

WAKA UMANGA: HAS THE GOVERNMENT MISSED THE BOAT ON MĀORI COLLECTIVE ASSETS MANAGEMENT?

RETHINKING NEW ZEALAND LAW FOR THE POST-SETTLEMENT ERA

Liam Remi McKay

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CONTENTS

Introduction	1
Chapter One: A Clash of Cultures – Tenurial Change and its Effects	5
1.1 Introduction	5
1.2 The Common Law Doctrine of Native Title	7
1.3 Māori Customary Law and Land Tenure	9
1.4 Māori Land Tenure From 1840 – A Cultural Clash	11
1.5 Early Approaches To Māori Grievances	18
1.6 The Treaty Of Waitangi Act 1975	21
1.7 Development Of The Current Treaty Settlement Process	22
1.8 The Contemporary Treaty Settlement Process	23
1.9 The Governance Entity	28
1.10 The Fisheries Settlement	29
1.11 Conclusion	32
Chapter Two: Māori Governance Entities	33
2.1 Introduction	33
2.2 Incorporated Societies	34
2.3 Companies	37
2.4 Private Trusts	39
2.5 Charitable Trusts	41
2.6 Māori Trust Boards	42
2.7 Incorporations And Trusts Under Te Ture Whenua Māori Act 1993	43
2.8 Statutorily Created Entities	46
2.9 Mandated Iwi Organisations	48

2.10 Conclusion	49
Chapter Three: The Law Commission On Waka Umanga	51
3.1 Introduction	51
3.2 Māori Customs And Values In New Zealand Law	51
3.3 Treaty Of Waitangi Claims – Addressing The Post-Settlement Phase	53
3.4 Waka Umanga – A Proposed Law For Māori Governance Entities	54
3.5 A New Legal Entity	55
3.6 A Process For Forming Entities And Resolving Formation Disputes	57
3.7 Recognition Of Tribal Authority	59
3.8 Dispute Resolution	62
3.9 Establishing Good Governance Standards	67
3.10 Provision Of Ongoing Support By Way Of Secretariat	69
3.11 Conclusion	70
Chapter Four: The Waka Umanga Bill	71
4.1 Introduction	71
4.2 The Waka Umanga Bill 2007 – As Introduced	72
4.2.1 Establishment Of Waka Umanga	73
4.2.2 Formation And Recognition Of Waka Umanga	74
4.2.3 Governance Of Waka Umanga	77
4.2.4 Dispute Resolution	82
4.3 report Of The Māori Affairs Select Committee	86
4.4 Future Of The Waka Umanga Bill	89
4.5 Conclusion	90

Chapter Five: Critique	91
5.1 Introduction	91
5.2 Māori Development And The Quiet Revolution	91
5.3 Towards An Articulation Of Good Māori Governance	94
5.4 Evaluating Waka Umanga	100
5.5 Waka Umanga – A Cure All?	126
5.6 Waka Umanga – An Opportunity Missed?	128
Conclusion	132
Appendix I – Twenty Questions On Governance	135
Bibliography	137

INTRODUCTION

For the past four decades Māori have been in a state of flux, a significant driver of which has been the Treaty settlement process. That process has seen the transfer of substantial resources and capital from the Crown to Māori in recognition of the harm and suffering caused by the Crown's breaches of the Treaty of Waitangi. Māori grievances concerning Treaty breaches have been well documented by both the Waitangi Tribunal and Māori themselves. Following the signing of the Treaty in 1840 Māori soon found themselves at the mercy of a regime that was "partly autochthonous but founded mainly on English norms",¹ and which would strip them of their lands, their resources, and their culture over much of the ensuing century. Although the ways in which this was effected were immense, the most insidious was the replacement of Māori customary land tenure with British land law. The intricate relationship between Māori and their whenua, and its importance in the Māori world view, ensured that the effects of this change would permeate through all aspects of Māori society.

There are fundamental differences between customary land tenure and British land law. Māori notions of collective usage rights in land rather than ownership of the land itself was difficult to reconcile with a system of individual title and exclusive ownership. A growing settler society that required vast amounts of land to fuel its development, and increasing numbers of Māori land owners eager to meet that demand and obtain the financial rewards it brought, provided ample inducement to end Crown pre-emption and make land available in a much more direct fashion. Through the various processes established under successive Native Lands Acts designed to transform Māori land ownership, as well as the creation and operation of the Native Land Court, Māori customary tenure was slowly undermined. The effects of those changes on Māori were immense. Māori custom was distorted, Māori social structures were destroyed, the role of rangatira was eroded, fraud and deception were incentivised, and Māori land was rapidly transferred out of their hands. As noted by Ballara, these were the "greatest catalysts of change in tribal organisation in the 19th century".²

¹Durie, ET "Custom Law: Address to the New Zealand Society for Legal & Social Philosophy" (1994) 24 VUWLR 325 at 326.

²Ballara, Angela Iwi: *The Dynamics of Māori Tribal Organisation from c. 1769 to c. 1945* (Victoria University Press, Wellington, 1998) at 260.

The major legacy of the tenurial changes that occurred throughout the 19th and early 20th century is that today, Māori retain only a small fraction of the lands they once possessed. But this is not the only legacy. The partition of Māori land during the 1800s means that the little land that Māori retain today is often fragmented in small holdings and is generally unproductive and poor quality.³ The interpretation of succession to Māori land adopted by the Native Land Court has resulted in large numbers of beneficial owners that increase with each generation.⁴ In addition, the migration of Māori from their lands into New Zealand's urban centres in search of a better life has created a large number of absentee owners spread throughout New Zealand and the world who have little connection to their iwi, hapu, and land.⁵ Each of these unique factors is not only problematic for the administration of Māori land, but for Māori collective assets in general, and require careful management to overcome.

It is clear that Māori are transitioning to a new chapter in the story of the Treaty, and one which presents new challenges and requires new ideas to meet them. While the legal battles of the 1980s and 1990s gave life to the Treaty and the leverage necessary for Māori to pursue settlements with the Crown,⁶ the battles of the post-settlement era are likely to be fought around governance and asset management issues. At present, Māori manage their collective assets through a number of different entities, from trusts and companies to incorporated societies and Māori Trust Boards. However, many argue that Māori are currently hampered in the management of their assets because no existing governance entity is capable of mitigating the problems caused by the breakdown of Māori customary tenure.

Collective assets, and particularly those received through the Treaty settlement process, are critical to Māori development, providing the capital and resources necessary to help "equalise the economic and social conditions between Māori and

³ Asher, George and Naulls, David *Māori Land* (New Zealand Planning Council, Wellington, 1987) at 67.

⁴ *Ibid*, at 58.

⁵ *Ibid*, at 68-72.

⁶ For example of these early legal battles, see *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513, *Te Runanga O Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 and *New Zealand Māori Council v Attorney-General* [1993] 2 NZLR 301.

non-Māori”.⁷ The inability of current legal entities to adequately address the problems that Māori face in the management of their collective assets makes it difficult, if not impossible, for them to take full advantage of those assets. However, Government has been presented with an enormous opportunity to remedy many of those problems through the creation of a new Māori-specific governance entity formulated by the New Zealand Law Commission and known as “waka umanga”. This thesis contends that New Zealand law must be recast to enable Māori to take full advantage of the economic and social opportunities their collective assets present and that waka umanga provides a strong model to achieve positive change. In particular, this thesis seeks to demonstrate how waka umanga might address the Māori governance issues of the post-settlement era and what kind of changes could be expected were the Commission’s proposals to be taken up by Government.

Before embarking on a critique of Māori collective assets management it is necessary to have an appreciation of the changes to Māori land management that followed the signing of the Treaty and that have given rise to many of today’s problems. Chapter One thus considers the historical events that have led to the contemporary Treaty settlement process and in particular the tenurial changes of the 19th century. Attention will be given to the breakdown in Māori notions of land ownership through the operation of the Native Land Acts and the Native Land Court, and the way in which this impeded the ability of Māori to retain their lands. Chapter One also provides a cursory overview of early attempts by the Crown to resolve Māori grievances concerning Treaty breaches and land loss.

Chapter Two outlines the contemporary Treaty settlement process, and the current approach to the settlement of Treaty grievances. Chapter Two also provides a detailed analysis of the range of legal entities currently available to, and employed by, Māori in the management of their collective assets and, in particular, their inability to meet Māori governance needs.

Chapter Three discusses the Law Commission’s recommendations concerning the creation of waka umanga as a solution to the current shortfalls in Māori governance. Chapter Three then provides an overview of the Māori governance problems

⁷ Irons Magallanes, Catherine “Reparations for Māori Grievances in Aotearoa New Zealand” in Lenzerini, Federico (ed) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, New York, 2008) at 540.

identified by the Law Commission, as well as their recommendations as to how these problems could be resolved.

Chapter Four provides an outline of the Waka Umanga Bill 2007, which was the response of the fifth Labour Government to the Law Commission's recommendations. The Bill would establish waka umanga as a new governance entity that could be employed by Māori in the management of their collective assets. Chapter Four considers both the provisions of the draft Bill as well as the changes recommended by the Māori Affairs Select Committee.

Finally, Chapter Five provides an assessment of the Waka Umanga Bill against a proposed framework for good Māori governance and the likely impact that this new legal entity would have on the governance of Māori collective assets. Chapter Five concludes that waka umanga would be a significant improvement, better enabling Māori to deal with many of the issues caused by the breakdown of Māori customary tenure, ultimately allowing them to take full advantage of the opportunities offered by their collective assets.

CHAPTER ONE: A CLASH OF CULTURES – TENURIAL CHANGE AND ITS EFFECTS

1.1 INTRODUCTION

For well over 150 years Māori have been engaged in a process of settling historical grievances with the Crown in relation to breaches of the Treaty of Waitangi. Viewed by Māori and Pakeha alike as the foundations of an enduring relationship articulated by the phrase “he iwi tahi tatou”,⁸ few people present at Waitangi on that February day in 1840 could have imagined how much influence the Treaty would have in 21st century New Zealand. Yet today, as it was 171 years ago, the Treaty is still very much at the forefront of Māori-Pakeha relations, and no more so than in the area of Treaty settlements.

Although the basis of Treaty grievances varies from claim to claim, the loss of land is a feature common to all. While land sales and confiscations are the major source of historical grievances, the underlying cause of Māori land loss following the signing of the Treaty was a clash between the Māori customary system of law that existed in New Zealand for centuries before the arrival of British settlers, and the English legal system those settlers brought with them, especially the system of laws governing land. Belgrave states that at 1840 the law of New Zealand was Māori Customary Law.⁹ Following the assumption of British sovereignty in 1840 the “technical legal features of land law in New Zealand fundamentally changed”.¹⁰ This so-called “tenurial revolution”, firmly rooted in legal positivist ideology,¹¹ was an “important element in the process of colonisation”¹² and viewed as a “necessary pre-requisite to the education and “civilisation” of native peoples”.¹³ This was true not only for New

⁸ The famous words spoken by Lieutenant Governor William Hobson during the signing of the Treaty of Waitangi, and literally translated as “we are one people”.

⁹ Belgrave, Michael *“Māori Customary Law: From Extinguishment To Enduring Recognition”* (Unpublished Paper, Personal Copy with Author Provided by the New Zealand Law Commission, 1996) at 5.

¹⁰ Bennion, Tom, Brown, David, Thomas, Rod and Toomey, Elizabeth (eds) *New Zealand Land Law* (2nd ed, Brookers, Wellington, 2009) at 347.

¹¹ Boast, Richard “Māori Customary Land and Land Tenure” in Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith (eds) *Māori Land Law* (2nd ed, Lexis Nexis New Zealand Limited, Wellington, 2004) at 21-22.

¹² Stokes, Evelyn *The Individualisation of Māori Interests in Land* (Te Matahauariki Institute, University of Waikato, Hamilton, 2002) at 2.

¹³ *Ibid*, at 159.

Zealand, but for all countries in which the “use or lose”¹⁴ ideology of settlers abutted the customary tenure of indigenous peoples. Stokes notes that the “urge” to transform customary or collective property rights into individual title was “widespread in areas of European settlement where the imported legal system was derived mainly from English law”.¹⁵ Boast adds that “individualisation was in the air; it was the contemporary mood, the liberal orthodoxy of the time”,¹⁶ and identifies parallels with enclosure in the United Kingdom between 1500-1850,¹⁷ colonisation in Mexico, Guatemala and Hawaii,¹⁸ and the general dogma of nineteenth century liberalism.¹⁹

New Zealand’s tenurial revolution had a destructive effect on Māori, seriously undermining their ability to retain their lands. Although the settlement of Treaty claims is a relatively recent event in New Zealand history, the source of most Treaty grievances is firmly posited in New Zealand’s early history as a Crown colony. Indeed, Treaty grievances have been a source of conflict between Māori and the Crown ever since the Treaty was signed.²⁰ From very early on in New Zealand’s post-Treaty history Māori saw that the bargain encapsulated in the terms of the Treaty could be a double-edged sword, providing them with the protection of the British Crown while at the same time making it considerably easier for their lands to be lost.²¹

This chapter considers the clash between Māori customary law and British law that occurred during the 19th century and the implications this has for the governance of Māori collective assets today. It is contended that the breakdown of Māori customary land tenure following the signing of the Treaty has given rise to many of the significant issues that Māori governance entities must grapple with today. Brief attention will first be given to the doctrine of Native title. The events of the 19th century that give rise to today’s Treaty grievances will then be examined, with a particular focus on the enactment of the early Native Land Acts and the

¹⁴ Brookfield, F.M. *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 2006) at 141.

¹⁵ *Ibid.*

¹⁶ Boast, Richard *Buying The Land, Selling The Land: Governments And Māori Land In The North Island 1865-1921* (Victoria University Press, Wellington, 2008) at 47.

¹⁷ *Ibid.*, at 42.

¹⁸ *Ibid.*, at 43-47.

¹⁹ *Ibid.*, at 42.

²⁰ Orange, Claudia *An Illustrated History of the Treaty of Waitangi* Bridget Williams Books, Wellington, 2004) at 48-53.

²¹ *Ibid.*

establishment of the Native Land Court, and the effects that these had on Māori land owners and land loss. Early attempts by the Crown to settle Treaty grievances will also be canvassed, before considering the current Treaty settlement process and the governance entity requirements for the receipt of settlement assets.

1.2 THE COMMON LAW DOCTRINE OF NATIVE TITLE

The doctrine of Native title recognises that Māori possessed property rights prior to European settlement. In *Te Runanganui o Te Ika Whenua Inc v Attorney-General*, Cooke P described Native title as:

“...a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title that goes with sovereignty. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights”²²

The common law doctrine of Native title is a sui generis collective interest in land,²³ and arises out of presumptions in English law that those in occupation of land have fee simple estate and valid title.²⁴ Native title thus plays an important part in the legal systems of colonial countries, particularly in the settlement of historical grievances with Indigenous peoples and the recognition of aboriginal rights.

It is important to note that Native title applies in New Zealand by virtue of common law rather than the Treaty. Indeed, the Treaty is merely declaratory of those common law rights that all aboriginal peoples possess.²⁵ Although the doctrine applied automatically to Māori upon the assumption of British sovereignty,²⁶ Native title has had a somewhat fitful history of Crown and judicial recognition in New Zealand. Native title was acknowledged early in New Zealand’s post-Treaty history in *R v Symonds* where the Supreme Court noted the doctrine was “entitled to be respected” and could

²² *Te Runanganui o Te Ika Whenua v Attorney-General* [1990] 2 NZLR 641 at 5.

²³ *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.

²⁴ McNeil, Kent *Common Law Aboriginal Title* (Oxford University Press, Oxford, 1989) at 298.

²⁵ McHugh, PG “The Legal Basis for Māori Claims Against the Crown” (1988) 18 VUWLR at 1 at 2-3.

²⁶ New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (New Zealand Law Commission, Wellington, 2001) at 12.

not be extinguished without the consent of Māori.²⁷ Similarly, in *Re The Landon and Whitaker Claims Act 1871* the Court of Appeal affirmed that the Crown was bound to “a full recognition of native proprietary rights”.²⁸

However, a decidedly different approach was taken by the Supreme Court in *Wi Parata v The Bishop of Wellington*,²⁹ which asserted that Māori were “incapable of performing the duties, and therefore of assuming the rights, of a civilised community”, thus rejecting any notion that they possessed pre-existing proprietary rights cognisable by the courts or the Crown. Though clearly at odds with the earlier jurisprudence, *Wi Parata* and the tenure of James Prendergast as New Zealand’s Chief Justice would have a negative influence on the recognition of Native title in New Zealand well into the 20th century.³⁰

Wi Parata was subsequently rejected by the Privy Council in *Nireaha Tamaki v Baker*,³¹ which gave support to Symonds as correctly defining the status of Native title in New Zealand. The Court found that Māori customary title was cognisable in New Zealand law and it was “rather late in the day” for any argument to the contrary. More recently, in *Ngati Apa v Attorney-General*³² the Court of Appeal, in considering customary rights in the foreshore and seabed, noted that the Crown’s radical title was not “inconsistent with common law recognition of native property” and that “any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature”.³³ The decision provides a detailed overview of Native title jurisprudence, drawing a line under the case law developed from *Wi Parata* and making it clear that judicial thought has moved on in favor of Symonds.³⁴ This is important because the acceptance that

²⁷ *R v Symonds* (1847) NZPCC 388.

²⁸ *In Re Landon and Whitaker Claims Act 1871* (1872) 2 NZCA 41.

²⁹ *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

³⁰ For examples of subsequent decisions in which the courts applied the reasoning in *Wi Parata*, see *Hohepa Wi Weera v Bishop of Wellington* (1902) 21 NZLR 655, *Re the Bed of the Wanganui River* [1962] NZLR 600, and *In Re Ninety Mile Beach* [1963] NZLR 461. See also Morris, Grant “James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty During the Latter Half of the Nineteenth Century” (2004) 35 VUWLR 117.

³¹ *Nireaha Tamaki v Baker* (1894) 12 NZLR 483.

³² *Ngati Apa v Attorney-General* [2003] NZCA 117.

³³ *Ibid*, at [30] and [31].

³⁴ For example of further decisions in which New Zealand courts have recognised the doctrine of aboriginal title see *Wallis v Solicitor-General* (1902) NZPCC 23, *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321, *Manu Kapua v Para Haimona* [1913] AC 761, *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, and *Te Runanganui o Te Ika Whenua v Attorney-General* [1990] 2 NZLR 641 at 5.

Native title, with its focus on the protection of indigenous collective property, applies in New Zealand has clear implications for Māori collective assets.

1.3 MĀORI CUSTOMARY LAW AND LAND TENURE

Like many Indigenous peoples, land played a significant part in early Māori society and was central to the Māori worldview. As noted by Kawharu:

“Land and its resources impinged on every one of his social activities, from food gathering to fighting, from regaling his guests with hospitality to propitiating his gods.”³⁵

Before European contact Māori possessed “the whole of the soil” of New Zealand,³⁶ which they administered in accordance with property rights derived from tribal customary law.³⁷ Unlike English law, customary law was “values oriented” and promoted an adherence to core principles rather than set rules.³⁸ The foundations of this “grassroots management of law”³⁹ lay in tikanga Māori - the “values, standards, principles or norms to which the Māori community generally subscribed for the determination of appropriate conduct”.⁴⁰

Tikanga was not rigid, but could vary according to the specific circumstances of individual iwi, hapu, and whanau, reflecting the fact that tikanga were passed on orally rather than written down.⁴¹ Despite this variation, fundamental principles were common.⁴² These included concepts such as “whanaungatanga” (“primacy of kinship

³⁵Kawharu, Ian Hugh *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 40-41.

³⁶Boast, Richard “The Evolution of Māori Land Law 1862-1993” in Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith (eds) *Māori Land Law* (2nd ed, Lexis Nexis New Zealand Limited, Wellington, 2004) at 66.

³⁷ McHugh, Paul *The Māori Magna Carta: New Zealand Land and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 76.

³⁸Durie, above n 1, at 331. Although Metge suggests that differences between English law and Māori customary law derive from their sources and the way in which they are communicated and passed on: Metge, Joan “*Custom Law Guidelines Project – Commentary On Judge Durie’s Custom Law*” (Unpublished Paper, Personal Copy with Author Provided by the New Zealand Law Commission, 1996) at 5.

³⁹Durie, ET “Will the Settlers Settle? – Cultural Conciliation and Law” (1996) 8 Otago Law Review 449 at 451.

⁴⁰ *Ibid*, at 452.

⁴¹ Erueti, Andrew “Māori Customary Law and Land Tenure: An Analysis” in Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith (eds) *Māori Land Law* (2nd ed, Lexis Nexis New Zealand Limited, Wellington, 2004) at 42.

⁴² *Ibid*, at 41.

bonds”),⁴³ whakapapa (“genealogies”),⁴⁴ manaakitanga (“generosity, caregiving or compassion”)⁴⁵ and utu (“the maintenance of harmony and balance”).⁴⁶ As such, tikanga was much broader than English law – it pervaded every part of Māori society, touching on “all aspects of human behaviour, including matters of spirituality, religion and morality”.⁴⁷ Indeed, tikanga reflects the Māori worldview of a “continuing relationship between land, environment, people, gods, ancestors and spirits”.⁴⁸

Relationships were equally important in Māori customary land tenure, which Stokes describes as a “system of overlapping and interlocking usufructuary rights derived from ancestry and occupation...that gave no power of alienation of property to any individual”.⁴⁹ Māori land was thus held communally, and customary tenure was based on the ownership of rights in land and the exercise of “mana whenua” over it, rather than ownership of the land itself.⁵⁰ In essence, Māori saw themselves as belonging to the land, which was “part of them by direct descent from the earth mother”.⁵¹ Mulgan notes that the communal nature of Māori land ownership was also linked to political authority and political sovereignty, with use rights “determined by the overall political authority of the community”.⁵²

Entitlement to land, derived from “ascription and subscription” to the community at large,⁵³ was an “expression of the relationships of people to their environment as well as each other” and based on “ahi ka” or continued occupation and use.⁵⁴ Māori customary tenure then, centred on the group rather than the individual, and with its emphasis on relationships, both physical and spiritual, was a world away from the British doctrine of tenures and estates transplanted to New Zealand from 1840. It is these fundamental differences, and thus the unavoidable clash between Māori and English land law, that proved to have the most significant impact on the retention of Māori land.

⁴³ Durie, above n 39, at 455.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Erueti, above n 41, at 41.

⁴⁸ Durie, above n 1, at 329.

⁴⁹ Stokes, above n 12, at 1.

⁵⁰ Erueti, above n 41, at 42-43.

⁵¹ Durie, above n 1, at 328.

⁵² Mulgan, Richard “*Commentary On Chief Judge Durie’s Custom Law Paper From The Perspective Of A Pakeha Political Scientist*” (Unpublished Paper, Personal Copy with Author Provided by the New Zealand Law Commission, 1996) at 25.

⁵³ Durie, above n 39, at 453.

⁵⁴ *Ibid.*

1.4 MĀORI LAND TENURE FROM 1840 - A CULTURAL CLASH

From 1840 the Crown, readily assisted by the Courts, began the transmutation of Māori land tenure, a so-called process of “tenurial substitution, involving the cancellation of the Māori customary allodial tenure and its replacement by classical English feudal tenure”.⁵⁵ The seeds of tenurial substitution were sown with the Treaty. Although there are much debated differences between the English and Māori texts,⁵⁶ in essence the Treaty had three effects. First, it secured sovereignty for the Crown,⁵⁷ and with it the power to “legislate for all matters relating to peace and good order”.⁵⁸ Second, the Crown acquired the right of pre-emption,⁵⁹ while guaranteeing Māori “full exclusive and undisturbed possession”, or “tino rangatiratanga”, of their lands, forestries and fisheries.⁶⁰ And finally, the Treaty conveyed the Crown’s protection, and the rights and privileges of British citizenship, to Māori.⁶¹ Together then, these three articles secured exclusive lawmaking powers for the Crown and brought Māori within the ambit of the legal framework that emerged through the exercise of those powers.⁶² This is important, because it is this legal framework that undermined customary tenure and deprived Māori of their lands.

The Native Land Act 1862

By 1862 an astonishing two thirds of New Zealand land, including most of the South Island, had passed out of Māori hands,⁶³ the majority lost through the exercise of the Crown’s pre-emptive right. Under pre-emption, the Crown acquired land from Māori and extinguished customary title, before the land was on sold by provincial government to settlers by way of crown grant.⁶⁴ In 1862 pre-emption was abandoned

⁵⁵ Boast, above n 36, at 70.

⁵⁶ For example, see the translation by Sir Hugh Kawharau in Kawharu, IH (ed) *Waitangi: Māori & Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 319-321.

⁵⁷ Treaty of Waitangi Article One.

⁵⁸ Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, Waitangi Tribunal, 1988) at 232.

⁵⁹ The sole right to purchase land from Māori.

⁶⁰ Treaty of Waitangi Article Two. The term “tino rangatiratanga” derives from the Second Article of the Māori text of the Treaty.

⁶¹ Treaty of Waitangi Article Three.

⁶² For a more detailed discussion of the Treaty of Waitangi and its effects, see generally Claudia Orange’s *An Illustrated History of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2004).

⁶³ Controller and Auditor General “Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee” (Controller and Auditor General, Wellington, 2004) at 23.

⁶⁴ Boast, above n 16, at 27.

with the enactment of the Native Land Act,⁶⁵ the first of a number of statutes that aimed to “feudalise” Māori land interests and recast customary tenure in British terms.⁶⁶ Indeed, that was made explicit in the Preamble to the Act, which desired that Māori customary interests be “assimilated as nearly as possible to the ownership of land according to British law” in order to “advance the civilization of the natives and promote the peaceful settlement of New Zealand”.⁶⁷ In supposed pursuit of that purpose, the Act provided for the ascertainment of ownership of Māori lands,⁶⁸ and introduced two significant changes. First, it established a process through which Māori communal land interests could be converted to freehold title, and second, it established a Native Land Court under the presidency of a European magistrate⁶⁹ to ascertain and define Māori rights to land.⁷⁰

All land that was subject to Native title could now only be dealt with and disposed of in accordance with the legislative regime established by the Native Land Act.⁷¹ Under the new regime any Māori tribe, community or, significantly, individual could apply to the Court to have their “native ownership” in respect of a piece of land ascertained and defined according to “Native Custom”.⁷² Once this had been done the Court would register the interests and issue a certificate of title,⁷³ and until a certificate had been issued, the rights, usages or customs of Māori in respect of the land were not “cognisable or determinable by any Court of Law or Equity or other Judicature”.⁷⁴ The certificate could then be converted or exchanged for a Crown Grant,⁷⁵ upon which customary title would be extinguished and the land freely sold to whomever the owners pleased.⁷⁶ The regime thus constituted a significant departure from Māori ideas of land tenure and reflected two key concepts in English land law – the individual ownership of land and the notion that all title to land derived from the Crown.⁷⁷

⁶⁵ See the Preamble to the Native Lands Act 1862. It should be noted that Crown pre-emption was briefly waived by Governor FitzRoy from March 1844 until it was restored by Governor Grey in November 1845 (Orange, above n

⁶⁶ Boast, above n 36, at 70.

⁶⁷ Preamble to the Native Lands Act 1862.

⁶⁸ Long Title to the Native Lands Act 1862.

⁶⁹ Section 4 and section 5 Native Lands Act 1862.

⁷⁰ Preamble, Native Lands Act 1862.

⁷¹ Section 2 Native Lands Act 1862.

⁷² Section 7 Native Lands Act 1862.

⁷³ Section 13 Native Lands Act 1862.

⁷⁴ Section 3 Native Lands Act 1862.

⁷⁵ Section 15 and section 18 Native Lands Act 1862.

⁷⁶ Section 17 Native Lands Act 1862.

⁷⁷ Boast, above n 36, at 69-70.

A final change introduced by the Act was the ability for owners to apply to the Court to partition their land.⁷⁸ Where owners were divided as to the sale of land, those in favour of selling could have their portion partitioned out under a separate certificate of title, which could then be disposed of as they wished. Similarly, a purchaser could buy individual interests from owners and, once they had accumulated a large enough share of the land, partition out their portion. Thus, where there was at least one willing seller the law provided a mechanism through which they could divest themselves of their land interests with no regard to the wishes of the other communal owners. Partition soon became an easy way to deal with unwilling sellers, and comprised a significant part of the Court's day-to-day business.⁷⁹

The New Zealand Settlements Act 1863

Early government policy concerning the acquisition of Māori land took a turn in the early 1860s with the onset of the New Zealand Wars, which McHugh describes as an “expression of aboriginal resistance to the empire of uniformity”.⁸⁰ Māori opposition to the Crown's encroachment on their lands developed into armed conflict with government troops in various parts of the North Island.⁸¹ As well as military action, the government's response was the enactment of the New Zealand Settlements Act 1863, which sought to address the “insurrections” of the “evil-disposed persons of the Native race”,⁸² and supposedly to ensure the security of the colony.⁸³ Through the Act, the Governor in Council was permitted to declare any land in the possession of those who had engaged in “rebellion” against the Crown as being subject to the Act.⁸⁴ Such land could then be set aside as settlements for colonisation,⁸⁵ and the land deemed to be Crown Land unencumbered by any title the possessors may have

⁷⁸ Section 20 Native Lands Act 1862.

⁷⁹ Gilling, Bryan “The Māori Land Court in New Zealand: An Historical Overview” (1993) 13(1) Canadian Journal of Native Studies 17 at 25.

⁸⁰ McHugh, P.G. “Aboriginal Identity and Relations in North America and Australasia” in Coates, Ken and McHugh, P.G. *Living Relationships – Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) at 109.

⁸¹ Orange, Claudia *An Illustrated History of the Treaty of Waitangi* Bridget Williams Books, Wellington, 2004) at 68-71.

⁸² Preamble New Zealand Settlements Act 1863.

⁸³ Although Gilling suggests that the “unofficial” reasons for the New Zealand Settlements Act and the confiscations that followed were to punish Māori opposition to the government by taking their “turangawaewae”, make further land available for European settlement, and to help finance the wars: Gilling, Bryan “Raupatu: The Punitive Confiscation of Māori Land in the 1860s” in Boast, Richard and Hill, Richard *Raupatu: The Confiscation of Māori Land* (Victoria University Press, Wellington, 2009) at 16-17.

⁸⁴ Section 2.

⁸⁵ Section 3.

had.⁸⁶ Through these provisions more than three million acres of Māori land were confiscated between 1864 and 1867,⁸⁷ including over 1 million acres in both Taranaki and Waikato, and hundreds of thousands of acres in Tauranga and Opotiki.⁸⁸ Today, land confiscations or “raupatu” form a significant part of Treaty grievances.⁸⁹

The Native Land Act 1865

In 1865 a second Native Lands Act was introduced, the purposes of which were to amend and consolidate laws relating to Māori customary title, ascertain the customary owners of Māori land, encourage the extinction of customary title in exchange for titles derived from the Crown, and regulate the descent of Māori land.⁹⁰ In contrast to its predecessor, the 1865 Act was much more explicit in its intent to “expediate the conforming of Māori custom to English law and thus the easier acquisition by settlers of Māori land”,⁹¹ and made a significantly stronger push toward transforming Māori land tenure to accord with that of the British. As noted by the Waitangi Tribunal:

“British legal procedures and ideas on land holding and descent were to be imposed on Māori with little or no consultation and no leeway such as under the 1862 Act.”⁹²

The Native Land Court was now permanently constituted,⁹³ and empowered to investigate and determine title to Māori land.⁹⁴ As with the 1862 Act, Māori could apply to the Court to have their land interests determined and a certificate of title issued.⁹⁵ However, the new Act also introduced two notable changes. First, a certificate of title issued by the Court could list no more than 10 individuals, giving

⁸⁶ Section 4.

⁸⁷ Litchfield, Michael R “Confiscation of Māori Land” (1985) 15 VUWLR 335 at 335.

⁸⁸ Orange, above n 81, at 74.

⁸⁹ For a more extensive discussion of the New Zealand Wars and the Crown’s response, see James Belich’s revisionist study in *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland University Press, Auckland, 1986).

⁹⁰ Preamble to the Native Lands Act 1865.

⁹¹ Gilling, Bryan “Engine of Destruction? An Introduction to the History of the Māori Land Court” (1994) 24 VUWLR 115 at 124.

⁹² Riseborough, Hazel and Hutton, John *The Crown’s Engagement With Customary Tenure in the Nineteenth Century* (Waitangi Tribunal, Ranghaua Whanui National Theme C, 1997) at 58.

⁹³ Section 5 Native Lands Act 1865.

⁹⁴ Part III Native Lands Act 1865.

