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TE·AKA·MATUA·O·TE·TURE

Study Paper 13

TREATY OF WAITANGI CLAIMS:
ADDRESSING THE
POST-SETTLEMENT PHASE

AN ADVISORY REPORT FOR TE PUNI KŌKIRI,
THE OFFICE OF TREATY SETTLEMENTS AND
THE CHIEF JUDGE OF THE MĀORI LAND COURT

August 2002
Wellington, New Zealand

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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Preface

THE PROJECT

IN *MĀORI CUSTOM AND VALUES IN NEW ZEALAND LAW* the Law Commission identified as an issue of high importance:

... the need to devise structures to ensure the success of settlements entered into by the Crown with Māori for historic grievances arising out of breaches of the principles of the Treaty of Waitangi. Of particular importance is the need to facilitate the efficient administration of the new class of kin-owned assets.

After a settlement has been negotiated, those with a mandate to govern the administration and allocation of the settlement assets must decide how the assets are to be administered and allocated to enable the betterment, economically and socially, of the group on whose behalf they have been negotiated.¹

The Chief Judge of the Māori Land Court has identified as no less important the need for a suitable dispute resolution mechanism because, in his opinion:

... [t]he next ten years will see inevitably an increase in kin-group discussion and disputation over issues such as:

- governance capacity;
- succession and/or membership of the beneficiary kin group;
- leadership accountability to the kin group;
- beneficiary participation in policy formulation for the kin group; and
- benefit distribution and utilisation.²

This study paper speaks to these two major issues.

TERMS OF REFERENCE

One of the principal functions of the Law Commission is “to make recommendations for the reform and development of the law of New Zealand”.³ In making recommendations, the Commission is specifically required to take into account *te ao Māori* (the Māori dimension).⁴

The Commission has been asked by the Minister Responsible for the Law Commission to provide an advisory report for the benefit of Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court on the basis of the following terms of reference:

¹ New Zealand Law Commission *Māori Custom and Values in New Zealand Law: NZLC SP9* (Wellington, 2001), 90.

² Submission of the Māori Land Court Judges to the Māori Affairs Select Committee on Te Ture Whenua Māori Amendment Bill 1999, 13.

³ Law Commission Act 1985 s 5(1)(b).

⁴ Law Commission Act 1985 s 5(2)(a).

To enquire into and report on the following issues:

- 1 Is there a need for changes, whether administrative or legislative, to address problems which have arisen in the period leading up to and in the course of implementation of settlements for breaches of the principles of the Treaty of Waitangi? In particular, is there a need for a generic post-settlement entity to be developed?
- 2 If specific problems are identified which require administrative or legal changes, what changes are recommended?
- 3 If legislation is recommended, what should be the form of the legislative framework?

The Commission's Memorandum of Understanding with its Minister requires a report on these issues by 30 June 2002.

The issues raised by this study paper are of great importance to Māori, but within the time available it has not been possible for the Commission to consult widely with Māori. This study paper can only be the first, and not the last, word on the subject.⁵

ACKNOWLEDGEMENTS

In preparing this paper the Commission has had the advantage of discussions with officials from Te Puni Kōkiri (TPK) and the Office of Treaty Settlements (OTS), a representative of Te Ohu Kai Moana (TOKM),⁶ and the Chief Judge of the Māori Land Court. (These discussions should not be elevated to the status of formal consultation.)

The Commission is grateful to the people and organisations with whom there have been discussions, including:

- Members of Te Mātāhauariki Research Institute under the guidance of Adjunct Professor Judge Michael JA Brown CNZM; in particular, Dr Alex Frame, Paul Meredith and Robert Joseph;
- Chief Judge Joseph Williams and staff in the Chief Judge's Chambers at the Māori Land Court;
- Ben Paki and members of the Law Reform Branch of TPK;
- Tony Sole of TOKM.

The Commission is grateful for the support and guidance of the members of the Māori Committee to the Commission:

- Sir Graham Latimer KBE;
- The Honourable Justice Durie;
- Judge Michael JA Brown CNZM;

⁵ The Commission notes that the report of the New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi* (Wellington, 1983) helped provide the policy basis for Te Ture Whenua Māori Act 1993, and suggests that a similar approach may be useful with respect to the issues raised in this paper, given both the undoubted importance of Treaty settlements and the need for Māori to have ownership of the process.

⁶ Also known as the Treaty of Waitangi Fisheries Commission.

- Professor Mason Durie CNZM;
- Jacqui Te Kani CNZM;
- Shane Jones;
- Te Atawhai Tairaoa; and
- Chief Judge Joseph Williams.

The Commissioners responsible for the study paper are Professor Ngatata Love QSO JP and the Hon Justice Paul Heath. The research, and some of the writing, was undertaken by Simon Karipa, to whom the Commission expresses its appreciation. The Commission is grateful to TPK for seconding Simon Karipa to the Commission to undertake this project.

1

Introduction

POST-SETTLEMENT ISSUES

- 1 SINCE 1985 THE WAITANGI TRIBUNAL has had jurisdiction to inquire into and make recommendations on Crown acts or omissions, which constitute breaches of the principles of the Treaty of Waitangi, from 6 February 1840, the date on which the Treaty was signed.⁷ Any Māori person may bring a claim under the Treaty of Waitangi Act 1975 on behalf of a group of Māori.⁸
- 2 Over the last decade, Deeds of Settlement have been concluded between the Crown and a number of settlement groups,⁹ with several more still to be completed.¹⁰ There are also at least 30 groups in negotiation with the Crown or in regular contact with the Office of Treaty Settlements (OTS). In addition, benefit allocations under the pan-tribal fisheries settlement concluded in 1992, are likely in the near future.¹¹
- 3 The Commission's analysis of the relevant case law and existing legal entities in use by Māori,¹² and discussions with officials from Te Puni Kōkiri (TPK) and OTS, and with the Chief Judge of the Māori Land Court, have confirmed the significance of the two issues prompting the Commission's reference.
- 4 First, there is at present, no uniform settlement model, able to be adapted to meet the particular needs of each individual settlement group and its members, which defines satisfactorily the core functions of those responsible for stewardship of the settlement assets.
- 5 Secondly, there is at present, no model mechanism to ensure that, when disputes arise among members of settlement groups (or between members of the group and those responsible for stewardship of the settlement assets), such disputes can be resolved promptly, and in a manner consistent with the cultural expectations of the group, by a forum knowing those expectations and operating with the confidence of the group.

⁷ For a discussion of the Treaty of Waitangi settlement process, see appendix A.

⁸ Treaty of Waitangi Act 1975 s 6(1); see also the definition of "Māori" in s 2 of the Act.

⁹ Waikato-Tainui, Ngai Tahu, Ngati Turangitukua, Pouakani, Te Uri o Hau, Ngati Ruanui, Ngati Whakaue, Te Maunga, Rotoma, Waimakuku, Hauai, Ngati Rangiteaorere have all been signed, with Ngati Tama, Te Uri o Hau and Ngati Ruanui awaiting the passage of legislation implementing their Deed of Settlement.

¹⁰ Ngati Awa, Ngati Mutunga, Rangitaane o Manawatu, Te Atiawa, Nga Rauru and Te Arawa Lakes have all signed Heads of Agreement or Agreements in Principle.

¹¹ Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

¹² See appendix B, and for a summary see appendix C.

6 There is, the Commission considers, a need for a model settlement entity, that answers both deficiencies and that marries existing legal principles with Māori values.

7 There is also the possibility that such an entity might serve wider purposes than just receiving assets transferred in settlement of Treaty grievances, and their use by the relevant settlement group. This will be a matter for Māori to consider.

DEFINING CONSIDERATIONS

8 In this analysis the following considerations are of prime importance.

Tribal identity

9 First, any new settlement model must support, and not be to the detriment of, tribal identity. As Professor Durie has noted:

... [d]ifferent concerns about modern tribal governance structures have ... been raised in connection with the emphasis on business models, which appear to corporatise iwi. Tribal members are aware of the corporations in Alaska which have all but ousted traditional tribal structures and are keen to avoid creating economically orientated organisations which fail to capture the essential cultural basis of the tribe.¹³

10 This danger can be avoided, the Commission believes, by creating a framework that recognises the importance of tikanga Māori.

Mandate and representation

11 Secondly, there are the enduring issues of mandate and representation of Māori in the Treaty claims process.¹⁴ These issues have their origin in the pre-settlement process, and in that sense are beyond the Commission's reference. But, any conflict in that phase can lead to problems in the post-settlement phase, upon which this paper focuses.

12 These issues can be within, or between kin groups, or expand to groups beyond kin groups involved in the settlement process. The role of the Crown in this area is a specific issue in itself.

13 The Crown prefers, when resolving Treaty grievances, to settle with "large natural groups", which may comprise a combination of claimants.¹⁵ While this

¹³ Mason Durie, *Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) 226–227.

¹⁴ For example, determining Māori groups for consultation purposes under the Resource Management Act 1991, amongst others. See, however, *Determining Representation Rights under Te Ture Whenua Māori Act 1993: An Advisory Report for Te Puni Kōkiri* (NZLC SP8, 2001) which made suggestions for amendments to s 30 Te Ture Whenua Māori Act 1993 based on concepts of mediation rather than court adjudication. See also the comments made by Judge Wainwright in the paper "Maori Representation and the Courts" delivered at the New Zealand Centre for Public Law's *Roles and Perspectives in the Law*, 5–6 April 2002, Victoria University of Wellington. See also the *Review of the Office of Treaty Settlements* by the Māori Affairs Select Committee (included as appendix A in the 2000/01 *Financial Review of the Ministry of Justice*, as reported by the Justice and Electoral Select Committee.)

¹⁵ See Office of Treaty Settlements *Healing the Past, Building a Future* (Wellington, 1999) 52; Justice and Electoral Select Committee 2000/01 *Financial Review of the Ministry of Justice*, 11.

approach certainly has advantages for the Crown and in some instances for the settlement group, the potential for disputes is greater when different kin groups are involved in the same settlement.¹⁶

Cost

- 14 Thirdly, the cost of creating suitable settlement entities is a significant issue in itself. The entity must be cost-effective, especially from the claimants' point of view.

Current policy

- 15 Fourthly, adherence to current Crown policy is a further consideration: specifically the criteria for post-settlement entities, and those applied by Te Ohu Kai Moana (TOKM).¹⁷ The Commission is in general agreement with these criteria, but considers that they need to be refined to take into account tikanga Māori.

Commercial efficacy

- 16 Fifthly, any entity must allow the settlement group to advance economically. There are instances of entities created in the past that have disadvantaged Māori economically.

A flexible approach

- 17 Finally, the Commission's preference is that any structure must be flexible enough to empower the various settlement groups to determine their own priorities, and how the priorities are to be given effect. Four elements, however, will always need to be present: stewardship, accountability, transparency and dispute resolution.

¹⁶ For instance, it is cost-efficient, from the point of view of both the Crown and claimants, and makes the process easier to manage and work through, helps deal with overlapping interests, and gives the opportunity for the settlement package to cover a wider range of redress.

¹⁷ Crown policy with respect to governance/settlement entities has been developed over the last decade, with the Crown recognising that an entity must represent all members of the claimant community; have transparent decision-making and dispute resolution processes; and be accountable to the claimant community. In the case of dispute resolution, the Crown insists generally on appropriate clauses in the trust deed that deal with 'significant transactions', for example, decisions that may involve a significant proportion of the settlement assets. While this type of transaction would obviously fall into one of the categories identified by the Chief Judge above, there are a number of other potential disputes that this type of clause is not designed to cater for.

