Tainui: A Case Study of Direct Negotiation

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I INTRODUCTION

The organisers of this conference suggested that I speak on the topic, "Tainui: A Case Study of Direct Negotiation". To understand the topic requires the telling of a tale that began many years ago. Direct negotiations are a recent but significant part of this tale; and, I might add, the tale has not ended!

In this paper I will try to place the direct negotiation process in the context of the tribal history, the current thinking on Treaty of Waitangi claims, and the path I see for Tainui.

As with any long story the beginning is hard to determine. Without doubt, the contemporary state of Tainui is a direct result of the 1863 war waged by the colonial forces on the people and the subsequent confiscation of 1.2 million acres of tribal lands in 1865.

A full appreciation of the contemporary must begin before the 1860s.

Around 1350 the Tainui canoe sailed from Eastern Polynesia bringing a rich cultural heritage which was adapted to a new land. After its arrival at Maketuu, the captain of the canoe, Hoturoa, the crew members and their descendants explored and settled New Zealand's central North Island:

Mokau ki runga
Tamaki ki raro
ko Pare Hauraki ko Pare Waikato
ko Mangatoatoa ki waenganui

To Mokau in the south, to Tamaki in the north, with Hauraki to one side, Waikato to the other, and Mangatoatoa in the middle, Tainui's boundaries are clearly defined. Within the area, the descendants of Tainui have multiplied, forming the major tribal groupings of Waikato, Maniapoto, Raukawa and Hauraki. Combined, these groupings make up the powerful confederation of tribes called Tainui.

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* Principal Negotiator, Tainui Maori Trust Board. In the months subsequent to the Conference, the poll of Tainui described later in the article ratified the Heads of Agreement and the Deed of Settlement between the Crown and Tainui was signed at a ceremony on Turangawaewae Marae.

A *The State of the Waikato Before Significant Paakeha Involvement*

Before the Treaty of Waitangi and the founding of the New Zealand colony, Tainui was united under the leadership of the famed Warrior Chief Potatau Te Wherowhero. After defeating Te Rauparaha of Ngati Toa in 1820-21, Potatau successfully united the Waikato-Maniapoto tribes into a loose confederation and later organised his own ruunanga system of government to maintain order and stability in the territory under his stewardship.

This pax Maori provided a safe haven for European traders and missionaries who enjoyed Potatau's patronage and protection. From the initial contact period Tainui offered hospitality to settlers who were prepared to work within the tribal tikanga. Early in the new colony's history, Governor Grey, fearful of a possible Nga Puhi attack on Auckland, asked Potatau to protect the colony's capital by settling at Mangere. Potatau agreed, warning Hone Heke to "beware the fringes of my cloak", referring of course to Auckland, located at Tainui's northern boundary.

In addition to securing the city's safety, Waikato supplied Auckland with the foodstuffs necessary for its survival. Just as the first members of the Tainui canoe had adapted to the challenges of the new land, so too were European technology, crops and ideas incorporated into Maori society. Flour mills were built; and pigs, potatoes, maize, wheat and other foodstuffs were raised. Maori owned canoes, coastal vessels and trading ships and transported many tons of agricultural produce to Auckland, Australia and America.

Early settlers travelling through the Waikato often remarked on the wealth of agricultural produce generated in the area.

> ... from a distance of nearly a hundred miles, the natives supply the markets of Auckland with the produce of their industry, brought partly by land carriage, partly by small coasting craft. In the course of the year 1852, 1792 canoes entered the harbour of Auckland, bringing to market by this means alone 200 tons of potatoes, 1400 baskets of onions, 1700 baskets of maize, 1200 baskets of peaches, 1200 tons of firewood, 45 tons of fish and 1300 pigs, besides flax, poultry and vegetables.
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> ... our path lay across a wide plain, and our eyes were gladdened on all sides by peaceful industry. For miles we saw one great wheat field. The blade was just showing, of a vivid green, and all along the way were peach trees in full blossom. Carts were driven to and from the mill by their native owners, the women sat under the trees sewing flour bags and babies swarmed around... We little dreamed that in 10 years the peaceful industry of the whole district would cease and the land become a desert through our unhappy war.[1]

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1 See P Temm (1989) Christian Brethren Research Fellowship Journal 10.

