.

HOW IS THE TRIBE IDENTIFIED?

- 4.21 What constitutes the "tribe", is it "hapū" or "iwi", and is any particular group a "hapū" or an "iwi"? This issue has been intensely debated over the last decade in the context of proposals to allocate fisheries-related assets to "iwi". If the intention was to distribute to tribes, should the distribution have been to hapū? The issue of who is an "iwi" was canvassed in litigation that proceeded to the Privy Council. When Parliament moved to specify the "iwi" groups in legislation, the debate continued before the select committee until the Maori Fisheries Act 2004 was passed. The debate also continues in another guise under the Office of Treaty Settlements' requirement for "large natural groupings".

⁵⁴ See *Porima v Te Kauhanganui o Waikato Inc* [2001] 1 NZLR 472 (HC).

- 4.22 We think the debate was unnecessary, but the experience is instructive in that, like the concerns in relation to the Runanga Iwi Act 1990, it cautions against a prescriptive approach to the formation of tribal structures. The critical question was not “who is an iwi” but how groups should aggregate in ways consistent with their culture to achieve an appropriately economic scale in managing their collective assets.
- 4.23 However, the debate is instructive in highlighting the traditional autonomy of even small hapū groups (of which there are several hundred) and their capacity to combine for particular purposes, so long as the responsibilities of each hapū to the confederation, and of the confederation to each hapū, have been clearly settled.
- 4.24 The anthropological evidence is plain (and is supported by considerable literature) that the social unit for the regular exercise of corporate functions was originally the hapū as represented in a marae or a cluster of marae in close proximity.⁵⁵ Consistently, “hapū” was used for tribe in the Treaty of Waitangi, in most official censuses of the 1800s and in legislation up to the early twentieth century.⁵⁶
- 4.25 Commentators such as Metge and Orbell have noted that the term “iwi” to describe a collective of hapū only acquired currency in the 19th century due to the greater collectivisation accompanying the musket wars and the opposition to growing government control.⁵⁷ In the late 1980s, the term became widely adopted by government departments, in developing functions of tribal bodies and was entrenched in such legislation as the Criminal Justice Act 1985, the Children, Young Persons and Their Families Act 1989 and the Runanga Iwi Act 1990.
- 4.26 However, instead of continuing this debate, the important consideration appears to be to focus on the cultural values involved rather than on any particular prescription. Hapū remain the most significant body for most Māori living in traditional environments for they are closest to their extended families. Associated with hapū is a strongly held cultural preference for local autonomy, or the management of matters at a local level.
- 4.27 Iwi, the concept of which is now entrenched, is the most significant body for managing matters at an economic level, and indicates the further traditional value that there is no customary inhibition on group aggregation, and no limit to the extent of aggregation amongst hapū who can trace a common line of descent.
- 4.28 To maintain autonomy, however, aggregations cannot be forced. That appears to be a major lesson from the last decade of debate. To achieve an appropriate scale of operation, it is necessary that the affected hapū should identify their common history and descent and freely negotiate the terms and conditions on which they combine.

55 For example, see Steven Webster “Māori Hapū and their History” (1997) 8 *Australian Journal of Anthropology* 307.

56 For example, the Confiscated Lands Act 1867, Tauranga District Lands Act 1886, Native Land Court Act 1886 and Maori Lands Administration Act 1909.

57 Joan Metge *New Growth From Old, The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) 317; Margaret Orbell “The Traditional Māori Family” *Families in New Zealand Society* (Peggy G Koopman-Boyden (ed), Methuen, Wellington, 1978) 104, 115, n 6. See also Angela Ballara Iwi: *The Dynamics of Māori Tribal Organisation from c1769 to c1945* (Victoria University Press, Wellington, 1998).

PROTECTION FOR MINORITIES

- 4.29 How are the interests of hapū and other groups to be protected within a large iwi structure? Concerns of loss of autonomy have been expressed by small hapū and are one of the major impediments to the formation of large governance entities. They have been expressed by many hapū who, in Treaty negotiations or claims to the Waitangi Tribunal, also seek specific relief for the loss of resources that were held for that hapū alone. They do not wish to see these lost in a large iwi-wide settlement.
- 4.30 These concerns suggest that charters and policy documents should be carefully shaped to the particular needs and circumstances of the constituent groups. They may be protected, for example, by policy decisions that a proportion of profits be distributed direct to hapū for given projects rather than being applied to projects managed by the representative corporation. Particular relief for specific groups may be provided for in claim settlements effected with a wider confederation of which they are part.
- 4.31 A major issue for tribes and local and central government and business interests has also been who to consult with on proposals affecting the environment. Some groups may wish to settle in advance the extent to which hapū are to be involved in resource management issues that particularly affect them.
- 4.32 The Commission believes it is important that the roles of hapū and iwi within a waka umanga are settled at an early stage, in wide and extensive consultations, and are then particularised in the charter so that there is no uncertainty as to the entity's obligations. We recognise that there will often be practical difficulties in achieving this, as distinct hapū interests have often become evident only during a Waitangi Tribunal hearing or as part of the settlement negotiations. It is, however, preferable that these issues be articulated at an earlier stage, without the pressure of the Crown in Treaty settlements, or a multiplicity of lawyers and other advisors during a Tribunal hearing.
- 4.33 It may also be necessary for tribes to consider making provision for future constitutional review⁵⁸ or even an exit clause to allay fears of small groups. As discussed further in Chapter 6, we believe such clauses should not make it too easy for groups to secede, but nor should it be impossible if all attempts at keeping the entity together have failed.

THE ROLE OF TIKANGA MĀORI

- 4.34 The question of whether charters should require compliance with tikanga Māori has also been the subject of debate. One view is that compliance with tikanga Māori is necessary to maintain a Māori dimension within the organisation and to encourage it to operate with Māori objectives in mind. Another is that the mere use of that term leads to uncertainty, particularly legal and commercial uncertainty, and that something more specific is required.
- 4.35 The role of Māori custom in contemporary society was considered by the Law Commission in a study paper of 2001 *Māori Custom and Values in*

⁵⁸ For example, Ngāti Awa Charter of Te Rūnanga o Ngāti Awa, cl 29 < <http://www.ngatiawa.iwi.nz/documents/Charter> > (last accessed on 23 March 2006). Tainui has also recently completed a review 10 years after its Treaty settlement, see Rules of Te Kauhanganui o Waikato Inc < <http://www.societies.govt.nz> > (last accessed on 23 March 2006).

New Zealand Law.⁵⁹ While prescriptive rules apply in matters of ceremonial and spiritual significance, decision-making is substantially based on broad values as perceived and applied by the community at a given time and in given circumstances. Accordingly, there is considerable room for debate as to what the law is when custom is sought to be applied in a western legal framework. There is a need to recognise that custom changes significantly over time, and will not be uniform, particularly for those outside a tribal context.

- 4.36 Accordingly, while the objects of the statute or an individual charter might refer to the need for waka umanga to reflect the tikanga and mana of the tribe, and to exercise kaitiakitanga on the tribe's behalf, these provisions, like English terms of accountability, transparency and stewardship, indicate overall aims of the organisation, rather than being directly enforceable at law. They are aspirational criteria rather than defined legal rules.
- 4.37 In reflecting such concepts in the organisation's structure and charter, it is important instead to consider and reflect the underlying values which custom represents. A mere direction to comply with tikanga Māori is plainly too vague. It is like directing that one should comply with the law without identifying what it is. It also invites litigation on whether the custom has in fact been complied with, creating the anomaly that a court fixes the custom in a non-customary way.
- 4.38 For a corporation to operate in the commercial and administrative worlds, the rules and directions by which it is guided must be certain. Any vagueness may give it too much power, expose it to liability, or create uncertainty over its capacity to commit to contracts or undertakings.
- 4.39 However, it also appears that appropriate objects can be framed, without creating legal or commercial uncertainty, to inculcate a climate in which the waka umanga both promotes cultural values and exemplifies cultural awareness in its mode of operating. These objects, in which there is no general reference to tikanga but a listing of specified cultural goals, may be supported by structural provisions, for example, requiring knowledge of tikanga Māori to qualify for certain offices or establishing expert bodies to advise on how to manage issues in culturally appropriate ways.
- 4.40 Provision might also be made for traditional respect protocols for debate within the waka umanga's tribal council (rūnanganui) to rebuild consensus after periods of dissent. Māori custom, which recognises desirable traits in traditional leaders, like generosity, working for the people without thought for reward, inclusiveness and the care of extended family, might be reflected in the standards of accountability required for tribal leaders.

WHO IS THE PRIMARY BENEFICIARY?

- 4.41 Who is the primary beneficiary of an entity that represents a tribe, the tribe or its individual members? In many cases, a balance is sought between the interests of the members as a tribal group and their individual interests. But there are times when the question must be affirmatively addressed, particularly when tribes are determining their voting structures and distribution policies. The issue is sometimes described in terms of the group rights of customary law and the individual rights of western law.

59 *New Zealand Law Commission Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001).

- 4.42 We think property and cultural rights are at stake and, that in terms of those rights, the tribe must be the primary beneficiary of most historical, Treaty claim settlements. In examining the property right, there appears to be a consensus amongst anthropologists that the resources of lands and waterways were held communally by the tribe. It follows that where compensation is due for land loss and the effects of land tenure reform, it is due to the tribe, as a corporate entity. It also follows that were compensation due for land wrongly taken from individual owners following land reform, the settlement should be not with the tribe but with those owners or their issue. While these claims are not the predominant concern in historical, Treaty claim settlements, they are important and a separate settlement in respect of those claims appears to be consistent with legal principle.
- 4.43 As for the cultural right, the starting point is again that the tribe was pre-eminent and the individual right to enjoy those resources depended upon support for the tribe. The further obligation was to ensure that tribal resources were passed on to future generations. Accordingly, what mattered in tribal culture was not what one could get from the tribe but what one gave to it. The individual reward was in the mana that came from supporting the group. These rights are important in assessing the rights now claimed by tribal members to benefit from Treaty claim settlements.
- 4.44 The opinion that reparation for historic resource losses is due to the tribe rather than to its constituent individuals is also fortified by the fact that the tribe is the keeper of the culture, the body that maintains Māori values and lifestyle. The tribe, as a body, meets the cultural cost of being Māori by maintaining tribal institutions, buildings and significant sites, by providing cultural education and by servicing regular tangihanga and hui.
- 4.45 The question is whether that position should be maintained in the charters of tribes today. Opposing the traditional position is the opinion that most of the people of a tribe have now been dispersed, and having no continuing obligation to the tribe, should now benefit individually. For example, it has been suggested by some that Treaty settlement funds should be apportioned to members in the form of shareholdings. That would take no account of the tribal right, or what is sometimes referred to as the group right. An alternative argument, as was maintained in the litigation over fisheries assets in the 1990s, is that benefits might also be passed through non-tribal organisations.
- 4.46 Statistics show that following population shifts between 1940 and 1985, most Māori by far now live in urban areas, although not all tribes are affected by urbanisation in the same way.⁶⁰ How to provide adequately for a largely urban population is now a major issue for most tribes.
- 4.47 The Commission believes that statutory provisions should not generally direct the tribes on a particular policy. Tribes should be encouraged to debate the issue by developing a vision that encompasses the direction they wish to take.

⁶⁰ For instance, the marae of some Bay of Plenty tribes were not far removed from major provincial towns and places of work and relocations may have required shifts of less than ten kilometres. This compares with some East Coast tribes where large numbers were compelled to relocate well beyond the tribal territory.

Tribes themselves will need to decide the primary beneficiary. They will need to consider the extent to which benefits should be distributed for the general purposes of the tribe as a whole, to the constituent hapū and taurahere (urban tribal collective), or direct to individuals. It may well be that the balance will shift over time. However, in the next section we consider how the issues might be managed through the determination of membership and membership rights.

HOW ARE MEMBERS DETERMINED AND WHAT ARE THEIR RIGHTS?

The issues

- 4.48 How membership is arranged in tribal constitutions raises critical issues about the tribe's concern to maintain the integrity of its culture while still providing for individual engagement. On membership issues, the same conflict is seen to exist between the group rights stressed in tribal society and the individual rights preferred in general society.⁶¹
- 4.49 The first question is whether membership should be determined by descent, a test that casts a wide net in determining membership, or whether, much more narrowly, membership should be limited to the tribe's active supporters who subscribe to its rules. If membership is determined by descent, the second question is whether only the active supporters should have the right to vote. Then, who decides whether an individual is entitled to be registered as a member; and if the opinion is that some members' rights to vote or to benefit can be restricted, who will decide in any particular case – the central entity or the hapū?

Our approach

- 4.50 We think the starting point for any consideration of membership issues is that it is the right of a tribe to determine its own membership and membership rules. We adopt, in that respect, the opinion of the United Nations Working Group that presented the *Draft Declaration on the Rights of Indigenous Peoples* in 1993, that indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.⁶² The same principle has also long been part of United States' law in relation to the Native American tribes of that country.⁶³ Accordingly, in our proposals for a statute to provide for the formation and operation of tribal and other entities we make no attempt to prescribe how the membership of entities should be determined.
- 4.51 Nonetheless, tribal charters should not be so framed as to exclude the lawful rights of individuals. Our purpose in this section is therefore to consider the issues and to suggest a way forward in devising tribal constitutions having regard to human rights law. We consider first that, in the context of membership rights, the claimed conflict between group and individual rights is exaggerated.

61 See for example, P G McHugh "What a difference a Treaty makes – the pathway of aboriginal rights jurisprudence in New Zealand public law" (2004) 15 PLR 87, 97.

62 See UN Subcommittee on the Prevention of Discrimination and Protection of Minorities, UN Commission on Human Rights "Draft United Nations Declaration on the Rights of Indigenous Peoples" (1994) E/CN.4/sub.2/RES/1994/45, article 32. The Draft was published by Te Puni Kōkiri in 1994 in *Mana Tangata* with a background and discussion on key issues. Although the New Zealand Government has expressed reservations about some provisions, we are not aware that any relate to this provision.

63 The early cases were reviewed in the leading decision of *Patterson v Council of Seneca Nation* (1927) 157 NE 734, 736 and 738 (NY).

We then consider how tribal bodies are subject to human rights laws. For the greater part, however, we compare the interests of the traditional group and the interests of its individual members and ask how the two may be reconciled.

Human rights

4.52 We consider there is no inherent conflict between the group rights of traditional tribes and the individual rights stressed in general law. As an aid to reasoning, lawyers have generally recognised that for every right there is a duty and for every duty, a right.⁶⁴ The flipside of the customary duty of the individual to contribute to the tribal group is that custom law also recognised the duty of the tribe to care for all its members. Likewise, the right of members at general law to participate in the affairs of a group of which they are members, is offset by the duty to abide by the group's rules.

4.53 However, membership rules in charters must not unlawfully discriminate on the basis of gender, age or other prohibited grounds of discrimination as set out in section 21 Human Rights Act 1993. In addition to that Act's processes for dispute resolution and review, it also appears possible that tribal entities are subject to challenge in the High Court for non-compliance with the anti-discrimination provisions of the New Zealand Bill of Rights Act 1990, insofar as their charters affect people's rights, powers, privileges, duties or liabilities.⁶⁵ That may occur, for instance, if a person entitled to membership is denied it or is denied access to benefits. Also, the effect of section 20 New Zealand Bill of Rights Act 1990 is that Māori cannot be denied the right to enjoy Māori culture along with other Māori and undue restrictions on membership may constitute a denial of that right.

Caring for the group interest

The nature of the group interest

4.54 As earlier indicated, the primary concern is to reconcile the group interest with the concerns of the individual. We have also said that traditional culture stresses the duty that each member has to the group. The tribe took precedence. Its ongoing survival was undoubtedly a central consideration and was supported by deeply-held beliefs and rules to maintain tribal integrity and cohesion. The ethic of tribal continuity is directly relevant to membership as traditionally conceived.

4.55 Traditionally, the members of a tribe are not confined to the living but pre-eminently include the tribal forebears and the generations to come. In Māori culture, the spirits of the forebears live on as part of the tribe to superintend daily conduct. As already indicated, the duty to future generations compels the view that people are entitled only to the fruits of the land, but the land itself must be passed on in an improved condition. These and other mores remain central to the enjoyment of culture for many Māori today.

⁶⁴ See Wesley Newcomb Hohfield "Some Fundamental Legal Concepts As Applied In Judicial Reasoning" (1913-14) 23 Yale LJ 16 and Arthur L Corbin "Jural Relations And Their Classification" (1920-21) 30 Yale LJ 226.

⁶⁵ See New Zealand Bill of Rights Act 1990, s 3; Claire Charters "Māori, Beware the Bill of Rights Act" [2003] NZLJ 233; and the tests applied in *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233.

- 4.56 It is not practical to cover the full array of cultural factors that are relevant to membership rights and duties, but in this section we focus on some that are seen as critical to maintaining the tribal way of life. In particular, we refer to the respect protocols, systems of meeting and greeting, and rules for managing debate that were necessary to maintain the participatory democracy that characterised the Māori way and to resolve disputes and achieve consensus. When we refer to the traditional meeting rules in this section, we have in mind those protocols and systems.

How membership was determined traditionally

- 4.57 Contrary to some assumptions, we do not consider that membership was in fact determined by descent. Notwithstanding that tribes are described as “descent groups”, we think they are rather characterised by descent than defined by it. The tribe was simply the sum of those who lived together in one area at a particular point in time. Its members were identified by those whose fires were burning on the land. They generally shared a common descent but descent was not an absolute criterion. Some other people were incorporated into a tribe. And not every person who descended from the tribal ancestor remained part of the tribe. Many married out or left in large groups to set up elsewhere. Unless rekindled, their fires grew cold in time. Accordingly, a tribe rarely included the whole of the descendants of a eponymous ancestor.
- 4.58 In addition, the name chosen for a new tribe simply reflected the predominant perception that most people had of the group.⁶⁶ That is another reason why references to tribal members as the descendants of eponymous ancestors cannot be taken too literally.
- 4.59 But membership was fluid. While fires grew cold it seems they were never entirely extinguished. Even today, tribes are adept at recruiting those with ancestral links as a way of maintaining tribal strength, especially if the recruits can make a significant contribution.
- 4.60 Today, there are two alternatives. Should members now be defined by a tribe’s active supporters, that is, as in former times, by those who contribute to the group and abide its values and rules? Alternatively, should membership now be determined by descent alone?

Who decided membership issues?

- 4.61 The modern tendency is for membership registers to be maintained by the central organs of a large tribal entity. This plainly departs from tradition for in the past there was no central organ, only numerous hapū. There is a view that the ordinary people of the hapū should still decide membership issues today. On this view, one should not enter a tribe through a central register but by knowing and being known by one’s aunts, uncles and numerous cousins of the hapū. This bottom-up approach is seen to be consistent with the culture, which focused on hapū, and to support cultural maintenance, for it is only by knowing one’s kin, and being known by them, that the tribal values and rules are learnt.

66 As to tribal reconstruction, see Angela Ballara Iwi: *The Dynamics of Māori Tribal Organisation from c1769 to c1945* (Victoria University Press, Wellington, 1998).

We support that view, but consider there are other matters that must be brought into account.

The effect of environmental change

- 4.62 Population changes have created new problems for maintaining tribal integrity and cohesion. Over three generations or more, many have left the tribe in search of new jobs or careers. That, in turn, has enabled them to live independent lifestyles. Whether people live far away from the tribe or nearby, they may or may not keep contact with their tribal marae.
- 4.63 In addition, while some continue to argue that participation is still the key to maintaining the tribal life, many tribes are now maintaining tribal registers based solely on descent. That is an inclusive approach that is well supported by the customary value of whānaungatanga – of acknowledging and accommodating all one’s kin in the extended family network. It, nonetheless, creates new problems as to how membership should be managed today.

Restrictions on the right of descendants to vote

- 4.64 The difficulties of maintaining tribal values and rules in the modern context have led some to consider ways to restrict voting rights. The problem affects tribal groups internationally. For example, participation in some Fijian mataqali or clans requires that the applicant be well known to the members of the mataqali and to have lived in or to have constantly visited the village.⁶⁷
- 4.65 Amongst Māori, there is a frequently expressed concern that those tribal descendants who have shown no primary commitment to the tribe may have too great a say in the conduct of its affairs. The problem is highlighted by recent practices of “bussing” and “swamping”. Tribal organisers whose plans for the tribe may appear to lack sufficient local support are claimed to have transported inactive descendants to marae meetings to outvote the home people. They are sometimes able to do this only because of the funds provided to them to manage a mandating process.
- 4.66 “Swamping” occurs when to the same ends, persons of various hapū who support a tribal organiser are brought in to vote at the marae meeting of another hapū on the basis of their genealogical connections. It is usual that Māori can connect to several hapū or marae in a tribal district. However, the pertinent question is not whether they connect to a tribe but whether they give it priority in active support.
- 4.67 Another concern is the debilitating effect that cultural ignorance or disregard has on the maintenance of traditional hapū values and rules for decision-making and dispute resolution. There is little room for traditional mechanisms to operate when nominal members attend at a marae and either do not know the rules or choose to ignore them.

⁶⁷ See Jennifer Corrin Care “The Status of Customary Law in Fiji Islands after the Constitutional Amendment Act 1997” *Journal of South Pacific Law* (2000) 1 para 3.3.

- 4.68 A further concern is that the complex genealogical tables of tradition and the modern increase in inter-tribal marriages enable most Māori to claim descent rights in an array of distinct tribal groups. As a result, they can seek to receive benefits from several tribes. Once more there is some feeling that descendants should be limited to claiming from those tribes with whom they mainly associate and support.
- 4.69 Postal voting systems also may mean that decisions are effectively made by those outside the tribal environment who have done little or nothing for the tribe and who are unlikely to know of the preceding tribal discussions and consensus views. This affects the tradition of participatory democracy. It also affects the morale of the people who staff the marae and of the tribal leaders who maintain the tribal culture, institutions and facilities, often at considerable personal cost.

Restrictions on the right of descendants to benefit

- 4.70 In considering individual grant applications, tribal bodies have sometimes given preference to those who either directly or through their families have maintained contact with the tribe. For example, Māori trust boards have sometimes preferred those applicants for educational grants who were recognised by the people of the tribal marae.
- 4.71 Other tribes maintain an open approach. Many have taken active steps to reach out to dispersed tribal members. They have provided impressive cultural, sporting, entertainment and holiday programmes with canoeing, tramping and horse-trekking on ancestral lands and waters. They may also make grants to members who have not been active in the tribe as a way of encouraging greater involvement or at least to keep the links.
- 4.72 If a tribe wishes to prefer those members who maintain their tribal links, it should not present a problem in terms of human rights. We consider that the charters or policy documents of tribal entities may properly prescribe criteria for individual grant applications, with provisions along the lines that account may be taken of the extent of a person's contribution to, or support for, the tribe, having regard to that person's personal circumstances. The tests should be reasonable and such that all are capable of qualifying if they so elect.

Caring for the individual members

- 4.73 The dispersed members of tribes, who now constitute the majority, have different degrees of interest in tribal affairs. They may be actively involved in the tribe's affairs whether they live locally or away. Others living overseas or managing their particular careers may not be able to participate regularly but may give moral or financial support and may be well known to regular, tribal participants.
- 4.74 Some Māori have joined non-tribal associations in areas removed from the tribal base. Some, but not all, give support to their home tribes as well. The position of the non-tribal associations is considered in the next chapter. The next chapter also considers taurahere groups, comprised of members of the same tribe who have come together outside their tribal area. For voting purposes, their taurahere may be treated as a new hapū. Alternatively, members may vote with their home hapū.

4.75 A particular concern for many individual descendants is that they may want some say in the affairs of a tribe but are unfamiliar with its rules and uncomfortable on tribal marae. They may prefer postal voting or to have meetings in non-tribal settings conducted according to ordinary club rules. Early results in a Massey University survey suggest that a not insignificant number are now in this category.⁶⁸ Women and young people in particular may feel that there is an inadequate place for them in tribal societies. As we have said, some may be opposed to the tribal way and may consider that benefits should be distributed direct to them as beneficiaries.

Providing for all

4.76 Structures are plainly needed to accommodate both the group interests and the interests of particular members in the charters of tribal entities. However, there is an initial problem of how to get started. When first forming a tribal entity, how can the members of a tribe decide anything before its membership and the voting rights of members has been settled? We propose (in Part 3) that the initial decisions on the formation of a tribal entity would be made at publicly notified meetings, in traditional and modern environments, by those descendants sufficiently interested to attend, and consider that those sufficiently interested to attend is a reasonable indication of membership for formation purposes. In case anyone is prejudiced by that, a scheme is proposed in Part 3 whereby persons may object and if necessary obtain a ruling from the Māori Land Court on the fairness of the process that is being applied.

4.77 Reverting to the structures that are necessary to deal with membership issues, we consider it is not practicable to recommend any one structure because of the different circumstances affecting different tribes. However, we investigated some possibilities. We consider below:

- registers of all members;
- hapū voting registers; and
- iwi voting registers.

Registers of members

4.78 We support a general tribal register of members based on proven descent from named tribal forebears. Those ancestors may need to be close on the genealogical table if the net is not to be cast too wide but sufficiently distant to accommodate the descendants of all who lived with the tribe before the modern diaspora.

4.79 There are two main reasons for supporting such a register. First, it fits with the Māori value of whānaungatanga. Second, it provides for the individual right. Where Treaty settlement assets are involved, the assets should be held for the benefit of all who descend from the tribal members who were affected by the act that gave rise to the claim. No proven descendant can be excluded. In addition, such a register will be required where the government and tribal negotiators

68 Research Officer, Te Hoe Nuku Roa Project, Massey University, "Personal Communication to the Law Commission on Preliminary Research Findings". General information about Te Hoe Nuku Roa research project is available at: Massey University < http://masseynews.massey.ac.nz/2004/Massey_News/feb/feb23/stories/11-02-04.html > (last accessed 7 March 2006). (Note: the main website, < www.tehoenukuroa.org.nz >, is available only through Massey University's intranet).

agree that a general vote of members is needed to approve a proposed Treaty claim settlement, or where it is sought to establish a mandated iwi organisation under the Maori Fisheries Act 2004.

- 4.80 We think such a register should be managed by the tribal representative entity. A full and proper inquiry into all descendants is a major task that may require an impartial examination of extensive written and oral sources and an ongoing role in maintaining it.
- 4.81 In addition to providing a list of members, the register also provides a definable constituency for reporting purposes and a ready voting list whenever a postal vote of all members is required.

Merging entities and maintaining registers

- 4.82 Where it is agreed that a waka umanga should manage a mandated iwi organisation under the Maori Fisheries Act 2004, or where it is to serve as a mandated iwi organisation itself, it may be necessary to maintain the mandated iwi organisation as a subsidiary organisation in any case where the affected descent groups are not precisely the same. This ensures that separate accounting is maintained. The same may apply on any merger with a trust board or other authority.

Hapū voting registers

- 4.83 While registers of members provide for the individual right, voting registers are concerned with the group right. We consider there is sound justification for hapū voting registers, that is, registers managed by the hapū of those who are held to be active members or known supporters and thereby entitled to vote at constituency or marae meetings in the event that a formal vote is necessary. They are justified on the ground that they are necessary to protect the integrity of tribal values and processes from the practices of “bussing” and “swamping” and from those who do not contribute to the hapū or otherwise abide by its rules. They need not be expensive or difficult to establish. They should be managed by the hapū themselves, utilising the knowledge that hapū leaders have of their regular participants and known supporters and applying settled tests to individual applications.
- 4.84 Tests may be developed around criteria of being well-known to hapū leaders, or of having contributed to the extent reasonable, having regard to personal circumstances. The tests must be principled, reasonable and gender neutral and must be impartially applied. Unreasonable tests or decisions that discriminate in an ad hoc way may be challenged under the processes for entity formation which we propose in Chapter 7 or in terms of the entity’s charter as considered in Part 4. Unreasonable tests may also be reviewable in terms of the Human Rights Act 1993 as earlier discussed.
- 4.85 In order to be reasonable, all members must have a fair opportunity to be registered as voters by meeting the prescribed tests having regard to their personal circumstances. That approach distinguishes a Canadian case where a provision restricting voting rights to “on-reserve” Indians was held to be contrary to the guarantee of equality before the law in the Canadian Charter of Rights

and Freedoms.⁶⁹ In that case, the “off-reserve” Indians had no realistic opportunity to qualify. While we are concerned with voting opportunities based upon support rather than residence, the same principle applies. The question is whether persons have a reasonable opportunity to qualify.

Iwi voting register

- 4.86 Where it is practical, an iwi voting register may be preferred for the confederation as a whole. This is a register managed by the entity, of those members who are held to be active members or known supporters of one or other of the several constituencies or of the confederation as a whole. The charter may limit voting rights to members on this register in relation to certain operations of the entity as a whole. Settled and reasonable tests would be required, as discussed before, and some body would need to be constituted to determine particular applications.
- 4.87 Voting restrictions are not unknown in societies with scattered members. For example, many states impose restrictions on voting rights on the basis of residence. In Pacific states, as with Māori tribes, the “home people” are frequently outnumbered by those now living abroad and they have introduced restrictions on the voting rights of absentee citizens. Even New Zealand citizens are generally not qualified as electors unless they have been in New Zealand in the previous three years.⁷⁰ In these cases, voting rights are restricted but any person can choose to comply with the minimum requirements in order to secure the right to vote.
- 4.88 As it is a major task to develop and maintain such a register, there may not be many tribes who would wish to consider this option. It is probably adequate to maintain a membership list that is available for postal voting where that is required, but to maintain voting registers for hapū.

On membership and voting registers generally

- 4.89 If voting registers are introduced, it is obviously important to settle those matters that the members as a whole must vote on and those that are to be decided according to the voting registers. For example, on the formation of an entity for a tribal confederation, it may be proposed that the members as a whole should vote on the charter and that it should also require the ratification of each constituency, or a fixed majority of them, using hapū voting registers. Under the proposals in Parts 3 and 4 of this report, membership and voting registers may be provided for in scheme plans for the formation of tribal entities and in the charters of entities as they are formed. The fairness of the voting arrangements may be challenged on application to the Māori Land Court, but if not challenged will be effectively binding. The scheme plans and charters will specify the matters to be decided by the members as a whole and the matters to be decided by constituencies, who may then use the hapū voting register if a formal vote is required.

69 *Corbiere v Canada (Minister of Immigration and Northern Affairs)* [1999] 2 SCR 203 (Supreme Court of Canada).

70 Electoral Act 1993, s 80(1)(a).

BOUNDARIES BETWEEN TRIBAL GROUPS

- 4.90 A common complaint on the establishment of entities to represent tribes relates to the definition of land boundaries. An assertion in a charter that an entity represents the hapū of a defined geographic area is likely to provoke a complaint from neighbouring tribal groups about the extent of territory claimed. This is not simply because the boundaries between tribal groups were not settled. It is rather because Māori defined rights in terms of ancestral association and access to resources rather than in terms of their absolute ownership. In many cases, the access to certain resources was shared between hapū, including hapū of distinct descent groups. A tribal boundary also does not, of itself, establish any claim of exclusive “ownership” of resources in that area.
- 4.91 It may well be helpful if the charters of tribal entities assert the customary ownership of a defined territory for the purpose of consultations with local authorities. However, in terms of custom, when laying claim to shared resource areas, it would be appropriate to acknowledge any customary interests of others, or for formal intertribal or intra-tribal agreements to be reached as to who will speak on certain resource issues.⁷¹

MANDATING TRIBAL ENTITIES

- 4.92 As explained in the introduction to this report, there were two main issues that prompted the Commission to develop a project on Māori entity formation. The first was the need for a customised legal entity shaped to Māori requirements as discussed in Chapter 3. The second concerned the need for settled processes in entity formation. That concern is addressed below.
- 4.93 We consider that current mandating processes undertaken by Government, and by legislation such as the Maori Fisheries Act 2004, have an undue effect on how tribal structures are formed.⁷² The “mandating process” refers to Crown policies and practices to determine how Māori groups should be aggregated for settlements and how representatives of the group should be determined to negotiate a settlement of Treaty claims. These representatives appoint negotiators and, if a settlement is reached, establish an entity to manage the settlement proceeds on behalf of the aggregated group. The basis for Government maintaining a mandating process has been the need to ensure that the persons with whom it deals are representative of the affected tribal group and that the entity that is formed to manage the settlement proceeds is also representative and accountable.
- 4.94 However, the mandating process often affects the capacity of Māori to freely and independently develop their representative institutions and to settle the terms on which autonomous constituencies may combine. We think a better process is needed, while not negating the needs for a representative and accountable structure. The entities that are developed by the process will determine tribal identity and development for generations to come, and it is important that their structures match the culture and vision of the affected people.

71 Current moves to get agreements as to coastline are examples of this, and the Maori Fisheries Act 2004, ss 11 and 180(1) makes provision for the resolution of any such disputes.

72 See Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Summary Edition, Wellington, 2004) 55.

4.95 Concerns raised with the Commission include the following issues:

- There are credibility issues when Government manages the process that determines the persons with whom it will negotiate a settlement of the claims against it, and itself judges the integrity of its process and the significance of any complaints that are made.
- Government has a political interest in the early settlement of Treaty claims that may lead it to unduly rush settlements before tribal structures have been properly formed.⁷³
- A facilitator may be appointed by Government to undertake and manage the process.⁷⁴ The concerns are that the process should be independently started and managed by the tribe through persons fully accountable to it, whereas the facilitator's process is more suited to Crown requirements and timelines that undermine traditional processes for consensus development and negotiations in relation to constituencies.
- Government policy of seeking to settle with large natural groups may lead to administrative assumptions as to the propriety of particular groupings and a restriction on tribes in developing the groupings themselves or negotiating the terms on which they will combine.
- The policy is subject to change in order to reach settlements quickly. Where the Government elects to settle only with a small group, the opportunity for confederation is lost. Where it elects to settle only with those hapū who have accepted its mandating process, and omits those who have objected, the result is the same, and long-standing but informal confederations may be divided.
- Where (as is common) the government-recognised grouping does not coincide with groupings recognised under the Maori Fisheries Act 2004 or the Maori Trust Boards Act 1955, the prospect of combining tribal bodies in a single administration is made much more difficult.
- There may be inadequate provisions to protect the interests of hapū, other minorities or individuals when it is proposed to settle specific claims within a wider settlement.
- The association of structural formation with intended settlements may influence voting. For example, settlements may be made between the Government and the tribal negotiators but with payment withheld until the tribal structure has been approved by a popular vote. This can work against an adequate debate on the charter terms, those wishing to contest certain proposals being seen to delay payment. In the same way, voters may be more concerned with early payment than with the charter terms or the constitutional structure.
- The process is not legislatively prescribed and is not uniformly applied. It exists only as a matter of departmental policy and as such is not generally open to judicial review.

73 See Governor-General "Speech from the Throne" (Legislative Council Chamber, Wellington, 8 November 2005) < <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=24330>, " ... my government will be setting a final date for the lodging of historical Treaty claims by 1 September 2008 with the objective of having claims settled by 2020."

74 See Waitangi Tribunal *Te Arawa Mandate Report: Wai 1150* (Legislation Direct, Wellington, 2004) 55 and 78.

4.96 The Government's mandating policies have been reviewed by both Māori and academic communities.⁷⁵ For instance, Thom expresses a common view that Treaty settlements should not drive the formation of tribal structures. Birdling considers the impact on individual tribal groups of the Crown's preference to settle with large natural groupings. He argues that there is no principled justification for that policy or for the fact that it was developed without reference to Māori people. He contends that the policy prevents Māori from freely developing their traditional social structures. Gover and Baird adopt a similar position in contending that Māori themselves must determine their own group identities. Coxhead protests the extent of Crown control of the negotiations process as a whole, arguing that it is so Crown-dominated as to negate the fair and just resolution of claims.

4.97 We have also considered the descriptions of mandating processes in reports of the Waitangi Tribunal,⁷⁶ and in court decisions, as referred to below, and have discussed the opinions with various Māori informants and their legal advisers. We have been made aware of many complaints about how the mandating process is in fact implemented.

ACCESS TO LEGAL PROCESS

4.98 A major concern is the lack of legal remedies to resolve disputes arising from the mandating process, and the fact that there is no mechanism for the ready resolution of disputes. The disputes over tribal formation are many and acrimonious, and in the absence of an effective resolution mechanism, it often takes years to dispose of them, if they are ever satisfactorily disposed of. We think it is common ground that these disputes are the main reason for the delay in settling Treaty claims.

4.99 Most disputes appear to relate to how hapū are grouped for claim settlements and whether particular hapū should be in or out of the proposed aggregation. Another cause of disputes relates to the fairness of the mandating process by which these and other issues are determined, raising tribal concerns of whether Government had too much say in tribal structuring, whether any timelines imposed are too tight and whether those managing the process have manipulated matters to secure a result. The absence of ready recourse to a process to ensure fair play and resolve disputes not only removes an incentive for tribal promoters to act fairly, but it increases suspicions amongst the tribe that those in control of the process may not be serving the tribe's best interests.

4.100 Government's mandating process is not prescribed by legislation, but is managed administratively through policies that are subject to change. The effect is to

75 Crown Forestry Rental Trust *Māori Experiences of the Direct Negotiation Process* (Wellington, 2003); Alison Thom, Deputy Secretary, Te Puni Kōkiri "Committee To Competence: Building Iwi Representative Bodies" (paper presented to the Human Rights Commission and Institute of Policy Studies Symposium on Human Rights and the Treaty, Wellington, 13 August 2004); Malcolm Birdling "Healing the Past or Harming the Future? Large Natural Groupings and the Treaty Settlement Process" (2004) 2 NZJPIL 259; Kirsty Gover and Natalie Baird "Identifying the Māori Treaty Partner" (2002) 52 Univ of Toronto LJ 39; Craig Coxhead "Where are the Negotiations in the Direct Negotiations of Treaty Settlements?" (2002) 10 Waikato LR 13; David Williams "Honouring the Treaty of Waitangi – Are the Parties Measuring Up?" (2002) 9 Murdoch University Electronic Journal of Law 3; and Leo Watson "The Negotiation of Treaty of Waitangi Claims: An Issue Ignored" (1996) 8 Otago LR 613.

76 Waitangi Tribunal *Pakakohi and Tangahoe Settlement Claims Report: Wai 758, Wai 142* (Legislation Direct, Wellington, 2000); and Waitangi Tribunal *Te Arawa Mandate Report: Wai 1150* (Legislation Direct, Wellington, 2004).

restrict the opportunity for challenge by judicial review or other remedies in the High Court. The prospect of court relief is particularly remote when the resultant settlements are regularly implemented by legislation. Were some procedural deficiency proven, the courts are still unlikely to intervene, according to our review of the decided cases, because settlement legislation is proposed and its effect will be to validate the action taken. This applies, even though a purpose of the settlement legislation is to prevent others from raising the same claim again.⁷⁷

4.101 Further, since the Treaty of Waitangi Act 1975 creates no legal obligation to remedy Treaty claims, the courts must regard the settlement of claims as political, unless there is some relevant statutory provision to the contrary.⁷⁸ The Court of Appeal has noted how the courts are prevented from making any inquiry as to either the terms of the settlement or the persons with whom the settlement is made.⁷⁹ Several High Court cases illustrate how it also prevents an inquiry into a range of mandating and cultural issues.⁸⁰ The particulars of the relevant cases have been examined in various academic works, most particularly by Birdling, Gover and Baird and Coxhead.⁸¹

4.102 Birdling also introduced an historical perspective when he briefly compared the present situation with a former period when the Crown's purchase of customary land was construed to be an act of state beyond the reach of the courts.⁸² We think this needs some emphasis, for while there are distinctions between the two situations, they share some common concerns.

4.103 The Waitangi Tribunal has reported that the New Zealand wars were sparked when the governor chose to deal with a willing seller of Māori land as opposed to the true representative of the affected tribe.⁸³ This brought to a head a longstanding Māori concern about the capacity of governments to pick and choose those whom government would recognise as the representatives of a tribe for the purpose of buying Māori land. Now, the Government does not purport to pick and choose the persons with whom it will negotiate a settlement, but, nonetheless, it has a large and questionable role in managing the process to select the tribe's negotiators. We think it wise to avoid any appearance of influencing the tribe's selection of negotiators.

77 See *Waitaha Taiwhenua O Waitaki Trust v Te Rūnanga O Ngai Tahu* (17 June 1998) HC CHCH CP 41/98; and *Kai Tohu Tohu o Puketapu Hapū Inc v Attorney-General* (5 February 1999) HC WN CP 344/97. But, also see *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

78 For example, the State Owned Enterprises Act 1986. See *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) and [1994] 1 NZLR 513 (PC).

79 *Te Rūnanga o Wharekauri Rēkohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA); *Milroy v Attorney-General* (11 June 2003) CA 197/02.

80 *Greensill v Tainui Maori Trust Board* (17 May 1995) HC HAM M 117/95; *Te Ngai Tuahuriri Rūnanga v Te Rūnanga O Ngai Tahu* (13 May 1998) HC CHCH CP 187/87; *Waitaha Taiwhenua O Waitaki Trust v Te Rūnanga O Ngai Tahu* (17 June 1998) HC CHCH CP 41/98; *Kai Tohu Tohu o Puketapu Hapū Inc v Attorney-General* (5 February 1999) HC WN CP 344/97; *Pouwhare v Attorney-General and Te Runanga o Ngati Awa* (30 August 2002) HC WN CP 78/02.

81 Malcolm Birdling "Healing the Past or Harming the Future? Large Natural Groupings and the Treaty Settlement Process" (2004) 2 NZJPL 259; Kirsty Gover and Natalie Baird "Identifying the Māori Treaty Partner" (2002) 52 Univ of Toronto LJ 39; Craig Coxhead "Where are the Negotiations in the Direct Negotiations of Treaty Settlements?" (2002) 10 Waikato LR 13; David Williams "Honouring the Treaty of Waitangi – Are the Parties Measuring Up?" (2002) 9 Murdoch University Electronic Journal of Law 3; and Leo Watson "The Negotiation of Treaty of Waitangi Claims: An Issue Ignored" (1996) 8 Otago LR 613.

82 As so determined in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) (SC) 72.

83 Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi: Wai 143* (GP Publications, Wellington, 1996).

4.104 Māori concerns for an independent process to determine tribal representatives and the lack of access to the courts, because acts of state are involved, are clearly of long-standing. Access to the Courts to resolve disputes on tribal restructuring or complaints of unfair process is a right of citizenship.⁸⁴

84 New Zealand Bill of Rights Act 1993, s 27.



Chapter 5

The issue for general-Māori groups

- 5.1 The question in this chapter is whether urban and other Māori groups which are not based on a traditional tribe (which we call “general-Māori groups”) should be included in the present proposals to provide a customised legal entity for Māori groups that manage communal Māori assets. The question is not whether urban groups should be included in Treaty claim settlements. That was an issue in the Māori fisheries claims. However, it is not an issue that is likely to arise on the settlement of land claims, since those claims more clearly relate to tribal properties. The question is whether provision should be made for general-Māori groups on account of other assets held or expected. In inquiring into the basis on which general-Māori groups may be recognised in law, this chapter also explores further why tribes are so recognised.
- 5.2 The question is addressed by considering the background to general-Māori groups, what is meant by that term, and their relationship with traditional tribes. We then discuss issues relating to the recognition of general-Māori groups, the basis on which recognition may be given and their capacity to provide representation.
- 5.3 A further issue is whether the benefits of the proposed Act should be available to non-Māori groups .
- 5.4 By “general-Māori groups” we refer to organisations of Māori managing communal Māori assets that are primarily defined by residential locality, or by residence and faith, rather than as a kin-group, and which promote Māori identity, values and development. Most of these are urban groups but we refer to “general-Māori groups” because they need not be urban-based or service an urban clientele. General-Māori groups could be part of a rural community, or they could be church-based. We also use “general-Māori” in preference to “non-tribal” for members of these groups may look upon themselves as members of a modern tribe. In addition, individual members of these groups may also be active members of their own traditional tribes.
- 5.5 However, these groups must have an overall purpose of promoting Māori identity, values and development. A Māori rugby or kapa haka club, which may incidentally foster such purposes, would not, of itself, qualify, although it may be formed by a general-Māori or tribal corporation.

- 5.5 The number who could associate with the urban-based groups is potentially large. In 1940, more than 80% of Māori lived in rural areas. As at 1998, 83% were urban dwellers.⁸⁵ That which has been called an “urban drift” happened worldwide, but for Māori, as with other indigenous groups of South Africa, Australia and North America who suffered large land-losses, the change was so rapid and affected so many that it may be seen as a demographic revolution.
- 5.6 Inevitably, the changes stimulated new ways by which Māori expressed their identity. Māori urban organisations were actively promoting Māori culture, amongst both urban Māori and the general population, from at least the 1930s.⁸⁶ In so doing, they added to a national Māori consciousness. Some of the organisations were associated with the “Māori war effort” and gave support to the Māori Battalion. The Battalion was also made up from many tribes and likewise gave expression to a national, Māori identity.
- 5.7 In time, urban communities established multi-tribal, urban marae. Although there was some tension with tribes traditionally associated with the urban areas, there was no general objection to this course, notwithstanding the former association of marae with specific tribal ancestors.⁸⁷
- 5.8 Urban Māori found common cause in culture and shared experience, and combined naturally. While the combinations were not the same as the kin groups of tradition, Māori had little difficulty in identifying as a people. In fact, they had so identified from the arrival of the first Europeans.
- 5.9 Much has been written on the land losses and urbanisation of the Māori people. We have focused on the material relating to the consequential issues of identity, and especially that which was written after certain tribes had challenged the status of general-Māori organisations.⁸⁸

RELATIONSHIPS WITH TRIBES

- 5.10 While the members of general-Māori organisations may identify strongly as a group, many take active steps to keep their tribal links. In addition, general-Māori organisations often take active steps to reconnect “lost” Māori to their tribal families.
- 5.11 Those responsible for setting up general-Māori organisations were frequently tribal leaders, as was the case with the formation of the Ākarana Māori Association and the Ngāti Pōneke Club, in 1927 and 1929 respectively.

⁸⁵ Statistics New Zealand *New Zealand Now Maori* (1998 ed, Statistics New Zealand, Wellington, 1998) 24.

⁸⁶ See, for example, Jonathan Dennis *The Silent Migration: Ngāti Pōneke Young Māori Club 1937–1948* (Huia Publishers, Wellington, 2001).

⁸⁷ See Waitangi Tribunal *Orakei Report: Wai 9* (GP Publications, Wellington, 1987). Also see Joan Metge *A New Māori Migration: Rural and Urban Conditions in Northern New Zealand* (Athlone Press, London, 1964).

⁸⁸ We have drawn, in particular, from research and opinions expressed or collated by Kirsty Gover and Natalie Baird, Ken S Coates and P G McHugh, and the Canadian Royal Commission on Aboriginal Peoples. Closely related to the legal material is the work of political scientist, Andrew Sharp. See Kirsty Gover and Natalie Baird “Identifying the Māori Treaty Partner” (2002) 52 Univ of Toronto LJ 39; Ken S Coates and P G McHugh *Living Relationships Kōkiri Ngātahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998); Royal Commission on Aboriginal Peoples *Report of the Royal Commission on Aboriginal Peoples* (Canada Communications Group, Ottawa, 1996) vol 4; Andrew Sharp “Blood, Custom and Consent: Three Kinds of Māori Groups and the Challenges They Present to Governments” (2002) 52 Univ of Toronto LJ 9.

Some tribal leaders continue to manage general-Māori organisations at present. Indeed, tribal leaders formed general-Māori communities even in 19th and early 20th centuries, the communities being defined by common residence and faith. These leaders included Tohu, Te Whiti, Te Kooti and Tahupotiki Rātana.

- 5.12 The opinion that general-Māori groups are “un-Māori” because they are not based on tribe appears to take an overly-rigid view of Māori society. The formation of new tribes as a result of exigencies like famine or war (and now urbanisation) has been a natural feature of Māori history.⁸⁹ The same exigencies gave rise to major migrations as well. These include the more recent migrations as a result of the 19th century musket wars, some of which resulted in substantial community reformations.⁹⁰ Given the fluidity with which Māori communities in fact reconstructed themselves in the past, it is not surprising that the names of some urban organisations conveyed the sense that a new tribe had formed as with “Ngāti Pōneke” and “Te Whānau o Waipareira”.
- 5.13 Accordingly, the main concern is not with some division between tribes and “urbans”, but with the fact that persons may belong to general-Māori organisations as well as to a tribe or several tribes. Indeed, multi-tribal allegiances may be more common amongst urban people. Urban children are more likely than rural children to have parents from different tribes because of the multi-tribal environment in which they were conceived. Further, while rural children are likely to identify with the local tribe, urban children are more likely to identify with each of the tribes from whom their parents derive.
- 5.14 Although a person may subscribe to more than one tribe and to a general-Māori organisation as well, we do not regard “multiple dipping” as a significant issue. Māori representative entities do not regularly pay out to individual shareholders but apply funds for general purposes. They may decline to fund individuals who are being assisted adequately by another Māori body.
- 5.15 Taurahere are another form of modern Māori organisation. They are combinations of Māori from the same tribe but living in a locality away from the traditional tribal lands. They are usually urban-based. The name “taurahere” derives from the traditional metaphor of a rope that binds. In this case, the metaphor captures the bond between dispersed people and their families of origin. If general-Māori organisations are untraditional, then so too are taurahere. Generally their members are not of the same extended family, but come from several marae of the traditional group.
- 5.16 A tribal organisation may include taurahere as a separate constituency. Alternatively, the tribal organisation may require that the members of the taurahere maintain their connections with their tribe through their respective families of the home marae. However, it appears that taurahere could also be recognised, if they wish, as a form of general-Māori organisation. Like tribal and other general-Māori organisations, they promote Māori identity and serve a particular Māori community.

89 Angella Ballara Iwi: *The Dynamics of Māori Tribal Organisation from c1769 to c1945* (Victoria University Press, Wellington, 1998).

90 See R D Crosby *Musket Wars: A History of Inter-Iwi Conflict, 1806–45* (Reed, Auckland, 1999).

DEFINING
THE ISSUE

- 5.17 The question of whether general-Māori organisations should be included in any proposals for organisations that are representative of Māori people has been affected by some opinions that the law should provide for tribes only. In recent years, it has been argued that only tribes should be recognised in Treaty settlements and that only tribes should be included in government schemes for service delivery or the placement of children or in the national settlement of fisheries claims.
- 5.18 To determine how the issue should be framed, we considered the position in comparable places overseas, the local argument, and academic opinion. In contrast with the position that developed in North America, Australia and New Zealand, the African National Congress in South Africa took something of a stand against tribalism in the constitutional restructuring of that country after the fall of apartheid. Possibly as a reaction to the apartheid policy for tribal homelands, the matter was initially argued on the basis that tribes were divisive, that national unity was needed, and that most black people resided in urban locations. Eventually, however, it was recognised that the tribes and traditional chiefs had to be accommodated, for they plainly existed as a significant social force.⁹¹ Nonetheless, the respect due to the urban blacks, who constituted the vast majority, was assumed.
- 5.19 In Australia and Canada, both tribes and urban groups are included in national self-government programmes, notwithstanding an original focus on tribal structures. Tensions have existed over land rights in Australian urban areas between the descendants of traditional owners and aboriginal immigrants, but we are not aware of any objection in principle to urban group recognition.⁹²
- 5.20 The Report of the Canadian Royal Commission on Aboriginal People supports efforts to have aboriginal people in urban areas run their own affairs. It also records no opposition to that from traditional groups and instead notes the support of the Native Council of Canada and the Congress of Aboriginal Peoples.⁹³
- 5.21 New Zealand has not enjoyed a consensus on this issue. Again, there may be historical reasons. The statutory vesting of Māori land in individuals, rather than tribes, left the tribes without an economic base on which to manage their affairs and, as discussed in Chapter 4, the provisions made for tribes from 1900 were not backed by sufficient funds for those provisions to be effective. This contrasts in principle with North America, where tribal governance was supported by tribal ownership of land reservations.
- 5.22 Although it was not expressed at the time, this history may account, in part, for the strong opposition from tribes when urban groups sought to be included in government programmes to devolve government services or to settle

91 See Constitution of the Republic of South Africa, Act 108 of 1996, ch 12.

92 As illustrated in *Gale v Minister for Land and Water Conservation for the State of New South Wales* [2004] FCA 374. See also Gaynor McDonald “‘Recognition and Justice’: The Traditional/Historical Contradiction in New South Wales” in *Fighting over Country: Anthropological Perspectives* (J Finlayson and D E Smith (eds), Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1997).

93 See Royal Commission on Aboriginal Peoples *Report of the Royal Commission on Aboriginal Peoples* (Canada Communications Group, Ottawa, 1996) vol 4, ch 7.

fisheries claims. These programmes provided a long-awaited opportunity for tribes to re-establish the economic base that would support tribal culture.

- 5.23 While the tribal position was understandable in terms of the history, it did not follow that the urban groups should be excluded from consideration. The position taken was simply the reverse of that initially proposed in South Africa. In New Zealand, however, the proper principle to apply was not fully argued. Instead an outcome was sought through proceedings before the superior courts and in claims to the Waitangi Tribunal over resource allocations.⁹⁴ In those environments, the matter had to be argued within the boundaries of judicial review, or had to be moulded to fit with the principles of the Treaty of Waitangi.
- 5.24 The broad contention for the tribes appears to be that the affairs of Māori people should be managed only through the traditional institution of the tribe. Supporters of that position contend that the tribes have the capacity to service and provide for all Māori, even those who live in urban places well removed from the tribal base. The smaller New Zealand landmass, compared with South Africa, Canada and Australia, gives some credence to this; it allows for more regular contact between tribes and urban dwellers.
- 5.25 Many urban Māori are equally assertive in opposing that position. They turn to the mentors and friends of their urban childhood as constituting their community of interest. Adopting what may be seen as an important customary value, they argue further that Māori governance should occur at the place where the affected people live and work. Tentative examination of a survey of Māori households by Massey University suggests most Māori would prefer that local business be conducted in community halls rather than at a tribal marae. Almost half of the respondents did not regard any marae as their own, and most rarely visited a marae.⁹⁵
- 5.26 As already indicated, however, the New Zealand debate has been affected by pecuniary considerations. Behind the litigation were claims by urban groups that part of the proceeds of a national settlement of Māori fisheries claims should be delivered to them, for the general benefit of urban Māori, since most Māori were now living in urban areas. Several tribes contended that the benefits should pass only to tribes, as the customary holders of traditional fishing rights.
- 5.27 A similar contest lay behind the Waipareira claim. One view was that only a tribe could be a Treaty partner of the Crown, and accordingly only tribes should manage government funds for service delivery to Māori. Urban groups contended for the same status as tribes and the right to deliver services to Māori in urban areas. This was for the pragmatic reason that they were best placed to do this, and for reasons of principle. Presumably, this would have entitled them to a larger share, for again it is in urban environments that most Māori are now to be found.

⁹⁴ See *Tainui Māori Trust Board v Treaty of Waitangi Fisheries Commission* [1997] 1 NZLR 513 (PC); Waitangi Tribunal *Te Whānau o Waipareira Report: Wai 414* (GP Publications, Wellington, 1998).

⁹⁵ Research Officer, Te Hoe Nuku Roa Project, Massey University, "Personal Communication to the Law Commission on Preliminary Research Findings". General information about Te Hoe Nuku Roa research project is available at: Massey University < http://masseynews.massey.ac.nz/2004/Massey_News/feb/feb23/stories/11-02-04.html > (last accessed 7 March 2006). (Note: the main website, < www.tehoenukuroa.org.nz >, is available only through Massey University's intranet).

- 5.28 The particular issues of resource competition are not the concern of this report. Our concern is with the ways in which Māori identify collectively, and whether any principle emerges from the debate to assist us in determining whether general-Māori groups should be included in any proposals to provide for Māori representative organisations.
- 5.29 The arguments of principle appear to have been based on structural issues, such as the extent to which urban groups are like tribes and are true to tradition as a result, and the extent to which urban leaders act like their tribal counterparts. For example, urban collectives were argued to threaten the integrity of Māori culture in that they were not based on whakapapa (genealogy) or, in effect, that they were not based on close blood relations in the same way as tribes.
- 5.30 We have found no-one who disputes that whakapapa is central to the Māori way of life, or that the closely-knit extended family is the key traditional unit that underpins the tribe. We note, however, that whakapapa is used for more than establishing relationships within tribes. It also establishes relationships between tribes, and connections between individual Māori from throughout the country.
- 5.31 On closer analysis, an approach based on the measure of perceived cultural purity appears difficult to sustain. This is not only because cultures, by nature, must change. It is also because after traumatic environmental change, purity of form is hard to find. It is then difficult to talk of traditional tribes unless it is accepted that tradition constantly adjusts, or that cultural values are regularly applied in different ways in new circumstances.
- 5.32 In the present age, where structures do not just develop but are planned, even fundamental values may be at risk. For example, the hallmark of tribal governance has been, until very recent years, that decision-making was mainly made at the local level of the extended family. Our study of current tribal constitutions suggests a marked shift towards decision-making at a much more remote and centralist level.
- 5.33 Further, a close blood-tie was not the only characteristic of earlier tribal membership. The other was that members generally lived together. The tradition was that members ceased to be members, and lost tribal rights, if they failed to keep their fires burning on the land.
- 5.34 Accordingly, it is not just urban groups, but tribal groups as well, who are adversely affected by any insistence on cultural purity. It no longer suits the tribes to define membership in terms of the residential requirement. Nor should they have to, for all must adapt to changed circumstances. But it is difficult to deny to those who live in the cities the right to adapt as well.
- 5.35 If the traditional test of group membership was based both on close blood relationships and residence, urban and tribal claims are somewhat equally balanced. It seems that the tribes score better in terms of close blood connections, while urban groups score better on residential qualifications. They may be seen to score equally on whakapapa. Tribes may use it in a traditional way to show the closeness of the kin group. Urban groups may use it in a traditional way as well, to establish the connections between members from diverse places.

- 5.36 But we would not support a contest. Urban communities may have what the tribes might lack, ready access to human capital. The tribes undoubtedly have what urban groups lack, ready access to the lands, elders and institutions of the ancestral culture. There is clearly room for co-operation.
- 5.37 We think the test is not structural, but is based on the human role in cultural change. It rather seems that culture is not based on structures, but that the structures are a cultural manifestation. It appears that culture survives through individual support for particular cultural groups. In other words, culture develops through real communities. Similarly, institutions survive because they appeal to people by expressing those values that are relevant to them according to their time and place. The ultimate test for institutional legitimacy is popular support.
- 5.38 Accordingly, we consider that Gover and Baird⁹⁶ are undoubtedly correct in arguing that the issue is one of identity, of how Māori choose to identify today and through what medium. They must also be correct in adding that issues of indigenous identity must fall squarely within the sphere of Māori autonomy as an issue primarily for determination by Māori themselves.
- 5.39 In reviewing the history of Māori development and the decisions made by Māori groups today, Gover and Baird are satisfied that Māori groups now crystallise around areas of commonality extending beyond the more traditional criteria. They consider that urban Māori authorities have emerged as a viable expression of Māori autonomous identity. We add that they also give vent to the fundamental traditional value that favours local decision-making.
- 5.40 But in a society where power is decentralised, how does one identify the Māori decision on the appropriate course to adopt? The answer can only be to consider how Māori themselves have decided the matter at the traditional seat of power, namely in the local communities. At a national level, we cannot expect any particular view to prevail. We have only to ask, when looking at the particular case, how the people of the affected group have utilised their own knowledge and comprehension of customary values to fit solutions to their individual circumstances.
- 5.41 Plainly, the law cannot shape how Māori society should be, but it can strive to accommodate the preferences of significant sections of the Māori community. Accordingly, we consider the fundamental starting point in developing the law for indigenous people is not to determine what should exist, but to inquire what actually exists in fact.
- 5.42 On the factual evidence, it can no longer be said that tribes are the only medium through which identity is expressed and cultural maintenance is sought. That is not to undervalue the crucial significance of the tribe for many Māori, including Māori who belong to urban organisations. It is merely to say that Māori identity now expresses itself in more than one way.