2 Treaty claims

TYPES OF TREATY CLAIM

- 18 **M**ĀORI GROUPS, who bring claims under the Treaty of Waitangi Act 1975, are most often bonded by blood. The usual common denominator of each group is the ability of each member to whakapapa¹⁸ to a common tipuna.¹⁹
- 19 While a goal of the settlement process should be to encourage management “by Māori, for Māori”, there are difficulties. Even where a settlement has been effected with members of a settlement group, there remains the potential for dispute between the tribal leadership and members of a particular whānau or hapū²⁰ over use or distribution of assets or the proceeds of assets. When settlements embrace more than one kin group, disputes are more likely still.
- 20 Although most claims have, in the past, been brought by kin groups, the new reality is that more Treaty claims are being brought by Māori not bonded necessarily by kinship. These claims focus on generic issues. Examples are the claims relating to flora and fauna,²¹ generic broadcasting,²² electoral issues,²³ Crown asset sales,²⁴ forestry ownership,²⁵ fisheries²⁶ and the Māori language.²⁷ A contemporary example is the current Volcanic Inner Plateau (VIP) claim. Such approaches are likely to carry an even greater potential for tension than that which exists already within groups.
- 21 Tensions are more likely to turn to disputes once assets are transferred to the claimant group. Ideally, the group should be able to resolve its own disputes, but experience has shown that this does not happen and the disputes inevitably reach the general courts.

¹⁸ Translates generally as “genealogy”, but in this context used to connote the tracing of descent from a tipuna.

¹⁹ Translates as “ancestor”.

²⁰ In general, translated as “sub-tribe” or “clan”. Historically, the major socio-political grouping in Maori culture.

²¹ WAI 262.

²² WAI 176.

²³ WAI 413.

²⁴ Culminating in the Treaty of Waitangi (State Enterprises) Act 1988 that followed the decision in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

²⁵ For example, WAI 790 (also known as the Volcanic Inner Plateau (VIP) claim).

²⁶ Culminating in the Treaty of Waitangi (Fisheries Claim) Settlement Act 1992.

²⁷ WAI 11.

- 22 Already, outside the realm of Treaty settlements, the real issues before the courts lie within one of the five areas identified by the Chief Judge,²⁸ sometimes masked by the way in which the cases have been pleaded: governance,²⁹ succession and/or membership of a kin group,³⁰ leadership accountability within a kin group,³¹ participation of members of a kin group in policy formulation,³² and the distribution of benefits among members of the kin group.³³
- 23 These disputes are not easily resolved under the general law by a judge inexperienced in the tikanga of a particular iwi. (For example, in *Te Runanga o Atiawa v Te Atiawa Iwi Authority*³⁴ conflicting evidence as to what constituted the tikanga of Te Atiawa was presented to the Judge.)³⁵
- 24 Disputes are better anticipated, and resolved, the Commission considers, by empowering the settlement group to make rules that are consistent with community expectations, and which enable such disputes to be resolved in a manner that promotes confidence. Additionally, or where the group itself cannot solve disputes, there may be a role for the Māori Land Court in some capacity.

EMPOWERMENT OF THE SETTLEMENT GROUP

- 25 The development of New Zealand scholarship relating to Treaty of Waitangi settlement issues is still at an early stage, but useful information can be derived from the Harvard Project on American Indian Economic Development.³⁶
- 26 The Harvard Project found that tribal decision makers are likely to make better choices than non-tribal decision makers about the future development of the tribal group. Indeed, a strong tribal culture was found to be a resource that

²⁸ New Zealand Law Commission *Māori Custom and Values in New Zealand Law*: SP9 above n 1.

²⁹ For example, see *Re Edwards* (1998) 1 Waiariki ANB 102 (MAC), *Re Rangitane o Tamaki Nui A Rua Inc* (1996) 1 Takitimu ACMB 96 (MAC).

³⁰ For example, see *Re Oku Rauapatu B4B2A Block* (2000) 13 ACTK 154 (MAC), *Re Waimania Hohua* (2001) 10 APRO 43 (MAC), *Re Hoturangi Tautau* (1999) 33 ACMB 228 (MAC) and *Re Rawinia Tuki* (1999) 9 Waiariki ACMB 247 (MAC).

³¹ For example, see *Re Tikirahi Block* (1995) Waikato Maniapoto ACMB 266 (MAC) and *Re Lynette Walker* (1995) 18 Waikato Maniapoto ACMB 260 (MAC).

³² For example, see *Re Rotoma No 1 Block Inc* (1996) 1 Waiariki ACMB 25 and *Re Tatarakaikina C Block* (1994) 11 Takitimu ACMB 50 (MAC).

³³ For example, see *Re Te Karaka Ahi Tapu* (2000) 5 APWH 209 (MAC) and *Re Te Hapua 24* (2000) Tokerau ACMB 275 (MAC).

³⁴ *Te Runanga o Atiawa v Te Atiawa Iwi Authority* (10 November 1999) High Court New Plymouth CP13/99 Robertson J.

³⁵ On this point the Commission notes that the work of the Te Mātāhauriki Institute at the University of Waikato. In particular, the project Te Matapunenga (which involves the compilation of a knowledge base of Māori customary law) will provide useful references for the judiciary and public alike.

³⁶ See Stephen Cornell and Joseph Kalt (eds) "What Can Tribes Do? Strategies and Institutions in American Indian Economic Development" Harvard Project on American Indian Economic Development website at <http://www.ksg.harvard.edu/hpaied/reloading%20the%20dice.pdf> (last accessed 26/02/02).

strengthened tribal governance. Cultural assimilation is not a prerequisite for economic development.³⁷

- 27 Also, amongst several distinguishing features of successful tribal governance structures identified by the study, two were:
- a governance structure that separates the functions of elected representatives and business managers;
 - the ability to settle disputes fairly.
- 28 Each settlement group will need, at the least, to be able to make decisions in a timely fashion. But the particular needs of each group will differ. Some groups will place emphasis on economic development, others on social development, and yet others may seek a holistic approach to Māori development.
- 29 The appropriate degree of interaction between management of the settlement entity and members of the settlement group can only be determined by the group, but reporting on an annual basis should be a minimum requirement.

CREATION OF SETTLEMENT ENTITY

- 30 The creation of a suitable settlement entity needs to be planned for early in the settlement process.
- 31 Evidence suggests that sometimes the creation of the settlement entity is seen as the last hurdle to overcome in achieving settlement of Treaty grievances.³⁸ Planning and consultation may often be inadequate. Commentators have noted:
- A common aspect of the settlement processes and outcomes is disagreement as to the basis for representation (by marae, hapū, or otherwise) within the governance structure and the mechanisms for accountability ... Many groups complain that no funding or information is given to ‘minority’ groups with which to formulate and propose alternative governance models. As a result, iwi members are often presented with a single proposed model, developed with or without consultation (and sometimes inconsistent with consultation undertaken). Because the development of the governance body is generally the responsibility of the tribal negotiators, the settlement package and the governance body are usually presented to the tribe as co-requisites.³⁹
- 32 The Crown contributes towards costs in order for the settlement group to complete the ratification of both the Deed of Settlement and the settlement entity. While claimants have a choice as to where this funding is allocated,

³⁷ We also note with approval the comments of Dame Evelyn Stokes in “Individualisation of Māori Interests in Land” (Te Mātāhauariki Institute Monograph, 2002, forthcoming) 185–186:

Governing institutions match the societies culture when its governing authority is exercised and its members regard that as legitimate ... Institutions have to have legitimacy with the people if they are to work.

³⁸ Although some groups have created an entity well in advance of settling their claims, or even before entering negotiations. A standardisation of this process would be useful.

³⁹ Christian Whata, Martin Dawson and Gina Rangi “Inter and Intra Tribal Debate” (Paper presented at the Business Information in Action Public Law Conference 2002, Duxton Hotel, Wellington, 16–17 April 2002) 8.

they generally organise consultation hui and postal voting on both issues at the same time in order to minimise costs.⁴⁰

- 33 While the group has a choice in how to organise these matters, it may be that the settlement entity is so important that the two issues, of ratification of settlement entity and Deed of Settlement, are better kept as distinct as possible. The Commission considers that more involvement from government agencies would be useful in this respect. As the Māori Affairs Select Committee recently noted:

The Office of Treaty Settlements considers it is for the claimant community to determine how the ratification process is carried out. Given that the conduct of the ratification process can affect the durability of settlements, we have reservations about the wisdom of this hands off approach. We consider care should be taken to organise the communication hui so that major marae within the settlement area are not excluded from the process. Also, where groups have expressed concern about the settlements, special care should be taken to ensure they have full opportunity to participate.⁴¹

ISSUES OF ECONOMY

- 34 The cost of establishing the current settlement entity of choice, the trust,⁴² can be extremely high because the trust deed must be fitted to the circumstances of the particular group. The approval of the form of the deed can also call for considerable work by OTS.
- 35 The Office of Treaty Settlements estimates that to review a single settlement entity, as well as assigning two to three senior analysts to the project over a period of months, it spends between \$20,000–\$30,000 on legal advice.⁴³ The cost to claimants, who lack the institutional experience of OTS, can be expected to be two to three times higher.
- 36 In the case of settlements concerning relatively small assets, the Commission is concerned that the costs to beneficiaries might reduce significantly, and could even negate, the benefits to which they are entitled.
- 37 If a single model entity was available, which could receive settlement assets, costs should be a lot lower, because a standard form entity is less likely to be time consuming to adapt than an entity that has to be created specifically.
- 38 The taxable status of settlement entities also needs to be clarified given the importance that both the Crown and Māori attach to the issue,⁴⁴ as does the need to achieve a commercially effective vehicle.

⁴⁰ An exception to this rule was the process undertaken by Ngati Ruanui, where the concern of ‘information overload’ was expressed. This is an understandable reason for separating the two issues, and a sensible approach to take.

⁴¹ Māori Affairs Select Committee *Report of the Māori Affairs Select Committee on the Te Uri o Hau Claims Settlement Bill*, 3–4.

⁴² See appendix B, paras B32–B34.

⁴³ Letter from OTS to the Law Commission 18 October 2001.

⁴⁴ See Walters J “Māori Trusts and Māori Charitable Bodies” [2002] NZLJ 65–66.

3

Tikanga Māori

39 **T**IKANGA LIES AT THE HEART OF MĀORI SOCIETY, is unique to each iwi, and is dynamic. As Professor Hirini Mead has said:

There are some citizens who go so far as to say that tikanga Māori should remain in the pre-Treaty era and stay there. To them tikanga Māori has no relevance in the lives of contemporary Māori. That body of knowledge belongs to the not so noble past of the Māori. Individuals who think this way really have no understanding of what tikanga are and the role tikanga have in our ceremonial and in our daily lives. It is true, however, that tikanga are linked to the past and that is one of the reasons why they are valued so highly by the people. They do link us to the ancestors, to their knowledge base and to their wisdom. What we have today is a rich heritage that requires nurturing, awakening sometimes, adapting to our world and developing for the next generations.⁴⁵

40 Tikanga can be seen in its most overt form on the various marae of Aotearoa/New Zealand. However, tikanga is a pervasive influence, and marae are not the only places where tikanga plays an important role for Māori.

41 Anecdotal evidence suggests that, even where detailed legal rules have been laid down (for example, in trust orders made by the Māori Land Court), kin groups do not always expect the rules to be followed closely. The “rules” are seen more as “guidelines”. Chief Judge Williams remarks:

The reality in my experience is that people who are kin group members appearing before the Court do not by and large take much notice of the enforced assimilation of the statute. They come to Court, if they are in conflict, armed with the tikanga-based arguments which support their position. Trustees are appointed to administer lands not for their skills, but for their seniority within the leading families. The view of kaumātua will take priority whatever the shareholding of those individuals, and sometimes whether or not those individuals own shares at all. Whatever the strict legal rights of beneficial owners as tenants in common of undivided interests in Māori freehold land, the imperatives facing the wider kin group will often prevail in a manner directly contrary to ordinary rules of entitlement according to good principles of equity. The will of non-owners will sometimes prevail. Judges will always find a way to defer to tikanga unless the statute and the tikanga are in direct conflict and even then there is often room for creativity, and sometimes that option is taken up.⁴⁶

⁴⁵ Quoted in *Maori Custom and Values in New Zealand Law: NZLC SP9*, above n 1, 3.

⁴⁶ Joseph Williams “The Māori Land Court – a separate legal system?” (Paper presented at the Victoria University of Wellington Public Law Seminar Series Address, Victoria University of Wellington Law School, Wellington, 10 July 2001).

