"MĀORI REPRESENTATION ISSUES AND THE COURTS"

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I INTRODUCTION

It is now 162 years since the Treaty of Waitangi was signed. Nowadays, it would surprise nobody to hear the Treaty referred to as the constitutional foundation stone of our nation. But although it and its significance remained to the fore in public discourse in the nineteenth century, by the twentieth century, its guarantees to Māori had become conveniently hazy in the minds of the ascendant colonists.

By the time I was born, at the dawn of the Swinging Sixties, talk of the Treaty was confined almost entirely to marae. The Treaty was never invoked in the context of contemporary politics, and even the pious utterances of officialdom on Waitangi day put the Treaty in an exclusively historical context.

In the twelve years I spent at school, I do not recall the Treaty being mentioned. Indeed, in the monocultural Lower Hutt of those days, the Māori children with whom I attended Hutt Central School saw their culture reflected only in the singing of the odd Māori song, the occasional "Māori project", and, in one stand-out year, in the playing of stick games.

Even when I came to Victoria University's law school in the late 1970s, the Treaty formed no part of my legal studies. My first recollection of the Treaty being mentioned at university was when, in 1983, I drifted into the study of Māori language. Lest you should think that in some prescient way, I apprehended the future importance of things Māori in New Zealand's jurisprudence, and in my life, let me assure you that the truth was otherwise and altogether less to my credit.

At the time, I was a junior lecturer in law at Victoria. I had been a student for five years, and was heartily sick of study. However, it was an inescapable part of the junior lecturer's lot that she sign up for a master's degree. I persuaded my unsuspecting supervisor that the area of research for me was the Māori Land Court (about which I knew absolutely nothing), and that in order to advance in that study I would need first to acquire some Māori language. At that point, you see, I felt much more enthusiastic about language-learning, than further legal study. I enrolled in Māori 101, and in

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so doing, moved for the first time in my life out of the safe confines of my Pākehā world into unknown territory. It was at the university's marae, in 1983, that I first heard the Treaty being invoked by people who were not "protestors", as a legal compact that ought to matter to all New Zealanders.

I have taken you on this brief journey, because I think we often forget how recently the Treaty assumed a significant role in public life in this country. I think, for reasons that I will come to, that it is important that we bear in mind for how much of our history we have been in denial about the proper status and rights of Māori. Essentially, it is for less than twenty years that we have been seriously endeavouring to re-shape the relationship between the indigenous people of this country, and those of us whose forebears came here as settlers.

The change of direction in public policy has seen New Zealand moving in step with other former colonies whose troubled past with indigenous peoples requires unravelling. Canada, North America, and latterly, Australia, have been walking parallel paths. We are part of an international phenomenon.

Fascinating though it is to look at the development of the rights of indigenous peoples in the broad, my focus today is on a topic that is altogether narrower and more local. I will call it – for want of a better label – Māori representation. The genesis of this topic is social and cultural, rather than legal, and that is where my consideration of it will begin. But then I will talk about how it manifests itself in legal contexts. I will focus in particular on how the problem arises in various guises for judicial determination, and consider a number of cases in point. I will look at how the judicial role may be discharged more constructively in future, particularly if the Te Ture Whenua Māori Amendment Bill is enacted.

II MĀORI REPRESENTATION: WHAT'S THE PROBLEM?

What is it that I am referring to? At its most basic, it is the difficulty experienced at all levels of Māori society in agreeing upon a person or entity that will represent the point of view of the collective.

It is not hard to see why there is increasing focus on this issue of Māori representation. As never before, Māori groups are now being called upon to respond in a representative fashion to all kinds of issues in many different contexts. Probably the most obvious and well-known context is that of Treaty settlements with the Crown.

In negotiating settlements, claimant communities are required to get themselves into a position where they are able to sign a "full and final" settlement agreement with the Crown. In doing so, the present generation is acutely aware that it is binding not only itself, but also generations to come. Time and again in this context, the putative interests of mokopuna (grandchildren/descendants) are invoked, often assuming more importance than the interests of the present-day beneficiaries of the settlement.

The same sense of responsibility attends the response of Māori groups in the resource management context. The Part II provisions of the Resource Management Act 1991 are now accepted as conferring on local authorities, and often also applicants for resource consents, a duty to "consult" with relevant Māori groups. Many local authorities have appointed Māori Liaison Officers, whose jobs are largely to do with co-ordinating the activities of those who seek a Māori response to planning documents and development proposals.

A Māori response is sought in many other areas of social policy. Consultation with Māori groups extends to decision-making about the delivery of health services, about electoral matters and Māori political representation, about broadcasting, about prisons and criminal justice generally, about coroners' practices, and about improving education outcomes for Māori – to name but a few.

The increased focus in public life on recognising the need for a Māori point of view to be incorporated in decision-making means that for Māori there are lots of collective decisions to be made. First, there is a decision about what the point of view is that needs to be expressed. But also, and equally challengingly, it must be decided on whose behalf the view is offered, and how and by whom it should be delivered. The more important the topic upon which the view is expressed, the more stresses are placed on the group to get all of it right, and to obtain community support for the decisions made.

