A Ngai Tahu Perspective on Some Treaty Questions

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I was always taught never to begin a speech with an apology. I will therefore confine myself to an explanation. What I am about to say will be relatively general in nature because of the particular situation in which Ngai Tahu finds itself at the moment. It will also be necessarily somewhat disjointed because I want to address some distinct topics that do not necessarily flow evenly one onto the other.

Ngai Tahu are engaged in formal proceedings before the Waitangi Tribunal on an extension of the *WAI 27* case[1] under the Crown Forest Assets Act 1989. It is the first such case of its kind to have reached this stage of development. We are also engaged in preparation of various other matters for the High Court and the Court of Appeal. These proceedings have largely resulted from a failure in the negotiation process - the causes of which I do not want to spend too much time on as the basic elements have had more than enough exposure this week already.

However, I am anxious not to deprive myself of the legal and judicial services of certain of those present either on a basis of presumptive bias or on any other grounds. It is for these reasons that I propose to speak more generally than I otherwise might and, I hope, with an uncharacteristic measure of circumspection.

As is widely confirmed by my critics I am a relatively simple minded person. In keeping with that view my perception of the Treaty is relatively simple. I see it very much as a Trinity:

ARTICLE I I see as being concerned with governance and the distinction between that and that rather curious notion, sovereignty - which I might add is not well defined in the Treaty discourse from either side.

ARTICLE II I see as being concerned with the property rights of tribes and their effective, and continuing, control over these rights. I see this particularly in respect of their own assets, and their ongoing interest in natural resource control. It is worth commenting that I do not believe that the Tribunal was correct in classifying Te Reo as a taonga in terms of Article II and I take broadly the same view of airwaves and items of that kind.

ARTICLE III Is commonly described as the equity package of the Treaty. It is my view that Article III conveys to Maori no greater and no lesser rights in social and legal terms than are available to the general populace but it does guarantee the full expression

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1 Waitangi Tribunal *Ngai Tahu Report* (Wai 27).

of those rights. It is here that I believe that Te Reo and other such matters should properly sit, as examples of universal rights of which no citizen should be deprived.

These three elements have their own autonomous "theological personality" for me. However, like the Christian Trinity from which I drew my metaphor, they also have a unity. In current Ngai Tahu thinking that unity comes most forcefully into play in the relationship between the Crown and our Iwi over matters of resource management and control. Our view derives very clearly from our general view of the proper role of the State. We see the State as having a function, a duty and a right to regulate and protect in the national interest but we draw quite heavily on Brennan J and his colleagues and their elegant expression in *Mabo*[2] of the distinction between sovereignty and ownership.

The notion that the larger society has necessarily to "own" as well as regulate natural resources and various other taonga, which we believe were secured and guaranteed to us by Article II of the Treaty, we find repugnant. It is an area of democratic Kiwi thinking which, in my personal view, is a deliberate ploy to prevent the realisation of the Treaty promise. The phrase "for the use and benefit of all New Zealanders" has for us less of an "odour of sanctity" and more of an "odour of sanctimony" - the latter being, I understand, the noun of "sanctimonious" - which seems a useful play on words given my metaphor of the Trinity.

The literature contains widespread reference to the Treaty of Waitangi as an international treaty and there is a reasonable amount of discourse based on that thesis. Recently on the Hirangi Marae before a huge gathering of tribal representatives convened by Sir Hepi Te Heuheu, Joe Williams delivered an outstanding analysis of the present Maori situation. In the course of that he relied heavily on *Te Heuheu* v *Aotea Maori Land Board*[3] and the decision of the Privy Council which defined the Treaty as an international treaty, and thus having no force at domestic law unless imported specifically into statute. In common with Joe Williams, I believe that is a question long overdue for further discussion. The notion of a treaty designed to govern and control domestic relationships being classed as an international treaty, a species which, by their definition, deal with relationships between nations, is at best misguided - as Skerret argued in relation to the Rotorua Lakes. It is my view that we are long overdue for a reassessment of that argument and that it can, and should, be argued that our Treaty is in fact a domestic contract between the Crown and signatory tribes and, as such, properly subject to the general law of contract or something like it.

In terms of historic Treaty issues, of course, that notion would raise the question of the Statute of Limitations and a whole range of legal issues of that ilk. It is about time, in my view, that those questions, too, were reviewed in terms of our Treaty jurisprudence. I note, though, with interest the findings of the Waitangi Tribunal in its *Ngai Tahu*[4] report that certain of the actions of the Crown constituted "unconscionable fraud" and that is one of the matters, like murder, which is capable of surmounting the

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2 (1992) 175 CLR 1.

3 *Hoani Te Heuheu Tukino* v *Aotea District Maori Land Board* [1941] AC 308.

4 Above n 1.

Statute of Limitations. In terms of my opening comments about my wish not to deprive Ngai Tahu of senior judicial services it would be improper of me to go further.