BASIS FOR RECOGNISING TRIBES

- 5.43 So far we have not needed to examine the basis for recognising tribes since, as we noted in Chapter 4, the tribes have been recognised in fact from early times

⁹⁶ Kirsty Gover and Natalie Baird "Identifying the Māori Treaty Partner" (2002) 52 Univ of Toronto LJ 39.

to the present. They were initially seen as competent to act and hold title to land without further statutory provision.⁹⁷ In other words, the tribes were political entities that preceded the state, and accordingly did not need to be created by it.

- 5.44 We think this points to the basis on which Māori tribes should be recognised in law. They are the institutions through which the aboriginal people, as one of the founding peoples of the state, express their identity. This approach is to be distinguished from that of cultural tolerance in a multicultural state. Indigenous cultures have constitutional significance. This view has support from international practice, colonial legal history and some recent literature in law and political science.⁹⁸
- 5.45 International practice is to recognise the rights or interests of indigenous cultures or tribes in constitutions, as with the recognition of indigenous cultures in the constitutions of Switzerland, Canada, South Africa and Fiji.⁹⁹ Where constitutional provisions are lacking, the courts may define the relationship between the state and its founding peoples. Concepts of domestic dependent nations, aboriginal autonomy, aboriginal rights, and treaty partnerships have evolved for indigenous groups in court decisions of the United States, Canada, Australia and New Zealand.
- 5.46 The recognition of particular Māori institutions, on the basis of the relationship that exists between the state and Māori as one of its founding peoples, is also consistent with the principles of the Treaty of Waitangi. It appears to be established as a principle of the Treaty that Māori have a right to organise themselves as groups and to have independent control of the groups' affairs.

THE BASIS FOR RECOGNISING GENERAL-MĀORI GROUPS

- 5.47 No principle limits the institutions of indigenous societies to those that existed upon the founding of the state. That would deny the right of cultural development. What matters is that the institutions are those through which the peoples concerned, in fact, identify today. As expressed in the Canadian constitution, recognition is given to such distinct cultural institutions as are necessary for the preservation and promotion of certain communities. The reference is not to pre-existing institutions.
- 5.48 Accordingly, as already indicated, the basis for recognising general-Māori institutions is simply that they give legitimate expression to Māori cultural identity today. They are a form of modern tribe. While they have not the close filial bonds of extended families, they are drawn together by the bonds of common culture, ancestral genealogical connections, and shared experiences as co-residents or members of a faith. We consider general-Māori groups cannot be left out of consideration when developing Māori legal policy.

97 For example, Native Land Court Act of 1862, ss VII and XII; and Native Lands Act 1865, s XXIII.

98 As to the literature, see Will Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford, 1995); Scott C Idleman, "Multiculturalism and the Future of Tribal Sovereignty" (2000) 35 Colum Human Rights L Rev 589; and Andrew Ladley "The Treaty and Democratic Government" (2005) 1 Policy Quarterly 21.

99 Constitution of the Republic of South Africa, Act 108 of 1996, arts 6 and 31 and ch 12; Constitution Act 1982 (Canada), arts 16, 16.1 and 35; Switzerland Constitution 1999, art 4; and Fiji Constitution (Amendment) Act 1997, ss 4 and 6.


THE NEED FOR SPECIAL PROVISIONS

- 5.49 The question is whether provision is needed for general-Māori groups in terms of our policy objective of providing legal support for Māori social structures. Like the structures for tribes, those for general-Māori groups provide important vehicles for expressing cultural identity. In addition, many now also manage major assets. Like tribes, their functions are at once social, cultural, commercial, and political. And as with tribes, the available legal structures are inadequate for managing their wide-ranging concerns.
- 5.50 The existing structures also do not cater for the new circumstances of general-Māori groups. The membership is fluid and changing. Those entitled to benefit at any one time are neither investors nor passive beneficiaries, yet expect and are entitled to full rights of participation and engagement. The groups may seek to make a profit, but profit is not their sole or dominant objective. Consequently, they have the same concerns as tribes in devising their charters; that is, to cater for representative and democratic governance with accountability to the affected group, transparency in operations, responsible stewardship and provisions to resolve disputes internally.
- 5.51 It follows, however, that special provision is needed for general-Māori groups only where they handle or expect to handle assets that belong to the group. In addition, not all the provisions for tribes would apply to general-Māori groups in the same way. First, we propose in this report (at Chapter 7) a process to manage disputes on the formation of tribal corporations which arise primarily from the difficulties of determining how hapū should be aggregated for management and Treaty settlement purposes. That process would not apply to general-Māori groups where the same problem does not arise. In addition, in Chapter 8 we propose provision for tribal corporations to be recognised as the legitimate representative of the associated tribal group. There is no basis on which general-Māori organisations that serve the Māori of a district can claim to represent all the Māori of that district. Obviously, many local Māori may not wish to be part of that organisation. We consider that a general-Māori corporation can formally represent only those who actively subscribe to it as members or participants from time to time.
- 5.52 Of course, a statute can empower an organisation to represent the Māori generally in a district, but there is no general right to so represent. Presently, the New Zealand Māori Council has power to represent Māori generally by virtue of the Maori Community Development Act 1962. That legislative authority enabled the Council to proceed with the litigation that began what is now a substantial Treaty jurisprudence. The Act supports the Council's authority by elaborate electoral structures at local, regional, and national levels. We do not propose that the Council's role should be displaced, and it is certainly beyond the scope of this project to consider the national structure for Māori representation and policy development.

APPLICATION TO OTHER GROUPS

- 5.53 Although the structure we propose for general-Māori groups is limited to groups which can establish a Māori ethos and manage collectively-owned assets for Māori, we do not see that their membership need be exclusively Māori, as many such groups include non-Māori members.

- 5.54 Nor does the structure established by the Act need to be exclusively available to Maori groups. In future, other groups which manage collectively-owned assets on behalf of a defined group may wish to avail themselves of the Act's provisions. These could include other ethnically-based or faith-based groups which also find the strictures of the trust law, companies or incorporated societies do not suit their particular needs. With minor amendments, the provisions of the Waka Umanga Act could extend to such groups.



Chapter 6

Principles and purposes

- 6.1 In seeking answers to the concerns affecting the formation of representative Māori entities, we have considered the principles to apply. They provide the criteria by which the options are analysed. This chapter covers the principles that we consider important and how they would be reflected in the purposes of the Act that we propose.
- 6.2 The principles that are considered, and the order in which they are discussed, are as follows.
- The principle of autonomy.
 - The principles of cultural match and mandated vision.
 - The principles of community empowerment and participatory democracy.
 - The principles of consensus and assisted dispute resolution.
 - The principles of fair process, protection of minorities and access to law.
 - The principle of choice.
 - The principle of diversity.
 - The principle of maintaining economies of scale.
 - The principle of rationalisation.
 - The principle of early entity development.
 - The principle of recognition.
 - The principle of ensuring good governance.
- 6.3 Some of these principles overlap. None is absolute and several must be balanced against each other.

AUTONOMY

- 6.4 The principle of autonomy assumes that Māori should govern themselves in matters relating to their own affairs. In the context of entity formation, it requires that Māori should determine the structures of their institutions in accordance with their own procedures.
- 6.5 The reason for this principle is that internal control promotes community participation and responsibility. When institutions are fashioned to the people's own design, they are more likely to see the institution as their own and be encouraged to participate in its affairs and promote its success.

- 6.6 The importance of the principle for the current programme of tribal rebuilding has been recognised overseas, for instance in reports of the Canadian Royal Commission on Aboriginal Peoples, the Institute on Governance, Ontario, and the Harvard Project on American Indian Economic Development.¹⁰⁰ Their points are summarised for the New Zealand context as follows.
- The communities must own and control the constitution-building process. They must design their own institutions.
 - They must have the freedom, time, encouragement and resources to do so.
 - They must be engaged in the process of entity formation from the outset and fully participate in developing and deciding the form of the entity's structure and the terms of the charter.
 - To the most practical extent, the process must be developed by traditional consensus procedures.
 - The process itself should be approved by the people and should be open and transparent.
- 6.7 Tribal autonomy is supported by the Treaty of Waitangi, where the principle of rangatiratanga envisages that tribes should shape their own institutions.¹⁰¹ It is also central to the Draft Declaration on the Rights of Indigenous Peoples.¹⁰² We are not aware that the Government has expressed any reservations with regard to this aspect of the Draft Declaration.¹⁰³

CULTURAL MATCH AND MANDATED VISION

- 6.8 The principle is that the structure of a representative entity should fit with the people's culture and vision. The term "cultural match" was coined by the Harvard Project to refer to the close fit required between a tribe's representative institutions and the people's cultural conceptions of how authority should be organised and exercised.¹⁰⁴
- 6.9 The two principles of autonomy and cultural match infer that by maintaining cultural integrity and engaging the people in a consensual process, the people will

100 See Royal Commission on Aboriginal Peoples *Report of the Royal Commission on Aboriginal Peoples* (Canada Communications Group, Ottawa, 1996) vol 2, part 1, ch 7; Institute on Governance *Understanding Governance in Strong Aboriginal Communities: Phase One: Principles and Best Practices from the Literature* (Ottawa, 1999) 32. For a summary of opinions emanating from the Harvard project, see Stephen Cornell, Miriam Jorgensen and Joseph P Kalt *The First Nations Governance Act: Implications of Research Findings from the United States and Canada* (Native Nations Institute, Udall Centre for Studies in Public Policy, University of Arizona, Tucson, 2002); Stephen Cornell *Five Myths, Three Partial Truths, A Robust Finding and Two Tasks* (Project Report Series, Harvard Project on American Indian Economic Development, John F Kennedy School of Government, Harvard University, 1994); and Stephen Cornell "The Importance and Power of Indigenous Self-Governance: Evidence from the United States" (National Indigenous Governance Conference, Canberra, 2002).

101 See Waitangi Tribunal *Taranaki Report – Kaupapa Tuatahi*: Wai 143 (GP Publications, Wellington, 1996) 5; Waitangi Tribunal *Muriwhenua Fishing Report*: Wai 22 (GP Publications, Wellington, 1988) 187; Waitangi Tribunal *Mangonui Sewerage Claim Report* Wai 17 (GP Publications, Wellington, 1988) 47; Waitangi Tribunal *Ngawha Geothermal Resource Report*: Wai 304 (GP Publications, Wellington, 1993) 101.

102 UN Subcommittee on the Prevention of Discrimination and Protection of Minorities, UN Commission on Human Rights "Draft United Nations Declaration on the Rights of Indigenous Peoples" (1994) E/CN.4/Sub.2/RES/1994/45. See, in particular, articles 4, 19, 31 and 32.

103 See the expression of the government approach in *Mana Tangata: Draft Declaration on the Rights of Indigenous Peoples 1993: Background and discussion on key issues* (Te Puni Kōkiri, Wellington, 1994).

104 See Stephen Cornell, Miriam Jorgensen and Joseph P Kalt *The First Nations Governance Act: Implications of Research Findings from the United States and Canada* (Native Nations Institute, Udall Centre for Studies in Public Policy, The University of Arizona, Tucson, 2002).

come to identify with the institution as their own creation and the institution will have legitimacy as a result. Anticipated outcomes are confidence in the institution, stability in its operations, certainty in its processes and greater willingness to mediate disputes.

- 6.10 The principle of cultural match has particular importance in three contexts:
- in capturing the people's concept of what constitutes the wider descent group when developing a tribal confederation;
 - in capturing the people's vision of themselves as a community, of their place in the Māori world and their future role; and
 - in incorporating the group's preferences and traditions when developing the organisation's charter.
- 6.11 The culture of the people is not limited to historic conceptions. A credible structure is one that conforms to the peoples' current understanding of themselves as a tribe or general-Māori community, of where they have been as a people, of who they are now and where they seek to be. A tribal vision provides the framework for the constitutional development that follows.
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- 6.12 The principle is to empower the individuals and the hapū or other constituent communities of the group by fully engaging them in the process of entity formation, by negotiating and entrenching the terms on which constituencies enter into a confederation, and by making provisions for their involvement in the entity's ongoing operations.
- 6.13 The principle may be sourced to Māori culture itself and its preference for local autonomy and participatory democracy. It finds support in the right of individuals to enjoy their culture in community with others as provided for in the New Zealand Bill of Rights Act 1990.¹⁰⁵
- 6.14 In a tribal context, the principle expresses the value traditionally placed on the independence and autonomy of hapū. The traditional opinion is that hapū should determine matters specific to it at a forum that is open to the associated whānau (extended families).
- 6.15 To give effect to the tenets of participatory democracy, proceedings to form representative entities should be open and transparent. For example, a scheme setting out the stages by which it is proposed to form a tribal organisation may be developed in consultation with a wide range of people in the community and publicly disseminated before the programme begins. In addition, a commitment may be made to disseminating opinions on different options and to assisting minorities to express their views, with an honest endeavour being made to accommodate their concerns.
- 6.16 The importance of engaging with particular sections of the community is particularly apparent when the settlement of a Treaty claim is contemplated. Many claims are specific to hapū or particular families. Measures may be needed to protect their interests in any large settlement that includes them, while at the same time balancing the needs of the tribe as a whole. Individual hapū may be concerned to know if distribution policies are proposed that will enhance their

COMMUNITY EMPOWERMENT AND PARTICIPATORY DEMOCRACY

¹⁰⁵ New Zealand Bill of Rights Act 1990, s 20.

ability to maintain their own development programmes. This does not detract from the need for the centralised prosecution of Treaty claims or administration and development of assets, but ensures that local members have a meaningful say in the process, rather than being passive beneficiaries.

CONSENSUS AND ASSISTED DISPUTE RESOLUTION

- 6.17 The principle is to promote consensus development in forming and operating entities for tribes and general-Māori groups. Again, the principle may be sourced to Māori tradition where rules of debate were crafted to enable consensus to develop.
- 6.18 Some assumptions about the autocratic power and authority of traditional leaders may need to be questioned. While such power was demonstrated in times of war, there is considerable evidence that leadership strengths in peace were demonstrated not by steamrolling proposals but by the capacity to identify, forge and execute a consensus community opinion. The development of consensus processes amongst Māori may be attributed to the imperative of maintaining tribal unity. Today, consensus serves as well to maintain the stability of the entity appointed to represent the group.
- 6.19 A number of factors have, however, undermined the traditional value of consensus in modern Māori society. These include:
- The dispersal of Māori, their exposure to alternative rules for discussion, and the consequential failure of many individuals today to adhere to the customary values and protocols maintained by their forbears.
 - The requirement for voting processes to determine outcomes in the rules and regulations affecting Māori trusts, trust boards and incorporations, and in the regulations for meetings of the assembled owners of Māori land.
 - The high level of dissension commonly associated with current entity formation and with the determination of policy in the ongoing administration of a community's affairs.
 - The occasional assumption that a high level of dissension justifies government intervention or control of the process or dictatorial tribal leadership. In fact, external intervention or control of the process and dictatorial leadership may in themselves be the cause of a high level of dissension.
 - The lack of binding rules and settled processes through the corrosion of tribal, decision-making systems.
 - The lack of expeditious, legal remedies to constrain high-handed practices.
 - The increased dissension arising from the greater interest of external agencies in dealing with the group raising questions of who represents the group for the particular purpose.
 - The increase in “patch disputes” between tribes or general-Māori groups as a result of government policy proposals, including Treaty settlement proposals.¹⁰⁶

FAIR PROCESS, PROTECTION OF MINORITIES AND ACCESS TO LAW

- 6.20 Where consensus has failed, it is necessary to look at forms of assisted dispute resolution. The principle is that Māori should have access to fair and settled processes in forming and managing entities with ultimate access to the courts to resolve process issues.

¹⁰⁶ That which is characterised as a “patch dispute” may not be so. For example, to complete a claim settlement, several tribes with an interest in a resource area may be required to delineate a boundary between them.

6.21 The rationale for the principle is twofold:

- the lack of fair process and clear rules generates long-lasting resentments that threaten the credibility of any entity established to represent the group; and
- fair process in entity formation is necessary to establish a valid mandate, while fair process in ongoing operations is necessary to maintain that mandate.

6.22 A fair process in entity formation is demonstrated:

- by a faithful record of proceedings that provides conclusive evidence that the entity structure and charter has the free and informed approval of most members in each constituency;
- by evidence that members had access to dispute resolution mechanisms with ultimate access to the courts on process issues; and
- by a charter that makes adequate provision for the needs and interests of each constituency and other minorities.

6.23 The outcome to be expected of a fair process in entity formation is a valid mandate for the representative entity. If the process is wrong, a valid mandate cannot be assumed, notwithstanding the outcome of a popular vote.

6.24 A fair process in the ongoing operations of an entity is one that ensures constituencies, interest groups and individual members have full opportunity to participate on an informed basis with access to dispute-resolution mechanisms and ultimate access to the courts. It is evidenced in part by a charter that commits to sound principles of good governance.

6.25 While dispute resolution mechanisms are important in resolving policy issues, ultimate access to the courts is critical to ensure compliance with any statutory or common law rules on process in entity formation and adherence to the requirements of the eventual charter.

6.26 These principles may be sourced to an overarching assumption in legal development that all persons should have access to settled process for the management of their individual and collective interests.

CHOICE

6.27 An important principle on which this report is premised is that, to the most reasonable extent, statutory provisions for process in entity formation and statutory requirements for charters should avoid prescription and provide options.

6.28 The purpose is to facilitate development without unduly restricting it. We have already indicated that use of the proposed Waka Umanga Act would be optional. The Act would provide an avenue by which entities may gain corporate status, recognition as representative bodies and recognition that their charters meet with good governance standards. However, there is no legal requirement to use the Act.¹⁰⁷

¹⁰⁷ We have considered the prospect that Government may require that an entity to be registered under the Act before it will deal with it. However, if the legislative intention that registration is optional is clear in the Act, we consider that Government could not lawfully require registration. It could only do as it presently does, that is, to insist that the Crown's standards for mandate and good governance have been met.

- 6.29 Similarly, rules for entity formation should empower groups to reach agreed conclusions, with provisions for a prescriptive determination by a court to apply only as a last recourse. The concern is that policy issues should be decided by the people, not the courts. Māori should have maximum scope and autonomy in designing their institutions limited only by that which is necessary to maintain fair process. For example, in relation to tribal bodies, the group must have maximum scope in defining the constituencies that make up “the tribe” and the relationship that the tribe may have to any larger tribal grouping.
- 6.30 In keeping with the provision of options, provision will also be required to allow existing entities to register as waka umanga if they so desire. This will require legislative provisions for transitional matters such as transfer of assets and liabilities to the new entity, and for disputes between entities regarding their respective assets and liabilities to be resolved by the Māori Land Court, if necessary.¹⁰⁸
- 6.31 Statutory requirements for charters need to be constrained, distinguishing between core obligations that are critical and therefore mandatory, and policies that are merely desirable. To assist groups formulating their charters on matters that are not mandatory, the Commission proposes that schedules to the Act will set out standard criteria for varying sizes of waka umanga, which can be adapted to suit the circumstances of each waka umanga.

DIVERSITY

- 6.32 In keeping with the principle of maintaining options, the principle in this instance is to provide for the diversity of situations that exist in tribal relationships. Just as no one tribe is the same, nor should all tribal representative structures be the same.
- 6.33 The social structures of tribes may be located at several levels ranging from individual marae, to a hapū which may be composed of several marae, to an iwi or other confederation of hapū, to the tribes of a geographic district, to the wide ranging tribes of a waka and, ultimately, to pan-tribal organisations that embrace the tribes of Aotearoa. These various combinations may be seen to reflect not a hierarchy of control, but a spectrum of purpose-built combinations.
- 6.34 It may be necessary to provide for representation at each of these levels if Māori needs are to be met. It is equally critical that the formation of an entity for a group at one level does not inhibit the formation of a larger entity of which that group is part. For example, a waka umanga may be formed for a hapū to manage the affairs of that hapū. At the same time, that hapū, represented by its waka umanga, may be part of a larger combination that manages the affairs of the combined group on agreed terms.

ECONOMIES OF SCALE

- 6.35 The historical evidence is clear that culture has not constrained hapū from combining in the past where there has been a need to do so. They combined frequently for particular expeditions such as fishing, warfare or migrations. These combinations grew in size and became more regular as a result of the musket wars and subsequent colonisation. In short, there has been no customary inhibition on group reformation or aggregation. On the contrary, hapū today

¹⁰⁸ For examples of such transitional provisions see Trustee Banks Restructuring Act 1988 (now repealed), ss 6 and 7; and Electric Power Boards Act 1925 (also now repealed), s 7.

regularly refer to the larger, descent groups of which they form part, describing them by districts or in terms of “waka”.¹⁰⁹

6.36 Equally, the development of iwi-based entities reflects a realisation that it was impractical to manage major Māori development and policy at the fractionated level of the hapū. This is illustrated in the establishment of Māori trust boards from the early 1900s. It is reflected in the policy behind the Maori Fisheries Act 2004 and the Government’s preference for Treaty settlements with “large natural groupings”.

6.37 Where the primary tasks are to manage assets and provide representation for the group, economies of scale clearly favour a large group as providing the most viable operation. It enables greater investment effectiveness, a more skilled infrastructure at less cost by avoiding duplication, and more power when treating with third parties. The main constraint is substantially that the traditional value of local autonomy compels careful provisions to uphold and foster the autonomy of the group’s constituent parts.

6.38 Accordingly, the elements of a successful entity for the management of assets are likely to include the following:

- that it represents the largest group that is consistent with the people’s perception of their history and identity and is acceptable to them for the purpose given; and
- that it expressly supports the traditional autonomy of each constituency.

6.39 One of the matters that will determine whether a hapū should form a waka umanga is whether it has assets of its own that are large enough to justify the formation and compliance costs.

6.40 An aspect of this principle is that it is necessary to maintain proportionality of transaction costs in any provisions made for the establishment and operation of entities, having regard to the comparative size of the group or of the assets administered on the groups’ behalf.

RATIONALISATION 6.41 The principle is to provide support for Māori entities to combine in order to more effectively marshal their affairs.

6.42 Over time a large number of entities have been established to manage assets for specific tribal groups. They include Māori trust boards, a plethora of trusts created by Maori Purposes Acts and other Acts, both public and private, and (most especially for present purposes) entities provided for by the Maori Fisheries Act 2004. Combining entities avoids duplication of management and provides for greater effectiveness and economy.

6.43 A considerable problem is that there is often a mismatch between constituencies provided for under the Maori Fisheries Act 2004 and the groups with whom the Government is prepared to settle claims. While there may be real problems in aligning the constituencies for the settlement of both fisheries and land claims, it is clearly in the interest of tribes to seek that alignment where that is practicable.

109 “Waka” in this context refers to the early ocean-going vessels by which groups settled in different parts of Aotearoa (New Zealand).

- 6.44 To achieve a reasonable alignment in forming new entities, Māori must have time to debate the option of combining with others already existing. Where the constituencies are not the same, provision may be considered for a common administration that manages separate accounts.

EARLY ENTITY DEVELOPMENT

- 6.45 The principle is to enable and support groups to form entities at an early stage. Logically, entity formation should precede the Treaty claims process. Claim negotiators should be appointed by established, democratic entities and should be accountable to them. If later, Government requires a larger group with which to settle a claim, then entities may negotiate the terms on which they will combine with others.
- 6.46 Sound discussion on entity formation also tends to be sacrificed to expedience when entity formation is left until claims are due to be settled. The settlement of claims tends to take priority over the development of sound management structures and the development of an appropriate structure may be caught up in disputes over the terms of settlement.
- 6.47 Early entity development also provides for adequate timelines for considered and informed discussion and consensus building. Timelines in the current mandating process tend more to be focused on the imperative of quick settlements. This causes suspicions that a structure is being imposed, adding to the prospect of dissension and court challenges and leading to greater overall time loss.
- 6.48 The principle of early entity development promotes the more expeditious settlement of Treaty claims by establishing in advance, the structure by which negotiators can be appointed, instructed and made accountable to the tribal organisation.
- 6.49 The basis for the principle is that it promotes Māori self-development of their own institutions according to their own timelines for adequate discussion and debate. The process by which early entity development can in practice be achieved is considered in Part 3.

RECOGNITION

- 6.50 The principle of recognition is that an entity with a proven mandate to represent a tribe should be recognised as the legitimate representative of that tribe. It should be recognised as legally and exclusively entitled to represent the tribe to third parties and in legal proceedings on all matters relating to the tribe's affairs, save to the extent that it is constrained in so doing by its charter.
- 6.51 Recognition would not oblige any person to deal with the tribal entity, but anyone wishing to treat with the tribe must deal with its legitimate representative or with any constituency with a delegated authority to act on a particular matter. Nor would it oblige the Crown to deliver government services through the entity. But where the Crown wishes to treat with the tribe on tribal business, it must treat with the tribe's official representative or those authorised by that representative.
- 6.52 Similarly, the fact that a recognised entity exists would not oblige the Crown to settle a claim with that entity, but the Crown must do so if it wishes to settle a claim with the tribe that the entity represents. It would remain open to the Crown to seek a settlement with a wider or narrower group of tribes than that

represented by the entity. However, the Crown should not include a tribe in any settlement proposals except through the recognised entity that has been established to represent that tribe.

- 6.53 Recognition does not restrict tribal members from expressing their own views or restrict members of the public from soliciting views or support from tribal members. Nonetheless, only the recognised entity can state the official tribal position as determined through its representative organs. It is also an important tool in building sound public relations. In addition, it encourages individual tribal members to commit to the entity as the tribe's official representative.
- 6.54 However, to be recognised as a legitimate representative the entity must be properly mandated by the tribe. It must have popular support secured by proper process; it must be truly representative of the community and answerable to it.
- 6.55 The reasons for such a principle are essentially pragmatic. It empowers and stabilises tribal governance since the tribe must then be consulted through its mandated body. Third parties are assisted by the existence of a certified representative for the purposes of treating with the tribe. The entity cannot be undermined by persons picking and choosing representatives to deal with, and challenges to leadership or mandate are determined only by the democratic processes of the charter. Nor could the entity be undermined by the mere establishment of a rival that promotes itself to others as the true representative of the tribe.
- 6.56 This principle applies primarily to tribal groups. General-Māori organisations are not representative of communities in the same way as tribes, for the reasons considered in Chapter 5. We note as well that the principle of recognition was provided for in the short-lived Runanga Iwi Act 1990. It was also provided for in the Orakei Maori Trust Board Act 1991 and in Te Runanga o Ngai Tahu Act 1996. However, it has not been carried through to more recent legislation, for example, in the Te Runanga o Ngati Awa Act 2005.
- 6.57 The importance of recognition has been accepted in other jurisdictions. The Canadian Royal Commission on Aboriginal Peoples has considered that aboriginal organisations are more effective when they are officially acknowledged as the proper representatives of the people.¹¹⁰ This follows opinions earlier expressed by researchers for the Harvard Project on American Indian Development, although the recognition of tribal governance has long been provided for in Canadian claim settlements.¹¹¹

GOOD GOVERNANCE

- 6.58 The principle of good governance is that entities must adhere to certain core obligations and management standards. The principle is necessary to maintain the mandate entrusted to the entity by the affected people and the credibility of

110 Royal Commission on Aboriginal Peoples *Report of the Royal Commission on Aboriginal Peoples* (Canada Communications Group, Ottawa, 1996) vol 2, part 3.

111 See Stephen Cornell *Five Myths, Three Partial Truths, A Robust Finding and Two Tasks* (Project Report Series, Harvard Project on American Indian Economic Development, John F Kennedy School of Government, Harvard University, 1994); Stephen Cornell "The Importance and Power of Indigenous Self-Governance: Evidence from the United States" (National Indigenous Governance Conference, Canberra, 2002); and Institute on Governance *Understanding Governance in Strong Aboriginal Communities: Phase One: Principles and Best Practices from the Literature* (Ottawa, 1999).

the entity in the political and commercial communities. It is also necessary for successful operations in both commercial and social enterprises.

- 6.59 The principle encapsulates long-established tenets of law where assets are managed on behalf of others and more recent insights, now universally proclaimed, into best practices in political and commercial development.
- 6.60 Good governance criteria are manicured to suit the particular organisation. In this instance, they may serve to maintain the distinction between the entity and the tribe and ensure that assets are administered, not only for present generations, but for the generations to come. At the same time, they promote systematic management of competing interests and objectives, and structures and systems which are comprehensible to others, including banks, potential business partners and local and central government. Accordingly, they permeate throughout our proposals.

THE PURPOSES OF THE PROPOSED WAKA UMANGA ACT

- 6.61 To fit with those principles we would introduce the Waka Umanga Act as having the purposes set out below. The subsequent structure of the Act is considered in Parts 3 and 4.

RECOMMENDATION

> Continued next Page

6.1 We recommend that the Waka Umanga Act has specified purposes along these lines:

- to provide for entities to manage the communal assets of tribes and other Māori groups;
- to provide for a corporate entity that meets the diverse objectives and cultural circumstances of tribes and other Māori groups;
- to provide certainty in tribal governance and in identifying bodies that are authorised to represent tribes;
- to promote stable tribal governance and assist third parties in treating with tribal groups by providing for entities to be recognised as the legitimate representative of specified tribal groups;
- to enable existing entities representing Māori groups to register under this Act;
- to provide processes for the establishment of tribal corporations that:
 - are equitable and open to all affected;
 - are independently managed by tribal organisers;
 - provide for local and federal structures based on tradition;
 - provide for dispute resolution with fair access to law; and
 - provide for the integrity of mandates to be independently assessed;
- to enable tribal representative authorities to express the mana of the tribe and the kaitiakitanga of its representatives in the administration of tribal affairs under the Act;
- to enable Māori groups to combine to achieve an economic scale in operations;

RECOMMENDATION

- to promote good governance through the registration of entities whose charters are representative and democratic and provide adequately for:
 - accountability to the affected group;
 - transparency in operations;
 - responsible stewardship;
 - internal dispute resolution; and
 - in the case of tribal entities, have a proven mandate; and
- to provide for ultimate and fair access to the courts on tribal entity formation and on the management of tribal entities.



Part 3

STRUCTURE

*Hangā te whare kia tika
Kia pakari tōna tū*

*Build the house strong
And people will seek
its security*

Chapter 7

Formation

INTRODUCTION 7.1 This chapter's main purpose is to provide guidelines for forming a waka umanga and to introduce a statutory scheme to manage the disputes that are likely to arise. First, we introduce the types of waka umanga that may be formed under the Act. The Act's purposes were introduced at the end of the last chapter.

THE ENTITIES THAT MAY BE FORMED

RECOMMENDATION

7.1 The statute should enable registration of the following types of waka umanga, in each case where the waka umanga manages or intends to manage communal assets for the associated group:

- waka umanga for tribes (called "waka pū"); and
- waka umanga for general-Māori groups (called "waka tūmaha").

7.2 Waka pū may be established for:

- a tribal group with several tribal constituents (a "tribal confederation"), whether or not the constituents have their own waka umanga;
- a constituent group in a tribal confederation (a "tribal constituency"), whether or not the federal body is a waka umanga;
- a tribal group that is not a confederation or a constituency (a "stand-alone tribal group"); or
- a coalition of several confederations (a "tribal coalition").

7.2 To illustrate the effect, a waka umanga could be registered for a stand-alone hapū, for a hapū that is part of an iwi, for the iwi of which it is part, and for a coalition of several iwi. A single waka umanga may comprise a number of smaller waka umanga or may be a confederation comprising a mixture of entities such as hapū-based trusts and incorporated societies or marae committees. The structure may be similar to a group of companies, a company with a number of subsidiaries or an incorporated society with several branches.

7.3 The Act is not intended to affect the continued formation or operation of other Māori organisations in civil society or of Māori land trusts and incorporations under Te Ture Whenua Maori Act 1993. To reduce administration costs,



some may choose to come under the umbrella of a waka umanga but they will retain their separate identity and responsibility for reporting.¹¹²

GUIDELINES
FOR FORMING
WAKA PŪ

- 7.4 These guidelines cover the steps necessary to establish a waka pū. They are not binding rules but suggestions to assist a proper process of formation. They take into account the standards necessary for registering under the Act and for mediating objections, as described later in this chapter and in Chapter 8. They cover the need to start promptly, appoint scheme promoters, develop a scheme plan, define constituent groups, develop a tribal vision statement, approve a scheme plan, determine the rules for formation, promote options, consult with others, develop the charter, negotiate any terms of confederation, manage human rights issues and determine the final ratification process.
- 7.5 These guidelines may be used whether or not there is an intention to register the entity under the Act. As we have said, the formation of a waka umanga is optional and tribes may prefer some other structure to manage their affairs.

Prompt initiatives

- 7.6 *The Law Commission suggests that under the Waka Umanga Act, tribal leaders should move promptly to establish an entity for the settlement of Treaty claims if no suitable entity already exists.*
- 7.7 Early steps are needed because of the time required for full community participation in tribal entity formation. Time is required for consensus-building, adequate dispute resolution and the assurance of “community ownership” of the structure. The relevant principles were discussed in Chapter 6.
- 7.8 Taking time can also save time. Anecdotal evidence suggests that disputes are fewer and more manageable if time is taken for discussion than if proposals are “steamrolled”. Disputes generated by overly-tight timelines and inadequate consultation lead to a greater loss of time overall, additional expense and, sometimes, lasting divisions.
- 7.9 An early start is also needed to sever issues about the appropriate tribal structure from later issues about the settlement of tribal claims. As we have seen, tribal structures must be made for tribes, not for Treaty settlements. Presently, some groups defer taking an initiative because the Crown’s mandating requirements are not known to them in advance. As a result, they may be overly influenced by the Crown’s settlement agenda. Other groups have deferred taking an initiative because there was no adequate process to settle disputes.
- 7.10 We also think entity formation should precede negotiations so that the imperatives of the claims process do not overly determine the shape of tribal organisations or overwhelm the proper consideration of optimum

112 See Charities Act 2005, s 46 where a parent entity and other entities may be treated as one for purposes of that Act.

PART 1: Outline
PART 2: Principles
PART 3: Structure
PART 4: Governance

tribal structures. Early entity formation is also more logical and efficient. A settled infrastructure should exist whereby Treaty negotiators can be appointed and authoritatively instructed by the waka umanga, through which they would be accountable to the tribe as a whole.

- 7.11 A further reason for deferring entity formation has been that funding may not be available for that purpose until the group has been accepted as a group with whom the Crown will negotiate. Funding may then be available from the Government or independent agencies like the Crown Forest Rental Trust.¹¹³ For the reasons given, we urge a change to funding practices to enable the formation of tribal structures ahead of, and independently of, Treaty settlements. We believe the Secretariat, referred to in Chapter 11, will be a useful body to work with government and tribal entities to help identify the reasonable needs of tribes for funding and to channel existing funds appropriately. Further, early and streamlined assistance will provide significant cost-savings to both the Crown and tribes.¹¹⁴
- 7.12 The initiative to start the process may be taken by tribal leaders in consultation with local kaumātua. Alternatively, it may be taken by an existing tribal body such as a Māori trust board or a mandated iwi authority under the Maori Fisheries Act 2004. These bodies may wish to take the initiative where there is a prospect that they may manage the further assets expected from a land settlement or combine or collaborate with a new body formed for that purpose.

Appoint scheme promoters

- 7.13 *The Law Commission suggests that those taking the initiative should establish a process for the selection of scheme promoters to manage the project.*
- 7.14 Those finally selected to manage the project are referred to as “scheme promoters”. We consider that the scheme promoters must have the confidence of the people and, to that end, should be chosen by them.
- 7.15 The selection of scheme promoters is necessary to avoid any suggestion of self-interest or “steam-rolling”. It also establishes from the outset an intention to proceed democratically and to engage with the community throughout, according to the principles discussed in Chapter 6. We suggest that those who are to manage the project should be selected, appointed or approved at a representative gathering. For example, the members taking the initiative may call a hui or a series of hapū gatherings to appoint the persons to carry the project from that point. A committee comprised of hapū representatives or directly accountable to hapū may be preferred.

Develop a scheme plan

- 7.16 *The Law Commission suggests that the scheme promoters should develop and settle a scheme plan by which the waka pū will be formed. The plan should be presented and discussed openly at public meetings and, once developed, must be readily accessible to tribal members.*

113 Te Ohu Kaimoana also assists groups seeking a mandate as mandated iwi authorities under the Maori Fisheries Act 2004.

114 See Chapter 3 under “Costs and benefits”.

- 7.17 This is necessary to help meet the criteria for the registration of a waka pū as described in Chapter 8. Amongst other things, a waka pū must be established by a process that is transparent. To achieve that, the proposed steps and the rules for participation should be settled in a scheme plan that is published in the early stages. Those steps and rules may be changed, as the project progresses, but only by a process set out in that plan.
- 7.18 The scheme should also be developed at open meetings with the affected constituencies and finally settled at a gathering that is open to all. It is desirable for a plan to outline strategies and milestones and provide for regular plan reviews.
- 7.19 Publishing a scheme plan helps to develop public confidence by showing from the beginning a commitment to openness, transparency and fair and clear rules for decision-making. A scheme plan creates a picture of the goals, the process and the sequence of events. When the process and the rules are clear, people are encouraged to be involved.
- 7.20 Where funds permit, independent process advisers may be engaged to assist in completing a fair, scheme plan. The Secretariat we propose in Chapter 11 could provide or fund independent, expert advice. It is important that any advisor should be, and be seen to be, independent of all interest groups.
- 7.21 A scheme plan may cover such matters as the tribal vision, the steps proposed to develop the representative body, the process by which the tribal constituencies will be settled, the rules for meetings, the appointment of a drafting committee, the proposals for settling disputes and the process by which the scheme plan itself may be changed. Some of these matters may merely be introduced in the initial plan to be more fully developed over time. Some are discussed further in the sections that follow.

Define constituent groups

- 7.22 *The Law Commission suggests that where a confederation is proposed, the scheme plan should provide for the constituent groups to be determined.*
- 7.23 While it is important to provide for local communities, it is also important that the entities receiving Treaty settlements and fisheries assets are sufficiently large to operate economically. In many contexts, a confederation will achieve that aim. Such a confederation should align with the people's perception of their collective identity. However, reaching an agreement with prospective constituencies takes time and is frequently the most difficult part of tribal entity formation. A scheme plan may particularly need to take into account that:
- many hapū, particularly those on the border of major tribes, could be at home in other confederations;
 - opinions on how hapū are clustered and how many representatives each should have may have changed due to changes in names, allegiances and numbers; and
 - sometimes the Crown will not settle with a hapū unless it joins a confederation.

- 7.24 A scheme plan may initially provide for no more than ongoing discussions on the appropriate constituents within the descent group and with adjoining descent groups. It may help to start with discussions with kaumātua as to the constituencies that they consider appropriate for the confederation. Later, an amended scheme plan should provide for a more detailed process for negotiating the terms on which prospective constituents may enter into the confederation and by which particular issues will be resolved. That is dealt with later in this section.

Develop a tribal vision

- 7.25 *The Law Commission suggests that the first major hui that is called should be for the purpose of developing a tribal vision statement.*
- 7.26 The formulation of a tribal vision is critical in developing a robust and representative structure. It should be the first major matter to be settled. The necessary sense of direction that a vision statement gives informs the goals to be achieved, which will then be added to the scheme plan, and provides the foundation for the tribal edifice to follow. The process also sets the pattern for open-minded, consensus-building discussions. The principles involved were considered in Chapter 6 under the headings of “Cultural match” and “Mandated vision”.
- 7.27 In a tribal vision statement, the people describe who they are as a group, where they have been, where they seek to be, the important values they seek to uphold and the goals they seek to achieve. Tribal culture is generally replete with supporting statements of group identity that will assist in providing the vision. Like tribal sayings, vision statements are generally inspirational.
- 7.28 An important focus for the initial hui (or series of hui) concerns the optimum goals to be achieved. The hui must be widely advertised and held in accessible locations, with meetings in urban places where need be. These set the design for the scheme plan by which the scheme promoters will seek a structure to match the vision as mandated by the people. It is not a purpose of the initial hui to dwell on the practical difficulties of formation. However, upon the completion of a vision statement, the hui may approve the terms of a draft scheme plan by which matters will proceed from that point.

Approve the scheme plan

- 7.29 *The Law Commission suggests that the scheme plan should be approved by the people.*
- 7.30 Popular approval of the scheme plan gives it legitimacy and reinforces in peoples’ minds the commitment that scheme promoters must make to the principles of participatory democracy, community empowerment, fair process and transparency. Those principles are the hallmarks for effective tribal entity formation.
- 7.31 Public debate on the scheme plan must be encouraged so that there is general agreement over the steps to be taken and the rules to be applied before final approval is given. Similarly, changes to the scheme plan over time should be

approved at notified public meetings. The scheme plan should incorporate the tribal vision and agreed goals. It may be debated and settled at the end of the initial hui to develop the tribal vision.

- 7.32 The hui to approve the scheme plan may also confirm or change the persons appointed as scheme promoters and approve the drafting committee. This should be a representative committee that works to the direction of the scheme promoters to draft refinements to the scheme plan and to develop the entities' charter as discussions progress.

Determine the rules

- 7.33 *The Law Commission suggests that the scheme plan should settle the general rules to be applied. The rules should meet the standards required for fair process.*

- 7.34 A scheme plan is necessary to meet the requirement of fair process for registration and recognition under the Act. However, the cloth must be cut to size and the scope of the rules will depend upon the size of the proposed group and the funds available to the scheme promoters. Preferably, there will be rules for notifying and conducting meetings, managing the conduct of participants and keeping an independent record of proceedings. Very importantly, the rules for who may vote as members of a constituency or marae must be spelt out before voting is required to finally ratify proposals. These rules should overcome the "swamping" and "bussing" practices discussed in Chapter 4 that threaten procedural integrity and the prospect of registration and recognition. Those practices work only in the absence of settled rules.

- 7.35 The ultimate test is whether the process has been fair and reasonable. Impartiality must be obvious and anything that smacks of opportunistic or manipulative behaviour must be avoided.

- 7.36 Guidelines for personal conduct may be needed where traditional respect protocols are not regularly adhered to by all. Guidelines should describe the requirements of speaking with respect. They should serve to ensure that the standards are known by all and to establish the basis on which persons may be disciplined for failure to comply, including requirements that they leave the meeting.

- 7.37 To meet the standards of natural justice and human rights, the guidelines must also ensure that women and young adults have an equal opportunity to be heard and a fair opportunity to take on positions.¹¹⁵ If not, they may object to the registration of a waka umanga on the grounds of gender or age bias in the formation process. Scheme promoters must therefore ensure that women and young adults are not discriminated against at meetings and that those chairing them are forewarned of the need to neutralise any discriminatory assertions.

- 7.38 The rules developed must be seen as a guide, not a straightjacket. For instance, timelines may need to be extended to deal with unforeseen circumstances. Provision should therefore be made for rule changes to be approved at publicly notified meetings where changes can be justified as necessary for good order and fair process.

115 The application of human rights law is considered under "Membership" in Chapter 4.

Promote options

- 7.39 *The Law Commission suggests that scheme promoters should initially propose options rather than finite proposals.*
- 7.40 To maintain neutrality, scheme promoters should impartially examine and report on all reasonable options before expressing a preference, and after those who have proposed options have presented them themselves. It is important that the people should discuss the full range of alternatives and seek consensus on the preferred choice. There should be no appearance of imposing a particular view by not presenting alternatives when viable alternatives exist.

Consult with other groups

- 7.41 *The Law Commission suggests that where a Treaty claim settlement is contemplated, scheme promoters should consult with other bodies managing assets for the tribe with a view to rationalisation of bodies. They should also consult on the size of the group with the Crown where a Treaty settlement is contemplated, Te Ohu Kaimoana where a mandated iwi organisation is involved and with the Secretariat on the optimum scheme plan.*
- 7.42 Separate tribal structures for land and fish compensation and for other tribal assets present an uneconomic, bureaucratic replication and capital dispersal that should be avoided where possible. The prospect of combining under one tribal authority should be routinely put to the people.
- 7.43 While tribes must define themselves and their historic confederation they must also consider the Crown's preferences where a Treaty settlement is in mind. The Crown has stated that it prefers to negotiate with "large natural groups" but what this may mean in a particular case is not clear and the policy appears to change.¹¹⁶ Early dialogue to remove uncertainty is plainly desirable and, provided both parties engage seriously in the process, would prevent many of the difficulties confronting Treaty negotiations in the past.
- 7.44 Where fisheries assets are involved it will be necessary to consult with Te Ohu Kaimoana. Many mandated iwi organisations are currently being formed under the Maori Fisheries Act 2004 to manage asset allocations. For that purpose, the hapū aggregations are prescribed by the Act. To achieve the benefits of rationalisation as discussed in Chapter 4, it may be proposed to incorporate a mandated iwi organisation into a larger, tribal structure. In that instance, it would help to liaise with Te Ohu Kaimoana to ensure that the proposals do not create a conflict with the Maori Fisheries Act 2004 and that the charter requirements are not less than those that Te Ohu Kaimoana requires.
- 7.45 The proposed Secretariat should be consulted with as it would be able to give professional advice on entity formation. It may also be in a position to provide skilled mediators, facilitators and moderators. A professional moderator appears to be critical for the initial hui to settle the tribal vision and scheme plan.

116 See Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Summary Edition, Wellington, 2004) 21. Note also that the Rangahaua Whānui Reports of the Waitangi Tribunal were organised in conformity with large tribal districts.

Develop the charter

- 7.46 *The Law Commission suggests that a representative, constitution-drafting committee should be appointed to develop a charter. It should be developed in consultation with the affected constituent groups.*
- 7.47 Popular “ownership” of the charter requires consultation on its terms with constituent groups and the groups as a whole, and the gradual drafting of a charter as opinions are developed. It is necessary that the committee ensures that all major issues are resolved by the tribe (for example, the constituencies and the number of representatives for each) and develops the charter as agreements are reached within the tribe. It must also identify the options for the more specific charter terms and promote wide discussion on each.
- 7.48 While specialist drafting expertise is usually essential before a charter is adopted, it is important that lawyers and other technocrats not take over the process too early. Both the schedules to the Waka Umanga Act and any templates developed by the Secretariat can provide a basis for discussions on a charter, but they will have to be adapted to ensure they reflect the vision and characteristics of the tribe.

Negotiate the terms of confederation

- 7.49 *The Law Commission suggests that where a confederation is proposed, scheme promoters should promote a policy for developing the terms on which constituent groups may agree to federate.*
- 7.50 We have already considered how the eligible constituent groups might be identified. The question at this point is whether their entry into the confederation can be secured. We consider that to maintain the tradition of hapū autonomy, it is important that constituent groups should enter the confederation on a clear understanding of the terms. For example, some groups may seek a separate accounting for their Treaty claims to specific resources before any large tribal settlement is effected or that a specified proportion of profits available for general purposes must be distributed to hapū.
- 7.51 We think the basis proposed for a confederation should be clarified in a policy document developed and circulated after wide consultation, with subsequent revisions circulated as changes are made or as groups negotiate particular terms. The matters to be considered in developing the terms for confederation include the following: the provisions to be made for representation on the central, representative body; the number of constituent groups; whether each is appropriately to be regarded as a separate constituency; whether constituent groups should be aggregated by districts; whether taurahere should be included as constituencies; the number of representatives for each constituency having regard to comparative sizes; the opportunities that constituent groups have had or will have in developing overall policy; the extent to which distributions will be made direct to constituent groups to develop their own funding base; the extent to which the interests of individual constituencies (for example, in particular resources or Treaty claims) are acknowledged and protected; and the provisions made to assist constituent groups to develop their own entities under the umbrella of the larger tribal group.

- 7.52 Discussions may also be needed on mechanisms for constituents to withdraw or on provisions to review the charter within a given time. The withdrawal of constituent groups is discussed in Chapter 8. However, a full discussion of the terms on which groups aggregate should reduce the need to use such provisions.
- 7.53 The issues governing the terms on which groups may federate were discussed in Chapter 6 in relation to the need to respect both autonomy and diversity. The task is to balance the traditional autonomy of hapū with the advantages known to tradition of forming economic or military alliances. The need for such a policy is underlined by the fact that conflicts in relation to constituent groups have been at the heart of major disputes in the recent past. We see little point in progressing proposals for a large confederation until the issues relating to constituent groups have been discussed and settled.

Define the final ratification process

- 7.54 *The Law Commission suggests that in the event of general support for a structure and charter, the scheme promoters should define and seek general agreement on the process for final ratification, and should consult with the Crown on that process.*
- 7.55 A settled ratification process is necessary to ensure that there is adequate evidence of final approval from the people. Such evidence is required for the registration and recognition of a waka pū under the Waka Umanga Act, as is considered in the next chapter. It is also required for the settlement of Treaty claims.
- 7.56 A usual process for final ratification incorporates a timetable for hui to be notified for specified places and times with provision for ratification by each constituency. While it is ultimately for the Māori Land Court to determine whether a valid mandate has been obtained, we suggest that the Crown should be consulted about any standards that it may have as the Crown has the right to be heard before the Māori Land Court when registration is sought.

THE PROCESS FOR MANAGING OBJECTIONS

- 7.57 The following are our proposals to resolve complaints and arguments arising in the formation process. They seek to give effect to certain of the Act's purposes: to provide a clear and settled process for the establishment of tribal representative authorities that is equitable and open to all affected; that is independently managed by tribal organisers; that facilitates local and federal structures that build on tradition; that provides for dispute resolution with fair access to law; and that enables the integrity of mandates to be independently assessed.

RECOMMENDATION

> Continued next Page

7.3 The statute should provide the following remedies for tribal groups:

- Where anyone is proposing or proceeding to establish an entity to represent a tribe (other than for the purposes of the Maori Fisheries Act 2004 or the Foreshore and Seabed Act 2004), any 15 or more persons who are directly or indirectly affected by the proposal may apply to the Māori Land Court to review the adequacy of the initiatives taken or proposed.

RECOMMENDATION

- Applications may be made on the grounds that the applicants are, or are likely to be, prejudicially affected by the absence of an agreed, adequate or publicly notified scheme plan, by the prospective inclusion or exclusion of any group, or by any steps that have been taken or are proposed.
- The Court may direct a conference, mediation or facilitation. It may incorporate the terms of any settlement in an order. Alternatively, or if need be, it may give directions for notices and hearings.
- On hearing an application, the Court shall consider whether the proposals are fair and adequate in the circumstances and shall have particular regard to whether the proposals:
 - are necessary (for example a representative tribal body may already exist or other steps are already underway to form one);
 - are being managed independently of external interests (for example, the Crown or another tribal group should not be dictating the structure of a confederation);
 - have been developed after adequate notice to, and consultation with, the affected tribal groups;
 - have adequate provisions to take account of cultural preferences;
 - are transparent and democratic;
 - have adequate timelines and provisions for discussion and the development of consensus views;
 - sufficiently inform persons of their opportunities to participate in the process, of any terms and conditions on which they may participate and provide reasonable access to information prior to meetings;
 - provide for those undertaking functions in the process to be democratically selected unless there are special reasons for them to be appointed (as with moderators, mediators or kaumātua);
 - has adequate voting provisions including adequate criteria to determine who may vote at hapū meetings; and
 - provides for a fair process.

RECOMMENDATION

> Continued next Page

7.4 The Court may also consider:

- whether the proposals conform with traditional decision making and other customs, where not in conflict with human rights or natural justice; and
- any of the matters the Court must consider when determining objections to registration (as described in Chapter 8).

7.5 Following a hearing, the Court shall rule on whether the applicants are, or are likely to be, unduly prejudiced by the proposed scheme. Where such prejudice exists or is likely, then the Court may:

- direct the scheme promoters to take action to remove the prejudice and at the Court's discretion, describe the action to be taken;

RECOMMENDATION

- direct that elections be held and how those elections shall be conducted; or
 - direct the preparation of a scheme plan or an amended scheme plan for the future conduct of the project and describe the matters to be included in that plan.
- 7.6 The Court shall be limited to process issues and shall not deal with the merits of competing policy proposals, provided that, if the Court is satisfied that a stalemate has been reached and the parties agree, the Court may determine the relevant policy issues and include its determination in an order.
- 7.7 The Court shall promote the prompt disposal of review applications. A Judge, after directing such judicial conferences or mediation as is considered expedient, may direct the time and place of hearing and the public and individual notices required and may hear applications at other than normal sitting times and places.
- 7.8 The Court may decline to hear an application:
- that is frivolous or vexatious;
 - that has been made without prior referral to mediation, where some form of mediation has been established in terms of a published scheme plan, unless, in the circumstances of the case, the Court considers that reference to mediation is undesirable, unnecessary or likely to delay progress unduly; or
 - where there has been unreasonable delay in bringing the application and where this has caused or is likely to cause undue prejudice to others or to the progression of the scheme as a whole.
- 7.9 Where any scheme plan relates to a body that is or is likely to seek a Treaty settlement or affects a mandated iwi authority, the Attorney-General or Te Ohu Kaimoana shall be served and may be heard on the application.
- 7.10 On application and notice as directed, the Court may vary its orders and directions where they prove to be impractical.

COMMENTS ON THE OBJECTIONS PROCESS

The need for a legal process

7.58 Where there is an adequate scheme plan, most disputes should be resolved without the need for court intervention. However, a scheme for legal intervention to manage formation disputes is necessary as the traditional rules for settling issues are not as enforceable as they once were through the dispersal of tribal members and indeterminate membership. These issues were considered in Chapter 4, where we described the problems associated with determining membership. We add that the difficulty in forming tribal representative entities delays the settlement of Treaty claims more than anything else, and that the need for a legal process to resolve disputes is apparent from the extensive formation disputes and associated litigation. At present, there is no legal remedy for overbearing or other conduct that is patently unfair, and, conversely, the lack of a legal sanction is an incentive to those who are so minded to “steamroll” proposals that require considered debate.

7.59 We particularly stress the problem identified in Chapter 4 that Māori are effectively denied access to legal remedies because of the administrative nature of the mandating process and the political factors involved. We consider there is a major flaw in the national legal system when a significant section of society is without adequate legal redress for grievances affecting the integrity of their social order. We consider that our proposals are critical in dealing with that lacuna.

GENERAL -MĀORI GROUPS

7.60 The scheme for managing formation disputes applies only to tribes. It does not affect waka tūmaha for the reasons given at the end of Chapter 5. Where general-Māori groups wish to form an association by engaging the local Māori community, they may adapt the suggestions we have made but, ultimately, and unlike tribes, the members of a waka tūmaha and its level of popular support are determined by individual subscription or participation. The criteria that waka tūmaha must meet in order to register under the Act relate mainly to the contents of their charters.

WHY THE MĀORI LAND COURT?

7.61 We have proposed initial access to the court system through the Māori Land Court. We have done so because of that Court's experience in managing group issues, its capacity to deal expeditiously with claims, to adopt the protocols of a marae, to avoid unnecessary formality and to call conferences at which issues may be determined.¹¹⁷ Since it has long dealt with more than land issues, the Court may be better described as a Court of Māori Affairs. Some informants were concerned that the Court was overly interventionist. In the processes described in this chapter and the next, the Court does not dictate to the tribes but simply moderates the process by which the tribe's decisions are made. Provision for appeals to the High Court are mentioned in Chapter 9.

RELATIONSHIP WITH SECTION 30 TE TURE WHENUA MAORI ACT 1993

7.62 The Māori Land Court presently has jurisdiction to determine the most appropriate representatives of a class or group of Māori under section 30 Te Ture Whenua Maori Act 1993.¹¹⁸ The jurisdiction proposed here is quite different. Presently, the Court determines the issue in the absence of any settled structure by which the people can formally determine their representatives. The Waka Umanga Act would, however, provide such a structure. Accordingly, section 30 would have no application to the formation of a waka umanga. The point is clarified in section 30C, which provides that the Court may not address an application under section 30 if the issues are governed by another enactment; or the Court may defer the hearing.¹¹⁹

7.63 Section 30H(2) provides that no order under section 30 can bind the Crown in relation to Treaty settlement negotiations (unless the Crown agrees otherwise). An order under the Waka Umanga Act would likewise not require that the Crown deal with that particular group, but the effect of recognition of a waka pū would be that it could not ignore that order and treat with another group claiming to represent the tribe concerned.

117 Te Ture Whenua Maori Act 1993, ss 66 and 67.

118 See New Zealand Law Commission *Determining Representation Rights Under Te Ture Whenua Maori Act 1993* (NZLC SP8, Wellington, 2001).

119 See Te Ture Whenua Maori Act 1993, s 30C(4) and (6)(c).

WHY FIFTEEN APPLICANTS ARE REQUIRED

- 7.64 Any 15 or more persons who are affected may apply to review any process to form a tribal entity. This number accords with that required by law to form an incorporated society and is, we believe, also appropriate for waka tümaha.¹²⁰ However, we also believe that 15 people should be required to support an application to register a waka umanga, as provided for in Chapter 8, or to object to the formation of a waka pū, as it fits with customary expectations of collective decision making.
- 7.65 The hapū does not dance to the tune of a self-selected individual, but where a reasonable number is involved it affects group cohesion. The hapū as a whole must take notice and 15 is probably a minimum cohort to compel hapū attention. The question is whether in any hapū, a small group of objectors or proponents would be prejudiced by this threshold. We must take the smallest, viable hapū, a viable hapū being one that can respectably manage customary requirements in welcoming, feeding and bedding other tribal groups. That probably requires an active and local membership of at least 50, as nowadays all are not available for every event. We think it reasonable that objectors or proponents in such a hapū should gather at least 15 supporters and consider that any fewer would suggest that the objection or proposal is not worthy. As considered in Chapter 8, the Court may waive the need for 15 persons in cases involving urgency.

OTHER TRIBAL GROUPS MAY OBJECT

- 7.66 An adjoining tribal group that is outside the scheme may also apply to review the formation process. Such a group could protest the inclusion of a related hapū in the proposed scheme or its own exclusion. It may seek to present an alternative to the related hapū before opinions become too solidified.

PROCEDURE

- 7.67 The process provides for the early disposal of claims. We consider objections about process must be swiftly disposed of as they arise to prevent a build-up of bad feeling, to maintain momentum and to enable scheme promoters to proceed on a sure basis. In addition, objections about fair process can not be left to the end, when the scheme complained of has progressed so far, or matters have moved so far beyond the event complained of, that the provision of any relief that is due would prejudice others.
- 7.68 To promote prompt hearings, applications are to be made initially to the Chief Māori Land Court Judge to give any directions for case management and to assign an available judge. Once the case has been assigned, the Māori Land Court may sit at other than scheduled times and places. Notices of applications are at the discretion of the Māori Land Court. A wide discretion is justified by the number of groups, associations and networks that exist in tribal districts and because the Court has experience in notifying appropriate persons where group issues are involved.
- 7.69 We consider that the Court must also have a wide discretion in giving directions because of the variety of circumstances that may apply. However, our view is that the Court should not consider the merits of competing proposals on the structure and operations of the entity, but should be limited to ruling on the integrity of the process by which decisions were reached or of the scheme by which decisions will be made. Likewise, when making rulings or giving directions, the Court should not direct the whole of the process to be followed,

¹²⁰ Incorporated Societies Act 1908, s 7.

but should be limited to considering how the particular issues may be resolved. The underlying principle was discussed in Chapter 6 that the body to represent the people for the future must be developed and settled by the people themselves according to their own processes.

- 7.70 The proposed waka umanga may not be registered whilst an objection process is before the Court. However, once scheme promoters have complied with any directions of the Court, they may proceed to seek registration. This will not mean they are immune to further objections at that stage, as discussed in Chapter 8, but a sound process and compliance with the Court’s requirements are likely to reduce such challenges.
- 7.71 Matters relating to costs, injunctions and appeals are dealt with in Chapter 9 on Dispute Resolution.

Chapter 8

Registration and Recognition

INTRODUCTION 8.1 A key feature of the Law Commission’s proposal is that the legislation would provide a process for the registration of Māori entities as waka umanga, whether for tribes or general-Māori groups, and for the recognition of certain tribal entities, or waka pū, as the legitimate representative of the associated tribal group.

8.2 This chapter first describes the process of registration. In this section, we also consider the circumstances under which the Māori Land Court may include a hapū in a tribal confederation, notwithstanding that a majority of that hapū has not agreed. The chapter then considers the effect of recognition. It is important to note that there are also constraints on recognition to protect existing interests. Finally, the chapter considers how changes to the waka umanga may need to be made over time.