⁹⁵ Section 21 and 23 Native Lands Act 1865.

rise to the so-called “ten-owner rule”.⁹⁶ Second, the Court was empowered to determine succession to Māori land.⁹⁷ Where any Māori died intestate or without making a “valid disposition” of their estate, any individual could apply to the Court for succession.⁹⁸ The Court could then inquire into and determine who, according to “native custom”, should succeed to the estate and make an order accordingly.⁹⁹

The new legal framework introduced by the two early Native Lands Acts was thus inherently different to Māori notions of customary land tenure, and proved a destructive force to Māori land holdings. The individualisation of Māori land interests made it significantly easier for Māori land to be sold, with or without the consent of all owners. The ten-owner rule, totally at odds with the communal nature of customary tenure, meant that the vast majority of Māori land owners were unable to have their interests recognised. Ownership of land was instead vested in a significantly smaller number of individuals who could deal with the land as they pleased. This raised tensions within Māori society between groups opposed to land sales and those in favour, which “allowed existing and sometimes very subtle divisions to be sharpened by substantially raising the stakes”.¹⁰⁰ The result was that large numbers of Māori were not only dispossessed of their lands, but dispossessed by the actions of their own. Indeed, the changes introduced by the Acts created a fertile ground for “fraud and misappropriation”.¹⁰¹

The Native Land Court

Although the effects of changes such as partition and the ten-owner rule were great, the most devastating creation to emerge from the Native Lands Acts was the Native Land Court itself. The Court has been the subject of much criticism, and a significant amount of blame for Māori land loss has been laid at its feet. The Court has been aptly described by Kawharu as a “veritable engine of destruction for any tribe’s tenure of land”,¹⁰² while Ward notes that “few institutions created by the Crown have

⁹⁶ Section 23 Native Lands Act 1865.

⁹⁷ Part III Native Lands Act 1865.

⁹⁸ Section 30 Native Lands Act 1865.

⁹⁹ Section 30 and 32 Native Lands Act 1865.

¹⁰⁰ Boast, above n 16, at 116.

¹⁰¹ Durie, Mason *Ngai Tai Matatu – Tides of Māori Endurance* (Oxford University Press, New York, 2005) at 192.

¹⁰² Kawharu, above n 35, at 15.

had a more pernicious impact on Māori society”.¹⁰³ Similarly, in his biography of the Court, Williams states:

“When one examines the statistics which starkly reveal the factual correlation between Land Court operations on the one hand and alienations of land to the Crown on the other, a clear pattern emerges. It is a pattern of land being lost to Māori after its passage through the Land Court”.¹⁰⁴

Through its interpretation of the Native Lands Acts and the internal processes and arbitrary rules it adopted, the Court became a significant driver of the land tenure revolution.¹⁰⁵ Although the Court was established in the 1862 Act, it was not until the Native Land Act 1865 that it was formally constituted, and it was under this Act that it began a “conscious attack on Māori society” through a number of mechanisms.¹⁰⁶

In contravention of the ten-owner rule, the Court generally vested ownership of Māori land in fewer than 10 owners,¹⁰⁷ reducing the number of individuals who could object to land sales, thus making alienation much easier. The Act also gave the Court wide powers to impose fees and duties on Māori land owners, which it readily exercised to establish a number of financial burdens that Māori were required to bear. Duties became payable by purchasers and lessees of Māori land under section 55 of the Act, reducing the amount of money received by Māori land sellers.¹⁰⁸ Under the discretionary powers conferred by section 62, fees were imposed on Māori litigants bringing claims or counter claims before the Court.¹⁰⁹ Among those fees, Māori were required to pay £1 for the investigation of every claim and £1 for every day the Court was occupied in hearing the claim.¹¹⁰ Those costs were significant, and placed considerable financial pressures on Māori and their ability to contest the alienation of their land. Where Māori could not afford to pay the fees, section 63 enabled the Court

¹⁰³ Ward, Alan *An Unsettled History: Treaty Claims In New Zealand Today* (Bridget Williams Books, Wellington, 1999) at 125.

¹⁰⁴ Williams, David V *‘Te Kooti Tango Whenua’ The Native Land Court 1846-1909* (Huia Publishers, Wellington, 1999) at 51.

¹⁰⁵ *Ibid*, at 53.

¹⁰⁶ Riseborough and Hutton, above n 85, at 59.

¹⁰⁷ Williams, above n 104, at 175-176.

¹⁰⁸ *Ibid*, at 189.

¹⁰⁹ *Ibid*.

¹¹⁰ Section 62 Native Land Act 1865.

to place a charge on the land. As noted by Williams, in many cases where the Court decided to exercise this discretion it also ordered partition to discharge the fees.¹¹¹

The distortion of Māori custom by the Native Land Court also assisted in the breakdown of Māori customary tenure. Though the Court was required to investigate Māori customary title having regard to Māori custom, it had the freedom to decide exactly what that custom was. Furthermore, the superior courts were “weary of custom”, and the Native Land Court was thus became the sole determiner of what custom was.¹¹² A prime example of the effect of this is succession to Māori land. In *Papakura – A Claim of Succession*,¹¹³ the Court decided against applying the English rule of primogeniture citing its inability to reconcile the rule with “native ideas of justice or Māori custom”,¹¹⁴ and instead decided that all children of the deceased should inherit equally. This meant that, over successive generations, the number of beneficial owners of Māori land increased exponentially, clearly evidenced by the large number of beneficial owners in blocks of Māori land today.¹¹⁵ The *Papakura* rule has been widely criticised on a number of fronts, including by the Court itself.¹¹⁶

A further way in which the Court distorted Māori custom was through the establishment of the so-called “1840 Rule” and its over-statement of “take raupatu”, or claiming land by conquest. In the case of *Oakura* the Court decided that those in possession of land at the arrival of British Government in 1840 were to be regarded as the owners of that land and their titles settled.¹¹⁷ Similarly, the Court determined that the “great rule which governed Māori rights to land” prior to 1840 was force, and that groups held land “until expelled from it by superior power and...it remained theirs until they in their turn had to yield it to others”.¹¹⁸ The Court applied this view to a number of later cases,¹¹⁹ and when combined with the 1840 Rule meant that Māori who were displaced from their lands and had not returned by 1840 could not be

¹¹¹ Williams, above n 104, at 190.

¹¹² Young, Grant, Belgrave, Michael and Bennion, Tom “Native and Māori Land Legislation in the Superior Courts, 1840-1980” (Massey University, Social and Cultural Studies Number 6, 2005) at 3.

¹¹³ *Papakura – A Claim of Succession* (1867) in Fenton, FD *Important Judgements Delivered in the Compensation Court and Native Land Court* (1879) 19.

¹¹⁴ *Ibid*, at 19-20.

¹¹⁵ Williams, above n 104, at 184.

¹¹⁶ See the comments of Chapman J in *Willoughby v Panapa Waihopi* (1910) NZLR 1123.

¹¹⁷ *Oakura* (1866) in Fenton, FD *Important Judgements Delivered in the Compensation Court and Native Land Court* (1879) 9 at 10.

¹¹⁸ *Ibid*, at 9.

¹¹⁹ For example, see *Owharoa* (1870), *Waihi* (1870), and *Aroha* (1871) in Fenton, FD *Important Judgements Delivered in the Compensation Court and Native Land Court* (1879).

recognised as the owners no matter how strong their connections to the land were. In contrast, those occupying land at 1840 would be recognised as the owners, even if they had no historical links to the land. As such, the imposition of these arbitrary rules by the Court undermined the importance of whenua to Māori and the “primacy of whakapapa in tikanga Māori”.¹²⁰

Together then, the Native Land Acts and the Native Land Court proved an effective force in the alienation of Māori land, providing both the machinery through which individualisation of Māori title could be effected and the vehicle to drive that process. This greatly advanced the loss of Māori land and by the early 1900s “the cultural asset of land as a taonga tuku iho of special significance to every hapu and whanau, had been almost completely stripped away”.¹²¹ This loss of land was accompanied by concurrent depopulation and breakdown in Māori society.¹²²

1.5 Early Approaches To Māori Grievances

As the amount of land transferred out of their hands began to grow, so too did Māori efforts to prevent it, and Māori increasingly turned to the government for assistance. While various enactments during the late 1860s sought to incorporate Māori into New Zealand society,¹²³ land loss continued. The apparent apathy with which the Crown respected its obligations as a Treaty partner led to a petition to Queen Victoria in 1882 by Māori seeking a Royal Commission to, among other things, investigate breaches of the Treaty.¹²⁴ Two more delegations went to Britain in 1914 and 1924, but on each occasion Māori were referred back to the New Zealand government, and further enactments and government policies at the turn of the 19th century continued

¹²⁰Williams, above n 104, at 189.

¹²¹*Ibid*, at 60.

¹²²Sorenson, MPK “Land Purchase Methods and Their Effect on Māori Population 1865-1901” (1956) 65 *Journal of the Polynesian Society* 3 at 1-2.

¹²³Ward, above n 103, at 135-136. Examples of legislation enacted during this period include the Native Rights Act 1865 which deemed all Māori to be “natural born subjects”; the Resident Magistrates Act 1867 which provided for the appointment of Māori assessors to Magistrate Courts; the Native Schools Act 1867 which provided for the establishments of schools for Māori education; and the Māori Representation Act 1867 which provided for Māori Parliamentary representation through the establishment of four Māori seats.

¹²⁴Orange, above n 81, at 101-102.

to exacerbate the position of Māori land owners.¹²⁵ As a result between 1911 and 1920 Māori lost half of their remaining land.¹²⁶

Throughout the 1800s and the better part of the 1900s, settlements of Māori grievances stemming from the loss of land and breaches of the Treaty were limited. In the few cases where the Crown recognised Māori had legitimate claims and sought to make amends, compensation was generally inadequate to provide Māori with a sense that their grievances had been fairly settled. In 1890 the government established a commission of inquiry into Māori land laws which led to some favourable changes, although these were short-lived.¹²⁷ Generally, there appeared to be no method to the settlement of Treaty grievances during this period.

In 1920 a government commission reported on the Kemp purchase of the South Island, recommending that the Crown compensate Ngai Tahu for the loss of its lands.¹²⁸ In 1922 the Crown reached an agreement with Te Arawa concerning Rotorua lakes.¹²⁹ Under the agreement, the beds of a number of Rotorua lakes were vested in the Crown in return for financial compensation and fishing rights.¹³⁰ In 1926 a settlement was reached with Ngati Tuwharetoa. Under the settlement, which was confirmed by way of legislation,¹³¹ Lake Taupo and adjoining waterways were vested in the Crown,¹³² with Ngati Tuwharetoa receiving an annuity and a share of fishing and camping licence revenue in return.¹³³ If nothing else these early settlements created hope among Māori that the Crown was finally prepared to talk about the Treaty and Māori claims.¹³⁴

The 1920s also saw a change in New Zealand's political landscape. The Ratana movement brought renewed attention to the Treaty and the struggle by Māori to have their grievances heard and resolved, and their subsequent union with the Labour

¹²⁵ *Ibid*, at 110. These included the granting of perpetual leases at low rents over Māori reserves in Taranaki, and the compulsory acquisition of Māori land under the Native Townships Act 1895 and the Native Townships Act 1910.

¹²⁶ Orange, above n 81, at 116.

¹²⁷ *Ibid*, at 110.

¹²⁸ Although a final settlement with Ngai Tahu was not reached until 1944.

¹²⁹ The agreement was given effect by way of the Native Land Amendment Act and Native Land Claims Adjustment Act 1922.

¹³⁰ Section 27 Native Land Amendment Act and Native Land Claims Adjustment Act 1922.

¹³¹ See the Native Land Amendment Act and Native Land Claims Adjustment Act 1926.

¹³² Section 14.

¹³³ Section 15.

¹³⁴ Although in 1926 Waikato Māori unsuccessfully petitioned the Crown for the return of fishing rights to the Waikato river.

Party ensured the Treaty would be firmly in the view of central government.¹³⁵ In 1926 the Sim Commission was established to investigate land confiscations that had occurred under the New Zealand Settlements Act, but fell short of resolving Māori grievances through the limited levels of compensation recommended.¹³⁶ In any case, the intervention of World War II put settlements on hold, and no compensation was paid in respect of the confiscations for almost another 20 years.¹³⁷

In 1940 the First Labour government began to reconsider the findings of the Sim Commission.¹³⁸ As a result, in 1944 compensation of £5,000 per year was awarded to the Taranaki Māori Trust Board,¹³⁹ followed in 1946 by compensation of £6,000 per year to Waikato Māori.¹⁴⁰ Compensation of £10,000 per year was also awarded to Ngai Tahu in respect of the Kemp Purchase.¹⁴¹ Although offering some level of amends, like earlier “settlements” the compensation awarded was inadequate, and this is perhaps best illustrated by the fact that all three iwi have since had claims heard by the Waitangi Tribunal, with Waikato and Ngai Tahu also concluding settlements with the Crown.

Following World War Two, the growing urbanisation of Māori gave further publicity to the Treaty and Māori grievances. While depression, war, and the post-war boom had helped to mask much of the “resentment and frustration” of Māori at the loss of their lands,¹⁴² Māori urbanisation brought with it a growing “awareness of their marginalisation”,¹⁴³ and Māori were no longer prepared to stay silent and wait in vain for the Crown to come to the negotiating table. The enactment of various pieces of legislation during the 1950s and 1960s galvanized Māori opposition to the treatment of their people by successive governments,¹⁴⁴ and was a catalyst of increased Māori protest over the following years.¹⁴⁵ The most visual expression of Māori grievance during this time was the 1975 “Land March” from Te Hapua in the far north to the

¹³⁵ Orange, above n 81, at 123.

¹³⁶ *Ibid*, at 122-123.

¹³⁷ *Ibid*, at 123.

¹³⁸ *Ibid*, at 130.

¹³⁹ See Taranaki Claims Settlement Act 1944.

¹⁴⁰ See Waikato-Maniapoto Māori Claims Settlement Act 1946.

¹⁴¹ See the Ngaitahu Claim Settlement Act 1944 and Ngaitahu Trust Board Act 1946.

¹⁴² Ward, above n 103, at 21.

¹⁴³ *Ibid*, at 21-22.

¹⁴⁴ This legislation included the Māori Trustee Act 1953, the Town and Country Planning Act 1953, the Māori Affairs Act 1953, the Counties Amendment Act 1961, and the Māori Affairs Amendment Act 1967.

¹⁴⁵ Orange, above n 81, at 137-138.

steps of Parliament in Wellington. In response to the growing unease, the third Labour government passed the Treaty of Waitangi Act in 1975, establishing the foundations for a cohesive Treaty settlement process, and heralding a new era in Treaty relations.

1.6 THE TREATY OF WAITANGI ACT 1975

The intent of the Treaty of Waitangi Act 1975 is summed up by its long title, which states:

“An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.”

Section 4 of the Act establishes the Waitangi Tribunal as a permanent commission of inquiry, the functions of which are outlined in section 5. The most important function of the Tribunal is to enquire into and make recommendations concerning breaches of the Treaty. By virtue of section 5(2) the Tribunal also has exclusive authority to “determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the difference between them” in exercising its functions. As originally enacted, the Act only empowered the Tribunal to consider claims by Māori that arose after its enactment. However, the jurisdiction of the Tribunal was extended in 1985, and the Tribunal was given the power to consider any claims arising after the signing of the Treaty on 6 February 1840.

Section 6 of the Act outlines the Tribunal’s jurisdiction, and provides Māori with the ability to submit a claim to the Tribunal where any “...ordinance, Act, regulations, order, proclamation, notice, statutory instrument, policy, practice, act or omission by or on behalf of the Crown was or is inconsistent with the principles of the Treaty of Waitangi”. On receipt of such a claim, the Tribunal is required to inquire into it unless the claim is submitted after 1 September 2008,¹⁴⁶ or the Tribunal exercises its discretion under section 7 not to inquire into the claim.

¹⁴⁶ Section 6 of the Act was amended in 2006 by the Treaty of Waitangi Amendment Act, preventing historical Treaty grievances from being lodged with the Waitangi Tribunal after 1 September 2008.

Perhaps of most importance, especially to the settlement of claims, section 3 of the Act empowers the Tribunal to recommend to the Crown that “action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future” if the Tribunal determines that the claim is well-founded. Such recommendations, although not binding on the Crown, are inevitably persuasive and provide a basis upon which settlements are negotiated.

1.7 DEVELOPMENT OF THE CURRENT SETTLEMENT PROCESS

Throughout the 1980s the growing body of research from the Waitangi Tribunal showing the extent to which the actions of the Crown in breaching the Treaty had affected Māori made it apparent that a coordinated response was needed to settle historical Treaty grievances.¹⁴⁷ In 1989 the Treaty of Waitangi Policy Unit was established within the Department of Justice, and was responsible for providing advice and assistance to the Crown in respect of Treaty litigation and settlement negotiations.¹⁴⁸ In 1993, the portfolio of “Minister of Treaty Negotiations” was established to provide overall guidance in the settlement process,¹⁴⁹ and in 1994 the government developed a set of policy proposals outlining its views as to how settlements with Māori could be reached.¹⁵⁰ The proposals inform much of the current settlement process.

The Office of Treaty Settlements (OTS) was established in 1995 within the Ministry of Justice to provide advice to the Minister of Treaty Negotiations on historical Treaty settlements, and is the principle government body involved in the current Treaty settlement process.¹⁵¹ The functions of the OTS include advising the Crown on Treaty negotiation strategies, negotiating with Māori on behalf of the Crown, and implementing settlements reached with Māori.¹⁵² All major decisions during the negotiation process are made by Cabinet or its Ministers.¹⁵³ As well as the OTS,

¹⁴⁷ For examples of the Tribunal’s early reports, see the Waiāu Power Station Report (Wai 2, 1978), the Motunui-Waitara Report (Wai 6, 1983), the Kaituna River Report (Wai 4, 1984), the Manukau Report (Wai 8, 1985), the Te Reo Māori Report (Wai 11, 1986), and the Orakei Report (Wai 9, 1987).

¹⁴⁸ Office of Treaty Settlements *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Office of Treaty Settlements, Wellington, 2002) at 21.

¹⁴⁹ *Ibid.*

¹⁵⁰ Office of Treaty Settlements *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals* (Office of Treaty Settlements, Wellington, 1994).

¹⁵¹ Orange, above n 81, at 226.

¹⁵² Office of Treaty Settlements, above n 148, at 23.

¹⁵³ *Ibid.*, at 22.

other key government departments involved in the Treaty settlement process include the Ministry of Māori Development (Te Puni Kokiri), the Ministry for the Environment, The Treasury, and the Department of Conservation.¹⁵⁴

In fulfilling its functions, the OTS has developed a four-stage settlement framework for the negotiation and settlement of Treaty grievances, which is based a number of guidelines.¹⁵⁵ These guidelines state that Treaty settlements should not create further injustice, settlements must be fair and achievable and remove the sense of grievance, the Crown has a duty to act in the best interests of all New Zealanders and must treat claimants fairly and equitably.¹⁵⁶ As well as these guidelines, the Crown has a number of principles by which negotiations and settlements are achieved. These principles include good faith, transparency, just redress, and the restoration and strengthening of the relationship between the Crown and claimants.¹⁵⁷ In each case, the Crown seeks a full and final comprehensive settlement.¹⁵⁸

Before claims can be negotiated, Māori must first register their claims with the Tribunal.¹⁵⁹ Once this is done, Māori have the option of moving directly to negotiations with the Crown and therefore commencing the settlement process.¹⁶⁰ If Māori choose to do this, they cannot pursue their claim through the Tribunal.¹⁶¹ Alternatively, Māori can have their claim heard by the Tribunal before pursuing negotiations with the Crown.¹⁶² At any point during the Tribunal process, claimants may also opt to move to the negotiation process.¹⁶³

1.8 THE CONTEMPORARY TREATY SETTLEMENT PROCESS

The current Treaty settlement process can be broken into four key stages. First, the preparation of claims for negotiation. Second, pre-negotiations between the Crown

¹⁵⁴ *Ibid.*, at 24.

¹⁵⁵ *Ibid.*, at 35-37.

¹⁵⁶ *Ibid.*, at 28.

¹⁵⁷ *Ibid.*, at 30.

¹⁵⁸ *Ibid.*, at 32.

¹⁵⁹ *Ibid.*, at 38.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

and Māori. Third, actual negotiations. And finally, ratification and implementation of the settlement.¹⁶⁴

Stage 1: Preparation of Claims for Negotiation

In negotiating Treaty claims, the Crown seeks to achieve a comprehensive settlement that resolves all of the claimant group's grievances, as opposed to individual settlements that address separate, distinct grievances.¹⁶⁵ For similar reasons,¹⁶⁶ the Crown also prefers to negotiate settlements with "large natural groupings" at an iwi or tribal level.¹⁶⁷

The first stage of the Treaty settlement process involves claimants demonstrating that they have suffered harm as a result of the Crown's breach of the Treaty and/or its principles, and the Crown accepting that it breached its Treaty obligations. During this stage, representatives of the claimant group must also demonstrate, to the Crown's satisfaction, that they have a sufficient mandate from the claimant group to undertake negotiations with the Crown.¹⁶⁸

This preliminary stage of the settlement process can be broadly viewed as setting out the basis upon which the claim is made. Given that grievances can relate to events that occurred over 170 years in the past, emphasis is placed on having sufficient evidence to identify the group harmed by the Crown's action or inaction, and demonstrate the harm suffered.¹⁶⁹ In this regard, research by the Waitangi Tribunal, the Crown Forest Rental Trust, the claimants themselves, and other bodies is useful. This research is assessed by the OTS, which can also advise claimants if additional research is needed to support their claim.¹⁷⁰

Mandating of claimant representatives is an important part of the Treaty settlement process, and helps ensure the Crown's expectation that settlements will be long-

¹⁶⁴ *Ibid*, at 35-37.

¹⁶⁵ *Ibid*, at 44.

¹⁶⁶ Primarily time and cost.

¹⁶⁷ Office of Treaty Settlements, above n 148, at 44 (although settlements still have the capacity to deal with claims made by individual hapū and Whānau that are distinct from those of the larger claimant group).

¹⁶⁸ *Ibid*, at 41.

¹⁶⁹ *Ibid*.

¹⁷⁰ *Ibid*, at 43.

lasting and durable is met.¹⁷¹ During the mandating process, members of the claimant group are given an opportunity to express their opinions as to the suitability of negotiations with the Crown and the individuals proposed to carry out those negotiations on their behalf.¹⁷² The final mandating of representatives is determined by way of postal ballot by the claimant group, after which a Deed of Mandate is prepared.¹⁷³ Before the claimant representatives are recognised by the Crown as the mandated representatives for that group, the Deed of Mandate is reviewed by OTS and Te Puni Kokiri before being considered by both the Minister for Treaty Negotiations and the Minister of Māori Affairs.¹⁷⁴ Ultimately it is up to the two Ministers to decide whether or not the Deed of Mandate, and thus the representative's authority to negotiate with the Crown, should be accepted.¹⁷⁵ Once mandating has been accepted, the Crown and Māori move into stage two of the settlement process.

Stage Two: Pre-Negotiations

While stage one of the Treaty settlement process involves establishing the basis upon which a claim is brought, at the pre-negotiation phase the parameters within which the negotiations will take place are fleshed out.¹⁷⁶ At this stage, Crown funding for claimants is allocated to help them meet the costs of negotiations, the terms of the negotiation are agreed, and the interests of each party are explored by way of the claimant's "Negotiating Brief" and the Crown's "Negotiating Parameters".¹⁷⁷

Perhaps the most important part of stage two is the preparation of the claimant group Negotiating Brief, which sets out, among other things, the breaches of the Treaty that should be the subject of the negotiations, the land they believe to be affected by the breaches, and the identification of any culturally important sites.¹⁷⁸ It is also during stage two that the OTS recommends claimant groups begin to consider the

¹⁷¹ *Ibid*, at 44.

¹⁷² *Ibid*, at 45 - this is usually by way of a series of hui with the claimant group.

¹⁷³ *Ibid*, at 45. The Deed of Mandate sets out the matters for which the claimant negotiators have been mandated, as well as the way in which members of the claimant group approved the mandate. The Deed of Mandate defines the claimants, the claims to be settled, the area(s) to which the claims relate, and who has authority to represent the claimants.

¹⁷⁴ *Ibid*, at 49.

¹⁷⁵ *Ibid*.

¹⁷⁶ *Ibid*, at 54.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid*, at 57-58.

governance entity that will receive and manage Treaty settlement assets from the Crown.¹⁷⁹ Until a governance entity has been established and ratified, the Crown is unable to transfer Treaty settlement assets to the claimants.¹⁸⁰

Stage Three: Negotiations

During the negotiation phase of the Treaty settlement process, claimants and the Crown advance their proposals for settling the claim and work toward reaching a settlement agreement.¹⁸¹ Negotiations focus on reaching a broad agreement before settling on the finer details, including the settlement quantum and the composition of the redress to be provided.¹⁸²

Negotiations for the Crown are usually undertaken by officials on behalf of the Minister for Treaty of Waitangi Negotiations, while negotiations on behalf of the claimants is undertaken by their mandated representatives or negotiators appointed by them.¹⁸³ Joint working groups may also be established by the Crown and claimants to work on distinct aspects of the settlement.¹⁸⁴ In general, the final settlement package usually comprises three components – an apology on behalf of the Crown,¹⁸⁵ financial and commercial redress,¹⁸⁶ and cultural redress.¹⁸⁷ Once the parties have reached a general agreement as to the redress to be provided, an Agreement in Principle is provided by the Minister for Treaty of Waitangi Negotiations, following which the claimants will respond or the two parties will sign a Heads of Agreement.¹⁸⁸ Together, these documents provide a broad outline of the

¹⁷⁹ *Ibid*, at 60.

¹⁸⁰ *Ibid*.

¹⁸¹ *Ibid*, at 61.

¹⁸² *Ibid*.

¹⁸³ *Ibid*, at 62.

¹⁸⁴ *Ibid*.

¹⁸⁵ *Ibid*, at 85-86. Through the apology the Crown formally acknowledges its Treaty breaches and the effects that these have had on the claimant group. The apology is thus an important part of rebuilding the relationship between the Crown and the claimants, and restoring the honour of the Crown.

¹⁸⁶ *Ibid*, at 87-88. Financial and commercial redress is economic in nature and varies from settlement to settlement. In general, redress includes things such as cash, commercial assets, and rights of first refusal in respect of specified Crown lands.

¹⁸⁷ *Ibid*, at 99. Cultural redress is provided in a number of ways, and can include the protection of waihi tapu sites, recognition of claimants as kaitiaki for certain sites and resources, access to resources of cultural significance, and partnerships with government agencies in the care and protection of natural sites and resources.

¹⁸⁸ *Ibid*, at 64.

proposed agreement settling the Treaty claim but are not legally binding on either party.¹⁸⁹

Following the signing of an Agreement in Principle and/or Heads of Agreement, the claimant group is generally given an opportunity to consider the proposed settlement before working toward the final Deed of Settlement with the Crown.¹⁹⁰ The Deed of Settlement is the comprehensive final agreement between the Crown and claimant group for settling the Treaty claim.¹⁹¹ The Deed of Settlement contains the mutual acknowledgement of what is being settled, and an acknowledgement by the claimant group that the settlement is accepted and that their claim is settled. The Deed of Settlement will also state that, once settled, the jurisdiction of the Courts and Waitangi Tribunal in respect of that specific claim is removed.¹⁹²

Once the Deed of Settlement has been finalised and Cabinet has agreed to the terms of the settlement, the mandated representatives initial the Deed, which is then taken back to the claimant group for ratification.¹⁹³

Stage Four: Ratification and Implementation

The final stage of the Treaty settlement process requires the ratification of the Deed of Settlement by the claimant group, the ratification and establishment of a governance entity, the passing of settlement legislation, and finally the implementation of the settlement.¹⁹⁴

The ratification process is conducted by way of postal ballot among the claimant group, and is a mandatory requirement.¹⁹⁵ The ratification process will generally involve meetings among the claimant group outlining the settlement, and claimants are required to satisfy the Crown that the process used to ratify the settlement is

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*, at 65.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*, at 68.

¹⁹⁵ *Ibid.*

adequate.¹⁹⁶ Ratification requires a minimum of 50-percent support among claimant group members.¹⁹⁷

Once the ratification process has been completed, the mandated representatives advise the Minister for Treaty of Waitangi Negotiations of the outcome. If the Deed of Settlement has been ratified and the Crown is satisfied that there is sufficient support for the settlement among the claimant group, both parties sign the Deed.¹⁹⁸ Generally, legislation is required before the agreement becomes unconditional, and before the legislative process can begin a governance entity must be established by the claimant group.¹⁹⁹

1.9 THE GOVERNANCE ENTITY

The development of effective governance entities underpins the successful management of settlement assets. It is thus important to consider the governance requirements of the settlement process and how these affect Māori governance. The governance entity represents claimants and holds and manages settlement assets on their behalf, and decides how assets and benefits derived from them are used.²⁰⁰ With such an important function and the control of significant assets, it is essential that an appropriate entity is established. The choice of governance entity is a decision for the claimant group to make based on their particular needs. Although the Crown does not specify the governance entity that must be used in any individual settlement, it must be satisfied that the entity established is robust, transparent and accountable to the claimant group.²⁰¹ As such, the Crown provides guidance concerning the qualities that an entity must have before it will be considered appropriate to receive settlement assets, and these are set out in the principles against which each governance entity is assessed.²⁰²

The Crown's principles for governance entities are that they adequately represent all members of the claimant group, have transparent decision making and dispute resolution processes, are accountable to the claimant group, ensure the beneficiaries

¹⁹⁶ *Ibid.*, at 69-70.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*, at 71.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*, at 72.

²⁰² *Ibid.*, at 71.

of the settlement and the entity are identical, and are ratified by the claimant group.²⁰³ Once the Crown has had an opportunity to consider the proposed governance entity against its principles, the entity can move to ratification. The ratification process for a governance entity is similar to that used to ratify the Deed of Settlement. As part of the ratification process, the Crown has a set of 20 questions that must be answered by the mandated representatives.²⁰⁴ These questions are broadly targeted at ensuring representation, accountability and transparency within the governance entity.²⁰⁵

Provided the governance entity has been established and ratified, the last step for most claims in the settlement process is the enactment of the settlement legislation. Settlement legislation removes the jurisdiction of the Courts and the Tribunal to inquire into the claims at the centre of the settlement, removes any statutory memorials from land which forms part of the settlement package, and may vest land in the governance entity.²⁰⁶ The settlement legislation passes through the usual parliamentary legislative process, and is overseen by the OTS.²⁰⁷ Once the settlement legislation has been passed and the governance entity established, the settlement can be implemented. As with much of the Treaty settlement process, the implementation of the settlement is also overseen by the OTS.²⁰⁸

1.10 THE FISHERIES SETTLEMENT

In considering the Crown's approach to settling Treaty grievances with Māori one cannot overlook the fisheries settlement, which arose out of litigation between the Crown and Māori during the late 1980s concerning rights to commercial fisheries. While most Treaty settlements follow the process outlined above, fisheries settlements have their own distinct process.

In 1986 the Government introduced a Quota Management System (QMS) to help manage fish stocks in New Zealand waters by way of the Fisheries Amendment

²⁰³ *Ibid*, at 72.

²⁰⁴ *Ibid*, at 75.

²⁰⁵ Appendix I.

²⁰⁶ *Ibid*, at 77.

²⁰⁷ *Ibid*.

²⁰⁸ *Ibid*, at 80.

Act.²⁰⁹ Under the QMS, an annual Total Allowable Catch (TAC) was set for each fish species and, within that, a Total Allowable Commercial Catch (TACC).²¹⁰ The TAC and TACC were the maximum number of fish that could be caught in any one year. The TACC was divided up into Individual Transferable Quotas (ITQ), which were allocated to those who participated in the fishing industry and could be sold or traded.²¹¹

Because ITQs were allocated on the basis of the catch history of those participating in the fishing industry, many Māori who were not fulltime fishers but only fished on a seasonal basis and therefore had a relatively small catch history were effectively excluded from the benefits of commercial fishing under the QMS.²¹² As such, Māori considered the introduction of the QMS an attempt to privatise the fisheries guaranteed to them under Article Two of the Treaty; rights they claimed had never been given up to the Crown.²¹³ Concerns about the alienation of Māori fishing rights formed part of the Muriwhenua and Ngai Tahu Treaty claims which were being heard by the Waitangi Tribunal during the late 1980s.²¹⁴ Noting that Māori fishing rights would be adversely affected by the QMS, the Tribunal requested that the QMS be placed on hold.²¹⁵ Despite this, the government continued to add further species to the system, and as a result Māori brought court action.²¹⁶

In 1987 Māori were successful in obtaining an injunction to prevent the Minister of Fisheries from adding further fish species to the QMS,²¹⁷ arguing that the system was ultra vires due to section 88(2) of the Fisheries Act 1983 which stated that nothing in the Act “shall affect any Māori fishing rights”.²¹⁸ The Court determined that prior to 1840 Māori had “a highly developed and controlled fishery over the whole coast of New Zealand”,²¹⁹ and there was no evidence to suggest that those rights

²⁰⁹Orange, above n 81, at 169-170.

²¹⁰Toki, Valmaine “Adopting a Māori Property Rights Approach to Fisheries” (2010) 14 N.Z. J. Env'tl. L. 197 at 206.

²¹¹*Ibid.*

²¹²Orange, above n 81, at 170.

²¹³*Ibid.*

²¹⁴*Ibid.*

²¹⁵*Ibid.*

²¹⁶*Ibid.*, at 170-171.

²¹⁷See *Ngai Tahu Māori Trust Board v Attorney General* HC Wellington CP559/87, 2 November 1987 and *Ngai Tahu Māori Trust Board v Attorney General (No 2)* HC Wellington CP559/87, 10 December 1987.

²¹⁸Orange, above n 81, at 171.

²¹⁹*Ngai Tahu Māori Trust Board v Attorney General* HC Wellington CP559/87, 2 November 1987 at 6.

had been given away by Māori or taken by the Crown.²²⁰ As a result of the decision, the government entered into negotiations with Māori over fisheries.