I well appreciate that there is more than one question to be addressed in the somewhat simple statement I have just made but suffice for the present, I do believe that the wider notion of the status of the Treaty and its place in our laws merit some further, seriously considered, judicial attention.

One of the great difficulties that arises in conducting negotiations on Treaty settlements with the Crown as an outcome of Tribunal cases is that there are a number of fundamental questions commonly underlying the negotiation process which have not yet been properly addressed in Treaty, or in any other, terms. In dealing with the State one comes quite quickly to these fundamental questions and the temptation to ignore them yet again and move to a deal on a settlement is powerful. It is, of course, frequently in the Crown interest to leave fundamental questions unanswered and to persuade the Maori side of the negotiation to set them to one side for the "purposes of the agreement" - which in itself is argued for in the "national" interest. In doing so, of course, the Maori negotiators leave themselves open to the charge that they have sold out a fundamental Treaty principle of some description simply on the basis that nearly all of our unanswered questions involve Treaty principles. We are not short of line umpires, either, ever ready to raise their little flags and protest at the spectre of sinful compromise or, worse, betrayal.

Permit me an example. In September 1987 Greig J issued his interim injunction against the extension of the quota management system in Maori sea fisheries.[5] The litigation proceeded almost entirely on the illegality of s 88 (2) of the Fisheries Act - the Treaty right reservation. In the Ngai Tahu view that was an extremely narrow foothold on which to stand one of the most fundamental pieces of Treaty litigation that has yet been undertaken.

The core question, which has been addressed by the Waitangi Tribunal in part in *Muriwhenua*[6] and more fully in *Ngai Tahu Sea Fisheries*,[7] was "what is the nature and extent of the Treaty right in fisheries?" The question was carefully avoided by certain of the Maori Fisheries Negotiators in the course of that *negotiation - clogged* litigation largely on the basis that they did not have to hand evidence, of a High Court standard to drive their case. That is not to say that there was no such evidence merely that they failed to assemble it. Ngai Tahu were differently placed. They had borrowed the money to fund the research and engaged in all the other effort that evidence to that standard entails.

5 *Te Runanga O Muriwhenua Inc* v *Attorney-General* Wellington High Court, CP 553/87, 30 September 1987 (order issued), 8 October 1987 (reasons for order). For the text of this judgment see *Muriwhenua: Fishing Report* (Wai 22) appendix 5, 303-307.

6 *Muriwhenua: Fishing Report* (Wai 22).

7 *Ngai Tahu Sea Fisheries Report* (Wai 27).

Ngai Tahu were subject not to just one run through the Tribunal on these matters but to a second set of hearings driven at the instigation of the fishing industry. In that second set of hearings, both sides essentially ran their High Court cases - almost like a trial run for the big one on the other side of town a little later. It is a matter of some satisfaction that we were able to withstand the industry and Crown attack.

By late 1989 we were getting quite close in subsequent High Court litigation to dealing with the core question of "nature and extent" when we entered into the Interim Settlement represented in the Maori Fisheries Act 1989. Then, a little later there was the unique opportunity for a more comprehensive settlement provided by the availability of the Sealord asset containing more than 27% of the total New Zealand commercial fisheries resource. In the rush for settlement the fundamental question, which, I repeat, key Maori elements did not want answered, went undealt with. I suspect that was not unconnected with the Waitangi Tribunal Report on Ngai Tahu Sea Fisheries.[8] Of course, until there was a settlement, neither did the Crown want it answered either. I suspected all this was because both suspected the answer. That was, however, more a coincidence than a collusion of interest.

The evidence underlying the Muriwhenua Report[9] and the Ngai Tahu Report[10] had got as far as the High Court and the Court of Appeal but the litigation had ground to a halt. Then we had the 1992 Settlement[11] - the negotiations, the Deed of Settlement and then the legislation. It is the Ngai Tahu view that that set of events finished nothing, that until the Treaty of Waitangi Fisheries Commission has delivered the assets from that settlement on a basis from which the rights were derived, that is from the Treaty right in fisheries, the settlement is potentially liable to the accusation that it is itself in breach of the Treaty.

That process of allocation of assets from the 1992 Fisheries Settlement is, as you know, not yet complete and given the turgidity of the debate and the interminable litigation over process it could be some time away. If the courts had been allowed to deal with the question of "the nature and the extent of the Treaty right in fisheries" the application of such a judgment would have given a measure of direction to the Treaty of Waitangi Fisheries Commission in coming to its conclusions as to how the assets in fisheries should be distributed to the tribes. The absence of such an authoritative direction, and an unwillingness inside and outside the Tribunal to be bound by that body's two major determinations on the substantive question of the Treaty right, has permitted a veritable maelstrom of amateur and inadequate versions of what the Treaty promised. Indeed, some Maori leaders have said, "Now we have a settlement the Treaty is irrelevant". Others have said "that the Treaty right in fisheries no longer matters for that is an argument between Maori and the Crown and this debate is between Maori and Maori and whatever we decide that will do".

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8 Above n 7.