I do not mean to imply, of course, that the current demands being made on Māori representative structures are, in themselves, a bad thing. Indeed, quite the contrary is the case, for the involvement of Māori in the making of important decisions, is indicative of a movement towards the partners to the Treaty of Waitangi acting in the manner of partners. I believe that to be a development in the right direction.

But, perhaps ironically, the demands have come at a time when in many ways Māori society is least able to bear them.

Non-Māori in this country have always yearned for a situation where "the Māori point of view" could be neatly delivered in any situation by a single and authoritative Māori voice. It has been sought, in the past, from outstanding Māori leaders like Sir Apirana Ngata and Sir Peter Buck (Te Rangihīroa). Then the New Zealand Māori Council was set up partly to perform that function, and it did in certain situations. The New Zealand Māori Congress had aspirations along those lines too, but its star quickly rose then fell. But really, it was always a forlorn hope. Māori views on any given subject are usually no more homogeneous than those of any other sector of society. But it is more complicated than a lack of unanimity.

A Kin-group Collectives

Most Māori people continue to see themselves as having their primary affiliations determined by whakapapa. To a certain extent, this is true of all of us, in that as humans we look to our family as a primary point of reference. But for Māori people, the reference point is not only familial, but

also tribal. The kin-group to which they relate is accordingly a lot bigger. The group will be further enlarged where there are multiple tribal links. This arises where a person derives his or her Māori descent through more than one Māori forebear, and those forebears were of different tribal origin. Usually a person will have stronger affiliations with one line of his or her descent than with the others. There will, therefore, be a primary tribal connection, and the other blood links will be regarded as secondary for practical purposes. But there will be situations in that person's life where all of his or her links will be relevant. When and how and to what extent the connections are played out will vary in different people's lives, and there are as many variables as there are people. The one constant for most Māori is that, for the purposes of decision-making affecting them in their capacity as Māori, they will want to have reference to their kin-group.

The stability over time of the political entity that comprises that kin-group, or that represents that kin group, is the factor at the fulcrum of this issue of Māori representation.

B Other Collectives

However, while the kin-group is the key collective for most Māori, today some Māori express their Māori-ness through other collectives. In the last Census,[1] 80,000 New Zealanders identified themselves ethnically as Māori, but did not specify their tribal origins. In the Census before last,[2] this figure was 140,000. That it has fallen may suggest that more Māori are getting in touch with their tribal origins. It is clear, however, that the effect of urbanisation on a relatively small, but nevertheless, significant minority of Māori has been to distance them from their wider kin-group, such that they no longer affiliate to a particular hapū or iwi. Sometimes, Māori living in cities form other bonds with Māori communities supporting pan-tribal urban marae and associated urban Māori authorities such as Te Whānau o Waipareira in West Auckland, and the Manukau Urban Māori Authority in South Auckland. For these Māori, the relevant collective is no longer kin-based. It has been suggested that the pan-tribal urban collectives have become the new iwi.

C The Nub of the Problem

The situation in a nutshell is this: Māori are under pressure to make many important, collective decisions. The ability to deliver those decisions is significantly compromised because traditional leadership of chiefs has been eroded, and overarching tribal structures are often weak and unstable. While other bodies claiming to represent the interests of groups of Māori have emerged – hapū groups, "urban Māori" organisations, and rūnanga, to name a few of the most common – these too are often weak, in that they frequently lack wide support, are too numerous and diverse, and their legitimacy can be vulnerable to challenge.

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1 Statistics New Zeaaland *2001 Census of Population and Dwellings: Ethnic Groups* (Statistics New Zealand, Wellington, 2002).

2 Statistics New Zeaaland *1996 Census of Population and Dwellings: Ethnic Groups* (Statistics New Zealand, Wellington, 1997).

III MĀORI REPRESENTATION: THE CAUSES OF THE PROBLEM

Problems arising from a failure of Māori representative structures hit the headlines in a multiplicity of guises. It is all too easy for the majority culture to dismiss them with a "Bloody Māoris scrapping again". But like all problems that manifest themselves often, there is a cause. And the cause is not that Māori people are more disposed to scrapping than the rest of us.

A The Lessons of History

As I embark on the task of delineating causes, I must apologise to those of you with a strong grasp on New Zealand's colonial history for taking you on a journey that you have been on already. But it will not take long. Without reference to a single date or historical source, I am now going to gallop through 200 years with a view to putting the current crisis of representation in context. The historical interpretation I offer is of course a personal one, but I do need to give credit to the writings of Justice Eddie Durie, whose work on customary Māori law has influenced so many of us working in this field.

Traditional Māori society was communal. Identification with the group was the individual's primary point of reference. Group identity was sustained by several means, but chief among them were associations with land, and whakapapa. Over time, autonomous kin-groups, or hapū, were not static. Hapū expanded, contracted, split, and reformed in response to many external and internal factors. However, social and political organisation was local. The cohesion of the hapū centred on the mana of a rangatira. The exercise of authority at the national or even regional level was unknown.