REGISTRATION Introduction

8.3 Registration gives legal notice that the waka umanga has corporate status and an adequate charter for good governance, and that it was founded with an appropriate mandate determined by a fair and full process. This section outlines the registration procedure, the powers of the Māori Land Court to deal with outstanding formation disputes, disputes on registration and any further challenges to the entity’s legitimacy. The formation process previously described should prevent most late challenges, but proper notice may not have been given to all.

Location of the registry

RECOMMENDATION

8.1 The statute should establish the position of Registrar of Waka Umanga within the Companies Office of the Ministry of Economic Development.

8.4 The Registrar of Waka Umanga may also be the Registrar of Companies and serve in other capacities within the Ministry.

- 8.5 The Māori Land Court judges have proposed that the registry be located in the Māori Land Court alongside trusts and incorporations formed under Te Ture Whenua Maori Act 1993. We favoured that proposal in our earlier report.¹²¹ However, following consultation with Māori groups, we now think that the registry should exist alongside that for companies, incorporated societies and other corporate bodies (which already include many Māori groups).
- 8.6 We consider that while the Māori Land Court has a vital role in dealing with disputes on both the formation and operations of a waka umanga, it is better to separate the judicial function of the court and the maintenance of an administrative register. We note in this respect that the Māori Land Court is not a complete repository of important records. The primary repository for Māori land titles is the Land Registry Office.
- 8.7 Further, the Companies Office has established processes for dealing with corporate bodies, its records are accessible through on-line facilities and 0800 numbers, it has mechanisms to review corporations annually for compliance with statutory requirements and there are links to the Ministry's economic support and investigative services. The Ministry is the agency charged with fostering economic development and prosperity generally, it assists businesses in conducting their affairs. Amongst other initiatives, it operates a Māori economic development strategy. It also has oversight of insolvency and intellectual property matters. If waka umanga are to be major players in the New Zealand economy, we think it is preferable that they be a formal part of the structure which co-ordinates the activities of the other corporate players.
- 8.8 However, the Registrar of Waka Umanga and the Māori Land Court will need to liaise on many matters. We also recommend that Māori Land Court registries maintain a public computer terminal to enable the public to access the web-sites of the Companies Office and the relevant waka umanga. We expect both registry and Māori Land Court staff will provide assistance to individual members seeking details of the relevant waka umanga.
- 8.9 We also propose that the Māori Land Court be involved at the outset in granting applications for provisional registration of waka umanga names.

Provisional registration of name

RECOMMENDATION

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8.2 The promoters of a waka umanga may apply to the Chief Judge of the Māori Land Court for the approval of the proposed name of the Waka Umanga before completing the formation process and applying to register.

¹²¹ New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (NZLC SP13, Wellington, 2002) para 105(e).

RECOMMENDATION

8.3 The Chief Judge or a Judge appointed by the Chief Judge, shall approve the name where satisfied that it is unlikely to cause confusion with another tribe or entity (or that other body has consented) and that it is not offensive or otherwise unsuitable, and may seek submissions on those matters. Approval may be given where tribes have the same or similar names, provided there is a unique identifier.

8.4 Following advice of approval, the Registrar of Waka Umanga shall provisionally register the name.

- 8.10 Potential name disputes should be sorted out at an early stage in the formation process. Not infrequently, tribes have similar or even the same names. In addition, the name proposed by one group may already be used by another. One would expect the Court to direct a search of the companies and other registers for similar names but, in addition, the Court would need to consider the array of existing tribal names. That is a matter that needs to be addressed nationally. For that purpose, the Chief Judge would seek the advice of other judges as they are generally aware of the tribal names in their districts. Tribes have been responsive to this problem already and several have already adopted unique identifiers, as where the Horowhenua tribe of Ngāti Raukawa became “Ngāti Raukawa ki te Tonga”.
- 8.11 Name registration is provisional only and would not usually require a formal hearing as the proposed name will be more fully notified for objections at the registration stage. This regime is different from that applying to companies and closer to that which governs trade marks. In the case of companies, a definitive ruling may be given but the name is reserved for only 20 days. With trade marks, preliminary advice is given as to the distinctiveness of the mark but actual registration is deferred until six months after notice is given of a formal application and any objections have been disposed of.¹²²
- 8.12 Names like “Te waka pū o ...” may be used but are not necessary. We would not displace established names like “Te Rūnanga o ...”, or “Te Whānau o ...”. However, it is necessary to indicate that the entity is registered under the Waka Umanga Act by the adding to the name “Waka Umanga” which may be abbreviated to “WU”, as with “Te Rūnanga o ... WU”. In the same way, companies and incorporated societies have added to their names, “Limited”, “Ltd” “Tāpui Limited” or “Incorporated”.¹²³

Application to register

RECOMMENDATION

> Continued next Page

8.5 An application to register a waka umanga must be supported by at least 15 members of the affected group.

¹²² See Companies Act 1993, ss 20 and 22(3), Trade Marks Act 2002, ss 16, 46–50. See also Incorporated Societies Act 1908, s 11.

¹²³ Companies Act 1993, s 21 and Incorporated Societies Act, s 6.

RECOMMENDATION

8.6 Each application for registration as a waka umanga must provide:

- the name of the proposed waka umanga (and any certificate of preliminary name approval);
- whether (in the case of a waka pū) the entity seeks to be recognised as the legitimate representative of the group;
- in the case of a waka pū, particulars of those representing other organisations managing aspects of the tribe's affairs and of those representing adjoining tribes with overlapping interests;
- the district with which the entity is associated or other identifying features;
- a certified copy of the proposed charter;
- the names and addresses of any interim or proposed officers and their signed consent to appointment;
- the prescribed fee; and
- a statutory declaration by at least three applicants setting out:
 - how the charter was developed and approved, the level of support and how that has been assessed;
 - particulars of those representing any constituencies;
 - particulars of any subsidiary or associated entity with which the waka umanga will have a working relationship; and
 - an address for service and for the registered office.

8.13 We discussed the reasons for a minimum number to support the application in the last chapter. Technically, only one person need bring an application since the level of popular support is something that must be established in any event, but we consider there should be a group responsibility for the application and its contents. Support would usually be established by referring to the formation scheme plan, compliance with the scheme's mandating requirements and the result. Where a waka umanga intends also to serve as a mandated iwi organisation under the Maori Fisheries Act 2004, it must also comply with the mandate requirements of that Act. The initial support for a waka tūmaha is determined by the number of members or the number of those voting at a hui.

8.14 Lists of office bearers may be provisional since elections may follow soon after registration; but the Registrar must have details of the founding officers and their consent to the application.

8.15 In the case of tribes, the district with which the entity is associated is the primary ancestral territory. The fact that other tribes may have interests in the same area is no impediment, as explained in Chapter 4. Tribes may have ancestral associations with places far and wide, as with the ancestral associations of Ngāti Awa of Whakatane with the far north, but for the purposes of notifying other Māori groups likely to be affected, the Registrar is only concerned with the present, principal territory. Waka tūmaha must state the districts or areas with which they are associated or provide other identity criteria for example, as members of a church group.

- 8.16 Details are required of independent bodies that manage aspects of the tribe's affairs. They may include for example, a Māori health provider that may or may not seek a formal relationship with the waka umanga. Some of these may have established working relationships with local authorities. As we consider below, it is important that these bodies and their existing working relationships are not upset through the formation of a waka umanga.
- 8.17 Details are also required of the constituent groups that make up the waka umanga and of any subsidiary or associated entity having an initial, working relationship. The constituencies of a waka pū may include hapū and taurahere. Similarly, a waka tūmaha may be comprised of branches. An entity that is a subsidiary or with whom there may be a working relationship may, for example, be a company, incorporated society, a trust, a trust board or a mandated iwi organisation.
- 8.18 Further discussion with the Ministry of Economic Development would be required to determine the registration fee. The regular test, that fees are generally established on the average cost of administering the register, has no application here where an experience has still to develop.

Processing applications

RECOMMENDATION

- 8.7 The Registrar of Waka Umanga must be satisfied:
- that the charter meets the good governance requirements of the Act and that the default schedules have been adopted or adapted to the group's needs;
 - in the case of a waka tūmaha, that the charter is representative of and accountable to its target group; and
 - that the proposed name has been provisionally approved by the Māori Land Court.
- 8.8 To enable errors or omissions to be corrected, the Registrar may refer any concerns on the application and charter to applicants.
- 8.9 Where significant changes are proposed, the Registrar may require evidence that the changes have been considered at an open meeting of the group.
- 8.10 Where the Registrar's requirements are disputed, the applicants may refer the issues to the Māori Land Court for determination.

- 8.19 The Registrar's role is not to second guess the tribe as to the optimal form of its charter, but to ensure that it is not inconsistent with the Act. Part 4 of this report describes the contents of charters and the proposals for default schedules which will apply unless alternative provisions have been agreed. To avoid registration difficulties, we suggest that scheme promoters seek early advice from the Secretariat and the Registrar as to whether a proposed charter is likely to comply with the Act.

Advertising applications

RECOMMENDATION

- 8.11 Once the Registrar is satisfied that the application is not inconsistent with the Act, and after consulting with the Chief Registrar of the Māori Land Court, the Registrar shall direct the applicants on the form and distribution of notices.
- 8.12 The distribution must include advertising in a national and a local newspaper (in each case, two notices one week apart) and individual notices to constituent bodies and affected tribes or organisations, as described in the application, or as recommended by the Māori Land Court as bodies likely to be interested or affected.
- 8.13 The form must include notice of a right to object by a date which is four weeks from the last public advertisement.
- 8.14 Notice must also be given to the Crown (Minister of Māori Affairs, Minister in Charge of Treaty of Waitangi Negotiations or, where the waka umanga proposes to deliver certain Crown services, to the relevant Minister).

- 8.20 As many people do not read public notices in newspapers, notice may also be given through Māori broadcasting media or magazines if either the Registrar or the applicants themselves decide this is desirable. We also suggest that the application and the details it contains be available electronically, both from the Companies Office and any website the scheme promoters may have established.
- 8.21 Although four weeks is a relatively long time to allow objections, we consider this time is required for groups whose members may now be dispersed. Also, short periods can encourage objections by reducing the chance for those affected to first discuss their concerns with the applicants. As provided for below, the time for objections may be extended in exceptional cases.
- 8.22 Service on the Crown would enable the relevant agency to make its views known to the Court should it so desire. These could be to support or oppose an application or simply to assist the Court. For instance, it may be relevant to the determination of objections if the Crown advised the Court on its view of the optimum size of a tribal confederation for Treaty claim settlement purposes.

Registration where there are no objections

RECOMMENDATION

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- 8.15 If there are no objections within the specified time, the entity shall be registered as a waka umanga.
- 8.16 The Registrar shall issue a certificate of incorporation with the words "Waka Umanga" added to the name.

RECOMMENDATION

- 8.17 Where the application sought recognition of a waka pū as the legitimate representative of a tribal group, the waka pū shall be so recognised and the Registrar shall record that fact on the certificate of incorporation.
- 8.18 The waka umanga will be entered onto the register which shall be open to public inspection.
- 8.19 The register shall include the charter, an address for service, the names and contact addresses of office holders and details of any constituencies.
- 8.20 Additional particulars may be added if the waka umanga and the Registrar agree.

- 8.23 Registration gives notice to the world that the body is registered and should provide a degree of assurance to those dealing with it that it is a legal entity with certain characteristics that comply with the Act. The provision for particulars to be added by agreement may help smaller waka umanga without their own websites who seek to give easy public access to their documents.

Objections to registration or recognition

RECOMMENDATION

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- 8.21 The statute should provide that 15 or more affected persons may file an objection to the registration or recognition of a waka umanga.
- 8.22 An objection to registration may be on the grounds:
- that the proposed name will cause confusion or is otherwise unsuitable; or
 - the charter does not or does not adequately meet the Act's requirements.
- 8.23 In the case of a proposed waka pū, an objection may be on the additional grounds that:
- the objectors' group did not have an adequate opportunity to be heard in the formation process or the process was unfair, and the group has been prejudiced as a result;
 - the proposed waka pū lacks a sufficient mandate; or
 - no adequate attempts were made to amalgamate or form an association with other groups that serve the whole or part of the same group.
- 8.24 Where it is intended that the proposed waka pū be the legitimate representative of the group, objections can be made that:
- the group should be represented by some other body; or
 - the charter should restrict the right of representation (for example, because a constituency did not agree to the entity having full rights to represent that constituency, or because an existing organisation already represents the tribe on aspects of the tribe's affairs).

RECOMMENDATION

- 8.25 The application must set out the grounds of objection and provide an address for service.
- 8.26 The Registrar of Waka Umanga shall refer any objection to the Māori Land Court for determination (unless the parties can earlier agree on how to rectify the problem).

- 8.24 The process and grounds for objection build upon the formation process described in the previous chapter. Many potential grounds for objection, like concerns over the entity's name or whether an existing entity should represent the tribe, should have been sorted out earlier. However, it is possible that some objectors were informed of the application only at the final stage or that some issues are still at large. Similarly, the Registrar of Waka Umanga will have checked the charter earlier for compliance with the Act's technical requirements, but objectors may still have qualms as to whether its contents reflect the needs and interests of the tribe or the conditions on which constituencies agreed to combine. The Māori Land Court will be in a better position than the Registrar of Waka Umanga to consider such qualitative objections and to consider whether these points have already been fully debated within the tribe and, if not, to refer the matter back to the tribe for further consideration.
- 8.25 However, unwarranted objections can have a demoralising effect on a group that is keen to proceed. In the process as described below, the Māori Land Court will have scope to dismiss unmeritorious objections, objections that have been previously litigated or cases where the objectors have unjustifiably delayed their objections to the end of the process.
- 8.26 Objections may be made by other bodies on the ground that the charter should restrict the right of representation. For example, where a local authority has an arrangement to deal with a tribal health body that has not merged with the entity, it is important that the charter provides that the waka pū does not represent the tribe in relation to health matters and will refer relevant matters to that body. As mentioned above, applications must specify those organisations that manage aspects of the tribe's affairs and those organisations with whom the entity has a working relationship; and notices must be given to them and to any others not named in the application that the Court may direct. In the same way, constituencies in a confederation may object if the charter allows the waka pū to represent a constituency in terms that have not been agreed.

Preliminary objection hearings

RECOMMENDATION

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- 8.27 On the receipt of an objection, the Chief Judge of the Māori Land Court shall appoint a judge in be in charge of the case.
- 8.28 Where the parties agree, the Chief Judge may also appoint pūkenga (advisors) to sit with the nominated judge.

RECOMMENDATION

- 8.29 The Chief Judge may also extend the time for objections to be filed if satisfied that the applicants would not be unduly prejudiced by doing so and the delay was not unreasonable in the circumstances.
- 8.30 The nominated judge shall arrange for a judicial conference with the applicants and objectors at which the judge may:
- record any agreement and make consequential orders;
 - refer the matter for mediation;
 - if satisfied that mediation is unlikely to succeed, set a special fixture for hearing (which may be fixed for other than normal sitting times and places); or
 - dismiss the objection if satisfied it is frivolous or vexatious, has been dealt with or should have been dealt with, during the formation process.

- 8.27 We have suggested that all applications be made initially to the Chief Judge, who can then assign a Judge who need not be from the relevant district. We believe that it is important that applications of this nature are dealt with as quickly as possible, as the applicants will have come to the end of a long process to form a waka umanga and should not be further delayed without good cause. It may also be important for the Court to cast a fresh eye over matters that may have become contentious.
- 8.28 Pūkenga may be desirable where the grounds of objection relate to matters which have a significant cultural component, but we think the group should have some say over the persons to assume that role because of customary concerns about one tribe sitting in judgement on another.
- 8.29 The requirement for a judicial conference fits with the existing powers of the Māori Land Court to call judicial conferences.¹²⁴ It provides judges with an early opportunity to scope the issues and assess the prospects of full or partial resolution by mediation, facilitation or otherwise.
- 8.30 In other cases, it may be evident that a final determination by the Court is necessary. As prompt resolution is desirable, a special fixture should be arranged, but should nonetheless be widely notified.

The hearing process

RECOMMENDATION

> Continued next Page

- 8.31 Where objectors satisfy the Court of a case to answer in respect of any of the grounds on which an objection may be made (as referred to below), the scheme promoters shall bear the burden of establishing that the waka umanga should be registered.

124 See Te Ture Whenua Māori Act 1993, s 67.

RECOMMENDATION

8.32 Unless the Court considers there are special circumstances that warrant its intervention on tribal policy issues or the parties agree that the Court may determine such an issue, the Court must focus on the process by which decisions were reached rather than on competing policy preferences.

8.33 Following the hearing, the Court may:

- uphold or dismiss the objections and direct the Registrar of Waka Umanga on whether or not the registration may proceed;
- order or refuse to order that a waka pū be recognised as the legitimate representative of the group; provided that the Court shall not order that a waka pū is the legitimate representative of a tribal group if the applicants have not so requested;
- direct that all or part of the formation process be further undertaken on such terms and conditions as may be prescribed; or
- direct the parties to take steps to resolve the issues and to report back to the Court for a final determination.

8.31 We consider that those who are obliged to maintain fair process should have the ultimate responsibility of proving that the process was fair in fact. To that end, they must be able to produce a sufficient record of the action taken.

8.32 As with any court challenges during the formation process (as earlier discussed), the Court's focus will be on the process by which decisions were reached, rather than itself deciding whether the proposed scheme was the right one for that tribe. Where there have been faults in the process, in particular the adequacy of consultation and efforts made to accommodate the needs of any objectors, the Court can order that steps be taken to remedy or mitigate those faults. However, as a matter of last recourse, the Court may intervene where a stalemate has been reached or the parties agree that a final decision is required.

Determining fair process objections

8.33 As we have seen, objections to registration may be made on the ground, amongst others, that the process was unfair and the objector's have been prejudiced as a result. The requirements for fair process were considered in the last chapter.

RECOMMENDATION

8.34 In considering whether the process by which the proposed waka umanga was formed was fair and in considering the likely prejudice to objectors, the Court shall consider the same matters that the Court is bound to consider when reviewing proposals for the formation of entities. Where the Court has reviewed the process in the formation stages, the Court shall also have regard to the extent to which the Court's directions were carried out.

Determining adequacy of support

- 8.34 A further ground for objecting, in the case of a waka pū, is that the waka pū lacks a sufficient mandate.

RECOMMENDATION

- 8.35 In considering whether there is sufficient mandate for the registration of a waka pū, the Court shall particularly consider:
- any ratification threshold agreed to during the formation process and failing an agreed threshold, the extent of approval in each constituency and the vote overall; and
 - the integrity of the voting process.

Mandate and the case of a dissenting hapū

RECOMMENDATION

- 8.36 In the case of a tribal confederation, where satisfied that the prejudice to the whole group from the exclusion of a constituency is likely to exceed the prejudice to the constituency from its inclusion, the Court may order that the entity shall be registered for the whole group, notwithstanding that the majority in the constituency have voted against its inclusion. In exercising this power, the Court shall have particular regard to:
- the size of the vote in favour in the constituency, and in the constituencies overall;
 - the effects of exclusion on the confederation and of inclusion on the constituency; and
 - the charter provisions that have been or may be made to protect the interests of the relevant constituency.

- 8.35 The most difficult issue likely to face the Court in any objection hearing arises when one or more of the proposed constituencies wish to stand apart from a macro structure that otherwise has general approval. We have already considered that appropriate charter provisions can protect the particular interests of constituencies and minorities. Eventually, however, the competing interests of minorities and of the group overall may need to be balanced. A point may have been reached, for example, where minority insistence can unduly prejudice the overall interests of the group as a whole in maintaining an appropriate size of operations or in settling claims.
- 8.36 In reaching this conclusion, we have had regard to the traditional and cultural preferences for local autonomy. We have balanced that with the reality that total autonomy was not always achieved in practice and that each unit of a descent group had social obligations to the group as a whole. As was sometimes said, a house that stands alone is food for the fire.

- 8.37 For example, the aggregation of fish assets appears to be critical to the success of tribal organisations under the Maori Fisheries Act 2004. Similarly, the Office of Treaty Settlements has indicated it does not favour settlement negotiations with small-sized groups. In such a situation, all members could suffer if one or two constituencies were able to insist on standing alone.
- 8.38 In these circumstances, the Court may be called upon to make a decision that goes beyond mere directions as to process and which directly affects the substantive rights of the parties. Where necessary, the Court may rule either that a constituency may be included in the wider group, notwithstanding that a majority in that constituency has not agreed, or that they be excluded from that group, notwithstanding the economies of scale or any traditional alliances.
- 8.39 We follow in this respect a principle recognised in section 17(2)(d) Te Ture Whenua Maori Act 1993 in relation to multiply-owned Māori land. This provides that in exercising its jurisdiction and powers under that Act, the Court shall seek to protect minority interests against an oppressive majority, and to protect majority interests against an unreasonable minority. As in relation to such land issues, we do not see the Court as simply adjudicating but as promoting practical solutions to particular problems or concerns.
- 8.40 However, the Court should not lightly make any such an order. It must first be satisfied that all reasonable steps have been taken to reconcile the differences between the constituencies, as coercion of an unwilling faction into a wider group is likely to result in ongoing enmity and difficulties in administration. However, a degree of compulsion may sometimes be necessary to enable people to move forward.
- 8.41 In some such cases, it may be suitable for the Court to seek agreement to a review of the charter within a fixed period.¹²⁵ By then, emotions may have been diffused and the advantages or disadvantages of aggregation may have become more apparent. In addition, settlement of Treaty and fisheries assets should have taken place, and appropriate mechanisms can be adopted to ensure a fair distribution among constituents without prejudicing the economic viability of the tribe as a whole.

THE EFFECT OF RECOGNITION

- 8.42 As discussed in Chapter 6, the recognition of a waka pū as the legitimate representative of a tribe serves to empower tribal governance, provide stability for the waka and give certainty to third parties.¹²⁶ It gives notice that the waka pū was formed by a process that was accepted as fair and that it has an adequate mandate for its operations.

¹²⁵ Such provision was made in the Tainui and Ngāti Awa constitutions. There has recently been a ten-year review of Tainui's structure. The Maori Fisheries Act 2004, s 18(1)(b)(i) provides that mandated iwi organisations may not change constitutions within two years of being recognised by Te Ohu Kaimoana Trustee Limited, and then only if a general meeting decides that the change is for the collective benefit of the whole iwi.

¹²⁶ See Chapter 6 under "The principle of recognition". The reasons for restricting recognition to waka pū were given in Chapter 5.

RECOMMENDATION

8.37 The statute should provide that:

- A waka pū that is recognised under the Act as the legitimate representative of a tribe shall be entitled exclusively to represent the associated tribe to third parties and in legal proceedings on matters relating to the tribe's affairs except as constrained by its charter.
- Recognition does not require the Crown or other third parties to settle or contract with the associated tribe, but subject to any specific legislative provision, those wishing to deal with the tribe must do so through the recognised waka pū. The waka pū may direct third parties to an appropriate constituency or other body to deal with a particular matter and shall do so where its charter so requires.
- Local and public authorities and any persons who are obliged to consult with Māori tribal groups or who seek to do so may discharge that function by treating with the legitimate representative of that tribe as recognised in terms of the Act.
- Recognition of a waka pū as the legitimate representative of the tribe will not prevent the Crown and others from dealing with individuals or organisations within or associated with that tribe where the matter involved does not affect the rights and liabilities of the tribe as a whole or any constituent part of the tribe.
- Nothing above restricts the rights of any individuals or other organisations from making independent submissions, expressing independent views or dealing independently with others and nothing prevents other organisations from forming.

8.43 The above wording is intended to cover several situations:

- "... to settle or to contract ...". For example, the Crown would not be obliged to settle a Treaty claim with a tribal group simply because it has a waka pū; but if it did wish to effect a settlement with that group, or any part of it, it would have to deal with the waka pū. Nor would the Crown be obliged to treat with the tribe for the delivery of any existing government services to other bodies associated with that tribe.
- "...except as constrained by its charter...". We discussed earlier, under the grounds for objecting to registration and recognition, that the arrangements maintained by existing tribal bodies must be respected and that other bodies would have the opportunity to ensure that they are by securing an appropriate limitation in the charter of the waka pū. The waka pū charter would then provide for relevant inquiries to be referred to those bodies. In the process described above, such bodies must be notified of recognition proposals and the Māori Land Court must be satisfied that such bodies are protected in terms of the charter.
- Also as noted when describing the process for registration and recognition, waka pū represent the constituent hapū only to the extent that the hapū have agreed, as set out in the charter.

8.44 The overall effect of those proposals is that third parties need simply go to the waka pū, who may refer them on to the appropriate tribal body with whom to consult.

8.45 Compared with the provisions in the Runanga Iwi Act 1990 for the recognition of rŭnanga as the authorised voices of tribes, our proposals are more specific about the effect that recognition has but, essentially, the same concept is involved.¹²⁷ Since the repeal of the Runanga Iwi Act 1990, full recognition as envisaged under that Act has been granted to only one tribal entity in the Treaty claims settlement process.¹²⁸

8.46 What happens in the future if a waka umanga wants to change its structure? For example, if a new constituency is added to a confederation, is it necessary to seek again the wide approval of members as required for initial registration? We think the people should decide this when the waka umanga is first formed. The charter should make provisions for constitutional amendments and settle the process required.

8.47 We also consider that the organic process of tribal reformation that once characterised traditional tribes is still ongoing. We think it is important that the Act allow for constituent groups to form and reform within the overall structure of a confederation and to amend the representation on the confederation as hapŭ populations and allegiances change. In Canada, this practice is provided for in the “New Bands” policy.

8.48 However, the Registrar of Waka Umanga should have notice of the amendments made and an explanation of the process undertaken to consult members.

RECOMMENDATION

8.38 Any amendments to the charter are to be notified to the Registrar of Waka Umanga with an explanation of the process adopted to effect the change.

Withdrawal of constituent groups

8.49 Conflict within a tribal confederation may lead to proposals by a constituent group to withdraw. The conflicts may be resolved through the tribe’s internal dispute resolution mechanisms but, ultimately, withdrawal of one or more groups from the entity may be the only viable solution. If attempts to resolve the issue have failed, the Māori Land Court may be called upon to make a decision. We propose that, as with objections to the formation of a waka umanga, the Court must balance the interests of the majority and minority, similar to the current provision in section 17(2)(d) Te Ture Whenua Māori Act 1993.

8.50 Again, it is important that the possibility of such withdrawals, and their consequences, is considered at the time of formation and, if need be, is provided for in the charter. Whilst the ability to later withdraw may give some reluctant groups the comfort to join up in the first place, the Commission believes that the charter should not make for easy withdrawal. Like federal nation states,

¹²⁷ Runanga Iwi Act 1990, ss 26 and 72(3).

¹²⁸ See Te Runanga o Ngāi Tahu Act 1996, s 15(1). Ngāti Awa sought the same but was recognised only as “a” representative: see Te Runanga o Ngāti Awa Act 2005, s 6(1). Recognition limited to claim settlements was given in the Orakei Act 1991, s 19. Prior to the Runanga Iwi Act, recognition (for settlement purposes only) was given in the Whanganui River Trust Board Act 1988, s 6.

tribes have embarked on a collective mission and differences that arise should be sorted out as far as possible within the constitutional framework.

- 8.51 An alternative arrangement is for charters to provide for a review of the charter after a specified period. Such a review could result in greater autonomy for constituent groups,¹²⁹ or a change in the voting structure, or the way in which dividends are distributed.¹³⁰
- 8.52 Any provisions for withdrawal must also have clear rules to dispose of the assets of the waka umanga and to maintain contractual relationships between the waka umanga and third parties. The issues are substantially the same as those in relation to the winding up of the existing entity as considered in Chapter 10, except that the obligations of the waka umanga continue. The provision of clear rules is especially important where Treaty settlements are involved, as the settlement continues to bind all groups, notwithstanding any withdrawal from the confederation.

129 At a national level, recent examples of accommodating dissident groups within a larger framework are the agreement that Bougainville be granted self government within Papua New Guinea, and Papua and Banda Aceh within Indonesia, in each case after long struggles for independence of those provinces.

130 For instance, Te Rūnanga o Ngāi Tahu's newly introduced superannuation scheme.

Chapter 9

Dispute resolution

- INTRODUCTION
- 9.1 One of the key requirements for every waka umanga is that it has an internal dispute mechanism.¹³¹ Whilst the requirement to have such a mechanism will be mandatory, the actual form adopted will be up to each group to fashion as best suits its needs.¹³²
- 9.2 We believe that effective dispute resolution mechanisms are essential for the tribes to take control of their own destiny and to ensure that members have confidence in their leadership and are able to participate fully in the affairs of the waka umanga.
- 9.3 This chapter suggests some options that waka umanga can incorporate within their charters. It also looks further at the role of the Māori Land Court in relation to disputes that arise both within waka umanga and between waka umanga and other entities.
- 9.4 The level of sophistication of the dispute resolution mechanisms will vary depending on the size, functions and tikanga of individual groups. It is also suggested that, depending on their size, waka umanga should consider further tiers of internal dispute resolution to cover the situation where initial attempts to resolve a matter have not succeeded. These may include formal mediation or arbitration.
- 9.5 However, we recognise that not all disputes will be capable of resolution internally. We therefore also propose that the jurisdiction of the Māori Land

131 A dispute resolution mechanism is listed as a requirement in the Office of Treaty Settlements “Twenty Questions” on Governance: *Matters Required in Disclosure Material for Governance Entities*, < [http://www.nz01.2day.terabyte.co.nz/ots/DocumentLibrary/20 QuestionsonGovernance.pdf](http://www.nz01.2day.terabyte.co.nz/ots/DocumentLibrary/20%20QuestionsonGovernance.pdf)> (last accessed 7 March 2006) and is one of the criteria for a mandated iwi organisation under the Maori Fisheries Act 2004, s 15(f) and Sch 7, Kaupapa 8. Te Puni Kōkiri’s discussion paper on governance also provides that each constitution must have a process for dispute resolution: see Te Puni Kōkiri *Ngā Tipu Whakaritorito: A New Governance Model for Māori Collectives* (Wellington, 2004). The Law Commission has also previously recommended that legislation for Māori waka umanga should require such entities to contain provisions for resolving disputes that may arise amongst members without the need to resort to the Court at the outset: see New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (NZLC SP13, Wellington, 2002) paras 89–104.

132 The importance of cultural match is emphasised by many writers. See, for instance, Materoa Dodd and Robert Joseph “Post-Treaty Settlement Governance Challenges: Independent Dispute Resolution for Ngāti Awa” (Commissioned Research Report, Waikato University, 2003) 3; Stephen Cornell “Nation building and the Treaty Process” (Speech to British Columbia Treaty Commission Forum, Vancouver, 1 March 2001).

Court be extended to give it exclusive jurisdiction to consider any disputes arising within the waka umanga which have not been resolved by the internal dispute mechanism. In determining such disputes, the Court should have powers to appoint additional members with relevant expertise, not limited to matters of tikanga, but also commercial and other expertise. The Court's powers to refer matters to mediation should also be extended to include disputes arising within waka umanga.¹³³

- 9.6 The Māori Land Court should also have jurisdiction to deal with disputes between waka umanga and other parties, but this jurisdiction would not be exclusive. Instead, it should have concurrent jurisdiction with the High Court where third parties are involved.

RECOMMENDATION

- 9.1 The statute will provide that the charter of each waka umanga specifies an internal dispute resolution system.
- 9.2 Disputes that have not been resolved within the waka umanga may be referred to the Māori Land Court, which will have enhanced powers to refer matters to mediation and to appoint expert assessors.
- 9.3 The powers of the Māori Land Court and the High Court to transfer jurisdiction from one Court to the other, depending on the subject matter and parties involved, should be strengthened.

- THE PROBLEM** 9.7 Although a number of tribes currently have dispute resolution mechanisms in their charters, many of these are currently limited to disputes regarding membership of the waka umanga or matters of tikanga. These often involve a reference to a kaumātua council or similar body.¹³⁴ Most other disputes arising from existing entities must be taken to the High Court under the general laws relating to companies, incorporated societies, and trusts.¹³⁵
- 9.8 Resort to the courts frequently involves the parties in protracted and expensive litigation, with one or both parties still feeling aggrieved when a decision is finally reached. Control is taken away from the litigants and placed in the hands of lawyers and judges. As a result, court orders often fail to provide long-term solutions and, as discussed earlier in relation to representation, lead to an impression that factions within tribes are always fighting each other.

133 The Court currently has such powers in relation to disputes arising under the Maori Fisheries Act 2004 and the Maori Commercial Aquaculture Claims Settlement Act 2004: see *Te Ture Whenua Maori Act 1993*, ss 26H–L, 26S(3)(c), 26T(3)(d), and 26V–Z. There is also jurisdiction to refer matters to mediation under ss 30D–30J where representation is at issue.

134 For example, *Te Rūnanga o Ngāi Tahu* has a membership committee (Charter, clause 9.7), while *Te Rūnanga o Ngāti Awa* refers disputes regarding membership and tikanga first to the Rūnanga, then a council of elders (*Te Kahui Kaumātua*) which appoints three elders as *Te Rōpū Rongomau* (Charter, clause 28).

135 For example, *Porima v Te Kauhanganui o Waikato Inc* [2001] 1 NZLR 472 (HC) and *Te Runanganui o Ngāti Kahungunu v Scott* [1995] 1 NZLR 250 (HC) both involved incorporated societies; *Carr v Ngāti Ruanui Group Management Ltd* (8 September 2004) HC WN CIV 2004/443/000422 involved both a company and tribal trust; and *Karaka v Ngāi Tai Ki Tamaki Tribal Trust* (7 March 2005) HC AK CIV 2003/404/006164 involved a tribal trust. See also discussion by Gina Hefferan “Post Settlement Dispute Resolution: Time to Tread Lightly” (2004) 10 Auck U LR 212.

As Hammond J held in *Mahuta v Porima*.¹³⁶

The legal process as such is not ultimately capable of resolving the real questions which have arisen because the range of alternatives at law are too narrow and the human factors run too deep.

- 9.9 Use of the courts also leads to the application of Western-based remedies. As a Canadian aboriginal body has noted: “Justice to our people means allegiance to the integrity of our spiritual values: simple in meaning but difficult to practice: to be pursued rather than attained.”¹³⁷ Solutions which reflect these values tend to be both more creative and long-lasting, and to preserve future relationships between the parties.¹³⁸ Whether formal or informal dispute resolution methods are adopted, the aim should be to retain the mana of both parties, rather than a “winner takes all” philosophy.
- 9.10 The Commission therefore believes that it is vital to the long-term success of waka umanga that they are able to resolve the inevitable differences that will arise within their own tribe by reference to their own culture and traditions as articulated in their charter. Wherever possible, this should involve resolving disputes by processes of dialogue, either as part of the political process, or informally with the assistance of a kairongomau or peace-maker, or more formally by use of outside mediators or arbitrators. The courts should be regarded as a last resort.¹³⁹
- 9.11 We believe that it is important that disputes arising within waka umanga are dealt with at the earliest possible stage, and that mechanisms for dealing with them are, wherever feasible, sorted out before the dispute arises.¹⁴⁰ Once disputes have got to the stage of requiring outside adjudication, by a court or arbitrator, the parties’ positions have often become too entrenched for compromise or reconciliation to be easily achieved. Even choosing the process for dispute resolution can be contentious.
- 9.12 Where the waka umanga’s charter has been discussed openly and adopted by the tribe, and where the ongoing representative processes are clear and transparent, many disputes can be avoided or solved through representations to the rünanganui or other processes including elections. There will, however, always need to be a separate mechanism for considering the complaints of members who do not think their concerns have been adequately heard by their representatives, or where differences have arisen between various groups within a waka umanga.

136 *Mahuta v Porima* (9 November 2000) HC HAM M 290/00 para 65. See also Gina Hefferan “Post Settlement Dispute Resolution: Time to Tread Lightly” (2004) 10 Auck U LR 212, 224–5, where she notes judges’ reluctance to intervene as they are placed in an invidious position of struggling with complex cultural parameters.

137 Grand Council *Treaty No 3 Report* (1993) quoted in Institute on Governance *Dispute Resolution Systems: Lessons from other Jurisdictions* (Ottawa, 1999) 4.

138 See also Nin Tomas and Khylee Quince “Māori Disputes and their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Oxford, 1999) 205, 212.

139 This approach has already been largely adopted in relation to mandated iwi organisations under the Maori Fisheries Act 2004.

140 The Employment Relations Act 2000, s 143 similarly stresses the need for early resolution by the parties themselves and the need for flexibility in problem-solving. Mediation is usually required before a case can go to court. Similar objectives and procedures exist under the Human Rights Act 1993, s 75.

- KAIRONGOMAU** 9.13 While the Law Commission believes it is important for waka umanga to devise a mechanism which best suits their own structure and culture, a suggestion for seeking to resolve disputes at an early stage is to appoint an internal ombudsman or standing mediator to whom members of can easily refer any issues they have with decisions taken by the waka umanga or its officers. As noted some tribes have also instituted kaumātua councils or similar bodies to hear disputes, although their role tends to be limited.
- 9.14 We have called this officer a kairongomau or peace-maker. Waka umanga may wish to use other terms which have particular meaning for them and which reflect the particular role envisaged.¹⁴¹ In our earlier report, the phrase “pūkenga” was used both in the context of an internal mediator and as additional members of the Māori Land Court where expertise in tikanga is required.¹⁴² However, the specialist role suggested by a pūkenga is probably more appropriate to the Court than to a tribal ombudsman.
- 9.15 The kairongomau would have a broad mandate to consider any disputes between waka umanga and their members, between waka umanga and their constituent groups or within the rünanganui itself. Disputes that arise between tribal members and any subsidiary of the waka umanga (for example, a service provider) or between the rünanganui and a service provider may also be referred to the kairongomau.
- 9.16 Disputes may relate to tribal membership, distribution of benefits and other matters affecting the relationship between members and their waka umanga. These could include implementation of the charter and policies, and requests for information. We do not see the jurisdiction of a kairongomau as extending to matters covered by the general law, such as domestic law, crime or employment disputes. Such matters should be dealt with in the ordinary tribunals and courts. In this respect, the Commission’s recommended role for kairongomau is different from many of the tribal court models in the United States, which exercise a broad civil and criminal jurisdiction.
- 9.17 The kairongomau’s role would be to:
- ensure the members are treated fairly in their dealings with the waka umanga;
 - seek a resolution that satisfies all parties;
 - improve future dealings with the waka umanga, including suggesting changes to practice and policies; and
 - consider requests for information that the waka umanga has declined and, where appropriate, make recommendations for its release on a limited or general basis.
- 9.18 Whether kairongomau are full-time or part-time, salaried or honorary and formally qualified or lay will depend on the size of the waka umanga,

141 For instance, the Human Rights Commission use the term “kaihohourongo” for their dispute resolution mediators and conciliators. Other suggestions were “kaiwhāio”, which also means “peacemaker” and “Te Taroi”, a term referred to by Sir Apirana Ngata in *Nga Moteatea Part 1* as being a person who makes things peaceful and allays strife. The term “ombudsman” may not be used, except with the consent of the Chief Ombudsman or by legislation: Ombudsman Act 1975, s 28A.

142 New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (NZLC SP13, Wellington, 2002) 95.

tribal preferences and the availability of suitable candidates. In the case of a small waka umanga, he or she may be a kaumātua or someone with standing in the community who is not otherwise involved in the business of the waka umanga, but who has sufficient impartiality and understanding of its business to have the respect of both the waka umanga and its members. In larger organisations, the kairongomau might be a lawyer or similarly qualified person and may even be a full time employee of the waka umanga, provided that person's independence from the waka umanga is assured.

- 9.19 It is important for tribes to agree on an appointment process which, as far as possible, establishes the kairongomau's independence from the rünanganui. The Commission suggests that kairongomau should have relatively long, but fixed, terms of appointment, so that the need for independence can be balanced with the need to ensure ongoing competence. The method of appointment should be fixed in the charter. Tribes might consider providing for the rünanganui to call for nominations and then selecting a suitable candidate, or ratifying the appointment at a general meeting or by constituent hapū or other groups. However, although a requirement for endorsement by the tribe would ensure widespread support for the appointment, it could run the risk of politicising the position.

Kairongomau and bias

- 9.20 We do not believe that the strict principles of "presumptive bias" applied to judicial officers should apply to kairongomau, who should not be disqualified merely because they are members of the group concerned. In Māori society (and increasingly in general society as well), an intimate knowledge of the background and personalities involved is often seen as a qualification rather than disqualification for adjudication, and this knowledge may lend weight to the decision reached. Two Navajo commentators described this difference between the usual Western and aboriginal concepts of bias accordingly:¹⁴³

*American mediation uses the model of a neutral third person who empowers disputants and guides them to a resolution of their problems. In Navajo mediation, the Naat'aanii [or headman] is not quite neutral, and his or her guidance is more value-laden than that of the mediator in the American model. As a clan and kinship relative of the parties or as an elder, the Naat'aanii has a point of view. The Traditional Navajo mediator was related to the parties and had persuasive authority precisely due to that relationship. The Navajo Code of Judicial Conduct (1991) addresses ethical standards for peacemakers and states that they may be related to the parties by blood or clan, barring objection.*¹⁴⁴

- 9.21 Instead, as is recognised in relation to specialist tribunals, the test should be that the officer concerned has no direct or close connection with any of the parties and that principles of natural justice are adhered to.¹⁴⁵ The parties should,

143 Philmer Bluenose and James Zion quoted in Royal Commission on Aboriginal Peoples *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Canada Communications Group, Ottawa 1996) 190.

144 See also D Hurley "Restorative Justice in the Civil Jurisdiction" (Towards a Restorative Society Symposium, Wellington, October 2005) < <http://www.vuw.ac.nz/ips/completed-activities/restorative.aspx> > (last accessed 7 April 2006).

145 See *Riverside Casino Ltd v Moxon* [2001] 2 NZLR 78 (CA).

however, also be able to challenge the person selected and seek an alternative appointment if there is a close family relationship or any real concerns about actual bias.¹⁴⁶

- 9.22 A number of commentators have expressed the view that, while this may be fine in theory and may have worked well informally in the past, many tribal members would be reluctant to submit disputes to one of their own people. They fear that if the kairongomau is related (even quite distantly) to one of the parties or has some other indirect connection, he or she will still be seen as being biased. Some indicated they would be hard-pressed to think of someone in their own tribe who they would be confident in appointing.
- 9.23 We do not think this is a reason for not proceeding with the proposal, but it is a reminder that tribal members must be willing to trust in their own ability to solve issues rather than resorting to outside intervention. We believe that strengthening mutual respect and trust between tribal members is essential if tribes are to be able to determine their own futures. We recognise it will take time and finding the right person, who commands general respect within the tribe and who is not otherwise engaged in its governance or management, will often not be easy. As tribal capacity and integration increases, this should become less of an issue.
- 9.24 As kairongomau will have fixed terms of appointment, and as their findings are only recommendations, there is some protection against biased or incompetent kairongomau. In the meantime, we suggest that regional kairongomau could be appointed to serve several waka umanga. The proposed Secretariat could assist in the selection of suitable candidates for a regional kairongomau. Such an outside appointment may also be the preferred option for some tribes.

Powers of Kairongomau

- 9.25 The kairongomau would act as inquisitorial authorities, with power to determine their own procedures, apart from a requirement to act in accordance with natural justice. Complaints should be initiated in writing, but other than that, any formality should be kept to a minimum.
- 9.26 It is suggested that the charter provide that the waka umanga must make available any information sought by the kairongomau. In doing so, it may, however, seek confidentiality of that information where justified, on commercial or privacy grounds and, if the kairongomau rules any such request to be justified, the other party will not be entitled to see the information. Whilst the kairongomau would have no coercive powers over individual complainants in terms of summoning them to appear or to produce documentation, a failure to comply with such a request will obviously risk an adverse determination.
- 9.27 We suggest that lawyers or professional advocates do not represent the parties at this stage, but there may be cases where the kairongomau considers that legal advice would help reach a solution. The charter should allow the kairongomau

¹⁴⁶ In *R v Secretary of State for the Home Department; ex parte Al-Hasan* [2005] UKHL 13, the House of Lords noted that judges draw on previous experience in deciding cases, as do many administrative decision makers.

to appoint a lawyer to advise him or her and to charge the waka umanga. Where necessary, the kairongomau could also recommend that the waka umanga should fund advisors for the complainants to a specified extent. Otherwise, complainants who cannot afford legal advice may be at an undue disadvantage if opposing the waka umanga, and the likelihood of resolution will decrease. In exceptional cases, the kairongomau might agree that both parties should be represented by counsel.

- 9.28 The charter could also empower the kairongomau to commission a report from an independent and respected advisor. As well as legal advice, such reports might include accounting or other commercial advice, or advice on aspects of tikanga and/or tribal history. In such cases, the parties could agree in advance to be bound by that report. Even where the dispute continues, the cost and delay involved will often be reduced where impartial expert advice is available. It also means that the kairongomau does not personally need expertise in all areas, as long as his or her choice of expert is respected. This is an area where the Secretariat could be called upon to suggest suitable experts who are not linked to either party.

Kairongomau's findings

- 9.29 It is suggested that the findings of kairongomau would be recommendatory only. Until the position of kairongomau and the people who hold it are well accepted within the community, tribes are unlikely to agree beforehand to be bound by a ruling. It would also be undesirable if the kairongomau's decisions could be challenged by complainants or a reluctant waka umanga, thus leading to litigation rather than reducing it.
- 9.30 If, however, the waka umanga fails to adopt the recommendations of the kairongomau, or a complainant is dissatisfied with the ruling, the complainant may chose to take the matter to a formal mediation or, in some circumstances, to the Māori Land Court. In addition, where a waka umanga has not accepted the kairongomau's recommendations, it should be required to give a formal statement of its reasons for not accepting them to both the complainant and the kairongomau.
- 9.31 The kairongomau should also be required to report annually on the types of disputes dealt with and their resolution as part of the waka umanga's annual report. The degree of detail included in the reports will depend on the sensitivity of complaints and any confidentiality requirements. This will provide a public record of the waka umanga's responsiveness to complaints and the effectiveness of the kairongomau.

Confidentiality

- 9.32 Apart from such reports made by the kairongomau and subject to any contrary agreement by the parties, proceedings before the kairongomau should be confidential. Where, however, there is no resolution of a dispute, it may be very helpful for any subsequent stage of proceedings if the parties at least have isolated

the key issues in dispute and any agreed facts.¹⁴⁷ The requirement for confidentiality would therefore not preclude the parties agreeing to a written summary of such matters to be submitted to an outside mediator or court as the case may be. This process may also help “buy in” to the next process, even where there has been no resolution of the actual dispute.¹⁴⁸

Precedents for kairongomau

- 9.33 We have taken as a model for this office the role of the Ombudsmen’s Office and various other New Zealand and overseas models, including some adopted by indigenous people in North America.
- 9.34 The Ombudsmen Act 1975 provides for investigation of complaints against the Crown, Crown entities and local government.¹⁴⁹ They may investigate any administrative decision, recommendation, act or omission which affects that complainant.¹⁵⁰ Investigations are conducted in private and the Ombudsmen may make such inquiries as they think fit.¹⁵¹ The Ombudsmen may require the production of information and summons people to give evidence on oath. There is no general right to a hearing, but an adverse finding cannot be made without giving the relevant organisation a right to be heard. Although the powers of Ombudsmen under the Ombudsmen Act 1975 are recommendatory only, failure to comply may lead to an adverse report, which is usually sufficient incentive to comply.¹⁵²
- 9.35 The Privacy Commissioner and Health and Disability Commissioner are also statutory bodies which can hear complaints and initiate their own inquiries into matters of concern.¹⁵³ Similar officers outside core government include a number of local authorities, including Wellington City Council’s Issues Resolution Office,¹⁵⁴ the Banking Ombudsman and the Insurance and Savings Ombudsman.¹⁵⁵ Although they have no statutory powers, these Ombudsmen have very considerable recommendatory powers.

147 This is also the practice of the Navajo peacemakers; Professor Bob Clinton, personal communication to the Law Commission (16 December 2004).

148 See Mereana Hond “Resort to Mediation in Māori-to-Māori Dispute Resolution” (2002) 33 VUWLR 579.

149 Ombudsmen have also replaced the role of University Visitors in relation to disputes involving staff or students arising within individual universities: Education Amendment Act 1990, s 50(4).

150 Ombudsmen Act 1975, s 13(1).

151 Ombudsmen Act 1975, s 18.

152 Ombudsmen Act 1975, s 22. Ombudsmen are also responsible for administering the Official Information Act 1982 and Local Government Official Information and Meetings Act 1987, roles in which they do have mandatory powers to order the disclosure of information by government departments, Crown entities, and local authorities.

153 Privacy Act 1993, ss 13(1) and 69(2); and Health and Disability Commissioner Act 1994, ss 14(1)(e) and 40(3).

154 The role of the Issues Resolution Office is to investigate public complaints about the Council’s policies, activities and services. The office is funded by council but is independent of it, reporting directly to the Chief Executive.

155 See Office of the Banking Ombudsman of New Zealand < <http://www.bankombudsman.org.nz> > (last accessed 8 March 2005) and the Insurance and Savings Ombudsman < <http://www.iombudsman.org.nz> > (last accessed 8 March 2005).

Overseas models

- 9.36 The Canadian First Nations Governance Bill 2002 proposed that bands must authorise an impartial person or body to consider any members' complaints about decisions of the band's council or the improper application of any band law.¹⁵⁶ The council could be ordered to rectify or reconsider its decision. In addition, the band could authorise the person or body to set aside an election or remove an officer if the complaint related to an election or constituted grounds for removal.
- 9.37 The Nisga'a of British Columbia have a comprehensive system for dealing with issues between them and the government at federal or provincial level. We think it could be adapted for waka umanga for both internal and external disputes.¹⁵⁷ It comprises three stages:¹⁵⁸
- *Stage One:* collaborative negotiations, which may or may not involve a third party.
 - *Stage Two:* if Stage 1 has failed, the dispute may be referred to mediation, a technical advisory panel, neutral evaluation, an elders' council or another non-binding process. Each of these processes has clearly laid out procedures.
 - *Stage Three:* if Stage 2 has failed, the parties may proceed to binding arbitration or judicial proceedings.
- 9.38 Many of the Indian nations in the United States have fully-fledged tribal courts, which operate similarly to state courts. There are also, however, some community-level mechanisms, which seek to incorporate traditional forms of dispute resolution. The Peacemaker Division of the Navajo Nations judicial branch practices the Navajo custom of "peacemaking", which encourages community members and disputants to talk things through with the help of a respected member of the community, to reach a consensual agreement. As with our proposals for kairongomau, peacemakers have the ability to resolve and address disputes and other conduct causing disunity to the tribal community.¹⁵⁹
- 9.39 The Hawaiian custom of "ho'oponopono", which means "to make right", is used to resolve a range of disputes including domestic and family disputes. It therefore applies to a wider range of disputes than we envisage for a tribal disputes procedure. However, like a peacemaker and kairongomau, a respected person from the community is chosen informally or is court-appointed to facilitate discussions and help disputing parties resolve their issues.¹⁶⁰

156 The First Nations Governance Bill 2002, C-7 has since lapsed as a result of opposition by First Nations and the new government.

157 See Nisga'a Final Agreement as discussed in Institute on Governance *Dispute Resolution Systems: Lessons from other Jurisdictions* (Ottawa, 1999).

158 Institute on Governance *Dispute Resolution Systems: Lessons from other Jurisdictions* (Ottawa, 1999) 24.

159 For a fuller discussion of Navajo peacemaking see Howard L Brown "The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum" (2002) 57-JUL Disp Resol J 44.

160 Brenda V Smith "Battering, Forgiveness and Redemption" (2003) 11 Am UJ Gender Soc Pol'y & L 921, 950.

- 9.40 A more formal Pacific example is the “dispute settlement authority” required before any customary land holding group can incorporate under the Papua New Guinea Land Groups Incorporation Act 1974.¹⁶¹

FACILITATION

- 9.41 Another method of reaching an agreed consensus, or at least an agreed set of facts to go to the next stage, is facilitation. This tends to be less formal than mediation and can be as informal as the parties sitting in a room together with an independent facilitator and “brainstorming” an issue. This could involve the kairongomau or an agreed facilitator. It could also involve appointing facilitators for both parties and setting the rules for the conduct of the session before it starts. This would include respect protocols and agreed understandings as to what should or should be treated as confidential.

MEDIATION

- 9.42 The Law Commission suggests the charter should contain provision for formal mediation if the parties agree and where resort to the kairongomau or facilitation has failed. In such cases formal mediation and/or arbitration within the tribal waka umanga is preferable to referring the issue straight to the Māori Land Court. In this way, the tribe as a whole retains control of the process, and mutually acceptable and timely solutions are more likely.
- 9.43 It is likely that someone from outside the tribe would be chosen as mediator, to avoid any allegations of bias and also to ensure the mediator has the skills required in the mediation process. However, it is still important to find someone who understands the issues. Experience has shown it can be hard for many Māori groups to find people knowledgeable in tikanga Māori who are also suitably qualified as mediators.¹⁶² Opinions also appear to vary as to the relative weight to be given to these criteria; it may depend on the nature of the parties and the dispute. The Commission considers it to be an important priority that a list of suitable mediators be developed; this might be a role of the proposed Secretariat, which could recommend mediators to waka umanga.¹⁶³ Mediators could also be chosen from a panel of mediators used by the Māori Land Court.
- 9.44 In addition, steps may need to be taken to ensure that the parties approach mediation on a relatively even footing. In most cases, the waka umanga will be well resourced, while the complainants may not be. As noted earlier, it may be necessary for the waka umanga to provide some funding for those who are opposing it, if recommended by the kairongomau or the mediator. The mediator should also have powers to seek expert advice should that be needed.

161 Land Groups Incorporation Act 1964 < <http://www.paclii.org/cgi-pacii/disp.pl/pg/legis/consol%5fact/lgia1974292/lgia1974292.html?query=%7e+land+group+incorporation>> (last accessed 7 April 2006).

162 Sometimes, as in the case of the mediations organised by the Waitangi Tribunal, two mediators may be appointed – one with tikanga expertise and the other a professional mediator.

163 The Secretariat could also liaise with wānanga and other training providers to arrange training in mediation skills for kaumātua and other suitable Māori, or to familiarise trained non-Māori mediators with some of the issues they are likely to confront in dealing with disputes within Māori waka umanga, including aspects of tikanga. The assistance of mediation organisations such as LEADR should also be sought in this regard.

- 9.45 A number of commentators have noted that the parties should have input into defining the issues and processes before mediation.¹⁶⁴ Unless this has been clearly settled through the kairongomau, a mediator would need to spend time at the outset speaking to the parties and also seeking to understand some of the unspoken issues that may be not be apparent.

ARBITRATION

- 9.46 If mediation has failed, it may be appropriate for a matter to be referred to arbitration rather than to the Māori Land Court, although this would require the consent of all parties. Just as the commercial world has increasingly turned to arbitration as a cost-effective and efficient method of resolving its disputes, waka umanga may find that arbitration provides a better model for determining their own future than resort to the courts, with all the attendant delays and possibilities of appeals, including review by the general courts. The success of arbitration will, however, again be largely dependent on the availability and cost of suitable arbitrators.
- 9.47 The Arbitration Act 1996 provides a framework for the resolution of disputes, and the resulting award is much less susceptible to appeal than a court order.¹⁶⁵ Awards are usually also confidential, though in line with the requirements that waka umanga be transparent and accountable to their members, we suggest that charters provide that the waka umanga must advise its members as to the outcome of any arbitration, except for information withheld on privacy, commercial or other sufficient grounds.
- 9.48 Many commercial contracts contain a provision that where the parties cannot agree on the arbitrator, a person such as the President of the New Zealand Law Society or of the local District Law Society makes the appointment. This may be appropriate in dealing with contracts between waka umanga and third parties such as financial institutions. Where internal disputes have arisen in waka umanga, we suggest the proposed Secretariat (or in its absence a body such as the Federation of Māori Authorities) could be nominated as the body to select an arbitrator.
- 9.49 Sometimes it can be difficult to “agree on what is disagreed” between the parties when animosity exists in their relationship, or one of them is a reluctant participant in the arbitration. We suggest that the person with power to appoint an arbitrator also has authority to settle the question and to resolve procedural issues between the parties which precede the actual commencement of the arbitration.
- 9.50 Where there is an ongoing dispute about the terms on which a matter is referred to arbitration or any issues relating to the arbitration or arbitral award, it is suggested that the Māori Land Court should be granted concurrent jurisdiction with the High Court to deal with such disputes.

164 Mereana Hond “Resort to Mediation in Māori-to-Māori Dispute Resolution” (2002) 33 VUWLR 579 and Colin McKenzie and Amster Reedy “A Treaty of Waitangi, Overlapping Claim Mediation: ‘A Prospective Hindsight’” (2001) 9 Resource Management Journal 1.

165 An award may be set aside only if there was some clear defect in the process, or the award exceeds the terms of the matter submitted to arbitration or is legally incapable of being implemented, or the High Court finds the award is in conflict with the public policy of New Zealand (including a breach of natural justice): Arbitration Act 1996, sch 1, cl 34. See also Sch 2, cl 5 which allows appeals on questions of law (by leave unless all parties consent).

THE MĀORI
LAND COURT

- 9.51 As discussed in Chapter 5, we propose that the Māori Land Court is given jurisdiction to deal with any disputes involving waka umanga and their members which have not been resolved internally. This is consistent with our recommendations that it is the Māori Land Court which oversees registration of waka umanga and is involved in their winding up. It is also consistent with the provisions of the Maori Fisheries Act 2004, Maori Commercial Aquaculture Claims Settlement Act 2004 and the Foreshore and Seabed Act 2004, where certain disputes can be referred to the Māori Land Court.¹⁶⁶ The Māori Land Court also has jurisdiction over incorporations and trusts formed under Te Ture Whenua Maori Act 1993.¹⁶⁷
- 9.52 We believe the Māori Land Court is preferable to referring matters to the High Court because of its existing and growing experience with Māori entities.¹⁶⁸ There also appears to be a general feeling among Māori that the Māori Land Court is “their court”. This is largely because of their long association and familiarity with the Court, and despite its earlier history in facilitating the alienation of Māori land. Its relative ease of access, less formal procedures and lower costs, its high proportion of Māori and Māori-speaking staff and the special expertise of its judges and staff, therefore make it the court of choice by Māori in many cases.
- 9.53 There is, however, sometimes a reluctance to submit matters to what is regarded as the interference and restrictions of that Court. This is perhaps indicated by the wish of most groups receiving land back from the Crown by way of Treaty settlements to have the land classified as general land rather than to reclassify it as Māori, freehold land.¹⁶⁹ Recent consultations have revealed that the acceptability or otherwise of the Māori Land Court as an adjudicating body varies considerably from region to region, often based on individual experiences with the local court.¹⁷⁰
- 9.54 There is also a perceived reluctance of non-Māori and financial institutions to submit to the jurisdiction of the Māori Land Court, as they are unfamiliar with the Court’s procedures or do not regard it as sufficiently expert in commercial matters. To help overcome these concerns we recommend that, in addition to its current powers to appoint experts in tikanga, there should also be provision for the Court to appoint commercial experts to sit with the judge.

166 See Maori Fisheries Act 2004, ss 180, 182, 185, and 187, Maori Commercial Aquaculture Claims Settlement Act 2004, ss 54 and 55 and Foreshore and Seabed Act 2004, ss 11(c), 39(b), 46, and 48–51.

167 An enhanced role for the Māori Land Court was also envisaged in New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004). The report recommended that jurisdiction of the Māori Land Court be increased to include all disputes involving Māori community assets, with power to appoint pu-wananga or pūkenga (experts in tikanga) and others with relevant skills as full members of the court in particular cases.

168 As is currently proposed by Te Puni Kōkiri.

169 For instance, Waikato Raupatu Claims Settlement Act 1995, s 21 vests land returned from the Crown in Pootatau Te Wherowhero under the jurisdiction of the District Land Registrar. Section 22 specifically ousts the jurisdiction of the Māori Land Court in relation to the Waikato Raupatu Lands Trust. Te Ture Whenua Maori Act 1993, s 220A also provides that land may be registered under the Land Transfer Act in the name of a tipuna or trust.