In 1988 the Waitangi Tribunal released an interim report concerning the fisheries aspect of the Muriwhenua claim, finding that the Crown had an obligation to protect Māori rights to fisheries under Article Two of the Treaty and "...must bargain for any public right to the commercial exploitation of the inshore fishery".²²¹ In relation to the QMS, the Tribunal noted the irony in the system "apportioning to non-Māori the full, exclusive and undisturbed possession of the property in fishing that to Māori was guaranteed".²²² An interim settlement between Māori and the Crown in respect of fisheries was reached in 1989 and implemented by way of the Māori Fisheries Act.²²³ Under the Act, a Māori Fisheries Commission was established,²²⁴ the functions of which were to facilitate Māori fisheries and receive fisheries quota from the Government.²²⁵ The Act required the Government to transfer 10-percent of all ITQs to the Commission by 1992,²²⁶ which could then be allocated by the Commission to iwi or individuals.²²⁷ However, 50-percent of all ITQs received by the Commission had to be allocated to Aotearoa Fisheries Ltd,²²⁸ a company required to be formed by the Commission under section 5 of the Act. The 1989 Act still left many questions unanswered, and Māori maintained their claim to a greater share of the fishing quota than the 10-percent allocated to them.²²⁹ Over the ensuing 3 years Māori and the Crown continued to negotiate, culminating in the 1992 Sealord Deal.

The Sealord Deal came on the back of the Waitangi Tribunal's 1992 Ngai Tahu Sea Fisheries Report, which determined that Ngai Tahu had exclusive rights to a significant amount of the sea fisheries within its tribal boundaries.²³⁰ Around the same time, Carter Holt Harvey was selling its share in Sealord Products Limited, which accounted for roughly 24-percent of the entire national fisheries quota.²³¹ As a result, a settlement was negotiated with Māori whereby the government would

²²⁰ *Ibid*, at 7.

²²¹ Waitangi Tribunal, above n 58, at 227.

²²² *Ibid*, at 13.

²²³ Orange, above n 81, at 174.

²²⁴ Section 4 Māori Fisheries Act 1989.

²²⁵ Section 5 Māori Fisheries Act 1989.

²²⁶ Section 40 Māori Fisheries Act 1989.

²²⁷ Section 5 Māori Fisheries Act 1989.

²²⁸ Section 43 Māori Fisheries Act 1989.

²²⁹ Orange, above n 81, at 212.

²³⁰ Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report* (Wai 27, Waitangi Tribunal, 1992) at 303.

²³¹ Orange, above n 81, at 212.

provide \$150m to the Māori Fisheries Commission (Te Ohu Kai Moana), part of which would be used to purchase 50-percent of Carter Holt Harvey's shares in Sealord, giving Māori approximately 22-percent of New Zealand's fishing quota.²³² In addition, as each new fish species was added to the QMS, the government would assign 20-percent of the quota to the Commission.²³³ In exchange, Māori would relinquish all customary rights over commercial sea fishing in New Zealand.²³⁴ The settlement was confirmed in 1992 with the enactment of Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

1.11 CONCLUSION

The legal framework established following the signing of the Treaty and the assumption of British sovereignty was a central force in the tenurial revolution that led to the destruction of Māori customary tenure and caused Māori to lose the vast majority of their lands. It is this revolution that has given rise to the contemporary Treaty settlement process that is seeing the return of significant assets to Māori. However, the operation of the Native Lands Acts and the Native Land Court has had a lasting effect on the management of those assets, and is a source of many of the governance problems that Māori must deal with today. It is thus essential that there are effective means through which Māori can counter those problems and successfully manage their assets, and the establishment of strong governance entities is essential to achieving this.

²³² *Ibid*, at 212-213.

²³³ *Ibid*, at 213.

²³⁴ *Ibid*, at 215.

CHAPTER TWO: MĀORI GOVERNANCE ENTITIES

2.1 INTRODUCTION

The development of a governance entity to hold and manage collective assets is perhaps the most important decision to be made by iwi during the settlement process. Given the likelihood that the entity will have responsibility for a significant number of diverse assets potentially worth millions of dollars, it is essential that it is transparent and appropriately accountable to its members and meets their needs.

By having rigorous assessment processes and firm principles against which governance entities are assessed, the Crown aims to ensure that its responsibilities to the members of claimant groups, and New Zealand taxpayers at large, are fulfilled. As with any large group made up of diverse individuals with varied needs, ensuring that those needs are adequately met is an unenviable task, and one which, in the case of Treaty settlements, undoubtedly requires a strong governance entity. Indeed, the potential for governance issues to spiral into entrenched factionalism poses a real threat to the ability of Māori groups to prosper from their Treaty settlements, as noted by Harrison J in *Solomon v Waikato Raupatu Trustee Company Limited* when he stated:

“This case is the latest in a long line of internal disputes within Tainui which have found their way into litigation in this Court over the last four years...For as long as those in positions of control and responsibility within Tainui continue to fight among themselves in preference to governing collectively, collegially and lawfully, the tribe's hard won funds will continue to be wasted on legal costs instead of being expended for the good of those who most need financial support and assistance”.²³⁵

Although the Crown does not dictate the particular entity that must be used, its rigorous requirements for governance entities mean that, in reality, the choices are limited. The possible entities currently available are incorporated societies, companies, private trusts, charitable trusts, Māori trust boards, incorporations and trusts under Te Ture Whenua Māori Act 1993, mandated iwi organisations, and

²³⁵ *Solomon v Waikato Raupatu Trustee Company Limited* [2004] BCL 607 at [29].

entities established through private statutory recognition. This chapter provides an overview of the way in which New Zealand law currently provides for Māori governance and the suitability of existing legal entities for the management of collective assets.

2.2 INCORPORATED SOCIETIES

One example of an incorporated society currently employed as a governance entity is Waikato-Tainui Te Kauhanganui Incorporated (the Kauhanganui) used by Waikato-Tainui to manage collective assets on behalf of close to 60,000 iwi members.²³⁶ The Kauhanganui is comprised of around 200 members elected by each of its 68 Marae.²³⁷ The Kauhanganui in turn elects 10 of its members to serve on its executive arm known as Te Arataura, and an eleventh member is appointed by the Māori King.²³⁸ The Te Arataura holds all of the shares in Tainui Group Holdings Limited, which is the main component of the tribe's commercial arm.²³⁹ The Kauhanganui is the sole trustee for the Waikato Raupatu Lands Trust, which is a charitable trust established by the Waikato Deed of Settlement and the Raupatu Claims Settlement Act 1995,²⁴⁰ and through which income and benefits are distributed to the tribe's beneficiaries.²⁴¹

Te Kauhanganui has had a long history of litigation concerning governance and management issues that highlight some of the difficulties faced by incorporated societies in the management of collective assets.²⁴² Of particular note, in *Porima v Te Kauhanganui o Waikato Inc* the High Court acknowledged the limitations of the current Incorporated Societies Act, stating:

²³⁶Waikato-Tainui *Navigating Our Future: Waikato Raupatu Lands Trust Annual Report 2010* (Waikato-Tainui, Hamilton, 2010) at 9.

²³⁷*Ibid*, at 21. Each marae elects three members - a marae representative, a kaumatua representative, and a rangatahi representative.

²³⁸ *Ibid*.

²³⁹ Waikato-Tainui Group Holdings Limited *2011 Annual Report* (Waikato-Tainui Group Holdings Limited, Hamilton, 2011) at 1.

²⁴⁰ Office of Treaty Settlements *Waikato-Tainui Deed of Settlement* (Office of Treaty Settlements, Wellington, 1995).

²⁴¹ Waikato-Tainui, above n 236, at 20.

²⁴² See for example *Porima v Te Kauhanganui O Waikato Inc* (Unreported, HC Hamilton M208/00, 22 September 2000), *Porima v Te Kauhanganui O Waikato Inc* [2001] 1 NZLR 472, *Mahuta v Porima* (Unreported, HC Hamilton M238/00, 22 September 2000), *Porima v Te Kauhanganui O Waikato Inc* (Unreported, HC Hamilton M208/00, 26 September 2000), *Mahuta v Porima* (Unreported, HC Hamilton M290/00, 9 November 2000), *Roa v Morgan* [2009] NZAR 162, *Martin v Morgan* (Unreported, HC Hamilton CIV-2010-419-1628, 10 June 2011), and *Waikato-Tainui Te Kauhanganui Inc v Martin* (Unreported, HC Hamilton CIV-2010-419-796, 17 June 2011).

“The Incorporated Societies Act has been a beneficent statute which has enabled a considerable variety of organisations (including Maaori interests) and clubs to take advantage of it. It has to be said however, that it is well out of date, and it has many gaps. It is a statute which is sorely in need of revision to bring it into line with the contemporary needs of New Zealanders. In particular, the Act is open to abuse by small cliques of individuals who seize the reins of power in a Society. There is no oppression remedy. And, there could usefully be discretionary remedies in the Courts to deal with the unfortunate disagreements which do arise from time to time.”²⁴³

More recently, issues have arisen relating to the transparency of Te Arataura’s finances and the appropriate role of the Māori King in Te Kauhanganui affairs.²⁴⁴

Incorporated societies are established and governed in accordance with the Incorporated Societies Act 1908. Under section 4 of the Act, any society with at least 15 members can become incorporated on application to the Registrar of Incorporated Societies. Upon incorporation, the Incorporated Society is added to the Register of Incorporated Societies and is issued with a certificate of incorporation by the Registrar.²⁴⁵ Once registered, section 10 of the Act provides that the society becomes a body corporate with perpetual succession, and capable of exercising all of the functions of a body corporate and of holding land.

On the face of it, incorporated societies have many features that may make them an attractive governance entity option. As well as their relatively low set-up and compliance costs, there is already a detailed statutory regime in place for the establishment and management of incorporated societies. This regime is relatively prescriptive, detailing the matters that must be outlined in the society’s rules,²⁴⁶ how those rules can be amended,²⁴⁷ and requiring a register of members to be

²⁴³ *Porima v Te Kauhanganui o Waikato Inc* [2001] 1 NZLR 472 at [80] and [81].

²⁴⁴ See for example Karla Akuhuta “Sacked tribal chair off to court” *The Waikato Times* (New Zealand, 13 December 2010) <www.stuff.co.nz>, Rawiri Taonui “Tension among taniwha grows in Tainui parliament” *The New Zealand Herald* (New Zealand, 14 December 2010) www.nzherald.co.nz, Yvonne Tahana “Enigma of a strong Kingitanga woman who’s staying staunch” *The New Zealand Herald* (New Zealand, 29 January 2011) www.nzherald.co.nz>, and Catherine Masters “What’s eating Tainui?” *The New Zealand Herald* (New Zealand, 8 October 2011) <www.nzherald.co.nz>.

²⁴⁵ Section 8.

²⁴⁶ Section 6.

²⁴⁷ Section 21.

maintained by every incorporated society.²⁴⁸ Transparency in an incorporated society's finances is also promoted by the requirement that annual financial statements be prepared and filed with the Registrar.²⁴⁹ The fact that there is a Registrar may also be seen as positive, ensuring there is some external agency to ensure incorporated societies comply with the requirements of the Act.

However, incorporated societies have a number of drawbacks that mean, in reality, they are not considered suitable vehicles for managing Treaty settlement assets. Incorporated societies are prevented by section 20 of the Act from engaging in any activities that involve pecuniary gain, and section 4 of the Act excludes pecuniary gain as one of the lawful purposes for which a society can be incorporated.²⁵⁰ As one of the most significant objects of a Māori governance entity will undoubtedly be to increase the value of its assets for the benefit of its constituent members, the inability to pursue activities involving pecuniary gain is an obvious barrier to achieving that.

A second major drawback of incorporated societies is that members do not have any right, title or interest, whether legal or equitable, in the society's property.²⁵¹ Given the communal nature of Māori assets and the fact that governance entities hold collective assets on behalf of their constituent members, section 14 may make it easier for such assets to be alienated from their beneficial owners. Membership of an incorporated society itself poses some problems. As has been noted by the Law Commission, there appears to be a conflict between membership of an incorporated society, which is contractual and based purely on individual subscription, and tikanga Māori which holds that membership to Māori groupings is based on whakapapa.²⁵²

A final problem with incorporated societies is that, generally, they are accountable to the Registrar rather than their individual members, and it is possible that the Registrar would have limited experience in dealing with the issues that often arise in the management of Māori assets, particularly issues concerning tikanga Māori. As such, the Registrar's ability to deal with situations that arise in the management of Māori collective assets may also be limited.

²⁴⁸ Section 22.

²⁴⁹ Section 23.

²⁵⁰ Section 20(2) states that any incorporated society that engages in an operation that involves pecuniary gain is liable for a fine of up to \$200.

²⁵¹ Section 14.

²⁵² New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (New Zealand Law Commission, Wellington, 2006) at 24-25.

2.3 COMPANIES

A recent example of a company used as a Treaty settlement governance entity is CNI Holdings Limited, which is the post-settlement governance entity for the CNI (Central North Island) Forests Collective Settlement. The settlement was finalised in 2008 and confirmed by the Central North Island Forests Land Collective Settlement Act between the Crown and eight iwi with forestry interests in the central North Island known as the CNI Iwi Collective.²⁵³ CNI Iwi Holdings is a trust holding entity that manages the settlement assets on behalf of the eight iwi,²⁵⁴ and whose core functions are to receive, distribute and safeguard Treaty settlement assets. The post-settlement governance entities of each iwi are equal shareholders in CNI Holdings, and each iwi appoints two directors to the company's Board.²⁵⁵ The Crown is an additional shareholder.²⁵⁶

Companies are established and managed in accordance with the Companies Act 1993, and play a significant part in the management of collective assets for many Māori groups. Applications for registering a company are made to the Registrar of Companies under section 12 of the Act, and upon registration a Certificate of Incorporation is issued under section 13. Like Incorporated Societies, companies have their own legal personality separate from their shareholders, and perpetual succession.²⁵⁷ However, unlike incorporated societies, companies are not prevented from undertaking activities that include pecuniary gain, and have full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction.²⁵⁸

One of the primary advantages of the use of companies is the extensive legislative regime that is the Companies Act. The Act is extremely prescriptive and sets out clear rules that companies and their directors must comply with. The key requirements that one would expect of an entity controlling significant assets, such as transparency, sound governance and accountability, are ensured through the

²⁵³ Ngai Tuhoe, Ngati Manawa, Ngati Rangitahi, Ngati Tuwharetoa, Ngati Whakaue, Ngati Whare, Raukawa, and Te Pumautanga O Te Arawa.

²⁵⁴ CNI Iwi Holdings Ltd "CNI Iwi Holdings Limited" (n.d.) CNI Iwi Holdings Ltd <www.cniiwholdingsltd.co.nz>.

²⁵⁵ Te Rūnanga O Ngāti Whare Trust, Tuwharetoa Settlement Trust, Raukawa Settlement Trust, Tuhoe Te Uru Taumatua Trust, Te Rūnanga O Ngāti Manawa Trust, Te Mana O Ngāti Rangitahi Trust, Te Komiti Nui O Ngāti Whakaue Trust, and Te Pumautanga O Te Arawa Trust.

²⁵⁶ *Ibid.*

²⁵⁷ Section 15.

²⁵⁸ Section 16.

management, governance, accounting and reporting requirements outlined in the Act. The duties of company directors are clearly spelled out,²⁵⁹ the rights and obligations of shareholders neatly defined,²⁶⁰ clear guidelines for dealing with conflicts of interest are in place,²⁶¹ the accounting and reporting requirements are well defined,²⁶² and the Act provides its own enforcement regime to ensure that its provisions are complied with.²⁶³

However, despite the extensive statutory regime directing the management of companies, there are a number of inadequacies that affect their suitability as an entity for the management of Māori collective assets. While collective assets are communal in nature and held on behalf of the members of a particular Māori collective, both present and future, companies are comprised of individual shareholdings owned by individual shareholders that give each shareholder rights in respect of the governance and management of the company.²⁶⁴ Apart from the significant difficulty in determining and apportioning shares in settlement assets between, potentially, thousands of individuals and the possible conflicts that this could create between iwi members, dividing assets up into individual holdings would go against tikanga Māori and the collective ownership of assets it promotes. The individualisation of interests in Māori land was a significant contributor to the loss of those lands and a central factor in many claims currently proceeding through the settlement process, and the prospect of the same happening to settlement assets may prove difficult for Māori to accept.

A further downside to companies is that they are not suitable for the social and cultural activities that governance entities will likely need to undertake. While companies are usually established to pursue commercial activities, and indeed the provisions of the Companies Act are largely cast in those terms, Māori governance entities are rarely, if ever, purely commercial in focus and often undertake additional functions, such as the provision of social and cultural services to their members.

²⁵⁹ Sections 131 to 138.

²⁶⁰ Part 7.

²⁶¹ Sections 139 to 149.

²⁶² Parts 11 and 12.

²⁶³ Part 9.

²⁶⁴ Section 36.

Despite the limited effectiveness of companies as governance entities, their proven ability to perform as commercial vehicles mean they will feature strongly in the future management of Māori collective assets. Indeed, although not the governance entities through which their settlement assets have been received, the recipients of the two largest iwi settlement packages, Ngai Tahu and Tainui, employ companies as a core part of the management scheme for their settlement assets.²⁶⁵

2.4 PRIVATE TRUSTS

An example of a private trust currently used as a governance entity is Te Runanga o Ngati Mutunga, which manages the Treaty settlement assets of the Ngati Mutunga iwi of Taranaki. The trust is comprised of five trustees elected from the iwi's registered members, and is administered in accordance with a trust charter.²⁶⁶ The administration of Ngati Mutunga's settlement assets is carried out by the trust through three subsidiary entities - Marathi Fisheries Limited, which is a company established under the Māori Fisheries Act 2004 to manage the iwi's fisheries allocation; the Ngati Mutunga Investment Charitable Trust, which invests and grows financial assets for charitable purposes that benefit iwi members; and the Ngati Mutunga Community Development Charitable Trust, which is a beneficiary of the Trust and "...promotes activities which strengthen Ngati Mutunganga among iwi members".²⁶⁷

The Law Commission has identified private trusts as the governance entity of choice for most iwi negotiating settlements with the Crown,²⁶⁸ although it suggested they have traditionally been used 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".²⁶⁹ Under a trust arrangement, legal ownership of trust property is vested in its trustees on behalf of its beneficiaries. Trusts are managed in accordance with their particular

²⁶⁵ Ngai Tahu through Ngai Tahu Holdings Corporation Ltd, and Tainui through Tainui Group Holdings Limited.

²⁶⁶ Ngati Mutunga "Organisational Structure" (2011) Ngati Mutunga <www.ngatimutunga.iwi.net>.

²⁶⁷ *Ibid*.

²⁶⁸ New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase - An Advisory Report For Te Puni Kokiri, The Office of Treaty Settlements, and the Chief Judge of the Māori Land Court* (New Zealand Law Commission, Wellington, 2002) at 38.

²⁶⁹ *Ibid*, at 39.

trust deed and the Trustee Act 1956, and do not have their own corporate personality unless incorporated under the Charitable Trusts Act 1957.²⁷⁰

In general, trusts provide a fairly flexible vehicle for managing settlement assets, and trust deeds can be drafted to meet the specific requirements of iwi. In addition, the duties, powers and responsibilities of a trustee are outlined in the Trustee Act which, like the Companies Act, provides some level of transparency and accountability in trust management. The Trustee Act is largely concerned with trust administration and provides for matters such as how trustees can be appointed and discharged,²⁷¹ how trustees can invest trust funds and the duties undertaken in doing so,²⁷² and the jurisdiction of the courts to intervene in trust matters.²⁷³ In general, trustees have the ability to deal with trust property as they see fit, provided it is in accordance with the provisions of the trust deed and the trustees act in the best interest of the beneficiaries.

However, while the Trustee Act is in some respects a positive factor supporting the use of trusts as governance entities, it also poses one of the biggest problems. The Act is seen as outdated and as not providing an adequate account of trust law. Indeed, the Law Commission noted in 2002 that "...There is much to be said for the view that the Trustee Act 1956 is, in important respects, confused and confusing and in need of a complete overhaul",²⁷⁴ and again in 2010 "...A full review of the Trustee act 1956 is long overdue. It needs modernisation. Some provisions need clarification and anomalies should be removed."²⁷⁵

Because trust law is notoriously complicated and the Trustee Act is limited in its ability to deal with all of these complexities, recourse to legal advice is often required when establishing and maintaining a trust, and ensuring that the duties of trustees are properly executed. As well as the substantial costs involved, this process can also be time consuming.

²⁷⁰ Section 7 Charitable Trusts Act 1957.

²⁷¹ Part 4.

²⁷² Part 2.

²⁷³ Generally outlined in Part 5.

²⁷⁴ New Zealand Law Commission *Some Problems In The Law Of Trusts: A Discussion Paper* (New Zealand Law Commission, Wellington, 2002) at 1.

²⁷⁵ New Zealand Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (New Zealand Law Commission, Wellington, 2010) at iii.

The Law Commission, in their current review of New Zealand's trust laws, has noted a further problem with trusts is the fiduciary duties owed by trustees creates complex and onerous legal obligations, and "...the precise content of these duties is the subject of on-going legal argument and debate and their scope is not always easy to define. Their breach can give rise to legal action".²⁷⁶ There are no specific statutory provisions defining the contents and requirements of a trust's deed. As such, it can be extremely difficult to achieve the level of accountability and transparency required for the management of collective assets and the protection of the interests of a trust's beneficiaries. It is also difficult for trusts to provide for internal dispute resolution processes, and in order for beneficiaries to ensure the terms of a trust deed are being adhered to they must seek relief from the High Court. Again, this process can be both costly and time consuming, contributing to the cumbersome nature of trusts.²⁷⁷

One final point to note is that, in general, trusts are by virtue of section 6 of the Perpetuities Act 1964 limited in their existence to 80 years. As Treaty settlement assets are not only held for current beneficiaries but future generations as well, this limitation is obviously a significant hurdle. However, despite these drawbacks, the fact that trusts are the most popular vehicle for the management of Treaty settlement assets indicates that they may still have a place in the future of Māori collective assets management.

2.5 CHARITABLE TRUSTS

Charitable trusts are established and managed in accordance with the Charitable Trusts Act 1957 and, as the name suggests, are established exclusively or principally for charitable purposes.²⁷⁸ Both trusts and societies can be incorporated as charitable trusts under the Act,²⁷⁹ and upon incorporation obtain a separate legal identity and perpetual succession.²⁸⁰ One advantage of charitable trusts as governance entities is that they have a fairly prescriptive statutory regime that provides some level of transparency and accountability in their operations. An

²⁷⁶ New Zealand Law Commission *Some Issues With The Use Of Trusts In New Zealand: Review of the Law of Trusts – Second Issues Paper* (New Zealand Law Commission, Wellington, 2010) at 4.

²⁷⁷ New Zealand Law Commission, above n 252, at 26.

²⁷⁸ Section 11(1).

²⁷⁹ Trusts under section 7 and societies under section 8 of the Act.

²⁸⁰ Section 13.

additional advantage is that charitable trusts deliver significant tax benefits, and in some cases are exempted from paying income tax.²⁸¹

However, a major drawback of the use of charitable trusts as governance entities is that because they are altruistic in nature it is often difficult for them to pursue the commercial activities desired in the management of collective assets. In addition, modification of the terms of the trust can be extremely difficult, and may require approval by both the Attorney General and the High Court.²⁸² This limits the flexibility of charitable trusts, and their ability to adapt to the needs of the particular group it represents. These difficulties can make charitable trusts “...cumbersome in a commercial context”.²⁸³

Another significant issue with charitable trusts is that, in the event that the trust is wound up, its assets must be directed to another charitable purpose or charitable organisation.²⁸⁴ This obviously raises the possibility that Treaty settlement assets could be alienated from their beneficiaries in the event that the trust is wound up.

2.6 MĀORI TRUST BOARDS

Māori Trust Boards have been in existence since 1922,²⁸⁵ and there are currently 10 Boards,²⁸⁶ all of which are administered in accordance with the Māori Trust Boards Act 1955. Each Māori Trust Board is a body corporate with perpetual succession,²⁸⁷ the functions of which are to administer its assets for the general benefit of its beneficiaries through, among other things, the promotion of health, social and economic welfare, and educational and vocational training.²⁸⁸ As with the Companies Act, the Māori Trust Board Act provides some level of transparency and accountability in the administration of Trust Boards. The requirements for

²⁸¹ For example, section CW41 of the Income Tax Act 2007 provides that the non-business income derived for a charitable purpose is exempt income for the purposes of income tax.

²⁸² Sections 32 to 35 Charitable Trusts Act.

²⁸³ New Zealand Law Commission, above n 268, at 38.

²⁸⁴ New Zealand Charities Commission *Rules and the Charities Act* (New Zealand Charities Commission, Wellington, 2010) at 3.

²⁸⁵ New Zealand Law Commission, above n 268, at 35.

²⁸⁶ Aorangi Māori Trust Board, Aupouri Māori Trust Board, Te Runanga o Ngai Tahu Māori Trust Board, Ngati Whatua o Orakei Māori Trust Board, Taitokerau Māori Trust Board, Taranaki Māori Trust Board, Tuhoe-Waikaremoana Māori Trust Board, Tuwharetoa Māori Trust Board, Wairoa-Waikaremoana Māori Trust Board, Whakatohea Māori Trust Board.

²⁸⁷ Section 13.

²⁸⁸ Section 24.

membership, and functions and powers, of Boards are clearly defined,²⁸⁹ Boards are required to maintain membership rolls,²⁹⁰ the processes for the election of Board members are set out,²⁹¹ Boards are required to maintain account books and submit yearly financial statements,²⁹² and Trust Boards are public entities as defined in section 4 of the Public Audit Act 2001 and therefore subject to audit by the Auditor-General.²⁹³ In addition, as many Trust Boards have been in existence for many years providing services and delivering benefits to their beneficiaries, they have built up a significant level of trust in the Māori community.

However, one of the major problems with Māori Trust Boards as governance entities is that, by virtue of section 32 of the Act,²⁹⁴ they are ultimately responsible to the Minister of Māori Affairs rather than the beneficiaries they represent, which the Law Commission has noted "...undermines the autonomy of tribal entities".²⁹⁵ Further supervisory powers vested in the Minister include the discretion to investigate the affairs of any Māori Trust Board,²⁹⁶ and to investigate the conduct and result of any elections.²⁹⁷ Another inadequacy of Trust Boards is that, as many were created many years ago, they may not accurately reflect the current tribal identity. As a result of these inadequacies, the Office of Treaty Settlements will not approve the use of Māori Trust Boards as governance entities.²⁹⁸

2.7 INCORPORATIONS AND TRUSTS UNDER TE TURE WHENUA MĀORI ACT 1993

The Te Ture Whenua Māori Act 1993 (TTWMA) provides for the establishment of Māori incorporations and a number of trusts for the management of Māori land.²⁹⁹ The specific trusts that can be formed under TTWMA are Putea Trusts,³⁰⁰ Whanau

²⁸⁹ Section 14 and sections 24 to 27.

²⁹⁰ Section 42.

²⁹¹ Part 3.

²⁹² Sections 30 and 31.

²⁹³ Section 30A.

²⁹⁴ Which requires a yearly statement of estimated receipts and proposed payments of the Board for the ensuing financial year to be provided to, and approved by, the Minister of Māori Affairs.

²⁹⁵ New Zealand Law Commission, above n 247, at 27.

²⁹⁶ Section 33.

²⁹⁷ Section 53A.

²⁹⁸ New Zealand Law Commission, above n 268, at 35.

²⁹⁹ Parts 12 and 13.

³⁰⁰ Formed under section 212 of the Act in circumstances where, due to the minimal value of the interests in Māori land or shares in a Māori incorporation, or because of difficulties in establishing the

Trusts,³⁰¹ Ahu Whenua Trusts,³⁰² Whenua Topu Trusts,³⁰³ and Kaitiaki Trusts,³⁰⁴ and are used extensively by Māori to manage their interests in Māori land.

2.7.1 Māori Land Trusts Under TTWMA

Trusts under TTWMA operate like ordinary trusts, with legal ownership of trust property vested in the trustees to manage on behalf of, and in the best interests of, its beneficiaries. TTWMA provides an extensive regime for the administration of Māori land trusts, and gives the Māori Land Court exclusive jurisdiction to constitute such trusts.³⁰⁵ The Act clearly defines the functions and responsibilities of trustees and how they are appointed,³⁰⁶ provides for the rights of beneficiaries to apply to the Court for review of a trust,³⁰⁷ establishes process for the enforcement of a trustee's obligation and duties,³⁰⁸ sets out processes for the replacement and removal of trustees,³⁰⁹ and specifies the mechanisms through which a trust can be terminated and varied.³¹⁰ In accounting for these matters, TTWMA ensures beneficiaries can participate in the management of their land, and provides a degree of transparency and accountability in the administration of those lands. When coupled with the extensive jurisdiction of the Māori Land Court, it is apparent that there is a considerable degree of protection for beneficiary interests. These qualities are undoubtedly important in the management of Treaty settlement assets.

However, a significant factor countering the use of Māori land trusts as vehicles for the management of settlement assets is that they are established to manage land interests only. While likely to comprise a considerable part of future redress packages negotiated with iwi, as indeed has been the case in settlements already

beneficiaries, or their whereabouts, it is impractical or undesirable to pay dividends or allow for continued succession to the interests.

³⁰¹ Formed under section 214 of the Act for the purpose of promoting the health, social, cultural and economic welfare, education and vocational training, and general advancement in life of the descendants of any tipuna.

³⁰² Formed under section 215 of the Act for the purpose of promoting and facilitating the use and administration of the land in the interests of the persons beneficially entitled to the land.

³⁰³ Formed under section 216 of the Act for the purpose of promoting and facilitating the use and administration of the land in the interests of the iwi or hapū through Māori community purposes.

³⁰⁴ Formed under section 217 of the Act to administer interests in Māori land and shares in Māori incorporations of any beneficiary who is subject to a disability.

³⁰⁵ Section 211.

³⁰⁶ Section 222 to 228.

³⁰⁷ Section 231.

³⁰⁸ Section 238.

³⁰⁹ Sections 239 and 240.

³¹⁰ Sections 241 and 244.

finalised, land is not the sole component. Settlement packages often comprise a wide range of assets, including cash and forestry, and over time the assets under the management of governance entities is likely to diversify into many different areas. As such, Māori land trusts, as they currently stand, are not suited to the management of these varied assets, and the fact that some Māori groups have excluded some settlement assets transferred to them from being subject to the Act may be an indication of this.³¹¹

A further limitation with the use of Māori land trusts as governance entities lies in the provisions of TTWMA itself. While undoubtedly serving an important function in the administration of Māori land, TTWMA is extremely restrictive, perhaps even paternalistic, and places limits on the way Māori freehold land can be dealt with. In practice, these restrictions make it extremely difficult for Māori to obtain finance and attract investment in respect of Māori land, and therefore inhibit the ability of Māori to pursue commercial developments.³¹²

2.7.2 Māori Incorporations Under TTWMA

Section 247 of TTWMA provides Māori with the ability to seek incorporation of their shares in Māori land, and upon incorporation become a body corporate with perpetual succession.³¹³ Māori incorporations are based on individual shareholdings in Māori land and produce dividends for their respective shareholders. In 2007 there were more the 150 Māori incorporations, controlling in excess of \$1b in assets.³¹⁴

Like Māori land trusts, one of the major attractions of incorporations is the clearly defined rules concerning governance, administration and transparency provided for in TTWMA. Among other things, TTWMA provides that each incorporation must have a constitution governing its internal management and a management committee to

³¹¹ New Zealand Law Commission, above n 268, at 37. Linkhorn also notes the “increasing tendency for Māori enterprise” to exclude their lands from the TTWMA system: Linkhorn, Craig *Māori Land and Development Finance* (Centre for Aboriginal Economic Policy Research, The Australian National University, Discussion Paper No. 284/2006, 2006) at 4.

³¹² For a detailed overview of the problems Māori face in securing finance over Māori land, see Hitchcock, Joshua “Ko Ngaa Take Ture Māori – Financing Māori Land Development: The Difficulties Faced by Owners of Māori Land in Accessing Finance for Development and a Framework for the Solution” (2008) 14 Auckland U.L. Rev. 217.

³¹³ Section 250.

³¹⁴ Potaka, Tama “Challenges for Māori Incorporations” (2007) 8 NZLJ 287.

ensure the proper administration and management of the incorporation,³¹⁵ defines the manner in which the powers of the management committee can be exercised and how committee members are appointed and dismissed,³¹⁶ outlines the way in which shares are dealt with and dividends paid out,³¹⁷ and sets out a number of mechanisms through which the activities of an incorporation can be reviewed.³¹⁸ As well as TTWMA The Māori Incorporations Constitution Regulations 1994 sets out the default constitution for all Māori incorporations established under TTWMA.³¹⁹ The default constitution promotes transparency, accountability, and good governance, and compliment the similar provisions provided for in TTWMA.

However, despite the significant provisions imposed by TTWMA and the Regulations, it has been noted that the governance standards of Māori incorporations leave much to be desired, and that the “...current governance framework for Māori Incorporations inadequately enshrines common sense expectations and may fail to fulfil shareholder expectations of governors of these institutions”.³²⁰ In addition, like Māori land trusts, incorporations established under TTWMA are designed to manage interests in Māori land only and are subject to the restrictions imposed by TTWMA, and thus face the same problems outlined above.

