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ARE NEW ZEALAND TREATY OF WAITANGI SETTLEMENTS ACHIEVING JUSTICE?

THE NGAI TAHU SETTLEMENT AND THE RETURN OF POUNAMU (GREENSTONE)

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Achieving 'justice' is the overriding aim of the Treaty settlement process. This process was established to resolve Maori historical grievances against the New Zealand Crown for alleged breaches of the Treaty of Waitangi. Because historical injustices involve the interactions of cultures over time, justice in the Treaty settlement process is shaped, and constrained, by two main factors: 'culture' and 'time'. The settlement of Ngai Tahu's historical grievances, and in particular the return of pounamu as part of the settlement, achieved a large measure of this limited kind of justice. The Ngai Tahu settlement and the return of pounamu suggest that Treaty settlements are achieving, and may continue to achieve, a large measure of the justice available in the Treaty settlement process.

Examination of the return of pounamu to Ngai Tahu reveals, however, that new injustices may have been created in the Ngai Tahu settlement. These new injustices are critically analysed, and recommendations for maximising justice in the Treaty settlement process are suggested. If Treaty settlements are to achieve the maximum justice available in the Treaty settlement process, the Treaty partners must heed the warning signs arising from the possible creation of new injustices in the Ngai Tahu settlement.
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PREFACE

It happened a couple of days into my fieldwork on the West Coast of the South Island of New Zealand, the traditional home of pounamu, also known as greenstone. I had interviewed several people that day and listened to their views on the implications of the return of pounamu to Ngai Tahu—part of the settlement of Ngai Tahu's historic grievances against the New Zealand Crown for breaches of the Treaty of Waitangi. I needed to clear my head, to gain a perspective on the information received that day, so I headed down to the beach. As I began to walk the grey stony beach, watching the turbulent waters and wild waves crashing on the shore, my thoughts took me away.

If I identified as Poutini Ngai Tahu, the Indigenous people of the West Coast, and believed as they do that pounamu is my kin, my ancestor, how would that change my perspective on pounamu and pounamu management issues? Geologically, pounamu is formed in the Southern Alps and is pushed up out of the earth as boulders, to be eroded, broken down into smaller and smaller chunks by glacial action and torrential rains. Or, as the mother lode gives birth to her children, pieces break off, are washed down the rivers and out to sea. There, the waves tumble and polish the smaller pounamu pebbles, and eventually wash them up on the shores of the West Coast. Well, then my ancestors and kin would be with me everywhere, requiring my care, respect and attention!

I clicked back to my present reality, looked down to the grey stone beach and saw something. A dusty grey stone. I sensed it was something more, something precious. I picked it up and as I rubbed it with my fingers it began to transform and show itself to me. The waxy surface of the stone took in the oils from my fingers and revealed its true colour—green. It was pounamu. The ancestors of this land were everywhere and with me, right here in my hand.
Ahakoa he iti, he iti pounamu
Although small, it is precious.

Indeed I had been given a precious gift. The event gave me confidence, as an 'outsider' (a non-Indigenous Australian), that I was walking my research path with the blessings of the ancestors of this place. My research into whether Treaty of Waitangi settlements are achieving justice, and if so what kind of justice, has challenged me in many ways. The cross-cultural nature of this research has led me to re-conceptualise my idea of the role of the researcher and research-participants as a whanau (family) of interest in line with Maori cultural practices with consequent challenges to notions of objectivity, legitimacy, and indeed the very nature of research-based knowledge. Moreover, my research is, of its nature, interdisciplinary which brings further challenges. I have drawn principally on the disciplines of my undergraduate learning and professional experience in law and politics, but range freely into history, archaeology, anthropology, philosophy, geography, and Maori studies—whatever is necessary to answer the questions raised by my field of inquiry.

My research has travelled through as many perspectives as the number of people I have entered into conversation with. 'Justice' is not an object 'out there' against which one can test the adequacy of the Treaty settlement process. Therefore, in conversation it is often difficult to know whether we are even talking about the same thing. However, I have a sense of a shared or negotiated space from which I, along with many others, can comment on the overall justice of Treaty of Waitangi settlements. Just as I communicated at a different level, crossed a boundary and contacted something special (but very real) when I found pounamu on the beach that day three years ago, we must all continue to cross boundaries, to find shared language and understandings, so that we may engage in the conversations about our time, our world, and ourselves, that make us who we are.

Dunedin, 30 September 2001
CHAPTER ONE

INTRODUCTION

1.1 WHAT IS THE 'TREATY SETTLEMENT PROCESS'?

1.2 WEAVING A STORY
In 1975, the Treaty of Waitangi Act established the Waitangi Tribunal to investigate Maori claims of prejudice arising from the failure of the New Zealand Crown to honour the Treaty of Waitangi from 1975 onwards. When, a decade later, the Tribunal’s jurisdiction was extended back to the signing of the Treaty on 6 February 1840, there began the immense and complex task of inquiring into, hearing, and ultimately resolving, Maori claims of historical injustice. The New Zealand Crown has now accepted that it has a moral obligation to resolve historical injustices in accordance with the Treaty of Waitangi, and 'principles' derived from it.

Contemporary Treaty polemics reveal, however, that there are many contested, and at times competing, expectations of the Treaty settlement process, its aims and outcomes. There is a need, therefore, to articulate more clearly what it is that the Crown and Maori seek to achieve by resolving Maori historical grievances. It is also important to assess whether the Treaty settlement process is achieving its aims, and if not, to analyse why and how the process is falling short of its desired outcomes. The process can then be modified, where possible, to better achieve its goals in the future. Without questioning the moral imperative underlying the Treaty settlement process, the objective of this thesis is, therefore, to bring clarity to the Treaty settlement process discourse by identifying what the process aims to achieve, and to analyse whether it is achieving its aims.

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1 The Indigenous peoples of New Zealand. The word ‘maori’ means normal, usual or ordinary. It has been capitalised and used to refer to the Maori people collectively. R. Walker (1990) *Ka Whawhai Tonu Matou: Struggle Without End* Auckland, Penguin Books, p94.


3 The English and Maori texts of the Treaty of Waitangi (as they appear in the Treaty of Waitangi Act 1975) are provided in Appendix A of this thesis.


This thesis argues that amongst the apparent complexity and confusion of expectations of the Treaty settlement process there is a common theme: to achieve 'justice'. However, achieving justice in situations of historical injustice is extremely complex. Situations of historical injustice are peculiar things. They are not of the same ilk as simple wrongs, such as torts or breaches of contract where compensation is paid soon after the injustice by the wrongdoer to the victim, and where the parties are individuals or perhaps legal entities involved in commercial transactions. Historical injustices are concerned with the interactions of whole communities and cultures over time.

The types of historical injustices under focus in this thesis arose as a result of European colonial expansion, which imposed European peoples (and in the case of New Zealand, primarily people from the British Isles), and their cultures, on Indigenous populations (in New Zealand, Maori tribes or 'iwi'). Colonisation marginalised Indigenous peoples from growing capitalist economies, and degraded, and sometimes annihilated, their cultures. Today's 'post-colonial' societies manifest this historical legacy. For example, in contemporary New Zealand, Maori continue to occupy the margins of society experiencing poorer educational outcomes, higher unemployment, lower levels of income, lower rates of home ownership, and poorer health than Pakeha often as a result of continuing institutional racism. In addition, the Maori language is threatened with extinction.

\[6\] Although, as discussed in Chapter Three of this thesis, "ideas of justice in contract and reparation for breach of contract ... provided one of the main approaches to understanding justice between Maori and Pakeha". A. Sharp (1997) Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s 2nd edn, Auckland, Oxford University Press, p33.

\[7\] Translations of Maori words are provided when the word first appears in the text. Further translations are also provided when a Maori word is used in a different context later in the text, suggesting a different meaning. Maori is an official language of New Zealand and therefore, Maori words are not italicised as is the custom for foreign words. For the sake of consistency, the macron is not used and the 'ng' spellings of Maori words is used, rather than the southern dialectical 'k' except where common usage dictates otherwise (for example, the Waitaki River).

\[8\] Non-Maori New Zealanders, primarily of European descent. 'Pakeha' was a term originally used by Maori to describe the newcomers to their lands. According to Ranganui Walker, the word derives from 'pakepakeha' or 'pakehakeha' "which are defined in William's Dictionary as 'imaginary beings resembling men, with fair skins'". Walker, Ka Whaohi Tonu Matou,
In the exchanges which followed the arrival of the new settlers, there was an inevitable clash of cultural values where different standards of right and wrong were brought to the scene. These cross-cultural exchanges between Indigenous peoples and the new settlers highlighted different notions of justice. So much so that finding a common standard of justice, of how to decide what constitutes right and proper behaviour, and what was wrong and unjust in the past, has taken time and accommodation between the cultures concerned. Generations of living together in the same land, sharing lives and histories, have been necessary for the settlers to accept that the expropriation of Indigenous peoples' land without their consent, without a fair price or compensation having been paid, and the resulting marginalisation of Indigenous people in many societies today, is unjust and requires some form of contemporary reparation. The problem of finding shared notions of justice in contemporary contexts is often exacerbated by the fact that the state (in New Zealand, 'the Crown') is the historical 'wrongdoer' and, at the same time, has general 'good governance' duties in respect of the wider society and is ultimately responsible for dispensing justice within that society (albeit through different arms of the state).

Exactly what redress should be made today raises further complexities for the resolution of historical injustices. Once there is an acceptance that past injustices have shaped present interests and advantages in various ways, what ought to be done? Is it unjust to take from the descendants of the settlers, who are not personally responsible for the past injustices but perhaps enjoy some advantages of those past unjust acts, to compensate the descendants of the

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p94. For a discussion of the differences and commonalities between Maori and Pakeha, see Sharp, Justice and the Maori, pp41–69; and M. King (1985) Being Pakeha: An Encounter with New Zealand and the Maori Renaissance Auckland, Hodder and Stoughton.


10For example, a 1996 study indicated that only twelve percent of Ngai Tahu could converse in te reo Maori (the Maori language). Te Runanga o Ngai Tahu (1999) 1999 Annual Report Christchurch, Te Runanga o Ngai Tahu, p8.

11The following questions are adapted from R. Nozick (1974) Anarchy, State and Utopia Basic Books, p152.
victims who now occupy the margins of contemporary societies? What if injustices have had such damaging effects that a cultural community has disintegrated and ceased to exist as such, or has adapted itself so radically that the transformed community bears little resemblance to what it was at the time of the injustice? And what of the generations who lived under continuing conditions of injustice in the intervening years? How far back must one go to wipe the slate clean?

And there are other dilemmas. External surroundings may have changed. A homeland that once supported several thousand people may now have several million inhabitants. Is it just, or even feasible, to return lands unjustly expropriated in the past but which now are the home to many who have no other place of belonging? A traditional food gathering site that once nurtured plants and wildlife in abundance may now be an industrial wasteland, the waters polluted and the food sources gone. What is achieved in terms of righting a past wrong by returning such places to their former owners when the cultural value it once had is gone and current environmental laws may well impose severe obligations to clean up the land? And whilst the descendants of unjustly treated Indigenous peoples are over-represented in the lower socio-economic levels of contemporary societies, there are many others also in need of welfare and assistance. What redistribution of society's resources paid in reparation for historical injustices is 'just' in light of other competing social justice issues in contemporary contexts?

This thesis explores how New Zealand's Treaty settlement process is navigating this complex and difficult terrain of providing contemporary reparation for historical injustices in the context of the colonisation of New Zealand. After examining the myriad of expectations of the Treaty settlement process, Chapter Two suggests that 'justice' is the overriding aim of the Treaty settlement process. Chapter Three then examines the nature of justice in the Treaty settlement process and confirms that the primary aim of the process is to achieve 'justice'. It builds on the seminal work of both Andrew Sharp in *Justice and the Maori* and Jeremy Sharp, *Justice and the Maori*. 

\[12\]Sharp, *Justice and the Maori.*
Waldron in "Historic Injustice: Its Remembrance and Supersession"\(^\text{1}\) in their respective analyses of providing redress for historical injustices in the New Zealand context. In doing so, this thesis makes an original contribution to the better understanding of the nature of justice in New Zealand’s Treaty settlement process. Chapter Three argues that because historical injustices involve interactions between cultures over time, the justice available in the Treaty settlement process is shaped, and constrained, by two main factors: 'culture' and 'time'. In the Treaty settlement process, the standard of justice is sourced in the Treaty of Waitangi (the influence of 'culture') and contemporary and prospective justice concerns temper a full application of reparative justice (the influence of 'time').

To assess whether the Treaty settlement process is achieving this limited kind of justice available in the Treaty settlement process, this thesis examines the Ngai Tahu settlement in Part II (Chapters Four and Five), and the return of pounamu (also known as 'greenstone' and 'New Zealand jade')\(^\text{14}\) to Ngai Tahu as part of that settlement in Part III (Chapters Six–Nine). Part II begins by examining why the Ngai Tahu settlement and the return of pounamu make a good case study for examining the kind of justice being achieved in the Treaty settlement


\(^{14}\)Pounamu' has many meanings. It is a Maori term which includes nephrite (also known as jade), semi-nephrite, and bowenite (also known as 'tangiwai' or 'takiwai'). R. Beck (1984) New Zealand Jade Wellington, A.H. and A.W. Reed, chapter 1. These lithic resources are also commonly referred to as 'greenstone'. Ngai Tahu have various names for the different types of pounamu, depending on its colour, appearance and type. See Chapter Seven of this thesis for a discussion of Ngai Tahu traditions with respect to pounamu. A list of the different types of pounamu is provided at Appendix C of this thesis; and see R. Beck (1970) New Zealand Jade: The Story of Greenstone Wellington, A.H. and A.W. Reed Ltd, pp55–57. Bowenite is a variety of serpentine but for the purposes of this discussion, the term 'serpentine' is used to refer to all types of serpentine except bowenite. (Note that serpentine is not nephrite and does not display the re-crystallisation and felting of nephrite. Serpentine is "a mineral group (antigorite, chrysolite and lizardite), being hydrous magnesium silicates". It is commonly green and is derived "from the alteration of magnesium-rich rocks such as dunite, peridotite, etc". Beck (1984), New Zealand Jade, p163). South Westland Ngai Tahu sometimes also use the term 'pounamu' to refer to 'aotea' which is neither nephrite nor serpentine, but a different mineral again. It is valued by some South Westland whanau in the same manner as other pounamu. Ngai Tahu Development Corporation (1999) Pounamu Project Report on Ngai Tahu Cultural Values, unpublished paper, p10; Poutini Ngai Tahu individuals, Interviews with author, August 1998. Aotea was not part of the Ngai Tahu claim, the findings and recommendations of the Waitangi Tribunal, nor the settlement negotiations, and therefore, is not discussed in this thesis.
process. Chapter Four then analyses Ngai Tahu's attempts to gain 'justice' from the Crown. The chapter highlights the complexities of the Crown's purchases of the vast majority of Ngai Tahu's traditional territory,\(^\text{15}\) over half the land mass of New Zealand, in the 1840s–1860s. Ngai Tahu was left almost landless, and its mana (authority) over pounamu was denied. As the new settlers prospered, Ngai Tahu struggled to survive, both economically and culturally. Feeling that injustices had been done, Ngai Tahu began the long and arduous task of calling for 'justice' from the Crown. For over a century, the Crown made little effort to redress the situation.

In 1986, Ngai Tahu lodged a claim with the Waitangi Tribunal alleging that the Crown had failed to adhere to the principles of the Treaty of Waitangi, and as a result, its people had suffered cultural and economic loss. In particular, Ngai Tahu claimed the Crown had failed to protect Ngai Tahu's right to retain its taonga (treasure), pounamu. The Waitangi Tribunal upheld the majority of Ngai Tahu's claims and found that the Crown had "acted unconscionably and in repeated breach of the Treaty of Waitangi" in its dealings with Ngai Tahu.\(^\text{16}\) It also upheld Ngai Tahu's claims in relation to pounamu and recommended that all Crown-owned pounamu found naturally in Ngai Tahu's rohe (traditional territory) be returned to Ngai Tahu.\(^\text{17}\) Pounamu is primarily found in Ngai Tahu's rohe in areas adjacent to the Southern Alps, where it is formed deep beneath the earth's surface over millions of years.\(^\text{18}\)

Having therefore established that the Crown had committed an injustice requiring contemporary reparation, Ngai Tahu and the Crown went on to negotiate a settlement, largely

\(^{15}\)For a map of Ngai Tahu's traditional territory see Appendix B of this thesis.


\(^{18}\)A full geological survey of New Zealand's pounamu sources has never been undertaken, and thus the full extent of the resource is unknown. There are seven major known fields of pounamu in New Zealand, all of them situated close to the alpine fault in the South Island: Nelson, Westland, South Westland, Whakatipu (including the Dart), Wanaka, Livingstone and Milford. Beck (1984), *New Zealand Jade*, chapter 2. See also B. Brailsford (1984) *Greenstone Trails: The Maori Search for Pounamu* Wellington and Christchurch, Reed; and Beck (1970), *New Zealand Jade*. For a description of pounamu sources see Appendix C of this thesis.
based on the Tribunal's findings. The second part of Chapter Four explores the prolonged and difficult settlement negotiations, where the parties struggled at first to find a shared notion of justice. After almost six years of negotiations, representatives of Ngai Tahu and the Crown signed a 'Deed of Settlement' in November 1997, and the implementing legislation, Ngai Tahu Claims Settlement Act 1998 came into force on 1 October 1998.\(^\text{19}\) Chapter Four shows how the return of pounamu part-way through the negotiations was crucial to the success of the negotiations. Chapter Five analyses the range of remedies provided in the Ngai Tahu settlement and concludes that a large measure of justice was achieved. However, opposition to the settlement suggests that the settlement may not have tapped the full complexities of the historical and contemporary situations, and that new injustices may have been created in the process.

The return of pounamu is then examined in Part III to explore further the kind of justice achieved in the Ngai Tahu settlement, and the issues surrounding the possible creation of new injustices. Before analysing the substantive issues raised by the return of pounamu to Ngai Tahu, Chapter Six first examines why a culturally appropriate methodology for research into the return of pounamu was necessary and explains the research methodology adopted. Chapter Seven then analyses why pounamu was returned to Ngai Tahu, and why it made such a good symbol of justice in the Ngai Tahu settlement. Ngai Tahu believe that pounamu is an ancestor with mauri (life force) and wairua (life spirit), often connected with the atua (deity and ancestor) Ngahue. It symbolises the mana of the iwi, and thus its return to the iwi symbolised the mana of Ngai Tahu restored, an important aspect of justice in the Treaty settlement process. Chapter Seven also examines the way in which the contemporary context limits Ngai Tahu's full kaitiakitanga (care, good guardianship) of pounamu, thereby illustrating the limits of justice in the Treaty settlement process.

\(^{19}\text{The Ngai Tahu Claims Settlement Act Commencement Order 1998 (No 295).}\)
Chapter Eight investigates the issues of justice surrounding to whom pounamu was returned, again illustrating the constraints on the justice available in the Treaty settlement process. The Ngai Tahu (Pounamu Vesting) Act 1997 vested ownership of all Crown-owned pounamu in Te Runanga o Ngai Tahu. In accordance with the Waitangi Tribunal's recommendations and a clear understanding between Ngai Tahu and the Crown, the pounamu in the Arahura River was immediately transferred to the Mawhera Incorporation, a Maori incorporation representing Poutini (West Coast) Ngai Tahu. The chapter questions whether new injustices were created by returning pounamu to Te Runanga o Ngai Tahu and the Mawhera Incorporation. In each case there are doubts as to whether these contemporary entities are representative and enable all Ngai Tahu whanau (families) to exercise full kaitiakitanga with respect to pounamu.

The final pounamu chapter, Chapter Nine, reviews what was returned to Ngai Tahu and the impacts of the return on the (largely Pakeha) pounamu industry. As discussed in this chapter, there exists a substantial art and tourist-related industry based around pounamu, primarily situated on the West Coast of the South Island, but also extending throughout New Zealand. In an attempt to avoid the creation of new injustices, the Ngai Tahu (Pounamu Vesting) Act 1997 did not return all pounamu to Ngai Tahu: existing private property rights and mining privileges were saved. This further illustrates the limits of justice in the Treaty settlement process. But other interests in pounamu were not preserved, again raising the question of whether new injustices have been created.

This thesis concludes in Chapter Ten (Part IV) that the Ngai Tahu settlement and the return of pounamu to Ngai Tahu achieved a large measure of the kind of justice available in the Treaty settlement process. Chapter Ten analyses the issues surrounding the new injustices that may have been created by the return of pounamu. It argues that some of these newly created

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20 The deed of transfer of the Arahura pounamu had already been executed by the parties and, on its terms, the transfer was effected immediately the Ngai Tahu (Pounamu Vesting) Act 1997 became law. See Ngai Tahu (Pounamu Vesting) Act 1997, Recital F; Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/5; Te Runanga o Ngai Tahu representative, Interview with author, July 1998.
injustices reflect the difficulties of providing contemporary redress for historical injustices, while others point to deficiencies in the Treaty settlement process itself. This thesis closes with recommendations for maximising justice in the Treaty settlement process, based on the lessons of the Ngai Tahu experience.

Before turning to examine the aims of the Treaty settlement process and whether the process is achieving its aims, it is first necessary to be clear about exactly what the Treaty settlement process is. While it is relatively straightforward to define what the Treaty settlement process is, it is much more difficult to say exactly what the process does. The remainder of this chapter, therefore, is devoted to providing a brief definition of the Treaty settlement process, before the major task of examining what the process is aiming to achieve, and what it is in fact achieving, begins in Chapter Two.

1.1 WHAT IS THE 'TREATY SETTLEMENT PROCESS'?

The 'Treaty settlement process' comprises a range of formal procedures whereby Maori who claim to have suffered prejudice as a result of Crown acts or omissions in breach of the principles of Treaty of Waitangi, reach agreement with the Crown that an injustice requiring reparation did in fact occur, and negotiate appropriate redress to remedy the prejudice suffered. As will be discussed in more detail in Chapter Three, that standard of justice in the Treaty settlement process is found in the Treaty of Waitangi, and 'principles' derived from it. What is the Treaty of Waitangi, and what obligations does it impose on the parties to it?

The Treaty of Waitangi was signed by representatives of Her Majesty Queen Victoria and Maori rangatira (chiefs) on 6 February 1840, and subsequently. The precise meaning and

application of the Treaty has been the subject of sustained debate, not least because it was signed in both English and Maori languages (with many rangatira only signing a Maori version) where the English version is not a direct, or accurate, translation of the Maori version.22 Significantly, in the English version, Maori rangatira ceded full "Sovereignty" to the Crown, but in the Maori version only "Kawanatanga", most often translated as 'governance', was ceded.23 From the perspectives of the rangatira, 'kawanatanga' would not have had connotations of sovereignty: terms such as 'mana' (authority, control, prestige) or 'rangatiratanga' (chieftainship) would have more closely paralleled the concept of sovereignty.24

In exchange for ceding 'kawanatanga' or 'sovereignty', Article II of the Treaty reserved to Maori "tino rangatiratanga", their chieftainship, over their lands, homes and other "taonga", or "valuable possessions and attributes, concrete or abstract".25 In the English version this was worded as reserving to the maori rangatira their:

full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession...

The principal ambiguity in Article II surrounds the reservation of 'tino rangatiratanga'. From a Maori perspective:


22The English and Maori texts of the Treaty of Waitangi (as they appear in the Treaty of Waitangi Act 1975) are provided in Appendix A of this thesis.


24It has been suggested that if 'mana' had been used, few Maori rangatira would have signed the Treaty. Walker, Ka Whawhai Tonu Matou, pp91-93. See also Ross, Te Tiriti o Waitangi: Texts and Translations.

the guarantee of chieftainship is in itself a guarantee of sovereignty, because an inseparable component of chieftainship is mana whenua [tribal authority over land]. Without land a chief's mana and that of his people is negated. The chiefs are likely to have understood [Article II] of the Treaty as a confirmation of their own sovereign rights in return for a limited concession of their power in kawanatanga.26

Thus, there is a crucial tension between the grant of 'sovereignty' to the Crown in Article I, and the retention of 'tino rangatiratanga' by the Maori chiefs in Article II of the Treaty.

Despite the ambiguities and tensions inherent in, and arising from, the Treaty texts, the British Crown proclaimed its full sovereignty over the islands of New Zealand.27 In the case of the North Island, the proclamation was made on the basis of the Treaty of Waitangi, and in the case of the South Island, on the basis of discovery (thereby assuming that the South Island was terra nullius, that is, an empty land). The existence of Ngai Tahu, who inhabited the greater part of the South Island, was largely ignored.28 In issuing these proclamations, and in the subsequent colonisation of New Zealand that followed the signing of the Treaty, it seems likely that the British Crown, and later the Crown in right of New Zealand,29 took more sovereignty than was ceded under the Treaty, thereby effecting a 'quiet revolution'.30

For much of New Zealand's history the Treaty of Waitangi was regarded legally as "a simple nullity"31 confirming "the absolute sovereignty of the Crown and the incapacity of the Treaty of Waitangi to act as any qualification upon that sovereignty".32 After decades of sustained and increasing Maori objections to the Crown for its failure to recognise the Treaty of Waitangi, and calls for the Crown to 'honour' the letter and spirit of the Treaty, Maori protests escalated.

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29See the discussion in Chapter Three of this thesis.
30Brookfield, *Waitangi and Indigenous Rights*.
31Wi Parata v The Bishop of Wellington (1877) 3 NZ Jur (NS) 72 (SC).
In 1975 thousands of Maori joined a march on Parliament. The Land March of 1975 is commonly considered as "a transformative event in the history of contemporary Maori claims", and in response to such pressure, the Treaty of Waitangi Act 1975 was passed. As noted above, this Act established the Waitangi Tribunal to investigate Crown acts and omissions (at first from 1975 onwards) in terms of principles derived from the articles of the Treaty, and to make non-binding recommendations to resolve well-founded Maori claims. Over the next fifteen years, the jurisdiction of the Tribunal was increased indicating the Crown's growing acceptance of the Treaty as a source of binding obligations. In 1985, the jurisdiction of the Tribunal was made retrospective, and in 1988 and 1989 the Tribunal was given powers to make binding recommendations for the return to Maori claimant groups of certain Crown lands ('memorialised lands').

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34 McHugh, *From Sovereignty Talk to Settlement Time*, p456.
35 Note also the well-known Bastion Point protests.
37 Although note that the jurisdiction of the Tribunal is progressively decreased with the 'full and final' settlement of Treaty claims. Treaty of Waitangi Act 1975, ss6(7)-6(12). Note also the limitations on the Tribunal's jurisdiction with respect to recommendations relating to private land. Treaty of Waitangi Act 1975, s6(4A).
38 A further indication of the Crown's growing acceptance of the Treaty of Waitangi is the inclusion of Treaty principles in legislation. See for example, State-Owned Enterprises Act 1986, s9; Conservation Act 1987, s4; Resource Management Act 1991, s8; Crown Minerals Act 1991, s4; and Hazardous Substances and New Organisms Act 1996, s8. See also the discussion in Chapter Three of this thesis.
39 Treaty of Waitangi Amendment Act 1985, s3(1), substituting new s6(1) of the principal Act.
40 With increasing privatisation and transfer of Crown land and assets to state-owned enterprises, Maori were concerned that culturally significant land would become unavailable for the settlement of Treaty claims. In response to Maori court action, the jurisdiction of the Tribunal was again amended by the Treaty of Waitangi (State Enterprises) Act 1988. In the settlement of the New Zealand Maori Council case, the Waitangi Tribunal was given powers to make binding recommendations for the return to Maori ownership of land transferred to state-owned enterprises under the State-Owned Enterprises Act 1986. See *New Zealand Maori Council v A-G* 1 NZLR 641 (CA). Later, the Crown Forest Assets Act 1989 gave the Tribunal powers to make binding recommendations for the return of Crown forest land. The lands which may be subject to the Tribunal's binding recommendations are Crown forest land subject to a Crown forestry licence, or 'memorialised lands'. 'Memorialised lands' are those owned, or formerly owned, by a state-owned enterprise or a tertiary institution, or former New Zealand Railways lands that have a notation on the certificate of title that the Tribunal may order their return to Maori ownership. Treaty of Waitangi Act 1975, ss8A,8HB&8HJ. See J. Dawson (2001) *Remedial Powers of the Waitangi Tribunal*, *Public Law Review* 12(3).
With its increased jurisdiction and powers, "despite considerable dissatisfaction with [the Waitangi Tribunal] among its Maori clientele, [and] general Pakeha unease about its operations", it has remained a force to be reckoned with.\(^{41}\) In tandem with the New Zealand courts, the Waitangi Tribunal has played a pivotal role in defining the 'principles' of the Treaty of Waitangi, as the standard of just conduct between the Crown and its Maori Treaty partners. The principles are derived from the articles of the Treaty itself\(^{42}\) and are based on an understanding "that the Treaty is to be always speaking—it is to be made relevant to our times".\(^{43}\) In brief, the principles of the Treaty include: the Treaty implies a partnership between Maori and the Crown characterised by a duty to act in good faith and co-operation; the right of the Crown to govern is subject to a duty of active protection of Maori interests, and in particular, 'tino rangatiratanga' over resources and taonga (treasured possessions), but is not unreasonably restricted; and the Crown has a duty to remedy past breaches.\(^{44}\)

Filing a claim is the first step in the Treaty settlement process.\(^{45}\) The Treaty of Waitangi Act 1975 provides that any Maori, or group of Maori, who claim to have been prejudicially affected

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\(^{42}\) The Waitangi Tribunal is required to have regard to the two texts of the Treaty of Waitangi (as set out in the First Schedule to the Treaty of Waitangi Act), and for the purposes of the Treaty of Waitangi Act, the Tribunal has exclusive authority to determine the meaning and effect of the Treaty. Treaty of Waitangi Act 1975, s5(2).


by Crown acts\textsuperscript{46} or omissions since 6 February 1840, inconsistent with the principles of the Treaty of Waitangi, may submit a claim\textsuperscript{47} to the Waitangi Tribunal.\textsuperscript{48} The Tribunal, originally a body consisting of three members, now comprises a Chairperson, and Deputy Chairperson, and up to sixteen members appointed for their knowledge of, and expertise in, the various matters likely to come before the Tribunal.\textsuperscript{49} A panel of between three and seven Tribunal members is appointed to hear any particular claim, or group of claims. A presiding officer, with legal qualifications or being a judge of the Maori Land Court, is also appointed.\textsuperscript{50} Usually, there are roughly equal numbers of Maori and non-Maori Tribunal members.

\begin{footnotesize}
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\item \textsuperscript{46}These may include an Act of Parliament, an ordinance, a regulation, a proclamation, a notice, or any other statutory instrument, passed, made, issued, or given at any time on or after 6 February 1840 and whether or not still in force; any policy or practice, adopted (whether or not still in force), or proposed to be adopted, by the Crown; or any other act or omission at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown, that was, or is, inconsistent with the principles of the Treaty of Waitangi. Treaty of Waitangi Act 1975, s6(1).
\item \textsuperscript{47}Generally, a distinction is made between two types of claims. First, there are 'historical' claims, where the Crown acts or omissions occurred after the signing of the Treaty of Waitangi on 6 February 1840 but prior to 21 September 1992. Second, there are 'contemporary' claims, where the Crown act or omission occurred on or after 21 September 1992. This date is an arbitrary cut-off, and reflects the date on which the (former) National Government confirmed its general policy for the settlement of Treaty of Waitangi claims. Office of Treaty Settlements, \textit{Healing the Past, Building a Future}, p22.
\item \textsuperscript{48}Treaty of Waitangi Act 1975, s6(1). The Tribunal also has power to examine proposed legislation, but only where it has been referred to the Tribunal in one of two ways. First, in the case of a Bill before the House of Representatives, it must be referred by a resolution of the House, and second, in the case of any proposed regulations or Order in Council, it must be referred by any Minister of the Crown. The Tribunal may only report whether, in its opinion, the proposed legislation, or any of its provisions, are contrary to the principles of the Treaty of Waitangi. Treaty of Waitangi Act 1975, s8.
\item \textsuperscript{49}Treaty of Waitangi Act 1975, s4. The Chairperson is a judge, or retired judge, of the High Court, or the Chief Judge of the Maori Land Court (s4(2)(a)). The Deputy Chairperson is a judge of the Maori Land Court (s4A). The Waitangi Tribunal is a permanent Commission of Inquiry subject to the provisions of the Commissions of Inquiry Act 1908 (except ss11&12 of the Commissions of Inquiry Act 1908). Treaty of Waitangi Act 1975, clause 8 of the Second Schedule. The Tribunal is serviced by the Waitangi Tribunal Business Unit. The staff of the Business Unit administer claims and hearings, undertake claims research, provide report writing and editorial assistance to Tribunal members, provide library and information services, and provide general administration and financial services to the Tribunal.
\item \textsuperscript{50}Treaty of Waitangi Act 1975, clause 5 of the Second Schedule.
\end{itemize}
\end{footnotesize}
In most cases, after a claim is lodged the Tribunal will hear the claim, or sometimes part of the claim.\textsuperscript{51} The Tribunal’s process is inquisitorial and the Tribunal may conduct its own research, or commission research on its behalf.\textsuperscript{52} Its process is flexible, particularly when it comes to hearings, which are often ‘marae-style’ following the local customs of the Maori claimant group, and the rules of evidence are not strictly applied.\textsuperscript{53} After hearing a claim, the Tribunal will issue a report of its findings on whether or not the Crown acted inconsistently with the principles of the Treaty, and therefore, acted unjustly. The Tribunal usually makes some general recommendations to the Crown, suggesting that action be taken to redress well-founded claims, but in most cases it leaves the Crown and the claimant group to negotiate a detailed settlement package.\textsuperscript{54} Sometimes, the Tribunal will recommend that the Crown take specific action. Except in certain circumstances, the Tribunal’s recommendations to the Crown are not binding.\textsuperscript{55}

\textsuperscript{51}Claims are not necessarily heard in order of filing. Claims are divided into two groups: district claims and generic claims. District claims relate to a particular location or area. Generic claims do not relate to any one particular locality and may relate to matters of national importance or general government policy. This division of claims is taken into account for administrative and scheduling purposes. For example, with respect to historical claims, the Tribunal has adopted a ‘casebook method’ of inquiry. According to this approach, the Tribunal groups the claims relating to a particular district together, ensures that all the claims in a district are fully researched before hearings start, and the evidence is compiled into a ‘casebook’. All claims in a district are heard at the same time. Priority of scheduling is based on a number of factors. See Waitangi Tribunal, Guide to the Practice and Procedure of the Waitangi Tribunal, pp3-4. The Tribunal may, in appropriate circumstances, grant an urgent hearing. See Waitangi Tribunal, Guide to the Practice and Procedure of the Waitangi Tribunal, pp4-5.

\textsuperscript{52}Treaty of Waitangi Act 1975, clause 5A of the Second Schedule.

\textsuperscript{53}Generally, the Tribunal endeavours to hear claimants at the venue of their choice, often at local marae (meeting house) in accordance with local tikanga (protocol). Melvin, \textit{The Claims Process of the Waitangi Tribunal}, p32. See also Durie and Orr, \textit{The Role of the Waitangi Tribunal} and Boast, \textit{The Waitangi Tribunal: Conscience of a Nation}, or Just Another Court? When the Tribunal is hearing the Crown’s evidence, or that of third parties, it will often sit at a neutral venue such as a public hall or conference centre. Evidence may be given in Maori or English. Treaty of Waitangi Act 1975, clause 6 of the Second Schedule.

\textsuperscript{54}Treaty of Waitangi Act 1975, ss6(3)&(4).

\textsuperscript{55}See Treaty of Waitangi Act 1975, ss8A–8HJ. Note that although the Tribunal has jurisdiction to inquire into claims which relate to private land, it may not recommend that private land be returned to Maori ownership, or that it be acquired by the Crown, unless memorialised. Treaty of Waitangi Act 1975, s6(4A).
Introduction

After the Tribunal's report and recommendations, the Crown and the claimant group will usually open negotiations to settle a claim, often culminating in an agreement (frequently in the form of a 'Deed of Settlement') between the Crown and the claimant group. In the case of historical claims, settlements are invariably expressed to be for the 'full and final' settlement of all of the group's historical grievances. A settlement agreement will usually also include the withdrawal of any current litigation by the claimant group.

56 Whilst 'any Maori' or 'any group of Maori' may make a claim to the Waitangi Tribunal under s6(1) of the Treaty of Waitangi Act 1975, the Crown will generally only negotiate with iwi, or larger hapu groupings, having a mandate. See Office of Treaty Settlements, Healing the Past, Building a Future, p45. Note also M. Wilson (2000) New Principles to Guide the Settlement of Historical Treaty Claims, Government Press Release, 20/07/2000. This issue is discussed further in Chapters Three and Eight of this thesis.

57 Treaty of Waitangi claims may also be settled through litigation in the New Zealand courts. M. H. Dune (1998) Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination Auckland, Oxford University Press, p179. Litigation is a limited option for claimant groups because the Treaty must be incorporated into domestic law before the courts have jurisdiction to hear a claim that the Treaty has been breached by the Crown. Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] AC 308 (PC). It was not until the 1980s that the Treaty began to be incorporated into domestic law through reference to the principles of the Treaty. For example, State-Owned Enterprises Act 1986, s9; Conservation Act 1987, s4; Resource Management Act 1991, s8; Crown Minerals Act 1991, s4; and Hazardous Substances and New Organisms Act 1996, s8. In fact, many historical injustices involved acts of the Crown undertaken in accordance with legislation in force at the relevant time, for example the way that the Native Land Court operated after 1865. Office of Treaty Settlements, Healing the Past, Building a Future, pp46&50. Therefore, litigation of Treaty matters has tended to focus more on contemporary claims than historical claims, where litigation is not often available. Even where the courts are directly involved in Treaty-based claims, they have not generally imposed settlements on the parties, rather suggesting that a political settlement be reached. Note the settlement of New Zealand Maori Council v A-G 1 NZLR 641 (CA) which involved the Crown agreeing to amend the Treaty of Waitangi Act, as discussed above, this chapter. Despite these limitations, Maori litigation has been an important driving force in the overall evolution of the Crown's policy towards the settlement of historical claims, and in developing a Treaty jurisprudence. Indeed, often one of the Crown's objectives in making settlements with iwi is to prevent further court action, and to reduce its contingent liability. As Chapter Four of this thesis demonstrates, Ngai Tahu's use of litigation in the course of negotiating a settlement with the Crown was a key incentive for the Crown to reach a negotiated settlement with the iwi. Note also the use of the litigation in the course of the commercial fisheries settlement negotiations. Further, particular issues relevant to a claim settlement may be settled by the courts. For example, the Maori Land Court may determine the most appropriate representative of a claimant group under section 30(1)(b) of Te Ture Whenua Maori Act 1993.

Mediation is another avenue for settling Treaty claims. The Treaty of Waitangi Act provides that at any time after a claim has been lodged, the Tribunal may refer a claim to mediation, on its own volition or at the request of one or both of the parties. Treaty of Waitangi Act 1975, clauses 9A–9D of the Second Schedule. Private mediation of selected issues is encouraged by the Tribunal and is particularly suitable where agreement is required between two or more claimant groups, or between claimants and 'third parties', for example. The Tribunal may adjourn all or part of a hearing while mediation takes place, and will give appropriate weight to any mediated agreement. The Tribunal will only direct a claim to be mediated where it is satisfied that the historical information concerning the claim is
Negotiating a settlement with the Crown takes place through the Office of Treaty Settlements and involves four steps: first, preparing a claim for negotiations; second, pre-negotiations; third, negotiations leading to a Deed of Settlement; and fourth, ratification and implementation of the agreement which may include legislation to give effect to the settlement. The initial stage of negotiating a settlement involves acceptance by the Crown that a group's claim is well-founded and that it has a mandate from its members. The Crown may accept responsibility for injustices based on the findings of a Waitangi Tribunal hearing, or where historical grievances involve acts or omissions which the Crown has generally accepted as being a breach of the Treaty. The latter may include confiscations of Maori land by the Crown under the New Zealand Settlements Act 1863 ("raupatu"), aspects of land purchases between 1840 and 1865, and certain Native Land Court actions. At any time after lodging a claim with the Waitangi Tribunal, a claimant group may approach the Crown to open 'direct negotiations' to settle a claim without the need for a full hearing by the Tribunal, or perhaps after a hearing only on selected issues.

sufficient. The parties to the mediation are the claimant group and the Crown. Mediation differs from the Crown (Office of Treaty Settlements) negotiations process in that a settlement is mediated by an independent mediator, rather than directly negotiated between the parties themselves. Mediation has been used infrequently (Durie cites two settlements which have been achieved by mediation. Durie, Te Mana, Te Kawanatanga, p179) but offers a largely unexplored opportunity for future settlements. Note the Waitangi Tribunal's use of preparatory and interlocutory conferences and mediation procedures. Waitangi Tribunal, The Waitangi Tribunal's Inquiry into Historical Claims: A New Approach.

Established in January 1995, the Office of Treaty Settlements is a separate unit within the Ministry of Justice reporting directly to the Minister in Charge of Treaty of Waitangi Negotiations. See Office of Treaty Settlements, Healing the Past, Building a Future, p47.


The Crown will agree to proceed to direct negotiations only where minimal further research of the claim is required. See Office of Treaty Settlements, Healing the Past, Building a Future, Part 4, pp41-77.
A claimant group may return to the Waitangi Tribunal after settlement negotiations have commenced, and perhaps have stalled, for a remedies hearing. A remedies hearing will take place where the claimant group has requested that the Tribunal use its binding powers to recommend the return of Crown forest land subject to a Crown forestry licence, or memorialised lands, to the claimant group.62 The Tribunal may not, however, inquire into claims that have been settled with the Crown.63 For the purposes of this thesis, the Treaty settlement process is considered complete when a settlement agreement is signed by both parties and an apology made, and any legislation required to give effect to the settlement agreement becomes operative.64

1.2 WEAVING A STORY

Having established what the Treaty settlement process is, this thesis now explores what the process is seeking to achieve, and whether it is achieving its aims. There are many strands intertwined to weave the story that follows. There are strands of hopes and expectations of 'justice' and cultural renewal for Maori; there are strands of injustice, disappointment and loss of trust; and there are strands of joy, and of the honour of the Crown restored, when Ngai Tahu's long-standing claims of injustice were finally recognised and a settlement made. The Ngai Tahu settlement and the return of pounamu to Ngai Tahu has affected many lives, and as I write, the story continues to evolve. Ngai Tahu is taking up the opportunities provided by the settlement

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62 Treaty of Waitangi Act 1975, ss8A–8HJ. As noted previously in this chapter, memorialised lands are those owned, or formerly owned, by a state-owned enterprise or a tertiary institution, or former New Zealand Railways lands that have a notation on the certificate of title that the Tribunal may order their return to Maori ownership.
63 Treaty of Waitangi Act 1975, ss6(7)–6(12).
64 Anything done after the settlement legislation comes into force is considered to be implementation of the settlement reached. This is, perhaps, an artificial distinction. Obligations arising out of the settlement may be ongoing and become part of a new, re-formed relationship between the Crown and iwi. Further, because implementation is likely to involve continuing obligations and relationships, the Treaty settlement process itself can be viewed as ongoing, without a finite end. Therefore, the distinction between the Treaty settlement process itself, and implementation of a settlement, is necessary to analyse critically the success of the Treaty settlement process, and to distinguish the Treaty settlement process from other, contemporary processes such as the ongoing Treaty partnership between the Crown and Maori.
and the return of pounamu, and is reviving its culture. The individual strands of this story continue to intertwine and weave the main thread, that of 'justice' in the Treaty settlement process.
PART I  THE AIMS OF THE TREATY SETTLEMENT PROCESS
CHAPTER TWO

THE TREATY SETTLEMENT PROCESS: GREAT EXPECTATIONS

2.1 A GLIMPSE OF JUSTICE

2.2 OTHER EXPECTATIONS: CULTURAL SURVIVAL AND THE FUTURE TREATY RELATIONSHIP

2.3 CLARITY LOOMS ON THE HORIZON
The discourse surrounding Maori claims to the Waitangi Tribunal reveals a great deal of confusion about the Treaty settlement process, its aims and outcomes.\textsuperscript{1} There is no single authoritative statement or public agreement between the parties concerning exactly what it is that the Treaty settlement process is seeking to achieve. Providing contemporary redress for historical injustices is a complex, and at times confusing, task. In addition, there are many perspectives of the past, and its relevance for our actions today. Accordingly, there are many, sometimes divergent, expectations of the process and what it seeks to deliver. Is it possible to glean an overriding aim of the Treaty settlement process from the confusion and complexity?

Exploring the many stated aims, objectives, and expectations of the Treaty settlement process suggests that there may be an overriding aim looming on the horizon, sometimes in sight, other times out of sight: to achieve 'justice'. The debate surrounding Treaty settlements reveals that achieving justice is often explicitly identified as the aim of the Treaty settlement process. At other times achieving justice is implicit in the parties' expectations. They identify goals which either suggest links with justice, or seem to be about applying justice in the Treaty settlement process.

However, just as we catch a glimpse of justice as the primary aim of the Treaty settlement process and fix an eye on this aim, it shimmers and any fixity of purpose wavers. The parties also talk of expectations which indicate two other, apparently distinct, threads of purpose: ensuring cultural survival for Maori, and laying the foundations for the future Treaty partnership. These two threads seem to crowd in and obscure any line of sight to a possible

overriding aim of achieving justice in Treaty settlements. What, then, is the aim of the Treaty settlement process?

2.1 A GLIMPSE OF JUSTICE

Both Maori and the Crown alike have directly asserted that 'justice' is a principal aim of the Treaty settlement process. For example, Mason Durie, a Maori academic reporting on the deliberations of a national Maori hui in January 1995 convened to respond to the 1994 Crown Proposals for the Settlement of Treaty of Waitangi Claims, stated in respect of settlements, "[i]t is hoped that both parties will be primarily concerned with justice." Former Tainui leader, the late Robert Te Kohati Mahuta, reflecting on his experiences negotiating a...
settlement of Tainui's historical grievances, speaks of "seeking justice" from the Crown. Ngai Tahu, too, has spoken of "years of struggle to get the justice of our claim recognised and dealt with".

The pursuit of justice is also one of the driving purposes of Crown policy for the settlement of Treaty of Waitangi grievances. Crown policy implies a goal of achieving justice by acknowledging that Maori have suffered historical injustices at the hands of the Crown and seeking to resolve such grievances. The Minister in Charge of Treaty of Waitangi Negotiations from 1991 to 1999, Douglas Graham, has argued that Treaty settlements "are simply a matter of justice" and also that "[t]he negotiation and settlement of grievances is designed to right a wrong done". Likewise, former Prime Minister of New Zealand, Geoffrey Palmer, has suggested that the "main business" for New Zealand society is to ensure "that Maori grievances are addressed and that justice is done".


8The portfolio of 'Minister in Charge of Treaty Negotiations' was created in 1993. Douglas Graham was 'Treaty Negotiations Minister' from 1991 until 1993.


Sometimes, however, the parties refer more indirectly to achieving justice in the Treaty settlement process. One example expressed by Maori claimants and the Crown alike, is the ambition to remove any sense of injustice which Maori feel as a result of Crown breaches of the Treaty of Waitangi. This will occur when justice is achieved. Removing Ngai Tahu’s sense of injustice was clearly articulated as an important goal of the Ngai Tahu settlement. The Waitangi Tribunal also has emphasised the importance of healing the wounds of the past, and the Tribunal’s director, Morris Te Whiti Love, sees it as the key to the success of the process.

There is also talk of the desire to move on from a grievance mode, to a development mode, with Maori taking a more active role in New Zealand society. For example, the Crown has stated, "A fundamental aim of the settlement process is to have Maori and the wider community shift their focus away from grievances toward the growth and development of Maori potential".

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15Love, Director, Waitangi Tribunal, Interview.


In the case of the Ngai Tahu settlement, the need to move on from grievance mode was explicitly acknowledged. Tipene O'Regan, principal Ngai Tahu settlement negotiator, described the Ngai Tahu claim as "a taniwha, a monster that has consumed our tribal lives down through the years as generation after generation has struggled for 'justice'," a taniwha which must be laid to rest if Ngai Tahu is to take full control of its destiny. The implication is that this shift can only occur when justice is achieved.

Restoring the honour of the Crown is also an important objective of the Treaty settlement process, and was acknowledged as such in the Ngai Tahu settlement. This is another indirect reference to the aim of achieving justice. St. Augustine once said: "Take away justice ... and what is a state but a large robber band?" In other words, the legitimacy of a state rests, to a large degree, on its ability to dispense justice as it is due. Therefore, providing justice for historical grievances is likely to quieten Maori assaults on the legitimacy of the New Zealand state, and reduce Maori protest and violence.
In addition, Treaty settlements should not create any new injustices.\textsuperscript{23} In this respect, the Waitangi Tribunal has stated: "It is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party while creating another for another".\textsuperscript{24} Because creating fresh injustice would not itself be just, it is clear that the Treaty settlement process seeks to achieve justice in an overall sense, both historically and in light of contemporary circumstances, or put differently, to achieve a situation which is just, now, for all New Zealanders. For example, private property is not available for redressing claims because it may be unjust, in the contemporary context, to disturb existing interests to provide historical justice despite the fact that much land taken unjustly by the Crown may therefore be unavailable for return to Maori.\textsuperscript{25} The expectation that private property will not be used in settlements is reflected in section 6(4A) of the Treaty of Waitangi Act 1975. It has been highlighted in Crown policy\textsuperscript{26} primarily to reassure the wider New Zealand public, and reflects the fact that the Crown is bound to act in the best interests of all New Zealanders in accordance with its general 'good governance' duty.\textsuperscript{27} This was acknowledged in the Ngai Tahu settlement.\textsuperscript{28} This example is simple enough. But applied in other ways the expectation

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\textsuperscript{24}Waitangi Tribunal, \textit{The Waiheke Island Claim Report}, p47.

\textsuperscript{25}However, as Sharp points out, some existing interests must be disturbed if there is to be any reparation at all. Sharp, \textit{Justice and the Maori}, p123. Just when existing interests should 'trump' any application of reparative justice will be examined in Chapter Three of this thesis and later, in the context of the return of pounamu to Ngai Tahu, in Chapter Nine of this thesis.

\textsuperscript{26}Office of Treaty Settlements, \textit{Crown Proposals: Summary}, p5; Office of Treaty Settlements, \textit{Healing the Past, Building a Future}, p23. See also the Treaty of Waitangi Act 1975, s6(4A), which prevents the Waitangi Tribunal from ordering (a) the return to Maori ownership of any private land, or (b) the acquisition by the Crown of any private land.


\end{footnotesize}
that Treaty settlements should not create any new injustice raises other tensions and complexities, at times causing confusion.

Sometimes, the expectation that the process will not create new injustices is expressed in terms of fairness and equity, terms which (at least in common usage) strongly suggest links to achieving justice.\textsuperscript{29} For example, Crown policy has stated that settlements should be fair and equitable between claimant groups.\textsuperscript{30} Again stemming from its good governance duty, the Crown's objective is to be fair and equitable in its delivery of justice in the contemporary context, while also providing historical justice in each particular claim. E. T. Durie, Chairperson of the Waitangi Tribunal, High Court Judge, and former Chief Judge of the Maori Land Court, also sees equity as an important objective of the Treaty settlement process. He has stated:

\begin{quote}
... the most pressing questions for the moment, as I see them, are questions of equity. I have referred to one, equity between tribes themselves, and this appears to me to be absent, and this is the most demanding issue for Maori at this moment [1995].

We have also to consider equity as between traditional and urban groups. The urban dispossessed appear to have been largely omitted from the equation so far, and yet they may represent the main casualties of our history and they may form the largest Maori in number.

And, of course, the settlement process is also about equity between Maori and Pakeha. In addressing these issues ..., we may find that at the end of the day the constraint upon us is not the economy but the limit to our own imaginations or the limit to our ability to capture a better vision for the future.\textsuperscript{31}
\end{quote}

Durie's comments point to the complexity of the wider context of Treaty settlements and historical injustices generally. Whole communities and cultures have been, and are being, affected and implicated over time. What can concepts such as 'justice', 'fairness' and 'equity'


mean in the Treaty settlement process? Does any one imply another?

Not everyone agrees that the Treaty settlement process should be concerned with equity. For example, O’Regan argues that Treaty settlements are essentially about rights under Article II of the Treaty and that, therefore, issues of fairness and equity are irrelevant in the Treaty settlement process. However, O’Regan has also stated that the Ngai Tahu claim and settlement were a struggle for 'justice'. Perhaps this indicates disagreement over the content or application of justice in the Treaty settlement process, whilst confirming the aim of achieving 'justice' as an overarching ideal.

At the risk of confusing matters even more, the question of who is expected to benefit from Treaty settlements reveals further disagreement and tension regarding the aims of the Treaty settlement process. Will individuals profit directly from settlements, or will Maori collectives benefit (and therefore individuals benefit through participating in the activities of those collectives)? Furthermore, should both traditional and contemporary collectives benefit from Treaty settlements? Some argue that iwi (traditional tribal groups), only, can expect to benefit from settlements: modern pan-tribal or urban collectives do not hold Article II rights and therefore, cannot and should not benefit from historical Treaty settlements. Durie suggests a more contemporary perspective:

Presumably, the purpose of a claims resolution policy is not merely to pay off debts, but to ensure some lasting and durable benefit for the greater number of Maori who bear the consequences of historic action. It appears many of the ultimate beneficiaries are now resident outside tribal areas and are serviced by or have developed allegiances to ...
urban pan-tribal collectives. There are issues of whether and how these are to be accommodated, or how interests are to be adjusted between traditional and modern combinations.\textsuperscript{37}

Who is intended to benefit from settlements is further complicated by an expectation that Treaty settlements contribute to equalising current socio-economic inequality between Maori and Pakeha.\textsuperscript{38} Crown policy states:

Most New Zealanders are also concerned about the many inequalities between Maori and non-Maori in areas such as educational achievement, health, housing, employment and imprisonment rates. Settlements of historical grievances cannot, by themselves, resolve these issues. However, settlements can help, along with other measures, to provide Maori communities with tangible recognition of their mana and a resource base for future development.\textsuperscript{39}

On its face, the desire to reduce inequality again suggests a strong link to achieving justice as a primary aim of the Treaty settlement process. However, the expectation that settlement assets will serve as an economic base for claimant groups to use, as they choose, to further develop their people raises still further complexity.\textsuperscript{40} Given that socio-economic status is measured by the relative wealth (in terms of per capita income, housing, educational outcomes, professional status and the like) of individuals, how will, or should, individuals benefit from an increased collective economic base? What does 'justice' require?

These complexities aside, the expectations concerning equity and equality of outcome of Treaty settlements suggest that the Treaty settlement process aims principally to achieve 'justice', in some sense. These expectations, however, also demonstrate conflict and confusion about how such lofty ideals might be achieved. Evident particularly, is a tension between the notion of providing historical justice (in terms of righting a past wrong with a consequent focus on

\textsuperscript{38}Office of Treaty Settlements, Crown Proposals, p44.
\textsuperscript{39}Office of Treaty Settlements, Healing the Past, Building a Future, p16, see also p93; Crown Officials, Office of Treaty Settlements, Interviews.
traditional tribal structures) and the justice the *contemporary* context may appear to demand (in terms of no new injustices, equity, fairness, or need). As a result, the 'justice' achievable in the Treaty settlement process remains unclear; its precise meaning in this context must be explored. Furthermore, although 'justice' stands out as a principal aim of the process, there are two other threads of expectation which do not immediately appear to be about justice: namely, ensuring cultural survival and laying the foundations for the future Treaty partnership.

### 2.2 OTHER EXPECTATIONS: CULTURAL SURVIVAL AND THE FUTURE TREATY PARTNERSHIP

Whilst there is talk of 'justice' in the Treaty settlement process, Maori, particularly, also express other expectations. For example, O'Regan stated:

> In bringing the claim before the Waitangi Tribunal the Ngai Tahu tribe seeks to have its mana restored in its ancestral territories in terms of the Treaty, and the subsequent land deeds, to secure a future relationship with the Crown founded on the Treaty, to negotiate a partnership with the Crown in the control and management of resources on land and sea, to achieve compensation for past wrongs, and be re-established as a significant participant in the economy of our traditional territory.\(^{41}\)

Such aspirations suggest that, apart from achieving justice, Maori look to the Treaty settlement process as a means of ensuring Maori cultural survival, renewal and development, and providing for future Maori-Crown partnerships based on the Treaty of Waitangi.

**Cultural survival**

Academic Ken Coates has asserted that a primary aim of Indigenous peoples, including Maori, in settling historical grievances is to ensure their 'cultural survival':

> For indigenous peoples and organisations, the resolution of their claims and grievances is vital to cultural survival and the continuing struggle for linguistic integrity.

\(^{41}\)O'Regan, The Ngai Tahu Claim, pp261-262.
Whether the issue is reaching the settlement of a land claim, seeking recourse for the abrogation of a treaty, or securing constitutional recognition of the fact of aboriginality, indigenous groups consider these elements as small steps towards the larger goal of cultural survival. \(^{42}\)

The New Zealand debate substantiates Coates' claim. \(^{43}\) Maori lawyer, activist, and now Chief Judge of the Maori Land Court, Joe Williams, agrees with Coates in this respect, arguing: 'To Maori, their survival as a discrete cultural, linguistic, political, and economic group within New Zealand is the purpose of the [Treaty settlement] process'. \(^{44}\) Other Maori agree. \(^{45}\) The Waitangi Tribunal, too, has explicitly acknowledged that Treaty settlements should ensure 'cultural survival' for Maori. \(^{46}\)

The goal of 'cultural survival', far from being minimalist, encapsulates many aspects including renewal, restoration, development, and ultimately a flourishing of Maori culture. In the New Zealand context, terms such as 'cultural survival' and 'tribal restoration' are used to refer to the restoration, re-establishment and recognition of tribal mana, rangatiratanga and turangawaewae (a place to stand, standing in the community). For example, the Waitangi Tribunal in its *Orakei Report* stated:

Any policy of tribal restoration must in our view be directed to assuring the tribe's continued presence on the land, the recovery of its status in the district and the

\(^{42}\)Coates, International Perspectives, p29.

\(^{43}\)Coates goes on to argue that governmental expectations include permanent resolution of Indigenous demands. This point is not borne out in New Zealand practice. See below, this chapter, and Office of Treaty Settlements, *Healing the Past, Building a Future* in terms of the concept of historical claims and contemporary claims, particularly at p22.


The Treaty Settlement Process: Great Expectations

These aspects of cultural survival (or tribal restoration) have been expressed as separate expectations of the Treaty settlement process. For example, both Maori and the Crown have clearly stated that settlements should recognise and restore the mana of Maori claimant groups. Some emphasise the restoration of Maori rangatiratanga. The Waitangi Tribunal has, on a number of occasions, clearly stated that the restoration of tribal mana and rangatiratanga, which include re-establishing mana whenua’s special relationship with their taonga and the environment generally (kaitiakitanga), are extremely important goals of Treaty settlements.

Recognition of Ngai Tahu’s cultural position in the South Island, and particularly the re-establishment of Ngai Tahu’s place in the landscape, was an important goal of many Ngai Tahu in the settlement of their claim. Specifically, Ngai Tahu wanted to secure input into government environmental decision making, especially in relation to culturally significant sites. Further, Ngai Tahu sought the return of mahinga kai (those places where food was

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52 Cook, Lecture.
traditionally produced or procured, which includes an extensive range of resources in and on the
land, forests, lakes, rivers, sea and air) and culturally important resources (such as pounamu) to
re-establish and revive cultural practices.53

The re-establishment of an economic base for Maori collectives has long been a prominent goal of
Maori.54 This is an indispensable prerequisite of cultural survival; an economic base provides
the material foundations from which Maori collectives can exercise mana and rangatiratanga,
and may also form the basis, at least in part, for re-establishing turangawaewae for future
generations.55 The Waitangi Tribunal has emphasised the importance of an economic base to
sustain tribes as distinct polities.56 The Crown, too, views an economic base as important in the
cultural development of Maori collectives, and it is seen by some as a key goal of Treaty
settlements.57 An economic base may include both land, resources, and financial assets, as it did
in the Ngai Tahu settlement.58

As a consequence of restoring a tribal economic base, some expect that Maori collectives will be
able to establish their own programs for cultural renewal without relying on governmental
funding.59 For example, as historian Alan Ward has suggested in relation to reparation:

53O'Regan, The Ngai Tahu Claim, pp249-250. Further, once settlements are made, the
considerable human and material resources required to pursue a Treaty claim and to negotiate a
settlement are expected to be used pro-actively to rebuild tribes and strengthen cultural ties.
This was explicitly acknowledged by Ngai Tahu as a consequent goal of the settlement with
1999 Annual Report Christchurch, Te Runanga o Ngai Tahu, p28; Cook, Lecture.
54R. Walker (1990) Ka Whawhai Tonu Matou: Struggle Without End Auckland, Penguin,
55See for example Waitangi Tribunal, The Turangi Township Remedies Report, p15 and Ward,
The National Overview, vol 1, p140.
56Waitangi Tribunal, The Waiheke Island Claim Report, p41; Waitangi Tribunal, The Orakei
Claim Report, p263; Waitangi Tribunal, The Ngai Tahu Report, p1056; Waitangi Tribunal, The
Turangi Township Remedies Report, pp14–15; Waitangi Tribunal, Te Whanganui-A-Orotu
Report on Remedies, p21; Waitangi Tribunal, Determination of Preliminary Issues, Appendix E.
See also Williams, Quality Relations, p263.
57Crown Official, Office of Treaty Settlements, Interview. This view is also supported by
Love, Director, Waitangi Tribunal, Interview.
58See Chapter Five of this thesis for further details. Note also O'Regan's comments cited at
footnote 41 of this chapter.
The goal is restoration of the tribal community. The community cannot seriously function as such without community-owned resources to manage and deploy. But with a substantial capital base, the community can embark on a variety of business enterprises; develop the tribal estate; preserve tribal knowledge, marae, and other central facilities; and perhaps assist community members with special needs in respect of housing or education.\footnote{Ward, \textit{The National Overview}, vol 1, p139.}

Statements such as this are, however, controversial. Once Maori collectives are financially secure and providing some social services to their members, the Crown may abdicate its ongoing Treaty responsibilities under Article III of the Treaty, insisting that Maori provide for their own from an increased economic base.\footnote{Settlement negotiator, Te Runanga o Ngai Tahu, Interview.} In an attempt to allay this fear, Crown policy explicitly acknowledges that "[t]he settlement of historic claims does not remove the Crown's ongoing obligations under the Treaty".\footnote{Office of Treaty Settlements, \textit{Healing the Past, Building a Future}, p22. Note also the Waikato-Tainui settlement, which specifically acknowledged the Crown's ongoing Treaty obligations to the tribe. Waikato Raupatu Claims Settlement Act 1995, Recital X.} This raises the issue of the relationship between Treaty settlements and the ongoing nature of the Treaty partnership.

\textit{The future Treaty partnership}

Treaty settlement discourse also reveals that many Maori expect the Treaty settlement process to provide the necessary institutional changes to ensure that their ongoing relationship with the Crown reflects the Treaty applied in contemporary contexts. For example, O'Regan's aspirations for Ngai Tahu included securing "a future relationship with the Crown founded on the Treaty".\footnote{O'Regan, \textit{The Ngai Tahu Claim}, pp261–262. The theme of ongoing and new partnerships is also evident in Coates' analysis of Indigenous peoples' goals generally. Coates, \textit{International Perspectives}, particularly at p29.} Ngai Tahu also expressly sought an "effective partnership with the Crown in the management of those few [mahinga kai] that remain".\footnote{O'Regan, \textit{The Ngai Tahu Claim}, p254.} The Waitangi Tribunal, too, has stressed that settlements should ensure improved future Treaty partnerships between Maori claimant groups and the Crown.\footnote{For example the Waitangi Tribunal has explicated the purpose of re-establishing an "effective interaction between the treaty partners" as an aim of settlements. Waitangi}
However, some commentators have suggested that governments generally have a more retrospective view on resolving historical injustices:

For most national and regional governments, the objective is far more direct: to acknowledge the injustices of the past, to conclude a settlement consistent with national resources and political conditions, and to settle outstanding grievances once and for all. To the extent that substantial consensus has emerged in many western democracies about indigenous rights, it consists of an expectation that the settlements of land claims or constitutional aspirations would resolve permanently the demands brought forward by indigenous organisations.\textsuperscript{66}

In contrast, New Zealand government policy demonstrates a clear acknowledgement of a continuing relationship with Maori. For example, Crown policy states:

The resolution of historical grievances is a necessary first step towards establishing healthy and robust relationships necessary to enable the country to cope with, and benefit from, the opportunities and challenges of the twenty-first century. A focus on the continuing management and development of relationships between the Crown and Maori reflects the underlying purpose of the Treaty of Waitangi and the work of the courts and the Waitangi Tribunal in recent years.\textsuperscript{67}

Further, the title of the Crown’s 1999 Treaty settlement policy framework, \textit{Healing the Past, Building a Future}, is germane.\textsuperscript{68}  


\textsuperscript{68}Office of Treaty Settlements, \textit{Healing the Past, Building a Future}, pp3,16&81–83, particularly at p81. It has already been noted that Crown policy acknowledges that Treaty settlements are not intended to replace rights under Article III of the Treaty of Waitangi. See also second and third reading speeches for the Ngai Tahu Claims Settlement Bill 1998, 567 \textit{NZPD} (31/3/1998), pp7940–7958 and 572 \textit{NZPD} (29/9/1998), pp12369–12389 respectively. In addition, Crown officials charged with negotiating settlements have clearly elucidated a
Waitangi Negotiations, has explicitly acknowledged that Treaty settlements are "only the beginning of a new relationship."\(^6\) \(^9\) Whilst Crown policy is retrospective in that it clearly indicates the ambition to conclude \textit{historical} claims fully and finally,\(^7\) \(^0\) this is seen as a necessary precondition for new Treaty partnerships to evolve.\(^7\) Further, part of the Crown's desire for an improved Treaty partnership is its expectation that Maori litigation against the Crown, and therefore court intervention in government processes arising out of Maori claims to land and resources, will be drastically reduced.\(^7\) \(^2\) This was particularly important in the Ngai Tahu settlement in relation to state-owned enterprise land and Crown forestry licence lands in Ngai Tahu's tribal area.\(^7\)

More ambitiously, some assert that:

There are, besides Maori, many other New Zealanders who concur that wrongs have been done to Maori, and should be addressed as soon as possible in order that a more cohesive and harmonious nation of New Zealanders can emerge and move on into the future.\(^7\) \(^4\)

The improvement of relations between Maori and Pakeha is explicitly acknowledged in Crown policy as a desired outcome of the Treaty settlement process.\(^7\) \(^5\) Whilst strictly speaking the prospective expectation that Treaty settlements will provide the foundations for the Crown-Maori partnership to better reflect the Treaty. Crown Official, Ministry of Justice, Interview; Crown Officials, Department of Conservation, Interviews; Solicitor, Chapman Tripp, Interview.