170 See Controller and Auditor-General *Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee* (Audit Office, Wellington, 2004) which notes concerns regarding the timely processing of applications and lack of standardisation between registries.

- 9.55 The proposed Waka Umanga Act, however, will place emphasis on groups resolving their own issues and the Court would have a valuable role in assisting and guiding this, rather than imposing its own will on them. Māori Land Court judges are often highly knowledgeable about the dynamics of Māori organisations and can sometimes intervene before an organisation gets into serious trouble, in a way that the High Court is usually unable or unwilling to do. Any legislation conferring additional roles on the Māori Land Court in relation to communally-owned assets should, however, ensure that the Court's role is sufficiently restricted to reviewing process, and only intervening to the extent required, to ensure that judges are not substituting their own views for those of the tribe.

Jurisdiction

- 9.56 The Māori Land Court should be able to decline jurisdiction if not satisfied that the internal dispute mechanisms have been exhausted. Unlike the Māori fisheries legislation,¹⁷¹ however, we believe the Court should have some discretion to hear a matter even where internal processes have not been commenced or completed, as there will be some cases requiring urgent intervention of the Court. In such cases, the Court can refer parties back to the internal processes once interim orders have been considered or made. There is therefore little incentive for a party to bypass the internal mechanisms unless urgent relief is required.

Transfer to other courts

- 9.57 Where a dispute involves an outside party or a Māori organisation that is not incorporated under the Waka Umanga Act, we recommend that the Māori Land Court should have concurrent jurisdiction with the general courts (the District Court or the High Court, depending on the quantum and/or nature of the dispute).¹⁷² This is the approach already adopted under various other pieces of legislation.¹⁷³ Plaintiffs could therefore choose the court in which to commence an action, but any other party could apply for the proceedings to be transferred to another court where appropriate.
- 9.58 The existing provisions in Te Ture Whenua Maori Act 1993 to move cases between the Māori Land Court and the High Court should also be expanded.¹⁷⁴ We propose that the High Court should have wider powers to move matters from its jurisdiction into the Māori Land Court (rather than solely the Māori Appellate Court, as at present) where it believes the Māori Land Court could more appropriately deal with a matter involving Māori organisations subject to the High Court's jurisdiction. This might include Māori-owned companies, private and charitable trusts and incorporated societies. By the same token, however, disputes raising complex commercial or other issues (including third party interests) may be more appropriately retained in the High Court or moved from the Māori Land Court into the High Court.

171 Te Ture Whenua Maori Act, ss 26D(6) and 26R(6).

172 Companies, trusts and incorporated societies will continue to mostly use the High Court, including such organisations controlled by a waka umanga.

173 See Te Ture Whenua Maori Act 1993, ss 21–24 (in relation to Property Law Act 1952); s 24A(1) (in relation to the Contracts (Privity) Act 1982 and Contractual Remedies Act 1979); s 26(2) (in relation to the Fencing Act 1978); and s 338A(1) (b) (in relation to the Trustee Act 1956).

174 Te Ture Whenua Maori Act 1993, ss 18(2), 61 and 72.

- 9.59 Provision could also be made in the legislation to allow parties to a contract to agree to refer the matter to the Māori Land Court if they so choose, either at the time of contracting or subsequently. By the same token, parties contracting with waka umanga should have the ability to provide that disputes arising from the contract are heard in the High Court rather than the Māori Land Court. This ability may help to allay the fears of some of the commercial community. But where there are not large sums at stake the Māori Land Court should, in general, deal with the matter.
- 9.60 We also recommend that the Māori Land Court is strengthened by the ability to appoint lay members with expertise in areas other than knowledge of tikanga, in particular commercial and other experts. This will be important if third parties are to have confidence in the prospect of cases being retained in the Māori Land Court rather than being referred on to the general courts.

Court mediation or facilitation

- 9.61 The Māori Land Court's powers to refer matters to mediation needs to be broadened to cover any type of dispute involving waka umanga, not merely representation¹⁷⁵ or matters currently covered by the Māori Fisheries Act 2004 and related legislation. Any amendments to Te Ture Whenua Maori Act 1993 in this area should be reconciled with the existing provisions to avoid there being dual systems for the same matters.¹⁷⁶
- 9.62 The Māori Land Court will also need to take account of any prior attempts to settle the matter by way of any internal dispute resolution mechanisms, such as the kairongomau, and any prior mediation, so that disputing groups need not be sent needlessly back to mediation.
- 9.63 The existing provisions for the mediator to report to the Court on issues that have been agreed or not agreed should be extended to allow the mediator to present a full record of the facts agreed and to allow much of the evidence presented at mediation to be available to the Court. As this is a departure from the standard principles of confidentiality of the mediation processes, which could undermine the mediation itself, disclosure to the Court must only be by consent of the parties. However, on balance it may be preferable that the parties are not put to the expense and delay of preparing their witnesses and material all over again for a court hearing.
- 9.64 A possible model for this approach to mediation is the South African Land Claims Commission and Court.¹⁷⁷ The Land Claims Commission has broad powers to investigate and mediate claims for the return of land. Where, however, mediation has not been successful, the Commission must prepare a comprehensive report for the Court.

175 Te Ture Whenua Maori Act 1993, ss 30C-G.

176 See, for instance, Maori Fisheries Act 2004, Part 5, especially s 180 and Te Ture Whenua Maori Act 1993, s 26C.

177 See the Restitution of Land Rights, Act 22 of 1994 (South Africa) and Liesle Theron "Healing the Past: A Comparative Analysis of the Waitangi Tribunal and the South African Land Claims System" [1998] 28 VUWLR 311.

Remedies available in the Māori Land Court

- 9.65 We have considered whether, in hearing cases involving disputes within waka umanga, the Māori Land Court's role should be confined, as the High Court is on judicial review, to matters of process rather than substance. This would be in line with our view that the Court should not get involved in the merits of disputes any more than is absolutely necessary and the role of the Court in relation to formation and registration disputes, as discussed in Chapters 7 and 8.
- 9.66 There may be cases which come to the Court where there has been a procedural defect, such as a failure to give adequate notice or other breach of natural justice, where the appropriate response is for the Court to refer a matter back to the waka umanga for the decision to be made properly.
- 9.67 We have decided, however, that the Court must have power to go beyond this limited degree of intervention. If parties have properly exhausted their internal dispute resolution mechanisms and any court-ordered mediation, they are entitled to a ruling on the substance of their claim. We suggest that the remedies available in such cases are based on the powers that judges already exercise in relation to incorporations and trusts.¹⁷⁸ The emphasis in relation to waka umanga would be on assisting the tribe to reach its own solutions and only making orders where the parties have reached a stage where such intervention is necessary.
- 9.68 The Court's powers should include the power to terminate the position of any representative, appoint interim representatives and call for new elections of representatives. It could suspend or vary the terms of any charter or document, pending the matter going back to the tribe for reconsideration under the charter's rules for major transactions. The Court should also be able to make a declaration as to a person or a groups' membership of the tribe.

Interim injunctions

RECOMMENDATION

- 9.4 The statute will provide that the Māori Land Court can grant an interim injunction on the grounds that:
- the waka umanga is acting or proposes to act in a manner contrary to the Act or charter;
 - the injunction is required on the balance of convenience; and
 - at least 15 members support the application.
- 9.5 The Court may also order the applicants give an undertaking as to consequential damages.

¹⁷⁸ Te Ture Whenua Maori Act 1993 gives the Court broad powers in relation to trusts, including their formation and termination (ss 219, 220 and 241) and authorises new ventures (s 229) and periodic review (s 231). It can exercise all the powers of the High Court in relation to trusts, including its inherent jurisdiction (s 237). In relation to incorporations, the Court also forms and winds up the entity (ss 247 and 282) and appoints and removes committees of management (ss 269 and 280(7)). It approves incorporations' constitutions in accordance with the Maori Incorporations Constitution Regulations 1994, appoints officers to examine their affairs (s 280) and may require officers to attend court to explain any non-compliance (s 281). It also has broad powers in respect of Māori reservations, including marae under Part 17 of the Act and the Maori Reservations Regulations 1994.

- 9.69 The power to make interim injunctions needs to be exercised sparingly, but may be essential in some cases to prevent serious harm to the assets of the waka umanga or to protect an individual's or group's rights in respect of the operations of the waka umanga. Applicants must establish that an interim order is necessary to preserve their position pending a full hearing and that any damage could not adequately be compensated by damages. They may also be required to give an undertaking as to damages should their application for permanent relief fail.
- 9.70 We propose that the application must be supported by at least 15 members, as with other applications under the proposed Waka Umanga Act, in order to prevent premature or unnecessary applications. Where a matter is truly urgent, the Court could grant leave either to dispense with this requirement or to require that evidence of support of other members be filed within a certain time frame.

Hearing procedures

- 9.71 One of the reasons for recommending the Māori Land Court rather than the High Court as a judicial forum is its more flexible approach to hearings.¹⁷⁹ For instance, parties are often not represented by legal counsel. In exercising jurisdiction under the Waka Umanga Act, we also think it is important for the Court to have broad powers to receive written communications from interested members without requiring a formal appearance or affidavit form. This will allow members, who may live at some distance or lack the time and resources to appear personally or to instruct counsel, to nevertheless have their views considered in any matter before the Court. The Court must, however, have the power to require the formal appearances or evidence where necessary.

Appeals

- 9.72 At present, appeals from the Māori Land Court go to the Māori Appellate Court, and from there to the Court of Appeal.¹⁸⁰ The Law Commission, in its 2004 report *Delivering Justice For All*,¹⁸¹ recommended that appeals from the Māori Appellate Court on matters of tikanga should go directly (if leave is granted) to the Supreme Court (Recommendation 122) but that appeals on other matters should go to the High Court rather than the Court of Appeal (Recommendation 124).¹⁸² The Commission considered that as a matter of principle, there should be a right of general appeal from any primary Court to the High Court. The Commission was prepared to make an exception in the case of the Māori courts, however, because the appeals mainly involve simple error correction or issues of tikanga Māori, and because of the flexible manner of hearing and decision making in those Courts.
- 9.73 We remain of that opinion in relation to the Māori Land Court's general jurisdiction but recommend that all appeals from the Māori Land Court under

¹⁷⁹ Te Ture Whenua Maori Act 1993, s 66.

¹⁸⁰ See Te Ture Whenua Maori Act 1993, ss 58, 58A, 58B and 59. Under s 58B, in exceptional circumstances, there may be a direct appeal to the Supreme Court from the Māori Appellate Court.

¹⁸¹ See New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004).

¹⁸² Both these recommendations were dissented from by Commissioners Ngatata Love and Frances Joychild.

the proposed Waka Umanga Act should go directly to the High Court rather than to the Māori Appellate Court. However, any matters involving a significant degree of tikanga may be referred to the Māori Appellate Court, by way of case stated, under the existing section 61(1)(b) Te Ture Whenua Maori Act 1993, or an expanded equivalent as suggested above.

- 9.74 Our reasons for this recommendation are that the Waka Umanga Act jurisdiction will be quite different from the Court's general jurisdiction in relation to land. Disputes arising under the Waka Umanga Act will give rise to questions of compliance with fair process in the formation of a waka umanga and of compliance with the terms of charters, in accordance with legal standards of good governance, once they have been established.
- 9.75 These invoke universal principles where it is critical to maintain uniform standards across all areas of law, particularly as it relates to corporate bodies with extensive commercial and other dealings with other persons, and process matters in the nature of judicial review.¹⁸³ Such appeals will involve matters of process and general law, and may involve non-Māori parties.¹⁸⁴ This is also consistent with the classic role of the High Court in maintaining a unitary legal system that is principled and coherent, as was discussed in the Commission's earlier report.¹⁸⁵
- 9.76 Although we recognise that there will be additional court costs and potential delay in going to the High Court rather than the Māori Appellate Court, many disputes will not just be simple matters of error correction and further appeals may occur.
- 9.77 In many cases, the disputes will have already gone through internal dispute resolution, including mediation, before going to the Māori Land Court. Allowing for appeals directly from the Māori Land Court to the High Court will ensure that, where a decision is being challenged, litigants are not faced with different courts and remedies depending on whether they exercise a right of appeal (currently to the Māori Appellate Court) or judicial review (to the High Court). This can lead to the same decision of the Māori Land Court being challenged in two different courts, at the same time.
- 9.78 Under the present appeal system, disputes risk going from the Māori Land Court to the Māori Appellate Court, then either on appeal to the Court of Appeal and possibly the Supreme Court, or on review to the High Court from either the Māori Land Court or Māori Appellate Court, thence to the Court of Appeal and possibly to the Supreme Court, a potential of 3 or 4 levels of appeal/review in addition to whatever internal mechanisms and mediations have already taken place.

183 We note that the power of both the Māori Land Court and the Māori Appellate Court to state a case to the High Court "on any point of law" (Te Ture Whenua Maori Act 1993, s 72) supports the view that those courts may seek assistance with complex legal issues.

184 The Māori Land Court will be hearing disputes under this Act which would otherwise have been heard in the High Court under legislation such as the Incorporated Societies Act 1908, the Charitable Trusts Act 1957 or the Companies Act 1993.

185 See New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) part 5, paras 358–361.

- 9.79 This is far too long-winded a process for matters which may require urgent resolution in the interests of both the tribe and any who deal with it. In recognition of this, we recommend that subsequent appeals from the High Court to the Court of Appeal are subject to a leave provision, as already exists in other specialist jurisdictions,¹⁸⁶ and generally in respect of the Supreme Court.¹⁸⁷

COSTS

RECOMMENDATION

9.6 The statute should provide that the Court may award costs based on the reasonableness of the parties' conduct both prior to the application being brought and during the hearing of the application, rather than necessarily following the outcome of the application.

- 9.80 Costs are not usually awarded in the Māori Land Court, but we consider a jurisdiction to award costs in appropriate cases is necessary to constrain either overbearing scheme promoters or vexatious complainants. Costs should be considered according to a test of reasonableness, rather than simply following the outcome as to who won or lost. For instance, costs in favour of an ultimately unsuccessful applicant may be appropriate where the other party has not engaged in mediation or other efforts to resolve the problem short of a court hearing, or where a valid objection was unreasonably left to the last minute before being brought.

AMENDMENTS
TO TE TURE
WHENUA
MAORI ACT

- 9.81 The recommendations in this chapter and Chapters 8 and 10 relating to registration, court interventions and winding-up will require significant amendments to Te Ture Whenua Maori Act 1993. This Act has recently had additional provisions inserted in relation to Māori fisheries, aquaculture, and foreshore and seabed claims which has created a confused array of sections. Whilst it is beyond the scope of this project, the Commission suggests it is timely for a streamlining and consolidation of those parts of the Act affected by these changes.

¹⁸⁶ See Employment Relations Act 2000, s 214 (appeals from the Employment Court to the Court of Appeal); and Resource Management Act 1991, ss 299 and 308 (appeals from the Environment Court to the High Court and from there to the Court of Appeal).

¹⁸⁷ Supreme Court Act 2003, ss 12–14.

Chapter 10

Court interventions and wind up

INTRODUCTION

- 10.1 This chapter discusses the role of the Māori Land Court in providing remedies and assistance when there is dysfunction in a waka umanga that cannot reasonably be resolved through internal systems, or where the waka umanga is insolvent or otherwise needs to be wound up. In these circumstances, we provide for two types of application to the Court: an application for a court intervention, and an application for wind up.
- 10.2 An application for a court intervention is appropriate where the waka umanga is not complying with the requirements of the Waka Umanga Act or its charter, but the membership still support the waka umanga and it is not immobilised by debt. The powers of the Court in response are designed to preserve or re-establish the waka umanga as a viable and solvent corporation, where this is possible. A Court might make an order for specific performance in response to a waka umanga's failure to comply with its charter. Alternatively, if, for instance, the rūnanganui has ceased to hold its scheduled meetings or is unable to make decisions because it lacks a quorum, the Court might order a review of the waka umanga's affairs, or appoint a commissioner to govern the waka umanga until new elections have been held.
- 10.3 An application for wind up is designed for situations where the waka umanga's problems are severe, or the members no longer wish the waka umanga to continue. The debts of the waka umanga may be overwhelming, or the loss of unity amongst the tribe so substantial, that there is no alternative but to pay the debts and wind up the waka umanga. Any remaining assets and any "protected assets" would be placed in trust until a successor entity could be formed.
- 10.4 Our recommendations allow for flexibility, so that if an application for an intervention reveals serious and pervasive problems that meet the threshold for wind up, the Court may then exercise its wind up powers. Similarly, if an application for wind up does not meet that threshold, the Court may make orders as if it had received an application for a court intervention.
- 10.5 This jurisdiction is one that is best suited to the Māori Land Court for the reasons previously outlined in Chapter 9. While it is the High Court that usually has jurisdiction to wind up trusts, incorporated societies and companies, the Māori Land Court already has considerable expertise in dealing with trusts

and incorporations formed under Te Ture Whenua Māori Act 1993. It will also apply this expertise in relation to mandated iwi organisations under the Maori Fisheries Act 2004.

Applications for a court intervention

RECOMMENDATION

- 10.1 An application for an intervention to the Māori Land Court may be made by 15 or more members, the Registrar of Waka Umanga or a creditor.
- 10.2 The application for an intervention may be made on the grounds that the waka umanga or any of its officers or employees has acted, is acting, or proposes to act in a manner that is contrary to the requirements of the Waka Umanga Act or its charter.

- 10.6 As discussed in the previous chapter, the internal dispute resolution system will be the first port of call for most issues that arise between members and the rünanganui or waka umanga. The recommendations in this chapter address where the internal system has failed or the rünanganui is operating in a manner that it is unlikely to abide by the recommendations of the internal dispute resolution system. It might be used, for instance, when a representative has failed to declare a material financial interest and the rünanganui has not instituted the dismissal procedures in the charter. The Court may make an order dismissing the representative or the entire rünanganui, with an order for new elections to be held.
- 10.7 It may also be utilised where the matter requires the immediate intervention of the Court. While it is important that the power to seek urgent relief is available, this power should not be used often, and the Court will need to ensure it is not used merely to by-pass the internal dispute mechanisms.

Applications by the Registrar of Waka Umanga

- 10.8 The Registrar of Waka Umanga is likely to be involved where, for example, the waka umanga has failed to furnish the returns required by the Act. The Registrar may use informal persuasion as an initial response, but if this is not successful, an application for intervention provides the Registrar with an avenue for enforcement which is short of an application for wind up. It could be used, for instance, if the waka umanga is not meeting the ongoing requirements of registration but otherwise appears to be functioning adequately.

THE COURT'S POWERS OF INTERVENTION

RECOMMENDATION

> Continued next Page

- 10.3 When considering an application for intervention the Māori Land Court must be guided by the purpose, where feasible, of preserving or re-establishing the waka umanga as a viable corporation that acts in accordance with the Waka Umanga Act and its charter, consistent with satisfying any outstanding debts of the waka umanga.

RECOMMENDATION

10.4 The Māori Land Court may convene a judicial conference, refer the matter to mediation or facilitation, dismiss the application or hear the matter and make one or more of the following orders:

- appoint a person or persons to review and report on the activities and operations of the rūnanganui and the waka umanga in such manner as the Court directs;
- require specific action(s) or restrain the rūnanganui from specific action(s) in accordance with the requirements of the Waka Umanga Act and the charter;
- declare a provision of the charter is inconsistent with the requirements of the Waka Umanga Act or general law;
- remove representative(s) from office if the Court considers this is justified on any of the grounds for removal in the Waka Umanga Act or the charter;
- make such orders as are necessary to provide for elections to be held to fill any vacancies on the rūnanganui;
- appoint one or more persons as members of the rūnanganui for a defined period and for defined purposes;
- suspend the rūnanganui's powers for a defined period, and appoint a commissioner to exercise those powers on such terms and conditions as the Court considers necessary;
- appoint an interim liquidator if the circumstances require;
- refer any matter to the Attorney-General to determine whether any prosecutions should be laid; and/or
- give such other directions as it sees fit for the purpose of settling the waka umanga's debts, and/or re-establishing the credibility of the waka umanga with its members.

10.5 The Court may also order that the waka umanga be wound up if, after receipt of a review report and conferences and/or hearings, the Court is satisfied that the threshold for wind up has been met.

10.9 Although the Court's objective in responding to an application is to maintain the waka umanga as a functional servant of the tribe, there must be a realistic chance of this succeeding and there will be some situations where it is preferable to wind the waka umanga up and preserve the assets until the tribe has formed a new waka.

10.10 In most cases, the Court should convene a judicial conference to consider whether the dispute could be resolved internally or through the court's mediation facilities.

10.11 Some of the powers are similar to those that may be exercised by the Minister for Local Government under the Local Government Act 2002, with respect to a

local authority that is not performing.¹⁸⁸ Subject to certain conditions, the Minister may appoint a review authority, a commissioner, or another person to act on behalf of the authority or to initiate a review, or may call a new election.¹⁸⁹

- 10.12 The power to appoint a commissioner is designed for situations where there is a clear failure of governance by the rūnanganui, but where the financial issues are not so critical as to require wind up. The appointment may be for a defined period and purpose, and would probably include organising and overseeing new elections. The Secretariat could have a panel of people suitable for such appointments, and be consulted before such an appointment is made.
- 10.13 Other powers recommended follow existing provisions of Te Ture Whenua Maori Act 1993 in relation to trusts and incorporations under that Act. Section 280 gives the Court wide powers to investigate the affairs of Māori incorporations.¹⁹⁰
- 10.14 There are, however, some significant differences in our proposals from the Court's existing powers. For instance, we considered whether it should be necessary for the Court to always appoint a reviewer prior to exercising any of the other powers, as is required by section 280 Te Ture Whenua Maori Act 1993. We decided against this on the basis that there would be instances where the Court, through its conferences and hearings, will have sufficient information to make a judgement as to what is required.
- 10.15 Section 280 Te Ture Whenua Maori Act 1993 also allows the Māori Land Court to suspend, as it sees fit, any or all of the provisions in the constitution of a Māori incorporation. We do not recommend this provision for waka umanga because charters represent their tribes' expressed wishes, and are approved at registration or when any amendment is lodged. The Court may only negate a provision of a charter if it does not comply with the law.
- 10.16 The costs of any review or commissioner would be borne by the waka umanga unless the Court orders otherwise.¹⁹¹

188 See Local Government Act 2002, ss 254-257. The Ngāti Paoa proposal provides for similar powers, to be exercised by the Māori Land Court: see Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cls 105–109.

189 See also the very wide powers under the Corporations (Investigations and Management) Act 1989 to appoint statutory managers or advisory committees of corporations and "associated persons": ss 38-40 and 60. Section 39(b) and (c) provide that a statutory manager of a corporation may be appointed where a corporation is (or may be) operating fraudulently or recklessly, or such an appointment is desirable to preserve the interests of its members or creditors or beneficiaries or the public interest, or to enable its affairs to be dealt with in a more orderly or expeditious way.

190 Te Ture Whenua Maori Act 1993, s 280 concerns an application to the Court to appoint examining officers, and the court's powers in response to such applications. The application may be made by shareholders owning not less than one-tenth of the shares, or following a special resolution at a general meeting. Officers of the incorporation have a duty to assist examining officers. In addition, s 269(4) allows any shareholder to apply to the Court for removal of a member of the committee of management.

191 There may be situations where the waka umanga is insolvent and outside funding is required. The Court's own resources are limited but there may be cases where the Government or another agency is able to assist (although the Court cannot order it to do so).

- 10.17 Applications for voluntary wind up may be made by the members or the rūnanganui itself. Applications for wind up may also be made by a creditor or by the Registrar of Waka Umanga.

Applications for voluntary wind up

RECOMMENDATION

- 10.6 The rūnanganui and/or the members may make an application to the Māori Land Court to wind up the waka umanga if the membership has first approved such an application, and providing the application is accompanied by an affidavit stating that the approval requirements have been met.
- 10.7 Membership approval for an application to wind up the waka umanga should require that the resolution to wind up has been put to at least two special general meetings summoned for that purpose, where at least 66% of those voting at the first meeting approved the resolution, and at least 66% of those voting at the second and any subsequent meetings approved the resolution. The second meeting must be held within 30 days of the first, and any subsequent meetings must be held within 30 days of the second.

- 10.18 An application for voluntary wind up has been identified as a “major transaction” for which a decision-making procedure must be specified in the charter. Although, in general, we have recommended that the threshold for such transactions be left to the tribe to decide, in this case we believe a standard minimum procedure is called for, because it affects the legal status of the waka umanga as a whole. We therefore recommend that the voluntary procedure must incorporate the minimum requirements for two general meetings and at least 66% approval, although it may include additional safeguards.¹⁹² These requirements are designed to prevent the waka umanga from being held to ransom by applications from small dissident groups.
- 10.19 Once the application has been approved it may be lodged by either the rūnanganui or by a group of members. The ability for members to lodge the application responds to situations where the rūnanganui may be too dysfunctional to make the application itself, or may have refused to accept the membership’s resolution for winding-up.
- 10.20 An application may not be lodged on the decision of the rūnanganui alone, as any such application must clearly be done in accordance with the wishes of the members. If the membership decide to disband, but the rūnanganui does not agree, the proper course for the representatives is to resign their positions so that new elections could be held.

192 Incorporated Societies Act 1908, s 24 contains a requirement of this type. Te Kauhanganui o Waikato (Inc) Rules Rule B.21.1. allows for voluntary winding up following a special resolution involving a 75% vote at a special general meeting. < <http://www.societies.govt.nz>> (last accessed 9 March 2006). See also Te Rūnanga o Ngāti Awa “Charter of Te Rūnanga o Ngāti Awa” cl 25.1(a), which provides that the Rūnanga may be wound up by special resolution (also 75%) of the members that it has become “impossible, impracticable or inexpedient to carry out the Rūnanga’s purposes”. < <http://www.ngatiawa.iwi.nz/documents/Charter/Charter23102005.doc>> (last accessed 9 March 2006).

- 10.21 We considered whether provision should be made, along the lines of the law relating to companies and incorporated societies, for the waka umanga to vote to wind up and appoint a liquidator directly, without the need to go first to the Māori Land Court.¹⁹³ We believe, however, that the involvement of the Court at an early stage is warranted as protection for the members' interests. This is for three reasons. Firstly, because the waka umanga represents the tribe, members cannot take their entitlements elsewhere and it also acts on behalf of those not yet born. Secondly, although the legislation will require at least two membership votes, we are conscious of the potential flaws in membership voting and of the wide diversity of views likely amongst the membership. Thirdly, the knowledge of the judges, and the Court's experience in organising meetings of members may be useful, especially given that many liquidators will not be familiar with Māori organisations.

Creditors' applications for wind up

RECOMMENDATION

- 10.8 A creditor may make an application to the Māori Land Court to wind up the waka umanga on the basis that the waka umanga is unable to pay its debts, provided that the application is accompanied by evidence of the debts and evidence that the waka umanga has failed to comply with a formal demand for payment.

- 10.22 Under sections 287 to 289 Companies Act 1993, a company is presumed unable to pay its debts if it has failed to comply with a statutory demand for payment, or with a debt judgment issued against it, or has had all, or substantially all, of its property placed into receivership as a result of charges over the property.¹⁹⁴ Section 289 provides for the making of a "statutory demand" by a creditor. This must be a written demand served on the company for a sum no less than the "prescribed amount" (currently \$1000).

Registrar's application for wind up

- 10.23 This is an alternative to the Registrar's power to apply for the Court's intervention as discussed above.

RECOMMENDATION

- 10.9 The statute should provide that the Registrar of Waka Umanga may make an application to the Māori Land Court to wind up the waka umanga on the basis that the waka umanga has not complied with its annual registration obligations, provided that adequate steps have been taken to seek compliance

193 Incorporated Societies Act 1908, s 24; and Companies Act 1993, s 241(2)(b) and Part 16. Section 241 provides that a liquidator may be appointed by a special resolution of shareholders. Part 16 governs the liquidation and includes requirements for shareholders to be fully informed and able to participate in the process.

194 The meaning of "unable to pay its debts" is to be determined by reference to ss 287-289 Companies Act 1993.

10.24 Where the waka umanga has failed to file an annual return or other requirements of registration, and the Registrar considers the winding-up may be justified, the Registrar must serve a reminder notice on the registered office. A second notice would advise of the Registrar's intention to file for wind up, which must also be served on other stakeholders, including the individual representatives, the constituents and any known creditors, so that they may either encourage the rünanganui to comply, or consider how best to manage their own interests.

10.25 Once the Registrar of Waka Umanga has filed the application with the Māori Land Court, it will be sufficient that the Court keeps the Registrar fully informed as to the proceedings without the need for the Registrar to be formally represented, unless the Registrar so wishes. The Court will need to determine whether the failures can be rectified, for instance by the appointment of a commissioner, or whether the waka umanga suffers from such a fundamental deficiency in resources and capacity that compliance is highly unlikely.

10.26 We recommend a number of statutory provisions to govern the procedures for the wind up of waka umanga. An alternative would be to apply the provisions of sections 17A to 17E Judicature Act 1908.¹⁹⁵ These apply to any corporate or unincorporated body that does not have its own statutory mechanisms for winding up. In such cases, the High Court can apply the provisions of Part 16 of the Companies Act.

10.27 Part 16 deals with matters such as the duties, rights and powers of liquidators; the qualifications of liquidators and their supervision by the Court; the effect of liquidation on the powers of the directors, on any proceedings against the company, and on creditors' actions; the powers of the Court to suspend the liquidation; payment of debts; and voidable transactions. We do not think this option adequately addresses the representative nature of a waka umanga and its stewardship of collective assets for future generations. The application of Part 16 of the Companies Act should therefore be subject to the specific provisions of the Waka Umanga Act.

Procedure on receipt of an application

RECOMMENDATION

10.10 When the Māori Land Court receives an application to wind up, the Court must advertise the application, and serve notice to the registered office of the waka umanga, the individual representatives, and any constituent entities, creditors, and parties with a particular interest of which the Court is aware, and advise the Registrar of Waka Umanga.

10.28 When the Court receives an application, the Registrar will advertise the application and the hearing date in Māori Land Court pānui and local newspapers. Other Māori media may also be used. The application and any hearing dates must also be posted with the waka umanga's details on the Register of Waka Umanga's website.

¹⁹⁵ Inserted, as from 1 July 1994 by Judicature Amendment Act 1993, s2.

When the Court may wind up

RECOMMENDATION

10.11 The Māori Land Court shall make an order to place a waka umanga into liquidation and remove a waka umanga from the register if it is satisfied that it is not possible for the waka umanga to continue as a viable and solvent corporation because:

- the waka umanga no longer has the resources to comply with the requirements of the Waka Umanga Act and/or to meet its debts;
- there has been some fundamental change in the nature or circumstances of the tribe which prevents, and is likely to continue to prevent, the waka umanga from performing its role; or
- the Court is satisfied that the application for voluntary wind up is a fair and accurate reflection of the views of the membership of the waka umanga.

10.12 Where the Court considers that the conditions for wind up have not been met, or that there is not sufficient information to determine whether wind up is merited, the Court may make any one or more of the orders which it may make in response to an application for a court intervention.

10.29 The Court will order the wind up of the waka umanga when it is clear there is no alternative because it lacks the necessary resources, and/or the tribe it was established to represent no longer has sufficient unity or identity to give it a mandate, or there is no longer sufficient will amongst the members to have a waka umanga.¹⁹⁶ A wind up may also be ordered as part of a planned merger with another waka umanga or other entity, as discussed below.

10.30 An application that does not meet the threshold for wind up may, nevertheless, warrant other interventions. The Court may consider that further information is required as to the waka umanga's operations and may, therefore, appoint a reviewer. Alternatively, a commissioner or interim liquidator may be appointed. If debt is an issue but there is, nevertheless, a possibility that the waka umanga may be saved from liquidation, a commissioner could be charged with meeting with creditors to try to facilitate a compromise debt-repayment scheme between the creditors and the waka umanga. This scheme could then be submitted to the Court for approval.¹⁹⁷

Interim Liquidator

RECOMMENDATION

> Continued next Page

10.13 When the Court receives an application for wind up, if it is satisfied that it is necessary or expedient in order to maintain the value of the assets of the waka

¹⁹⁶ Our threshold for wind up draws in part on the Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004), 5th sch, cl 14.

¹⁹⁷ See Incorporated Societies Act 1908, ss 23A and 23B.

RECOMMENDATION

umanga, the Court may appoint an interim liquidator, with such powers and for such time as necessary for the purpose of maintaining the value of the assets of the waka umanga.

- 10.31 This recommendation responds to situations where there is an immediate need to make urgent inquiries as to the financial position of the waka umanga, and to take any necessary steps to preserve the assets. The judge may make such an order prior to any hearing or conference.¹⁹⁸

Order for Winding up

RECOMMENDATION

10.14 When the Māori Land Court makes an order to wind up a waka umanga, the Court shall suspend the governance powers of the rūnanganui or any commissioner previously appointed, and appoint a liquidator with full powers to dispose of the waka umanga's assets, other than "protected assets", to the extent necessary to settle the waka umanga's debts, and to preserve any surplus assets.

10.15 Following the appointment of a liquidator, Part 16 of the Companies Act 1993 shall apply to the liquidation of a waka umanga, with such modifications as may be necessary, except that the Māori Land Court shall exercise the powers of the High Court under Part 16 and any surplus assets vested by court order. Any "protected assets" are not subject to liquidation procedures.

10.16 On completion of the liquidation, the Court shall:

- Vest any surplus assets and any "protected assets" in an alternative entity or entities in accordance with the provisions of the charter, provided that there shall be no distribution to individual members.
- Where an alternative entity is not available the remaining assets shall vest in the Māori Trustee, Public Trustee, or a trustee corporation to be held until a successor entity is formed and approved by the Court to receive the property.

10.17 Each charter must specify what should happen to the waka umanga's assets in the event the waka umanga is wound up.

- 10.32 Incorporating the liquidation provisions of the Companies Act 1993 (Part 16) means that the wide range of issues associated with liquidation is covered.¹⁹⁹ These provisions will apply to the extent that they do not conflict with the provisions of the Waka Umanga Act. This means that the wind up procedures will largely reflect those that already exist in relation to companies and incorporated societies, and therefore provides familiarity and certainty to members and creditors alike.

¹⁹⁸ See Companies Act 1993, s 246.

¹⁹⁹ The recommendation is modelled on the Incorporated Societies Act 1908, s 24.

- 10.33 Surplus proceeds and assets are to be distributed to entities nominated in the charter,²⁰⁰ although the Court will have power to override this if circumstances have changed markedly, for instance, if the successor entities are no longer operative or no longer have popular support. As the property is the collective asset of the tribe, including those not yet born, it may not be distributed to individual members. The waka umanga will probably have “protected assets”, such as sacred sites and tribal taonga. The Court may therefore have to make orders to ensure that these assets and any surplus remain in trust for the tribe.²⁰¹ The Court would need to be satisfied that any new entity is a suitable successor, and has a mandate to receive the assets.

Subsidiaries

- 10.34 The fate of any subsidiaries of a waka umanga that is wound up will depend on the extent of the waka umanga’s ownership interest, and on the extent to which that interest must be liquidated in order to pay the waka umanga’s debts. If a successor entity is created it may be able to assume ownership of any remaining subsidiaries.
- 10.35 Where a creditor seeks to wind up a company, trust, or incorporated society that is a subsidiary of a waka umanga, the law relating to wind up of companies, trusts or incorporated societies will apply. This means that any such application would be filed in the High Court rather than the Māori Land Court, although as proposed in Chapter 9, the High Court should have power to transfer such matters to the Māori Land Court where appropriate.

AMALGAMATIONS

RECOMMENDATION

- 10.18 The Court may make an order to transfer assets and liabilities from a waka umanga that is wound up to a successor entity or entities, if it is satisfied that the members and creditors have approved this arrangement.

- 10.36 To help protect membership and creditors’ interests, the amalgamation of existing waka umanga or the division of one waka umanga into two or more entities ought not to take place without the Court’s sanction. The new entity may be another waka umanga, but is not required to be.
- 10.37 In other respects, the normal provisions for registration and wind up apply. In these instances, the wind up would be on the basis of a voluntary application from the members, and the Court would have to be satisfied that the application was a fair and accurate representation of the wishes of the membership.

200 Compare Incorporated Societies Act 1908, s 27(1), under which the general rule is that the assets of a society are disposed of as provided for in the society’s rules. Compare also Te Rūnanga o Ngāti Awa “Charter of Te Rūnanga o Ngāti Awa” cl 25.1(b), < <http://www.ngatiawa.iwi.nz/documents/Charter/Charter23102005.doc> > (last accessed 9 March 2006); and Te Kauhanganui o Waikato (Inc), Society No 951867 “Te Kauhanganui o Waikato (Inc) Rules” Rule B.21.2 < <http://www.societies.govt.nz> > (last accessed 9 March 2006), which variously provide for each entity’s assets on dissolution to be passed to another organisation with “similar objects”, a charitable purpose and/or a body that is representative of, or works in the interests of, the members of the original entity.

201 One option is to vest the assets in the Māori Trustee. The Maori Trustee Act 1953 established the Trustee as a corporation sole with perpetual succession. The Trustee operates within Te Puni Kōkiri, and as well as acting as the administrator of estates of deceased Māori, has the power to accept and hold in trust any land or other property for specified classes of Māori (s 11).

- 10.38 An application to amalgamate a waka umanga with another entity must be accompanied by the supporting information required for registration of the new entity. If the new entity is to be a waka umanga, the application would be accompanied by the usual information. If the new entity meets the requirements for registration as a waka umanga and there are no valid objections, the Registrar of Waka Umanga would issue the certificate of registration and cancel the existing order of registration for the previous waka umanga.
- 10.39 Similarly, if a waka umanga proposes to split into two or more entities, the Court would have to be satisfied that the conditions for wind up and for registration had been met in each case, and make orders accordingly. In some cases, waka umanga will already have made provision in their charters for constituents to withdraw from the waka umanga, as discussed in Chapter 7. This procedure should be followed unless it has become manifestly unfair to any of the parties.

THE ROLE OF THE REGISTRAR OF WAKA UMANGA

RECOMMENDATION

- 10.19 The Registrar of Waka Umanga must give notice on the public Register of Waka Umanga of any application to wind up a waka umanga, appointment of a liquidator or commissioner and any hearing dates scheduled by the Court.
- 10.20 If the Registrar of Waka Umanga does not receive a court order disposing of the application, or an order for an extension of time, within 90 working days of the application to wind up being filed with the Māori Land Court, the Registrar may remove the waka umanga from the Register, but may not do so without first informing the Court, the waka umanga and any known creditors of his or her intention to do so.

- 10.40 The integrity of the Register of Waka Umanga requires that this public record reflect court proceedings relating to the wind up of a waka umanga and any court-ordered, alternative, governance arrangements, such as the appointment of a commissioner or liquidator as this register must enable members and third parties to readily determine the waka umanga's status. Third parties can then decide whether to seek or continue relationships, negotiations, or consultations with the waka umanga.
- 10.41 We note that the Charities Commission could remove any waka umanga registered as a charity from the register of charitable entities if the waka umanga no longer qualifies or it has persistently failed to meet the requirements of the Charities Act 2005.²⁰² This, however, is a quite separate process from registration and de-registration under the Waka Umanga Act.

²⁰² Charities Act 2005, ss 31–36.

Chapter 11

Secretariat

- INTRODUCTION** 11.1 One of the Law Commission's proposals to accompany the Waka Umanga Act is that a Secretariat (which could be called Te Rōpū Awhina) be set up to service waka umanga and to co-ordinate many of the existing services available to assist Māori organisations. The Commission sees the existence of such a body as an essential aspect of our overall proposal; it would provide the ongoing support some entities may need to prosper and develop and should provide or co-ordinate training and other activities at a national level.²⁰³
- 11.2 It is important, however, that the Secretariat supplements rather than duplicates existing initiatives and is supported and funded by waka umanga themselves. In particular, the Secretariat would need to work in close collaboration with the Federation of Māori Authorities (FOMA), which already represents a number of iwi authorities as well as many other Māori entities, and which has similar objectives.

RECOMMENDATION

- 11.1 We recommend that a Secretariat be established to provide support to waka umanga, both at their establishment stage and on an ongoing basis.
- 11.2 The formation of a Secretariat would accompany the enactment of the Waka Umanga Act.
- 11.3 Initially, the Secretariat would receive assistance and direct funding from Government, but would move as soon as possible to becoming self-funding through levies paid by waka umanga members and contract funding from Government and other agencies.
- 11.4 Membership of the Secretariat would be voluntary and it would be responsible to its waka umanga members. Associate membership should also be available to other Māori entities.

²⁰³ See also Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) paras 376-388, which suggests that initial funding might be provided (say for three years) by Te Puni Kōkiri, Office of Treaty Settlements, or Te Ohu Kaimoana, but that the Secretariat eventually be funded by the authorities themselves.

THE PURPOSE OF A SECRETARIAT

- 11.3 Many Māori groups that wish to incorporate under the Waka Umanga Act will not have the experience or resources to undertake the range of measures needed to meet their obligations under the Act, particularly in the start-up phase. Although it is vital that each group develop its own charter, policies, and rules according to individual circumstances and culture, the Secretariat can assist with specialised and technical advice.
- 11.4 Through the Secretariat, waka umanga could together achieve a critical mass and share the expense involved with many of the compliance requirements of the Act. Both small and large waka umanga will have equal access to information and services, and overall costs will be reduced. As a group, waka umanga will have more economic and political “muscle” and so be in a better position to influence Government and non-government organisations.
- 11.5 The strength of the Secretariat will, of course, ultimately depend on the support of its membership and ability of its staff. We believe that, provided it is set up with adequate funding, the Secretariat will be able to attract people who have the requisite background and training, including those who are experienced in setting up tribal organisations.
- 11.6 The types of services and functions that the Secretariat will perform will largely depend upon the needs of waka umanga, but are likely to include:
- Providing advice and assistance to waka umanga on matters relevant to their formation and registration. For example, the Secretariat could provide assistance to tribes wanting to establish a waka umanga by advising them on the preparation of scheme plans for forming entities, on matters to be included in charters, processes for gaining tribal endorsement, and other steps necessary for registration.
 - Providing advice and undertaking research on governance best practices and other operational issues. For example, the Secretariat could undertake research, and engage consultants to provide information and assistance to waka umanga on the sorts of things they need to consider as part of their governance practices.²⁰⁴
 - Facilitating mentoring and other relationships between waka umanga and private sector organisations.²⁰⁵
 - Providing governance training itself to waka umanga or arranging governance training through providers such as wānanga, universities and other training providers.
 - Developing a panel of mediators and arbitrators who have relevant skills to deal with disputes that may arise within waka umanga.

204 An example of the assistance currently provided is the production of templates by Te Ohu Kaimoana for organisations wishing to become mandated iwi organisations.

205 The New Zealand Business Council for Sustainable Development is already working with several iwi on governance issues. See New Zealand Business Council for Sustainable Development and Westpac New Zealand *Let's Settle This: Through Settlement to Sustainable Development* (Wellington, 2005).

- Developing model documents. For example, the Secretariat could design templates of important documents such as charters, annual reports, codes of conduct, policy documents and performance agreements for principal officers.²⁰⁶
 - Co-ordinating and working with government agencies providing assistance to tribal groups and promoting further government assistance in priority areas.
 - Organising regional groups of waka umanga or sector groups based on size or location.
 - Liaising with other organisations which focus on aboriginal governance issues, for instance the First Nations Governance Centre in Canada, the Harvard Project on American Indian Economic Development, and the Native Nations Institute of the University of Arizona.
 - Providing advocacy for waka umanga on issues that affect waka umanga collectively. This would not prevent any individual waka umanga from advocating a separate or differing view, but the Secretariat could provide a collective view to central and local government on things such as legislation and policies that may affect waka umanga.
- 11.7 At present, much of this advice is currently obtained from legal firms or private sector consultancy groups. This can lead to inappropriate “off the shelf” documents if the advisors involved do not have the requisite background in tribal matters, and may also be beyond the financial resources of the tribe to obtain, unless they receive pre-mandate funding from entities such as the Crown Forestry Rental Trust or the Office of Treaty Settlements. We believe this assistance is better delivered through an independent organisation which is available to all groups wishing to form a waka umanga.
- 11.8 There is already a considerable range of existing government and non-government initiatives available to assist Māori entities with various aspects of governance. These include:
- Te Puni Kōkiri programmes, including the new governance website,²⁰⁷ and its capacity building program;
 - Office of Treaty Settlements funding for settlement groups;
 - Ministry of Economic Development (Regulatory and Competition Policy Branch);
 - New Zealand Trade and Enterprise, including its Māori Enterprise Team and Māori Trustee Training scheme, through the Enterprise Training Scheme;
 - Programmes by departments such as the Ministries of Health, Education and Social Development;
 - Inland Revenue Department (Māori community officers);
 - Department of Internal Affairs Community Development group;
 - Te Ohu Kaimoana;
 - Māori Land Court, including the Māori Land Information Service;
 - Legal Services Agency;
 - NZ Council for Sustainable Business Development; and

206 See also Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) para 382.

207 See Te Puni Kōkiri < <http://governance.tpk.govt.nz> > (last accessed 7 March 2006).

- Universities, for example Victoria University's Institute of Policy Studies and the University of Auckland Management School.
- 11.9 While many of these programmes provide invaluable assistance, there is no overall co-ordination between them. Their priorities are largely set by the individual agency and political priorities, rather than by the Māori organisations affected. Many of these programmes should be channelled through or carried out in liaison with the Secretariat.
- 11.10 We propose that membership of the Secretariat could be voluntary and open to all waka umanga. Its services must also be available to Māori groups seeking to become waka umanga or to other Māori entities representing Māori tribes or communities, on terms agreed by its members (for instance as associate members). In the long term, members of the Secretariat could consider whether membership should be expanded to other forms of Māori entity to represent a broad collective of Māori groups.
- 11.12 The structure of the Secretariat needs to be flexible so that waka umanga can shape the Secretariat as they wish. An incorporated society or similar corporate body may be appropriate, as we do not believe that the Secretariat should be a Crown entity. But at the same time, a mechanism is required to kick start the organisation. We therefore propose that the Waka Umanga Act provide that Government initially establish a Secretariat as a unit within core government, but with a sunset clause of say five years.²⁰⁸ After that, the unit would cease to exist and its functions would be taken over by the members.
- 11.13 We suggest it may best be attached to Te Puni Kōkiri, although the Ministry of Economic Development where the Registry for Waka Umanga will reside or the Māori Land Court are also options. Te Puni Kōkiri will continue to have a pivotal role as the government agency tasked with assisting Māori development. Te Puni Kōkiri already provides a range of programmes for Māori, has regional offices and has considerable experience with individual Māori and iwi development. However, longer term, Te Puni Kōkiri's accountability to government conflicts with the Secretariat's need to be primarily accountable to waka umanga and independent of government.
- 11.14 Following on from this, we believe that ultimately the Secretariat must be self-funding in order to achieve its purpose as an independent agent of its members. However, initial funding must be provided by government.²⁰⁹ Submissions we received on funding for the Secretariat ranged from the need for it to be self-funding from the start to fully government funded. We believe that neither option is realistic. When the Act is first passed, there will be no waka umanga and the Secretariat's support will be crucial for the first groups formed. By the same token, we do not believe the Secretariat should or can be

²⁰⁸ See, for instance, the Crown Forestry Rental Trust set up under the Crown Forest Assets Act 1989, s 35. However, we do not propose a Crown/Māori model as in that case. Similarly, the New Zealand Māori Council and its member councils are established by the Māori Community Development Act 1962, but subject to considerable oversight by the Minister of Māori Affairs, which we do not think is suitable in the case of the waka umanga Secretariat.

²⁰⁹ The Ngāti Paoa proposal suggests that government agencies like Te Puni Kōkiri and Office of Treaty Settlements or a body like Te Ohu Kaimoana could help contribute to the initial funding of a secretariat. See Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) para 387.

beholden to government for its ongoing funding base, as this could compromise its activities and continuity of funding.

- 11.15 Once well established, the Secretariat would be funded by levies from member waka umanga (graduated depending on membership size) and indirect government and other funding through the performance of government- and privately-funded projects, based on the delivery of specific services.²¹⁰ Direct government funding can then be reduced as funding from members levies and contracts takes over. In this way, the Secretariat will need to provide high quality services to ensure that it attracts and maintains its members, as well as funding from other sources.
- 11.16 In addition, requiring waka umanga to fund the Secretariat helps to ensure that the Secretariat will be primarily accountable to waka umanga. The success of the Secretariat is likely to depend upon its ability to deliver services as an institution which is “owned” by its members and independent of government. Just as tribal entities are designed to be primarily servants of the tribe, so too should the Secretariat be the servant of its members. The Secretariat would, of course, also be accountable to any contract funders for the performance of individual contracts, but not generally.
- 11.17 As discussed in Chapter 1, we do not believe that this initial funding for the Secretariat and the costs of the legislation in general will exceed the moneys already spent by Government on mandating, the formation of tribal entities and their ongoing governance. Indeed, the provision of proper processes and co-ordinated guidance on governance matters creates the potential for significant cost and time savings for both Government and Māori.

NEW ZEALAND MODELS

- 11.18 A useful model for the Secretariat is the Local Government Association (LGNZ), which both represents local authorities at a national level and provides a variety of services for local authorities.²¹¹ LGNZ is divided into six regional zones, which meet four times a year to discuss regional issues, facilitate communication between the regions and LGNZ, and provide information and networking, as well as acting as an electoral college to appoint the LGNZ Board. There are also four sector groups based on population size and on whether the constituency is urban, rural, or regional. The Secretariat could also develop similar regional and interest-based models for waka umanga.
- 11.19 Other similar examples of organisations that provide a co-ordinating, education, and advocacy role are the School Trustees Association, the District Health Boards (DHBNZ), and certain national representative sporting bodies like the NZ Rugby Football Union (NZRFU).²¹²

210 In this respect our proposal differs from the Canadian model, the First Nations Governance Council, which is fully funded by the Canadian government.

211 LGNZ's goals at a national level are: to lobby on behalf of councils and be the national voice for local government; to work in partnership with central government to achieve its objectives; to identify policy and legislative issues and provide the research to support such initiatives; and, at a local level, to develop services to support member councils, including training programmes, best practice guides, supporting the Local Government Industry Training Organisation (LGITO) and information sharing and mutual support between councils. LGITO is owned by LGNZ and provides certified training courses under the Industry Training Act 1992.

212 Note, however, that the NZRFU also has governance powers.

A CANADIAN MODEL

11.20 The Federation of Māori Authorities (FoMA) already plays a very valuable role for Māori incorporations and many other entities, including representing them at a national level.²¹³ It is important that any new Secretariat not undermine this role or simply duplicate the services that FoMA already provides. A strong relationship with FoMA is therefore vital to ensure appropriate synergies prior to establishment. Ongoing relationships could be managed by developing protocols between the two organisations; these could clearly distinguish between the different roles of each, and provide the basis for working together on areas of common concern.

11.21 An example of our proposed Secretariat is the National Centre for First Nations Governance (NCFNG) in British Columbia.²¹⁴ It is an organisation controlled and directed by the indigenous peoples of Canada, which they can choose to access. It provides governance, advisory, and professional development services, research on land law and governance, public education and communication.

11.22 The NCFNG governance services include assistance with designing and creating organisations through advice on the creation of constitutions and codes, improvements in fiscal management, undertaking and co-ordinating research into different models, and helping to ensure that central government programmes are targeted in the right areas. Professional development services include supporting both public and first nations' educational institutions to provide relevant and culturally sensitive courses for first nations leaders (including the traditional leaders) and to provide training courses in community organising, strategic planning, human resource development, financial administration and board development, either through its own resources or by other institutions.

11.23 The Canadian Government has agreed to fund the NCFNG following a recommendation of the Royal Commission on Aboriginal Peoples²¹⁵ for adequate resources for self-government through such a centre.

CONCLUSION

11.24 As our discussion in Chapter 4 indicates, the history of Māori organisations indicates that lack of support and finance has often led to their collapse. In recent years, much of the emphasis has been on achieving Treaty settlements with the Crown, and relatively little thought has been given to what happens to tribal entities after that. These mistakes must not be repeated and waka umanga must be given the assistance they need to represent their people and ensure they prosper.

213 FoMA is an incorporated society that was formed in 1987. It comprises 11 rohe, based loosely on waka or iwi groupings. Its members are about 400 Māori authorities (mostly trust boards or trusts and incorporations under Te Ture Whenua Maori Act 1993) or business interests owned by Māori authorities. Fees are paid on a sliding scale up to \$10,000 per annum. FoMA provides advocacy, networking, research and training on behalf of its members. This includes the promotion of training for managers of Māori authorities. Its website also contains a useful list of its members and, in some cases, relevant information about them: See Federation of Maori Authorities < http://www.foma.co.nz/our_people/members_showcase.htm > (last accessed 13 March 2006).

214 For more information on the centre, see National Centre for First Nations Governance < <http://www.fngovernance.org/> > (last accessed 7 March 2005).

215 Royal Commission on Aboriginal Peoples *Report of the Royal Commission on Aboriginal Peoples* (Canada Communications Group, Ottawa, 1996) vol 2, part 1.





Part 4

GOVERNANCE

*He kete aroha
He taonga tangata*

*A kit shared
Strengthens the future*

Chapter 12

Overview

- 12.1 This part of the report considers the governance requirements for waka umanga. It outlines the matters that must be considered in setting up the structure for waka umanga.²¹¹ We have sought to strike the right balance between what is required for all entities and matters that are best left to tribes to design for themselves; between standard forms of accountability and autonomy. The legislation must not unilaterally impose a governance model against the needs and will of Māori groups.²¹²
- 12.2 In many cases we have also made suggestions as to good practice, which tribes and other groups can choose to adopt.²¹³ Some of the pros and cons of various proposals are set out as a basis for tribal discussion.
- 12.3 We are conscious that much time, effort and expense may be involved in each waka umanga drawing up its own governance rules. We therefore suggest that the Waka Umanga Act include a number of schedules containing detailed provisions which would be the default options for groups wishing to form a waka umanga, or which they can draw on in designing their charters.²¹⁴ These could also be used by existing groups which may not wish to register as a waka umanga, but wish to update their constitutions. In this way, groups and tribes could move towards becoming waka umanga in stages.
- 12.4 We propose that the financial reporting and accountability requirements should vary according to the size of the waka umanga. This is a similar approach to that suggested in the recent review of the Financial Reporting Act 1993,²¹⁵ which proposed different tiers of reporting requirements according to the size of the entity. We understand this proposal is likely to be implemented and

211 Note: references in this chapter to tribes are generally intended to include the constituent members of general-Māori waka umanga. This is to avoid repetitive awkward language, and also because members of such waka umanga often regard themselves as belonging to modern tribes.

212 See, for example, Vice-Chief Ghislain Picard, Regional Chief, Assembly of First Nations of Quebec and Labrador “Evidence Opposing the First Nations Governance Bill C-7 to the Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources” (26 March 2003).

213 A valuable general resource is the Controller and Auditor-General *Inquiry into Certain Aspects of Te Wānanga o Aotearoa* (Wellington, 2005) Appendix 2, which refers to some state sector guides to good governance.

214 These would be similar to the schedules to the Companies Act 1993, which may be adopted in part or full if companies wish.

215 Ministry of Economic Development *Review of the Financial Reporting Act 1993 Part 1: The Financial Reporting Structure* (Wellington 2004).



consider the Waka Umanga Act should be aligned with the proposed changes. In the New Zealand context, the number of members of the tribe or group and the size of the geographic area would be relevant, as well as the size of the assets.

- 12.5 In this part, we have drawn heavily from relevant provisions in existing statutes. As well as the legislation under which many Māori entities are currently formed (the Companies Act 1993, Incorporated Societies Act 1908, Trustee Act 1956 and Charitable Trusts Act 1957), we have also drawn significantly from the Local Government Act 2002, the Crown Entities Act 2004 and the Maori Fisheries Act 2004.²¹⁶ These statutes not only reflect some of the more modern thinking on governance issues, but also have particular relevance to waka umanga.
- 12.6 As with local government, waka umanga serve a broad community, often based in a defined geographical area, and have a wide range of social, economic, environmental and cultural purposes. Unlike companies and incorporated societies, local body ratepayers and members of waka umanga do not specifically subscribe to the organisation but belong to it by virtue of residence and/or descent. This difference significantly changes the dynamic of how the organisation engages with its membership and requires much more pro-active accountability and consultation than private subscriber based entities.
- 12.7 The Local Government Act 2002 was the basis for a draft Kaupapa Māori Authorities Act developed for Ngāti Paoa by David Gray, along with Ngāti Paoa's own trust deed.²¹⁷ We have referred to this helpful draft Act, as well as to other tribal documents, throughout this part.
- 12.8 The Crown Entities Act 2004 is relevant in that, although waka umanga will in no sense be Crown entities, like such entities they will often administer a mixture of self-generated revenues and monies paid by the Crown in the form of Treaty settlement monies or service delivery contracts. However, Crown entities are accountable to the Government, whereas waka umanga will be directly accountable to their members.
- 12.9 The Maori Fisheries Act 2004 is relevant in that either waka umanga will seek to be mandated iwi organisations, or a mandated iwi organisation will form part of their structure. While the requirements of the Maori Fisheries Act significantly limit the flexibility for tribes to design their own entities, this is a reality that most tribes must take into account.
- 12.10 We have also drawn on literature on good governance including writings on governance for First Nations communities in North America. It needs to be

²¹⁶ Other relevant legislation includes the Local Government (Members Interests) Act 1968, Local Government Official Information & Meetings Act 1987 and Financial Reporting Act 1993.

²¹⁷ Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 9(1), and the Deed of Trust for the Ngāti Paoa Trust.

remembered, however, that each waka umanga will be unique. It will have adapted and incorporated its own tikanga into the statutory requirements under the Waka Umanga Act. It is not sufficient simply to require that waka umanga must observe tikanga. Tikanga must instead inform the structures and procedures that are developed.

- 12.11 Overall, these chapters stress that good governance includes caring for future generations and protecting their interests, while at the same time being able to grow tribal assets and develop its potential.

Chapter 13

The waka umanga and its rūnanganui

INTRODUCTION 13.1 This chapter makes recommendations about the legal status of the waka umanga; its purposes and roles; and its powers.

13.2 The waka umanga is the body corporate and the rūnanganui is the governing council of the waka umanga. The relationship between the two is analogous to that of company and its board. We have used the word “rūnanganui” to describe the board or governing council in this report, but other terms may be adopted by individual entities depending on their preferences and history.²¹⁸

STATUS OF THE WAKA UMANGA

RECOMMENDATION

13.1 A waka umanga recognised under this Act will be:

- a body corporate with perpetual succession; and
- a legal entity in its own right separate from the tribe it serves, and from the individuals and communities of that tribe.

13.2 Separate legal identity, including perpetual succession (where the entity continues although the office bearers change), enables the waka umanga to operate as the legal representative of the tribe for so long as the tribe gives its mandate. A distinction is made between the tribe and the waka umanga through a legislative provision equivalent to section 15 Companies Act 1993.²¹⁹

²¹⁸ For instance, the Tainui Parliament is known as “Te Kauhanganui” and its executive was known as “Tekaumarua” (now to be called “Awataura”). See “Tribe Governance to have Three Heads” (29 November 2005) *Waikato Times* Hamilton. The term “rūnanga” is likely to be used by many waka umanga, particularly smaller ones.

²¹⁹ Companies Act 1993, s 15: “A company is a legal entity in its own right, separate from its shareholders and continues in existence until it is removed from the New Zealand register”.

PURPOSES
OF THE WAKA
UMANGA

RECOMMENDATION

13.2 The purposes of the waka umanga are to:

- carry out the responsibilities and exercise the rights conferred on it by the Waka Umanga Act and any other legislation;
- give effect to the charter and other formal resolutions of the waka umanga;
- promote the social, economic, and cultural development of the tribe, in the present and for the future; and
- represent the tribe as authorised by the charter.

13.3 When undertaking these purposes, the waka umanga shall:

- adhere to any values set by the tribe in the charter;
- exercise responsible stewardship of such assets, rights and interests as the tribe confers on it; and
- operate in a manner that is transparent and accountable to the tribe, its constituent communities, and the individual members of the waka umanga.