The arrival of settlers heralded a new era of change, characterised by more permanent settlements and larger aggregations of people. It was in this period that collectives expressed in terms of iwi or waka began to emerge. While hapū continued (and continue) to occupy a critical role, iwi, and confederations of iwi, gradually assumed political responsibilities at a regional level.

The right to land was claimed through whakapapa. Political authority over it was exercised by hapū. Control over land was inevitably local, because rights were allocated in terms of use. Tenure was conditioned by the contributions of individuals to the welfare of the group, expressed through participation in a host of activities. It was, then, by definition, complex. The culture was so knitted to the land that it could hardly be imagined to have existence apart from it.

In the second half of the nineteenth century, settlers began to confront the difficulties of parting hapū from their lands. Just as land was an integral part of Māori social and cultural identity, the acquisition of land was an indispensable ingredient of the settlers' dream of a new and better life. It was not long before settlers began actively to seek devices to break through the obstacles to land acquisition. War, followed by land confiscation, was an obvious and quick response. At a more subtle level – but no less devastating over time – the devices for achieving alienation were primarily twofold. The first was the redefinition and vast simplification of Māori land rights into idealised

patterns of ownership that would enable land to be treated as a commodity. The Native Land Court, charged with powers enacted by frustrated settler governments, played a key role here. Secondly, policies were aimed at undermining the cohesion and potency of the collective Māori social structures, so that they would be less able both to assert effective authority over land, and to protect it from alienation.

No great insight is required to discern that the settlers were successful in achieving dominance for the social and political reality that flowed from their own cultural preferences. There was little interest in preserving Māori cultural norms. Indeed, many believed that Māori would benefit from the superimposition of the Pākehā way.

With the loss of mana inherent in the loss of land, with the disintegration of hapū structures as the landholdings upon which they were centred diminished radically, with the poverty that accompanied or followed soon after land alienation, Māori were cut adrift from the constants that had defined their identity.

By the beginning of the twentieth century, ill health and demoralisation were widespread. The Māori population had declined radically, and some predicted the extinction of the race: a dire plight indeed. The Māori race did not die out, but neither was their poverty and misery quickly relieved. As the century proceeded, it is apparent that for many Māori, the hope for the future seemed to lie in embracing the Pākehā way. Māori parents saw their children's best interests as lying in an emphasis on competency in te reo Pākehā rather than in te reo Māori. It seemed more and more important to be able to transact life according to Pākehā rather than Māori norms. The communal mode of living, and the accompanying political structures that had characterised te ao Māori (the Māori world), began to fall away.

Lack of economic opportunity in the regions and the drastic diminution of the Māori land base meant that the impulse to urbanisation was irresistible. As the 1960s and 1970s wore on, fewer and fewer Māori were living in their traditional tribal areas, and almost none in the traditional tribal way. Few were raised speaking Māori, or were otherwise steeped in the traditional ways of doing things. Things Māori were less and less valued by Māori people themselves, as the worth of their culture was reflected scarcely at all in the world around them.

B Representative Bodies Today

By the 1980s, tribal authority exercised along traditional lines had become the exception rather than the rule. In many areas, Māori Trust Boards had been introduced. These were a hybrid of the Pākehā trust concept and the traditional leadership exercised by kaumātua. As tribal representative bodies, they continue to be supported in some areas, but in others there has been a resurgence of political energy at the hapū level.

Recent Māori politics has been characterised by two phenomena. First, the tension between the representative status of "umbrella" bodies like trust boards and runanga, and the desire for autonomy

of smaller kin-groups emphasising the ancestral power-base of hapū; and secondly, the emergence of "urban Māori" organisations, which stand outside tribal politics.

In most areas of the country today, there is no representative Māori body that would claim to speak for all members of a particular tribe on all matters. Where there is an umbrella group like a trust board or a runanga, that body may well have authority to speak for the collective on some issues, but not on others. The umbrella group will typically acknowledge the right of hapū to have a voice on matters affecting their locality; hapū will generally acknowledge the representative capacity of the umbrella group where broader tribal matters are in issue. "Urban Māori" organisations will claim the right to have a separate voice altogether.

Where the views of Māori in a district are sought, it is usually not enough to refer only to one tribal group. In many areas, the tangata whenua come from several tribes. While there are usually long-standing understandings between tribal groups as to their respective spheres of influence, these too are often tested by the modern pressures. The settlement of Treaty claims, for instance, can involve the handing back of land to one group in an area where another group also has links to that land. Or the Crown may recognise the mana of one group in a way that tends to undermine the mana of another. Competing groups in this situation will usually have reference to their respective whakapapa to demonstrate their links to the areas in question. Such contests are keenly felt. They can be hard-fought, and are difficult to resolve.

Sometimes the disputes about mana are not between tribal groups only. The "urban Māori" interest came to the fore in the context of the allocation of some of the proceeds of the settlement of the dispute between Māori and the Crown over the nature and extent of Māori fishing rights. Where nation-wide resources are in issue, it can now be expected that there will be a contest between tribes on the one hand, and on the other, non-tribal organisations seeking to represent the interests of those Māori people in the city, who do not affiliate tribally.

All these groups have legitimate interests. If the interests they represent are not to be overlooked, they must be asserted. Many different groups asserting different interests makes for conflict.