\(^{71}\)On this latter point see Palmer, The International Practice, p100.


\(^{74}\)Mahuika, Whakapapa is the Heart, p214.

Treaty partnership is between the *Crown* and Maori, relations between Maori and Pakeha in the wider community impacts on the ability and willingness of the Crown to meet its Treaty obligations. By taking "some steps to put right" historical injustices, the Crown "hopes to lay the basis for greater racial harmony" and provide the necessary conditions for an improved Treaty relationship.\(^{76}\)

Cultural survival, and laying the foundations for the future Treaty relationship—the two threads of expectation of the Treaty settlement process presented in this section—are clearly linked. Cultural survival is not simply about the past; it is ongoing and prospective. It includes cultural revival and development, and an ongoing relationship with the Crown based on the Treaty. Accordingly, the settling of historical claims can be seen from Maori perspectives as "a single stage in the process of cultural survival and renewal",\(^{77}\) a means to an end, not the end itself. In addition, cultural survival is clearly a necessary precondition for a future relationship between the Crown and Maori collectives which reflects the Treaty. Maori must be sustained and flourishing in their culture before the Treaty partnership can reach its full potential.

### 2.3 CLARITY LOOMING ON THE HORIZON

What a lot of talk about the Treaty settlement process and what it seeks to achieve! What can be made of the complexity and confusion of expectations? Maori and the Crown have made it clear that each seeks 'justice' as a result of Treaty settlements. There are also other justice-related expectations of the process which support the assertion that achieving 'justice' is the primary aim of the Treaty settlement process. These justice-related expectations are at times

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\(^{77}\)Coates, International Perspectives, p68.
contested, leading to confusion, possibly as a result of differing perspectives, and opinions on the application, of justice in the Treaty settlement process. However, Maori have also clearly identified a desire to survive and flourish as Maori, and to secure a relationship with the Crown which reflects the Treaty in contemporary contexts. The Crown also talks of these goals in the Treaty settlement process. These two threads of expectation are related—each is necessary to achieve the other—although it is not immediately apparent how they relate to 'justice'.

Amongst the confusion and complexity of expectations there is, therefore, only a glimpse of 'justice' as the principal aim of the Treaty settlement process, together with two further associated threads of expectation. Can we be certain that it is 'justice' that the Treaty settlement process is seeking to achieve? What does 'justice' mean in the Treaty settlement process? And, how are the other threads of expectation related to 'justice'? The following chapter examines 'justice' in New Zealand's Treaty settlement process and demonstrates that the two further threads of expectation, rather than being two distinct purposes, are in fact intertwined with, and indeed essential parts of, the overall aim of achieving 'justice'. 
CHAPTER THREE

JUSTICE IN THE TREATY SETTLEMENT PROCESS

3.1 TALKING JUSTICE

3.2 THE INFLUENCE OF 'CULTURE'

3.3 THE INFLUENCE OF 'TIME'

3.4 CONCLUSION
3.1 TALKING JUSTICE

Maori and the Crown expect the Treaty settlement process to achieve 'justice'. However, Treaty discourse reveals that there is no consistent conception of that justice, and that other threads of expectation, not apparently about justice, also exist. The debate about justice in Treaty settlements also displays conflict, confusion and complexity. What is 'justice' in the Treaty settlement process, and why does it engender conflict, confusion and complexity?

Justice is a virtue.\(^1\) It is an ideal which most, if not all, societies wish to achieve, and is "a fundamental and indispensable organizing principle for any kind of human association".\(^2\) Justice may be conceived in terms of (moral or legal) rights, which ultimately depend on conceptions of what is good for individuals, groups, cultures, and for society as a whole.\(^3\) What is 'good' and 'right' in one particular situation may, however, not be so in another; differing priorities may be present, particularly in differing cultural contexts. Variation in the content of justice across history and cultures is a result of the myriad of situations in which the principle of justice must do its work. In other words, whilst the ideal of justice may well be universal, its content or exact application varies with context.

Situations of historical injustice concern the interactions between cultures over time. In New Zealand, the attempt to achieve justice in the Treaty settlement process is a response to the

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\(^3\) A. Sharp (1997) *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s* 2nd edn, Auckland, Oxford University Press, p30. See also Cullen, Philosophical Theories of Justice, p29 and following, referring to the theories of Nozick and Dworkin as examples.
interactions since 1840 between the cultures of the (once colonial) Crown and the Indigenous inhabitants of New Zealand, Maori, and their descendants. Thus, the two most important contextual factors influencing the kind of justice available in the Treaty settlement process are 'culture' and 'time'. How do cultural and temporal factors shape the kind of justice achievable in New Zealand's Treaty settlement process?

First, Maori and the Crown bring different conceptions of justice, of right and wrong, and of the 'good', to any debate about justice in what has become a shared, New Zealand, society. Justice has been, and will continue to be, influenced by the interaction of those cultural perspectives. Justice in the Treaty settlement process, therefore, can only be that part of justice which is shared, or agreed to, by both Maori and the Crown. This shared conception of justice is derived from the Treaty of Waitangi. The Treaty, therefore, provides a shared standard of just conduct between Maori and the Crown, but also, as a consequence, limits what can be achieved in the Treaty settlement process.

Second, justice in situations of historical injustice is essentially about making right a past wrong. This kind of justice, reparative justice, is historical and retrospective. However, because reparation is made in contemporary contexts, justice in the Treaty settlement process is not full reparative justice: contemporary and prospective concerns also influence Treaty settlement justice. In righting a past wrong, we cannot allow a strict application of reparative justice to take society along a path contrary to that which the justice of today requires. Justice is compromised if, in righting one wrong, we create new injustices—the contemporary context must therefore temper the application of reparative justice. Accordingly, the justice to be done in the Treaty settlement process is a mix of retrospective, contemporary, and prospective, justice concerns.

The influence of 'culture' and 'time' on justice in the Treaty settlement process is also reflected in the two threads of expectation identified in the previous chapter: ensuring cultural survival and laying the foundations for the future Treaty partnership. These threads are thus revealed as aspects of justice in the context of the Treaty settlement process; threads which are intertwined with the explicit aim of achieving justice. Justice is, therefore, the principal aim of the Treaty settlement process, albeit limited by cultural and temporal constraints.

3.2 THE INFLUENCE OF 'CULTURE'

In any cross-cultural discourse about 'justice'—such as that which occurs on the Treaty settlement process—how can we be sure that the parties are talking about the same thing, indeed have a common goal, and not just talking past each other? 'Justice' is not an object 'out there', independent of the meanings given to it in different contexts, or against which any translation of the word can be verified in cross-cultural exchanges. When two cultures meet, interact, and speak about justice, each brings its historical and cultural perspective to those interactions, perhaps highlighting certain facets or applications of justice in the process. Those conceptions of justice might be very different. In the New Zealand context, academic Andrew Sharp's comprehensive study of Maori claims to justice shows that the main cultural groups in New Zealand, Maori and Pakeha, "as a matter of fact ... have separate and often contradictory conceptions of what justice demands". Is there any overlap or agreement between these different cultural perspectives of justice in contemporary New Zealand?

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6 Sharp, Justice and the Maori, p1.
A shared standard of justice

Sharp suggests that there is an agreed or shared justice in New Zealand, sourced in the Treaty of Waitangi:

It is an ancient idea to think that in the absence of widespread agreement on the depth and detail of justice a thinner conception of justice can be constructed by two or more parties. This justice can now be enforced as justice must be if it is to be justice and not just an ideal of good conduct. It can be enforced because now justice consists in giving people their rights specified in contract rather than their rights according to the disputed conceptions of what justice is.7

Sharp demonstrates that (at least from 1987) Maori made the Treaty of Waitangi a sacred, solemn contract, and the standard of justice between Maori and the Crown.8 Although the wider Pakeha population have undoubtedly lagged behind in accepting the Treaty as the standard of justice, at least by the mid-1980s for the first time there was growing support in government circles for the notion of the Treaty as the standard of justice, breaches of which required reparation.9 The establishment of the Waitangi Tribunal in 1975, the extension of its jurisdiction to cover historical claims in 1985,10 and the various ways in which the principles of the Treaty were enshrined in legislation in the 1980s and 1990s,11 demonstrate the growing acceptance of the Treaty as a standard of just conduct between Maori and the Crown.12 The jurisdiction of the Waitangi Tribunal, in particular, clearly shows that the Treaty is to be the standard of justice between the Crown and Maori.13 The statements of the New Zealand Court of Appeal in the 1987 New Zealand Maori Council v A-G case, for example, have also been

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7Sharp, Justice and the Maori, p32 (original emphasis) and see pp32–34.
9Sharp, Justice and the Maori, pp100–102.
12More recent Crown policy clearly acknowledges this: "The Crown has accepted a moral obligation to resolve historical grievances in accordance with the principles of the Treaty of Waitangi". Office of Treaty Settlements, Healing the Past, Building a Future, p9.
13See the Treaty of Waitangi Act 1975, s6.
extremely influential in establishing the Treaty as a source of binding obligations. Accordingly, the 'justice' of the Treaty settlement process is found in the shared institution of the Treaty of Waitangi.

The Treaty of Waitangi is well suited to act as a shared standard of just conduct for a number of reasons. First, by viewing New Zealand history through the lens of the Treaty of Waitangi, an allegorical history—from which to draw lessons for present and future applications of justice—can be constructed. In this vein, Sharp suggests the Treaty has become something of an oracle. It has become the focus of contemporary attempts to make sense of a shared past: conversations about what was right and wrong in that past, what implications past wrongs have in the present, and therefore, also a dialogue about the present and the future. As the cornerstone of a New Zealand story of justice and injustice, therefore, the Treaty enables Maori and the Crown to agree that a breach of the Treaty is an injustice.

Second, the Treaty can be interpreted as a contract. In its early reports the Waitangi Tribunal interpreted the Treaty as a document containing strict rights and corresponding duties, so that any breach of the Treaty is an injustice requiring reparation. Accordingly, the Treaty has allowed "ideas of justice in contract and reparation for breach of contract" to guide the Maori-

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15Unless the context otherwise requires, reference in this thesis to 'the Treaty' or 'the Treaty of Waitangi' include references to the principles of the Treaty. Some readers may consider the argument that the standard of justice in the Treaty settlement process is found in the Treaty of Waitangi to be axiomatic. The Treaty of Waitangi Act 1975 determines the jurisdiction of the Tribunal, based on the Treaty as the standard of justice, and thereby sets the parameters of much of what follows in the Treaty settlement process. The point is, however, that the standard of justice could be found elsewhere, perhaps resulting in a wider conception of justice than that which the Treaty offers.
16Sharp calls this 'juridical history' and suggests that it is "to engage in a mode of representing the past so as to make it available to legal and quasi-legal judgement in the present". He suggests that doing this kind of history "is not really doing history at all". A. Sharp (1997) History and Sovereignty: A Case of Juridical History in New Zealand/Aotearoa. In M. Peters (ed) Cultural Politics and the University in Aotearoa/New Zealand Palmerston North, Dunmore Press, pp159-160.
17Sharp, Justice and the Maori, p140.
18Sharp, Justice and the Maori, p131-140 referring particularly to the Tribunal's Reports on the Waiau Power Station, Te Atiawa, the Kaituna River, the Manakau Harbour, Te Reo Maori and Muriwhenua Fishing.
Crown dialogue of justice in the Treaty settlement process. However, this approach has disadvantages. Situations of historical injustice are not standard cases of breach of contract where reparation is made soon after the breach, so it is somewhat ironic that this is how the Treaty settlement dialogue is often framed. Further, the Treaty itself does not easily lend itself to debate which requires agreement about its exact meaning. The Treaty has many interpretations: "It has multivalent locutionary force because it is in two languages, in at least five versions in English; and though it is in only one version in te reo Maori, Maori is a language which plays on multivalence." Added to this, the Treaty of Waitangi was inexpertly and hurriedly drawn up, there is much doubt as to how much, if anything at all, was understood by many signatories. There can, therefore, only be speculation on the parties' exact intentions at the time of signing.

Perhaps in response to these problems of interpreting the Treaty as a contract containing strict rights, the New Zealand Parliament, the Waitangi Tribunal, and the courts, have also viewed the Treaty as a living document which speaks in contemporary contexts, and have emphasised the principles of the Treaty, rather than its strict text. This is a third reason why the Treaty is well suited to acting as a shared conception of justice: it enables the Crown

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23See for example the legislation cited this chapter at footnote 11, the Waitangi Tribunal Reports cited this chapter at footnote 24, *New Zealand Maori Council v A-G* [1994] 1 NZLR 513 (PC), p517, per Lord Woolf and see *New Zealand Maori Council v A-G* [1987] 1 NZLR 641 (CA), p663, per Cooke P.
and Maori to look to the future as well as into a shared past (since the signing of the Treaty), and to determine the just boundaries of their relationship over time.

To summarise, the Treaty as shared justice enables the Crown and Maori to agree that a breach of the Treaty (or its principles) is an injustice requiring reparation, and that a just relationship between the parties over time is bounded by the Treaty. Because there is much ambiguity in the Treaty itself, and in its practical application, there is often disagreement between the Treaty partners as to the precise application of the Treaty in any given situation, and as to the exact boundaries of the Treaty relationship. All these specifics must be negotiated. The point, however, should be clear: the Treaty frames the justice of the Treaty settlement process and the dialogue which takes place within this process.

The Treaty as shared justice and expectations of justice

What are the implications of the Treaty as shared justice? One implication is that the threads of expectation identified in the previous chapter—ensuring cultural survival for Maori and laying the foundation for the future Treaty partnership—are revealed to be facets of the aim of achieving justice in the Treaty settlement process.

If the standard of justice in the Treaty settlement process is located in the Treaty, then justice exists in fulfilling the promises of the Treaty. Article II of the Treaty guarantees to Maori rangatiratanga over their lands and other taonga, which has been interpreted by the Waitangi Tribunal as including a guarantee of tribal mana, rangatiratanga, and turangawaewae, albeit adapted in light of the changed circumstances of the contemporary context. 24 In other words,

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the Treaty guaranteed to Maori their cultural survival. Accordingly, the expectation that the Treaty settlement process will ensure cultural survival for Maori is an expectation that, through settlement redress, the Crown will meet the standard of justice contained in the Treaty. This is 'culture' shaping the content or application of justice in the Treaty settlement process. In a similar manner, the second thread of expectation is also revealed as being an expectation of justice. The expectation that the Treaty settlement process will lay the foundations for a future Maori-Crown relationship based on the Treaty is an expectation of future just conduct, as found in the Treaty. This second thread of expectation is a combination of the influence of both 'culture' and 'time' on the content of justice in the Treaty settlement process.

The complexity and confusion of expectations, goals and objectives of the Treaty settlement process discussed in the previous chapter are now shown to be aspects of, or perspectives on, the content of justice, the principal aim of the Treaty settlement process.

**Constraints flowing from the Treaty as shared justice**

A further implication of the Treaty of Waitangi being the source of shared justice in the Treaty settlement process is that justice is constrained in two important respects. First, the boundaries of the sovereignty arrangements established by the Treaty itself apply.°° Debate is therefore focused on the relationship between the sovereignty (kawanatanga) ceded to the Crown under Article I of the Treaty, and the rangatiratanga (authority, chieftainship) retained by Maori according to Article II. For some, this is a severe limitation on the justice which Treaty settlements are able to achieve, and accounts for some of the conflict in Treaty settlement discourse.

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Muriwhenua Claims (Wai 45 and others), Chief Judge Durie (Presiding Officer), unpublished memorandum.

°°Note Brookfield's analysis, however, which suggests that the Crown took more sovereignty than it was ceded under the Treaty of Waitangi and has effected a 'quiet revolution'. F. M. Brookfield (1999) *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* Auckland, Auckland University Press.
The second major constraint flows from the first. Because the ultimate sovereignty of the Crown is not under question in the Treaty settlement process, the Crown, as sovereign, has general 'good governance' duties with respect to the New Zealand community as a whole. It also remains responsible for dispensing justice, albeit through different arms of the state in accordance with the principles of Westminster government and the separation of powers. But, the Crown is also the 'wrongdoer' in this scenario of historical injustice, and the contemporary entity responsible for making reparation.26 Australian academic Susan Dodds has suggested that in such situations "there is a genuine question about the authority of the state to encapsulate indigenous people's concerns within the state".27 A similar line is taken by academic James Tully who, focussing on the North American context, argues that "many of the representative Western theories of property do not provide an impartial conceptual framework in which [Indigenous peoples'] demands for justice with respect to property can be adjudicated".28 He suggests that a "cross-cultural 'middle ground' composed of early modern Aboriginal and common-law systems of property, and their authoritative traditions of interpretation", is required in such situations.29 Leaving aside the inherent difficulties of achieving an 'impartial' conceptual framework, in New Zealand some of the issues identified by Dodds and Tully are ameliorated by the unique status and operation of the Waitangi Tribunal.

The Waitangi Tribunal embodies bicultural elements and has played a key role in developing a New Zealand-based bicultural jurisprudence.30 The Tribunal has provided a forum for the greater understanding of the issues at stake for Maori claimant groups through the re-telling of history from the claimant group's perspectives, and has provided an analysis of the effects of

26 T. O'Regan, Settlement negotiator, Te Runanga o Ngai Tahu, Interview with author, November 2000.
29 Tully, Aboriginal Property, p154.
past wrongs from within the institutions and value systems of particular claimant groups.\textsuperscript{31} To some extent, then, these factors suggest the Treaty settlement process is a 'cross-cultural middle ground' and go some way to countering the fact that settlements are, in general, made within a system based on common law principles.

However, the Tribunal's limited ability to bind the Crown diminishes these positive aspects of the Tribunal's work and suggests that the Crown holds most, if not all, of the cards, and can decide whether or not to play by the rules of the game in the Treaty settlement process. For example, the Crown is not bound by the Tribunal's findings of fact and therefore, is not bound by the Tribunal's determination that a breach of Treaty principles has (or has not) taken place.\textsuperscript{32} Consequently, the Crown can reject the resulting inference that an injustice requiring reparation has in fact occurred (and face any resulting public disapproval).\textsuperscript{33} Moreover, the Tribunal has limited powers to bind Crown action, and has generally only made non-binding recommendations regarding appropriate Crown reparation, leaving the Crown and Maori claimant groups to negotiate just redress.\textsuperscript{34} Ultimately, the Crown has power to dissolve the

\textsuperscript{31}Dodds, Justice and Indigenous Land Rights.

\textsuperscript{32}Note that the opinions of the Waitangi Tribunal are not binding on the courts in proceedings concerning Acts other than the Treaty of Waitangi Act 1975 (see s5(2) of that Act), but are of "great value": New Zealand Maori Council v A-G [1987] 1 NZLR 641 (CA), pp661–662, per Cooke P. Note also that the Tribunal can only inquire into proposed legislation at the request of Parliament, or a Minister of the Crown. Treaty of Waitangi Act 1975, ss6&8.


\textsuperscript{34}See the Treaty of Waitangi Act 1975, ss8A–8HJ. For example in \textit{Te Whanganui-A-Orotu Report on Remedies}, the Tribunal did not make binding recommendations in a number of instances where it could have, preferring instead to leave the matter for settlement between the parties with the option of coming back to the Tribunal if a settlement could not be reached. Waitangi Tribunal (1998) \textit{Te Whanganui-A-Orotu Report on Remedies}, pp17 and following. The Tribunal made its first binding recommendations in 1998 in the Turangi Township Remedies
Tribunal. In direct negotiations, the merger of the Crown's roles as 'provider of justice' and 'wrongdoer', and the resulting potential for conflict of interests, is particularly obvious.

The merging of Crown roles thus limits the kind of justice which the Treaty settlement process is able to achieve, and the justice of the Treaty settlement process is, in these respects, a negotiated justice. Therefore, the Treaty settlement process engenders contested views of justice, leading to an apparent confusion and complexity of expectations of the Treaty settlement process, as revealed in the previous chapter.

**Mutual Understandings**

To conclude, the Treaty of Waitangi provides a point of convergence in the cross-cultural dialogue of justice which takes place in the Treaty settlement process. The Treaty (and its principles) are the shared, contested and evolving, standard of justice against which the relationship between the Crown and Maori can be measured, and provides the parameters for the parties to negotiate the application of justice in each Treaty claim and settlement. In some respects, therefore, justice sourced in the Treaty is a more limited notion of justice than either party might otherwise claim or bargain for. In particular, the Treaty limits the justice available in the Treaty settlement process in two principal ways. First, the sovereignty arrangements set down in the Treaty are not under question (although the exact way they should be implemented may be negotiable). Second, the Crown is to an extent both 'judge' and decision. Waitangi Tribunal, The Turangi Township Remedies Report. However, Dawson suggests that the threat of the use of the Tribunal's binding powers is a great incentive for the Crown to reach settlements with claimant groups. For a detailed analysis of the Tribunal's remedial powers see J. Dawson (2001) Remedial Powers of the Waitangi Tribunal, Public Law Review 12(3).

35Luban suggests that legal negotiation and political bargaining are beset with "the paradox of compromise: commitment to a principle means commitment to seeing it realized. But in practice this means compromising the principle (since all-or-nothing politics is usually doomed to defeat)—and compromise is partial abandonment of the principle. Conversely, refusal to compromise one's principles means in practice abandoning entirely the hope of seeing them realized. Morality and its abandonment seem to implicate one another—that is the paradox of compromise". D. Luban (1985) Bargaining and Compromise: Recent Work on Negotiation and Informal Justice Philosophy & Public Affairs 14(4), pp414-415, original emphasis. On negotiated justice see I. Macduff (1995) The Role of Negotiation: Negotiated Justice Victoria University of Wellington Law Review 25.
'wrongdoer' in the Treaty settlement process, although through different arms of the state. These two constraints explain some of the confusion and complexity of expectations of justice in the Treaty settlement process.

3.3 THE INFLUENCE OF 'TIME'

In the Treaty settlement process, justice is primarily about putting right historical wrongs, and therefore, is largely historical and retrospective. However, the Treaty settlement process is also expected to achieve fairness, equality, contemporary justice (no new injustices), and reduce inequalities in current, and future, social and economic arrangements. These expectations suggest, therefore, that justice in the Treaty settlement process is not purely retrospective, but also embraces contemporary and prospective justice concerns. How much of the justice of the Treaty settlement process is retrospective, and how much is it contemporary and forward-looking?

From a Western liberal perspective, there are two different kinds of justice: distributive justice and reparative justice. Distributive justice concerns the justice of distributions of resources (and duties) in society. Western philosophers have suggested various theories to guide the distributions of social and economic arrangements and institutions based on criteria such as need, fairness, equality, complex equality, mutual advantage, reciprocity,

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36 Sometimes also referred to as 'social justice' or 'social equity'.
37 Aristotle, Nicomachean Ethics, p35.
38 Aristotle refers to the "distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution". Aristotle, Nicomachean Ethics, p35.
40 See generally Cullen, Philosophical Theories of Justice, pp33–37.
impartiality, desert, or rights. Setting aside debate about these theories, it is important to appreciate that distributive justice is largely contemporary and prospective in focus, and differs in nature and purpose to the other kind of justice, reparative justice.

Reparative justice, in contrast, involves putting right past wrongs, and as such, it is the dominant mode of justice in the Treaty settlement process. It is largely historical in focus. Sharp explains:

Reparative justice is a reciprocal exchange between two equal parties, recognizing the same standards of right, whereby one party having done wrong to the other, repairs that wrong by restoring the wronged party to his, her, their or its ... position before the wrong. I wrongly take your land; I return it. I arrogate your authority; I restore it to you. I do not benefit from the transaction: your suffering is relieved; balance is restored and justice in transactions is done. A debt—generated by the wrong action—is discharged in the reparation: what is owed is paid, what is taken is restored.

Put simply, reparative justice "consists in having an equal amount before and after the transaction". This notion of justice accords with the Maori principle of 'utu' meaning 'repayment' or 'compensation' or 'reciprocity', restoring some sort of balance, exacting what is

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42See Cullen, Philosophical Theories of Justice, pp27-29 discussing Brian Barry's theories of justice as mutual advantage and justice as impartiality, and the references provided there.
43Cullen, Philosophical Theories of Justice, pp37-39.
44Sharp defines distributive justice as "giving to classes of people what is theirs by right, where classes are distinguished by characteristics that call for or generate those good things that can be thought to be demanded for them as of right". Sharp, Justice and the Maori pp29-30. See also Cullen, Philosophical Theories of Justice, pp29-33, referring to the theories of Robert Nozick and Ronald Dworkin.
47Sharp, Justice and the Maori, p34. Note that Sharp refers to an 'original' position in the passage quoted. This has been omitted lest it be confused with Rawls' well-known concept of an original position in his theory of distributive justice.
48Aristotle, Nicomachean Ethics, p38. According to Aristotle, reparative justice involves equalising a wrong whereby the gain from that wrong is taken from the wrongdoer and the loss of the victim is given back. Aristotle, Nicomachean Ethics, p37
due, what is demanded by the situation".49 Significantly, because "utu is essentially a mechanism for restoring lost mana",50 it is a core aspect of justice in the Treaty settlement process (that is, ensuring cultural survival). Many Maori argue for reparation in this vein: "As land was taken, so land should be returned".51 However, it is not always so simple. To understand why reparation made in contemporary contexts is more complex than this simple rule suggests, it is necessary first to appreciate how reparation works in contemporary contexts.

**Approaches to reparative justice**

The first step of reparative justice is to determine that a wrong has been done. In the Treaty settlement process, the Treaty of Waitangi provides the necessary standard of justice to ascertain when a wrong has been done. The next step, ideally, is to return the victim to their position before the breach. But how can this be done? We cannot turn back the clock, nor can we erase the fact that generations have lived their lives in conditions of ongoing injustice, or lived with the effects of particular acts of injustice. Situations of historical injustice involve complex interactions of communities over time where, in addition to numerous isolated incidents of past injustice, there are continuing institutional injustices:52

The world we know is characterized by patterns of injustice, by standing arrangements—rules, laws, regimes, and other institutions—that operate unjustly day after day. Though the establishment of such arrangements was an unjust event when it took place in the past, its injustice then consisted primarily in the injustice it promised for the future.53

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53Waldron, Historic Injustice, p154.
Accordingly, reparative justice in the Treaty settlement process must ameliorate the effects of each past injustice and of ongoing injustice, as well as prevent the repetition of injustice caused by continuing unjust arrangements. 54

One approach, the 'counterfactual approach', concentrates on ameliorating the effects of past injustice. 55 One begins by imagining what New Zealand would be like today if the particular Maori claimant group in question had not suffered historical injustice. The second step is to provide redress to ensure that the actual situation matches, as far as is possible, the imagined, or counterfactual, situation of no injustice. The victims of injustice, Maori claimants, will thereby be put in the position they would have been, but for the injustice. 56 In terms of utu, the balance is thereby restored.

Another approach, the 'restoration approach', focuses on remitting ongoing injustice. This second approach seeks to restore that which was taken unjustly (for example, property, authority or mana), thereby preventing the continuation of that injustice. 57 Again, there are similarities with the Maori concept of utu as a process of restoring lost mana.

The counterfactual and restorative approaches are not mutually exclusive and both offer guidance in navigating the complex territory of historical injustice. 58 There are situations where reparation might entail both models: in the New Zealand context we may wish to restore unjustly expropriated land, and therefore mana, and pay compensation to fully reflect

54Waldron, Historic Injustice, p145.
56Sharp notes the difference in legal theory between the remedy in contract law (to restore the wronged party to the position they would have been if the promise had been kept) and tort law (where the remedy intends to put the victim in the position had the wrong not occurred). Sharp, Justice and the Maori, p35.
57Waldron, Historic Injustice, pp146 & 153–159. It must be acknowledged, however, that the damage to the Maori-Crown relationship, particularly the loss of trust, caused by historical injustices will be difficult to heal.
58Waldron, Historic Injustice, p146.
the situation the victims of that theft would have enjoyed had the expropriation not occurred (for example, to reflect an income stream the land may have generated during the period of expropriation). Further, a counterfactual approach may involve restoration of something denied unjustly where that thing would have been retained but for the injustice. Similarly to the counterfactual approach, the restoration approach may require changes to unjust institutional arrangements which perpetuate breaches of the Treaty of Waitangi, to ensure that contemporary and future arrangements reflect the principles of the Treaty. Accordingly, the difference in application between the two approaches is at times subtle.

Using these approaches as conceptual tools, some philosophers have suggested that reparative justice raises practical problems so serious as to throw doubt on the ability to provide justice in situations of historical injustice at all. These problems arise because (retrospective) reparative justice is applied in contemporary contexts. These dilemmas will now be explored in the context of the Treaty settlement process, to determine whether there can be any justice at all in Treaty settlements.

**Who's who in historical injustices?**

One dilemma raised by philosophers of justice in situations of historical injustice is who ought to pay compensation or make restoration, and to whom? Because decades or centuries may have lapsed between the time of the injustice and the present in which reparation is being made, in most cases the individuals involved in the historical situation of injustice are no longer alive. What rights do present-day descendants of the victims have to claim recompense for what was done to their ancestors, and what duties do the current generation owe to make good those wrongs?

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Some philosophers have suggested that an individual cannot be harmed by (unjust) events occurring before that individual was conceived, and moreover that present-day individuals may owe their very existence to such events. They conclude therefore, that present-day individuals cannot claim recompense for events occurring before their lifetimes. This reasoning suggests that, in the Treaty settlement process, individual Maori have no moral claim to reparation for breaches of the Treaty of Waitangi suffered by their ancestors. The Treaty settlement process recognises, however, that past injustices may have ongoing effects, and that injustices may persist over time: any Maori who claims to be prejudicially affected by breaches of the Treaty, including breaches going back to the signing of the Treaty, can make a claim to the Waitangi Tribunal.

The ongoing effects of historical injustice and persisting injustices do seem to affect communities over time. Present-day communities may well suffer the consequence of past wrongs (for example, in the case of Maori exhibiting low socio-economic status) and therefore, it can be argued that there is a moral right to redress persisting over time, despite the death of the individuals directly involved in the past wrong. Alternatively, one can reason that because only communities can be harmed by injustices occurring before the time of their individual members' respective conceptions, "the only entities capable of deserving reparations for ancient wrongs are 'communities'." Accordingly, what is important is that the "community", or a

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60Wheeler, Reparations Reconsidered.
61Morris, Existential Limits.
62Morris, Existential Limits; Wheeler also reaches the conclusion that the descendants of victims of historical injustice cannot claim contemporary reparation for historical injustices, although by a different logic. Wheeler, Reparations Reconsidered.
63Treaty of Waitangi Act 1975, s6(1).
64Waldron, Historic Injustice, p167. See also the line of argument developed by D. Lyons (1977) The New Indian Claims and Original Rights to Land Social Theory and Practice 4(3).
65Wheeler, Reparations Reconsidered, p303. Wheeler goes on to consider the nature of 'communities' and concludes that they are social constructs that can be "intentional artefacts". When communities are the recipients of compensation for past injustices, this conclusion, Wheeler argues, has two unjust consequences. The first is that because communities, and their members, are self-identifying, groups can constitute identities in order to create moral obligations on others (such as the obligation to restore past wrongs), or alternatively, to avoid moral obligations. Further, individuals can opt in or out of communities according to whether or not it will benefit them. Second, he argues that further wrongs can reduce moral debt, for example by the suppression of the identity or consciousness of a community that would
"related group of persons";67 continues to exist.68 This latter argument is particularly persuasive in the context of the Treaty settlement process because the Treaty of Waitangi, as the shared standard of justice, determines the parties to injustice as the parties to the Treaty.

How might the difficulties of who exists be resolved in the New Zealand context? The parties to the Treaty of Waitangi were Queen Victoria and the rangatira (chiefs) of hapu comprising the Confederation of United Tribes of New Zealand (established by the 1835 Declaration of Confederation and Independence) together with independent rangatira of hapu not belonging to the Confederation. Whilst not envisaged by the Treaty, in 1863 the conventions of responsible government in Maori matters were transferred from the United Kingdom to New Zealand,69 and "the obligations of Her Majesty, the Queen of England, under the Treaty are now those of the Crown in right of New Zealand".70 Therefore, the enduring notion of 'the Crown' can clearly be established and the present entity responsible for providing redress for breaches of the Treaty is the Crown in right of New Zealand, in practice the government of the day.

There seems little doubt that Maori collectives have endured "in spite of the mortality of individual members"71 since the Treaty of Waitangi was signed by rangatira on their behalf. Whilst any Maori may bring a claim for breaches of the Treaty of Waitangi,72 in practice individuals have tended to bring claims on behalf of wider descent groups, such as iwi, hapu and whanau groups. This is as we would expect, given the nature of Maori society. Maori

otherwise be entitled to reparations for past wrongs. He therefore concludes that there is no justification for the widespread intuition that the descendants of the perpetrators of injustice should make reparation to the descendants of the victims of those injustices. Wheeler then proceeds to argue why there are good reasons, but not obligations, for why this should in fact occur. Wheeler, Reparations Reconsidered, p305-306.

68Wheeler, Reparations Reconsidered, p303.
66Sher, Ancient Wrongs and Modern Rights, p8.
69Brookfield describes this division of the Crown as part of a 'quiet revolution', that is not provided for under the Treaty of Waitangi. Brookfield, Waitangi and Indigenous Rights.
71Waldron, Historic Injustice, p155.
72Treaty of Waitangi Act 1975, s6(1).
society, however, has always been dynamic, and the form and importance of different groupings within Maori society has changed over time.\(^{73}\) For example, historian Angela Ballara suggests that 'iwi' is a post-colonial political construct, which replaced the hapu as the primary political unit in Maori society in the 20th century, or earlier.\(^{74}\) Further, Maori collectives may be legally constituted or represented by a variety of means including trust boards,\(^{75}\) incorporated societies,\(^{76}\) Maori incorporations,\(^{77}\) and other corporate structures.\(^{78}\)

In the Treaty settlement process, careful historical analysis will be needed to ascertain whether an entity making a contemporary claim, or receiving settlement assets, has historical continuity with the unjustly treated Maori collective in question.\(^{79}\) There may be questions of degree in particular cases. Certainly this line of argument raises major uncertainties for more recent collectives of Maori, such as the urban Maori collective known as the Waiperaira Trust, having any legitimate claim for historical injustices done to Maori generally. For some, this may be a major limitation on the justice the Treaty settlement process can deliver and the cause of some confusion and complexity of expectations as revealed in the previous chapter. There is also an unresolved issue where the Crown's breaches were so detrimental that Maori communities became severely fragmented, or even dissolved altogether.\(^{80}\) In the latter

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\(^{75}\) Governed by the Maori Trust Boards Act 1955.

\(^{76}\) Governed by the Incorporated Societies Act 1908.

\(^{77}\) Governed by Part XIII of Te Ture Whenua Maori Act 1993.

\(^{78}\) See for example Te Runanga o Ngai Tahu Act 1996.

\(^{79}\) See Chapter Eight of this thesis for discussion of these issues in relation to Ngai Tahu.

\(^{80}\) The fragmentation of traditional Maori groups, and group identity is a huge problem in the Treaty settlement process, often taking shape as disputes about mandate. The recent events in Taranaki are a good example. See Waitangi Tribunal (2000) *The Pakakohi and Tangahoe Settlement Claims Report* (Wai 758) Wellington, Legislation Direct, especially at p28.
situation, the Treaty settlement process offers no justice at all. Despite these shortcomings, at this stage it is sufficient to accept that there are enduring Maori collectives with historical continuity suitable to receive contemporary reparation for historical injustices.

In summary, in settling historical breaches the Crown is providing redress primarily to (historical) Maori collectives such as iwi, sometimes major hapu groups, and less often to whanau, resulting in a constraint on the kind of justice available in the Treaty settlement process. Reparation is not made to individuals, nor to contemporary Maori collectives without direct historical continuity. As a result, reparation for breaches of the Treaty of Waitangi will only indirectly benefit individuals, through membership of contemporary Maori collectives.

The constraint of moral authority and the counterfactual approach

Applying reparative justice in contemporary contexts leads to other difficulties, and resulting constraints on justice, particularly when using the counterfactual approach to reparations. Significantly, how can we ascertain what today's world would look like had the relevant injustice not occurred so that reparation might be made to reflect that just, counterfactual, situation? For example, what would today's world look like if the Crown had reserved

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81 Because any Maori, as an individual, can make a claim to the Waitangi Tribunal, the hearing process at least offers the opportunity to state a case against the Crown and to have the Tribunal report on that case.

82 For example, the Taranaki settlements. Note that the present Labour/Alliance Coalition Government has indicated a degree of flexibility with regard to recognising the mandate of large hapu, as well as iwi. See M. Wilson (2000) New Principles to Guide the Settlement of Historical Treaty Claims, Government Press Release, 20/07/2000.

83 For example, the ancillary claims included in the Ngai Tahu, Ngati Turangituku and Ngati Awa settlements. For a discussion of the Crown's policy on ancillary claims see Office of Treaty Settlements, Healing the Past, Building a Future, pp66-67.

84 Waldron also raises other problems with a counterfactual approach to reparations, one of which he terms "the contagion of injustice". Waldron, Historic Injustice, p151, original emphasis. The idea is that unjust market transactions affect the whole market. For example, one fraudulent transaction whereby a purchase of land is made at a drastically reduced price, or expropriated without recompense, will tend to reduce the price of a similar holding, even when acquired justly. This is the work of the free market. If we apply Nozick's principle of justice in rectification and make the world as it would have been had the injustice not occurred, then all holdings affected by the injustice must be adjusted. This approach could call into question all present landholdings. Waldron, Historic Injustice, p152. One can only begin to imagine the difficulties of undertaking such a task.
sufficient land and resources in the 1840s–1860s for Ngai Tahu needs then and into the future? If
we assume the counterfactual that Maori lands were not unjustly expropriated at some time in
the past, how do we know what would have happened in the intervening years up to the point
at which we undertake this counterfactual reconstruction? How do we know that persons or
collectives would have made one choice over others in any given counterfactual situation?

The usual logic is to assume that the causal laws of nature apply, or "more crudely, [that] the
normal course of events" will flow. For example, historically event E (the injustice) was
followed by events F, G and H say. If we take a description of the real world up to event E, and
then assume event that E*, a just event, instead took place, then applying causal laws we could
assume that events F*, G*, and H* followed. Our task in rectification is to ensure that our
present world reflects situation H*. There are a number of issues with this line of reasoning, but
important for our purposes is that "counterfactual speculation of this kind is of interest only in a
world that is not completely deterministic." Some events are random or the product of free
choice, and therefore do not simply follow from antecedent conditions. Further, these types of
non-deterministic events are exactly the focus of our inquiry:

The expropriation of Maori lands, for example, did not take place according to inexorable laws of nature. It took place because certain wilful and greedy individuals decided to seize those lands in circumstances in which they could easily have done otherwise. ... [I]t was a contingency, not a necessity ...

The fundamental problem lies in the limitations of rational choice theory. We cannot even
know whether individuals or collectives would have made rational choices. "The thing about
freedom [of choice] is that there is no fact of the matter anywhere until the choice has been
made. It is the choice that has authority, not the existence as such of the chosen option."88

85Waldron, Historic Injustice, p147.
86Waldron, Historic Injustice, pp148-149, emphasis added.
87Waldron, Historic Injustice, p149.
88Waldron, Historic Injustice, pp146-153, quote at p150. The Waitangi Tribunal has noted that
the counterfactual approach is problematic because "a host of variables confront the
programming of a just calculation [of compensation]; and the assessment of 'what might have been' is highly subjective". Waitangi Tribunal, The Orakei Claim Report, p263.
Accordingly, how can we be sure of the moral authority of a specific counterfactual constructed for reparation in the Treaty settlement process? If no moral authority can be found, can there be any justice at all?

In the Treaty settlement process, justice is found in the shared institution of the Treaty of Waitangi which "did not see the loss of tribal identity as a necessary consequence of European settlement". Rather, the Treaty guaranteed Maori rangatiratanga under Article II and therefore, Maori authority, identity and culture. Accordingly, the Treaty as the shared notion of justice gives moral authority to the proposition that if injustices (Treaty breaches) had not occurred, Maori would now have sufficient land and resources, a turangawaewae, from which to exercise their mana and rangatiratanga: these things are the very assurances of the Treaty. On this approach, it is not necessary to know exactly what land and resources would have been retained but for the injustice, and the problems of rational choice theory are thereby resolved, or at least minimised. The Waitangi Tribunal has taken this approach in a number of claims.

89 A related argument is made by George Sher, Ancient Wrongs and Modern Rights, particularly at pp12–13. In constructing a counterfactual world where an injustice is rectified, we run into problems of the transferability of a person's entitlements in the counterfactual world to the real world. Sher suggests that there are two distinct factors at play here: "[Transferability] is limited first by the degree to which one's actual entitlements have been diminished by one's own omissions in this world, and second by the degree to which one's entitlements in a rectified world are generated anew by one's own actions there." George Sher, Ancient Wrongs and Modern Rights, p12. The point is that in constructing a counterfactual world, we assume people will act in certain ways which may bear little resemblance to the real world. For example, we may assume that had victim V's land not been taken unjustly, V would have developed that land and used it to provide a livelihood. But given that V did none of those things in the real world, how can we justify that assumption and, say, compensate V as if he had done these things? What if we know that V's belief would suggest that he would not have developed the land in any manner? Sher suggests, then, that the value that must be compensated is the lost opportunity to develop or otherwise use the land, and not the value of the goods produced by having had the opportunity. He then takes the issue of transferability one step further. Applying this reasoning to historical injustices, he suggests that transferability diminishes over time because the actions and omissions in the real world have a greater and greater effect on V and V's descendants' entitlements acquired in the real world and less and less over time can be attributed to the historical injustice. The argument that the moral weight of injustices may fade over time will be discussed more fully below.


Therefore, justice in the Treaty settlement process requires that we modify our present situation to reflect the morally authoritative counterfactual world in which Maori culture survives and flourishes, and Maori have rangatiratanga over natural resources as envisaged by Article II of the Treaty. Again it is clear that because justice in the Treaty settlement process is sourced in the Treaty, the Treaty itself shapes the justice available in the Treaty settlement process.

The discussion thus far demonstrates that, at best, a counterfactual approach to reparations involves 'guesstimations' about precisely what reparative justice should achieve. There is no single correct counterfactual which describes a New Zealand where breaches of the Treaty did not take place, but rather many possible ones. When imagining what New Zealand might be like had Maori retained their mana, rangatiratanga, and turangawaewae, we may come up with several ways in which the current arrangements could reflect the Treaty promises. In deciding which particular scenario or version of events to mimic in reparation, the justice of current or future distributions may guide our choice of counterfactual or scenario to replicate in reparation. This is one way in which current and future distributions are relevant factors in the work of reparative justice.

However, if we go one step further with the counterfactual approach, another dilemma challenges the relationship between retrospective (reparative) justice and contemporary or prospective (distributive) justice: Why be content with a world where the relevant injustice did...

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92 Nozick, *Anarchy*, p231. Even Nozick, who generally dismisses the right of the state to redistribute resources other than to rectify injustice in acquisitions or transfers in holdings, is unable to separate totally reparative and distributive justice. While Nozick argues that justice is simply historical—the justice of a given situation depends on how it came about—he suggests that there is a role, albeit limited, for distributive justice. Nozick, *Anarchy*, p153. Phillips suggests that "rectification to correct earlier injustice might do more than Rawls' theory of justice to redress existing inequalities, and is preferable (morally speaking) to redistribution in the name of equality". D. L. Phillips (1979) *Equality, Justice and Rectification: An Exploration in Normative Sociology* London and New York, Academic Press, p258. Further, in adopting a version of the Lockean proviso that 'enough and as good' must be left to others in initial acquisitions, Nozick concedes that background circumstances may impinge on our conception of justice. Nozick, *Anarchy*, p174-182. This latter point is also made by Waldron, *Historic Injustice*, pp159-160.
not occur, when an even better, more just, world could be envisaged?\footnote{Waldron, Historic Injustice, p152.} Philosopher Jeremy Waldron argues that, "if any part of our concern about justice has to do with the relative size or distribution of people's holdings independently of their history—then the counterfactual approach to reparation may not be the last word".\footnote{Waldron, Historic Injustice, p153 (original emphasis).} This is a live issue in New Zealand debate, where reparative justice is not seen as "the sum total of justice and good policy".\footnote{Sharp, Justice and the Maori, p158.} For example, the Chief Judge of the Waitangi Tribunal has mused, "Need the resettlement of the landless tribes depend upon proof of some past wrong or is it more equitable to apportion assistance having regard to need? Does the reparation approach in any event create more problems than it solves?"\footnote{Waitangi Tribunal, The Waiheke Island Claim Report, p41.}

The expectations of the Treaty settlement process concerning reducing current socio-economic inequalities between Maori and Pakeha, for example, indicate that justice in the Treaty settlement process is concerned with current and future distributions in New Zealand society. More obviously, if any counterfactual in which the relevant injustices did not occur takes us to another situation of injustice, creates a new injustice, or otherwise does not improve our contemporary situation, "[t]hen it looks as though we have to choose between justice in the sense of reparations and justice in the sense of making the present world a fairer place in which to live".\footnote{Waldron, Historic Injustice, p153.} How can these dilemmas be solved in the Treaty settlement process? And to what extent are contemporary concerns relevant when providing reparative justice?

**Contemporary justice concerns**

Reparation is made in the present. Just as other contextual factors influence the application of justice, so too will the present situation. Whilst reparative justice in situations of historical injustice focuses on the past to identify an injustice and its effects over time, it is not possible to change that past. Reparative justice can, therefore, only work in the present, and into the
future, to change the effects of past injustice and to remit continuing injustices. What is required now to right past wrongs depends both on the past and the present, and to an extent, on our imagining of the benefits which contemporary reparation will bring in the future. How do these temporal factors shape reparative justice in the Treaty settlement process?

First, the contemporary context limits the application of reparative justice in the Treaty settlement process because reparation is made with current resources. We cannot restore something if it no longer exists. Further, there seems little point in returning something damaged or so changed that it no longer has value, or if a cultural context has changed in the intervening years to an extent where things once important no longer hold particular relevance. Accordingly, the current context influences the kind of solution which is just; the redress provided today must be relevant to today's circumstances. For example, a wetland which once provided food and traditional medicines may have been unjustly expropriated, drained, and used for public works purposes. Although it may now be surplus to Crown requirements, and therefore available for return to Maori, how can that land play its traditional role in contemporary Maori society? Moreover, it may be so polluted that it is a financial burden. Where is the justice in a strict reparative approach in such a situation?

Second, because providing reparation for past wrongs is an allocation (or redistribution\(^{99}\)) of current resources, that allocation must be justified, morally, and hence politically, in relation to

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\(^{98}\)Sharp, *Justice and the Maori*, p35. This is not to argue that the Crown can divest itself of resources without regard to Maori Treaty claims. Note the case of *New Zealand Maori Council v A-G* [1987] 1 NZLR 641 (CA), in response to which the jurisdiction of the Tribunal was amended by the Treaty of Waitangi (State Enterprises) Act 1988 giving the Waitangi Tribunal powers to make binding recommendations for the return to Maori ownership of land transferred to state-owned enterprises under the State-Owned Enterprises Act 1986. Later, the Crown Forest Assets Act 1989 gave the Tribunal powers to make binding recommendations for the return of Crown forest land. The lands which may be subject to the Tribunal's binding recommendations are Crown forest land subject to a Crown forestry licence, or memorialised lands. Memorialised lands are those owned, or formerly owned, by a state-owned enterprise or a tertiary institution, or former New Zealand Railways lands that have a notation on the certificate of title that the Tribunal may order their return to Maori ownership. Treaty of Waitangi Act 1975, ss8A,8HB&8HJ.

\(^{99}\)In any rectification of injustice in holdings there is necessarily a redistribution of resources in society. Phillips, *Equality, Justice and Rectification*, p257. The important point to bear in mind
other competing claims on those resources. Where full reparative justice cannot be justified in the face of other contemporary, competing claims, reparative justice in the Treaty settlement process will thereby be constrained.

Full reparative justice may not always be justified because changes in background circumstances over decades and generations may alter the validity of specific moral claims to land or resources. Therefore, any moral duty to restore land and resources unjustly expropriated in the past may be restricted to situations where the claim to those lands and resources survives into the present, with the same moral force as the claim had at the time of the historical injustice. Why would changes in background circumstances change the moral claim to land and resources? One argument is that initial entitlements to property may fade with time because the longer the holding is out of an individual's possession and control, the less it plays an indispensable role in that person's life. New Zealand's Treaty settlement process, and particularly the evidence given to the Waitangi Tribunal by Maori, has clearly shown just how...

\[\text{is that, as Nozick acknowledges, whether something can properly be described as 'reistributive' depends on the reasons for the redistribution. Nozick, Anarchy, p27. See also Phillips, Equality, Justice and Rectification, p257.}^{100}\]

\[\text{Waldron refers to the legal doctrines of prescription and adverse possession and the procedural bar of the statute of limitations. He gives two pragmatic reasons for the diminution of historical entitlements over time. The first concerns the difficulties of obtaining accurate evidence of events occurring generations ago. The success of the Waitangi Tribunal in its hearing and research of historical evidence relating to Crown breaches of the Treaty of Waitangi from 1840 up to 1992 indicates the fragility of this argument in the New Zealand context. Second, he argues that people build up structures and expectations around resources actually under their control which would be "costly and disruptive" to disturb in the name of restitution. Waldron, Historic Injustice, pp155-156. This latter point is picked up below in this chapter.}^{101}\]

\[\text{Waldron's view of initial entitlement is, however, not the only one. The initial acquisition of land and resources by Maori in New Zealand can also be viewed as legitimate either according to Maori custom or tikanga, or, in accordance with the Treaty of Waitangi as the relevant social contract which established New Zealand society. J. Tichy and G. Oddie (1992) Is the Treaty of Waitangi a Social Contract? In G. Oddie and R. Perett (eds) Justice, Ethics and New Zealand Society Auckland, Oxford University Press; Phillips, Equality, Justice and Rectification, p261. Either way, land and resource dealings between the Crown and Maori should have been conducted in accordance with the Treaty as containing a shared notion of justice. According to the social contract thesis, the persistence of moral claims to land and resources depends rather on interpretations of the Treaty, than on an analysis of whether any particular entitlement can be said to have ceased to play an indispensable role in the life of particular Maori or Maori collectives.}^{102}\]
important land and natural resources are to tribal identity and cultural survival. Moral claims to particular sites integral to aboriginal identity and cultural survival are as valid today as in the past. In the New Zealand context, these might be wahi tapu sites (sacred or burial sites), mahinga kai (food gathering sites), or prominent landmarks associated with eponymous ancestors.

This line of argument obviously portends a limit on reparative justice in the Treaty settlement process. Is the requirement to restore land and resources unjustly expropriated in the past, restricted to only particular, culturally important sites? It must be recognised that there are "many ways of being harmed that do not involve violations of property rights at all". For example, many of the injustices suffered by Maori, and particularly the unjust deprivation of land, led to the loss, or diminution, of Maori culture. This has been recognised by the Waitangi Tribunal:

People who lose their lands to an alien culture bear the additional risk of identity loss and social and cultural impairment. This could not have been more apparent than in the confiscation of Maori land, where the effect was not only to acquire land but to take control of the people and to effect a social reordering. Loss therefore must be assessed not only in terms of individual deprivation and personal suffering but in terms of the impairment of the group's social and economic capacity, the general distortion of its physical and spiritual well-being, and the flow-on effects of subsequent standards of living.

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104 Waldron, Historic Injustice, p158–159. Waldron merely suggests that the return of particular sites integral to aboriginal identity and cultural survival may have "an edge" over claims for the return of land of mainly economic value.

105 Sher, Ancient Wrongs and Modern Rights, pp8–10. Waldron's approach gives little consideration to values other than property. Dodds, Justice and Indigenous Land Rights, p197.

106 Waitangi Tribunal, The Taranaki Report, p134. Even in the case of the Ngai Tahu claim, where no land was confiscated but instead the Crown failed to ensure that Ngai Tahu retained sufficient land for their future needs, the results are similar: loss of mana, loss of rangatiratanga, loss of turangawaewae. Waitangi Tribunal, The Ngai Tahu Report. Justice demands that these wrongs also be righted.
Because the loss of tribal land, both generally and of specific sites, has ultimately led to the loss of culture for Maori, redress must be made to ensure cultural survival for Maori claimant groups. Again, as with the counterfactual approach, it is necessary to re-frame the issue in terms of cultural survival (rather than in terms of property rights). A moral claim to own and control sufficient land and resources to ensure cultural survival, and to restore cultural identity, persists over time and does not diminish because a tribal land base was historically unjustly removed from Maori possession and control. This line of thought is echoed by the Waitangi Tribunal:

[The broad object of the Treaty was to secure a place for two peoples in one country, where both would benefit from settlement, and which basically required a fair sharing of resources. On that basis, where the place of a hapu has been wrongly diminished, an appropriate response is to ask what is necessary to re-establish it.]

Here we see both cultural and temporal factors shaping the justice of the Treaty settlement process.

However, the argument clearly suggests that a moral entitlement to all lands and resources once in the possession or control of Indigenous groups may not survive changed circumstances. As alluded to above, there is the issue of present need. Because redress for historical wrongs is made in contemporary contexts, competing claims based on "hunger, poverty, homelessness, and lack of opportunity" must be addressed in any contemporary justification for allocation of resources. The immense changes in the world's population in the past two hundred years mean that Indigenous populations can no longer be afforded exclusive domination of their former, vast territories, because to do so would be to relegate many others to poverty, and even starvation. Therefore, in such changed circumstances:

108 Waldron, Historic Injustice, p159.
Applying this reasoning to the New Zealand situation, the fact that land unjustly withheld or taken from Maori historically is now in private ownership, where it would be unjust by today's circumstances to deprive the current owners of that property, suggests that not all land once in Maori hands should be returned and perhaps, that certain parcels of land should not be returned. Full compensation for all land unjustly expropriated may not be justified either, if to do so would bankrupt the Treasury. Moreover, whilst settler populations acquired land historically through unjust circumstances, the intervening years have, to some extent, legitimated (some of) those holdings, or at least, a right to an equitable share in New Zealand's land and resources.

However, Waldron has suggested that contemporary justice concerns should only 'trump' reparative justice claims when full compensation or restitution of historical injustices would "carry us in a direction contrary to that which is indicated by a prospective theory of justice". For example, where full reparation would not lead to a fairer distribution of

\[\text{[W]hat is called for is a distribution morally appropriate to present circumstances, present resources, and the present population of inhabitants who have no choice but to live in these territories ... In this sense a[n] historic injustice can be superseded, and its reparation trumped as it were, by principles of justice applied directly to present circumstances.}^{109}\]

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109 Waldron, Historic Injustice, p165 (original emphasis).
110 Phillips discusses the situation of individual to individual reparation at length and concludes that in such situations justice does not permit land to be taken from current (innocent) individual owners in reparation for historical injustices. Phillips, Equality, Justice and Rectification pp270–280. See also Sharp, Justice and the Maori, p123.
111 This is implied in the Tribunal's comments in Waitangi Tribunal, The Turangi Township Remedies Report, p35.
112 Waldron, Historic Injustice, pp159–167. Note that George Sher doubts that an equal sharing of resources is necessarily required. Sher, Ancient Wrongs and Modern Rights, p9.
113 Waldron, Historic Injustice, p166. This is in the second of Waldron's two important provisos to his thesis of supersession of historical injustices, and it is these that critics must fully appreciate. Waldron, Historic Injustice, p166–167. One critic who has failed to account adequately for Waldron's proviso is Susan Dodds. Dodds, Justice and Indigenous Land Rights. The first proviso for the application of any supersession is that contemporary society is actively and honestly attempting to achieve just future arrangements. In the New Zealand context this is shown by the current Treaty settlement process and also by policies such as the Labour/Alliance Coalition Government's 'Closing the Gaps'.
resources based on need, or where new injustices would be created (for example, by disturbing private property rights). Taking the first of these, in situations of historical injustice, claims for redress of historical wrongs and claims for fairer distribution of goods will often coincide:

[P]ast injustice is not without its present effects. It is a fact that many of the descendants of those who were defrauded and expropriated live demoralized in conditions of relative poverty—relative, that is, to the conditions borne by the descendants of those who defrauded them. If the relief of poverty and the more equal distribution of resources are the aims of a prospective theory of justice, it is likely that the effect of rectifying past wrongs will carry us some distance in this direction.\textsuperscript{114}

Far from taking New Zealand society in a direction contrary to contemporary justice, reparation for Crown breaches of the Treaty of Waitangi, and the rebuilding of the Crown-Maori Treaty relationship, are exactly the imperatives of justice in the contemporary situation.\textsuperscript{115} However, care must be exercised in the negotiation and actual application of justice to ensure that no new injustices are created in the contemporary context, and justice thereby compromised. The exact balance of historical and contemporary justice is contested ground requiring negotiation in each settlement, and this accounts for some of the apparent confusion and complexity of expectations of justice in the Treaty settlement process.

But the influence of contemporary concerns on the application of reparative justice in the Treaty settlement process is restricted. The Waitangi Tribunal has cautioned that "care should be taken to ensure that the level of redress does not become dependent on the contemporary needs of iwi that are unconnected with the historical wrongs being addressed".\textsuperscript{116} At the same time,

\textsuperscript{114}Waldron, Historic Injustice, p167. Note that Phillips also argues along these lines.
\textsuperscript{116}Argument of Crown counsel referred to in Waitangi Tribunal, The Turangi Township Remedies Report, p15.
the Tribunal has placed a growing emphasis on the restoration of "the place of the hapu" or iwi. For example, Tribunal member Orr argues that "the assurance of a more secure future for legitimate tribal objectives may have greater weight" than a "pay off for the past", and that "full restoration of the people as a people, may deserve more emphasis than strict legal reparation, even assuming such reparation is possible". The Tribunal has, on many occasions, pointed out that the Treaty settlement process is not concerned to provide full redress along legal lines, but rather "to compensate for past wrongs and remove the prejudice, by assuring a better arrangement for the future."

When considering what justice requires in relation to the loss of tribal mana and rangatiratanga, loss of culture, and the more personal psychological effects of continued dispossession and cultural hegemony, the relevance of retrospective justice fades, giving way to current and prospective concerns. Why? Because any hope of restoring conditions to those required by justice are necessarily focussed on how our current arrangements might be changed to allow for the future cultural survival of Maori. Further, the right to have the promises of the Treaty of Waitangi honoured is not negotiable (unless a completely new compact or constitutional arrangement is made). How the Treaty can be given effect to, and how the mana of Maori claimant groups can best be restored, changes with changing circumstances, and requires consideration of the contemporary justice of any given situation. The concept of utu also encompasses this point, as is shown in the story of Te-rangi-tamau and Moki in which:

119 Waitangi Tribunal, Memorandum—In the Matter of Ngati Awa and other claims, p12.
Te-rangi-tamau creeps at night into the sleeping hut of his enemy Moki, but does not kill him [in an act of utu], leaving his cloak behind instead as evidence of his visit ... Te-rangi-tamau's wife, who has been captured by Moki, is present in the hut. Quietly her husband takes her outside, questions her and discovers that she and his children have been well treated. That is one reason why he spares Moki. Te-rangi-tamau decides that the offence for which he sought Moki's life has been wiped out by the good treatment of the wife and children. Utu is no longer seen to be needed. And the other crucial point is that, while they are indeed engaged in a quarrel, and a serious one at that, Te-rangi-tamau and Moki are kin. This makes a great difference. There is a strong motive for ending the affair peacefully, and indeed this is just what happens.¹²¹

Thus, utu as a mechanism for restoring lost mana is sensitive to the contemporary contexts in which mana must be restored. Contemporary concerns influence the application of the principle of utu as a means of restoring lost mana, and restoring balance.

Accordingly, we might think of justice being done with one eye on the past, and the other on the present looking forward to a better future—a future where the ongoing relationship between the Treaty partners is healthy and just.¹²² Therefore, the justice to be done in situations of historical injustices requires a blend of reparative (historical) justice and distributive (contemporary and prospective) justice. Both 'culture' and 'time' thereby influence, and at times constrain, the justice of the Treaty settlement process.

3.4 CONCLUSION

To conclude, the aim for both Maori and the Crown of the Treaty settlement process is to achieve 'justice'. The kind of justice achievable in the Treaty settlement process is shaped by two principal factors: 'culture' and 'time'. Justice in the Treaty settlement process is only that part of justice which is shared by Maori and the Crown: this is found in the Treaty of Waitangi. The Treaty, as the shared standard of justice, limits the justice in the Treaty settlement process

¹²¹Patterson, *Exploring Maori Values*, p120-121. Note that Patterson is discounting the theory that utu can involve forbearance.
¹²²Sharp suggests that Maori calls for justice were "Janus-faced, looking both ways". Sharp, *Justice and the Maori*, p157.
in two important ways. First, Treaty settlements do not challenge the ultimate sovereignty of the Crown. Second (and following from the first), the Crown is responsible for dispensing justice, and thus both the 'judge', and the historical 'wrongdoer'. As a result, the justice of the Treaty settlement process is predominantly a negotiated justice.

Temporal factors also influence, and constrain, the justice of the Treaty settlement process in important ways. First, only contemporary Maori collectives with a continuous historical link to the groups that suffered past injustices will receive redress from the Crown. Individuals will only benefit from settlements as members of such historically-linked collectives. Second, because of the difficulties of providing contemporary redress for historical wrongs, it is necessary to frame reparative justice in terms of the aim of ensuring cultural survival for Maori, which includes a present right to resources sufficient to maintain Maori collectives. This indicates that the influence of both 'culture' and 'time' work together to shape the justice of the Treaty settlement process.

Finally, even though justice in the Treaty settlement process is largely reparative in that the aim is to right a past wrong, we do not want to create new injustices in the process. A purely reparative approach to justice in the Treaty settlement process is inappropriate, and at times impractical. The tides of history have changed the shoreline—there is no returning to a situation that once was, nor can we make the world a place where injustices of the past did not occur. At best we can aim to limit the effects of past injustices in today's New Zealand and for the future, and to undertake structural adjustments necessary to remit persisting unjust arrangements to better reflect the justice of the Treaty in contemporary contexts. Just how this might be done, and the complexity of determining the exact application of the limited kind of justice available in the Treaty settlement process, is examined in the next two chapters.
PART II  THE NGAI TAHU SETTLEMENT
CHAPTER FOUR

NEGOTIATING JUSTICE: THE NGAI TAHU CLAIM AND SETTLEMENT NEGOTIATIONS

4.1 THE CASE STUDY

4.2 THE NGAI TAHU CLAIM

4.3 NEGOTIATING JUSTICE

4.4 JUSTICE CLAIMED AND NEGOTIATED
4.1 THE CASE STUDY

Contemporary Treaty settlements are extremely complex and contain a high degree of detail. To enable analysis of the Treaty settlement process beyond a superficial level, this thesis concentrates on one settlement only, the Ngai Tahu settlement, and then on one particular aspect of that settlement, the return of pounamu. Ngai Tahu are the southern most iwi (tribe) of New Zealand's Indigenous people, Maori. A brief overview of the history of the iwi is provided in Chapter Eight of this thesis. Today, Ngai Tahu number approximately twenty-five thousand. Although Ngai Tahu is one of the most prosperous and well-educated of Maori tribes, its people are, on the whole, nonetheless disadvantaged. The Ngai Tahu Whanui (the wider Ngai Tahu group) is geographically dispersed, with high numbers living outside its traditional territory. Ngai Tahu's rohe (tribal area) covers the larger part of the South Island of New Zealand, known to Ngai Tahu as Te Wai Pounamu.

The Ngai Tahu settlement provides a useful case study of the justice being achieved in the Treaty settlement process for a number of reasons. First, the settlement was one of the first major

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1 For example, the Ngai Tahu settlement is contained in some five volumes and 1800 pages, and required 546 pages of legislation (479 sections and 117 schedules) to implement.
4 For example, a 1996 Statistics New Zealand report found the following: Thirty percent of Ngai Tahu had a post-school qualification; twenty-five percent of Ngai Tahu children under the age of fourteen lived in families where there was no employed parent; eleven percent of the Ngai Tahu working force were unemployed; the median annual personal income for Ngai Tahu aged fifteen and over was $14,100; and twenty-eight percent of adult Ngai Tahu received some form of government income support. Te Runanga o Ngai Tahu, 1999 Annual Report, p8.
5 A map of Ngai Tahu's traditional territory is provided in Appendix B of this thesis.
comprehensive iwi-scale settlements following a full hearing before the Waitangi Tribunal. As a result, the Treaty settlement process as a whole can be examined. Second, the Ngai Tahu claim and settlement covered a large area of land (more than half the land mass of New Zealand) and a diversity of resources, and therefore, encompassed a range of remedies. In particular, a number of new and innovative redress mechanisms, designed to recognise and restore Ngai Tahu's mana and cultural identity, were developing during the Ngai Tahu settlement negotiations. Third, The Ngai Tahu settlement has become something of a benchmark and precedent for other settlements. For example, the cultural redress mechanisms developed in the Ngai Tahu settlement, together with the type and mix of redress provided in the settlement, are now reflected in the Crown's general policy on Treaty settlements. The Ngai Tahu settlement, therefore, provides useful indications of what future Treaty settlements are likely to achieve. Fourth, choosing the Ngai Tahu settlement as a case study allowed me to work with the iwi having mana whenua (tribal authority) in the area where I lived and studied for the period of this research.

However, even concentrating on just one settlement, it is not possible in this thesis to examine every aspect of that settlement in depth. Rather, a detailed examination of one particular aspect of the settlement is required to get to the bottom of things, and to reveal how the Ngai Tahu settlement has affected people's lives. The return of pounamu to Ngai Tahu promised a fruitful exploration of the kind of justice being achieved in the Ngai Tahu settlement, and more

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6 The other major settlement that had been made at the time this research commenced was the 1995 Waikato-Tainui settlement. The Tainui settlement was limited in a number of ways and therefore did not offer as rich a source of analysis as the Ngai Tahu settlement. For example, the Tainui claim was not heard before the Waitangi Tribunal and the settlement was made by means of direct negotiations; the settlement only covered issues relating to raupatu (confiscation) and not, for example, Tainui's claims relating to the Waikato River; and there was only a limited emphasis on cultural redress. For a brief discussion of the Tainui settlement see Price, R. T. (2001) New Zealand's Interim Treaty Settlements and Arrangements—Building Blocks of Certainty. In Speaking Truth to Power: A Treaty Forum British Columbia Treaty Commission and the Law Commission of Canada, pp135–163; and R. T. Price (2001) The Politics of Modern History-Making: The 1990s Negotiations of the Ngai Tahu Tribe with the Crown to Achieve a Treaty of Waitangi Claims Settlement Macmillan Brown Working Paper Series No 7, Christchurch, Macmillan Brown Centre for Pacific Studies, pp17–19.

generally, in the Treaty settlement process, because the return appeared at one level to be a clear case of 'justice'—something unjustly taken was being returned. And yet at another level, it seemed to create new injustices—for example, Poutini Ngai Tahu I had spoken with early in my research felt excluded by the return of pounamu to Te Runanga o Ngai Tahu and the Mawhera Incorporation.