13.3 These purposes underscore the idea that the waka umanga is the servant of the tribe. They also signal its long-term inter-generational focus, which goes beyond the interests of the current members. The purposes emphasise transparency, accountability and responsible stewardship.²²⁰

13.4 The tribe may use the charter to limit the extent to which the waka umanga acts as the representative of the tribe. This would reflect any agreements that had been reached on the division of representative functions between the rūnanganui and the constituent communities, in relation to, for instance, consultations under the Resource Management Act 1991.

²²⁰ See also Local Government Act 2002, s 10, which defines the purposes of local government as:

- (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
- (b) to promote the social, economic, environmental and cultural well-being of communities, in the present and for the future.

The Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) defines the purposes of a Kaupapa Māori Authority as:

- (a) to provide principled, democratic, transparent, accountable governance for its descent group;
- (b) to facilitate the efficient and effective stewardship of assets jointly owned by, and rights and interests jointly held by, the descent group;
- (c) to achieve the specific purposes (if any) of the authority set out in its charter; and
- (d) to promote the social, economic, environmental, and cultural well-being of the descent group, in the present and for the future.

POWERS OF THE WAKA UMANGA

RECOMMENDATION

- 13.4 The waka umanga may do anything that a natural person of full age and capacity may do, consistent with the Waka Umanga Act, the waka umanga's charter and other formal resolutions of the waka umanga.
- 13.5 The charter of a waka umanga may restrict the powers of the waka umanga more narrowly than is provided in the Waka Umanga Act.
- 13.6 The default schedule should include procedures for custody and use of any common seal.

- 13.5 The Companies Act 1993 provides a useful model for defining the powers of the waka umanga.²²¹ To help guard against a waka umanga pursuing its own purposes rather than those set by the tribe, we recommend additional provisions restricting the waka umanga to actions consistent with the Act, the charter and formal resolutions of the waka umanga, such as its long-term plan and policies on "major transactions".
- 13.6 In accordance with the principle that tribes can adapt a framework to suit their preferences, the charter may further restrict the waka umanga's powers.²²² This helps empower the constituent groups and members in their relationship with the waka umanga, as they may collectively set limits on the waka umanga's actions on their behalf. This is particularly relevant where a constituent group retains decision-making powers over certain matters – for instance a resource in their area.
- 13.7 While a common seal (or unique stamp) is not strictly necessary, a requirement that documents be sealed, as well as signed, creates barriers to unauthorised actions made in the waka umanga's name.²²³ Rules around use of a seal would need to include the minimum number of representatives required to sign a document before it can be recognised as authorised by the waka umanga.

THE RŪNANGANUI

RECOMMENDATION

> Continued next Page

- 13.7 Each waka umanga will be governed by a rūnanganui or governing council made up of:
 - elected representatives acting together; and
 - any appointed members provided for by the charter.

²²¹ Companies Act 1993, s 16.

²²² Companies Act 1993, s 16(2): "The constitution of a company may contain a provision relating to the capacity, rights, powers, or privileges of the company only if the provision restricts the capacity of the company or those rights, powers, and privileges".

²²³ See the Charter of Te Rūnanga o Ngāti Awa < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) sch 3, cl 10, which governs the custody and use of the common seal. The use of the seal requires authorisation by resolution of the representatives, and the seal must be affixed in the presence of three representatives who must sign the document.

RECOMMENDATION

- 13.8 The rūnanganui will have all the powers necessary for governance and management of the operations of the waka umanga, to be exercised in compliance with its governance obligations.
- 13.9 The default schedule should contain standard governance obligations of rūnanganui, which may be adapted by individual waka umanga to suit their own structure and needs.

- 13.8 The rūnanganui is the decision-making authority, and responsible to the tribe for setting the policies and directions. The operations are carried out by a chief executive and staff. The rūnanganui monitors their performance against the directions it has set. Expectations flow from the tribe to the rūnanganui and down to the chief executive and staff, and the chain of accountability flows from the staff to the chief executive, up to the rūnanganui and back to the tribe. With subsidiary organisations, the expectations and accountabilities flow between the rūnanganui and the subsidiary's board, and between the subsidiary's board and its chief executive and staff.
- 13.9 Given the rūnanganui's pivotal role, the statute ought to provide guidance as to the governance obligations of the rūnanganui.²²⁴ A useful starting point is the Carver model of governance, which identifies three essential roles for a governance board: providing the ongoing linkages with the owners or members; developing and communicating the governing values and policies of the organisation; and monitoring the waka umanga's performance against its objectives.²²⁵
- 13.10 Providing linkages to the members requires the rūnanganui to be active in informing itself about its members and the tribe. It must communicate with the members and seek their views. In particular, the rūnanganui must seek the views of the members in relation to matters identified as major transactions, including the contents of the charter and any long-term plan. When developing and communicating the governing values and policies of the organisation, the rūnanganui must remain within the bounds of the legislation, the charter, and the long-term plan. Monitoring the waka umanga's performance against its objectives requires monitoring the performance of the chief executive and the boards of the subsidiaries.

224 Both the Local Government Act 2002 and the Ngāti Paoa proposal specify the key role of the governing body in the chain of accountability and as the seat of responsibility. The Local Government Act 2002, s 41(3) states "[a] governing body of a local authority is responsible and democratically accountable for the decision-making of the local authority". The Ngāti Paoa proposal describes the purpose of the governing board as:

"... to be accountable, to and on behalf of the owners of the organisation, for ensuring that the organisation achieves what its owners desire and avoids what is unacceptable. The board is where all authority resides, on behalf of the owners, unless and until some of this authority is delegated to others." (*Ngāti Paoa Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) 67.

225 John Carver "Boards that Make a Difference: A New Design for Leadership" in *Nonprofit and Public Organisations* (2 ed, Jossey-Bass Inc, San Francisco, 1997) 134–135.

13.11 The Commission proposes that the default schedule to the Act shall oblige the rūnanganui to:

- inform itself about its members and its constituent communities;
- report regularly to its members;
- seek the views of its members in formulating and adopting major policies affecting them, and before authorising any major transactions;
- establish governance policies for the waka umanga's operations;
- ensure the waka umanga acts in accordance with the Waka Umanga Act, the charter and formal resolutions of the waka umanga;
- appoint a chief executive responsible for managing the waka umanga in accordance with the governance policies;
- establish performance expectations for the chief executive, and monitor the chief executive's performance against these expectations;
- appoint a board to govern any subsidiary; and
- set expectations for the board of each subsidiary and monitor performance against those expectations.

Chapter 14

The rūnanganui representatives

INTRODUCTION 14.1 This chapter makes recommendations and suggestions about the selection of representatives to serve on a rūnanganui and about eligibility to become a representative, chair or deputy chair of a rūnanganui.

RECOMMENDATION

- 14.1 The statute should prescribe that:
- a waka umanga must have a democratic system for the election of representatives to the rūnanganui;
 - an election of representatives must be held within six months of the date of registration of the waka umanga; and
 - the charter must set out the election process except to the extent that provisions contained in the default schedule are adopted.
- 14.2 The statute should include a schedule setting out the provisions for an election system to comply with appropriate standards, which could also provide a default option for some matters.

SELECTION OF REPRESENTATIVES A democratic system of election

- 14.2 How representatives are selected for a rūnanganui will be a critical issue in achieving democratic representation and a sense of belonging among members. The details of the voting system must be set out in the waka umanga's charter, although for some matters the default provisions contained in a schedule to the Act could be adopted. Alternatively, a tribe may seek to incorporate elements of "consensus" or collective decision-making to reflect a more traditional approach to democracy. Although there will be considerable scope in determining an election system which suits the tribe, overall it must be transparent and accountable to members.
- 14.3 Representation is a key aspect of credibility with, and connection to, the tribe, and is particularly important where the waka umanga is formed from a number of different communities. The quality of the rūnanganui will depend greatly on

the abilities of the representatives. A case study of ten Māori organisations published by the Ministry of Māori Development and the Federation of Māori Authorities stated that “[g]ood governance ultimately depends on the quality of people appointed to the board and the skills and attitude they bring”.²²⁶ Even though the ten organisations studied in this report were all business enterprises rather than tribal governance organisations,²²⁷ the point remains valid.

- 14.4 Governance skills do not necessarily equate to technical expertise in matters such as law or accountancy. If the rünanganui duplicates the skills of the chief executive and staff, or of directors of subsidiaries, there is a danger that it will spend too much time trying to do or re-do their work. Technical expertise will be available to the rünanganui through the chief executive and staff, and representatives may also seek professional advice. Subsidiary organisations will have boards selected for their relevant expertise. The crucial qualities representatives need are: the ability to ask the right questions; to take a long-term, strategic and independent view; and to exercise good judgement in decision making. Otherwise, the rünanganui risks being run by the waka umanga’s chief executive and staff.

Whether voting for representatives is direct or indirect

- 14.5 Representativeness and governance skills are not always incompatible. There are several ways to achieve the right balance. One is through a democratically elected college that then selects representatives according to set criteria. This procedure means the necessary skills have been clearly identified and the appointees assessed against these skills.
- 14.6 Te Rünanga o Ngāi Tahu is one entity that uses an electoral college. The members of each of the constituent communities, the papatipu rünanga, select an electoral college for that papatipu rünanga by means of a postal ballot. The college then appoints the papatipu rünanga representative and alternate representative on the tribal rünanga.²²⁸
- 14.7 Most other tribal authorities, however, rely on elections through hapū constituencies. If so, they could first identify desired governance skills and require candidates to provide self-assessments against these standards, as discussed below.

²²⁶ Te Puni Kōkiri and Federation of Māori Authorities *Hei Whakatinana i te Tūrura Pō: Business Success and Maori Organisational Governance Management Study* (Wellington, 2003) 10.

²²⁷ The organisations studied were Kaikoura Whale Watch, Wakatu Inc, Tohu Wines Ltd, Palmerston North Māori Reserve Trust, Wairarapa Moana Inc, Te Wānanga o Raukawa, Lake Taupo Forest Trust, Mai Media Ltd, Ngāti Hine Health Trust and Shotover Jet Ltd: Te Puni Kōkiri and Federation of Māori Authorities *Hei Whakatinana i te Tūrura Pō: Business Success and Māori Organisational Governance Management Study* (Wellington, 2003).

²²⁸ Charter of Te Rünanga o Ngāi Tahu (Te Rünanga o Ngāi Tahu, Christchurch, 2003) cls 1.6, 6.7 and 7. See generally Lyn Waymouth “The Bureaucratisation of Genealogy” (2003) 6 *Ethnologies Comparées* < <http://recherche.univ-montp3.fr> > (last accessed 13 March 2006) on Ngāi Tahu’s adaptation to modern governance needs, and compare “Ngai Tahu” (5 November 2005) *The Press* Christchurch D3; and Louise Bleakley “Success Dominates Image” (11 November 2005) *The Press* Christchurch A4.

Constituencies within the tribe

- 14.8 A tribe may choose to have all eligible members vote in a single constituency, with the highest-polling candidates selected to fill the available seats on the *rūnanganui*. Alternatively, voting may be by constituencies, probably based on hapu, takiwa (tribal area) or marae, and the members will vote for candidates in their own constituency. This is the system used in most existing entities. For instance, representatives are voted onto Te Rūnanga a Iwi o Ngāpuhi by the members of each takiwa and taurahere groups.²²⁹ Similarly, members of Ngāti Awa may vote within their hapu to elect the representative for that hapu.²³⁰
- 14.9 Ensuring all the tribe's constituent communities are represented would assist in linking the waka umanga and the tribe. The representatives should provide the *rūnanganui* with a mix of perspectives. If the *rūnanganui* is to function effectively, however, the representatives must also balance their responsibilities to their particular constituencies with their overriding duty as members of the *rūnanganui* to act in the best interests of the tribe as a whole. If this is not achieved, the *rūnanganui* may well be hamstrung by "patch protection".

Alternate representatives

- 14.10 Providing alternates helps to ensure that the constituent communities always have a voice at the table, and could help to bring younger representatives onto the board, but could also heighten the risk that representatives are perceived primarily as advocates for their own communities. Tribes should consider these factors when deciding whether or not to provide for alternate representatives. If alternates are permitted, the charter must specify how they are to be selected, for instance, whether the alternate would be the next highest-polling candidate or should be separately elected.

The notification and nominations process

- 14.11 The charter must specify how long before an election the notice must be given, how long after the notice the nominations must be submitted, and how long before the election the candidates must be announced and the voting forms distributed. The methods used to give these notices must be detailed. In addition to public notices in the local newspapers, all registered adult members should receive advice by post or e-mail.²³¹
- 14.12 Any information that the candidates ought to provide should also be identified. If the call for nominations is accompanied by identification of the expectations

229 Te Rūnanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005), cl 6.1 and sch 1, Part A.

230 See Charter of Te Rūnanga o Ngāti Awa < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) sch 2, cl 7.4.

231 Te Rūnanga o Ngāti Awa requires the call for nominations to be posted to all registered adult members, advertised in local newspapers, and publicised by other means as the *rūnanga* may determine: Charter of Te Rūnanga o Ngāti Awa < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) sch 2, cl 6.3.

for the role,²³² candidates could be asked to provide a self-assessment against these expectations. Such information is one way to empower the voting members of the tribe and to foster informed decision making, especially where voting is not marae based. If meetings are held as part of the election process, members can question candidates on these issues. Even if there is no “job description”, candidates should still be asked to provide information about themselves and their skills in support of their bid for office.²³³

14.13 The Law Commission suggests that where direct election rather than an electoral college is chosen, charters should include procedures that:

- require identification of the governance skills and attributes expected of representatives;
- require candidates to provide a self-assessment against these expectations; and
- require the self-assessments to be distributed with the voting papers.

The method of voting

14.14 Whether voting is done through the postal system, by electronic means,²³⁴ and/or in person will depend on an assessment of the costs and effectiveness of the different methods and how they fit with each tribe’s traditions and preferences, as well as the issue involved. Other considerations include the geographical spread of the membership, and whether taurahere vote in a taurahere community or their “home” community within the rohe.

Mandated Iwi Organisations and “Twenty Questions”

14.15 Waka umanga aiming to be mandated iwi organisations under the Maori Fisheries Act 2004 will also need to take account of that Act’s requirements for such organisations. Groups which intend to enter Treaty settlements with the Crown²³⁵ will also need to take account of the Crown’s “Twenty Questions on Governance”, though these do not require any particular voting system.²³⁶ Our recommendations and suggestions concerning the selection of representatives to the rünanganui are not inconsistent with the kaupapa (principles) set out in

232 Te Rünanga a Iwi o Ngāpuhi is one example of an organisation that has established prerequisite skills and a job description for representatives. The minimum skills requirements include knowledge of Ngāpuhi traditions and tikanga, verbal and written communication skills, and analytical and decision-making ability. Te Rünanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005) sch 1, part C, paras 12 and 13.

233 Drawing on ten case studies of Māori organisations, Te Puni Kōkiri and the Federation of Māori Authorities found that most are now requiring candidates for governance positions to provide formal profiles prior to election. For instance, the Wakatohea Māori Trust Board requires a profile or curriculum vitae for nominees to be sent out with the voting forms, although this is not a requirement under the Maori Trust Boards Act 1955. Te Puni Kōkiri and Federation of Māori Authorities *He Mahi, He Ritenga Hei Whakatinana i te Tūrura Pō 2004: Case Studies: Māori Organisations Business, Governance and Management Practice* (Wellington, 2004) 10 and 20.

234 The Maori Fisheries Act 2004, Sch 7, kaupapa 3, allows the use of electronic voting facilities, but these must not be the only means by which a member may vote.

235 Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Summary Edition, Wellington, 2004).

236 See Office of Treaty Settlements “Twenty Questions” on Governance: Matters Required in Disclosure Material for Governance Entities, <http://www.nz01.2day.terabyte.co.nz/ots/DocumentLibrary/20QuestionsonGovernance.pdf> (last accessed 7 March 2006).

Schedule 7 of the Maori Fisheries Act, but compliance with them will restrict the methods or voting adopted.²³⁷

- 14.16 Many Māori communities will be familiar with postal voting, as it has often been used for Māori trust boards,²³⁸ although some communities have chosen to use voting in person.²³⁹

Integrity of elections, disputes, and verification of results

- 14.17 The charter must specify how the elections will be managed to ensure that they are free and fair. This will require that a returning officer be appointed to organise the nominations and elections process, including the counting of the votes and verifying the result.
- 14.18 The charter should specify the duties of the returning officer and indicate any qualifications for, or restrictions on, the appointment to ensure that the person appointed is seen as being independent.²⁴⁰ The system for dealing with electoral disputes needs to be the responsibility of someone other than the returning officer. The charter should specify the rules for applying for a review of the election result, including who may apply, when and on what grounds, together with the powers of the reviewing officer, and the type of outcomes that may follow a review.²⁴¹ For instance, the reviewing officer may have powers to require information, and to overturn an election result and require a new election to be held.

237 Kaupapa 1 requires that, at least once every three years, all adult members of an iwi have the opportunity to vote for the governors of their mandated iwi organisation. Kaupapa 2 specifies that all adult members of an iwi have the right to participate in these elections. Kaupapa 3 requires that a mandated iwi organisation ensure that these voting rights can be exercised.

238 The Maori Trust Boards Act 1955, s 50, specifies that elections for trust board members are to be by postal ballot unless the regulations provide otherwise.

239 Te Rūnanga o Ngāti Awa used postal voting when the rūnanga was a Māori trust board (Maori Trust Board Regulations 1985, regs 5C–5K), but the rūnanga has been reconstituted under the Te Runanga o Ngati Awa Act 2005. The new charter provides for voting to be either postal or at a wahi pooti (designated place where people vote in person): Charter of Te Rūnanga o Ngāti Awa < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) sch 2, cl 7.1.

240 Te Rūnanga o Ngāti Awa charter provides for the appointment of a chief returning officer, who may not be a representative, employee, or member of the hapu for which the election is being held, and shall be a person of standing in the community. The chief returning officer is responsible for: ensuring only one vote is cast per eligible member; ensuring that only eligible members vote; keeping a record of all votes received; vote-counting; certifying the result; and declaring it to the rūnanga: Charter of Te Rūnanga o Ngāti Awa (< <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006)) sch 2, cls 10 and 11.

241 Under Te Rūnanga o Ngāti Awa's charter, candidates may seek a review within 14 days of the result being declared. The rūnanga appoints an election review officer, who is to be a person nominated by the President of the Auckland District Law Society. Subject to the rules of natural justice, the review officer has powers to inquire into, and decide upon, any matters relating to the review (cl 14.2), and powers to seek necessary information. The conclusion is to be guided by the "substantial merits" of the application rather than technical points. The review officer may declare the successful candidate or any other candidate duly elected, or declare the election void and recommend a new election. The decision of the electoral review officer is final: Charter of Te Rūnanga o Ngāti Awa (< <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006)) sch 2, cls 13–14.

14.19 In summary, the default schedule or charter must include the following requirements for an election process:

- whether representatives are to be selected by direct election or indirectly by an elected electoral college;
- if representative appointments to the rünanganui are to be made by an electoral college, how the electoral college is itself elected;
- any constituencies, including the number of constituencies and the number of representatives per constituency;
- whether alternate representatives are permitted and, if so, how the alternates are selected;
- when and how members are notified of forthcoming elections;
- how nominations for candidates are invited, the information that must accompany a nomination, how long before election nominations must be invited and when nominations must be submitted;
- the method of voting;
- which positions are responsible for each part of the entire election process, including verification of the results; and
- the method for dealing with disputes about election results.

Appointed members of the rünanganui

RECOMMENDATION

14.3 The charter may allow further rünanganui members to be appointed provided that at least 75% of the representatives are selected by the democratic electoral system.

14.20 Tribes may decide to reserve some places on the rünanganui for “appointed members”. These places could be used to provide representation for particular sectors of the tribe, such as the kaumatua (elders)²⁴² and rangatahi (young people), or sectors that might otherwise not be represented.²⁴³ Alternatively, representatives for these sectors could be elected separately. Appointed positions might also be used to recognise institutions or people of

²⁴² See for instance, the Charter of Te Rünanga o Ngäti Awa concerning the appointment of a whakaruruhau. A whakaruruhau may be appointed by the rünanga on the recommendation of the kaumatua council. The whakaruruhau may attend meetings of the rünanga and speak on issues of tikanga, reo, kawa and korero, and may provide advice to the rünanga and chief executive. The whakaruruhau does not, however, have voting rights, nor is he or she counted in any quorum unless also a representative: Charter of Te Rünanga o Ngäti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) cls 4.8–4.12.

²⁴³ The Charter of Te Rünanga o Ngäi Tahu provides for the appointment of a “beneficiaries representative” to represent the interests of Ngäi Tahu individuals who are at the time resident outside of the tribal rohe and whose interests are not otherwise represented by a rünanga representative. The “beneficiaries representative” is entitled to attend and speak at meetings of the rünanga but may not vote, nor be counted as part of the quorum: Charter of Te Rünanga o Ngäi Tahu (Te Rünanga o Ngäi Tahu, Christchurch, 2003) cls 1 and 6.14.

significance to the tribe.²⁴⁴ Another possible use would be to address any gaps in skills among the elected representatives. This would work best if the necessary skills were identified first and elected representatives assessed against them, to determine any gaps in the rünanganui as a group, and then appointees selected to address the needs identified.

- 14.21 Where the charter permits appointed representatives, these appointments should not be at the expense of the overall representativeness of the rünanganui. We recommend that at least 75% of the representatives be elected. The charter must specify who may make the appointments and the roles and rights of appointees. If they have the full rights of a representative to vote and be part of the quorum, the appointees must be subject to the same conditions of office, duties and liabilities as other representatives.

WHO MAY BE A REPRESENTATIVE ON THE RÜNANGANUI

- 14.22 Individuals and constituent communities of the tribe are entitled to have high expectations of the rünanganui, especially because those individuals and constituent communities do not have the option of joining another group, and because the rünanganui decisions affect not just current members, but also future generations, and the standing of the tribe as a whole.

Credibility and competence

- 14.23 Establishing minimum standards for who may stand for the office of representative is one way to foster credibility and competence on the rünanganui. Examples of such standards can be found in the Companies Act 1993 and the Charities Act 2005. Section 151 Companies Act 1993, which sets out the qualifications of directors, also requires a director to be a “natural person” who is at least 18 years of age, whereas the Charities Act provides that an officer need not be a natural person and the minimum age is 16 years.²⁴⁵

Natural persons and consent

RECOMMENDATION

- 14.4 Each representative must be a “natural person” who must:
- give written consent to becoming a representative; and
 - make a written statement that he or she is not disqualified from holding office as a representative.

- 14.24 Representatives must be natural persons as they are required to exercise personal judgement and skill and may be personally held to account, primarily via the electoral system. Another legal entity, such as a constituent community’s rünanga, cannot itself be a representative on the rünanganui.

²⁴⁴ Maniapoto Maori Trust Board Act 1988, s 6(c) provides for the board to include a representative appointed on the nomination of Te Arikiniui to represent Te Arikiniui. So do Tainui: see paragraph 5.4 of the Rules of Te Kauhanganui o Waikato Inc, registered 5/12/2005, <http://www.societies.govt.nz> (last accessed on 23 March 2006).

²⁴⁵ Charities Act 2005, s 16.

RECOMMENDATION

- 14.5 A person will not be eligible to stand as a representative if he or she is:
- an undischarged bankrupt;
 - a prohibited person under section 382, section 383, or section 385 Companies Act 1993; or
 - a prohibited person under section 16(2)(c) Charities Act 2005.

14.25 We consider that the positions of trust which representatives will hold means that dishonesty offences are in a different category from other types of criminal convictions. The period of disqualification should be in line with the standard found in the Charities Act, particularly as many waka umanga may seek to register as charities.

14.26 We have recommended that these standards be mandatory because representatives will be responsible for managing tribal assets. The stewardship obligations on the rünanganui are heightened because the assets are managed on behalf of the tribe, including future generations. As part of this role, representatives may be directly or indirectly responsible for subsidiary companies.

14.27 This recommendation follows closely the requirements of the Companies Act 1993, the Crown Entities Act 2004 and the Charities Act 2005. The relevant sections of the Companies Act relate to:

- offences in connection with the promotion, formation, or management of a company (ss 382(1)(a) and 383(1)(a));
- offences relating to false pretences and fraud, or dishonesty offences under the Crimes Act 1961 (s 382(1)(b));
- situations where a person has had a judgment entered against him or her as an “insider” under the Securities Markets Act 1988 (s 382(1)(c));
- situations where a person has persistently failed to comply with the Companies Act 1993 or the Securities Act 1978 (s 383(1)(c)(i));
- situations where a person has breached his or her duty to the company or to a shareholder; or has been reckless or incompetent in performing his or her duties as director; or has become of unsound mind (s 383(1)(c)(ii) and (iii)); or
- situations where the Registrar of Companies has prohibited a person from directorship on the basis of his or her involvement in, and responsibility for, the failure of a company (s 385).

14.28 The Charities Act 2005 disqualifies an individual who has been convicted of a crime involving dishonesty and has been sentenced for that crime within the last seven years,²⁴⁶ which is two years longer than the Companies Act equivalent.

²⁴⁶ Charities Act 2005, s 16(2)(c). Crimes of dishonesty are defined by the Crimes Act 1961, s 2(1).

Criminal convictions

RECOMMENDATION

14.6 The default schedule or charter should specify the details for disqualification of representatives on the basis of criminal convictions (other than the crimes of dishonesty addressed above).

- 14.29 The criminal convictions standard is not so much a predictor of a risk of reoffending as an indicator that the person is someone in whom the tribe can have confidence to perform the governance and leadership role. We do not prescribe the standard to be set, as the types of conviction that may affect confidence will depend on the size of the *waka umanga* involved and the role expected of the representative. The following paragraphs discuss relevant issues and examples.
- 14.30 Existing legislation varies considerably as to tests prescribed in relation to criminal offences. Some criminal conviction thresholds disqualify people only if they are still under sentence. For instance, the Maori Trust Boards Act 1955 disbars anyone from appointment to a trust board who has been “convicted of any offence punishable by imprisonment for a term of 6 months or longer, unless he has received a free pardon or *has served his sentence* or otherwise suffered the penalty imposed upon him” [emphasis added].²⁴⁷ This provision potentially covers quite minor offending whether or not imprisonment results, but ceases to have any effect once the sentence has been served.
- 14.31 In contrast, the Crown Entities Act 2004 disqualifies anyone who is currently serving a term of imprisonment or is still subject to a non-custodial sentence, rather than simply convicted of an imprisonable offence.²⁴⁸ The Charities Act 2005 only covers crimes of dishonesty and applies only to convictions in the previous seven years.²⁴⁹
- 14.32 There are considerable difficulties in setting thresholds for offences that may disqualify a person from being a representative on the *rūnanganui* or require their dismissal as a representative. Some of the maximum sentence levels may not reflect current community values, or the frequency with which courts actually impose a term of imprisonment, or a term beyond a certain length, for the offence. As such, these thresholds provide rather a blunt instrument. Disqualifying representatives on the basis of all past convictions above a certain threshold does not allow for the possibility of rehabilitation. Yet limiting the standard to convictions for which the sentence is still current, as in the Maori

247 Maori Trust Boards Act 1955, s 14(3)(c). Essentially the same provision applies for members of a committee of management for a Māori incorporation under Te Ture Whenua Maori Act 1993, s 272 (2)(c).

248 This is one element of the threshold in the Crown Entities Act 2004, although it only applies if the sentence is still current. Section 30(2)(e) disqualifies “a person who has been convicted of an offence punishable by imprisonment for a term of two years or more, or who has been sentenced to imprisonment for any other offence, unless that person has obtained a pardon, served the sentence, or otherwise suffered the penalty imposed on the person”.

249 Charities Act 2005, s 16(2)(c).

Trust Boards Act 1955 and the Crown Entities Act 2004,²⁵⁰ does not disbar those with serious past convictions that may cast doubt on their suitability. The balance needs to be carefully considered before simply adapting an existing legislative threshold in a charter.

- 14.33 An alternative to a set threshold is to require past convictions to be disclosed by way of a statutory declaration at the time a candidate puts his or her name forward for selection. The voters can then decide for themselves whether the convictions are material.²⁵¹ Such a policy would be subject to the Criminal Records (Clean Slate) Act 2004, so that candidates could not be asked to declare any “clean slate” convictions.²⁵² If the representatives are selected by an electoral college, the college must seek such a declaration before making its selections. Similar procedures would be necessary for any appointed representatives.
- 14.34 It could be argued that openly declaring any convictions is an undue infringement of the candidate’s privacy and a disincentive for people to stand for office, but may nevertheless be warranted given the position of trust representatives exercise on behalf of their whole community. Such disclosure may in many cases be unnecessary since the candidates will be well known in their constituencies. Yet the information in circulation about a candidate’s past may not be equally known to all or may be inaccurate in key respects. This option allows the community to make an informed choice about whether a candidate’s past convictions matter. It would help to protect the credibility of the rūnanganui from any damaging effects of a subsequent revelation of past convictions. Importantly, it opens up opportunities to those who may otherwise be disqualified by a blanket rule on past convictions.²⁵³

Minimum standard for mental capacity

RECOMMENDATION

- 14.7 A person cannot stand as a representative if he or she is subject to:
- a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992; or
 - a property order or a personal order made under the Protection of Personal and Property Rights Act 1988.

250 Maori Trust Boards Act 1955, s 14(3)(c) and Crown Entities Act 2004, s30(2)(e).

251 Te Rūnanga a Iwi o Ngāpuhi used to require candidates to make a statutory declaration to their takiwa before they stood for election as the representative of that takiwa. The declaration included disclosure of any criminal convictions. This provision is no longer in the Rūnanga’s new charitable trust deed: Te Rūnanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005).

252 The Criminal Records (Clean Slate) Act 2004 establishes a “clean slate” scheme for qualifying individuals as defined in s 7.

253 The consequences of a very broad previous convictions rule became evident when two members of the Tainui executive body had to resign in 2004 because of previous convictions for imprisonable offences (drunk driving and obstructing police during a land march), which put them in breach of the disqualification rule: Chemene Del La Varis “Soften Conviction Rule: Tainui Members” (21 September 2004) Waikato Times Hamilton, 2 ed, 3. Paragraph 5.3.1(e) of the new Tainui constitution (see the Rules of Te Kauhanganui o Waikato Inc, registered 5/12/2005 < <http://www.societies.govt.nz>> last accessed on 23 March 2006) remedies this problem by limiting disqualification for criminal activities to convictions for crimes of dishonesty (including fraud) as defined in the Crimes Act 1961, s 2(1).

14.35 Legislative provisions of this type commonly refer to the Mental Health (Compulsory Assessment and Treatment) Act 1992,²⁵⁴ the Protection of Personal and Property Rights Act 1988,²⁵⁵ or both. These Acts cover rather different forms of incapacity:²⁵⁶

- A person subject to a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992 is someone who, following a series of assessments and a court order, has been found to be “mentally disordered”.²⁵⁷
- Under the Protection of Personal and Property Rights Act 1988, the court can make both property and personal orders in respect of persons who lack the competence to manage their own affairs.

14.36 While the groups of people whom the two Acts cover may overlap, they are not equivalent so it is desirable for the charter to refer to both.²⁵⁸

Minimum age limits

RECOMMENDATION

14.8 The minimum age for representatives will be 18 years.

14.37 Minimum age requirements are often used as a means of defining competency and capacity. For instance, the Companies Act 1993, section 151 requires that directors be at least 18 years old. Eighteen is the minimum age for candidates and voters in general elections and under the Maori Fisheries Act 2004.²⁵⁹

254 Te Ture Whenua Maori Act 1993, s 272(2)(a) provides that a person may not be a member of a committee of management for a Māori incorporation if he or she is, or is deemed to be, subject to a compulsory treatment order under Part 2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992. The Maori Trust Boards Act 1955, s 14(3)(a) disqualifies from board appointments, any person who is “mentally disordered” within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

255 The Companies Act 1993, s 151(2)(f) disqualifies from being a director “[a] person who is subject to a property order made under s 30 or s 31 of the Protection of Personal and Property Rights Act 1988”. These provisions allow the Court under certain conditions to make a temporary order in respect of the person’s property, or to appoint a property manager. The Crown Entities Act 2004, s 30(2)(c) and (d) excludes from board membership any person who is subject to a property order under the Protection of Personal and Property Rights Act 1988, and any person who is subject to a personal order under that Act, where the order “reflects adversely on” that person’s competence to manage his or her property, or capacity regarding decisions about his or her personal care and welfare.

256 See for instance, the Trustee Act 1956, s 51(2)(c); Receivership Act 1993, s 5(1)(f) and (g); Sale of Liquor Act 1989, s 219W(e) and (f); Mutual Insurance Act 1955, s 30(10)(d); and the Motor Vehicle Sales Act 2003, s 24(l) and (m).

257 The Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2, defines “mentally disordered” in relation to any person as being of an abnormal state of mind, characterised by delusions, or disorders of mood or perception to the degree that the person’s mental state poses a serious danger to the health or safety of that person or others, or seriously diminishes the capacity of that person to take care of him or herself.

258 Laws of New Zealand (LexisNexis NZ Ltd, June 2005) Mental Health, Part V: The Protection of Personal and Property Rights, para 126, n 2.

259 New Zealand Bill of Rights Act 1990, s 12; and Electoral Act 1993, s 3, interpretation, definition of adult and ss 47(1) and 74. Compare the Maori Fisheries Act 2004, which does not set an age limit for membership of the boards of the various entities it establishes, but does set 18 as the minimum age for voting by iwi members, s 5, interpretation, definition of adult. Compare also the Charities Act 2005, s 16(2)(b) where the minimum age for officers of a charity is set at 16 years.

However any minimum age requirements in legislation, other than a minimum age of 16, raise issues of prima facie age discrimination under the Human Rights Act 1993,²⁶⁰ so questions of justification then arise.

- 14.38 We have considered whether a minimum age limit is necessary and, if so, what it should be. The nature of representatives' roles and the wider significance of their decisions and behaviour suggest the need for judgement and decision-making skills, and the capacity to take a wide and long-term view of issues, which are more likely to be found among those who are 18 or over. We are aware that tribes may wish to have the voice of rangatahi on the rünanganui. In our view, the breadth and significance of the representative's role justifies setting the minimum age at 18 years, but it may be difficult to justify any higher age limit.

Positive qualifications for office as a representative

- 14.39 A further matter relevant to credibility and confidence is whether certain skills and attributes should be required for office as a representative. Rather than simply specifying who may not be a representative, should the statute and/or charter include positive requirements for office as a representative? We believe that this is a matter for the tribe to determine, while noting that identifying desired skills and attributes may assist voters to make informed choices.
- 14.40 A related issue is whether potential representatives must meet certain qualifications in respect of membership, residency, active community involvement and the like, with any rules for these being set out in the charter. This is a matter which was raised in Chapter 4 in relation to member's voting rights, and again we believe is a matter for the tribe and its constituent communities to determine according to their preferences and traditions. Such matters could be covered as part of the desired attributes.

Dual roles for representatives?

RECOMMENDATION

- 14.9 The default schedule or charter should specify rules to determine whether a representative can also be an employee of the waka umanga or its subsidiaries, or a board member of the subsidiaries.

- 14.41 In considering whether representatives may have other roles in the waka umanga or its subsidiaries, the key issue is to ensure that the rünanganui can still monitor the performance of its executive arm and of its subsidiaries, and manage any conflicts of interest. Restrictions on such dual roles are not uncommon in

²⁶⁰ Protection against age discrimination under the Human Rights Act 1993, s 21 does not apply in respect of anyone aged under 16 years.

existing constitutions.²⁶¹ The Local Government Act 2002 requires any employee of a local authority who is elected to that authority to resign from his or her employment.²⁶² The Ngāti Paoa proposal contains an equivalent provision, and another clarifying that a governor cannot hold any executive position in the authority.²⁶³

Representatives as employees

14.42 Under a standard governance model, prohibiting representatives from being employees of the waka umanga maintains accountability between the rünanganui and the chief executive and staff of the waka umanga. The chief executive is accountable to the rünanganui for the performance of the waka umanga, and is the employer of all staff. A staff member who is also a representative would be accountable to the chief executive at the same time as the chief executive would be accountable to him or her as a member of the rünanganui. The increased potential for conflicts of interest may also heighten the impression that the waka umanga is operating for the benefit of certain individuals rather than for the tribe as a whole. Dual roles for the chief executive or chairperson, in particular, would severely compromise accountabilities.

14.43 We have therefore recommended that the default position be that no representative may be also an employee. A charter could, however, allow the rünanganui to make exceptions in respect of ordinary board members. This may be necessary, especially in smaller communities, where the role of representative will generally be part-time, and in rural areas, where there may not be many employment opportunities beyond enterprises run by the waka umanga. There may also be a small potential recruitment pool for both representatives and employees. However, a resolution to permit a representative to continue in such employment should be passed immediately after the person's election, or for existing representatives, before any employment is commenced.

Representatives as members or employees of subsidiary boards

14.44 We suggest that the default position does not need to extend to employment in subsidiaries of the waka umanga. The tribe should, however, address this question when forming its charter.

261 Te Rünanga a Iwi o Ngāpuhi requires that representatives may not be employees of the entity or directors of its asset-holding company: Te Rünanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005) cls 4.5(c) and 8.1(b); the latter clause is stated to accord with ss 16 and 17 Maori Fisheries Act 2004, but actually the Act is less stringent. Te Rünanga o Ngāti Awa states that a representative may not be an employee, but may be a director or trustee of one of the subsidiary organisations: Charter of Te Rünanga o Ngāti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) cl 5.3 and sch 2, cls 2.2 and 2.3. Te Rünanga o Ngāi Tahu prohibits employees, including employees of subsidiaries, from taking the office of representative: Charter of Te Rünanga o Ngāi Tahu (Te Rünanga o Ngāi Tahu, Christchurch, 2003) cl 6.11. Te Kauhanganui o Waikato disqualifies any representative who "is or becomes an employee of Te Kauhanganui, the trustee of the Trusts or any of their wholly owned subsidiary companies" (sic): Rules of Te Kauhanganui o Waikato Inc (2005) 5.3.1(f).

262 Local Government Act 2002, s 41(5).

263 Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cls 25(6) and (7).

14.45 The key determinant of board membership of a subsidiary should be the skills and attributes required for the position. The procedure for making these appointments should be merit based, and if any representative on the rünanganui is judged to be the best person for the position they may be appointed, provided that the selection process is fair and transparent and that rules governing conflicts of interests are observed.

14.46 Where a representative is appointed to a subsidiary board, the rules governing conflicts of interest must be properly observed whenever the business of the subsidiary is before the rünanganui, so that the rünanganui can continue to monitor its subsidiaries effectively. This suggests that a limit should be set on the number of representatives appointed to a subsidiary board.

14.47 The Maori Fisheries Act 2004 imposes a constraint on the boards of subsidiary quota-holding companies or fishing enterprises. Kaupapa 10 of Schedule 7 requires that elected directors, trustees or office holders of a mandated iwi organisation must not comprise more than 40% of the total number of directors, trustees or office-holders of these subsidiary organisations. Any waka umanga seeking mandated iwi organisation status and establishing such subsidiaries would need to comply with this (as would a waka umanga seeking recognition as an iwi aquaculture organisation under the Maori Commercial Aquaculture Claims Settlement Act 2004). Otherwise, whether or not representatives may be members of subsidiary boards is best left to the tribe to determine in its charter.²⁶⁴

14.48 In summary, the Law Commission considers the default schedule should provide:

- that a representative cannot also be the chief executive of the waka umanga, nor may the chairperson of the rünanganui also be an employee of the waka umanga;
- that, apart from these positions, a representative can also be an employee of the waka umanga, but only if the rünanganui resolves that this would be in the best interests of the tribe;
- rules as to whether representatives may also be employees of a subsidiary of the waka umanga; and
- rules as to whether representatives may also be trustees or directors of a subsidiary of the waka umanga.

Dismissal and cessation of representative office

RECOMMENDATION

> Continued next Page

14.10 A representative will cease to hold office if he or she:

- submits a written resignation; or
- becomes ineligible under the disqualification provisions, after being elected.

²⁶⁴ Te Rünanga o Ngäi Tahu allows representatives to be appointed as directors of any of the entity's arms and their subsidiaries: Charter of Te Rünanga o Ngäi Tahu (Te Rünanga o Ngäi Tahu, Christchurch, 2003), cl 6.12.

RECOMMENDATION

14.11 A representative can be dismissed from office, following a procedure that accords with the principles of natural justice, if he or she:

- is unable to perform any duty or role of a representative;
- has neglected any duty as a representative;
- has brought the *waka umanga* into disrepute through any action or inaction; or
- has failed to declare a material conflict of interest.

14.49 Anyone who, during his or her term of office, becomes disqualified in terms of the requirements for election as a representative will forfeit his or her position as a representative and may not be re-elected or re-appointed as long as the disqualification continues to apply. A simple resolution of the *rūnanganui* accepting a resignation or recording the grounds for disqualification will be sufficient to terminate the representative's term.

14.50 However, where a representative has allegedly failed to meet the minimum standards for holding office as a representative, he or she would be required to vacate office following completion of a prescribed procedure in accordance with the rules of natural justice for removing that representative.

14.51 We considered whether to use "neglect of duty" or the often used, and more specific and objectively measured, ground of "failure to attend three consecutive meetings without leave". We prefer "neglect of duty" because it can embrace the full range of behaviours; for instance, a representative may attend meetings but not participate, or his or her attendance may be so sporadic as to justify removal.

14.52 While there is undoubtedly a subjective element to "neglect" or "disrepute", it is not possible to define with precision the relevant grounds.²⁶⁵ *Waka umanga* may wish to consider more specific grounds in their charters. However, the major protection against misuse of the power to dismiss will be requirements for natural justice in exercising that power.

14.53 The dismissal procedure set out in each charter must specify the decision-making authority. The orthodox approach is that whoever appoints should also have the power to dismiss. However, where individual members elect representatives it would be too cumbersome to have a membership vote on the question of dismissal. The decision could be made instead by the rest of the *rūnanganui* by way of a special resolution or by the constituent organisation that elected or appointed the person.

²⁶⁵ Acting in such a way as to tend to bring a profession or organisation into disrepute is a ground for removal from office in several existing statutes. The Defence Act 1990, s 57A(1) and the Police Act 1958, s 5A(1) employ the term as a broad, sole ground for dismissal. The Lawyers and Conveyancers Act 2006, s 241(c) and (d), and Survey Act 1996, s 51(1)(a) use it as a test of whether specific behaviour such as criminal conviction or professional negligence or incompetence are serious enough to incur disciplinary measures. The Maori Television Service (Te Aratuku Whakaata Irirangi Maori) Act 2003, sch 2, cl 11(2)(b)(i) lists bringing the Service into disrepute as the first of eight non-exhaustive grounds for removing a Director of the Service from office. The term "bring into disrepute" is not itself defined in these provisions.

14.54 Compliance with the rules of natural justice refers to procedures which should include: giving representatives fair and full prior notice of all allegations against them; notice that these could lead to dismissal; fair notice of the hearing; a full opportunity to engage legal counsel, attend a hearing, respond to allegations and evidence, and make submissions; hearing and determination of the matter by people without any conflicts of interest; and a right of appeal.

Filling vacancies between elections

14.55 A new election would be the default position for filling a mid-term vacancy, except where the residual term is too short to justify a further election. In this case, an interim appointment by the rūnanganui or the relevant constituent community would be appropriate.²⁶⁶

CONDITIONS OF OFFICE

Term of office of representatives

RECOMMENDATION

14.12 The maximum period a representative may hold office will be four years, although the waka umanga's charter may set a lower maximum period.

14.13 An election must be held when a representative's term of office expires or, if the representative is appointed, a replacement appointment procedure must be undertaken.

14.56 A maximum term of office is necessary for any democratic structure. A term of three to four years will balance stability and continuity against the countervailing needs for accountability and providing opportunities for new people to move into governing roles.

14.57 The Maori Fisheries Act 2004 sets the terms for board members, directors or governors of mandated iwi organisations at a maximum of three years between elections.²⁶⁷ This would be the effective maximum term for any waka umanga that wished also to be a mandated iwi organisation and/or an iwi aquaculture organisation, but we believe four years is generally preferable to provide stability.

14.58 The charter may also provide for a maximum number of times a person may stand for election – say two or three terms, depending on the length of the initial term. Such a provision is important to prevent the waka umanga from becoming overly dominated by particular individuals, even those with acknowledged skills, knowledge, and mana, and to bring in younger and fresh leaders.

²⁶⁶ For instance, under the Local Electoral Act 2001, s 117, where a vacancy arises more than a year prior to the next triennial election, a new election must be held, but otherwise an authority may appoint a qualified member (e.g. from that constituency) or decide not to fill that vacancy.

²⁶⁷ Maori Fisheries Act 2004, sch 7, kaupapa 1.

- 14.59 The Law Commission suggests that charters include rules about the number of consecutive terms an individual can serve on the rünanganui;²⁶⁸ and allow rotating vacancies in order not to risk losing all institutional memory from the rünanganui at one time.²⁶⁹

Remuneration

RECOMMENDATION

14.14 Each waka umanga must:

- set a remuneration and fees policy for its representatives and make this available to members; and
- publish in its annual report the actual remuneration and fees paid to each representative during the financial year it covers.

- 14.60 How much a waka umanga pays its representatives, and on what basis, is for each waka umanga to decide, but responsible stewardship and accountability require transparency on these matters. The remuneration and fees policy should specify the procedure for setting remuneration and fees – for instance, whether these are decided by the rünanganui following advice from the chief executive or the Secretariat. The Secretariat could provide comparative information on appropriate levels, having regard to such matters as the size of the waka umanga and the responsibilities of the representatives.²⁷⁰

CHAIRPERSON AND DEPUTY CHAIRPERSON

RECOMMENDATION

14.15 In relation to the chairperson and deputy chairperson (if there is one), the default schedule and charter should include:

- the term of office;
- the number of consecutive terms an individual may serve;
- the method of selection; and
- the method of removal.

- 14.61 The organisation's chairperson is likely to play a pivotal role in setting the direction of the rünanganui and the waka umanga as a whole. Careful thought needs to be given to the scope of this role, so the expectations of the position in relation to both the rünanganui and the chief executive of the waka umanga are clear from the outset. If appointed, a deputy chairperson can act in the chairperson's absence, and this also provides opportunities for leadership training.

268 See, for instance, Te Rünanga ä Iwi o Ngäpuhi Charitable Trust Deed (10 September 2005) cl 12.1, which limits representatives to two terms.

269 See Charter of Te Rünanga o Ngäti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) cls 4.2–4.4.

270 The Remuneration Commission currently assesses the appropriate remuneration for local body representatives in a similar manner.

14.62 The maximum term of office for the chair and deputy chair should match the maximum term for representatives. Organisations often select their chair and deputy by a vote of all board members,²⁷¹ although sometimes the chair is selected by a vote of all members in a presidential style vote.²⁷² Factors in determining the selection method would include the costs and the timeliness with which appointments can be made. The method of removal should normally match the method of appointment.

14.63 A further issue to be specified in the charter is whether, on election as chairperson, another representative (or alternate) should be appointed to represent that constituency. The chairperson can then focus solely on the role of chair. However, since all representatives are required to act in the best interests of the tribe as a whole, selecting an alternate to replace the chair may strengthen the perception that representatives are advocates for their communities and that the particular community has both the chairperson and the alternate to advocate on its behalf. In the end, each tribe must decide what is best, given its own size, structure and traditions.

271 See Maori Trust Boards Act 1955, s 17.

272 See, for instance, the Constitution of Ngati Kahungunu Iwi Inc (5 March 2003) cl 9.3.2.

Chapter 15

Duties and Roles of Representatives

INTRODUCTION 15.1 This chapter makes recommendations and suggestions about the individual duties and roles of representatives, their liabilities and indemnities, and the management of conflict of interests. These can be set out in the waka umanga's charter or, for some matters, the default provisions contained in a schedule to the Act could be adopted.

Duty of care

RECOMMENDATION

- 15.1 A representative's duty of care requires that he or she:
- exercises the care, diligence, and skill that a prudent person of business would exercise in managing the affairs of others; and
 - is guided in all decisions, including decisions concerning asset management and development, by the vision set in the waka umanga's charter and other formal resolutions of the waka umanga.

15.2 We have considered whether the representatives stand in a fiduciary relationship to the tribe. The relationship has many of the characteristics of a fiduciary. In particular, the rünanganui's role in acting for the tribe, including future generations, means that the tribe must place considerable faith and trust in the rünanganui, particularly as individuals and communities in the tribe may find it difficult to monitor the rünanganui's actions effectively. The corollary of this trust is the requirement for absolute loyalty to the tribe on the part of its representatives on the rünanganui.

15.3 Despite these characteristics, we are not convinced that the relationship between representatives, the members and the tribe more generally should be defined as a fiduciary one. The fiduciary concept opens up a considerable body of common law obligations and liabilities. Unless representatives have ongoing access to specialist legal advice they will not necessarily be certain where their fiduciary obligations and liabilities begin and end. This uncertainty is likely to make them extremely cautious. The lack of clear boundaries may also act as a disincentive to people to take on the role of representative.



- 15.4 The fiduciary concept also imports notions of trusteeship, and with that the imperative of keeping the trust property “safe”, as is the expectation of trustees. A waka umanga, however, is a body with mixed objectives. It is likely that there will be some property that must be kept safe (for instance, sites of cultural significance), but other property may be purely commercial investments that the tribe wishes to manage for growth and profit, with attendant risks of loss.²⁷³ Even so, the inter-generational nature of the tribe imposes a general requirement for prudence on the part of representatives. It is expected that a representative will be guided by the low risk standards of the trustee in some matters, but be more enterprising in others; in short, that the representative’s role will be a mix of the trustee and the commercial director.
- 15.5 Our recommendation adopts the standard of the Ngāti Paoa proposal.²⁷⁴ Although this formulation is drawn from trustee law, it encapsulates the mixed nature of the representative’s role. The requirement that representatives be guided by the parameters of the charter, long-term plan and policies on major transactions emphasises that they work on behalf of the tribe.

Duty to act in good faith and in the best interests of the tribe

RECOMMENDATION

15.2 A representative must act in good faith, and in a manner that the representative believes on reasonable grounds to be in the best interests of the tribe served by the waka umanga.

15.3 A representative must not act in a way that unfairly prejudices or unfairly discriminates against any of the waka umanga’s constituent communities, unless he or she believes on reasonable grounds that this is required in the best interests of the tribe as a whole.

15.4 A representative must not allow the business of the waka umanga to be carried out in a manner likely to cause serious loss to the members or any creditor of the waka umanga or to allow the waka umanga to incur obligations which the representative believes it will not be able to perform.

273 See for instance *Re International Vending Machines Pty Ltd and Companies Act* (1961) 80 WN 465 (NSWSC) Jacobs J: “A trustee ... is obliged, primarily, to keep the trust property safe. However, a director of a company is a commercial man and any duty of his in regard to dealings with the property of the company on its behalf must be looked at in the light of his position in commerce.” Quoted in Andrew S Butler, “Fiduciary Law” in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (Thomson Brookers, Wellington, 2003) 338, 394.

274 Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 28(1)(c). This is drawn from the Trustee Act 1956, s 13B, which relates to the duty of a trustee exercising a power of investment.

PART 1:	Outline
PART 2:	Principles
PART 3:	Structure
PART 4:	Governance

- 15.6 The Law Commission suggests that the charter should specify that each representative is responsible for information and views being shared between his or her particular community and the rünanganui.²⁷⁵ Although the rünanganui and the waka umanga as a whole will also have obligations to keep the members informed and to elicit their views, this is another way to emphasise the role of representatives in linking the members and the rünanganui.
- 15.7 The representatives' loyalty in their role as a representative is owed to the tribe rather than to any constituent community or the waka umanga itself.²⁷⁶ The duty to act in good faith and in the best interests of the tribe raises two issues:
- the balance between the interests of the tribe as a whole and the interests of the constituent communities, which in most instances will have selected the representatives; and
 - the need to guard against representatives using their own concept of "the best interests of the tribe" as a justification for actions disloyal to the waka umanga.
- 15.8 Nevertheless, the overall duty of loyalty is to the tribe as a whole, not the waka umanga as an organisation or any particular constituent body.
- 15.9 The constituent communities may select the representatives, but if the waka umanga is to operate effectively, the rünanganui cannot afford to be hamstrung by "patch protection", that is, representatives unable to see beyond the interests of their own constituency. Representatives will need to bring forward the views of their communities and ensure they are taken into account, and this may create some tension between the needs and expectations of the constituent communities and the good of the entire tribe. A requirement to act in the best interests of the tribe as a whole will not remove these tensions and inclinations, but is a valuable aspirational prescription. It will serve to remind representatives of their duty to take a broad, long-term perspective.
- 15.10 The duty to act "in the best interests of the tribe" is subject to the requirement for "reasonableness" and the "tribe's interests" as defined by what is expressed in the waka umanga's charter and long-term plan, and by the policies on major transactions. Nor does the duty to act in the best interests of the tribe open the way to prejudice or discrimination against the interests of particular communities within the tribe.²⁷⁷
- 15.11 The requirement to act in the best interests of the tribe can be further addressed in the code of conduct for representatives. The potential for real conflict between

275 Representatives on the Ngāpuhi Rünanga are required to provide regular reports on their takiwa to the governing board and reports on the governing board to their takiwa: Te Rünanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005) sch 1, para 13(a).

276 Compare Companies Act 1993, s 131(1), which requires every director to act "in what the director believes to be the best interests of the *company*" [emphasis added].

277 The charter of Te Rünanga o Ngāi Tahu expresses the "fundamental duty" of representatives "to act in good faith and in a manner that the ... [r]epresentative believes on reasonable grounds is in the best interests of Ngāi Tahu Whānui as a whole". A further clause requires that a representative must not act in a way that unfairly prejudices or unfairly discriminates against any particular papatipu rünanga unless he or she "believes on reasonable grounds" that this is required by the fundamental duty to the Ngāi Tahu Whānui": Charter of Te Rünanga o Ngāi Tahu (Te Rünanga o Ngāi Tahu, Christchurch, 2003), cl 8.1–8.2.

the interests of the tribe and the interests of the waka umanga ought to be minimal in any case, given that the waka umanga must act in accordance with the tribe's interests, as expressed in the charter and any long-term plan.

- 15.12 The requirement on representatives not to allow the waka umanga to act in a manner likely to cause serious loss to members or creditors, often referred to as “reckless trading”, is drawn from the Companies Act 1993.²⁷⁸ These duties will create a corresponding right of members to bring an action against representatives whom they believe are in breach of their duties.²⁷⁹ As discussed in Chapter 9, unless the matter requires urgent court relief, such concerns must first be raised within the waka umanga and any informal dispute resolution mechanism followed before the matter goes to the Māori Land Court.

Reliance on information and advice

RECOMMENDATION

15.5 A default schedule should contain provisions on the extent to which a representative can rely on the advice of employees, professional advisors and other representatives when carrying out statutory functions.

- 15.13 This recommendation draws on the model of the Companies Act 1993, and further emphasises that representatives must exercise their roles with diligence and care.²⁸⁰ The Law Commission suggests that a representative, when exercising powers or performing duties as a representative, may rely on information and advice, provided that the representative:

- acts in good faith;
- makes proper inquiry where the need for inquiry is indicated by the circumstances; and
- has no knowledge that reliance on the information and advice is unwarranted.

- 15.14 In this context “information and advice” comprises reports, statements, and financial data and other information prepared or supplied, or professional or expert advice given, by any of the following persons:

- an employee of the waka umanga whom the representative believes on reasonable grounds to be reliable and competent in relation to the matters concerned;
- a professional adviser or expert in relation to matters which the representative believes on reasonable grounds to be within the person's professional or expert competence;
- any other representative in relation to matters within the other representative's designated authority; or

²⁷⁸ Companies Act 1993, ss 135 and 136.

²⁷⁹ Compare Companies Act 1993, s 169.

²⁸⁰ Companies Act 1993, s 138. Several existing Māori entities substantially follow this model. See Constitution of Ngāti Kahungunu Iwi Inc (5 March 2003), cl 11.4; Te Rūnanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005), cls 4.10 and 4.11, and Charter of Te Rūnanga o Ngāi Tahu (Te Rūnanga o Ngāi Tahu, Christchurch, 2003), cl 8.5.

- a committee of the rünanganui upon which the representative did not serve in relation to matters within the committee's designated authority.

Disclosure of information

RECOMMENDATION

15.6 The default schedule should contain provisions to specify the standards required of a representative in relation to disclosure of information.

15.15 The representative's relationship of loyalty to the tribe gives rise to a duty not to disclose confidential information. Our recommendation draws on the equivalent provision in the Companies Act 1993.²⁸¹ A person who has information in his or her capacity as a representative, that would not otherwise be available to him or her, must not disclose that information to any person, or make use of, or act on that information, except:

- in the performance of the waka umanga's functions;
- as required by law;
- as required by the waka umanga's access to information policy;
- in complying with the requirements for representatives to disclose interests; or
- if the rünanganui has first authorised the representative to disclose, make use of, or act on the information.

15.16 This provision does not prevent a representative from reporting to his or her constituent community and/or the governing body of that community on the business of the waka umanga, provided that the rünanganui may resolve that certain information may not be disclosed on grounds of privacy or commercial sensitivity.

15.17 The last element of our recommendation enables representatives to report back to their constituencies – for instance, the rünanga of the hapu that elected them. Such reporting back is an important aspect of the rünanganui's linking role with the tribe and its communities. In Chapter 18, we set out our recommendations for a code of conduct for representatives. This code would set parameters regarding when, where and how the rünanganui's decisions could be discussed.

CONFLICTS OF INTEREST

15.18 Rules for dealing with conflicts of interest are important in any governance context, and especially in kin-based organisations. Their importance is likely to be particularly acute in waka umanga centred in relatively small rural areas. As a result, the representatives will be related to, and have close connections with, potential (and actual) contractors with the waka umanga and potential (and actual) employees of the waka umanga.²⁸² The representatives may also

²⁸¹ Companies Act 1993, s 145.

²⁸² In the context of Canadian First Nations governance, Sterritt observes that conflicts of interests pose special problems, because the small size of the communities means that decisions are likely to impact on family members and friends of councillors. He adds that the fiduciary nature of the councillors' responsibility means "[m]embers have a right, therefore, to expect councillors to behave properly when a conflict of interest occurs." Neil J Sterritt *First Nations Governance Handbook: A Resource Guide for Effective Councils* (Ministry of Public Works and Government Services, Ottawa, 2003) 40–41.

have their own business interests in the area. Further, the waka umanga will be influenced by whanaungatanga²⁸³ and associated expectations regarding reciprocal obligations to family.

15.19 Proper management of conflicts of interest is therefore very important in promoting responsible stewardship on behalf of the tribe, and in maintaining the credibility of the waka umanga with the members and with third parties.²⁸⁴ We are particularly mindful of the widespread and lasting damage that can be caused by perceptions of bias, and of the propensity for the media and politicians to focus on allegations of bias and nepotism in Māori organisations. We therefore recommend legislative prescriptions in this area to address material financial interests, contractual interests, and non-financial interests.²⁸⁵ These will apply, not only to representatives, but also any employees charged with making decisions in relation to contracts, including employment.

15.20 We note that Te Ture Whenua Maori Act 1993, section 227A²⁸⁶ provides that employees of trusts formed under that Act or those with interests in any contracts with any such trust, are not disqualified from also being trustees, but that such trustees may not vote or participate in discussion on any matter affecting their employment, remuneration or contract. Whilst this provision may reflect a necessary reality in respect of land-owning trusts, especially smaller ones, we do not believe this provision goes far enough in respect of waka umanga. Instead, we believe the presumption for waka umanga should be that representatives may not be employees or interested in contacts with the waka umanga, but that in appropriate circumstances the rūnanganui may agree to waive this provision, provided the safeguards as to transparency are adhered to. We do, however, consider that s 227A represents a minimum standard beyond which there should be no waiver.

When a representative has a conflict of interest

RECOMMENDATION

15.7 A default schedule and the charter should contain provisions defining when a representative has a conflict of interest in either a material financial sense or a non-financial sense.