B Land, Kingitanga and War

The thriving society of Tainui during the 1840s and 1850s began a momentum of progress and prosperity for the tribe that could only be stopped by an event of gargantuan proportion that would garotte such development. Such an event occurred in the war of 1863 and its accompanying legislation which legitimised the confiscation of tribal lands.

II BACKGROUND

Potatau did not sign the 1840 Treaty of Waitangi. A year earlier he signed the Declaration of Independence - a document which affirmed chiefly mana. Even though some chiefs did not sign the Treaty, the colonial government nevertheless applied it to all tribes. The Treaty was supposed to guarantee the protection of lands, forests, fisheries and treasures as well as ensure that the sale of land would be tribally controlled. At first the colonial government conducted land sales in a manner which acknowledged the equality of the participants; under the direction of tribal leaders the boundaries were walked by all concerned and a price was agreed. Eventually it was realised that too much land was being sold too quickly with the consequence that the economic viability of the tribes was threatened.

Because of pressure from the colonial government land issues were of great consequence for the Maori. Also, with the New Zealand Constitution Act 1852, a colonial government was taking shape without provision for Maori participation. The property qualification effectively excluded Maori from the vote as Maori land rights were tribally held. The importance of these matters led to a call for a centralised Maori-controlled political organisation.

Beginning in 1848, many inter-tribal hui were held throughout the North Island to discuss land issues which quickly merged with discussions about the establishment of a Maori King. The opinions of the greatest leaders of the day were canvassed, many hui were held, and there was much debate. In the desire to find the best candidate several Ariki were offered the honour of holding the Kingship, but each declined in turn until the best choice was clear. Because of his noble bearing, his vast accomplishments in war and diplomacy, his kinship ties to virtually all of the chiefly lines of the North Island, and the prosperity of the Waikato under his rule, Potatau's name was most often mentioned.

In 1858 Potatau was installed as the first Maori King. The Kingitanga was to hold the mana of the Iwi, prevent inter-tribal warfare and slow the flow of land from Maori hands. Notice was given that the Waikato tribes would refuse to sell land south of the Mangataawhiri River.

Meanwhile, many settlers were arriving from the British Isles lured by possibilities of owning their own land in the new colony. Together with Auckland business investors, they agitated for extensive Maori land alienation. Operating without a clear policy, Governor Gore-Brown bowed to these pressures and in 1860, proceeded with a land purchase in Waitara against the wishes of the senior chief Wiremu Kingi. Armed

conflict ensued and, because of kinship ties and a realisation that the colonial government was perpetrating a great injustice, some parties from the Waikato-Maniapoto area lent support to Taranaki in the conflict. Inquiries into the affair at the time and subsequently have unequivocally concluded that the government had been in the wrong.

In 1860, the first Kohimarama conference was called by Governor Gore-Brown, mainly to gain support for the government policy during the Taranaki war, but there was also talk of making it the first of an annual series of Maori parliaments. In the same year, Potatau's son, Tawhiao, was installed as the second Maori King.

The balance of power in New Zealand was shifting as the number of Paakeha settlers began to equal the Maori population. On the pretext that Auckland was in danger from a Maori attack, Governor Grey signed the New Zealand Settlements Act 1863 confiscating 1,202,172 acres of land between the Waikato and Waipa rivers. This premeditated act was followed up on 12 July 1863 by General Cameron who led colonial armed forces across the Mangataawhiri River to invade the Waikato. The Waikato tribes were forced to fight in self defence.

Military genius and determined resistance confounded colonial expectations of a quick war. However, the overwhelming numbers of troops and the ability of the colonial forces to continue in the field while their Maori counterparts needed to return to their cultivations eventually turned the tide. Following the battle of Orakau in 1864, King Tawhiao and many of his supporters withdrew to Ngati Maniapoto territory which then became known as the King Country, effectively shunning the government which had treated them so badly. In time 314,262 acres of the original 1,202,172 confiscated, much of it marginal lands unwanted by the settlers, were returned to Maori control.

Unfortunately, this land was returned in an ad hoc fashion, often going to groups whose origins were outside of the Waikato, and whose loyalties for and against the colonial government did not count. These returns did not, as a consequence, lay to rest the injustices inflicted.

Much of the subsequent history of the interaction with the government must be read as Waikato attempts to seek redress for the unjustified invasion and illegal confiscation of lands.