Further, when I commenced this research in February 1998, there was a manifest need for research on the management implications of the return of pounamu. Pounamu had been returned to Ngai Tahu by the Ngai Tahu (Pounamu Vesting) Act 1997, but the iwi had yet to formulate any policy or management plan. Early discussions with representatives of Te Runanga o Ngai Tahu and the Mawhera Incorporation indicated that Ngai Tahu would, therefore, support my research into pounamu management issues. As a result of these discussions, I defined the scope of my research into pounamu, based on Ngai Tahu's suggestions. To my knowledge, this thesis is the first research to be undertaken on pounamu management issues in the post-settlement context.

This chapter outlines the events leading up to the Ngai Tahu claim, lodged with the Waitangi Tribunal in 1986. The Crown's purchases of Ngai Tahu's traditional territory took place in an era where scant attention was paid to the rights of Indigenous peoples. On the whole, the Crown took a 'high-handed' approach to the purchases, often dismissing Ngai Tahu requests for land to be excluded from the purchases, or reserved to them for present and future needs. The

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Crown seemed to pay little, if any, regard to the Treaty of Waitangi. As a result of the near landless and poverty-stricken situation Ngai Tahu found itself in following the land purchases, Ngai Tahu began to call for 'justice': for more lands to be provided, for compensation, and for a place in the growing economy and political life of New Zealand. For almost 150 years Ngai Tahu pursued its claims against the Crown, which culminated in its claim to the Waitangi Tribunal and the subsequent settlement of its claims in 1998.10

In hearing the Ngai Tahu claim (1987–1989), the Waitangi Tribunal reviewed the past acts and omissions of the Crown in its dealings with Ngai Tahu against the standard of justice of the Treaty settlement process: the Treaty of Waitangi and the principles derived from it. It found that the Crown had repeatedly breached the principles of the Treaty, and had therefore acted unjustly. It recommended that the Crown provide Ngai Tahu with comprehensive and substantial redress, which should reflect the large scale and wide range of Ngai Tahu losses. This set the scene for the Crown and Ngai Tahu to begin negotiating 'justice' for the settlement of Ngai Tahu's claims.

Because Ngai Tahu and the Crown brought different cultural perspectives to the negotiating table between 1991 and 1997, a certain kind of dialogue was required to reach agreement on how justice would be applied in the Ngai Tahu settlement.11 A sharing of the past, and a recognition of present circumstances, was needed before the parties could reach mutual understandings and cross-cultural common ground. The exact blend of reparative and contemporary justice concerns relevant to the Ngai Tahu settlement had to be found. Consequently, the negotiations leading up to the settlement were, on the whole, protracted and difficult. At times these difficulties were exacerbated by the merging of the Crown's roles as sovereign and 'wrongdoer'. Despite the difficulties of the six-year negotiations, a settlement

was agreed, and signed in November 1997. The return of pounamu to Ngai Tahu part-way through the negotiations played a key role in facilitating the negotiation process.

4.2 THE NGAI TAHU CLAIM

The Ngai Tahu claim was born out of the Crown's purchases of the vast majority of Ngai Tahu's traditional territory in the 1840s, 1850s, and 1860s for extremely minimal sums of money, leaving Ngai Tahu nearly landless. Each of the eight major purchases had its own complexities. Ngai Tahu's traditional territory covered the greater part of the South Island of New Zealand, and thus the purchases included a myriad of localities and resources. Further, the Crown agents and Ngai Tahu rangatira (chiefs) brought very different cultural assumptions to the purchase negotiations. Ngai Tahu rangatira relied on their understanding that Treaty of Waitangi protected their rangatiratanga and the right to retain such lands as they wished. Yet, as will be shown in this chapter, Ngai Tahu's requests to retain specific, culturally significant lands, places and resources were brushed aside by Crown representatives, and Ngai Tahu interests were largely ignored. The Crown's failure to protect Ngai Tahu's interests resulted in a complicated and extensive range of alleged injustices, and a deep-seated sense of grievance which has been carried by Ngai Tahu for many years.

The land purchases

From 1844 to 1864, the Crown purchased some 34.5 million acres of Ngai Tahu's traditional territory, for £14,750,\textsuperscript{12} in eight major land transactions: Otago, Canterbury (Kemp's purchase), the Banks Peninsula purchases (considered as one), Murihiku (Southland), North Canterbury, North Canerbury,

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Kaikoura, Arahura (West Coast) and Rakiura (Stewart Island).\textsuperscript{13} Ngai Tahu, numbering approximately 3,000 at the time, were left with only 35,757 acres.\textsuperscript{14}

The Treaty of Waitangi had opened the way for settlement of New Zealand, and so land was required for the new settlers. In 1841, the New Zealand Company was given a Royal Charter, officially authorising it "to 'purchase and acquire, settle, improve, cultivate, let, sell', and otherwise deal in land in New Zealand for the purpose of profit".\textsuperscript{15} The governor of the day, Captain Robert Fitzroy, waived the Crown's right of pre-emption under the Treaty of Waitangi\textsuperscript{16} to allow the Company to purchase the land directly from Ngai Tahu, but appointed a protector of Ngai Tahu interests for the purchase of land, John Jermyn Symonds.\textsuperscript{17}

After some weeks of negotiations in Otago, which included traversing the boundaries of the purchase lands, the first of the Crown purchases, the Otakou deed, was signed on 31 July 1844.\textsuperscript{18} The deed transferred to the New Zealand Company a purported 400,000 acres, for £2,400, although it appears that some 534,000 acres of land was actually transferred by the agreement.\textsuperscript{19} Otakou Ngai Tahu specifically wanted certain lands reserved from the sale, particularly the whole of the Otago Peninsula (some 21,250 acres) which housed many ancestral sites and the kainga (settlement) of Otakou.\textsuperscript{20} The New Zealand Company objected to the reservation, and threatened to call off the transaction. Despite his brief to protect Maori interests, Symonds did not intervene and finally it was agreed that the local Ngai Tahu would keep a smaller area of land: the northern section of the Otago Peninsula (including Otakou),

\textsuperscript{16} Article II of the Treaty of Waitangi. See Appendix A of this thesis.
\textsuperscript{17} Waitangi Tribunal, \textit{The Ngai Tahu Report}, vol 1, p30.
\textsuperscript{18} Waitangi Tribunal, \textit{The Ngai Tahu Report}, vol 1, pp30–51.
\textsuperscript{19} Waitangi Tribunal, \textit{The Ngai Tahu Report}, vol 1, p30.
\textsuperscript{20} Evison, \textit{The Long Dispute}, p148.
some land at lower Taieri, and at Te Karoro—a mere 9,612 acres. Three factors in this purchase became themes in subsequent land transactions between the Crown and Ngai Tahu: the minimal purchase price, Ngai Tahu's wish to exclude or reserve greater areas of land than what was finally agreed, and the Crown's failure to intervene in the purchase negotiations to protect Ngai Tahu interests.

By the time of the next purchase of Ngai Tahu territory, 'Kemp's purchase' in 1848, Governor Grey had replaced Fitzroy, and took a 'hard-line' approach to Maori issues. The purchase was finalised on 12 June 1848, and Crown representative, Walter Mantell, was charged with the responsibility of surveying the boundaries of the purchase, and the lands reserved for Ngai Tahu. Mantell failed to undertake the surveys before the purchase was completed, as required of him, resulting in later disputes over boundaries and appropriate reserves. In particular, Ngai Tahu believed that it had not sold a substantial area of land in the centre of the South Island, known as the 'hole in the middle'. It also appears that Ngai Tahu understood that they had reserved from the purchase "their villages and homes, their gardens and their natural food resources ... as well as substantial lots". However, Mantell took a "narrow and parsimonious" approach to the allocation of Ngai Tahu reserves and left Ngai Tahu with only 6359 acres out

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21 Evison, *The Long Dispute*, p148. Ngai Tahu have long argued that they were promised one tenth of the purchase land as reserves. This did not occur. Waitangi Tribunal, *The Ngai Tahu Report*, vol 1, p31. For a background to the tenths policy see Waitangi Tribunal, *The Ngai Tahu Report*, vol 1, pp32–36 & vol 2, pp285–299. In addition, Ngai Tahu have asserted that they were promised a reserve for landing their boats in Princes Street, Dunedin which was also not made. Waitangi Tribunal, *The Ngai Tahu Report*, vol 1, pp44–51 & 54 & vol 2, pp347–386. These two claims were not upheld by the Tribunal.

22 Waitangi Tribunal, *The Ngai Tahu Report*, vol 1, p53. See generally Waitangi Tribunal, *The Ngai Tahu Report*, vol 1, pp51–83. Governor Grey had, for example, dismissed all Maori protectors. In addition, by the time of the second purchase, the New Zealand Company's settlement schemes had become troublesome because settlers had been sold titles to land that was still owned and occupied by Ngai Tahu. There were also problems because the Crown had purchased land in the north of the South Island, the Wairau purchase, from Ngati Toa. The southern boundary of the Wairau purchase was stated to be Kaiapoi, clearly within Ngai Tahu's territory. Waitangi Tribunal, *The Ngai Tahu Report*, vol 1, pp53–55.

23 See the map provided at Waitangi Tribunal, *The Ngai Tahu Report*, vol 1, p7. The 'hole in the middle' claim was not upheld by the Tribunal.

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of 20 million. The parties to the purchase clearly had very different ideas about the extent of the land sold, and the conditions of the sale. As a result:

Kemp’s purchase was the largest block of land ever bought by the Crown. Its 20 million acres made up almost a third of the country’s land area, although some of this overlapped with later purchases. The purchase must also be one of the most controversial. Maori complaints began within months of the deed being signed. ... [T]he agreement has been the subject of numerous petitions, parliamentary inquiries, Royal commissions and court proceedings.

The purchases of the three Banks Peninsula blocks had their own complications. Ngai Tahu had purportedly sold much of the land to the French commercial colonisation company, the Nanto-Bordelaise Company, in 1840. But because the French titles did not derive from the British Crown, they were invalid. However, the impression that Ngai Tahu had properly sold land to the French remained, and was used by Walter Mantell to press Ngai Tahu into agreements to sell the Port Cooper and Port Levy blocks in 1849 for “token payments for the land”. Again Mantell allowed the barest minimum of reserves for Ngai Tahu. The Akaroa purchase was completed later, in 1856, by W. J. W. Hamilton, again for a token payment and with minimal reserves.

Mantell began negotiations to purchase remaining Ngai Tahu lands in the south of the South Island in 1851, although the agreement of purchase of the Murihiku (Southland) block was not made until 17 August 1853. By this agreement the Crown purchased over seven million acres of land for £2600 leaving Murihiku Ngai Tahu with only 4875 acres in seven reserves. Ngai Tahu have long claimed that Mantell promised schools and hospitals as part of the

28The story of the French in Banks Peninsula is much more complicated than portrayed here. For further details see Waitangi Tribunal, The Ngai Tahu Report, vol 1, pp86-90 & vol 2, pp527-543.
consideration for the lands transferred. These did not eventuate. In addition, Ngai Tahu disputed the boundaries of the purchase, in particular that much of Fiordland was not included. Again, Ngai Tahu's requests for certain lands to be excluded were refused. Although important pounamu sources were included in the area of land sold, the deed made no mention of pounamu.

The purchases of the North Canterbury and Kaikoura blocks were complicated by Mantell's fixing of the Kemp purchase (northern) boundary at Kaiapoi pa which "effectively dispossessed Ngai Tahu of their territory in Kaikoura and Canterbury". The land north of Kaiapoi pa was recognised by the Crown as Ngati Toa land until 1856, and had already been settled by pastoralists by the time the Crown actually purchased the land from Ngai Tahu. Accordingly, Ngai Tahu's desire to assert and maintain their mana over this land appears to have been a heavy inducement to sell the land for a low price. The North Canterbury purchase was completed on 5 February 1857 transferring well over one million acres of valuable pastoral land for £500. No reserves were granted.

Ngai Tahu fared little better in negotiating the Kaikoura purchase. After over a month of negotiations, which broke down more than once, a deed was signed on 29 March 1859. The block consisted of 2.8 million acres for which Ngai Tahu received £300 and 5558 acres of reserves. Ngai Tahu had requested reserves of about 100,000 acres which were largely refused, primarily because the land had already been handed over to European run holders. Again, Ngai Tahu's interests were ignored.

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34 This may have been due to the misunderstanding over the western boundary of the block.
James Mackay Jnr, who had negotiated the Kaikoura purchase, arrived in Arahura on the West Coast in 1859 with instructions to purchase the West Coast lands from Poutini Ngai Tahu for no more than £200 and reserving no more than 500 acres for them.\textsuperscript{39} At first, Mackay's offer was soundly rejected. Poutini Ngai Tahu sought a more realistic sum (£2,500 was requested) and wished to reserve about 200,000 acres of land to protect their rights over, and access to, pounamu.\textsuperscript{40} After convincing his superiors that a better deal would be required before Poutini Ngai Tahu would part with their land, Mackay returned to the West Coast the following year, 1860. He negotiated the purchase of Poutini lands, which amounted to seven million acres, for a mere £300 (almost 100 acres per penny).\textsuperscript{41}

To protect Poutini Ngai Tahu rights to pounamu and ownership of the Arahura river bed, 2000 acres were set aside as reserves along the banks of the Arahura River, out of the 8000 acres requested.\textsuperscript{42} A total of 6724 acres were reserved for individual allotment, together with 3500 acres for religious and educational purposes.\textsuperscript{43} Evidence relating to the purchase negotiations clearly shows that Poutini Ngai Tahu were determined to protect their ownership of, and access rights to, pounamu.\textsuperscript{44} However, the Arahura purchase deed did not specifically mention pounamu, or acknowledge the importance of pounamu to Ngai Tahu. The English text referred to the transfer to the Crown of 'minerals', while the Maori text to referred 'kowhatu' or stones. None of the other purchase deeds made any reference to pounamu.\textsuperscript{45}

Finally, in its last purchase of Ngai Tahu lands, the Crown obtained title to Rakiura (Stewart Island) in 1864.\textsuperscript{46} The purchase price was £6000, with £2000 paid in cash, another third

\textsuperscript{40}For further discussion of this see Waitangi Tribunal, \textit{The Ngai Tahu Report}, vol 3, pp722–723.
\textsuperscript{41}Waitangi Tribunal, \textit{The Ngai Tahu Report}, vol 1, p121.
\textsuperscript{42}Along the river as far upstream as Mount Tuhua.
\textsuperscript{43}Waitangi Tribunal, \textit{The Ngai Tahu Report}, vol 1, p122.
allocated for specific individuals, and the remaining third was for educational and other purposes. All of Rakiura and the outlying islands were conveyed to the Crown with the exception of nine reserves for Ngai Tahu, totalling approximately 935 acres. The agreement ensured that Ngai Tahu retained access to twenty-one Titi Islands, situated off the coast of Rakiura, for the purpose of continuing their customary take of the titi (mutton bird). However, Whenua Hou (Codfish Island) and some of the smaller Titi Islands were not specifically reserved for Ngai Tahu and accordingly, transferred to the Crown. The educational endowment money was not utilised for some 21 years after the purchase.47

This brief history of the Crown's purchases of Ngai Tahu's traditional lands clearly shows that Ngai Tahu were left with very little land, and that the tribe's requests to exclude particular areas of land, and to receive larger reserves, were ignored by the Crown. The minimal purchase prices paid by the Crown in each case were justified by reasoning that:

> [u]noccupied land derived its only value from the application of European labour and capital, ... and the Maoris with their 'barbarous and superstitious customs' could not effectively use it. They were entitled only to land 'actually occupied by them, and cultivated in common', and to forests 'actually used for cutting timber'.48

Benefits would supposedly accrue to Ngai Tahu through an increase in the value of the land retained, and through "Christianity, schooling and the superior example of the 'civilized race'".49 However, this kind of logic relied on the tribe having retained sufficient lands to take advantage of the overall increases in the value land as a result of settler development, and to actively engage in the growing cash economy. Without sufficient lands, Ngai Tahu could not possibly reap such benefits. Cultural assumptions of this kind continued over the next century, making it very difficult for the Crown to accept that Ngai Tahu had been treated unjustly in the land purchases, and thus frustrated the iwi's attempts to gain 'justice' in the years to come.

48 Evison, The Long Dispute, p151, referring to a British House of Commons report on New Zealand.
49 Evison, The Long Dispute, p152.
Te Kereme is born

According to Ngai Tahu, their claim, 'Te Kereme', was born in 1849 when it first became apparent that the Crown was failing to honour the terms of the land purchases, that is, even before all of the purchases had been completed.50 At this time, Matiaha Tiramorehu first complained to the Lieutenant-Governor of the inadequacies of the land reserved to the tribe as a result of Crown land purchases: "Let the boundaries be extended," he pleaded, 'that we may have plenty of land to cultivate wheat and potatoes, and also land where our pigs, cattle and sheep may graze'.51 And so began Ngai Tahu's long and arduous task of calling for 'justice'; asking the Crown to keep its promises made as part of the land purchases, and to abide by the Treaty of Waitangi. In the brief overview of Te Kereme that follows, the Crown often refused to acknowledge Ngai Tahu's grievances and continued to undervalue the iwi's need for land and resources.

The effects of the land purchases soon became apparent. In the initial years of British settlement Ngai Tahu Whanui successfully engaged in the growing capitalist economy. For example, Otago Maori engaged in whaling, provided food for early settlers in Dunedin trading fish, potatoes, wheat, mutton and beef, and were later prominent in the transportation of goods and people.52 However, the initial boom faded as European labourers arrived in greater numbers and European agriculture became established on extensive areas of land available for settlement following the land purchases. Because the land reserved to the tribe was so limited, Ngai Tahu found it difficult to compete with the settlers who held greater amounts of land, had a greater capital base from which to finance growth, and greater expertise in the new economic system.

52Dacker, Te Mamae me te Aroha, pp13,31–33.
Ngai Tahu would increasingly find their participation in the growing economy as service providers to European settlers. This was perhaps as intended by some such as Lt Colonel McCleverty, the New Zealand Company's adviser on Maori Land, whose approach was adopted by Mantell in allocating reserves from land sales. The approach was premised the following principles:

Natives should only have enough land to subsist on. If they had too much land they might not work for wages, and could compete with European settlers. Working for wages was seen as part of the civilising process, for it would force them away from barbaric communal customs and into contact with civilising influences.

In addition to limiting Ngai Tahu participation in the capitalist economy, a heavily reduced land base also prevented the traditional economy from continuing. The iwi quickly found that their access to mahinga kai, or traditional food sources and places, was no longer available or that the resources themselves had been destroyed. This was particularly the case for inland resources, although access to coastal resources, or kaimoana, may well have kept starvation at bay for many whanau.

By the time the Crown had completed all the Ngai Tahu purchases:

Ngai Tahu were in a parlous, some might say pitiable condition. They were now an impoverished people largely confined to uneconomic patches of land, almost entirely isolated from mainstream European development, neglected by government at both central and provincial level, marginalised and struggling to survive both individually and as a people. Their rangatiratanga greatly diminished, their communal way of life and the cultural and spiritual values associated with it seriously undermined. As settlement steadily encroached on them from all sides, as land was progressively fenced and drained, as their access to mahinga kai steadily decreased, Ngai Tahu eke out a bare subsistence on land incapable of sustaining them. No wonder their voices came to be heard more and more in protest.

53Dacker, Te Mamae me te Aroha, pp33–34.
54Dacker, Te Mamae me te Aroha, p28.
55Dacker, Te Mamae me te Aroha, pp35–36.
Over the next century Ngai Tahu sought 'justice' in many ways. It petitioned Parliament, took its claims to the various inquiries established to inquire into the poverty and landless position of its people, and sought remedies in the courts. Sometimes Ngai Tahu's grievances were dismissed in a cursory manner. When a detailed examination of Ngai Tahu's claims was made, invariably the findings were in favour of Ngai Tahu. But even then, the Crown failed to respond adequately.

For example, in 1886 the Mackay Commission was appointed to inquire into Ngai Tahu claims. It found that Ngai Tahu "grievances were supported by historical evidence, and that the lack of land had detrimentally affected [Ngai Tahu Whanui]." But the government took no action, notwithstanding pressure from Ngai Tahu Parliamentarians, Taiaroa and Parata. In 1891, a further Commission of Inquiry was appointed to examine Ngai Tahu's near-landless situation. The bench-mark for a sufficiency of land was taken as fifty acres per person, despite the fact that around that time one hundred acres per (European) person was considered the minimum economic unit for agricultural purposes. That the iwi's situation was measured against a lower standard indicates that the Crown did not consider Ngai Tahu as equal to

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57 For a detailed analysis of Ngai Tahu's pursuit for justice see Waitangi Tribunal, *The Ngai Tahu Report*, vol 3, chapters 20, 21 & 22. See also T. M. Tau (2000) Ngai Tahu—From 'Better Be Dead and Out of the Way' to 'To Be Seen to Belong'. In J. Cookson and G. Dunstall (eds) *Southern Capital, Christchurch: Towards a City Biography 1850–2000* Christchurch, Canterbury University Press. For example, in 1868, Ngai Tahu took its complaints to the Native Land Court, presided by Chief Judge Fenton. See Dacker, *Te Mamae me te Aroha*, p47. Ngai Tahu challenged the Native Land Court's ability to make a final ruling on Kemp's purchase in the Supreme Court, but before the Supreme Court's decision was secured, the government of the day validated the Kemp purchase by an Act of Parliament, the Ngai Tahu Purchase Validation Act 1868. See Dacker, *Te Mamae me te Aroha*, p48. In 1879, a Royal Commission of Inquiry was appointed known as the Smith-Nairn Commission. The Commission upheld Ngai Tahu's claims and considered that Ngai Tahu were entitled to receive one-eleventh of the total sale proceeds received by the Crown under the Kemp (including Akaroa) and Otakou purchase deeds on the basis that the New Zealand Company should have set aside for Ngai Tahu one-tenth of the land purchased. Once again redress was stymied by the government, and Ngai Tahu received nothing. See Dacker, *Te Mamae me te Aroha*, pp63–67. Note also that Te Maiharoa and his followers established a peaceful occupation in inland Otago in protest over the insufficiency of the amount of land reserved to Ngai Tahu in a desperate attempt to have Ngai Tahu's concerns heeded. For more details see Dacker, *Te Mamae me te Aroha*, pp60–66.

58 Dacker, *Te Mamae me te Aroha*, p71.

59 Dacker, *Te Mamae me te Aroha*, p73. Again Mackay was commissioned to undertake the inquiry.
European settlers. Even on the bench-mark of fifty acres the findings were "dramatic". Only 9.1 percent of Ngai Tahu Whanui had 'sufficient' land, 43.16 percent had less than fifty acres, while 47.74 percent of Ngai Tahu had no land at all. Mackay's report "gave a depressing account of the poverty, listlessness and despair amongst Ngai Tahu".

In response to Mackay's findings on Ngai Tahu landlessness, the South Island Landless Natives Act 1906 was passed by Parliament. The Act set aside a further 126,324 acres of land to Ngai Tahu, some of which were never allocated. A further Commission of Inquiry in 1914 into the use of these lands found that only a very small percentage of the land had been utilised, most of it being unsuitable for agricultural purposes. The Crown continued to show little regard for the well-being of Ngai Tahu, and again the tribe found itself disappointed in its pursuit of justice.

In the 1920s, a further Royal Commission of Inquiry was established to inquire into Kemp's purchase. The Commission again found for Ngai Tahu, this time recommending £354,000 compensation be paid to the tribe, although it noted that this sum was less than the value of the reserves which should have been allotted to Ngai Tahu under Kemp's deed. After a long wait, in 1945 the Ngai Tahu Claim Act was passed, awarding to Ngai Tahu £300,000 (£54,000 less than recommended in 1920) in settlement of the tribe's claims with regard to the Kemp...
purchase. The sum was to be paid in thirty yearly payments of £10,000 each. Although a substantial sum in 1946, by 1976 "it would not cover administration costs" of the tribe. As part of the settlement the Ngai Tahu Maori Trust Board was established to administer the funds. Many Ngai Tahu were unhappy with the settlement, but it was accepted on the basis that "half a loaf is better than no loaf", again indicating that the Crown's view of just compensation for Ngai Tahu's landlessness, and the iwi's, were very different. The 'drip-feed' compensation payments, and the limited autonomy of the Trust Board, however, severely constrained the tribe's ability to use the compensation to engender cultural growth in the years that followed.

When, in response to the growing pressure from Maori throughout the country, the Crown established the Waitangi Tribunal to inquire into the adequacy of the Crown's actions and gave the Tribunal retrospective jurisdiction, Ngai Tahu took up this new opportunity to seek 'justice' from the Crown through its tribal representative, the Ngai Tahu Maori Trust Board. The Crown's paltry efforts to appease the tribe's concerns over the years had not alleviated Ngai Tahu's near landless position, nor its sense of injustice. But the tide was beginning to turn.

67 Dacker, *Te Mamae me te Aroha*, p118.
68 Ngaitahu Trust Board Act 1946, s4(2). See also Tau, Ngai Tahu–From 'Better Be Dead and Out of the Way' to 'To Be Seen to Belong', pp230–231; and Chapter Eight of this thesis for further details on the Trust Board.
69 Dacker, *Te Mamae me te Aroha*, p118. See also Parsonson, Ngai Tahu–The Whale that Awoke, p254. Ngai Tahu Whanui remained dissatisfied with the 1945 settlement of their claims, and in 1969 the Ngai Tahu Maori Trust Board had petitioned Parliament seeking, "the yearly compensation payments [of the 1945 settlement] to be reinstated and paid in perpetuity, on the grounds that the 1945 settlement did not have the support and acceptance of the people, that there was no justification for a monetary settlement of less than the figure recommended by the 1921 Commission, and that the method of payment had effectively reduced the real value of the settlement". After some delay, the 1972-1975 Labour Government agreed to make the requested payments in perpetuity, in line with payments being made at the time to other iwi. However, the 1945 settlement only concerned Kemp's purchase and so the many other Ngai Tahu grievances remained unaddressed. See Dacker, *Te Mamae me te Aroha*, p126.
70 Discussed further in Chapter Eight of this thesis.
72 Treaty of Waitangi Act 1975.
73 Treaty of Waitangi Amendment Act 1985
74 Dacker, *Te Mamae me te Aroha*, p127. See also Tau, Ngai Tahu–From 'Better Be Dead and Out of the Way' to 'To Be Seen to Belong', pp241–245; and Parsonson, Ngai Tahu–The Whale that Awoke, p254–255.
The Ngai Tahu claim before the Waitangi Tribunal

After over one hundred years of inadequate Crown responses to the iwi’s calls for ‘justice’, the Waitangi Tribunal offered Ngai Tahu its first opportunity to have its historical grievances examined in a bicultural context. The Tribunal’s role in the Treaty settlement process is to investigate the Crown’s past acts and omissions through the lens of the Treaty of Waitangi and its principles, as the standard of just conduct between the Crown and its Maori Treaty partners. Where the Tribunal finds that the Crown breached the Treaty or its principles, this is an injustice requiring contemporary redress. In this context, Ngai Tahu lodged a claim in 1986 with the Waitangi Tribunal, alleging that the Crown acted unjustly in the land purchases of the 1840s–1860s, and that it subsequently failed to remedy the resulting prejudice suffered by the tribe.

The Ngai Tahu claim was known as the ‘Nine Tall Trees’, referring to claims concerning the eight major land purchases, and those relating to mahinga kai (those places where food was produced or procured, which includes an extensive range of resources in and on the land, forests, lakes, rivers sea and air). Ngai Tahu claimed that the Crown failed to adhere to the principles of the Treaty of Waitangi in a number of respects, and as a result, its people had suffered cultural and economic loss. The iwi argued that the Crown had not reserved sufficient land for its needs, at the time and into the future, and had failed to permit Ngai Tahu to exclude from the purchases certain lands it did not wish to sell. In particular, Ngai Tahu claimed the Crown had failed to protect its right to retain its pounamu. The iwi also alleged

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76See Chapter Three of this thesis.
77For a description of the Ngai Tahu claim see Parsonson, Ngai Tahu–The Whale that Awoke, pp255–264.
that the Crown had failed to protect and ensure Ngai Tahu access to its mahinga kai, and had not provided schools and hospitals as agreed as part of the purchases.\textsuperscript{79}

Overall, Ngai Tahu argued seventy-three alleged wrongful Crown acts or omissions. In addition, the Ngai Tahu claim included 108 further ancillary claims relating to individual property rights of members of the tribe and claims arising out of the South Island Landless Natives Act 1906, together with approximately twenty sea fisheries claims.\textsuperscript{80} Ngai Tahu stated, "Five generations of Ngai Tahu men and women have grown old in the shadow of our tall trees".\textsuperscript{81}

After twenty-three hearings over the course of more than two years, from August 1987 to October 1989, the Waitangi Tribunal upheld the majority of Ngai Tahu's claims.\textsuperscript{82} The Tribunal held:

\begin{quote}
The Tribunal has found on the evidence before it that many of the Claimants' grievances arising out of the eight Crown purchases including those relating to mahinga kai, have been established. Indeed the Crown has properly conceded that it failed to ensure Ngai Tahu were left ample lands for their present and future needs. The Tribunal cannot avoid the conclusion that in acquiring from Ngai Tahu 34.5 million acres, more than half of the land mass of New Zealand for £14,750 and leaving them with only 35,757 acres, the Crown acted unconscionably and in repeated breach of the Treaty of Waitangi.\textsuperscript{83}
\end{quote}

It also held that "subsequent efforts by the Crown to make good Ngai Tahu's losses were few, extremely dilatory, and largely ineffectual".\textsuperscript{84}

\textsuperscript{79}Waitangi Tribunal, \textit{The Ngai Tahu Report}, vol 1, pp8-10.
\textsuperscript{81}Te Runanga o Ngai Tahu, \textit{Te Karaka Special Edition}, cover page.
\textsuperscript{82}Waitangi Tribunal, \textit{The Ngai Tahu Report}, vols 1-3.
\textsuperscript{83}Waitangi Tribunal, \textit{The Ngai Tahu Report}, vol 3, p1051.
\textsuperscript{84}Waitangi Tribunal, \textit{The Ngai Tahu Report}, vol 3, p1051.
The Tribunal found that the Crown had breached the Treaty principle that, "cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga". The Tribunal stated:

Rangatiratanga signifies the mana of Maori not only to possess what they own but to manage and control it in accordance with their ... customs and cultural preferences. ... But as we have seen, the Crown declined the right of Ngai Tahu to retain lands they wished to keep and left them with a mere fraction of the vast lands they formally [sic] owned. Such deprivation meant not only a loss in material terms but also a loss of the exercise of their rangatiratanga upon which the viability of their social system itself depended.

... 

In none of these purchases was the land which remained in Ngai Tahu ownership and possession remotely adequate to enable them to maintain their traditional way of life and social structure, let alone engage in new activities such as pastoral farming. Because the loss of land and traditional resources led to a consequential loss of an economic base for Ngai Tahu communities, Ngai Tahu people were forced to migrate away from traditional areas to find work, further weakening those communities and their cultures. The "predominantly negative European attitudes towards Maori and their culture" exacerbated this trend. In addition, the Waitangi Tribunal found that the Crown's failure to exclude from sale the land that Ngai Tahu did not wish to sell, and its failure to ensure adequate reserves for the iwi, was a breach of the principle of the Treaty that the Crown right of pre-emption (under Article II) imposed a reciprocal duty. This duty "was to ensure, when exercising its right of pre-emption, that the Maori people in fact wished to sell; secondly that each tribe was left with a sufficient endowment for its needs—both present and future". The Crown's actions also offended the Treaty principle that the Crown must actively protect "Maori people in their lands and waters to the fullest extent practical". The Tribunal stated:

In their single-minded commitment to the purchase of Ngai Tahu's vast estate, the respective Crown purchase agents, with the connivance or clear endorsement of the various governors of the day, very largely ignored Ngai Tahu's rights as a Treaty partner. It is abundantly clear the odds were weighed so heavily against Ngai Tahu that, in the absence of a competent and committed officer appointed to advise and assist them, they stood no real chance of avoiding tribal disintegration, serious impoverishment and virtual landlessness.89

The Tribunal held that the Crown's acts and omissions were "difficult if not impossible to reconcile with the duty of the Crown to act towards its Maori partner 'reasonably and with the utmost good faith'."90

Specifically, the Waitangi Tribunal upheld Ngai Tahu's claims in relation to pounamu.91 In this respect the Waitangi Tribunal stated:

The tribunal is satisfied that there would have been a demarcation in Ngai Tahu thinking between ordinary stones and greenstone, so great were the spiritual and cultural values attached to its possession. ... The tribunal is satisfied that Poutini Ngai Tahu did not consciously agree to part with their pounamu and that the language of the deed was not sufficient to convey it to the Crown.92

The Tribunal further found that Ngai Tahu had expressed a clear desire to retain pounamu, and the land on the West Coast where pounamu was found in order to retain its rights to pounamu. The Crown had therefore breached the principles of the Treaty in failing to protect Ngai Tahu's right to retain its taonga, pounamu, and in failing to respect the iwi's rangatiratanga with respect to pounamu, contrary to Article II of the Treaty.93 The Tribunal also found that the Crown acted in breach of Article II of the Treaty in failing to protect Ngai Tahu's access to pounamu by reserving to Poutini Ngai Tahu the 80,000 acres requested at the Arahura River.94

As a result of the Crown's failure to honour the Treaty and its principles, the Tribunal found that Ngai Tahu had suffered "grave injustices over more than 140 years". The iwi was therefore "clearly entitled to very substantial redress" which would be likely to comprise "a mixed set of remedies which reflect not only the nature and extent of the grievances but present day realities". At the request of the parties, the Tribunal made only limited recommendations for redress, instead leaving the parties to negotiate a settlement.

The Tribunal did, however, make specific recommendations with respect to pounamu. It recommended that the Crown return to Ngai Tahu all Crown-owned pounamu occurring naturally in Ngai Tahu's tribal area, subject to all existing mining licences. In relation to the Arahura River, it recommended that all pounamu in the Arahura be vested in a body nominated by Ngai Tahu, the beds of the tributaries of the Arahura River be vested in the Mawhera Incorporation (or another body nominated by Ngai Tahu), and the banks and land either side of the Arahura and its tributaries, sufficient to provide access to reasonable quantities of pounamu, also be vested in the Mawhera Incorporation (or another body nominated by Ngai Tahu).

The Waitangi Tribunal findings set the scene for the Crown-Ngai Tahu negotiations which began some months after the Tribunal's report on the Ngai Tahu claim was released. The primary aim for the tribe in taking its claim to the Tribunal, and negotiating a settlement with the Crown, was to achieve 'justice'. Ngai Tahu sought to do this through the restoration of the iwi's mana in its tribal area and by securing an economic base for the tribe. It also wished to establish a new Treaty relationship involving "power sharing and political representation at

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99 For a detailed discussion of the Mawhera Incorporation see Chapter Eight of this thesis.
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regional and local level, and ... sharing resource administration with the Crown". The Ngai Tahu leadership identified that a diversity of remedies would be required to reflect the "rich diversity of land, situation, and title represented in the [Waitangi Tribunal] claim". Accordingly, the Ngai Tahu negotiators entered the settlement negotiations seeking "a 'package' made up of legislative reform, land and coastal resources, shared administration with the Crown, and cash".

4.3 NEGOTIATING JUSTICE

Negotiations for a comprehensive settlement of all Ngai Tahu claims began in September 1991. Whilst the Crown and Ngai Tahu had some reservations about the Waitangi Tribunal's findings of fact on the claims, both parties agreed to put those differences of opinion aside and proceed to negotiate a settlement. Initially, the negotiations were very slow moving, and a shared notion of what would be required to achieve 'justice' was difficult for the negotiators to find.

Different perspectives

The parties had very different perspectives coming to the negotiating table. For the current generation of Ngai Tahu, this was only the second opportunity to meet the Crown—in its capacity as wrongdoer—face to face. The first had been during the hearings before the

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101 O'Regan, The Ngai Tahu Claim, p235.
102 O'Regan, The Ngai Tahu Claim, p256.
104 S. Cook, Ngai Tahu settlement negotiator, Lecture, Faculty of Law, University of Otago, 19/05/2000; Crown Officials, Department of Conservation, Interviews with author, April 2000. See also Price, The Politics of Modern History-Making, pp8–9.
105 It should be noted that the parties also had very different resources coming to the negotiating table. Price, The Politics of Modern History-Making, p6. See also A. Mikaere (1987) Settlement of Treaty Claims: Full and Final, or Fatally Flawed? New Zealand Universities Law Review 17, p45.
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Waitangi Tribunal where the Crown had been represented by lawyers from Crown Law, who had come to know the Ngai Tahu claim very well. But in the negotiations, the Crown was represented by officials from the Office of Treaty Settlements who were new to the Ngai Tahu claim, and to their role in negotiating settlements. The Crown had not yet established firm policy on Treaty settlements suggesting that its understanding of the justice required in the Treaty settlement process was lacking. There was also a gap in the Crown's understanding of Ngai Tahu's lived experience of injustice. Office of Treaty Settlement officials describe a sharp learning curve as they struggled, at first, to come to grips with what the Ngai Tahu negotiators were talking about, and what they wished to achieve. Different perspectives within the Crown itself added to the difficulties of finding common ground. For example, the Department of Conservation had different objectives and requirements being 'on the ground' and having direct relationships with the iwi through local offices, to Treasury, whose prime concern was to limit the Crown's fiscal risk.

One indicator of the size of the gap in understandings between the parties in the initial stages of the negotiations, was the difference between the respective parties' valuation of the overall worth of the claim. Ngai Tahu had been advised that their claim was worth over two billion dollars, and perhaps even as much as $16 to $18 billion, a far cry from the Crown's initial offer of $100 million. Unprepared to accept the Crown's offer:

'Ngai Tahu has stated categorically that $100 million is substantially below its assessment of the level of compensation required to establish an economic base for its

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109 T. O'Regan, Settlement negotiator, Te Runanga o Ngai Tahu, Interview with author, November 2000. Note also D. Graham (1997) Trick or Treaty? Wellington, Institute of Policy Studies, Victoria University of Wellington, p81, suggesting that the figure asserted was $20 billion.
present and future needs, and hence could not form the basis of an enduring settlement'.  

A settlement that did not provide a sufficient base for the iwi to re-establish their cultural identity and position was no justice for Ngai Tahu. From the perspective of the Ngai Tahu negotiators, justice in the Ngai Tahu settlement should be reparatory and restore to the iwi what it had lost. The huge difference in valuation figures may also have reflected the Crown's lack of understanding of the effects of past Treaty breaches, particularly its failure to ensure to Ngai Tahu sufficient land and resources for its needs.

Despite this impasse, some common ground had been found on a number of other fronts. For example, the Te Runanga o Ngai Tahu Bill, which was to create a legal personality for Ngai Tahu (Te Runanga o Ngai Tahu) had been introduced into Parliament in 1992. In addition, negotiations for the return of pounamu, the Crown Titi Islands, Whenua Hou and Rarotoka Island were progressing, and a 'land bank' to hold properties covered by the claim which might form part of the settlement package had been established.

The negotiations broke down in August 1994, around the same time as the National Government announced its 'Fiscal Envelope' policy which capped the amount the Crown would pay in settlement of all Maori historical grievances at $1,000 million. It is clear that at this stage

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112 O'Regan, Settlement negotiator, Te Runanga o Ngai Tahu, Interview; Settlement negotiator, Te Runanga o Ngai Tahu, Interview with author, July 2000.
114 Price, *The Politics of Modern History-Making*, pp11-12. It is interesting to note that Ngai Tahu believe that the Crown called off the negotiations, whereas the Crown assert that Ngai Tahu withdrew. Obviously, communication was at a low ebb. Tipene O'Regan (Ngai Tahu lead negotiator) is reported as admitting that he and Douglas Graham (then Minister in Charge of Treaty of Waitangi Negotiations) had "very deep and fundamental disagreements" over the settlement. *Evening Post*, 8/11/1999, "Sir Douglas: a convert to the Waitangi cause". Price describes there being a real clash of personalities between the two. Price, *The Politics of Modern History-Making*, p11, referring to interviews with both Ngai Tahu and Crown negotiators. See also Graham, *Trick or Treaty?*, pp81-82; and Te Runanga o Ngai Tahu submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/20-MA/97/27, p7.
the Crown and Ngai Tahu still had some fundamental differences in their respective understandings of the justice required in the settlement. Academic Richard Price suggests that in addition to personality issues between lead Ngai Tahu negotiator, Tipene O'Regan, and then Minister in Charge of Treaty of Waitangi Negotiations, Douglas Graham, and the impasse over the financial worth of the claim:

... both sides were operating under real negotiation constraints. On the one hand, the Crown had to overcome the reluctance of Treasury to make substantial payments to treaty claimants. On the other, Ngai Tahu membership was pressing the leadership to get as many resources to settle the claim as they could from the government.115

The Crown-Ngai Tahu relationship also deteriorated due to the lack of progress of the Te Runanga o Ngai Tahu Bill, which was stalled in the Parliamentary Select Committee process. For Ngai Tahu, the Crown's failure to pass the legislation represented a lack of good faith on the part of the Crown. O'Regan commented at the time:

Our Kaumatua have told members of the Select Committee that if the Crown will not recognise the legal personality of Ngai Tahu at no cost to itself and as a response to the clearly expressed majority wish of our people, then there are serious doubts about the Crown’s sincerity in attempting to negotiate a settlement. The tribunal has already pointed out that if there is no clear legal personality there can be no durability of settlement.116

Further, Ngai Tahu sources suggest that the Crown had reneged on a number of other agreements reached at this stage of the negotiations, further adding to a loss of trust between the parties.117

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In the hiatus in negotiations, the rift between the parties deepened. The government was pursuing an aggressive privatisation program, leading to the disposal of assets (particularly land) which might form part of a settlement package. Ngai Tahu, determined to achieve justice in one way or another, moved its focus to the courts. The iwi had two key objectives in its 'litigious' approach—the first was "aimed primarily at preventing the Crown from disposing of assets required for a settlement, broadly speaking in line with the recommendations of the Waitangi Tribunal". The second objective was "to keep pressure on the Crown to behave properly in terms of its duties to Ngai Tahu". At one point Ngai Tahu had seventeen court actions against the Crown, preventing the Crown from dealing with certain South Island forests, state-owned enterprise lands, and high country stations.

Ngai Tahu also returned to the Waitangi Tribunal during this period, seeking a hearing on remedies. It sought the return of "all forest land within its rohe [tribal area] and full compensation under the [Treaty of Waitangi] Act". This pressure on the Tribunal to use its binding powers was unsuccessful. Ngai Tahu's application for a full hearing was refused by (then) Chief Justice Durie, Chairperson of the Waitangi Tribunal, on the grounds that "a full hearing of the Ngai Tahu claim on relief will seriously affect the allocation of resources to other claims pending or in hearing". Contemporary justice in the Treaty settlement process (equity between tribes) was placed ahead of Ngai Tahu's interests in obtaining reparative justice. The Crown's roles as sovereign and 'wrongdoer' conflicted at this point, making Ngai

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118For example, the sale of assets by Coalcorp and Landcorp, and Crown forestry assets. See Price, *The Politics of Modern History-Making*, pp20–21.
122Cook, Lecture; Graham, *Trick or Treaty?*, p79.
Tahu's attempts to achieve justice from the multifarious Crown particularly difficult and complex.\textsuperscript{125}

Ngai Tahu had begun its claim in the Waitangi Tribunal, had attempted to achieve settlement of its claims through negotiations with the executive arm of the Crown, and finding little justice there, had turned to the courts and returned to the Tribunal. Incensed at the Tribunal's decision, the iwi retaliated by lodging further High Court actions against the Crown.\textsuperscript{126} Ngai Tahu's litigation had effectively hamstrung a large proportion of government dealings with land and resources in much of the South Island, and had the potential to embarrass the Crown. The Crown was forced to find a way to re-open settlement negotiations.\textsuperscript{127}

\textbf{Growing common ground}

It was not until mid-1996 that moves were made to re-establish settlement talks.\textsuperscript{128} The breakthrough came when then Prime Minister, Jim Bolger, met face-to-face with Tipene O'Regan. The meeting led, finally, to an agreement on the quantum of the financial redress—$170 million.\textsuperscript{129} Bolger suggests that it was the personal friendship and high level of trust between himself and O'Regan that made the breakthrough possible.\textsuperscript{130} Both parties, however, had to compromise. Ngai Tahu negotiators believed that although the $170 million figure was less than they thought Ngai Tahu was due, the overall worth of the settlement could be enhanced by additional ingredients of value:
That figure [$170 million] was considered on its own to be unacceptable given the huge scale of Ngai Tahu's loss. ... However, negotiations were entered into on the basis that a range of additional conditions could be included. ... In the view of the Negotiators, the additional conditions [relating to the purchase of Crown assets] are worth substantially more as building blocks for wealth than the nominal quantum of the proposed settlement. ... Using [one of these conditions, the deferred selection process], we have hugely increased the net asset worth of Ngai Tahu. ... If we have managed to build a net asset worth of $32 million [in 1996] from $100,000 in 1990, what kind of multiple can we reasonably expect to build on a nominal settlement base of $170 million?131

Thus, the prospect of future gains resulting from the additional conditions was balanced against Ngai Tahu's desire for full reparative justice. Equally, the Crown accepted that if a deal was to be brokered, it would have to live with a figure beyond what Cabinet had initially approved for the settlement.132 Important common ground had been found.

Given the failure of the first round of negotiations, there was an obvious need for the Crown to demonstrate its good faith in a tangible way. The first step, from the iwi's point of view, was to achieve the passage of the Te Runanga o Ngai Tahu Bill, and thereby establish a tribal legal entity having power to contract with the Crown and generally to administer the tribe's affairs.133 This was an essential ingredient of a settlement intending to restore Ngai Tahu's mana and rangatiratanga. Previously, the tribe's affairs were administered by the Ngai Tahu Maori Trust Board, under which the tribe was accountable to the Minister of Maori Affairs rather than members of the tribe.134 Ngai Tahu wanted independence from the Crown and control over its own affairs.

However, as Chapter Eight discusses in detail, the establishment of Te Runanga o Ngai Tahu met with considerable opposition from within the tribe.135 Some Ngai Tahu felt that Te

133Cook, Lecture.
134Under the Maori Trusts Boards Act 1955, particularly ss31&32.
135See Chapter Eight of this thesis, and the references to the submissions to the Maori Affairs Committee given there.
Runanga 0 Ngai Tahu did not adequately represent all members of the tribe, while others believed that it did not reflect the traditional political structure of Ngai Tahu's multi-hapu groupings. Many claimed a lack of adequate consultation, and that the passage of the Bill would create new injustices. Prominent in this opposition were those claiming separate Waitaha, Ngati Mamoe, and Poutini Ngai Tahu autonomy. These matters had stalled the Bill at Parliamentary Select Committee stage. It was only through the personal intervention of the then Prime Minister, Jim Bolger, that the Te Runanga 0 Ngai Tahu Act 1996 was finally passed by Parliament in April 1996, and Ngai Tahu given legal autonomy. The opposition to Te Runanga 0 Ngai Tahu was largely ignored and the negotiators then progressed settlement negotiations to the next stage—the Deed of 'On-Account' Settlement.

The Crown provided interim redress in the Deed of 'On-Account' Settlement, signed in June 1996, which went some way to restoring the honour of the Crown in the negotiation process. The Deed itself acknowledged that the good faith of the Crown was at stake:

> this Deed is entered into by the Crown as a sign of good faith by the Crown and a demonstration of the Crown's goodwill, and in the expectation that both parties will negotiate in good faith toward a comprehensive settlement of Ngai Tahu's claims and will use reasonable endeavours to remove any obstacles to such good faith negotiations proceeding.

Significantly, the Deed provided for the return of pounamu, and a $10 million cash payment, to Te Runanga o Ngai Tahu. Both were non-returnable even if a final settlement was not achieved. In return, Ngai Tahu agreed to an indefinite adjournment of its litigation relating to the claim. Common ground between the parties was increasing.

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137 Note that because the Te Runanga o Ngai Tahu Bill was a private member's bill, the Maori Affairs Committee had little power to suggest alterations which may have met some of the concerns of those opposing the proposed legislation.
139 Price, The Politics of Modern History-Making, p27. The Deed of 'On Account' Settlement also provided for the vesting of Tutaepatu Lagoon in Te Runanga o Ngai Tahu (which included a gift of $250,000 for wetlands restoration, and $50,000 to establish a management plan). See also Price, New Zealand's Interim Treaty Settlements.
The return of pounamu to Ngai Tahu, both in principle and more particularly at this stage of the negotiations, was especially significant and symbolic.\(^{140}\) As will be discussed in Chapter Seven, pounamu is a taonga of Ngai Tahu.\(^{141}\) It is intimately linked to the mana of the iwi, and to Ngai Tahu tipuna (ancestors) through various tribal histories, and therefore, is integral to Ngai Tahu identity. Traditionally, it was also highly valued as a material for tools, weapons and adornment. Pounamu retains symbolic and material value for Ngai Tahu today, and is "a treasure that will help to sustain our [Ngai Tahu] ancient culture as few things can."\(^{142}\) Importantly, the promise of the return of pounamu signalled that the Crown accepted Ngai Tahu's mana in relation to the resource, and its role as kaitiaki (guardian) of the stone. Thus, the return of pounamu indicates the growing cross-cultural common ground of the settlement negotiations.

Further, at least at a symbolic level, the justice of the return was patent: something unjustly taken was to be returned, and it was an essential element in a settlement package intending to restore Ngai Tahu's mana as a people, and, therefore, Ngai Tahu's cultural survival. While the Crown acknowledged its beauty, pounamu was more trouble for the Crown than it was worth. Pounamu had a low monetary value (it cost the Crown more to administer the relevant mining licences than it collected in royalties from those licences), and the Crown found it extremely difficult to monitor existing licences and the resource generally. The Crown believed that Ngai Tahu would be a better manager of the resource—the iwi valued pounamu in a way

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\(^{140}\)See Te Runanga o Ngai Tahu submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/20-MA/97/27, p7; Price, New Zealand's Interim Treaty Settlements. Note the similar role played by the return of Hopuhopu air base as part of the Waikato-Tainui raupatu settlement. Price, New Zealand's Interim Treaty Settlements; Crown Official, Ministry of Justice, Interview with author, April 2000.


that the Crown would never do and local Ngai Tahu were better placed to keep a watchful eye on pounamu deposits than the Crown administration could ever be.\(^\text{143}\)

The Crown was also very much aware that the return of pounamu at the beginning of the second phase of negotiations would be psychologically significant for Ngai Tahu Whanui. It realised that the return of pounamu would assist the Ngai Tahu negotiating team in convincing iwi members that the Crown was acting in good faith and that a final settlement was indeed possible.\(^\text{144}\) Ngai Tahu's own consultation document stated:

> The Ngai Tahu Negotiating Group believes that the delivery by the Crown on its promise to return Pounamu is a very significant pointer to the future. It demonstrates the Crown's determination to act honourably in resolving the Ngai Tahu Claim. It bodes well for the overall settlement, should Te Runanga o Ngai Tahu decide to accept the offer.\(^\text{145}\)

Once again, however, the measure was not without opposition from Ngai Tahu members.\(^\text{146}\) Following on from their objection to the establishment of Te Runanga o Ngai Tahu, some iwi members opposed the return of pounamu to the newly created Te Runanga o Ngai Tahu, and to a West Coast-based Maori incorporation, the Mawhera Incorporation. Again the grounds for opposition were that these entities were not the traditional ones responsible for pounamu, and did not, in the contemporary context, represent all those entitled to be considered kaitiaki of the stone. The return to Te Runanga o Ngai Tahu and the Mawhera Incorporation, therefore, it was argued, created fresh injustices. Opposition also came from outside Ngai Tahu.\(^\text{147}\) Members of the pounamu industry, and some members of the public, claimed they had not been adequately consulted, and that their 'rights' to pounamu would be defeated by the return of

\(^{143}\)The entire pounamu resource was valued at $0.00 so as not to affect the overall quantum of the settlement (at this time the 'Fiscal Envelope' policy was in full effect), and because it was considered inappropriate to place a monetary value on something so spiritually and culturally important to Ngai Tahu. Crown Official, Ministry of Economic Development (formerly Ministry of Commerce), Interview with author, April 2000.

\(^{144}\)Crown Official, Ministry of Economic Development, Interview.


\(^{146}\)See Chapter Eight of this thesis and the references cited there.

\(^{147}\)See Chapter Nine of this thesis.
pounamu to Ngai Tahu, thereby creating new injustices. However, the opposition to the Bill achieved little, and the return was effected by the Ngai Tahu (Pounamu Vesting) Act, passed by Parliament on 25 September 1997. It came into force on 29 October 1997.\textsuperscript{148}

\textit{Good faith secured, common ground established}

With the good faith of the parties secured (at least to a workable degree) and considerable common ground established, the complex negotiations proceeded with vigour to a non-binding agreement in principle, or a 'Heads of Agreement', just four months later in October 1996. The speed at which the second phase of the settlement negotiations proceeded is remarkable given the slow start to the process. The Heads of Agreement deal was clinched by the Crown agreeing to pay interest on the claim money outstanding\textsuperscript{149} and the addition of a relativity clause,\textsuperscript{150} both adding to the settlement quantum.\textsuperscript{151} Ngai Tahu had, by this stage, successfully negotiated additional potential wealth generating ingredients to the settlement, primarily the land bank and deferred selection process mechanisms. Ngai Tahu had already used the land bank device during the negotiation period to increase its capital base.\textsuperscript{152} The negotiators now felt confident that the economic redress package was sufficient to restore an economic base for the tribe, and would therefore enable the tribe to provide for its cultural survival.\textsuperscript{153} These were essential aspects of 'justice' for Ngai Tahu.

A number of factors were influencing the settlement negotiations at this stage. It seems both Ngai Tahu and the Crown were eager to finalise the Heads of Agreement before what was to be


\textsuperscript{149}That was $160 million from 5 October 1996 until final payment, 20 business days after the claim settlement legislation went through Parliament.

\textsuperscript{150}If the Crown increases the fiscal cap of settlements beyond $1 billion, Ngai Tahu will be given a 'top up' to retain their seventeen percent share.


\textsuperscript{152}Price, New Zealand's Interim Treaty Settlements.

\textsuperscript{153}Te Runanga o Ngai Tahu, \textit{Te Karaka Special Edition}, pp22-23.
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New Zealand's first election under a Mixed Member Proportional voting system, late in 1996,\textsuperscript{154} The election was expected to produce a greater range of Parliamentary interest group representation and, possibly, a change in government. Both of these factors seemed unlikely to favour Ngai Tahu in achieving a settlement with the Crown. In addition, other large Tribunal claims were looming ready for settlement, particularly the Taranaki claim. Ngai Tahu may have feared that the Taranaki negotiations would take precedence over its own.\textsuperscript{155} And lastly, both the Crown and the iwi had, by this stage, improved their negotiating skills and processes, particularly through greater use of small specialist teams working on particular elements of the settlement with less emphasis on the lead negotiators.\textsuperscript{156}

Following the Heads of Agreement, Te Runanga o Ngai Tahu undertook consultation with its members. In particular, it sought members' opinions on which culturally significant sites and areas should be returned to the iwi, protected, or the subject of new environmental decision making procedures being negotiated as part of the settlement.\textsuperscript{157} The annual meeting of Ngai Tahu members, the Hui-A-Tau at Tuahiwi in 1996, voted in support of the Heads of Agreement, and it was further supported by the newly formed tribal council, Te Runanga o Ngai Tahu.\textsuperscript{158} Focus then turned to drafting the final settlement agreement. The Crown's final offer of settlement was made on 23 September 1997.

By the time the Heads of Agreement had been signed, and particularly once the Crown had made its final settlement offer, there appeared little opportunity for the 'rank-and-file' members of the tribe to have any meaningful input into the settlement. However, after the Crown's offer, Te Runanga o Ngai Tahu sought a mandate from its members to accept the


\textsuperscript{157}Cook, Lecture.

\textsuperscript{158}Price, The Politics of Modern History-Making, p32. But see below, this chapter, regarding opposition to the settlement.
settlement offer, through a series of hui (meetings) and a postal ballot.\textsuperscript{159} One Ngai Tahu negotiator described the process as seeking "moral legitimacy" for the settlement since Te Runanga o Ngai Tahu actually had the power itself to sign off on the deal.\textsuperscript{160} Certainly, some individual Ngai Tahu members did not feel involved in the negotiation of the settlement deal, and felt that the consultation hui presented them with a \textit{fait accompli}, rather than engaging in any meaningful consultation.\textsuperscript{161} This was particularly the case where individuals were effectively excluded from papatipu runanga (local tribal council or marae) involvement due to poor communication.\textsuperscript{162} This raises the question of whether the settlement tapped the complexities of the relevant contemporary contexts, and whether justice was thereby compromised. However, given that the settlement negotiations were conducted in confidence, one has to question the extent to which Ngai Tahu was able, at any point, to consult effectively with its members.\textsuperscript{163}

The postal vote gave all adult Ngai Tahu members an opportunity to express a simple 'yes/no' opinion on the settlement package.\textsuperscript{164} Ngai Tahu members were given just over six weeks to discuss and decide upon the merits of an extremely complex settlement with far reaching implications. Approximately fifty percent of eligible voters returned their papers.\textsuperscript{165}

\textsuperscript{159}Hui were held in each of the major centres in both the North and South Islands between 11 October and 3 November 1997. The hui entailed presentations from the Ngai Tahu negotiators detailing the settlement package and allowed for questions and answers. An information booklet on the settlement was provided to each adult Ngai Tahu member. The meetings did not gather information about what the tribal members wanted from the settlement. Te Runanga o Ngai Tahu, \textit{Te Karaka Special Edition}, p10.

\textsuperscript{160}Cook, Lecture.

\textsuperscript{161}Based on the author's attendance at the Dunedin consultation hui, and subsequent discussions with Ngai Tahu individuals.

\textsuperscript{162}For a discussion of these issues, particularly relating to the West Coast and pounamu, see Chapter Eight of this thesis.

\textsuperscript{163}Discussed further in Chapter Ten of this thesis.

\textsuperscript{164}Te Runanga o Ngai Tahu, \textit{Te Karaka Special Edition}, p10.

\textsuperscript{165}See Deloitte Touch Tomatsu, letter dated 13 November to Mr S Ashton reporting on the ballot, appended to Office of Treaty Settlements (1998) Report on the Ngai Tahu Claims Settlement Bill—Claim Definition and Waitaha to the Maori Affairs Committee, 8 July 1998 (NTS/OTS/47) for the different ways in which the figure could be calculated.
that voted did so decisively (93.7 percent) in favour of the settlement.\textsuperscript{166} Anecdotal sources suggest that a significant number of those who did not return their ballot paper did so as an expression of their dissatisfaction with the settlement.\textsuperscript{167} Again, one must query whether consultation at this time would have been effective in any case—the deal had essentially been done. One imagines that the Ngai Tahu negotiators would have been loathe to re-negotiate any major parts of the settlement for fear of losing the settlement as a whole. The negotiations had been difficult enough, and further complexity was, perhaps, to be avoided if an agreement was to be reached, and honoured. However, the limited consultation undertaken by Ngai Tahu, and its timing, suggests that some complexities may not have been addressed, and certain injustices may remain unresolved, or new injustices may have been created as a result.

Some Ngai Tahu openly opposed the settlement. Two of the eighteen papatipu runanga that make up the tribal council of Te Runanga o Ngai Tahu voted against the settlement when it came before the Te Runanga board.\textsuperscript{168} Te Ngai Tuahuriri Runanga, based north of Christchurch, unsuccessfully sought a court injunction to stop the settlement proceeding. The Runanga opposed the settlement on the basis that the Crown's offer of $170 million was not enough to do justice to the claim, and that more would be gained through pursuing the claim through the courts rather than a negotiated settlement.\textsuperscript{169} One Ngai Tahu member expressed his doubt about the settlement this way:

\begin{quote}
The problem with the Heads of Agreement is that it is not based on justice ... (or) on the Crown redeeming itself in front of us. Its just a deal .... There is no rationale to this one, its just a figure picked out of nowhere, and that is the problem with it ... . We can't justify it to ourselves.\textsuperscript{170}
\end{quote}

\begin{footnotes}
\item[166] Te Runanga o Ngai Tahu (1998) 1998 \textit{Annual Report} Christchurch, Te Runanga o Ngai Tahu, p12. Note that the total votes in favour of the settlement as a percentage of the total eligible voters was 46.88 percent. See Deloitte Touch Tomatsu, letter.
\item[167] See for example submission to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill NTS/335C.
\item[169] Price, \textit{The Politics of Modern History-Making}, p37. See also Ngai Tuahuriri Runanga submission to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill NTS/151.
\end{footnotes}
Despite opposition to the settlement, and the limitations of Ngai Tahu’s internal consultation process, the deal was accepted by the tribe as a whole. The Deed of Settlement was signed at Kaikoura on 21 November 1997. Legislation was required to implement much of the settlement, and so the Ngai Tahu Claims Settlement Bill was introduced into Parliament in March 1998. The Bill was referred to the Maori Affairs Select Committee for review.

A considerable number of Ngai Tahu members again chose to use the Parliamentary Select Committee process to express their dissatisfaction with the settlement, as they had done in the case of the Te Runanga o Ngai Tahu and Ngai Tahu (Pounamu Vesting) Bills, although this time in greater numbers. One of the themes of opposition, consistent with previous opposition, was that the Crown would create new injustices by making a ‘full and final’ settlement with Te Runanga o Ngai Tahu, thereby dismissing the mana of other groups such as Waitaha, Ngati Mamoe, and Poutini Ngai Tahu. Submitters also complained of lack of consultation.

The Waitaha issue gained much public currency, even generating Pakeha submissions. The inclusion of Waitaha in the settlement, together with the provisions included to ensure a ‘full and final’ settlement, effectively excludes the right of Waitaha as a separate iwi—and this is contentious—to pursue claims against the Crown for historical breaches of the Treaty of

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171 See Chapter Eight of this thesis, and the references cited there.
172 The Office of Treaty Settlements reported 159 submissions, and 36 supplementary submissions on Waitaha, Ngati Mamoe and related issues, including form letters (50 against and 44 supporting the inclusion of Waitaha). Office of Treaty Settlements, Claim Definition and Waitaha Executive Summary to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 08/07/1998, NTS/OTS/47, p1. For a detailed list of relevant submissions to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill see Chapter Eight of this thesis, footnotes 9&10.
173 Ngai Tahu Claims Settlement Act 1998, s9 defines ‘Ngai Tahu’ and ‘Ngai Tahu Whanui’ as being ‘the collective of individuals who descend from the primary hapu of Waitaha, Ngati Mamoe, and Ngai Tahu, namely, Kati Kuri, Kati Irakehu, Kati Huirapa, Ngai Tuahuriri, and Kai Te Ruahihiki’ and correspondingly amends these definitions on the Te Runanga o Ngai Tahu Act 1996 to include ‘Waitaha’. Previously, the Te Runanga o Ngai Tahu Act definitions of ‘Ngai Tahu’ and ‘Ngai Tahu Whanui’ did not include a reference to ‘Waitaha’.
Waitangi in Ngai Tahu's rohe.\textsuperscript{174} The matter was investigated by the Crown, who essentially relied on information provided to it by Te Runanga o Ngai Tahu\textsuperscript{175} that all persons claiming to be Waitaha are also of Ngai Tahu or Ngati Mamoe descent. Therefore, the Crown reasoned, such individuals are not excluded from the Ngai Tahu settlement and its benefits, and no new injustices would thereby be created.\textsuperscript{176} However, at least one submission to the Maori Affairs Committee suggested that there are individuals who are Waitaha, but not Ngai Tahu or Ngati Mamoe.\textsuperscript{177}

Because the legislation was to give effect to the settlement negotiated between the Crown and Ngai Tahu, the Maori Affairs Committee could hear submissions but could not change the settlement in any substantial way.\textsuperscript{178} This was problematic from the perspective of those Ngai Tahu opposing the settlement and more particularly, many interested 'third parties'\textsuperscript{179} for whom this was the first opportunity to comment on the settlement.\textsuperscript{180} In fact, many of the submissions to the Maori Affairs Committee criticised the Crown's lack of consultation with 'third parties'.\textsuperscript{181} Again there are doubts about whether the Ngai Tahu settlement captured

\textsuperscript{174}Ngai Tahu Claims Settlement Act 1998, s10.
\textsuperscript{175}And its predecessor, the Ngai Tahu Maori Trust Board.
\textsuperscript{176}Office of Treaty Settlements, Claim Definition and Waitaha Executive Summary to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 08/07/1998, NTS/OTS/47.
\textsuperscript{177}Maori Affairs Committee, \textit{Commentary on the Ngai Tahu Claims Settlement Bill}, pvi.
\textsuperscript{178}Maori Affairs Committee, \textit{Commentary on the Ngai Tahu Claims Settlement Bill}, piii.
\textsuperscript{179}Note that there is debate as to whether there can be 'third parties' to a Treaty settlement given that the Crown and Maori are the parties to the Treaty of Waitangi. For a discussion of 'third party' consultation in the Treaty settlement process see J. Hayward (2001) \textit{Three's a Crowd? Third Party Interests in the Settlement of Indigenous Claims in New Zealand}, unpublished paper.
\textsuperscript{180}Some major interest groups and statutory bodies affected by the settlement (for example, local and regional authorities, Fish and Game New Zealand, Federated Mountain Clubs and certain state-owned enterprises) had been consulted, confidentially, during the negotiations. The Royal Forest and Bird Protection Society refused to agree to such consultation remaining confidential, and was therefore excluded from this stage of meetings. Conservation groups were also addressed by the Minister in Charge of Treaty Negotiations following the Heads of Agreement. Crown Official, Office of Treaty Settlements, Interview.
\textsuperscript{181}Maori Affairs Committee, \textit{Commentary on the Ngai Tahu Claims Settlement Bill}, piv. See also for example submissions to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill NTS/162 (New Zealand Conservation Authority), 270 (Public Access New Zealand) & 324W (Federation of Freshwater Anglers Inc).
the full complexity of the contemporary context, and whether any new injustices were thereby created.