C Maintaining Strong Representative Bodies

Negotiating and managing the delicate interplay of rights and obligations at different levels within the tribal polity can often take up a terrific amount of time and energy for Māori people. Any differences of opinion will usually be required to be aired and debated publicly. Arriving at a consensus view is vital to the cohesion of the group, and to its relationships with other related groups. The long hours of attendance at meetings at marae and other venues are mandatory for Māori who want to remain actively involved in issues affecting them. For many, such occasions are enjoyable, and provide an opportunity to reinforce kin links. But when there are many decisions to be made there are many hui, and these obligations are difficult to reconcile with the other ordinary pressures of home, work, and family that Māori people have to manage like all the rest of us.

In short, maintaining robust representative structures is hard work. Constant attention is required to maintain relationships between those living in the wā kāinga (home territory) and those living away; between the older people wielding traditional authority and the younger people with different experience and new ideas; between the active few and the passive many. New models are constantly being sought, and tried.

We have moved so very far from the situation where, really little more than fifty years ago, most Māori were living in their own tribal regions, and were left by the rest of New Zealand to deal with their own issues in a sort of parallel universe. It is no wonder that, given the extent and pace of the change that has occurred, the situation today, as to who represents whom and as to what, is frequently unclear and unsettled. It is also unsurprising that, given the importance of some of the issues confronted by the various groups, and the value of the resources at stake, representation issues end up before the courts.

IV REPRESENTATION ISSUES BEFORE THE COURTS

A What are the issues that come before the courts?

The contexts in which questions of representation come before the courts are essentially these:

1 In the ordinary courts

Where government bodies and local authorities are making decisions affecting Māori, the courts are called upon to determine this question:

- Have relevant people been the subject of adequate and meaningful consultation?

Disputes about representative capacity and authority frequently come to a head in the context of settling Treaty claims. Here, the courts are called upon to determine:

- Who should be bound by the settlement?; and
- Who is entitled to benefit from the settlement?

2 In the Environment Court

In the Environment Court the representation questions are likely to be these:

- Who is the relevant iwi authority for the purposes of consultation upon a particular planning decision?
- Have the relevant people been the subject of adequate and meaningful consultation?

3 In the Māori Land Court

The Māori Land Court has, as a distinct part of its jurisdiction, the resolution of questions about representation referred to it, pursuant to section 30 of Te Ture Whenua Māori Act 1993. Under section 30, the Court must determine, for particular purposes, who should represent whom.

4 In the Waitangi Tribunal

Where representation issues arise particularly in settlement contexts, and there is no issue that is justiciable in the courts, members of claimant communities – usually those who are, or feel themselves to be, at the margins of claimant communities – come to the Tribunal for a finding as to whether the Crown has breached the Treaty in the process it has undertaken to effect settlement.

Why is it important that Māori representation issues are resolved?

First let me say that, in my view, the successful resolution of these issues of representation is important not only for Māori, but for the nation as a whole. They usually manifest themselves most stridently in contexts where the stakes are highest.

The Treaty settlement context is the obvious one. Treaty settlements are made by governments in the name of the Crown, and on behalf of the whole of society. But at the level of *realpolitik*, Treaty settlements are a burying of the hatchet between Pākehā New Zealand and Māori New Zealand. If, at the moment when Pākehā New Zealand (as represented by the government of the day) is holding out the hand of reconciliation, the people with whom the settlement is being effected are being blown apart by internal struggles that go to the core of their modern-day existence, the settlement process – even if a settlement is achieved – will not leave those people in good shape. It will take them years to recover from the stress and damage of that time, and years later, when reflecting on what happened, many will recall the struggle and the pain of the process rather than deriving satisfaction from the outcome.

There are those who will say that these disputes would not arise if there were strong leaders whose leadership was acknowledged and supported, or strong groups that managed their constituency well through good communication and shared decision-making. I agree. However, these fine attributes are of course much less likely to dominate in populations of people who – as the socio-economic indicators constantly remind us – are by and large not well off, not well educated, and who lack professional expertise. To my mind, the historical experience of Māori, which I have outlined, entirely explains these circumstances. The result is, and experience shows, that the strong leader/strong group scenario is difficult to achieve in the modern context. When the going gets tough, and the group is under pressure – where, say, it is required to make a difficult decision in a tight timeframe – relationships can break down entirely. Those whose needs have been least well provided for by the process of arriving at a collective decision sometimes decide to go for broke: litigate. At that point, it's goodbye marae processes: hello judge!

Confronted with this situation, how does the judge deal with it? I want to turn now to some examples.

B Cases in the Ordinary Courts

Mindful of time constraints, I focus in this paper on cases concerning representation that have come before the ordinary courts, rather than in the specialist courts.

The cases reveal that in every major settlement attempted by the Crown, proceedings have been brought by part of the claimant community that felt aggrieved by the process followed.

In 1992, in *Te Runanga o Wharekauri Rekohu v Attorney-General*,[3] the Court of Appeal heard representatives of iwi opposed to the Sealord Deal. That was the settlement between the Crown and Māori, in which Māori surrendered their interests in the commercial sea fishery in exchange for the Crown providing the capital for Māori to participate in a joint venture with Brierley Investments Ltd to purchase Sealord Products Ltd. At that time, Sealord owned twenty-six per cent of the commercial fishing quota.