283 Whanaungatanga can be summarised as denoting “the relationships between people bonded by blood, and the rights and obligations that follow from the individual’s place in the collective group.” New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (NZLC SP13, Wellington, 2002) para 42. See also New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) paras 130–136.

284 Investigation of “identification and management of conflicts of interest” in relation to certain educational programmes was part of an inquiry started by the Auditor General in March 2005: Controller and Auditor-General *Inquiry into Certain Aspects of Te Wānanga o Aotearoa* (Wellington, 2005).

285 We note that the kaupapa applying to mandated iwi organisations as set out in the Maori Fisheries Act 2004, sch 7 do not contain any stipulations relating to conflict of interests.

286 Inserted by Te Ture Whenua Maori Amendment Act 2002, s 33, as from 1 July 2002.

- 15.21 It is first important to define when a conflict will not arise. That is in cases where a representative's interest:
- is of the same kind, and of the same or substantially the same size, as the interest of the tribe, the constituent community to which the representative belongs or the public of the area; or
 - is so remote or insignificant that it cannot reasonably be regarded as likely to influence him or her in carrying out his or her duties and roles as a representative.
- 15.22 The first element of this recommendation concerns an interest in common with the wider public. It draws on the equivalent provision in the Local Authorities (Members' Interests) Act 1968 and on the suggestions of the Auditor-General on ways to better define the concept of a common interest.²⁸⁷
- 15.23 The second element of the recommendation, the "remote and insignificant interest" draws on the equivalent provision in the Crown Entities Act 2004.²⁸⁸

Material financial interests

RECOMMENDATION

- 15.8 The default schedule and charter should contain provisions defining when a representative has a material financial interest in a matter to which the waka umanga is a party.

- 15.24 The Law Commission suggests that a representative should be seen as having a financial interest if:
- a reasonable observer informed of all relevant facts would conclude that the representative may derive a material financial gain or loss from the matter;²⁸⁹

287 Local Authorities (Members' Interests) Act 1968, s 6(1); see Controller and Auditor-General *Local Authorities (Members' Interests) Act 1968: Issues and Options for Reform* (Wellington, 2005) 30–31. See also Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 30(1).

288 See Crown Entities Act 2004, s 62(3)(c). The Auditor-General suggests that a similar statement should form part of the definition of pecuniary interest for the local authorities legislation: Controller and Auditor-General *Local Authorities (Members' Interests) Act 1968: Issues and Options for Reform* (Wellington, 2005) 30.

289 The Auditor-General's suggested definition of pecuniary interests in the local government context is: "Pecuniary interests' means an interest that a person has in a matter if that matter would, if dealt with in a particular way, give rise to a reasonable likelihood or expectation of appreciable gain or loss to that person" Controller and Auditor-General *The Local Authorities (Members' Interests) Act 1968: Issues and Options for Reform* (Wellington, 2005) 30. This derives from the test applied by the Auditor-General in relation to the Act. See Controller and Auditor-General *Conflicts of Interest: A Guide to the Local Authorities (Members' Interests) Act 1968 and Non-Pecuniary Conflicts of Interest* (Wellington, 2004), 25: "The Act does not define a pecuniary interest. The test we use is: whether, if the matter were dealt with in a particular way, discussing or voting on that matter could reasonably give rise to an expectation of a gain or loss of money for the member concerned".

- the representative is in a close family relationship²⁹⁰ with a person who, a reasonable observer informed of all relevant facts would conclude, may derive a material financial gain or loss from the matter;
- the representative holds a position of influence in an entity that is either directly or indirectly a party to the matter (where “position of influence” includes partner, director, officer, board member or trustee), and the representative may derive a financial loss or benefit from the performance of that entity; or
- the representative holds a substantial minority interest or a controlling interest in an entity that is either directly or indirectly a party to the matter.

15.25 The rules governing a material financial interest deal with situations that raise a presumption of bias on the part of the representative because the situation could reasonably give rise to an expectation of financial consequences for the representative. More generally, the State Services Commission’s guidelines for appointees to Crown bodies helpfully states:²⁹¹ “The key question to ask when considering whether an interest might create a conflict is: does the interest create an incentive for the appointee to act in a way which may not be in the best interests of the Crown body?” The Auditor-General’s 2004 guide²⁹² says that a way to express the issue is: “Would a reasonable, informed observer think that your [i.e. the representative’s] impartiality might have been affected?”

15.26 Both the first and the second elements of our suggested definition of “material financial interest” use the objective standard of “the reasonable observer informed of all relevant facts”. The credibility of the waka umanga requires that the members and third parties see it as free from the appearance of bias. This test ought to promote caution on the part of representatives and the rünanganui, as is appropriate given the relationship between the rünanganui and the tribe, and the rünanganui’s stewardship role. The second element of the definition deems the representative to share the financial interests of close family members.

15.27 The third element deems the representative to share the financial interests of companies, partnerships, trusts and other entities in which he or she holds a “position of influence”, so long as he or she has “a beneficial interest” or any other potential financial interest in the entity. The beneficial interest qualification is intended to exclude the situation where a representative is, for instance, a trustee of a trust of which he or she is not a beneficiary, or an unpaid officer of a non-profit body.²⁹³ The provisions for non-financial interests, as discussed below, should cover these situations. The list of “positions of influence” is indicative only.

290 Compare Companies Act 1993, s 139(1)(d) which uses “parent, child, or spouse” instead of “close family relationship”. Also see the State Services Commission’s guidelines on conflict of interest: State Services Commission *Board Appointment and Induction Guidelines* (Wellington, 1999) especially Annex 2, 32. We define “close family relationship” for the purposes of our report below.

291 State Services Commission *Board Appointment and Induction Guidelines* (Wellington, 1999) 32.

292 Controller and Auditor-General *Conflicts of Interest: A Guide to the Local Authorities (Members’ Interests) Act 1968 and Non-Pecuniary Conflicts of Interest* (Wellington, 2004) 5.

293 This avoids a problem noted by the Auditor-General with respect to the definition of pecuniary interests in the Local Authorities (Members’ Interests) Act 1968, s 6: Controller and Auditor-General *The Local Authorities (Members’ Interests) Act 1968: Issues and Options for Reform* (Wellington, 2005) 12.

- 15.28 The fourth element of the definition, concerning a “substantial minority or controlling interest”, requires a judgement to be made, as do all the other elements. This is preferable to a blunt cut-off point, as in the local authorities legislation, which specifies a 10% shareholding as the trigger point for an interest.²⁹⁴ As in the third element, concerning “positions of influence”, the representative is deemed to share the interest of the entity – that is, a separate judgement is not required as to whether the representative is likely to gain or lose financially.
- 15.29 The definition does not specify the situation of a representative who is a remunerated employee of an entity that is either directly or indirectly a party to the matter. If the matter could reasonably be expected to affect his or her future as an employee of the entity, then we would expect this to be covered by the first element. In other cases, the interest may be of a kind to trigger the provisions for non-financial interests (see below), or be too remote or insignificant to be reasonably regarded as likely to influence the representative – for instance, if he or she is an employee of a large nationwide company and he or she has no professional connection to the particular matter.

Close family relationship

RECOMMENDATION

- 15.9 A person is in a close family relationship with a representative if he or she is:
- the representative’s spouse or civil union or de facto partner;
 - the representative’s parent (including step-parents or parents of whangai);
 - the representative’s child (including step-child and whangai); or
 - any other person with whom the representative is, or has been, in a relationship of financial interdependence.

- 15.30 We have considered whether this definition should also include anyone from the same household as the representative, or siblings or other relatives.²⁹⁵ In our view, the focus should be on situations where there is a financial relationship or a real prospect of a financial relationship between the parties. We consider this is adequately captured by the above formulation. If members of the representative’s household, siblings or other relatives are in a relationship of financial interdependence with the representative, then they will be covered. If not, they would most likely be covered by the provisions for non-financial interests. For instance, if the representative has a flatmate, that person would not be covered by this definition (unless he or she was in a relationship of financial interdependence with the representative), but the prospect that the representative may be influenced by this relationship is captured by the provisions for non-financial interests.

294 Local Authorities (Members’ Interests) Act 1968, s 6(2)(a). The Auditor-General has raised the question of whether a member with shareholdings of, for instance, 9.9% is assumed not to have an interest: Controller and Auditor-General *The Local Authorities (Members’ Interests) Act 1968: Issues and Options for Reform* (Wellington, 2005) 12.

295 Compare Human Rights Act 1993, s 2, which defines relative to include “a member of a person’s household”.

Declaration of material financial interests

RECOMMENDATION

15.10 A default schedule or the charter should contain provisions to prescribe the process when a representative declares a material financial interest.

- 15.31 The Law Commission suggests that an interested representative must declare material financial interest as soon as practicable after the representative becomes aware that he or she has such an interest. The declaration must be made to the chairperson of the rūnanganui, who must advise the rūnanganui at the relevant meeting. The declaration must be entered in the minutes of the relevant meeting.
- 15.32 The declaration must describe the nature and extent of the interest, but this does not necessarily require precise details of the monetary value. Any declaration of interest must be available for inspection by members as soon as practicable after the declaration has been recorded and the minutes have been ratified. Interests must be declared as soon as the representative becomes aware of a real or potential conflict of interests – for instance, when the representative reads the agenda for the forthcoming meeting – and before any discussion takes place.
- 15.33 In line with the principle of transparency, the record of declarations must be available for inspection by members. As the record will be accessible, it is not necessary for a representative to disclose the precise monetary value of his or her interests.²⁹⁶ Only the nature and extent of the interests need be indicated – for instance, if the interest is in a property, the extent of the interest might be indicated as a half share a tenth share, or sole owner, as the case may be.

Consequences of a material financial interest

RECOMMENDATION

- 15.11 A representative who has a material financial interest in a matter:
- must not vote on or take part in any discussion or decision by the rūnanganui or any committee relating to the matter, or sign any document related to the matter; and
 - must be disregarded for the purpose of forming a quorum for that part of a meeting of the rūnanganui or committee during which there is any discussion or decision relating to the matter.

²⁹⁶ Compare Standing Orders of the House of Representatives, Appendix B, and the Register of Pecuniary Interests of Members of Parliament. A Registrar is appointed to maintain the register, advise members and publish a summary of the information. Only the interest must be recorded not its value. Also Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) paras 2.52–2.55, which concerns the Register of Ministers' Interests. Ministers and Parliamentary Under-Secretaries are required to declare interests and assets but not their monetary value.

- 15.34 We have drawn here on the equivalent provision in the Crown Entities Act 2005. That Act also disbars an interested member from “otherwise participat[ing] in any activity of the entity that relates to the matter”.²⁹⁷ We have omitted this prohibition, as its scope is potentially very wide and may not be practical, especially for a small waka umanga. Also, unlike the Crown Entities Act 2005, our proposal makes no provision for special exceptions to be authorised by an outside agent.²⁹⁸
- 15.35 We have confined “material financial interests” to those situations where there is a real possibility that the representative will be influenced or seen to be influenced. In such circumstances, the representative must not play any part in the decision making, nor should there be any provision for exceptions to the rule.²⁹⁹ Flexibility should be possible, however, when a representative has a non-financial interest, as discussed below.

Contractual interests of representatives

RECOMMENDATION

15.12 Each waka umanga must publish in its annual report a list of all contracts entered into by the waka umanga during the financial year, in which a representative has a material financial interest

- 15.36 Waka umanga may be major enterprises in their local communities, affording significant income streams to those who provide goods and services to them. The waka umanga may come to be seen as benefiting a favoured few if a representative has substantial and/or ongoing business relationships with the waka umanga – for instance, if the representative’s own company is a major supplier to the waka umanga. It is vital that the credibility of the waka umanga is not impugned by perceptions of preferential treatment.
- 15.37 We have considered whether waka umanga should be subject to rules governing contractual interests such as those in the Local Authorities (Members’ Interests) Act 1968, where a person is prohibited from being a member of a local authority if that person or his or her businesses have contracts with the authority that exceed \$25,000 in any one year.³⁰⁰ The Auditor-General has examined these

²⁹⁷ Crown Entities Act 2005, s 66.

²⁹⁸ Crown Entities Act 2005, s 68 allows an interested member to act with prior authorisation from the board chair. The Local Authorities (Members’ Interests) Act 1968, s 6(1) disbars a member from discussing or voting on any matter in which he or she has a pecuniary interest, but exceptions may be made by means of a declaration from the Auditor-General that the member may act despite his or her interest: s 6(4). See also the Gambling Act 2003, s 231(2), which allows an interested commissioner to act by resolution of the Gambling Commission.

²⁹⁹ By way of contrast, the Companies Act 1993, s 144 allows an interested director to take part in a transaction (that is, to vote, sign documents and be part of quorum) as if he or she were not interested in the transaction, although this section is subject to the individual company’s constitution. Similarly, the *Standing Orders of the House of Representatives* (Wellington, 2004), SO 165 requires only that a Member of Parliament declare any pecuniary interest before participating in consideration of the item of business.

³⁰⁰ Local Authorities (Members Interests) Act 1968, s 3(1). In the Ngāti Paoa proposal the corresponding figure is \$10,000: Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 29(2).

provisions, and is not convinced that “the mere existence of contracts over a certain value represents either a conflict of interest so pervasive, or an indication of improper behaviour so compelling, that the member should be disqualified from office”.³⁰¹ The Auditor-General stated:³⁰²

There may be other ways to ensure proper transparency and encourage fair processes for contracts concerning members, which could enable the contracting rule to be safely abolished. These could include some or all of: [a] a requirement for local authorities to instead make public disclosure of contracts with members (or at least those contracts which exceed a specified monetary limit); [b] additional procedural requirements (such as mandatory tendering) for contracts concerning members; and/or [c] a requirement for local authorities to maintain a public register of members’ interests.

15.38 We agree that there are other means by which conflicts of interest and damaging perceptions can be avoided. We are also concerned that blanket provisions on certain individuals from being representatives may prove a real difficulty in small communities where there is a limited pool of people available for the office of representative.

15.39 Our recommendation is in keeping with our general approach of accountability through transparency. The publication requirement is designed to reveal the contracts that could reasonably be seen to have financial consequences for a representative. For this reason, it is linked to the definition of material financial interests. This is not to suggest that a waka umanga should never enter into contracts with individual representatives or related persons or companies, but rather to impose a check on behaviour, with the aim of either preventing questionable contracts or exposing them to further scrutiny.

15.40 The rules governing material financial interests for representatives mean that a representative should never be part of any discussion at the rünanganui in respect of a contract covered by the rules for contractual interests. Many contracting decisions, however, are likely to be made by the chief executive or staff of the waka umanga who will likewise be bound by similar requirements in relation to conflicts of interest.

15.41 Further, the waka umanga should reinforce this requirement with competitive contracting processes. Ensuring any major contracts are let by tender should help the waka umanga get the best deal possible, and is, therefore, in line with the requirement that waka umanga manage their finances prudently and in a manner that promotes the current and future well-being of the tribe. A threshold should be set at which matters must go to tender and the rünanganui should not let a contract to any person or body in which a representative has a material financial interest unless the matter has gone to tender.

301 Controller and Auditor-General *The Local Authorities (Members’ Interests) Act 1968: Issues and Options for Reform* (Wellington, 2005) 21.

302 Controller and Auditor-General *The Local Authorities (Members’ Interests) Act 1968: Issues and Options for Reform* (Wellington, 2005) 34.

Non-financial interests

RECOMMENDATION

15.13 A default schedule should contain provisions to prescribe the process when a representative has a non-financial interest.

15.42 In many cases a non-financial interest in a matter may create as great a potential for conflict as a financial interest. The rules governing non-financial interests deal with what, in administrative law, is termed “apparent bias”. These are situations where the relationship between the representative and a party to the matter under consideration is such that the question must be asked whether a reasonable observer, informed of all relevant facts, would think that the impartiality of the representative might be, or might have been, affected.³⁰³ Although these connections raise no prospect of financial consequences for the representative, they may influence his or her decision making. For instance, if the representative is a trustee of a non-profit organisation that has made an application to the rünanganui, his or her participation in decision-making could reasonably be seen to be influenced by his or her wish to do well by the organisation.

15.43 A representative would have a non-financial interest in a matter before the rünanganui (or any committee of the rünanganui on which the representative serves) if that representative has any interest in the matter, or relationship with any other party, other than a material financial interest.³⁰⁴ The representative should be required to declare any non-financial interest to the chair of the rünanganui as soon as practicable after becoming aware of the issue. The rünanganui may resolve that, despite the relationship or interest, the representative may take part in some or all of the discussion and decision making on the matter. But the rünanganui should only pass such a resolution if it is satisfied that the representative’s relationship with, or interest in, the matter will not impair the representative’s judgement in relation to the matter.³⁰⁵

303 This is the current test, as developed by the Court of Appeal in *Erris Promotions Ltd v The Commissioner of Inland Revenue* (2003) 16 PRNZ 1014, para 32 (CA).

304 See Controller and Auditor-General *Conflicts of Interest: A Guide to the Local Authorities (Members’ Interests) Act 1968 and Non-Pecuniary Conflicts of Interest* (Wellington, 2004) 39-50 for a discussion of non-pecuniary conflicts of interest. Non-pecuniary bias may exist where the representative has “a close relationship or involvement with an individual or organisation affected by the matter”. See also Companies Act 1993, s 204, which requires an auditor when carrying out his or her duties to “ensure ... that his or her judgment is not impaired by reason of any relationship with or interest in the company or any of its subsidiaries”.

305 Compare Gambling Act 2003, s 231(2) under which an interested commissioner may participate by resolution of the Gambling Commission. Compare Local Authorities (Members’ Interests) Act 1968, s 6(4) where the Auditor-General may allow an interested member to participate if satisfied that the authority’s business would otherwise be impeded, or that it is “in the interests of the electors or inhabitants of the district”. The Ngāti Paoa proposal gives the Māori Land Court power to declare that an interested governor may participate if satisfied that non-participation by the governor “would not be in the best interests of the descent group”: Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 30(4).

- 15.44 A representative's declaration of a non-financial interest must be entered in the minutes of the relevant meeting, and must outline the nature of the interest. The rünanganui may impose conditions on the representative's participation, and may revoke the permission by further resolution.³⁰⁶ A resolution that a representative may participate despite having a non-financial interest must be entered in the minutes of the relevant meeting, along with any conditions, and any subsequent amendment to and/or revocation of the permission.
- 15.45 The processes described above would be required under common law, but for reasons of transparency and certainty we recommend that they be included in a default schedule.
- 15.46 Non-financial interests are generally not seen as such a threat to integrity as financial interests. For this reason, and because these interests potentially arise in a very wide range of situations, we recommend that there be a provision for the representative to act despite the interest, as long as the rünanganui passes a resolution to that effect.
- 15.47 A non-financial relationship with any other party to a matter might include family members who are not caught by the definition of a close family relationship, such as (but not confined to) in-laws, siblings and first cousins. For both practical reasons and in recognition of the obligations arising from whanaungatanga, we do not think there should be an absolute prohibition on representatives considering matters affecting such relationships but its operation must be open and transparent. The waka umanga's legal advisors should be available to assist the rünanganui in making these judgements, in particular by helping the rünanganui to apply the relevant common-law test.

Sanctions

- 15.48 Some statutes create offences for breach of rules governing conflicts of interest. The Local Authorities (Members' Interests) Act 1968 creates summary offences for acting in breach of the interest provisions.³⁰⁷ Under the Companies Act 1993, failure to comply with the conflict of interest requirements is an offence, with a fine of up to \$10,000.³⁰⁸
- 15.49 The Auditor-General has considered the criminal offences in the Local Authorities (Members' Interests) Act 1968 and expressed a preference for the civil penalty of removal from office rather than criminal conviction. The Auditor-General noted that criminal convictions are difficult to achieve because of the required standard of proof, that criminal law concepts do not sit well with the civil law concepts embodied in rules governing conflicts of interests and that a criminal conviction is arguably unnecessary if the member can otherwise be removed from office.³⁰⁹

³⁰⁶ See Crown Entities Act 2004, s 68(2) and (5), which allow for conditions to be imposed as part of granting permission to act, and allow the permission to be amended or revoked in the same way as it was given.

³⁰⁷ Local Authorities (Members Interests) Act 1968, ss 5 and 7.

³⁰⁸ Companies Act 1993, ss 140(4) and 373(2).

³⁰⁹ Controller and Auditor-General *The Local Authorities (Members' Interests) Act 1968: Issues and Options for Reform* (Wellington, 2005) 11.

- 15.50 We are also of the view that removal from office should be the penalty when a representative has breached these rules. These processes might be triggered by the rünanganui itself or by a member, for instance, by information revealed in response to a member's request for information.³¹⁰ Such removal would not, of course, preclude civil action being taken as well in appropriate cases.
- 15.51 Alternatively, where the rünanganui itself has failed to act against a representative, dismissal could be achieved through an order of the Māori Land Court. We have proposed that a group of no fewer than 15 members or the Registrar of Waka Umanga may apply for a court intervention on the grounds that a representative has acted, or is acting, in a manner contrary to the requirements of the Act or the formal resolutions of the waka umanga. The court could make a range of orders in response to such an application, including an order dismissing a representative and an order suspending the rünanganui's powers. For instance, the latter power might be used where the rünanganui as a whole was not complying with, or enforcing, the requirements of the Act for dealing with conflicts of interest.
- 15.52 We note that there remains the possibility of criminal prosecution under the Secret Commissions Act 1910, which contains bribery and corruption offences applicable to private bodies. Prosecutions under this Act require the consent of the Attorney-General and are very rare.

Further Measures to Address Conflicts of Interest

- 15.53 Tribes may wish to consider further measures to deal with conflicts of interests when developing their charters, and waka umanga will, undoubtedly, require operational policies to give effect to the rules governing conflicts of interest.
- 15.54 One option would be to require that candidates for the office of representative declare any conflicts and potential conflicts when standing for office. This would mean that voters are aware of the extent to which a candidate has connections with the waka umanga's business, and can make judgements accordingly.³¹¹ Once representatives are appointed, these declarations could be kept in an interest register established for that purpose, and updated annually.
- 15.55 Within each waka umanga, the chief executive should arrange for specialist advice to representatives to assist them in complying with the rules governing conflicts of interests. The Secretariat might also provide guidance on how to interpret and apply the rules, and how to develop the necessary operational policies.

310 The ability of members to request information of the waka umanga provides both an incentive towards compliance by representatives, and a means to expose non-compliance with the conflict of interest rules.

311 This is a requirement for candidates for election to District Health Boards. See New Zealand Public Health and Disability Act 2000, sch 2, cls 6, 12 and 17. Under clause 17, a person is disqualified from board membership if he or she failed to "declare a material conflict of interest" before accepting nomination as a candidate.

LIABILITIES AND INDEMNITIES

RECOMMENDATION

15.14 A waka umanga must indemnify its representatives for:

- costs and damages for any civil liability arising from any action brought by a third party, if the representative was acting as a representative as specified in the Waka Umanga Act; and
- costs arising from any successfully defended criminal action relating to acts or omissions in his or her capacity as a representative.

15.56 Representatives ought to be indemnified to the degree that competent people will not be discouraged from office holding, but the protections should be so framed as to strengthen the incentives towards compliance with prescribed duties. Indemnity insurance for representatives should be taken out by the waka umanga, as is standard with similar entities. Our recommendation is modelled on the equivalent provision in the Local Government Act 2002.³¹² Failure to act in accordance with the stated duties would mean a loss of indemnity in any civil actions. It may also leave the representative open to a move to dismiss him or her from the rünanganui on the grounds of neglect of duty or bringing the waka umanga into disrepute.

PART 1:
Outline

PART 2:
Principles

PART 3:
Structure

PART 4:
Governance

³¹² Local Government Act 2002, s 43. The Ngāti Paoa proposal links civil indemnity to situations where the “governor was acting in accordance with” the proposed statute’s specified duty of care, and provides criminal indemnity matching that of the Local Government Act 2002, s 43: see Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 31.

Chapter 16

Internal communication

- INTRODUCTION**
- 16.1 The relationship between the rünanganui and waka umanga, and between the waka umanga and the tribe, its communities and individual members, ought to be characterised by mutual communication. The waka umanga ought to provide its members with sufficient information to facilitate their participation, and must actively consult on some matters. On significant matters, members may be directly involved in the decision making.
- 16.2 This chapter makes recommendations and suggestions on: communication and consultation with members; how decisions on major transactions should be made; annual and special general meetings; and information to be provided to members as a matter of course, as part of a “governance statement”.

COMMUNICATION AND REQUESTS FOR INFORMATION

RECOMMENDATION

- 16.1 Each waka umanga should develop and publish a policy for ongoing communication with its members.

- 16.3 The waka umanga needs to adopt methods for ongoing communication, such as a regularly updated website and a newsletter, which could also be provided electronically, as far as possible, to save costs. The rünanganui may also plan to hold general meetings, hui or other gatherings at regular intervals, as an opportunity for members to raise and debate issues. The representatives should play a major role in communication, especially in taking information back to their constituent communities, and bringing the views of those communities to the rünanganui.

Members’ requests

- 16.4 To encourage participation by members, we also recommend that there is a statutory scheme to allow members to request information from a waka umanga. Our scheme, as outlined in the following recommendations, draws in many

respects on the Local Government Official Information and Meetings Act 1987 albeit with some significant differences.³¹³

RECOMMENDATION

16.2 A default schedule should specify what information registered members may request from the rūnanganui and its committees, and also contain guiding principles for withholding information; the time limit for requests; refusal of requests; undertakings not to disseminate information; the form in which information may be supplied; and disputes about access to information.

16.5 Waka umanga information includes:

- information held by any committee of the rūnanganui or of the waka umanga; and
- any information held by a representative, committee member or employee in his or her capacity as a representative, committee member or employee.³¹⁴

16.6 This definition is a modified version of the definition of “official information” in the Local Government Official Information and Meetings Act 1987.³¹⁵

16.7 The definition does not include information held solely as an agent for another person or organisation, deliberations of the kairongomau (dispute resolution officer) in relation to any particular dispute or information contained in communications between the Privacy Commissioner and the waka umanga about any investigation under the Privacy Act 1993. The exclusion of dispute resolution information is analogous to the exclusion from the coverage of the Official Information Act 1982 of information related to the judicial functions of courts and tribunals.³¹⁶

16.8 The provisions for access to information will exist alongside the waka umanga’s obligations under the Privacy Act 1993.³¹⁷ Where a person wishes to request personal information about him- or herself, that request must be dealt with under the Privacy Act 1993 rather than the access to information provisions of the Waka Umanga Act.

313 See also Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) 96–97 and cls 89–104, which outline a scheme for information availability. This largely mirrors the relevant provisions of the Local Government Official Information and Meetings Act 1987.

314 Compare Local Government Official Information and Meetings Act 1987, s 2(3) and (4).

315 Local Government Official Information and Meetings Act 1987, s 2.

316 Official Information Act 1982, s 2(6).

317 Waka umanga will fit within the definition of “agency” and therefore be obliged to comply with the Privacy Act’s provisions relating to collecting, retaining and making available private information: Privacy Act 1993, s 2, definition of “agency”.

- 16.9 The ability to request information is restricted to members, as it is a tool to enhance accountability to members. In this respect, the regime is quite different from the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987, under which anyone can request information. This is not necessary in relation to waka umanga as they are not “public bodies” in the same sense.
- 16.10 Instead there is an analogy with the provision in the Companies Act 1993 that allows shareholders to request information from the company.³¹⁸ Credibility with external parties is addressed by the requirement for certain information to be publicly available on the register. A waka umanga may also choose to make additional information publicly available but should not be legally required to do so.
- 16.11 Subsidiary organisations of the waka umanga, such as companies handling investments or trusts responsible for social delivery will not be covered by this scheme. Any information that a subsidiary has supplied to the waka umanga will, however, be subject to an information request.
- 16.12 Subsidiaries are excluded for several reasons. Unlike the waka umanga, subsidiaries are not in a direct accountability relationship with tribal membership. The subsidiaries are accountable to the rünanganui, which in turn is accountable to the members for the performance of the subsidiaries. The rünanganui will receive reports and information from the subsidiaries as part of its statutory obligation to monitor its majority-owned subsidiaries. Members may make requests for information as to how the rünanganui is exercising its responsibility for the subsidiaries.
- 16.13 Members will also have direct access to some information about the subsidiaries, as each subsidiary’s statement of intent and annual report must be available to members.
- 16.14 These organisations will already have reporting requirements as determined by their legal form and status,³¹⁹ and reporting obligations to the rünanganui under the Waka Umanga Act. There would be substantial compliance costs in making them also subject to members’ information requests, which could put a business subsidiary at a considerable disadvantage in comparison with its competitors. The ability of social service subsidiaries to undertake their core tasks may similarly be hampered. Further, not all subsidiaries will be wholly owned by the waka umanga. Potential business partners may be wary of ventures that have these additional compliance costs.

318 Companies Act 1993, s 178.

319 There will also be a certain amount of public information available on each subsidiary. For instance, the Companies Act 1993, s 215(1) allows for public inspection of a range of company documents; the Incorporated Societies Act 1908, s 34 allows for public inspection of any documents lodged with the registrar; and the Charities Act 2005, ss 27–29 allows for searches of information on the charities register under certain conditions. In addition, the Incorporated Societies Act 1908, s 23 requires an incorporated society to make an annual financial statement to the Registrar of Incorporated Societies; the Companies Act 1993, ss 208–209 require an annual report to shareholders and s 214 requires an annual return to the Registrar of Companies; and the Charities Act 2005, s 41 requires a registered charity to make an annual return to the Charities Commission.

RECOMMENDATION

- 16.3 The default schedule will provide that waka umanga should make information it holds available unless there are good reasons not to. The basis for withholding information will be the extent that this is necessary in order to:
- avoid prejudice to the maintenance of law;
 - avoid endangering the safety of any person;
 - avoid prejudice to the commercial position of the waka umanga or of another person;
 - protect the privacy of natural persons;
 - respect traditional knowledge, culture and practices;
 - protect information supplied in confidence or under a legal obligation, if release would prejudice the supply of further such information and be against the best interests of the tribe;
 - protect the free and frank expression of opinions within the waka umanga, and protect the people working there from improper pressure or harassment;
 - maintain legal professional privilege;
 - protect negotiations in which the waka umanga is involved, including industrial relations and commercial negotiations; or
 - prevent disclosure or use of the information for improper gain or advantage.

16.15 Information may only be withheld to the extent necessary. This may mean, for instance, that only a part of a document is withheld and the rest released. The waka umanga is required to consider each request on its merits against the general principle of availability.

16.16 The ability to withhold information to “respect traditional knowledge, culture and practices” is designed to address particular sensitivities that can arise when dealing with certain categories of information in a Māori context.³²⁰ Information that might be withheld under this ground could include whakapapa that have been produced to establish eligibility for membership. Likewise, knowledge of sites of traditional significance may need to be conveyed by a particular hapū to the waka umanga (for instance, in relation to a resource management issue) without intending that this knowledge be made available within the tribe as a whole. There will, nevertheless, be circumstances where such information should be made available in the interests of natural justice. For instance, a person’s whakapapa may be both private information and traditional knowledge, and can therefore be withheld on both grounds. However, where there is a challenge to that person’s eligibility for membership based on that whakapapa, limited disclosure may have to be allowed.

³²⁰ The Official Information Act 1982 excludes from the definition of “official information” material that is held in museums and libraries. We have not considered such a provision necessary in the case of waka umanga, as sensitive material such as whakapapa lists may, where appropriate, be dealt with under this discretionary heading.

Refusal of requests and deletions of information

16.17 A waka umanga may also decline a request if the information is already available to the member or soon will be; if the information is not held by the waka umanga or cannot be made available without substantial collation or research; or if the request is frivolous or vexatious or the information requested is trivial. The “frivolous or vexatious” reason may relate to an individual request or a series of requests from a particular member or group of members where the requests are cumulatively of a vexatious nature.³²¹

16.18 Where there are good reasons to delete some of the information, a copy of the document may be released with deletions. The waka umanga must let members requesting information know the reasons for any refusal or deletions, and advise that they may apply to the kairongomau if they dispute the decision.³²²

Time limit for responding to requests

16.19 We suggest that twenty working days should be the time-limit for responses to official information requests, although extensions are possible where the request is for a large quantity of information, or consultations are necessary before a decision can be made.³²³ If the request is refused, the member should be advised and the reasons given, also within twenty days.

Undertaking not to disseminate information

16.20 Where the waka umanga has a reasonable concern that the member requesting the information will give it to third parties, and that this would not be in the best interests of the tribe, the waka umanga may request an undertaking that the information will not be given to non-members, or place other reasonable restrictions on its public use.

16.21 This provision is suggested because, although only members are able to request information, once a member has the information it will be difficult to restrict what he or she does with it. We are mindful that the media or other third parties who cannot obtain the information directly from the waka umanga may seek to obtain information through members. This possibility may lead waka umanga to be wary of disclosing certain information. The ability to impose conditions is intended to address this situation by providing another option for the waka umanga to consider, rather than simply withholding the information on a ground such as preventing disclosure or use “for improper gain or advantage”.

16.22 Although such an undertaking would be difficult to enforce and could not always be relied upon, we believe that it will help to address the balance between accountability to members and the waka umanga’s legitimate need to keep certain information from wider circulation. If the member breaches the undertaking, he or she cannot be removed from membership of the waka umanga,

321 See Local Government Official Information and Meetings Act 1987, s 17.

322 See Local Government Official Information and Meetings Act 1987, s 16 “Deletion of information from documents” and s 18 “Reason for refusal to be given”. Section 18(b) requires that the applicant be advised of the right to seek an investigation and review of the refusal by an Ombudsman.

323 See Local Government Official Information and Meetings Act 1987, ss 13–14.

but the breach may be noted by members and the public, and formal steps could be taken either through the internal disputes mechanism or through the courts to enforce the undertaking or seek damages.

- 16.23 This recommendation is in contrast to the situation with central and local government information obtained under the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987, which can be used for any purpose. The waka umanga is not a public body, however, and is not responsible beyond its membership. There is an analogy between the recommendation and the rules of discovery in courts, where relevant and non-privileged information must be made available to other parties, but cannot be used for purposes other than the particular case.³²⁴ The Companies Act 1993 contains a similar provision. Where the High Court makes an order requiring a company to release information that the company had previously refused to a shareholder, the court may “specify the use that may be made of the information and the persons to whom it may be disclosed.”³²⁵

Form in which information may be supplied

- 16.24 Waka umanga information may be available in various forms. The information should be provided in the form requested by the member unless this would impair the efficient administration of the waka umanga or be within any of the good reasons to withhold information.
- 16.25 Often it will be convenient for both the member and the waka umanga if a copy of the document is simply sent to the member. Where there is a substantial volume of information it may be necessary for the member to inspect the information at the waka umanga’s office or another location. Waka umanga will need to develop operational policies for handling information requests, which encourage staff to provide reasonable assistance to members.³²⁶ This is an area where the Secretariat may assist in providing general guidelines.
- 16.26 We suggest that the waka umanga should designate an information officer as the first port of call for any members with a dispute over access to information. Depending on the size of the waka umanga, this person may be the same person who is designated the privacy officer under the Privacy Act.³²⁷

Disputes regarding access to information

- 16.27 A dispute over access to information may arise where the waka umanga has refused a request, deleted information, not responded to the request in the appropriate time period or the member disagrees with any conditions the waka umanga has imposed.

324 See High Court Rules, r 312(4) and *Wilson v White* [2005] 3 NZLR 619 (CA).

325 Companies Act 1993, s 178(8).

326 Compare Local Government Official Information and Meetings Act 1987, s 11 which imposes a statutory duty to give “reasonable assistance to requesters”.

327 The Privacy Act 1993, s 23 requires each “agency” to have at least one privacy officer.

- 16.28 There should be an internal dispute resolution system to deal with such disputes,³²⁸ which will be for the tribe to determine. If the information officer cannot resolve the dispute, it may be referred to the dispute resolution officer (kairongomau). In keeping with our discussion of dispute resolution in general, we recommend that the kairongomau has power to make recommendations to the rünanganui, which must consider the recommendations; and if it declines to implement the kairongomau's recommendations, publish its reasons in the annual report.
- 16.29 A member who is still dissatisfied may apply to the Māori Land Court for an order releasing the information. There is an analogy between this recommendation and the provision in the Companies Act 1993, which allows a shareholder to apply to the High Court for an order in respect of the time a company takes to respond to an information request, the proposed charge for the information or the company's refusal to supply the information.³²⁹
- 16.30 The Māori Land Court could review a recommendation from the internal dispute resolution officer that information is not released or a decision of the waka umanga not to release information. The court must apply the same criteria to deciding whether information should be released as those which should be applied by the waka umanga itself under the Act. No further appeal rights will apply, since by this time the request will have already been subject to several layers of review.

CONSULTATION

RECOMMENDATION

16.4 Each waka umanga should have a policy and principles to guide consultation with members, including measures to foster early recognition of when to consult and measures to enhance the effectiveness of that consultation.

- 16.31 Decision-making authority rests with the rünanganui, but it also has a responsibility to consult with members and other affected persons or groups as necessary.³³⁰ It is important to identify consultation needs and issues early in the process of developing proposals, and then tailor the process to address those needs. The aim is to identify likely impacts of any decisions on the tribe and on any of its particular constituencies and to assist in determining the best methods for engaging with the members affected, depending on the nature of the issue and its impact. We would expect the chief executive to implement procedures to ensure that this aim is met. Our suggestions below draw on the principles of consultation in the Local Government Act 2002.³³¹

328 In the central and local government context, the ombudsman deals with disputes over access to official information: Official Information Act 1982, s 28; and Local Government Official Information and Meetings Act 1987, s 27.

329 Companies Act 1993, s 178(6) and (7).

330 One of the governance obligations of the rünanganui is to inform itself about its members, the tribe and its constituent communities.

331 Local Government Act 2002, s 82.

16.32 The rünanganui's decision-making rules³³² and any internal procedure guidelines for the corporate office should include some guidance to help the rünanganui and the staff to determine whether consultation with members is necessary or desirable on a particular issue. These guidelines should help to tailor the design of any such consultation.

16.33 Principles to govern the consultation procedure would include matters such as:

- providing clear and sufficient information about the purpose and scope of the consultation;
- sufficient time and opportunity for those who wish to present a view;
- receiving the information and views elicited from consultation with an open mind; and
- providing feedback to those who made submissions, including what decision was made and the reasons for it.

16.34 Relevant questions that the rünanganui and staff may ask themselves would include:

- Will the matter affect the whole tribe, or have particular impacts on any constituent communities?
- What is the extent of those impacts and will they be long-lasting?
- Should the affected groups or persons be notified of the matter, and if so when and how?
- Is there sufficient information about the likely impacts on the affected groups and their views and preferences?
- If there is not sufficient information, how is this best acquired?
- What is the best way to reach affected members and/or communities, for instance, a communications strategy, information gathering, discussions, targeted consultations or use of a special consultation procedure?

MAJOR TRANSACTIONS

RECOMMENDATION

16.5 A default schedule and the charter should state which issues will be treated as major transactions and how decisions will be made on these issues, including any special voting requirements.

16.35 Although most decisions will be taken by the runanganui on behalf of the tribe, certain major matters will require the tribe as a whole to be involved. "Major transactions" is the term used in the Companies Act to identify decisions of such significance that special approval processes must be followed.³³³ We propose the term is adopted for certain major decisions affecting the tribe, not limited to "transactions" in a literal sense. The definition of what constitutes a major transaction, and the methods for seeking views and making decisions

³³² We recommend that each rünanganui adopt some ground rules for decision-making and suggest that these include triggers for identifying consultation needs.

³³³ Under the Companies Act 1993, s 129(2), major transactions relate to dealings involving assets with a value that is more than half the value of the company's original assets.

on major transactions, should be set out in the charter, and need not be the same for all major transactions. For instance, the adoption of the charter might be done by a vote of all adult members,³³⁴ but the adoption of the long-term plan might be done through the special consultation procedure discussed below.

16.36 The key point is that the method for making the decisions in each case is documented ahead of any actual decision making, so that everyone knows what to expect. The process of working out how to address these issues may be valuable in itself.³³⁵

16.37 The Law Commission considers that the definition of major transactions in the charter should include:

- adoption of, or any amendment to, the charter, distribution policy, long-term plan, annual plan, financial plan or other significant policies;
- classification of land or other assets as “protected” and the reversal of any such classification;³³⁶
- establishment or disestablishment of any subsidiary organisations or any material changes to the nature and scope of those subsidiary organisations;
- proposed changes to the nature and scope of the waka umanga, such as amalgamation with another waka umanga or entity or splitting into two or more waka umanga or entities;
- an application for voluntary winding up of the waka umanga; and
- any other matters the charter specifies or the waka umanga decides requires a special vote.

Voting on major transactions

16.38 There are various approaches to voting on major transactions.³³⁷ The method chosen may depend on the nature of the particular issue and preferences of the tribe. There are existing statutory or government policy requirements for postal votes in some circumstances such as mandate, but, as discussed in Chapter 4, it does not follow that postal voting is the best or only method for making other decisions.

334 This is required by the Maori Fisheries Act 2004, ss 17(2)(b) and 18(2) and sch 7, kaupapa 2 (a)(ii). If the waka umanga wishes to qualify as a mandated iwi organisation under the Maori Fisheries Act 2004, or for the purposes of the Maori Commercial Aquaculture Claims Settlement Act 2004, then the charter must be ratified by not less than 75% of all adult members who vote, with the vote being either cast in person at a general meeting held for that purpose or through a postal ballot. Amendments to the charter must be ratified by a membership vote.

335 The Canadian First Nations Governance Handbook comments that:

Most communities by custom and tradition want formal community involvement and approval for major decisions that affect members and external parties. Despite Council’s authority to act, community members should have a say about important issues. Such discussion must consider internal community issues and relationships with external parties. Developing a suitable way to involve First Nation members in community decisions takes time. Successful procedures, once identified as policies, should survive changes in leadership.

Neil Sterritt *First Nations Governance Handbook: A Resource Guide for Effective Councils* (Ministry of Public Works and Government Services, Ottawa, 2002) 15.

336 Protected assets are those such as inalienable land and tribal taonga, see also Recommendation 17.14.

337 For instance, the Companies Act 1993, s 129 requires major transactions to be dealt with by way of a special resolution that is passed by at least 75% of the votes cast.

16.39 Most local authorities use postal voting, but the 2004 local body elections, in particular, were marked by very low turnouts. Voter interest will depend on the overall level of engagement of members with the waka umanga's business and the level of interest in the particular issue. The cost of postal voting may also be a significant factor.

16.40 Major transactions are also sometimes put to a general meeting of members but, as raised in Chapter 4, voting by a show of hands at a tribal meeting has limitations, given the highly dispersed and urbanised nature of many tribal populations. Those who happen to live in the home area and those with the resources to travel would be likely to dominate voting, although factions with sufficient resources and a particular agenda might transport supporters in for a vote. Against this, those living in the home area are likely to be the best informed and most interested voters. There are also problems with proxy voting. It is too easily manipulated and anyone who appoints a proxy to vote for them would be unable to consider the issues raised at the meeting, which might affect the way they would have voted.

16.41 While there are both advantages and disadvantages to both forms of voting, there is a fundamental problem with voting as the only means of deciding policy issues. Voting usually presents a stark "yes/no" choice, and provides no room for adjusting policies to meet legitimate concerns. It may be preferable that waka umanga avoid making significant decisions on the basis of popular votes except where they are otherwise required to do so, as, for instance, in the case of initial mandating decisions and adoption of the charter.

Decision-making by a special consultation procedure

16.42 Instead of those voting procedures, we suggest that procedures for decision-making on major transactions draw on the traditional Māori preference for debating issues and working towards consensus. The rünanganui would then be charged with making the final decisions in light of those discussions. In so doing, they would be guided by the duties they have to fulfil, by the purposes of the waka umanga and the governance obligations of the rünanganui, and by the charter, long-term plan and the policies on "major transactions". The representatives are subject to constraints that the individual members are not. These require them to focus on the longer-term and more strategic matters, looking beyond the interests of the current members to include the interests of those not yet born.

16.43 The special consultation procedure of the Local Government Act 2002 provides a model for procedures that a rünanganui may use to seek the views of members on major transactions. This procedure applies to certain decisions of a local authority, for instance, the adoption of a long-term plan. The authority is required to publicly notify the proposed plan, widely distribute a summary and make details available for inspection. Submissions are called for and time is allowed for hearing of oral submissions. The authority's final decision must be made at a meeting which is open to the public, and the authority must notify all submitters of its decisions and the reasons for those decisions.³³⁸

³³⁸ Local Government Act 2002, s 83.

- 16.44 The rünanganui might make information available, then summon a hui or special general meeting (or several such meetings throughout the rohe and in urban areas), at which the issues can be debated, but where there is no determinative vote which binds the rünanganui. In addition to such meetings, members should have the opportunity to make submissions to the rünanganui. The vote by the rünanganui itself might have to be taken by a special majority as discussed below.
- 16.45 This procedure would mean that decisions on major transactions would take time, but taking the time to work through the issues and consider the options and their implications is more likely to produce good decision making and therefore a credible and durable waka umanga. A concern could be that waka umanga may miss commercial opportunities if they are bound by a slow procedure, but in most instances, the commercial decisions will be made at the level of the subsidiary companies, using the assets that have already been passed to them by the rünanganui.

Safeguards on major transactions

RECOMMENDATION

- 16.6 The default schedule or the charter must include rules to allow special votes for decisions by the rünanganui on identified major transactions, and the ability to substitute an alternative decision for the rünanganui's original decision.

- 16.46 Despite the requirements for consultation and the discipline imposed by periodic elections of representatives, it is possible that a rünanganui could persistently ignore the views of its members on major transactions, and proceed with its own plans, irrespective of views expressed at hui and submissions received. As a safeguard, the Law Commission suggests that a special vote procedure be required if the rünanganui has received a petition with an alternative proposal addressing the identified issue or issues, which is supported by at least 15 members calling for such a vote.
- 16.47 The debate that would be generated with this approach should help to alleviate the problematic aspects of voting. The final decision must be made by means of a fair and reasonable process devised in advance by the rünanganui.

GENERAL MEETINGS

- 16.48 Annual general meetings and special general meetings serve a valuable role in promoting engagement between the rünanganui and the tribe. They ought, however, to be seen in light of a wider communication strategy rather than as an end in themselves or as the only means of accountability. The rünanganui might use a general meeting to provide information, to gather information, as a vehicle for consultation or as an occasion at which members may participate in decision making by voting. As hui-a-iwi (tribal meeting), these meetings can also perform important functions in tribal rebuilding. Tribes should determine the purposes for which they will use general meetings and shape the rules accordingly.

Annual General Meetings

RECOMMENDATION

16.7 A default schedule or the charter should require each waka umanga to hold an annual general meeting not later than six months after the waka umanga's annual balance date, and contain standard requirements for the conduct of the meetings.

16.49 Annual general meetings are an expected part of an entity's calendar and allow members to question the rünanganui about the annual report and annual accounts. As discussed above, this may not be the best time to take votes on major issues, but providing the opportunity for kanohi-ki-te-kanohi (face-to-face) discussions between tribal members and the rünanganui helps to answer members' concerns or obtain feedback from members. It serves as one means of "taking the pulse" of the tribe.³³⁹

16.50 Under a default schedule or the charter, the annual general meeting should be required to consider the annual report and the audited accounts from the previous financial year, and to provide an opportunity for tribal members to discuss the report with the rünanganui and consider its implications for ongoing operations. The Law Commission suggests that a default schedule or the charter should also have standard requirements for the conduct of annual general meetings including:

- giving at least 20 working days' public notice and individual notice to all registered members of an intended annual general meeting;
- that the notice include the time and place of the annual general meeting, and the agenda, with copies of reports to be discussed either provided or made accessible;
- further purposes for an annual general meeting;
- whether any votes taken at the meeting are determinative or indicative, and requiring the rünanganui to consider the results of any indicative vote;
- requiring minutes to be kept as a proper record of the business transacted and decisions taken at the meeting, and made available to members; and
- the rules for chairing the meeting, for a quorum and procedures if there is not a quorum, for resolutions, and voting rights and procedures.

The agenda

16.51 The annual general meeting should be linked into the accountability framework by being held at a time when the previous year's annual report and audited financial accounts are available. Consideration of these documents is the standard

³³⁹ See the Charter of Te Rünanga o Ngäi Tahu (Te Rünanga o Ngäi Tahu, Christchurch, 2003) cl 13.1(b) which specifies that the annual general meeting is an opportunity to review the annual accounts, appoint auditors, consider matters as determined by the Rünanga, and, in the open forum of the hui-a-iwi, a chance for members of Ngäi Tahu Whänui to raise and debate issues

agenda item for this meeting,³⁴⁰ but the charter may provide for other matters to be considered. The charter needs to clarify whether the agenda may include items raised by members and whether any notice of such items is required.³⁴¹

16.52 A requirement for the annual general meeting to approve the plan for the current financial year would present timing problems. It takes some time for an annual report to be prepared and for the accounts to be audited, and members need time to consider these once they are available. This means the meeting cannot usually be held until three or four months into the new financial year, which is too late for effective input to the current year's plan.

16.53 The main focus for members should be the long-term plan, which will be the waka umanga's key planning document. The annual plan is less critical, as each plan represents the year-by-year implementation of a previously approved strategy. Nevertheless, feedback from members at the annual general meeting may lead to changes in the following year's plan, or discussion on matters where further analysis is required, leading to proposals for changes to the long-term plan or other policies on major transactions.

Minutes

16.54 A proper record of the proceedings should be kept and made available for inspection by members, especially if any matters are to be conclusively decided at the meeting. If the meeting is essentially a forum for discussion, the official record may best focus on the results of any indicative votes and a listing of the issues raised.

The chairperson

16.55 The chairperson of the rünanganui would normally preside at the meeting, but it would be desirable to retain some flexibility. In the event that neither the chairperson nor the deputy can preside, the responsibility would lie with one of the representatives, but the ability to appoint an independent chair would also be valuable should the situation require this.³⁴²

The quorum

16.56 In setting the quorum for an annual general meeting, three issues are relevant:

- the number or proportion of the rünanganui representatives who are present;
- the number or proportion of members who are present; and

340 If the waka umanga wishes to qualify as a mandated iwi organisation under the Maori Fisheries Act 2004, or for the purposes of the Maori Commercial Aquaculture Claims Settlement Act 2004, it is required to hold an annual general meeting at which the annual report for the previous year is considered as well as the annual plan for the next financial year: Maori Fisheries Act 2004, sch 7, kaupapa 7(2).

341 See, for instance, the Charter of Te Rünanga o Ngäti Awa < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) cl 14.1, where the purposes of the annual general meeting include undertaking notified business, and general business raised at the meeting at the chair's discretion. See also Charter of Te Rünanga o Ngäi Tahu (Te Rünanga o Ngäi Tahu, Christchurch, 2003) cl 13.1(b).

342 Compare Companies Act 1993, sch 1, cl 1. Here the default position is that the shareholders select one of their number to preside in the absence of the chair.

- the extent to which the constituent communities of the tribe are represented among those present.³⁴³

16.57 A further matter is to provide for circumstances where a quorum is not present. A commonly used rule requires those present to wait until 30 minutes have elapsed, and then adjourn until another date. If a quorum is not present at the second meeting after 30 minutes, the meeting proceeds with a quorum of those present.³⁴⁴ Whether the meeting is one where votes are determinative or indicative will influence the quorum provisions.

Voting rights and procedures

16.58 Voting rights and procedures need to be established. Voting is frequently by voice or a show of hands as determined by the chair, although a poll may be demanded by those present.³⁴⁵ Given our reservations about voting at general meetings, we suggest that any votes taken at general meetings be indicative only. Should an indicative vote signal a desire for a change of direction, the rünanganui needs to take account of that and may need to embark on a process of wider consultation and debate on the matters in contention, leading perhaps to proposals for change to the long-term plan, the charter or other policies, as appropriate.

16.59 It could be argued that indicative voting does not create a sufficiently strong imperative for the rünanganui to follow-up on the vote. Representatives would, however, ignore such votes at their peril. As has been noted in the context of First Nations governance, “in a democratic system, elections are the ultimate means of redress.”³⁴⁶

Special General Meetings

RECOMMENDATION

16.8 A default schedule or the charter should empower waka umanga to hold special general meetings and contain standard requirements for their conduct.

16.60 Special general meetings are also an important accountability tool, especially as they allow the members to require the rünanganui to focus on a specific issue. In this sense, they can be of greater significance than annual general meetings. There need to be standard rules, as with annual general meetings, about notice to members, keeping minutes, accessible information, the quorum, chairing and voting. As with annual meetings, we suggest that tribes provide for indicative

343 See, for instance, Charter of Te Rünanga o Ngāti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml>> (last accessed 31 March 2006) cl 14.9, which requires a quorum of 70 adult members present who are registered with not less than 75% of the hapu represented.

344 Compare Companies Act 1993, sch 1, cl 4. See also Constitution of Ngāti Kahungunu Iwi Inc (5 March 2003) cl 12.5.3 and Charter of Te Rünanga o Ngāti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml>> (last accessed 31 March 2006) cl 14.12.

345 See for instance the Companies Act 1993, sch 1, cl 5(1). See also Constitution of Ngāti Kahungunu Iwi Inc (5 March 2003) cl 12.7.

346 Neil Sterritt *First Nations Governance Handbook: A Resource Guide for Effective Councils* (Ministry of Public Works and Government Services, Ottawa, 2002) 16.

rather than determinative voting, but that the rünanganui be required to take account of the results of any indicative votes.

- 16.61 A threshold for calling a special general meeting is required to ensure that the waka umanga is not unnecessarily put to the expense of organising such a meeting. We would expect that a special general meeting could be called by the chair, a minimum number of representatives on the rünanganui, or a minimum number of members.³⁴⁷ An additional stipulation could be for a minimum number of the constituent communities to be represented among those calling for the meeting, although this risks some constituent groups being prevented from calling a meeting unless they can obtain support from others. Those calling the meeting could be required to state the reason for and objectives of the meeting.

GOVERNANCE STATEMENT

RECOMMENDATION

- 16.9 A default schedule or the charter should define the key governance documents that should be available to members and which could be included in a governance statement.

- 16.62 This discussion is concerned primarily with what the waka umanga could and should do to ensure its operations are as transparent and accountable as possible. Providing information gives members the means to enforce accountability; members, for their part, need to take up the opportunities to participate. The key document will be the charter of the waka umanga, which needs to be developed prior to registration and filed along with other formal documents. Either prior to registration or shortly after, the waka umanga will also be expected to develop a series of policies under which it will operate, and these should also be available to members.
- 16.63 A governance statement is a formal statement that ensures the key documents and policies are easily accessible to members, for instance, information about where decision-making power rests and how the organisation is structured.³⁴⁸ In many cases, copies of the actual documents (for instance, the charter) may be provided, but in other cases members can be told how they can access the full documents either on request as a hard copy, or preferably online through the internet as well.

³⁴⁷ See, for instance, the Companies Act 1993, s 121; also the Constitution of Ngāti Kahungunu Iwi Inc (5 March 2003) cl 12.3, which allows for special general meetings to be requisitioned by the board, or on a written requisition from at least 20% of tangata whenua members, provided the requisition states the objects of the meeting; and Charter of Te Rūnanga o Ngāti Awa < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) cl 14.4, which allows a special general meeting to be requisitioned by the chair and deputy, any five representatives, or ten percent of the adult members, provided they are registered with not less than five hapu, and provided the purposes and agenda items of the meeting are specified.

³⁴⁸ A governance statement is required of local authorities under the Local Government Act 2002, s 40. The Ngāti Paoa proposal also requires that Kaupapa Māori Authorities issue governance statements: Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 27.

16.64 We considered whether a prescribed time limit for publication of the governance statement would be useful. A well-resourced waka umanga should be able to provide the information within six months to a year of becoming registered, but we think such a requirement could be a heavy burden for smaller waka umanga. Although some documents, such as the charter, will be prepared before registration, others will take time to formulate. Some rünanganui may have more urgent practical issues to deal with in their first year or so. We would expect representatives to explain their timeframes at annual general meetings, where they could be directed to publish faster. A rünanganui that does not meet members' expectations in this regard will face voter dissatisfaction at the next election. On balance, we think the governance statement should be made available to members by a date specified in the charter, subject to any direction from a general meeting of the tribe.

16.65 The Law Commission suggests that the governance statement should include:

- the current long-term plan and annual plan, and the procedures for development and review of these plans;
- the names, contact information, declared non-financial interests, and registered financial interests of representatives on the rünanganui;
- the management structure of the waka umanga, and the relationship between the management and the rünanganui;
- the governance and management structures of any subsidiary organisations, and the relationship between the governance of these organisations and the rünanganui;
- the delegation of responsibilities, duties and powers within the waka umanga;
- the nature and scope of the activities of the waka umanga and any subsidiary organisations;
- the major transactions policy, and details of the procedures for decision making;
- the policies for ongoing communication and consultation with members;
- the list of the land or other assets classified as protected;
- the policies governing the manner in which the rünanganui and the waka umanga will operate (including the code of conduct, and any standing orders for meetings of the rünanganui);
- policies and procedures for members to request information from the waka umanga; and
- the procedures for internal dispute resolution.

16.66 In addition to the information collated in the governance statement, members should have access to information from meetings of the rünanganui,³⁴⁹ general meetings,³⁵⁰ annual reports,³⁵¹ and planning and reporting information

349 Members are to be provided with the schedule of meetings of the rünanganui for the forthcoming twelve months, notices of meetings of the rünanganui if required by the charter and the certified minutes of rünanganui meetings.

350 Members are to be provided with notice and minutes of annual general meetings and of special general meetings.

351 The annual report is to be made available to members prior to the annual general meeting.

concerning subsidiary organisations.³⁵² Members are to have access to the register of charges against any assets of the waka umanga.³⁵³

- 16.67 The waka umanga may also wish to make further information available to members as of right. One option is to provide a list of members, although we suggest for privacy reasons that this should not include contact details.³⁵⁴ The list would enable members to check their status and find out who else is registered. If it included hapū/marae affiliation, it would be a means by which ordinary members could see the relative sizes of different constituencies.

HOW IS THE INFORMATION TO BE PROVIDED?

- 16.68 Making information available to members does not mean mailing a copy of every document to every member, which would be both time-consuming and costly. The waka umanga could use e-mail and the internet to make information readily and cheaply available to members. Access to certain website information can be restricted to members by means of unique personal identification numbers (PINs). Electronic availability also helps address the problem of an often highly mobile population, especially young people, as members can log in from wherever they are and update their contact details at the same time.
- 16.69 However, not everyone is able to access electronic media or is comfortable with doing so. If specifically requested, paper copies of the information should be provided to members or households, noting that copies of many documents, except election papers, might be able to be shared. Information must also be available at the registered office of the waka umanga during business hours. Members should not normally have to pay to receive information, although a waka umanga may develop rules to enable a reasonable charge to be made for additional copying and postage.

352 Compare Companies Act 1993, s 216 according to which shareholders may request minutes and resolutions of meetings, certificates given by directors under the Act, an interests register and all communications to shareholders including annual reports, financial statements and group financial statements. Copies can be obtained from the company at a reasonable charge and it is an offence not to provide the documents, s 218.

353 This register of charges must also be available for inspection by third parties with just cause, for instance, potential investors.

354 There are a number of possible reasons, sometimes including personal safety, why people may not wish their addresses to be available to all members. Such a requirement would be an unnecessary disincentive to registration.



Chapter 17

Accountability

INTRODUCTION 17.1 This chapter makes recommendations and suggestions about long-term planning, annual planning, reporting, and financial management. The recommendations focus particularly on the operations of large waka umanga, with many hundreds of members and assets worth several millions. They may also have relevance to smaller waka umanga which may choose to adopt or adapt these standards if they have the capacity, although they will not be required to do so. It is, however, important that small waka umanga, while meeting basic principles of accountability, are not unduly burdened with costly compliance requirements.

RECOMMENDATION

17.1 The Waka Umanga Act should differentiate between large, medium and small waka umanga so that the financial reporting and accountability requirements are appropriate for the size of the entity. The basis for size differentiation should include the number of members of the waka umanga and the size of their assets.