Whilst a number of important concerns were raised at the Parliamentary Select Committee stage, the view expressed by the then Leader of the Opposition, Helen Clark, held the day:

The [Ngai Tahu Claims Settlement] Bill has faced strong opposition in the House and outside. I acknowledge again the sincerity of all those members of Parliament who have advanced the case for Waitaha and others to have their identity acknowledged as separate from Ngai Tahu. I do believe that the evidence presented on that has been contradictory and is not strong enough for this House to block the passage of the legislation, given the history of the measure. I also believe that were this House to have blocked the settlement, it would have sent a strong message and unwelcomed message to all Maori that the process of negotiating with the Crown was an extremely risky one, with no certainty of agreements reached in good faith being honoured.182

The Ngai Tahu Claims Settlement Act 1998 was passed by Parliament on 29 September 1998 without substantial amendments, and came into force in October 1998 under the unusual provisions of section one of the Act.183 Section one provides that the Act shall come into force by an Order in Council made by the Governor-General. The Act explicitly provides that this Order shall be made on the recommendation of the Prime Minister who in turn must not recommend such action unless and until Te Runanga o Ngai Tahu has advised in writing that the Act is acceptable to Ngai Tahu. Upon receiving such advice the Prime Minster must so advise the Governor-General who must make the Commencement Order. These provisions suggest an "important rite of passage in the maturing of a post-colonial constitution for New Zealand".184

Section one of the Ngai Tahu Claims Settlement Act also reflects the nature of the overall settlement package in a number of ways. First, these provisions are not the simple, usual way of bringing an Act into force. Instead, they are more complex, reflecting the settlement's overall

complexity and the complexity of justice in the Treaty settlement process. Second, they reflect Ngai Tahu's restored mana in the South Island and the precarious balancing of the Crown's right to govern under Article I of the Treaty and Ngai Tahu's rangatiratanga under Article II which the justice of the settlement seeks to provide, without challenging the ultimate sovereignty of the Crown. And third, the provision indicates that the settlement is a result of hard-won negotiations between the parties in its balancing of interests—consequently, Ngai Tahu needed to ensure that the settlement legislation accurately represented the deal which had been struck.

4.4 JUSTICE CLAIMED AND NEGOTIATED

In the Ngai Tahu claim and settlement negotiations, Ngai Tahu's longstanding claims of injustice resulting from the Crown's purchases of its traditional lands were finally recognised. The Waitangi Tribunal played a crucial role, determining that the Crown had in fact breached the Treaty and its principles in its dealings with Ngai Tahu, and therefore that injustices had been done. Recognising this, the Crown entered into negotiations with Ngai Tahu to agree on the contemporary redress required to achieve 'justice' in the settlement of Ngai Tahu's claims. Due to the complexity of the land purchases and their effects on Ngai Tahu, and the complexity of justice in the Treaty settlement process, the negotiations were protracted and demanding. The return of pounamu played a pivotal role in achieving an agreed settlement.

But the opposition to the settlement indicates that the blend of historical (reparative) justice, and contemporary and prospective justice concerns negotiated by the parties was not to everyone's liking, and that new injustices may have been created. The Crown's lack of public consultation during the negotiations, and later at Ngai Tahu Claims Settlement Bill stage, suggests that some of the complexities of the contemporary context were not taken into account. The iwi, too, appears to have failed to consult with its members as adequately as it could have
done. There is doubt, therefore, as to whether the negotiations adequately tapped the complexities of the contemporary situation, and thus whether the settlement reflects the level of complexity required for justice in these circumstances. New injustices may, therefore, have resulted.

However, it is clear that the claim and negotiations themselves produced some justice. They were an essential part of the healing process whereby the parties met, face-to-face, acknowledged and then attempted to address past injustices and their effects. This in itself was a recognition by the Crown of Ngai Tahu's mana. The settlement negotiations also restored the honour of the Crown, and established substantial common ground and cross-cultural mutual understandings. A shared notion of justice, and its application in the circumstances of the Ngai Tahu claim, was negotiated.
CHAPTER FIVE

THE NGAI TAHU SETTLEMENT

5.1 THE CROWN APOLOGY

5.2 AORAKI/MT COOK

5.3 ECONOMIC REDRESS

5.4 CULTURAL REDRESS

5.5 ANCILLARY CLAIMS

5.6 A 'FULL AND FINAL' SETTLEMENT

5.7 A COMPLEX JUSTICE
From the perspectives of both Maori and the Crown, the aim of the Ngai Tahu settlement was to achieve 'justice'. But justice in the Treaty settlement process is extremely complex. Its exact application in contemporary contexts must be carefully negotiated to ensure that settlements reflect the complexity of the relevant historical and contemporary cultural contexts, and that no new injustices are created. The Ngai Tahu settlement, in its attempt to achieve such a complex aim, was complicated, multi-faceted, and far-reaching.

The settlement's variety of remedies was intended to restore to Ngai Tahu what it lost, and to put Ngai Tahu in a position where its cultural base can be maintained and developed, without creating fresh injustices. The settlement employed a range of remedies, including an apology by the Crown; the return to Ngai Tahu, and subsequent Ngai Tahu gift to the nation, of Aoraki/Mt Cook; economic redress valued at $170 million; and a raft of cultural redress mechanisms intended to restore Ngai Tahu's mana. Also included was non-tribal redress for the ancillary claims of Ngai Tahu whanau and individuals settled as part of the package. The diversity of redress reflects, in part, the variety of land and resources affected by the Crown's historical breaches of the Treaty of Waitangi, and the extent and type of losses suffered by Ngai Tahu as a result. The following analysis of the settlement package is, however, not exhaustive. Rather, it provides a summary of the main provisions and highlights the complexities of the exact blend of historical and contemporary justice achieved in a settlement detailed in some five volumes and 1800 pages, and which required 546 pages of legislation (479 sections and 117 schedules) to implement.

There is a large measure of justice in the Ngai Tahu settlement. It is the type of justice one would expect, given the kind of justice available in the Treaty settlement process. Significantly, the settlement provides opportunities for Ngai Tahu to ensure its ongoing cultural
survival, and lays some foundations for ongoing relations between Ngai Tahu and the Crown based on the Treaty. However, as indicated by the opposition to the settlement discussed in the previous chapter, some complexities of the Ngai Tahu situation appear to have been collapsed into simple solutions, or ignored altogether, raising the question of whether justice was compromised, and if so, to what extent.

5.1 THE CROWN APOLOGY

The Crown apology was a vital component of a settlement seeking to deliver justice, and for some Ngai Tahu this was the most important part of the settlement. In any situation of injustice, an apology "is always the first step in the healing process" and is necessary to remove a sense of injustice. According to philosopher Jeremy Waldron:

To neglect the historical record—or worse still, to attempt deliberately to forget or expunge it—is to do violence to this identity and thus to the community that sustains it.

...  

[T]he determination not to forget is part of the moral respect we owe to human identity: the task of remembrance is bound up with the very being of community and individuality in the modern world ...  

Because individual and group identity is bound up with history—what happened in the past is an important part of what makes us who we are—the Crown's apology in itself goes some way to

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restoring Ngai Tahu's cultural identity as required by reparative justice. Further, the apology symbolised the Crown's recognition of Ngai Tahu's mana in its tribal area.

After acknowledging the generations of Ngai Tahu who have pursued their claim for justice, the apology concedes that the Crown acted unconscionably, and in repeated breach of the Treaty of Waitangi, in its purchases of Ngai Tahu lands, and subsequently in failing to ensure that Ngai Tahu was left with sufficient land for its needs. The Crown apologised thus:

The Crown expresses its profound regret and apologises unreservedly to all members of Ngai Tahu Whanui for the suffering and hardship caused to Ngai Tahu, and for the harmful effects which resulted to the welfare, economy and development of Ngai Tahu as a tribe. The Crown acknowledges that such suffering, hardship and harmful effects resulted from its failures to honour its obligations to Ngai Tahu under the deeds of purchase whereby it acquired Ngai Tahu lands, to set aside adequate lands for the tribe's use, to allow reasonable access to traditional sources of food, to protect Ngai Tahu's rights to pounamu and such other valued possessions as the tribe wished to retain, or to remedy effectually Ngai Tahu's grievances.4

The apology was also necessary to restore the Crown's honour, and as a sign of good faith for the post-settlement Treaty partnership between Ngai Tahu and the Crown. The Crown apology also states:

... the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and, with the historical grievances finally settled ... to begin a process of healing and to enter a new age of co-operation with Ngai Tahu.5

The apology is recorded in both Maori and English in the Deed of Agreement6 and the Ngai Tahu Claims Settlement Act 1998.7 In addition, it was spoken by the then Prime Minister, Jenny Shipley, at Onuku Marae on 29 November 1998.8

6Section 2.1.
7Sections 5 (Maori version) & 6 (English version).
5.2 AORAKI/Mt COOK

A second key ingredient of the settlement was the agreement reached over Aoraki/Mt Cook. The settlement changed the official name of the mountain from 'Mt Cook' to 'Aoraki/Mt Cook', and provides for the vesting of Aoraki/Mt Cook in Te Runanga o Ngai Tahu, and, seven days later, for the subsequent gifting of the mountain by Ngai Tahu, back to the New Zealand nation. These provisions indicate compromise between the parties, and reflect the cross-cultural nature of the settlement negotiations.

Aoraki is a revered ancestor of Ngai Tahu people and has the following significance to the tribe:

To Ngai Tahu, Aoraki represents the most sacred of ancestors, from whom Ngai Tahu descend and who provides the iwi with its sense of communal identity, solidarity, and purpose. It follows that the ancestor embodied in the mountain remains the physical manifestation of Aoraki, the link between the supernatural and the natural world. The tapu associated with Aoraki is a significant dimension of the tribal value, and is the source of the power over life and death which the mountain possesses.

Significantly, the gifting back to the nation of the mountain, the highest in the country, by Ngai Tahu confirms the tribe's mana. The arrangements provide for an ongoing role for Ngai Tahu in the management of Aoraki National Park (administered by the Department of Conservation under the National Parks Act 1980) through the mechanisms of statutory acknowledgment, deed of recognition, topuni, and the role of statutory adviser (discussed in more detail below in this chapter). In doing so, the settlement provides Ngai Tahu with secure avenues to exercise its rangatiratanga with respect to the mountain by fulfilling its kaitiaki role, thus allowing Ngai Tahu to restore and rebuild its cultural relationship with

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9Ngai Tahu Claims Settlement Act 1998, s162 & Part 3, respectively.
Aoraki. The provisions also demonstrates the tribe's "commitment to the co-management of areas of high historical, cultural and conservation value with the Crown", and as such, lay the foundations for the future Treaty partnership with respect to the management of Aoraki/Mt Cook.13

However, the gifting back of the mountain by Ngai Tahu to the New Zealand nation was not without controversy. Many Ngai Tahu wanted ownership of Aoraki ake ake ake (forever),14 in keeping with Ngai Tahu's kaitiaki role. From an Indigenous perspective, one cannot 'own' a mountain, but rather one has a special relationship with a mountain based on whakapapa (ancestral) connections and as kaitiaki of the mountain. Accordingly, the kaitiaki cannot, strictly speaking, give back something not owned, nor can kaitiaki responsibilities be given away or surrendered in this manner.

Ngai Tahu negotiators realised that restoring full ownership to Ngai Tahu was politically unpalatable to the wider community. The mountain is an important symbol for all New Zealanders, especially those living in the South Island. In addition, it is included in a National Park area of significant environmental value. As a result, the deal gave Ngai Tahu largely symbolic ownership, but importantly recognised Ngai Tahu's mana. Academic John Dawson has described the Aoraki/Mt Cook arrangement as one which expresses the "equality of mana between Ngai Tahu and the Crown".15 Moreover, the compromise evinces cross-cultural common ground where the cultural interests of Ngai Tahu, and those of the New Zealand public, are provided for within the settlement arrangements. It also reflects elements of reparative justice, through the restoration of Ngai Tahu mana and kaitiakitanga, tempered by contemporary concerns to protect the interests of all New Zealanders.

14Cook, Lecture. See also the views expressed to the Maori Affairs Select Committee. Maori Affairs Committee (1998) Commentary on the Ngai Tahu Claims Settlement Bill Wellington, Government Printer, px.
5.3 ECONOMIC REDRESS

The economic redress provides the "anchor" of the settlement. It includes $170 million cash together with interest and accumulated rentals, a deferred selection process ("DSP") for Ngai Tahu purchase of certain Crown assets, a right of first refusal ("RFR") over surplus Crown assets, and a relativity clause. During the negotiations, Ngai Tahu maintained that $170 million alone was insufficient to redress the losses suffered as a result of Crown Treaty breaches, and was far short of what was required by reparative justice. Indeed this is expressly acknowledged by both parties in the Deed of Settlement. However, Ngai Tahu negotiated a number of 'bolt-ons' to enable it to grow the $170 million into an amount sufficient for the re-establishment of an economic base for the tribe. These complex provisions reflect the common ground negotiated in the settlement, and a balancing of the strictures of the contemporary context and Ngai Tahu's desire for full reparative justice. Given other contemporary claims on government funds, full compensation was, probably, fiscally impossible.

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16Cook, Lecture.
17The cash component of $170 million was made up of $10 million paid to Ngai Tahu as part of the Deed of 'On Account' Settlement, a further $10 million paid five days after the introduction of the settlement legislation into Parliament, and the remaining $150 million paid on 22 October 1998, after the settlement legislation had been brought into force by Order in Council. See section 2.4 of the Deed of Settlement; and Te Runanga o Ngai Tahu, 1999 Annual Report, p10. Ngai Tahu also received interest on the unpaid settlement monies from the date of the Heads of Agreement, which amounted to some $25,177,638 and accumulated rentals from Crown forestry licence lands purchased by Ngai Tahu. Te Runanga o Ngai Tahu, 1999 Annual Report, p10. See also Ngai Tahu Claims Settlement Act, Part 7. The accumulated rentals from Crown forestry licence lands were estimated at the time of the settlement as worth between $40 and $50 million. Cook, Lecture.
19Section 20.1.1(c) of the Deed of Settlement. See also Maori Affairs Committee, Commentary on the Ngai Tahu Claims Settlement Bill, pxxiv.
20Te Runanga o Ngai Tahu, Te Karaka Special Edition, p17. See also Maori Affairs Committee, Commentary on the Ngai Tahu Claims Settlement Bill, pxxiv.
The 'bolt-on' provisions are some of the most complex parts of the deal. The first of these, the DSP mechanism, allowed Ngai Tahu to purchase Crown assets up to the value of $250 million (less the value of other assets purchased under other parts of the settlement) from a defined pool of properties. Three pools of properties were agreed:

- ninety-three properties owned by government departments, Crown health enterprises, Land Corporation Limited (Landcorp) and New Zealand Post Limited;
- fifty-three Landcorp farms; and
- Crown forestry assets which comprise the six Aoraki forests and twenty-seven licensed Crown forests.

The iwi had fifteen months, from the time the settlement legislation came into force, in which to decide which of the DSP identified properties it wished to purchase, although some were identified in the Deed of Settlement itself. The key to the financial advantage of the DSP mechanism is that DSP assets were purchased at the market value as at the date of Deed of Settlement (November 1997). Another benefit of the DSP mechanism is that Ngai Tahu was able to purchase DSP properties regardless of the Crown's desire to sell them. Some DSP purchased assets, such as post offices and police stations, have been leased back to the Crown securing a steady income for the tribe.

The second 'bolt-on', the RFR mechanism, allows Ngai Tahu the right of first refusal, in perpetuity, on certain Crown assets which the Crown decides to sell. The RFR applies to

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23Maori Affairs Committee, Commentary on the Ngai Tahu Claims Settlement Bill, pxi.
24The Deed of Settlement outlines the process for determining the market value and terms of transfer of DSP properties. See sections 4–7 (and attachments) of the Deed of Settlement.
25Note also that under the DSP mechanism, Ngai Tahu was entitled to the accumulated rentals on Crown forestry licence lands where Ngai Tahu purchased the underlying title but not the forests themselves, as noted above in this chapter.
26See Te Runanga o Ngai Tahu, Te Karaka Special Edition, pp20–21. Initially, the Crown sets the price (current market value), terms and conditions of sale, but must negotiate with Ngai Tahu in good faith to agree on such matters. If an agreement cannot be reached, the Crown is able to offer the property to third parties, but not on more favourable terms than offered to Ngai Tahu.
certain Crown properties owned at the date of the Deed of Settlement. Memorials are placed on the titles to these properties, giving notice to all third parties of the RFR mechanism. This mechanism produces a situation of some irony given the pre-emptive purchase rights given to the Crown by Maori under the Treaty of Waitangi.

Finally, the relativity clause provides that, should the total amount of all Treaty settlements exceed $1,000 million (the initial fiscal envelope amount), Ngai Tahu will be paid a 'top up' to maintain Ngai Tahu’s share relative to other tribes (seventeen percent of the total amount). This provision applies until 2044.

The economic redress provisions reflect the agreed blend of reparative and contemporary justice concerns, and the complexity of justice in the Ngai Tahu situation. As discussed in the previous section, conservative estimates suggest that Ngai Tahu’s claim was worth at least two billion dollars—the agreed value of $170 million is far short of anything like full compensation. Time will tell whether the complex provisions of the settlement’s economic redress will allow Ngai Tahu to build their economic position to that which it would have been if the Crown had reserved sufficient land for the tribe’s needs, a situation required by the counterfactual approach to reparative justice.

Ngai Tahu has already taken advantage of the DSP mechanism to increase its tribal assets (a $50 million increase in tribal equity in the financial year following the settlement), and is

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27 Such as lands of the Departments of Education, Defence, and Corrections, Crown land and unallocated Crown land (including Crown forestry lands), tertiary education institutes, Crown heath enterprises, Crown research institutes, Timberlands shares, Highbank Power Station, the Crown’s share holdings in Dunedin, Invercargill and Christchurch airports, and assets at Milford airport, together with assets not selected as part of the DSP process.
28 The latter part of Article II of the Treaty of Waitangi. See Dawson, A Constitutional Property Settlement, p214.
29 Section 18 of the Deed of Settlement. See also Te Runanga o Ngai Tahu, Te Karaka Special Edition, p21.
now "the second largest single land-owner in Te Wai Pounamu, after the Crown".\textsuperscript{31} This suggests a restoration of Ngai Tahu's mana and turangawaewae in a very real sense. Ngai Tahu intends to use its economic base to "generate funds required for the tribe's social and cultural development".\textsuperscript{32} Careful financial management will be required to ensure sufficient cash flows to fund Ngai Tahu's cultural restoration and renewal. Therefore, while the settlement is not full reparative justice, it offers Ngai Tahu the opportunity to restore its cultural and economic base, and thereby ensure its cultural survival into the future.

5.4 CULTURAL REDRESS

For many Ngai Tahu, cultural redress was the focus of the settlement.\textsuperscript{33} This was intended to restore tribal mana, and thus reflect reparative justice, and to provide new expression to Ngai Tahu's traditional relationship with the environment, thereby reflecting contemporary and prospective concerns.\textsuperscript{34} The measures were designed to enable Ngai Tahu "to give practical effect to its kaitiaki responsibilities" and to allow Ngai Tahu to exercise its customary practices.\textsuperscript{35} Accordingly, increased environmental management opportunities and assured access to culturally significant sites were key goals of the cultural redress mechanisms. An improved 'on the ground' relationship with the Department of Conservation was also an important element of the package. In essence, the cultural redress components of the settlement

\textsuperscript{31}Te Runanga o Ngai Tahu, 2000 Annual Report, p17.
\textsuperscript{33}Cook, Lecture.
\textsuperscript{34}See generally Te Runanga o Ngai Tahu, Te Karaka Special Edition, pp25-43.
\textsuperscript{35}Te Runanga o Ngai Tahu, Te Karaka Special Edition, p25.
were intended to give Ngai Tahu practical means to ensure its cultural survival, and to lay the foundations for partnerships with the Crown that reflect Article II of the Treaty.

The following section looks at the principal cultural redress mechanisms, except for one: the return of pounamu. The return of pounamu was an indispensable, and highly symbolic, element of the cultural redress. The significant role played by the return of pounamu, particularly in the negotiations where it provided essential cross-cultural common ground between the parties, has already been explained. Pounamu will not be discussed further here because Part III of this thesis explores, in depth, the return of pounamu to further examine the justice of the Ngai Tahu settlement.

**Return of significant sites**

The settlement returns to Ngai Tahu a number of significant sites, illustrating reparative justice at work in the settlement. Three high country stations (Elfin Bay, Greenstone and Routeburn), four specific sites (Arahura Valley, Rarotoka, Whenua Hou\(^{36}\) and the Crown Titi Islands), and forty-one wahi taonga (places of special value) including wahi tapu (sacred sites), mahinga kai (food gathering places) and three lake beds (Te Waihora/Lake Ellesmere, Muriwai/Coopers Lagoon and Lake Mihinapua),\(^{37}\) were returned, or control transferred, to Te Runanga o Ngai Tahu by the settlement. These measures result in a tangible cultural base for Ngai Tahu, adding to, and re-building, its turangawaewae.

The return of the three high country stations is a good example of the blend of reparative and contemporary justice concerns negotiated in the settlement, and was one of the more contentious elements of the settlement.\(^{38}\) The Elfin Bay, Greenstone and Routeburn stations encompass areas

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\(^{36}\)Formerly known as Codfish Island.

\(^{37}\)Note that Tutaepatu/Woodend Lagoon was returned to Ngai Tahu as part of the Deed of 'On Account' Settlement.

\(^{38}\)Te Runanga o Ngai Tahu, *Te Karaka Special Edition*, pp25-26. See also Ngai Tahu Claims Settlement Act 1998, Part 10; Maori Affairs Committee, *Commentary on the Ngai Tahu Claims Settlement Bill*, pxvii; and submissions to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill NTS/155 (Tararua Tramping Club Inc), 162 (New Zealand Conservation
with extremely high conservation values. As a concession to the interests of the wider public, and more particularly environmental lobby groups, the stations were returned to Ngai Tahu with conditions attached. Ngai Tahu agreed to gift back to the nation for conservation purposes, the mountain tops of the three stations, to be known as 'Ka Whenua Roimata'—'the Land of Tears'—recognising Ngai Tahu's struggle to gain justice and Ngai Tahu's mana in the area. Ngai Tahu leases approximately ninety percent of the area of the stations, in perpetuity, to the Department of Conservation (at peppercorn rental), but retains a power of veto over concessions granted by the Department of Conservation. The remaining ten percent of the stations is vested in Ngai Tahu. Again reflecting contemporary justice concerns, the public retains the right of access for tramping, hunting, and fishing to this remaining ten percent. The high country stations provisions are complex, reflecting the blend of reparative justice (the return of culturally significant lands) and contemporary justice (the recognition of conservation values for the whole community and continued public access rights) negotiated by the parties.

In addition to the high country stations, ownership of three specific areas was returned to Ngai Tahu, again with conditions reflecting contemporary justice concerns. Management of a further area is conferred on Ngai Tahu. The settlement vests Rarotoka and the Crown Titi Islands in Te Runanga o Ngai Tahu, as Maori freehold land and fee simple (respectively). Both islands have traditional significance to Ngai Tahu:

Rarotoka ... both as a resting place on the arduous journey to the titi islands, and as a navigational marker for guiding Ngai Tahu as they navigated the difficult southern seas. The use of the island as a navigational site has continued into modern times.

... All of the titi islands have been an integral part of the Ngai Tahu economy for centuries. The titi harvested from these islands were not only an essential food source, but were also a tradeable commodity. ... The return of the title to the Crown Titi Islands will ensure that the rights of Rakiura Maori to harvest titi on a sustainable basis will be protected in perpetuity.

Authority), 247W (T. J. Thomson), 288 (Fish & Game Otago), 324W (Federated Freshwater Anglers Inc), 157 (Federated Mountain Clubs), and OTS/41 (Office of Treaty Settlements).


Ngai Tahu's mana in the islands is restored by their return, and local Rakiura Maori kaitiakitanga is ensured through provisions which allow for management of the islands as a nature reserve. Conservation values important to the general public are also protected. Ngai Tahu also gains management input into Department of Conservation management of Whenua Hou, also an important island in the journey to harvest titi and the ancestral home of Rakiura Maori. In these instances, the settlement confirms Ngai Tahu's mana and ability to continue their cultural practices through increased (or confirmed) rights to manage these culturally significant areas.

In accordance with one of the Waitangi Tribunal's recommendations, the third area returned to Ngai Tahu is in the Arahura Valley, an area of particular significance to Ngai Tahu as one of the principal sources of pounamu. The Arahura River itself was returned to Poutini (West Coast) Ngai Tahu through the Mawhera Incorporation in 1976. The settlement vested certain unformed legal roads alongside the river in the Mawhera Incorporation, in fee simple, enabling the Incorporation "to exercise effective control and management over its lands within the Arahura catchment", and to provide better access to pounamu. In addition, an historic reserve has been created under the Reserves Act 1977 in the upper catchment of the Arahura. The Waitaiki Historic Reserve, as it is to be known, is important conservation land. As a compromise, rather than returning this land, the settlement provides for the Mawhera Incorporation to manage the Reserve for its historic values, related primarily to pounamu.

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42Ngai Tahu Claims Settlement Act 1998, ss331&332; Section 15.5 of the Deed of Settlement; Te Runanga o Ngai Tahu, *Te Karaka Special Edition*, p27.
43See Chapter Four of this thesis.
44See also Chapter Eight of this thesis.
45Ngai Tahu Claims Settlement Act 1998, s325.
The settlement also provides for ownership and management, and in some cases management only, of a further forty-one sites of special significance to Ngai Tahu. The provisions allow Ngai Tahu to exercise its kaitiakitanga with respect to these sites, thereby restoring Ngai Tahu mana. The settlement legislation uses a number of different vehicles depending on Ngai Tahu’s relationship to the area, and the public and private interests involved. For eighteen properties, the fee simple is vested in Ngai Tahu; six properties are vested in Ngai Tahu subject to protected private land agreements; and fifteen sites are vested in Ngai Tahu subject to the Reserves Act 1977. The Department of Conservation retains a significant management role in relation to the properties subject to protected private land agreements, and public access is assured. Again, the variety of arrangements illustrate a balancing of reparative justice and contemporary concerns. The arrangements also “reflect the partnership which Ngai Tahu seeks to establish with government agencies and the wider community in the management of the environment”.

The provisions of the settlement relating to the vesting of the beds of Lake Ellesmere/Te Waihora, Coopers Lagoon/Muriwai, and Lake Mihinapua reflect the different existing uses and interests in the lakes and surrounding areas, again illustrating the negotiated blend of historical and contemporary justice concerns. In each case, the bed of the lake is vested in Te Runanga o Ngai Tahu subject to the rights of ownership, use and occupation of existing lawful structures on or in the lake beds. Existing lawful commercial uses of the lakes are also

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50 Ngai Tahu Claims Settlement Act 1998, ss120-139.
53 See section 11.20 of the Deed of Settlement for text of the agreements.
56 Ngai Tahu Claims Settlement Act 1998, ss174,189&197.
saved, and the lake beds of Te Waihora and Muriwai are returned subject to existing grazing licences and certain easements. All rights of public access and recreational use of the lakes are retained, excepting the use of the lake beds for maimai (temporary shelters used for game bird hunting) where different arrangements for continued use have been negotiated. In each case, the settlement provides for co-management of the conservation and cultural values of the lakes, reflecting prospective justice concerns. Again, the complexity of the requirements of justice are evident in the provisions of the settlement.

**Mana recognition**

The Ngai Tahu claim covered a vast area of land, and a huge variety of resources. In light of the contemporary context, not all of the land or resources sought by Ngai Tahu, or required by a full application of reparative justice, could be returned. New injustices would have been created. Other ways to restore Ngai Tahu's mana, rangatiratanga, and turangawaewae had to be found. The negotiators of the Ngai Tahu settlement found cross-cultural common ground where Ngai Tahu cultural interests could be met whilst accommodating the concerns of the wider New Zealand public. A number of new mechanisms were developed that reflect the complexity of justice in the Treaty settlement process, and the creation of new injustices avoided as a result. These mechanisms are statutory acknowledgments, deeds of recognition, topuni, and dual place names. They give real and practical expression to Ngai Tahu's mana in its tribal area.

The idea for 'statutory acknowledgments' arose in the course of negotiations in response to Ngai Tahu concerns about participation in Resource Management Act processes. Ngai Tahu's

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57For example, the rights to use a paddle steamer, and the use of a jetty and buoys by third parties for commercial purposes, are retained. Ngai Tahu Claims Settlement Act 1998, s197.
60Ngai Tahu Claims Settlement Act 1998, ss177,188&196.
experience had been that environmental decision makers remained unaware of Ngai Tahu’s special relationship with culturally important sites, and therefore, Ngai Tahu interests and concerns regarding such areas went largely unrecognised in environmental decision making processes. Statutory acknowledgments aim to improve Ngai Tahu participation by ensuring that Ngai Tahu has standing as an affected party for the range of sites subject to statutory acknowledgments, and that information about Ngai Tahu’s special relationship with those sites is publicly available.\(^{63}\)

Statutory acknowledgments operate over sixty-four defined sites by recording the exact nature of Ngai Tahu’s special relationship with each site.\(^{64}\) In most cases the statements of special significance detail creation stories or activities of eponymous ancestors relating to the site. They may also note traditional practices, such as food gathering, which have taken place and sometimes continue to take place, at the site.\(^{65}\) Statutory acknowledgments have a number of practical effects:

- statutory acknowledgments are to be noted on district and regional plans and in policy statements thereby ensuring third parties are on notice of Ngai Tahu’s interests and special relationships with those areas;
- councils are required to notify Ngai Tahu of any resource consent applications impacting on statutory acknowledgment sites;
- Ngai Tahu are given greater standing as an affected party by the requirement that councils, the Environment Court and the Historic Places Trust have regard to the statutory acknowledgments; and

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\(^{63}\)Te Runanga o Ngai Tahu, Te Karaka Special Edition, p33.
any member of Ngai Tahu and Te Runanga o Ngai Tahu may cite a statutory acknowledgment as evidence of Ngai Tahu's relationship with the area.66

Statutory acknowledgments (as with deeds of recognition discussed below) do not otherwise affect statutory powers or decision making. Importantly, they do not create any property rights nor do they affect third parties' rights.67 They do acknowledge Ngai Tahu mana and provide a secure basis for Ngai Tahu to exercise its kaitiaki responsibilities through Resource Management processes, without creating any new injustices.68 They also lay the foundations for a just Crown-Ngai Tahu relationship into the future.

Deeds of recognition complement statutory acknowledgments by allowing the Crown body administering the relevant land to enter into an agreement with Ngai Tahu to provide for Ngai Tahu input into decision making and management of that area.69 The relevant Crown body (Department of Conservation, or Land Information New Zealand for example) must then have "particular regard to" Ngai Tahu's special relationship with the site as detailed in the statutory acknowledgment.70 Ngai Tahu has stated that, through the statutory acknowledgment and deed of recognition devices, "the mana of the tribe will be recognised and given operational effect in day-to-day management".71

The third innovative device for mana recognition is the topuni:

The concept of Topuni derives from the traditional Ngai Tahu tikanga (custom) of persons of rangatira (chiefly) status extending their mana and protection over a person or area by placing their cloak [topuni] over them or it. In its new application, a Topuni

70Ngai Tahu Claims Settlement Act 1998, s213.
71Te Runanga o Ngai Tahu, Te Karaka Special Edition, p35.
confirms and places an 'overlay' of Ngai Tahu values on specific pieces of land managed by [the Department of Conservation]. A Topuni does not override or alter the existing status of the land (for example, National Park status), but ensures that Ngai Tahu values are also recognised, acknowledged and provided for.72

The topuni mechanism is a clear example of the cross-cultural common ground achieved in the settlement. It also illustrates how Ngai Tahu traditions can be reflected in contemporary contexts, thereby restoring Ngai Tahu mana and achieving reparative justice without creating new injustices.

Fourteen areas, managed by the Department of Conservation, have been declared as topuni.73 Once the Crown and Ngai Tahu have agreed on specific principles for avoiding harm to, or diminishing, Ngai Tahu topuni values, the New Zealand Conservation Board (or other conservation board) is required to "have particular regard to" such principles and the Ngai Tahu values of the topuni when considering "any general policy, conservation management strategy, conservation management plan, or national park management plan in respect of a Topuni".74 Further, topuni must be included in any such policy, strategy, or plan.75 The Department of Conservation must publicly notify the agreed principles relating to topuni and are empowered to make bylaws, or recommend that the governor-General make regulations, to give effect to these principles.76 Ngai Tahu has stated:

Topuni will provide very public symbols of Ngai Tahu mana and rangatiratanga over some of the most prominent landscape features and conservation areas in Te Wai Pounamu.77

73See Ngai Tahu Claims Settlement Act 1998, s238 & Schedules 80-93. One area that has been declared as topuni is the Dart River-Te Koroka pounamu source. See also Chapter Seven and Appendix C of this thesis.
77Te Runanga o Ngai Tahu, Te Karaka Special Edition, p35.
Finally, numerous place names were changed by the Ngai Tahu Claims Settlement Act 1998.78 Generally names were changed from their English name to a joint English/Maori name. A notable exception is Aoraki/Mt Cook where the Maori name comes first. For Ngai Tahu, place names "are a significant symbol of Ngai Tahu's relationship with the landscape" and the "re-establishment of traditional place names ... will serve as tangible reminders of our history in Te Wai Pounamu".79 Significantly, the change in place names provides reparative justice through recognition of Ngai Tahu mana, while not creating any new injustices.

\textit{Mahinga kai}

A number of components of the settlement provide opportunities for Ngai Tahu to re-establish relationships with mahinga kai ("food and other natural resources and the places where those resources are obtained") and thereby provide for its cultural survival.80 These components include 'nohoanga' (a place to sit)81 sites, a raft of customary fisheries provisions,82 mechanisms to facilitate Ngai Tahu input into management of taonga species management,83 and guarantees that if coastal tendering under the Resource Management Act 1991 is implemented (or a similar scheme) Ngai Tahu will have options over ten percent of the space made available.84

The 'nohoanga' is another innovation of the settlement negotiations designed to provide for Ngai Tahu cultural survival in the contemporary context. Ngai Tahu customary fishing and gathering of other natural resources is provided for by seventy-two nohoanga (camp) sites.85 These sites, situated adjacent to lakes and rivers, may be used for up to 210 days a year between

\footnotesize{78}Ngai Tahu Claims Settlement Act 1998, s269.  
\footnotesize{79}Te Runanga o Ngai Tahu, \textit{Te Karaka Special Edition}, p37.  
\footnotesize{80}Te Runanga o Ngai Tahu, \textit{Te Karaka Special Edition}, p37.  
\footnotesize{81}Te Runanga o Ngai Tahu, \textit{Te Karaka Special Edition}, p37.  
\footnotesize{82}Ngai Tahu Claims Settlement Act 1998, ss297-311. See also Te Runanga o Ngai Tahu, \textit{Te Karaka Special Edition}, pp40-41.  
\footnotesize{83}Ngai Tahu Claims Settlement Act 1998, ss287-296. See also Te Runanga o Ngai Tahu, \textit{Te Karaka Special Edition}, p41.  
\footnotesize{84}Ngai Tahu Claims Settlement Act 1998, ss315-320.  
mid-August and the end of April reflecting the traditional season of hikoi (excursion) into the interior of the South Island for mahinga kai. The sites are for Ngai Tahu’s exclusive use but are set back from the lake or river side recognising public rights of access. Nohoanga sites are subject to all usual legislation, bylaws and regulations. Ngai Tahu believes that these sites:

provide all Ngai Tahu with an opportunity to experience the landscape as their tipuna [ancestors] did, and to rekindle the traditional practices of gathering food and other natural resources, so long an essential part of Ngai Tahu culture. 86

Nohoanga is another mechanism which enables Ngai Tahu to give practical expression to its special relationships with the environment, whilst retaining public access and enjoyment in the general vicinity (here rivers and lakes). A blend of reparative justice and contemporary concerns is evident once more.

Environmental decision making

The settlement lays the foundation for a more just Crown-iwi relationship, an aspect of justice in the Treaty settlement process, through increased Ngai Tahu input and responsibilities with regard to environmental decision making and management. In addition aspects of the settlements already noted, Te Runanga o Ngai Tahu is appointed to be a statutory adviser to the Minister of Conservation in relation to twenty-one specified sites. 87 The settlement also entitles Ngai Tahu to nominate persons to dedicated seats on a number of statutory bodies. 88 They include the New Zealand Conservation authority, regional conservation boards within Ngai Tahu’s tribal area, the New Zealand Geographic Board, and Guardians of Lakes Manapouri, Monowai, Te Anau and Lake Wanaka. Te Runanga o Ngai Tahu is also appointed statutory adviser to Fish and Game councils in its tribal area in relation to defined native game birds. 89 In each case these statutory bodies are required to have particular regard to Ngai Tahu’s advice.

Ngai Tahu's input into conservation management is further enhanced by the addition of protocols defining Ngai Tahu's relationship with the Department of Conservation in relation to cultural materials, freshwater fisheries, culling of species of interest to Ngai Tahu, historic resources, Resource Management Act involvement, and visitor and public information. The protocols also establish procedures for Ngai Tahu input into the Department's budget- and priority-setting processes, and enable Ngai Tahu to identify specific projects for implementation, subject to available funding. In the words of the Department of Conservation:

The Protocols are intended to help build a relationship between DoC [the Department] and Ngai Tahu that achieves conservation policies, actions and outcomes sought by both Ngai Tahu and DoC. Ngai Tahu and DoC have similar objectives in environmental and conservation management—protecting and enhancing what's special about New Zealand for future generations.

These provisions establish important cross-cultural common ground with respect to environmental decision-making, and mechanisms to ensure the future Crown (Department of Conservation)-Ngai Tahu relationship better reflects the Treaty and therefore, achieve the kind of justice available in the Treaty settlement process.

5.5 ANCILLARY CLAIMS

As part of the overall settlement of Ngai Tahu claims, a number of individual and whanau claims were settled. These 'ancillary claims' concerned the individual property rights of

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91Te Runanga o Ngai Tahu, Te Karaka Special Edition, p42.
92Quoted in Te Runanga o Ngai Tahu, Te Karaka Special Edition, p42.
93The Te Runanga o Ngai Tahu Annual Report 2000 gives examples of the practical benefits of the settlement's mana recognition and cultural redress mechanisms, indicating that Ngai Tahu's cultural preferences are being taken into account in environmental decision making. Te Runanga o Ngai Tahu, 2000 Annual Report, pp17–18.
members of Ngai Tahu Whanui such as Fenton entitlements, fishing reserves, and land claims in Kaikoura, Ararura, Otakou and Murihiku, together with claims arising out of the South Island Landless Natives Act 1906.\textsuperscript{94} Evidence relating to these claims was presented during the hearings at the Waitangi Tribunal during the main tribal claim, and the Tribunal reported on these claims in 1995.\textsuperscript{95} The Ngai Tahu negotiating team undertook negotiations on behalf of those affected and arguably were better placed to secure just recompense. Redress for ancillary claims was made directly to those affected, rather than to the collective tribal entity, Te Runanga o Ngai Tahu, as was the case for the rest of the settlement. This is an exception to the general limit on justice in the Treaty settlement process that individuals and small whanau groups will not benefit directly from settlements. However, from the Crown's perspective, a 'full and final' settlement of all Ngai Tahu claims was desirable. Hence, these ancillary claims were settled as part as Ngai Tahu settlement package\textsuperscript{96} and rights to further pursue such claims are abolished.\textsuperscript{97}

5.6 A 'FULL AND FINAL' SETTLEMENT

The settlement is intended to be a 'full and final' settlement of all Ngai Tahu claims against the Crown for breaches of the Treaty of Waitangi which occurred prior to 21 September 1992 (historical claims). The Ngai Tahu Claims Settlement Act 1998 provides that the settlement of Ngai Tahu claims\textsuperscript{98} is final, and that the Crown is released and discharged in respect of those

\textsuperscript{95}Waitangi Tribunal, \textit{Ngai Tahu Ancillary Claims Report}.
\textsuperscript{97}Note that the Ngai Tahu settlement does not affect the Wai 158 claim. Ngai Tahu Claims Settlement Act 1998, s10(e). See also Te Runanga o Ngai Tahu, \textit{Te Karaka Special Edition}, p47.
\textsuperscript{98}For a definition of Ngai Tahu claims see Ngai Tahu Claims Settlement Act 1998, s10.
claims. No court or tribunal, including the Waitangi Tribunal, has jurisdiction to inquire into or make any finding in relation to Ngai Tahu claims, the validity of the Deed of Settlement, and the adequacy of the benefits provided to Te Runanga o Ngai Tahu and others under the Act or the Deed of Settlement. However, jurisdiction of the courts is retained with regard to interpretation or implementation of the Deed of Settlement or the Ngai Tahu Claims Settlement Act. Notably, the settlement is not intended to limit Ngai Tahu’s ability to pursue claims against the Crown based on aboriginal title or customary rights, nor does it prevent the Crown from disputing the existence of such title or rights, provided that such claims do not fall within the definition of "Ngai Tahu claims", that is claims by Ngai Tahu Whanui based on pre-September 1992 breaches of the Treaty. This provision represents a situation where the Crown and Ngai Tahu “agreed to disagree” over whether or not the Crown land purchases effectively extinguished all Ngai Tahu customary rights and aboriginal title in respect of those lands.

The settlement legislation also provides that legislative provisions relating to resumptive memorials on land within the Ngai Tahu claim area no longer apply, that resumptive memorials within the Ngai Tahu claims area be removed from land titles as appropriate, and that the jurisdiction of the Waitangi Tribunal to make binding recommendations with respect to state-owned enterprise or Crown forestry lands in Ngai Tahu’s tribal area is

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100Note the amendments made to the Treaty of Waitangi Act 1975 by the Ngai Tahu Claims Settlement Act 1998, s462.
101Ngai Tahu Claims Settlement Act 1998, s461(4). This thesis does not address the effect of s461 on cross-claims, or overlapping claims. For a discussion of this and the issues surrounding the ongoing boundary dispute between Ngati Apa and Ngai Tahu see Dawson, Remedial Powers of the Waitangi Tribunal.
103Cook, Lecture.
removed. All of these provisions are intended to ensure that the settlement is comprehensive and conclusive.

In theory, the 'full and final' provisions are necessary for a just settlement. Once the wrongdoer (the Crown) has made reparation (restored Ngai Tahu to its former position, or to a position it would have been but for the injustice), there are, at least in theory, no further effects of past injustices to be ameliorated, nor any continuing injustices to be remitted. Reparation should also have laid the foundations for a just future Crown-iwi partnership, and thus ensure the necessary flexibility to meet changing circumstances over time. Once justice is done, there should be no surviving injustice. In practice, however, justice in the Treaty settlement process, is not full reparative justice and some effects of past injustice may remain. The balancing of retrospective, reparative justice, with contemporary and prospective justice concerns negotiated in any particular settlement may, therefore, leave some individuals aggrieved. This reflects the constraints on reparative justice in the Treaty settlement process, particularly that justice is provided to collectives rather than individuals. Indeed, the Deed of Settlement expressly recognises that the application of justice in the Treaty settlement process depends on context in its acknowledgment by the Crown and Te Runanga o Ngai Tahu that the settlement "is fair in the circumstances".

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107 Strictly speaking, the Ngai Tahu Claims Settlement Act can be amended by a simple parliamentary majority, as pointed out by the New Zealand Law Society in its submission to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill NTS/304, p8.
108 Note that the Ngai Tahu Claims Settlement Act 1998, s467, provides that the settlement is for the benefit of the iwi collectively and not for the benefit of any individual except as Te Runanga o Ngai Tahu so decides in accordance with its charter and the Te Runanga o Ngai Tahu Act.
109 Section 20.1.1 of the Deed of Settlement.
5.7 A COMPLEX JUSTICE

The complexity of justice in the Treaty settlement process is clearly reflected in the complexity of the Ngai Tahu settlement. Because Ngai Tahu suffered historical injustices which affected vast areas of land and a diversity of resources, the Ngai Tahu settlement displays a range of remedies which affect a variety of sites, and therefore, communities. The complexity also reflects the cross-cultural common ground established by the settlement, as Ngai Tahu and the Crown found ways to accommodate differing perspectives on justice, together with the blend of retrospective justice, and contemporary and prospective justice concerns negotiated by the parties.

The indications are, then, that there is a large measure of justice in the Ngai Tahu settlement. Tangible benefits accrue to Ngai Tahu enabling the tribe to restore and rebuild its cultural identity and tribal economic base. However, the opposition to the settlement, the issues of mandate and representation surrounding the Waitaha and Poutini Ngai Tahu issues, and the limited consultation process (both within Ngai Tahu, and with 'third parties'), suggest that not all of the complexity of the contemporary context is reflected in the settlement, and that new injustice may have been created. The negotiators struck a deal, but the exact blend of cultural perspectives, and historical and contemporary justice concerns, may not be to everyone's advantage. However, the variety and complexity of remedy could never have been the result of a strict application of reparative justice in the courts—it could only result from a negotiated application of justice. The Ngai Tahu settlement demonstrates that, with the flexibility of negotiated justice, the Treaty settlement process can be a cross-cultural middle ground of imagination, innovation, and vision for a more just New Zealand society.110

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PART III  THE RETURN OF POUNAMU
CHAPTER SIX

POUNAMU RESEARCH METHODOLOGY

6.1 A CULTURALLY APPROPRIATE METHODOLOGY FOR POUNAMU RESEARCH

6.2 INDIGENOUS PEOPLES' CONCERNS ABOUT RESEARCH INTO THEIR LIVES

6.3 KAUPAPA MAORI RESEARCH PRACTICES

6.4 RESEARCH TRANSFORMED?
Many people have been affected by the return of pounamu to Ngai Tahu: Ngai Tahu whanau, pounamu mining licence holders, members of the pounamu industry, pounamu carvers, and indeed, anybody wishing to collect pounamu in its natural setting. Those stakeholders most affected include both Ngai Tahu and non-Ngai Tahu (mostly Pakeha) individuals living close to pounamu sources, particularly on the West Coast of the South Island. Research intending to capture and explore the tensions caused by the transfer of pounamu ownership, and the resulting change of a (former) Crown-owned mineral to tribally-held private property, involves investigation of the interactions between (and within) the Crown, Ngai Tahu, the pounamu industry, and the wider New Zealand public, and indeed between Maori and Pakeha cultures. It also involves research into Ngai Tahu traditions. What methodology is appropriate to undertake research in such contexts?

My research into the implications of the return of pounamu required a cross-cultural and collaborative approach for a number of reasons. First, the Treaty of Waitangi implies a research partnership when undertaking research involving Maori and their traditions. A cross-cultural Treaty-based research partnership is particularly appropriate in this context because pounamu is a taonga (treasure) of Ngai Tahu and knowledge itself is considered tapu (sacred) in Maori culture. Second, because Maori is an oral culture and also because this research was undertaken immediately after the return of pounamu to Ngai Tahu, written sources could provide only part of the story. Much relevant information was held by pounamu stakeholders and would only be available by talking to those (Ngai Tahu and non-Ngai Tahu) people affected by the return. Collaboration with pounamu stakeholders was, therefore, vital for collection of primary data in the form of interviews recording stakeholder opinions and lived experiences of the change in ownership of pounamu. Third, there is an established literature

1For a description of New Zealand's pounamu sources see Appendix C of this thesis.
that suggests that conventional forms of research, often undertaken by non-Indigenous researchers into the lives of Indigenous people, have perpetuated inequalities and injustices between Indigenous and non-Indigenous people. As a result, culturally sensitive research approaches are now required if non-Indigenous researchers (in this case, non-Ngai Tahu researchers such as myself) are to gain the co-operation and support of Indigenous participants. For these reasons, I decided to align my pounamu-related research with Kaupapa (agenda) Maori research practices to ensure my research was culturally appropriate, collaborative, and returned benefits to (Ngai Tahu) research participants.

The term 'collaborative research' is used in this chapter to define social science research where the research participants and the researchers share power in the research process and where all parties benefit from the research. It is also "about bringing to the centre and privileging indigenous values, attitudes and practices". The term 'cross-cultural' is used to describe a number of situations. Primarily, it is used to describe the space (both metaphorical and material) where cultures meet and interact; in other words, the relationship between cultures. 'Cross-cultural research' is, then, research which takes place across, or between, cultures and includes research undertaken by non-Indigenous researchers into the lives of Indigenous people.

6.1 A CULTURALLY APPROPRIATE METHODOLOGY FOR POUNAMU RESEARCH

The Treaty of Waitangi was my starting point in the search for an appropriate methodology for my research into the return of pounamu to Ngai Tahu. While some Maori advocate that only

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4 The term also includes reference to Indigenous people working within (or from) 'Western' frameworks, for example academia, with their own people.
Maori should research Maori issues, others argue that the Treaty implies a research partnership when researching Maori issues.\(^5\) Maori academic Russell Bishop posits two arguments for the involvement of non-Maori in research into Maori people's lives. His first point is that "there is a cohort of highly-skilled, professionally-trained non-Maori who are becoming bicultural and willing to work within Maori-controlled contexts".\(^6\) Second, Bishop argues that it is an abdication of responsibilities under the Treaty of Waitangi for non-Maori to wash their hands of research into Maori. Another Maori academic and advocate, Ranganui Walker, argues that:

Maori as a minority of 12 percent of the population of three million, cannot achieve justice or resolve their grievances without Pakeha support. For this reason, Pakeha are as much a part of the process of social transformation in the post-colonial era as radical and activist Maori.\(^7\)

In particular, a research partnership based on the Treaty was important because pounamu is a taonga (treasure) of Ngai Tahu. I was also aware that Maori consider knowledge itself to be a taonga and in certain situations, tapu (sacred).\(^8\) Clearly, it would be inappropriate to undertake this research without Ngai Tahu's involvement, merely relying on historical records and other documentation, generally written from a non-Maori perspective. In addition, because Maori is an oral tradition, relying only on what is written can sometimes produce a distorted

\(^5\)See, for example, discussions in R. Bishop (1996) \textit{Collaborative Research Stories: Whakawhanaungatanga} Palmerston North, Dunmore Press Ltd, p17; and Tuhiwai Smith, \textit{Decolonizing Methodologies}, pp184–185. Indigenous researchers also need to remain aware of the effect of role relationships when researching in their own communities or elsewhere. Presumably, such researchers will have the advantage of a thorough knowledge of relevant protocols and their own understanding of Indigenous experience and perspectives. Note also the analogy with some feminist discourse which advocates that only women can undertake feminist research. Feminism also has moved away from this essentialist position. On this last point see Tuhiwai Smith, \textit{Decolonizing Methodologies}, p187 at footnote 11.

\(^6\)Bishop, \textit{Collaborative Research}, p17.


\(^8\)One implication of this view is that it is the choice of the holder of knowledge how and when traditional knowledge is disseminated. See E. Stokes (1985) Maori Research and Development: A Discussion Paper for the Social Sciences Committee of the National Research Advisory Council, reprinted in Research Unit for Maori Education (ed) (1992) \textit{The Issue of Maori and Research} Auckland, Research Unit for Maori Education, University of Auckland. In contrast, the Western academic attitude assumes the right of the researcher to know, and generally advocates a free dissemination of knowledge (subject to limited ethical constraints).
impression of a given situation, even where written sources have been produced by Maori, and in this case, Ngai Tahu. Moreover, my initial contacts with Poutini Ngai Tahu suggested that there were issues surrounding the ability of Te Runanga o Ngai Tahu and the Mawhera Incorporation to represent all Ngai Tahu, and enable all Ngai Tahu to exercise kaitiakitanga with respect to pounamu. Such issues would be unlikely to be referred to, let alone discussed in any detail, in published material about the settlement and the tribe's affairs. It would be necessary to speak directly with those affected to gain an understanding of the issues at stake. A culturally sensitive, collaborative approach was clearly necessary.

6.2 INDIGENOUS PEOPLES’ CONCERNS ABOUT RESEARCH INTO THEIR LIVES

A culturally appropriate research methodology would also be required if I was to gain the full support and participation of Ngai Tahu. Maori scholar Tuhiwai Smith suggests that the word 'research' "is probably one of the dirtiest words in the Indigenous world's vocabulary". She writes:

When mentioned in many indigenous contexts, it [research] stirs up silence, it conjures up bad memories, it raises a smile that is knowing and distrustful. It is so powerful that indigenous people even write poetry about research. The ways in which scientific research is implicated in the worst excesses of colonialism remains a powerful remembered history for many of the world's colonized peoples. It is a history that still offends the deepest sense of our humanity.

Indigenous peoples have expressed a number of concerns about research into their lives, particularly regarding their control over, and participation in, the research process.

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9 For a full discussion of the concerns about research into Indigenous peoples' lives see Gibbs, Towards a Strategy for Undertaking Cross-Cultural Collaborative Research.
10 Tuhiwai Smith, Decolonizing Methodologies, p1.
11 Tuhiwai Smith, Decolonizing Methodologies, p1.
12 The kind of research under scrutiny has included historical, archaeological and anthropological research (Tuhiwai Smith, Decolonizing Methodologies; D. B. Rose (1986))
Indigenous peoples have tended to be the passive subjects, and even the objects of conventional forms of social science research, much of it undertaken by non-Indigenous academics. Bell has noted that social research tends to be done "on the relatively powerless for the relatively powerful". Indigenous people want:

forms of research that are under their control, follow their priorities rather than those of the government or academics, and use methods they can identify with. They wish research to serve them, rather than be done on them, and to deal with current problems.

For Maori, the principal concern is that research has failed to benefit those who have been the subject of such research. Instead, it has largely benefited those doing the research.

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13ASTEC, Environmental Research Ethics, p41.
15Ross, Community Social Impact Assessment, p186.
17This has also been an important concern for Australian Indigenous peoples. See for example Howitt et al, Participation, Power and Social Research, p2; Veth, Archaeological Ethics;
Research has told Maori things they already knew, and has been cast within a Western world view sometimes leading to asking irrelevant or meaningless questions from the point of view of those being researched.\(^2\) Maori people's cynicism of research may be compounded by the fact that very little has changed for them as a result of continued research into their lives, despite implied promises of benefits flowing to research participants.\(^3\) This is a significant criticism for social research which has been oriented toward constructive social change.

As a result of such criticisms, efforts have been made to address Indigenous concerns, and research approaches have been developed that are culturally sensitive and return benefits to Indigenous communities.\(^4\) It must be acknowledged, however, that criticisms of research into the lives of Maori have been slow to acquire a degree of legitimacy within academic circles, and culturally appropriate research approaches have yet to gain widespread practical

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application in New Zealand.\textsuperscript{21} This may be due to the ideal of academic freedom' and resistance to ethical review.\textsuperscript{22}

6.3 KAUPAPA MAORI RESEARCH PRACTICES

The development of more culturally appropriate research in New Zealand has occurred over the last twenty years prompting a claim in the early 1990s that a "developing New Zealand ontological base ... [is] challenging the dominance of the Pakeha (European) world view of research".\textsuperscript{23} A distinctive 'Kaupapa Maori' research practice is part of these developments. Kaupapa Maori discourses developed from the late 1960s as Maori began openly to voice their concerns about research into their lives and also began to formulate their own research agendas.\textsuperscript{24} This occurred alongside other key changes in Maori cultural politics and government

\textsuperscript{21}Although note the research projects discussed in Tuhiwai Smith, \textit{Decolonizing Methodologies}, pp142-162; Taiepa et al, Co-Management of New Zealand's Conservation Estate, pp245-246.
\textsuperscript{23}Bishop, Initiating Empowering Research, p175. The influence of feminist, poststructuralist and postmodern thinking has validated greater space for alternative methodologies and given validity to varied perspectives. This space has often been the site of struggle for Indigenous viewpoints and the place from which Indigenous peoples have made the call for greater awareness by researchers about the effects, intended and unintended, of their research practices. See Tuhiwai Smith, \textit{Decolonizing Methodologies}, pp163-182. It is also the space from which non-Indigenous academics have heeded these calls and where alternative, culturally appropriate and collaborative approaches to cross-cultural research have been developed by both Indigenous peoples and non-Indigenous academics. See Gibbs, Towards a Strategy for Undertaking Cross-Cultural Collaborative Research.
\textsuperscript{24}Tuhiwai Smith, \textit{Decolonizing Methodologies}, p163.
policy. Kaupapa Maori research as developed by Smith, Bishop and Tuhiwai Smith, and others is:

'...the philosophy and practice of being and acting Maori'. It assumes the taken for granted social, political, historical, intellectual and cultural legitimacy of Maori people, in that it is a position where 'Maori language, culture, knowledge and values are accepted in their own right'.

Further, Kaupapa Maori is "epistemologically based within Maori cultural specificities, preferences and practices".

Kaupapa Maori research practice is primarily located in the sphere of critical social science research because it actively engages both existing power structures and the way the dominant hegemony defines and legitimates the creation of knowledge. Maori scholar Pihama suggests that:

intrinsic to Kaupapa Maori theory is an analysis of existing power structures and societal inequalities. Kaupapa Maori theory therefore aligns with critical theory in the act of exposing underlying assumptions that serve to conceal the power relations that exist within society and the ways in which dominant groups construct concepts of 'common sense' and 'facts' to provide ad hoc justification for the maintenance of inequalities and the continued oppression of Maori people.

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25Tuhiwai Smith highlights three main factors which allowed such developments: (1) the establishment of the Waitangi Tribunal charged with the responsibility of hearing claims by Maori concerning breaches of the Treaty of Waitangi; (2) the development of Te Kohanga Reo, a Maori language revitalization program; and (3) challenges to the epistemological foundations of Western research through "feminist and critical critiques of positivism". See Tuhiwai Smith, Decolonizing Methodologies, p163. These factors must be viewed in light of the general renaissance of Maori culture and the growing recognition of the Treaty of Waitangi as a foundational constitutional document of New Zealand. See Bishop, Collaborative Research, p11; and generally, Walker, Ka Whawhai Tonu Matou.

26Smith, The Development of Kaupapa Maori; Bishop, Collaborative Research; Tuhiwai Smith, Decolonizing Methodologies. Kaupapa Maori, as a theorised research approach, developed out of the work of the Research Unit for Maori Education, Auckland University in 1989-1996. See Tuhiwai Smith, Decolonizing Methodologies, pp131-132&183-195, particularly citing Kathy Irwin.

27Smith quoted in Bishop, Collaborative Research, p12.

28Bishop, Collaborative Research, p15.

29Quoted in Tuhiwai Smith, Decolonizing Methodologies, pp185-186.
Bishop suggests that Kaupapa Maori addresses Foucault’s "productive function of power-knowledge" by deconstructing the disempowering hegemonies which have marginalised Maori and their knowledge, and prevented Maori from controlling their own knowledge.30 Because critical social science is underpinned by a belief that "[b]y means of analysis and effort, humans are thought to be capable of solving their own problems through an enlightened re-ordering of their collective arrangements",31 Kaupapa Maori research practice can be seen as a local approach through which the emancipatory goal of social science research is being realised.

In summary, research practices positioned within Kaupapa Maori research are embedded in a Maori world view and allow research to be undertaken in accordance with Maori cultural preferences. As such, Kaupapa Maori "is a counter-hegemony approach to Western forms of research and ... is imbued with a strong anti-positivistic stance".32 Bishop’s 'whakawhanaungatanga' research strategy provides a method for carrying out Kaupapa Maori research.

**Bishop’s whakawhanaungatanga research strategy**

As Bishop explains:

Whakawhanaungatanga as a research process uses methods and principles similar to those used to establish relationships among Maori people. These principles are invoked to address the means of research initiation, the establishment of research questions, to facilitate participation in the work of the project, to address issues of representation and accountability and to legitimate the ownership of knowledge defined and created.33

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30Bishop, Collaborative Research, p13.
32Tuhiwai Smith, Decolonizing Methodologies, p189. For a discussion of the methodological implications of Kaupapa Maori research practices (for example, the role of the researcher and objectivity) see Gibbs, Towards A Strategy for Undertaking Cross-Cultural Collaborative Research.
33Bishop, Collaborative Research, p239.
As such, Bishop's research strategy is a "culturally constituted metaphor for conducting Kaupapa Maori research".34

The basic unit of Maori society, the whanau, provides the basis for determining the relationships and roles of the participants in the research process, including the researchers.

Whanau means extended family. Whanaunga are relatives/relations, those members of your whanau with whom you have an inextricable, bodily link. ... Whakawhanaungatanga is the process of establishing relationships, literally by means of identifying, through culturally appropriate means, your bodily linkage, your engagement, your connectedness and therefore (unspoken) commitment to other people.35

'Whanaungatanga' is also the Maori term for connectedness and engagement and is "one of the most fundamental concepts within Maori culture, both as a value and as a social process".36 In terms of a research process, it provides a metaphor for repositioning the researcher and the research participants as collaborative research partners. All those involved are considered as part of a 'whanau of interest' or 'research whanau'.37 Because relationships established within the research process are whanau-based, this strategy addresses issues of power sharing and allows for the research to be partially participant-driven. Power is retained within the research whanau throughout and importantly "the locus of power and control is within the cultural understanding of the research participants".38

As a means of ensuring that my research into post-settlement pounamu issues was collaborative and conducted in culturally appropriate ways, I adopted Bishop's whakawhanaungatanga research strategy, wherever possible.39 I endeavoured to create a 'research whanau' and to

34Bishop, Collaborative Research, p215.
35Bishop, Collaborative Research, p215, original emphasis.
37Bishop, Collaborative Research, p219.
38Bishop, Collaborative Research, p227.
39For a more robust form of collaborative research see R. Hill, A. Baird and D. Buchanan (1999) Aborigines and Fire in the Wet Tropics of Queensland, Australia: Ecosystem Management Across Cultures Society & Natural Resources 12; and Bishop, Collaborative Research. See also Taiepa et al, Co-Management of New Zealand's Conservation Estate.
model my relationships with research participants on the whanau, thereby invoking aroha, or respect, trust, and support within the research process.

**Research agreement**

In an effort to apply Bishop's research strategy, I met with key Ngai Tahu to confirm the scope of my research into post-settlement pounamu issues and to finalise research questions to reflect the pounamu research that Ngai Tahu wanted undertaken. This has ensured that benefits will flow back to Ngai Tahu from my research. My discussions with Ngai Tahu also traversed a number of concerns about research into the lives of Maori. These included arrangements for participation of local Ngai Tahu in the research, use of traditional knowledge, intellectual property rights in traditional knowledge and knowledge created in the research process, and the outcomes of the research. As a result, a Memorandum of Understanding ("MOU") between the University of Otago and Dunedin-based Ngai Tahu, represented by Te Runanga Otakou (the local tribal council), was negotiated to clearly articulate how such issues would be managed.  

Participation by local Ngai Tahu in the work of the project is addressed in the MOU. The parties to the MOU agreed to work collaboratively and accepted mutual responsibility for the research. Further, the MOU established an advisory committee, consisting of a research supervisor from the University and a member of the local tribal council, for guidance and advice. Importantly, this committee was the avenue through which contacts with local Ngai Tahu were to be initiated and interviews facilitated, thereby enhancing the principles of whakawhanaungatanga. Under these arrangements I travelled with Otakou whanau on a hikoi (traditional excursion) to a sacred pounamu source by the Dart River, Central Otago, and shared with Otakou whanau as traditional knowledge of the source was passed on.  

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40 A copy of the MOU is provided in Appendix D of this thesis.
41 See Chapter Seven of this thesis.
experience was essential to my research. Without the MOU arrangements, I would not have had an opportunity to visit this pounamu source which has extremely restricted access.\footnote{Note the implications of this type of arrangement for researchers in domains other than social science (geology, hydrology, natural sciences, as examples) where access to sites is vital for data collection.}

According to Bishop's whakawhanaungatanga research strategy, the power to validate and legitimate knowledge created in the collaborative process should rest with the research whanau.\footnote{Bishop, \textit{Collaborative Research}, p226.} To address this issue, the MOU provided for the cultural practice of rahui (prohibition, ban). In essence, through an ability to place a rahui on (or prohibition on the dissemination of) traditional knowledge,\footnote{Traditional Knowledge' is defined for the purposes of the collaborative research undertaken by the University of Otago and Te Runanga Otakou as "traditional and whanau knowledge and values relating to pounamu". Recital B of the Memorandum of Understanding between the University of Otago and Te Runanga Otakou dated 7 October 1998. The demarcation between 'traditional knowledge' and other kinds of knowledge is slippery ground. In my experience, 'traditional knowledge' is used to refer to culturally sacred knowledge, traditional or customary ecological knowledge, knowledge of genealogies, burial sites, specific cultural sites and the like. It generally does not cover information already published or otherwise in the public domain, although this in itself is problematic given the concerns expressed by Indigenous peoples.} local Ngai Tahu have retained control over the use and dissemination of their traditional knowledge, leading to greater power sharing within the research process. The rahui provisions were not invoked in my research. But, if Ngai Tahu had, for example, not wished to have certain knowledge published, or had disagreed with the way that their traditional knowledge was represented in the final thesis text, the MOU provided a procedure for discussing and resolving the matter through the advisory committee. If the matter was unable to be resolved, Te Runanga Otakou had the power to prohibit the use of its traditional knowledge in my research or the final thesis text. Subject to this proviso, the University has retained the right to publish the research after giving local Ngai Tahu every reasonable opportunity to view and comment on papers before publication. In this sense academic freedom is maintained.
The MOU also makes explicit that the University makes no claim to the intellectual property in the traditional knowledge of local Maori:

The University acknowledges that whanau, kaumatua [tribal elders] and individual Ngai Tahu collectively own the intellectual property of their traditional and whanau knowledge and values relating to pounamu.

This is another key factor in local Ngai Tahu retaining control over the research process. When coupled with the ability to place a rahui on the dissemination of traditional knowledge, it provides a potent tool to ensure that power is shared in the research process. The intellectual property rights to other information collected and knowledge created in my research remains with the University in the conventional manner.

**Interviews**

The MOU arrangements, however, only covered the Dunedin-based Ngai Tahu runanga, Te Runanga Otakou, and their traditions relating to pounamu primarily located in Otago. Contacts with Poutini (West Coast) Ngai Tahu, and their traditions relating to the West Coast sources of pounamu, were not regulated by any formal research agreement. Initially, I approached both of the West Coast runanga, Te Runaka o Kati Waewae and Te Runanga o Makaawhio. Te Runaka o Kati Waewae chose not to participate at all, even when I contacted the runanga office for the third time. Members of the Executive of Te Runanga o Makaawhio met with me, but declined to be interviewed on the basis that Ngai Tahu had yet to establish its policy on pounamu management issues, and therefore, they felt it inappropriate to speak with me. The Runanga provided me with a limited amount of uncontroversial information. Consequently, I contacted Poutini Ngai Tahu whanau in the spirit of Bishop’s whakawhanaungatanga research strategy, and those choosing to participate did so as whanau and individuals, rather than as representatives of their respective runanga.
I interviewed many people, both Ngai Tahu and non-Ngai Tahu who had an interest in pounamu issues. The majority of research participants were located on the West Coast. In addition to Poutini Ngai Tahu whanau and individuals, I interviewed representatives of Te Runanga o Ngai Tahu\(^{45}\) and the Mawhera Incorporation (the current legal owners of pounamu deposits), members of the pounamu industry and many pounamu carvers (Ngai Tahu and non-Ngai Tahu), all pounamu mining licence holders (as at August 1998), one member of the gold mining industry, Department of Conservation employees with responsibilities that covered pounamu in the conservation estate, and representatives of West Coast territorial authorities.\(^{46}\) The interviews were semi-structured, open-ended and in-depth in format. In some situations they took the form of discussion.

Those people (both Ngai Tahu and non-Ngai Tahu) participating in my research did so under the general ethical guidelines, approved by the University of Otago, in accordance with the following principles:

- **Consent** The consent of each potential interviewee was sought before any interview took place. Consent was requested to undertake the interview, record the interview (by tape or hand-written notes), transcribe the interview (subject to the right of the interviewee to correct and amend the transcript), to use the transcript for the purposes of the research project, and to quote the interviewee (anonymously or by reference to the organisation they represented, according to the choice of the interviewee). Where an interviewee was to be quoted directly, that interviewee had a choice whether or not to view the text prior to its finalisation. All participants had the option of withdrawing consent at any time up to the time of the final thesis text. An information sheet

\(^{45}\)All of whom had been directly involved in the settlement negotiations.