In the case, the mandate of the representatives of "Māori" to seal the deal on their behalf was challenged. The Court said:[4]

> It was common ground among all the counsel that on the affidavit evidence this Court cannot determine with any accuracy the degrees of support and opposition that the proposal in the deed has from iwi generally, still less from hapū or individual Māori generally. All that can safely be said is that the deed was negotiated by some responsible Māori leaders and has significant Māori support but also significant Māori opposition. For the reasons about to be given, it is immaterial that an accurate assessment cannot be made.

The reason for non-interference was the convention that the courts do not act so as to prohibit a Minister from introducing a Bill into Parliament. Legislation to enact the Deed was immediately in contemplation, and the Court would not stand in its way.

In 1995, in *Greensill & Ors v The Tainui Māori Trust Board*,[5] certain Tainui people, some of them well-known and influential, but nevertheless excluded from the high table of the power elite, tried to enlist the Court's power to injunct the Tainui Māori Trust Board from proceeding further with its proposed settlement with the Crown.

In 1998, in *Te Ngāi Tuahuriri Runanga & Ors v Te Runanga o Ngāi Tahu & Attorney-General*,[6] the plaintiffs were opposed to the Ngāi Tahu settlement proceeding, because they did not wish certain rights of theirs to be the subject of negotiation with the Crown. In essence, they challenged the representative authority of Te Runanga o Ngāi Tahu, and tried to find legal obstacles to put in the way of the settlement. In the same year, *Waitaha Taiwhenua o Waitaki Trust & Anor v Te*

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3 *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 (CA).

4 *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301, 307 (CA).

5 *Greensill & Ors v The Tainui Māori Trust Board* (17 May 1995) High Court, Hamilton, M117/95, Hammond J.

6 *Te Ngāi Tuahuriri Runanga & Ors v Te Runanga o Ngāi Tahu & Attorney-General*, (13 May 1998) High Court, Christchurch, CP187/97, Master Venning.

Runanga o Ngāi Tahu[7] also concerned the Ngāi Tahu settlement. In that case, the plaintiffs were the Waitaha people, who are, according to the Court (drawing on the Waitangi Tribunal's 1991 Ngāi Tahu Report), "*an older iwi which occupied the South Island before the southern migrations of Ngāi Tahu and Ngāti Mamoe*".[8] Waitaha sought to be excluded from the settlement with the Ngāi Tahu Runanga, wanting instead to pursue their own claims against the Crown. They denied the authority of the Ngāi Tahu Runanga to represent them, and to purport to settle Waitaha claims.

Of late, the Crown has been endeavouring to reach settlement with Taranaki iwi. These attempts, too, have been subject to challenge. In 1999, in *Kai Tohu Tohu o Puketapu Hapū Incorporated v Attorney-General and Te Atiawa Iwi Authority*,[9] the Puketapu hapū of Te Atiawa iwi, like Waitaha before it, denied the authority of the mandated negotiating group Te Atiawa Iwi Authority Incorporated, to negotiate on its behalf. It sought to halt the settlement negotiation process until such time as its involvement in the negotiating process has been secured.[10] Last year, segments of another Taranaki iwi, Ngāti Ruanui, tried twice in the High Court by different means to stop the settlement with the Crown proceeding. In *Hayes & Anor v Waitangi Tribunal & Ors*,[11] the claimants sought to have set aside a Report of the Waitangi Tribunal on which the Crown was relying for its confidence that it was dealing with the right parties. The claimants alleged bias against the Tribunal's presiding officer. In *Rukutai Watene & Ors v The Minister in Charge of Treaty of Waitangi Negotiations & others*,[12] the process by which the terms of the settlement were being communicated prior to ratification was challenged.

C Cases about Relationships

In all of these cases, counsel struggled to present the judges with issues that were justiciable. That is because these cases were not really about legal issues at all: they were about relationships. They were about the breakdown in connections between people in the face of enormous strains that their internal structures were unable to manage.

In almost every case, I think, attempts had been made to repair the relationships, but these had failed. The groups who brought these issues to court, did so because the outcome mattered to them

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7 *Waitaha Taiwhenua o Waitaki Trust & Anor v Te Runanga o Ngāi Tahu*, (17 June 1998) High Court, Christchurch, CP41/98, Panckhurst J.

8 *Waitaha Taiwhenua o Waitaki Trust*, above, 1.

9 *Kai Tohu Tohu o Puketapu Hapū Incorporated v Attorney-General and Te Atiawa Iwi Authority* (5 February 1999) High Court, Wellington, CP344/97, Doogue J.

10 *Kai Tohu Tohu o Puketapu Hapū Incorporated*, above, 2.

11 *Hayes & Anor v Waitangi Tribunal & Ors*, (10 May 2001) High Court, Wellington, CP111/01, Goddard J.