NGA UARA O NGA TIKANGA: THE VALUES UNDERPINNING TIKANGA

42 In *Māori Custom and Values in New Zealand Law*, the Law Commission summarised the central values that underpin the totality of tikanga Māori, as:

- whanaungatanga – primarily this denotes the relationships between people bonded by blood, and the rights and obligations that follow from the individuals place in the collective group.⁴⁷
- mana – encompasses political power, as well as authority, control, influence and prestige.⁴⁸
- tapu – seen as part of a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons and traditional values.⁴⁹
- utu – relates to the concept of reciprocity in order to maintain relationships between people.⁵⁰
- kaitiakitanga – relates to the notion of stewardship and protection, often used in relation to natural resources.⁵¹

Each tribal grouping will have its own variation of these and have different ideas on the values that inform tikanga Māori.⁵²

43 In addition, the constitution of a settlement entity would need to take account of tikanga tangata (social organisation) tikanga rangatira (leadership) and tikanga whenua (connections to the land).⁵³

WHAKATAUKĪ AS ILLUSTRATIVE OF TIKANGA

44 As Judith Binney pointed out:

Māori had a legal system based upon well-established custom, concepts of collective responsibility and the resolution of disputes through compensation.⁵⁴

⁴⁷ Discussed in *Māori Custom and Values in New Zealand Law: NZLC SP9*, above n 1, paras 130–136.

⁴⁸ Discussed in *Māori Custom and Values in New Zealand Law: NZLC SP9*, above n 1, paras 137–149.

⁴⁹ Discussed in *Māori Custom and Values in New Zealand Law: NZLC SP9*, above n 1, paras 150–155.

⁵⁰ Discussed in *Māori Custom and Values in New Zealand Law: NZLC SP9*, above n 1, paras 156–162.

⁵¹ Discussed in *Māori Custom and Values in New Zealand Law: NZLC SP9*, above n 1, paras 163–166.

⁵² See *Māori Custom and Values in New Zealand Law: NZLC SP9*, above n 1, para 125; in particular, see also footnote 161.

⁵³ See *Māori Custom and Values in New Zealand Law: NZLC SP9*, above n 1, paras 183–200.

⁵⁴ Judith Binney “The Native Land Court and the Māori Communities” in Judith Binney, Judith Bassett and Erik Olssen (eds) *The People and the Land: Te Tangata me te Whenua: An illustrated history of New Zealand 1820–1920* (Allen & Unwin, Wellington, 1990) 17.

- 45 These principles of collective responsibility underpin the rules that deal with the holding or use of assets by one group of people on behalf of another. By way of example, there are these whakataukī:
- “He waka eke noa” – “A canoe on which everyone can embark”.⁵⁵
 - “Ma pango mā whero ka oti te mahi” – “By red and by black the work is finished”.⁵⁶ The red refers to the mixture of shark oil and red ochre (kōkōwai) which was smeared on a chief. By contrast the rank and file workers appeared black. The saying means that only by the united labour of chiefs and their followers can the task be accomplished.
- 46 Other whakataukī reflect the behaviour required to give proper effect to the principle of collective responsibility through other means:
- “He tanga kakaho koia kitea e te kanohi, tena ko te kokanga ngākau e kore e kitea” – “If the layers of reeds in the roof of a house do not lie parallel to the rafters the eye can see the crookedness; but the recesses of the human heart you cannot see.”⁵⁷ This whakataukī expresses the sentiments that lie behind the principle of transparency.
 - “Ko te tumu herenga waka” – “The stump to which the canoe is tied.” This metaphor portrays the influence and reliability of a notable chief: it expresses sentiments similar to the duties of stewardship owed by persons who manage things on behalf of others.⁵⁸
- 47 A further example of a whakataukī, that deals with dispute resolution, albeit specific to Ngati Maniapoto, is:
- “Haere mai haere mai ki te marae o Hine”
“Welcome welcome to the marae of Hine!”
- The Chief Maniapoto had forbidden any conflict on his daughter Hine’s marae. Consequently, the term “Hine’s marae” became a metaphor for mutual ground where peace is made and kept.
- 48 Whakataukī could readily form part of any governing constitution, as illustrative of the values with which the settlement group wishes to imbue the entity.

TIKANGA AND THE SETTLEMENT ENTITY

Limiting factors in the process

- 49 Tikanga Māori needs to be central to any process that governs and manages settlements, but the current regime imposes two limiting factors.

⁵⁵ AE Brougham and AW Reed *The Reed Book of Māori Proverbs* (Reed Publishing, Auckland, 1963) 14; Sidney M Mead and Neil Grove *Ngā Pēpeha a ngā Tīpuna* (Victoria University Press, Wellington, 2001) 136.

⁵⁶ See Mead and Grove *Ngā Pēpeha a ngā Tīpuna*, above n 55, 282.

⁵⁷ Sir George Grey *Ko nga Whakapepeha me nga Whakaahuareka a nga Tīpuna o Aotearoa: Proverbial and Popular Sayings of the Ancestors of the New Zealand Race* (Saul and Solomon, Cape Town, 1857) 27.

⁵⁸ See Mead and Grove, above n 55, 262 and Brougham and Reed *The Reed Book of Māori Proverbs*, above n 55, 11.

- 50 The first is the criteria laid down by the Crown (and similarly Te Ohu Kai Moana (TOKM)) that must be complied with in order for the settlement group to receive assets.⁵⁹ Not all criteria are compatible with tikanga.
- 51 Secondly, while the Crown is relatively flexible in its approach to the choice of legal entity made by the settlement group, expression of tikanga is limited by the types of entity available. Most entities were created without Māori values in mind. They instead derive from English law.

Entitlement to benefits

- 52 According to tikanga, benefits usually accrue through whakapapa and mana. Mana can be both conferred by whakapapa (where the individual is defined in terms of their blood relationship with others), and could be earned through participation in, and contribution to, the group.
- 53 Today, group entitlements to the benefits of Treaty settlements are generally determined by whakapapa alone. While traditionally, for Māori, involvement in, and contribution to, society were paramount to issues of entitlement, today's reality is that only whakapapa can be the basis for inclusion in the settlement group. This is especially so where the alienation of Māori from their tribal groups has been the result of past Crown actions.⁶⁰
- 54 What is critical is that the benefits of settlement need to be made available to all those whose tipuna were affected by breaches of the Treaty, so that the kin group as a whole is able to exercise te tino rangatiratanga. Any exclusion of those Māori alienated from their tribal roots could possibly expose the Crown to further legal risk, frustrating the goal of full and final settlement.

TIKANGA AND DISPUTE RESOLUTION

- 55 Māori decision-making processes are not easily turned into detailed rules of a type with which Pākehā (or their law) are familiar. Decision making by Māori, certainly on the marae, is still linked to mana. It is not necessarily *what* is said that will sway the day; those present will also place great emphasis on *who* says what. To understand *how* a decision has been made on a marae, one must understand the particular community and the mana of the individuals who spoke.
- 56 Traditionally, Māori dispute resolution has taken place primarily on the marae, with emphasis as much on the process as on the outcome. In *Korero Tahi: Talking Together*, Dame Joan Metge explains that:

Māori collectively see the marae as the appropriate venue for debating issues of all kinds, especially at family and community level. Discussion is an integral part of every gathering held on a marae, whether the community is meeting on its own or entertaining visitors, and whatever the publicly announced reason for coming

⁵⁹ Office of Treaty Settlements, TPK and the Crown Law Office are all involved in reviewing any proposed settlement entity and provide reports to the Minister in Charge of Treaty of Waitangi Negotiations (who has delegated authority from the Cabinet to approve the entity).

⁶⁰ For example, see Shane Gibbons "Realising our leadership potential: change or be damned" (Paper presented at the Foundation for Research, Science and Technology Young Māori Leaders Conference, Wellington, 6 August 2001) 14.

together. When Māori meet for discussion in other places, they transform them into the likeness of a marae by their use of space and application of marae rules of debate ...

The rules for discussion in Māori settings [nga tikanga korero] are not hard-and-fast directives (though the inexperienced are tempted to treat them as such) but flexible guidelines that both encourage and require modification according to the circumstances. In particular, they are modified according to whether the gathering is held on or off a marae complex, whether visitors are present or not and whether those visitors are kin or strangers. Like all tikanga Māori, they are grounded in basic Māori values, laying particular emphasis on respect for the spiritual dimension (expressed in karakia and the observance of tapu), ancestral connections (expressed in whakapapa and whanaungatanga), attachment to the land (whenua) generosity (aroha) and care for others (manaaki ki te tangata) peace (rangimarie) and unity (kotahitanga) they are neither set out as a code nor formally taught, they are absorbed by watching and doing.⁶¹

- 57 Emphasis is placed on achieving consensus through a unified, collective agreement. Consensus is achieved through a process that demands goodwill, patience, and freedom from time constraints.
- 58 According to Thomas and Quince, any modern system of Māori dispute resolution needs to reflect that, and to include the following features:
- (1) Community input and responsibility – the Māori community must own the processes by which conflicts amongst its members are resolved, with the participants needing to have input into defining the system and its outcomes.
 - (2) Reciprocity and balance – the aim of dispute resolution must be to restore participants or disputants to their communities. Once decisions are made, with individual and community input, all parties must work together to implement the decisions.
 - (3) Process – the principle of kotahitanga (inclusiveness) in participation and accountability will underpin any process of Māori dispute resolution. It is important to note that Māori place much value on the process itself, as distinct from its outcomes. The process itself is seen as an inherent good, because it empowers the parties and community to take responsibility for the future.
 - (4) Appropriate forms and structures – both the physical environment and the forum must reflect Māori principles. In traditional Māori society the marae fulfilled this function and in modern society it remains the most appropriate environment, for reasons which have stood the test of time.
 - (5) Te Reo Māori – less than 20% of Māori now speak te reo fluently. This reality will almost certainly require that the English language be used if inclusion of all parties is to be achieved.
 - (6) Representation and leadership – it is fundamental to the resolution of any dispute, particularly with respect to enforceability and acceptability of any outcome, that those with grievances be properly represented and that those who lead are properly mandated by their constituency.⁶²

⁶¹ Joan Metge *Korero Tahi: Talking Together* (Auckland University Press with Te Mātāhauariki Institute, Auckland, 2001), 8–10.

⁶² Nin Thomas and Khylee Quince “Māori disputes and their resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Auckland, 1999) 228–233.

59 There are inevitable tensions between tikanga and the current process.⁶³ However, there is also a significant degree of commonality with New Zealand domestic law. Ultimately, a balancing of the two will provide a more equitable process, and, it is hoped, durable outcomes.

⁶³ See also Christian Whata, Martin Dawson and Gina Rangi “Inter and Intra Tribal Debate”, above n 39, 8.

4 Towards a legislative framework

UNDERLYING RATIONALE

- 60 **A** MAJOR POLICY CHANGE in relation to Māori land occurred with the enactment of Te Ture Whenua Māori Act 1993. The Preamble states:
... it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect whai tapu, and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu ...
- 61 In part, this is achieved by the Māori Land Court exercising a supervisory jurisdiction, ensuring that beneficial owners are protected from abuse on the part of those responsible for administering their assets.
- 62 This balance, between supervision and freedom to act according to one's desires, is also well understood in the general law. For instance, company law provides a framework for the stewardship that managers exercise over the assets so vital to shareholders.
- 63 Here too, and in the same spirit, the Commission considers it is appropriate for Parliament to identify the core obligations that must, in some way, be addressed by groups when settling Treaty grievances with the Crown.
- 64 To achieve this, the Commission believes, it is appropriate for Parliament to enact legislation to create a model settlement entity, and a mechanism for members of a claimant group to decide whether, and to what extent, to adopt the model.⁶⁴

FEATURES OF THE FRAMEWORK

- 65 The Commission considers that any model entity created to receive and manage settlement assets must be fiduciary in character, have legal personality and possess or provide for the following features or functions:
- The capacity and powers of the entity.
 - The core obligations identified, including:
 - the interrelationship between the rights of members of the settlement entity and those responsible for managing the assets of it (principles of stewardship);

⁶⁴ This could be through the creation of a new statute, or through an addition to an already existing statute. If the latter option is chosen, then a possibility is the insertion of relevant sections into the Te Ture Whenua Māori Act 1993.