9 Above n 6.

10 Above n 7.

11 See Fisheries Settlement Act 1992.

That viewpoint is not sufficient for Ngai Tahu. We do not want other people's assets, neither do we want them to have our Treaty assets.

Fish, and I would not like you to think that I am piscatorally fixated, provides me with another useful example from which to springboard a point. In so far as the quota management system delivers a quite significant level of control to quota owners in the management of fisheries it is capable of delivery of a significant representation of the Article II promise. The principle that the Crown's role under Article II of the Treaty is to ensure that the resource is conserved in a sustainable manner is a fundamental concept of the system.

The extent to which the Crown's power to regulate actually spills over into the task of management, and the intrusion on the property rights in access to fisheries as enjoyed by quota owners, are central questions in assessing the extent to which the quota management system gives effect to the principle of control and management contained within the concept of tino rangatiratanga. I say this because it is plain that tino rangatiratanga is not just about property rights. Article II is also about, at least a measure, of control. In analysing the Treaty fisheries outcome we must conduct an assessment of the quota management system and the Fisheries Act in terms of its capacity to give effect to this aspect of the practical and operational realisation of the Treaty promise as distinct from the philosophical and theoretical considerations which abound in the discourse. In my view, the system has that capacity and I note with interest the conclusions of the Waitangi Tribunal in *Ngai Tahu Sea Fisheries*[12] in this respect.

It would be improper of me to discuss the similar issues involved in the Kaikoura Whales case before the High Court simply because that is the one of the cases which is en route to appeal. I can, returning to the point I opened with, however, safely refer to the fact that Neazor J relied heavily upon *Te Heuheu* v *The Aotea Maori District Land Board*[13] in coming to his conclusions and indicating by vigorous hand signals the direction up the road to another place.

The territory I am indicating then is where the intersection takes place between the Article I duty of governance and regulation and the continuing ownership and control secured and guaranteed by Article II.

I make the comment here that in fish, as in anything else, Treaty settlements are an attempt to give expression to the Treaty promise. They are largely an exercise in recapture, of resumption. They do not involve the establishment of new rights but the resumption of old ones that have been denied.

They may involve, though, some change to the condition of the Treaty as a taonga in its own right. Now, there is no good reason for having rights preserved and guaranteed under the Treaty unless they can be given effect to in practical and

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12 Above n 7.
13 Above n 3.

contemporary terms. To have the principles beautifully framed on the wall as the subject of academic discourse or standing like some ancient Madonna as an object of tearful prayer is one thing, to have them operating in the real world for the benefit of the Iwi to whom they were promised is quite another matter. It requires a measure of compromise and accommodation as well as both wit and wisdom. It is not a task susceptible of lazy slogans and easy rhetoric. The great challenge is to ensure that it does not involve a betrayal of Treaty principles.

It is in that particular nexus that much of the present pain, much of the misconception and much of the failure in understanding within the Maori world takes place.

The next matter with which I wish to deal is whether Treaty settlements can or should be conducted on a pan-Maori basis or on a basis of Iwi by Iwi in terms of their respective Treaty rights. In order to deal with that question I need first to go one step back.

I note that, at the moment, the Honourable Minister of Justice in his role as the Minister in charge of Treaty Negotiations is taking great care in public to talk about "hapu" as distinct from "Iwi". I suspect it is a useful political device but it also raises the question in whom do Treaty rights properly reside, in "all Maori", in "whanau", in "hapu" or in "Iwi"? Political sand paper is commonly rubbed against these questions, by discussion in newspaper editorials and in political forums, of Maori leadership elites and the plight of the dispossessed, culturally alienated Maori urban masses. These discussions as to who should benefit from Treaty settlements verge frequently on the hysterical. I want to focus on the question, however, of "hapu" and "Iwi". That, I believe, is the substantive one unless we are going to degenerate into the fundamentally racist notion of "all Maori".

The Treaty refers to the "hapu" but most of the jurisprudence and most of the effort in respect of the major Treaty cases has thus far taken place within the rubric of "Iwi". My elected responsibilities are less for undertaking philosophical debate whilst squatting on someone else's payroll than attempting to give practical effect to the Treaty outcomes within the extensive rohe of the Ngai Tahu Iwi and to the Ngai Tahu beneficiaries living far beyond that rohe.

Ranginui Walker, Sandra Lee and others to the contrary, I and my colleagues have had a clear and unambiguous mandate to do that. In specific matters that mandate is reviewed annually and in electoral terms every three years. In fulfilling that mandate I have been forced to wrestle with identifying in whom, and in what form, Treaty rights reside within Ngai Tahu itself.

I produced a paper to the Waitangi Tribunal at an earlier time dealing with that question. The issue I addressed was "Will the real 'hapu' please stand up?" Within our particular tribal people there is a complexity of whakapapa and overlapping hapu interest that largely defies allocation of assets on a hapu basis. I find it hard to believe that that situation does not exist within other Iwi but I am content to allow them to speak for themselves.