2.8 STATUTORILY CREATED ENTITIES

Governance entities established by way of statute provide a further option for the management of Treaty settlement assets. An example of a Māori governance entity established by way of private statute is Te Runanga o Ngai Tahu (TRONT), which is the representative of, and governance entity for, Ngai Tahu. TRONT was established by section 6 of the Te Runanga o Ngai Tahu Act 1996 as a body corporate with perpetual succession, and is tasked with managing Ngai Tahu assets for the benefit of present and future members of Ngai Tahu Whanui.³²¹

Governance entities established by way of private statute have the potential to offer Māori the most tailor-made vehicle for managing their settlement assets, essentially

³¹⁵ Sections 268 and 269.

³¹⁶ Sections 270 to 273.

³¹⁷ Sections 260 to 267.

³¹⁸ Sections 280 to 281.

³¹⁹ The default constitution is outlined in Schedule 1 of the Regulations.

³²⁰ Potaka, above n 314, at 289.

³²¹ Section 14.

providing a blank canvas from which to develop a suitable governance structure for each individual entity. Statutorily created entities would also theoretically be able to legislate out of a number of other enactments, and provide a way to get around some of the issues associated with other governance entity options.

However, drafting and enacting legislation is no straightforward task, and would be extremely time consuming, especially given the significant number of Treaty claims still to be settled. Because the establishment of entities by this method is also reliant on the passage of enacting legislation through Parliament, the Government's legislative programme, and more importantly its capacity to accommodate the legislation, will be an essential factor in deciding whether or not the legislation will proceed. This has obvious implications for the timeframes within which an entity could be established by statute. In addition, Government will always be conscious of maintaining their popularity with the electorate, and ensuring that their actions do not lose votes. Accordingly, the establishment of Māori governance entities by statute may well play second fiddle to the realities of politics, especially Treaty politics.

Legislation establishing a governance entity may also be introduced by way of Private Member's Bill, which poses its own set of distinct problems. Firstly, Māori would need to find a Member of Parliament willing to sponsor the Bill through the House. As with government legislation, Members and their respective parties will also be conscious of maintaining the support of the electorate, and this would inevitably factor into any decision to sponsor a Bill through the House. Secondly the Bill would be subject to the lottery that is the Member's Ballot Box, which could obviously affect the ability of legislation to be enacted in a timely fashion, if at all.

A further downside to a statutorily created governance entity that is common to both government legislation and Private Member's Bills is that during its passage through the House the Bill would be subject to Select Committee scrutiny, and likely public examination. Apart from providing the possibility of non-Māori influences on the content of the Bill and the ultimate shape of the governance entity, the Bill could be changed in ways that were not envisaged by Māori during the drafting of the Bill. Finally, the statute creating the governance entity could be repealed by Parliament at any time, meaning that there would be a lack of certainty as to the governance entity.

2.9 MANDATED IWI ORGANISATIONS

One final governance entity that must be discussed is the Mandated Iwi Organisation (MIO), which is a governance entity specific to the management of fisheries assets received under the Fisheries Act 2004. The Act sets out a number of statutory requirements that must be met by iwi before they can receive fisheries assets from Te Ohu Kai Moana, but the most important is the establishment of a MIO.

A MIO is defined in section 5 of the Act as “an organisation recognised by Te Ohu Kai Moana Trustee Limited under section 13(1) as the representative organisation of that iwi under this Act”. The functions of the MIO are outlined in section 12 of the Act, and include holding settlement assets allocated by Te Ohu Kai Moana on behalf of their respective iwi.³²² The criteria for recognition of a MIO by Te Ohu Kaimoana are contained in section 14 of the Act. These criteria are that the organisation is a company, trust, body corporate, or incorporated society; the constitutional documents of the organisation comply with the Kaupapa in Schedule 7 of the Act; the directors, trustees, or office holders of the organisation can demonstrate that they have been elected or appointed in accordance with those constitutional documents; and the MIO has a register of iwi members³²³.

Schedule 7 of the Act lists 11 requirements or “kaupapa” for the constitutional documents of each MIO. These requirements are extensive, and deal with matters such as voting rights, the election of the MIO’s directors, trustees or office holders, accountability, and the holding of meetings. For example, Kaupapa 1 states that all adult members of the iwi must have the opportunity to elect the directors/trustees/office holders of the MIO no less than once every three years. Kaupapa 4 states that notification of general meetings must be notified by the MIO by way of public notice, while Kaupapa 7 provides that every mandated iwi organisation is accountable to the members of its iwi, and has specific reporting responsibilities to them.

³²² It is possible for the mandated iwi organisation required for the receipt of fisheries settlement assets can be combined with the governance entity established by the iwi to receive other Treaty settlement assets, as provided for in section 15 of the Act.

³²³ Must have a specific number of members.

Under the Act, every MIO must have a constitution that satisfies the 11 “kaupapa” outlined in Schedule 7 of the Act.³²⁴ The kaupapa outlined in Schedule 7 are extensive, and cover a wide spectrum of issues concerning sound governance, accountability and transparency, and are hence one of the most significant strengths of MIOs as governance entities. The kaupapa establish the voting rights of members,³²⁵ the way in which MIO meetings are convened and executed,³²⁶ the way in which MIOs are accountable to their members,³²⁷ and provide that MIOs must exercise “strategic governance” in respect of the assets they manage.³²⁸ Importantly, Kaupapa 8 states that every IMO constitution must contain dispute resolution processes to deal with internal disputes between MIOs and their members.

While the Fisheries Act helps ensure the good governance of fisheries assets, its prescriptive nature is often seen as a major drawback, and many Māori groups find it difficult to satisfy its requirements, especially the 11 constitution kaupapa in Schedule 7. A further issue is that MIOs can only be established in respect of the iwi specified in Schedule 3 of the Act.³²⁹ This requirement means that Māori are unable to determine their own groupings, and does not provide for the ability of iwi to develop and change their identity over time.³³⁰

2.10 CONCLUSION

Although there are a number of possible vehicles through which Treaty settlement assets can potentially be received and administered, the reality is that the significant limitations of these entities mean that only a few of them are currently employed as governance entities by Māori. Even then, those governance entities, such as private and charitable trusts, have their own limitations that inhibit Māori from taking full advantage of the opportunities presented to them by Treaty settlements. The fact that many Māori groups employ a range of legal entities to assist them in the management of their Treaty settlement assets is evidence of this.

³²⁴ Section 17.

³²⁵ Kaupapa 1, 2 and 3.

³²⁶ Kaupapa 4.

³²⁷ Kaupapa 7.

³²⁸ Kaupapa 11.

³²⁹ Section 14.

³³⁰ New Zealand Law Commission, above n 252, at 28.

It is obvious that, at present, there is no single legal entity that meets all of the commercial, cultural, social and political needs of Māori collectives in the management of their collective assets. When one considers the enormous potential that those assets have to lift the social and economic standing of Māori, it is a significant barrier that must be overcome. Indeed, this is a situation that has not been lost on the Law Commission, which has recommended the establishment of a new legal entity specifically tailored to the particular needs of Māori who have received Treaty settlement assets.

CHAPTER THREE: THE LAW COMMISSION ON WAKA UMANGA

3.1 INTRODUCTION

While only published in 2006, the New Zealand Law Commission's report on Waka Umanga has a history that stretches back much further. Its foundations can be found in previous work on Māori values in New Zealand law and the Treaty settlement process, and many of the recommendations made by the Commission are directed at resolving issues identified by that earlier work. It is apparent that if fulfilled the Commission's vision will have a significant impact on Māori in the future.

Begun in 2004 in response to government's lack of action on previous recommendations, the Commission's 269 page report is the culmination of two years of specific research, consultation, and discussion on the vexed issue of tribal governance and the management of collective Māori assets. The report presents a comprehensive framework for the establishment of a new statutory Māori governance entity, the processes by which the entity would operate, and the way in which it would interact with its members, constituencies, the courts, business, and government.

This chapter outlines the Law Commission's proposal for the establishment of a new Māori governance entity called "waka umanga" as an attempt to recast New Zealand law and better cater for Māori governance needs. Particular focus will be given to the issues identified by the Commission as being problematic in the current arrangements for the management of Māori collective assets, and the inadequacies of current management models. Consideration will be given to previous work undertaken by the Commission, and the influence that that work has had on the final shape of the waka umanga report and its recommendations. Finally, the Commission's main proposals will be canvassed.

3.2 Māori Customs and Value in New Zealand Law 2001 Paper

In order to appreciate the context in which the Commission's report on waka umanga has been made, it is necessary to briefly consider some of the earlier work that the

Commission has undertaken. In its 2001 report entitled “Māori Customs and Values in New Zealand Law”³³¹ the Commission expanded on a growing body of legal research, commentary and scholarship concerning the place of Māori customs and value in New Zealand’s legal system. Initiated in 1994 by then Chief Judge of the Māori Land Court, the Honourable Justice Eddie Durie, the Commission’s report provided a detailed account of Māori tikanga and custom law, and its treatment in New Zealand’s legal system. That it took some seven years to complete is a strong indication of the difficulties inherent in any exercise that seeks to reconcile Māori values, customs, traditions, beliefs and institutions with a legal system that is based on purely Western concepts.

Although the full conclusions made by the Commission in its 2001 report stretch far beyond the scope of this chapter, and indeed could in themselves give rise to a number of legal thesis, of particular significance is the Commission’s identification of the “After Settlement Asset Programme”, perhaps by no coincidence abbreviated to “ASAP”, as an area of future work where it could give effect to Māori values in New Zealand law.³³² In outlining the importance of the project, the Commission stated:

“A contemporary issue of major significance for all New Zealanders is 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.”³³³

The Commission then went on to say:

“It is important to ensure that, in dealing with settlements and the settlement process, the New Zealand legal system furthers the objectives of the rule of law and can respond to an accepted set of rules, values and principles. In general terms it is important that the obligations of the parties be clear and the rules applied be sufficiently stable to allow those who are participating in the process

³³¹ New Zealand Law Commission, above n 26.

³³² *Ibid*, at 90.

³³³ *Ibid*, at 90.

to be assisted by them in reaching and enforcing arrangements made among them.”³³⁴

The project envisaged by the Commission would seek to achieve four aims. First, to assess the need for a distinct dispute resolution jurisdiction in respect of the discharge by tribal organisations of their various obligations in the administration of settlement assets. Second, to identify the circumstances in which such a jurisdiction should be exercised and the principles that should guide its exercise. Third, to identify the forum and processes most appropriate to resolving these disputes. And finally, to propose a legislative framework around which the jurisdiction might operate.³³⁵

It is in reading the Commission’s 2001 report on Māori custom and values, and particularly its vision for future work on the management of Treaty settlement assets, that one can clearly see the genesis for its later research on waka umanga.

3.3 Treaty of Waitangi Claims - Addressing the Post-Settlement Phase 2002 Paper

The need for future work on the management of Treaty settlement assets identified by the Commission in its 2001 report formed the basis of its 2002 study paper entitled “Treaty of Waitangi Claims: Addressing the Post-Settlement Phase”.³³⁶ The purposes of the paper, as outlined in the Commission’s terms of reference, were to investigate the need for changes to address problems that have arisen around Treaty settlements, and particularly whether there was a need for a generic post-settlement entity to be developed; to recommend changes to address any of the problems identified; and to recommend a legislative framework to effect those changes if necessary.³³⁷

³³⁴ *Ibid*, at 92.

³³⁵ *Ibid*, at 91.

³³⁶ New Zealand Law Commission, above n 268.

³³⁷ *Ibid*, at v-vi.

The Commission identified two significant issues, as follows:

“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.

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.”³³⁸

Accordingly, the Commission determined there was a need for a statutory post-Treaty settlement entity for the management of Māori communal assets that would address the issues outlined above, and in a way that would reflect Māori values.³³⁹

The Commission recommended that, among other things, any such entity should be required to have its own constitution, that a process be established for the certification of each individual entity by the Registrar of the Māori Land Court, and that the Court itself have jurisdiction to deal with disputes arising within the entity.³⁴⁰

3.4 Waka Umanga - A Proposed Law for Māori Governance Entities 2006 Report

The Commission’s report on waka umanga is a continuation of its earlier research noted above. Many of the issues identified by that research are considered in more depth, and the Commission’s proposals are very much aimed at addressing those issues. As noted above, the report provides a comprehensive framework for a new Māori governance entity, and with it a new approach to dealing with Māori collective assets. This is an approach is not currently present in New Zealand law, and the Commission notes at the outset:

³³⁸ *Ibid*, at 1.

³³⁹ *Ibid*, at 1-2.

³⁴⁰ *Ibid*, at 24-25.

“The rebuilding of Māori institutions is a matter of longstanding concern for both Māori and the Crown. There are two vital issues. The first is the lack of a legal framework to represent and manage the interests of tribes and other Māori collectives in a way suitable both for them and those with whom they deal. The second is the lack of a legal framework for tribal restructuring to ensure that entities are developed by the people themselves against a background of their own culture and that enables the ready resolution of formation disputes.”³⁴¹

Against that backdrop, the Commission sets out its view for the rebuilding of these institutions, which are outlined in five key proposals. First, the establishment of a new legal entity for the management of Māori communal assets. Second, a detailed process for the formation of the new entities and dispute resolution. Third, a process for the recognition of tribal authorities. Fourth, the establishment of good governance standards. And finally, the provision of ongoing support to the new entity by way of a secretariat.

3.5 A New Legal Entity

The most significant proposal put forward by the Law Commission is the creation of a new statutory legal entity for the management of communal Māori assets called “waka umanga”, which they envisaged would “...steer the canoes and shape the lives of future generations of Māori”.³⁴² According to the Commission, such a need arose out of the fact that current legal structures were ill-suited to the special nature of Māori collectives, such as iwi, hapu, and urban authorities, whose functions were at once social, commercial, political, and, perhaps most importantly, cultural.³⁴³ In terms of assets, Māori entities were likely to be managing communal assets derived from a number of different sources, such as land claims and fisheries settlements, and aquaculture allocations, each of which could potentially place distinct requirements on the entity which were unknown to non-Māori entities.³⁴⁴ This reality makes it especially difficult for current legal structures to serve the varied needs of Māori.

³⁴¹ New Zealand Law Commission, above n 252, at 12.

³⁴² *Ibid*, at 18.

³⁴³ *Ibid*, at 14.

³⁴⁴ *Ibid*, at 19.

While entities such as trusts, companies, and incorporations are legal models that have long been used by Māori for the management of their affairs, none of those entities can fulfil all of the needs of Māori and in a way that reflects Māori tikanga.³⁴⁵ Similarly, current “Māori” entities, such as Māori trust boards and mandated iwi organisations, do not have the characteristics that satisfy commercial lending criteria,³⁴⁶ making it exceptionally difficult for Māori groups to raise funds, and effectively operate in a commercial environment level with non-Māori entities.

The way in which Māori entities are currently created was also of concern to the Commission, which viewed current Treaty settlement legislation and the settlement mandating process as having too great an influence over the shape and character of tribes and tribal structures.³⁴⁷ Requirements that Māori have to fulfil in order to negotiate with the Crown often affected their ability to freely and independently develop their own institutions.³⁴⁸

In contrast, waka umanga, a new legal entity specifically shaped to the various and special needs of Māori groups, and created by a process that required the full involvement of its constituent members, would give Māori far greater control over the development of their institutions, and thus their own affairs. Such an entity would free Māori to develop in a way that reflected their own customs and traditions, rather than the western values and beliefs imposed on them by government. At the same time, waka umanga would provide Māori groups with all of those characteristics necessary for them to be able to operate effectively in the commercial world.³⁴⁹

According to the Commission’s proposal, waka umanga would be established by way of a Waka Umanga Act,³⁵⁰ and would be divided into two different types, known as “waka pu” and “waka tumaha”.³⁵¹ Waka pu would be reserved solely for tribes, while waka tumaha would be specifically designed for other Māori collectives, such as urban authorities, cultural clubs, and similar organisations.³⁵² It is apparent

³⁴⁵ *Ibid*, at 15.

³⁴⁶ *Ibid*, at 19-20.

³⁴⁷ *Ibid*, at 52.

³⁴⁸ *Ibid*.

³⁴⁹ *Ibid*, at 13.

³⁵⁰ *Ibid*, at 14.

³⁵¹ *Ibid*, at 12.

³⁵² *Ibid*.

throughout the Report that the Commission saw as quite distinct and separate the needs and functions of tribes in comparison to those of general Māori groups.

In piecing together its proposal for the establishment of waka umanga, the Commission acknowledged the fear among many Māori that, with the creation of such an entity, the tribe and its waka Pu could become merged, raising the potential of “corporate warriors” taking over the collective.³⁵³ This is particularly worrying as, being a creature of statute, Parliament could repeal any Waka Umanga Act, disestablishing waka umanga, and potentially threatening the existence of their respective tribes.³⁵⁴ The Commission thus noted the need for the tribe and its representative entity to remain distinct and separate not only for the protection of the tribe, but also to maintain the political and commercial integrity of the entity itself.³⁵⁵

3.6 A Process for Forming Entities and Resolving Formation Disputes

Formation Process

The Commission proposed that, for waka pu, “scheme promoters” chosen from the constituent groups would manage the establishment of each individual waka umanga.³⁵⁶ Scheme promoters would be charged with developing a scheme plan, which would set out the process by which the waka pu would be established and generally set out the group’s vision. The plan would be developed in consultation with, and eventually approved by, the people, with a requirement that the scheme promoters hold meetings to discuss the plan. The scheme plan would set out the rules by which the waka pu would be developed, and include such things as the way in which meetings would be conducted, how votes would be taken, and so on.³⁵⁷

The next step in the formation process would be the establishment of a charter developed in consultation with the waka pu membership by a representative constitution drafting committee.³⁵⁸ While the scheme plan would seek to put in place the boundaries of the process by which the waka pu would be formed, the charter

³⁵³ *Ibid*, at 38-39.

³⁵⁴ *Ibid*.

³⁵⁵ *Ibid*.

³⁵⁶ *Ibid*, at 81.

³⁵⁷ *Ibid*, at 82-83.

³⁵⁸ *Ibid*, at 87.

would set out the rules of the waka pu itself. The Commission viewed consultation with, and involvement of, the people as being necessary to give “popular ownership” to the charter.³⁵⁹

The final step in the formation process would require the scheme promoters to seek agreement and ratification of the waka pu structure and charter by the people. The Commission proposed that, in this final stage, consultation with the Crown would be necessary.³⁶⁰

Formation Disputes

The Commission proposed that any 15 or more people affected by the proposal to establish a waka pu could apply to the Māori Land Court to review the proposal on the grounds that the applicants are, or were likely to be, prejudiced by the proposal.³⁶¹ On receipt of an application for review, the Court would have the ability to direct a case conference be held, or that the parties enter into mediation or facilitation.³⁶² In every case, the overriding focus of the Court would be on the prompt disposal of review applications, and the Court would be required to consider whether the proposals were fair and adequate in the circumstances.³⁶³ In hearing an application for review, the jurisdiction of the Court would be limited to considering process issues, rather than policy considerations, and provided an adequate scheme plan was in place, the Commission envisaged that most disputes would be resolved without recourse to the Māori Land Court.³⁶⁴

The Māori Land Court would also have significant powers on upholding an application for review and determining that the applicants were likely to be prejudicially affected by the proposed course of action. In such circumstances, the Court could order that the prejudice be removed, direct elections to be held, or direct that a new scheme plan be developed or the existing scheme plan be amended.³⁶⁵

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*, at 88.

³⁶¹ *Ibid.*, at 88-89.

³⁶² *Ibid.*, at 89.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*, 89-90.

³⁶⁵ *Ibid.*

3.7 Recognition of Tribal Authority

The second proposal outlined in the Law Commission’s report is the establishment of a statutory framework for the registration of waka umanga. In addition, the Commission proposed that registration would also recognise waka pu as the legitimate representative of their relevant tribes.³⁶⁶ The Commission noted that, without firm guidance in place around the issue of tribal representation, the current arrangements for Māori entities allow third parties to choose the tribal representatives with whom they deal, and give tribal members the ability to promote competing representative institutions. Furthermore, without a single recognised body of representatives, there was a lack of certainty for those wishing or obliged to deal with the tribe. This reality undermined existing governance models, and tribal authority generally.³⁶⁷ The Commission viewed registration of waka umanga as recognition that the entity had corporate status, and an adequate charter for good governance.³⁶⁸ A specially created “Registrar of Waka Umanga”, who would sit within the Companies Office of the Ministry of Economic Development, would oversee registration and be responsible for the maintenance of a “Register of Waka Umanga”.³⁶⁹

The waka umanga registration process would begin with the provisional registration of the waka umanga name, initiated by an application to the Chief Judge of the Māori Land Court.³⁷⁰ This process would be reasonably straightforward and not require a formal hearing, and the name would be notified for objections at the formal registration stage of the waka umanga.³⁷¹

The Commission proposed that an application to register a waka umanga could be made to the Māori Land Court, and would require the support of at least 15 members of the group.³⁷² In addition, each application would be required to provide for a number of things, including the name of the proposed waka umanga, a copy of the

³⁶⁶ *Ibid*, at 94.

³⁶⁷ *Ibid*, 15-16.

³⁶⁸ *Ibid*, at 94.

³⁶⁹ *Ibid*.

³⁷⁰ *Ibid*, at 95-96.

³⁷¹ *Ibid*.

³⁷² *Ibid*, at 96.

waka umanga's proposed charter, the district with which the waka umanga is associated, and a statutory declaration signed by at least three of the applicants.³⁷³ Once an application for registration is lodged, the Law Commission proposes that the Registrar would determine whether that the waka umanga's charter is consistent with the Act.³⁷⁴ The Registrar would have to be satisfied that the charter meets the Act's good governance standards, is representative of and accountable to its target group (if a waka tumaha), and the Māori Land Court has provisionally approved the waka umanga's name.³⁷⁵ In considering the charter's compliance with the Act, the Registrar would have the ability to refer any concerns, and propose any changes, to the applicants who could in turn seek the assistance of the Court if there was a dispute with the Registrar's requirements.³⁷⁶ If satisfied the waka umanga's charter complied with the requirements of the Act, the Registrar would then require notification of the application.³⁷⁷

Once the application has been advertised, the public would have an opportunity to raise any objections.³⁷⁸ If no objections are raised, the Registrar would be required to register the waka umanga, issue a certificate of incorporation, and enter the waka umanga into the register.³⁷⁹ Like the registration of companies, the register of waka umanga would contain the waka umanga's name, charter, address for service, name and contact addresses of its office holders, and details of any of its constituencies if applicable.³⁸⁰

Objections to the registration of the proposed waka umanga could be made to the Chief Māori Land Court Judge during the public notification process if supported by 15 or more affected persons.³⁸¹ In general, the grounds for filing such an objection would be limited to two matters - that the proposed name would cause confusion, or that the entity's charter does not adequately meet the requirements of the Act.³⁸² In the case of a proposed waka pu, objections could also be made on the grounds that

³⁷³ *Ibid*, at 97. The statutory declaration would set out a number of matters, such as how the charter was developed, the level of support for the charter, and the particulars of those representing any constituencies.

³⁷⁴ *Ibid*, at 98.

³⁷⁵ *Ibid*.

³⁷⁶ *Ibid*.

³⁷⁷ *Ibid*, at 99.

³⁷⁸ *Ibid*.

³⁷⁹ *Ibid*.

³⁸⁰ *Ibid*, at 100.

³⁸¹ *Ibid*.

³⁸² *Ibid*.

there was not an adequate opportunity to be heard during the formation process, the formation process was unfair and the applicants are prejudiced, the waka pu lacks sufficient mandate, or that adequate attempts were not made to amalgamate or form an association with other groups that serve part or all of the same group as the proposed waka pu.³⁸³ Furthermore, if it is intended that the waka pu be the legitimate representative of the group, then the Commission proposed two further grounds of objection, namely that the group should be represented by some other body, or that the charter should restrict the right of representation.³⁸⁴

On receipt of an objection, the Chief Māori Land Court Judge would assign the matter to another Judge of the Court.³⁸⁵ The Commission also proposed that the Chief Judge have the ability to appoint “pukenga”, or advisors, to sit with the Judge if necessary, and it appears that their role would be to advise the Judge, especially in particularly difficult situations involving cultural issues.³⁸⁶ A judicial conference would then be held with the applicants and the objectors, which would allow the Court an initial opportunity to access the strengths of the competing claims.³⁸⁷ If satisfied there is a case to answer, the matter would proceed to a hearing and the onus would then be on the scheme promoters to demonstrate to the Court that the waka umanga should be registered.³⁸⁸

In determining any objection, the Court would be required to focus only on the process by which decisions concerning the proposed waka umanga were made, rather than matters of policy, and would be bound to consider all those matters it is obliged to consider during formation disputes.³⁸⁹ Following the judicial conference, the Māori Land Court would have a number of options open to it in dealing with the objection. The Court could uphold or dismiss the application, direct the Registrar as to whether or not the waka umanga should be registered, order that some or all of the formation process be undertaken again, or direct that the parties resolve the issues among themselves and then report back to the Court.³⁹⁰ In the case of a proposed waka pu, the Court could also make orders declaring it to be the legitimate

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*, at 101.

³⁸⁶ *Ibid.*, at 101-102.

³⁸⁷ *Ibid.*, at 102.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*, at 103.

³⁹⁰ *Ibid.*

representative of a particular tribal group.³⁹¹ In all cases, the focus would again be on the prompt resolution of disputes and disposal of applications.³⁹²

Where a waka pu has been recognised under the Waka Umanga Act as the legitimate representative of a tribe, the Commission proposes that it be entitled to exclusively represent that tribe, and those wishing to deal with the tribe must do so through the waka pu unless legislative provisions provide otherwise.³⁹³ In addition, those required to consult with Māori tribal groups, including local and public authorities, could discharge that obligation by treating with the legitimate representative of the tribe as recognised under the Act.³⁹⁴

3.8 Dispute Resolution

As noted, one of the most problematic issues identified by the Commission concerning current Māori entities was their inability to resolve disputes effectively and efficiently without recourse to the courts. The Commission observed that litigation was costly, time consuming, and often lead to the imposition of western-based remedies, when the focus was more appropriately directed at maintaining the mana of the parties involved.³⁹⁵ Furthermore, when parties entered the Courtroom, much of their control was handed over to lawyers and judges.³⁹⁶ The Commission thus proposed a number of mechanisms by which disputes concerning waka umanga could be resolved in a way that did not hamper the entity's ability to carry out the functions and fulfil the purposes for which it was created.

Internal Mechanisms

The most significant proposal was that each waka umanga incorporate internal dispute resolution mechanism into their charter.³⁹⁷ This would be a mandatory requirement, but the exact nature of the dispute resolution mechanism would be left up to each individual waka umanga to decide.³⁹⁸ Such mechanisms could thus reflect

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ *Ibid.*, at 105-106.

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*, at 111.

³⁹⁶ *Ibid.*, at 110.

³⁹⁷ *Ibid.*, at 109.

³⁹⁸ *Ibid.*

the particular nature of the group establishing the waka umanga, and elements of their individual tikanga. The Commission viewed the establishment of such mechanisms as being essential if tribes were to take control of their own destinies, and would allow for the early resolution of internal disputes before the opposing positions of the relevant parties became too entrenched and Court intervention was necessary.³⁹⁹

Jurisdiction of the Māori Land Court

As well as internal dispute resolution mechanisms, the Commission proposed that the Māori Land Court would have exclusive jurisdiction to determine any disputes arising within waka umanga that had not been resolved internally.⁴⁰⁰ Where third parties were involved, such as creditors, the Māori Land Court would have concurrent jurisdiction with the High Court.⁴⁰¹ The Law Commission felt that extending the Māori Land Court's jurisdiction to determine matters relating to waka umanga was preferable to the High Court because of its experience with Māori entities and the general feeling among Māori that the Court was their court.⁴⁰²

Although the focus would be firmly on internal dispute resolution and matters of process, the Commission considered that the Māori Land Court should have the jurisdiction to rule on the substance of a claim where all internal mechanisms had been exhausted.⁴⁰³ In such situations, the Commission proposed that the Court's powers be the same as remedies already available to other courts dealing with incorporations and trusts. It is clear that the Commission's preference was that tribes should be encouraged to reach their own solutions, and the Court should only make orders where the parties have exhausted all other avenues.

The proposed powers of the Māori Land Court would include terminating the position of any waka umanga representative, appointing interim representatives, calling elections, suspending or varying the terms of any charter or document, making

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*, at 109-110.

⁴⁰¹ *Ibid.*, at 110.

⁴⁰² *Ibid.*, at 120.

⁴⁰³ *Ibid.*, at 123.

declarations as to a person's or group's membership of the waka umanga, granting interim injunctions,⁴⁰⁴ and awarding costs.⁴⁰⁵

Appeals from the Māori Land Court relating to waka umanga would be made to the High Court rather than the Māori Appellate Court.⁴⁰⁶ The Commission felt this was necessary because the waka umanga jurisdiction would be quite different to the Court's general jurisdiction.⁴⁰⁷ The Commission noted that the proposed changes would also require significant amendments to the Te Ture Whenua Māori Act 1993, and a streamlining and consolidation of some parts.⁴⁰⁸

Kairongomau

To compliment the internal dispute resolution mechanisms, the Commission also proposed that waka umanga could appoint "kairongomau" or "peace makers".⁴⁰⁹ The role of the kairongomau would be similar to that of Ombudsmen, and they would have a broad mandate to consider any disputes arising between a waka umanga and its members, constituent groups, or within the runanganui itself.⁴¹⁰ Kairongomau would be charged with ensuring that members were treated fairly by the waka umanga, and would seek to find a solution to a dispute that was satisfactory to all parties.⁴¹¹ The kairongomau could suggest changes to waka umanga practices and policies to ensure that any future dealings with its members were improved, and they would also consider requests for information.⁴¹²

In terms of process, the Commission envisaged that kairongomau would act as inquisitorial authorities, and would largely determine their own processes, with an overriding requirement to act in accordance with natural justice, and in particular, maintain their independence and impartiality.⁴¹³ While the findings of kairongomau would not be binding, waka umanga would have to provide reasons if they decide not

⁴⁰⁴ On the grounds that the waka umanga is acting contrary to its charter or the Act, that the injunction is required on the balance of convenience and is supported by at least 15 members of the waka umanga.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*, at 124-125.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*, at 126.

⁴⁰⁹ *Ibid.*, at 112.

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ *Ibid.*, at 114.

to follow a recommendation, and the complainant could potentially take further action.⁴¹⁴ There would thus be a significant impetus on the waka umanga to uphold any recommendations made by a kairongomau. Kairongomau could also potentially assist the parties with facilitation as another way of resolving disputes.⁴¹⁵

Mediation

The Commission recommended that waka umanga charters make specific provision for mediation where the kairongomau or facilitation was unable to resolve the dispute.⁴¹⁶ Having such an option would further reduce the potential for litigation, and increase the likelihood of disputes being resolved internally. In order to ensure that mediation was effective, the Commission suggested the creation of a list of individuals suitably skilled and experienced, especially in matters of tikanga, who could act as mediators in waka umanga disputes.⁴¹⁷

Arbitration

Arbitration is another mechanism the Commission considered appropriate for the resolution of waka umanga disputes. Arbitration would only be available if agreed by all parties, and would be provided in accordance with the Arbitration Act 1996.⁴¹⁸

Court Intervention & Wind-Up

Where problems within a waka umanga were significant or there was severe dysfunction, the Commission noted the need for the availability of remedies outside of the mandatory internal disputes resolution mechanisms.⁴¹⁹ The Commission proposed two such remedies – court intervention and wind up. Court intervention would be appropriate where a waka umanga was not complying with the Act or its charter, but its members still supported it and it was not immobilised by debt.⁴²⁰ In contrast, wind up would be available where a waka umanga was unable to meet its

⁴¹⁴ *Ibid*, at 115. The Commission noted that this further action could be mediation or court proceedings.

⁴¹⁵ *Ibid*, at 118.

⁴¹⁶ *Ibid*, at 118.

⁴¹⁷ *Ibid*.

⁴¹⁸ *Ibid*, at 119.

⁴¹⁹ *Ibid*, at 127.

⁴²⁰ *Ibid*.

financial obligations, its members no longer supported its existence, or its problems were otherwise severe.⁴²¹

Applications for wind up could be made by a group of 15 or more members, the Registrar of Waka Umanga, or a creditor, on the grounds that the waka umanga, its officers, or its employees had acted, were acting or proposing to act, in a manner that is contrary to the Act or its charter.⁴²² The waka umanga's internal dispute resolution process would still be the first point of call, and the Māori Land Court's focus in hearing applications for wind up would be to preserve or re-establish the waka umanga.⁴²³ In addition, the waka umanga charter would be required to specify what should happen to its assets in the event of wind-up.⁴²⁴

The Commission proposed that voluntary wind-up be deemed a "major transaction" for which special provisions should be made in the waka umanga's charter.⁴²⁵ Although the exact nature of these provisions would be left to the individual group to decide, the Commission suggested that, at minimum, voluntary wind-up could only be sought where at least 66-percent of the membership had approved the action via a special resolution at at least two special general meetings.⁴²⁶

Wind-up could also be sought by a creditor on the basis that the waka umanga was unable to pay its debts.⁴²⁷ In such cases, the Commission proposed that the process to follow would be the same as that for companies outlined in sections 287 to 289 of the Companies Act.⁴²⁸ The Registrar of Waka Umanga could also make an application for the wind-up of a waka umanga on the basis that it had not complied with its annual registration obligations, provided the Registrar had taken adequate steps to seek compliance.⁴²⁹

Once an application for wind-up was received, the Māori Land Court would be required to publicly notify the application, serve notice of the application on the

⁴²¹ *Ibid.*

⁴²² *Ibid.*, at 128.