- the need to keep appropriate accounting and other records and to ensure that the records of the entity are audited and presented to members on an annual basis (transparency);
 - the rights of members of the settlement entity, including the right to convene meetings and select the trustees or directors of the entity, and to vote on essential policy issues (accountability);
 - rules that provide for resolution of disputes among members or between members and management (dispute resolution).
- Rules indicating how assets of the settlement entity are to be applied in the case of insolvency or winding up.

66 A more basic question, which cannot be answered in this paper, is with respect to the choices available to the group. For example, should the group be free to pursue alternative settlement structures, or must the group use the model entity proposed but be able to adapt the rules to suit their unique character?

CORE OBLIGATIONS⁶⁵

67 English law, from which New Zealand law has developed, has traditionally used equitable concepts of trusteeship and fiduciary obligations to ensure that assets held by one group of people on behalf of others are managed appropriately on behalf of the beneficial owners.⁶⁶

68 While it has been said that the categories of fiduciary relationships are not closed,⁶⁷ accepted categories of fiduciary relationships are traditionally seen as those involving trust and confidence.⁶⁸

⁶⁵ We note that the core obligations we have identified (with the exception of dispute resolution) are all of a type generally regarded as necessary in order for approval of the settlement entity to be given by the Crown, under current policy.

⁶⁶ For example, trusts created either during a settlor's lifetime or by will, contain an irreducible core of obligations owed by trustees to beneficiaries and enforceable by them. This irreducible core is fundamental to the concept of a trust. Listed companies have detailed rules to ensure that shareholders are apprised, by full disclosure, of what directors have done with their assets. This information also enables shareholders to trade their shares readily on the stock exchange. Shareholders' Councils are a recent innovation in cooperative dairy companies that allow shareholders' representatives to deal more effectively with management and report to shareholders on what is being done with their assets. See generally Underhill and Hayton *Law of Trusts and Trustees* (15 ed, Butterworths, London, 1995) 3; Jill Martin *Hanbury and Martin: Modern Equity* (14 ed, Sweet & Maxwell, London, 1993) 46; and AJ Oakley (ed) *Trends in Contemporary Trust Law* (Oxford University Press, Oxford, 1996) 47.

⁶⁷ For example, *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41, 96 (HCA) Mason J and *Lac Minerals Limited v International Corona Resources Limited* (1989) 61 DLR (4th) 14, 61 (PC) Sopinka J. See also *Elders Pastoral Limited v Bank of New Zealand* [1989] 2 NZLR 180 (CA).

⁶⁸ *Hospital Products Limited v United States Surgical Corporation* above n 67, 96. The following types of relationship have been labelled as fiduciary in nature: trustee and beneficiary; agent and principal; solicitor and client; employer and employee; director and company; members of a partnership, as between themselves. Additionally, a relationship can be totally fiduciary, or fiduciary only in part: *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 (PC).

- 69 Entities that were established to hold and manage the use of Māori land after European settlement of New Zealand, were designed through adaptation of these concepts of trusteeship and fiduciary obligation.
- 70 In recent times the development of land has been undertaken, primarily, by trusts and incorporations. The most recent examples of trusts are to be found in section 438 of the Māori Affairs Act 1953 and the Ahu Whenua Trust created under Part XII Te Ture Whenua Māori Act 1993.⁶⁹ The incorporation model is now enshrined in Part XIII of Te Ture Whenua Māori Act 1993.⁷⁰

Principles of stewardship

- 71 In *Hospital Products Limited v United States Surgical Corporation* Mason J (as he then was) identifies the critical features of a fiduciary relationship:
- ... the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.⁷¹
- 72 Subject to any agreement between the parties to the contrary⁷² as a matter of law:⁷³
- A fiduciary must act in good faith and for proper purposes.
 - Fiduciaries must not allow their own interests to conflict with those of the person on whose behalf powers or discretions are exercised; for example, fiduciaries must account for profits made if they use opportunities for personal benefit presented to them in their capacity as fiduciaries.⁷⁴
 - Where a fiduciary has a personal interest in a matter, with which they are dealing on behalf of another, the fiduciary must disclose the material facts to those on whose behalf they are acting. Failure to disclose can lead to a transaction, however favourable it may be to the beneficiary, being set aside at the instance of the beneficiary.
- 73 Where an entity manages, as well as holds, assets on behalf of another, appropriate standards of care are necessary.⁷⁵ It is debatable, however, how far trustees are under a duty of care. Millett LJ, for example, agrees that “trusts must be performed honestly and in good faith for the benefit of beneficiaries”,⁷⁶ but does not accept that trustees are necessarily subject to duties of skill and care, prudence and diligence.

⁶⁹ In particular, see Te Ture Whenua Māori Act 1993 ss 210, 211, 215, 219–245.

⁷⁰ In particular, see Te Ture Whenua Māori Act 1993 ss 246–284.

⁷¹ *Hospital Products Limited v United States Surgical Corporation*, above n 67, 96–97.

⁷² Fiduciary obligations may be limited or varied: *Berlei Hestia (NZ) Limited v Fernyhough* [1980] 2 NZLR 150, 166 (SC) Mahon J.

⁷³ *Clark Boyce v Mouat* [1993] 3 NZLR 641, 648 (PC) Lord Jauncey of Tullichettle.

⁷⁴ For example, see *Keech v Sandford* (1726) Sel Cas 1 King 61; 25 ER223.

⁷⁵ See generally New Zealand Law Commission *Some Problems in the Law of Trusts* (NZLC R79, Wellington, 2002).

⁷⁶ *Armitage v Nurse* [1998] CH 241, 253–254.

74 However, a fiduciary obligation may always be turned or enhanced to meet particular needs. For example, in *Berlei Hestia (NZ) Ltd v Fernyhough*,⁷⁷ Mahon J, in considering a case involving directors appointed by corporate shareholders, concluded that:

... [as] a matter of legal theory as opposed to judicial precedent, it seems not unreasonable for all the incorporators to be able to agree on an adjusted form of fiduciary liability limited to circumstances where the rights of third parties vis-à-vis the company will not be prejudiced.⁷⁸

75 Members of a settlement group will need to determine the circumstances in which those responsible for the stewardship of the assets should be liable to beneficial owners.

Transparency

76 Transparency is necessary in order to maintain the accountability of managers for their actions. This is achieved by requiring appropriate disclosure of information to beneficial owners so that they can decide whether the managers have dealt adequately with their assets.⁷⁹ It has been said that “sunlight is the best disinfectant”.

77 Thus, when promoters of a company wish to solicit investments from members of the public they must make full disclosure under the provisions of the Securities Act 1978 and related regulations. Where a company trades its shares on a stock exchange or solicits funds from the public the circumstances surrounding that company must be totally disclosed.

78 Where a large group of people have a common interest in the enterprise, but do not trade their shares,⁸⁰ as is the issue being discussed in this section, a case can be made for more limited disclosure to those with a direct interest. Equally, consideration will need to be given as to how such information can be disclosed as inexpensively as possible.

Accountability

79 How should those responsible for the stewardship of assets be held accountable for their actions by the owners of the assets? A number of techniques are employed in New Zealand law to deal with this issue, and a mix of these may be required.

⁷⁷ *Berlei Hestia (NZ) Limited v Fernyhough*, above n 72.

⁷⁸ *Berlei Hestia (NZ) Limited v Fernyhough*, above n 72, 166; see also *Levin v Clark* [1962] NSW 686 and *Re Broadcasting Station 2GB Pty Ltd* [1964–65] NSW 1648.

⁷⁹ See, generally, Part XII of the Companies Act 1993 that deals with disclosure to shareholders of a company through the dissemination of annual reports and financial statements. See also the Financial Reporting Act 1993.

⁸⁰ Because membership of the group is achieved through whakapapa there is no choice about the group to which someone will belong. Because members of the kin group do not have the option to trade that membership, it is essential that they have proper disclosure to ensure that property is being dealt with adequately on their behalf. Similar circumstances arise with respect to shareholders in Māori incorporations or beneficiaries in Māori trusts. Shareholders are not readily able to sell their interests because of the alienation provisions of Te Ture Whenua Māori Act 1993. Generally speaking, sale of interests can only be made to the preferred class of alienee. See Te Ture Whenua Māori Act 1993 s 4 for the two definitions of “preferred class of alienee”.

- 80 In company law, duties can be imposed by statute upon those responsible for stewardship of assets. A company director in New Zealand is required to comply with the obligations imposed by the Companies Act 1993.⁸¹ Directors are given power to manage the business and affairs of a company⁸² but, in return, owe duties:
- To act in good faith and in what the director believes to be the best interests of the company.⁸³
 - To exercise powers for proper purposes.⁸⁴
 - To comply with the Companies Act 1993 and the constitution of the company.⁸⁵
 - Not to agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to creditors.⁸⁶
 - Not to agree to the company incurring an obligation unless the director believes at the time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.⁸⁷
- 81 In addition, it is necessary for directors to ensure that proper accounting records are kept;⁸⁸ if the company is subsequently placed in liquidation a director may be held personally liable for its debts if accounting records have not been kept.⁸⁹
- 82 It will be important that the means used to achieve accountability do not impede the exercise of sensible commercial judgment, or cause concern to lenders, either of which might reduce the extent to which economic empowerment of Māori, through Treaty settlements, can occur.

Voting rights

- 83 Voting rights can be used to avoid oppressive action by those responsible for stewardship of assets or abuse of management rights,⁹⁰ but can also be problematic.
- 84 The risk of voting rights is that they may be used to impede commercial and economic development. And, what voting rights are, or ought to be, can be contentious. As Judge Savage noted in *Re Proprietors of Mangakino Township Incorporated and Pouakani No 2*:

⁸¹ Powers and Duties of Directors are set out in Part VIII of the Companies Act 1993 ss 126–138.

⁸² Companies Act 1993 s 128.

⁸³ Companies Act 1993 s 131(1).

⁸⁴ Companies Act 1993 s 133.

⁸⁵ Companies Act 1993 s 134.

⁸⁶ Companies Act 1993 s 135.

⁸⁷ Companies Act 1993 s 136.

⁸⁸ Companies Act 1993 s 194.

⁸⁹ Companies Act 1993 s 300.

⁹⁰ Compare with the remedy set out in section 174 of the Companies Act 1993.

Some may argue for one man one vote and others for voting by shares. Both have only dubious validity in Māori tradition. They are both the logical consequences of individualisation of title and ownership by this court. The very idea of voting and majority rule whether by number or shares has doubtful validity in Polynesian tradition. In a legal sense also, the voting is of doubtful use. Voting by beneficiaries is not orthodox in general trust law. It has been grafted on to the Trust system by this court to make this structure conform to an extent with the Incorporation mode and to give owners the opportunity to have their say. The result however except in some very special circumstances does not decide anything. Voting is a device for making the views and the strengths of those views known to the trustees and the court. It gives the owner a venue and structure for discussion. One only has to look at the trust order in this particular case. There is provision for voting by show of hands and the use of proxy. The trust order is however silent as to what may be voted on and the effect of that vote. The trustees must make the decisions of trust business and cannot be dictated to by the owners. They cannot delegate their decision making responsibility to a vote at a meeting of owners. This is particularly so in that there are unlikely to be all the owners at the meeting and the trustees have a duty to all of the owners and not just those present at the meeting. In fact owners present at meetings of trusts such as this rarely represent by share or number more than a very modest proportion.⁹¹

- 85 The Commission considers it essential that those groups who undertake the next phase of consultation, gather information that incorporates the wishes of various Māori communities on the question of voting.
- 86 There is already a broad acceptance within Māori society of the rules that govern Māori incorporations⁹² and trusts,⁹³ and the Commission does not advocate any one particular answer.⁹⁴ But, as an illustration, the Commission notes the following ways in which voting rights might be addressed within the constitution of a settlement entity:⁹⁵
- Each person, who can whakapapa to a common tipuna within the settlement group, to have one vote.⁹⁶

⁹¹ *Re Proprietors of Mangakino Township Incorporated and Pouakani No 2* (1999) 73 Taupo MB 30, 32–33.