I wrestled with the same question within the Treaty of Waitangi Fisheries Commission when we set out in an earlier phase to identify who the beneficiaries of the 1989 Act[14] and the subsequent 1992 Settlement[15] really were. In practical and operational terms alone, the only groups in whom resource could reside in a manner consistent with the Treaty were Iwi. If they wanted to collectivise their interest on regional or on some other basis that, in my view, is entirely their business. It is not the business of Maori politicians to try and replicate the disasters imposed on us historically by the Crown's attempts to "stamp out the beastly communism of the Maori" in the 19th century or by successive post war governments and their officials to subvert the tribe with their pan-Maori collective organisations.

You see, the "hapu" like the subsets of which it is composed, the "whanau", is really an extremely dynamic concept. It is in a process of continual evolution and decay. It is fascinating to walk around the headstones in our old tribal urupa and look at the names of hapu of less than a century ago. Many of the names listed there (some stones have up to 20 hapu names listed) are now gone from our contemporary discourse and internal identity.

If I want to disassociate myself from my immediate relations in some manner, all I have to do is go to a headstone, pluck down a name, establish the whakapapa to that name, and announce myself as "Ngati Mea" or "Ngati Mea Iti" for the occasion. Then I trot along to the Maori Land Court and make a section 30 application[16] and before long the Maori radio is dripping with my tearful struggle to assert my identity.

In practice as well as in tikanga and legal terms, there exists a tribal overright. To some extent it is hinted at in statute and it is baldly, but not exhaustively, stated in at least three Tribunal Reports.

You see, the Iwi, the tribe, is a group around which you can effectively erect a whakapapa fence which matches the rohe fence. Whatever the theoretical debate, the fact remains that Iwi provides a practical entity with which Treaty settlements can be made and within which Maori can reasonably organise themselves without the super-structural paraphernalia of yet another layer of ethnic pseudo-government - as is advocated by some well-known commentators.

Within that tribal or Iwi ring-fence there are a host of hapu and geographical dimensions - many of them traditionally overlap, as in the wakawaka which define our mahinga kai. They are diverse as between Iwi and they are commonly extremely dynamic themselves. As the Tribunal and other judges have said these are internal divisions for individual Iwi to order, define and negotiate within themselves. They are not the business of the Crown, the courts or the Tribunal.

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14 Maori Fisheries Act 1989.

15 Above n 11.

16 Te Ture Whenua Maori Act 1993.

Which leads me, to Iwi legal personality. When Ngai Tahu took the issue of Iwi legal personality to the foundation meeting of the Congress we were vigorously ridiculed by people who, in my view, should have known better. The supinely dependent attitude of some of those leaders towards the settler Parliament distressed us.

Amidst all the talk of autonomy and prayerful incantation of rangatiratanga they stood, (with a few but very important exceptions), with hands outstretched for State funding. It was sadly reminiscent of the Canadian situation in which the focus of indigenous politics is riveted on a place at the trough, interminably negotiating a percentage. Now that might be all right for Article III and for participatory extraction from the trough of distributive equity. But is it not good enough for tino rangatiratanga and the autonomy, responsibility, control and ownership of yourself and your assets which that concept demands.

The 19th century settler Parliament which systematically, intentionally and with full and intelligent awareness of what it was doing, vapourised the legal personality of its Treaty partners, perpetrated what, in my view, is the greatest single breach of the Treaty.

The successive Parliaments which have failed to remedy the breach, right down to the present one, continue to compound the offence. Conceptually it is no different from entering into a marriage and converting one's spouse into a chattel - without rights of any kind who, legally, no longer exists. Whilst that chattel may have a good sense of rhythm and even be treated on occasion to a measure of affection the fact remains, despite the fact that the spouse clearly lives and breathes, that the marriage can only function at the dictate of one party.

You will be stunned, I know, at the gender free manner in which I have conquered this metaphor. Metaphors aside, though, it is the antithesis of a concept of "partnership" in any sense, let alone that described by the Court of Appeal in 1987.[17]

Through the late eighties and in the nineties Ngai Tahu went it alone on the issue of legal personality. The Tribunal's Supplementary Report on Ngai Tahu Legal Personality clearly supported the direction we were developing and in an exhaustive series of hui, interminable debate and innumerable drafts we finally achieved an overwhelming consensus on draft legislation and the Ngai Tahu Charter. Our decision involved the abolition of the Ngai Tahu Maori Trust Board and its substitution by a body representing our 18 traditional marae-centred runanga.

My more obsessive critics, rather than taking delight in the disappearance of the structure through which I have operated for more than 20 years, suddenly developed a deep affection for it and provided sufficient difficulty in the select committee process to block it. The general paralysis of our Parliamentary process - shortly to be compounded in the name of an extended democracy - did not help.

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17 *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641.