⁴²³ *Ibid.*, at 127.

⁴²⁴ *Ibid.*, at 135.

⁴²⁵ *Ibid.*, at 131.

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.*, at 132.

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*, at 132-133.

registered office of the waka umanga, its representatives, any constituent entities, its creditors and any party with a particular interest in the application.⁴³⁰ The Court would also be required to advise the Registrar that an application for wind-up had been made.⁴³¹ If satisfied that the waka umanga could not continue because it no longer had the resources to comply with the requirements of the Act, could not pay its debts, there had been a fundamental change in the nature or circumstances of the tribe that prevents, and is likely to continue preventing, the waka umanga from performing its role, or because the Court is satisfied that an application for voluntary wind up is a fair and accurate reflection of the views of the waka umanga's membership, the Court would be required to make orders placing the waka umanga into liquidation and removing it from the Register.⁴³² On the making of an order for wind up, the powers of the runanganui would be suspended, and a liquidator appointed. At this point, Part 16 of the Companies Act 1993 would apply.⁴³³

3.9 Establishing Good Governance Standards

The fourth proposal of the Law Commission was the establishment of a framework for good governance that could be incorporated into a waka umanga's charter.⁴³⁴ As has already been observed with many of the Commission's proposals, individual groups would largely determine their own governance systems, but a number of "core obligations" would be mandatory.⁴³⁵ The Commission viewed the waka umanga as the body corporate, and the runanganui as the waka umanga's governing council, with a relationship analogous to that of a company and its board.⁴³⁶

A waka umanga would be a distinct and separate entity from its tribe, recognised by the Waka Umanga Act as being a body corporate with perpetual succession. This provision would be similar to that of section 15 of the Companies Act.⁴³⁷ The Act would also set out the purposes of the waka umanga, which, in the words of the

⁴³⁰ *Ibid*, at 133.

⁴³¹ *Ibid*.

⁴³² *Ibid*, at 134.

⁴³³ *Ibid*, at 135. Part 16 of the Companies sets out the provisions that apply to companies in the even of liquidation.

⁴³⁴ *Ibid*, at 16.

⁴³⁵ *Ibid*.

⁴³⁶ *Ibid*, at 149.

⁴³⁷ *Ibid*. Section 15 of the Companies Act provides that a company is a legal entity in its own right, separate from its shareholders, and continues in existence until it is removed from the Companies Register.

Commission, would make it clear that a waka umanga was the servant of its tribe and reflect notions of “transparency, accountability and responsible stewardship”.⁴³⁸ A waka umanga would have the power to do anything that a natural person could do so long as it was consistent with the Act, the charter, and any formal resolutions, and the Commission viewed the Companies Act as a useful model for defining the powers of waka umanga.⁴³⁹ In any case, the waka umanga’s charter could restrict the powers granted in the Act.⁴⁴⁰

Each waka umanga would be governed by a runanganui made up of both elected representatives, and any representatives appointed in accordance with the charter.⁴⁴¹ The Commission proposed that the runanganui would have all of the powers necessary for governance and management of the waka umanga, and the Act would provide for a standard set of runanganui powers and obligations that could be adapted by individual waka umanga as necessary.⁴⁴² These would include obligations to provide regular reports to its membership, appoint the waka umanga’s chief executive, and to seek the views of its memberships in the formulation of major policies.⁴⁴³

Given the runanganui’s significant functions and responsibilities in relation to its tribe, the Commission considered that the Act should provide specific recognition of the runanganui.⁴⁴⁴ As well as the powers outlined above, the Commission proposed that provision be made for the election of runanganui representatives,⁴⁴⁵ the appointment of members to the runanganui,⁴⁴⁶ who may be a member of the runanganui,⁴⁴⁷ the duties and roles of representatives,⁴⁴⁸ communication,⁴⁴⁹ accountability,⁴⁵⁰ the

⁴³⁸ *Ibid*, at 150.

⁴³⁹ *Ibid*, at 151.

⁴⁴⁰ *Ibid*.

⁴⁴¹ *Ibid*, at 151.

⁴⁴² *Ibid*, at 152.

⁴⁴³ *Ibid*, at 153.

⁴⁴⁴ *Ibid*, at 152.

⁴⁴⁵ *Ibid*, at 154-159 - Including how elections were to be undertaken, the way in which nominations should be processed, the method by which votes should be taken, how disputes should be dealt with, and how the results of elections should be verified.

⁴⁴⁶ *Ibid*, at 160-161. The Commission recommended that a waka umanga charter could provide for the appointment of members to the runanganui provided that at least 75-percent of the runanganui members were democratically elected.

⁴⁴⁷ *Ibid*, at 160-165 - Such provisions would deal with a broad range of matters, including credibility and competence, mental capacity, age limits, the qualifications necessary for certain offices, terms of office, the dismissal of office holders, and remuneration of representatives.

⁴⁴⁸ *Ibid*, at Chapter 15 - These provisions would be directed at the duties and responsibilities of each representative, their liabilities and indemnities, and the way in which conflicts of interest should be

functions of the runanganui,⁴⁵¹ and the establishment of a corporate office for the waka umanga.⁴⁵²

3.10 Provision of Ongoing Support by Way of a Secretariat

The final proposal made by the Commission is the establishment of a Secretariat, known as “Te Ropu Awhina”, to provide ongoing support and advice to waka umanga.⁴⁵³ Membership to the Secretariat would be voluntary and funded by levies paid by each member waka umanga.⁴⁵⁴ The Secretariat would initially be established by Government and attached to a Government department, such as Te Puni Kokiri, but would not be a Crown entity, and would operate more as an incorporated society.⁴⁵⁵ Overall, it would be up to waka umanga to decide the shape that the secretariat should take.

The Commission envisaged the Secretariat providing a number of services to waka umanga, including advice and assistance with the registration process, advice on governance issues, research on governance practices, facilitation of mentoring, and fostering of relationships, between waka umanga and other organisations, training, and advocacy on behalf of waka umanga.⁴⁵⁶ By having such services provided by one central body, the Commission stated that waka umanga would have more “economic and political muscle and so be in a better position to influence Government and non-government organisations”.⁴⁵⁷

dealt with. The Commission focused on the representatives’ duty of care, good faith and best interests, and disclosure of information, and the sanctions for breaches of these duties.

⁴⁴⁹ *Ibid*, at Chapter 16 - Which would include detailed provisions concerning requests for information, how they could be made, the timeframes in which the runanganui would have to respond, the forms in which information could be provided, and the way in which disputes regarding information would be handled. These provisions would also include the way in which consultation should be undertaken, issues that would be deemed “major transactions”, the way in which general meetings and special general meetings would be conducted, and governance statements.

⁴⁵⁰ *Ibid*, at Chapter 17 - These provisions would focus on the financial reporting and accountability requirements of the waka umanga, and would differ depending on the size of the entity. These provisions would set out the planning requirements of the waka umanga, requirements for its annual report, and define the runanganui’s role in relation to the financial management of the waka umanga.

⁴⁵¹ *Ibid*, at Chapter 18 - These provisions would provide for the way in which runanganui meetings would be conducted, how decisions and resolutions would be made, how committees would be established,

⁴⁵² *Ibid*, at Chapter 19 - The Commission envisaged that such an office would provide advice and information to the runanganui, and translate the runanganui’s plans and policies into actions.

⁴⁵³ *Ibid*, at 138.

⁴⁵⁴ *Ibid*.

⁴⁵⁵ *Ibid*.

⁴⁵⁶ *Ibid*, at 139-140.

⁴⁵⁷ *Ibid*, at 139.

3.11 CONCLUSION

The Law Commission's Waka Umanga Report encompasses a detailed analysis of the current issues affecting the management of Māori collective assets, as well as a comprehensive framework for how those issues can be addressed and stronger governance delivered for Māori. However, the Commission's Report is just that – a report, and on its own cannot bring about change and recast New Zealand law for the post-settlement era. That job rests with Government, but the Commission's work provides a firm basis from which Government can effect that change.

CHAPTER FOUR: THE WAKA UMANGA BILL

4.1 Introduction

A little over a year after its publication, the recommendations of the Waka Umanga Report were broadly adopted by the fifth Labour Government in the form of the “Waka Umanga (Māori Corporations) Bill 2007”.⁴⁵⁸ As proposed by the Commission, the Bill provided for the establishment of Waka Umanga as a new, optional legal entity for Māori collectives managing communal assets, and was apparently underpinned by a policy of “supporting the realisation of Māori potential”.⁴⁵⁹

According to its explanatory note, as well as establishing a new legal entity, the Bill would also provide a mechanism for the recognition of waka umanga as the legitimate representative of tribal groups, introduce corporate governance standards to ensure that communal assets were managed in accordance with the best interest of owners, and establish internal dispute resolution processes that avoided costly litigation. It was envisaged that the result of these changes would not only have a positive impact for Māori, but also a “correspondingly positive impact on New Zealand’s economic, cultural, and social outcomes”.

In introducing the Bill in the New Zealand House of Representatives, then Minister of Māori Affairs, the Hon Parekura Horomia, noted that the Waka Umanga Bill sought to address a number of problems arising from “...a number of common and defining experiences for Māori collectives within the current environment”.⁴⁶⁰ These included the lack of cohesion between the form and function of existing legal frameworks and the unique characteristics of Māori collectives, and the need to protect the rights and interests of members of Māori collectives.⁴⁶¹ As such, the Minister stated:

“There is a clear need for a mechanism to assist Māori collectives in managing their communal assets in order to achieve greater certainty for Māori, to assist the Crown and third parties to leverage off existing successes and focus on

⁴⁵⁸Waka Umanga (Māori Corporations) Bill 2007 (No 175-1).

⁴⁵⁹Waka Umanga (Māori Corporations) Bill 2007: First Reading (11 December 2007) *New Zealand Parliamentary Debates (Hansard)*: Weekly Hansard, 644, 13858.

⁴⁶⁰*Ibid.*

⁴⁶¹*Ibid.*

forward development and growth, and to support cultural identity and positive contributions to national identity. This legislation supports these objectives.”⁴⁶²

The Minister went on to summarise the proposed legislation thus:

“...a purpose-built governance model, underpinned by the principles of cultural match, flexibility, and good governance standards. It is about creating certainty for iwi and hapū and for those third parties that deal with them—including the Crown. With the advent of technology, globalisation, and digitalisation it is clear that Māori need to adapt in order to remain relevant in the ever-changing world. To do that, they need to be supported by good governance structures and practices.”⁴⁶³

This chapter will provide an overview of the key provisions of the Waka Umanga Bill as introduced on 11 December 2007. Particular focus will be given to the proposed process for the establishment and registration of waka umanga, the proposed governance standards for waka umanga, and the internal dispute mechanisms promoted by the Bill. Brief consideration will then be given to the Māori Affairs Select Committee and their recommended changes outlined in their report of 8 September 2008. Finally, some thought will be given to the politics surrounding the Bill and, in particular, its current status in the House and future under the current National-led Government.

4.2 The Waka Umanga Bill 2007 – As Introduced

The six broad purposes of the Waka Umanga Bill were outlined in clause 3, and were targeted at resolving the current problems around the management of Māori collective assets identified by the Law Commission. Of significance among the purposes was the development of representative institutions,⁴⁶⁴ the promotion of stability and legal certainty,⁴⁶⁵ and facilitation of the effective management of communal assets.⁴⁶⁶

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

⁴⁶⁴ Clause 3(1)(a).

⁴⁶⁵ Clause 3(1)(b).

⁴⁶⁶ Clause 3(1)(d).

In order to achieve its purposes, the Waka Umanga Bill provided for four key things. First, the establishment of waka umanga as a new legal entity for the management of communal assets by tribal groups (waka pu) and Māori associations (waka tumaha), and a process for how those entities could be formed.⁴⁶⁷ Second, a process for the registration of waka umanga, and the ability for waka pu to obtain legitimate representative status of its respective tribal group.⁴⁶⁸ Third, specific governance and management standards for waka umanga, their runanganui, governors, and employees.⁴⁶⁹ And finally, the Bill established internal dispute resolution mechanisms that allowed for the resolution of disputes outside of the Courts.⁴⁷⁰

4.2.1 Establishment of Waka Umanga

“Waka umanga” was defined in clause 4 of the Bill as “a Māori incorporation registered under this Act as either a waka pu or a waka tumaha...”.⁴⁷¹ “Waka pu” was defined in clause 4 as “a waka umanga registered for a tribal group” and “tribal group” was defined as “a group comprising 1 or more iwi or hapu”.

Clause 6 of the Bill outlined the status, capacity and powers of waka umanga. As proposed by the Law Commission, a waka umanga would have been a body corporate with perpetual succession, and a legal entity in its own right separate from its tribal group or Māori association, and its members.⁴⁷² Waka umanga would have had full capacity to, among other things, undertake any business and enter into any transaction for the purposes of exercising their powers and performing their duties under the charter, the Bill, or any other enactment.⁴⁷³ Importantly, no governor, member or employee of the waka umanga would have had any rights or interests in the waka umanga’s assets, and would not have been liable for any liability of the waka umanga.⁴⁷⁴

The formation requirements for waka pu was dealt with in clause 8 of the Bill. A waka pu could be formed and registered by a tribal group provided the group descended

⁴⁶⁷ Clause 3(2)(a).

⁴⁶⁸ Clause 3(2)(a), (b) and (c).

⁴⁶⁹ Clause 3(2)(d).

⁴⁷⁰ Clause 3(2)(e).

⁴⁷¹ Clause 7 of the Bill provided that a waka umanga could be either a waka pu or a waka tumaha.

⁴⁷² Clause 6(1).

⁴⁷³ Clause 6(2).

⁴⁷⁴ Clause 6(4).

from one or more common named ancestors, the waka pu would hold communal assets on behalf of the tribal group or its constituents, there was a mandate from the tribal group, and the requirements of the Act were satisfied.⁴⁷⁵

Clause 9 stated that a waka pu could be the legitimate representative of a tribal group if it comprised one or more iwi or several hapu, held or was likely to hold communal assets on behalf of the tribal group, the matters for which it was the legitimate representative were defined in its charter, and it had a mandate from the tribal group it represented. The effect of legitimate representative status, as outlined in clause 10, would have been that anyone wishing to deal with the tribal group regarding matters for which the waka pu was the legitimate representative could only do so with the waka pu. Furthermore, if a waka pu had legitimate representative status for Treaty negotiation and settlement matters, the Crown could not negotiate or settle with any other person or body except as authorised by the waka pu charter.⁴⁷⁶

4.2.2 Formation and Registration of Waka Umanga

Formation

The formation process would begin with notification of the intention to form and register a waka umanga to eligible members.⁴⁷⁷ The notification would outline how eligible members may participate in the formation and registration process. Clause 16 then required the compilation of a provisional register of members before a charter could be considered for adoption under clause 22.

The prerequisites for registration of a waka pu were defined in clause 17, which broadly required the preparation, notification and adoption of a charter. Every charter was required to define the waka umanga's objectives and criteria for membership, the process by which governors would be elected or appointed, describe the tribal group and how it would be identified, and outline the matters for which the waka pu

⁴⁷⁵“Communal assets” were defined in clause 4 as meaning assets owned or held by, or for the benefit of, a tribal group or Māori association, and included any “protected assets” as designated by the waka umanga's charter

⁴⁷⁶ Clause 11.

⁴⁷⁷ Clause 15.

would be the legitimate representative of the tribe.⁴⁷⁸

The process for establishing a charter first required consultation under clause 20 of the Bill, and then notification under clause 21. During the consultation process, the tribal group or Māori association was required to receive and consider submissions on the charter, give notice stating where the charter may be inspected, details of public meetings where the charter would be discussed, and when and how submissions could be made. Copies of the charter were required to be provided on request to individuals likely to be members of the waka umanga. In the case of waka pu, meetings convened for the consultation process were required to be held at times and in places that the tribal group reasonably believed would permit a substantial proportion of eligible members to attend.

Once the consultation process was completed, and before the charter could be adopted, the tribal group or Māori association was required to finalise the charter and then publicly notify it. As with the consultation process, copies of the charter would be made available to any eligible members on request. Copies of the charter would also be provided to local authorities that operated in the tribal area, the Minister of Māori Affairs and, in certain circumstances, the Ohu Kai Moana Trustee Limited.⁴⁷⁹

Once the consultation and notification process had been satisfied, a charter could be adopted in accordance with clause 22 of the Bill provided it was approved by a special majority.⁴⁸⁰

At any time before the charter had been notified under clause 21, clause 23 provided that the charter could be varied provided the consultation process in clause 20 was followed for any “significant variations”. Clause 24 provided that applications could be made to the Court for declarations relating to the formation of a waka pu,⁴⁸¹ and for review relating to the formation process and charter of a waka umanga generally.⁴⁸²

⁴⁷⁸ Clause 19.

⁴⁷⁹ If the waka pu was seeking to be the legitimate representative for fisheries or aquaculture activities.

⁴⁸⁰ A special majority under clause 22 was no less than 75 percent of those entitled to vote and voting, or more than 50 percent in each constituent group, or a combination of the two as long as the effect was no less stringent than that imposed by either of them.

⁴⁸¹ In accordance with section 78 of the Act.

⁴⁸² In accordance with section 79 of the Act.

Registration

As proposed by the Law Commission, clause 25 required the establishment of a Registrar of Waka Umanga, and stated that Part 20 of the Companies Act 1993 applied to the Registrar's powers.⁴⁸³ The Registrar was required to keep a Register of Waka Umanga, which was publicly available at all times.⁴⁸⁴ The purpose of the Register was to provide current information relevant to the governance and management of waka umanga in a publicly accessible form, and would include information such as the name of every waka umanga, the registered offices and address for service, the charter, and copies of each annual report.⁴⁸⁵

Applications for registration were dealt with under clause 28, which required all applications to be made to the Registrar as soon as practicable after the adoption of the charter.⁴⁸⁶ Once an application was received, the Registrar was required to publicly notify the application in accordance with clause 30 if satisfied that the requirements in clause 29 had been met.⁴⁸⁷ If not satisfied, the Registrar could refer the matter back to the applicant or request further information from them.

Applications could be made to the Māori Land Court under clause 82 objecting to the intended registration of a waka umanga. When such an application was made, the Registrar was prevented from entering the application in the Register or issuing a certificate of registration until notified by the Chief Registrar of the Court that the objection had been withdrawn or resolved.⁴⁸⁸ Where no objections were raised, or objections were withdrawn or resolved, clause 32 directed that the Registrar enter the details of the waka umanga on the register and issue a certificate of

⁴⁸³ Part 20 of the Companies Act established the Registrar of Companies, and broadly outlined the purpose and powers of that office.

⁴⁸⁴ Clause 26.

⁴⁸⁵ Clause 27.

⁴⁸⁶ Each application must have included a copy of the charter, the physical address of the waka umanga's registered office and address for service, the names of the waka umanga's governors, a declaration as to the number of members on the provisional register of members, a declaration from each governor that they consented to being a governor and were not disqualified from holding that position, sufficient evidence that the charter was adopted by a special majority, and any other information required by the Registrar.

⁴⁸⁷ Namely, that the application met the requirements of the Act, the proposed name of the waka umanga was not identical or almost identical to the name of any registered entity, the proposed name was not a name that the Registrar had already reserved, the proposed name was not inappropriate, or the proposed name would not contravene an enactment.

⁴⁸⁸ Clause 31.

registration.⁴⁸⁹

Changes to the name of a waka umanga could be made under clauses 34 and 35 of the Bill. Clause 34 stated that a waka umanga wishing to change its name must apply to the Registrar, and comply with the requirements of clauses 29 to 33. Clause 35 gave the Registrar the power to direct a waka umanga to apply to change its name if they believed on reasonable grounds that the waka umanga should not have been registered under a particular name. If the waka umanga failed to comply with the direction within 3 months, the Registrar could select and enter a new name for the waka umanga.

Changes could also be made to the waka umanga charter, in accordance with clause 36 of the Bill. Any amendments and substitutions to a charter must have been notified to the Registrar within 10 working days after their adoption, and would not have effect until that notification had been given.

4.2.3 Governance of Waka Umanga

Governance

The governance and management of waka umanga were dealt with in Part 3 of the Bill, and generally reflected the proposals put forward by the Law Commission.

Clause 37 established that every waka umanga must have a runanganui, which was the entity's governing body and exercised the powers and performed the duties provided under the Act and charter.⁴⁹⁰ Each runanganui was comprised of the number of governors specified in its charter who each held office for the term specified in the charter.⁴⁹¹ Clause 38 stated that any person who was not disqualified

⁴⁸⁹ Clause 33 provided that a certificate of registration was conclusive evidence that all requirements for registration under the Waka Umanga Act had been met, and that the waka umanga was a registered waka umanga from the date of registration stated in the certificate.

⁴⁹⁰ Accordingly, clause 37 stated that the runanganui had the authority and powers necessary to exercise its powers and perform its duties, and was accountable to the tribal group on whose behalf the waka umanga had been formed and registered.

⁴⁹¹ Clause 4 of Schedule 2 provided that, except in the case of corporate trustee of a mandated iwi organisation, the number of governors for a runanganui could not be less than three. Clause 5 of Schedule 2 provided that the term of office could not exceed four years from the date of election.

under the Act or the waka umanga's charter could be a runanganui governor.⁴⁹² Before being elected or appointed to office, a governor was required to give written consent, and make a written statement that they were not disqualified from holding that office.⁴⁹³ Generally, every governor would be elected in accordance with clause 39,⁴⁹⁴ or appointed in accordance with section 40.⁴⁹⁵

The duties of governors were outlined in clause 41, and generally reflected the corporate governance standards proposed by the Law Commission. These included requirements to act in good faith and in the best interests of waka umanga members,⁴⁹⁶ comply with the requirements of the Act,⁴⁹⁷ act in a manner that did not unfairly prejudice or discriminate against any constituent groups,⁴⁹⁸ and exercise the care, diligence and skill that a reasonable governor would exercise.⁴⁹⁹

Clause 43 dealt with conflicts of interest, and obliged all governors to disclose any benefit or material financial interest that they may have derived from a transaction or matter relating to the waka umanga.⁵⁰⁰ Clause 43 also set out the circumstances in which a governor would be deemed to derive a benefit⁵⁰¹ or have a material financial interest.⁵⁰² The runanganui was also required to maintain a register that listed any declared interests, and as soon as a governor became aware of such an interest, clause 44 required them to ensure it was disclosed to the runanganui and entered into the register.⁵⁰³

⁴⁹² Clause 1 of Schedule 3 listed a number of individuals who were disqualified from holding office as a runanganui governor. These included any individual under the age of 18, an undischarged bankrupt, and any individual who had been convicted of a crime involving dishonesty and had been sentenced for that crime within the past seven years.

⁴⁹³ Clause 38(2).

⁴⁹⁴ The general requirements were that a governor must be elected in accordance with the terms of the waka umanga charter.

⁴⁹⁵ The waka umanga charter could allow for up to 25 percent of the governors to be appointed instead of elected, but had to specify how such appointments were to be made.

⁴⁹⁶ Clause 41(1)(a).

⁴⁹⁷ Clause 41(1)(b).

⁴⁹⁸ Clause 41(1)(c).

⁴⁹⁹ Clause 41(2)(a).

⁵⁰⁰ Clause 43(1).

⁵⁰¹ Clause 43(3)(a) stated that a governor derived or may have derived a benefit if they were a close relative of a person who would or could derive a benefit, or the governor held a position of influence or had a material financial interest in an entity that would or could derive a benefit.

⁵⁰² Clause 43(3)(b) provided that a governor had a material financial interest if a reasonable observer would conclude that the governor or close relative would or could derive a financial gain or loss from the transaction or matter.

⁵⁰³ The disclosure was required to include the monetary value, nature and extent of the benefit or interest.

Where a governor derived or may have derived a benefit from, or had a material financial interest in, a transaction or other matter, clause 45 stated that they could not vote, take part in any discussion or decision, or sign any document relating to the transaction.⁵⁰⁴ Transactions from which a governor derived a benefit or had a material financial interest would also be listed in the waka umanga's annual report.⁵⁰⁵

The Bill also established a process around waka umanga entering into major transactions.⁵⁰⁶ Clause 47 prevented a runanganui from entering into a major transaction unless the transaction was authorised in accordance with the requirements for adopting the charter under clause 22 or by a special resolution of the runanganui after consultation with its registered members. In addition, the runanganui could not pass such a resolution unless satisfied it accorded with the consensus or majority views of its members.⁵⁰⁷

The Registrar of Waka Umanga would create and maintain a register of "protected assets" for waka umanga,⁵⁰⁸ and every runanganui was required to notify the Registrar of any collective assets it had classified as protected.⁵⁰⁹ As long as an asset was classified as protected, clause 48 stated that a runanganui could not sell, transfer, dispose of, or grant a mortgage or charge over the asset. In addition, protected assets were generally not available to satisfy the demands of creditors.⁵¹⁰

Management

Clause 51 required every runanganui to appoint a chief executive, who was accountable to the runanganui, to head the waka umanga.⁵¹¹ The duties, functions and responsibilities of the chief executive were broadly outlined in schedule 3 of the

⁵⁰⁴ However, clause 45 gave the runanganui the ability to resolve that a governor who had declared a benefit or material financial interest could take part in discussions and decisions regarding the transaction if it was satisfied that the governor's benefit would not impair their judgment in relation to the transaction.

⁵⁰⁵ Clause 45(4).

⁵⁰⁶ Clause 46 stated that amending or substituting the charter, adopting or amending the long-term plan, transactions that affected assets worth more than 50-percent of the total value of the waka umanga, the classification or declassification of assets as protected assets, the appointment of a liquidator, or any other matters specified in the charter, were "major transactions" and had to be included in the waka umanga's policy on major transactions.

⁵⁰⁷ Clause 47(2).

⁵⁰⁸ Clause 49(1).

⁵⁰⁹ Clause 49(2).

⁵¹⁰ Clause 48(2) and (3).

⁵¹¹ Clause 51(4) stated that the chief executive could be a registered member of the waka umanga, but not a governor.

Act, and could be delegated by the runanganui.⁵¹² In appointing a chief executive, the runanganui was required to have regard to, among other things, the skills, attributes and experience required of the chief executive, and the nature and scope of the activities of the waka umanga.⁵¹³

The runanganui management provisions contained in the Bill also dealt explicitly with access to information held by a waka umanga.⁵¹⁴ Runanganui and waka umanga minutes, governance documents, planning and reporting information, any registers required under the Bill,⁵¹⁵ were required to be made available to members on request.⁵¹⁶ The waka umanga charter could also specify information that would be disclosed upon request.⁵¹⁷ In addition, Schedule 3 of the Bill outlined further provisions concerning the disclosure of information. Of particular significance clause 21 set out the process for receiving and deciding requests for information,⁵¹⁸ and clause 22 specified the grounds upon which such a request could be refused.⁵¹⁹

The governance documents of waka umanga were specified in clauses 57 and 58 of the Bill. The key governance document of every waka umanga was its charter.⁵²⁰ In addition to the charter, every waka umanga was required to have a long-term plan, annual plan, annual report, and annual financial statements.⁵²¹ The requirements for each governance document were set out in clauses 31 to 35 of Schedule 3. Broadly, the governance documents were designed to provide a basis upon which the runanganui could be accountable to the waka umanga membership, and were focused on the steps needed for the waka umanga to achieve its goals and

⁵¹² The role of the Chief Executive was outlined in clause 25 of Schedule 3, and included ensuring the prudent and effective management of the waka umanga, providing advice, information and assistance to the runanganui, and implementing resolutions of the runanganui.

⁵¹³ Clause 51(3).

⁵¹⁴ Clause 53.

⁵¹⁵ Specifically, the register of members, register of protected assets, and the register of declared interests.

⁵¹⁶ Although a runanganui had the ability to restrict access to its minutes in relation to commercially sensitive and personal information in accordance with clause 53(2).

⁵¹⁷ Clause 53(1)(d).

⁵¹⁸ A waka umanga had to make the requested information available within 20 working days from the date of the request, or advise the requester that more time was needed to consider the request, that the request had been declined and the reasons why, or that the information would be released with some conditions imposed. Where a request was declined, the requester had to be informed that they could pursue the matter through the waka umanga's internal dispute resolution processes.

⁵¹⁹ The grounds upon which information could be withheld included that it was necessary to avoid prejudice to the maintenance of the law, avoid endangering the safety of any individual, protect the privacy of a natural person, or avoid prejudice to the commercial position of the waka umanga.

⁵²⁰ Clause 57.

⁵²¹ Clause 58.

objectives.

Administration And Liquidation

Where a waka umanga was or could become insolvent, it could enter into voluntary administration under clause 60. The purpose of voluntary administration was to provide for the administration of the operations, property and activities of a waka umanga in a way that maximised the chances of the entity continuing in existence or resulted in a better return for its creditors. The role of an administrator during voluntary administration was specified in clause 61, and included controlling the operations, property and activities of the waka umanga, and exercising any of the functions and powers of the waka umanga or its officers.⁵²² Where a waka umanga was under voluntary administration, clause 62 provided that Part 15A of the Companies Act applied as if the waka umanga were a company under voluntary administration.⁵²³

As well as administration the Bill also set out a process for liquidation.⁵²⁴ A waka umanga could be put into liquidation by way of a resolution made under clause 64 of the Bill and passed by a majority of members at a general meeting, and then confirmed at a subsequent general meeting. In addition, the Māori Land Court also had the ability to place a waka umanga into liquidation in accordance with clause 65.⁵²⁵ Applications for the appointment of a liquidator could be made in accordance with clause 66 by the runanganui, the greater of 1 percent or 15 or more of the waka umanga members, creditors, or the Registrar. Where a resolution had been passed to place a waka umanga into liquidation, or an application for the appointment of a liquidator had been made, clause 67 stated that Parts 16 and 17 of the Companies Act would apply.⁵²⁶

⁵²² Although an administrator was prevented from disposing of any protected assets except with the prior consent of the Court.

⁵²³ Part 15A of the Companies Act outlines the voluntary administration provisions for companies, and deals with matters such as the appointment and removal of administrators, the protection of property during administration, and the rights of secured creditors.

⁵²⁴ Clauses 64 to 70.

⁵²⁵ If satisfied the entity did not have the resources to comply with the Act, could not pay its debts, there had been a fundamental change in the circumstances of its members so that the waka umanga could no longer perform its role, or liquidation accorded with the views of the waka umanga's members.

⁵²⁶ Part 16 of the Companies Act outlines the liquidation process for companies, and provides a comprehensive framework for the appointment of liquidators, the duties and powers of liquidators, and

Once a waka umanga had been liquidated and removed from the Register, any surplus assets were required to be disposed of in accordance with the Act and the waka umanga charter under clause 69.⁵²⁷

4.2.4 Dispute Resolution

Internal Dispute Resolution Processes

Part 4 of the Bill established the internal dispute resolution requirements for waka umanga. Clause 73 defined “internal dispute” as including a dispute arising between a member (or person claiming to be a member) of a waka umanga and a waka umanga in relation to membership, rights and obligations of members, a decision of the runanganui, a decision of a governor or employee of the waka umanga, requests for information, and any other matter arising under the Bill affecting the member.

Every waka umanga was required to have internal dispute resolution processes incorporated in its charter that were consistent with the principles of natural justice, provided for the resolution of internal disputes, and that would be followed before a party was entitled to issue proceedings.⁵²⁸ In order to comply with those requirements, a waka umanga could adopt one or more of the dispute resolution processes outlined in schedule 5 of the Bill.

Schedule 5 of the Bill listed a number of optional dispute resolution processes that waka umanga could adopt and, again, these were largely reflective of proposals put forward by the Law Commission. Some of the more significant processes were the use of kairongomau (or “peacemakers”) to hear and determine complaints from members,⁵²⁹ mediation,⁵³⁰ and arbitration.⁵³¹ While the internal dispute resolution mechanisms were intended for disputes between waka umanga and their members, where a dispute arose between a waka umanga and another entity, the two parties

dealing with creditors’ claims. Part 17 outlines the process for removing a company from the Companies Register.

⁵²⁷ Except where the assets could not be disposed of in accordance with the charter, the assets were subject to a trust or were protected assets, it would be inconsistent with the provisions of the Act, or the surplus assets were settlement quota or income shares within the meaning of the Māori Fisheries Act 2004.

⁵²⁸ Clause 74.

⁵²⁹ Clauses 1 to 5 of Schedule 5.

⁵³⁰ Part 2 of Schedule 5.