III FURTHER INJUSTICES

To facilitate the alienation of tribal lands, the colonial government established a special court to determine and individualise title. Aware that ruination often followed the sale of tribal lands, Tawhiao and his followers opposed putting blocks of land through the Maori Land Court.

In 1867 Tawhiao, himself recognised as a great prophetic leader, met with other important Maori of spiritual renown such as Te Ua Haumene, Te Whiti, Te Kooti and Aperehama Taonui. Later on, Te Kooti was given sanctuary from government harassment by Tawhiao so that he and his followers could peacefully pursue their

religion. While the King Country was officially closed, traders and travellers reported that the standard of living under Tawhiao's rule was much higher than that of many Maori groups elsewhere whose traditional system of social organisation had crumbled or whose tribal lands had been sold.

In 1875 Maniapoto chiefs refused government's peace overtures and in the next year Governor Grey's offers of compensation to Tawhiao were likewise refused. Peace was formally declared between Tawhiao and the government's representative Major William Gilbert Mair in 1881.

Despite Tawhiao's injunction against the Land Court, its insidious nature was such that all of the members of an Iwi could lose their land if they did not appear to defend their title when any one member asked the court for a hearing. Consequently, the boycott of the Land Court eventually proved ineffective. Further, the government of the day was pressing for permission to put a railroad through the King Country.

When signing the Treaty of Waitangi and in all subsequent dealings, the colonial government had always represented itself as acting on behalf of the British monarch. Thus dissatisfied with the dearth of colonial justice, King Tawhiao led a deputation to England in 1884 to seek redress for the confiscation of Waikato lands. Tawhiao was twice refused an audience with Queen Victoria, the face of justice was not seen, and he returned home.

In 1885, Ngati Maniapoto chiefs agreed to allow the main trunk railway line to run through the King Country. The resulting easy access to the King Country opened it to land sales and settlers.

IV ATTEMPTS AT REDRESS

In 1894 Mahuta became the third Maori King. He tried to promote change by working through the government. The Prime Minister Richard Seddon and King Mahuta met to discuss the Treaty of Waitangi and raupatu issues in 1902. Besides sponsoring several candidates for the Maori Parliamentary seats which had been established in 1867, Mahuta served on the New Zealand Legislative Council between 1903 and 1910. While serving on the Legislative Council he transferred the kingship to his younger brother Te Wherowhero.

In 1912, Te Rata, the fourth Maori King, led a second deputation to England seeking redress for land confiscations. Like Tawhiao's previous deputation, Te Rata's party did not receive satisfaction.

Because Tawhiao had declared that the Waikato Iwi should never again take up arms, there was a disinclination to join the armed forces at the outbreak of World War I. The Waikato people, economically and socially depressed from the effects of raupatu, questioned if the overseas war concerned them. In what seemed another repressive move, the Waikato was one of few areas in New Zealand where forced conscription was instituted. Resistance to conscription saw the rise of Princess Te Puea as effective Kingitanga organiser and leader.

Following an influenza epidemic which had devastating effects on Waikato Maori, Te Puea assembled the survivors and orphans and in 1920 moved on to a patch of waste land in Ngaruawahia and began the construction of what was to become Turangawaewae Marae. Guided by the prophecy of Tawhiao, her plan was to establish a home for Kingitanga worthy of its mana. Working with only the minimum of materials and supplies, and taxes from river tribes to assist, Te Puea supervised the construction of Turangawaewae as a marae for all the tribes who had set Kingitanga in place, a national marae held for all by Tainui.

V NEGOTIATIONS BEGIN

A number of petitions to Parliament were submitted on behalf of Waikato groups on the raupatu issue. On 18 October 1926 a Royal Commission known as the Sim Commission was formed. Its brief was to investigate the scale of confiscation, not the act of confiscation itself. The subsequent report was submitted to Parliament on 29 June 1927 and released the next year. The findings of the report were that the land confiscations had been excessive!

Following a pattern established in Taranaki, the Commission recommended that an annual payment of £3,000 be made to settle the matter. After much debate amongst members of the government, Sir Apirana Ngata, the Minister of Maori Affairs at the time, was delegated to distribute the money. Waikato, however, would not agree to any monetary settlement saying "as land was taken, so land should be returned". This position was based on the belief that money taken in compensation for land their ancestors died for would be contaminated.