17.2 In recommending differing compliance standards for different sizes of entities, the Law Commission seeks to balance the requirements of accountability with recognition that too rigorous a regime will be unrealistic for smaller groups and a disincentive to their becoming waka umanga. The concept of distinguishing between entities on the basis of size is one recommended in a recent review of the Financial Reporting Act 1993.³⁵⁷ It has also been endorsed by the Institute of Chartered Accountants.³⁵⁸

17.3 The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 provides another model for distinguishing between small, medium and large corporations, with different compliance levels for each. Categories are based on their gross income and assets and number of employees.

17.4 The criteria adopted in this legislation need further consultation and consideration. The New Zealand Institute of Chartered Accountants suggest the

³⁵⁷ Ministry of Economic Development *Review of the Financial Reporting Act 1993 Part 1: The Financial Reporting Structure* (Wellington, 2004).

³⁵⁸ New Zealand Institute of Chartered Accountants *Framework for Differential Reporting* (Wellington, 2005) para 3.9.

amount of income and assets, and the number of employees as basis for differential reporting of companies. In the case of waka umanga, the number of members, the complexity of the operations, including the number of constituencies and subsidiaries, may also be relevant factors.

LONG-TERM PLANNING

RECOMMENDATION

17.2 A waka umanga which meets the prescribed threshold as to size, should have a current long-term plan for the following purposes:

- to provide a long-term focus for the activities of the waka umanga;
- provide a framework for co-ordination of the resources of the waka umanga;
- to provide a basis for accountability of the waka umanga to the members and the tribe; and
- to encourage members to participate in determining the direction and priorities of the waka umanga.

17.3 A waka umanga cannot be required to implement the provisions of a long-term plan, but it must gain approval for amendments to the plan before taking actions that are significantly different from the plan.

- 17.5 The practice of long-term planning sits well with the concept of inter-generational stewardship that underlies our proposal. Formulation of the long-term plan provides an opportunity for the waka umanga to find out the hopes and expectations of its members over the coming years. The plan then translates these into outcomes, to which the waka umanga directs its resources.
- 17.6 Long-term planning also creates an opportunity for the waka umanga to engage with organisations with whom it has, or wishes to have, collaborative relationships – for instance, other waka umanga, service providers and local government. Once the plan has been developed, its publication is a means of communicating the waka umanga's intentions to the tribe and to other organisations.
- 17.7 High-quality, long-term planning requires time and resources for consultation, information gathering and forecasting. Skilled people are needed to analyse this information and convert it into plans, but outside assistance can be sought where waka umanga themselves do not have the resources, perhaps through the assistance of the Secretariat.³⁵⁹
- 17.8 Year-by-year implementation of the long-term plan is included in the annual plan, and reporting against the long-term plan is therefore achieved through annual reporting. The benefit is from setting out a clear framework for future decision making, rather than responding to circumstances in an ad hoc manner. The long-term plan will, however, need to be amended from time to time in response to changes in the overall environment and circumstances of the tribe.

³⁵⁹ There are already a large number of government and non-government agencies which provide some assistance in such cases.

- 17.9 We considered whether a requirement for long-term planning is too arduous, and whether it should be optional for waka umanga to take up when they judge that they have the capacity for the task. As noted, this is an area where the statute could provide a range of requirements depending on the size and structure of the waka umanga.
- 17.10 We believe that, whether mandatory or not, the potential benefits of long-term planning for inter-generational stewardship make this a worthwhile requirement from the outset, especially in helping to instil a strategic perspective and capacity within the waka umanga and confidence among members as to the direction of the organisation. The proposed Secretariat could work with waka umanga to develop their capacity for long-term planning.
- 17.11 A long-term plan is a blueprint for the future; it should not represent a binding obligation.³⁶⁰ However, the rünanganui should remain within the parameters set by the plan, or seek an amendment if that is no longer feasible.³⁶¹ An example would be if the plan identified providing employment opportunities in agriculture as an objective, but the rünanganui decided to lease out its farms without any stipulations as to employment of its members by the lessees. Such a decision would require an amendment to the long-term plan.

The long-term planning period

RECOMMENDATION

- 17.4 A default schedule in the statute should have provisions to specify the planning period, content, formation, adoption and publication of the long-term plan.

- 17.12 Views will vary as to the most suitable duration of the long-term planning period. Both the Local Government Act 2002 and the Ngāti Paoa proposal³⁶² require a long-term plan covering not less than ten years, although a local authority plan must be reviewed once every three years.³⁶³ The Charter of Te Rünanga o Ngāti Awa and the rules of the Muaupoko Tribal Authority Inc require a five-year plan.³⁶⁴
- 17.13 A term at the longer end of the scale fits with the inter-generational nature of the waka umanga's role, but may be difficult to achieve. For this reason, we suggest that the minimum period be five years, but that waka umanga be encouraged to plan further ahead if their resources allow. We also suggest that the plan be adopted before the commencement of the first year to which it

³⁶⁰ See Local Government Act 2002, s 96.

³⁶¹ See Local Government Act 2002, s 97.

³⁶² Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) ch 5.

³⁶³ Local Government Act 2002, s 93(3) and 93(7)(a); and Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) 17–18.

³⁶⁴ Charter of Te Rünanga o Ngāti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) cl 9.2; and Constitution of Muaupoko Tribal Authority Inc, cl 10.2.

relates,³⁶⁵ and be reviewed every three years. The Secretariat ought to work with waka umanga to assist longer-term planning so that waka umanga can move towards a plan for up to ten consecutive financial years.

Contents of the long-term plan

- 17.14 A long-term plan should include the long-term desired outcomes identified through consultation with the members, and outline how the waka umanga will work towards achieving these by identifying the key activities of the waka umanga. Ideally, the plan would also outline how the waka umanga will work with other organisations, such as other waka umanga and local authorities. If the waka umanga has subsidiaries, the contributions they will make towards achievement of the desired outcomes should also be included in the plan.
- 17.15 Proper planning requires consideration of resource requirements. The plan should include a projection of the waka umanga's income and expenditure over the period, and information on how the waka umanga intends to fund the planned activities, although greater detail would be contained in the annual plan. It should also include information about how progress to outcomes will be measured and reported during the life of the long-term plan.³⁶⁶

Formation of the long-term plan

- 17.16 One of the purposes of the plan is to provide an opportunity for participation by the members in determining the direction and priorities of the waka umanga. The planning process must therefore provide opportunities for members and constituent communities to express their views on the proposed outcomes and priorities. The waka umanga should also recognise and consult with other organisations with which it may work.

Adoption of the long-term plan

- 17.17 As adoption of the long-term plan is a major transaction, the charter must set out the procedure for making decisions on adoption of the plan and any amendments. We have already suggested that waka umanga use a procedure modelled on the local authorities' "special consultative procedure". Adoption of the long-term plan may also be a matter for a special resolution of the rünanganui.

Publication of the long-term plan

- 17.18 If the plan is to contribute to accountability, it must be available to members. A summary should be published, with the full document available on request. The waka umanga may also wish to make the plan available to external organisations, and will need to do so if the plan includes working with other organisations.

³⁶⁵ See Local Government Act 2002, s 93(3).

³⁶⁶ Compare Local Government Act 2002, sch 10, cls 1–11; Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 4, cls 1–7. The Charter of Te Rünanga o Ngāti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) requires that the long-term plan include statements of the commercial, management and distribution policies that the rünanga plans to follow, and set out the longer-term vision of the rünanga in respect of matters outlined in the annual plan; cl 9.2. The five-year plan of the Muaupoko Tribal Authority must include the Authority's commercial and distribution policies; cl 10.2.

RECOMMENDATION

- 17.5 A waka umanga must have a current annual plan to:
- give effect to the long-term plan in the year to which it relates;
 - set out the proposed annual budget for the year to which it relates;
 - identify any variation from the funding information included in the waka umanga's long-term plan for the year to which it relates; and
 - contribute to the accountability of the waka umanga to the members.
- 17.6 A default schedule of the statute should include provisions to specify the content, timing, adoption and publication of the annual plan.

17.19 The annual plan complements the long-term plan by setting out the year's contribution to the long-term plan, and identifying and explaining any deviation from that plan. The information gathering would be limited to identifying any significant changes since the formation of the long-term plan. Information on progress against the long-term plan will also be relevant. We do not think it necessary for waka umanga to engage in major consultation with the tribe before developing each annual plan, unless specific concerns have arisen.

17.20 The annual plan should include:

- identified long-term outcomes;
- activities to be undertaken by the waka umanga and its subsidiaries;
- the forecast financial statements for the waka umanga and any subsidiaries;
- performance measures for the waka umanga and any subsidiaries; and
- identification of any changes from the projected activities or budgets of the long-term plan, and the reasons for these.³⁶⁷

Date of Annual Plan

17.21 We have considered whether there should be some flexibility about the due date, for instance, by allowing one month's grace. Our view is that, since the annual plan is essentially an updated and more detailed version of the existing long-term plan, the requirement that the annual plan must be adopted prior to the commencement of the year to which it relates it is not too rigorous for the rünanganui.³⁶⁸ We suggest that it should be adopted before the commencement of the year to which it relates.

³⁶⁷ Compare Local Government Act 2002, sch 10, cls 12–14.

³⁶⁸ See also Local Government Act 2002, s 95(3); Constitution of Muaupoko Tribal Authority Inc, cl 10.1, under which the annual plan must be made available no later than one month before the start of the financial year; and charter of Te Rünanga o Ngāti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) cl 9.1 under which the rünanga is required to prepare the annual plan no later than one month before the commencement of the financial year.

Adoption of the annual plan

- 17.22 The annual plan represents a year-by-year development of the long-term plan. As such, it ought not contain any significant deviations from previously agreed directions. Where such deviations are necessary (for instance, due to changed circumstances for the waka umanga), amendments to the long-term plan will need to be adopted.
- 17.23 We consider that adoption of the annual plan should be treated as a major transaction, so the relevant default schedule or charter would set out the procedure for making decisions on adoption of the plan. Whereas the long-term plan would normally require the special consultative procedure plus a special resolution of the rünanganui, a special resolution of the rünanganui would normally suffice for adoption of the annual plan.

Publication of the annual plan

- 17.24 As with the long-term plan, if the annual plan is to contribute to accountability, it should be available to members within one month of its adoption, and a summary should be included in the governance statement. It should also, where applicable, be available to external organisations.

ANNUAL REPORT

RECOMMENDATION

- 17.7 Each waka umanga must prepare an annual report for each financial year which must be adopted by resolution of the rünanganui within four months of the end of the financial year to which it relates.
- 17.8 For the year to which the annual report relates, the purposes of the report are:
- to account to the members and the tribe for the decisions the waka umanga has made; and
 - to compare the actual performance of the waka umanga with the planned activities and performance as set out in the long-term plan and the annual plan.

- 17.25 The annual report documents the waka umanga's actual performance against its planned performance. The report is an important tool for communicating with both members and third parties. In addition to the annual report, the waka umanga will be required to make an annual return to the Registrar of Waka Umanga. If the waka umanga is registered as a charity, it will also need to make an annual return to the Charities Commission.³⁶⁹
- 17.26 The annual report must be completed and adopted by the rünanganui in time to meet the requirement for the report to be available at least 20 working days before the waka umanga's annual general meeting, which in turn must be held within six months of the waka umanga's balance date. Waka umanga need to determine how they will make the report available. In addition to electronic availability, it must be possible for members to request a hard copy.

³⁶⁹ Charities Act 2005, ss 41–42.

Content of the annual report

RECOMMENDATION

- 17.9 The relevant default schedule should include provisions to specify the content of the annual report to enable an informed assessment to be made of the waka umanga's operations and performance for the financial year.

- 17.27 If the annual report is to fulfil its accountability role it is important that the information is accessible and relevant.³⁷⁰ The Crown Entities Act 2004 addresses this issue in the following way:

*The annual report must provide the information that is necessary to enable an informed assessment to be made of the entity's operations and performance for that financial year, including an assessment against the intentions, measures, and standards set out in the statement of intent prepared at the beginning of the financial year.*³⁷¹

- 17.28 The standard information in an annual report includes financial and service performance, and the auditor's report. The report should also explain any significant deviations from the waka umanga's planned performance. The information on subsidiaries in the report may be presented in summary form, with cross-referencing to each subsidiary's own report for greater detail.
- 17.29 The annual report must also include information on any strategically significant changes made during the year, especially changes to the long-term plan or policies on major transactions.

FINANCIAL MANAGEMENT

- 17.30 The rünanganui's primary governance roles in relation to the waka umanga's financial management are to:
- establish policies that set the parameters for decision making, and ensure compliance with those policies;
 - approve realistic and prudent budgets for planned activities, monitor expenditure, and approve financial adjustments as necessary;
 - ensure that the chief executive has systems in place to ensure the appropriate use of funds, including internal controls and delegations, to provide accurate and timely financial reports, and to enable the waka umanga to meet its financial reporting obligations;
 - ensure that there are systems in place to support an independent, timely, and high-quality audit of the waka umanga; and
 - require any subsidiaries to have systems and practices in place to achieve all of the above.

³⁷⁰ Compare Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 4, cls 10–13; and Local Government Act 2002, sch 10, cls 15–21.

³⁷¹ Crown Entities Act 2004, s 151(2).

Financial management responsibilities

- 17.31 This section discusses the legislative requirements associated with these governance roles, except those for subsidiaries.

RECOMMENDATION

17.10 A waka umanga must manage its revenues, expenses, assets, liabilities, investments and general financial dealings prudently and in a manner that promotes the current and future well-being of the tribe.

- 17.32 A statutory provision to reflect the financial responsibilities of the waka umanga, as set out in the recommendation above, would help establish the strategic purpose of the provisions that follow, and serve to remind the rünanganui and the waka umanga of their responsibilities not just to the current members, but also to the tribe as an ongoing entity.³⁷² As discussed in Chapter 15, there are corresponding duties on individual representatives to act prudently and not to engage in reckless trading.

Financial policies

RECOMMENDATION

17.11 Each waka umanga, in order to provide predictability and certainty in financial management, should adopt and make available to members financial policies which address liability management, investment, procurements, distribution and financial partnerships.

- 17.33 Adoption and amendment of financial policies is a significant issue, for which a decision-making process must be specified in the charter of each waka umanga. Financial policies are a means of enhancing predictability and certainty in financial management.³⁷³ This is particularly desirable for matters such as distributions that are likely to be contentious. Similarly, for decisions with long-lasting effects, such as investments, it is important to have established parameters so that decisions are made with due attention. It is better to discuss and agree on the approach well before the time for actual decisions. It is also important to have adequate financial policies in place before receipt of a Treaty of Waitangi settlement.
- 17.34 Once formulated these policies should be available to members and form part of the governance statement.

372 See also Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 62 and Local Government Act 2002, s 101, which outline the overall objectives of financial management within the organisation.

373 See also Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) 83–87 and cls 61–70; and Local Government Act 2002, ss 101–107.

Distribution policy

- 17.35 A core policy for waka pū (tribal waka umanga) of whatever size should be a policy on distribution of benefits to its members and constituents, especially in relation to a Treaty settlement. Its absence can lead to conflict among members and poor decision making by the representatives. In many cases, the policy should be developed alongside the charter, and before any Treaty settlement is received.

RECOMMENDATION

17.12 The charter should require that waka umanga make any distribution of benefits prudently and in a manner that promotes the current and future well-being of the tribe.

17.13 The policy should include:

- the objectives for which distributions are to be made;
- how the waka umanga will determine for each year what proportion (if any) of net income and other benefits is to be distributed, and what proportion (if any) is to be reinvested in the activities of the waka umanga or its subsidiaries;
- how the waka umanga will determine what proportion (if any) of net income and other benefits is to be distributed by the waka umanga, and what proportion (if any) is to be distributed to and by the constituent communities;
- the forms in which the waka umanga is permitted to make distributions;
- the categories of persons, groups and entities to which the waka umanga is permitted to make distributions; and
- the procedures and criteria by which specific distribution decisions are to be made and reported on by the waka umanga.

- 17.36 Distribution decisions, like all significant decisions, should be made bearing in mind the interests of future, as well as present, members. They are a measure by which members will judge the performance of the waka umanga, and it is important to balance the needs of the tribe as a whole against those of constituent communities or individuals, as well as the present needs of members against those of future generations.

- 17.37 The policy must set out how decisions will be reached on the balance between distributions and reinvestments. Distributions may take various forms – for instance, scholarships or marae grants – and the associated criteria and procedures should be clear. Part of the policy may be a strategy to adjust distributions over time, for instance, to move progressively from centralised distribution to greater autonomy for the constituent communities.

- 17.38 In addition to clarifying expectations, a well-established distribution policy helps guard against improper decisions in this area. It should also help reduce pressure from members for individual and immediate returns from a Treaty of Waitangi settlement, if they can see that wise decisions are being made on behalf of

future generations. A clearly articulated distributions policy is therefore vital in obtaining and retaining members' support for the waka umanga, and for individual hapū to ensure their needs are being considered as well as those of the tribe as a whole.

Protected assets

- 17.39 Another essential policy relates to protected assets that the tribe has agreed may not be subject to any charge, and which must be retained in perpetuity. In order to do so, the waka umanga must create a register of protected assets and of charges against any other assets, so that both members and creditors alike are informed what property may be subject to a charge and what is not.

RECOMMENDATION

17.14 The default schedule or charter should require the rūnanganui to establish and maintain a register of protected assets which is available for members to inspect.

- 17.40 Māori organisations often have difficulties in raising finance, and thus may sometimes be tempted to put at risk assets which are regarded as taonga by the tribe. This is recognised in the Ngāti Paoa proposal, which includes a provision enabling groups to use specific assets to guarantee loans, while designating other assets as "protected". Protected assets are those such as inalienable land and tribal taonga, which should not be put at risk by being used as security for loans. Protected assets would not be subject to the liquidator's powers if the waka umanga must be wound up. The categorisation of protected land and assets is a significant issue, for which the major transactions procedure should be utilised.
- 17.41 Waka umanga should establish a register of protected assets. This would be available for inspection by any member, or by other persons with just cause, such as a potential investor.
- 17.42 We recommend that the default schedule should require that a charge may not be created over any asset that is listed as a protected asset, and suggest that a copy of the register should be attached to every document creating a charge over a waka umanga's assets. An asset subject to a charge should not be capable of being classified, or reclassified, as a protected asset unless the charge-holder agrees.
- 17.43 Other assets may be suitable as collateral, however, and waka umanga will need to have some such assets if they are to secure loans. The waka umanga must establish a register of charges over assets so that the extent of any external interests in, or claims to, the waka umanga's assets is clear to members and external investors.³⁷⁴ The register should be attached to every document that creates a charge over any asset of the waka umanga.

³⁷⁴ See also Local Government Act 2002, s 116 which requires a local authority to keep a register of charges over its assets.

Other financial policies

17.44 The scope and complexity of the policies outlined below may depend significantly on the size of the waka umanga involved.

Financial partnerships policy

17.45 A financial partnerships policy sets out the parameters within which a waka umanga may commit resources to a partnership with a service provider, the Crown (for instance, with the Department of Conservation), another waka umanga or other Māori entity, including a mandated iwi organisation, a local authority, or a private sector organisation.³⁷⁵

17.46 Each waka umanga should consider adopting a financial partnerships policy which states the waka umanga's policies for the commitment of resources to partnerships between the waka umanga and any other organisation. Those policies should include the parameters within which the waka umanga will provide funding or other resources to any form of partnership. The parameters could include prior consultation, risk assessment and management, and how the partnership will be monitored and reported on.

Liability management policy

17.47 In the context of Canadian First Nations governance, Sterritt comments on the contribution a borrowing policy may make to long-term durability of tribal governance entities. He urges clearly defined rules on such matters as how much money can be borrowed, by whom, when and under what circumstances.³⁷⁶

17.48 We suggest that the default schedule should require each waka umanga to adopt a liability management policy that states the waka umanga's policies for the management of borrowings and other liabilities, including the procedures by which decisions are reached on such matters as interest rate exposure, liquidity, credit exposure, debt repayment, specific borrowing limits, giving of securities and charges, and the giving of guarantees and other securities.³⁷⁷

Investment policy

17.49 Each waka umanga should adopt an investment policy that includes:

- the procedures by which investment decisions are made;
- the procedures by which investments are managed and reported on to the rünanganui; and

³⁷⁵ See Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 67; and Local Government Act 2002, s 107.

³⁷⁶ Neil Sterritt *First Nations Governance Handbook: A Resource Guide for Effective Councils* (Ministry of Public Works and Government Services, Ottawa, 2002) 33.

³⁷⁷ See also Local Government Act 2002, s 104; and Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 64.

- the procedures by which the risks associated with investments are assessed and managed.³⁷⁸

17.50 An investment policy may well include other matters, including considerations as to the balance between the liquid assets of the tribe and purchase of land, some of which may be protected assets and therefore not available to creditors.

Procurement policy

17.51 We suggest that every waka umanga should have a policy regarding contracts to obtain goods and services commonly called “procurement contracts”. A useful starting point is the guidelines published by the Auditor-General in 2001,³⁷⁹ which require clear and published procedures, ensuring there are no conflicts of interest, including rules regarding receipt of gifts, hospitality or other incentives from prospective or existing suppliers, and that the waka umanga acts in fair and unbiased manner observing ethical standards. This includes ensuring confidentiality by waka umanga representatives and employees and keeping adequate records of all procurements.

Conflicts of interest policy

17.52 As discussed in relation to rünanganui representatives, it is essential for every waka umanga to have comprehensive policies regarding conflicts of interest which relate to employees as well as to representatives.

17.53 Conflicts of interest can affect any decision makers throughout the waka umanga. As discussed in Chapter 15, there can be a fine line between such conflicts and the legitimate exercise of whanaungatanga. What is important is to be conscious of, and to manage, any potential conflicts appropriately.³⁸⁰

Accounting records and audit

RECOMMENDATION

> Continued next Page

17.15 A waka umanga must keep accounting records that:

- correctly record and explain the financial transactions of the waka umanga;
- will at any time enable the financial position of the waka umanga to be determined with reasonable accuracy; and
- will enable the financial statements of the waka umanga to be readily and properly audited.

378 See also Local Government Act 2002, s 105; and Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 65.

379 Controller and Auditor-General *Procurement – A Statement of Good Practice* (Wellington, June 2001) < <http://www.oag.govt.nz/2001/procurement/Procurement.doc> > (last accessed 20 March 2006).

380 See, for example, Controller and Auditor-General *Inquiry into Certain Aspects of Te Wānanga o Aotearoa* (Wellington, 2005), which heavily criticised the Wānanga’s former chief executive for, among other things, failing to adequately identify and manage conflicts of interest.

RECOMMENDATION

17.16 Each waka umanga must have an annual audit or some other form of independent financial scrutiny appropriate to their size, as specified in the Waka Umanga Act.

17.54 The accounts of a waka umanga must be subject to independent review at the completion of each financial year. The New Zealand Institute of Chartered Accountants recognises three levels of involvement with an entity's financial statements, reflecting the differing requirements of organisations, with an audit being the most rigorous standard. For smaller organisations, the cost of an annual audit could be prohibitive and unnecessary, and either a compilation, prepared by a member of a recognised professional body or a review of the information provided by the organisation would be sufficient. It is, however, important that every waka umanga prepares its annual accounts for an independent scrutiny promptly and answers any queries from the reviewer, so that the process is completed in plenty of time to present authorised accounts to members at the annual general meeting.

17.55 As discussed earlier, the statute should have different mandatory requirements for different sized entities. Financial statements prepared in compliance with the requirements in the statute should be completed within five months of the end of the financial year.³⁸¹

Appointment of auditors or reviewers

RECOMMENDATION

17.17 The rūnanganui must from time to time appoint an auditor or financial reviewer to comply with the requirements of the Waka Umanga Act. The default schedules should specify standard requirements for this, including the appointment process, content of the audit or financial review, powers of the Registrar of Waka Umanga, and the declaration of conflicts of interest.

17.56 Under the Companies Act 1993, the shareholders of a company appoint the auditors at the annual general meeting.³⁸² We have previously indicated our view of the limitations of membership voting at such meetings, and consider that it should be the rūnanganui's responsibility to appoint the auditor, as part of its responsibility for ensuring a credible audit process or financial scrutiny.³⁸³

17.57 The default schedule should specify that the person appointed must be a chartered accountant under the Institute of Chartered Accountants of New Zealand Act 1996, and must not be a representative on the rūnanganui, governor of a subsidiary organisation or an officer or employee of the waka umanga or of

³⁸¹ See Companies Act 1993, s 204; and Financial Reporting Act 1993, s 10.

³⁸² Companies Act 1993, s 196.

³⁸³ Our recommendations draw on the Companies Act 1993, s 196, and the Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 4, cl 14.

a subsidiary organisation. The rünanganui must specify how the auditor or reviewer is to be remunerated at the time of appointment, and record this in the minutes.

- 17.58 Where applicable, the auditor must conduct an audit of the waka umanga's financial statements following each financial year, and produce an audit report for each annual report. Where a waka umanga fails to appoint an auditor within two months of a vacancy occurring, the Registrar of Waka Umanga may appoint an auditor.³⁸⁴

Content of the audit

- 17.59 We suggest that the audit report must state:

- the work done by the auditor;
- the scope and limitations of the audit;
- any other relationships or interests that the auditor has with the waka umanga or its subsidiaries;
- whether the auditor obtained all information and explanations as required;
- the auditor's opinion of whether proper accounting records have been kept by the waka umanga;
- the auditor's opinion of whether the financial statements comply with generally accepted accounting practice and, if not, where they fail to comply; and
- the auditor's opinion of whether the financial statements give a true and fair view of the matters to which they relate and, if not, where they fail to give such a view.

- 17.60 Legislative requirements help to protect the quality of the audit report. We have looked to the Financial Reporting Act 1993 for guidance on the required contents of an audit report, and the proposed provisions largely mirror its requirements.³⁸⁵

- 17.61 The auditor of a waka umanga should ensure, in carrying out the duties of an auditor, that his or her judgement is not impaired by reason of any relationship with, or interest in, the waka umanga or its subsidiaries.³⁸⁶ Similar provisions should apply to any review of the accounts.

Auditor to be available to members

- 17.62 The person who undertakes the independent audit or financial scrutiny acts on behalf of the members as a check on whether the organisation is providing a true and accurate picture of its financial position.³⁸⁷ They must, therefore, be available to members at the annual general meeting where the annual report and any audit or independent financial report are discussed, and at any other relevant general meetings, and be able to address or respond to members.

³⁸⁴ Compare Companies Act 1993, s 196(5).

³⁸⁵ Financial Reporting Act 1993, s 16.

³⁸⁶ See Companies Act 1993, s 204.

³⁸⁷ Creditors and other stakeholders (for instance, staff) will also have an interest in the audit report.



Chapter 18

The functions of the rūnanganui

INTRODUCTION 18.1 The matters discussed in this chapter represent principles of good governance in relation to the decision-making functions of the rūnanganui, and include the conduct for meetings, committees, a code of conduct and a decision-making code.

MEETINGS OF THE RŪNANGANUI

RECOMMENDATION

18.1 The default schedule or charter should contain standard requirements to guide the rūnanganui decision-making processes.

18.2 The rūnanganui’s work is for the most part accomplished in meetings. As Sterritt has noted with regard to Canadian First Nations governance, “[n]early all Council time together is in Council meetings. Official business gets done there. Good meetings are important for the morale of Council. Timely decisions are essential to the proper governance of community business.”³⁸⁸ Well-run meetings are essential to the operations of the rūnanganui, and the tribe should have the opportunity for input into the requirements for meetings of the rūnanganui, as established in each waka umanga’s charter.

Frequency of meetings

18.3 The Local Government Act 2002 requires a local authority to “hold the meetings that are necessary for the good government of its region or district”.³⁸⁹ Like a local authority, a rūnanganui ought to be able to determine when, where and how frequently it meets, and these decisions will depend on such matters as the nature and extent of the business to be conducted. For reasons of transparency and accountability to members, however, we recommend that each rūnanganui

388 Neil Sterritt *First Nations Governance Handbook: A Resource Guide for Effective Councils* (Ministry of Public Works and Government Services, Ottawa, 2002) 34.

389 Local Government Act 2002, sch 7, cl 19(1). An equivalent provision is included in Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 2, cl 1(1).

PART 1:	Outline
PART 2:	Principles
PART 3:	Structure
PART 4:	Governance

must establish a schedule of its planned meetings and publish this to the members.³⁹⁰

Notice of meetings

- 18.4 The charter should specify the requirements for notice of ordinary meetings of the rūnanganui, including the minimum period of notice and the content of any notice. Notice must be sent to all representatives. However, depending on the structure of the waka umanga and its relationships with constituent communities, it may be decided, for instance, that notice should also go to the rūnanga or governing councils of the constituent communities.³⁹¹
- 18.5 If members of the tribe have the right to attend meetings or parts of a meeting, it would be necessary to give notice to members in general, although this need not be by means of individual notices to members and need not include copies of the papers to be discussed.

Quorum

- 18.6 Each rūnanganui must determine the quorum required for ordinary meetings to proceed.³⁹² One aspect to consider is the extent to which the quorum should be linked to representation of the constituent communities of the tribe, as opposed to a simple number or percentage of representatives being present.³⁹³ These rules might also cover the situation where representatives leave during the course of a meeting. Quorum rules often address the situation where a quorum is not present for the scheduled meeting time, leading to rescheduling of the meeting as discussed in Chapter 16 in relation to general meetings.

Chairing of meetings

- 18.7 The chairperson of a rūnanganui will normally preside at meetings, or the deputy in the chairperson's absence or if the chairperson is unable to act – for instance, because of a conflict of interest. Where neither the chairperson nor deputy can preside, provision is generally made for the representatives to select one of their number to chair the meeting.³⁹⁴

390 “Publishing” need not require that a copy is sent to every member. The waka umanga newsletter and website provide alternatives – for instance, the Federation of Māori Authorities emails a monthly “Electronic Panui” to all of its members.

391 The Te Rūnanga a Iwi o Ngāpuhi Constitution formerly required notice to be sent to the takiwa as well as the representatives, but this requirement has been removed from the current Trust Deed: Te Rūnanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005).

392 Compare Companies Act 1993, sch 3, cl 4(1) which provides that the quorum for a board meeting is a majority of directors; and cl 4(2) which provides that no business may be conducted if a quorum is not present.

393 See, for instance, Constitution of Muaupoko Tribal Authority Inc, cl 12.5 where the quorum requires a representative from each hapu to be present.

394 See for instance Companies Act 1993, sch 3, cl 1(3); Charter of Te Rūnanga o Ngāi Tahu (Te Rūnanga o Ngāi Tahu, Christchurch, 2003) cl 16.6. Te Rūnanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005) cl 4.7(b) provides that the Trustees may elect one of their number to act as Deputy Chairperson as the need arises, if that person has been a Trustee for the previous year.

- 18.8 The chairperson ought to have powers to regulate the conduct of meetings, for instance, the power to adjourn a meeting if it becomes too unruly, disorderly or unduly protracted,³⁹⁵ and also the power to require a representative to leave if he or she breaches standing orders or the code of conduct. These powers could be defined in either the charter or standing orders adopted by the rünanganui to govern its meetings.

Who may attend and participate at meetings

- 18.9 The charter should affirm the right of a representative to attend meetings of the rünanganui, unless the representative has been excluded under the provisions of the charter or standing orders.³⁹⁶ When a representative is unavailable to attend meetings, consideration needs to be given to representation of that constituency. We have already discussed in Chapter 14 the possibility of tribes selecting alternate representatives, particularly if there is only one representative per constituency. However, allowing alternates who do not usually attend meetings introduces a new member to the rünanganui “team” who is not familiar with the group ethos that has developed between the representatives. An alternative is to enable that person to pass his or her speaking and voting instructions and rights to another representative.³⁹⁷ These are issues for each tribe to determine in developing its charter.
- 18.10 We expect that a rünanganui will wish to invite non-representatives to attend meetings for particular purposes. The chief executive would generally attend and will often have the formal role of preparing agendas, minutes, and any necessary documents. Staff will often attend for particular agenda items. Others whom the rünanganui may wish to invite for particular discussions could be non-staff advisers, staff of the Secretariat, or representatives of businesses, local authorities or other waka umanga with whom the waka umanga has significant relationships.
- 18.11 Tribes will need to decide whether meetings of the rünanganui ought to be open to general attendance by members of the waka umanga. Allowing members to attend would be in line with the principle of transparency and the rünanganui’s role in maintaining linkages with the tribe and its communities. This, however, is not the only means to achieve transparency. Open meetings of this type may impact adversely on the rünanganui’s ability to function as a group, to have full

395 See for instance Charter of Te Rünanga o Ngäti Awa, < <http://www.ngätiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) sch 3, cl 5.5.

396 This is modelled on the Local Government Act 2002, sch 7, cl 19(2), “[a] member of a local authority, or of a committee of a local authority, has, unless lawfully excluded, the right to attend any meeting of the local authority or committee”. A similar provision is included in Ngäti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngäti Paoa Māori Entities Project, Pukekohe, 2004) sch 2, cl 1(2).

397 We appreciate that tribes may, nonetheless, wish to provide for alternates, as evidenced in existing constitutions. See for instance, Charter of Te Rünanga o Ngäi Tahu (Te Rünanga o Ngäi Tahu, Christchurch, 2003), cl 18, which allows for the appointment of a proxy prior to a meeting; cl 18A.1, which allows the alternate to take the representative’s place at a meeting; and cl 18A.2, which allows for a representative to be appointed proxy by another who has to leave during the course of the meeting. Te Rünanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005) sch 1, part A, cl 3, provides for the election by each takiwa/taurahere of a person to represent the interests of all Ngāpuhi as a proxy trustee of the Trust; an earlier provision allowing the chairperson of a takiwa to appoint such a proxy has been removed.

and frank debates, and to get its work done, particularly if those in attendance try to interrupt proceedings. The rünanganui may be brought into conflict with tribal members when it has to enforce standing orders about who may speak and when, or if it resolves to close a meeting. This will be a matter for each tribe to decide.

- 18.12 Instead the rünanganui could decide to set up meetings specifically for the purposes of communication and/or consultation, rather than attempting these in the context of an ordinary meeting of the rünanganui, which are best kept for the normal business of the rünanganui.³⁹⁸ A rünanganui could have a policy for roving meetings held in different parts of the tribal area to “meet the people”. An ordinary meeting of the rünanganui, with tribal members excluded from part of the meeting, could also be held in conjunction with the public meeting.
- 18.13 Further questions concern attendance by non-members and the media. We do not suggest opening meetings to outsiders as a general rule. The media are, however, a key means by which the public is informed about the activities of the rünanganui. One of the goals of pro-active media liaison could be to foster a positive relationship with the general public. The charter should make clear whether it is the chairperson or another officer (e.g. the chief executive) who has key responsibility for such liaison.
- 18.14 If meetings of the rünanganui are to be open in any way, the charter should empower the rünanganui to close a meeting when sensitive topics and information are discussed – for instance, employment matters. The charter or standing orders should also enable the rünanganui to regulate the input and behaviour of those who attend, possibly through the powers of the chairperson to suspend meetings and require individuals to leave under certain circumstances, as suggested above.

Decisions on resolutions

- 18.15 The rule is often “one representative, one vote”, although if there is more than one representative per constituent community their votes may be counted separately. Voting may be by show of hands, or voice or a formal ballot. In the normal course of events, the chairperson is responsible for verifying the vote and confirming the result.
- 18.16 Consideration of the voting powers of the chairperson raises the issue of a casting vote. Any matter that is decided on a casting vote will be one where there is a considerable degree of opposition or uncertainty within the rünanganui.

³⁹⁸ Our preference differs from the local government model, in which there is a presumption that meetings are open to the public, although the authority may pass a resolution during a public meeting to exclude the public on specific grounds, and the chairperson may ask members of the public to leave under certain conditions for the purpose of maintaining order (Local Government Official Information and Meetings Act 1987, ss 47, 48 and 50). Similar provisions are included in Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 2, cl 6. Charter of Te Rünanga o Ngāi Tahu (Te Rünanga o Ngāi Tahu, Christchurch, 2003) has comparable provisions: cls 16.12 and 16.13. Ngāpuhi’s constitution used to have a similar provision, but under the new Te Rünanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005) such things are presumably now covered by the provision in cl 7.6 that all general meetings are to be conducted in accordance with standing orders as recorded in any Standing Orders Manual.

In such cases, the better approach is to provide that the status quo remains, with the matter being able to be re-debated at a later time to see if a greater degree of consensus can be achieved. We believe this is usually preferable to forcing through a divisive policy.³⁹⁹

- 18.17 Tribes may wish to consider whether resolutions may be passed outside an ordinary meeting if there is a pressing need. One model allows for a resolution signed by all board members to be treated as if it had been passed at a board meeting,⁴⁰⁰ with the requirement for unanimity imposing a significant barrier to overuse of this provision.

Special resolutions

- 18.18 Whether the rünanganui determines any matters by special resolution will depend on the charter provisions for making decisions on major transactions. A tribe may, for instance, decide that at least some of the major transactions ought to be decided by special resolution.⁴⁰¹

Special meetings

- 18.19 A rünanganui may need to hold special meetings to deal, for instance, with an urgent matter that arises outside the normal schedule of meetings.⁴⁰² Given that this sort of meeting is usually called in response to particular issues, it will normally be restricted to the notified agenda.
- 18.20 A key issue is who can request a special meeting, and whether the chairperson has any discretion in responding to such a request. The Local Government Act 2002 allows extraordinary meetings to be requisitioned by resolution of the local authority, or by the mayor, or by not less than one third of the membership of

399 Te Rünanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005) contains a general rule of decision by a simple majority vote of the Trustees other than the Chairperson – that is, the Chair does not have a deliberative vote. But in the event of an equality of those votes, the Chairperson has a casting vote: cls 4.6(a) and (b). The Speaker of the New Zealand House of Representatives formerly held a casting vote, but now votes as an ordinary MP; hence a tied vote is considered to be a defeat.

400 See Companies Act 1993, sch 3, cl 7. See also Constitution of Ngāti Kahungunu Iwi Inc (5 March 2003) cl 10.12 which provides that a resolution if signed or assented to in writing by all board members is valid as if it had been agreed at a valid board meeting. Te Rünanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005) cl 4.6(d) is in very similar terms.

401 Both Te Rünanga ā Iwi o Ngāpuhi and Te Rünanga o Ngāi Tahu require special resolutions and/or procedures for proposals to change their charters: see Te Rünanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005) cls 7.3(g) and 12.1, and Charter of Te Rünanga o Ngāi Tahu (Te Rünanga o Ngāi Tahu, Christchurch, 2003) cl 15.1.

402 For instance, the previous Ngāpuhi constitution allowed the chairperson to call an urgent meeting in response to a petition from representatives that raised serious constitutional, financial or cultural concerns. This has now been superseded in the current Ngāpuhi Trust Deed by a general right of any representative to give notice convening a meeting of Trustees: Te Rünanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005) cl 4.6(e).

the authority.⁴⁰³ If the chairperson does have the discretion, this may help to avoid unnecessary special meetings. However, it may also allow the chairperson effectively to block dissent, including legitimate dissent. A right of review, probably through the waka umanga's internal dispute-resolution system, would temper any misuse of such discretion.

Minutes and access to minutes

- 18.21 The minutes of a meeting are evidence of proceedings and decisions. The proper functioning of a rūnanganui requires that all representatives receive copies of the minutes.⁴⁰⁴ Once certified, the minutes should be available to members of the waka umanga as soon as practicable, in the interests of transparency and accountability. The rūnanganui does, however, have a power to restrict access to sensitive information in the minutes.

Standing orders

- 18.22 In addition to the charter provisions for meetings of the rūnanganui, each rūnanganui should consider adopting a set of standing orders or rules for the conduct of its meetings and those of its committees.

IRREGULARITIES IN DECISIONS

RECOMMENDATION

- 18.2 A default schedule or the charter should contain provisions to deal with the validity of actions taken by the rūnanganui without compliance with their own rules.

- 18.23 A vexed issue often arises about the extent to which bodies should be bound by decisions which were not made in compliance with their own rules, for instance, if there was no quorum, or inadequate notice was given, or if those who signed a document that would bind the waka umanga were not authorised to do so. Wherever possible the relevant decision should simply be reconsidered at a properly constituted meeting, but what happens if action has already been taken in reliance on that invalid decision?

- 18.24 Under the Crown Entities Act 2004, any action by an entity which is contrary to or outside the authority of the Act is invalid, although a court may validate minor or technical breaches. Where the irregularity is more substantial, a person dealing with that entity may be able to enforce that transaction unless

403 Local Government Act 2002, sch 7, cl 22. The Ngāti Paoa proposal has a similar clause, but also allows the principal officer (chief executive) to call such a meeting: Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004), sch 2, cl 4. The Ngāi Tahu charter allows a certain number of representatives to call for a special meeting, with the petition to include the reasons and objectives of the meeting: Charter of Te Rūnanga o Ngāi Tahu (Te Rūnanga o Ngāi Tahu, Christchurch, 2003) cl 14. Clause 14.3 in that charter allows the requisitioners to convene a special meeting if Te Rūnanga does not, within 14 days of delivery of the requisition, proceed to organise a meeting.

404 See for instance, Te Rūnanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005) cl 4.6(i), which requires minutes of all proceedings of Trustee meetings to be signed by the chairperson and available for inspection by all registered adult members, subject to such reasonable restrictions as the Trustees may impose from time to time (including a restriction on confidential information) and in a manner consistent with the Privacy Act 1993.

he or she knew or reasonably ought to have known that the entity's act was contrary to the statute or done for other purposes.⁴⁰⁵ That Act limits the ability of an entity in this situation to escape liability for the action, and requires that any decisions so enforced are included in the annual report.⁴⁰⁶

18.25 Similar provisions exist under the Companies Act 1993. No act of the company or transfer of property is invalid merely because the company did not have the requisite powers (although shareholders and others may take actions to restrain such conduct or seek compensation from directors).⁴⁰⁷ In addition, the company cannot assert non-compliance with the constitution, or lack of authority of directors or agents, or invalidity of the document, as a reason to avoid any contract, unless the contracting party knew or ought to have known of the invalidity or lack of compliance or authority.⁴⁰⁸ Nor is anyone deemed to have constructive notice of the constitution or other documents merely because they are on the Companies Register.⁴⁰⁹

18.26 Incorporations set up under the Te Ture Whenua Maori Act 1993 have much broader powers to act, provided it is not contrary to legislation or its constitution. Shareholders may, however, specifically limit the powers of the incorporation.⁴¹⁰ Section 271 provides that an incorporation is bound by the acts of its committee but limits the ability of other parties to look at the processes whereby the committee is authorised by shareholder resolutions.

18.27 This issue is at the centre of the recent dispute involving a loan raised by an incorporation set up under the predecessor to Te Ture Whenua Maori Act 1993.⁴¹¹ The Court of Appeal held that the loan was outside the powers of the incorporation under section 358A but referred the issue of whether the "indoor management" rule applied back to the High Court for further argument.

18.28 We favour the Crown entity model, which would promote accountability of the waka umanga to its members and provide a standard level of protection for the interests of parties who deal in good faith with the waka umanga.

COMMITTEES OF THE RŪNANGANUI

RECOMMENDATION

18.3 A default schedule or the charter should contain provisions to guide the rūnanganui's devolution of work to committees.

⁴⁰⁵ Crown Entities Act 2004, ss 19-20.

⁴⁰⁶ Crown Entities Act 2004, ss 23, 20(3) and 22.

⁴⁰⁷ Companies Act 1993, s 17.

⁴⁰⁸ Companies Act 1993, s 18.

⁴⁰⁹ Companies Act 1993, s 19.

⁴¹⁰ Te Ture Whenua Maori Act 1993, s 253A.

⁴¹¹ *Proprietors of Matauri X v Bridgescrop Finance Ltd* [2005] 3 NZLR 193.

- 18.29 A rūnanganui should establish standing committees, or issue- or project-related committees, where the rūnanganui believes such committees are necessary to support its governance functions.⁴¹² The literature supports the use of committees as a means of sharing workloads among board members, assigning expertise where it is most relevant and enabling detailed examination of issues.⁴¹³ This support is accompanied by cautions against allowing committees to usurp either the role of the governing board as a whole, or the role of the chief executive and staff. Carver expresses this in particularly strong terms:

*Board Committees are to help get the board's job done, not to help with the staff's job. ... [C]ommittees should be established consonant with due care for minimalism, reservation of the CEO role, and holism. Have no more committees than absolutely needed. Do not compromise the clear accountability linkage between the board and its CEO. Disturb board wholeness as little as possible.*⁴¹⁴

- 18.30 The key points Carver makes are that committees should be established only as necessary, the accountability of the committee to the board should be clear, as should the terms of reference or purpose of the committee and committees should be dissolved when no longer needed. He focuses on committees preparing advice as a contribution to board decision making. This advice should concern governance matters, not management functions such as personnel and finance. Committees might, for instance, develop options for defining the organisation's objectives, or for a code of ethics. The board would consider the options and make decisions.⁴¹⁵

412 A local authority may appoint the committees, subcommittees, other subordinate decision-making bodies and joint committees "that it considers appropriate": Local Government Act 2002, sch 7, cl 30. The Ngāti Paoa proposal contains a similar provision: Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 2, cl 8. There are similar provisions in the constitutional documents of some existing Māori entities. For instance, the Rules of Te Kauhanganui o Waikato Inc (2005) enable the tribal parliament, Te Kauhanganui, to form committees that Te Kaumaarua (the executive council) considers "necessary or desirable" in the pursuit of the identified objects of Te Kauhanganui; Rule B18.1. The Charter of Te Rūnanga o Ngāti Awa, < <http://www.ngātiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) provides for delegation by representatives to committees, employees, representatives or to other persons as Te Rūnanga thinks "expedient" for carrying out the rūnanga's business: sch 3, cl 6.1. Charter of Te Rūnanga o Ngāi Tahu (Te Rūnanga o Ngāi Tahu, Christchurch, 2003) cl 19 allows Te Rūnanga to appoint committees and delegate any functions that are properly done by Te Rūnanga. Te Rūnanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005) cl 4.8(a) permits the Trustees to delegate in writing to any committee of any Trustee, Trustees or chief executive of the Trust such of the powers of the Trustees (within specified limits) as the Trustees may decide.

413 See, for instance, Terry Kilmister *Boards at Work: A New Perspective on Not-for-Profit Board Governance* (NFP Press, Wellington, 1993) 92. Principle 3 of the Securities Commission Principles for Corporate Governance states: "The board should use committees where this would enhance its effectiveness in key areas while retaining board responsibility": Securities Commission *Corporate Governance in New Zealand: Principles and Guidelines: A Handbook for Directors, Executives, and Advisers* (Wellington, 2004) 13. The King Report describes committees as "[m]erely a mechanism to aid and assist the board and its directors in giving detailed attention to specific areas. ...": *King Report on Corporate Governance for South Africa 2002* (Institute of Directors in Southern Africa, Parktown, South Africa, 2002) 70.

414 John Carver "Boards that Make a Difference: A New Design for Leadership" in *Nonprofit and Public Organisations* (2 ed, Jossey-Bass Inc, San Francisco, 1997) 145. Sterritt similarly stipulates that committees must not interfere with the chief executive's role and relationship with the council: Neil Sterritt *First Nations Governance Handbook: A Resource Guide for Effective Councils* (Ministry of Public Works and Government Services, Ottawa, 2002) 30.

415 John Carver "Boards that Make a Difference: A New Design for Leadership" in *Nonprofit and Public Organisations* (2 ed, Jossey-Bass Inc, San Francisco, 1997) 147–152.

18.31 Although the literature on corporate entities argues that some committees are essential,⁴¹⁶ Carver maintains that there are no indispensable committees for the non-profit sector. He cites the personal characteristics of board members and their ability to work together as important considerations in forming committees.⁴¹⁷ A waka umanga may, however, wish to establish certain standing committees to address specific aspects, such as membership applications.⁴¹⁸

18.32 A standing committee may also be appointed as guardians of, and advisers on, the tribe's history and traditions.⁴¹⁹ This is the role of the kaumatua councils provided for under the Maori Trust Boards Act 1955. That Act also provides that a trust board may appoint a council of rangatahi or young people to advise it on the needs and interests of the young people among the beneficiaries.⁴²⁰ Waka umanga may similarly wish to have a committee to advise on the rangatahi perspective.

18.33 Some organisations consider it useful to have an executive standing committee with power to deal with strictly limited urgent matters, and with the obligation to account to the full executive for all decisions taken. We consider that in general this is not advisable, since in practice it commonly leads to an exclusive "inner circle" which has the real power in an organisation. In our view, it is preferable to deal with urgent matters by electronic means; this, of course, requires all representatives to be fully and fairly advised about the urgent matter which requires decision.

Relationships between the rūnanganui and its committees

18.34 Rūnanganui committees are committees of the rūnanganui, and as such are accountable to the rūnanganui and the upshot is that the rūnanganui remains responsible for the work of its committees.⁴²¹ A committee of any rūnanganui is subject in all things to the control of the rūnanganui, and must carry out all

416 For instance, the King Report which argues remuneration and audit committees are essential, *King Report on Corporate Governance for South Africa 2002* (Institute of Directors in Southern Africa, Parktown, South Africa, 2002) 28–29. The Securities Commission states that each publicly owned company should have an audit committee: Securities Commission *Corporate Governance in New Zealand: Principles and Guidelines: A Handbook for Directors, Executives, and Advisers* (Wellington, 2004) 13.

417 John Carver "Boards that Make a Difference: A New Design for Leadership" in *Nonprofit and Public Organisations* (2 ed, Jossey-Bass Inc, San Francisco, 1997) 147.

418 Muaupoko Tribal Authority has a Kaunihera Kaumatua me nga Kuia committee, the roles of which include confirming whakapapa in relation to certain membership decisions: Constitution of Muaupoko Tribal Authority Inc, cl 5.1. A membership committee may be established under Charter of Te Rūnanga o Ngāi Tahu (Te Rūnanga o Ngāi Tahu, Christchurch, 2003) cl 9.3. Te Kaumata Taumata of Ngāti Kahungunu may be asked to consider disputes and membership issues, Constitution of Ngāti Kahungunu Iwi Inc (5 March 2003) cl 22.

419 For instance, Te Kahui Kaumatua of Ngāti Awa has responsibilities that include "protecting the Mauri of Ngāti Awa" and facilitating the resolution of internal disputes regarding Ngāti Awa tikanga, reo, kawa and korero: Charter of Te Rūnanga o Ngāti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) cl 4.4.

420 Maori Trust Boards Act 1955, ss 23A–23B.

421 As expressed in the Securities Commission's Principle 3: "The board should use committees where this would enhance its effectiveness in key areas while *retaining board responsibility*" (emphasis added): Securities Commission *Corporate Governance in New Zealand: Principles and Guidelines: A Handbook for Directors, Executives, and Advisers* (Wellington, 2004) 13. Sterritt emphasises that although committees may be created to advise a governing council, the council is still responsible for the decisions: Neil Sterritt *First Nations Governance Handbook: A Resource Guide for Effective Councils* (Ministry of Public Works and Government Services, Ottawa, 2002) 30.

general and special directions that the rūnanganui may give in relation to the committee's work. The rūnanganui ought to set the terms of reference, timeframe, reporting regime and budget for committees it sets up. The Local Government Act 2002 expresses this fundamental link between responsibility and accountability.⁴²²

- 18.35 Delegations, terms of reference, reporting, monitoring, and eventual decision making by the rūnanganui are the main tools in the responsibility/accountability relationship.⁴²³ The rūnanganui should approve the budgets of its committees. It may also wish to nominate a representative from each committee to report on progress,⁴²⁴ and require each committee to make its minutes available to the rūnanganui.⁴²⁵
- 18.36 The rūnanganui's responsibility for its committees is ultimately exercised on behalf of the tribe it serves. In the interests of transparency and communication with members, the terms of reference, life span and membership of all committees should be available to members.⁴²⁶ The committees assist the rūnanganui, so the annual report should include information on what has been achieved by committees as part of the rūnanganui's reporting.⁴²⁷ At the annual general meeting, the members of the tribe should be permitted to question the rūnanganui about the operation of its committees.

Committee Membership

- 18.37 The rūnanganui should, as a general rule, be responsible for appointing and dismissing all members of its committees.⁴²⁸ Practice varies as to whether all

422 Local Government Act 2002, sch 7, cls 30(3) and 32(7). See also Ngāti Awa Charter, under which, despite a delegation, representatives remain responsible as if they had exercised the delegated power themselves, unless they believed on reasonable grounds that the delegate would exercise the power in accordance with the charter and the duties owed by representatives under the charter, and have monitored by reasonable means the exercise of the power by the delegate. See Charter of Te Rūnanga o Ngāti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) sch 3, cl 6.2.

423 The King Report advocates clear delegations, terms of reference, life spans for committees and evaluation of committees by their boards: *King Report on Corporate Governance for South Africa 2002* (Institute of Directors in Southern Africa, Parktown, South Africa, 2002) 70.

424 The Securities Commission guidelines include requiring the proceedings of committees to be reported back to the governing board to allow other directors to question committee members: Securities Commission *Corporate Governance in New Zealand: Principles and Guidelines: A Handbook for Directors, Executives, and Advisers* (Wellington, 2004) 13.

425 See, for instance, the Maori Trust Boards Act 1955, s 22(3), under which the minutes of each committee meeting shall be forwarded "as soon as practicable" to the secretary of the parent board.

426 The Ngāti Paoa proposal requires each Kaupapa Māori Authority to maintain a register of all delegations and to make that available for inspection with "reasonable cause" by the descent group and by third parties where appropriate: Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 2, cl 10(4).

427 The Securities Commission guidelines include requiring the charter and membership of each (security-issuing) board committee to be published for investors: Securities Commission *Corporate Governance in New Zealand: Principles and Guidelines: A Handbook for Directors, Executives, and Advisers* (Wellington, 2004) 13.

428 Local authorities have these powers in respect of their committees: Local Government Act 2002, sch 7, cl 31(1).

members of a committee must also be members of the governing board.⁴²⁹ Although members of a local authority committee may be elected members of the authority, they need not be. There is, however, a requirement that at least one member of such committees be an elected member of the local authority. Where a local authority appoints non-elected members to a committee, the legislation requires that the appointees must, “in the opinion of the local authority”, have “skills, attributes, or knowledge” that will assist the committee’s work.⁴³⁰ We suggest that this is an appropriate model to follow.

18.38 Restricting committee membership to representatives on the rünanganui may mean that the committee does not have access to the full range of skills it requires. Where necessary skills are not represented on the committee it should be possible for the committee to engage advisers.

18.39 However, if most or all representatives do not have the opportunity to serve on committees, which are instead staffed mainly by appointed “experts”, then representatives may feel that the “real work” of the rünanganui is done elsewhere. In response, they may either “rubber-stamp” committee proposals or debate and question details as a way of asserting authority. It seems preferable that at least one member of each committee be a representative on the rünanganui, with preferably a majority of representatives on each committee.

18.40 The Local Government Act 2002 does not allow employees “acting in the course of employment” to be members of local authority committees, although they may be members of subcommittees.⁴³¹ Waka umanga employees should not be full voting members of committees, as this would undermine staff accountability to the chief executive. They may, however, provide information, advice and secretarial services to committees as requested.

18.41 In the interests of effective functioning and transparency, rules will be required for matters such as quorum, chairing, notice, passing of resolutions and minutes. The extent to which rules are set out in the charter will be for the tribe to determine.⁴³² Defining the rules would save time later and mean that all committees operate according to a common standard. Nevertheless, aspects such as the period for notice may need to be determined for each specific committee according to such matters as the size of the committee, the frequency of its

429 The King Report suggests that, in general, committees should contain only board members: *King Report on Corporate Governance for South Africa 2002* (Institute of Directors in Southern Africa, Parktown, South Africa, 2002) 70. Kilmister states that a committee may include staff or other co-opted members: Terry Kilmister *Boards at Work: A New Perspective on Not-for-Profit Board Governance* (NFP Press, Wellington, 1993) 92. Te Kauhanganui o Waikato Inc Rules (2005) at B.18.2 state that committee membership is determined by Te Kaumaarua (but members need to be elected members of Te Kauhanganui) and at least one member of a committee must be a member of Te Kaumaarua. Under the Ngāti Awa Charter, a committee may co-opt persons as members but must notify the representatives of all such co-opted persons: < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) sch 3, cl 6.3.

430 Local Government Act 2002, sch 7, cl 31(3) and (4)(a).

431 Local Government Act 2002, sch 7, cl 31(4)(b).

432 For instance, the Ngāi Tahu charter outlines committee procedures: Charter of Te Rünanga o Ngāi Tahu (Te Rünanga o Ngāi Tahu, Christchurch, 2003) cl 19. Other than the matters stipulated in the charter, any committee meets and conducts proceedings as it sees fit. The Ngāti Awa Charter contains similar provisions in sch 3, cl 6.3: < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006).

meetings and the nature of its tasks. In keeping with the accountability relationship between the rünanganui and its committees, the rünanganui should approve any rules for committee proceedings.⁴³³

- 18.42 As one of its oversight mechanisms the rünanganui may wish to appoint the chairpersons of its committees or, alternatively, it may allow committee members the autonomy to choose the chairperson for themselves.⁴³⁴
- 18.43 When representatives are appointed to committees, they would carry over their individual duties and obligations as representatives. When non-representatives are appointed to committees, for the purposes of their committee roles they should assume the duties and obligations of representatives, as if they were representatives.⁴³⁵ This is justified because, in respect of their roles on the committees, these individuals have become an extension of the rünanganui.
- 18.44 A final question concerns the rights of attendance at committee meetings by representatives from the rünanganui, members of the tribe and others. This will be for the tribe or the rünanganui to determine, and the rules should be consistent with the rules for attendance at meetings of the rünanganui. There may be occasions when committees organise open sessions, for instance, for consultation. As a general rule, however, our view is that ordinary committee meetings will be more effective if closed.⁴³⁶ Representatives do not need to attend committee meetings to enhance accountability, because they can assess committees on the basis of their reports to the rünanganui. Similarly, members of the tribe can direct questions about the performance of committees to the rünanganui.

Joint Committees

- 18.45 The waka umanga will not exist in a vacuum. The rünanganui may wish to establish joint committees with other organisations with which it has, or wishes to have, a significant relationship. We do not mean a business relationship, such as a joint venture, but relationships at the governance level. For instance, a waka umanga and the local authority may wish to work together to develop principles on consultation, or a joint committee might be formed as a means of managing the ongoing relationship between the waka umanga and the local authority. The Local Government Act 2002 reflects a similar philosophy in that

433 See, for instance, the Maori Trust Boards Act 1955, s 22(2) which allows a committee of a trust board to fix a quorum, subject to the approval of the trust board.

434 A local authority may appoint the chairperson of a committee, but if it does not, the committee itself has this power: Local Government Act 2002, sch 7, cl 26(3).

435 See Crown Entity Act 2004, sch 5, cl 15 which applies a number of provisions relevant to board members, including the conflict of interest rules, to each member of a committee who is not a member of the board, “with necessary modifications”. The Ngāti Paoa proposal stipulates that a member of a subordinate decision-making body who is not a governor of the authority, when performing duties in respect of that body, is subject to the duties applying to a governor as if he or she were a governor of the authority: Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 2, cl 9(4).

436 This is consistent with our view on meetings of the rünanganui.

it empowers a local authority to appoint “a joint committee with another local authority or other public body”.⁴³⁷

18.46 A waka umanga may also wish to use a joint committee to foster a relationship with government agencies such as the Department of Conservation or with the local health board or a neighbouring waka umanga, to consider governance matters of mutual interest, and as a part of the ongoing relationship between the two. If such committees are formed, the parties will need to agree on the terms of reference, and on rules for such matters as appointments, dismissals, and chairing.⁴³⁸

18.47 One matter to be considered is whether the proposed work of any joint committee relates more to governance or to management. In the latter case, the chief executives of the respective bodies should be responsible for the joint committee. Sometimes it may be necessary to have two committees, one of representatives and one of staff.

CODE OF CONDUCT

RECOMMENDATION

18.4 A default schedule or the charter should contain a code of conduct for its representatives consistent with the provisions of the Waka Umanga Act and the charter.

18.48 The code of conduct should set out the rünanganui’s understandings and expectations of its representatives’ conduct, including their behaviour toward one another, staff, and the public.⁴³⁹ It should also have rules to enable the rünanganui to amend it in the future. Once approved, the code of conduct should be published to the members.