⁵³¹ Part 3 of Schedule 5.

could agree to use the dispute resolution processes contained in the Bill.⁵³²

Dispute Resolution and the Māori Land Court

Before registration of a waka pu, clause 78 provided that the tribal group could seek a declaration from the Māori Land Court that the charter complied with the Bill and the process for adopting the charter was adequate. Similarly, clause 79 set out review provisions for the waka umanga formation process and charter, and provided that, before registration, an entity or constituent group that was directly affected by the formation and registration of the waka umanga could apply to the Court for orders.⁵³³ The grounds for seeking orders included that the charter did not comply with the Bill, the applicant did not have an adequate opportunity to be heard during the consultation process, and the proposed name of the waka umanga was inappropriate. Applications for both declarations and reviews were dealt with under clause 80.

When determining an application under clause 80, the Māori Land Court was required to consider whether adequate consultation had been undertaken, and whether the processes for forming the waka pu and adopting the charter had been fair. The Court also had the ability to look at whether the charter made adequate provision for tikanga, had adequate voting procedures, and made provision for fair processes for the waka umanga to follow. If the Court determined that an applicant was unduly prejudiced by the charter, it could deal with the application in a number of ways, including refer the matter back to the tribal group, direct further consultation be undertaken, refer the matter to mediation,⁵³⁴ or direct changes to the charter.

Clause 82 stated that any entity or constituent group could raise objections to the registration of a waka umanga.⁵³⁵ The grounds for objection were that there was insufficient mandate to form and register the waka umanga, and also included the grounds for review set out in clause 79. Where an objection was raised under clause 82, orders could be sought from the Court under clause 83, which provided the Court

⁵³² Clause 75.

⁵³³ Provided the entity or constituent group was one that was or should have been provided with a copy of the waka umanga charter under clause 20.

⁵³⁴ With the consent of the parties.

⁵³⁵ Provided they were directly affected by a proposal to register a waka umanga, and with leave of the Court.

with the ability to dismiss the objection and direct the waka umanga be registered,⁵³⁶ or make any of the orders outlined in clause 80.⁵³⁷

Clause 84 allowed applications to be made to the Court for relief in relation to internal disputes.⁵³⁸ If satisfied that the parties had taken reasonable steps to resolve the dispute, the Court could make any orders it considered appropriate, including refer the matter to a mediator. Similarly, at any time after registration, applications for relief could be made to the Court under clause 85 on the grounds that the waka umanga, runanganui, or any governor or employee had acted, was acting, or was proposing to act, in a manner that was inconsistent with the Bill or the charter.⁵³⁹ Applications could be made by a number of individuals, including at least 1-percent or 15 or more registered members, the Registrar, a secured creditor and, in specific circumstances, the Attorney-General.⁵⁴⁰

The Court could make orders in relation to an application under clause 85 if it was satisfied that the grounds in clause 85 had been made out, the making of an order was the most appropriate way to remedy the matter, and the matter did not relate to the jurisdiction of the Court under the Māori Fisheries Act 2004 or the Māori Commercial Aquaculture Claims Settlement Act 2004.⁵⁴¹ The orders the Court could make included the appointment of someone to review and report on the activities and operations of the runanganui and waka umanga, require the runanganui, a governor or employee to act in accordance with the Act, remove a governor, and declare that a provision of the charter was inconsistent with the Act. With consent of the parties, the Court could also refer the matter to an internal dispute resolution process or a mediator.

⁵³⁶ If the Court was satisfied that a majority of members had voted in support of the proposal, and the prejudice to the whole tribal group from including or excluding a constituent group would be likely to exceed the prejudice to that constituent group.

⁵³⁷ These included referring the matter back to the tribal group or Māori association, directing further consultation, directing changes to the charter, and referring the matter to mediation (if agreed to by the parties).

⁵³⁸ Provided that all internal dispute resolution processes had been undertaken and failed, the Court considered it inappropriate to order the parties to engage in a further dispute resolution process, timetable or other procedural requirements in the charter for dispute resolution processes had not been complied with, or a settlement agreement entered into in the course of a dispute resolution process had not been complied with.

⁵³⁹ Other grounds for relief were that the runanganui or waka umanga could not function because of a lack of quorum or substantial disagreement, or that there was a proposal to amend the charter in a manner that the applicant alleged to be inappropriate.

⁵⁴⁰ Where there is a proposal to amend the charter in a way that the applicant considered inappropriate for reasons such as those specified in clause 79.

⁵⁴¹ Clause 86.

Clause 88 stated that the Māori Land Court could transfer proceedings to the High Court at any time before the proceedings were heard and finally disposed of. In addition, clause 89 provided that any appeal against an interlocutory or final order of the Māori Land Court could only be made to the High Court.

The Waka Umanga Secretariat

As proposed by the Law Commission, the Bill provided that the Minister of Māori Affairs could, after consultation with the Minister responsible for the administration of the Companies Act, establish the Waka Umanga Secretariat.⁵⁴² The functions of the Secretariat were to provide advice to promote compliance with the Act by those wishing to form and register, or who had already formed and registered, a waka umanga.⁵⁴³

Offences and Penalties

The Bill established a range of offences and imposed a number of penalties for breaches of its provisions. Clause 124(1)(a) stated that it was an offence to misuse or fail to use the correct name of a waka umanga as required by clause 33. Other offences included the failure to appoint an auditor if required under clause 58,⁵⁴⁴ failure to give an auditor access to information or explanations requested in accordance with clause 59,⁵⁴⁵ failure to create, maintain and retain accurate records of the waka umanga as required by Schedule 3,⁵⁴⁶ and failure to provide accurate information to the Registrar as required by Schedule 3.⁵⁴⁷ The penalty for an offence was a fine of up to \$5,000 for a waka umanga, or up to \$2,000 for an individual.⁵⁴⁸ A fine not exceeding \$10,000 was imposed where a person failed to make accurate declarations as required by clause 28(2) and (3),⁵⁴⁹ failed to comply with a lawful direction or request of the Registrar,⁵⁵⁰ failed to disclose an interest as required by clause 43(1),⁵⁵¹ or failed to comply with the requirements of clauses 46 to 50 and the

⁵⁴² Clause 122.

⁵⁴³ Clause 123.

⁵⁴⁴ Clause 124(1)(b).

⁵⁴⁵ Clause 124(1)(c).

⁵⁴⁶ Clause 124(1)(d).

⁵⁴⁷ Clause 124(1)(e).

⁵⁴⁸ Clause 124(2).

⁵⁴⁹ Clause 124(3)(a).

⁵⁵⁰ Clause 124(3)(b).

⁵⁵¹ Clause 124(3)(c).

charter in relation to major transactions or protected assets.⁵⁵²

4.3 Report of the Māori Affairs Select Committee

The Māori Affairs Select Committee reported on the Waka Umanga Bill on 8 September 2008, the majority recommending that the Bill be passed, albeit with a number of changes.⁵⁵³ The Committee, comprised of members of the Labour, National, Māori, New Zealand First and Green parties, received 15 written submissions on the Bill and heard eight oral submissions.⁵⁵⁴

The Committee felt that the purposes of the Bill should be limited to allow “a more easily adoptable governance entity...”. As such, the scope of clause 3 was reduced.⁵⁵⁵ Significantly, the Committee also recommended the removal of the ability for waka pu to obtain legitimate representative status, citing the potential disruption that this could cause to existing iwi and hapu structures. As a consequence, clauses 7 to 14 of the Bill were deleted.

A further significant change was the removal of the separate types of waka umanga, waka pu and waka tumaha. The Committee felt that this was necessary to ensure that no Māori collectives were excluded from being eligible to become waka umanga. Accordingly, references in the Bill to “waka pu” and “waka tumaha” were replaced with “waka umanga”, and references to “tribal group” were replaced with “Māori collective”. In addition, the term “runanganui” was replaced with “board”.

The majority considered that the key requirement for formation of a waka umanga should be that the Māori collective was characterised by descent from one or more tupuna. As such, a new clause 14 was inserted, outlining the process for formation and registration of waka umanga. Clause 14 provided that a Māori collective could be formed and registered as a waka umanga if its members descended from a tipuna

⁵⁵² Clause 124(3)(d).

⁵⁵³ Waka Umanga (Māori Corporations Bill) As Reported from the Māori Affairs Select Committee (Māori Affairs Select Committee, 8 September 2008).

⁵⁵⁴ Committee members were Dave Hereroa (Committee Chair, Labour Party), Dr Pita Sharples (Deputy Chair, Māori Party), Christopher Finlayson (National Party), Hon Tau Henare (National Party), Hon Mahara Okeroa (Labour Party), Pita Paraone (New Zealand First), Hon Mita Ririnui (Labour Party), Hon Georgina Te Heuheu (National Party), Metiria Turei (Green Party).

⁵⁵⁵ Waka Umanga Bill, above n 553, at 3. As amended by the Committee, the purposes of the Bill were to provide for the establishment and operation of waka umanga, and to define their relationship with governors and Māori collectives.

or tupuna, or the members did not descend from a tipuna or tupuna but were predominantly Māori, supported Māori culture and tikanga, and the services of the collective was to provide services or benefits to its members.

The Committee considered that, in light of the removal of the legitimate representative provisions, there was little need for retaining the prescription for forming waka umanga beyond what existing entities were required to adhere to. As such, clause 15 was amended to remove the need for Māori collectives to give notice of their intention to form a waka umanga, and clause 16 was amended to remove the requirement that Māori collectives give notice of their charters before they could be considered for adoption. Both clauses were replaced with more general formation and charter provisions.

Clause 19 was significantly changed to provide more general and less prescriptive requirements for the content of charters. Clauses 20 and 21 were deleted, removing the requirement for consultation and notification of a charter before its adoption, and replaced with a new clause 21 that simply required public notification of the waka umanga's registration as soon as practicable after registration had occurred. The new clause 21 would also replace clause 30 of the Bill, meaning that there was no longer provision for objection to registration prior to registration actually taking place.⁵⁵⁶

The Committee also recommended the replacement of clause 22, which specified the voting requirements for the adoption of a waka umanga charter, with a new clause 22 that simply required that the charter be adopted by special resolution at the first general meeting after registration.⁵⁵⁷ Clauses 23 and 24, which provided for variations to a charter and declarations or reviews, were also deleted to make the formation and registration process more analogous to that for existing legal entities.

Significant amendments to the provisions dealing with the election and appointment of governors were also recommended, again with the intention of reducing the level of prescription in the Bill and allowing Māori collectives to determine their own

⁵⁵⁶ Instead, members would determine the appropriateness of entity at the first annual general meeting and approve the charter by special resolution.

⁵⁵⁷ Instead, Members would determine the appropriateness of entity at the first annual general meeting and approve the charter by special resolution.

processes through the waka umanga charter. Much of the detailed provisions in clause 39 were removed and replaced with a number of “minimum” requirements. These included basic provisions for matters such as how elections should be held and notified to members. Similarly, clause 41 was also amended to remove the “overly onerous” duties the Bill imposed on governors, and to more clearly align the duties with those imposed by the Companies Act.⁵⁵⁸

The provisions concerning major transactions were considered to be too onerous. As such, the Committee recommended amendments to clause 47 that would require a special resolution of waka umanga members to approve any major transaction, which would also reflect similar provisions in the Companies Act for shareholders. Clause 51, which required a waka umanga to have a chief executive, was also deleted with the Committee noting that waka umanga should decide for themselves whether or not they should have a chief executive.

Another significant amendment to the Bill was the limiting of the definition of “internal dispute” in section 73 to disputes relating to the membership of a waka umanga and other disputes specified in the charter. In recommending this change, the Committee noted that the original provisions were “too restrictive on the day-to-day decision of waka umanga”.⁵⁵⁹ The Committee also recommended the deletion of the mediation and arbitration provisions in Schedule 5 of the Bill, stating the Secretariat would be in the best position to advise waka umanga on the use of these processes.

Overall, the general view of the Committee appears to have been that the level of prescription in the Bill should be reduced, and the requirements for waka umanga made more analogous to those of existing entities, such as companies and trusts. As such, the majority of amendments recommended by the Committee are aimed at reducing prescription and increasing the flexibility for Māori collectives to determine the shape of their waka umanga.

⁵⁵⁸ The new clause 41 simply required governors to act in good faith and the best interests of the waka umanga, and the requirement for a governor to avoid acting in a way that would unfairly prejudice or discriminate was removed on the basis that collectives could make provision for this in their charter if they so wish.

⁵⁵⁹ Waka Umanga Bill, above n 553, at 12.

4.4 Future of the Waka Umanga Bill

Since the report of the Māori Affairs Select Committee in September 2008, no further progress on the Waka Umanga Bill has been made. While in government, the Labour Party expressed its commitment to the Bill becoming law, a stance that was also supported by the Green Party. Although the Māori Party supported the Bill to the Select Committee stage, its members viewed the "...substantive concerns about and opposition voiced by hapu and iwi" as presenting a bar to the Party's ongoing support. Instead, the Māori Party noted that further work was required to resolve the issues surrounding current legal entities from a kaupapa-Māori basis.⁵⁶⁰

However, since the election of the current National-led government in 2008, the future of the Bill has become tenuous. The Party had indicated its opposition to the Bill becoming law prior to entering government. As explained by the Honorable Georgina Te Heuheu during the Bill's first reading:

"Māori did not seek this legislation. There is no demand for it from Māori. The initiative is one that was developed solely in Wellington, and now it seeks to be imposed on Māori tribes.... Māori in the 21st century are quite capable of developing their own entities and managing their own affairs. In fact, there are a number of increasingly high-profile Māori entities in New Zealand now, which bears testament to the fact that Māori are capable of managing their own affairs. They do not need a Labour-led Government to, yet again, impose on them an entity that, as I said, is debatable in its value."⁵⁶¹

Furthermore, current Attorney-General, Christopher Finlayson, stated:

"...National will not be supporting this bill. Let me make the position of the National Party clear beyond doubt: iwi should be free to develop their own structures, with their own administrative procedures and measures of performance, so that iwi can make their own decisions about what is important to them. National considers that iwi must be independent of the Government. Māori should be in control of their own future. They should not be subjected to a

⁵⁶⁰ Waka Umanga Bill, above n 553, at 21.

⁵⁶¹ Waka Umanga, above n 459.

paternalistic Government whose Government-knows-best approach is rooted in colonial times. So for these reasons National intends to oppose the first reading of this bill.”⁵⁶²

Although no official announcements have been made, it appears that the Waka Umanga Bill has been discharged by the current Government.⁵⁶³

4.5 CONCLUSION

The Waka Umanga Bill gave effect to the research and recommendations made by the Law Commission, and provided a comprehensive legislative regime for a new governance entity. In essence, the Bill represented an attempt to recast New Zealand law to better provide for the governance needs of Māori in the post-settlement era and address the issues caused by the breakdown in Māori customary tenure. While it appears that Government currently has no desire to see the Bill enacted, nor any policy agenda for addressing Māori governance issues, it is worthwhile considering how the Bill may have affected the governance of Māori collective assets and what positive changes may have resulted were it adopted.

⁵⁶²*Ibid*, at 13879.

⁵⁶³*Progress of Legislation: Schedule of Bills (As at 20 October 2011)*, at 25.

CHAPTER FIVE: CRITIQUE

5.1 INTRODUCTION

As noted in Chapter Four, the Waka Umanga Bill 2007 was a comprehensive plan for the resolution of the governance issues currently faced by Māori in the management of their collective assets. Supported by the detailed research of the Law Commission, on the face of it the Bill represented a robust framework for Māori governance in the post-settlement era, and one aimed at addressing the lasting effects of tenurial revolution. However, it is apparent that Government has consigned the Waka Umanga Bill to the legislative dustbin and, for the time being, the status quo will continue for Māori governance and Māori collective assets. But, notwithstanding that, what impact might waka umanga have had and what opportunities has Government potentially passed over?

This chapter provides a critique of the Waka Umanga Bill 2007 against a proposed framework for good Māori governance. The importance of the Māori economy, including the financial benefits derived from Treaty settlements, will be briefly canvassed before considering a selection of international models for strong governance. A model framework for good Māori governance will then be articulated before assessing the provisions of the Waka Umanga Bill and the characteristics of waka umanga against the five key principles of that framework. Finally, some concluding comments will be offered as to the opportunities that Government has forgone in choosing not to recast New Zealand law for the post-settlement era.

5.2 MĀORI DEVELOPMENT AND THE QUIET REVOLUTION

When one considers the entire history of Māori development since 1840 it is difficult to deny that the tenurial revolution that took place following the signing of the Treaty of Waitangi has had a significant and lasting effect. In fact, the inescapable conclusion is that, in the clash between Māori customary land tenure and English law, there has been a clear winner and a clear loser. While Māori once possessed all of the lands of New Zealand in accordance with their own customs, the displacement of custom by English law and the resulting individualisation of land title has left Māori with only a fraction of their original land holdings. Yet the effects of tenurial revolution

are not only measured in acres and hectares, but by the general socio-economic status of Māori today. Not only did Māori lose the economic base from which to drive their development, but the significance of whenua to the Māori worldview meant that a loss of land was also a loss of mana, a loss of identity and, as a result, a loss of self. It is a sad reality that on almost any measure of socio-economic status, whether it is education, health, justice or employment, Māori are over represented at the negative end of the scale.⁵⁶⁴

Durie conceptualises Māori development since 1900 in terms of four distinct phases: Recovery (from 1900 to 1925),⁵⁶⁵ Rural Development (from 1925 to 1950),⁵⁶⁶ Urbanisation (from 1950 to 1975),⁵⁶⁷ and Claims, Settlements, Autonomy (from 1975 to 2000).⁵⁶⁸ These phases trace the effects of, and responses to, the alienation of Māori land during the 1800s, from Māori depopulation and despondency at the turn of the 20th century, the “salvation” of Ngata’s land development schemes,⁵⁶⁹ the migration of Māori away from their rural homelands to escape the effects of war and depression, to the enactment of the Treaty of Waitangi Act and the creation of the Waitangi Tribunal in 1975. It is clear that the past 100 years have been a tumultuous period in Māori development. But while many would expect such a history to be unsurvivable, it has been suggested that New Zealand is on the verge of a new revolution, a so-called “quiet revolution” that will be “largely driven by Māori and through Māori organisations”.⁵⁷⁰ If nothing else, this is a testament to the resilience of Māori.

Stone describes this revolution in terms of three phases of legal jurisprudence: a rights recognition phase in which Māori fought to gain access to resources; a rights protection phase in which Māori sought to protect the assets gained in phase one; and a rights development phase in which Māori seek to develop their assets. Stone argues that Māori are currently transitioning from rights recognition and protection characterised by litigation, to a rights development phase characterised by

⁵⁶⁴ Durie, above n , at 37-41.

⁵⁶⁵ Durie, Mason *Nga Kahui Pou: Launching Māori Futures* (Huia Publishers, Wellington, 2003) at 87.

⁵⁶⁶ *Ibid*, at 89.

⁵⁶⁷ *Ibid*, at 90.

⁵⁶⁸ *Ibid*, at 91.

⁵⁶⁹ *Ibid*, at 89.

⁵⁷⁰ Damien Stone “Who’s the Boss – Tensions in Asset Management” (Paper Presented to the Māori Law Society Conference, Wellington, 3 September 2010).

“commercial law concepts and freedom of contract”.⁵⁷¹ This transition has the potential to deliver huge benefits to Māori, and one only has to consider Treaty settlements to understand this.

That Māori will play a significant part in this quiet revolution is not surprising given the economic opportunities gained through the Treaty settlement process. For the past three decades, Māori and the Crown have embarked on a process to settle historical Treaty grievances, resulting in the distribution of significant assets, including cash, land, forestry and fisheries quota, to iwi and hapu throughout New Zealand. Since the development of the contemporary Treaty settlement process, the Crown has completed around 26 settlements with iwi worth almost \$1b,⁵⁷² the biggest of which are the Ngai Tahu, Tainui and Fisheries settlements valued at \$170m each, and the more recent CNI forestry settlement worth \$161m.⁵⁷³ A significant number of settlements are still to be negotiated.⁵⁷⁴ Many claimant groups are currently in the pre-negotiation phase of the settlement process, 20 groups are negotiating Agreements in Principle,⁵⁷⁵ 14 groups have signed Agreements in Principle worth more than \$200m in total,⁵⁷⁶ and around 10 groups are awaiting the introduction of settlement legislation.⁵⁷⁷ Once settled, it is clear that the value of settlements will far exceed the “Fiscal Envelope” proposed during the 1990s.

Treaty settlement assets, both those that have been distributed and those still to come, present a huge opportunity for Māori and New Zealand as a whole. The Māori economy accounts for approximately 5-percent of New Zealand’s production GDP, or

⁵⁷¹ *Ibid.*

⁵⁷² Office of Treaty Settlements “Claims Progress” (2011) Office of Treaty Settlements <www.ots.govt.nz>.

⁵⁷³ *Ibid.*

⁵⁷⁴ As at 11 June 2009, 2034 claims had been registered with the Waitangi Tribunal: See Waitangi Tribunal “Frequently Asked Questions” (2011) Waitangi Tribunal <<http://www.waitangi-tribunal.govt.nz>>.

⁵⁷⁵ Ngāi Te Rangī, Mana Ahuriri, Ngāti Hineuru, Ngāti Haua, Taumata Wīwī Trust, Ngai Tai ki Tamaki, Te Atiawa, Taranaki Iwi, Ngāti Pukenga, Ngāti Raukawa, Ngāti Kuri, Ngai Takoto, Nga Puna Wai O Te Tokotoru (Tapuika/Ngāti Rangiwewehi/Ngāti Rangiteaorere), Ngāti Ranginui, Te Kawerau a Maki, Ngāi Tūhoe, Ngāti Raukawa, Ngāti Whatua o Kaipara, Moriori, and Whanganui Iwi (in respect of the Whanganui River).

⁵⁷⁶ Tamaki Collective, Ngāti Whatua o Orakei, Te Kawerau a Maki, Te Hiku, Ngāti Whatua o Kaipara, Tainui, Taranaki ki te Tonga, Ngāti Toa Rangatira, Waitaha, Ngāti Kahu, Tūranganui-a-Kiwa (Ngāi Tamanuhiri, Te Pou a Haokai and Rongowhakaata), Ngatikahu ki Whangaroa, Te Rarawa, Te Aupouri, and Rangitāne o Manawatu.

⁵⁷⁷ Ngāti Makino, Maraeroa A and B Blocks, Ngāi Tamanuhiri, Ngāti Porou, Ngāti Pahauwera, Ngāti Apa ki te Rā Tō, Rangitāne o Wairau, Ngāti Kuia, Ngāti Manawa, and Ngāti Whare.

around \$10b per year.⁵⁷⁸ Māori hold roughly 37-percent of the country's domestic fishing quota,⁵⁷⁹ 36-percent of New Zealand's pre-1990 forestry,⁵⁸⁰ and 14-percent of land underlying plantation forests.⁵⁸¹ Although the Māori economy is not exclusively derived from settlement assets, it is apparent that they form an integral part of it. Even more apparent is that the large number of claims still to be settled will ensure that the Māori economy will have an essential role to play in New Zealand's economic future. However, the extent to which the opportunities presented by Treaty settlement assets will shape the quiet revolution will depend on a number of factors, and in particular, how those assets are managed. Stone emphasises that the transition to a rights development is driven by "economic endeavour and economic clout" and is "heavily influenced by prudent asset management".⁵⁸² As such, governance is integral to ensuring that the quiet revolution delivers tangible results for Māori and non-Māori alike.

This chapter provides an assessment of waka umanga against a proposed framework for good Māori governance and argues that this new entity would recast New Zealand law, significantly improving the ability of Māori to derive real benefits in the post-settlement era.

5.3 TOWARDS AN ARTICULATION OF GOOD MĀORI GOVERNANCE

It has been said that governance is a "perennial feature in the discourse on Māori organisations".⁵⁸³ As noted in Chapter One, the legacy of tenurial revolution is a unique set of circumstances that all Māori collectives must grapple with in the governance of their assets. Ever-increasing numbers of beneficiaries, many of whom have little connection to their cultural identity makes bringing beneficiaries together and enabling them to participate in decision-making processes difficult. Balancing the various competing interests of beneficiaries is also challenging. While the pursuit of commercial objectives is important, achieving social and cultural outcomes are perhaps more significant for Māori collectives. Indeed, "profit in Māori businesses is

⁵⁷⁸ Business and Economic Research Limited (BERL) "The Māori Economy – A Sleeping Giant About To Awaken?" (2010) BERL <<http://www.berl.co.nz>>.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid.*

⁵⁸² Stone, above n 570.

⁵⁸³ Te Puni Kokiri *A Time for Change in Māori Economic Development* (Te Puni Kokiri, Wellington, 2007) at 14.

sought in an instrumental sense rather than being an end in itself” and financial returns are “sought to apply to areas outside the normal purview of business”.⁵⁸⁴ Māori collectives must also have a long-term view, protecting and developing assets not only for the present, but also future generations. Suffice to say the balancing of these interests is an enormous task for any Māori collective. In terms of Māori land, fragmentation presents problems around making the best economic use of small parcels of land. Navigating all of these issues thus requires governance that can operate effectively within a European legal and political framework, but with a tikanga Māori approach.

While Māori currently employ a range of entities to assist them in managing their assets, some with great success, it is clear that there is no one governance model that adequately addresses the unique character of Māori collectives and the governance issues they must deal with. Given the importance that governance will play in Māori development, the current shortfalls in governance entities is unacceptable and change is required. Unless these governance issues are addressed, the opportunities presented by collective assets will become opportunities lost.

In order to address the current inadequacies in governance entities, it is necessary to understand what governance, and particularly “good” governance, is. It is important to note that there is no single definition of governance, and governance can mean different things to different groups. However, it is possible to distinguish underlying principles that are common to any definition of good governance. The OECD Principles of Corporate Governance provide an international benchmark of acceptable corporate governance standards, and a useful comparison for Māori governance entities, not least because a large part of their role will involve pursuing commercial objectives.⁵⁸⁵ The OECD principles highlight that good governance should promote transparency and efficiency,⁵⁸⁶ be consistent with the rule of law,⁵⁸⁷ clearly articulate the division of responsibilities between different arms of the

⁵⁸⁴ *Ibid*, at 13.

⁵⁸⁵ Organisation for Economic Co-operation and Development (OECD) *OECD Principles of Corporate Governance* (OECD, Paris, 2004).

⁵⁸⁶ *Ibid*, at 17. In particular, an organisation’s governance framework should be developed with a view to its overall impact on the organisation’s economic performance.

⁵⁸⁷ *Ibid*. Importantly, rules should be transparent and enforceable.

governance entity,⁵⁸⁸ protect and facilitate the exercise of shareholder rights and protect all shareholders equally,⁵⁸⁹ recognise the rights of stakeholders,⁵⁹⁰ promote disclosure and transparency,⁵⁹¹ and ensure the strategic guidance and effective monitoring of management.⁵⁹²

The United Nations Economic and Social Commission for Asia and the Pacific defines governance as “the process of decision-making and the process by which decisions are implemented”.⁵⁹³ The Commission argues that good governance has the following eight key characteristics:⁵⁹⁴

- **Participation** – all members of the group should have the ability to participate, either directly or indirectly, in decision-making processes.
- **The rule of law** – fair legal frameworks that are enforced impartially.
- **Transparency** – decisions, and the enforcement of decisions, are made according to rules and regulations, and information is freely available to enable those affected to understand the decisions.
- **Responsiveness** – institutions and processes try to serve the needs of their stakeholders within a reasonable timeframe.
- **Consensus oriented** – the interests of each stakeholder must be balance to achieve a broad consensus that represents the best interests of all stakeholders.
- **Equity and inclusiveness** – all members should feel they have a stake in the group and its governance.

⁵⁸⁸ *Ibid.* This ensures that the public interest is served.

⁵⁸⁹ *Ibid.*, at 18. Among other things, the basic rights of shareholders should be protected, shareholders should have an opportunity to participate effectively in decision making and general meetings of the organisation, all shareholders (or shareholders of the same class) should have the same rights and be treated equally, and board members and key executives should be required to disclose any potential conflicts of interest.

⁵⁹⁰ *Ibid.*, at 20. Of particular note is the requirement that the governance framework provide redress for the violation of shareholder rights, an effective and efficient insolvency framework, and the effective enforcement of creditor rights.

⁵⁹¹ *Ibid.*, at 22. The governance framework must ensure that information on material matters relating to the organisation are readily available and of high quality, annual independent audits should be carried out by auditors accountable to the shareholders, and information is provided in a timely and cost efficient manner.

⁵⁹² *Ibid.*, at 24-25. Board members must act in good faith and with due diligence in the best interests of shareholders, the board should treat shareholders fairly and have access to accurate and relevant information in order to discharge their functions, and the board should ensure the effective monitoring of the management of the organisation and be accountable to shareholders.

⁵⁹³ United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) “What is Good Governance?” (2011) UNESCAP <www.unescap.org>.

⁵⁹⁴ *Ibid.*

- **Effectiveness and efficiency** – process and institutions meet the needs of their stakeholders, while making the best use of the resources at their disposal.
- **Accountability** – requires transparency and the rule of law.

Similarly, the Canadian Institute on Governance describes governance as “a process whereby societies or organisations make their important decisions, determine whom they involve in the process and how they render account”.⁵⁹⁵ The framework underlying the governance process is important because it comprises the “agreements, procedures, conventions or policies that define who gets power, how decisions are taken and how accountability is rendered”.⁵⁹⁶ The Institute draws on work by the United Nations Development Programme to articulate five key principles for good governance:

1. **Legitimacy and voice**, which describes broad participation based on freedom of association and speech, and consensus oriented with a focus on achieving the best outcome for the group as a whole.⁵⁹⁷
2. **Direction**, which requires a strategic vision for long-term good governance, as well as an “understanding of the historical, cultural, and social complexities in which that perspective is grounded”.⁵⁹⁸
3. **Performance**, which focuses on the responsiveness of governance institutions and process to the needs of their stakeholders, and the effectiveness and efficiency of those processes and institutions in producing results.⁵⁹⁹
4. **Accountability**, which centres on the accountability of decision-makers to their stakeholders, and transparency of governance processes and institutions built on the free flow of the information needed to monitor their performance.⁶⁰⁰
5. **Fairness**, which concerns governance frameworks based on the rule of law, enforced fairly and impartially, while treating all stakeholders equally.⁶⁰¹

⁵⁹⁵ Canadian Institute on Governance *Principles for Good Governance in the 21st Century* (Policy Brief No. 15, 2003) at 1.

⁵⁹⁶ *Ibid.*

⁵⁹⁷ *Ibid.*, at 3.

⁵⁹⁸ *Ibid.*

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Ibid.*

⁶⁰¹ *Ibid.*

In terms of indigenous governance, research carried out by the Harvard Project on American Indian Development and the Native Nations Institute concerning American Indian governance is insightful, establishing that political factors, including the quality of government, were the most significant predictors of development success on American Indian reservations, and groups with “capable, culturally appropriate, and effective governing institutions” did better than those that did not.⁶⁰² The research also determined that five factors were particularly important: practical sovereignty,⁶⁰³ capable governing institutions,⁶⁰⁴ cultural match,⁶⁰⁵ strategic orientation,⁶⁰⁶ and leadership.⁶⁰⁷ Given the shared history of colonisation, land loss, and its consequences, it is likely that these factors will also be relevant to Māori governance.

In articulating principles for Māori governance, it is also important to consider the aspirations that Māori have for their collective assets, which undoubtedly influence how those assets should be managed. As yet, there is no comprehensive account of Māori aspirations in this area, but research concerning Māori land may provide an insight into what those aspirations are. A recent study by The Ministry of Māori Development⁶⁰⁸ found that while Māori landowners had a diverse range of ambitions, the retention and utilisation of land were particularly important.⁶⁰⁹ However, the study also determined a number of barriers that currently impede Māori ability to realise these aspirations. These barriers included the absence of commonality among landowners,⁶¹⁰ difficulties in accessing finance,⁶¹¹ the high rate of absentee

⁶⁰²Cornell, Stephen, Curtis, Catherine, and Jorgensen, Miriam *The Concept of Governance and its Implications for First Nations* (Joint Occasional Papers on Native Affairs, Native Nations Institute, Arizona, 2004) at 7-8.

⁶⁰³Real decision-making in the hands of indigenous nations

⁶⁰⁴ Institutional environments that encourage participation.

⁶⁰⁵ In order to achieve legitimacy, institutions must match indigenous ideas about how authority should be organised and exercised

⁶⁰⁶ An ability to think, plan, and act in ways that support a long-term vision of the nation’s future

⁶⁰⁷ A set of persons who consistently act in the nation’s best interests, and can persuade others to do likewise.

⁶⁰⁸Ministry of Māori Development *Owner Aspirations Regarding the use of Māori Land* (Ministry of Māori Development, Wellington, 2011).

⁶⁰⁹ *Ibid*, at 14-17. Māori landowners saw the retention of land was important to maintaining and promoting cultural connections and identity, while the utilisation and improvement of land was viewed as an important aspect of kaitiakitanga.

⁶¹⁰*Ibid*, at 22. Difficulties in achieving commonality resulted from the diversity among landowners, but was influenced by the size of interests in land blocks, the extent of owners’ cultural engagement including knowledge of tikanga Māori, the proximity of owners to the land, and owners’ knowledge of the land.

⁶¹¹ Landowners indicated that banks were reluctant to lend money against land subject to the provisions of the Te Ture Whenua Māori Act. Difficulties obtaining finance and accessing capital were viewed as major obstacle to the utilisation of Māori land.

ownership,⁶¹² large numbers of landowners,⁶¹³ and difficulties in reaching consensus.⁶¹⁴ These barriers are also likely to feature in the management of other collective assets, and an appropriate governance entity will need to be able to counter these.