\(^{46}\)I undertook a total of 35 interviews. In addition to those listed, the interviewees included a number of Wellington-based Crown officials and advisors who had been directly involved in the negotiation of the Ngai Tahu settlement, and the return of pounamu, about the aims of the settlement and the return of pounamu. In some cases the interviews covered post-settlement pounamu issues, but generally did not. These responses appear primarily in Chapter Two of this thesis.
outlining the research proposal was usually provided to participants, along with a consent form, prior to the interview.47

• Confidentiality Privacy of participants was ensured by recording the information in a manner that did not disclose their personal identity. The identity of interviewees remains confidential. Because the West Coast community, and particularly the pounamu community, is relatively small and close knit, to ensure the confidentiality of research participants, interviews are referenced according to the chosen identification of the interviewee, and are not numbered or coded in the thesis text or footnotes. In a couple of instances, interviewees had several roles (for example as a carver, member of pounamu industry, and a mining licence holder or Poutini Ngai Tahu). Where this was the case, the reference most appropriate to the comments or views referenced has been used.

• Intellectual property The information collected in the interviews remains the intellectual property of each interviewee.

These ethical guidelines meet Bishop's whakawhanaungatanga research strategy criteria in a number of important respects. Because the research participants were able to view the interview transcript and correct it, to view the text where they were directly quoted, and ultimately, to withdraw from the research, the ethical guidelines provided a sharing of power in the research process. They also enabled research participants to control the representation of their views in the text, and so provided for shared legitimation of knowledge produced in the research. The power sharing is strengthened by the fact that the interviewees retain intellectual property in their views as recorded.

Once I had decided to adopt Bishop's strategy for my research into pounamu issues, I applied the principles of whakawhanaungatanga to both Ngai Tahu and non-Ngai Tahu research.

47 Sometimes the consent form was provided to the interviewee with the transcript of interview. In these cases, verbal consent was obtained prior to the interview.
participants. The University's ethical guidelines, too, applied to all participants equally. The main difference in my work with Ngai Tahu and non-Ngai Tahu was that my initial approaches to Ngai Tahu were through official Ngai Tahu channels, first through Te Runanga o Ngai Tahu and then through local runanga channels. As discussed above, in one case this led to a research agreement which formalised the means of communicating with local Ngai Tahu. Certainly, Ngai Tahu interviewees often spoke in cultural metaphors, and I interpreted their responses accordingly. However, many Pakeha also expressed a profound relationship with pounamu and the land, and in some cases this relationship was expressed in terms of Maori metaphors. For example, many pounamu carvers, both Ngai Tahu and Pakeha, spoke of their relationship with pounamu as a 'taonga'. Therefore, to the extent to which I was able to establish a 'research whanau', it consisted of both Ngai Tahu and non-Ngai Tahu pounamu stakeholders.

**A pounamu research whanau**

The research participants formed a limited 'research whanau' in line with Bishop's whakawhanaungatanga research strategy. All pounamu research participants self-identified as having an important, and sometimes profound, relationship with pounamu. All had concerns about the management of pounamu by Ngai Tahu in the post-settlement context, although those concerns varied. And, to a greater or lesser extent, all research participants had views on the justice of the return of pounamu which they wanted to express. In these ways, research participants shared an interest in my research and can be described as a 'whanau of interest' or 'research whanau'.

This research whanau, however, did not extend to my PhD thesis as a whole. Very few of the research participants shared an interest in the overall design, research, and writing of this thesis. Indeed some research participants may be disappointed that their story does not appear in this work, or if it does, only in an abbreviated form. As with any academic research, there is a lot of research that does not make it into the final draft. However, every interview,
and every perspective on pounamu management issues offered by research participants, has enriched this thesis in some way. For this, I am grateful to all research participants who gave freely of their time and knowledge of pounamu.

Benefits of research

One of the important issues concerning research into the lives of Maori which Bishop's strategy seeks to address is that of who benefits from the research. In addition to the benefits which flow back to Ngai Tahu through the MOU arrangement already discussed, I undertook further collaborative work with Ngai Tahu in order to assist the iwi in their analysis of pounamu management issues. After I had completed my initial fieldwork, Ngai Tahu suggested a further collaborative information gathering exercise through its cultural and social service delivery arm, Ngai Tahu Development Corporation. As part of its 'Pounamu Project', Ngai Tahu wished to undertake a series of consultations with all Ngai Tahu members, and the general public, on pounamu management issues, and required assistance from someone with a sound knowledge of the pounamu industry, stakeholder attitudes to the change in pounamu ownership, and the geological details of the various sources. I agreed to work collaboratively with Ngai Tahu on the consultation project for a period of three months.

Under the mana of Ngai Tahu Development Corporation, and its (then) Heritage Development Manager who had responsibility for the consultation work, I organised a series of consultation meetings with tribal members and the wider public in Hokitika and Haast on the West Coast, Invercargill, Dunedin, Christchurch, and Arrowtown in Central Otago. In each case a Ngai Tahu hui (meeting conducted in accordance with Ngai Tahu protocol) and a public meeting was held, except in Arrowtown where only a public meeting was held. The consultation meetings were facilitated by Ngai Tahu Development Corporation's Heritage Development Manager, and allowed any person with an interest in pounamu management issues to express his or her views on pounamu management in the post-settlement era. The research whanau networks I had already established in my initial field work enhanced Ngai Tahu's own networks and
increased the numbers involved in the very comprehensive consultations. I used the knowledge gained from my field work to produce, in collaboration with Ngai Tahu Development Corporation and a Ngai Tahu Pounamu Working Party, comprehensive background papers which proved invaluable in focusing stakeholder attention on the questions that Ngai Tahu wanted answered. At the conclusion of the consultations I prepared draft reports of Ngai Tahu cultural values, and community values, relating to pounamu. The reports were finalised by Ngai Tahu Development Corporation and the Pounamu Working Party, and provided the basis for policy recommendations to the iwi-wide tribal council, Te Runanga o Ngai Tahu. My research and the collaborative consultation project thus provided very real benefits to Ngai Tahu.

The collaborative consultation project has also greatly enhanced the primary data available for analysis in this thesis. Over two hundred and fifty people participated in the consultations. As a result, the two Pounamu Project reports produced are very comprehensive, both in their coverage of stakeholder opinions and their discussion of contemporary pounamu issues. As an individual researcher, I simply did not have the resources available to undertake such a thorough and comprehensive collection of primary data, and therefore, the reports have added value to the pounamu research undertaken in this thesis. Perhaps most significantly, I was present at all of the consultation hui and meetings and heard the views of all Ngai Tahu members and interested members of the public wishing to be heard. At the beginning of the collaborative consultation project, I agreed that I would keep confidential all information I

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48 Attendance varied from approximately 15 people in Haast, a remote town in South Westland, to over 50 at each of the Ngai Tahu and public meetings in Hokitika. In all, over 250 people attended the consultations.
49 The Pounamu Working Party was an advisory group consisting of representatives of all papatipu runanga (local tribal council) with pounamu in their local areas ('kaitiaki runanga').
51 Note that Ngai Tahu’s pounamu management policies are currently being developed and have evolved since the Pounamu Project consultations took place. The information provided in the following chapters has been updated where possible, and to the best of my knowledge, is current as at the time of writing.
learnt as part of the consultation process, including the final reports, unless and until Ngai Tahu released the information to my PhD research. It was a long wait, almost two years, before Ngai Tahu gave its permission for these reports to be used for the purposes of this thesis. All other information remains confidential. In line with Bishop's whakawhanaungatanga research strategy, these confidentiality arrangements allowed Ngai Tahu to control the release of the consultation information, which contained a number of sensitive issues. It was important for Ngai Tahu to establish its policy position before the information was made public. Thus, the collaborative consultation arrangements allowed benefits to accrue to both parties involved in the research.

6.4 RESEARCH TRANSFORMED?

The reorientation of research towards Kaupapa Maori research practices often does not fundamentally change the form of research actually undertaken. Howitt, Crough and Pritchard note that where local Indigenous groups set the research agenda, although "the balance of power [is changed] somewhat, the research itself is not necessarily transformed". What is changed is the way the research is undertaken, primarily through forming and maintaining relationships in a cultural context. For example, in my research with Ngai Tahu (and non-Ngai Tahu), semi-structured open-ended interviews were one of the primary methods of data collection. However, my research relationships with Ngai Tahu participants were regulated culturally from the point of initial contact through to final representation of their views in the thesis text, thereby minimising any misrepresentation. Questions were framed in terms of cultural metaphors and responses understood in that context.

In my experience, the main issue for Indigenous research participants is often not so much what researchers do or do not do, as how they conduct themselves with and in Indigenous

52Howitt et al, Participation, Power and Social Research, p3.
communities. It is the relationships established and maintained through processes such as Bishop's whakawhanaungatanga research strategy that are important to Indigenous communities, and it is the nature of those relationships that are remembered by those communities. Tuhiwai Smith suggests that while many researchers may be able to give the 'right' answers to Indigenous concerns about research:

What may surprise many people is that what may appear as the 'right', most desirable answer can still be judged incorrect. These questions are simply part of a larger set of judgements on criteria that a researcher cannot prepare for, such as: Is her spirit clear? Does he have a good heart? What other baggage are they carrying?53

In this regard, communication is of the utmost importance. Respectful, open, honest and timely communication, ideally leading to relationships of trust between researchers and researcher participants, is the foundation of successful cross-cultural collaborative research. It must be remembered that research is itself a political act and social science researchers are "always the medium through which research occurs".54

The adoption of Bishop's whakawhanaungatanga research strategy was intended to ensure that Ngai Tahu (and non-Ngai Tahu) research participants and I, the researcher, shared power in the research process, and that all involved would benefit from the research. In many ways these goals were achieved. Through the MOU arrangements and the ethical guidelines for interviews, a culturally sensitive approach to representation of Ngai Tahu's cultural material was ensured and power shared. During the research process, Ngai Tahu received clear benefits from my research through the collaborative consultation project. Individuals, members of the pounamu industry, and pounamu carvers may also have benefited, primarily through the opportunity I provided to express their points of view. In many cases, research participants commented that I was the first person to ask their opinion on the subject, and was the only person taking an interest in how the return of pounamu to Ngai Tahu had actually affected

53Tuhiwai Smith, Decolonizing Methodologies, p10.
their lives. I trust that there will be ongoing benefits flowing from my research to Ngai Tahu, members of the pounamu industry, and others affected by the return of pounamu to Ngai Tahu, through a better understanding of the issues raised by the return of pounamu to Ngai Tahu. Ultimately, I hope that this thesis contributes to achieving greater justice in Treaty settlements, thereby benefiting New Zealand society as a whole.
CHAPTER SEVEN

WHY WAS POUNAMU RETURNED?
RESTORING MANA, RANGATIRATANGA, AND KAITIAKITANGA

7.1 POUNAMU: A SYMBOL OF JUSTICE

7.2 POUNAMU: A TAONGA OF NGAI TAHU IN TRADITIONAL TIMES

7.3 NGAI TAHU AND POUNAMU: A CHANGING RELATIONSHIP

7.4 LIMITS TO FULL RESTORATION OF NGAI TAHU'S RELATIONSHIP WITH POUNAMU: THE CONTEMPORARY CONTEXT

7.5 CONCLUSION
7.1 POUNAMU: A SYMBOL OF JUSTICE

The return of pounamu to Ngai Tahu is rich in symbolism. As discussed in Chapter Four, the return of pounamu to Ngai Tahu was pivotal in bridging the gap between the Crown and Ngai Tahu in the breakdown of the settlement negotiations. Without the return of pounamu there may well have been no settlement, and therefore no justice for Ngai Tahu, at all. The return of pounamu was also essential in a settlement intending to ensure Ngai Tahu's cultural survival through the restoration of mana, rangatiratanga, and turangawaewae, and thus, to achieve reparative justice. But why was the return of pounamu so important, and why did it make such a good symbol of justice in the Ngai Tahu settlement?

First, on the face of it, the return of pounamu was a clear case of reparative justice. The Waitangi Tribunal found that "in none of the deeds of sale did Ngai Tahu agree to part with any pounamu to be found in the respective purchase blocks". Accordingly, the Tribunal held that:

the Crown failed in breach of the Treaty principle requiring it to protect Ngai Tahu's right to retain this taonga and further failed to respect the tino rangatiratanga of Ngai Tahu over their taonga, contrary to article 2 of the Treaty.2

With the return of pounamu, something taken unjustly was restored to its rightful owner, in keeping with the restoration approach to reparative justice. The return therefore symbolised the good faith of the Crown in the settlement negotiation process, and restored the honour of the Crown (at least to a workable degree, allowing the negotiations to proceed). For Ngai

2 Waitangi Tribunal, The Ngai Tahu Report, vol 3, p725. Note also the Tribunal's finding that "the Crown acted in breach of article 2 of the Treaty in failing to reserve to Ngai Tahu the 80,000 acres requested at the Arahura River".
Tahu, the return also symbolised that a settlement could take place: that there could, and would, be some justice for Ngai Tahu after generations of struggle.

Second, for Ngai Tahu, the return of pounamu symbolised the iwi’s mana restored, and a future of ensured cultural survival. The power of pounamu as a symbol lies in Ngai Tahu’s special relationship with pounamu. Pounamu was, and is, a taonga of Ngai Tahu. Pounamu is integral to Ngai Tahu identity, both as an iwi, and for individual members of the tribe. It not only represents the mana of Ngai Tahu, but in many ways, pounamu is Ngai Tahu. Thus, the return of pounamu to Ngai Tahu was, at least at a symbolic level, a recognition and reaffirmation of Ngai Tahu mana and cultural identity, and an acknowledgment by the Crown of Ngai Tahu’s rangatiratanga over the resource. Thus, the return of pounamu symbolised ‘justice’ for Ngai Tahu.

But was the return of pounamu to Ngai Tahu merely symbolic? What are the practical implications of the return for Ngai Tahu cultural survival? What can Ngai Tahu actually do to restore its relationship with pounamu? This chapter also explores the extent to which the return of pounamu restores Ngai Tahu’s mana and rangatiratanga through Ngai Tahu’s practical exercise of its kaitiakitanga (guardianship) with respect to pounamu in the contemporary context. In the period of the Crown’s unjust expropriation of the resource, background circumstances changed dramatically. Because the justice of the Treaty settlement process is the shared justice of the Treaty, and therefore the Crown’s sovereignty is not at issue,

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4The term 'kaitiakitanga' is used in this thesis to describe the nature of Ngai Tahu’s special relationship with pounamu. Note, however, that this is a modern usage of ‘kaitiakitanga’ and that traditionally terms such as ‘mana’, ‘mana whenua’ or ‘rangatiratanga’ are more likely to have been used.
Ngai Tahu's kaitiakitanga must now be exercised within the constraints of the contemporary legal system and institutions. Current legislation limits Ngai Tahu's ability to restore fully its traditional relationship with pounamu in two key areas: access to, and use of, pounamu, and resource protection.

Despite the fact that Ngai Tahu's kaitiaki relationship with pounamu cannot be restored to what it was in traditional times, it can be rebuilt and adapted in the contemporary context. The return of pounamu provides Ngai Tahu with opportunities to develop forms of kaitiakitanga suited to the contemporary situation but that still retain core traditional concepts. In this manner, there is potential for the return of pounamu to result in Ngai Tahu holding a position it would have done had the historical injustice not occurred, in line with the counterfactual approach to reparative justice. The return of pounamu, therefore, puts Ngai Tahu in a position to achieve full restoration of its mana in a practical sense, and thereby affirm and nurture its tribal identity, and ultimately, its cultural survival. In this manner, the return of pounamu offers justice for Ngai Tahu, into the future.

7.2 POUNAMU: A TAONGA OF NGAI TAHU IN TRADITIONAL TIMES

There is no doubt that pounamu was, and is, a taonga5 of Ngai Tahu. Traditionally, pounamu was the toughest lithic resource known to Maori, a people who had no knowledge of metals.6 Its unique crystalline structure allows it to keep a sharp edge under most circumstances and

5On the concept of 'taonga', particularly in relation to works of art and artefacts, see Mead, Landmarks, Bridges and Visions, chapter 19 (The Nature of Taonga).
6R. Beck (1984) New Zealand Jade Wellington, A.H. and A.W. Reed, p81. Beck states: "It should be pointed out here that the main advantage of nephrite over argillite and other brittle stones was not hardness but toughness. The actual cutting angle of a tool blade could be shallower and thus more efficient and remained sharp without chipping. Small chisels and gouges could also be tapped with a mallet and remain intact. The brittle nature of the other stones required a steeper cutting angle which would prevent chipping of the blade edge but gave a less efficient result."
Why was pounamu returned? 169

therefore, was used extensively for tools such as adzes, gauges, and chisels to great effect. Further, its dense, heavy nature made it suitable for weapons such as patu and mere, flat club-like weapons. Not only is it strong, tough, hard, and able to be worked to a fine edge, it is incredibly beautiful and can be polished to a smooth, mirror-like finish. As a result, it was also used for carved ornaments and ceremonial items. All of these natural attributes and uses ensured that it was highly valued by Ngai Tahu, and other Maori alike. However, for Ngai Tahu, there was more. Because pounamu is found almost exclusively in Ngai Tahu's tribal area, pounamu is inextricably linked to Ngai Tahu's mana. Indeed, the waves of migration to the South Island, and Ngai Tahu's expansion to the West Coast of the South Island, were (at least in part) motivated by the desire to gain mana and control over pounamu. Ngai Tahu's good guardianship (kaitiakitanga) of pounamu, its ability to utilise the resource, and thence to trade it with other iwi, all enhanced Ngai Tahu's mana in traditional times. But perhaps the most fundamental reason for Ngai Tahu having a taonga relationship with pounamu lies in Ngai Tahu's cosmological beliefs about pounamu, and the natural world in general. These beliefs are examined before looking more closely at other factors contributing to the taonga value of pounamu in Ngai Tahu traditional society.

Ngai Tahu's cosmology and pounamu

Ngai Tahu's traditional relationship with pounamu stems from the iwi's beliefs about the natural world. Ngai Tahu consider themselves part of the natural world through shared whakapapa:

Like other Maori tribes, Ngai Tahu claim the same whakapapa through Raki [the sky father] and Papatuanuku [the earth mother] and see themselves as connected to the mountains, forests and waters, and the life supported by them. In this way, all things

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7 As discussed in Chapter Nine of this thesis, only the natural deposits of pounamu occurring within Ngai Tahu's tribal area were returned to Ngai Tahu by the Ngai Tahu (Pounamu Vesting) Act 1997. However, this accounts for the vast majority of the known deposits of pounamu occurring in New Zealand. There are reputed to be small occurrences outside Ngai Tahu's tribal area, notably on D'Urville Island and in the Nelson area. These deposits are not of gem grade. For a description of New Zealand's pounamu sources see Appendix C of this thesis.

8 See Chapter Eight of this thesis.
are considered to have a *Mauri* (life force) and to be living, and to have a genealogical relationship with each other. Ngai Tahu are therefore related to all entities in the natural world.9

While there are many Maori traditional accounts of the origins of pounamu,10 most confirm that Ngai Tahu has shared whakapapa with pounamu, and that pounamu has a mauri, or spiritual force, often connected with the atua (deity and ancestor) Ngahue.11 For example, Ngai Tahu kaumatua (respected elder) Teone Taare Tikao (1850-1927) gave the following account of the origin of pounamu to Herries Beattie:

Tama, in the Tairea canoe, arrived very early in the South Island. The karakia (invocation) for this canoe was not right, and although it safely crossed the stormy sea, the crew was turned to pounamu12 (greenstone) and it was wrecked on the land that it reached. This was Westland, and when she was lost a great wave carried her with a rush up the Arahura River, where, at a place called Hohonu, there she lies turned into a block of pounamu, which no one can lift or shift away. ... Tama, the captain, was not turned to stone, but went later to the North Island. Each member of the crew was turned into a different variety of greenstone, which was named after of him, viz, Kawakawa, (after a chief); Kahurangi; Auhunga; Inanga; Aotea; and others whom I forget. Kokotangiwai was a woman on board and she and her children, Mata-kirikiri, stayed down about Piopi oi ahi (Milford Sound) and formed a glassy type of pounamu [tangiwai]. ...

I have told you about the arrival of the greenstone canoe in Westland, but I should make it clear what brought them here. The pounamu, or greenstone, was once a race of people who lived on one of the Hawaikis and were very afraid of two races named Mata (flint) and Hoanga (grindstone). Being in such dread of these foes they fled in the Tairea

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10Beattie suggests that different, and sometimes contradictory, traditions associated with the origins of pounamu occur "because the accounts are gleaned from different tribes, who each have an explanation based on tribal lore". H. Beattie (1920) *The Southern Maori and Greenstone* Transactions of the New Zealand Institute 52, p47.


12Note that "pounemu" is an old dialectical spelling of pounamu.
canoe and came to the South Island, where they thought that they could live in quietness and peace. But alas they either made a mistake in saying the *karakia* for the canoe, or they forgot it, and so things went wrong with them. Arrived in the South Island the canoe was wrecked and the crew became greenstone, and still in fear of their old enemies took refuge under waterfalls and in river-beds.13

An alternative history of pounamu is told by Ngai Tahu historian and lead negotiator of the Ngai Tahu settlement, Tipene O'Regan:

Poutini was a giant water being. He was guardian for Kahue (Ngahue), the atua or deity of pounamu, greenstone. ...

Once when Poutini was being pursued in the oceans by Whatipu [another taniwha, related to sandstone], he took refuge in a shady corner of a bay at Tuhua (Mayor Island). It was early morning. Lying quietly in the still morning water, Poutini saw a beautiful woman coming down the water's edge to bathe. Her name was Waitaiki. He watched as she removed her clothes and slipped into the sea. ...

Disregarding the danger of being discovered by his enemy Whatipu ... he caught Waitaiki and fled with her across the sea towards the mainland.

Meanwhile, back at Tuhua, Waitaiki's husband[, Tamaahua, discovered her missing]. ... Distraught, he went to his tuahu (place of ritual) and sought to discover her fate by the powers of karakia (incantation) and divination. He used a tekateka ... a small, dart-like spear. He hurled it in the air and it hung there quivering and pointing to the mainland in the direction taken by Poutini and his beautiful captive, Waitaiki. Rushing to his canoe, Tamaahua paddled off in pursuit.

Poutini had stopped at Tahanga on the Coromandel Peninsula and lit a fire on the beach to warm Waitaiki. Then he fled across the land to Whangamata on the western shore of Lake Taupo where he lit another fire for Waitaiki. Meanwhile, Tamaahua landed on the beach at Tahanga and discovered the fire, but the ashes were cold. Using his tekateka again ... he took off in pursuit, eventually arriving at Whangamata. He discovered the remains of the second fire ....

The chase went on—fires and tekateka at every pause. To Rangitoto or D’Urville Island, to Whangamoa in the hills above Whakatū (Nelson) and to Onetahua or Farewell Spit. Then down the western coast of the South Island to Pahua near Punakaiki and past Mawheranui, past Teramakau and Arahura, right to Mahitahi ... . As he crossed the mouth of the Arahura River, Tamaahua noticed the water was not as cold as the waters of other rivers he had been crossing .... [After heading further south as far as Piopiotahi, Milford Sound, and finding his tekateka pointing back the way he had come, Tamaahua returned to the Arahura River.]

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13H. Beattie and T. Tikao (1939) *Tikao Talks Ka Taoka o te Ao Kohuta: Treasures from the Ancient World of the Maori told by Teone Taare Tikao* (1850-1927), reprinted 1990, Christchurch, Penguin, pp60–61. Note that this history was recounted by Sandra Rose Te Hakamatua Lee before the Waitangi Tribunal in the Ngai Tahu claim. S. Lee, Submission to the Waitangi Tribunal: Ngai Tahu Claim (Wai 27), Doc #D11, p3.
Poutini was indeed hiding in the upper Arahura River, by a stream which flows into the main river. That stream we call today Waitaiki. ... [Poutini] knew he had little chance of escape should he be found, but he did not want to leave his beautiful captive. Deciding that if he couldn't have her then no-one else would either, he changed her into his own essence—pounamu—and laid the woman-stone in the bed of the river, just by the junction of the stream now called Waitaiki with the main river. Then he slipped silently away ... [and] swam to the coast and ever since he has cruised its waters as the kaitiaki, guardian spirit, of the land and its sacred stone. That is why the coast is known as Te Tai Poutini, 'the tides of Poutini'. ... Ever since those ancient times, when the winter snows melt in spring and the waters tumble down the wild Arahura gorges, pieces of pounamu are broken off the great body of Waitaiki and make their way down the riverbed. These are the uri, children, of Waitaiki, the mother lode of the stone and the parent of the mauri that lies within pounamu.14

Both histories illustrate the Ngai Tahu belief that pounamu has human origins, and Ngai Tahu, as people of the land, are related through whakapapa to pounamu, as with all of the natural world. This was stressed by Teone Taare Tikao who stated, "as I have told you, it [pounamu] had a human origin".15 Beattie also reports that all varieties of pounamu16 "were originally a people, or a number of persons, turned to stone".17 Because of its human origin, pounamu has a mauri (life force) and wairua (life spirit).18


15Beattie and Tikao, Tikao Talks, p60.

16Beattie reports: "I have notes as follows: 'Piopiotahi was a canoe which came from Hawaiki. Kahotea was the captain and Tangiwai one of the crew, and two kinds of greenstone now bear these names.' Beattie, The Southern Maori and Greenstone, p47. According to alternative traditions, the lost wives of Tamatea Pokai Whenua represent different varieties of pounamu. Reed (1964), quoted in Brailsford, Greenstone Trails, p8. See Appendix C of this thesis for further explanation of the different varieties of pounamu.


The history related by O'Regan is also an oral map of the ancient stone quarries used in traditional times. Obsidian came from Mayor Island, basalt from Tahanga, Whangamata refers to black obsidian found there, argillite is found on D'Urville Island and at Whangamoa, floater stones for fashioning tools and ornaments occur on Farewell Spit, pahua flints are found near Punakaiki (used for drilling holes in pounamu), Piopiotahi (Milford Sound) is the source of tangiwai (a translucent form of pounamu), and the Arahura River is the home of the most highly prized pounamu. The Tikao history explains the origins of mata (flint) and haonga (grindstone) used in traditional times to shape the stone. Therefore, both histories reflect the materials used by Ngai Tahu in their traditional methods of working the stone, discussed briefly below.

There are other accounts of the origin of pounamu which emphasise pounamu as a fish and a god. The link here, as is suggested by O'Regan's account above, is through Poutini whose essence is pounamu and is kaitiaki of the West Coast and pounamu, and guardian of Ngahue, the atua (deity) of pounamu. Fish are considered the children of Tangaroa, deity of the sea, are therefore sacred, and humans, as descendants of Tane, brother of Tangaroa, have whakapapa in common with pounamu. Such relationships are indicative of Maori cosmology.

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19 New Zealand Geographic Board, *Place Names of the Ancestors*, p84.
20 For example, William Colenso, an early missionary writing over one hundred years ago, records that "this stone was both a fish and a god". W. Colenso (1894) History of a Block of Greenstone *Transactions of the New Zealand Institute* 27, p602. Captain Cook reported being told repeatedly by Maori in Queen Charlotte Sound that pounamu was a fish. Chapman, *On the Workings of Greenstone*, p482; Beaglehole (1967) quoted in Brailsford, *Greenstone Trails*, p6. Beattie reported that Temuka tangata whenua in 1920 asserted that "the old people had said the pounamu [pounamu] was originally a takata [tangata] (man) and that others said it had been an ika [inga] (fish)". Beattie in Anderson, *Traditional Lifeways of the Southern Maori*, p548.
21 Brailsford speculates that the origin of the fish myth may have developed from Maori knowledge of the geology of pounamu being associated with uplifted and folded sedimentary rocks formed in the oceans. He also hypothesises that the association with fish may have come from the well known fact that water "gives life" to pounamu as it does to fish. Brailsford, *Greenstone Trails*, p8.
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according to which all things on earth are intimately related and interconnected through a kin-
based system.22

Kaitiaki, or guardians, of the natural world, such as Poutini, are spirit beings and ancestors of
the living tangata whenua.23 Local tangata whenua, with mana whenua,24 are also kaitiaki
of natural resources,25 and provide the "interface between the secular and spiritual worlds" in
the exercise of kaitiakitanga, or guardianship, care, and wise management of those resources.26
Ngai Tahu, and its hapu and whanau, traditionally held mana over pounamu resources, and
acted as kaitiaki of pounamu. The practical exercise of kaitiakitanga has maintained and
reaffirmed Ngai Tahu's spiritual and bodily links with pounamu, and the natural world, and
reinforced Ngai Tahu's mana and cultural identity:

... As minders, kaitiaki must ensure that the mauri or life force of their taonga is
healthy and strong. A taonga whose life force is depleted ... presents a major task for
the kaitiaki. In order to uphold their mana, the tangata whenua as kaitiaki must do
all in their power to restore the mauri of the taonga to its original strength.27

Kaitiakitanga is not, however, a merely protective role. It was, and is, according to
contemporary Maori scholars, "more akin to game management than to conservation, if
conservation is seen strictly in the preservationist sense as the altruistic management of ...

Press. See also M. Roberts et al (1995) Kaitiakitanga: Maori Perspectives on Conservation
Pacific Conservation Biology 2.
23New Zealand Conservation Authority (1997) Maori Customary Use of Native Birds, Plants
and Other Traditional Materials: Interim Report and Discussion Paper Wellington, NZCA,
p86.
24"Mana whenua is described as the political and occupational authority over a particular
26Te Puni Kokiri (1993) Mauriora Ki Te Ao: An Introduction to Environmental and Resource
27Report of the Board of Inquiry into the New Zealand Coastal Policy Statement, quoted in
New Zealand Conservation Authority, Maori Customary Use, p87 and see also p88.
species for their own good rather than also for the good of the harvesters. These points are borne out in the following, Ngai Tahu endorsed, statement:

The term taonga includes values that are peculiar to Maori belief and outside a Western perception. This does not mean, however, that taonga has no relevance to Western thoughts and attitudes to resource use. Taonga embraces the concept of a resource—an anthropocentric term which, by definition, contains an aspect of utility. It incorporates the already familiar notion of the wise use of resources and the maintenance of the health of a resource. Sustainability and the need to preserve options for future generations is also recognised in the term. Taonga demands a respect for the past—aspects of the environment which merit preservation for their historic value.

Utilising a taonga such as pounamu wisely, and in accordance with tikanga (custom), remains an important part of Ngai Tahu’s kaitiaki relationship.

According to Ngai Tahu beliefs, because Ngai Tahu shares whakapapa with pounamu, and all of the natural world, the well-being of Ngai Tahu is intimately connected to the welfare of pounamu and the wider environment. Moreover, the well-being of the natural environment is closely linked with Ngai Tahu identity:

The land, water and resources in a particular area are representative of the people who reside there. They relate to the origin, history and tribal affiliation of that group, and are for them a statement of identity. These natural resources also determine the welfare and wealth of the tribal group which owns or controls them.

Thus, Ngai Tahu’s kaitiaki relationship with pounamu was traditionally an important factor in Ngai Tahu’s well-being and identity.

30This philosophy is illustrated in the following proverb: “Toi tu te Marae o Tane, Toi tu te Marae o Tangaroa, Toi tu te Iwi.” Translated as “If the Deity of the forest, Tane, survives, If the Deity of the sea, Tangaroa, survives, The people live on.” Goodall, Ngai Tahu Resource Management Strategy, p25.
The social significance of pounamu in traditional Ngai Tahu society

Augmenting Ngai Tahu's kaitiaki relationship with pounamu, was the social significance of pounamu artefacts in traditional society. Most importantly, pounamu was a sign of rank and power.²² Ornaments worn, and weapons used, by distinguished rangatira (chiefs) symbolised the mana of the current owner and became family heirlooms to be handed down through the generations.³³ These taonga, or 'taonga tuku iho' (treasured heirlooms), were also thought to hold something of the essence, identity, and mana of the previous, and current, owners. Wearing pounamu heirlooms associated with eponymous ancestors symbolised and reinforced the mana of current owners:

Using and wearing personal ornaments made from pounamu, handed down through the generations, allowed the wearer to share the strength and power of those who had previously worn the ornament. These treasured heirlooms established a pathway between the living and their tupuna [ancestors], bringing with it their mana.³⁴

When a person died, their pounamu ornaments, tools or weapons, would sometimes be laid or buried with them, and retrieved after a passage of time. This practice signalled the mana of the deceased to the mourners, further adding to the significance of the taonga.³⁵ The worth of such taonga pounamu,³⁶ therefore, "rested more on the sentiment which had been created around them, due to their traditional associations, than on their desirability for purposes of ornament or even their aesthetic merits."³⁷

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³³Firth, Economics of the New Zealand Maori, p396. See also Mead, Landmarks, Bridges and Visions, chapter 19, especially p184, where Mead states: "Antiquity is valued because it implies association with the ancestors, who form the foundation of Maori identity."
³⁴Vial, Finding the Essence of Pounamu, p22. See also Mead, Landmarks, Bridges and Visions, p184
³⁵Firth, Economics of the New Zealand Maori, p396; Vial, Finding the Essence of Pounamu, p22; Mead, Landmarks, Bridges and Visions, p186. Traditions in South Westland suggest that pounamu heirlooms may have been buried with the ashes of cremated corpses. P. Madgwick (1992) Aotea: A History of the South Westland Maori Greymouth, Greymouth Evening Star, p62.
³⁶Taonga pounamu' is the Maori term for taonga made of pounamu.
³⁷Firth, Economics of the New Zealand Maori, p396.
Pounamu artefacts were prominent in gift-exchanges, and confiscations in war, which apart from borrowing and theft, were two of the principal means by which goods traditionally changed hands. For example, victory in battle was usually followed by the victors seizing themselves of the moveable property of the vanquished, including items of personal property such as (pounamu) weapons, (pounamu) ornaments, and clothing of slain victims. Pounamu was sometimes even a motivating force for raids. Occasionally, the life of a potential victim could be saved by offering up a valuable pounamu mere. Peace was often cemented by the gift of a significant taonga pounamu.

Trade of pounamu was an integral part of the gift-exchange system used by Maori across the length of New Zealand. Pounamu was traded widely throughout the whole of the North and South Islands, both as worked items and raw stone, although most stone was worked by Ngai Tahu and then traded north. Social factors—primarily securing lasting relationships

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38Firth, *Economics of the New Zealand Maori*, pp398-400. Firth states that the other (third) principal means by which goods changed hands was through the custom of muru (reciprocity or compensation).
40Firth, *Economics of the New Zealand Maori*, p400.
42Brailsford, *Greenstone Trails*, p38. See the Waitangi Tribunal’s discussion of traditional gift-exchange in Waitangi Tribunal (1997) *The Muriwhenua Land Report* (Wai 45) Wellington, GP Publications, pp27-28. Exchanges took place by reciprocal gifts, that is gift and counter-gift. Brailsford, *Greenstone Trails*, p38; Firth, *Economics of the New Zealand Maori*, p409. Note that while pounamu played an important part in the economic exchange system, it did not play the same role that money plays today. It did not provide a common measure of value. However, often hints were made as to the desired articles of exchange. The guiding principle of utu, or reciprocity, governed all such dealings and in fact, permeated all aspects of Maori culture. Firth, *Economics of the New Zealand Maori*, pp412-417. In this context, it provided that for every gift, one of equal worth must be given in return. On gift-exchange generally see J. Hendry (1999) *An Introduction to Anthropology: Other People’s Worlds* Hampshire and London, MacMillan Press Ltd, chapter 3 (Gifts, Exchange and Reciprocity).
43Firth, *Economics of the New Zealand Maori*, p407; Beck (1984), *New Zealand Jade*, p75. There are different accounts of the range of items exchanged for pounamu. Some traditions suggest that pounamu was never traded for food (Information supplied by Te Runanga o Makaawhio under letter to the author dated 04/11/1998), while other traditions indicate that particularly heirlooms of pounamu were not exchanged for food, and still other accounts tell of exchange of pounamu for kumara, taro, fern-root and other delicacies of a given region. Firth, *Economics of the New Zealand Maori*, pp396&407.
between whanau and hapu—were also important elements of the gift-exchange system, and perhaps the most significant underlying purpose of any exchange of goods. Social ties were strengthened through the gift-exchange of taonga pounamu in particular:

Occasions of great social importance, such as the celebration of peace, the naming of a child of high rank, the marriage of persons of good birth, or the death of a chief were often marked by ceremonial gifts and exchange of property. ... This is ... illustrated by the adventures of 'Hine-nui-o-te-paua', a [pounamu] mere given by the Kawerau tribe about eight generations ago to Ngati-Paoa as a token of peace—he koha. The same mere was afterwards given by Ngati-Paoa to Ngapuhi at Mauinaina to try and secure peace; it was held by the latter tribe for a number of years and was afterwards returned to Ngati-Paoa at the time of the great feast Kohimarama. Afterwards this tribe presented it to Governor Grey as a token of their desire to keep peace with the white man.

The passing of pounamu heirlooms from tribe to tribe, to be returned to their original owners after a passage of time, as in the example cited above, was also common practice at tangi (funeral gatherings). Pounamu heirlooms were given to the bereaved by (more distantly) related whanau, and would be returned on the death of a member of the donor whanau. It was a great sign of disrespect to keep such items indefinitely. In accordance with the principle of utu (reciprocity), pounamu items were also gifted to acknowledge assistance in war.

In summary, pounamu symbolised rank and power, and the social ties between whanau, hapu, and iwi. These aspects of pounamu's taonga status reinforced Ngai Tahu's spiritual relationship with its ancestors. Further, because pounamu was a significant item of trade, Ngai Tahu's mana as kaitiaki of the natural resource was recognised throughout New Zealand. Therefore, pounamu was a significant thread in the web of Ngai Tahu relations.

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45 Firth, *Economics of the New Zealand Maori*, pp414–415, original emphasis. See also Stafford, *Te Arawa: A History of the Arawa People*, p123.
46 Firth, *Economics of the New Zealand Maori*, p415.
The pounamu trails: naming the land, walking the land, finding pounamu

Another factor adding to the taonga status of pounamu in traditional times was the associations between pounamu, the ancestors, and place. Except for those Ngai Tahu living close to pounamu sources, Ngai Tahu had to journey long distances through physically demanding terrain to reach pounamu collection points. Ngai Tahu navigated the land by "memory maps". Early colonials, such as Shortland, Heaphy and Mantell, all recorded what they saw as the astounding ability of their Maori guides to accurately recall the detailed sequence of places, including place names, resting places, and general countryside, along complex river systems and coastal tracks. Places were named after eponymous Ngai Tahu, Ngati Mamoe, and Waitaha ancestors, and associated accounts told of "heroic deeds, of epic journeys of exploration of ancestors, and the myth memory of how the land was formed". Thus, each walking of the greenstone trails confirmed Ngai Tahu's relationship with the natural world and its ancestors, reinforcing tribal identity.

Immense skill and effort was required to survive the trails to and from the pounamu sources. Whilst canoes were used on some river trails and for the sea legs of some journeys, in most cases the seekers of pounamu walked the trails. Over time, southern Maori established a number of trails to access pounamu from its sources. All of the main passes from the West Coast across the Southern Alps to Canterbury and Otago were utilised, with the following passes being used regularly: Harper, Arthur's, Browning/Noti Raureka, Mathias, and Whitcombe Passes,

48 There are seven major known fields of pounamu in New Zealand, all of them situated close to the alpine fault in the South Island: Nelson, Westland, South Westland, Whakatipu (including the Dart), Wanaka, Livingstone and Milford. For a description of New Zealand's pounamu sources see Appendix C of this thesis.
49 Brailsford, Greenstone Trails, p38.
51 Brailsford, The Tattooed Land, p197. See also Anderson, The Welcome of Strangers, pp122 and following.
52 Barry Brailsford provides an excellent account of the various trails and related pounamu traditions. See Brailsford, Greenstone Trails.
53 Several routes were known from Taramakau on the West Coast. One of these routes traversed up the Taramakau River to Harper Pass, followed on to the Hurunui River, Weka Pass and on
Why was pounamu returned?

and further south, Sealey Pass, Haast Pass/Tioripatea and Maori Saddle, Lake Harris Saddle/Tarahaku Whakatipu, and Mackinnon Pass. Coastal and river routes were also used by Ngai Tahu to and from the West Coast. Otago and Murihiku (Southland) whanau also travelled into the interior of the Otago, and the northern Murihiku region, on regular hikoi to mahinga kai sites and pounamu sources.

After the arduous journey to the remote and inaccessible places where pounamu is located, one was by no means assured of finding the taonga. Anyone who has ever searched for pounamu in a
to, for example, Kaiapoi in Canterbury. Harper Pass, along with Okura in the south, was favoured by family groups. Brailsford, Greenstone Trails, chapter 8.

One route crossed the Browning Pass/Noti Raureka, from the Hokitika and Kokatahi Rivers in the west, across to the east and along the Wilberforce River, to the side of Lake Coleridge and on to the Rakaia River. Brailsford, Greenstone Trails, chapter 9. This trail is associated with the Rau Reka tradition which is said to have introduced knowledge of pounamu to Ngai Tahu. Chapman, On the Workings of Greenstone, p490. Other commentators give similar versions of this tradition. See Anderson, The Welcome of Strangers, p39; Beattie, The Southern Maori and Greenstone, p48; and H. Robley (1915) Pounamu: Notes on New Zealand Greenstone London, Guilford and Company, p11. Note that Brailsford claims that this story "does not figure at all in local tribal traditions". Brailsford, Greenstone Trails, p125. It is cited as an anecdotal source by Ngai Tahu scholar Vial, Finding the Essence of Pounamu, p20.

Trails also followed the Poutini coast south to Jackson's Bay/Okahu. From there, people travelled across the divide to Whakatipu and Wanaka. Haast Pass/Tiopatea was well used and possibly also the Maori Pass which links the Okuru and Blue Valleys. Brailsford, Greenstone Trails, chapter 10.

Other possible routes were traversed by sea canoe along the south-west Fiordland coast to Papapounamu (Poison Bay) and Hupokeka (Anita Bay), and from Milford Sound/Piopiotahi, to the Mackinnon Pass (Omanui) along the Clinton River (Waitawai) to Lake Te Anau and overland to Lake Whakatipu. Further trails linked Fiordland and the lakes of Central Otago. One known route linked Kotuku (Martin's Bay) to the Hollyford River, thence to Greenstone Valley or the Routeburn, and then on to the Lake Whakatipu sources of pounamu. Brailsford, Greenstone Trails, chapter 11.

One trail followed the northern Poutini coast. It began (or finished) at Massacre Bay (in Golden Bay on the north coast of Te Wai Pounamu), cut across the north-western tip of the island to the north of the West Coast, followed the northern Poutini coast south to Greymouth (Mawhera), Kumara, Arahura, and on to Hokitika. Brailsford, Greenstone Trails, chapter 4.

Rivers also formed important trading links within Te Wai Pounamu. The Grey/Mawheranui, Inangahua and Buller Rivers linked the Poutini coast inland and north to Picton, Nelson and Motueka. These rivers provided low-level routes which were swiftly traversed due to the use of canoes for much of the journey. Brailsford, Greenstone Trails, chapters 5&6. The Maruia Valley was the basis of several other important greenstone trails. A route via the Kawatiri, Maruia and Mawhera Rivers was used. In addition, the route now known as the Lewis Saddle, on to Waiau-ua, and through to South Marlborough and North Canterbury was also used. Brailsford, Greenstone Trails, chapter 11.

riverbed, or on the West Coast beaches, will attest to the keen eyesight and intuition required. Raw pebbles and boulders of pounamu can vary in colour from rust brown to white due to the outside crust of oxidisation. For Ngai Tahu in traditional times, observing omens and carrying out the correct rituals was imperative:

The [Maori] of the east coast of the South Island were in the habit of going, in small parties, during autumn, across the ranges by the several passes known to them, to the West Coast. On arriving there the tohunga of the party would separate himself from the rest, and go through certain religious ceremonies to induce the atuas [spirit beings, gods, ancestors] to show him where greenstone was to be found. When propitious they would grant his request by revealing to him in a dream the spot where the coveted stone was to be found.

On awaking, the tohunga would tell his companions what had been revealed to him, and they would all start for the spot indicated, spreading themselves across the riverbed as they approached it. When the boulder was found it was at once named after the spirit who helped the party to its discovery.60

Thus, the manner in which Ngai Tahu found pounamu intensified pounamu's taonga status, and reinforced Ngai Tahu's links with the natural and supernatural world, and with the ancestors. Continued walking of the greenstone trails, visiting the pounamu sources, and finding the stone, thus reinforced Ngai Tahu's mana in its tribal area, and reaffirmed its cultural identity. Further value was added by the immense effort required to fashion pounamu into useful items, and the mana of those who worked the stone.

Traditional pounamu working methods

Ngai Tahu's traditional pounamu working methods were imbued with the spiritual importance of the taonga, and working pounamu had a certain amount of tapu (sacredness) involved. As with the search for pounamu, appropriate karakia (prayers, incantations) were required at

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60Recorded by Canon Stack (1932) based on discussions with Kaiapoi Maori, quoted in Brailsford, Greenstone Trails, p21. See also Brailsford, Greenstone Trails, pp20–22; and M. Riley (1994) Jade Treasures of the Maori Paraparaumu, Viking Sevenseas Ltd, p16. Beattie also recorded the tradition of naming the pounamu found after the spirit or person who revealed its whereabouts by dream. Beattie in Anderson, Traditional Lifeways of the Southern Maori, pp493–494. According to many accounts, "the fit time" is after an appropriate dream. Smith (1908) quoted in Riley, Jade Treasures of the Maori, p16. See also Sherrin (1863) quoted in Brailsford, The Tattooed Land, p207; and Colenso, History of a Block of Greenstone, p603.
each stage of the carving process. Once a boulder or pebble of pounamu was found and carried back to the kainga (village) or other place where it was to be worked, the lengthy and laborious task of cutting, shaping and polishing the stone began. If a boulder was too large to move it was cut on site and smaller, manageable sized pieces were carried away. Sometimes up to thirty men used a pounamu hammer to break apart large pounamu boulders:

The method they adopted for breaking off fragments was to procure what they described as a ‘knotty’ round greenstone boulder, the grain of which was twisted in every direction. This they fixed to the end of a beam of wood, and having fastened three ropes to the hammer end of the beam-end, they raised it to an angle of about eighty degrees; then, fastening one of the ropes, and leaving a man in charge, the rest of the party would return close to the rock, holding the two ropes in such a manner as to cause the hammer to fall on the exact spot they wanted. Hakopa te atu o Tu told me that thirty men were employed to work the hammer, on the occasion of his going for greenstone to the West Coast, about sixty years ago.

The process of shaping a piece of pounamu could take months, years, even generations, depending on the implement or ornament involved. Customarily, elderly chiefs, too old for fighting, spent their time grinding pounamu artefacts into shape. Shortland made this observation when visiting Waikouaiti as Protector of Aborigines in 1843-1844:

The house belonging to the chief, Koroko, was like a stone-cutter’s shop. He and another old man were constantly to be seen there, seated by a large slab of sand-stone, on which they by turns rubbed backwards and forwards a misshapen block of pounamu, while it was kept moist with water, which dropped on it from a wooden vessel. While

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61 For example, the karakia "Ko haruru tai e! E Au teitei e! Tangaroa ripiripia Tangaroa haehae Tangaroa wawahia" evokes the sounds and sights of the raging sea and invites Tangaroa (sea god) to "slice open and slit apart" a pounamu boulder. Other specific karakia were sung or chanted depending on the purpose of the object being made. Cowan (undated) quoted in Riley, *Jade Treasures of the Maori*, p42. Other traditions suggest that removing the tapu (sacred) from unworked pounamu, thus making it noa (common) and therefore workable, required karakia to the female element, of which Hine-tuahoanga is the guardian goddess. Tiniraupeka (1943) in Riley, *Jade Treasures of the Maori*, p42.


63 "With pretty constant work—that is, when not talking, eating, doing nothing, or sleeping—a man will get a slab into a rough triangular shape, and about an inch and a half thick, in a month, and, with the aid of some blocks of sharp, sandy-gritted limestone, will work down the faces and edges of it into proper shape in six weeks more." Heaphy (1862) quoted in Brailsford, *Greenstone Trails*, p24. See also Chapman, *On the Workings of Greenstone*, p499; Riley, *Jade Treasures of the Maori*, p44; E. Shortland (1851) *The Southern Districts of New Zealand*, reprinted 1976, Christchurch, Capper Press Ltd, p117. A mere (war club) might have taken at least twelve months to work into shape.
one rubbed the other smoked. They made, however, so little progress on it during my stay, that it seemed probable it would be left for some of the next generation to finish the work. It is not, therefore, to be wondered, that what has cost so much labour, should be regarded as the greatest treasure of the country.\textsuperscript{64}

Thereby, the mana of the carver, and the quality of the workmanship, also contributed to the value of pounamu artefacts.\textsuperscript{65} Pounamu was often polished by women of high rank and older women of the tribe, who rubbed the pounamu against their skin to absorb its oils;\textsuperscript{66} further adding to the value of the finished item.\textsuperscript{67}

The beauty of the stone itself also impacted on the taonga status of the items fashioned out of it. The most prized variety was kahurangi\textsuperscript{68} of bright or light green hue, translucent and free from inclusions or other flaws, followed closely by inanga, a pearly white to grey/green variety (most highly prized by some), and then by kawakawa, the most common variety of deep green colour.\textsuperscript{69} Of course, each piece was judged on its particular merits as many pieces had faults and inclusions.

\textbf{Summary: Ngai Tahu and pounamu in traditional times}

Pounamu was valued highly as the toughest stone traditionally available to the Maori people, and was used for tools, weapons, and ornaments. However, pounamu's purely utilitarian features were not its only, nor necessarily most important, qualities. Ngai Tahu's spiritual relationship with pounamu, as an ancestor with mauri and wairua, combined with the immense skill and effort required to obtain the stone and carve it into artefacts, and the mana particular

\textsuperscript{64}Shortland, \textit{The Southern Districts of New Zealand}, p117.
\textsuperscript{65}Mead, \textit{Landmarks, Bridges and Visions}, p187.
\textsuperscript{66}Sometimes shark oil was also used. E. Best (1912) \textit{The Stone Implements of the Maori}, reprinted 1974, Wellington, New Zealand Government Printer, p46.
\textsuperscript{67}Donne (1927) and Wilson (1932) quoted in Riley, \textit{Jade Treasures of the Maori}, p50.
\textsuperscript{68}Firth states: "Terms for the most highly prized varieties of greenstone, as \textit{kahurangi} and \textit{tongarewa}, were also used somewhat metaphorically as adjectives to denote any precious object. The usage is especially common in poetry, where a loved child may be spoken of as 'taku \textit{kahurangi}', 'my jewel'. The order of reference seems to be, \textit{kahurangi}-greenstone--a treasured ornament--any precious thing."
\textit{Firth, Economics of the New Zealand Maori}, p395, footnote 1.
\textsuperscript{69}Firth, \textit{Economics of the New Zealand Maori}, p395. For a discussion of the different varieties of pounamu see Appendix C of this thesis.
taonga pounamu gained through their association with rangatira, as well as their ceremonial and symbolic uses, all contributed to the supreme taonga status of some pounamu artefacts. Further, because the concepts of mana, rangatiratanga, and kaitiakitanga are inextricably linked in traditional Ngai Tahu society, Ngai Tahu's mana with respect to pounamu, and its exercise of rangatiratanga and kaitiakitanga over pounamu were of extreme importance to Ngai Tahu culture. Further, because mana is tied up with identity, pounamu symbolised Ngai Tahu cultural identity.

But how did Ngai Tahu's traditional relationship with pounamu survive the many changes brought about by the settlement of New Zealand? Is pounamu still integral to Ngai Tahu mana and identity such that its return would be required to ensure Ngai Tahu's cultural survival, and therefore, to achieve justice in the Ngai Tahu settlement?

7.3 NGAI TAHU AND POUNAMU: A CHANGING RELATIONSHIP

Ngai Tahu's relationship with pounamu began to change with the early influence of sealers, whalers, and traders, from the 1770s onwards. Initial contacts appear to have been amiable enough with a small amount of trading between sealers and local Maori.70 Fiordland Maori are reported to have acquired "hatchets—with which they immediately mimed an intention to kill their enemies—knives, nails, cloth and cloaks, and many other things".71 Tomahawks may well have in circulation in the Foveaux Strait from as early as 1773.72 By around 1810

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70 Anderson, The Welcome of Strangers, pp63-65. Later, between 1810 and the mid to late 1820s, there was fighting between sealers and local Ngai Tahu, until sealing declined. Anderson, The Welcome of Strangers, pp65-66. On the East Coast some trade between sailors and local Maori ended in blood-shed as in the case of the Sophia which stopped at Otago Harbour to buy potatoes. There are differing accounts of the reasons for the fighting which ended with the destruction of forty-two canoes at Otago and the firing of the settlement by sailor John Kelly, but Anderson suggests the most likely cause of trouble being the behaviour of the crew towards the local women. Anderson, The Welcome of Strangers, p71.
71 Anderson, The Welcome of Strangers, p64.
potatoes were being grown in the far south and traded with sealers in exchange for "iron and edged tools".\(^{73}\) The 1820s saw the establishment of a flax trade, where prepared flax was exchanged for iron tools and weapons, fish-hook, nails, knives, scissors, hatchets, razors, glass beads and trinkets.\(^{74}\) Another highly sought after item of trade was the musket. There appear to have been a few Foveaux Strait Maori with muskets in 1827, but at this stage traditional weapons such as the taiaha (spear) and (pounamu) patu were still prevalent.\(^{75}\) As trading with outsiders brought new items of material culture into the lives of the southern Maori, the use of equivalent items made out of traditional material dwindled as new items were obtained. As a result, the economic and utility value of pounamu was corresponding diminished.\(^{76}\) Pounamu was no longer treasured for its qualities as a tool- or weapon-making material, "and its use became largely symbolic and ornamental".\(^{77}\)

Trade with outsiders changed Ngai Tahu's traditional gift-exchange system. The focus of Ngai Tahu trade shifted from exchange of traditional material items of culture within the tribe, to trade with outsiders primarily for European goods.\(^{78}\) For example, as pounamu adzes became redundant, some were reworked for trade, and pounamu carving designs were adapted to meet European demands for curiosities.\(^{79}\) However, it appears that this surge in pounamu manufacture and trade was short-lived. After the Crown purchased almost all of Ngai Tahu lands in the 1840s-1860s, there is a dearth of evidence of the continuation of Ngai Tahu carving traditions.\(^{80}\) This is not surprising given the changing circumstances of increased colonisation.

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\(^{73}\)Anderson, *The Welcome of Strangers*, p65. Anderson suggests that potatoes were introduced into Murihiku with the sealers. Anderson, *The Welcome of Strangers*, p74. Women were the next preferred item of trade, after potatoes. Other early trading items for southern Maori included fish, firewood, and freshwater, and later, pigs, vegetables, and wheat were also traded. Anderson, *The Welcome of Strangers*, pp66–72&129.


\(^{75}\)Anderson, *The Welcome of Strangers*, p77.

\(^{76}\)Anderson, *The Welcome of Strangers*, p76.


\(^{79}\)Brailsford, *Greenstone Trails*, p179.

As discussed in Chapter Four, the Crown purchases left the iwi with insufficient land for its needs. The Crown assumed that ownership of pounamu had passed to it with the land purchases, and thereby denied Ngai Tahu’s mana and rangatiratanga over its taonga, in breach of the principles of the Treaty.81 Because Ngai Tahu mana and identity remained inextricably linked to pounamu, the loss of pounamu (together with the loss of land) was a severe blow to the mana of the iwi, and to individual members’ sense of cultural identity. Further, the Crown’s failure to provide Ngai Tahu with sufficient land for their future needs left Ngai Tahu disadvantaged:

The loss of land and the loss of traditional resources deprived the people of an economic base for their communities which eventually forced more and more of them to migrate to where there was work. Once the strength of the communities was broken in this way, the people were exposed increasingly to the predominantly negative European attitudes to the Maori and Maori culture. Hence loss of economic strength flowed through into loss of culture. The history of each particular area varies but similar factors operated though at a different pace, that different pace often set by another variable, intermarriage.82

In such circumstances, Ngai Tahu was in no position to develop its manufacturing or trading of pounamu. Ngai Tahu’s trade in newly crafted items appears to have stopped almost completely.83 Indeed one of the only references to Maori working pounamu after 1860 is in

81Waitangi Tribunal, The Ngai Tahu Report, vol 1, pp127–130. See also Chapter Four of this thesis.
82B. Dacker, Submission to the Waitangi Tribunal—The Prejudicial Effects of the Lack of Land with Particular Reference to the Otakou Block: Ngai Tahu Claim (Wai 27), Doc #F11, Dacker collection, p5. This passage (except for the last sentence) was quoted by the Tribunal in Waitangi Tribunal, The Ngai Tahu Report, vol 3, p922. The land that Ngai Tahu did have was insufficient to compete adequately in the growing economy. There was not enough land in individual or community ownership, generally, to be sustainable, and the land retained by Ngai Tahu was insufficient in size to undertake pastoralist activities such as cattle or sheep farming. Because settlers were stocking their adjacent lands with cattle, Ngai Tahu were forced to fence their smaller sections which they used for more intensive farming such as agriculture and raising pigs. Capital for such improvements was generally raised by leasing some of the land in their possession leading to less land ultimately available to support themselves. Dacker, Submission to the Waitangi Tribunal, p21; Dacker, Te Mamae me te Aroha, chapter 5. See also Waitangi Tribunal, The Ngai Tahu Report, vol 3, pp922–945. 83Beck has claimed that “the Maori had, by [the early 1900s], long since discarded his stone tool culture for the European way of life and not one Maori craftsman remained who could fashion jade or even had the knowledge of how it was done”. R. Beck (1970) New Zealand Jade: The Story of Greenstone Wellington, A.H. and A.W. Reed Ltd, p84.
Dunedin, where political prisoners from Taranaki worked pounamu whilst imprisoned in the 1860s.\textsuperscript{84}

As a result of the almost exclusively Pakeha-led renaissance in New Zealand pounamu carving since the 1970s,\textsuperscript{85} some Ngai Tahu have learnt to carve pounamu using modern techniques and equipment. Accordingly, there are a few Ngai Tahu carvers working in the pounamu industry today.\textsuperscript{86} Northern Maori, too, have joined the pounamu industry which flourishes in the North Island (principally in Rotorua and Auckland) servicing the tourist industry. However, prior to the Ngai Tahu (Pounamu Vesting) Act 1997, limited legal access to the natural deposits of the stone have frustrated any ideas of expanding Ngai Tahu's interests in the pounamu carving industry, or regenerating a Ngai Tahu skill-base in pounamu carving.

Despite having no legitimate avenue to exercise a kaitiaki role, at least some Ngai Tahu have continued to search for and collect small quantities of pounamu in its natural setting, sometimes carving it into personal items.\textsuperscript{87} On the whole, Ngai Tahu individuals have done this without the required permits under relevant mining legislation.\textsuperscript{88} Many Ngai Tahu believe that collecting small quantities of pounamu from rivers and the West Coast beaches is a birthright, depending on whakapapa, rather than on Crown permission.\textsuperscript{89} Indeed, many Ngai Tahu have collected pounamu knowingly in contravention of laws current at the time. For many, the act of being in a natural environment, looking for pounamu, is to be in communion with the spirits of the natural world and the ancestors.\textsuperscript{90} Thus, the ability to fossick for pounamu remains "an

\textsuperscript{84}Brailsford, \textit{Greenstone Trails}, p180; Beck (1984), \textit{New Zealand Jade}, pp116-117. See also Dacker, \textit{Te Mamae me te Aroha}, p66.

\textsuperscript{85}Discussed in Chapter Nine of this thesis. Note that one Poutini Ngai Tahu was involved in a large find of pounamu in the Arahura River in 1963, which led to the establishment of Westland Greenstone, one of Hokitika's largest, and the West Coast's oldest, pounamu manufacturing businesses.

\textsuperscript{86}Vial, Finding the Essence of Pounamu, pp31-33

\textsuperscript{87}Poutini Ngai Tahu individuals, Interviews with author, August 1998.


\textsuperscript{89}Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values, p8; Poutini Ngai Tahu individuals, Interviews.

\textsuperscript{90}Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values, p24.
important part of Iwi members' cultural identity and their process of connecting with the land. Over the years, traditional pounamu artefacts have continued to be gifted for ceremonial and social purposes, although many distinguished taonga pounamu have ended up in museums and private collections around the world.

The power of pounamu for Ngai Tahu individuals has not, however, diminished by the changing circumstances. Interviews with Poutini Ngai Tahu, and the views expressed by Ngai Tahu whanau in the Ngai Tahu Development Corporation's 1999 Pounamu Project consultations, suggest that many Ngai Tahu have retained a spiritual relationship with pounamu. Most continue to believe that pounamu is an ancestor, and has mauri and wairua. Contemporary stories tell of ceremony and ritual to bless newly found pounamu, and of gifting of pounamu in a traditional manner. Further, pounamu clearly remains symbolic of Ngai Tahu mana and part of Ngai Tahu identity. For example:

Pounamu gives our people "MANA" and as we give and show respect for Pounamu so then do we give Pounamu great "MANA" also. ... Pounamu's "MANA", its life force is also a taoka [taonga] to our people.

The taonga aspect of pounamu contributes to Iwi members' individual identity and that of the tribe as a collective. This is particularly so for Poutini Ngai Tahu.
Ngai Tahu also continue to believe that the well-being of Ngai Tahu Whanui is interconnected with the good guardianship and wise use of pounamu.\textsuperscript{99} Thus, Ngai Tahu still hold beliefs underpinning its traditional kaitiaki relationship with pounamu.

The Crown's ownership of pounamu prior to 1997 was a direct insult to Ngai Tahu's mana and denigrated Ngai Tahu's cultural identity, both symbolically and because it did not allow Ngai Tahu to exercise legitimately its kaitiaki role. Ngai Tahu has had to sit on the side-lines and watch the Crown issue licences for the mining of pounamu and fail to adequately police the resource, a situation which has led to high levels of poaching and a thriving black market.\textsuperscript{100} This, along with the fact that Ngai Tahu cultural beliefs have not been taken into account in the management and use of pounamu, has been prejudicial to Ngai Tahu's cultural identity.\textsuperscript{101}

Thus, the importance of the return of pounamu to Ngai Tahu, and that it symbolised justice in the Ngai Tahu settlement, is manifest. The Crown returned something it had unjustly expropriated, thereby restoring its honour, and Ngai Tahu mana and cultural identity have been restored at a symbolic level. Ngai Tahu now owns its taonga. Given that the spiritual and social significance of pounamu remains strong—pounamu is a taonga of contemporary Ngai Tahu and is clearly part of Ngai Tahu identity, mana, and the social web that binds Ngai Tahu together as an iwi—the stage appears set for a complete renewal of Ngai Tahu's kaitiaki relationship with pounamu, if Ngai Tahu so chooses. How will the drama unfold?

\textsuperscript{100} T. Schoon (1973) \textit{Jade Country} Sydney, Jade Arts, pp44–52.
\textsuperscript{101} Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values.
7.4 LIMITS TO FULL RESTORATION OF NGAI TAHU'S RELATIONSHIP WITH POUNAMU: THE CONTEMPORARY CONTEXT

From a Ngai Tahu perspective, the control and management of pounamu must be approached on the basis of pounamu as a taonga of Ngai Tahu, thus incorporating Ngai Tahu cultural values in any management regime.\textsuperscript{102} Because kaitiakitanga is so linked to rangatiratanga and mana,\textsuperscript{103} Ngai Tahu's restored exercise of kaitiakitanga over pounamu also affirms Ngai Tahu's mana and tribal identity. For Ngai Tahu, two principal aspects of kaitiakitanga, as applied to pounamu in the contemporary context, are management of any extraction of the resource, and the protection of pounamu in its natural settings.\textsuperscript{104} In each case, there are contemporary factors militating against Ngai Tahu fully restoring its previous, traditional, relationship with pounamu.

\textit{Limits to Ngai Tahu's control over pounamu extraction}

The first limitation on Ngai Tahu's restoration of its former kaitiaki relationship with pounamu arises because although Ngai Tahu now owns nearly all pounamu occurring in its tribal area, it does not own or control the vast majority of the land on, or in, which pounamu is found. From a geological perspective, nephrite pounamu is formed in the Southern Alps.\textsuperscript{105} Felted layers of nephrite, known as 'pods', in the Southern Alps have been subject to erosion and

\textsuperscript{102}Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values, p9.
\textsuperscript{104}Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values.
\textsuperscript{105}Brailsford, \textit{Greenstone Trails}, pp1&10. Millions of years ago certain igneous rock types flowed between sedimentary rock layers beneath the earth's surface. These rocks were then subject to intense folding and pressure causing the crystals to realign, twist and entangle in a process known as 'felting'. It is the process of felting that gives nephrite its characteristic hardness and smooth wax-like texture. If re-crystallisation is not complete, softer semi-nephrite is formed. Brailsford, \textit{Greenstone Trails}, pp1&10; Beck (1970), \textit{New Zealand Jade}, pp59–60; Beck (1984), \textit{New Zealand Jade}, pp7&48,143–144.
glacial action over thousands of years causing the pods to break up. Individual boulders and stones of nephrite are then washed down the rivers and streams which cut through the Southern Alps.\textsuperscript{106} Some nephrite pebbles are washed out to sea, tumbled by wave action, carried on the tides and finally washed up on the West Coast beaches.\textsuperscript{107} There are seven major known fields of pounamu in New Zealand, all of them situated close to the alpine fault in the South Island: Nelson, Westland, South Westland, Whakatipu (including the Dart), Wanaka, Livingstone and Milford.\textsuperscript{108}

Traditionally, legitimate access to pounamu resources depended primarily on whakapapa and ahi kaa relationships.\textsuperscript{109} While Ngai Tahu now owns all natural deposits of pounamu, these property rights do not extend to control of the land where deposits occur (except in the special case of the Arahura River). Ngai Tahu was not assured access to any of the pounamu deposits as part of the settlement package, and Ngai Tahu must therefore negotiate with each landowner to gain access to the land where pounamu occurs. This is problematic for the practical restoration of Ngai Tahu mana and cultural identity because in a society such as Ngai Tahu's, where identity is based on a tribal and whanau structure, the links with the ancestors must be sustained through the continuation of patterns of traditional resource use.\textsuperscript{110} Moreover:

Inextricable from the connections with ancestors are the connections with place ... . Regular access to [taonga] areas, and use of the natural resources [such as pounamu] they provide, are integral parts of the identity and spiritual well-being of the whanau and hapu.\textsuperscript{111}

\textsuperscript{106}Brailsford, \textit{Greenstone Trails}; Hanna and Menefy, \textit{Pounamu: New Zealand Jade}.

\textsuperscript{107}Punakaiki seems to be the northern limit for beach-found nephrite. Brailsford, \textit{Greenstone Trails}, p14.