18.49 The values and ethics incorporated in the code can also provide a model for the staff of the waka umanga and for the directors, managers and staff of any subsidiaries.⁴⁴⁰ The rünanganui may choose to use the code as the place where it expresses the tikanga by which it will operate.

18.50 Sterritt comments on the significance of council values to the reputation of the First Nations enterprise as a whole, and suggests that First Nations’ councils adopt codes of ethics to this end. He further emphasises the importance of managing and developing the councillors’ internal relationships with one another and with the Chief, noting “Council will better manage its external relationships if it works as a team.”⁴⁴¹ The Securities Commission similarly stresses the

437 Local Government Act 2002, sch 7, cl 30(1)(b). This empowers local authorities to establish joint committees with other local authorities and other public bodies. Since waka umanga will not be public bodies (though sharing many characteristics of such bodies), legislation may need to declare that waka umanga are public bodies for this purpose.

438 Compare Local Government Act 2002, sch 7, cl 30(9).

439 Compare Local Government Act 2002, sch 7, cl 15.

440 We note that Te Rünanga a Iwi o Ngäpuhi has developed a board manual that includes values and principles for board members: Te Rünanga ä Iwi o Ngäpuhi Charitable Trust Deed (10 September 2005).

441 Neil Sterritt *First Nations Governance Handbook: A Resource Guide for Effective Councils* (Ministry of Public Works and Government Services, Ottawa, 2002) 19 and 40.

importance of ethical behaviour by directors, and advocates adoption of a written code of ethics, commenting:

Ethical behaviour is central to all aspects of good corporate governance. Unless directors and boards are committed to high ethical standards and behaviours, any governance structures they have put in place will not be effective.

*Good governance structures can encourage high standards of ethical and responsible behaviour. A formal code of ethics will assist in this when it is understood by directors and management and applied to their governance decision making.*⁴⁴²

18.51 Writing of non-profit organisations, Carver advocates the value of taking time to design sound processes, including establishing rules on behaviour. He comments that “[d]ealing with the dysfunctional behaviour of a board member is far more difficult if the board has not previously determined what constitutes appropriate behaviour.”⁴⁴³

18.52 We see the code of conduct as especially valuable in setting expectations of behaviour from representatives. This may include expectations as to how representatives give feedback to their constituent communities on decisions of the rūnanganui, and on relationships with the media. The rūnanganui ought to foster adoption of the principles of the code of conduct throughout the entire waka umanga and its subsidiaries. Beyond that, we do not prescribe the content of the code, as the needs will vary according to the particular waka umanga. Although the Secretariat may be able to assist with model codes, these should be adapted to reflect the common understandings of the tribe.

DECISION- MAKING CODE

18.53 Boards exist to provide leadership, and decision-making is an essential part of leadership. Carver points to the potential for boards to waste time by not keeping focused on the topic at hand, and letting board members pursue their favourite topics. As Carver notes, a governing board’s task is essentially verbal, and in order to use board time effectively “there must be discipline in the talking. That discipline involves what is talked about, how the talking occurs, and when it is done.”⁴⁴⁴

18.54 The Local Government Act 2002 reflects the significance of decision making by prescribing the procedures for local authority decision making.⁴⁴⁵ These apply to every decision made by a local authority, including the decision not to do something. Authorities may, however, exercise discretion as to the extent to which they apply these procedures, depending on the significance of the matters affected by the decision. The Ngāti Paoa proposal also contains a decision-making framework.⁴⁴⁶

⁴⁴² Securities Commission *Corporate Governance in New Zealand: Principles and Guidelines: A Handbook for Directors, Executives, and Advisers* (Wellington, 2004) 8.

⁴⁴³ John Carver “Boards that Make a Difference: A New Design for Leadership” in *Nonprofit and Public Organisations* (2 ed, Jossey-Bass Inc, San Francisco, 1997) 126.

⁴⁴⁴ John Carver “Boards that Make a Difference: A New Design for Leadership” in *Nonprofit and Public Organisations* (2 ed, Jossey-Bass Inc, San Francisco, 1997) 172–173.

⁴⁴⁵ Local Government Act 2002, ss 76–81.

⁴⁴⁶ Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cls 34– 39.

18.55 A decision-making code will provide a framework for the rünanganui's exercise of leadership and judgement. It will assist the rünanganui to ask the right questions about the recommendations put to it by the chief executive and staff, thereby helping to avoid domination of governance by management. We consider that each rünanganui should develop its own code. Prescribing a standard decision-making code would also be difficult because of the wide variations in the size, shape and tikanga of waka umanga.

18.56 The Secretariat will be of assistance in this area, particularly in encouraging the sharing of approaches and advising on best practices. Matters that could usefully be included in a decision-making code in respect of any particular decision are:

- identifying the objective and clarifying how this relates to the waka umanga's long-term plan and other strategic documents;
- outlining the pros and cons of the options and collecting the information needed to assess the options; and
- identifying who will be affected and how they should be involved in the process.

Chapter 19

The corporate office

INTRODUCTION 19.1 We expect that the waka umanga will have a corporate office that provides advice and information to the rünanganui, and translates the rünanganui's plans and policies into actions. The corporate office, whatever its size, will need an overall manager. We use the term "chief executive" to describe this position, but some tribal groups have their own Māori terms.

19.2 This chapter primarily concerns issues related to the role of the chief executive and the relationship between the chief executive and the rünanganui. This focus reflects the critical role of the chief executive in the management of the waka umanga. We discuss:

- the respective roles of governance (the rünanganui) and management (the corporate office led by the chief executive) and the resultant relationships;
- legislative provisions related to the chief executive's employment, functions and delegations; and
- measures to instil throughout the waka umanga values that are in accordance with the legislative standards set for representatives on the rünanganui, especially regarding conflict of interest, and in accordance with the values set by the rünanganui in its code of conduct.

EMPLOYMENT OF A CHIEF EXECUTIVE

RECOMMENDATION

19.1 A default schedule or the charter should have provisions relating to the appointment and responsibilities of the Chief Executive.

19.3 Arguably the most important task for any governance board is to appoint the chief executive. It is critical to appoint the right person for the job, and then to build and maintain a positive, respectful and mutually supportive relationship between the board and the chief executive. Writing of non-profit organisations, Kilmister states: "[c]entral to the success of the board is its relationship with the CEO", and adds that the chief executive and the board "constitute a leadership team with the CEO as the leader of the staff team and the board as the leader of



the whole organisation team”. Relationship management skills are a key, desired attribute of any chief executive.⁴⁴⁷

19.4 The rünanganui would appoint the chief executive who would be accountable to it for the proper exercise of all functions and powers delegated to him or her by the rünanganui, or imposed by the Waka Umanga Act or any other law. These would include:

- implementing the resolutions of the rünanganui;
- providing advice to the rünanganui and its committees, if any;
- ensuring the effective and efficient management of the resources and activities of the waka umanga;
- maintaining systems to enable effective planning and accurate reporting of the financial and service performance of the waka umanga;
- providing leadership for the staff of the waka umanga;
- employing, on behalf of the waka umanga, the staff of the waka umanga, and exercising all the rights, duties, and powers of an employer in respect of the staff of the waka umanga, including negotiating the terms of employment of the staff;⁴⁴⁸ and
- ensuring that the management structure and procedures of the waka umanga are capable of achieving the long-term outcomes of the waka umanga.⁴⁴⁹

Can the chairperson also be the chief executive?

19.5 The literature emphasises the desirability of separating the roles of the chief executive and the chair of the board, given their distinct roles.⁴⁵⁰ We are aware that smaller waka umanga and tribes may feel that they lack sufficient resources and people to separate these roles. Sterritt makes the following comment on this dilemma:

When acting as the Director of Operations, the Chief is not a member of Council – she is as accountable to Council as if she had been independently hired by Council to do the Director’s job. A Chief who respects this distinction may be

447 Terry Kilmister *Boards at Work: A New Perspective on Not-for-Profit Board Governance* (NFP Press, Wellington, 1993) 99 and 110. See also Neil Sterritt *First Nations Governance Handbook: A Resource Guide for Effective Councils* (Ministry of Public Works and Government Services, Ottawa, 2002) 19 and 45 on the importance of hiring the right person as chief executive and on the significance of the chief executive’s relationship with the chair of the board.

448 Compare State Sector Act 1988, s 59(2).

449 Compare Local Government Act 2002, s 42; and Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 32.

450 See, for instance, *King Report on Corporate Governance for South Africa 2002* (Institute of Directors in Southern Africa, Parktown, South Africa, 2002) 53–54, which advocates that it is best in principle to keep these roles separate.

*effective for a time, but is walking a tightrope. Devoting Council energy toward obtaining the resources to hire the best possible Director is far better.*⁴⁵¹

- 19.6 The different roles of the rünanganui and the chief executive, and their responsibility/accountability relationship, also mean that a representative cannot also be the chief executive. This is in line with the general prohibition on representatives being employees of the waka umanga.

Should the chief executive be an ex-officio representative on the rünanganui?

- 19.7 It is often the case in the corporate world that the chief executive, by virtue of his or her office, is a full voting member of the board, that is, an executive director. In waka umanga, the communities of the tribe choose the representatives on the rünanganui. Having the chief executive as a full member of the rünanganui introduces to the governing table a representative without a constituency. It also complicates accountabilities, since the chief executive is accountable to a board of which he or she is a fully participating member. This is another example of the “tightrope” situation referred to by Sterritt.
- 19.8 The advice of the chief executive is, of course, available to the rünanganui without the chief executive having full membership and voting rights. Indeed, it would be impractical for him or her not to take part in rünanganui discussions - except, of course, when the rünanganui is discussing issues related to the employment or conduct of the chief executive. Kilmister describes the chief executive’s role vis-à-vis board meetings thus:

*The CEO serves the role of consultant to the board, offering information, advice and guidance in most matters coming before it. In this way he/she participates in all board matters but does so with a clear understanding of both role and responsibilities, leaving the board and the staff equally clear as to where the CEO’s loyalties and priorities lie at any given time.*⁴⁵²

- 19.9 The requirement to employ a chief executive who is accountable to the rünanganui reinforces the separation of governance and management. For a small waka umanga, the chief executive need not be a full-time employee and the number of staff may be minimal.
- 19.10 We have noted the importance of appointing the right person. For this reason, the legislation should encourage the rünanganui to determine the nature of the chief executive’s job, and make appointments with reference to the skills required for that job. The legislation will also require the rünanganui to monitor the chief executive’s performance.⁴⁵³
- 19.11 While it is common practice to have a written performance agreement setting out objectives and assessment criteria, and allowing for twelve-monthly review,

451 Neil Sterritt *First Nations Governance Handbook: A Resource Guide for Effective Councils* (Ministry of Public Works and Government Services, Ottawa, 2002) 45–46.

452 Terry Kilmister *Boards at Work: A New Perspective on Not-for-Profit Board Governance* (NFP Press, Wellington, 1993).

453 Our recommended provisions are drawn largely from the Local Government Act 2002, s 42 and sch 7, cls 33–35 and Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004), cl 32 and sch 2, cls 12–13.

we have left the method of assessing the chief executive's performance more open, to allow for different circumstances and changed preferences over time. Whatever the system adopted, the key requirements are that the rünanganui communicate its expectations to the chief executive, including making clear the criteria against which performance will be judged, and that the rünanganui monitor the performance of the chief executive and the waka umanga against those expectations.⁴⁵⁴

RELATIONSHIPS BETWEEN THE RÜNANGANUI AND THE CORPORATE OFFICE

19.12 Separation of governance and management is in accordance with contemporary practice.⁴⁵⁵ Under this model, the chief executive is accountable to the rünanganui for the performance of the waka umanga against its objectives. The rünanganui employs the chief executive, who is in turn the employer of all the waka umanga's staff, and the staff is accountable to the chief executive. The rünanganui's relationship with the chief executive is effectively the rünanganui's relationship with the corporate office. As the rünanganui translates the tribe's wishes into plans, so the chief executive must translate these plans into action, and is held accountable by the rünanganui.

19.13 Sterritt, writing of First Nations governance in Canada, has described governance and management in the following terms:

*Council decides issues in the form of Council policies. The Director acts on Council decisions by implementing their policies. Policies are Council rules that allow Council and the Director to deal with issues consistently. This allows Council to deal with the important, long-term needs of the community, while the Director of Operations deals with the details of the daily management and administration.*⁴⁵⁶

Delegations

19.14 The chief executive must have the powers necessary to undertake his or her functions. Just as the tribe must give the rünanganui the authority and space to fulfil its role within established parameters, so too must the rünanganui do the same for the chief executive, within the constraints of the plans, policies and financial resources of the waka umanga.

19.15 The rünanganui ought to be clear about the functions and powers it delegates to the chief executive. The delegation ought not to include any matters that are inherently the responsibility of a governing board, such as major financial and policy decisions. Delegations do not absolve the governing board from

454 John Carver "Boards that Make a Difference: A New Design for Leadership" in *Nonprofit and Public Organisations* (2 ed, Jossey-Bass Inc, San Francisco, 1997) 110–115, discusses the importance of pre-established criteria and outlines different methods of monitoring.

455 See, for instance, *King Report on Corporate Governance for South Africa 2002* (Institute of Directors in Southern Africa, Parktown, South Africa, 2002) 53: "The chairperson is primarily responsible for the working of the board. ... The chief executive officer's task is to run the business and to implement the policies and strategies adopted by the board." See also Local Government Act 2002, s 42, which requires each local authority to employ a chief executive and sets out the responsibilities of that officer.

456 Neil Sterritt *First Nations Governance Handbook: A Resource Guide for Effective Councils* (Ministry of Public Works and Government Services, Ottawa, 2002) 118–119. The CEO must be able to rely on the board to confront and resolve issues of governance while respectfully staying out of management. The board must be able to rely on the CEO to confront and resolve issues of management while respectfully staying out of governance.

responsibility for the delegated matters.⁴⁵⁷ The chief executive may in turn delegate his or her functions and powers. In the interests of transparency, the waka umanga must have a register of delegations that is kept current and is available for inspection by members, and by outsiders in particular circumstances.

Remuneration

- 19.16 We note the desirability of fair and reasonable remuneration of chief executives.⁴⁵⁸ The chief executive's remuneration package is a decision for the rünanganui of each waka umanga, although the Secretariat could assist. Waka umanga should seek advice and assistance from the proposed Secretariat when determining its chief executive's remuneration. This could include job-sizing and market surveys to provide advice on remuneration levels for comparable positions.

ETHICS AND VALUES IN THE CORPORATE OFFICE

- 19.17 Consistent with the chief executive's function of "providing leadership for the staff of the waka umanga", the rünanganui should require the chief executive to implement a code of conduct for the staff, and to take such steps as necessary to maintain the code's ongoing significance in the operations of the waka umanga.

Avoiding conflicts of interests in employment and contracting

- 19.18 We have discussed conflict of interest rules in the context of the individual duties and roles of representatives on the rünanganui and in relation to accountability generally. Rules are also necessary for the corporate office, where the chief executive and staff will be making employment and contracting decisions.
- 19.19 We believe that the application of whanaungatanga,⁴⁵⁹ is a legitimate expression by the tribe of a desire to provide employment and opportunities to members of that tribe, provided it does not amount to discrimination contrary to section 22 Human Rights Act 1993. Traditionally, tribal members were expected to support their tribe in this way. If preferment of tribal members is the expressed wish of the tribe, then the rünanganui should develop and publish employment and contracting policies to reflect this.⁴⁶⁰

457 Compare delegation powers under Local Government Act 2002, sch 7, cl 32; Companies Act 1993, s 130 and sch 2; and Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 2, cl 10.

458 Principle 5 of the Securities Commission's principles and guidelines for corporate governance states: "The remuneration of directors and executives should be transparent, fair, and reasonable": Securities Commission *Corporate Governance in New Zealand: Principles and Guidelines: A Handbook for Directors, Executives, and Advisers* (Wellington, 2004) 17.

459 Whanaungatanga can be summarised as denoting "the relationships between people bonded by blood, and the rights and obligations that follow from the individual's place in the collective group": New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (NZLC SP13, Wellington, 2002) para 42. See also New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) paras 130–136. See the conflicting views on whanaungatanga rights and obligations held by Maori academic Dr Ranginui Walker and Maori businessman Shane Jones MP, as recorded in Ruth Laugeson "A \$150m family firm – and proud of it" (11 December 2005) Sunday Star Times Auckland A6.

460 We note that the waka umanga, if challenged under the Human Rights Act 1993, may need to show that any such preferment was for the purpose of assisting or advancing persons in need under s 73 of that Act.

- 19.20 Our concern is focused on any practices that might marginalise sections of the tribe or lead to the appointment of tribal members who are not able to perform their roles adequately. This would prejudice the performance of the waka umanga, with resultant disenchantment among members, loss of credibility with the outside world, and consequent threat to the durability of the waka umanga and prejudice to future generations. Conflict of interest rules are therefore needed to avoid practices such as the appointment or promotion of family or friends, or contracts with family or friends, on other than a merit basis. This includes making appointments that are surplus to requirements, or giving unfair preference in situations like redundancies, where choices must be made between existing employees.
- 19.21 If preferment of tribal members in employment and/or contracts is the expressed wish of the tribe, then this should be explicitly reflected in the policies of the waka umanga. However, any such policies should not be absolute, and should focus on competencies rather than tribal membership per se.
- 19.22 Within any such parameters, the rünanganui should require the chief executive to operate employment and contracting policies that require impartial selection of the persons or organisations best suited to the position or task, including policies for competitive and transparent tendering and employment processes, and rules for management of conflicts of interests. These policies and rules should apply throughout the waka umanga.
- 19.23 The rünanganui should require the chief executive to operate contracting policies that require competitive and transparent tendering of contracts above a minimum amount determined by the rünanganui.
- 19.24 Employment and contracting decisions should be subject to selection processes that are designed to appoint the person or organisation best suited to the position or task.⁴⁶¹ The waka umanga should develop job and project descriptions that accurately reflect the requirements. As previously noted, it is important that the waka umanga's policies for competitive and transparent tendering and employment processes should require all decision makers throughout the waka umanga to declare any conflict of interests, with the declaration to be followed by steps to manage that conflict. These procedures could be part of the code of conduct.
- 19.25 The Waka Umanga Act would require each annual report to include a list of all contracts entered into by the waka umanga during the financial year in which a representative had a material financial interest. The waka umanga may consider also publishing each year, in their annual report or perhaps on a members-only area of their website, a list of all recipients of waka umanga contracts and the names of all employees. Such lists would show who was getting the jobs and the contracts, and so help to reveal any unjust preferences within the tribe, but they would not necessarily reveal unfair practices – that is, whether the appointments are merit based.

⁴⁶¹ See State Sector Act 1988, s 56(2)(c): the requirement to be a “good employer” includes operating employment policies for “the impartial selection of suitably qualified persons for appointment”, and s 60 which requires appointments to be made on merit, giving “preference to the person who is best suited to the position”.

Chapter 20

Subsidiary organisations

- INTRODUCTION**
- 20.1 This chapter makes recommendations and suggestions about the establishment of subsidiaries, and the relationships between a waka umanga and its subsidiaries and between the subsidiaries and members of the waka umanga. We also consider the instruments used to manage these relationships: constitutions, board appointments, systems for planning, monitoring and reporting, the waka umanga's corporate office, codes of conduct and dispute resolution processes.
- 20.2 We have drawn on two reports by the Auditor-General: *Statements of Corporate Intent: Are They Working?* and *Local Authority Governance of Subsidiary Entities*.⁴⁶² We have also looked at the equivalent provisions in the Local Government Act 2002 and the Ngāti Paoa proposal.⁴⁶³
- 20.3 A waka umanga may own or partly own subsidiaries. The subsidiaries are likely to be companies, trusts or, possibly, incorporated societies, and accordingly will be governed by directors, trustees or officers. Each subsidiary will have its own constitution, trust deed or rules, and will operate in accordance with the general law.
- 20.4 Our discussion concerns wholly or majority-owned subsidiaries. Where the rünanganui is a minority shareholder, it will need to make arrangements with other shareholders that are appropriate to its level of interest, and in accordance with its investment and liability management policies, long-term plan and other policies as appropriate. A waka umanga may also have a number of "associated entities" with which it has an ongoing relationship, but which are not formally or partly owned by the waka umanga. These may include some existing service delivery providers.
- 20.5 We use the terms "governors", "board" and "constitution" when discussing subsidiaries in general but use the appropriate term for particular subsidiaries, for instance, "director" when discussing companies.

⁴⁶² Controller and Auditor-General *Statements of Corporate Intent: Are They Working?* (Wellington 1998); Controller and Auditor-General *Local Authority Governance of Subsidiary Entities* (Wellington, 2001).

⁴⁶³ Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004).



ESTABLISHMENT OF SUBSIDIARIES

RECOMMENDATION

20.1 A waka umanga should be able to establish, disestablish and incorporate subsidiary organisations for such purposes as it determines appropriate, consistent with the waka umanga's subsidiary policy.

- 20.6 A waka umanga may choose to establish subsidiaries to promote more effective management of its different enterprises or to oversee other subsidiaries. Subsidiaries enable both commercial enterprises and social service ventures to be governed and managed independently, by those with relevant expertise. Conducting commercial ventures through a separate company uses the legal framework established especially for businesses. This allows different assets to be used for different purposes, enabling some to be protected from exposure to risk.⁴⁶⁴ A subsidiaries structure provides a buffer between the politically-focused governance of the rünanganui and the governance needs of particular enterprises. The Harvard Project on American Indian Economic Development⁴⁶⁵ found that businesses insulated from political interference were four times as likely to be profitable as those where tribal governments played a role in day-to-day business operations.⁴⁶⁶
- 20.7 Many existing Māori entities have subsidiaries. Te Rünanga o Ngāi Tahu has established Ngāi Tahu Holdings Corporation Ltd to operate its commercial enterprises, and Ngāi Tahu Development Corporation to pursue its social and cultural development and natural environment objectives.⁴⁶⁷ Similarly, the charter of Te Rünanga o Ngāti Awa requires the rünanga to establish a company and a community development trust.⁴⁶⁸ The Maori Fisheries Act 2004 requires that a fishing business using settlement quota must be operated separately from the mandated iwi organisation, but be responsible to that body.⁴⁶⁹

⁴⁶⁴ We have previously indicated in Chapter 17 that tribes will likely wish to define some assets as "protected", while other assets will be available as security for loans and for income generation.

⁴⁶⁵ The Harvard Project on American Indian Economic Development, John F Kennedy School of Government, Harvard University < <http://www.ksg.harvard.edu/hpaied/> > (last accessed 21 March 2006). The project undertook extensive research into the common elements of economically successful Indian tribes and what these tribes did differently from those that were not so successful.

⁴⁶⁶ Stephen Cornell "Strategic Analysis: A Practical Tool for Building Indian Nations" (1998) The Harvard Project on American Indian Economic Development, John F Kennedy School of Government, Harvard University < <http://www.ksg.harvard.edu/hpaied/> > (last accessed 21 March 2006). For a full discussion see Stephen Cornell and Joseph P Kalt "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today" (1998) 22(3) American Indian Culture and Research Journal 187, 198.

⁴⁶⁷ Charter of Te Rünanga o Ngāi Tahu (Te Rünanga o Ngāi Tahu, Christchurch, 2003) cl 10.1(c) and (d).

⁴⁶⁸ Charter of Te Rünanga o Ngāti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) cl 6.

⁴⁶⁹ Maori Fisheries Act 2004, sch 7, kaupapa 9.

- 20.8 Whether a waka umanga runs its commercial subsidiaries through a holding company is a matter for each waka umanga to determine. Where the waka umanga has a number of commercial enterprises, this would probably be worthwhile. Establishing a holding company should introduce specialist commercial skills and business disciplines into the overseeing of subsidiary companies. The rünanganui must retain the ability to monitor the holding company, and to ensure that the company and subsidiaries work within the rünanganui's overall objectives. A primary issue is clarifying expectations with the holding company, particularly for the flow of information to the rünanganui.⁴⁷⁰
- 20.9 Not all waka umanga will have the resources to establish and operate subsidiaries and their associated infrastructure. Rünanganui will need to weigh up the costs of a subsidiary's structure against the benefits of reduced exposure to risk and of more specialised governance. Exposure to risk can also be managed by identifying "protected assets" and specifically excluding those assets from being used to guarantee loans. The rünanganui could instead decide to operate its enterprises as unincorporated bodies within its corporate office, under the overall management of the chief executive. Alternatively, the rünanganui might operate as the board of directors (or trustees), and appoint a manager who is directly responsible to the rünanganui. In such circumstances the rünanganui could operate like the committee of management for a Māori incorporation.⁴⁷¹
- 20.10 The members will determine whether or not the waka umanga will have subsidiaries; the policy on establishment or disestablishment of any subsidiary organisations; and whether any material changes to the nature and scope of those subsidiary organisations is a major transaction, subject to the approval procedure set out in the charter.⁴⁷²

RELATIONSHIP BETWEEN THE RÜNANGANUI AND ITS SUBSIDIARIES

- 20.11 Despite the benefits of separating governance and management of subsidiaries, the separation must not be total. The governance obligations of the rünanganui include appointing a board to govern each subsidiary, setting expectations for each board in the subsidiary's constitution and statement of intent, and monitoring the boards' performance against those expectations.
- 20.12 The subsidiaries are accountable to the rünanganui for the assets they receive, and for the performance of their allocated activities, be they running a business or providing social services. In many cases, the assets will be from Treaty of Waitangi settlements, which are intended to be full and final and to provide capital to tribes to restore their economic base.⁴⁷³ A tribe, therefore, has much to lose if the rünanganui does not adequately monitor its subsidiaries, and the subsidiaries' performance will invariably reflect on the rünanganui and the tribe, including influencing investors' perceptions.

470 See Controller and Auditor-General *Local Authority Governance of Subsidiary Entities* (Wellington, 2001) 19–21.

471 Compare the discussion of Whangara B5 Inc and other Māori organisations in Te Puni Kōkiri and Federation of Māori Authorities *He Mahi, He Ritenga Hei Whakatinana i te Tūrua Pō 2004: Case Studies: Māori Organisations Business, Governance and Management Practice* (Wellington, 2004).

472 Compare Local Government Act 2002, s 56 which requires a local authority to undertake the special consultative procedure before establishing a council-controlled organisation.

473 Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Summary Edition, Wellington, 2004) 87.

20.13 The responsibility/accountability relationship applies as much to non-profit subsidiaries as it does to commercial subsidiaries. The rünanganui must be satisfied that its social and cultural subsidiaries are pursuing objectives and activities that are consistent with the waka umanga's long-term plan, and that the performance and financial reporting by these subsidiaries provides an accurate picture. The non-profit subsidiaries may not be managing valuable assets or generating dividends, but their performance will reflect on the waka umanga and the tribe, as they will usually be receiving some funding from the waka umanga. Even if a subsidiary's funding comes largely from elsewhere – for instance, from the government for health services contracts – the rünanganui must oversee the subsidiary in terms of its fit with the waka umanga's long-term plan, its effects on the waka umanga's relationship with the Crown and on public perceptions, and its ongoing capability.⁴⁷⁴

20.14 Managing the relationship between the rünanganui and the subsidiaries is a matter of establishing parameters and then leaving the details to the organisation to deliver, with policies in place to assess what is delivered. Many of the benefits of subsidiaries would be sacrificed if the rünanganui were able to interfere at will in the subsidiaries' operations. But for the reasons noted above, neither can subsidiaries be left to go their own way.

RELATIONSHIPS BETWEEN SUBSIDIARIES AND THE TRIBE

20.15 Members of the tribe will have a range of relationships with, and interests in, the subsidiaries. Social service subsidiaries will provide services to members, and some members will be employees of subsidiary organisations. Members will have an interest in the performance of subsidiaries, as this will affect the profits available for distribution, the level of services provided, and the reputation and credibility of the waka umanga and the tribe. There will probably be keen interest in the extent to which the subsidiaries are seen to operate in accordance with tribal values, provide employment opportunities for members, and contribute to the cultural and economic development of the constituent communities.

20.16 It is not desirable for members to feel isolated from the operations of the subsidiaries or for the subsidiaries to be subject to conflicting expectations from members and the rünanganui. The rünanganui acts on behalf of the members in overseeing the subsidiaries. Members can express views and concerns about subsidiaries by speaking with their rünanganui representative, raising issues at the annual general meeting, or by calling a special general meeting. Subsidiaries will have to publish statements of intent and annual reports, and information about subsidiaries must be included in the waka umanga's annual report.⁴⁷⁵

20.17 Although the members' interests in governance will be expressed through the rünanganui, there will probably be other opportunities for direct input into the operations of subsidiaries. For instance, a subsidiary that delivers social services to members might, as part of its business planning, seek feedback from members

⁴⁷⁴ See Controller and Auditor-General *Local Authority Governance of Subsidiary Entities* (Wellington, 2001) 91 which discusses the need for clear accountability relationships between local authorities and any trusts and non-profit entities they establish.

⁴⁷⁵ Compare Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 75; and Local Government Act 2002, s 58(1) which specifies that a director's role in a council-controlled organisation is to assist the organisation to meet its objectives and any other requirements of its statement of intent.

as consumers. These measures will provide members with information about the expectations and actual performance of subsidiaries. This information can be used to question and challenge the rünanganui's oversight of the subsidiaries.

CONSTITUTIONS 20.18 Forming a constitution is the first step in establishing the responsibility/accountability relationship between the rünanganui and each of its subsidiaries. The relationship should be fostered if the rünanganui and each subsidiary's board have the opportunity jointly to work out the constitutional arrangements, although the final approval must rest with the rünanganui.

20.19 The purpose of the subsidiary should be defined.⁴⁷⁶ If the subsidiary is a company, its key purpose is presumably to make a profit, but there may be extra dimensions to that. Additional purposes may be, for instance, to provide employment for tribal members or to operate in an environmentally sustainable manner. Whatever the purposes, they need to be clear and the accountability requirements need to reflect and support the purposes.

GOVERNORS 20.20 The rünanganui's relationship with its subsidiaries will be a relationship with each subsidiary's governors, rather than with the subsidiary's managers or staff. The rünanganui can influence subsidiaries through the power to appoint and dismiss governors, although there must be clear rules to ensure that this power is not exercised arbitrarily. This power must be exercised in a way that is consistent with the extent of the rünanganui's ownership interest in the subsidiary. For a wholly-owned subsidiary, the rünanganui would approve all appointments. For a majority-owned subsidiary, agreement will have to be reached with the other shareholding interests.

20.21 According to its particular form, the subsidiary will be subject to minimum legislative standards for governors. For instance, the Companies Act 1993 sets requirements for directors' qualifications and removal from office, and specifies when a director ceases to hold office.⁴⁷⁷ If the subsidiary intends to register as a charity, then the governors' qualifications will need to meet the requirements of the Charities Act 2005.⁴⁷⁸ The rünanganui should consider what additional or alternative rules are necessary, to the extent that they are permitted by the legislation governing the subsidiary. There should be no inconsistency between these rules and the charter of the waka umanga.

Governors' skills and experience

20.22 The literature emphasises the contribution that governors' skills make to the success of an entity. A case study of ten Māori organisations published by the Ministry of Māori Development and the Federation of Māori Authorities states that "[g]ood governance ultimately depends on the quality of people appointed

⁴⁷⁶ The Auditor-General has developed principles of good governance for subsidiary entities of local authorities, one of which is that the "subsidiary entity should have a clearly defined purpose Controller." and Auditor-General *Local Authority Governance of Subsidiary Entities* (Wellington, 2001) 10.

⁴⁷⁷ Companies Act 1993, ss 151, 156 and 157.

⁴⁷⁸ Charities Act 2005, s 16.

to the board and the skills and attitude they bring”,⁴⁷⁹ adding that “[a]ppointing and selecting board members, either for a commercial organisation or a non-profit organisation, is arguably the most critical component to success and longevity”.⁴⁸⁰ The Auditor-General recommends skills and competency-based appointments for local authority subsidiaries,⁴⁸¹ and the Securities Commission’s principles for corporate governance include the principle that “[t]here should be a balance of independence, skills, knowledge, experience, and perspectives among directors so that the board works effectively”.⁴⁸² The Securities Commission further stresses that the directors’ skills, knowledge and experience should be “relevant to the affairs of the entity”.⁴⁸³

- 20.23 We have proposed that there be a Secretariat to provide on-request assistance to tribes in the formation and running of their waka umanga. The Secretariat would be able to assist the rünanganui also to identify the types of skills required for a particular subsidiary. It could maintain a list of suitable appointees or assist with recruitment, and could broker training for directors.

Preference for tribal members

- 20.24 The rünanganui may wish to give preference to tribal members for at least some appointments. The policy might, for instance, require that preference be given to tribal members where they meet the skills and experience requirements for the position. There will undoubtedly be some governance positions where knowledge of, and credibility with, the tribe will be particularly relevant. A rünanganui may also wish to focus on developing and encouraging a new generation of tribal members to aim for future appointments. There are also benefits to be had from the more independent perspective of appointees from outside the tribe.⁴⁸⁴ A mix of both tribal members and outside people is usually optimal.

479 Te Puni Kōkiri and Federation of Māori Authorities *Hei Whakatinana i te Tūrua Pō: Business Success and Māori Organisational Governance Management Study* (Wellington, 2003) 10.

480 Te Puni Kōkiri and Federation of Māori Authorities *Hei Whakatinana i te Tūrua Pō: Business Success and Māori Organisational Governance Management Study* (Wellington, 2003) 13. The ten organisations studied in this report were all business enterprises: Kaikoura WhaleWatch, Wakatu Inc, Tohu Wines Ltd, Palmerston North Māori Reserve Trust, Wairarapa Moana Inc, Te Wānanga o Raukawa, Lake Taupo Forest Trust, Mai Media Ltd, Ngāti Hine Health Trust and Shotover Jet Ltd. See also Charter of Te Rūnanga o Ngāti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) cl 7.4, under which a person will only be appointed as director or trustee if that person has the particular skills and expertise required of a member of the board to which that appointment relates, in light of the activities with which the subsidiary will be involved.

481 Controller and Auditor-General *Local Authority Governance of Subsidiary Entities* (Wellington, 2001) 11.

482 Securities Commission *Corporate Governance in New Zealand: Principles and Guidelines: A Handbook for Directors, Executives, and Advisers* (Wellington, 2004). For discussion of principle 2, see 9–12. Although the Securities Commission’s focus is primarily on issuers of securities, it makes the point that these principles can be generally applied to the wide range of entities that have economic impact in New Zealand, or are in some way accountable to the public. Waka umanga are of course accountable to a particular public, their members: see Securities Commission (above) 4.

483 Securities Commission *Corporate Governance in New Zealand: Principles and Guidelines: A Handbook for Directors, Executives, and Advisers* (Wellington, 2004) 10.

484 The Securities Commission emphasises the importance of independence of mind among directors: Securities Commission *Corporate Governance in New Zealand: Principles and Guidelines: A Handbook for Directors, Executives, and Advisers* (Wellington, 2004) 11.

Rūnanganui representatives as governors

- 20.25 The waka umanga's charter must specify whether representatives from the rūnanganui may serve also as directors or trustees.⁴⁸⁵ Appointing representatives to subsidiary boards is one way of installing the rūnanganui's perspective in the governance of the subsidiary, but it is not the only way, nor necessarily the best way. In the local government context, the Auditor-General recommends exploring other options. These include requiring appointees to have a sound understanding of the priorities of the local authority, ensuring clear articulation of the authority's expectations of the board, and ongoing communication between the authority and the subsidiary on strategic issues and matters of common interest.⁴⁸⁶ These strategies would be equally appropriate for subsidiaries of waka umanga.
- 20.26 Where a representative is appointed to a subsidiary's board, that appointment should be the result of due process and in accordance with the required skills and experience. Observance of the rules governing conflict of interest will be vital when the subsidiary's affairs are discussed by the rūnanganui. This may mean setting limits on how many representatives there may be on any subsidiary's board.
- 20.27 A waka umanga that is also a mandated iwi organisation under the Maori Fisheries Act 2004 will be subject to that Act in respect of representatives serving on the boards of fisheries and quota-holding enterprises. The governors of a mandated iwi organisation must not comprise more than 40% of the total number of governors of a subsidiary quota-holding or fishing enterprise.⁴⁸⁷

Employees as governors

- 20.28 Just as employees of the waka umanga may not normally be representatives on the rūnanganui,⁴⁸⁸ so too must there normally be a separation between the governors of a subsidiary and its staff, so as not to compromise accountabilities. This default position applies unless the rūnanganui resolves otherwise in the best interests of the tribe.

Remuneration

- 20.29 The requirement to publish the remuneration policy for governors and the actual amounts paid is in line with our recommendations for the remuneration of representatives on the rūnanganui. The Secretariat should be able to assist the rūnanganui to make remuneration decisions by providing information on benchmarks.

485 See Charter of Te Rūnanga o Ngāi Tahu (Te Rūnanga o Ngāi Tahu, Christchurch, 2003) cl 6.12, which allows its rūnanga representatives to hold office as both a rūnanga representative and a subsidiary director; and Te Rūnanga a Iwi o Ngāpuhi, which does not allow rūnanga representatives to also be directors of the subsidiaries. Te Rūnanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005), cl 29.2.

486 Controller and Auditor-General *Local Authority Governance of Subsidiary Entities* (Wellington, 2001) 16.

487 Maori Fisheries Act 2004, sch 7, kaupapa 10.

488 Compare Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) cl 74(3).

20.30 Subsidiaries will have their own internal business planning and reporting requirements. These will be determined by the governors of each subsidiary. They will also have external requirements determined by their particular legal framework.⁴⁸⁹ Subsidiaries must also have a planning, monitoring and reporting framework to link them to the rūnanganui, and to give effect to the accountability/responsibility relationship between the two.

20.31 We recommend a system based on statements of intent, monitoring and reporting. This system will apply to all subsidiaries that are majority-owned by the waka umanga.⁴⁹⁰ Local government subsidiaries and Crown entities and Crown entity companies use a similar system,⁴⁹¹ as do some existing Māori entities. For instance, Te Rūnanga o Ngāti Awa requires its subsidiaries to produce statements of corporate intent, five-year plans, annual plans and quarterly reports.⁴⁹²

Statement of intent

20.32 The statement of intent enables the parent body to participate in setting the direction of the subsidiary, provides a public statement of the activities, intentions and objectives of the subsidiary, and provides a basis to hold subsidiary governors accountable to the parent body.⁴⁹³ As part of the accountability requirements, the statement of intent must be available to members once it has been finalised.⁴⁹⁴

20.33 The statement of intent should set out the subsidiary's intentions in the medium-term, usually for the upcoming three-year period, although it is a living document and should be reviewed each year.⁴⁹⁵ The statement of intent must

489 Charities Act 2005, s 41; Incorporated Societies Act 1908, s 23; and Companies Act 1993, ss 208 and 214. A subsidiary that is a registered charity must make an annual return to the Charities Commission, an incorporated society must make an annual financial statement to the Registrar of Incorporated Societies, and a company must make an annual report to shareholders and an annual return to the Registrar of Companies.

490 We note that the Local Government Act 2002, s 71A exempts a council-controlled organisation from the requirements for the statement of intent and half yearly and annual reports, if the organisation is listed on a stock exchange. The Auditor-General has commented that this exemption is not justified as the ownership concerns of the wider public are the same whether the organisation is listed or not: Controller and Auditor-General *Statements of Corporate Intent: Are They Working?* (Wellington, 1998) 117. Similarly, tribal members ought not to be deprived of the accountability information provided by the statement of intent and reports just because the subsidiary is listed on the stock exchange.

491 Local Government Act 2002, s 64; and Crown Entities Act 2004, s 139.

492 See Charter of Te Rūnanga o Ngāti Awa, < <http://www.ngatiawa.iwi.nz/documents/Charter/index.shtml> > (last accessed 31 March 2006) cl 11.

493 See Crown Entities Act 2004, s 138; Local Government Act 2002, sch 8, cl 1; Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 3, cl 1. *Controller and Auditor-General Statements of Corporate Intent: Are They Working?* (Wellington, 1998) 108, describes the Auditor-General's expectations of statements of corporate intent in similar terms, and also as a relationship management document between the shareholder and the entity.

494 See Local Government Act 2002, sch 8, cl 7; Crown Entities Act 2004, s 149; and Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 3, cl 8.

495 Statements of intent for local authority subsidiaries and Crown entities are required to cover at least a three-year period: Local Government Act 2002, sch 8, cl 9(1); and Crown Entities Act 2004, s 139(1).

not be inconsistent with the subsidiary's constitution or with the charter and policies of the waka umanga, and should be written in plain language.

The process

20.34 The usual process for developing a statement of intent involves both the parent body and the subsidiary.⁴⁹⁶ Before the start of the financial year, the subsidiary produces a draft statement of intent for consideration by the parent body. The latter responds with comments, and the subsidiary then provides a revised statement after considering these comments. After the statement of intent is adopted, both the subsidiary board and the parent body have the right to modify the statement in certain circumstances.⁴⁹⁷ These provisions reflect the extent to which the statement ought to represent a partnership or collaborative effort, but the parent body has the final authority to adopt or modify the statement of intent.⁴⁹⁸ These procedures are also appropriate to the relationship between a rünanganui and its subsidiaries.

20.35 The Auditor-General has recommended a higher level of engagement between local authorities and the boards of their subsidiaries in forming the statement of intent, which we endorse.⁴⁹⁹ In addition to receiving the draft statement of intent, the rünanganui should receive information on the strategic outlook for the subsidiary, and use this to assess the draft statement of intent against its own interests and objectives. The rünanganui ought to use its own long-term plan to assist with its assessments of the compatibility between each subsidiary's intentions and its own. The timeframes need to allow for this level of engagement.⁵⁰⁰

20.36 We suggest that development of a statement of intent should include the following steps.

- The governors of the subsidiary must deliver to the rünanganui each year a draft statement of intent for the following three financial years, not less than four months before the end of the waka umanga's current financial year.
- The rünanganui must provide comments on the draft statement of intent to the subsidiary governors not less than two months before the end of the waka umanga's current financial year, and the governors must consider these comments.
- The governors of the subsidiary must deliver the completed statement of intent to the rünanganui before the end of the waka umanga's current financial year.

496 See, for instance, Crown Entities Act 2004, s 146; and Local Government Act 2002, sch 8, cls 2–3.

497 See for instance Crown Entities Act 2004, ss 147–148; Local Government Act 2002, sch 8, cls 4–5; and Ngāti Paoa *Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation* (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 3, cls 5–6.

498 See for instance, Local Government Act 2002, s 65(2).

499 Controller and Auditor-General *Local Authority Governance of Subsidiary Entities* (Wellington, 2001) 26–27.

500 See Local Government Act 2002, sch 8, cls 2–3 under which the first draft is to be delivered to the local authority four months before the start of the next financial year, with comments returned to the subsidiary within two months.

- As soon as practicable after receiving the completed statement, the rünanganui must either adopt the statement of intent or take steps to modify the statement by the procedure specified below.

20.37 The rünanganui should retain the ability to modify the statement of intent, provided that the rünanganui has first given the governors the opportunity to comment on the proposed modifications and has considered these comments. Likewise the governors of a subsidiary may propose modifications to the statement of intent, giving the rünanganui the opportunity to comment. The rünanganui should, as soon as practicable, adopt or modify the statement of intent.

Content of statement of intent

20.38 A well-prepared statement of intent should be characterised by:

- relevance – that is, the information, objectives and performance measures should reflect the entity’s circumstances and be consistent with the business plan and other corporate documents;
- completeness of the information provided on the nature and scope of the entity’s activities, with the objectives and performance measures covering all significant activities and relevant dimensions of performance, and an indication of any underlying planning assumptions; and
- the use of language that is understandable to the general public, the provision of clear rationales for measures and their links to overall objectives, understandable objectives and performance measures.⁵⁰¹

20.39 Depending on the purpose of the subsidiary, the rünanganui and the governors may have agreed some specific objectives, such as profit targets, dividends to be returned to the rünanganui, numbers of cultural events staged or proportion of tribal members employed to total staff. If so, these should be reflected in the statement of intent.

20.40 We suggest that the default schedule should specify that a statement of intent should include the following information:

- the purpose of the subsidiary as defined in its constitution;
- the nature and scope of the subsidiary’s activities;
- how these activities are related to the subsidiary’s purpose and to the strategic vision and/or long-term outcomes of the waka umanga’s long-term plan;
- specific objectives, both financial and non-financial, for the period;
- the performance standards and other measures by which the performance of the subsidiary will be assessed in relation to its objectives;
- future measures to maintain or enhance capacity to fulfil its purpose and to meet the waka umanga’s strategic vision and/or long-term outcomes;
- the planning assumptions that underlie the objectives and measures;
- any internal and/or external factors that could affect capacity to achieve objectives, and how these factors have been taken into account when setting objectives, performance standards and measures;

⁵⁰¹ Controller and Auditor-General *Statements of Corporate Intent: Are They Working?* (Wellington, 1998) 108–109.

- the nature and frequency of reporting to the rünanganui; and
- any other matters agreed by the rünanganui and the governors.⁵⁰²

Reporting and monitoring

20.41 Reporting to the rünanganui against the statement of intent, and making these reports available to tribal members, is the other limb of the accountability process. The statement of intent must include the agreed schedule of reporting to the rünanganui. The Local Government Act 2002 requires a local authority to undertake regular performance monitoring of its subsidiaries, and requires both half-yearly and annual reports by subsidiaries. The reports must include information that compares actual with planned performance, audited financial statements and the auditor's report.⁵⁰³

20.42 The Auditor-General has concluded that reporting against statements of corporate intent should include:

- clear comparisons between the objectives and targets of the statement and the actual performance;
- comparisons over time to reflect the three-year term of the statement and to provide a better guide to overall achievements by reflecting trends; and
- explanation of variations to provide a more complete picture of performance.⁵⁰⁴

20.43 We suggest that a default schedule to the Act should require the governors of each subsidiary to produce an annual report within three months of the end of each financial year, which must:

- be written in plain language, and
- include the information necessary to enable an informed assessment of the operations of the subsidiary, including:
 - details of all performance measures set out in the statement of intent, including the performance standard for each measure;
 - the actual performance achieved against each measure, and an explanation, where relevant, of any material variation between the measure and the actual performance;
 - audited financial statements for that financial year; and
 - the auditor's report on these financial statements.

20.44 The final report must be delivered to the rünanganui and made available to the members, either as a stand-alone report or, by resolution of the rünanganui, in the annual report of the waka umanga.

20.45 Smaller non-profit subsidiaries may lack the resources to prepare a separate annual report. In these circumstances, their reporting information may, by agreement with the rünanganui, be included in the report of the waka umanga

502 Compare Crown Entities Act 2004, s 141; Local Government Act 2002, sch 8, cl 9; and Ngāti Paoa Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation (Ngāti Paoa Māori Entities Project, Pukekohe, 2004) sch 3, cl 10.

503 Local Government Act 2002, ss 65–69.

504 Controller and Auditor-General *Statements of Corporate Intent: Are They Working?* (Wellington, 1998) 109–110.

as a whole. In any event, the waka umanga's annual report must include information from the annual reports of the subsidiaries.

Protection from disclosure of sensitive information

20.46 Local Government Act 2002 provides that council-controlled organisations are not required to include in their statements of intent, financial statements and reports any information that they could properly withhold under the Local Government Official Information and Meetings Act 1987.⁵⁰⁵ Subsidiaries should be similarly protected through application of the general rules applying to the waka umanga's response to information requests from members.

RELATIONSHIP BETWEEN MANAGEMENT OF THE WAKA UMANGA AND SUBSIDIARIES

20.47 We expect the waka umanga's corporate office to support and advise the rünanganui, including providing advice on any subsidiaries.⁵⁰⁶ The waka umanga's corporate office and the subsidiaries should establish relationships that provide for information flow, but do not impede the ability of the corporate office to provide independent advice to the rünanganui.

20.48 The Auditor-General has examined the role of local authority chief executives in relation to local authority subsidiaries. The Auditor-General recommended that the chief executive (or the staff on his or her behalf) be kept fully informed of material matters concerning subsidiaries, but take no part in the subsidiaries' internal governance, so as to retain independence. The Auditor-General also recommended that review of the local authority's interests in its subsidiaries and advice to the local authority on subsidiaries should be a formal responsibility of the chief executive.⁵⁰⁷

ETHICS, VALUES AND CONFLICT OF INTERESTS

20.49 The rünanganui is required to foster the adoption of the principles of its code of conduct throughout the waka umanga and its subsidiaries. This matter should also be addressed in each subsidiary's constitution, and could be given additional emphasis as necessary in the statement of intent.

20.50 Rules to manage conflicts of interest are an important aspect of the code of conduct. The directors of subsidiary companies will be subject to the Companies Act 1993, and any trustees will be under fiduciary obligations. The rünanganui should consider whether any further rules are necessary for the governors of its subsidiaries, and require the subsidiaries to have rules for the proper management of conflicts of interests by managers and staff.

DISPUTES BETWEEN THE WAKA UMANGA AND ITS SUBSIDIARIES

20.51 We would expect that there will be ongoing relationships and dialogue between the rünanganui and its subsidiary boards, and between the chief executive and the subsidiaries, and that this should help to avoid or defuse serious disputes. Disputes may nevertheless arise, and it is better to have dispute resolution procedures established before they are needed. Although formal legal remedies

⁵⁰⁵ Local Government Act 2002, s 71.

⁵⁰⁶ For instance, Te Rünanga o Ngäi Tahu requires its office to provide administrative and secretarial support to the rünanga, to convey the rünanga's instructions and directions to the subsidiaries, to carry out the directions of the rünanga in relation to the subsidiaries and to monitor the subsidiaries' performance: Charter of Te Rünanga o Ngäi Tahu (Te Rünanga o Ngäi Tahu, Christchurch, 2003) cl 10.1(b).

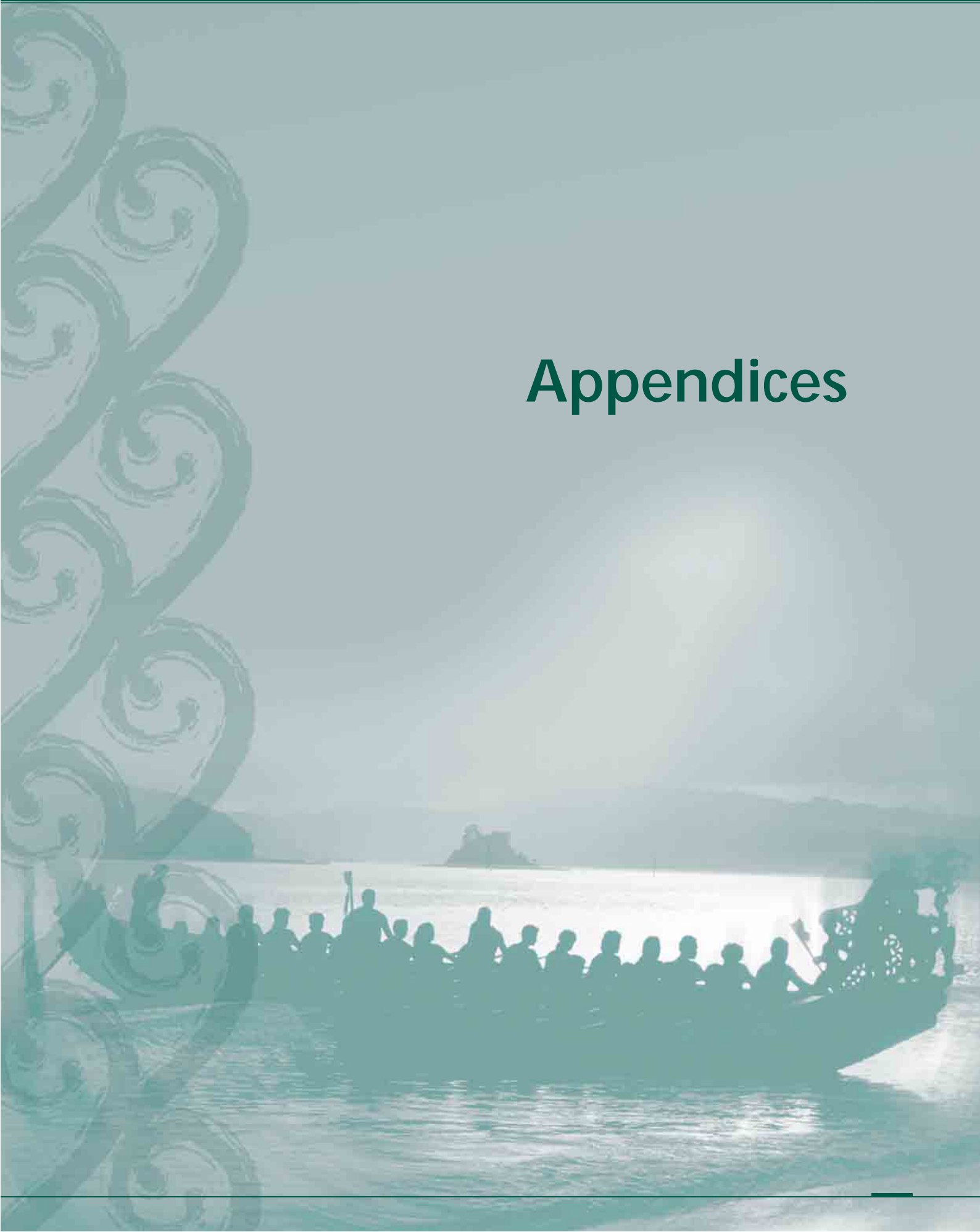
⁵⁰⁷ Controller and Auditor-General *Local Authority Governance of Subsidiary Entities* (Wellington, 2001) 18–19.

will be open to the rünanganui in accordance with the general law,⁵⁰⁸ public legal battles between a rünanganui and its subsidiaries are very costly in financial relationship and credibility terms. Recourse to the courts should therefore be the last resort. The procedure for resolving disputes between the waka umanga and its subsidiaries should instead provide for recourse to the waka umanga's internal disputes resolution system.⁵⁰⁹

508 For instance, under the Companies Act 1993, the rünanganui in certain situations could apply to the High Court for an injunction (s 164); a compliance order (ss 170 and 172); the appointment of an inspector (s 179(1)); or bring an action against a director (s 169(1)). Also, shareholders can take various proceedings in the High Court against a company. Members of incorporated societies and beneficiaries of private or charitable trusts can also enforce rights through the High Court.

509 See the Ngāpuhi constitution, which requires conflict between a subsidiary and the rünanga to be initially dealt with through the disputes resolution procedure. Court proceedings may only be commenced once this procedure has been completed. Te Rünanga ā Iwi o Ngāpuhi Charitable Trust Deed (10 September 2005, cls 28.1(e), 29.1(c)(v)).

Appendices



Appendix 1

Terms of reference

The Commission will develop legal frameworks that will be available to Māori groups wishing to incorporate for the purpose of managing communally-owned assets and giving effect to communal rights and responsibilities on behalf of the members of the group.

In undertaking this project, the Commission will build on the recommendations and options outlined in *Study Paper 13: Treaty of Waitangi Claims: Addressing the Post-Settlement Phase*. In particular, the project will address the Study Paper's recommendations for four core obligations: principles of stewardship, information disclosure, accountability obligations and methods of dispute resolution.


The project will include mechanisms for approval or recognition of the entities, and a process to convert existing entities to the new model should groups wish to do so.

More than one framework may be appropriate in recognition that the groups will be of varying sizes and have diverse roles. It is expected that the frameworks will include some core elements, and in other areas provide options or guiding principles under which groups could develop their own rules. It is likely that the frameworks will be given effect through legislation, possibly with optional schedules, and other aspects addressed in non-statutory constitutions.

The frameworks must be capable of use by groups receiving Treaty and fisheries assets, so the project will address both the issues identified in the "20 Questions" used by Office of Treaty Settlements to assess governance entities, and the 12 kaupapa for mandated iwi organisations as set out in the Maori Fisheries Bill 2003.

The analysis and recommendations will take account of current tax policy in relation to Māori authorities and charitable organisations, and the impact and incentives of these policies.

As well as creating frameworks for the umbrella governance structure, the Commission will consider frameworks for the organisations that often sit under or alongside the overall governance structure. These organisations may be formed, for instance, for health and social services delivery, or for purposes such as employment, education and cultural development. Most of these



organisations are currently organised as trusts or incorporated societies, but there is a wide variety of organisational relationships, including use of charitable trusts. These organisations raise risks and opportunities for the profile and standing of the parent group, for relationships with government, and for wider government funding of service delivery by Māori groups.

The Commission will consider the legal frameworks for these organisations in the context of ways to realise the potential of these bodies and ways to manage the risks.

This aspect of the project recognises that these social service and contract bodies may exist within both tribal structures and in other contexts such as the urban authorities.

Appendix 2

Glossary as used in text

MĀORI

hapū	tribe
hui-a-iwi	general tribal meeting
hui-a-tau	annual general meeting
iwi	tribal confederation
kairongomau	peacemaker, ombudsman
kaitiakitanga	stewardship
kanohi ki te kanohi	face to face
kapa haka	cultural performance
kaumātua	elder
kaupapa	plan
kawa	protocols
mana	personal authority
marae	meeting place
mauri	life force
pākehā	European New Zealander
panui	notice
pukenga	custom law advisors
rangatahi	youth
rangatira	leader
rangatiratanga	autonomy
rohe	boundary
rūnanga	council
rūnanganui	confederation council
takiwā	district
tāngata whenua	local tribe
tangihanga	funeral
taonga	treasure
taurahere	urban tribal collective
Te Ohu Kaimoana	A body established under Maori Fisheries Act 2004 to administer Māori fisheries assets
Te Puni Kōkiri	Ministry of Māori Development
tikanga	custom law
tupuna/tipuna	ancestor



waka	vehicle, canoe
waka umanga	Māori corporation
waka tūmaha	general-Māori corporation
waka pū	tribal corporation
whakapapa	geneology
wānanga	school of learning
whānau	extended family
whānaungatanga	kinship maintenance
whāngai	customary adopted persons

Appendix 3

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Appendix 4

List of consultees

Angela Ballara	David Hurley
Dame Margaret Bazley	Inland Revenue Department
Tom Bennion	Andrew Irwin
Richard Benton	Judge Wilson Issac
Malcolm Birdling	Robert Joseph
Richard Boast	Kahui Legal
Mary Boyd	Bill Karaitiana
Leslie Brown	Kensington Swan
Business New Zealand	Pihopa Kingi
Lyn Carter	Grant Knuckey
Claire Charters	Sir Graham Latimer
Professor Robert Clinton	June McCabe
Crown Forestry Rental Trust	John McEnteer
Materoa Dodd	Juliet McKee
Michael Doogan	Colin McKenzie
Peter Doolin	Nanaia Mahuta MP
Professor Mason Durie	Professor Hirini Moko Mead
Stewart Edward	Richard Meade
Andrew Erueti	Ministry of Economic Development
Ripeka Evans	Paul Meredith
Professor Alex Frame	Dame Joan Metge
Jeremy Gardiner	Judge Stephanie Milroy
Andrew Geddis	Paul Morgan
Kirsty Gover	New Zealand First Party
David Gray	Tama Nikora
Jim Gray	Garth Nowland-Foreman
Neil Gray	Office of Treaty Settlements
Judge Layne Harvey	Pita Paraone MP
Hauraki Greenland	Alan Parker
Bill Gudgeon MP	Atareta Poananga
Human Rights Commission	Privacy Commission

Gina Rangi
Matiu Rei
Mike Reid
Marc-Rene Ruakere
Geoff Sharp
Michael Sharp
Professor Keith Sorrenson
Tai Tokerau Community Legal Service
Tai Tokerau District Maori Council
Tainui Taranaki ki te Tonga
John Tamihere
Georgina Te Heuheu MP
Te Hunga Roia Maori O Aotearoa
Te Matahauariki Institute
Te Ohu Kaimoana
Teresa Te Pania-Ashton
Te Puni Kōkiri
Te Runanga O Ngati Apa
Allison Thom
Tariana Turia MP
Dion Tuuta
Jamie Tuuta
Waaka Vercoe
Keita Walker
Judge Carrie Wainwright
Alan Ward
Nicola White
Judge Caren Wickliffe
Chief Judge Joe Williams
Whatarangi Winiata