In 1930, Pei Jones formed a rangatahi group, under the leadership of Tumate Mahuta, to negotiate with the government on the raupatu issue during the depression. It was agreed at a hui that the Roopu Rangatahi would present submissions to the Kahui Ariki. This was done. The Kahui Ariki decided to seek counsel from Tarapipipi, who in turn deliberated with the Te Kaumarua. This process took so long that the Kahui Ariki decided to pursue the raupatu issue themselves.

In 1933 Koroki became the fifth Maori King. Under King Koroki's reign Tumate Mahuta, Koroki's uncle, began negotiations on the confiscation issue. Tumate and 21 other Waikato spokespeople went to Wellington where they met with Prime Minister Forbes and Native Affairs Minister Coates in September 1935. Tumate presented two issues. The government refused to discuss the first issue - as land was taken, land should be returned. Following this, Tumate raised the second issue, that the government pay £358,666 as a lump sum of £10,750 annually in perpetuity. The government did not agree.

In subsequent correspondence and meetings the government proposed paying £5,000 annually and also £100,000 additional to settle the matter completely. Tumate said no to this second issue. He stated that the second issue could be settled when the sum was raised to £358,666. The government decided to shelve the £100,000 question until later

because an election was forthcoming. There was agreement, however, on the £5,000 annual payment.

Following the Labour victory, Tumate wrote to Savage, the new Premier, several times reminding him of the state of negotiations and of the past agreement. Finally Savage replied but only to say that it would need to be brought before Parliament for more discussion. Tumate wrote again informing Savage that the extensive delays put pressure on him at home - some were questioning his ability and wondering if they might not do better themselves. Tumate also stated that one of his main objectives was to provide flexibility in the negotiations process so that ensuing generations would have access to the government when seeking compensation on the first issue.

On 18 March 1937 Savage and Apirana Ngata (the previous Minister of Maori Affairs) came to Turangawaewae. Happy that the Prime Minister had finally come so that the people would have the opportunity to hear the government on the matter, Tumate reiterated the principle that as land was taken, so land should be returned. He invited Savage to comment on this, and on the £10,750 to be paid annually. Savage said that the confiscated lands could not be returned as that would be unjust for those now living on them. He said he had not come to finalise the issue but promised that his government would not pay less than the previous one had agreed to pay.

Another series of letters passed between Tumate and Langstone, who was in charge of the negotiations while Savage was in England. The latter said that no monies would be forthcoming until a trust board had been established to administer the funds.

Continually reminding the government of the issue through correspondence, a meeting was again arranged. On 14 February 1938 Tumate, Te Hurinui, and Kahupake went to Wellington for negotiations. The government would not agree to the amounts which Tumate asked for but did say that perhaps part of the compensation would be made by the return of land. After an adjournment the government offered to settle for 10 shillings an acre for the confiscated land. Te Hurinui reminded them that the government tried to buy land for 8 shillings per acre 20 years before the confiscation and pointed out that the value of the land had surely risen more than two shillings per acre in over one hundred years! Since the government was unable to agree to their proposals Tumate suggested that £125,000 be offered together with some Crown lands.

Tumate was depressed on his return from Wellington because there had been confusion as to whether or not King Koroki supported Tumate as his representative in Wellington. Even though the King later assured Tumate of his support, Tumate's health declined and he died. His body was conveyed by the waka Te Winika to Taupiri.

With the outbreak of World War II, raupatu negotiations were postponed by mutual agreement. The raupatu grievance stood in the way of good relations with the government. In 1928 the Sim Commission had found in Waikato's favour, yet a settlement was still lacking. Te Puea and many Waikato people could not understand why the raupatu wrong had not been addressed and was still permitted to burden the Waikato Maori. While one problem was that the machinery of government was often

slow, another difficulty consisted of the unresolved debate within the Iwi as to whether money should be accepted.