⁹² Te Ture Whenua Maori Act 1993 Part XIII, ss 246–284 and Maori Land Court Rules 1994, Part 14 (Rules 134–139).

⁹³ Particularly Ahu Whenua Trusts. See generally Part XII Te Ture Whenua Maori Act 1993 and the provisions of Part 11 of the Māori Land Court Rules 1994 dealing with meetings of assembled owners.

⁹⁴ Note the different voting regimes in Parts XII and XIII of Te Ture Whenua Māori Act 1993 with respect to trusts and Māori incorporations. Also, see the Māori Land Court Rules 1994.

⁹⁵ Here, we wish to emphasise the distinction between the vote required to approve the settlement entity (which as a matter of course will provide rules for future voting in the constitution) and the exercise of voting rights pursuant to that constitution. We raise the possibility of whether the Māori Land Court should exercise some supervisory jurisdiction in the former case, to ensure that the rules adopted meet with the majority approval of the claimants.

⁹⁶ Consultation will also need to determine whether age restrictions are to apply and whether proxies can be exercised.

- Appointment of a representative shareholder to hold that share for a particular iwi, hapū, marae, or whānau and to exercise that vote equally with other representative shareholders.
- Appointment of a representative shareholder to hold the share on behalf of a particular iwi, hapū, marae or whānau but with differential voting rights existing as between different kin groups within the settlement group.
- The use of particular tribal tikanga to establish rights: an example being the support of Kingitanga within the Tainui tribe.⁹⁷

87 These examples show the diverse ways in which various settlement groups could organise their affairs. Such a degree of flexibility is to be encouraged. It is for members of the settlement group to establish the rights that they wish to exercise. By doing so they exercise te tino rangatiratanga.

88 In the case of representative shareholders, it will be necessary to define how they are to be accountable to those they represent. The rules may also need to spell out whether, and how, members of the particular iwi, hapū, marae or whānau may, or can, dictate or recommend to representative shareholders how they may, or can, vote.⁹⁸

Dispute resolution

89 The Commission considers that a mechanism to resolve disputes between members of the settlement group, and between members and those responsible for stewardship, is essential, and should be in place well in advance of any dispute (including types of dispute other than those involving ‘significant transactions’.⁹⁹)

90 The dangers of not resolving disputes can be real, as some commentators have noted:

... the Māori community in question must be able to deal with internal disputes through its own processes. By providing for a dispute resolution process within the constitution, the tribe has available a binding mechanism that is competent to deal with the substantive issues and matters of tikanga. At the very least the body may act as a filter, perhaps avoiding the recent situation in Waikato where more than 9 statements of claim (and amended statements of claim) were filed by both sides within three months time, each relating to meeting procedure at different tribal meetings.¹⁰⁰

91 Nor is litigation, as a means of solving intra-kin group disputes, usually the most efficient or durable approach to take. Speaking about a number of judgments

⁹⁷ See *Porima v Te Kauhanganui o Waikato Inc* [2001] 1 NZLR 472. In that case, the objects of Te Kauhanganui o Waikato Inc were to “protect, advance, develop and unify the interests of Waikato”, to uphold and support the Kingitanga “which incorporates the principles of unity, the retention of the tribal base and collective ownership and co-operation amongst peoples”, to foster among members of Waikato the principles of “whakaiti, rangimarie and kia tupato” and “to achieve settlements of outstanding claims”.

⁹⁸ By way of example, see *Te Runanga o Atiawa v Te Atiawa Iwi Authority* above n 34.

⁹⁹ See above n 17.

¹⁰⁰ Christian Whata, Martin Dawson and Gina Rangi “Inter and intra tribal debate”, above n 39, 16.

arising out of intra-kin group dispute in relation to Treaty settlements,¹⁰¹ Judge Wainwright has noted:

... [i]n none of the cases that I have referred [to] was the litigation successful either in a legal or political sense. I think it is plain that, even if parties to disputes like these were able to fit their problems into legal boxes, litigation is hardly ever going to be a good option. First, there is a problem I have already identified, which is that fitting the issues into the legal boxes may, and in my view, probably will, obscure the real issues. But, perhaps more importantly, it also sours relationships. Litigation is a 'winner takes all' strategy. The corollary is that it creates losers. This makes it entirely inappropriate for resolving conflict within kin groups, or even between kin groups, who cannot escape having an ongoing relationship. In such situations, a means of resolving disputes that leaves the mana of the parties intact is infinitely preferable.¹⁰²

92 Several issues with respect to dispute resolution are of first importance, and will need to be examined in detail during the next phase of developing the framework for a model settlement identity:

- What types of dispute should be subject to the process? What types should not? Who is to decide this question?
- What level of dispute will require recourse to the dispute resolution mechanism?
- How will this dispute resolution mechanism work?

93 Modern commercial contracts often state the process to be followed when parties to the contract cannot agree. Usually, the process requires the parties to negotiate in good faith, and to cooperate in a process that can involve negotiation, mediation, arbitration and adjudication. The Commission considers that such a dispute process needs to be identified in this present context.

94 Ordinarily, the law requires an impartial person to resolve disputes, by reference to judicial authority. But, in this context, members of the settlement group, in whom others repose confidence, may be better placed by reason of their knowledge of relevant tikanga to make decisions affecting the group if consensus has not been reached.

95 A mixture of both could ultimately provide a solution. For example, it may be possible to use a neutral arbiter (that is, a judicial officer) with knowledge of tikanga along with those who are part of the settlement group, or who have specific knowledge of the tikanga of the group (that is, one or more pūkenga¹⁰³).

¹⁰¹ *Te Runanga o Wharekauri Rekohu v Attorney-General* [1992] 2 NZLR 301; *Greensill and Ors v Tainui Māori Trust Board* (17 May 1995) M117/95, High Court, Hamilton Registry, Hammond J; *Te Ngāi Tuahuriri Runanga and Ors v Te Runanga o Ngāi Tahu and Attorney-General* (13 May 1998) CP187/97, High Court, Christchurch Registry, Master Venning; *Waitaha Taiwhenua o Waitaki Trust and Anor v Te Runanga o Ngāi Tahu* (17 June 1998) CP 41/98, High Court, Christchurch Registry, Panckhurst J; *Kai Tohu Tohu o Puketapu Hapū Incorporated v Attorney-General and Te Atiawa Iwi Authority* (5 February 1999) CP 344/97, High Court, Wellington Registry, Doogue J; *Hayes and Anor v Waitangi Tribunal and Ors* (10 May 2001) CP 111/01, High Court, Wellington Registry, Goddard J; *Rukutai Watene and Ors v The Minister in Charge of Treaty of Waitangi Negotiations and Ors* (11 May 2001) CP 120/01, High Court, Wellington Registry, Goddard J.

¹⁰² Carrie Wainwright "Maori Representation and the Courts" (Paper presented at the New Zealand Centre for Public Law Roles and Perspectives in the Law, Victoria University of Wellington Law School, Wellington, 5–6 April 2002) 21.

¹⁰³ Specialists in a particular field of knowledge, and in this context experts in tikanga/whakapapa.

- 96 The two main options with respect to dispute resolution are:
- A domestic tribunal set up and run by the settlement group themselves; and/or
 - Empowering the Māori Land Court to determine issues sitting with pūkenga using mediation, and perhaps, in the last resort, adjudication processes.¹⁰⁴

A domestic tribunal

- 97 A domestic tribunal could be constituted solely of members of the settlement group. Pūkenga, having knowledge of the tikanga of the settlement group or relevant kin group, and appointed by the members, would enjoy both legitimacy and confidence.
- 98 From a public law perspective, however, a relationship with the group might be thought to disqualify pūkenga, and there will be a need to confirm that decisions should not be set aside on that ground alone. Such an approach would better accord with Māori customary practices.

The Māori Land Court

- 99 An alternative, which would avoid the issue of disqualification, would be to empower the judges of the Māori Land Court to sit with pūkenga to resolve disputes. Such decisions might be deemed to be final, subject only to judicial review on grounds of illegality, irrationality, or flawed process.
- 100 Judges of the Māori Land Court now have the further power under Te Ture Whenua Māori Act 1993 to mediate solutions to representation issues.¹⁰⁵ As Judge Wainwright has noted:
- ... [s]ometimes the mediator will be an outside appointee, and sometimes a judge. Those Māori Land Court judges not already experienced in mediation are currently undergoing training in anticipation of the change ... As far as a suitably qualified mediator is concerned, filling the job description is a tall order in anyone's terms. The perfect candidate will be a person fluent in two cultures and two languages, with legal training and advanced skills in mediation ... To be candid, such people probably do not yet exist, although some come close ... However, I am confident that with training and experience – especially experience – a core of experts will emerge.¹⁰⁶
- 101 While this option cannot be a panacea for all settlement disputes, the Māori Land Court offers skills and expertise on Māori issues that are hard, if not impossible, to find elsewhere.¹⁰⁷ Consultation will be needed to determine what kind of disputes might be referred to mediation, and in what circumstances.

¹⁰⁴ The Commission suggests that these options are not mutually exclusive or exhaustive, and settlement groups may be able to take a 'mix and match' approach in designing the best form of process for them.

¹⁰⁵ Te Ture Whenua Māori Amendment Act 2002.

¹⁰⁶ See Wainwright, above n 102, 25–28.

¹⁰⁷ For instance, Judge Durie (as he then was) in his 1979 submission to the Royal Commission into the Māori Land Court suggested that the Court was, in fact, a court of 'social purpose'. In this context, he noted that its main purpose was to find 'social solutions' to the disputes that came before it, through, as far as is possible, reconciling family groups.

Public law issues

- 102 It is possible that judicial review could lie in respect of either decisions that detrimentally affected a particular segment of the kin or settlement group, or those where there had been procedural unfairness:
- The range of administrative agencies amenable to judicial review has broadened progressively over the years, and extends to incorporated bodies and unincorporated domestic bodies.¹⁰⁸
 - A decision is reviewable if it is “in substance public” or has “important public consequences” and the presumption of reviewability strengthens where individuals are left without any other redress.¹⁰⁹
 - There is an emphasis in the relevant legislation on Treaty principles.¹¹⁰
 - A public law element is present where a settlement group is involved in the co-management of some natural resource, a type of redress common to settlements.
- 103 However, there are good reasons why it is undesirable, in principle, for the decisions of a settlement group, once settlement has been effected, to be reviewed by the High Court:
- As a matter of principle it is appropriate that members of the settlement group should determine how their assets are to be used.
 - It is open to members of the group to provide, in the constitution of their settlement entity, for alternative dispute resolution processes to ensure that members are not left without redress.
 - Few judges of the High Court have sufficient experience in issues of tikanga, or in the social dynamics of a kin group, to engender public confidence in the outcome of any such review.¹¹¹
- 104 The Commission considers that decisions made by a forum created by the constitution of a settlement entity should only be reviewable against the principles of natural justice, for non-compliance with the powers conferred by the constitution, and to prevent irrationality.

¹⁰⁸ See Joseph, *PA Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 748–749.

¹⁰⁹ See Joseph, above n 108, 749 citing, in support, *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1(CA) 11 (decision reversed without the point being discussed: [2000] 2 NZLR 513 (PC)) and *Mercury Energy Limited v Electricity Corporation of New Zealand Limited* [1994] 2 NZLR 385 (PC) 388; see also *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (HL) 409.

¹¹⁰ In particular, see *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (HC) and (CA) and *New Zealand Maori Council v Attorney General* [1992] NZLR 576 (CA). See also Sir Robin Cooke, *Empowerment and Accountability: The Quest for Administrative Justice* (Judicial Colloquium, Balliol College, Oxford, 21–24 September 1993) 10; cited in Joseph, above n 108, 779, fn 389.

¹¹¹ Often these types of settlement dispute are seen as non-justiciable.