12 *Rukutai Watene & Ors v The Minister in Charge of Treaty of Waitangi Negotiations & others*, (11 May 2001) High Court, Wellington, CP120/01, Goddard J.

very much, and because they had nowhere else to go. It is apparent that in every case the plaintiffs struggled fruitlessly to fit their issues into the boxes that courts will recognise and address, and uniformly, they failed. In every case, they left the courtroom with their conflict with their whanaunga (relatives) perfectly intact. Indeed, in some cases it was probably exacerbated by the blow to the mana of the hapless plaintiffs' groups who already felt marginalised, and now were told in no uncertain terms that, as far as the court was concerned, they did not have a leg to stand on.

And the relationship issues, which were what the Māori parties, at least, were really transacting, were outside the courts' purview. In the case concerning Te Atiawa representation, Doogue J clearly stated his view on the matter:[13]

> The Puketapu hapū has chosen, notwithstanding that membership is available to it in TAIA [the Te Atiawa Iwi Authority], not to authorise TAIA to represent it in respect of its claim. That is its decision and its choice. Why there was the falling out between the Puketapu hapū and the other five hapū at present members of the Te Atiawa iwi is not before the Court and is not germane to the present matter.

Later in his judgment,[14] he observed:

> It will be plain I reject the claim of the Puketapu hapū as pleaded and argued.
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> I would note that this is yet another case where the Court has been asked to intervene in what is essentially a political process without any proper foundation of law being put before it for the Court's intervention. The Puketapu hapū can point to no right which has been breached, no duty which has been unfulfilled, no decision capable of review where there has been a flawed process, and no justification for the Court to possibly grant relief.

The measure of the plaintiffs' desperation to find an avenue for their sense of outrage at their inability to influence the settlement process is that in nearly every case where the matter was brought to court, there was also an attempt to find a solution in the Waitangi Tribunal. Mostly, claimants' applications for urgent hearings were rejected. But in the cases where there were hearings,[15] or decisions on the merits of the applications,[16] the Tribunal too declined to intervene to

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13 *Kai Tohu Tohu o Puketapu Hapū Incorporated*, above 16.

14 *Kai Tohu Tohu o Puketapu Hapū Incorporated*, above 18.

15 The Tribunal's findings on the Sealord deal were set out in Waitangi Tribunal *The Fisheries Settlement Report 1992: Wai 311* (Brooker & Friend Ltd, Wellington, 1992); on the proposed settlement with Ngāti Ruanui in Waitangi Tribunal *The Pakakohi and Tangahoe Settlements Claim Report 2000: Wai 142* (Brookers, Wellington, 2000); on the proposed settlement with Ngāti Tama in Waitangi Tribunal *The Ngāti Maniapoto-Ngāti Tama Settlement Cross-claims Report 2001: Wai 800* (Brooker & Friend Ltd, Wellington, 1992).

16 See, for example, Waitangi Tribunal *Memorandum and Directions of the Waitangi Tribunal in Respect of an Aapplication (by Te Huirangi Waikerepuru and another on behalf of Hapōtiki and Ngāti Hāmua) for an Urgent Inquiry (concerning the Ngāti Ruanui Deed of Settlement): Wai 889* (Unpublished report of the Waitangi Tribunal, Wellington, 21 February 2002).

stop the settlements. It is very hard indeed to persuade any forum to call a halt to the process of effecting a settlement in order that the misgivings of the few can be addressed in the face of the apparent desire to proceed of the many, and of the Crown.

But the problem is that the misgivings, even where they are the misgivings of relatively few, do not go away. They remain there to fester and breed, and the rents and tears in the fabric of relationships become ever more difficult of repair. I think of the ongoing unhappiness within the Tainui iwi; the seemingly endless scrapping about the fisheries assets that still have not been allocated; the conflicts in the settlement community in Taranaki. Is it fanciful to wonder whether, if it had been possible to address the real essence of the plaintiffs' complaints about the process, and about the people by whom they felt aggrieved, the welfare of the communities affected by those conflicts would have been enhanced? The packages served up in court were, of course, only a partial reflection of what was going on in the Māori kin-groups concerned, but clearly there were matters of substance there that needed unravelling, and they were not. The court system possibly lacked the will, but certainly lacked the means, to help.

When I say that the courts lacked the means to help, I am speaking of the inflexibility of the court process, and the requirement for Judges to deal with matters in a strictly legal context. It is not available to a Judge, even if she should be so minded, to say, "Look, this is really not the way to deal with this. We need a forum in which all the viewpoints can be openly expressed, and the real issues identified, understood in their cultural context, and mediated". The Judge is obliged, as the Judges did in the cases I have mentioned, to determine the causes of action as presented.

Sometimes there may have been political motivation for the court cases I have referred to. Obviously, litigation can serve as a means of raising points at a political level. I do not want to over-simplify the nature of the litigation as being purely a cover for relationship issues. In many cases, there were other things going on. There was almost certainly an aspect of using the courts to ventilate frustration with the settlement process, and to deliver messages about that to government.

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

V MĀORI REPRESENTATION: A SOLUTION?

A Mediation of Representation Disputes

The obvious answer is mediation. In my experience of mediating issues with Māori parties, even when the issue is not resolved, the parties come out better off for having aired their take (issues, grievances) in a controlled and constructive environment.