VI 1946 FULL AND FINAL SETTLEMENT

The Ngai Tahu claim in the South Island was settled in March 1946 and in April of that year Prime Minister Fraser and Mason, the Minister of Maori Affairs, came to Turangawaewae for negotiations. In his book *Te Puea*, Michael King describes these events:[2]

> After a day of fruitless discussion on the marae on 20 April (in which some spokesmen called for statutory recognition of the Maori kingship as a prerequisite for settlement), Fraser asked Pei Jones to bring a group of elders to the Waipa Hotel that night.
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> "We were conducted by Mr Fraser to his big bedroom. The elders were invited to make themselves comfortable on the Prime Minister's bed and the rest sat on chairs. "Now", said the Prime Minister, "We can talk man to man without the worry of saying things for the benefit of the hundreds out there on the marae today. My Government is prepared to make a fair settlement on the same basis as was made with Sir Maui Pomare for his Taranaki people". [Jones] pointed out to the Prime Minister that Mr Savage had made a similar promise ten years earlier. "All right then", the Prime Minister replied, "You ask the elders whether an extra £50,000 spread over ten years will be acceptable". One of the elders said, "Make it £10,000 the first year and spread £40,000 over 40 years". "That is fair enough", said the Prime Minister."
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> The eventual offer made on the marae the following day was for £6,000 per year for fifty years and £5,000 thereafter in perpetuity. The boldness of the move took the conservative spokesman by surprise. Before disagreement could erupt yet again, Te Puea told Roore Edwards to get to his feet and accept. He stood up and said, "Kua oti te take nei", which Mick Jones translated to Fraser as "the matter is finalised satisfactorily". In this manner a sore that had festered for eighty-two years was finally healed.
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> Formal Waikato acceptance was signed on 22 April by Te Puea, her brother Wanakore Herangi, Roore Edwards and Ngapaka Kukutai.

In time the inadequacies of this settlement would become apparent.

VII THE TAINUI MAORI TRUST BOARD

A legislative Act was drawn up to finalise the negotiations and was brought to Ngaruawahia for discussion by an officer of the Minister for Maori Affairs. In reviewing the proposed legislation, Te Puea said that Ngati Maniapoto should be included in the Act as a gift from the Waikato. Initially the Trust Board was to be composed of one non-voting representative from the Kahui Ariki, and one voting

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2 (Spectre, Auckland, 1982) 224. The quotation is from Jones P *Mahinarangi* (JC Ekdahl, Hawera, 1946) 150.

member each from Tamaki, Manuka, Pukekohe, Te Puaha, Rangiriri, Waahi, Pukemoremore, Whatawhata, Tainuiawhiro, Rangiaowhia, Puniu, and Kemureti. Because of these discussions, representatives were also included from Turangawaewae, Tauhei-Te Hoe, and Parawera.

The Tainui Maori Trust Board was established to administer the annual payments under the Waikato-Maniapoto Maori Claims Settlement Act 1946. Te Puea nominated the first members and thereafter members were elected. A hui was convened on 4 November 1946 to elect the Chairman and Secretary and determine the seal. King Koroki, attending the opening of this meeting, offered the following words:

> Greeting my grandfathers.
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> I greet you all the spokespeople of the tribe. The canoe has now been launched. However, it is important that the canoe returns to shore also. You all are the anchors of this precious canoe. These are my words:
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> I must also pay respect to the government, to parliament, and to the people because this issue has been so long in conflict. At last the dust has settled. And discussion is over. What you all have said is good. This is a great day for the people. Karena you were correct. Therefore be strong and bold. Do what is right. Go in peace. Paddle our canoe. Do the work.

Upon notification that this meeting had taken place, the first amount of £10,000 was received at the beginning of February 1947. A modest portion of the first monies received was laid before King Koroki and the £4,000 extra, over the £6,000 annual amount, was used to build a memorial for the soldiers of the country at Turangawaewae. Turangawaewae House in Ngaruawahia, built previously for Te Rata's Kauhanganui, became the Board's headquarters.

The 1946 legislative Act defined "Tainui" as those hapu whose lands were confiscated. The parameters of the legislation called for the Board to provide for the education, housing, and health of confiscation victims only. However, the policy of the Board was that all Tainui had been affected, so all should receive the benefits of compensation. This is in line with the Board's founding goals which Te Puea articulated: to support the Kingitanga and hold the mana until Tainui was united as a tribe.

Thus, the Board has used its funds for educational scholarships, marae improvements, support of traditional arts and crafts, to offset tangi expenses, to support Iwi representatives and the Kingitanga. With the Maori Affairs Act 1955, the Board's role in respect of social and economic development was expanded.