\textsuperscript{108}A full geological survey of New Zealand's pounamu sources has never been undertaken, and thus the full extent of the resource is unknown. A description of New Zealand's pounamu sources is provided in Appendix C of this thesis. See also Beck (1984), \textit{New Zealand Jade}, chapter 2; Brailsford, \textit{Greenstone Trails}; Beck (1970), \textit{New Zealand Jade}; and Hanna and Menefy, \textit{Pounamu}.

\textsuperscript{109}See Chapter Eight of this thesis.

\textsuperscript{110}New Zealand Conservation Authority, \textit{Maori Customary Use}, p95.

\textsuperscript{111}New Zealand Conservation Authority, \textit{Maori Customary Use}, p95.
Without lawful access to pounamu and the places it is found, and without the ability to collect and use the stone (at least in a traditional manner, as discussed below in this chapter), the links with the ancestors cannot be maintained and thus, Ngai Tahu cultural identity and well-being cannot be restored in any meaningful way. This suggests a significant limit on the justice achieved by the return of pounamu to Ngai Tahu.

The majority of Ngai Tahu's pounamu occurs on Crown-owned land, administered and managed for conservation purposes under the Conservation Act 1987. Further, an estimated ninety-seven percent\(^\text{112}\) of the deposits with commercial potential occur on land declared as national parks under the National Parks Act 1980. For example, significant pounamu deposits are located within the Fiordland and Mt. Aspiring National Parks. Generally, it is an offence to remove any stone or mineral from a conservation area, including a national park.\(^\text{113}\) One specific exception to this general rule is where removal takes place in accordance with an arrangement for access to any Crown-owned land to mine a privately owned mineral under section 61B of the Crown Minerals Act 1991. In granting an access arrangement to conservation land under section 61B, the Minister of Conservation must have regard to:

\begin{itemize}
  \item [(a)] The objectives of any Act under which the land is administered; and
  \item [(b)] Any purpose for which the land is held by the Crown; and
  \item [(c)] Any policy statement or management plan of the Crown in relation to the mineral;
  \item [(d)] The safeguards against any potential adverse environmental effects of carrying out the proposed programme of work in relation to the mineral; and
  \item [(e)] The interests of the owner of the mineral, ...; and
  \item [(f)] Such other matters as the ... Minister considers appropriate.\(^\text{114}\)
\end{itemize}

The Minister must also take into account the principles of the Treaty of Waitangi.\(^\text{115}\)

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\(^\text{112}\)Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values, p19. Note that the Cascade area in south Westland, where large amounts of commercial-grade pounamu occurs, is a conservation area under the Conservation Act 1987, rather than a national park area. Crown official, Department of Conservation, Interview with author, August 1998.


\(^\text{114}\)Crown Minerals Act 1991, s61B.

\(^\text{115}\)Sections 4&6 of the Conservation Act 1987 read together can be interpreted as requiring the administration of the National Parks Act 1980 to be administered so as to give effect to the
The first four criteria listed in section 61B, above, relate to environmental protection issues. The Conservation Act requires conservation land and resources, including national parks, to be managed "for conservation purposes".\textsuperscript{116} "Conservation" is defined as:

\begin{quote}
... the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.\textsuperscript{117}
\end{quote}

The emphasis of the Department's role is clearly to manage conservation land for its intrinsic values, and for public appreciation and (largely passive) enjoyment. The National Parks Act is even more specific in its purpose, with similar effect:

\begin{quote}
... the provisions of this Act shall have effect for the purpose of preserving in perpetuity as national parks, for their intrinsic worth and for the benefit, use, and enjoyment of the public, areas of New Zealand that contain scenery of such distinctive quality, ecological systems, or natural features so beautiful, unique, or scientifically important that their preservation is in the national interest.\textsuperscript{118}
\end{quote}

Section 4(2) of the National Parks Act further states that having regard to the general purposes of the Act that national parks "shall be preserved as far as possible in their natural state". The underlying assumption of both the Conservation Act and the National Parks Act is that humans are not a 'natural' part of such landscapes, and that the appropriate human-nature relationship for conservation land is low impact and essentially passive (except for eradication of pests and introduced species).\textsuperscript{119} On this basis, conservation lands are generally 'no take' areas.\textsuperscript{120}

\textsuperscript{116}Conservation Act 1987, s6(a) & First Schedule.
\textsuperscript{117}Conservation Act 1987, s2(1). Note also the definitions of 'preservation' and 'protection' in s2(1) also emphasising intrinsic values.
\textsuperscript{118}National Parks Act 1980, s4(1).
\textsuperscript{119}Note that the National Parks Act 1980, like the Conservation Act 1987, has been described as "a multi-purpose statute, providing for both preservation/protection and human utility". K. Bosselmann and P. Taylor (1995) The New Zealand Law and Conservation Pacific Conservation Biology 2, p115. However, the 1983 General Policy for National Parks (quoted in New Zealand Conservation Authority, Maori Customary Use, p27) notes that human utility is "public access
However, the concept of a dichotomy between humans and nature is incompatible with Maori environmental ethics where, as explained above in this chapter, humans and the natural world are inextricably linked through a kin-based world view. Instead, the Maori sense of a 'conservation ethic' is:

... based on a kin-centric world view, ie., in which humans and nature are not separate entities but related parts of a whole. This manifests itself by way of reciprocal utilitarianism, whereby utilitarianism is defined as 'the ethical view that right conduct is determined by useful consequences, especially as it tends to promote the most good for the most people' (Webster Dictionary 1973).

As noted above, this ethic is more akin to game management than preservation. It does not necessarily imply a 'no take' approach to resource management, although some areas may be designated 'no take' areas, under the traditional environmental management tool of rahui, to ensure the sustainability of the particular resource. While Maori environmental ethics and


Note that in the mid-1980s, major reforms of conservation law and management took place. Previously, the administration of natural resources was undertaken on a multi-function basis, with resource utilisation (forestry, mining and pastoral uses), recreation, and conservation all managed concurrently. The restructuring separated out the more utilitarian and specific protection and preservation roles, with the newly created Department of Conservation becoming responsible solely for the latter. New Zealand Conservation Authority, *Maori Customary Use*, p19.


Rahui is a form of tapu restricting the use of land, sea, rivers, forests, gardens and other food resources. If a place is under that ritual restriction, access to it is forbidden to unauthorised people ... . A rahui would be put in place by the mana of the person, tribe, hapu, or family and stays in place until it was lifted ... " Barlow (1991) quoted in New Zealand Conservation Authority, *Maori Customary Use*, p93. However, the New Zealand Conservation Authority has recognised that while there are similarities between rahui and contemporary environmental protection "it must be recognised that the purposes of rahui are fundamentally different from the modern preservation ethic". New Zealand Conservation Authority, *Maori Customary Use*, p94. On 'rahui' see also Mead, *Landmarks, Bridges and Visions*, chapter 18 (The Rahui and its Applications), especially at p171 on the 'conservation rahui'.
the preservationist ethic are not mutually exclusive, there is a manifest tension between Ngai Tahu's view of the natural world, and the objectives of the current legislative framework for managing conservation lands.124

The second criterion under section 61B of the Crown Minerals Act requires the Minister for Conservation to take into account the purpose for which land is held by the Crown. There are several categories of land held under the Conservation Act. They include conservation parks, ecological areas, sanctuary areas, wilderness areas, water course areas, wildlife management areas, and other specially protected areas.125 For example, a conservation area must be managed to protect its natural and historic resources,126 and a wilderness area managed to protect its indigenous natural resources.127 In addition, all national parks come under the general ambit of the Conservation Act.128 Each area has a corresponding management plan to achieve the purposes for which the land has been set aside (the third criterion of section 61B). Further, the adverse effects of any pounamu extraction will be assessed against the conservation status of the land concerned: the higher the conservation status, the higher the test. Thus, the fourth criterion of section 61B—safeguards against any potential adverse effects of mining—also depends on the conservation status of the land concerned. All of these environmental protection considerations operate from an environmental ethic different to that held by Ngai Tahu.

Weighing against these environmental protection factors will be criterion (e) in section 61B—the interests of the owner of the mineral, here Ngai Tahu. Given Ngai Tahu's world view, it is not surprising that the majority of Ngai Tahu Whanui believe that the conservation status of land on which pounamu is found "should not be a barrier to Ngai Tahu accessing pounamu—on a

124 The New Zealand Conservation Authority recognised this tension as a "fundamental difference[] in philosophy". New Zealand Conservation Authority, Maori Customary Use, p9.
125 Conservation Act 1987, Part IV.
126 Conservation Act 1987, s19.
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sustainable basis—for commercial purposes". Iwi members expect, however, that collection of pounamu from conservation land will be subject to environmental standards.

The situation is a difficult one for Ngai Tahu. With most iwi members advocating pounamu extraction from conservation lands, including national parks, Te Runanga o Ngai Tahu has a clear mandate from its members to negotiate with the Minister of Conservation to facilitate this. As noted above, both the Conservation Act and the Crown Minerals Act require the Minister to take into account the Treaty of Waitangi, and in particular, the duty of active protection of Maori people in their use of their lands, water and other taonga "to the fullest extent practicable". Arguably, this includes a duty of active protection of Ngai Tahu's kaitiaki relationship with pounamu. The Crown's duty of active protection applies only where the provisions of the applicable legislation—in this case the Conservation Act and the National Parks Act—"are not clearly inconsistent with the principles" of the Treaty, and extends only to "such action as is reasonable in the prevailing circumstances". Therefore, conservation may take precedence over the Crown's duties under the Treaty in appropriate circumstances. In this way, the Treaty as the shared standard of justice may limit full restoration of Ngai Tahu's kaitiaki relationship with pounamu, and thus constrain the justice available in the Ngai Tahu settlement.

129 Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values, p19. Indeed, a common response from Maori is that legislation such as the National Parks Act is inconsistent with Article II of the Treaty and a denial of kaitiakitanga, and therefore, invalid. New Zealand Conservation Authority, Maori Customary Use, pp15,19&21. Note also the views of Ngai Tahu in Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values, p19.
130 Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values, p19. This is a situation of some irony. The present Minister of Conservation, Sandra Lee, strongly opposed the return of pounamu to Te Runanga o Ngai Tahu and the settlement generally. See Chapter Eight of this thesis. This raises the question whether the Minister may have a conflict of interest.
Where does the balance lie between the justice of Ngai Tahu’s having the opportunity to restore its kaitiaki relationship with its pounamu located in conservation lands, and the wider public's interests in preserving conservation lands for their intrinsic worth? Arguably, there will be some cases where the preservation of particular pounamu sources, or the ecosystems of which they are a part, will have such high conservation values that the Crown's duty of active protection of Ngai Tahu’s kaitiaki relationship with pounamu will be inconsistent with the preservation of the intrinsic values of such areas. In such a case, it may be unreasonable, in the circumstances, for Ngai Tahu’s interests in extracting pounamu to outweigh such high conservation values, and the interests of the wider New Zealand public in preserving those values.

Where high conservation values are seen to be at risk from pounamu extraction, strong opposition can be expected from conservation groups. For example, the following submission made by the Federated Mountain Clubs ("FMC")\(^\text{134}\) was indicative of public views expressed at the Pounamu Project consultations:

> Public interest values include the qualities of wilderness, solitude, scenery, natural quiet and enjoyment of nature. If [pounamu] extractions are small scale and located away from areas of high public use, their impacts are unlikely to be of concern. Mechanised extraction of pounamu in particular has the potential to conflict with the values held by the general public, especially on land with National Park status. ... Use of aircraft to access and transport pounamu on conservation land is not favoured by FMC. Intrusive noise is already an issue in places on the conservation estate and FMC is endeavouring to have this sort of impact reduced rather than added to.\(^\text{135}\)

The public's "limited" acceptance of Ngai Tahu collection of pounamu in the conservation estate appears to have been based on a recognition of the cultural importance of pounamu to Ngai

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\(^{134}\)The Federated Mountain Clubs is a national organisation representing tramping, mountaineering, skiing, mountain-biking, and hunting clubs, as well as individuals. Membership comprises approximately 90 clubs and 15,000 individuals.

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Tahu. Many members of the public attending the pounamu consultations appeared to accept more readily a 'cultural take' (that is what an individual can carry without mechanical aid) from conservation lands, including national parks, or small scale commercial extraction by a Ngai Tahu operation. However, some members of the public strongly opposed any taking of pounamu from national parks, which they believed should remain 'no take'. This latter example illustrates, at its most blatant, a conflict of environmental ethics.

Taking the restoration approach to reparative justice, restoration of Ngai Tahu's former, traditional, kaitiaki relationship with pounamu would require only that Ngai Tahu be able to collect pounamu in a traditional manner, that is without the aid of mechanical devices. There is a strong argument that a cultural take is sufficient to maintain traditional practices, and the links with the ancestors and place, that are so vital to a healthy, restored Ngai Tahu cultural identity. However, this approach ignores any right to develop traditional practices, and would effectively freeze Ngai Tahu's relationship with pounamu in the 1840s. Although there is no clear judicial statement on this issue, there are indications that the principles of the Treaty include a right of development. The Waitangi Tribunal has endorsed a right of

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137 For the purposes of this discussion, this definition of 'cultural take' is adopted because it most closely represents the collecting of pounamu in traditional times. It was the most widely accepted definition, and was used to demarcate 'cultural take' with 'commercial take' (that is, any more than a cultural take, or falling outside that definition), in Ngai Tahu Development Corporation's Pounamu Project consultations. For a discussion of these matters see generally Ngai Tahu Development Corporation, Pounamu Project Report on Community Values; and Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values. Note, however, that many Poutini Ngai Tahu found the distinction unhelpful because there was no such distinction in traditional times. Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values, p17; Poutini Ngai Tahu individuals, Interviews.
138 Ngai Tahu Development Corporation, Pounamu Project Report on Community Values, pp12&17. Perhaps these people would oppose any mining in national parks.
139 For example, the Court of Appeal in the Whale-watching case noted: "A right of development of indigenous rights is indeed coming to be recognised in international jurisprudence, but any such right is not necessarily exclusive of other persons or other interests." Ngai Tahu Maori Trust Board v Director-General of Conservation [1995] 3 NZLR 553 (CA), p560. The Court was not required to address squarely the right of development because whale-watching was not considered to be a taonga itself, merely "analogous" to a taonga (at p561). Nevertheless, the Court held that the Ngai Tahu tribal whale-watching business required the relevant legislation to be administered to protect Ngai Tahu's interests in accordance with Treaty principles.
development under the Treaty, for example in the *Muriwihenua Fishing Claim Report*, and again in its *Ngai Tahu Sea Fisheries Report*:

The Treaty does not prohibit or limit any specific manner, method or purpose of taking fish, or prevent the tribes from utilising improvements in techniques, methods or gear.\(^{140}\)

The Tribunal suggested that in the case of fishing, the right of development included the right to expand fishing into areas not fished traditionally, as a result of adopting new technologies.

Applying this reasoning to pounamu, the Treaty (which is the standard of justice in the Treaty settlement process) offered Ngai Tahu the opportunity to take advantage of new technologies for extracting and manufacturing pounamu. If Ngai Tahu had retained control over pounamu in its rohe, and had had a sufficient capital base, it is likely that Ngai Tahu would have continued its kaitiaki relationship with pounamu by collecting and manufacturing pounamu in some form or another, taking advantage of technological advances as they occurred. The right of development would also suggest that Ngai Tahu should be able to expand its use of pounamu sources beyond those used traditionally. The counterfactual approach to reparative justice applied here would require that Ngai Tahu be in a position to engage in the pounamu industry, both 'culturally' and 'commercially' (pounamu was always traded), taking advantage of contemporary technologies and 'new' discoveries\(^{141}\); that is the position it would have been in had the Crown not unjustly expropriated pounamu. Therefore, taking this approach to achieving justice in the Treaty settlement process, Ngai Tahu must be able to extract, on a commercial basis, enough of its pounamu sources—whether or not they occur on conservation land—to undertake commercial activity.


\(^{141}\)See also Chapter Nine of this thesis.
Thus, Ngai Tahu must negotiate access to conservation land for pounamu extraction on a case-by-case basis, and develop ongoing relationships with the Department of Conservation and its officers. The exact balance between Ngai Tahu's interests, and the interests of the preservation of the natural environments in which pounamu occurs, will need to be negotiated over time between Ngai Tahu and the Department of Conservation, with the underlying understanding that Ngai Tahu's kaitiaki relationship with pounamu is an extremely significant part of Ngai Tahu mana and cultural identity. Perhaps Ngai Tahu will choose to restrict its activities in areas of extremely high conservation value to a cultural take, and pursue commercial extraction in areas with lesser conservation values. Mining of gold and other minerals does, after all, take place regularly in the conservation estate.

There are, however, a number of factors lessening the potential clash between Ngai Tahu's interests and those of conservation. First, the environmental impacts of pounamu mining are relatively minor, as compared to open-cut mining or alluvial gold mining, for example. In many cases, pounamu boulders can be cut in situ, and pieces of stone helicoptered out. The environmental impacts may, therefore, be limited to the removal of vegetation, excavation, noise and dust emissions from any drilling or sawing in situ, and the construction of any roads or (temporary) huts used for the mining activities. Further, three or four large pounamu boulders may be sufficient to supply the New Zealand industry with stone for a year. Second, the environmental protection legislation already mentioned, together with the Resource Management Act 1991 which regulates the environmental effects of any mining of pounamu, provide environmental checks and safeguards. Ngai Tahu will be required to obtain any relevant resource consents under applicable Regional, District, or Coastal Plans, and concessions may be required for the use of helicopters in any extraction operations. Third, Ngai Tahu's

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142 This will depend on a number of factors including the continued importation of foreign jade and a continuation of the ban on the export of raw pounamu under the Customs Export Prohibition Order 1996, s3. Note, however, that the industry will want a range of different types of pounamu which may mean a slightly higher rate of extraction in the early years of any Ngai Tahu commercial activity to form small stock piles of different pounamu types.

143 National Parks Act 1980, s49; Conservation Act 1987, Part III B.
kaitiaki relationship encompasses protection of the resource. Therefore, in some instances the interests of Ngai Tahu and conservation will be similar, as will now be discussed.

**Limits to Ngai Tahu’s control over resource protection**

Because Ngai Tahu believe that the well-being of Ngai Tahu individuals, and the tribe as a whole, is affected by Ngai Tahu's proper fulfilment of its kaitiaki responsibilities, "the ongoing theft and rumour of poaching is [adversely] affecting [Ngai Tahu’s] mana as kaitiaki of the pounamu resources".\(^{144}\) Ngai Tahu’s present policy is that, apart from any existing mining licences, no pounamu may be collected except with the prior permission of the local kaitiaki runanga.\(^{145}\) Anyone taking pounamu without this prior approval is committing an act of theft.\(^{146}\) This includes collecting small beach and river pounamu pebbles, known as 'floaters'.

However, theft of pounamu is not restricted to small pebble-size pieces.\(^{147}\) Large boulders of pounamu exist, generally located in rugged inaccessible country such as the Cascade Plateau, and Big Bay and Barn Bay, in South Westland, for example. It is relatively simple to saw up large boulders in situ and helicopter out chunks of stone. The black market in pounamu is well established (indicating the Crown's lax attitude toward policing this mineral in past years) and continues to account for a large proportion of the trade in pounamu for the carving industry.\(^{148}\) In addition, members of Ngai Tahu attending Ngai Tahu's Pounamu Project consultations made a strong call for the complete protection (rahui) of at least some pounamu sources.\(^{149}\) These areas would be 'no take' and enable present and future generations of Ngai Tahu to experience pounamu in its natural setting, as in traditional times. What mechanisms

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\(^{144}\)Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values, p30.


\(^{146}\)The implications for West Coasters walking the beaches and rivers in search of pounamu, and taking home what they find, are discussed in Chapter Nine.

\(^{147}\)See for example, Landaus v Police unreported, 24/06/96, Chisholm J, HC Greymouth AP2/96.


\(^{149}\)Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values, p30.
are available to enforce any protected, or rahui, areas? How can Ngai Tahu protect its pounamu and thereby restore, and maintain, its mana as kaitiaki of pounamu?

Ensuring compliance with any Ngai Tahu management policies or plan will be a major issue for the iwi. Because pounamu is the private property of Te Runanga o Ngai Tahu, the legal mechanisms available to the iwi for enforcement are the usual private property based civil and criminal actions, notably conversion and theft. Where pounamu is located in or on land with special status, such as national park land or reserve status land, additional avenues are available under applicable legislation. This situation is somewhat ironic given that the same legislation may inhibit Ngai Tahu’s kaitiakitanga with respect to extraction, as just discussed. The use of current environmental protection laws relies on the co-operation of the Crown (the Department of Conservation), suggesting a form of co-management of the resource. In these respects, the ongoing Treaty partnership between Ngai Tahu and the Crown is crucial to Ngai Tahu’s successful management of pounamu, and the restoration of its cultural identity through pounamu. Reference to two examples of areas currently protected for their pounamu deposits show that in the case of resource protection, existing environmental protection laws can be used for Ngai Tahu’s purposes.

The Dart River Special Area

According to oral histories, one of the major sources of pounamu in traditional times was located at the head of Lake Whakatipu. Up the Dart River, on the western side, was a mountain named Te Koroka where the highly prized inanga variety of pounamu (pale, milky green to grey) was found. The precise location of this source was lost to common knowledge, and even

152Information for this section is taken from Beck (1984), New Zealand Jade, pp51–56, and the author’s visit to the site with Te Runanga Otakou in March 1999.
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dismissed altogether, until it was 're-discovered' to be in the Mt Aspiring National Park by a deer hunter, Tom Trevors, in 1970.

After subsequent investigations, it became clear that the Dart River-Te Koroka source had changed little since southern Maori last used the site in traditional times. Most importantly, it has never been commercially mined and contains an alluvial pounamu boulder in excess of twenty tonnes, the largest known unspoilt pounamu boulder in New Zealand, "and among the largest surviving in the world". In an area known as the 'collection area', close to the source itself, pounamu and artefacts of traditional pounamu manufacturing lie in the grass. Above, pounamu tumbles out of the mouth of the 'giant' Te Koroka, and down the scree slopes (the mountain range in which the in situ source is located looks like a giant lying on its back with pounamu coming out its mouth).

To preserve this unique site of both archaeological and cultural significance, the area (1,618 hectares) was declared a Special Area under the National Parks Act, and is also registered as an historic site under the Historic Places Act 1993. Entry to the Special Area is by permit only, which in practice must be approved by Ngai Tahu. It is an offence to enter the area without a permit. The Special Area has been photographed and all pounamu recorded on a grid pattern. The Department of Conservation works closely with Ngai Tahu to monitor the site. Unfortunately, some pounamu has been removed from the area without the required approval of the Minister of Conservation. Again, it is the remote location of such deposits which makes monitoring and protection difficult. Protection of many pounamu sources such as this depends not

153Beck (1984), New Zealand Jade, p54.
154On the joint recommendation of the Mt Aspiring National Parks Board and the National Parks Authority under the National Parks Act 1952, s12, now National Parks Act 1980, s12.
155Historic Places Act 1993, Part II.
157National Parks Act 1980, s60. Note also it is an offence to intentionally destroy, damage, or modify an historic place. Historic Places Act 1993, s97 and generally, Part V. See also B. Ahern, Department of Conservation Internal Correspondence to D. Higgins, dated 13/05/1998.
only on good relations between the Department and Ngai Tahu, but also, on the wider public's respect for, and understanding of, the importance of the site.

**Waitaiki Historic Reserve**

As noted in Chapter Five, the Ngai Tahu Claims Settlement Act 1998 created an historic reserve under the Reserves Act 1977 in the upper catchment of the Arahura. The name of the reserve, Waitaiki Historic Reserve, recognises Ngai Tahu's spiritual and ancestral relationship with the mother lode of pounamu in the Arahura River, in accordance with one of Ngai Tahu's oral histories (as recounted by O'Regan above, this chapter). It also reinforces Ngai Tahu's relationship with the land, and confirms Ngai Tahu's mana with respect to pounamu.

The reserve was vested in the Mawhera Incorporation who must manage it "for the purpose of protecting and preserving in perpetuity [the area], objects, and natural features, and such things thereon or therein contained as are of historic, archaeological, cultural, educational, and other special interest". It is an offence to remove any pounamu from the reserve, and the Incorporation may appoint officers who are given limited enforcement powers under the Reserves Act. This is an example of a Ngai Tahu entity actively managing an area for its pounamu values. The Chairman of the Mawhera Incorporation has acknowledged that the use of the Reserves Act is not ideal, but is the best mechanism available to protect pounamu in an area that has high conservation, historic, and cultural values.

Te Runanga o Ngai Tahu is currently investigating other enforcement mechanisms including practical measures concerning the availability and supply of pounamu to the general public.

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160 Reserves Act 1977, s18(1).
161 Reserves Act 1977, s94(1).
162 Reserves Act 1977, s93.
163 Interview with author, May 1998.
population. Some pounamu poaching and black market activity appears to be as a result of the lack of availability of the stone. Therefore, if Ngai Tahu can supply the industry with sufficient stone in a fair manner, it is likely that poaching will diminish. Ideas such as a Ngai Tahu brand, and 'whakapapa papers' certifying the legitimacy of the source of each piece of pounamu, are being explored.\textsuperscript{164} Any enforcement mechanisms introduced by Ngai Tahu must also be able to deal with the fact that many in the industry already possess large stores of the stone (legitimately acquired prior to the commencement the Ngai Tahu (Pounamu Vesting) Act 1997) and are freely able to trade this resource. Further, there remains one existing mining licence outside of Ngai Tahu's control,\textsuperscript{165} and pounamu is currently being collected on a 'cultural take' basis by Mawhera Incorporation shareholders,\textsuperscript{166} and under approvals given by kaitiaki papatipu runanga. There are interesting problems of proof—it is very difficult to identify the source of any particular piece of pounamu with any certainty, or to determine when it was collected.\textsuperscript{167}

Ngai Tahu has employed a full-time pounamu protection officer, situated on the West Coast, and three local part-time pounamu protection officers.\textsuperscript{168} In the absence of further legislation, these pounamu protection officers only have the powers of an ordinary person and cannot, for example, undertake searches of individuals (or their property) alleged to be involved in pounamu theft. This remains the role of the police. To an extent, Ngai Tahu must rely on information supplied by Department of Conservation officers in the field who are the most likely to spot any pounamu poaching.\textsuperscript{169} Despite these limitations, Ngai Tahu are actively

\textsuperscript{164}Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values, p32.
\textsuperscript{165}See Chapter Nine of this thesis.
\textsuperscript{166}See Chapter Eight of this thesis.
\textsuperscript{167}Although see J. Wood (1988) Forensic Tools Emerge to Detect Gold Theft \textit{The New Zealand Mining Journal} 48, suggesting that advances in forensic mineral analysis are making it easier to prove theft of gold and other minerals such as pounamu.
\textsuperscript{168}Note that at the time of writing the part-time positions were under review. Te Runanga o Ngai Tahu representative, personal communication, September 2001.
\textsuperscript{169}See discussion in Ngai Tahu Development Corporation, Pounamu Project Report on Ngai Tahu Cultural Values, p32. Note that New Zealand Customs also has a role to play in monitoring pounamu. The export of raw pounamu is prohibited by the Customs Export Prohibition Order 1996. Ngai Tahu is also developing policy to monitor pounamu turned up as
undertaking its kaitiaki responsibilities, and this alone sends a clear message that Ngai Tahu is in control of its taonga.

7.5 CONCLUSION

In the contemporary context, pounamu is a taonga of Ngai Tahu. Although Ngai Tahu's relationship with pounamu has changed over the years with a decrease in the collection and use of pounamu by Ngai Tahu since the Crown's unjust expropriation of the resource, Ngai Tahu has retained the essence of its special kaitiaki relationship with pounamu. As a result, pounamu continues to symbolise the mana and identity of the iwi, and its individual members. For these reasons, if there was to be justice in the Ngai Tahu settlement, pounamu had to be returned to Ngai Tahu.

There are, however, potential restrictions on the restoration of Ngai Tahu's kaitiakitanga over pounamu, and thus potential obstacles to the full practical restoration of Ngai Tahu mana, rangatiratanga and cultural identity, and therefore, to achieving justice. These potential limits to Ngai Tahu's extraction and protection of pounamu, are manifestations of the tensions between the grant of kawanatanga, or sovereignty, to the Crown, and the retention of rangatiratanga, or chieftainship, to Maori over their taonga, and thus a result of the limited kind of justice available in the Treaty settlement process. The ongoing Treaty relationship is crucial. Ngai Tahu and the Department of Conservation must work closely, in a spirit of mutual co-operation and trust, to find the balance between Ngai Tahu's desire to extract pounamu, and its protection, while also conserving New Zealand's unique ecosystems and landscapes. These part of other activities, for example gold mining. This will require the co-operation of territorial authorities in the resource consent process, and the Department of Conservation, where the activity takes place in the conservation estate. Te Runanga o Ngai Tahu, personal communication, September 2001.
are sites of negotiation where the exact justice of the situation must be developed to suit the contemporary context, on an ongoing basis.

Despite these constraints on Ngai Tahu's kaitiakitanga of pounamu, Ngai Tahu is largely in a position to ensure that pounamu is managed in accordance with its cultural preferences. This is a key aspect of rangatiratanga,\(^\text{170}\) and thus the return of pounamu restores Ngai Tahu's mana in a practical way, augmenting the restoration of Ngai Tahu mana and cultural identity at a symbolic level. However, ultimately, Ngai Tahu must be able to access pounamu where it is naturally found to reaffirm links with the ancestors and place, therefore, to restore the iwi's cultural identity. The use of taonga such as pounamu also offers an avenue for contemporary Ngai Tahu to enter, and confirm relationships with, the spiritual dimensions of the Maori world. Mana, rangatiratanga, kaitiakitanga, identity, and the social web of Ngai Tahu Whanui, are all strengthened by access to, and use of, pounamu. Therefore, the restoration of Ngai Tahu's special relationship with pounamu must be revived in practical ways if the return of pounamu is to contribute in a meaningful way to Ngai Tahu's cultural survival, and hence to the justice of the Ngai Tahu settlement generally.

Working within these limitations of the contemporary context, Ngai Tahu can utilise its pounamu, and revive its traditional, symbolic, and spiritual relationship with pounamu. This is already happening. In March 2001, Tamatea Marae (Otakou) hosted a hui where pounamu was gifted by Te Runanga o Makaawhio to other papatipu runanga. The pounamu boulder from which the pounamu gifts were taken, was the same boulder which was illegally poached from the Cascade Plateau, and used to build the well-known Wairau 'Wall of Tears' monument.\(^\text{171}\) The gifting ceremony confirmed Makaawhio's mana over pounamu in its takiwa (runanga area), and Ngai Tahu's mana, generally, with respect to its taonga. The gifts also confirmed links between papatipu runanga as the contemporary manifestation of Ngai Tahu whanau and hapu


\(^{171}\) See *Landaus v Police* unreported, 24/06/96, Chisholm J, HC Greymouth AP2/96.
of the past, between the present members of Ngai Tahu and their ancestors and atua spirits, and confirmed the place of the present generation of Ngai Tahu as holding the mana of the pounamu sources, and as mana whenua of the greater part of Te Wai Pounamu, the place of pounamu.
CHAPTER EIGHT

TO WHOM WAS POUNAMU RETURNED?  
THE VESTING OF POUNAMU IN TE RUNANGA O NGAI TAHU  
AND THE MAWHERA INCORPORATION

8.1 RETURNING POUNAMU TO NGAI TAHU

8.2 WHY 'IWI' AND WHY 'NGAI TAHU'?  
THE INTERNAL DYNAMICS OF NGAI TAHU WHANUI

8.3 REPARATIVE JUSTICE: HISTORICAL CONTINUITY

8.4 CONTEMPORARY JUSTICE:  
REPRESENTATION AND PARTICIPATION

8.5 CONTINUITY AND CHANGE
RETURNING POUNAMU TO NGAI TAHU

The Ngai Tahu (Pounamu Vesting) Act 1997 returned all Crown-owned pounamu, occurring in its natural state in Ngai Tahu's tribal area, to Te Runanga o Ngai Tahu.1 In accordance with the Waitangi Tribunal's recommendations,2 and a clear understanding between Ngai Tahu settlement negotiators and the Crown,3 Te Runanga o Ngai Tahu immediately transferred the pounamu in the Arahura River to the Mawhera Incorporation, a Maori incorporation representing many Poutini (West Coast) Ngai Tahu. However, as detailed in Chapter Four, the return of pounamu to these entities was not without controversy. Opposition primarily centred on claims that both Te Runanga o Ngai Tahu and the Mawhera Incorporation were not traditional, or suitable, Ngai Tahu structures for the return of pounamu. The return of pounamu to these two entities has implications for the achievement of justice in the Ngai Tahu settlement.

As discussed in Chapter Three, one of the difficulties of providing reparative justice for historical injustices is that the individuals involved may no longer exist. In the Treaty settlement process, these difficulties can be overcome by the Crown providing redress to

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1 Ngai Tahu (Pounamu Vesting) Act 1997, s3.
3 See Ngai Tahu (Pounamu Vesting) Act 1997, Recital F; Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/5; Crown Official, Ministry of Economic Development (formerly Ministry of Commerce), Interview with author, April 2000. The deed of transfer of the Arahura River pounamu from Te Runanga o Ngai Tahu to the Mawhera Incorporation was appended to Te Runanga o Ngai Tahu submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/20-MA/97/27. It was also a long-standing arrangement between Te Runanga o Ngai Tahu (and its predecessor the Ngai Tahu Maori Trust Board) and the Mawhera Incorporation. See submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/16-MA/97/20; 19A-MA/97/26 and attached correspondence; 20-MA/97/27; NTP/MOC/5; Mawhera Incorporation representative, Interview with author, July 1998; Te Runanga o Ngai Tahu representative, Interview with author, July 1998; Settlement negotiator, Te Runanga o Ngai Tahu, Interview with author, July 2000.
contemporary Maori collectives having historical continuity with the group(s) that suffered the injustices, and where individuals benefit from settlements through participation in that collective. From a contemporary perspective, then, Maori collectives receiving settlement redress must represent all members of that collective, and provide for their effective participation in the collective. This second criteria is necessary if settlements are not to create new injustices by excluding members from participating in settlement benefits. In the context of the return of pounamu to Ngai Tahu, there are, therefore, two criteria of suitability (and therefore justice) that must be met by Te Runanga o Ngai Tahu and the Mawhera Incorporation: one historical, the other contemporary. First, each entity must have historical continuity with the Ngai Tahu communities (in a general sense) which had mana, and exercised kaitiakitanga, over pounamu at the time of the land purchases. Second, the present structure of these contemporary entities must (a) provide representation for all Ngai Tahu whanau, in the case of Ngai Tahu, and all Poutini Ngai Tahu with ancestral links to the Arahura River, in the case of the Mawhera Incorporation, and (b) enable them to exercise kaitiakitanga with respect to pounamu.

The historical background of the people who are today's Ngai Tahu highlights two difficulties, both arising because Ngai Tahu's social and political structure is, and has always been, fluid. The internal and external importance of whanau, hapu, and iwi, the units making up Ngai Tahu society, have waxed and waned over time. In addition, historical accounts are equivocal as to exactly which unit of Ngai Tahu society exercised what rights over pounamu at each particular source at the time of the land purchases. It is difficult, therefore, to fix on a particular unit of Ngai Tahu society as the unit that traditionally had mana over pounamu, or exercised kaitiakitanga with respect to pounamu. It is also difficult to determine which, if

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4 Or rather, all those individuals entitled by whakapapa (descent) to be a member of the collective and wishing to be included as a member.
5 Note that this contemporary justice requirement may impose a more vigorous test than the restoration approach to reparative justice suggests because traditional Ngai Tahu structures are unlikely to have been 'representative' and 'participatory' in the contemporary sense used in this thesis.
any, of the contemporary Ngai Tahu units are the present manifestation of any specific traditional unit. Given these difficulties, to whom might pounamu justly be returned?

Although the issue is contested, evidence suggests that, regardless of the historical situation, in the contemporary context the 'iwi' known as 'Ngai Tahu' has become the dominant socio-political unit of Ngai Tahu society. Therefore, it is the 'iwi' unit of Ngai Tahu society which is the current manifestation of, and encompasses, the traditional units with mana over pounamu, and to whom pounamu might justly be returned. Te Runanga o Ngai Tahu has historical continuity as the representative of the iwi, suggesting that the first criteria of suitability, and justice, is satisfied for the return of pounamu to Te Runanga. The return (in effect)\(^6\) of the Arahura pounamu to the Mawhera Incorporation is, however, at odds with the conclusion that the iwi is the current manifestation of, and encompasses, the traditional units with mana over pounamu. Despite this, the Incorporation has historical continuity with the Arahura Ngai Tahu who suffered the injustice, suggesting that the first criteria of suitability may, nonetheless, be satisfied.

The opposition to the return of pounamu to these entities suggests, however, that neither Te Runanga o Ngai Tahu, nor the Mawhera Incorporation, adequately represents all the descendants of the communities that suffered the injustices and who currently make up these collectives. Further, there are doubts as to whether these entities enable all relevant whānau to exercise kaitiakitanga with respect to pounamu. This raises the question of whether the identified deficiencies amount to new injustices, and whether therefore, the Ngai Tahu settlement has achieved the (limited) kind of justice possible in the Treaty settlement process.

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\(^6\)The expression 'return (in effect)' is used in this thesis to acknowledge the fact that pounamu in the Arahura River was first returned to Te Runanga o Ngai Tahu, and then transferred to the Mawhera Incorporation on the clear understanding of the Crown, Te Runanga o Ngai Tahu and the Mawhera Incorporation, as discussed above in this chapter.
The controversy

During the course of the Ngai Tahu settlement negotiations and up to the time of the passing of the settlement legislation, there was substantial opposition to the establishment of Te Runanga o Ngai Tahu, its representation of Ngai Tahu Whanui (the wider Ngai Tahu community), and its mandate to enter into a settlement with the Crown. There was also opposition to the return of pounamu to Te Runanga o Ngai Tahu. This opposition centred on two primary issues. First, opponents argued that Te Runanga o Ngai Tahu does not reflect traditional Ngai Tahu social and political institutions, and in particular, does not recognise the place of hapu within Ngai Tahu society and is overly corporate in style. Second, there was objection to Te Runanga o Ngai Tahu as the sole representative of all Ngai Tahu. This latter objection focused on the definition of

7T. W. M. Tirikatene-Sullivan, a member of the Maori Affairs Committee, stated that "[t]here were 446 submissions from Ngai Tahu beneficiaries, and 84 percent of them objected" to the TRONT Bill. T. Tirikatene-Sullivan (1996) 554 NZPD (17/04/1996), p11949. See for example submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/68A (Te Ngai Tuahuriri Runanga). Note that Te Ngai Tuahuriri Runanga filed proceedings in the High Court of New Zealand seeking a declaration that they were not bound by the settlement in respect of customary and other rights. See submission to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill NTS/151, Appendix 5, Amended Statement of Claim.

8See generally Maori Affairs Committee (1997) Commentary on the Ngai Tahu (Pounamu Vesting) Bill as Reported from the Maori Affairs Committee Wellington, Government Printer; and submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/1; NTP/MOC/5 (Ministry of Commerce).


10See for example submissions to the Maori Affairs Committee on Te Runanga o Ngai Tahu Bill 99W-MA/95/237 in addition to those cited at footnote 9 of this chapter; submissions to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill, NTS/1, 1A, 9, 10, 11, 12, 13, 14, 45, 47B, 49, 49A, 49C, 49D, 49E, 50, 52, 53, 53A (claiming mandate of 2000 Ngai Tahu), 55 (by implication), 56, 58, 58A, 58D, 59, 61W, 61A, 61B (typed list of 108 people), 61C (101 signatures), 62W, 63W, 63B (claiming mandate of 300 Tuhuru descendants), 63D (claiming mandate of 28 people), 65W (claiming mandate of 9 people), 66W (claiming mandate of 19 people), 67W (claiming mandate of 10 people), 69W (claiming mandate of 5 people), 71W (claiming mandate of 28 people), 72W, 77B, 77F, 77G, 77H, 78W (claiming mandate of 77 people), 79W, 99W, 103W, 97W, 98W & 100W, 116W, 217W & 218W (claiming mandate of 29 people), 147W (claiming mandate of 22 people), 208, 229, 249, 272W, 273W, 274W, 275W, 276W, 277W & 298. (Note that this list includes what appears to be Pakeha support for the Waitaha issue.) Poutini Ngai Tahu individuals, Interviews. A further 26 submissions to the Maori
'Ngai Tahu Whanui', and whether or not it should properly include reference to Waitaha, as well as Ngai Tahu and Ngati Mamoe. In relation to pounamu, some opposed Te Runanga o Ngai Tahu as the sole, and indeed proper, kaitiaki of pounamu. There was also strong opposition to the return of the Arahura pounamu to the Mawhera Incorporation. Many argued that the Incorporation was inappropriate to receive pounamu because it does not represent all Poutini Ngai Tahu. Others opposed the return to the Incorporation on the grounds that pounamu is a tribal, and not a hapu-based, resource.

Most of the opposition to the return of pounamu to Te Runanga o Ngai Tahu and the Mawhera Incorporation, and to Te Runanga o Ngai Tahu itself, was voiced before the Maori Affairs Committee reporting on the Te Runanga o Ngai Tahu, Ngai Tahu (Pounamu Vesting), and Ngai Tahu Claims Settlement Bills. The Parliamentary Select Committee process was for many the last resort to find a forum to air their views, for a number of reasons. As discussed in Chapter Four, some Ngai Tahu argued that there had been inadequate consultation within Ngai Tahu Whanui regarding the establishment of Te Runanga o Ngai Tahu, the return of pounamu to Te Runanga o Ngai Tahu and the Mawhera Incorporation, and the settlement in general. The confidential nature of the Crown-Ngai Tahu settlement negotiations no doubt constrained Ngai Tahu's ability to consult with its members. Further, much of the opposition concerned claims that individuals, whanau, and even hapu, are not represented by the Te Runanga o Ngai Tahu structure, or the Mawhera Incorporation. Therefore, the opposition voiced in the

Affairs Committee on the Ngai Tahu Claims Settlement Bill (at least) supported the inclusion of Waitaha, in addition to the Te Runanga o Ngai Tahu submission.

11See for example submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/12, 13, 17, 17A, 19A, 24, 25, MOC/5 p14; Poutini Ngai Tahu individuals, Interviews.

12See for example submissions to the Maori Affairs Committee on Te Runanga o Ngai Tahu Bill 61A-MA/95/166; submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/15W, 18, 19 & 19A (Te Runanga o Makaawhio), 22, 25, MOC/5 p12; submission to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill, NTS/207; Poutini Ngai Tahu individuals, Interviews.

13See for example submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/15W &18. In contrast see submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/19A arguing that pounamu does not belong to all Ngai Tahu Whanui.

14For a further discussion of these issues, see Chapter Ten of this thesis.
Parliamentary Select Committee process is, perhaps, all the more relevant and revealing. The points of opposition were repeated in my interviews with Ngai Tahu individuals (and recognised by non-Ngai Tahu individuals), particularly on the West Coast, and to a lesser degree, reflected in the Pounamu Project consultations undertaken by Ngai Tahu Development Corporation in March 1999. The impassioned voices of those opposing the mechanisms for the return of pounamu tells of the importance to Ngai Tahu whanau of their kaitiakitanga over pounamu, and reminds us of the real effects of the settlement on people’s lives.

8.2 WHY 'IWI' AND WHY 'NGAI TAHU'? 
THE INTERNAL DYNAMICS OF NGAI TAHU WHANUI

The history of the occupation of the South Island of New Zealand, known to southern Maori as 'Te Wai Pounamu', is characterised by a series of migrations from the north, each pulsing further and further south. This produced continual flux in the resident population, as new migrants were constantly being accommodated as a result of conquest and intermarriages. As each wave of newcomers integrated into the existing peoples, new alliances were formed, new groupings emerged, and names changed.

Waitaha peoples are thought to have been the first to settle in the South Island, migrating from the North Island, and prior to that, the islands of Polynesia at around AD1200.


Traditional histories suggest that Waitaha knew of pounamu and its sources, and were the first to exercise mana over pounamu. As Waitaha established themselves in the South Island, in the North Island other peoples were proliferating. In the late 15th century, people from the tribes of the southern districts of the North Island began to migrate south to Te Wai Pounamu. Evison suggests that "[flood and pounamu attracted people to Te Wai Pounamu, and held them there]." In the mid-16th century a small section of a tribe known as Ngati Mamoe, resident in the region of the modern city of Napier, "settled on the Cook Strait coast near Wellington and shortly afterwards crossed the strait and imposed themselves on the Waitaha communities" of the South Island. "Over time [Ngati Mamoe] came to dominate Waitaha, more by strategic marriages than by war, and the old southern tribal communities began to be known by their name, Ngati Mamoe, over the length of Te Wai Pounamu."
The North Islanders also filtered south down the western coast of Te Wai Pounamu in small numbers, marrying into the West Coast Waitaha peoples. Anderson describes one of these North Island groups as Ngati Wairangi who established themselves at Arahura and became kaitiaki of the pounamu there. The Ngai Tahu Report, however, suggests that Ngati Wairangi were themselves Waitaha peoples:

The last of these Waitaha peoples to be incorporated into Ngai Tahu were Ngati Wairangi. Ngati Wairangi held control of the west coast including the valuable pounamu of Arahura. They are presumed to have been pre-Aotea people who originally came from the Taranaki area.

Migrations of northern Maori, predominantly from eastern North Island tribes, continued into the 17th century. It seems likely that pounamu continued to induce the northern tribes to migrate south. Several groups linked to the ancestor Tahu Potiki settled in Te Wai Pounamu and eventually became known as Ngai Tahu:

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27Anderson, *The Welcome of Strangers*, p22; and Park, *Nga Uruora The Groves of Life*, pp283–284. According to O'Regan, Ngati Wairangi were the first to work pounamu. O'Regan, Submission to the Waitangi Tribunal, p5.
30See Anderson, *The Welcome of Strangers*, p25. Note that Beattie reports that there are conflicting traditional histories about Ngati Mamoe knowledge of pounamu. Beattie, *The Southern Maori and Greenstone*, pp48–49. There is a tradition which relates how the people on the east coast of the South Island came to know of the West Coast sources of pounamu:

It is said that a woman named Rau Reka ... with a small travelling party, found the way up the Hokitika River over Browning's Pass across the mountains theretofore considered impassable, and thence to the East Coast. Arrived at Horowhenua, in the Geraldine District, she saw some men engaged in making a canoe, to whom she remarked how blunt their tools were. They asked if she knew any better. She replied by taking a little packet from her bosom from which she unfolded a sharp adze of the kind of greenstone called Inanga. This was the first they had ever seen, and they were so delighted with the discovery that they sent out three Ngaitahu to accompany the visitors to the coast and fetch some. On their return they stated that it was found at Arahura; after which it came into general use for tools and weapons, those of inferior material being, according to Mr. Stack's informants, discarded.

They had a rich mixture of North Island tribal descent flowing in them, and the bonding into a reasonably unitary tribe did not take place until they had been in Te Waipounamu for nearly a century. The story of that century is one of conflict, of peacemaking, and intermarriage, both with the Ngati Mamoe and amongst themselves.32

The Ngai Tahu migrations south initially led to concentrations of Ngai Tahu in the northern areas of Kaikoura and the Banks Peninsula.33 Further south, in Otago and Southland, Ngati Mamoe retained political power until the late eighteenth century but were subject to “raiding and small-scale colonisation by Ngai Tahu”.34 It seems that Ngati Mamoe retained mana over the Otago and Murihiku sources of pounamu for some time after Ngai Tahu settled further north. Years of conflict between Ngati Mamoe and Ngai Tahu were formally settled at Poupoutunoa (near Clinton) around 1780 with an exchange of marriage partners between the senior lines of the warring factions, thus uniting the groups by blood.35 However, the peace was accepted less by Ngati Mamoe than Ngai Tahu.36

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32 O'Regan, The Ngai Tahu Claim, p238.

33 Anderson suggests that there were two major thrusts of substantial migration: first, Ngati Kuri to Tory Channel and thence to Kaikoura, and second, Ngai Tuhaitara to Kaikoura and then to the Banks Peninsula district. Anderson, The Welcome of Strangers, p27; Waitangi Tribunal, The Ngai Tahu Report, vol 2, pp177–179; O'Regan, Submission to the Waitangi Tribunal, pp6–9 on Ngati Kuri and note O'Regan's view that the migrations of people now known as Ngati Irakehu was the second of the Tahu migrations (at p9).

34 Anderson, The Welcome of Strangers, p27.

35 Anderson, The Welcome of Strangers, p51; see also p78. O'Regan, Submission to the Waitangi Tribunal, p12.

36 Anderson, The Welcome of Strangers, p51. See also O'Regan, Submission to the Waitangi Tribunal, p12. Successions of retaliatory raids continued, but also examples of peaceful cohabitation. Many early Ngai Tahu chiefs took Ngati Mamoe spouses to strengthen their claims to land and resources acquired through conquest. The children of these partnerships inherited resource rights through their mothers, further legitimising Ngai Tahu rights gained by conquest. For Ngati Mamoe such marriages ensured that their children retained rights otherwise lost in battle. Anderson, The Welcome of Strangers, pp205–206.
It was access to, and control, of the Poutini pounamu sources that motivated Kaiapoi-based Ngai Tahu hapu, Ngati Waewae, to enter into sustained conflict with the West Coast people of Ngati Wairangi in the late 18th century. After the Tuhuru-led Ngati Waewae conquest of Ngati Wairangi at Lake Mahinapua, the West Coast peoples have became known collectively as 'Poutini Ngai Tahu', and through consistent occupation have maintained mana whenua over the Poutini coast and its pounamu. However, it is not clear whether Tuhuru won the pounamu sources for Poutini Ngai Tahu, as a hapu maintaining ahi kaa, or on behalf of the wider Ngai Tahu Whanui. Indeed one Poutini Ngai Tahu source suggests that Tuhuru was of predominantly Waitaha, and not Ngai Tahu, ancestry, further confusing the issue of which unit of Ngai Tahu society had mana whenua over the West Coast pounamu sources, and under whose mantle. However, an important consequence of the Ngati Waewae control of the Poutini pounamu sources and trails was that Kaiapoi became the principal pounamu trading (and working) centre, up until its sacking by Te Rauparaha in the early 1830s. Ngai Tahu thus controlled the trade of pounamu to the North Island, which had previously gone through Nelson, and developed the traditional pounamu industry.

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38 Note that Poutini Ngai Tahu were subjugated by northern iwi (Ngati Rarua according to Anderson and Ngati Koata according to O'Regan) for a period from 1828, as will be explained later in this chapter, but occupied the coast continuously, thus retaining their mana whenua status in the longer term. Anderson, The Welcome of Strangers, pp80; O'Regan, Submission to the Waitangi Tribunal, p5.

39 O'Regan, Submission to the Waitangi Tribunal, p5; Evison, The Long Dispute, p20. But see also M. Rochford (1993) The Kati Waewae Myth, unpublished paper appended to submission to the Maori Affairs Committee on Te Runanga o Ngai Tahu Bill MA/95/156.

40 Ngai Tahu Development Corporation, Ngai Tahu Cultural Values, p11.

41 Poutini Ngai Tahu individual, Interview.

42 There were, however, major pounamu working centres elsewhere, for example in Otago at Whareakeake (Murdering Beach). It is estimated that 3.5 hundred weight of worked pounamu was recovered from Whareakeake up to 1933, including 22 specimens of heitiki. Eccles cited in B. Dacker (1999) He Raraka a Ka Awa: Ka Putake a Te Mamae Me Te Aroha, 1999, unpublished manuscript, p19 at footnote 10.

43 Anderson, The Welcome of Strangers, pp82–85

44 O'Regan, Submission to the Waitangi Tribunal, p11. See also Anderson, The Welcome of Strangers, pp39&208.
Not only were the hapu and iwi groupings of southern Maori in constant flux, traditionally Ngai Tahu had a complex system of resource ownership and management, "a complexity that had grown up over many generations of travel and dispersal over and through Te Wai Pounamu". Customary rights to land and natural resources were primarily based on inheritance (take tupuna) and occupation (ahi kaa). Rights could also be acquired through marriage and by conquest followed by continuous occupation for three generations. Generally, rights were held in common over tribal property, although certain areas or resources might be restricted to use by particular rangatira and their whanau. Anderson suggests:

... it can be inferred that the land and its resources was perceived in three ways: as a tribal territory, that is the area for which the tribe would fight; as land in common ownership excepting those tenured pieces, or rights of access to resources, which were inherited through hapu and could be located at any point in the tribal territory; and as a series of annual ranges (weakly combined into districts), which were areas customarily ranged over by the members of the residential communities in the course of their yearly economic activities.

This amounts, in turn, to an economic system in which common ownership was not congruent with management. The tribe owned the land in common but did not manage it economically. Hapu owned property or access rights but did not manage them at hapu level. Communities owned neither land nor resources but, were, nevertheless, the

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45Firth notes that terms such as 'property' and 'ownership' are used to denote certain relationships within a western framework but do not necessarily readily transfer to other social structures, such as that of traditional Maori society. He states: "The essential factors in the situation—the individual, the goods, and other members of the community—remain unchanged, but the set of concepts by which these are related has been formed against a different cultural background". R. Firth (1959) *Economics of the New Zealand Maori*, reprinted 1972, Wellington, New Zealand Government Printer, pp338–339. This point must be borne in mind in the following discussions of this thesis.


47Evison, *The Long Dispute*, p23. See also Dacker, *Te Mamae me te Aroha*, p8; and R. Walker (1987) Maori Myth, Tradition and Philosophic Beliefs. In J. Phillips (ed) *Te Whenua, Te Iwi: The Land and the People* Wellington, Allen and Unwin Ltd and Port Nicholson Press, p43. See also Firth, *Economics of the New Zealand Maori*, p383. Firth also notes a number of instances falling outside these categories. For example, certain rights might arise if a person was born in the territory of a different hapu, his blood was shed in another territory, his ancestors were buried there, or his umbilical chord had been cut there. Firth, *Economics of the New Zealand Maori*, p387.

48Evison, *The Long Dispute*, p23. See also Firth, *Economics of the New Zealand Maori*, pp383–388. Firth notes that for the original inhabitants of New Zealand there was also a form of discovery where rangatira walked over and named the land. Firth, *Economics of the New Zealand Maori*, p384.

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operationally-effective economic managers through their organisation of activity schedules and labour.50

With such a complex system of resource use and ownership, it is not surprising that historical accounts are inconclusive as to which unit of Ngai Tahu society was kaitiaki over pounamu in general, or with respect to particular sources, and under whose mantle (Ngai Tahu, Ngati Mamoe, Waitaha, or Poutini Ngai Tahu, for example). Indeed, submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill differed on this point, with conflicting arguments that (West Coast) pounamu was not a tribal (iwi) resource,51 and that it "was a collectively owned iwi/hapu asset to which all had access".52 In addition, there is a dearth of historical or archaeological scholarly writings about which part of Ngai Tahu collected and worked some particular sources, such as the Dart River sources.53

Moreover, in the period 1810–1850 (at least) it appears that Ngai Tahu's social organisation and settlement patterns did not follow the standard patterns that seem to have existed in the North Island.54 A common view is that the basic unit of Maori society is the whanau, or extended family,55 consisting of kaumatua and kuia (the male and female elders), their sons

51Submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill, NTP/1B-MA/97/3 (Te Runaka o Kati Waewae); 17A-MA/97/23; 19A-MA/97/26 (Te Runanga o Makaawhio).
52Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill, NTP/15W-MA/97/19 (Te Taumutu Runanga), p3. The Runanga asserted: "The traditional hapu that have occupied the area of Taumutu have always had and maintained their access to pounamu found in takiwa such as the Arahura. They secured this access through processes of conquest, whakapapa and ahi kaa. Further still, this access was respected by those Ngai Tahu who occupied Te Tai Poutini." Te Taumutu Runanga supported the vesting of pounamu in Te Runanga o Ngai Tahu but opposed the vesting of Arahura pounamu in the Mawhera Incorporation.
53Anecdotal sources suggest that the Dart River-Te Koroka source, for example, was only collected and worked by a certain Murihiku-based whanau.
and daughters and their respective spouses, and children. It has been suggested that at least in the 18th and early 19th century, the hapu was "the largest effective corporate group which defended a territory or worked together in peaceful enterprises". Iwi at this time existed more as conceptual groups denoting common ancestry, and had scattered populations, which sometimes came together for large tribal gatherings or to repel a common enemy.

Many Ngai Tahu hapu, in contrast, were dispersed throughout various communities over large areas, rather than being solely contained in one clear territory. Ngai Tahu's social organisation and settlement patterns probably developed as a result of its huge tribal area and the distances travelled by whanau and hapu to collect and exchange important food and resources on a seasonal basis, the limited ability to grow crops in the south, and frequent marriages between hapu. While Ngai Tahu hapu were known to war with each other, Anderson suggests that, "[t]he common form of community structure in the Ngaitahu region, then, was a multi-hapu settlement and, thus, multi-settlement hapu distributed over much of the tribal territory". Because it appears that Ngai Tahu communities crossed hapu divisions, these factors add uncertainty to historical evidence concerning which unit of Ngai Tahu society was kaitiaki over particular pounamu sources at the time of the land purchases (1840s–1860s).

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56 Walker, Ka Whaohai Tonu Matou, p63.
57 See Firth, Economics of the New Zealand Maori, p112–115.
59 Anderson, Towards an Explanation of Protohistoric Social Organisation, pp8–11.
The 1830s saw Ngai Tahu band together as an iwi to defend its territory in response to a succession of attacks on Ngai Tahu territory from northern tribes under the leadership of Te Rauparaha and Te Puoho. The attacks from the north led to turmoil within Ngai Tahu society, adding to the internal turbulence caused by the Kai Huanga (literally 'eat relations') feud between hapu of Ngai Tahu in the years preceding Te Rauparaha's raids. The northern raids were largely motivated by a desire to capture South Island resources, including pounamu, and the people to work them, for the purposes of external trading for European items, including muskets. The West Coast pounamu (as far as Hokitika), arguably Ngai Tahu's most important and lucrative commodity, fell under Ngati Rarua's control from 1828 to around 1839. During this time, Ngati Rarua forced the Poutini Ngai Tahu people to continue the traditional pounamu industry until Ngai Tahu regained its mana over its traditional territory, including the West Coast pounamu sources, when Ngai Tahu defeated Te Rauparaha, Te Puoho and their northern allies.

The decade or so of fighting with the northern tribes was a "massive disaster" for Ngai Tahu. The Ngai Tahu population was reduced by about one quarter, the Kaikoura Coast was largely deserted for over ten years, Kaiapoi (Ngai Tahu's northern stronghold) was destroyed and the

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65O'Regan states Ngati Koata as the iwi. O'Regan, Submission to the Waitangi Tribunal, p5.


68Brailsford, *The Tattooed Land*, p192; Lee, Submission to the Waitangi Tribunal, p15.

69Anderson, *The Welcome of Strangers*, p90. The "massive disaster" caused by the northern raids of Te Rauparaha and also Te Puoho was all the more keenly felt given the timing. The 1830s saw greater pressure from settlers for land at a time when Ngai Tahu were in certain disarray with whanau having moved from their traditional territories or, in many cases, having been decimated. Ngai Tahu were not well placed to rebuff the pressure to sell or to bargain effectively. Note that European diseases and alcohol were also taking their toll on Ngai Tahu. Anderson, *The Welcome of Strangers*, p90.
surrounding district largely depopulated, and Ngai Tahu’s pre-eminent chief and many of the rangatira of the tribe were killed or captured. Significantly, the years of fighting with Te Rauparaha and Te Puhoi heightened the southward drift of Ngai Tahu people. Literally hundreds of refugees from the northern Ngai Tahu settlements were accommodated further south in largely Ngati Mamoe settlements, with a number of new communities being formed at Arowhenua, Kakanui, Moeraki, Aramoana (and elsewhere along the western shore of lower Otago Harbour), Henley and Ruapuke Island. These movements disrupted the traditional rights to land and resources, including pounamu, and further dispersed people of largely Ngai Tahu whakapapa amongst those of predominantly Ngati Mamoe, and Waitaha, descent. However, it is clear that "[a]t 1840 Ngai Tahu had neither entirely displaced nor by any means extinguished existing groups of Ngatimamoe, Waitaha and Rapuwai descent."^{70} Ngai Tahu society continued in flux.

Around the time of the signing of the Treaty of Waitangi, and increasingly in subsequent years, the influence of the written word was to impact on Maori tribal structures, and most importantly, their recognition by the Crown. The spread of literacy amongst southern Maori also had a strong influence, "freezing definitions of hapu and iwi at the point which they were commonly written about".^{71} As an example, Edward Shortland recorded Ngati Mamoe as the tangata whenua of all land south of Taumutu in 1844, but later in 1851 he recorded that Ngai Tahu and Ngati Mamoe had "become incorporated into one tribe, which was generally called

^{70} Anderson, Submission to Waitangi Tribunal, p71.
^{71} Dacker, He Raraka a Ka Awa, p16 at footnote 5. When asked their hapu affiliation, individuals would answer depending on the situation in which they found themselves. If at an outlying seasonal settlement a different hapu name might be declared than at their main village, most likely indicating the hapu from which the right to the resource or occupation was derived. Anderson, Submission to Waitangi Tribunal–Mahinga Kai, p72. Anderson also suggests: "At smaller summer camps, when families were resident at their mahinga kai, an even greater diversity of hapu names was recorded, since it was by these that each individual established a right of resource access." Anderson, The Welcome of Strangers, p113. See also Anderson, Towards an Explanation of Protohistoric Social Organisation.
Ngaitahu or Kaitahu?" Shortland’s reference to the conjoining of the groups into one iwi was reflected in the recordings of later officials. Therefore, whilst in the 1860s:

Ngati Mamoe occupied positions of authority from Arowhenua to the south, particularly at Otago Peninsula and in western Foveaux Strait, from the 1870s, the villages in the southern districts were described uniformly as Ngai Tahu in official records, and that convention became universal in Ngai Tahu territory by the turn of the century.

It has been argued that over the 19th century, ‘iwi’ as fundamental units of Maori society underwent a revival, gaining "renewed importance as categories and acquired new forms as corporate groups". By the mid-19th century in many areas of New Zealand, the focus of much political activity shifted from hapu to wider kin-based categories. Many of the problems facing Maori as a result of colonisation befitted common solutions, adding impetus to iwi groupings. For example, there were various iwi-based runanga units established in the mid-19th century. Some were short term, and others developed into longer term institutions dealing with local issues, initially concerning the sale of land and tribal boundaries. The iwi-based approach of these runanga can be seen as "the first institutions—nascent tribal governments—of the modern tribes".

As discussed in Chapter Four, as early as the 1860s Ngai Tahu began the long process of seeking ‘justice’ from the Crown for its failure to abide by the Treaty of Waitangi and honour the terms of the land purchases of the 1840s to 1860s. This proved to be a unifying force. "As had

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72Ballara, Iwi, pp70–76, quote at p72.
73Ballara also suggests that the name of Ngai Tahu gained ascendancy over Ngati Mamoe due to the repercussions of the Wairau affair. Ballara, Iwi, pp72–73. To conciliate Ngati Toa, Governor Grey paid the tribe for land which Ngati Toa claimed to have conquered from Ngai Tahu. This move outraged Ngai Tahu. Grey then instructed Kemp to recognise Ngai Tahu exclusively in the next land purchase, with the result that Ngati Mamoe were not recognised at all.
75Ballara, Iwi, p217.
76Ballara, Iwi, p217. Ballara also notes that in the later 19th and the 20th centuries there was also a shift towards non-tribal groupings, although this was not consistent. Ballara, Iwi, p218.
77Ballara, Iwi, p283.
79Ballara, Iwi, p288.
happened in response to the raids of Te Rauparaha, Ngai Tahu managed to drop hapu loyalties in favour of iwi unity", and evolved a 'pan-hapu' view.80 As the tribe pursued its claim, 'Te Kereme', it became clear that an entity would be required to receive any settlement gained from the Crown. Ngai Tahu would also need to determine exactly who its members were.81 As a result of the favourable findings of the 1920 Native Land Claims Commission in relation to Ngai Tahu's Canterbury claims, in 1928 the Native Land Amendment and Native Land Claims Adjustment Act was passed, which, amongst other things, made provision to constitute the 'Ngaitahu Trust Board' as the single body representing Ngai Tahu Whanui to discuss and arrange "the terms of any settlement of the claims for relief that may be come to".82 The expected distribution of the compensation caused friction within Ngai Tahu Whanui, some believing it should be apportioned between the descendants of the occupants of Kemp's block in 1848 (only) and others who thought all in the wider Ngai Tahu group should share in the compensation.83 Ultimately the latter view held sway and two Native Land Court hearings in the 1920s were required to identify the beneficiaries. The result was an iwi-wide census which, along with previous censuses, was used by the Court to establish a list of Ngai Tahu kaumatua. This list is known as the Blue Book84 and "remain[s] the foundation of Ngai Tahu's identity today".85

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81 Tau, Ngai Tahu- From 'Better Be Dead and Out of the Way' to 'To Be Seen to Belong’, p229.
82 Quotation from s21 of that Act. Successive Acts of Parliament continued the existence of the Board. Native Purposes Act 1931, s65; Ngaitahu Trust Board Act 1946, s4(2); Maori Trust Boards Act 1955, s6. Between 1910 and 1938, the New Zealand government would only deal with one group of negotiators seeking to settle Ngai Tahu claims against the Crown. Ballara, Iwi, pp315–316. This caused concern amongst Ngai Tahu hapu and whanau as not all Ngai Tahu groupings could be represented. Ballara reports: "Ngati Mamoe, Poutini Ngai Tahu and some northern descent groups struggled to make their presence felt”. Ballara, Iwi, p315. The issue of representation was still unsettled in 1937. There were at that stage twenty-seven local runanga needing to be represented.
84 Dacker, Te Mamae me te Aroha, p96.
85 Tau, Ngai Tahu- From 'Better Be Dead and Out of the Way' to 'To Be Seen to Belong’, p229.
Years of frustration followed for Ngai Tahu. It was not until 1944 that redress was provided by the Crown under the Ngai Tahu Claim Settlement Act, and then without consultation with Ngai Tahu.\(^{86}\) The Trust Board was finally appointed in 1946 (and became known as the ‘Ngai Tahu Maori Trust Board’\(^{87}\)), to receive the 1944 settlement.\(^{88}\) It continued until its dissolution in 1996 by the Te Runanga o Ngai Tahu Act.\(^{89}\) Despite the shortcomings of the Trust Board legislation (discussed later in this chapter), the Ngai Tahu Maori Trust Board was the primary political vehicle for Ngai Tahu Whanui for most of the 20th century. In particular, it played a leading role in taking the Ngai Tahu claim to the Waitangi Tribunal, and in managing whakapapa and tribal history, again indicating Ngai Tahu’s growing ‘pan-hapu’ view.\(^{90}\) Indeed, the lodging of the claim with the Waitangi Tribunal and the subsequent work of presenting evidence, brought Ngai Tahu together and resulted in something of a Ngai Tahu cultural revival.\(^{91}\)

The 1970s and 1980s saw the Crown increasingly focus on the iwi as the primary political (and social service delivery) unit of Maori society, for example in programs such as Maori Access, Mana Enterprises, and the Matua Whangai scheme.\(^{92}\) The Crown’s continued emphasis on iwi is evidenced in the passage of the Runanga Iwi Act 1990, which gave iwi legal personality

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\(^{86}\) Tau, Ngai Tahu—From ‘Better Be Dead and Out of the Way’ to ‘To Be Seen to Belong’, p231.