Currently, the options available for the resolution of representation issues in any forum are limited.

B Mediation in the Waitangi Tribunal

Clauses 9A-9D of the Second Schedule to the Treaty of Waitangi Act 1975 allow the Waitangi Tribunal to refer a claim for mediation. Sometimes this power has been used in an attempt to resolve disputes internal to claimant groups, or between claimant groups.[17]

However, the focus of the provisions is on settling "a claim" by mediation. Because the claims under the Act are between Māori claimants, on the one hand, and the Crown on the other, the legislation apprehends that the claim being mediated is that between a claimant group and the Crown, rather than between claimants. Nevertheless, the provisions are useful to the Tribunal as a tool that can be deployed to resolve representation issues that arise in its jurisdiction. It is anticipated that more use may be made of it in future, in the context of the "new approach" to running Tribunal claims that has recently been introduced. A feature of this new approach is to focus, in the period before claims go to hearing, on identifying and resolving representation issues in the claimant community. The objective is to diminish the extent to which, as in the past, representation problems were papered over for the purpose of presenting a united front to the Tribunal. The tendency then was for the weaknesses in representative structures to emerge at the conclusion of the Tribunal process, leading to fragmentation of the claimant community, and delaying – and in one or two cases,[18] preventing – settlement with the Crown.

C Representation disputes before the Māori Land Court

The Tribunal's ability to refer claims to mediation is relevant only to its jurisdiction. The focus in section 30 of Te Ture Whenua Māori Act 1993 is wider, and addresses explicitly the need for representation issues within and between Māori groups to be resolved.

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17 In fact, mediation has not been widely used in the Tribunal. Nor has much record been kept of the attempts that have been made. The first mediation under the auspices of the Tribunal was of a dispute concerning the Waitomo Caves in the late 1980s. This led to agreement of the parties on a resolution. Since then, there have been three mediations: between Ngāti Pikiao and Ngāti Makino in 1996, between two hapū of Ngāti Ruanui (Pakakohi and Tangahoe) and the Ngāti Ruanui tribal negotiation body in 2000, and between Ngāti Maniapoto and Ngāti Tama also in 2000.

18 The Muriwhenua situation is a case in point.

Section 30 confers on the Māori Land Court the power:

> (a) At the request of any court, commission, or tribunal, [to] **supply advice**, in relation to any proceedings before that court, commission, or tribunal, as to the persons who, for the purposes of those proceedings, are the most appropriate representatives of any class or group of Māori affected by those proceedings; and
>
> (b) At the request of the Chief Executive or the Chief Judge, [to] determine, in relation to any negotiations, consultations, allocation of funding, or other matter, the persons who, for the purposes of the negotiations, consultations, allocation, or other matter, are the most appropriate representatives of any class or group of Māori affected by the negotiations, consultations, allocation, or other matter.
>
> [Emphasis added]

While this section allows a Māori Land Court Judge to focus on the problem, the efficacy of this jurisdiction is limited because the Judge is required to make a determination. These are not issues where a determination made by an adjudicator is likely to be the answer. In my view, the solution needs to arise from the people themselves.

The Māori Land Court has made a number of determinations pursuant to section 30, and in all the situations with which I am familiar, there has been difficulty in getting the Judge's determination to stick. A decision imposed from the outside all too often lacks the essential feature of capturing the will of the people to abide by it. The underlying dissension simply continues.

A case in point was *In re Tararua District Council*,[19] where the presiding Judge, together with two additional Māori members, determined the question as to who should represent Māori in dealings with the Tararua District Council. The Tararua District Council initiated the application, and for the Council the primary question was with whom it should consult in the context of the Resource Management Act 1991. The application presented itself to the Court as a competition for ascendancy between local Ngāti Kahungunu and Ngāti Rangitāne. The Court issued what I consider to be a very fine decision, and ordered that each tribal group should nominate three representatives to a consultative committee. Ngāti Kahungunu complied with the order, and Ngāti Rangitāne did not. The Court ordered that in the meantime the Tararua District Council should consult with the three nominated by Ngāti Kahungunu. Ngāti Rangitāne appealed the Court's decision.

From reading the decision of the Māori Appellate Court,[20] which recounted the arguments of the parties, it seems that the Court may have misunderstood the real reservations of Ngāti Rangitāne about Ngāti Kahungunu being the subject of consultation with the District Council. If they were understood, they were not really addressed in the solution arrived at by the Court. I think that a

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19 *In re Tararua District Council*, 138 Napier MB 85 (Maori Land Court).

20 *In re an Appeal by Rangitāne o Tamaki-nui-a-rua Incorporated Society*, 11 Takitimu Appellate Court MB 96-108 (Maori Land Appellate Court).

compromise solution would have been available, and would have been accepted by Ngāti Rangitāne, but the kind of compromise required was not likely to be arrived at by an outsider. It had to do with whakapapa and mana and arose from a desire on the part of Ngāti Rangitāne to assert itself in the face of a larger tribal group that was accustomed to taking the dominant tangata whenua role in the district. But the reality was that nearly every Ngāti Rangitāne person concerned had Ngāti Kahungunu lines of descent, and nearly every Ngāti Kahungunu present was also Ngāti Rangitāne. The situation cried out for mediation rather than litigation.