In frustration we took an alternative step. We had waited long enough for the Crown to do its job with its Parliament. Whilst I am statutorily accountable as the Chairman of a Maori Trust Board to the Minister of Maori Affairs rather than to Ngai Tahu and while the assets of our people are ultimately under the Minister's control I and fellow Board members regard ourselves as accountable to Ngai Tahu and not to the Crown. The formal transfer of that accountability to our people, however, is a major concern. The new structure, which should have been recognised (and I stress "recognised") by Parliament as a "corporation sole" which is representative of Ngai Tahu, has instead now appeared under the cloak of the new Companies Act 1993. It is operational and we are functioning - albeit in an unnecessarily clumsy duality.

I am not going to stand here and explain the processes we are following to further our intentions lest they may be impeded by the tiresome interference of our enemies - both official and beneficial. Suffice to say that the horizon of my retirement becomes more real as each day passes - a thought which I know will bring relief to some - again both official and beneficial. What I do want to say, however, is that unless each individual Iwi grapples with the issue of legal personality and the Crown gives itself the capacity properly to recognise that Iwi, settlement negotiations will be dogged with silly and enervating litigation and debate over representivity and assertions as to mandate.

A further point I would like to make about tribal representivity is that, to some extent, the rule of law itself provides a significant component of the problem. The individual legal rights secured and guaranteed by Article III of the Treaty mean that virtually any dog barking at the side of the road has the capacity to frustrate, sometimes for a substantial period, the collective will of thousands.

The frequent trumpeting of "consensus" as being characteristic of Maori decision making, together with its more recent sanctification in contemporary democratic rhetoric, means that substantial majorities no longer have the force which they once did. An inordinate amount of time and effort is spent in the courts dealing with disaffected Maori minorities who are legally exercising their Article III rights. That would be all right, were it not for the quite extraordinary status in the public mind such groups are able to achieve through the media. The diversion of tribal effort in dealing with such matters is frequently a major challenge.

I turn now to those lovely phrases so frequently used by the wise - "fairness" and "equity". The latter, "equity", has become one of the most misused concepts available to us. Equity can have in its meaning an element of "equality" or "equal shares". But it is by no means limited by that. It also contains and covers the notion of equal treatment in respect of rights in property and other respects. Those rights, particularly when they relate to natural resources or property, may be very different as between individuals or groups and the concept of equity in such a context may very properly mean something quite different from equity of distribution. Whilst the latter is quite suitable for dealing with distribution of social welfare payments or the application of habeas corpus it is quite inappropriate in dealing, for instance, with the Treaty rights of a tribe in forests or lakes and the Treaty rights of another tribe in respect of fish or

minerals. I am currently engaged for example in questions of fish and questions of pounamu, or greenstone.

I am fascinated by the way in which it is generally recognised by Maori and Pakeha that pounamu or greenstone is unquestionably a Ngai Tahu interest and not subject to "equity" in the "equal distribution" sense whilst others at the same time argue that the fish off our tribal coasts should be subject to the principle of equal distribution across all Maori citizens - almost as if they were Article III rights and not Article II rights. In the same context I am deeply conscious that something like nine-tenths of all Maori resources rest broadly north of a line centred on Lake Taupo whereas south of that line Maori asset interests are minimal. People who are already rich in resources, or who have had those resources and previously disposed of them, now seek to predate upon the resources of people of the eastern coast of the North Island, the South Island and the Chathams. That is argued for and quite widely endorsed on a basis of equity and fairness. I find it quite interesting in a psychological sense. I leave you to judge what perjoratives beyond "interesting" I am tempted to use.

My primary point is that Treaty settlements based on Article II of the Treaty should have nothing whatsoever to do with fairness or equity. They are essentially matters of "rights" and should be dealt with on that basis.

I see no reason why Pakeha should be able to manage their property interests, either collective or individual, on a basis of rights, whereas Maori should have their Treaty secured and guaranteed rights to property, and a role in the control of the exercise of those rights, made available to them on a basis of fairness or equity - or of need. It is my view that the fundamental distinction between Article II and Article III is commonly deliberately blurred by people engaging in the question of Treaty settlements. Equity is respect of property rights is about equity of treatment as between parties as to how those rights are dealt with.

Equity, in so far as it appears in Article II, demands equality of treatment in respect of rights. In that context fish are no different from land. All Maori tribes have, without dispute, accepted that their rights in land in their traditional territories pertain to them, that their rights in lakes and rivers in those areas are theirs and not those of others, the rights in mahinga kai, the rights in the Crown Forests interests and so on are theirs - why, rationally, should fish be different?

All these rights are sourced ultimately to Article II of the Treaty. What I am arguing for, quite simply, is equality of treatment in terms of Treaty principles. To apply the Pakeha concept of distributive equality in the name of "equity" is wrong and leads to a trampling of Article II Treaty rights and on what tino rangatiratanga we have available to us.

Which leads me to another dimension, that of the notion of relativities. Now, I well understand that relativity is an issue for judges in determining sentence. It is an issue in the determination, for instance, of awards for defamation.