\(^{87}\) Maori Trust Boards Act 1955, s6.


\(^{89}\) Te Runanga o Ngai Tahu Act, ss20–29.

\(^{90}\) Tau, Ngai Tahu—From ‘Better Be Dead and Out of the Way’ to ‘To Be Seen to Belong’, p243.

\(^{91}\) Dacker, Te Mamae me te Aroha, p133. Dacker also suggests that the ‘Te Maori’ exhibition also contributed to the flourishing of Ngai Tahu in the 1980s. Dacker, Te Mamae me te Aroha, p129.

\(^{92}\) Crocker, Iwi or Hapu?, p34.
through registration under the Act,93 and in the Crown's strong preference for dealing only with iwi in Treaty settlements.94

Accordingly, whilst iwi began as conceptual groups important to identity but not acting as corporate bodies, "[i]n response to both internal and exotic influences this situation changed from the late 18th century ... [and] iwi or 'tribes' adapted themselves to become, in the 20th century, the most recognised Maori descent groups".95 By the 20th century (if not before), Ngai Tahu, too, had come to act predominantly as an iwi, especially in its dealings with the Crown. The collective of individuals descending from the three major strains of whakapapa, Waitaha, Ngati Mamoe, and Ngai Tahu, had come to be known by the name 'Ngai Tahu'. Ngai Tahu began to function as a wider iwi grouping in response to external threats such as Te Rauparaha's raids, the Pakeha pressure for land, and increasingly after the land purchases, in its "huge efforts to achieve justice that characterised the political life of many iwi as the [19th] century developed".96 The Crown's emphasis on iwi as the primary unit of Maori society encouraged this process.

In summary, at the time of the land purchases Ngai Tahu was in a state of internal flux, and it is likely that kaitiaki arrangements differed according to each of the pounamu sources. However, regardless of exactly which traditional unit exercised mana over each pounamu source, the iwi known as 'Ngai Tahu' is the present manifestation of the multi-hapu settlement structure of traditional Ngai Tahu society. Ngai Tahu's identity as an iwi is owed to a large degree to the effects of pursuing its claims against the Crown for over 150 years, as it has united against this 'common enemy'. So, in one sense, it is in accordance with tradition that Ngai Tahu

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93The Act met with a mixed response and was short-lived. It was repealed by the Runanga Iwi Repeal Act 1991.
95Ballara, Iwi, p336.
96Dacker, He Raraka a Ka Awa, p16 at footnote 5. See also Anderson, Submission to Waitangi Tribunal, p205.
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act as an iwi vis-a-vis the Crown, and therefore appropriate that settlement assets, such as pounamu, be vested at an iwi level. Not all Ngai Tahu agree with this conclusion, however. That pounamu could not be returned to the exact unit which had mana over pounamu at the time of the injustice is one of the limitations expected when applying reparative justice in contemporary contexts.

The return (in effect) of Arahura pounamu to the Mawhera Incorporation appears at odds with the above conclusion. One of the reasons for the return of Arahura pounamu to the Incorporation was that the Incorporation had provided finance for the Ngai Tahu claim on the understanding that should pounamu be returned to Ngai Tahu, the Arahura pounamu would be vested in the Mawhera Incorporation. The reasons for the Crown's insistence that pounamu in the Arahura River be returned to Mawhera Incorporation are discussed later in this chapter. Thus, the Mawhera situation is anomalous, adding further complexity to the question of to whom pounamu might justly be returned.

8.3 REPARATIVE JUSTICE: HISTORICAL CONTINUITY

Over time, Ngai Tahu's socio-political institutions have adapted and grown in response to changing circumstances. However, amongst the constant flux which has characterised Ngai Tahu society, there has also been some continuity. This section examines the historical continuity between Ngai Tahu as an iwi and Te Runanga o Ngai Tahu, and between Poutini Ngai Tahu and the Mawhera Incorporation. Although both Te Runanga o Ngai Tahu and the Mawhera Incorporation are relatively recent Maori institutions—each is an creature of statute

97See submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/16-MA/97/20; 19A-MA/97/26 and attached correspondence; 20-MA/97/27; NTP/MOC/5; Mawhera Incorporation representative, Interview; Te Runanga o Ngai Tahu representative, Interview; Settlement negotiator, Te Runanga o Ngai Tahu, Interview.
giving legal status to Maori collectives—each has direct historical links back to the communities from whom pounamu was unjustly taken.

What is the whakapapa of Te Runanga o Ngai Tahu?

Despite considerable opposition, the Te Runanga o Ngai Tahu Act 1996 (the "TRONT Act") was enacted in April 1996 giving legal status and self-management to Ngai Tahu Whanui through the vehicle of Te Runanga o Ngai Tahu. The TRONT Act provides:

For the benefit of, and as representative of, Ngai Tahu Whanui there is hereby established a body corporate to be known as Te Runanga o Ngai Tahu, having perpetual succession and a common seal, with power to purchase, accept, hold, transfer and lease property, and to sue and be sued, and having all the rights, powers, and privileges of a natural person.98

Te Runanga o Ngai Tahu must be recognised for all (legal) purposes as the sole representative of Ngai Tahu Whanui,99 within Ngai Tahu's tribal area, or takiwa, as defined by the Act.100 Te Runanga o Ngai Tahu is comprised of eighteen papatipu runanga,101 or "traditionally marae-based Runanga [which] have been the basis of Ngai Tahu organisation since the mid-nineteenth century".102 Essentially, Te Runanga o Ngai Tahu is the 'Ngai Tahu Parliament', where each of the eighteen papatipu runanga has a seat at the decision making table.103 The tribe's collective tino rangatiratanga rests in Te Runanga o Ngai Tahu, and the papatipu runanga are the ultimate repositories of tino rangatiratanga.104 Every member of Ngai Tahu Whanui is

98TRONT Act, s6.
99TRONT Act, s15(1).
100TRONT Act, s5. Note that assets of Te Runanga must be administered for the benefit of the present and future members of the tribe. TRONT Act, s14(I)(a).
101TRONT Act, s9 & First Schedule. The eighteen papatipu runanga are Te Runanga o Kaikoura, Te Ngai Tuahuriri Runanga, Rapaki Runanga, Te Runanga o Kourourarata, Wairewa Runanga, Te Runanga o Onuku, Taumutu Runanga, Te Runanga o Arowhenua, Te Runanga o Waiho, Te Runanga o Moeraki, Kati Huirapa ki Puketeraki, Te Runanga o Otakou, Waihopai Runaka, Te Runanga o Awarua, Te Runanga o Oraka Aparima, Hokonui Runaka, Te Runanga o Te Koeti Turanga (known as Te Runanga o Makaawhio), and Te Runaka o Kati Waewae. TRONT Act, First Schedule.
102Te Puni Kokiri, Briefing Paper to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 09/03/1994, TPK/3-MA/95/303, p3.
103Clause 6.6 of the Charter of Te Runanga o Ngai Tahu (amended as at 24 November 1999).
104T. O'Regan (1992) What is the Tribe'? Who is the 'Treaty Partner'? A paper submitted to the Waitangi Tribunal by Ngai Tahu in the course of hearings on the Maori Fisheries
entitled to be a member of each papatipu runanga to which he or she can demonstrate whakapapa connections.105

Te Runanga o Ngai Tahu was established for two principal reasons. First, Ngai Tahu, as a collective of individuals, has no legal status, in and of itself. Second, whilst the iwi had been represented legally as a trust board since 1928,106 the Ngai Tahu Maori Trust Board (the "Trust Board")107 had limited powers to govern the tribe's affairs, and lacked independence from the Crown.108 For example, the Trust Board could not borrow money, or buy, sell, or lease land, without prior Ministerial approval,109 and importantly, the Trust Board was ultimately accountable to the Crown rather than to Ngai Tahu Whanui.110 Many Ngai Tahu considered that the Trust Board structure was therefore inappropriate to receive settlement assets, and to take Ngai Tahu into a new era of restored mana and rangatiratanga. Justice required that Ngai Tahu be in a position to control its own affairs.


105TRONT Act 1996, s13. This is based on the lists forming the Blue Book, described above in this chapter.

106Native Land Amendment and Native Land Claims Adjustment Act 1928, s21(1), established the 'Ngaitahu Trust Board'. It was continued by the Native Purposes Act 1931, s65, the Ngaitahu Trust Board Act 1946, s4(2), and the Maori Trust Boards Act 1955, s6. Although note that the Board was not actually established until 1944, as discussed above in this chapter.

107Governed by the Maori Trust Boards Act 1955 and its predecessors, the Native Land Amendment and Native Land Claims Adjustment Act 1928, the Native Purposes Act 1931, and the Ngaitahu Trust Board Act 1946.

108During the hearing of the claim, Ngai Tahu constituted Te Runanganui o Tahu, an incorporated society under the Incorporated Societies Act 1908, in anticipation of the enactment of the Runanga Iwi Act 1990. However, the Runanga Iwi Act was repealed in 1991, and Ngai Tahu, still without an appropriate legal entity to take them forward with the settlement of their claim, returned to the Waitangi Tribunal seeking its recommendations on an appropriate legal structure. The Waitangi Tribunal recognised the need for a legal structure to represent the iwi, with legal capacity to make a settlement deal with the Crown and thereafter receive and administer settlement assets on behalf of Ngai Tahu. See Waitangi Tribunal, The Ngai Tahu Claim: Supplementary Report on Ngai Tahu Legal Personality, p4.

109See the Maori Trust Boards Act 1955, ss26(1),27(a)&29, prior to its amendment by the Maori Trust Boards Amendment Act 1996.

110See the Maori Trust Boards Act 1955, ss31&32.
The TRONT Act dissolved the Trust Board and transferred to Te Runanga o Ngai Tahu all of the assets, liabilities, and general affairs, of the Trust Board.\textsuperscript{111} Te Runanga is therefore the historical continuation of the Trust Board as the legal entity representing the tribe since 1928. The previous section illustrated how, by this time, the iwi was the principal political unit of Ngai Tahu, and that it had come to act as an iwi largely in its efforts to gain justice from the Crown. Further, as already noted, the Trust Board was originally established for the purpose of receiving settlement funds from the Crown, and later took up the responsibility of pursuing Ngai Tahu’s long-standing claim. Therefore, despite the changing dynamics of Ngai Tahu society, there has also been continuity. Although contested by some, this continuity for Ngai Tahu Whanui, as an iwi, is currently crystallised in the body of Te Runanga o Ngai Tahu.

While the iwi has become the most recognised unit of Maori society, much daily activity still centres around smaller whanau and hapu groupings.\textsuperscript{112} O’Regan suggests that "traditional Runanga" have become the "putahi, or heart" of Ngai Tahu Whanui.\textsuperscript{113} In the contemporary context, O’Regan argues that these are the papatipu runanga of the Te Runanga o Ngai Tahu structure:

They are multi hapu groupings for historical reasons derived from the pre-Treaty tikanga of our tupuna .... If the tino rangatiratanga of Ngai Tahu lies anywhere, it rests in our Papatipu Runanga.\textsuperscript{114}

O’Regan suggests that since the 1850s, when the Ngai Tahu claim began, "the Runanga [and concomitant marae] rapidly became the basic political hub of Ngai Tahu life and has remained so today", reinforcing traditional political and resource management frameworks.\textsuperscript{115}

\textsuperscript{111}Note that the TRONT Act also dissolved Te Runanganui o Tahu Incorporated and transferred its assets, as well as those of the Trust Board, to Te Runanga o Ngai Tahu. TRONT Act, ss20-24&25-29.
\textsuperscript{112}Ballara, Iwi, p219.
\textsuperscript{113}O’Regan, What is the ‘Tribe’?, pp7-8.
\textsuperscript{114}O’Regan, What is the ‘Tribe’?, pp7-8.
\textsuperscript{115}O’Regan, What is the ‘Tribe’?, p8. See also submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill NTP/MOC/5, Appendix 3. As an example, the history of Te Runaka o Kati Waewae, the northern West Coast, or Poutini Ngai Tahu, runanga is as follows:
However, a number of submissions to the Select Committee on the Te Runanga o Ngai Tahu Bill opposed the establishment of Te Runanga o Ngai Tahu, and its constituent papatipu runanga, on the basis that such structures are not the traditional repositories of rangatiratanga, and in fact usurp the rangatiratanga of traditional units, specifically, hapu and whanau. Most hostile in its opposition to the measures was a group of Poutini Ngai Tahu whanau, identifying themselves as the hapu of Tuhuru. The Tuhuru submission made reference to a Waitangi Tribunal finding that the hapu was the basic unit of any tribe in traditional times, and held rangatiratanga in relation to a given area. In particular, the Tuhuru hapu claimed to be "kaitiaki of those things that make us what we are today. Not least of these is our special taonga, te pounamu, from which our great island takes its name". These submissions do not acknowledge Te Runanga o Ngai Tahu as having any historical continuity, or as being the contemporary manifestation of Ngai Tahu Whanui.

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"One of the first runanga [meeting] of Poutini peoples was held at a place now known as "Runanga" following the defeat of the resident West Coast tribes by Tuhuru of the Hapu Waewae in the 1800s;
- After the signing the Treaty of Waitangi and the sale of lands to the Crown in 1860, the hapu of Kati Waewae held regular meetings to discuss the issues of the day;
- In 1945 Kati Waewae formed a tribal committee;
- In 1962 Kati Waewae formed a Maori Committee under the Maori Welfare Act;
- In 1984 Kati Waewae decided to take on runanga status;
- Te Runaka o Kati Waewae is listed in the First Schedule to the Te Runanga o Ngai Tahu Act 1996 as one of the eighteen papatipu runanga."

See Te Runaka o Kati Waewae, Submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, NTP/1B-MA/95/3, pp1-2.

116 Submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 49CM-MA/95/131, p1 (Tuhuru Hapu); see also submissions to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill cited at footnote 9 of this chapter.

117 Submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 49CM-MA/95/131, referring to the Waitangi Tribunal's Fisheries Settlement Report. This point was also made by the New Zealand Maori Council, who opposed the Bill as "ill-advised, inadequately mandated and potentially damaging to the Crown-Maori relationship". New Zealand Maori Council, submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 117-MA/95/259, p5, and see p4. See also submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 9-MA/95/48; E. T. Durie (1996) Will the Settlers Settle? Cultural Conciliation and the Law Otago Law Review 8, p450.

118 Submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 49A-MA/95/129.
The definition of 'Ngai Tahu Whanui' in the TRONT Act was also the subject of controversy before the Maori Affairs Committee. The definition enacted in the TRONT Act took a whakapapa-based approach:

In this Act, unless the context otherwise requires, 'Ngai Tahu Whanui' means the collective of the individuals who descend from the primary hapu of Ngai Tahu and Ngati Mamoe, namely, Kati Kuri, Kati Irakehu, Kati Huirapa, Ngai Tuahuriri, and Kai Te Ruahikihiki.

The Trust Board and the Ngai Tahu Negotiating Group sought, at the Select Committee stage of the TRONT Bill, to have this definition changed to include reference to 'Waitaha' alongside Ngai Tahu and Ngati Mamoe on the grounds that the absence of a reference to 'Waitaha' was an "oversight", and that "it is virtually impossible to be of Ngai Tahu descent without being of Waitaha and Ngati Mamoe descent". This chapter has demonstrated that Ngai Tahu's history is one of a commingling of three major whakapapa strains—Waitaha, Ngati Mamoe, and Ngai Tahu—and that for various reasons, the Whanui came to act as an iwi under the name 'Ngai Tahu'. However, submissions to the Maori Affairs Committee on this point were divided, some suggesting that Waitaha should be included in recognition of Ngai Tahu's collective whakapapa, whilst others opposed the inclusion of Waitaha under Ngai Tahu's mana. The definition of 'Ngai Tahu Whanui' was amended to include reference to Waitaha.

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119 See the Maori Affairs Committee examining both the Te Runanga o Ngai Tahu Bill and the Ngai Tahu Claims Settlement Bill. Maori Affairs Committee (1996) Commentary on the Te Runanga o Ngai Tahu Bill as Reported from the Maori Affairs Committee Wellington, Government Printer; Maori Affairs Committee (1998) Commentary on the Ngai Tahu Claims Settlement Bill as Reported from the Maori Affairs Committee Wellington, Government Printer.
120 TRONT Act, s2.
121 Ngai Tahu Maori Trust Board, Closing submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 31/08/1994, 17K-MA/95/70, p3.
122 See also submission to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill, NTS/305W (Atholl Anderson).
123 See Te Puni Kokiri, Report to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 06/10/1994, TPK/8-MA/95/308, p15; and for example supporting the inclusion of Waitaha: submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 16-MA/95/56; and opposing the same submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 49E-MA/95/133 (on behalf of Te Iwi o Waitaha Whanui); & 99W-MA/95/237. For a detailed list of relevant submissions to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill, see footnote 10 of this chapter. Note also Waitaha.
by the Ngai Tahu Claims Settlement Act 1998, and then only after many more submissions to the Maori Affairs Committee. Most of these submissions related to "the status of Waitaha in relation to Ngai Tahu Whanui, in particular, whether Waitaha exists as an iwi in its own right, as distinct from Ngai Tahu". Similar submissions were also received in relation to the separate existence of Ngati Mamoe. There were also submissions on the Ngai Tahu (Pounamu Vesting) Bill requesting that the mana of Waitaha with respect to pounamu be recognised. These submissions reflect the uncertainties and complexities of Ngai Tahu society, and its traditional systems of resource ownership and management.

Te Runanga o Ngai Tahu has now (mid 2001) devolved responsibility for the day-to-day management of pounamu to the Ngai Tahu Pounamu Management Group, a body representing the papatipu runanga with pounamu in their respective takiwa, or local areas (referred to as 'kaitiaki runanga'). Currently, Ngai Tahu individuals and whanau may collect pounamu in"
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a customary manner\textsuperscript{131} with the prior permission of the relevant kaitiaki runanga.\textsuperscript{132} As discussed previously in this chapter, tradition suggests that whilst the iwi or hapu owned land and resources, day-to-day use and management of these was largely undertaken by small communities and whanau. Therefore, taking into account the contemporary context, the ownership of pounamu by Te Runanga o Ngai Tahu, as the principal political unit of Ngai Tahu, together with the management by kaitiaki runanga, is largely in line with tradition. Thus, while there has been change in the contemporary structure of Ngai Tahu, there is also continuity with traditions.

Pounamu has been returned to a different unit of Ngai Tahu society to the one exercising kaitiakitanga with respect to pounamu at the time of the injustice. This is unsurprising because justice in the Treaty settlement process is not full reparative justice, but is tempered by contemporary concerns. Ngai Tahu society and its institutions have changed since the time of the land purchases, and the iwi, rather than the hapu, has come to be recognised as the principal political unit. Te Runanga o Ngai Tahu is the present manifestation of the iwi and has strong historical continuity as the current representative of Ngai Tahu as an iwi.

\textit{What is the whakapapa of the Mawhera Incorporation?}

The Mawhera Incorporation was established in 1976 to administer certain West Coast Maori reserved lands, giving Poutini Ngai Tahu control over their lands for the first time.\textsuperscript{133} The

\textsuperscript{131}Up to an amount which they can personally carry, without the use of machinery.
\textsuperscript{132}This is Ngai Tahu's formal policy position, but note that some kaitiaki runanga have yet to endorse this policy. Te Runanga o Ngai Tahu representative, personal communication, September 2001.
\textsuperscript{133}Constituted by the Mawhera Incorporation Order 1976, No 1976/127, s3(1). The Order was made pursuant to the Maori Reserved Land Act 1955, s15A, and came into effect from 31 May 1976. The Incorporation was originally governed by the provisions of Maori Affairs Amendment Act 1967, Part IV, and is now governed by Te Ture Whenua Maori Act 1993, Part XIII and the Maori Incorporations Constitution Regulations 1994. See the Schedule to the Mawhera Incorporation Order 1976 for a description of the relevant land.
Mawhera Incorporation currently owns and manages the bed and banks of the Arahura River,\textsuperscript{134} arguably the most significant pounamu-bearing river in Te Wai Pounamu.

As a result of the Crown’s purchase of the West Coast block in 1860, certain lands were reserved for the former Poutini Ngai Tahu owners. These lands came under the Native Reserves Act 1856, and were vested in the Public Trustee, and later the Maori Trustee by legislative succession.\textsuperscript{135} The Maori Trustee held land on trust for Maori owners, and carried out administrative functions on their behalf.\textsuperscript{136} The Trustee had power to lease any unleased Maori reserved land of specified types, power to convert existing term leases to leases renewable in perpetuity, and to offer renewals of leases.\textsuperscript{137} The Trustee also had a power of sale of Maori reserved lands, including power to sell sections unprofitable by reason of their size, configuration, nature, or quality.\textsuperscript{138} Despite being in a fiduciary relationship with Maori owners, the legislative framework did not always enable the Maori Trustee to protect Maori interests, and it is generally recognised that the Maori owners’ interests were neglected.\textsuperscript{139}

\textsuperscript{134}Maori Purposes Act 1976, s27, vested as Maori freehold title. The land is comprised of some 280 hectares. The boundaries of the title have not been surveyed and are only defined by reference to natural features. Due to the river shifting its course over time, there has been uncertainty as to the exact location of the physical boundaries to the title. The Ngai Tahu Claim Settlement Act 1998 sought to remedy this situation. Section 325 stopped a number of legal but unformed roads and vested title to this land in the Mawhera Incorporation. Section 326 vested the ‘top section’ of the Arahura River in the Mawhera Incorporation pursuant to the Reserves Act 1977, s26, as an historic reserve. On this latter issues see also Chapter Seven of this thesis.

\textsuperscript{135}B. Sheehan (Chairman) (1975) \textit{Report of Commission of Inquiry into Maori Reserved Land Wellington, Government Printer, pp16–20&452}. The office of the Maori Trustee was established in 1920 (replacing the Public Trustee and in some circumstances the Public Trust Office Board together with two Maori representatives appointed by the Governor) due to a perceived need to vest all Maori reserved land, and its administration, in an ‘independent’ body. Sheehan, \textit{Report of Commission of Inquiry}, p20. The lands came to be administered under the Maori Reserved Land Act 1955. Included were some 237 acres of leased land in Greymouth (producing a rental of $39,093.67 per annum in 1974), a further 74 leases in Arahura (producing $946.35 per annum in 1974) and 35,000 acres of reserves provided for in the Arahura Purchase Deed for religious, social and moral purposes. Sheehan, \textit{Report of Commission of Inquiry}, p16. See also Chapter Four of this thesis. In 1922 the individual ownership of the majority of these reserves was determined. Sheehan, \textit{Report of Commission of Inquiry}, p20.


\textsuperscript{137}Under the Maori Reserved Land Act 1955.


Due to increasing concern regarding the Maori Trustee's administration of Maori reserved lands, and growing calls from Maori for greater control over their lands, in 1973 the government of the day commissioned an Inquiry into Maori reserved lands which resulted in a report and recommendations.\textsuperscript{140} The Inquiry confirmed that the majority of the owners of Maori reserved lands were dissatisfied with the office of the Maori Trustee and its administration of Maori reserved lands. In particular, owners complained about lack of information about their lands and the manner in which they were being administered, a failure by the Trustee to consult owners regarding leasing of their lands, the terms of the leases (particularly the adequacy of rents), the failure of the Maori Trustee to act as a prudent, well informed land owner (particularly in relation to resource management matters), and dissatisfaction with the Trustee concerning sale and freeholding of reserved lands.\textsuperscript{141} Most Maori owners expressed a desire to play a more active role in the administration of their lands.\textsuperscript{142} The Inquiry report recommended that the ownership and administration of most Maori reserved lands should be transferred to the relevant Maori owners through incorporations, trusts, or other suitable

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\textsuperscript{140} Sheehan, \textit{Report of Commission of Inquiry}. For information concerning the problems with the Maori Trustees administration of the Arahura Block MR30 see J. P. McLoon, Submission to the Waitangi Tribunal: Ngai Tahu Claim (Wai 27), Doc #D3.

\textsuperscript{141} Sheehan, \textit{Report of Commission of Inquiry}, pp23–24. There was also much criticism of the legislation under which the Maori Trustee operated, in particular the ability of the Maori Trustee to sell Maori reserved lands. The sale of Maori reserved land was minimal prior to 1964. However, after this time, the sale of Maori reserved land increased, and in the next decade Maori reserved land was reduced by approximately 18,000 acres where "obviously the areas sold would be the choicest sections". Sheehan, \textit{Report of Commission of Inquiry}, p51. These provisions enabled the Maori Trustee to sell reserved land to the leasee of that land provided that there were owners wishing to sell and in sufficient numbers. The consent of all beneficial owners was not required. Further, the limited ability of the Maori Trustee under legislation to exercise discretion, or question the appropriateness of, the freeholding (or leasing) of Maori reserved land was noted. The Commission of Inquiry recommended that the provisions allowing for the sale of the freehold to leasees be repealed to prevent the "further erosion of the corpus" of Maori land. It stated: "... we feel that these lands are a means of preserving racial identity, of sustaining Maori mana and self respect, contributing towards a sense of community by uniting large numbers of Maori people in a continuing common enterprise, and enabling them to identify as an integral part of the New Zealand society and economy. ... All these considerations ... call for an immediate cessation to the sale of the freehold of the lands to leasees. ... The Commission is of the opinion that the principle of retention of Maori land in Maori ownership must be firmly upheld". Sheehan, \textit{Report of Commission of Inquiry}, pp48–55, quote at pp54–55.

vehicles. Specifically, the Report recommended that the owners of the West Coast reserved lands, and particularly in the area of the Arahura River, be constituted as a Maori incorporation to hold and administer those lands, with the consent of the owners.

As a result of the Commission of Inquiry's recommendations, and the support of the majority of Poutini Ngai Tahu affected, the Mawhera Incorporation was established in 1976. All those owners of Maori reserved lands in the region of Arahura and Greymouth (also known as Mawhera) who agreed to have their lands included in the portfolio of the Incorporation were constituted as a Maori incorporation, known as the Proprietors of Mawhera (referred to as the "Mawhera Incorporation" or "the Incorporation"). The bed and banks of the Arahura River were also vested in the Incorporation at this time. Each owner was allocated shares in the Incorporation commensurate with the value of his or her interest in the reserved lands transferred to the Incorporation. The shareholders were individuals and sometimes whanau trusts.

Shares can only be bought or sold within a 'preferred class', being children, grandchildren or blood relatives of the shareholder, other owners of the relevant land or those that descend from former owners and who are members of the hapu associated with the land vested in the

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145 Note the similarities with the establishment of the Parininihi-ki-Waitotara Incorporation ("the PKW Incorporation") in Taranaki. See Waitangi Tribunal, *The Taranaki Report*, chapter 9.
146 Shareholders enjoy limited liability in the same manner as shareholders in companies. Te Ture Whenua Maori Act 1993, s262.
147 The shares in an incorporation are undivided interests in Maori freehold land, where the Maori incorporation holds bare legal title in trust for its shareholders, and shareholders retain beneficial ownership. Te Ture Whenua Maori Act 1993, ss250(6)&260. Previously under the Maori Affairs Amendment Act 1967, incorporation shares were deemed to be personal property and therefore no longer interests in land, and the land ceased to be Maori land. Maori Affairs Amendment Act 1967, ss31(2),31(3)&38(1). In 1975, the Maori Purposes Act changed the status of incorporation lands by deeming land vested in a Maori incorporation to be Maori freehold land and this was confirmed by Te Ture Whenua Maori Act 1993. Maori Affairs Amendment Act 1967, s11(7); now Te Ture Whenua Maori Act 1993, s250(6).
Incorporation, the State Loan Department, or back to the Incorporation. Shareholders cannot dispose of their shares by will other than to members of the preferred class. These provisions are intended to ensure a balance between the interests of Maori owners wishing to sell their interests in an incorporation (in other words, to have the same freedom as other land owners), and the desire to retain Maori land in Maori ownership.

Accordingly, the Mawhera Incorporation has a direct historical link with the very people from whom the West Coast pounamu was unjustly expropriated as a result of the Crown purchase of the West Coast block 1860; the original shareholders of the Incorporation are the direct descendants of those to whom land was reserved as a result of that purchase.

8.4 CONTEMPORARY JUSTICE: REPRESENTATION AND PARTICIPATION

The second criterion for the suitability, and justice, of the return of pounamu to Te Runanga o Ngai Tahu and the Mawhera Incorporation, is whether these institutions represent all Ngai Tahu and Poutini Ngai Tahu, respectively, and whether they enable whanau to exercise...
kaitiakitanga with respect to pounamu. The opposition to the return of pounamu to these entities indicates that both entities may not fulfil this two-fold criteria of justice.\textsuperscript{152} As noted above, the submissions to the Maori Affairs Committees reporting the TRONT, Ngai Tahu (Pounamu Vesting), and Ngai Tahu Claims Settlement Bills are particularly relevant in this instance because the concerns of those not represented within recognised Ngai Tahu institutions must be voiced outside Ngai Tahu structures in other, perhaps less appropriate, fora. This opposition challenges a seemingly united Ngai Tahu picture.

\textit{Te Runanga o Ngai Tahu: representation and participation}

Every member of Ngai Tahu Whanui is entitled to become a member of each papatipu runanga to which he or she can show whakapapa.\textsuperscript{153} Each papatipu runanga recognised under the TRONT Act has a seat at the Te Runanga table.\textsuperscript{154} Accordingly, papatipu runanga are the vital link for individual and whanau membership and participation in Te Runanga o Ngai Tahu, and are the "heart" of Ngai Tahu rangatiratanga.\textsuperscript{155} How well do papatipu runanga represent Ngai Tahu members?

There are few requirements under the TRONT Act for the structure and administration of papatipu runanga.\textsuperscript{156} Some papatipu runanga are constituted as incorporated societies, and others as charitable trusts, and therefore must meet the requirements of the relevant legislation

\textsuperscript{152}For example, arguing generally that Te Runanga o Ngai Tahu is not a representative structure—submissions to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill: NTS/46, 47, 47A, 51, 51D, 58C, 60 (claiming a mandate of 6 people), 80W, 88W (Arowhenua), 102W, 124; and regarding representation of Ngai Tahu living outside the rohe—submissions to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill 73W, 73A, 73B, 75, 75WA, 75W, 83W, 84W, 85W, 86W, 87W, 89W, 90W, 91W, 92W, 112W (claiming a mandate of 49 people), 113W & 149A.

\textsuperscript{153}TRONT Act 1996, s13.

\textsuperscript{154}Clause 6.6 of the Charter of Te Runanga o Ngai Tahu.

\textsuperscript{155}O'Regan, What is the Tribe?, pp7–8.

\textsuperscript{156}Members of each papatipu runanga must "elect from time to time, in a democratic manner by postal ballot, the members of that Papatipu Runanga who are to be charged with the duty of appointing to Te Runanga o Ngai Tahu from time to time the members who are to act as representatives of that Papatipu Runanga". TRONT Act, s16(c).
governing such bodies.\textsuperscript{157} There is considerable freedom under these arrangements for each papatipu runanga to regulate its own affairs, as one would expect of a body possessing tino rangatiratanga. However, there is also ample opportunity for local and whanau politics to dominate the administration of papatipu runanga, sometimes to the detriment of particular whanau. Ngai Tahu Whanui itself recognises that papatipu runanga can, and do, dysfunction and "experience difficulties from time to time."\textsuperscript{158}

Particularly relevant for pounamu, there have been a number of difficulties with the West Coast-based papatipu runanga recognised under the TRONT Act, and their ability to represent all Poutini Ngai Tahu.\textsuperscript{159} The problems lie primarily with Te Runaka o Kati Waewae. The Tuhuru group challenged the inclusion of Te Runaka o Kati Waewae as one of the initial eighteen papatipu runanga, on the basis that Te Runaka o Kati Waewae did not have the mandate to represent the hapu.\textsuperscript{160} The Tuhuru hapu stated:

\begin{quote}
We will never cede nor vest our rangatiratanga over our lands, river, mountains, pounamu and other traditional resources to any form of organisation without our express consent.
\end{quote}

\textsuperscript{157}The Incorporated Societies Act 1908 and the Charitable Trusts Act 1957. See submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/5, Appendix 3.

\textsuperscript{158}Ngai Tahu Development Corporation, Ngai Tahu Cultural Values, p15.

\textsuperscript{159}These issues are by no means confined to the West Coast. See for example, submissions to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill 54E & 74 (Otautahi), 93W (Mangamaunu) & 94W; submissions to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill NTS/8, 8B, 8C, 46, 47B, 51B, 54 (Otautahi), 93W (Mangamaunu), 97A, 122, 124 (claiming a mandate of several hundred whanau) & 129W.

\textsuperscript{160}See Te Puni Kokiri, Report to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 06/10/1994, TPK/8-MA/95/308; submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 49C-MA/95/131 (Tuhuru Hapu), 49A-MA/95/129, 58C-MA/95/159 (claiming mandate of 22), 61A-MA/95/166, 61W-MA/95/165, 63D-MA/95/174 (claiming mandate of 28), 65W-MA/95/179 (claiming mandate of 9), 66W-MA/95/180 (claiming mandate of 19), 67W-MA/95/181 (claiming mandate of 10), 71W-MA/95/187 (claiming mandate of 28), 77A-MA/95/199, 77W-MA/95/207 (claiming mandate of 77), 79W-MA/95/208, 96W-MA/95/184, 116-MA/95/258, 128W-MA/95/274 (claiming mandate of 29) & 147W-MA/95/293 (claiming mandate of 22); Poutini Ngai Tahu individuals, Interviews. Note particularly submission 47B-MA/95/123.
Quite simply, we do not have the right to do so because as kaitiaki we are responsible for the well being of future generations and have an obligation to those tupuna [ancestors] who have gone before us.\(^{161}\)

Those identifying with the Tuhuru group include many of the tangata whenua who live at Arahura Pa, on the banks of the Arahura River.

Submissions before the Maori Affairs Committee from 1996 to 1998, and interviews with various Poutini Ngai Tahu in 1998, indicated that there may be (or have been) three runanga-type groups on Te Tai Poutini: Kati Waewae, Makaawhio (Te Koeti) and Tuhuru. Only the first two have papatipu runanga status under the Te Runanga o Ngai Tahu Act 1996. As a result there is a group of Poutini Ngai Tahu who have been effectively disenfranchised: the Tuhuru people are simply not represented in the Te Runanga structure. Although most, if not all, of the whanau making up the Tuhuru group can show whakapapa links with either or both of the Kati Waewae and Makaawhio runanga,\(^{162}\) they choose not to participate through these channels, or are effectively excluded from them, for a number of reasons.

First, despite common whakapapa, the Tuhuru group identifies as a different group to either Kati Waewae, or Makaawhio. Members of the Tuhuru group did, however, identify themselves as being part of the hapu of Ngati Waewae when giving evidence to the Waitangi Tribunal hearing the Ngai Tahu claim.\(^{163}\) Later, after Te Runaka o Kati Waewae was incorporated and became a papatipu runanga member of Te Runanga o Ngai Tahu, the same whanau used the name Tuhuru (Waewae's grandson)\(^{164}\) in their public opposition.\(^{165}\) Later again, they joined with others identifying as Waitaha (perhaps because the Waitaha name

\(^{161}\)Submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill, 49A-MA/95/129 (Sandra Lee), p5.

\(^{162}\)For a discussion of Poutini Ngai Tahu whakapapa, see Rochford, The Kati Waewae Myth.

\(^{163}\)See Submission to the Waitangi Tribunal: Ngai Tahu Claim (Wai 27), Doc #D11(a), p28; and Doc #D12, p2.

\(^{164}\)Poutini Ngai Tahu individuals, Interviews.

\(^{165}\)See submissions to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill cited at footnote 152 of this chapter, particularly submission 49C-MA/95/131 (Tuhuru Hapu).
had gained public currency) in opposing the Ngai Tahu settlement.\textsuperscript{166} This fluidity suggests a group struggling to find representation and a legitimate voice within the Te Runanga o Ngai Tahu structure.

Second, it appears that Te Runaka o Kati Waewae has been controlled by a handful of people from one whanau, and then largely by its upoko (head).\textsuperscript{167} For example, the Constitution of Te Runanga o Kati Waewae gives the upoko a proxy for all runanga members not in attendance at any meeting.\textsuperscript{168} Interviews with Poutini Ngai Tahu individuals (in 1998) suggested that the runanga communication has been extremely poor. Individuals and whanau cannot participate in meetings if they do not know they are being held, and if they have no information about the issues of the day.\textsuperscript{169} Nor can a consensus of the collective runanga be achieved. Indeed, one Poutini Ngai Tahu had this to say:

\begin{quote}
As we know, Te Runanga o Tuhuru and other Ngati Waewae outside of that are not represented by [Te Runaka o] Katiwaewae. They have no voice on the Runanga o Ngai Tahu [decision making body] and have to suffer [the upoko] representing the Arahura marae 'on their behalf' but clearly against their wishes.\textsuperscript{170}
\end{quote}

This situation is at odds with traditional decision making where "tribal heads, elders, or a paramount chief ... were not autocrats but the facilitators and locators of consensus".\textsuperscript{171} The

\textsuperscript{166}See for example, submission to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill, NTS/323 and submission to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill, NTS/152, Attachment A, Waitangi Tribunal, Memorandum of Tribunal Claim 706.

\textsuperscript{167}See the Constitution of Te Runaka o Kati Waewae and its 'Application for Incorporation' under the Incorporated Societies Act 1908 for the original members of the incorporated society. See also submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill 61A-MA/95/166.

\textsuperscript{168}Constitution of Te Runaka o Kati Waewae. Note that this situation was under review by members of the runanga and Te Runanga o Ngai Tahu at the time of writing. Te Runanga o Ngai Tahu representative, personal communication, September 2001.

\textsuperscript{169}For example one member of Te Runaka o Kati Waewae stated that a recent annual general meeting of the runanga was attended by less than ten members. Poutini Ngai Tahu individual, interview.

\textsuperscript{170}Submission to the Maori Affairs Committee on the Te Runanga o Ngai Tahu Bill 47B-MA/95/123 (a member of Te Runanga o Makaawhio), p2.

views of the collective (the iwi, hapu, or whanau depending on the context) as a whole would be sought before any decision was made.

The Tuhuru group was perhaps unfortunate not to have achieved papatipu runanga status when Te Runanga o Ngai Tahu was established. There may be a number of reasons why they failed to do so. The fact that there are personality clashes and inter-whanau disputes, feuds even, between the whanau controlling Te Runaka o Kati Waewae and the Tuhuru group is likely to have been one reason. Perhaps the fact that the lead spokesperson for the Tuhuru group, Sandra Lee (presently Deputy Leader of the Alliance Party in coalition government with the Labour Party) and lead negotiator of the Ngai Tahu settlement, Tipene O'Regan are long time political adversaries is relevant. Present day political differences cannot be swept aside as inconsequential when so much is at stake. Also relevant may be that the two existing Poutini runanga cannot agree on their respective boundaries, and currently under the TRONT Act, have mana whenua over exactly the same territory. To have added a third runanga into this dynamic may simply have been unworkable.

The opposition to Te Runanga o Ngai Tahu and the Ngai Tahu settlement clearly indicates that Ngai Tahu is not an homogenous group. There are complexities of identity and group dynamics which are not reflected in the Te Runanga o Ngai Tahu structure. Some Ngai Tahu members clearly identify with other hapu or iwi groupings, such as Poutini Ngai Tahu, Waitaha or Ngati Mamoe. The contemporary context illustrates that there is fluidity within

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172 Individuals identifying with the Tuhuru hapu pursued a number of avenues to establish themselves as having the right to represent themselves, and their hapu, within the Ngai Tahu structure. These measures have included letters to Ministers of the Crown, petitioning the Maori Land Court under the Maori Affairs Act 1953, s453, an application to the Maori Land Court under Te Ture Whenua Maori Act 1993, s30, and filing claims before the Waitangi Tribunal (e.g. Wai 322 & 706). Note also Waitaha Taiwhenua o Waitaki Trust & Anor v Te Runanga o Ngai Tahu unreported, 17/6/1998, Pankhurst J, HC Christchurch CP41/98.

173 Personal communication with representatives of Te Runanga o Ngai Tahu also suggested that the legal entities representing the Tuhuru group have had serious financial difficulties.

174 See generally the submissions to the Maori Affairs Committee on the Te Runanga o Ngai Tahu, Ngai Tahu (Pounamu Vesting), and Ngai Tahu Claims Settlement Bills.
Ngai Tahu society, and the names used to describe different units within Ngai Tahu, just as there has been historically. But names represent people, and the fact is that a substantial group of Ngai Tahu remain unrepresented in the current arrangements of Te Runanga o Ngai Tahu. As a result, these whanau cannot participate in the life of the tribe. Significantly, because management of pounamu has been devolved to the kaitiaki runanga, these whanau cannot take part in pounamu management decisions, and therefore cannot exercise their kaitiakitanga over pounamu. This suggests that new injustices may have been created by the return of pounamu to Te Runanga o Ngai Tahu.

However, the question remains whether such issues are properly issues for the Crown, or whether they are within the rangatiratanga of the iwi itself. In the Waitangi Tribunal’s view, Ngai Tahu’s structure is properly a matter for Ngai Tahu, and not for the Crown or the Tribunal. The structure of Te Runanga was put to the Crown by its Treaty partner, Ngai Tahu, alongside evidence of substantial consultation with Ngai Tahu Whanui over a number of years. As noted, Te Runanga o Ngai Tahu’s structure has elements ensuring a basic level of representation and participation for individuals. There are dispute resolution mechanisms enabling challenges to papatipu runanga and Ngai Tahu membership status. Arguably, ensuring these basic protections is as far as the Crown’s responsibility goes. Any more is likely to be seen as overly paternalistic and out of line with current thinking on the Treaty partnership. Thus, it would appear that the problems relating to representation by Te Runaka o Kati Waewae could well be resolved within the existing Te Runanga structure. Besides, a partnership implies responsibilities for both partners. What is the responsibility of Te

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177 The authority of papatipu runanga can be challenged, and where necessary papatipu runanga can be replaced or additional papatipu runanga established to form part of Te Runanga o Ngai Tahu. TRONT Act 1996, ss10–12; Clauses 6.5 & 24 of the Charter of Te Runanga o Ngai Tahu.
178 TRONT Act 1996, s7.
179 Note that this is recognised by the provisions of the Ngai Tahu Charter (clauses 6.5 & 24) which effectively oust the jurisdiction of the Maori Land Court under s30 Te Ture Whenua Maori Act 1993.
Runanga o Ngai Tahu, as the Treaty partner, to ensure that it allows all Ngai Tahu whanau their rangatiratanga?

**The Mawhera Incorporation: representation and participation**

The controversy surrounding the return of the Arahura River pounamu to the Mawhera Incorporation focused on two principal arguments: first, that the Incorporation does not represent all Poutini Ngai Tahu, and second, that the share structure of the Incorporation effectively excludes most shareholders from participating in the decision making of the Incorporation.180

The current shareholders of the Mawhera Incorporation do not represent all of the descendants of those that suffered the original injustice for three reasons.181 First, not all of the descendants of the owners of all West Coast reserved lands chose to become part of the Incorporation. Second, because shares can be bought and sold,182 some of the original shareholders of Mawhera Incorporation no longer own shares.183 Third, in the early days of the Incorporation shareholders who held less than fifty shares had their shares resumed by the Incorporation.184 And fourth, children of original and current shareholders may not be shareholders. This is problematic because only shareholders can legally walk up the Arahura and collect pounamu.185 For individuals and whanau who can show whakapapa directly to

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180 See for example submissions to the Maori Affairs Committee on Te Runanga o Ngai Tahu Bill 61A-MA/95/166; submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/15W, 18, 19 & 19A (Te Runanga o Makaawhio), 22, 25, MOC/5 p12; submission to the Maori Affairs Committee on the Ngai Tahu Claims Settlement Bill, NTS/207; Poutini Ngai Tahu individuals, Interviews.
181 Poutini Ngai Tahu individuals, Interviews.
183 Further, some shareholders are not Ngai Tahu members. These are predominantly the spouses of shareholders who were left shares by will.
184 See Te Runanga o Ngai Tahu minutes of meeting appended to submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Act NTP/19A-MA/97/26 (Te Runanga o Makaawhio), 15W-MA/97/19 & MOC/5 (Ministry of Commerce). This practice has now ceased and one share entitles the holder to membership of the Incorporation.
185 Mawhera Incorporation representative, Interviews. Note that non-shareholders can walk up the river if accompanied by a shareholder, and shareholders can gift to non-shareholders any pounamu found on the river.
the River but are not current shareholders, a walk up the Arahura is trespass, and to collect pounamu there is theft. These factors alone indicate that a share structure, based on individual share ownership, is an inappropriate avenue for the exercise of traditional customary 'rights'.

The Crown was aware that not all Poutini Ngai Tahu are represented by the Mawhera Incorporation, but wished to recognise the importance of the River and its pounamu to Poutini Ngai Tahu as part of the settlement, and saw Mawhera as representing the majority of Poutini Ngai Tahu.\textsuperscript{186} Further, there was an argument that since the bed and banks of the River were vested in the Mawhera Incorporation in 1976, the Incorporation had owned the pounamu found there.\textsuperscript{187} Despite this uncertainty surrounding the ownership of Arahura pounamu, the Crown had continued to issue mining licences for pounamu in the Arahura as if it was a Crown-owned mineral. The Crown was anxious, therefore, to remove any doubt about the Incorporation's ownership of the Arahura pounamu. Further, because those who have sold shares retain the right to buy back in to the Incorporation, the Crown reasoned that returning pounamu to the Mawhera Incorporation did not disenfranchise such individuals and whanau.\textsuperscript{188}

The second issue of controversy is more serious because it affects most shareholders in the Incorporation and prevents those shareholders from exercising full kaitiakitanga with respect to the pounamu in the Arahura.\textsuperscript{189} Over time, shares in the Mawhera Incorporation have changed hands resulting in a situation today where certain individuals and whanau have accumulated substantial share holdings in the Incorporation.\textsuperscript{190} These accumulated share

\textsuperscript{186} Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/5 (Ministry of Commerce); Crown Official, Ministry of Economic Development, Interview; Mawhera Incorporation representative, Interview. Note also the Waitangi Tribunal's recommendation. \textit{Waitangi Tribunal, The Ngai Tahu Report}, vol 1, p130.

\textsuperscript{187} Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/5 (Ministry of Commerce); Mawhera Incorporation representative, Interview.

\textsuperscript{188} Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/5 (Ministry of Commerce). Shares were valued at $1.17 each at the time in 1997.

\textsuperscript{189} The majority of shareholders are individuals holding small amounts of shares. Former Mawhera Incorporation Chairman, personal communication.

\textsuperscript{190} See submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/61A-MA/97/166, particularly Appendix 9 noting share transfers to the Mason-Russell whanau. This indicates that the same whanau have controlled both Te Runaka o Kati
holdings do not reflect what whanau or individuals would have been entitled to based on whakapapa or inheritance. Rather, they reflect the financial investment of those individuals. The Waitangi Tribunal has commented in relation to Maori incorporations that "it cannot be assumed that the interests of the shareholders are no different from those in any public company, where the only concern is to make the most money".

The accumulation of share holdings causes particular problems due to the share voting mechanisms of the Maori Incorporations Constitution Regulations 1994. Generally, every shareholder of an incorporation has the right to vote by being present at a meeting of that incorporation, by proxy or by duly appointed attorney or trustee. Except where voting is on the basis of share holding, each shareholder has one vote and voting is by a show of hands. A resolution is carried by a majority. However, a vote on share holding may be demanded by at least five people who have a right to vote and are present at a meeting, or, anyone exercising at least ten percent of the total votes of those present at the meeting. A shareholder's voting power is then determined by the number of shares which he or she holds.

Members of the Incorporation have reported that when major decisions are to be made, certain individuals and whanau who have accumulated substantial share holdings persistently call for a share vote. While within the law, this practice has effectively silenced most

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Waewae and the Mawhera Incorporation. Interviews with Poutini Ngai Tahu individuals suggest that some individuals and whanau sold shares in times of extreme financial need. Other shareholders, better-off financially, were able buy up these shares.  
Former Mawhera Incorporation Chairman, personal communication.  
See also Te Puni Kokiri (1994) Te Ture Whenua Maori Act 1993: A Guide to the Regulations for Maori Incorporations and Maori Reservations Wellington, TPK.  
Maori Incorporations Constitutions Regulation 1994, clause 12, First Schedule. The Maori Incorporations Constitution Regulations 1994, clause 20, makes provision for postal voting by special resolution at an earlier general meeting.  
Maori Incorporations Constitutions Regulation 1994, clause 13, First Schedule.  
Maori Incorporations Constitutions Regulation 1994, clause 14, First Schedule.  
Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/61A-MA/97/166; Poutini Ngai Tahu individuals, Interviews. At Ngai Tahu's pounamu consultation hui, some Poutini Ngai Tahu expressed concern about the use of a share voting system for the management of pounamu:
shareholders, and severely limits their ability to have input into pounamu management decisions. For example, the Mawhera Incorporation allows alluvial gold mining in the Arahura River. This involves digging up to fifteen to eighteen metres of the river bed, passing the gravels through a sieve, and piling the larger, rejected stones back onto the river bed.¹⁹⁸ Pounamu is turned up in this process and usually ends up in the piles of rejected stones. Some shareholders object to this as disturbing the mauri, or life force of the river and its pounamu.¹⁹⁹ However, as small shareholders they cannot influence such decisions which are controlled by the major shareholders through the share voting mechanisms. Again, this type of decision making is far removed from traditional collective consensus decision making,²⁰⁰ and has led some shareholders to stop attending meetings altogether.²⁰¹

As noted above, the Mawhera Incorporation was established to allow Poutini Ngai Tahu greater control over their lands and resources. The share system was adopted as a means to balance the desire of some Maori to have the same rights as others over their land (that is, to buy and sell), and the desire to retain Maori land in Maori ownership. It is ironic, then, that the share mechanisms now operate to deny many Poutini Ngai Tahu effective kaitiakitanga over their lands and their pounamu.²⁰²

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¹⁹⁸Member of alluvial gold mining industry, Interview with author, August 1998.
¹⁹⁹Poutini Ngai Tahu individual, Interview.
²⁰¹Poutini Ngai Tahu individuals, Interviews.
²⁰²A further irony is that the Mawhera Incorporation has also been extremely successful in retaining Maori land in Maori ownership: its property portfolio has increased since it was established. Evidence given as part of the Waitangi Tribunal claim suggested a thirty-seven percent capital increase in Mawhera Incorporation operations from 1976, when it was established. J. M. Russell, Submission to the Waitangi Tribunal: Ngai Tahu Claim (Wai 27), Doc #D17. Note also the Waitangi Tribunal’s comments in relation to the Parininihi-ki-
8.5 CONTINUITY AND CHANGE

When providing redress for an injustice which occurred 150 years ago, there are enormous difficulties in assessing to whom redress might justly be made. In the case of Ngai Tahu, as a fluid society constantly adapting to changing circumstances, these difficulties are patent. Whichever traditional Ngai Tahu unit exercised mana over pounamu at each source, in the contemporary context, Ngai Tahu Whanui has come to act as an iwi, under the name 'Ngai Tahu', and is currently manifest in the entity Te Runanga o Ngai Tahu. Thus, from an historical perspective, pounamu might justly be returned to the iwi, through this entity.

The restoration of kaitiakitanga is required for justice in the Treaty settlement process because the continuation of the patterns of traditional resource use and management that link present generations with their ancestors and with place, are essential for the restoration of cultural identity and well-being. New injustices may have been created by returning pounamu to Te Runanga o Ngai Tahu because it may not represent all of Ngai Tahu Whanui in the contemporary context. For example, whanau identifying with the 'Tuhuru' group have been effectively disenfranchised. These whanau cannot, therefore, restore their kaitiaki relationship with pounamu, which amounts to a denial of their mana, and ultimately detracts from the mana of the whole tribe and the justice of the settlement.

It is, perhaps, unrealistic to expect any entity comprising over 25,000 individuals to represent each and every single member. But when identifiable communities of Ngai Tahu are excluded from participating in the life of the iwi, new injustices are created, and new grievances are felt to open the wounds of the past. The Tuhuru situation is felt all the more keenly because many of

its members continue to maintain ahi kaa (keep the home fires burning), living on the West Coast, and at Arahura Pa on the banks of the sacred pounamu river, the Arahura. The representation issues that have plagued Te Runaka o Kati Waewae in the recent past may be resolved by the iwi within the Te Runanga o Ngai Tahu structure. The complex, and at times confusing, mandate issues surrounding the claims of those identifying as Waitaha and Ngati Mamoe, however, throw further doubt on whether Te Runanga o Ngai Tahu currently represents all Ngai Tahu Whanui.

The situation in relation to the Mawhera Incorporation is even more problematic. Why was Arahura pounamu singled out, and why was it returned to an entity where a few individuals derive substantially greater benefits than the majority, through the accumulation of substantial share holdings? There is no evidence to suggest that these individuals have been more affected by the Crown's unjust expropriation of pounamu than the rest of Poutini Ngai Tahu. Although there are reasons why the Arahura pounamu was returned to the Mawhera Incorporation, none of them justify—in terms of reparative justice—why pounamu should have been returned at other than an iwi level.203 The fact that the Incorporation does not represent all of the descendants of the Arahura Ngai Tahu from whom pounamu was unjustly expropriated suggests the creation of new injustices. Further, the share voting mechanisms of the Incorporation appear to effectively deny most shareholders any meaningful input into the management of the Arahura River and its pounamu. Although all share holders can walk the Arahura and collect pounamu, and so restore their kaitiaki relationship with pounamu to some extent, the full extent of their mana over pounamu is denied, again creating new injustices.

203Note that although all pounamu was returned at an iwi level to Te Runanga o Ngai Tahu by the Ngai Tahu (Pounamu Vesting) Act 1997, Arahura pounamu was returned to Te Runanga o Ngai Tahu on the clear understanding that it would be transferred to the Mawhera Incorporation. In fact, the deed of transfer of the Arahura pounamu had already been executed by the parties and, on its terms, the transfer was effected immediately the Ngai Tahu (Pounamu Vesting) Act 1997 became law. See Ngai Tahu (Pounamu Vesting) Act 1997, Recital F; Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/5; Te Runanga o Ngai Tahu representative, Interview; Crown Official, Ministry of Economic Development, Interview.
In conclusion, although both Te Runanga o Ngai Tahu and the Mawhera Incorporation display historical continuity with the traditional communities from whom pounamu was unjustly expropriated, the return of pounamu to these entities raises complex contemporary justice concerns. The structure of Te Runanga o Ngai Tahu may well be flexible enough to adapt to changing representation requirements through its dispute resolution mechanisms, and thus the possible creation of new injustices with respect to the Tuhuru group, particularly, may be short-lived. The same cannot be said for the Mawhera Incorporation. The inability of Poutini Ngai Tahu whanau to fully participate in pounamu management in the Arahura River because of the share structure of the incorporation raises more serious ongoing contemporary justice concerns.
CHAPTER NINE

WHAT WAS RETURNED TO NGAI TAHU?
AN EXAMPLE OF THE LIMITS OF JUSTICE IN THE TREATY SETTLEMENT PROCESS

9.1 WHAT WAS RETURNED BY THE POUNAMU VESTING ACT?

9.2 LIMITS TO THE RETURN OF POUNAMU

9.3 OTHER INTERESTS IN POUNAMU NOT SAVED:
    NEW INJUSTICES?

9.4 CONCLUSION
The overriding objective of the Ngai Tahu (Pounamu Vesting) Act (the "Pounamu Vesting Act"), as the first piece of legislation implementing the Ngai Tahu settlement, was to provide justice in respect of pounamu. Reparative justice requires that something unjustly taken be restored, and the victim be put in the position it would have occupied but for the injustice. In the case of pounamu, reparative justice required the Crown to restore to Ngai Tahu all pounamu unjustly expropriated by the Crown's Ngai Tahu land purchases of the 1840s–1860s, and restore Ngai Tahu's mana with respect to pounamu. The Crown was also concerned, however, not to create any new injustices in the process.

During the period in which the Crown assumed ownership and control over pounamu, new traditions and patterns of use were established within New Zealand society, predominantly by Pakeha and specifically by those living on the West Coast of Te Wai Pounamu. A pounamu industry now exists which collects pounamu from its natural setting and carves it into artefacts largely for tourism. The industry extends to both the North and South Islands. Many New Zealanders of various ethnicities value pounamu in other ways and have a profound connection with the stone. The preservation and continuation of the interests of members of the pounamu industry, and the traditions of the New Zealand public generally, depends on access to the stone. This created a tension between the return of pounamu to Ngai Tahu in a manner ensuring Ngai Tahu's rangatiratanga and kaitiakitanga over its taonga (that is, its ability to control the resource), and the continued access to pounamu for non-Ngai Tahu.

In an attempt to ensure no new injustices were created by the return of pounamu, the Crown and Ngai Tahu negotiated a compromise deal, reflected in the Pounamu Vesting Act. The Crown did not return to Ngai Tahu exactly what it expropriated historically: practicalities of the existing situation were provided for and existing private property rights were saved.
Contemporary justice issues thereby tempered a full application of justice, as expected in the Treaty settlement process. Interests in pounamu other than private property rights and existing interests in mining licences, however, were not safeguarded by the Pounamu Vesting Act. The lack of protection for the traditions and interests in pounamu held by non-Ngai Tahu raises the question of whether new injustices have been created by the return of pounamu to Ngai Tahu.

9.1 WHAT WAS RETURNED BY THE POUNAMU VESTING ACT?

The principal purpose of the Pounamu Vesting Act was to vest ownership of all Crown-owned pounamu occurring in its natural state in Ngai Tahu's tribal area and the adjacent territorial sea, in Te Runanga o Ngai Tahu. The Pounamu Vesting Act provides:

3. Ownership by Ngai Tahu of certain minerals—
Notwithstanding any other enactment, all pounamu occurring in its natural condition in—
(a) The Takiwa of Ngai Tahu Whanui; and
(b) Those parts of the territorial sea of New Zealand ... that are adjacent to the Takiwa of Ngai Tahu Whanui and the seabed and subsoil beneath those parts of the territorial sea—
that, immediately before the commencement of this Act, is the property of the Crown, ceases, on the commencement of this Act, to be the property of the Crown and vests in and becomes the property of Te Runanga o Ngai Tahu.

While it is not clear from archaeological records exactly when southern Maori began using pounamu, it seems that by the 12th century, and certainly by the 14th century, the use of pounamu was well established. This included nephrite, semi-nephrite, and bowenite. As discussed previously, pounamu became central to Ngai Tahu economic and social life, and an important part of the lives of other iwi with whom Ngai Tahu traded, and to whom Ngai Tahu gifted, the stone. Whilst the introduction of metal to traditional Maori society led to the rapid

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1 As defined by Te Runanga o Ngai Tahu Act 1996, s5.
4 Chapter Seven of this thesis.
abandonment of pounamu as a material for tools and weapons, it continued to be used for other artefacts important to Ngai Tahu's cultural life and that of other iwi.

There is no doubt that pounamu was a taonga of Ngai Tahu at the time of the Crown's land purchases, as was recognised by the Waitangi Tribunal in the *Ngai Tahu Report*: "Pounamu was and remains a cherished taonga of Ngai Tahu". The Waitangi Tribunal had found clear breaches of the principles of the Treaty of Waitangi in the Crown's failure to reserve pounamu to Ngai Tahu, and to allow Ngai Tahu to exercise its rangatiratanga over pounamu. The Tribunal recommended that the Crown transfer to Ngai Tahu the ownership and control of all Crown-owned pounamu in Ngai Tahu's tribal area, subject to the continuation until expiry of all existing mining licences, "to ensure that the holders of such licences are not adversely affected". The vesting of ownership in Ngai Tahu of all Crown-owned pounamu in Ngai Tahu's tribal area is, therefore, an example of reparative justice. The next part of this chapter demonstrates, however, that there were constraints on the Crown's ability to return to Ngai Tahu exactly what it unjustly expropriated, and that a blend of contemporary and reparative justice was negotiated in the settlement in an effort not to create any new injustices.

*Pounamu as defined in the Pounamu Vesting Act*

The Pounamu Vesting Act, defines 'pounamu' as including the lithic resources of bowenite, nephrite, semi-nephrite, and serpentine occurring in its natural condition in three areas described in the Schedule to the Act. These serpentine areas are in the Milford/Dart River area, the Cascade River area, and the Pounamu Ultramafic Belt.

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7 Waitangi Tribunal, *The Ngai Tahu Report*, vol 3, p726. The Tribunal also made recommendations regarding vesting the bed and banks, and tributaries, of the Arahura River in Ngai Tahu.
8 Ngai Tahu (Pounamu Vesting) Act 1997, s2.
Serpentine may also have been used by early southern Māori for tools and decoration for a very limited period. However, it appears that serpentine was replaced by nephrite as soon as nephrite was discovered, and any traditions relating to serpentine were discontinued several hundred years before contact with Europeans. Because serpentine was not a taonga at the time of the land purchases in the same manner as pounamu, and it would appear that Ngai Tahu sold it as part of the deeds of sale. Accordingly, the inclusion of serpentine in the areas specified in the Pounamu Vesting Act goes beyond traditional Ngai Tahu usage, and beyond the findings and recommendations of the Waitangi Tribunal.

The inclusion of serpentine in the Pounamu Vesting Act was a practical response to the fact that in these areas, nephrite and serpentine occur together, and it is impossible to isolate serpentine without affecting the nephrite also occurring there. Members of the pounamu industry believe that there is the potential to develop a serpentine tile industry in New Zealand (the tiles being used for wall facades on public buildings and in the home) and therefore, the addition of serpentine is a potential 'cash cow' for the iwi. This is an example of how contemporary practicalities influence the application of reparative justice, in this instance to the potential advantage of Ngai Tahu.

Bowenite is a variety of serpentine but for the purposes of this discussion, the term 'serpentine' is used to refer to all types of serpentine except bowenite. See also Chapter One of this thesis, at footnote 14.

Beck (1984), New Zealand Jade, chapter 5.

Beck (1984), New Zealand Jade, chapter 5.


See Maori Affairs Committee (1997) Commentary of the Ngai Tahu (Pounamu Vesting) Bill Reported from the Maori Affairs Committee Wellington, Government Printer, p2; submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Act NTP/MOC/1, p1; J. Hawke (1997) 563 NZPD (25/9/1997), p4595. Note that one pounamu industry member suggested that the pounamu in the defined areas can be extracted without taking the serpentine and that the negotiators of the Ngai Tahu settlement knew the potential value of the serpentine tile industry. Pounamu Industry member, Interview with author, August 1998.

Pounamu Industry members, Interviews.
9.2 LIMITS TO THE RETURN OF POUNAMU

So that new injustices were not created by the return of pounamu, all existing private property rights in pounamu were preserved by the Pounamu Vesting Act, upholding the Crown's general policy that settlements will not affect existing private property rights. These provisions of the Pounamu Vesting Act also reflect the fact that some pounamu cannot be returned to Ngai Tahu: some pounamu has been mined, worked into products for sale or gift, and passed into the hands of individuals throughout New Zealand, and the world. In addition to saving private property rights, the Pounamu Vesting Act preserved the rights to extract pounamu from its natural setting under existing mining privileges, rights somewhat similar to private property rights. All of these factors limit the amount of pounamu returned to Ngai Tahu by the Crown.

Private property rights preserved

The first saving of private property rights in pounamu is a result of the Pounamu Vesting Act transferring ownership to Ngai Tahu of pounamu occurring in its natural state. Therefore, pounamu collected or mined before October 1997 (when the Act came into force) is not affected by the Act, and remained the private property of the owner at the time the legislation was enacted. The second saving of private property rights flows from the fact that the Pounamu Vesting Act vests only Crown-owned pounamu in Ngai Tahu. Not all pounamu occurring in its

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16 There are no reliable figures for the extent of past and present use of pounamu by the pounamu industry. Further, New Zealand's pounamu sources have never been systematically surveyed. Estimates from members of the pounamu industry vary, but suggest that the industry may use between ten and twenty ton of stone (all types) per year. Pounamu Industry members, Interviews.
18 Ngai Tahu (Pounamu Vesting) Act 1997, s3.
What was returned to Ngai Tahu? 260

natural state was Crown-owned before the operation of the Pounamu Vesting Act. Early land alienations generally did not reserve mineral rights to the Crown, except in respect of gold and silver, and as a result, minerals (including pounamu) on or under these Victorian titles are owned by the proprietor of the land. Later, under successive Land Acts the Crown began reserving to itself the rights to minerals on the alienation of land, and since 1949 any Crown alienation has reserved to the Crown all mineral rights, including rights to pounamu. The pounamu on or under these early Victorian titles is not affected by the Pounamu Vesting Act and any pounamu in or on such land remains those land owners' private property. Once again reparative justice is constrained by the requirements of justice in the contemporary context, namely that private property rights are protected. Private ownership of pounamu through Victorian titles is not thought to be extensive.

[20]In addition to the exception created by early Victorian titles discussed, minerals occurring on Maori land are not owned by the Crown. In Ngai Tahu's traditional area, Maori land would most likely be owned by Ngai Tahu whanau (possibly through entities such as the Mawhera Incorporation), and the pounamu on or under that land owned by the Ngai Tahu owners. This limits Te Runanga o Ngai Tahu's ownership and control of pounamu.


[23]Land Act 1892, s121 (resumption of land); Land Act 1924, s135 (resumption of land); Land Act 1924, s153 (reservation of land from sale); Land Act 1948, s59 (all minerals reserved to the Crown).


[25]Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/5, p4. There is a difference of opinion amongst members of the pounamu industry as to whether or not the pounamu owned privately under Victorian title is of significant quantities or not. One member of the industry suggested that there is a significant quantity of pounamu in the Arahura catchment privately owned under Victorian title, but another believes that this is not a commercial amount. Members of the pounamu industry, Interviews.
Existing mining privileges preserved

The third constraint on the return of pounamu to Ngai Tahu follows the recommendations of the Waitangi Tribunal that all existing pounamu mining licences continue until they expire. Section 4 (1) of the Pounamu Vesting Act provides:

Nothing in section 3 [transfer of ownership of Crown-owned pounamu to Ngai Tahu] affects an existing privilege [under s106 of the Crown Minerals Act 1991] or the rights or obligations of any holder of an existing privilege and Part II of the Crown Minerals Act 1991 continues to apply in relation to that privilege as if this Act had not been passed.

The Crown is to collect any royalties for pounamu extracted under any existing licences, and pass the money on to Te Runanga o Ngai Tahu.