5 Recommendations

105 **T**HE COMMISSION recommends that:

- (a) A new model settlement entity be created by statute through which a settlement group can receive, and have administered on its behalf, assets transferred to it in the settlement of grievances. An issue for further consideration and consultation is whether this entity should be the sole entity capable of receiving and administering settlement assets, or whether other forms of entities, which comply with the core obligations that we have identified, may also be used.
- (b) The constitution of the settlement entity should prescribe the following core obligations:
 - i) principles of stewardship, to which those responsible for the management of the entity are to be subject, including the standard and duty of care that they are to owe to the members of the settlement group;
 - ii) categories of information, to be disclosed to members of the settlement group to enable them to scrutinise the actions of those responsible for the management of the entity;
 - iii) accountability obligation to members of the settlement group of those responsible for the management of the entity;
 - iv) methods by which any disputes involving members of the group, in respect of the distribution or use of the assets of the entity, are to be resolved.
- (c) A standard form constitution be settled that ensures the four core obligations apply. Any settlement group might, however, define the core obligations in the constitution in some other way, subject to satisfying the approval mechanism.
- (d) An approval mechanism, consistent with the current Office of Treaty Settlements practice be established, to provide certification verifying that the constitution of the proposed settlement entity contains the appropriate core obligations, and that the settlement group has agreed to the terms of the constitution.¹¹² Further thought will need to be given to this approval

¹¹² This certification should be conclusive evidence that the entity has been validly created, and would be physical evidence of ratification of the entity. Third parties could deal with the entity without fear of challenge to its valid creation. But, members of the settlement group, and those responsible for its management, could also resolve their disputes under the procedure in the constitution.

mechanism, and whether or not some form of appeal to a body (like the Māori Land Court) should be available if certification is not forthcoming.

- (e) The Chief Registrar of the Māori Land Court be empowered to issue a certificate of incorporation for the entity, on deposit with the Māori Land Court of the constitutive documents (including the verifying certification), and act as the Registrar of the entity once it is incorporated.
 - (f) Once certified, in line with current practice, any subsequent changes to the constitution of the entity be approved by a 75 per cent majority of members of the group who are exercising votes in terms of the constitution.
 - (g) The Māori Land Court be empowered to resolve those disputes that claimant groups elect to have mediated, or determined, by the Court. Appropriate legislation might provide that a judge of the Māori Land Court may sit with pūkenga, if that option is envisaged by the constitution.
 - (h) Consideration be given to making this settlement regime applicable to settlements completed after the date on which the new statute comes into force, and any prior settlements where the settlement group decides to vary its constitution to adopt the settlement regime. (This should be optional rather than mandatory.)
 - (i) Any entity created to receive settlement assets be capable of being used by the settlement group for wider purposes, for example, for the running of its marae.
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APPENDIX A

The Treaty settlement process

INTRODUCTION

- A1 **T**HIS APPENDIX considers the Treaty settlement process and outlines the two different (though complementary) processes that are currently used by kin groups and the Crown to resolve grievances emanating from alleged breaches of the principles of the Treaty of Waitangi.
- A2 The appendix also describes the approval processes of both the Crown and Te Ohu Kai Moana (TOKM) with respect to settlement entities. Under current practice it is necessary for claimant groups to comply with the approval processes before assets can be transferred to a settlement group to settle Treaty grievances. The policies of TOKM tend to be more prescriptive than the Crown, with an additional point of departure being that, after some amount of litigation, it has been decided that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 requires TOKM to deal with ‘iwi’ in their historical sense.

THE TREATY SETTLEMENT PROCESS

The Waitangi Tribunal

- A3 The first major step on the part of the Crown to redress breaches of the principles of the Treaty came with the creation of the Waitangi Tribunal,¹¹³ which is a permanent commission of inquiry.¹¹⁴ The principal functions of the Waitangi Tribunal include:
- inquiring into claims made by or on behalf of Māori¹¹⁵ that allege breaches of principles of the Treaty of Waitangi;¹¹⁶ and
 - to make (predominantly non-binding)¹¹⁷ recommendations to the Crown¹¹⁸ if those allegations are sustained.

¹¹³ Treaty of Waitangi Act 1975, s 4.

¹¹⁴ Treaty of Waitangi Act 1975, Second Schedule, clause 8.

¹¹⁵ See above n 114, s 6(1).

¹¹⁶ For a discussion of the principles of the Treaty of Waitangi see *Māori Custom and Values in New Zealand Law: NZLC SP9*, above n 1, paras 334–351 and *He Tirohanga o Kawa ki te Tiriti o Waitangi* (Te Puni Kōkiri, Wellington, 2001) 73–100.

¹¹⁷ In a claim where land is at issue, and is Crown forest land subject to a Crown forestry licence or ‘memorialised lands’, the Waitangi Tribunal does have some powers that are binding upon the Crown. See State-Owned Enterprises Act 1986 s 27B and Crown Forest Assets Act 1989 s 36.

¹¹⁸ Treaty of Waitangi Act 1975, s 5(a).

- A4 Originally, the Waitangi Tribunal only had jurisdiction to inquire into and make recommendations on Crown acts or omissions dating from the commencement of the Treaty of Waitangi Act in 1975.¹¹⁹ However, in 1985 this jurisdiction was extended to allow inquiry into claims arising from alleged Crown breaches dating from 6 February 1840, the date of the signing of the Treaty.¹²⁰
- A5 Any Māori¹²¹ may submit a claim to the Waitangi Tribunal. When a claim is lodged, the Registrar checks the claim against section 6 of the Treaty of Waitangi Act 1975 and if the requirements of that section are satisfied, the claim is registered and assigned a “Wai” number.¹²² Once this is completed the Crown and others with an interest in the claim are notified. The Waitangi Tribunal also identifies any claims that should be heard together.¹²³
- A6 After the claimants’ research is filed, the Waitangi Tribunal undertakes research and a casebook is compiled containing all the research to be presented to the Waitangi Tribunal during its inquiry. The hearings are timetabled and begin with evidence and submissions presented by the claimants, followed by the Crown and others with an interest in the claim. Subsequent to the hearings being completed the Waitangi Tribunal issues a report, where:
- ... [t]he Tribunal’s task is to decide, whether, on the balance of probabilities, a claim is well founded. If the Tribunal decides that a claim is well founded, it may recommend to the Crown how the claimants can be compensated, how the harm they are suffering can be removed, or how similar harm can be prevented from happening in the future.¹²⁴
- A7 Depending upon the nature of the claim and the conclusion reached in the report of the Waitangi Tribunal, settlement negotiations may then begin between the claimants and the Crown. Alternatively, the Waitangi Tribunal may hold a remedies hearing where the parties involved have an opportunity to recommend to the Waitangi Tribunal what actions should be undertaken to remedy the breach. If such a hearing is held, the Waitangi Tribunal issues a further report, after the hearing, detailing its recommendations.¹²⁵
- A8 Māori allegations of historical breaches¹²⁶ of the principles of the Treaty have focused mainly on the following issues:
- Pre-1840 land purchases “old land claims” and “surplus lands”
 - The New Zealand Company Purchases

¹¹⁹ 10 October 1975; date by Royal Assent.

¹²⁰ Treaty of Waitangi Act 1975, s 6(1) as inserted by Treaty of Waitangi Amendment Act 1985, s 3(1).

¹²¹ This includes a descendant of a Māori, or a Māori on behalf of a group of Māori – see s 6(1) and s 2 of the Treaty of Waitangi Act 1975.

¹²² This is an administrative requirement of the Waitangi Tribunal so that the claim is assigned a unique identifier.

¹²³ The Waitangi Tribunal has generally favoured an approach dealing with all claims in a particular area.

¹²⁴ Geoffrey Melvin *The Claims Process of the Waitangi Tribunal – Information for Claimants* (Waitangi Tribunal, Wellington, 2000).

¹²⁵ For example, see Waitangi Tribunal *Turangi Township Remedies Report* (Wai 84, GP Publications, 1998) and Waitangi Tribunal *Te Whanganui-a-Orotu Report on Remedies* (Wai 55, GP Publications, 1998).

¹²⁶ Determined by Cabinet as those Crown acts or omissions that occurred before 21 September 1992.

- Pre-emption waiver purchases, and “surplus lands”
 - Pre-1865 Crown purchases
 - War and land confiscation (raupatu)
 - The introduction and operations of the Native Land Court.¹²⁷
- A9 To date, most claims to the Waitangi Tribunal have arisen from these historical breaches of the Treaty. However, there are a number of claims relating to more contemporary cultural issues like the protection of Māori intellectual property rights (Wai 262).
- A10 At any stage after the lodgement of a claim with the Waitangi Tribunal, the claimants are able to initiate direct negotiations with the Crown. If the claimant groups decide to negotiate directly with the Crown the Waitangi Tribunal will usually suspend further consideration of the claim while negotiations are in train, unless the parties have agreed otherwise.¹²⁸ If negotiations fail, the Waitangi Tribunal will usually resume consideration of the claim.
- A11 The Crown’s current policy is not to negotiate while the Waitangi Tribunal process is continuing. The Crown may decide to wait until the Waitangi Tribunal has reported before it embarks on negotiations. While the Waitangi Tribunal’s findings will inform the parties, neither party is bound to follow those recommendations in negotiating a settlement.¹²⁹

Direct negotiations with the Crown

- A12 Negotiations with the Crown are undertaken in four distinct phases:
- agreement to begin negotiations;
 - pre-negotiations;
 - negotiations;
 - ratification and implementation.¹³⁰

Agreement to begin negotiations

- A13 A prerequisite for entering negotiations is the registration of a claim with the Waitangi Tribunal. Direct negotiations begin when the claimant group asks either the Office of Treaty Settlements (OTS) or the Minister in Charge of Treaty of Waitangi Negotiations to begin negotiations.
- A14 If the claimants proceed directly to negotiations they must provide the Crown with detailed research that outlines every Crown action alleged to have breached the Treaty, and that demonstrates the link between the acts and/or omissions of the Crown and the resulting damage or harm done to the claimants’ tipuna.

¹²⁷ See Office of Treaty Settlements *Healing the Past, Building a Future*, above n 15, 10–14.

¹²⁸ This is the case at any stage during the Waitangi Tribunal process *except* when the parties are preparing for, or taking part in, a remedies hearing.

¹²⁹ See Office of Treaty Settlements *Healing the Past, Building a Future*, above n 15, 45.

¹³⁰ See Office of Treaty Settlements *Healing the Past, Building a Future*, above n 15, 41.

- A15 Negotiated claims will often proceed at an iwi level, in order to be able to obtain a wider range of reparation and to address the past breaches of the Treaty. However, within such claims there is room for the interests of smaller groups (such as whānau, marae or hapū) to be taken into account.¹³¹ The ability to settle on an iwi or hapū basis will often turn on the way in which the particular kin group has organised its affairs, or on the formal legal personality and organisation of the claimant group.
- A16 A major part of the negotiation is the acquisition of a mandate for negotiators from their kin group to undertake negotiations on their behalf. The Crown has in place a process with which the claimant negotiators must comply, the end product of which is a Deed of Mandate.¹³² As well as the Office of Treaty Settlements, Te Puni Kōkiri (TPK) is involved in advising the Crown in the mandating process. Once a mandate has been established and the Crown has recognised it, the Crown will consider how to provide a reasonable financial contribution to the negotiation of the claim.

Pre-negotiations

- A17 A document is developed between the Crown and the claimant group called the Terms of Negotiation. This document sets out the scope and goals of the negotiation process. While it is the Crown's preference to settle all historical claims during negotiations, in the past some claims have been excluded from negotiations to be dealt with at a later date by the parties or by the Waitangi Tribunal. The document may include a timetable for negotiations. Options for reparation are addressed with the claimants providing the Crown with specific details of what redress is sought and what Treaty breaches they are seeking to be formally recognised.¹³³ Ministers are required to approve the Crown Negotiating Brief before the process can continue.¹³⁴

¹³¹ Note the comments of the Waitangi Tribunal in *Pakakohi and Tangahoe Settlement Claims Report* (Wai 758, Wai 142, GP Publications, Wellington) 66, where the Waitangi Tribunal noted in relation to the distinct identities of the Pakakohi and Tangahoe hapū within the Ngati Ruanui iwi, that their traditions needed to be “factored into the settlement deed ... [which if not included could] create a fresh grievance out of the settlement of an old one”.