When we are dealing with the questions of rights in a context of Treaty settlements the notions of relativities as between one tribe and another is conceptually flawed. I believe it is subject to the same strictures as I have, a few moments ago, applied to "equity" and "fairness". The notion that because one tribe should have secured a given amount of asset from the Crown in a settlement then that should have a bearing on what another tribe secures from the Crown in a settlement is I think one of the great denials of Treaty principles which is currently around us.

I hear it from politicians, from judicial officers, and of course editorial comment is awash with it. We are not dealing with actions for damages. We are not dealing with crimes of inter personal violence. We are dealing with a process of resumption of property by individual groups. They had different properties at the beginning. They should have different properties as an outcome. So much, for now, for the "Benchmark" theory.

The last matter I wish to address is the cancer of "pan-Maori" theory. There is a practical reason why pan-Maori settlements should not be contemplated. By far the most outstanding example is the outcome of the Fisheries Settlement which has thus far failed to deliver its fruits to the people whose rights it attempted to return. The form of the Fisheries Settlement was forced by the peculiar form in which the rights were packaged - the quota management system. It does not offer a precedent. The plain fact, though, is that Maori are not a unity, never have been a unity and never should be a unity, anymore than the Pakeha can be said to be a unity. The interests of Maori in the South Island are as different from those in Auckland and Tai Tokerau as the interests of Tasmanians and Western Australians are.

The notion that they should be lumped together under the control of some new layer of Maori bureaucracy - and I suggest that Maori bureaucracy is no better, and frequently worse, than Pakeha bureaucracy - is an absurdity. The more important point is, however, that the numerous minorities within Maoridom have no basis for trusting the integrity, in Treaty terms, of the majorities.

The minorities are forced to rely on the Treaty because the plain fact is that the more numerous populations will always predate upon them and exploit them as they have done historically. The rule of law and the rule of Treaty principle is the only protection they have.

There is however a more philosophical argument beyond these practical ones. Once you remove the tribal interest or, as Peter Tapsell would have it, "the ugly tribalism" of Maori and put Maori people on an individual basis simply because they are of Maori descent you have, in fact, selected a distinction based on race.

When you take that distinction of race, or mere ethnicity, as a basis for organisation, rather than that of tribe, you are developing an essentially racist base for dealing with your assets and your affairs. I find it difficult to understand how such an argument can be overcome. I do not stand before you as a Maori person. Those of you who know of my corpuscular arrangements know that I am more Irish than I am anything else. However, I can stand before you as a Ngai Tahu person by whakapapa and by descent. It

is as a Ngai Tahu that I hold interests in the Treaty rights of my people. I do not hold them as Maori any more than I hold them as a "New Zealander".

Indeed, the concept "Maori" would have no meaning were it not for the presence of Pakeha. Now, that is not quite correct. It would have its uses - as in waimaori - freshwater or ordinary water, but it would not apply to people and it would certainly not be a basis for classification. Thus when I look at Bob Mahuta I see a Tainui. When I look at Peter Tapsell I see an Arawa. In terms of Article II that is the only way I can see them.

To distinguish rights and property and the holding of such within our society on a purely ethnic basis is fundamentally repugnant to me and that is the core of my objection to the thinking that has been advanced by Sir Graham Latimer and many others by way of pan-Maori solutions to the issue of Treaty settlements. I deprecate utterly the "Maori Nation" thesis on the same grounds.

Incidentally, I reject also the argument that tribally based structures do not provide an effective basis for Maori organisation. An examination of the facts nationally reveals that either in the form of Incorporations, Trusts or Trust Boards they provide some of the most durable and outstanding examples of social and economic organisation, Maori or Pakeha, in this society. I think it is about time the media and our politicians were called to account for their gross abuse of the truth in this area.

Perhaps as Ngai Tahu Senior Counsel is wont to say, "for completeness", I will make one further comment. The press is awash this week with demands from politicians that tribal leadership should be asserted, that Maori elders should take command of their own marae, that it is time for responsible Maori leadership to stand up, front up and assert the true richness and value of Maoridom and to control the rabble. If you were a tribal leader would *you* put your hand up or your head above the parapet? If you do, you will be welcomed with yards of political and other rhetoric damning you as unrepresentative, and having no mandate, and having no authority to speak - especially for a phenomenon that is now universally described as the "young people". You will be treated to column inches of innuendo about your standing, your income, your industry and your relevance. You will be characterised as belonging to a past age, you will be referred to as either garbage to be disposed of or compared with horses that should be put kindly to pasture.

I am an inveterate collector of editorials and letters to the editor. I have a 25 year collection which repays occasional study because it gives a rich insight into the low level of rhetoric driven debate which occupies the Kiwi mind.

All I can say is that, given the innuendo, the occasional defamation, the general slagging that Maori leadership gets, I have seen few examples of Maori individuals who have personally benefited to any great extent from the years of devoted endeavour to build the Maori economic base. I certainly see none of them figuring in the rich lists in National Business Review. I will make no comment on people occupying comparative positions in the wider society or in their relative security of income and position.