At the time the Pounamu Vesting Act came into operation in October 1997, there were seven existing licences to extract pounamu, all of which had been issued under the previous Mining Act 1971, and continued by Part II of the Crown Minerals Act 1991. Pounamu extracted under three of the existing seven licences is the property of Mawhera Incorporation, whose shareholders are Poutini Ngai Tahu individuals. The other four existing licences were owned by non-Ngai Tahu.

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26Note that the term 'licence' was used in the Mining Act 1971, and the term 'permit' is used under the Crown Minerals Act 1991. The term 'licence' will be used to refer to both permits and licences, except where it is necessary to distinguish the two terms.
28The Crown Minerals Act 1991, s106 defines "existing privilege" as including every "Mining privilege granted under Part IV of the Mining Act 1971".
30Submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/1 (Ministry of Commerce), p2; Information supplied to the Chairperson, Maori Affairs Committee under letter dated 5 May 1997 from Ms Katrina Bach, Ministry of Commerce.
31One of these permits is held by the Mawhera Incorporation, the Maori incorporation representing many Poutini Ngai Tahu. It expires in May 2031. Two of the existing permits, expiring in August 2009 and May 2015, are held by L&M Mining Limited, a gold mining company. The permits cover gold and pounamu in the mid-section of the Arahura Valley. L&M Mining Limited has an arrangement with the Mawhera Incorporation whereby any pounamu turned up by L&M as a result of its gold mining operations on the Arahura River is the property of the Mawhera Incorporation. L&M Mining Limited representative, Interview with author, August 1998. The terms of this arrangement are quoted in The Proprietors of Mawhera Incorporation v Tumahai unreported, 01/03/1999, Somerville J, DC Greymouth MA479/97, pp7-8. See Chapter Eight of this thesis regarding the issues surrounding the ownership of pounamu.
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Tahu operators. Two of these were not being worked for pounamu, and have since expired.\textsuperscript{32} Another licence, over an area of Big Bay in South Westland, was worked up until its expiry on 14 November 2000. The final existing licence, which is for bowenite and serpentine in the Wainihinhi area near Kumara, has a right of renewal which the licence holder is currently seeking to exercise.\textsuperscript{33}

The preservation of all existing mining privileges, particularly the continuation of rights of renewal of mining licences and rights of priority under the Mining Act 1971, was an area of contention, and confusion, both during the Parliamentary Select Committee process, and after the Pounamu Vesting Act came into force. The Crown maintained that there were no rights of renewal for any of the existing pounamu mining licences.\textsuperscript{34} Members of the pounamu industry, accepting the Crown's position, argued before the Maori Affairs Committee reporting on the Pounamu Vesting Bill that the rights of existing mining licence holders to renew their licences would be defeated by the Bill, creating new injustices.\textsuperscript{35} One member of the pounamu industry has suggested that the former Department of Mines generally issued licences for less than the maximum period of 42 years, with a clear understanding that licence holders could renew such licences under section 77(2) of the Mining Act 1971, if they had not exhausted the resource and

\textsuperscript{32}Mining licence holder, Interview with author, August 1998.

\textsuperscript{33}\textit{Glenharrow Holdings Ltd v A-G} unreported, 6/10/00, Heron ACJ, HC Wellington CP321/99, p2, noted [2000] BRM Gazette 161; Mining permit holder, personal communication, May 2001. As at September 2001, there had been no decision on the application to renew the Glenharrow licence.

\textsuperscript{34}Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP / MOC/5 (Ministry of Commerce), pp7–8. Also for example, in a letter to the author, the Manager of the Permitting Unit of Crown Minerals advised: "The Crown Minerals Act 1991 does not provide for the right of renewals of mining licences for any mineral granted under the Mining Act 1971. Hence the mining licences for pounamu have no right of renewal."

\textsuperscript{35}Submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP / 8 (the New Zealand Jade Industry Association & the Jade Miners and Manufacturers Affiliation), 8B & 9. These sentiments were echoed in interviews with the author. Members of the pounamu industry, interviews with author, August 1998.
had otherwise fulfilled the requirements of the relevant legislation.\(^{36}\) It appears that under this practice, four of the existing licences were issued for a ten year period.

The Crown's position was incorrect at law. The Crown Minerals Act 1991 clearly saves the right to renew a mining licence issued under the Mining Act 1971 (section 77(2) of that Act), provided all other requirements of the legislation are met,\(^{37}\) and these rights are saved in turn by section 4(1) of the Pounamu Vesting Act. The confusion over rights of renewal was clarified by the High Court in *Glenharrow Holdings Ltd v A-G.*\(^{38}\) Glenharrow Holdings Limited purchased one of the existing pounamu licences sometime after the Pounamu Vesting Act came into force, but had been refused a renewal of its licence. The High Court held that the provisions of Part II of the Crown Minerals Act 1991 were clear in saving mining privileges under the Mining Act 1971, and that Glenharrow's licence could be renewed under section 77(2) of the Mining Act 1971, or the term of the licence extended under section 103D(3). Other licence holders, unaware of their rights to renew and relying on the Crown's incorrect advice, did nothing and have since lost any right of renewal with the expiry of their licences.\(^{39}\)

The Crown confusion over the saving of existing mining privileges also extended to certain priority rights to 'upgrade' a prospecting licence to an exploration licence, and an exploration licence to a mining licence.\(^{40}\) Because substantial investment is required to undertake the...
prospecting and exploration required to be in a position to exploit a mineral resource, the minerals regime protects the ability of a licence holder to progressively upgrade to a mining licence, and continue to have the right to hold a licence until the resource is fully utilised in the area covered by the licence. This system provides protection for the intellectual property and investment of miners, particularly in respect of newly discovered resources. 41

The Crown, again under the misapprehension that rights of existing licence holders were not saved by the Pounamu Vesting Act, stated:

... it is a necessary consequence of transferring ownership of pounamu to Ngai Tahu that any right to the next stage permit (ie the right to mine) enjoyed by an existing licence holder must be extinguished. If this were not the case Ngai Tahu would gain ownership without the ability to effectively control the use of the resource. The ownership right transferred by the Crown to Ngai Tahu would be qualified in a manner not provided for in the 'On Account' Settlement and Ngai Tahu's power over its taonga would be diminished. 42

The conflict over the rights of renewal and priority rights of existing pounamu licences demonstrates the manifest tension between the desire to return pounamu to Ngai Tahu and restore Ngai Tahu's rangatiratanga with respect to pounamu, and the desire not to create new injustices in the process. Both the Crown and Ngai Tahu expected that by November 2000, the only existing pounamu mining licences would be those in the Arahura River where the pounamu extracted is the property of the Mawhera Incorporation, giving Ngai Tahu effective control over all extraction of pounamu in its tribal area. The continuation of the Clenharrow licence limits Ngai Tahu's ability to control the pounamu resource, thereby limiting Ngai Tahu's rangatiratanga over pounamu.

programme (s43(1))". Somerville, An Analysis of New Zealand's New Mining Law, vol 2, pB-9 (28/19/1993).

41 The concept of any 'new discoveries' of pounamu is challenged by some Ngai Tahu who claim that all pounamu resources were known in traditional times.

42 Submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/5, p8.
From the perspective of the former existing licence holders, the Crown's actions appear disingenuous, if not dishonest. Only one of the existing licences is now able to be renewed, and then only after costly court action to force the hand of the Crown. Others, relying on the Crown's incorrect advice, did not renew their licence, lost their rights and the consequent protection of their intellectual property in those pounamu sources. This information is now available to Ngai Tahu to exploit if it chooses to engage in commercial pounamu extraction, a situation which some members of the pounamu industry believe to be unfair and theft of their intellectual property.

However, it must be remembered that the agreement to return pounamu to Ngai Tahu came at a crucial point in the settlement negotiations, and was a significant component of the Deed of 'On Account' Settlement, which led to the final stage of the negotiations of the overall Ngai Tahu settlement. Arguably, without the return of pounamu there would have been no settlement at all. The Crown's roles were in clear conflict. Returning pounamu to Ngai Tahu was essential to the justice of the Ngai Tahu settlement and required of the Crown as the historical wrongdoer, yet returning all pounamu to Ngai Tahu threatened to create new injustices. Perhaps the Crown discounted the rights of renewal and priority rights of the existing mining licence holders in order to secure a settlement with Ngai Tahu and restore its good faith with Ngai Tahu; maybe it simply acted on bad advice. Either way, the good faith of the Crown in the eyes of the pounamu industry was severely damaged as a result.

43Member of the pounamu industry, personal communication, May 2001.
44Members of the pounamu industry, Interviews; Submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/8 (the New Zealand Jade Industry Association & the Jade Miners and Manufacturers Affiliation), 8B & 9.
9.3 OTHER INTERESTS IN POUNAMU NOT PRESERVED:

NEW INJUSTICES?

For generations, people have been walking the rivers and beaches of the West Coast looking for pounamu. Pounamu is not easy to find. In its natural setting, the surface of pounamu is rarely green. Larger boulders almost always exhibit a waxy oxidised rind of varying colours, from milky white to rusty brown. Smaller pieces, more recently broken off a larger deposit or boulder, can be easier to recognise as pounamu, particularly if wet when the water brings the stone 'alive'. Pounamu is also difficult to locate because, apart from some easily accessible beaches, most pounamu is found in rugged and remote locations. Experience and knowledge of the New Zealand bush, of the stone, and great patience, are all required. A common saying with respect to finding pounamu is: 'You don't find it, it finds you'. The maxim of 'finders, keepers' generally applied to pounamu, except larger quantities or in situ deposits, where previously a mining permit would have been sought.

Many non-Ngai Tahu have a tradition of walking the beaches and rivers of the West Coast, and collecting pounamu (generally up to what a person can individually carry). For many

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45See Chapter One of this thesis for locations of pounamu, and generally Beck (1984), New Zealand Jade, chapter 2.
46Note that the rights of a finder are limited:
The simply [sic] rule that the finder acquires a title good against all but the true owner is, however, subject to some exceptions. First, if the finder is a servant or agent acting in the course of his or her employment or agency, the finder's title will belong to the employer or principal rather than the actual finder. Secondly, in cases where the found goods were attached to or under land, it is the owner or occupier of the land as against the finder who is entitled to the goods. ... A third exception to the 'finder's keepers' rule is that the right of an occupier of land to which goods are on (rather than in or attached to) the land prevail over the right of the finder if the occupier has manifested an intention to exercise control over the land and things which may be upon it or under it. ... Burrows Law of Torts in New Zealand quoted with approval in The Proprietors of Mawhera Incorporation v Tumahai unreported, 01/03/1999, Somerville J, DC Greymouth MA479/97, pp10-11. Note also the Crown Minerals Act 1991, s8(2)(b), and the slightly different provisions of the Mining Act 1971, s8, discussed below.
Pakeha West Coasters "gathering pounamu on the beaches is akin to breathing air". Pounamu is part of the identity of West Coasters particularly, although many members of the wider New Zealand community have a great respect for the stone. Other iwi also have a traditional relationship with pounamu. For many carvers of pounamu, an essential part of the creative carving process is finding pounamu themselves, in communion with the natural world. One (Pakeha) carver expressed the value of pounamu thus, "Pounamu ... is a material of great spiritual power, capable of expressing above all other indigenous materials, the essence of this land New Zealand that is our homeland". For another, "Pounamu embodies the spirit of this land, the spirit of aroha".

The practice of walking the rivers and beaches of the West Coast and 'fossicking' for pounamu by many New Zealanders was recognised under the Crown Minerals Act 1991, prior to the Pounamu Vesting Act. Previously, any person could collect pounamu in the bed of a river or lake, or in the coastal marine area, without a permit. Therefore, another consequence of pounamu ceasing to be a Crown-owned mineral under the Crown Minerals Act 1991 is that the public no longer has any 'right' to collect pounamu from rivers and beaches. Unless Ngai Tahu extends a similar privilege to non-Ngai Tahu, these traditions of predominantly West Coasters will die, or continue as acts of theft. The majority of Ngai Tahu Whanui attending the Pounamu Project consultations supported Ngai Tahu extending a 'privilege' to non-Ngai Tahu to fossick freely.

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50 Ngai Tahu Development Corporation, Pounamu Project Report on Community Values, p15.
53 Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/27.
55 See Chapter Six of this thesis for further details.
on the West Coast beaches, and take what they can carry individually. Te Runanga o Ngai Tahu has not extended any general privilege to date (mid-2001).

In submissions to the Maori Affairs Committee, members of the pounamu industry also claimed that new injustices would flow from section 5 of the Pounamu Vesting Act. To complete the return of ownership and control of pounamu to Ngai Tahu, section 5 of the Pounamu Vesting Act prohibits the Minister of Energy from granting any new mining permits under the Crown Minerals Act 1991, or pursuant to any undetermined applications made under the previous Mining Act 1971, in respect of the pounamu transferred to Ngai Tahu by the Pounamu Vesting Act. At the time the Maori Affairs Committee considered the Bill, there were thirteen outstanding applications to mine pounamu. Three applicants subsequently withdrew their applications and four made settlements with the Crown, leaving seven applications which the Minister of Energy was required to refuse under section 5 of the Pounamu Vesting Act. Some of these applications had been outstanding for some time because Crown Minerals policy for the decade preceding the Ngai Tahu settlement had been to issue no new permits to mine pounamu.

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55 Ngai Tahu Development Corporation (1999) Pounamu Project Report on Ngai Tahu Cultural Values, unpublished paper, p29. Note that the Whanui was less comfortable with such a privilege extending to fossicking in rivers and elsewhere.
56 Note that it is possible for non-Ngai Tahu to approach Te Runanga o Makaawhio for permission to fossick in South Westland. Te Runanga o Ngai Tahu representative, personal communication, September 2001.
57 Submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/8 (the New Zealand Jade Industry Association & the Jade Miners and Manufacturers Affiliation), 8B & 9. These sentiments were echoed in interviews with the author. Members of the Pounamu Industry, interviews with author, August 1998.
58 Ngai Tahu (Pounamu Vesting) Act 1997, s5.
59 Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/5. Eight were made under the Mining Act 1971, and five under the Crown Minerals Act 1991. All are referred to as applications for 'permits' although the Mining Act used the term 'licence'.
60 Members of the pounamu industry, Interviews. Note that the Mining Act 1971, s109 required every application to be determined within 12 months, unless extended "because of special circumstances". Members of the industry have suggested some applications were undetermined for eight years. In one case, the applicant had received a Department of Commerce 'Regional Development Grant' to establish a business extracting lower grade pounamu and manufacturing it into tiles and building products. When he applied for a licence to mine pounamu to establish this business, the Crown did not process the application due to the moratorium on issuing licences. Member of pounamu industry, Interview.
What was returned to Ngai Tahu? 269

until the settlement of Ngai Tahu's claims, so as not to prejudice the Crown's ability to return as much pounamu as possible to Ngai Tahu.61

Once again, the tension between restoring pounamu to Ngai Tahu in a manner ensuring Ngai Tahu's ability to effectively manage the resource, and the Crown's desire to avoid creating new injustices by protecting existing pounamu interests, is evident. Realising that the two were incompatible, the Crown offered to compensate those who had applied for pounamu licences. The Crown's offer covered only the costs of meeting the statutory requirements of a permit application.62 This was considered inadequate by many applicants as it did not cover the true cost of making an application under the Crown Minerals Act, or its predecessors.63

In addition, because section 5 of the Pounamu Vesting Act prohibits the Crown from issuing any permits in respect of Ngai Tahu's pounamu, all members of the public lose the right to be granted permits under section 23 of the Crown Minerals Act 1991 in respect of pounamu in Ngai Tahu's tribal area.64 Generally, Crown ownership of minerals under the Crown Minerals Act 1991 (and its predecessors) provides a 'level playing field' for those wishing to engage in mineral exploitation. Any person may apply for a permit, and the Minister's discretion to grant a permit must be consistent with the relevant mineral program.65 Accordingly, all applicants must be treated consistently and fairly. In practice, if the requirements if the legislation are met, the Minister will grant a permit to mine.

61May 1990 appears to be the last date of a grant of a pounamu mining licence (under the Mining Act 1971). Information supplied to the Chairperson, Maori Affairs Committee under letter dated 5 May 1997 from Ms Katrina Bach, Ministry of Commerce.
62Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/MOC/5, p8.
63Members of the pounamu industry, Interviews; Submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/8 (the New Zealand Jade Industry Association & the Jade Miners and Manufacturers Affiliation), 8B & 9. For example, the compensation offered did not cover the costs and investment involved in locating pounamu in its natural setting, prior to making an application for a licence.
64Submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/8 (the New Zealand Jade Industry Association & the Jade Miners and Manufacturers Affiliation), 8B & 9.
65Crown Minerals Act 1991, ss23(1)&22 respectively.
Now that pounamu is privately owned, there is no 'level playing field'. Ngai Tahu is not under any obligation to provide the public with any legal access to pounamu at all, and if it does decide to allow access, it is not subject to the requirements of natural justice. Ngai Tahu Whanui attending the Pounamu Project consultations expressed "general and widespread objection to any non-Ngai Tahu parties having a primary interest in the extraction of commercial quantities of pounamu". The Whanui did, however, see a role for non-Ngai Tahu in the manufacture of pounamu products through "joint ventures [with Ngai Tahu business entities] or similar business arrangements". One member of the pounamu industry perceives some irony in this situation: arguably, existing members of the pounamu industry have been effectively marginalised from the resource on which they have built their livelihoods, just as Ngai Tahu were marginalised from pounamu in the past.

There is the further issue of the equity of one group of New Zealanders owning all (subject to the limitations discussed) of any resource. Recall that Chapter Three of this thesis argued that because the past 200 years have seen a great change in circumstances where Pakeha New Zealanders now know no other home, an equitable sharing of New Zealand's resources is required by justice in the contemporary context. The vexed question as to where the balance lies between historical reparative justice, and the justice of the contemporary situation, confronts every New Zealander.

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66 Although depending on future circumstances, it may be possible to convince a court that despite pounamu being a private mineral, Ngai Tahu would be acting in the public realm if, for example, it was issuing licences to mine pounamu. In such a hypothetical situation, if Ngai Tahu's future decisions also affected individuals' rights and legitimate expectations, a court may also be convinced to exercise its discretion to require Ngai Tahu to observe the principles of natural justice.
69 Member of the pounamu industry, Interview.
The example of pounamu is unusual in that pounamu was, and remains, unmistakably a highly significant taonga of Ngai Tahu. The Crown's actions in expropriating pounamu were clearly in breach of the Treaty of Waitangi, and therefore, manifestly unjust. The case for reparative justice is strong. However, pounamu has become a significant cultural icon for many New Zealanders, particularly those living on the West Coast, where it has become part of the identity of Maori and Pakeha alike (although in different ways). Pounamu makes a significant contribution to the West Coast economy (and to a lesser extent elsewhere in New Zealand), providing much needed employment and attracting tourist dollars. Predominantly Pakeha individuals have built this industry through locating specific pounamu deposits in the bush, investing the resources in its extraction, and building up the necessary wherewithal for its manufacture and eventual sale as finished carvings to the market place. Some have spent twenty-five to thirty-five years in this pursuit. The renaissance in jade carving that has occurred since the 1970s was almost exclusively Pakeha-led. New technologies have been developed, and a new, distinctly New Zealand, style of carving has developed that is now recognised world-wide. A Polytechnic course in Greymouth is training a new generation of jade carvers to enter the industry. Those in the industry can, of course, carve other stone. But many New Zealand carvers wish to carve New Zealand jade above all other stone.

The interests of these carvers, of previous pounamu mining licence holders, and of all those New Zealanders wishing to walk the West Coast beaches and collect pounamu, are not protected by

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70 Ngai Tahu Development Corporation, Pounamu Project Report on Community Values, pp 6 & 15; Submissions to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/26W (Mayor, Westland district Council) & 11W (Mayor, Grey District Council).
72 Members of the pounamu industry, Interviews; Pounamu carvers, Interviews with author, December 1999.
73 Pounamu carvers, Interviews.
74 At Ngai Tahu Development Corporation's pounamu consultation meeting at Hokitika, March 1999, students from the jade carving course at Tai Poutini Polytechnic were "amongst the most vigilant saying their investment in their education would be jeopardised if access and regulations prohibited fossicking rights [and other carvers shared concerns with the same theme]." West Coast Times 24/03/1999, "Carvers send clear message over jade", p1.
75 Ngai Tahu Development Corporation, Pounamu Project Report on Community Values; Pounamu carvers, Interviews.
the Pounamu Vesting Act. Other iwi, who have a traditional relationship with the stone, are treated no better. Ngai Tahu is in a monopolistic situation with complete control over supply of the stone to the market (except for the one remaining pounamu licence). Will Ngai Tahu provide other New Zealanders with access to pounamu?\textsuperscript{76} The words of one (Pakeha) pounamu carver give pause for thought:

\begin{quote}
I have no other country. My ancestors are buried here. We have to make it work. We need to have a cultural understanding of each other. It will create strife if we say that things are limited to one race or culture.\textsuperscript{77}
\end{quote}

\section*{9.4 CONCLUSION}

The Pounamu Vesting Act vests ownership in Ngai Tahu of all Crown-owned pounamu occurring in its natural state in Ngai Tahu's tribal area. Existing private property rights to pounamu, arising from pounamu already collected at the time of the Act and as a result of Victorian titles, were saved. The Pounamu Vesting Act also preserved all existing mining privileges. These measures were intended to avoid any new injustices. As a result, Ngai Tahu now owns and controls the vast majority of, but not all, pounamu in its tribal area.

However, the Crown's stance in denying that existing mining licence holders had any right of renewal has led to the loss of rights to pounamu by some industry members. Further, the ability of the pounamu industry, and the public generally, to access pounamu has been jeopardised. There is no guarantee that Ngai Tahu will make pounamu available to those who have built

\textsuperscript{76}Note that Te Runanga o Ngai Tahu will not supply any commercial quantities of stone to non-Ngai Tahu until 2003 (at least). Te Runanga o Ngai Tahu representative, personal communication, September 2001. This is because large quantities of pounamu were extracted by mining licence holders before their existing mining licences expired (November 2000). There is, therefore, a over-supply of the stone at present.

\textsuperscript{77}Pounamu carver, Interview. A common theme of many views of members of the pounamu industry, pounamu carvers and members of the public alike, is that access to pounamu should not on the basis of race, ethnicity or tribe. See for example the views expressed to Ngai Tahu reported in Ngai Tahu Development Corporation, Pounamu Project Report on Community Values.
their livelihoods around the stone, and the ability of all New Zealanders to walk the West Coast beaches and rivers and collect pounamu pebbles has been taken away.

The Crown's role as wrongdoer and provider of reparation for past wrongs, and its role as the representative of the wider New Zealand public, were clearly in conflict and have limited the justice of the Ngai Tahu settlement. The blend of reparative and contemporary justice negotiated between the Crown and Ngai Tahu may well have created new injustices for non-Ngai Tahu with interests in pounamu, and particularly for some members of the pounamu industry. Much depends on what Ngai Tahu decides to do with its taonga.\textsuperscript{78}

\textsuperscript{78}Te Runanga o Ngai Tahu expects to release a tribal-wide pounamu management plan by mid-2002. Te Runanga o Ngai Tahu representative, personal communication, September 2001.
PART IV CONCLUSIONS
CHAPTER TEN

CONCLUSIONS

Let not this settlement turn the stone [pounamu] into a source of ongoing grievance. The mana of the stone, the mauri of the stone, the wairua of the stone, and the place it will hold in the future, is in the balance.  

10.1 THE JUSTICE AVAILABLE IN THE TREATY SETTLEMENT PROCESS

10.2 THE JUSTICE OF THE NGAI TAHU SETTLEMENT AND THE RETURN OF POUNAMU: INDICATIONS FOR ACHIEVING JUSTICE IN THE TREATY SETTLEMENT PROCESS

10.3 ACHIEVING JUSTICE IN THE TREATY SETTLEMENT PROCESS

1Submission to the Maori Affairs Committee on the Ngai Tahu (Pounamu Vesting) Bill NTP/27.
This thesis has examined the Ngai Tahu settlement, and in particular the return of pounamu, as a case study of the success of the Treaty settlement process in achieving 'justice'. Only a limited kind of justice is available in the Treaty settlement process. The Ngai Tahu settlement and the return of pounamu achieved a large measure of this limited justice. This thesis has argued, however, that new injustices may have been created in the Ngai Tahu settlement. The justice achieved in the Ngai Tahu settlement and the return of pounamu, and the possible creation of new injustices, have important implications for the justice being achieved in the Treaty settlement process.

10.1 THE JUSTICE AVAILABLE IN THE TREATY SETTLEMENT PROCESS

Because the Treaty settlement process is a response to complex interactions between cultures over time, justice in the Treaty settlement process is shaped by 'culture' and 'time' in complex ways. The justice of the Treaty settlement process is the shared notion of justice found in the Treaty of Waitangi, conceived in terms of the principles of the Treaty. Justice, therefore, consists in the restoration of tribal mana, rangatiratanga, and turangawaewae, or 'cultural survival', and laying the foundation for ongoing Crown-Maori claimant group relationships based on the Treaty of Waitangi. In the latter instance, 'time' and 'culture' act together to shape the justice of the Treaty settlement process.

The Treaty as shared justice constrains the kind of justice achievable of the Treaty settlement process in important respects. Treaty settlements do not challenge the ultimate sovereignty of
the Crown, and therefore, settlements are made within the current legal and political system. As a result, the Crown is both the historical 'wrongdoer', and the sovereign with 'good governance' duties and responsible for dispensing justice, although through different arms of the state. This means that the justice of the Treaty settlement process is a negotiated justice.

The influence of 'time', too, limits the justice of the Treaty settlement process. Because the Treaty settlement process takes place in the contemporary context, what is just redress depends both on the relevant past injustices and on the present in which redress is made. The justice of the Treaty settlement process, therefore, is not full reparative justice, but is tempered by contemporary justice concerns. The blend of reparative and contemporary justice concerns negotiated in settlements is primarily guided by the desire not to create new injustices in the process of making settlements.

10.2 THE JUSTICE OF THE NGAI TAHU SETTLEMENT AND THE RETURN OF POUNAMU: INDICATIONS FOR ACHIEVING JUSTICE IN THE TREATY SETTLEMENT PROCESS

The Ngai Tahu settlement, both in process and outcome, embraces a large measure of justice of the kind available in the Treaty settlement process. Clearly, the Ngai Tahu settlement is not full reparative justice. This is to be expected and was acknowledged in the Deed of Settlement: "it is not possible to and it is acknowledged that the Settlement will not fully compensate Ngai Tahu for all losses and prejudices suffered". The redress figure of $170 million is far short of even conservative estimates of the worth of the Ngai Tahu claim and reflects a compromise between reparative justice and contemporary concerns (what was fiscally and politically palatable, and perhaps, possible).

2Section 20.1.1(c).
But the settlement was not a simple cash deal. Financially, the settlement also contained the 'deferred selection process' and the 'right of first refusal' mechanisms, which offer Ngai Tahu opportunities to increase the value of the settlement, and thereby to re-establish a secure economic base for the tribe in the long term. In the financial year following the settlement, the tribe reported a $50 million increase in tribal equity to $256.6 million, largely as a result of the deferred selection process. This suggests that the settlement may well, over time, restore Ngai Tahu to the financial position it would have occupied had the injustices not occurred, in accordance with the counterfactual approach to reparative justice.

In addition, the Ngai Tahu settlement included a raft of mechanisms to recognise and restore Ngai Tahu mana, rangatiratanga, and kaitiakitanga over significant sites and resources, such as pounamu, as well as Ngai Tahu's mana and turangawaewae, generally, in its tribal area. These mechanisms, which included the return of significant sites, statutory acknowledgments, deeds of recognition, topuni, and nohoanga, indicate the negotiated blend of reparative justice (restoring Ngai Tahu mana, rangatiratanga and kaitiakitanga) and contemporary justice concerns (no new injustices by preserving private property rights and public rights of access to conservation land, for example). Many of the provisions designed to recognise Ngai Tahu's mana and to provide cultural redress also lay the foundation for the ongoing Crown-Ngai Tahu relationship, particularly in the area of co-management of significant sites and natural resources. Overall, these provisions also illustrate that settlements take place within the current legal and political framework and do not challenge the ultimate sovereignty of the Crown.

As a whole, the Ngai Tahu settlement achieved the kind of justice expected in the Treaty settlement process. The settlement is extremely complex and detailed, reflecting the
complexity of justice in the Treaty settlement process, and the complexity of the historical and contemporary contexts of the settlement. If future Treaty settlements use mechanisms similar to the economic and cultural redress mechanisms of the Ngai Tahu settlement, as is suggested by current Crown policy, a large measure of the justice available in the Treaty settlement process will continue to be achieved.

The opposition to the Ngai Tahu settlement, and the claims of lack of consultation within the iwi, raise doubts, however, that the settlement tapped all of the complexities of the Ngai Tahu situation. The Treaty settlement process itself is not particularly conducive to high levels of consultation within claimant groups. The key decision points for claimant groups as a whole are: (1) mandating representatives for negotiations; (2) approving the Deed of Settlement; and (3) approving the post-deed governance structure of the entity to receive settlement assets. At these stages of the process, all members of the claimant group have an opportunity to express their views. After the Crown has accepted a claimant group mandate and negotiations begin, and until after the Deed of Settlement is signed, the frequency and manner of consultation within the claimant group is constrained by the requirement that the negotiations remain confidential. Further, many groups may be in the process of developing new governance structures, with transparent decision making and accountability to the wider claimant group, while negotiations are taking place. Secure lines of communication and accountability may not, therefore, be in place during negotiations. Crown policy puts most emphasis on the ratification of the Deed of Settlement, which essentially amounts to a 'yes'/'no' choice for group members. This was the case in the Ngai Tahu settlement, which also indicates that settlement agreements are unlikely to be re-negotiated to take into account member opinions and concerns, once the parties have entered into a Deed of Settlement.

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5 Office of Treaty Settlements, Healing the Past, Building a Future, p60.
These factors suggest that the Treaty settlement process is not well structured to maximise the input of claimant groups, as a whole, into the detailed negotiations of settlements. The Treaty settlement process, therefore, may not be tapping into the full complexities of the historical and contemporary contexts of settlements. There is an obvious tension between achieving settlements within reasonable time frames and resource limits, and the risk of creating new injustices by failing to take into account all relevant factors. Claimant group members must be embraced in the negotiation process if they are to 'own' the outcomes of settlement negotiations, to understand the fine blend of reparative and contemporary justice concerns necessary when negotiating justice in the Treaty settlement process, and for all involved to ensure that no new injustices are created. If these conditions are met, the justice being achieved in the Treaty settlement process will be maximised and settlements are more likely to be durable. The Crown and the claimant group negotiators must remain mindful of these issues and work together to embrace the whole claimant group in the negotiating process.

Specifically, the return of pounamu to Ngai Tahu also indicates that, to a large degree, the Ngai Tahu settlement achieved the kind of justice available in the Treaty settlement process. In returning pounamu, the Crown restored to Ngai Tahu something unjustly expropriated and, by doing so, recognised the mana of the iwi. Moreover, because of the special significance and symbolism of pounamu for Ngai Tahu, the return was, in itself, a restoration of Ngai Tahu's mana. A large measure of reparative justice was achieved by the return of pounamu, without which there may have been no settlement at all. As in traditional times when peace was often secured by the gift of pounamu, the return of pounamu symbolised the good faith of the Crown in settling Ngai Tahu's historical grievances.\(^7\)

The current legislative framework has the potential, however, to constrain Ngai Tahu's full restoration of its practical exercise of kaitiakitanga with respect to pounamu. The issues relating to Ngai Tahu's extraction of pounamu from conservation lands, and Ngai Tahu's ability

\(^7\)See Chapter Seven of this thesis.
to police the resource indicate that, if the return of pounamu is to provide justice over time, careful attention to the Crown-Ngai Tahu relationship is essential. Only if Ngai Tahu is able to maintain traditional patterns of resource use, thereby rebuilding and strengthening the links with ancestors and place that are so important to Ngai Tahu's cultural identity, will the full justice of the return of pounamu be realised. While settlements are made within the current legal and political system—a constraint on justice in the Treaty settlement process—it is up to present and future generations to ensure the necessary institutional arrangements continue to deliver the ongoing justice implicit in Treaty settlements.

The return of pounamu to Ngai Tahu indicates the importance of the ongoing Crown-Maori claimant group relationships in delivering justice in the Treaty settlement process over time. The return of pounamu as a private property right is an exception to the Crown's policy that, in general, ownership of resources will not be transferred to claimant groups. The Crown has also indicated that conservation land will not be available for use in settlements, apart from individual, significant sites. When negotiating cultural redress, Crown policy suggests that the focus will be on meeting the interests of Maori claimant groups in land and natural resources in other ways. This approach is likely to result in the transfer of management (in full or in part)—rather than ownership—of significant sites and resources, and the recognition of claimant group interests through mechanisms such as statutory acknowledgments, topuni and nohoanga. This approach also minimises the creation of new injustices. In such cases, the achievement of justice over time will be all the more dependent on healthy and just, ongoing Maori claimant group-Crown (particularly the Department of Conservation) relationships.

The fact that the Crown did not return to Ngai Tahu all of the pounamu it unjustly expropriated illustrates that justice in the Treaty settlement process is constrained by the contemporary context in which redress is provided. In order not to create new injustices, the Ngai Tahu

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(Pounamu Vesting) Act 1997 preserved private property rights and mining licences existing at the time the Act became law. The issues surrounding the Crown's mistaken advice that mining licence rights of renewal were extinguished by the Act, demonstrate the tension in finding the appropriate blend of reparative and contemporary justice concerns, and the Crown's conflict of roles as historical 'wrongdoer' and sovereign with 'good governance' responsibilities in respect of the wider New Zealand public. Reparative justice clearly required that pounamu be returned in a manner which enables Ngai Tahu to exercise its rangatiratanga with respect to pounamu; the rights of existing mining licence holders threatened Ngai Tahu's full control of the resource. The Crown's mishandling of the situation appears to have created new injustices for those existing mining licences holders who did not renew their licences in reliance on the Crown's incorrect advice. Further, the return of the vast majority of pounamu to Ngai Tahu, with no guaranteed access to the stone for the existing pounamu industry, pounamu carvers, or the New Zealand public generally, points to new injustices.

When providing redress in situations of historical injustice, it is to be expected that some existing interests will be disturbed in order to restore land and resources unjustly expropriated to their rightful owner(s). How this can be done without creating new injustices will depend on the circumstances of each case. The theory stating that a blend of reparative and contemporary justice is required in the Treaty settlement process gives little guidance on the exact mix of the two required to maximise justice. It says only that once new injustices are created, the overall justice of settlements will be compromised. Compensating those people whose existing interests have been disturbed is one option for maximising justice in the Treaty settlement process. This option may not be particularly attractive to the Crown, or to the New Zealand taxpayer, as it adds to the cost of settlements. In the case of pounamu, the Crown offered a small amount of compensation to pounamu mining licence applicants. This could have been increased so that it more adequately covered the costs of making a mining licence application, for example, to

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include some recompense for the time and resources spent locating pounamu, and the intellectual property with respect to the location of deposits or 'new discoveries'.

Another option which is likely to lessen the sense of new injustices being created, and therefore also opposition to settlements, is increased Crown consultation with those 'third parties' directly affected by settlements. Consultation also offers the opportunity for alternative, or new, mechanisms to be explored, which may result in the avoidance of new injustices and thereby maximise the justice being achieved in Treaty settlements. The Crown undertook very little, if any, consultation with pounamu industry members. Although most in the pounamu industry acknowledged that Ngai Tahu had suffered historical injustices with respect to pounamu that required Crown redress, industry members suggested that if the Crown had undertaken consultation they may have been more positive toward the return of pounamu to Ngai Tahu and the way it was returned. In future Treaty settlements, increased consultation with affected 'third parties' is likely to bolster the public's confidence in the Treaty settlement process, add to its legitimacy, and maximise the justice being achieved.

However, it is still early days. Ngai Tahu is yet to announce its long-term plans for pounamu, and whether or not it will supply the industry with stone or extend to non-Ngai Tahu the privilege of fossicking for pounamu. Whether the matters identified as potential new injustices persist over time depends largely on how Ngai Tahu manages its taonga. The fact that many New Zealanders identify strongly with the land and its resources, and that taonga such as pounamu have become icons for a distinct 'New Zealand' or 'New Zealand/Pakeha' identity, indicates that there is common ground between Ngai Tahu and non-Ngai Tahu. Pakeha wish to be able to express their relationship with this land, their home, just as Ngai Tahu do, but often

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13I interviewed all relevant mining licence holders and many in the pounamu industry on the West Coast in August 1998. All maintained that there had been no Crown consultation.
14Members of the pounamu industry, Interviews with author, August 1998; Pounamu carvers, Interviews with author, August 1998.
in different ways. With careful management and a sensitivity to these issues, the mauri of pounamu, and the mana of the people involved with the stone, will be restored, maintained and enhanced. Then the justice of the Ngai Tahu settlement will be assured into the future.

Also expected from the kind of justice available in the Treaty settlement process is that pounamu would be returned to an entity different from the one(s) traditionally responsible for it. Much has changed for Ngai Tahu Whanui since the time of the Crown's land purchases. Despite ongoing fluidity within Ngai Tahu, there has also been continuity, and Ngai Tahu has come to act predominantly as an iwi under the name of 'Ngai Tahu'. Therefore, regardless of the traditional situation, pounamu was justly returned to the iwi, Ngai Tahu. Because Te Runanga o Ngai Tahu is the historical continuation of the first entities representing Ngai Tahu Whanui as an iwi, from an historical perspective there was justice in returning pounamu to Te Runanga o Ngai Tahu.

This thesis has argued that justice in the Treaty settlement process requires that the contemporary entity receiving settlement redress has historical continuity with the relevant unjustly-treated Maori community. In many cases, the appropriate contemporary manifestation of the relevant historical community may not be as apparent as in the case of Ngai Tahu as an iwi and Te Runanga o Ngai Tahu. Further, although it was just to return pounamu to Ngai Tahu as an iwi, there will be other situations where settlement assets may justly be provided at other than an iwi level. There may even be situations where urban or pan-Maori collectives can show sufficient continuity with an historical community to whom the Crown owed Treaty partnership duties which it breached. What is 'just' will depend on the circumstances.

The Ngai Tahu settlement and the return of pounamu suggests, however, that where contemporary entities receiving settlement assets do not represent all members and allow them to participate freely in the life of the collective, the Treaty settlement process will not achieve the full extent of justice available. The justice of the Ngai Tahu settlement was compromised
by the lack of representation, and therefore inability to exercise kaitiakitanga with respect to pounamu, for a group of Mawhera (Greymouth)-Arahura based Poutini Ngai Tahu whanau, sometimes known as the Tuhuru group. The issues surrounding the separate status of Waitaha and Ngai Tahu Mamoe are less clear cut than the Tuhuru case, but also raise concerns for the achievement of justice in the Ngai Tahu settlement, and ultimately, the Treaty settlement process. If even a minority of whanau cannot participate in the benefits of a settlement and the opportunities that a settlement brings for reviving a positive cultural life and identity, new grievances will be added to old ones and the sense of injustice will not be removed. If the internal politics highlighted in this thesis are not resolved by Ngai Tahu Whanui, there are likely to be adverse repercussions for the well-being of the tribe as a whole and for the durability of the settlement. It appears, however, that the representation issues with respect to Te Runaka o Kati Waewae may be resolved within the structure of Te Runanga o Ngai Tahu. At the time of writing, the situation is under review by runanga members and Te Runanga.\footnote{Te Runanga o Ngai Tahu representative, personal communication, September 2001.}

The theory of to whom redress might justly be given in situations of historical injustice gives no guidance on the internal structures appropriate for entities making settlements and receiving redress. These are issues of contemporary justice that will affect the durability of settlements. Moreover, it is far from clear what is an appropriate role for the Crown in such matters. The responsibility for internal politics must ultimately rest with Maori collectives in exercise of tino rangatiratanga. A few things, however, can be said.

First, the Crown must support the resolution of internal iwi disputes by providing appropriate (judicial) mechanisms external to the iwi. At present, section 30 of Te Ture Whenua Maori Act 1993 is the primary avenue available in the courts. It is questionable, however, whether the Maori Land Court is an appropriate body to give advice on matters of representation.\footnote{Although note that Te Ture Whenua Maori Act 1993, s33 provides for the appointment of two or more additional members of the Maori Land Court, who have knowledge and experience relevant to the subject-matter of the request.} A tikanga (custom)-based model may be more appropriate. The Waitangi Tribunal has taken
steps to incorporate bicultural representation and mandate dispute resolution dispute mechanisms into the Treaty settlement process, as indicated in its 'new approach' to inquiring into historical claims.\textsuperscript{18} The Tribunal's procedure for preparing for claim hearings now includes a number of conferences where, amongst other things, issues of representation and mandate are identified. The Tribunal will use alternative dispute resolution mechanisms such as negotiation and mediation,\textsuperscript{19} and convene hui (meetings), to assist claimants to resolve intra-group and inter-group disputes in accordance with local tikanga. In addition to these initiatives, the Tribunal's Director, Morris Te Whiti Love, has suggested that a mechanism is required to bridge the gap between the Tribunal's processes and the Crown's mandating procedure.\textsuperscript{20}

These measures aside, because its jurisdiction is to examine Crown actions in relation to Maori, the Tribunal's ability to assist in the resolution of internal mandate disputes is limited. It is possible for a disaffected groups to file claims before the Tribunal arguing, for example, that the Crown's refusal to negotiate with that group separately is a breach of the principles of the Treaty.\textsuperscript{21} The Tribunal has noted that such cases are more appropriately dealt with under section 30 of Te Ture Whenua Maori Act 1993, but will proceed, where it has jurisdiction. It will do so cautiously due to the political nature of settlements, "the artificiality of treating internal disputes as if they were disputes against the Crown, and the inherent difficulty of the subject matter".\textsuperscript{22} It is likely to intervene only "in clear cases of error of process, misapplication of tikanga Maori, or apparent irrationality".\textsuperscript{23}

\textsuperscript{20}Interview with author, April 2000.
\textsuperscript{21}This was the case in the Pakakohi and Tangahoe Settlement Claims. Waitangi Tribunal, The Pakakohi and Tangahoe Settlement Claims Report.
\textsuperscript{22}Waitangi Tribunal, The Pakakohi and Tangahoe Settlement Claims Report, p57.
\textsuperscript{23}Waitangi Tribunal, The Pakakohi and Tangahoe Settlement Claims Report, p57.
Second, as recognised in current Crown policy, if a claimant group is so divided internally that no secure mandate can be achieved, the Crown should not proceed to settle a claim. The risk of creating new injustices, and jeopardising the integrity of the Treaty settlement process, is too great.\textsuperscript{24} Compared with some other Maori groupings, Ngai Tahu is a relatively well-defined iwi. Issues of representation in other settlements may not be so easily, or neatly, managed. In some cases the Crown will need to be flexible in its preference only to negotiate with iwi and larger hapu groupings.\textsuperscript{25} Future settlements might alternatively recognise and provide for the distinct identity of minority groups, for example in the recitals, acknowledgments and apology of the settlement. It may also be appropriate for the Crown to suggest that as part of accepting a mandate where a clear minority exists, distinct representation for that minority is provided for both during the settlement negotiations, and later, in post-deed governance structures.\textsuperscript{26}

Third, the Crown must ensure that the entities receiving settlement assets have internal dispute resolution mechanisms for matters concerning representation. The Crown's criteria for governance structures requires that entities adequately represents all members of the claimant group, have transparent decision making and dispute resolution procedures, and are fully accountable to the whole claimant group.\textsuperscript{27} The Ngai Tahu Charter contains a basic dispute resolution mechanism, and this would have reassured the Crown that Ngai Tahu could, and would in time, resolve its internal representation issues.\textsuperscript{28} In cases where there are obvious minorities, but a mandate still exists, similar mechanisms must be in place, and perhaps an assurance from the claimant group that it will use its best endeavours to resolve existing disputes, before settlements take place.

\textsuperscript{27}Office of Treaty Settlements, \textit{Healing the Past, Building a Future}, p73.
\textsuperscript{28}Clauses 6.5\&24 of the Charter of Te Runanga o Ngai Tahu (amended as at 24 November 1999).
The Crown must remain attentive to representation and mandate issues if settlements are not to create new injustices by excluding whanau from receiving benefits through membership of contemporary Maori collectives, and thereby compromise the justice being achieved in the Treaty settlement process. The issues of the return of pounamu to Te Runanga o Ngai Tahu suggest that even in a well-organised and well-defined iwi, new injustices will be created if all iwi and hapu members are not represented by the entity receiving settlement benefits. This is another area where a healthy and just ongoing Crown-Maori relationship is essential. The Crown must be guided by Maori, and support Maori in their resolution of internal political disputes. If the Crown and Maori claimant groups take heed of the warnings arising from the representation and participation issues in the Ngai Tahu settlement and the return of pounamu, future Treaty settlements are likely to better achieve the kind of justice available in the Treaty settlement process.

In addition to raising issues of representation, the return (in effect) of pounamu to the Mawhera Incorporation raises substantial concerns about providing settlement redress to Maori incorporations governed by Part XIII of Te Ture Whenua Maori Act 1993 and the Maori Incorporations Constitution Regulations 1994. Because incorporation shares can be bought and sold, individuals and whanau who have accumulated large share holdings stand to gain far greater benefits from settlements than other members. There is no justification for this historically as these present-day individuals and whanau have not necessarily suffered any greater injustice than others in the group. Nor is it justified in the contemporary context as they do not necessarily have any greater current need, and in fact may have less need given their stronger financial position within these incorporations. In cases of taonga management, the argument that a greater financial interest (share holding) should lead to a greater ability to exercise cultural 'rights' (such as kaitiakitanga over pounamu) is spurious. Current Mawhera Incorporation policy provides that only one share is required to walk up the Arahura River and collect pounamu, but because the decision making of the Incorporation is effectively controlled
by the largest share holders, most members of the Incorporation cannot exercise full kaitiakitanga with respect to pounamu.

The share holding and share voting structure of Maori incorporations suggest that these types of entities are inappropriate to receive settlement assets, and inappropriate to hold taonga such as pounamu. Indeed the Waitangi Tribunal has expressed concern about providing settlement redress to Maori incorporations because of their share structure.29 Treaty settlements will not achieve the kind of justice possible in the Treaty settlement process if entities with structures similar to Maori incorporations are used to receive settlement assets.

10.3 ACHIEVING JUSTICE IN THE TREATY SETTLEMENT PROCESS

The Ngai Tahu settlement, and the return of pounamu to the iwi, suggest that Treaty settlements are achieving, and may continue to achieve, a large measure of the kind of justice available in the Treaty settlement process. The Ngai Tahu settlement and the return of pounamu indicate that Treaty settlements are more likely to achieve the limited kind of justice available in the Treaty settlement process if: the Crown consults more adequately with 'third parties' directly affected by settlements; there is improved consultation within claimant groups during negotiations; and mechanisms for resolution of political disputes internal to iwi, or between competing iwi or hapu groups, are enhanced. Further, if Treaty settlements are to achieve justice, Maori incorporations should not be used to receive settlement redress. Both Maori claimant groups and the Crown must remain sensitive to these issues when negotiating the blend of reparative and contemporary justice concerns in Treaty settlements. The Ngai Tahu settlement and the return of pounamu also clearly demonstrates that the ongoing Crown-

claimant group relationship is crucial to ensuring that Treaty settlements deliver justice over time, and are thus durable.

The justice achieved in the Ngai Tahu settlement, and that being achieved in the Treaty settlement process generally, will be judged in years to come with the benefit of hindsight. Future generations will know what Ngai Tahu decides to do with its taonga, pounamu. They will see whether it supplies the existing pounamu industry and perhaps allows the average New Zealander to collect pounamu while walking the West Coast beaches, and thereby to carry on Pakeha traditions and provide a means for others to relate to the land. They will also know whether, and how, the internal disputes surrounding representation of Tuhuru, Waitaha, and Ngati Mamoe, were resolved. Future generations will, therefore, be in a position to judge whether the settlement ensured Ngai Tahu's cultural survival, and whether the settlement reflected the full complexity of the historical and contemporary contexts of the Ngai Tahu situation. All of these factors will affect the justice of the settlement over time, and thus its durability.

What can be said now, just three years after the settlement legislation came into effect, is that the Ngai Tahu settlement intended to achieve justice of the kind available in the Treaty settlement process. This kind of justice is not a perfect justice, but justice rarely is in its application. From the perspective of the contemporary context in which the settlement was made, it has achieved a large measure of justice. It has provided Ngai Tahu with opportunities to restore its mana, rangatiratanga, and turangawaewae, and its kaitiakitanga with respect to pounamu, and some foundations for a more just ongoing Crown-Ngai Tahu relationship. Much is in Ngai Tahu's hands, but the Crown-iwi relationship is vital if the settlement is to realise its full potential of justice over time. The Crown and Maori alike must heed the warning signs arising from the possible creation of new injustices in the Ngai Tahu settlement and the return of pounamu if Treaty settlements are to achieve the maximum justice available in the Treaty settlement process.
HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty’s Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.
ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W. HOBSON Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[Here follow signatures, dates, etc.]
TE TIRITI O WAITANGI
(The Text In Maori)

Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawah ki nga Rangatira me nga Hapu o No Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatirantanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata Maori o Nu Tirani-kia wakaaetia e nga Rangatira Maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i t e Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiani, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

KO TE TUATAHI

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawangatanga katoa o ratou wenua.

KO TE TUARUA

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te
hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

KO TE TUATORU

Hei wakaritengta mai hoki tenei mo te wakaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) WILLIAM HOBSON,
Consul and Lieutenant-Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.
APPENDIX B

NGAI TAHU'S TRADITIONAL TERRITORY
APPENDIX C

SOURCES AND TYPES OF POUNAMU

POUNAMU SOURCES

There are seven major known fields of pounamuaw in New Zealand, all of them situated close to
the alpine fault in the South Island: Nelson, Westland, South Westland, Whakatipu
(including the Dart), Wanaka, Livingstone and Milford. A full geological survey of New
Zealand’s pounamu sources has never been undertaken, and thus the full extent of the resource is
unknown.

The Westland field is one of the main sources of pounamu. It covers the rivers between Hokitika
and Greymouth, and includes the Arahura River. It is the principal source named in Ngai Tahu

1From a geological perspective, nephrite is formed in the Southern Alps. Millions of years ago
certain igneous rock types flowed between sedimentary rock layers beneath the earth’s surface.
These rocks were then subject to intense folding and pressure causing the crystals to realign, twist
and entangle in a process known as felting. It is the process of felting that gives nephrite its
characteristic hardness and smooth wax-like texture. If re-crystallisation is not complete,
softer semi-nephrite is formed. The felted layers of nephrite, known as pods, in the Southern
Alps have been subject to erosion and glacial action over thousands of years causing the pods to
break up. Individual boulders and stones of nephrite are then washed down the rivers and
streams which cut through the Southern Alps. Some nephrite pebbles are washed out to sea,
tumbled by wave action, carried on the tides and finally washed up on the West Coast beaches.
Punakaiki seems to be the northern limit for beach-found nephrite. R. Beck (1984) New
Jade: The Story of Greenstone Wellington, A.H. and A.W. Reed Ltd, pp59–60; B. Brailsford
(1984) Greenstone Trails: The Maori Search for Pounamu Wellington and Christchurch, Reed,
pp1,10&14.

2The information concerning locations of pounamu is taken from Beck (1984), New Zealand Jade,
chapter 2, unless otherwise specified. See also Brailsford, Greenstone Trails, Beck (1970), New
Zealand Jade; and N. Hanna and D. Menefy (1995) Pounamu: New Zealand Jade Kamo,
Jadepress.
traditions and has been a major source of pounamu over the years. In particular, the pounamu found in the Arahura is of excellent quality. Large boulders of pounamu, often weighing more than a tonne, are found in the upper Arahura and its tributaries. The New River, on which the town of Marsden is situated, also provides a good source of pounamu, often referred to as 'Marsden stone'. Mixed quality stone is also found in the Hokitika River. Alluvial gold mining has occurred in this general area, and pounamu is often uncovered alongside gold and found in old gold tailings. Because the alluvial flats of this field provide the most easily accessible pounamu, this source has greatly diminished over time.

The other major West Coast field is found in South Westland. This field is bounded by Jackson Bay/Okahu, Big Bay, Red Hills Range, and the Arawata River, and includes the area of the Cascade River. This field overlaps into the Livingstone Mountains. The area is remote and rugged, with limited access. Huge boulders, some in excess of ten ton are found on the South Westland beaches of Big Bay and Barn Bay. This field did not become commonly known as a source of pounamu until the late 1960s and 1970s, but since then has become one of the major source of commercial quantities of pounamu. As discussed in Chapter Eight, pounamu was being extracted from this area up until November 2000, when mining licences issued by the Crown prior to the return of pounamu to Ngai Tahu expired. Bowenite (tangiwai) is found nearby at Anita Bay and Poison Bay, near the entrance of Milford Sound/Piopiotahi. This source was valued highly by Ngai Tahu and is mentioned in oral traditions. Tangiwai also occurs, although in far lesser quantities, in the Arahura River and also at the Nelson field.

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3See Chapter Seven of this thesis for a detailed discussion of Ngai Tahu traditions with respect to pounamu.
4This field has supplied industry with the majority of raw stone up until very recently.
5Beck (1984), New Zealand Jade, p8.
6See Chapter Seven of this thesis.
7Beck (1984), New Zealand Jade, chapter 3. See also Brailsford, Greenstone Trails; Beck (1970), New Zealand Jade.
The Otago sources of pounamu are also significant, although less well known. The Whakatipu field was an important traditional source of pounamu for Ngai Tahu, although its quality generally is not as good as in Westland. The field covers an area from just south of Kinloch along the Greenstone and Caples Rivers, to the upper reaches of the Dart River/Te Awa Whakatipu in the north. Pounamu is found in the Routeburn River, and to a lesser degree in the Caples and Greenstone Rivers. The Whakatipu sources were discounted by ethnologists and geologists for many years, despite the fact that Ngai Tahu traditions specified an important pounamu source at the western head of Lake Whakatipu. As discussed in Chapter Seven of this thesis, it was not until the early 1970s that the Dart River-Te Koroka source was 'rediscovered', being exactly where Ngai Tahu traditions described it. It is now protected as a Special Area under the National Parks Act 1952 and entry is by permit only. Pounamu is also found at the head of Lake Wanaka (Makarora), in Southland in the Livingstone Mountains, and outside Ngai Tahu's traditional territory in the Nelson region (D'Urville Island, the Dun Mountain complex, the Cobb River, and Matakitaki). The Nelson areas are not known to contain gem grade pounamu.

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TYPES OF POUNAMU

There are many varieties of pounamu. The following list covers the major types.\(^9\)

\textit{Inanga}

'Inanga' is pounamu that is pearly white to grey-green in colour. It is traditionally the most highly prized variety by Maori. It bears the same name, and is similar in colour to, the native juvenile minnow (whitebait). This type is mainly found at the Whakatipu field, primarily at the Dart River -Te Koroka source.

\textit{Kahurangi}

'Kahurangi' is one of the rarest varieties of pounamu, and was highly prized by all Maori. It has a light green hue, is highly translucent, and free from inclusions and other flaws. The name means 'highly distinguished' and a 'highly prized and treasured possession'. It was traditionally made into ceremonial adzes and pendants.

\textit{Kawakawa}

The most common variety of pounamu is 'kawakawa'. It may be so termed because of its resemblance to the deep green leaves of the kawakawa plant. Kawakawa is often flecked with black inclusions.

**Kokopu**

This variety of pounamu shows similar colouring and markings as the small native freshwater fish of the Galaxiide family (trout). It has dark brown, olive green and yellow colourings with brown spots.

**Totoweka**

This name means blood (toto) of the weka, a native woodhen. It describes a variety of pounamu similar to kawakawa, but with small reddish iron oxide inclusions. It is relatively rare.

**Other varieties**

Other varieties are also recognised including 'auhunga', 'kahotea', 'pipiwharauroa' (breast of the shining cuckoo), 'raukaraka' (leaves of the karaka tree), and 'flower jade' (referring to Marsden stone).
APPENDIX D

MEMORANDUM OF UNDERSTANDING
MEMORANDUM OF UNDERSTANDING

Dated 7th of October, 1998

BETWEEN:
A. THE UNIVERSITY OF OTAGO, a body corporate established under the University of Otago Ordinance 1869, the University of Otago Amendment Act 1961 and the Education Act 1989, of Dunedin, New Zealand (“the University”)

AND
B. TE RUNANGA OTAKOU, Tamatea Road, Otakou, RD 2, Dunedin (“Runanga”).

WHEREAS:
A. The parties have agreed to enter into this Memorandum of Understanding to outline the protocol/kaupapa for the Pounamu Research to be undertaken collaboratively by the University and the Runanga.
B. The University acknowledges that Pounamu is a taonga of Te Runanga Otakou. The University acknowledges that whanau, kaumatua and individual Ngai Tahu collectively own the intellectual property of their traditional and whanau knowledge and values relating to pounamu (“Traditional Knowledge”).
C. The Runanga wishes to retain discretion over access to and the use of its Traditional Knowledge.
D. The University of Otago names Associate Professor Ali Memon, Department of Geography, and Ms Meredith Gibbs, student, as the researchers at the University of Otago.

THE PARTIES AGREE AS FOLLOWS:

1 POUNAMU RESEARCH

1.1 The “Pounamu Research” means the collaborative research undertaken by the University and the Runanga into the:
   a) identification and input to pounamu management processes by Te Runanga Otakou; and
   b) traditional knowledge or values of the Runanga and its members relating to pounamu, or Traditional Knowledge.
1.2 The Pounamu Research is to be undertaken as part of the student’s research into the implications of the Ngai Tahu (Pounamu Vesting) Act 1997 for the management of pounamu in Te Wai Pounamu. Further details of this research are provided in Appendix A. This research will form the basis of the student’s thesis to be submitted in fulfilment of the degree of Masters of Arts (Geography) or any upgrading of that degree.

1.3 The parties agree to work collaboratively under this Memorandum of Understanding. It is acknowledged that both parties will contribute in various ways to facilitate the attainment of the Pounamu Research.

1.4 It is understood that the parties accept mutual responsibility for the Pounamu Research and will co-operate for the common good and achievement of the Pounamu Research.

2 PROJECT MANAGEMENT

2.1 A committee consisting of Associate Professor Ali Memon of the University and Mr Edward Ellison of the Runanga (or some other representatives of the Runanga as advised in writing) will be formed for advice and guidance.

2.2 This advisory committee will conduct its business in a manner which reflects the partnership between the researchers, and will:

   a) advise the student in the Pounamu Research;
   b) initiate any necessary contacts with the Runanga and Runanga members;
   c) facilitate the student in arranging meetings of the Runanga;
   d) confer over the withholding by the Runanga of any Traditional Knowledge;
   e) keep all records so as to inform the Runanga and the University of the progress of the research; and
   f) undertake other responsibilities for the common good and achievement of the research.

3 CONFIDENTIALITY AND RAHUI

3.1 The Runanga reserves the right to apply a “rahui” on Traditional Knowledge and prohibit its dissemination and shall advise the University in writing when it intends to apply a rahui. The contents of such a notice may need to be treated as Traditional Knowledge.
3.2 Any interviews undertaken as part of the Pounamu Research will be conducted according to Ethical Approval process of the University in place at the time. Particular reference is drawn to the follow two issues:

a) **Consent:** The consent of each potential interviewee will be sought before any interview takes place. An information sheet outlining the research proposal will be provided along with a consent form prior to the interview. In essence the consent form will seek the interviewee’s consent to undertake the interview, record the interview, transcribe the interview (subject to the right of the interviewee to correct and amend the transcript), to use the transcript for the purposes of the research project and to quote the interviewee (anonymously or by reference to the organisation on behalf of which they speak).

b) **Confidentiality:** The confidentiality of participants will be ensured by recording the information in a manner that does not disclose their personal identity. The identity of interviewees will remain confidential.

4. **INTELLECTUAL PROPERTY**

4.1 The University makes no claim, implied or explicit, to any intellectual property in the names, stories, values, knowledge, culture or heritage of the Runanga or its members, including (but not limited to) any Traditional Knowledge.

4.2 If discoveries are forthcoming other than the Traditional Knowledge, the intellectual property or ownership shall be negotiated under separate deed.

4.3 The University reserves the right to publish the Pounamu Research, and shall accord the Runanga every reasonable opportunity to view and comment on such papers before publication.

4.4 Any thesis relating to this research can be submitted for examination and due academic process.

4.5 Parts of any thesis relating to this research, may be protected as being Traditional Knowledge. The Runanga, University and the student must be informed in writing of all such protections which may limit the publication or any rights.
5  GENERAL

5.1 Any dispute between the parties arising out of this Memorandum of Understanding unable to be resolved by mediation shall be submitted to arbitration under the Arbitration Act 1908, or any similar Act of Parliament then being in force, if it cannot be first resolved by the parties.

5.2 Where any clause or part of any clause of this Memorandum of Understanding is declared invalid, unenforceable or illegal, all other clauses or parts of clauses shall remain in full force and effect.

5.3 Any amendment to this Memorandum of Understanding must be in writing and signed by both parties to this Memorandum.

5.4 This Memorandum of Understanding shall commence on the date of signing by all parties and continue in force until such time as agreed in writing by the parties.
SIGNED:

Dr Ian Smith
Deputy Vice-Chancellor
(Research & International)
on behalf of
THE UNIVERSITY OF OTAGO

Mr Kuao Langsbury
Chairperson
on behalf of
TE RUNANGA OTAKOU

sighted by
Associate Professor P A Memon

Ms Meredith Gibbs
APPENDIX “A”

RESEARCH PROJECT CONDUCTED BY
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Provisional Thesis Title: Implications of the Ngai Tahu (Pounamu Vesting) Act 1997 for the management of pounamu in Te Wai Pounamu

RESEARCH

Objectives

The objective of the research is to critically analyse (a) the issues of ownership and control of pounamu in Te Wai Pounamu and (b) the attitudes of interested parties (stakeholders) towards these issues. The project will take a historical approach to these issues in order to inform an inquiry into the current pounamu management issues facing Ngai Tahu. Accordingly, research will focus on the following research questions:

- What was the relationship between Ngai Tahu and pounamu in pre-colonial times? What place did it hold in society? How and why was it valued?

- What was the impact of colonisation on this relationship? The question of whether the Crown rightfully claimed ownership of pounamu will be explored through interpretation of the land sales of the mid-1800s and concepts of aboriginal or customary title, raising issues of sovereignty and the status and implications of the Treaty of Waitangi. In addition, the history of the Ngai Tahu claim and settlement will be explored in relation to pounamu.

- What is the effect of vesting ownership of pounamu in Te Runanga o Ngai Tahu (by the Ngai Tahu (Pounamu Vesting) Act 1997) in terms of the opportunities for Ngai Tahu to restore or rebuild their relationship with pounamu and thereby gain effective control over this resource?

The last of these research questions is likely to form the most substantial part of the thesis. This question may cover issues such as how Ngai Tahu might be able to exercise their kaitiaki role with respect to pounamu, what that relationship might mean in the current social and political institutional context and how a traditional/pre-European role might be adapted in the modern New Zealand context. This may lead to an analysis of possible management models (pre-existing and innovative) for both
the commercial and cultural use of Pounamu in accordance with tikanga Ngai Tahu. An analysis of other customary management models, such as eel management and customary fishing management regimes, and their applicability to management of Pounamu, may also be involved. These issues are amongst those currently facing Ngai Tahu in its management of Pounamu.

Information Sources

Information for this research project will be sought from a number of sources. The primary data source for this study will be semi-structured in-depth interviews with stakeholders. In addition, after consulting with various Ngai Tahu people and representatives, I propose to focus on how Te Runanga Otakou responds to the issues relating to pounamu management in Te Wai Pounamu and develops its policy in light of the wider pounamu management issues.

To date the following stakeholders have been identified although others may become apparent during the course of research:

- **Te Runanga Ngai Tahu** (as the legal incorporation of the iwi of Ngai Tahu and in whom the *Ngai Tahu (Pounamu Vesting) Act* 1997 vests ownership of pounamu);
- **The Mawhera Incorporation** (as the legal entity holding ownership of the bed of the Arahura River and pounamu in the Arahura River area);
- **Papatipu Runanga - Otakou** as a case study;
- **Ngai Tahu individuals**;
- **The holders of existing mining licences issued under the Mining Act 1971**;
- **Commercial operators using or selling pounamu products**;
- **Individual pounamu carvers/artists**;
- **Regional and District Councils**;
- **Office of Treaty Settlements**;
- **Department of Conservation** (access issues);
- **Customs officials and New Zealand Police** (enforcement issues); and
- **Conservation Groups**.

In addition to stakeholder interviews and any collaborative work with Te Runanga Otakou, historical records and general academic and other literature will be researched.
# LIST OF ABBREVIATIONS

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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AC</td>
<td>Appeal Cases</td>
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<tr>
<td>ASTEC</td>
<td>Australian Science, Technology and Engineering Council</td>
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<td>BRM Gazette</td>
<td>Brooker's Resource Management Gazette</td>
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<td>DC</td>
<td>District Court</td>
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<td>DSP</td>
<td>Deferred selection process</td>
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<td>HC</td>
<td>High Court</td>
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<td>NZCA</td>
<td>New Zealand Conservation Authority</td>
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<tr>
<td>NZJur(NS)</td>
<td>New Zealand Jurist Reports (New Series)</td>
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<td>NZLR</td>
<td>New Zealand Law Reports</td>
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<td>OTS</td>
<td>Office of Treaty Settlements</td>
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<td>RFR</td>
<td>Right of first refusal</td>
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<td>SC</td>
<td>Supreme Court</td>
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<td>TPK</td>
<td>Te Puni Kokiri</td>
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<td>TRONT Act</td>
<td>Te Runanga o Ngai Tahu Act 1996</td>
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Incorporated Societies Act 1908
Land Act 1892
Land Act 1924
Land Act 1948
Maori Affairs Act 1953
Maori Affairs Amendment Act 1967
Maori Incorporations Constitution Regulations 1994
Maori Purposes Act 1976
Maori Reserved Land Act 1955
Maori Trusts Boards Act 1955
Mawhera Incorporation Order 1976 (No 127)
Mining Act 1926
Mining Act 1971
National Parks Act 1980
Native Land Amendment and Native Land Claims Adjustment Act 1928
Native Purposes Act 1931
Ngai Tahu (Pounamu Vesting) Act 1997
Ngai Tahu Claims Settlement (Resource Management Consent Notification) Regulations 1991
Ngai Tahu Claims Settlement Act 1998
Ngai Tahu Claims Settlement Act Commencement Order 1998 (No 295)
Ngaitahu Trust Board Act 1946
Reserves Act 1977
Resource Management Act 1991
Runanga Iwi Act 1990
State-Owned Enterprises Act 1986
Te Runanga o Ngai Tahu Act 1996
Te Ture Whenua Maori Act 1993
Titi (Mutton Bird) Regulations 1978
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Treaty of Waitangi Amendment Act 1985
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