Given the principles outlined above, what then might good Māori governance look like? This thesis contends that it is possible to define five clear principles that any Māori governance entity must uphold in order to achieve good governance for its members:

1. The entity must promote participation. This means enabling its members to participate in decision-making processes, thereby delivering members some measure of practical sovereignty.
2. The entity must adhere to the rule of law. This means its processes and institutions are directed by clear rules and regulations that make them accountable to their members. Dispute resolution must be fair and impartial, and all members treated equally. The rules and regulations must be clearly articulated and available to members so they understand how their entity should work, and information must be readily available to enable members to understand how the entity is operating.
3. The entity must be effective and efficient. This requires capable leadership and strong dispute resolution processes that can build consensus among members, and balance the many competing interests to achieve best outcomes for the greatest number of members.
4. The entity must have a vision. This requires strong and capable leadership that takes into account the aspirations of its members.
5. The entity must be capable of incorporating aspects of tikanga into its process and institutions in order to achieve cultural match and legitimacy.

Using these five principles as the foundation for good Māori governance, it is possible to evaluate the waka umanga governance model, and assess its ability to

⁶¹²*Ibid*, at 22-23. Owners, including those charged with managing land blocks, often live away from their land holdings, and it was identified that in some cases there are more absentee owners than owners living in close proximity. This can result in owners being “out of touch” with the land’s needs.

⁶¹³*Ibid*, at 23.

⁶¹⁴*Ibid*, at 25. Divergent views and priorities amongst landowners made consensus problematic, especially where landowners were not limited to Whānau groups but included wider iwi and hapū members.

deliver good governance for Māori collectives. As introduced, the Waka Umanga Bill has a strong focus on the key criteria for good governance and, if it were enacted, would offer significant improvements in the governance of Māori collective assets.

5.4 EVALUATING WAKA UMANGA

5.4.1 Participation

Capable governing institutions create “an institutional environment that encourages tribal citizens and others to invest time, ideas, energy, and money in the nation’s future”.⁶¹⁵ This is participation, and participation centres on the involvement of members in their governance entity. In a general sense, participation requires that each individual has a say in the way their governance entity operates and the decisions it makes on their behalf, and processes through which those views can be heard and taken into account. In a much broader sense, participation is about individuals making decisions for themselves, and in that regard can deliver some measure of practical sovereignty or self-governance to Māori over their own affairs. This is particularly important because self-governance at a tribal level will presumably foster self-governance and tino rangatiratanga at a national level.⁶¹⁶

Participation will naturally be important in processes like electing representatives and mandating proposals put forward by those representatives. But because it is an obvious pre-requisite to legitimacy, participation must be much wider than that, extending to all aspects of the governance entity from its very creation and the development of its internal rules and processes, to the way in which it applies those rules and processes in carrying out its day-to-day functions. When people feel they have a say in the decision-making processes of the institutions that have an impact on their lives, or simply have the opportunity to have their views heard, it seems logical that there is a greater likelihood those institutions will achieve legitimacy and trust in the eyes of those they serve, and thus gain allegiance.⁶¹⁷ In contrast, where people feel disengaged and alienated from those institutions, or participation is simply token, legitimacy and trust is undermined and eroded, and allegiances are

⁶¹⁵Cornell, above n 602, at 7.

⁶¹⁶Durie, Mason “Tino Rangatiratanga” in Belgrave, Michael, Kawharu, Merata and Williams, David *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) at 15.

⁶¹⁷Cornell, above n 602, at 7.

broken. In that regard, participation is perhaps the most important principle of good governance.

As introduced, the Waka Umanga Bill promotes participation from the ground up. That is, participation is not simply confined to the day-to-day activities of the waka umanga once it has been established, but is emphasised from the very beginning of the waka umanga through the processes that help it take shape. The Bill achieves this in a number of ways, but primarily through the requirements that those establishing and operating waka umanga must fulfil. Of particular significance are the strong provisions around the development of the most important governance document of every waka umanga, its charter. The waka umanga charter sets out the objectives of the collective, the way in which those objectives will be pursued, the rules and processes that will regulate those pursuits, and the criteria for membership. In essence, the charter defines the relationship between the waka umanga and its members and, to this extent, lays the foundations of the waka umanga and steers its future course. As such, participation is particularly critical at this point if the charter, and therefore the waka umanga, is to achieve long-lasting legitimacy.

Participation in the charter formation process is promoted through the mandatory notification of the intention to form and register waka umanga, and the requirement to consult on a proposed charter before a waka umanga is registered. The opportunity to inspect and provide submissions on a proposed charter gives members a say on the rules and processes to which they will be bound once the waka umanga is registered. This is especially important because, although there are minimum standards that every charter must comply with, groups wishing to establish waka umanga have relatively free-range to tailor charters to suit their needs, and charters thus have the potential to have very wide ranging provision over a number of issues. Although submissions are not binding, they do give decision makers a better understanding of what is important to their members and how best to meet their needs, and the range of views expressed in the submissions should allow decision makers to find consensus and develop a waka umanga that best meets the needs of a majority of its members.

Because a charter can only be adopted if it has significant support from members, there is more impetus on decision makers to ensure that as many members as

possible have their say, and that those views are taken into account in drafting the charter. In addition, the more individuals who have a say in the charter making process, the more people there are with ownership over the rules and processes that result. This means that members are less likely to feel alienated from the waka umanga once it is up and running, or complain that the waka umanga is not representative of the individuals it serves. Of course, all of this is predicated on members actually wanting to participate in the processes made available to them under the Waka Umanga Bill and, while the potential benefits to be derived from settlement assets make the costs of non-participation high,⁶¹⁸ no matter what mechanisms are put in place there is no guarantee that every member, or even a large number of members, will want to be involved.

However, the Bill does contain a number of provisions that will help to overcome this and achieve buy-in from members by making participation as easy as possible. These include the requirements for public notification as to where a proposed charter may be inspected, details of meetings where the charter will be discussed, information as to how submissions can be made, and provision of copies of the charter on request. In addition, to promote and encourage participation it is obviously necessary to establish mechanisms through which those entitled to participate can be identified. The Waka Umanga Bill achieves this by requiring each waka umanga to create a register of members, as well as define, through its charter, who can become a member and how.

As well as participation in the early stages of the waka umanga, members have the ability to participate in the day-to-day running of the entity. In particular, the Bill sets out a range of situations in which those governing waka umanga must seek mandate from their members before taking a particular course of action. For example, a Runanganui will not be able to enter into major transactions unless it has followed the consultation process required for establishing a charter of the special consultative procedures that must be included in every waka umanga charter. Furthermore, any decision made under the special consultative provisions must accord with the consensus or majority view of the membership. Given major transactions, such as amending the charter or selling significant assets, can have a serious impact on the

⁶¹⁸ Gover, Kirsty “Comparative Tribal Constitutionalism: Membership Governance In Australia, New Zealand, and The United States” (2010) 35 Law and Social Inquiry 689 at 690.

stability and viability of the waka umanga, requiring such a high level of support from members helps to ensure the engagement and participation of members in these critical decisions. This is supported by the fact that the Bill makes non-compliance with the provisions concerning major transactions an offence. Finally, because the charter can define what may constitute a major transaction, members can obtain a high level of control over the activities of the waka umanga through the charter formation process.

The requirement to hold Annual General Meetings also strengthens participation by giving members an opportunity to consider the annual plan, reports, finances and accounts, and to generally gauge the performance of their waka umanga. This is of course standard practice for commercial entities like companies, and gives stakeholders an understanding of how their governance entity is operating. Having this information undoubtedly means that members are better placed to participate in their governance entity.

Participation is an essential element of good Māori governance, and waka umanga have a number of characteristics that not only enables greater participation, but encourages it. This is not only important for current beneficiaries of Māori collective assets, but for future generations as well. The reality is that the number of Māori who have an interest in collective assets is growing, and will continue to grow. The geographical spread of beneficiaries throughout New Zealand, and indeed the world, means that participation will likely be an issue in the future, and Māori collectives will need to address how to increase the ability to participate, as well as participation itself. Waka umanga would set Māori in good stead to cope with this, linking Māori in with their governance entity now.

5.4.2 The Rule of Law

The rule of law is a fundamental theory of constitutional and administrative law, and plays an integral part in legal and political systems the world over. It is difficult, if not impossible, to articulate a single, exhaustive account of the theory or the principles it embodies, and the nature of the rule of law may vary depending on the specific country, society or legal system to which it applies. Indeed, the rule of law has been a topic of great debate for centuries, from the time of pre-eminent philosophers like

Socrates, Aristotle and Plato, to legal scholars such as Montesquieu and Dicey.⁶¹⁹ The Magna Carta of 1215 can be viewed as an early example of the rule of law in operation,⁶²⁰ while some have suggested that the Ten Commandments are an even earlier expression.⁶²¹ Today, discussion around the meaning of the rule of law tends to fall into two competing schools of thought – one that supports a “thick” or wide interpretation of the theory, combining it with principles of democracy and human rights, and another that takes a more restricted or “thin” interpretation, which holds simply that people are ruled by the law and must obey it.⁶²²

Whatever one’s interpretation of the rule of law may be, it is possible to discern a number of key principles that appear to be, for the most part, accepted as critical components of the theory. First, all persons, institutions, and organisations, no matter their rank or standing in society, are accountable under publicly promulgated laws. This includes government and organs of the State. Second, there must be equality before the law, and laws must be enforced equally. Third, accountability under the law must be determined by an independent judiciary. And fourth, those who exercise power over others must be able to point to some lawful authority to do so.

Although the rule of law features most prominently in discussions concerning the State and its interactions with its citizenry, it can be an important aspect of any system within which institutions or individuals exercise powers over others, and it is thus easy to see how important the principles promoted by the rule of law can be to the governance of collective assets. Where power is unrestrained and the rights of individuals who are subject to those powers are not properly protected, it will be much easier for that power to be abused. In contrast, when power is restrained by properly promulgated rules and decision makers are held accountable in the exercise of those powers, abuses of power will be less likely to occur.

⁶¹⁹Neate, Francis “Introduction: A Brief History of the Development of the Concept of the Rule of Law” In Neate, Francis (ed) *The Rule of Law: Perspectives from Around the Globe* (Lexis Nexis, London, 2009) at 1-2.

⁶²⁰Bingham, Tom *The Rule of Law* (Penguin Books Limited, London, 2010) at 10-13.

⁶²¹Neate, above n 619, at 1-2.

⁶²²*Ibid*, at 6-7.

As noted by Joseph, there are significant tensions between the application of the rule of law and the appropriate weight to be given to tikanga Māori.⁶²³ While Māori governance entities are obviously significantly different to states and national governments, many of the principles of the rule of law will be the same, albeit it on an appropriately smaller scale. For example, a governance entity that upholds the rule of law will carefully define the rights, powers and privileges of those in positions of authority, and have safeguards in place to ensure that those individuals are held accountable for their actions. A governance entity that promotes the rule of law will also enforce its rules equally and consistently, regardless of a person's position or status within the group, and through independent adjudication bodies or processes. While there are many other principles that will also be relevant, such as the public availability of the entity's rules, one of the key messages of the rule of law for governance entities is that law must triumph over arbitrariness.⁶²⁴

The Waka Umanga Bill reflects principles of, and promotes and upholds, the rule of law in three primary ways. First, it requires a constitutional foundation for every waka umanga, namely a charter, which establishes the rules and processes that govern the entity and bind its decision makers. Second, it contains a number of mechanisms that make waka umanga and their governors accountable to the Māori collectives they represent. And third, it establishes minimum dispute resolution requirements that every waka umanga must meet, and through which members' disputes can be heard and adjudicated.

The Charter

The charter is the constitution and key governance document of every waka umanga, and each Māori collective has a considerable degree of flexibility in the way in which their charter is drafted, the matters it covers, and the provisions it contains. However, each charter must set out, among other things, how governors are elected and/or appointed as well as the criteria that will qualify or disqualify individuals from holding office, the way internal disputes must be resolved, and the waka umanga's management policies. As such, the charter is intended to be the rulebook for the

⁶²³ Joseph, Robert "Māori Governance and Business Organisations Background" in Watson, S, Gunasekara, G, Gedye, M, van Roy, Y, Ross, M, Longdin, L, Brown, L and Keating, M *The Law of Business Organisations* (Palatine Press, Auckland, February 2009) at 795.

⁶²⁴ Neate, above n 619, at 4.

waka umanga and its governors, setting out the processes that must be followed in undertaking its day-to-day business, and the rules that regulate those processes. As such, the charter is perhaps the greatest expression of the rule of law, providing the constitutional basis for the exercise of the waka umanga's powers, while at the same time constraining those powers within the scope of the charter itself.

Many of the provisions of the Waka Umanga Bill that deal with the charter reflect important principles of the rule of law. At the highest level, the waka umanga, its governors and office holders are subject to the law, as outlined in both the legislation and the charter, and are made explicitly accountable to members of the Māori collective whom they serve. Waka umanga governors are required to, among other things, act in good faith and exercise their powers for a proper purpose, and must comply with the provisions of both the Act and the charter, and in some cases where the Act or charter is not complied with penalties can be imposed. These features of waka umanga uphold the principle that decision makers and those who exercise power are accountable under the law.

Similarly, while a charter may contain provisions outlining the rights, privileges and powers of a waka umanga, the rights, privileges and powers must not exceed those provided for in the legislation. This undoubtedly protects the waka umanga, its assets and resources, and ultimately its members, from becoming hostage to individuals or groups usurping power and control for their own interests which, as noted in Chapter Two can be a problem for other governance entities, such as incorporated societies. Furthermore, until a waka umanga has adopted a charter, the powers of its Runanganui are limited, a clear expression of the principle that those exercising power must be able to point to some lawful authority that allows them to do so. If a waka umanga has not adopted a charter within 12 months of registration, the Registrar of Waka Umanga is required to remove it from the Waka Umanga Register.

Finally, the requirement that every waka umanga charter must be consulted on and passed by a special resolution also helps to maintain the rule of law in two ways. First, it helps ensure that the rules of the waka umanga are well known to both members of the Māori collective as well as potential governors. And second, the participation of members in the development of those rules reduces the likelihood that individuals or groups with particular interests will be able to skew the internal

processes or structures of the waka umanga in their favour, or give themselves powers that would allow them to abuse the waka umanga and its resources.

Dispute Resolution

A major strength of waka umanga is the emphasis placed on the resolution of disputes through internal processes rather than the courts, and this would go a long way to addressing some of the most significant issues affecting governance entities today. Any organisation that has responsibility for significant resources and large sums of money is likely to encounter conflict and dispute from time to time. This is perhaps more so for Māori governance entities that, unlike most others, must try to meet the needs of a usually large and diverse membership spread throughout New Zealand and the world, as well as balance their competing social, cultural, financial and political aspirations. When one considers these realities it becomes apparent that it is impossible for Māori governance entities to satisfy every one of its members, and conflict will inevitably arise. While conflict can be positive, encouraging debate and a range of views to be heard, it can also prove debilitating for governance entities.⁶²⁵

Whenever the stakes are high and there is much to gain and much to lose, there will be fertile ground for conflict, and for Māori the stakes are highest in the area of Treaty settlements. Here conflict is not only confined to post-settlement governance matters, but can arise at the very outset of settlement negotiations as groups decide who has the right to negotiate settlements with the Crown.⁶²⁶ This is entirely understandable when one considers the gravity of the decisions that Māori are required to make – a full and final settlement of all of their grievances that will not only affect current generations, but generations to come.⁶²⁷ It is thus important for every Māori governance entity that there are adequate mechanisms in place to

⁶²⁵Stone, above n 570.

⁶²⁶For example, see the cases of *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, *Rukutai Watene & Ors v The Minister in Charge of Treaty of Waitangi Negotiations & others* (Unreported, HC Wellington CP120/01, 11 May 2001), *Hayes & Anor v Waitangi Tribunal & Ors* (HC Wellington CP111/01, 10 May 2001), *Waitaha Taiwhenua o Waitaki Trust & Anor v Te Runanga o Ngai Tahu* (HC Christchurch CP41/98, 17 June 1998), and *Te Ngai Tuahuriri Runanga & Ors v Te Runanga o Ngai Tahu & Attorney-General* (HC Christchurch CP187/97, 13 May 1998).

⁶²⁷Wainwright, Carrie “Māori Representation Issues and the Courts” in Carter, David and Palmer, Matthew (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) at 182.

manage disputes, and the Law Commission has noted that, at present, there is no such mechanism.⁶²⁸

In pre-European times, disputes usually arose when mana⁶²⁹ or tapu⁶³⁰, the “basis of the normative and prescriptive rules under which Māori society operated”,⁶³¹ was infringed. Māori considered that the universe existed in a state of balance, and when tapu or mana was violated, that balance was disturbed.⁶³² Traditionally, disputes were resolved in a number of ways. The concept of utu required reciprocal actions or words to restore the universal balance upset when mana or tapu were breached.⁶³³ Rangatira, as leaders who held the mana of their kin groups, were important and employed principles of tikanga Māori, such as whanaungatanga and manaakitanga, to settle disputes by maintaining the mana of their kin group and the integrity of their whakapapa.⁶³⁴ Dispute resolution took place on the marae, and through the medium of Te Reo Māori, the “vehicle by which spirituality finds collective expression and the whakapapa of universal knowledge finds expression in speech”.⁶³⁵

However, the arrival of European settlers brought significant changes to the way in which Māori disputes were settled. With the advent of British law, Māori found themselves facing “dual accountability under competing systems”,⁶³⁶ and the Native Land Court soon became the medium through which disputes were resolved. The emphasis on individual rights and responsibility in British law lead to the “diminution of group obligation” and undermined the mana and authority of rangatira.⁶³⁷ Indeed, “the word of the rangatira, once sacrosanct now competed openly with a cash economy and the rules of an individualised Pakeha property law system”⁶³⁸ and “resolution processes of the marae were marginalised as the judicial system strengthened its hold over the actions of Māori people”.⁶³⁹ The decline in traditional

⁶²⁸New Zealand Law Commission, above n 268, at 1.

⁶²⁹The source of human authority over the actions of others: Tomas, Nin and Quince, Khylee “Māori Disputes and their Resolution” in Spiller, Peter (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Melbourne, 2002) at 208.

⁶³⁰*Ibid.* The condition or state of an object which could be altered by mana.

⁶³¹*Ibid.*

⁶³²*Ibid.*, at 211.

⁶³³*Ibid.*

⁶³⁴*Ibid.*, at 213-215.

⁶³⁵*Ibid.*, at 216.

⁶³⁶*Ibid.*, at 217.

⁶³⁷*Ibid.*

⁶³⁸*Ibid.*

⁶³⁹*Ibid.*, at 218.

Māori dispute resolution processes has persisted, and today governance disputes are generally resolved through the courts.

Recourse to the courts is both an inefficient and ineffective way of resolving Māori governance disputes. Litigation is considerably costly and time consuming, draining both the financial and human resources of Māori collectives. Māori governance disputes often involve matters that do not necessarily fit within existing causes of action.⁶⁴⁰ Issues of justiciability thus become a focal point that distracts the court from dealing with the “real issues”,⁶⁴¹ and Māori often leave the court “with the conflict with their whanaunga perfectly intact”.⁶⁴² Palmer has noted that more than any other branch of government the judiciary probably has “less familiarity with Māori perspectives”.⁶⁴³ As a result, the Courts can struggle to deal with the tikanga issues that governance disputes regularly touch on. In such situations judges find themselves in the “invidious position of attempting to assist, whilst struggling with the complex cultural parameters involved in the disputes”.⁶⁴⁴ The court process itself also takes control away from Māori and leaves matters to be decided by an individual who may not understand the cultural and political factors that go to the heart of the dispute, making the likelihood of an enduring resolution remote.⁶⁴⁵ Finally, litigation is adversarial and “winner takes all” in nature, which can take a huge toll on relationships. This can be particularly damaging for Māori because, unlike most disputes, Māori governance disputes almost always involve litigants who have relationships that must endure long after a Judge has made a decision.⁶⁴⁶ The “contest of rights” promoted in the courtroom can cause long-lasting damage to these relationships and fuel further conflict.⁶⁴⁷ Indeed, one only needs to consider the mountain of governance-related litigation that has bedevilled Waikato-Tainui to appreciate this.

⁶⁴⁰Hefferan, Gina “Post-Settlement Dispute Resolution: Time to Tread Lightly” (2004) 10 Auckland University Law Review 212 at 227. For example of cases where the Courts have dealt with jurisdiction issues in Māori disputes see also the cases of *Kai Tohu Tohu o Puketapu Hapū Inc v Attorney-General* HC Wellington CP344/97, 5 February 1999 and *Greensill v Tainui Māori Trust Board* HC Hamilton M117/95, 17 May 1995.

⁶⁴¹Hond, Mereana “Resort to Mediation in Māori-to-Māori Dispute Resolution: Is it the elixir to cure all ills?” in Carter, David and Palmer, Matthew (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) at 158.

⁶⁴²Wainwright, above n 627, at 190.

⁶⁴³Palmer, Matthew *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 268.

⁶⁴⁴Hefferan, above n 640, at 224.

⁶⁴⁵New Zealand Law Commission, above n 252, at 110.

⁶⁴⁶Hefferan, above n 640, at 227.

⁶⁴⁷Hond, above n 641, at 158.

That litigation is an ineffective way of resolving Māori disputes is a fact that has not been lost on the judiciary either. Former Judge of the Māori Land Court, Carrie Wainwright, has noted the difficulties posed by the “inflexibility of the court process” and the “requirement that judges deal with matters in a strictly legal sense”,⁶⁴⁸ while former Chief Judge of the Māori Land Court, Wilson Issac, has noted the “growing need...for an organisation to assist in the process of encouraging parties in disputes to resolve their own disputes”.⁶⁴⁹ In *Te Runanga o Te Atiawa v Te Atiawa Iwi Authority* Robertson J indicated that the dispute should not have been before the courts, and alternative dispute resolution would have been a more appropriate way to resolving some of the issues.⁶⁵⁰ However, perhaps the best articulation of the current inadequacies of Māori dispute resolution can be found in the words of Hammond J in *Mahuta v Porima*, who noted:

“When people within a given community are at odds with each other in the pursuit of clashing objectives, regrettably it is all too often pointless to push for a “meeting of the minds” kind of consensus. The quest for consensus will routinely be foredoomed. What is then needed is an approach which renders dissensus harmless and if possible, profitable...The legal process as such is not ultimately capable of resolving the real questions which have arisen, because the range of alternatives at law is too narrow, and the human factors run too deep.”⁶⁵¹

The dispute resolution provisions proposed in the Waka Umanga Bill would introduce a number of positive changes that would address many of the significant deficiencies of the status quo, including reducing the inefficiencies caused by litigation and resolving disputes more effectively than the current court process allows. Central to these changes is the requirement that every waka umanga incorporate dispute resolution mechanisms into its charter that must be followed before a party to an internal dispute can issue proceedings. This makes dispute resolution a primary consideration for those establishing governance entities, and sends a strong signal about the appropriateness of court proceedings in dispute resolution.

⁶⁴⁸Wainwright, above n 627, at 191.

⁶⁴⁹Wilson, Issac “*The Māori Land Courts And The Future – Setting Goals For 2020*” (Issac Wilson, Chief Māori Land Court Judge, Māori Land Court, n.d.) at 22.

⁶⁵⁰ *Te Runanga o Te Atiawa v Te Atiawa Iwi Authority* HC New Plymouth CP 13/99, 10 November 1999 at [69].

⁶⁵¹ *Mahuta v Porima* HC Hamilton M290/00, 9 November 2000 at [65].

Internal dispute resolution processes will increase the likelihood that governance disputes are resolved by Māori themselves, and restore the control that is lost when disputes proceed through the courts. Māori have a significant degree of control over what their dispute resolution mechanisms look like, allowing them to tailor processes that fit with their own tikanga and values. This has two effects. First, allowing members to participate in the design of their dispute resolution processes creates a sense of ownership over those processes, making it more likely members will respect and abide by their outcomes. And second, disputes are likely to be approached in a way that is more appropriate for Māori and sensitive to the specific tikanga of each collective, offering better prospects that long-lasting resolution can be found. In addition, because these processes are not burdened with the issues of justiciability and causes of action that the courts must deal with, matters of tribal politics and relationships that often go to the heart of governance disputes can be addressed, and within a forum that Māori consider appropriate for those issues.

The Bill also provided a number of dispute resolution mechanisms that Māori could adopt, including alternative dispute resolution processes such as mediation, arbitration and, rather innovatively, kairongomau. Although, disputes will always be adversarial, processes like mediation and arbitration would mitigate much of the contest of rights that occurs within the confines of the courtroom, by searching for consensus and mutual gain rather than determining who is right and who is wrong. In addition, the use of kairongomau would employ similar dispute resolution principles to mediation and arbitration but within a tikanga Māori framework, while maintaining the principles of fairness and independence required by the rule of law.

Internal dispute resolution processes are complemented by section 84 of the Bill, which generally prevents court proceedings from being issued until internal dispute resolution processes have been followed and the court does not consider it is appropriate for the parties to engage, or further engage, in a dispute resolution process. This obviously makes recourse to the courts more difficult, and increases the likelihood that disputes can be resolved internally. In addition, internal disputes relating to waka umanga are heard by the Māori Land Court, rather than the general courts. Given Māori Land Court judges have significant experience dealing with Māori disputes, have a much deeper understanding of Māori tikanga than most other

judges, and are generally held in high regard by Māori, appropriate resolution is made more possible.

Overall, the dispute resolution processes proposed by the Waka Umanga Bill will bring about significant and positive changes for Māori governance entities, dealing with disputes in a much more efficient and effective way, allowing governance entities to get on with the job they have been designed to do. Indeed, for the first time Māori may walk away from disputes with their relationships with their Whanaunga intact, rather than their conflicts.

Accountability

The accountability of decision makers, governance structures and processes is an essential requirement for good governance of Māori collective assets. Accountability ensures that a governance entity operates in the best interests of its members, and protects against decision makers abusing their powers for their own gain. Where there is ineffective accountability in governance, governance structures and processes will be open to abuse. This ultimately erodes trust in the governance entity, and reduces allegiance amongst the collective. Accountability is promoted across all five principles for good Māori governance, and where those principles are realised, the accountability of a governance entity to its collective will be greatly enhanced. However, as well as the charter and dispute resolution processes mentioned above, waka umanga would help to achieve accountability in a number of other ways, two examples of which are the provisions around the disclosure of information to members and the requirement for Annual General Meetings.

Every registered member of a waka umanga has a right to access specific information related to the performance and day-to-day business of the waka umanga. This information includes the minutes of Runanganui meetings, and certain governance, planning and reporting information. The availability of this information allows members to make an assessment of how their waka umanga is being managed and the way in which its governors are making decisions. This promotes transparency, which in turn promotes accountability. The availability of this information enables members to make an assessment of the performance of their waka umanga and governors and, if necessary, raise concerns. The accountability

promoted by the information disclosure requirements is complemented by the mandatory Annual General Meetings of waka umanga. These meetings give members an opportunity to consider the performance of their waka umanga, and make an assessment of how well it is meeting its goals and objectives. Without this information and opportunity, members would likely be left in the dark about the performance of their governance entity and how well their collective assets are being managed.

5.4.3 Tikanga Māori

Te Aho states that the objectives of Māori governance involve “identifying a vision and values founded in tikanga Māori”.⁶⁵² Hall adds that, in order to work for Māori, governance structures must “build from a traditional base” and “recapture control of Māori values and ethics”.⁶⁵³ Thus one of the major issues for current governance entities is they have not been established from a traditional base and cannot adequately incorporate aspects of Māori tikanga cultural values. Many legal entities, like trusts and companies, were not designed with Māori in mind, and are based on western values and principles. The mechanics of these governance entities are skewed toward western ideas about how governance systems and processes should operate, and Te Aho has noted that this can “often conflict with essential Māori beliefs and philosophies”.⁶⁵⁴ In addition, existing entities find their basis in highly prescriptive statutes, and consequently lack the flexibility necessary to accommodate aspects of tikanga. Appropriate integration into New Zealand’s legal system has been identified as a major challenge for Māori governance.⁶⁵⁵ The incorporation of tikanga into Māori governance structures is a necessary part of overcoming that challenge, and something that waka umanga would help to achieve.

As noted in Chapter One, tikanga is encapsulated in the term “Māori custom law”, and broadly defined as the “body of rules developed by Māori to govern

⁶⁵² Te Aho, Linda “Contemporary Issues in Māori Law and Society: Mana Motuhake, Mana Whenua” (2006) 14 Waikato L. Rev. 102 at 113.

⁶⁵³ Hayward, Janine and Wheen, Nicola *The Waitangi Tribunal – Te Roopu Whakamana I te Tiriti o Waitangi* (Bridget Williams Books, Wellington, 2004) at 184.

⁶⁵⁴ Te Aho, Linda “Corporate Governance: Balancing Tikanga Māori With Commercial Objectives” (2005) 8.2 Yearbook of New Zealand Jurisprudence 300 at 301.

⁶⁵⁵ Robert Joseph “Contemporary Māori Governance: New Error” (Paper Presented to the Māori Law Society Conference, Wellington, 3 September 2010).

themselves”.⁶⁵⁶ In essence, tikanga embodies the values and principles of Māori society, and can thus differ between iwi, hapu, whanau and even individuals. Joseph has commented that good Māori governance “requires an understanding and alignment with the values, institutions, and cultural norms prevalent within Māoridom”.⁶⁵⁷ This is not only true for Māori governance, but for governance in general. It makes sense that if governance structures and systems are to have legitimacy they must reflect the values and norms of the society within which they operate. It also seems logical that when governance structures do not reflect those values or norms they alienate and lose touch with the people they serve. As a consequence, the ability of those structures to build trust and gain allegiance is severely compromised,⁶⁵⁸ and governance is weakened. At present, while Māori employ a range of legal entities to carry out the governance functions they require, their inability to incorporate tikanga Māori means they cannot fully reflect the values, institutions and cultural norms of the Māori collectives they serve. Indeed, while these entities may be operated by and apparently for Māori, they lack cultural match,⁶⁵⁹ and this has obvious implications for trust, allegiance and legitimacy.

It is important to appreciate that there are a range of views on the place of tikanga within governance structures and New Zealand law in general. The Law Commission has noted two competing views concerning the incorporation of tikanga Māori into Māori governance – one that considers it necessary to “maintain a Māori dimension” within a governance entity and “encourage it to operate with Māori objectives in mind”,⁶⁶⁰ and another that holds tikanga is too unspecific and leads to commercial and legal uncertainty.⁶⁶¹ Turvey has warned that the incorporation of Māori concepts and terms into New Zealand law opens them up to “processes of selection, interpretation and implementation by western authorities”,⁶⁶² and can be seen as an attempt by the Crown to counter challenges to its exclusive sovereignty⁶⁶³ by eroding the “conflict between kawanatanga and tino rangatiratanga”.⁶⁶⁴ Joseph warns that new forms of Māori governance should not come at the expense of Māori culture,

⁶⁵⁶New Zealand Law Commission, above n 26, at 1.

⁶⁵⁷Joseph, above n 655.

⁶⁵⁸Cornell, above n 602, at 7.

⁶⁵⁹*Ibid.*

⁶⁶⁰New Zealand Law Commission, above n 252, at 41.

⁶⁶¹*Ibid.*

⁶⁶²Turvey, Arnu “Te Ao Māori In A “Sympathetic” Legal Regime: The Use Of Māori Concepts In Legislation” (2009) 40 VUWLR 531 at 553.

⁶⁶³*Ibid.*, at 540.

⁶⁶⁴*Ibid.*, at 550.

tikanga and identity,⁶⁶⁵ but also emphasises the importance of ensuring that Māori values and traditions contribute to good governance rather than undermine it.⁶⁶⁶ Joseph thus suggests that the legitimacy of a Māori governance entity relates more to its “competence in modern corporate governance and commercial management tempered by tikanga” than its strict adherence to Māori custom.⁶⁶⁷ Indeed, the focus in Māori governance is on performance rather than compliance,⁶⁶⁸ a point highlighted in *Porima*, where the Court stated:

“The Maaori way of doing things (Tikanga) is not the same way as the Pakeha way of doing things. In particular, in its own form of collectivism, Maaori allow things to evolve through means and mechanisms that are peculiarly their own. And in the case of Tainui, the Maaori way of doing things is inextricably intertwined with the Kiingitanga. Tainui regard that spiritual and temporal mantle as their most precious Taonga and one which has borne them through their historic tribulations. But, all of that said, Tainui still have to operate in the modern world of commerce and technology”.⁶⁶⁹

It is thus apparent that the extent to which tikanga should be incorporated into Māori governance structures is open to debate. Yet, although it is important to bear these views in mind, there is no compelling reason why tikanga should not have any part at all. While it is true that the broad and flexible nature of tikanga can lend itself to uncertainty, that is perhaps no more true than for concepts such as equity and fairness, which the law has managed to deal with for centuries - what is equitable and what is fair is as amenable to interpretation as what is right or “tika” in any particular situation. In any case, tikanga itself is amenable to “creative adaptation”.⁶⁷⁰ Similarly, while incorporating Māori concepts and terms into legislation may expose tikanga to perverse interpretations by the courts and other “western authorities”, it also helps to achieve the recognition of Māori custom law needed to realise legal pluralism and tino rangatiratanga within New Zealand. The focus should thus be on developing processes that protect tikanga and enable it to contribute to the

⁶⁶⁵ Joseph, Robert “Māori Governance and Business Organisation Entities” in Watson, S, Gunasekara, G, Gedye, M, van Roy, Y, Ross, M, Longdin, L, Brown, L and Keating, M *The Law of Business Organisations* (Palatine Press, Auckland, February 2009) at 810.