Happily, I am not alone in thinking that mediation is the way forward in this area.

D Law Change Pending

Currently before Parliament is a bill amending Te Ture Whenua Māori Act that confers on the Māori Land Court the power to handle representation issues differently. I have attached the relevant clauses to this paper. The intention of the new sections is "*to enable and encourage applicants and persons affected by an application under section 30 to resolve their differences concerning representation, without adjudication*" (new section 30A). Other courts, commissions, or tribunals can invoke the Māori Land Court's jurisdiction on representation issues by written request, and the Judge addressing the request may "*refer some or all of the matters arising from the request to a mediator for mediation*".

The significant change introduced by the new law is that the option is now available in all matters of representation coming before the Court, whether in its own jurisdiction or arising from other contexts, to be addressed by means of mediation. Sometimes the mediator will be an outside appointee, and sometimes a Judge. Those Māori Land Court Judges not already experienced in mediation are currently undergoing training in anticipation of the change.

It will be apparent from all I have said that it is my view that, should the law be introduced, the chances of resolving representation issues for the benefit of Māori, and those dealing with Māori, will be increased. New options will be available to judicial officers in other courts to facilitate the resolution of representation disputes that come before them. And a process that enables the real issues to be focussed on will be to the benefit of us all.

E Other Hurdles to Overcome

But it would be foolish to regard the introduction of a specific power to mediate representation disputes as a panacea. While the flexibility of mediation makes it altogether more suited to resolving these kinds of issues, the experience thus far of the Waitangi Tribunal – admittedly very limited – is that it is hard anyway.

Ultimately, the task of defining groups and matching them with resources is extraordinarily difficult, and that is what Treaty settlements entail. A process that requires as an outcome the definition of the relationship of a Māori kin group with an asset will always produce conflict and

pain, because it involves defining that which is by its nature indefinable, or which is changed by the process of definition.

In this, there is an ironic parallel between the fluid, complex and subtle traditional rights that the Native Land Court was called upon to delineate in the context of allocating land interests in the nineteenth century. In many ways we are experiencing again the pain and difficulty of transacting the discordance between fluid understandings and relationships and usages on the one hand and the requirement for the creation of more concrete property rights on the other.

So it is not surprising, in my view, that the mediations conducted by the Tribunal should have had only indifferent success. But we should not be too quick to brand them "failures" when they do not immediately arrive at a resolution of all the issues.

For example, I was the presiding officer last year over the Waitangi Tribunal that heard the claim of Ngāti Maniapoto, with respect to the Crown's impending settlement with neighbouring tribe Ngāti Tama. The issues between Ngāti Maniapoto and Ngāti Tama had earlier been the subject of mediation, but the mediation had not resolved the dispute. Nevertheless, it was apparent to the Tribunal at the hearing that much ground had been covered in the mediation, and that the positions of the parties had advanced considerably as a result of it. The work that had been done enabled the Tribunal to pare away the side issues, and bear down on the nub of the differences between Ngāti Maniapoto, on the one hand, and Ngāti Tama and the Crown on the other. Our hearing was considerably shorter, and I think our Report more concise and useful, because of the mediation that had gone before.

While a few representation disputes will not be resolved by mediation – are indeed by their very nature virtually insoluble – I think we are, as yet, a long way from truly exploring the potential of this tool for resolving these kinds of disputes.

I need to point to what I consider to be a significant reason for the Waitangi Tribunal not having made greater use of the mediation provisions in its Act, and why mediations that have been attempted may not have achieved the desired outcomes. Quite simply, we are not good enough at it yet.

The kind of mediation I have been talking about is possibly the most difficult kind of mediation there is; no one has done many of them; and there is not as yet a stable of suitably qualified persons to draw upon. This means that there is a lack of confidence in embarking upon mediation as a response to representation problems when they arise.

As far as a suitably qualified mediator is concerned, filling the job description is a tall order in anyone's terms. The perfect candidate will be a person fluent in two cultures and two languages, with legal training and advanced skills in mediation. Sometimes representation disputes are not bi-lateral but multi-lateral, and in the latter case, experience of multi-party mediation is required.

To be candid, such people probably do not yet exist, although some come close. The kind of mediation I have been talking about is a specialised field, but is really only now being recognised as such. However, I am confident that with training and experience – especially experience – a core of experts will emerge. As they say, it will not happen overnight, but it will happen.

F Conclusion

In my view, effective mediation has to happen, because the record to date of resolving issues of representation is not good. In too many cases, the fall-out from such disputes is really impeding progress for Māori people. If there is no agreed basis for the making of decisions, paralysis ensues. I believe that, as a society, we need to strengthen our commitment to finding ways of identifying and improving upon techniques for resolving representation issues. The proposed legislation should help.

I look forward to the challenge ahead. If we in the Māori Land Court are able to develop techniques for reliably clearing away representation conflicts and putting in their place better relationships and robust representative structures, we will really be making a difference.