I do note, however, how ironic I find the thunderous summons to leadership responsibility from a press which, with utter impunity, only a few weeks ago was describing the same people they are calling to arms now as "greedy élites" - you will have noticed the fascinating way in which the debate has shifted its focus from the "lazy native" to the "greedy native". I repeat my question "If you were a tribal leader - would *you* shove your head above the fortifications of the Pa fence?"

I suppose given the announcement today from London of the Whale Watch Kaikoura Ltd's success that I would seem churlish if I was to sound too critical and bitter. Ngai Tahu are overjoyed at the success of their little flagship enterprise. It is one of a number of companies that we own collectively and drive on a pretty rigorous basis. reference is to the success of Ngai Tahu's whale watch Kaikoura in a world ecological tourism award. Both in commercial and social terms in the Whale Watch business we have striven for excellence. We have made a lot of mistakes and we have had some pretty freaky times in terms of debt exposure and management.

With the collective support of the Tribe we have managed to make that one work as, indeed, most of the others are working. We believe very deeply that what we are doing in Kaikoura is a contemporary expression of our tribal values, our identity and our Treaty rights. In our view that whole development turns on the issue of tino rangatiratanga. We have no security in the enterprise - we simply own the debt on some boats. We are in fundamental dispute with the Crown over the Article II relationship between tino rangatiratanga and the Crown's right to governance on which that enterprise sits. I could deliver you a large amount of evidence to demonstrate that the Crown and its friends are interested in dispossessing us of the fundamentals that underlie that business. I am joyful at the success of our people but I am fearful for the underlying issue.

It provides me with another example of those great unanswered questions I referred to earlier - which this society has yet to address - the relationship between governance and tino rangatiratanga. Those questions are questions which I hope the Institute of Advanced Legal Studies will hold within its purview in the days ahead.

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APIRANA MAHUIKA

Tainui korua ko Ngai Tahu, tena korua. Tena korua e whakamahana nei i toku nei ngakau o tera o nga karangarangatanga o korua o roto i a Ngati Porou.

Ladies and gentlemen, when I arrived here this morning I had this imagery drawn in my mind by your presence. When I looked around I said what a magnificent gathering of people. Middle, upper class talking about the low social economic strata, the grass roots people and their rights. I heard everybody talking and making contributions to this meeting. I too have read the reports from the Crown and the opposition in terms of pan-Maori organisations to challenge Iwi. And I was reminded when I was sitting down this morning of one line. It's actually the only Shakespearian line I know. "To be or not to be, that is the question". Whether its nobler in the mind to usurp the autonomy

of Iwi and to replace it with the democratic processes as determined by the Crown, to determine who and what is my whakapapa, and having done that, to end me for ever.

Now it concerns me when we're sitting around here and the grass roots people are back there, and we're talking about their rights. Tena koe Tipene. Kei muri i a koe. On Iwi development that is the way to go. I don't need pan-Maori organisations or a Crown appointed committee to select who and what we are and therefore to stand on our marae and to run our business. Because if that happens and if Tipene O'Regan were to be the Chairman, as a Ngati Porou I may have to write and seek his permission for me to go to a hui and to stand up and say, "Ko Hikurangi te maunga, Ko Waiapu te awa, Ko Ngati Porou te Iwi". Now he may not give his permission, so I will have to say, "Ko te maunga, Ko te awa, Ko te Iwi. Na reira tena koe".

Tena hoki koe Bob. Yes, I was very critical of Tainui because I feared your people creating precedents which is part of the Pakeha mental processes. Once you create a precedent the same happens to Ngati Porou and to all. And I make the statement this morning that first of all I'm a racist. I'm Ngati Porou first, Irish next, Scottish and only after all of those am I a Maori.

So the question I want to ask now is will you stick by those of us who want Iwi development as opposed to the Crown's pan-development?

ROBERT MAHUTA

Maku ra e whakautu to patai tuatahi, Api. Koina hoki te huarahi mai ra ano i o tatou tupuna a, ko tatou Iwi. Ko te mana whakahaere kei a ratou. Koinei tonu te huarahi e whaia nei i a matou nei mai i tera wa. Ko tenei kararehe e korerotia inaianei, no inaianei ka kitea. Na te aha? Na te kaha o nga Iwi ki te hauhaki i nga take i raro i te Tiriti. Tenei ko timata te puawai kua kitea etehi ana, tena pea ma tatou ke e whakahaere. Me te mataku ano e te kawanatanga ki a kaha ano tatou nga Iwi. Mohio ana koe e te wa i whakaputaina nga moni mo te MANA me te MACCESS, koina te take e whakamutu aua mahi ra. Ne? Ki te kaha rawa o tatou ki te whakahaere i nga take e pa ana ki a tatou.

All I'm saying is, Iwi development yes. I have no problem with that. This pan-Maori thing is something that occurred yesterday and it's only heard because in a sense there is the prospect of some resources coming back into indeterminate Maori hands at the moment. And until they find that out, they're saying well, they're putting their hands up and saying, may be we should control it. But the lesson there for us is, we've got to get our act together too. And I keep saying the only way the Crown is going to listen to you, to me, is we've got to do our homework better than them. At the end of the day it's homework and hard work.