¹³² A mandate checklist is noted in Office of Treaty Settlements *Treaty of Waitangi Claims – Direct Negotiations Process – An Introduction* (Wellington, 1999) 9. Briefly, the checklist requires the kin group to provide statements outlining who the kin claimant group is; a description of the claims; definition of the area of the claims; who the beneficiaries are; the names and addresses of the body and its representatives (including negotiators); how the mandate was obtained; a description of the processes of the decision-making body and the rules for eligibility of membership to the claimant group; a statement of the limitations of the power of the negotiators; an agreement that the Crown may make the mandate known, and the signed and witnessed deed.

¹³³ Typically, types of redress will include (1) an apology; (2) cultural redress that may include the transfer of wāhi tapu and wāhi whakahirahira to tribal ownership, measures to allow the kin group greater participation in the management of natural resources within their rohe and other measures to recognise their mana within the rohe. For instance Statutory Acknowledgements, Deeds of Recognition and Departmental Protocols may be entered into to this end; (3) commercial and financial redress including the return of Crown lands, cash and other resources to tribal ownership.

¹³⁴ See Office of Treaty Settlements *Healing the Past, Building a Future*, above n 15, 61.

Formal negotiations

- A18 Once both the Crown and the claimant group have been authorised to conduct negotiations those parties commence formal negotiation with the object of achieving, in the first instance, general agreement, which may be formalised in a document called a Heads of Agreement¹³⁵ or an Agreement in Principle (the former being a more detailed document than the latter). This agreement is drafted in the form of an offer from the Crown to ensure that, after the consultation that follows, the claimant group is aware of the terms negotiated on their behalf.
- A19 Once the kin group has approved a Crown offer, a formal document detailing all the settlement issues is prepared and executed: this is called the Deed of Settlement. This Deed requires Cabinet approval before it can be finalised by the Crown and put to the kin group for ratification by the claimants.¹³⁶ Once signed by both parties, the agreement recorded in the Deed of Settlement is legally binding.
- A20 This agreement usually contains:
- an agreed historical account and Crown acknowledgements, which form the basis for a Crown apology;
 - cultural redress; and
 - commercial and financial redress to be offered by the Crown.

Ratification and implementation

- A21 The proposed Deed of Settlement must be ratified by the claimant group. The Crown will not implement a settlement unless a satisfactory ratification is undertaken by the claimants, which involves the Minister in Charge of Treaty of Waitangi Negotiations approving the process by which the ratification is to take place, and Cabinet deciding that a sufficient majority of the claimant group has approved the settlement.
- A22 The purpose of the ratification process is two-fold. From the perspective of the claimant group, it ensures that members of the claimant group are adequately informed of the proposed settlement and consent to their representatives concluding a formal settlement. From the perspective of the Crown it provides assurance that members of the claimant group have, in fact, been informed of the terms of the proposed settlement and that they have consented to it. Consent from members of the claimant group may be obtained through hui and/or postal ballot.
- A23 Once the results of the process are made known to the Minister in Charge of Treaty of Waitangi Negotiations, and after the Cabinet is satisfied with the results of the process, the Crown and the claimants sign the Deed of Settlement that then becomes binding.

¹³⁵ This stage in the process is currently under review and may be amended or abolished for future negotiations – see Media Statement, Hon Margaret Wilson, 19 February 2002.

¹³⁶ See Office of Treaty Settlements *Healing the Past, Building a Future*, above n 15, 66.

- A24 Once the Deed of Settlement is signed:
 ... [t]he members of the settlement group must also agree on a way of ‘holding’ and managing the lands, cash and other agreed redress offered to settle their claim. This may form part of the claimants’ ratification process. These arrangements must be finalised before the Crown hands over the settlement assets.¹³⁷
- A25 Often an Act of Parliament will need to be passed before all of the settlement can be implemented, though many parts of the agreement will be in force once ratification and signing has concluded. The Waitangi Tribunal will be made aware of the settlement and will make no further inquiry into the claim. The Office of Treaty Settlements then oversees the implementation of the agreement on behalf of the Crown with any changes to the agreement requiring consent from both sides.
- A26 Usually, while the legislation is progressing through the legislative process, the kin group works with OTS to have a settlement entity developed and approved, with the ratification of the entity needing to take place before the settlement legislation is introduced into Parliament.

OFFICE OF TREATY SETTLEMENTS REQUIREMENTS

- A27 The role of the Crown can, generally, be regarded as completed once a grievance has been addressed and settlement funds have been transferred. While the Crown can be seen to have a legitimate interest in the successful operation of settlement entities (in particular, in relation to the delivery of social and economic benefits to Māori), it is preferable to regard the management of the assets transferred as part of the settlement as being within the exclusive domain of the relevant group.
- A28 In approving a settlement entity, OTS has a series of 20 questions that it uses as a guide in determining whether or not an entity adequately protects the membership of the kin group. These questions are based around themes of governance, representation, accountability and transparency as set out below:
- GENERAL
- (1) What is the proposed Governance Entity and its structure?
 - (2) How was the proposed Governance Entity developed?
 - (3) What is the relationship between the proposed new Governance Entity and existing entities that currently represent me?
- REPRESENTATION
- (4) How do I know if I am a beneficiary of the settlement and that I can participate in the Governance Entity?
 - (5) How do I have a say in who the representatives on the Governance Entity will be?
 - (6) How often and how will the representatives change?
- ACCOUNTABILITY
- (7) What are the purposes, principles, activities, powers and duties of the Governance Entity and the bodies accountable to it?
 - (8) Which decisions will I have a say in?

¹³⁷ Office of Treaty Settlements *Treaty of Waitangi Claims – Direct Negotiations Process – An Introduction*, above n 132, 18.

- (9) How can I participate in the decisions of the Governance Entity?
- (10) Who will manage the redress received in the settlement?
- (11) Who will determine what benefits I get?
- (12) What are the criteria for determining how benefits are allocated and distributed?
- (13) How will the people managing assets and determining benefits be accountable to me?
- (14) What are the rules under which the Governance Entity and the bodies accountable to me operate?
- (15) Are there any interim governance arrangements in the period between the establishment of the Governance Entity and the date that the settlement assets are transferred? If so, what are they?
- (16) How will the structure and the rules of the Governance Entity and the bodies accountable to it be changed?
- (17) What are the planning/monitoring/review processes for decisions?
- (18) What if I don't agree with a decision made by the Governance Entity?

TRANSPARENCY

- (19) How often will accounts be prepared and audited?
- (20) Will I receive information about decisions that affect me? How? How often?¹³⁸

TE OHU KAI MOANA REQUIREMENTS

A29 A more prescriptive approach is taken by TOKM to approval of settlement entities, and its statute requires TOKM, to deal with “iwi” rather than with a claimant “group”.¹³⁹

A30 Te Ohu Kai Moana literature identifies a number of kaupapa¹⁴⁰ to be set out in the constitution of any iwi organisation to which it allocates assets: viz

- Kaupapa 1: The constitution must acknowledge that Iwi organisation's obligation to act for the members of the iwi.
- Kaupapa 2: Membership, expressed as the right to participate in choosing representatives on the Iwi organisation, is a right open to all those who affiliate to the Iwi by whakapapa.
- Kaupapa 3: Voting rights in Iwi elections and matters relating to constitutional amendments are confined to those who affiliate to the Iwi by whakapapa.
- Kaupapa 3(a): All issues relating to whangai should be entirely determined according to the tikanga of each Iwi. Accordingly the matter of whangai voting rights remains at the discretion of each Iwi organisation.
- Kaupapa 4: Individual Iwi members shall have the right to request and exercise a postal vote in any process that elects representatives to the Iwi organisation, or considers amendments to the constitution.

¹³⁸ Office of Treaty Settlements, “Matter required in disclosure material for governance entities” Internal Draft 10 June 2002.

¹³⁹ See relevant provisions in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Treaty of Waitangi Act 1975.

¹⁴⁰ Translates in this context as ‘policy’.

- Kaupapa 5: All Iwi organisations shall establish and maintain a register of iwi members.
- Kaupapa 6: The Iwi organisation must have an Annual General Meeting at which it will provide to iwi members:
 - An annual plan
 - An annual report
 - Annual audited accounts
- Kaupapa 7: Constitutional amendments to change any of the Kaupapa and Policies set by Te Ohu Kai Moana require at least a seventy-five percent [75%] majority of votes cast to be carried.¹⁴¹

A31 More specific policies are also articulated by TOKM to give effect to the above kaupapa:

- Policy 1: A recommended minimum 15 working days' notice in the appropriate media must be given before Iwi AGMs, and elections or hui to consider constitutional amendment.
- Policy 2: Notice of elections shall call for nominations in writing to be received at the Iwi office at least five working days before the hui or election.
- Policy 3: Iwi organisations are required to advertise any processes involving elections or proposed constitutional amendments, and all AGMs, in any area containing significant concentrations of their members.
- Policy 4: Constitutions shall state the period of office of elected representatives, that period not to exceed five years.
- Policy 5: If an Iwi organisation decides to provide for alternates to the elected representatives, each alternate must be elected by, and as part of, the same process that elected the particular representative onto the Iwi organisation.
- Policy 6: Iwi organisations shall make a copy of their constitution available for viewing by Iwi members at their Iwi office in normal office hours, and available by post on request, on a cost recovery basis if necessary.¹⁴²

A32 Further, TOKM demands a structural separation between asset management and governance. For instance, the role of the representative iwi organisation to provide strategic governance over the separate asset management body must be included in the constitution of the iwi organisation, with elected representatives to the iwi organisation being able to comprise only one-third of the directors on the asset management body. Additionally, TOKM stipulates that the representative iwi organisation must have the power to amend the constitution of the asset management body with the 75 per cent majority as set out in the representation policy.

¹⁴¹ Te Ohu Kai Moana *He Tohu Arahi – A guide to representation on Iwi organisations*, (Wellington, 2001) 6–8.

¹⁴² See Te Ohu Kai Moana, above n 141, 9–12.

APPENDIX B

Legal entities currently in use by Māori

INTRODUCTION

- B1 **T**HIS APPENDIX describes the range of legal structures that are currently available for use by Māori for various purposes. The advantages and disadvantages of each structure are examined, and their respective suitability (or otherwise) for use as settlement entities is discussed.

APPROVAL OF THE SETTLEMENT ENTITY

- B2 While the structure of the kin group organisation is an issue for the group itself, it is undeniable that the relationship between beneficiaries of the assets to be transferred and those responsible for management of those assets must be carefully circumscribed. Both OTS and TOKM invest a great amount of time and resources on approving governance entities to ensure that suitable procedures are in place before the proceeds of the settlement are made available to the kin group. This is because:

... [e]nsuring that the governance structure meets these requirements also means that the Crown is meeting its responsibility to all New Zealanders to ensure that settlement assets are managed by and for those who will rightfully benefit from the claim. Those concerns are, of course, equally important to members of the claimant group who will want to see good management of their settlement assets.¹⁴³

- B3 The type of entities existing currently are:
- Māori trust boards under the Māori Trust Boards Act 1955;
 - incorporated societies under the Incorporated Societies Act 1908;
 - company structures under the Companies Act 1993;
 - structures under Te Ture Whenua Māori Act 1993;
 - charitable trusts under the Charitable Trusts Act 1957;
 - statutory bodies;
 - trusts created (by Deed) for the particular purpose.
- B4 Many of these entities do currently, and in the future will, form an integral part of any successful settlement group organisation, whatever model settlement entity is devised. To prosper commercially, and to provide social benefits to beneficial owners, the settlement entity will inevitably create and manage other such entities.

¹⁴³ Office of Treaty Settlements *Treaty of Waitangi Claims – Direct Negotiations Process – An Introduction*, above n 132, 73.