⁶⁶⁶ Joseph, above n 655, at 12.

⁶⁶⁷ *Ibid*, at 30.

⁶⁶⁸ *Ibid*, at 24.

⁶⁶⁹ *Porima v Te Kauhanganui o Waikato Inc* HC Hamilton M208/00, 22 September 2000 at [12].

⁶⁷⁰ Joseph, above n 655, at 28.

governance of Māori collective assets without hindering the corporate and commercial functions governance entities are required to undertake. This is best summed up by Joseph, who suggests good corporate governance must be “intrinsically tied to the primary purpose of business and viewed as an economic imperative but tempered by tikanga values”.⁶⁷¹

Waka umanga would address the current lack of cultural match between governance entities and Māori collectives by providing the flexibility necessary to accommodate tikanga Māori within Māori governance structures, processes and institutions. This is achieved primarily by the waka umanga’s charter, through which Māori collectives have a significant amount of freedom to design their governance entity, and can therefore tailor it to reflect their own values and principles. This is supported by the fact that the Bill does not impose any requirement on waka umanga to adopt particular cultural practices or set minimum standards around tikanga. In fact, one of the most important aspects of the Bill is that Māori are not required to incorporate tikanga at all. It is ultimately a matter for each Māori collective to decide how, if at all, their governance entity will incorporate aspects of tikanga, and to what extent. In addition, the proposed definition of tikanga, as simply “the customary values and practices of a tribal group”, is considerably loose, and allows for a range of different interpretations of tikanga across Māori collectives. This is important because it is the Māori collective that is the “primary custodian of the tribe’s cultural ethics, values and tikanga” not the governance entity,⁶⁷² and it should thus be up to the collective to determine how tikanga should be incorporated.

The extensive provisions around consultation on the charter and the strong emphasis on participation make it even more likely that the values and customs of the collective as a whole, rather than particular individuals or groups, are reflected in the structures and processes of the waka umanga, helping to increase trust and allegiance required for effective governance. In addition, the emphasis on participation should ensure a range of voices are heard and encourage debate around the interpretation and meaning of the collective’s tikanga. Having these conversations at the outset has the potential to prevent disputes arising later around what particular tikanga mean.

⁶⁷¹ *Ibid*, at 24.

⁶⁷² *Ibid*, at 20.

5.4.4 Vision

While processes that encourage participation, governance structures that adhere to the rule of law, effective dispute resolution mechanisms, and principles and values that reflect tikanga Māori are all essential elements of good Māori governance, none of those factors can deliver results without vision. Vision encapsulates the goals and objectives of a Māori collective and defines the way in which its governance entity operates to meet those expectations. Vision is the plan and the glue that binds all of a governance entity's processes and structures together so that it can deliver on the collective aspirations of Māori. In essence, vision provides direction, and without direction even the best governance structures can prove ineffective.

In order to take control of the “quiet revolution” and benefit fully from the opportunities it provides, Māori must do more than simply manage their collective assets. Instead, Māori collectives must grow their assets and use them to transform the lives of present and future members, and this transformation requires vision. The two primary components of vision are strategic orientation and capable leadership, and through its underlying focus on both of these requirements the Waka Umanga Bill promotes vision in Māori governance.

Strategic Orientation

Strategic orientation is about having a strategy to meet the demands of the Māori collective in the most efficient manner possible. Strategic orientation concerns the alignment of a governance entity's structures, processes and resources with the goals and objectives of the Māori collective it represents. In this regard, strategic orientation is concentrated on planning and, like vision in general, must be future focussed to ensure that collective assets deliver benefits not only for the present, but for future generations as well.

Perhaps the most fundamental part of strategic direction is a clear articulation of the goals and objectives of the Māori collective. Without an understanding of what is important to Māori and what they hope to achieve with their collective assets, there can be no direction. It is also important to note that those goals and objectives may not be finite or capable of being packaged into neat little boxes that can be easily

ticked off when achieved. Instead the goals and objectives of Māori collectives may be as broad as lifting the social and economic standing of its members, or building and enhancing mana. While there may be key milestones to meet along the way, such objectives are obviously not finite – they are continuous, and will change over time as the dynamics of the collective itself changes. Strategic direction thus needs to continuously adapt, refocus and reconfigure to meet these changes.

To a large extent, articulating the aspirations of the Māori collective will depend on participation and, as noted earlier, the draft provisions of the Waka Umanga Bill places strong emphasis on processes that encourage the participation of Māori in their governance entity, and particularly the development of its charter. These provisions will undoubtedly have a significant impact on strategic orientation by enabling, and perhaps in some cases forcing, decision-makers to engage with the Māori collective and understand their aspirations. The ability for Māori to incorporate their aspirations into the waka umanga charter - its most important governance document and its constitution - provides the highest recognition of what it is they hope to achieve, placing their vision front and centre in the day-to-day business of the waka umanga. Indeed, the charter itself is the ultimate expression of vision.

The Bill also encourages strategic orientation in a much more explicit way through the requirement that every waka umanga have both a long-term and annual plan. These plans are future focussed and concentrate governors, decision-makers, and the collective as a whole, on the goals and objectives they hope to achieve. By identifying the focus for the waka umanga at any given time, articulating the framework for the management of the waka umanga's resources, and setting out the way in which progress will be measured and reported, the plans serve as a useful reminder of the waka umanga's vision, keeping its leaders on track and guiding them toward the realisation of that vision. Yet, as noted earlier, strategic orientation is only one part of the vision equation, and to put that strategic orientation into action a governance entity must have capable leadership.

Capable Leadership

Katene argues that “contemporary Māori leadership is about iwi, hapu, whanau, Māori socio- economic advancement and political influence”,⁶⁷³ and comments:

“Leadership requires the presentation of an achievable and desirable future state or outcome for which people are willing to follow their chosen leader...a good leader paints a picture of some identifiable vision that people have aspirations for and then focuses on motivating, encouraging and supporting people to follow them and a mutually beneficial strategy toward achievement of the common vision”.⁶⁷⁴

Capable leadership is about guiding and steering a governance entity in the direction set by its strategic orientation to ensure it meets its vision. In that regard, capable leadership must fulfil a number of functions within a governance entity. First, capable leadership must help to determine the aspirations of the Māori collective, and thus to define its vision. Second, it must help to build support for that vision within the Māori collective, and to unify members behind the governance entity as it seeks to fulfil that vision. This not only necessitates the ability to inspire, build consensus and inoculate conflict, but also requires recognisable leadership – leadership that reflects the values and principles of the collective, and that is viewed by the collective as being “one of them”. Third, capable leadership must itself foster leadership amongst the collective. This is necessary to ensure that, long after the leaders of today have moved on, there are capable individuals to take up the mantle and continue to guide the collective forward. Finally, capable leadership must navigate the governance entity, and therefore the collective, through the often turbulent waters of commerce, economics and politics, all while ensuring that the entity stays on track to deliver the results desired by its members. In many ways, this requires capable leadership itself to be strategically orientated.

When one considers the competing social, cultural, commercial and political functions that Māori governance entities are required to perform, as well as the considerable tasks their leaders must undertake, it becomes apparent that those

⁶⁷³Katene, Selwyn “Modelling Māori Leadership: What Makes for Good Leadership?” (2010) 2 (Article 1) MAI Review <www.review.mai.ac.nz>.

⁶⁷⁴*Ibid.*

leaders must possess a wide range of skills and expertise in order to be effective. This includes not only obvious leadership qualities such as integrity, dedication, loyalty, strong communication skills and the ability to build relationships, but more specific qualities like commercial expertise, political savviness, social awareness, a firm understanding of the tikanga of the collective they lead and, more than ever, an appreciation of the changes brought about by increasing globalisation that requires leaders to “work across cultures and nationalities without compromising their own values”.⁶⁷⁵ Although it would be impossible to provide a definitive list of all of the qualities necessary for capable leadership, Meade’s eight key pumanawa, or talents, for contemporary Māori leadership are helpful.⁶⁷⁶

1. The ability to manage, mediate and settle disputes so as to uphold the unity of the group.
2. The ability to ensure that every member of the unit is provided with the necessities that ensure their growth.
3. Bravery and courage to uphold the rights of the hapu and the iwi.
4. The ability to lead the community forward, improve its standing, economic base and mana.
5. A wider vision and more general education than is required for every day matters.
6. Manaakitanga
7. The ability to lead the group to undertake and successfully complete big projects.
8. Knowledge of the traditions, culture, and language of the group, as well as an understanding of those of other groups.

Finding all of these characteristics in any one individual is likely to be difficult, and capable leadership thus needs to be multi-layered, combining the skills and expertise of a number of individuals.⁶⁷⁷ It is also important to recognise that the leadership skills and qualities necessary for the negotiation of Treaty settlements may not be the same as those required to manage Treaty settlement assets and implement the

⁶⁷⁵ *Ibid*, at 9.

⁶⁷⁶ Mead, Professor Hirini et al “Māori Leadership in Governance” (Scoping Paper, Hui Taumata Action, n.d.) at 10.

⁶⁷⁷ Katene, above n 673.

vision of the Māori collective.⁶⁷⁸ This means that there may need to be a leadership change when Māori collectives and their governance entities transition from the negotiation phase to the post-settlement phase.

In terms of the problems currently facing Māori leadership, Meade notes that there is a “lack of awareness and understanding of the roles, responsibilities, and guiding principles of effective leadership and governance across all levels of Māoridom”,⁶⁷⁹ and states:

“...there is currently a broad range of individuals in leadership and governance roles who are not well equipped for these positions, failing to provide effective leadership or to create adequate governance structures. This leads to a variety of problems for Māoridom, ranging from the under-utilisation of their existing economic resources to issues as to their readiness to receive settlement assets”.⁶⁸⁰

Similarly, Joseph states that “less effective leadership in Māori governance entities is a further challenge for many Māori groups that will hinder good governance and positive development”,⁶⁸¹ and adds that “tikanga imperatives” can limit the leadership skills required by governance entities and create partisan interests that “push development considerations into the background”.⁶⁸²

Of course, there is no quick fix for the issues highlighted by Meade and Joseph. The selection of leaders is appropriately a matter for Māori to decide, and in the end they choose the leaders they feel are best suited to the job. Capable leadership is thus heavily reliant on individuals - not only in terms of the specific skills and expertise that each individual leader may possess, but also the individual views that each member of the collective holds on leadership and takes into account when deciding who gets their vote. This not only means that those chosen may not always reflect the qualities and attributes espoused as being essential for capable leadership, but that short of imposing strict leadership criteria or making decisions for Māori, there is no way to guarantee capable individuals are given leadership roles.

⁶⁷⁸ Joseph, above n 655, at 16.

⁶⁷⁹ Mead, above n 676, at 30.

⁶⁸⁰ *Ibid.*

⁶⁸¹ Joseph, above n 655, at 16.

⁶⁸² *Ibid.*, at 25.

Although it is impossible to guarantee capable leadership, encouraging capable leadership and providing an environment within which capable leadership can be fostered is not, and in this regard waka umanga offer a significant opportunity to improve leadership in Māori governance. Those in charge of waka umanga would be required to meet a number of standards that promote capable leadership. Governors would be required to act in the best interests of present and, significantly, future members of the Māori collective they represent and in accordance with the charter. This requires leaders to turn their minds to what those best interests may be, and this will undoubtedly be found in the collective's goals and objectives. This is complemented by the requirement that governors must be guided in the performance of their duties by the objectives of the charter, long-term plan, and governance policies of the waka umanga and, together, these provisions maintain leadership focus on the collective's vision.

In addition, while leaving the decisions around leadership up to Māori to make, the Bill sends a clear signal as to the qualities and skills that individuals should have in order to lead a governance entity. As well as setting its own general criteria that would disqualify individuals from being governors, the Waka Umanga Bill also incorporates a number of provisions from the Companies Act that would prohibit individuals with from holding office. These include, among other things, individuals convicted of crimes involving dishonesty, a person who has been disqualified by a court as a company director, and a person who has been prohibited from being a director or promoter of, or of taking part in the management of, a company by the Financial Markets Authority. As well as setting these leadership standards, these provisions also align waka umanga with the commercial leadership standards of companies.

The Waka Umanga Bill also imposes a number of other requirements on governors that promote capable leadership. These include requirements to exercise the care, diligence and skill of a reasonable governor, and the disclosure of conflicts of interest. Similarly, the Bill sets expectations around the Chief Executive – the executive head of the waka umanga. In appointing a Chief Executive, a Runanganui must have regard to, among other things, the skills, attributes and experience required by the role. In addition, the Bill places clear requirements on the Chief Executive to ensure prudent and effective management, effective planning, and

accurate reporting. Again, these are all strong indicators of capable leadership. Finally, the Bill's explicit requirement for the separation of governance and management responsibilities within the waka umanga would help mitigate against some of the issues for Māori governance caused by "tikanga imperatives", as noted by Joseph.⁶⁸³

While leadership choices are ultimately made by Māori collectives and no measure, including the provisions outlined in the Waka Umanga Bill, can guarantee the leadership skills and qualities and the strategic orientation necessary to fulfil the vision of Māori collectives, waka umanga certainly incorporate the strong foundations that would help make this possible.

5.4.5 Effectiveness and Efficiency

The final criteria required for good Māori governance is the ability of a governance entity to achieve its goals in the most effective and efficient way possible. This means that governance structures and processes must work to fulfil the aspirations of as many of the collective it can, and with the least impact on their collective assets. When governance is ineffective and inefficient, its resources will be wasted and its goals will not be achieved. As a result, there is likely to be a high level of dissatisfaction among members, and trust and allegiance will dissipate. In contrast, highly efficient and effective governance structures and processes are likely to deliver stronger results for members, while sustaining the collective assets of the group for future generations. In this regard, efficiency and effectiveness are essential for Māori because the number of beneficiaries of Māori collective assets is growing, and will continue to grow over successive generations. This means that the range of functions governance entities are required to fulfil will also grow, the range of views on how those functions should be carried out will expand, and effectiveness and efficiency will be necessary to navigate all of those factors and achieve the best for the most.

Effectiveness and efficiency will require a governance entity to, among other things, have a low level of bureaucracy and streamlined internal processes, have a clear plan and focus as to how it will achieve its objectives, have robust systems to

⁶⁸³ *Ibid*, at 26.

measure success and report progress, have appropriate mechanisms to minimise conflict and build consensus, and strong leadership to keep everything working as it should. In short, effectiveness and efficiency cannot exist in isolation, but will be influenced by every process and mechanism of a governance entity. Thus, whether or not a Māori governance entity is effective and efficient will very much depend on how successful it is at meeting the other four requirements for good governance – participation, rule of law, cultural match, and vision. As such, because of its focus on each of these criteria and the range of ways it helps to promote good governance generally, waka umanga offers an effective and efficient vehicle for the management of Māori collective assets.

Participation

The Waka Umanga Bill places a strong emphasis on participation and the involvement of members in the establishment of their governance entity. Participation helps to build trust and allegiance as well as knowledge of the rules, processes and structures through which the waka umanga carries out its functions. This encourages effectiveness and efficiency in a number of ways. First, the involvement of members in the design of their waka umanga makes it more likely that it will be geared to best meet their needs. Second, the role of members in setting goals and objectives and drafting a constitution will help to ensure that the focus of the waka umanga aligns with theirs. Third, members will be less likely to challenge the processes and structures through which the waka umanga carries out its functions on the basis that they do not represent the members or are not in their best interests, reducing the likelihood of disputes that can take up time and resources. Fourth, participation will likely encourage transparency, which will in turn reduce the likelihood those in positions of power will be able to abuse their positions. And finally, participation mitigates against claims that people have not had an opportunity to have their say or be heard, again reducing the potential for dispute.

Rule of Law

The rule of law is promoted in the internal processes and structures of waka umanga through requirements around the charter, accountability and transparency, and internal dispute resolution processes. These dispute resolution processes are the

strongest way in which waka umanga encourage effectiveness and efficiency. Disputes can have a significant impact on governance and the resources of Māori collectives, and the resolution of those disputes through the courts can take up substantial amounts of time and money, and damage the relationships between Māori and their whanaunga. In this regard, litigation is both ineffective and inefficient. The requirement for waka umanga to incorporate internal dispute resolution processes into their charters that must be followed before proceedings can be brought thus significantly increase their effectiveness and efficiency in managing collective assets.

Tikanga Māori

Waka umanga offers Māori collectives the flexibility necessary to incorporate aspects of tikanga into governance structures. This achieves “cultural match”, and means that those structures are more representative of the group they serve. This will encourage effectiveness and efficiency because members will better understand and relate to the structures that exercise control over their assets.

Vision

Vision incorporates strategic orientation and capable leadership, and is the driving force behind a governance entity’s ability to achieve its objectives and deliver on the aspirations of its members. As such, vision is obviously a major contributor to efficiency and effectiveness. Where a governance entity lacks vision, it will lack direction and the plan necessary to meet its objectives. In fact, a lack of vision is likely to mean that its objectives are poorly defined, making it difficult to determine exactly how they can be met. Similarly, without capable leadership a governance entity does not have the engine to drive it forward and ensure it stays on course.

Waka umanga would contribute to effective and efficient governance by promoting vision. The provisions of the Waka Umanga Bill will help to ensure the clear articulation of goals and objectives, promote capable leadership, and establish mechanisms through which progress can be measured to keep the eyes of leaders firmly on the ball. These provisions assist leaders in understanding what it is they have to achieve, and the processes they implement must be directed at achieving

those goals. Waka umanga thus encourages focus, and helps prevent leaders and decision-makers from becoming sidetracked by issues that hamper the effective and efficient operation of the entity. This is particularly important to help leaders manage the higher expectations that Māori tend to have with regard to the behaviour of their governance entities.⁶⁸⁴

Overall, waka umanga would bring about a sea-change in Māori governance. Through its promotion of good governance, waka umanga has the potential to deliver huge benefits by increasing the ability of Māori to participate in governance entities that are truly reflective of their culture and beliefs, while giving them the power and control to determine what those entities will look like and the functions they will fulfil.

5.5 Waka Umanga – A Cure All?

It is clear that waka umanga would bring a considerable amount of positive change to the governance of Māori collective assets, and help to remedy many of the significant issues that current governance entities are not capable of dealing with. However, it must be recognised that waka umanga cannot solve all of the problems, nor can it guarantee good Māori governance. Indeed, there are a number of aspects of waka umanga that could be improved to make it a much more robust governance entity.

Some of the changes recommended by the Māori Affairs Select Committee would, if adopted, undermine the good governance standards that the Waka Umanga Bill promotes. In particular, the Select Committee recommended that those intending to form and register a waka umanga should not have to publicly notify their intention or consult on a proposed charter. Instead, a waka umanga would be required to have its charter adopted by special resolution at the first general meeting after its registration. Given a waka umanga requires only 15 members to be registered, but could potentially end up managing resources and assets on behalf of thousands, it would seem desirable to have as much input as possible in the development of its key governance document from the very start, rather than once the waka umanga is already up and running. Although a waka umanga charter would still need to be inspected, copies provided to members on request, and adopted by a special resolution of members, this would not happen until after registration. Consulting with

⁶⁸⁴Te Aho, above n 654, at 306.

the membership after their governance entity has been set up seems rather back-to-front, and it would be more appropriate to have a strong mandate to form the waka umanga from the outset and before it is registered, rather than have to potentially fix things up further down the track, when time and effort has already been spent developing the first charter.

A further recommendation made by the Select Committee is that the definition of “internal dispute” should be limited to disputes involving membership of a waka umanga or disputes defined in the charter. The rationale for this recommendation was the original definition of “internal dispute” included matters relating to members’ rights and obligations, decisions of governors, and requests for information, and that this definition would be too restrictive of the day-to-day decisions of the waka umanga. However, the wider the definition of “internal dispute” the more types of disputes that will be brought within the waka umanga’s internal dispute resolution processes, potentially avoiding costly and time consuming litigation, as well as all of the collateral damage that court proceedings can cause. Furthermore, the reality is that, even if the definition of “internal dispute” is limited in the way proposed by the Select Committee, disputes concerning decisions of governors and the rights and obligations of members will not go away. Instead, those disputes will be pursued through the courts as they currently are, and will therefore be much more restrictive on the waka umanga’s ability to carry out its day-to-day business than could be the case if they were processed through an alternative dispute resolution mechanism. Restricting the definition of “internal dispute” would only serve to undermine the significant attempt the Waka Umanga Bill makes toward finding a better way to resolve governance disputes.

Similarly, the Select Committee recommended the removal of the prescriptive requirements around mediation and arbitration from the draft Bill, and instead suggested the Secretariat would be best placed to provide Māori with guidance on these processes. While the Secretariat may be able to provide advice, having these alternative dispute resolution processes outlined in legislation makes them visible, and sends a strong message that there are much better ways to resolve governance disputes. The fact that the provisions have already been drafted makes the adoption of alternative dispute resolution processes much easier for Māori entities. This is

particularly helpful as anecdotal evidence suggests that Māori are reluctant to use these processes to settle their disputes.

Others have also raised concerns about the waka umanga model, suggesting it is an example of paternalistic and “nanny-state” government foisting on Māori what it thinks is best for them.⁶⁸⁵ Indeed, this was the position taken by the Hon Georgina Te Heuheu.⁶⁸⁶ Others argue that waka umanga, and its standardisation of Māori governance, may threaten mana motuhake.⁶⁸⁷ There is of course force in the argument that changes for Māori should come from Māori, especially when one considers the Crown’s legacy of making decisions in the supposed best interests of Māori. However, it is apparent that a significant amount of research has gone into understanding the issues that currently hamper the ability of Māori to manage their collective assets, and the way in which the current legal framework contributes to this. It is also clear that the Commission has consulted widely on Māori governance and considered what has worked for indigenous governance in other parts of the world in developing its recommendations. As a result, waka umanga is attuned to the governance problems that Māori themselves have identified.

In the end, the adoption of waka umanga would not be mandatory and Māori collectives would still be free to choose the governance entity that best meets their needs. But the reality is that Māori do not yet have the degree of tino rangatiratanga necessary to establish their own governance structures that have the full force of law, and any changes to Māori governance, especially the degree of change needed to address current problems, is going to need support from government.

5.6 Waka Umanga - An Opportunity Missed?

It is clear that New Zealand law is not currently geared to meet the challenges faced by Māori collectives in the post-settlement era. There are significant barriers for Māori in the governance of their collective resources, which inhibits their ability to make the most of the opportunities presented by those resources. As such, Māori governance requires “urgent attention to reflect more accurately the new post-

⁶⁸⁵McMahon, Niamh “Waka Umanga: Has The Nanny State Gone Too Far?” (NZ Lawyer Magazine, New Zealand, 2006) <www.nzlawyermagazine.co.nz>.

⁶⁸⁶Waka Umanga Bill, above n 458.

⁶⁸⁷Te Aho, above n 654, at 117.

settlement era”.⁶⁸⁸ While waka umanga would not guarantee that all of those barriers are removed, it offers a significant opportunity to greatly reduce them through its promotion of the key requirements for good Māori governance. This is particularly clear when compared with current legal entities employed in the governance of Māori collective assets as demonstrated in Table 1 below. In deciding not to pursue waka umanga, the Government has essentially decided not to address the problems Māori collectives currently face.

As noted by Joseph, “the ethos of the Waka Umanga Bill was, inter alia, about empowerment of Māori communities not government”. Waka umanga is about giving Māori the ability to manage their resources in a way that allows them to gain the greatest reward for present and future generations. It is an undeniable fact that Māori are currently at the bottom of every indicator of socio-economic status in New Zealand, and reversing this will take a huge amount of effort that, in turn, will need to be supported by significant resources. Without the ability to govern their collective resources to their full potential, Māori cannot hope to provide the resources their people need to lift their status. That in itself is a denial of tino rangatiratanga and disempowerment of the greatest degree.

In abandoning the Waka Umanga Bill, Government has decided to leave Māori powerless to manage their collective resources in a way that provides them the best opportunity to reap the greatest rewards. However, it is not too late to change all of this. The hard work has already been done, and the legislative framework necessary to effect change has been crafted. All that is required is a government brave enough to support the Waka Umanga Bill and deliver positive change for Māori.

⁶⁸⁸ Ruru, Jacinta “Waka Umanga: A Comment” (2006) 7 New Zealand Law Journal 251 at 252.

Table 1: Comparative Analysis of Good Governance in Current Governance Entities and Waka Umanga

	Participation	Rule of Law	Tikanga Māori	Vision	Efficiency & Effectiveness
Waka Umanga	Promotes participation from the ground up through development of Charter. Participation provided for in both the Act & charter.	Rules & processes clearly defined in charter & Act, requirement for internal dispute resolution processes, & accountability achieved through charter & Act.	Provides the flexibility to incorporate aspects of tikanga into the day-to-day operations of the entity.	Promotes an environment conducive to the selection of strong leaders, & has core focus on the goals of the collective which encourages a strategic orientation.	Encourages efficiency and effectiveness through their strong emphasis on participation, rule of law, tikanga Māori, and vision.
Incorporated Societies	Participation can be promoted through the rules of the Incorporated Society.	Ultimately accountable to the Minister of Māori Affairs rather than beneficiaries. Dispute resolution is through the courts.	Contractual nature of membership, as opposed to whakapapa, conflicts with tikanga.	No statutory standards that office holders are required to meet, but society rules may provide for this.	Inability to pursue pecuniary gain makes them ineffective at achieving commercial objectives.
Companies	Companies Act defines shareholder rights, & protects participation.	Strong legislative regime for the management of companies, but dispute resolution is through the courts.	Individual share holdings do not reflect the collective nature of Māori assets, and conflicts with tikanga.	Duties of directors clearly spelled out in Companies Act	Not effective at pursuing non-commercial objectives.
Private Trusts	Trust deed can promote participation through the articulation of beneficiary rights and powers.	Difficulty providing internal dispute resolution processes & beneficiaries must seek relief from Court to ensure deed is complied with.	Trust deed may allow the incorporation of aspects of tikanga into the day-to-day operation of the trust.	Trustee Act promotes strong leadership, but difficult to achieve the level of accountability & transparency required for the management of collective assets.	Trust law is notoriously complex, & recourse to the courts is often required to resolve disputes. Establishing trusts can be costly, & onerous legal obligations can make trusts cumbersome.

	Participation	Rule of Law	Tikanga Māori	Vision	Efficiency & Effectiveness
Charitable Trusts	Participation can be promoted through the trust deed.	Charitable Trusts Act provides a degree of accountability & transparency, but dispute resolution is through the courts.	Do not provide the flexibility necessary to incorporate tikanga.	Trustee Act promotes strong leadership.	Not effective at pursuing commercial objectives.
Māori Trust Boards	The Office of Treaty Settlements will not approve the use of Māori Trust Boards as Treaty settlement governance entities.				
Incorporations & Trusts Under TTMMA 1993	Only available for the management of Māori land, and therefore not suitable for the management of Treaty settlement assets, which are likely to involve a wider range of assets and resources.				
Statutorily Created Entities	Can potentially be designed to meet all five principles of good Māori governance. However, drafting legislation can be time consuming, and political realities may make enactment difficult.				
Mandated Iwi Organisations	Only available for the management of fisheries assets, and therefore not suitable for the management of Treaty settlement assets, which are likely to involve a wider range of assets and resources.				

CONCLUSION

There can be no doubt that British settlement has had a significant and lasting impact on Māori land holdings. The tenurial revolution of the 19th century brought with it radical changes not only to Māori customary land tenure, but to Māori society as a whole. The legal regime established by the Crown through the Native Land Acts and then carried into effect by the Native Land Court distorted Māori custom, undermined the role of rangatira, and broke down the social structures that for centuries had maintained order in Māori society. These changes manifested as fraud, corruption, land loss, deprivation and poverty, the effects of which would reach well into the 21st century. Yet, as well as the social and economic effects still felt today, Māori have been left to grapple with another reality – how best to manage what little resources they have left within a legal system that, to a large extent, is not conducive to good governance of Māori collective assets.

Tenurial change and the replacement of aboriginal customs with European law was not unique to New Zealand. However, unlike many former colonies, New Zealand has moved much more “vigorously and comprehensively” to settle Treaty grievances,⁶⁸⁹ albeit only in the past forty years of its history. Today the Crown and Māori are engaged in a process to remedy past wrongs caused by the Crown’s breaches of the Treaty. The contemporary Treaty settlement process is the culmination of well over 100 years of the determination and persistence of Māori to have their grievances recognised by the Crown. While the Crown’s breaches of the Treaty stem right back to 1840, its history of making genuine amends for those breaches is much shorter. Indeed, the current Treaty settlement process has only been in existence for the past four decades. However, though the history may be short, the opportunities presented for Māori through those settlements are huge.

It is an inescapable reality that in New Zealand today Māori sit at the bottom of almost every indicator of socio-economic status, featuring heavily at that wrong end of health quality, educational achievement, employment, income, crime, and imprisonment. However, the Treaty settlement process and the assets it confers on

⁶⁸⁹Bourassa, Steven C, and Strong, Ann Louise “Restitution of Land to New Zealand Māori: The Role of Social Structure” (2002) 75 (2) Pacific Affairs 227 at 254.

Māori presents a significant opportunity to reverse these statistics by providing Māori with the financial resources necessary to drive their development. Through Treaty settlements, Māori have the ability to determine their own destiny and chart their own course, and the significant part that Māori play in New Zealand's economy is a testament to this. Indeed, it is somewhat ironic that a people persistently and consistently undermined by the actions of successive governments and whom, not so long ago, many doomed to extinction would today be on the cusp of driving a quiet economic revolution within New Zealand.

However, the ability of Māori collectives to take full advantage of the opportunities offered by Treaty settlements is threatened by the significant limitations imposed by the current range of governance entities available to them. While Māori make use of a number of different types of legal entities, and some to great success, there is at present no entity that can cater to the wide-ranging needs of Māori, nor address the unique circumstances Māori collectives face in managing their assets. Many of the existing entities have been conceived through a European lens to fit within a legal framework that is at odds with Māori custom. As a result, those governance entities discourage participation in the management of collective assets, limit accountability to beneficial owners, encourage litigation as a way to resolve disputes, and make it difficult for aspects of tikanga Māori to be incorporated into their processes and structures. In essence, the current governance entities available to Māori collectives do not promote good governance.

The waka umanga governance model offers a significant opportunity to remedy many of the problems that currently afflict Māori governance. For the first time, Māori would have a legal entity designed specifically for the purpose of managing Māori collective assets, and one that acknowledges and addresses the unique circumstances that Māori collectives have found themselves in following the breakdown of Māori customary tenure. The changes introduced by the Waka Umanga Bill would promote participation in governance matters, increase the accountability of decision-makers, find more effective ways to resolve internal disputes, improve both the efficiency and effectiveness of Māori governance and, perhaps most importantly, allow all of this to be done within a tikanga Māori framework. In essence, waka umanga would promote and help to ensure the good governance of Māori collective assets, benefiting all owners and Māori as a whole.

The importance of the post-settlement era to the future of Māori cannot be overstated, and it is vital that Māori collectives have the tools necessary to make the most of the opportunities presented by Treaty settlements. Unfortunately it appears that Government is content to let those opportunities pass by. The reasons for this are hard to discern, especially given the huge benefits that New Zealand as a whole would gain through the effective management of Māori collective assets. A primary factor in the Government's decision appears to be a notion that Māori have not asked for waka umanga, and the creation of this entity would be another paternalistic intervention in Māori affairs, undermining their ability to do things for themselves. Yet, when one considers the amount of litigation concerning the governance of Māori assets that passes through New Zealand's courts every year, it is apparent that for a very long time, Māori have been asking for change. While that request may not be explicit, it is implicit in every concern raised by every Māori litigant regarding the management of their assets, and it is implicit in every crippling governance dispute between Māori and their whanaunga. There are clear issues in Māori governance that must be addressed before Māori can take full control of their destiny, and while government may argue that waka umanga would undermine Māori, robbing Māori of the ability to fully benefit from their collective assets is surely something more insidious.

APPENDIX I

Twenty Questions On Governance from the Office of Treaty Settlements

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 the claimant group?
4. How can beneficiaries of the settlement participate in the affairs of the governance entity?
5. How do members have a say in who the representatives on the governance entity will be?
6. How often and how will the representatives change?
7. What are the purposes, principles, activities, powers and duties of the governance entity and any bodies accountable to it?
8. Which decision will members have a say in?
9. How are decisions made by the governance?
10. Who will manage the redress received in the settlement?
11. Who will determine what benefits are made available to beneficiaries?
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 beneficiaries?
14. What are the rules under which the governance entity and any bodies accountable to it operate?
15. Are there any interim governance arrangements in the period between the establishment of the 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 any bodies accountable to it be changed?
17. What are the planning/monitoring/review processes for decisions of the governance entity?
18. What if members do not agree with a decision made by the governance entity?
19. How often will accounts be prepared and audited?

20. Will beneficiaries receive information about decisions that affect them? How?
How often?

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