I support what you're saying Api.

SIR TIPENE O'REGAN

Kia ora, Api. I'm not available for the Chairmanship, Api.

There was only one argument for taking the approach which we did in the Fisheries Settlement and that was, very simply, it was the form in which the asset was, the form in which the property rights had evolved, demanded that we work collectively. That's the fundamental reason. And it's worth bearing in mind that the model they had evolved, actually made, gave us the model by which it was possible to actually deliver rights to us. If we hadn't have had that system we would have been yet again dealing with that amorphous, use and benefit of all New Zealanders' stuff.

But I see it as not being justified in Treaty terms for us to be required to go into those sorts of groupings. If there are SOE assets or things of that kind, that can be discussed on the basis of the delivery of shares. There is absolutely no reason, however, why one Iwi should take in a form of Treaty settlement from the Crown assets within another Iwi's rohe. And I believe similarly that rohe potae of Iwi is a precious thing to be protected in terms of the maintenance of our own inter-cultural and inter-tribal relationships. So I will stand by that position. Ake tonu ake.

APIRANA MAHUIKA

Kia ora Tipene. Taihoa, kei te pai noa atu. I've got to answer you on that.

The only reason why I ask my question about giving support for Iwi is because in our own tribal area, irrespective of what anybody else says, we have progressed.

We started off in 1987 with absolutely nothing and we had pan-organisations then. Now we can physically demonstrate how Iwi can operate by itself successfully so that I can say without any contradiction from anyone that formation of our Iwi authority has given to our tribe assets in excess of $5 million. The development and the renaissance that is occurring now is occurring for that Iwi. It is occurring in our kohanga reo for the Iwi. It is not occurring on a pan-Iwi basis.

Now there's only one difficulty I have in your last statement, Sir Tipene. I think you have to consult with us first before you move to the purchase of assets.

SIR TIPENE O'REGAN

I, as a matter of kaupapa, believe that Heaven is a function of southward movement and I won't be coming north of Raukawa moana.

DONNA HALL

I wanted to just pick up on the comment on representation. And to say to the Chiefs of the Congress who are here today who have spoken and to Tipene, on the question of representation and the place of Iwi. I have no difficulty with Iwi being

acknowledged as very important and that Iwi strength is where most of Maori movement and progress has come from.

I do just want to foreshadow though that we do have to look at what is happening in urban Auckland and urban Wellington. And I always seem to end up saying the things that nobody wants to hear. I do this all the time in the Congress, so they are used to me. We do have to look at it. 147,000 Maori in central Auckland, 48,000 Maori here in Wellington. Wainuiomata and Porirua are probably the home bases of some of the biggest homeless, tribeless Maori in the country. And we do have to look at it. Now this is not to say that the place and the priority that has gone to the tribes is not a correct one.

And I think that it's appropriate that the tribe should be there at the fore. But we cannot walk away from the problem of urban Auckland and Wellington to which every tribe in this room today has contributed.

Now perhaps Dr Tapsell's suggestion may need modification and may be we need to start talking about how do we look at a better structure for modern Maori. The Maori who belong to the under-35 age bracket. Maori that aren't too far removed from the sort of life style that I lead. There are many Maori who live, work and have raised their families outside the home base. And it is something that is going to get bigger, not smaller. And the longer we walk away from the issue, the harder it's going to get to deal with it. So, let's just close it on that and I've really enjoyed the debate.

Congratulations, Ngai Tahu, on that marvellous award and congratulations, Bob on the Tainui settlement.

SIR TIPENE O'REGAN

Kia ora Donna. I'd just be cautious because I've heard a lot about... let me start with the young ones, this young group so-called. I'm very conscious when I listen to it that the strength of my maraes and the strength of my people are not our kaumatua. It is young people and that's the point that I would want to make. And the idea that because one is young, one is not linked in or committed to or involved or linked in some effective manner with the Iwi is a nonsense but is one of the assumptions that comes about.

And the next point I would make is that Bob and I have had to deal with this question a lot and argue it a lot in terms of the Te Ohu Kai Moana. I just put to you the notion that, because someone lives in Wainuiomata, it does not mean to say that they are out of communion. The fact of the matter is we have a very large group from the East Coast which lives in Wainuiomata.

The bulk of our Iwi populations today actually live in urban centres and they are actively in communion with their Iwi. Just because they are in urban populations does not mean they are out of communion or out of connection with their Iwi. And I think it is an assumption which a number of the big urban groups tend to trade on. And I'd

just be very cautious of it. I only say that I agree with you, it is an issue that has to be dealt with. The proportions are even worse in Invercargill.

ROBERT MAHUTA

I guess all I want to say is that, of the demographic characteristics of Waikato, 49% of our people live in South Auckland. And that's why we are targeting the young in South Auckland. And what we're saying is, first of all they have to identify on the roll so that we can get the benefits to them. That's where the bulk of them are.