INTRODUCTION TO CONTEMPORARY LEGAL ENTITIES

Māori trust boards

- B5 Between 1922 and 1953 ten Māori trust boards were created by statute to receive and administer compensation paid by the Crown to settle a number of different grievances. The Māori Trust Boards Act 1955 was enacted to standardise and improve the administration of these boards as well as to provide a template for future organisations to follow.
- B6 The Minister of Māori Affairs was given a number of supervisory powers over the administration of the assets, to the extent that the boards required ministerial approval to enter such basic transactions as purchasing land. These powers were said to be justified in protecting the rights of the beneficiaries and their interests in the administration of what were public funds. The enactment of this legislation was not without opposition, which focused primarily on the paternalistic nature of the statute – criticisms that have endured to this day.
- B7 In 1994, the Mason Committee said (of the Māori Trust Boards Act 1955) that it was enacted:
- ... solely for the benefit of the Crown ... [and] that the [Act] is an anachronism created during a considerable Māori dependency and State paternalism.¹⁴⁴
- B8 Because section 32 of the Maori Trust Boards Act 1955 makes a board, ultimately, accountable to the Minister of Māori Affairs, the use of a Māori trust board as a vehicle for receiving settlement funds becomes undesirable from the point of view of both the Crown and the relevant settlement group.
- B9 The boards have the advantage that, by virtue of their empowering legislation and initial certification by the Commissioner of Inland Revenue, they have charitable status. So long as the original trust deeds are flexible enough to allow assets to be added to the original trust, it is theoretically possible for settlement assets to be added to a Māori trust board.
- B10 However, in practice, the lack of accountability to beneficiaries means OTS would not give approval to a Māori trust board being used as a governance entity for settlements, at least not without significant amendment to the empowering legislation. Both Tainui and Ngai Tahu, when undergoing Treaty claims, achieved charitable status for various arms of their operations through other means in the ensuing settlement legislation, winding up their trust boards created under the 1955 Māori Trust Boards Act.¹⁴⁵
- B11 While there is interest from some of the groups currently negotiating settlements with the Crown, the Commission considers that the 1955 Māori Trust Boards Act would require significant amendment to make it a suitable governance entity for the holding of Treaty settlements. The interest shown in this entity is based firmly on the charitable status of a trust board. The Commission suggests that any initiation of amendments to the 1955 Māori Trust Boards Act to rectify the accountability problem discussed in paragraph B8 is likely to bring about

¹⁴⁴ Mason Committee *Report on Māori Trust Boards to Chief Executive of Te Puni Kōkiri*, (Te Puni Kōkiri, Wellington, 1994) 58–70.

¹⁴⁵ See Te Runanga O Ngai Tahu Act 1996, s 20 and Waikato Raupatu Claims Settlement Act 1995, s 28.

an end to the tax advantages that are sought by the groups who are proposing the use of this structure as a settlement entity.

Incorporated societies

- B12 Incorporated societies (like Māori trust boards) have body corporate status that provides for perpetual succession and limited liability, and are governed by the Incorporated Societies Act 1908.
- B13 However, one of the major disadvantages in the use of incorporated societies is that section 4(1) of the Incorporated Societies Act 1908 prohibits the pursuit of pecuniary gain as being an objective of the entity. This is a problem when one obvious goal of settlement groups is to grow their assets through commercial enterprise.
- B14 Additionally, the relationship between, on the one hand, the society and its members, and on the other, between its members does not necessarily suit the settlement context. For instance, the rules of an incorporated society constitute a contract solely between the society and its members, although the members have no ties as between themselves. In the settlement context this relationship neglects the values of te ao Māori, including concepts like whanaungatanga, manaakitanga and whāngaitanga, amongst others.
- B15 Also in the settlement context, there is the possibility of problems with respect section 4(2) of the Incorporated Societies Act 1908, which states that no application for incorporation shall be made except with the consent of a majority of the members of the society. In the context of Treaty settlements, there is the possibility of problems being encountered in this regard with respect to the ratification of the settlement entity.
- B16 It may not be wise to have the Registrar of Incorporated Societies having an administrative role in the settlement of Treaty assets, pursuant to the powers given them under the Incorporated Societies Act 1908. If any authorising body is to be utilised it should be one that has experience in dealing with Māori issues.

Company structures

- B17 Company structures offer flexibility, 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.
- B18 However, the holding of individual share allotments in an entity is inappropriate for settlement structures, given that the settlement is for the benefit of a collective group, rather than for individuals.
- B19 Irrespective of practical difficulties in the issuing of share allotments to beneficiaries present and future, individualisation of communal assets has long been seen as a major problem that inhibits Māori kin group economic and social development.

B20 The negative effect of the historical role of the Native Land Court in individualising title to communal lands is well documented.¹⁴⁶ While raupatu (confiscation) was one of the more insidious Crown acts of the past, equally destructive was the effect of land tenure reform on the Māori social order. As the Waitangi Tribunal has noted with respect to the raupatu of Taranaki land:

The confiscation of tribal interests by imposed tenure reform was probably the most destructive and demoralising of the forms of expropriation. All land that remained was individualised, even reserves and lands returned. No land was thus passed back in the condition in which it was taken; it came back like a gift with an incendiary device. This land reform, so clearly contrary to the Treaty when done without consent, made alienations more likely, undermined or destroyed the social order, jeopardised Māori authority and leadership, and expropriated the endowments to which hapu, as distinct from individuals, were entitled.¹⁴⁷

B21 It was not officially recognised, until the enactment of Te Ture Whenua Māori Act in 1993, that land was a taonga tuku iho¹⁴⁸ (a gift handed down through the generations) and that the Māori Land Court should exercise its jurisdiction in a manner that would assist and promote the retention and development of Māori land.¹⁴⁹

B22 The company structure will most likely have a role in any successful kin group organisation. However, like incorporated societies, the company framework is unable to take account of significant Māori values, with participation based upon individual shareholding and individual rights.

Te Ture Whenua Māori Act 1993

B23 Structures under the Te Ture Whenua Māori Act 1993, while providing a high level of beneficiary participation, can also prove to be unwieldy in a commercial context, and only relate to Māori customary or Māori freehold land, not to other assets.

B24 Given that the types of redress available to claimant groups often include cash, agreements with local authorities for co-management of resources and the like, the structures under Te Ture Whenua Māori Act 1993 are inadequate.

B25 While amending Te Ture Whenua Māori Act 1993 is a possibility, several groups have specifically excluded assets transferred to them as part of a Treaty settlement from being covered by the Act.¹⁵⁰ This suggests some wariness in the Māori community about the ability of the Act to deliver, in some circumstances, tangible benefits to Māori.

¹⁴⁶ For example, see MPK Sorrenson “Land Purchase Methods and their Effect on the Māori Population, 1865–1901” (1956) 65 *Journal of the Polynesian Society* 183, 191 and 192; Ian Pool *Te Iwi Māori: A New Zealand Population: Past, Present and Projected* (Auckland University Press, Auckland, 1991) ch 5; Judith Binney “The Native Land Court and the Māori Communities” in Judith Binney, Judith Bassett and Erik Olssen (eds) *The People and the Land: Te Tangata me te Whenua: An illustrated history of New Zealand 1820–1920* (Allen & Unwin, Wellington, 1990).

¹⁴⁷ Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, GP Publications, Wellington, 1996) 3.

¹⁴⁸ Te Ture Whenua Māori Act 1993, Preamble.

¹⁴⁹ See Te Ture Whenua Māori Act 1993 s 17(1).

¹⁵⁰ See for example, Waikato Raupatu Claims Settlement Act 1995 s 32.

B26 Additionally, anecdotal evidence suggests that it is often difficult to obtain credit to improve and develop Māori land held under Te Ture Whenua Māori Act 1993, which is likely to hinder the economic development of Māori groups who are gaining settlement.

Charitable trust boards

B27 Charitable trust boards can also be registered as bodies corporate and may attain charitable status if the public benefit test can be satisfied. However, there is some uncertainty in New Zealand law whether or not the public benefit test can be met by a trust where the beneficiaries are determined by a blood or contractual relationship.¹⁵¹ The current government, as part of the review of the rules affecting charitable organisations, has identified this uncertainty.¹⁵² If the law is reformed as proposed, more Māori entities may be able to apply to gain a ‘charitable’ tax exemption.

B28 However, this entity can also be cumbersome in a commercial context and any assets that form part of the charitable trust must continue to be utilised for charitable purposes in the event of the entity being wound up. This requirement may create the potential for the alienation of settlement assets associated with the ‘charity’.

B29 While a charitable trust may be utilised in parts of the kin group organisation to administer benefits to kin group members, its use as a settlement entity is not a suitable option.

Private statutory recognition

B30 Ngai Tahu is the only settlement group to utilise the statutory body through their private statute Te Runanga O Ngai Tahu Act 1996. This has given Ngai Tahu an efficient legal personality that has contributed to the continued success of the iwi.

B31 However, the number of current and future settlements and busy government legislation programmes hinders the possibility of enactment of successive private statutes for every settlement group. Current government policy and practical legislative considerations seem to preclude this option for the future.

Trusts

B32 The current settlement vehicle of choice is the trust, albeit in circumstances where legislation states specifically that the rule against perpetuities does not apply.

¹⁵¹ However, note the media statement from Hon Dr Michael Cullen and Hon Parekura Horomia of 11 April 2002: “Entities that qualify as charities will not be excluded from the associated exemption from income tax simply because they benefit people connected by blood ties”.

¹⁵² Policy Advice Division of the Inland Revenue Department, *Government Discussion Document No 2 of the Tax Simplification Series: Taxation of Māori Organisations* (Wellington, 2001) 67.

B33 There are substantial costs involved in creating trusts for the holding of Māori assets from Treaty settlements. While the price is less for the Crown, for each successive settlement group going through the process it is an extremely time-consuming and expensive business.

B34 Additionally, as the Commission's preliminary paper, *Some Problems in the Law of Trusts*, noted:

... trusts are today used, and some would say at times misused, for purposes some of which were undreamt of when the current rules were settled, and that in this as in so many other contexts the time is well overdue for the law to catch up with what is actually happening in the world.¹⁵³

The Commission would suggest that this is indeed the case with respect to settlement assets. Trusts have been used primarily because they are less offensive to the groups involved in the settlement process than any other legal instrument, rather than because they fulfil the needs of Māori and the Crown in a comprehensive manner.

¹⁵³ New Zealand Law Commission *Some Problems in the Law of Trusts* (NZLC PP48, Wellington, 2002) 1.

APPENDIX C

Summary of available legal entities

	Adaptable to reflect tikanga of group?	Accountable to beneficiaries?	Governance rules?	Suitable for use in a commercial context?	Dispute resolution to body au fait with Māori issues?	Other
Māori Trust Boards Act 1955	No	No, only to the Minister of Māori Affairs	Contained in Act and Constitution of Trust Board	No	Yes, but recourse to Minister paternalistic	
Incorporated Societies Act 1908	No	No, accountability primarily to Registrar	Contained in Act and Constitution of Society	No, debarred from pecuniary gain	No, recourse to the Registrar or ordinary courts	
Companies Act 1993	No	Yes, as shareholders and to Registrar	Contained in Act and Constitution of Company	Yes	Ordinary courts	
Te Ture Whenua Māori Act 1993	No	Yes, but note role of Court	Contained in the Act	No	Yes, Māori Land Court	Deals only with land
Charitable trust board	No	Primarily to Registrar	Contained in Deed	No	Ordinary courts	Potential problem with blood relationship

Continued

	Adaptable to reflect tikanga of group?	Accountable to beneficiaries?	Governance rules?	Suitable for use in a commercial context?	Dispute resolution to body au fait with Māori issues?	Other
Private legislation	Perhaps	Per Act	Per Act	Probably	Unknown, per Act	No longer available as a viable option
Trust	Possibly, within limits	Yes, per Deed	Yes, per Deed	Possibly	Ordinary courts	Expensive to set up for settlement groups
Proposed statutory model	Yes, to be decided by group	Yes, core obligations need to be satisfied	Yes, in constitution of statutory entity	Will depend upon outcome of further consultation	Yes, domestic tribunal or Māori Land Court with or without pūkenga	Structure to more accurately reflect Māori values

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