Te Puea worked very hard to have Turangawaewae a fitting centre for the Kingitanga. Each time members of the British royal family came to New Zealand, attempts had been made to have them stop at Ngaruawahia to be accorded Kingitanga hospitality. Te Puea died in 1952, a year before the first visit of British royalty to Turangawaewae.

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VIII SEEKING JUSTICE

Looking back to the protracted negotiations with the government over raupatu, there were two separate issues to be addressed which were not always kept clearly distinct. First, there was the need for the government to admit that its invasion of the Waikato and subsequent confiscations were wrong. Secondly, as land had originally been taken, there was the need for the government to return land or to otherwise provide the Waikato people with a secure economic base.

Given that the negotiations had been conducted with successive governments, that the government refused to consider the return of raupatu lands, and that some Waikato leaders felt the pressing need to get social and economic development underway, it is no wonder these two issues were sometimes merged.

The agreement between Te Puea and the Prime Minister in 1946, which resulted in the establishment of the Tainui Maori Trust Board to administer compensation funds, was significant because it was a formal recognition from the government that a wrong had been done. This admission then paved the way for Waikato economic and social development, something which the weight of the long standing raupatu grievance had constrained. The second issue had not yet been resolved and the Board began to turn its attention to this matter.

Beginning in the 1970s, the pursuit of the Iwi's social and economic well-being was stepped up. As a well organised representative tribal body, the Board was increasingly called on to mediate between the Iwi and government authorities. The Maori Land Court and Maori Trustee requested that the Board negotiate on behalf of Waikato and Ngati Maniapoto land owners with the Ministry of Works and Development for damage compensation from the Kapuni gas pipeline traverse of Maori land. The Board's responsibilities extended beyond the original confiscation area and its traditional role of compensation funds distributor.

In 1976 the Prime Minister asked that the Board be recognised as the statutory authority to represent the interests of Maori people adversely affected by the development of the Huntly Power Station. As a result of these negotiations, modifications were made in the power station and costs to cover the detrimental social impact effects on the neighbouring Waahi Marae were provided.

Due to Board negotiations, ownership of Taupiri mountain was returned to Waikato tribes. In 1975 the Board was successful in its negotiations to have its annual grant increased to offset inflation and allow for capitalisation for twenty years. The Board also filed a claim with the Maori Land Court for ownership of the Waikato River. Waikato had agreed it was time to raise the issue of inland waterways and coastal harbours, whose ownership and guardianship had never been relinquished. The Maori Land Court adjourned the case *sine die* so it has been refiled with the Waitangi Tribunal and is still to be heard.

Beginning in the 1980s, the Board, concerned over the possible negative impact of development, assisted Te Puaha ki Manuka marae representatives in negotiations with New Zealand Steel. One result of these efforts was the establishment of a separate body called the Huakina Development Trust to administer funds so that local hapu might benefit and participate in development. In 1982 the Board tried to prevent the Ministry of Agriculture and Fisheries from granting marine farming leases within Tainui's three harbours. Efforts were made to get control of the West Coast Harbours returned to Tainui by having the Board recognised as the regional authority for administering these.

Realising the need for an overall development plan, the Board commissioned Waikato University's Centre for Maori Studies and Research to produce the Tainui Report. This report provided a direction for development through the establishment of a number of management committees within Tainui to facilitate and direct economic and social programmes at the local level. In addition, a number of subcommittees of the Board were formed to oversee initiatives in farming, health, education and youth.

In 1988 the Board refused to sign new contracts for the MANA and MACCESS schemes. The new contracts required that the Board sign as an agent of the Crown. This designation would have impacted upon an Article II claim under the Treaty of Waitangi and compromised its position vis-à-vis the people whom it served. While it would have been a simpler matter for the government to change the wording from "agent of the Crown" to "appointed authority", a change which would not have legally diminished contract accountability, the Government chose instead to withdraw all MANA and MACCESS funds. This move exposed the inadequacy of Iwi dependence on the Government and highlighted the need for an established economic base totally under tribal control.

The Board assisted the efforts of local marae groups in negotiation, court cases, and tribunal hearings, such as the fisheries issue and State Owned Enterprises ("SOE") transfer of lands.

In 1987 the Crown changed State Coal Mines to Coal Corporation of New Zealand Ltd, and attempted to transfer the ownership and licences within the raupatu boundaries to this new SOE. The Board challenged this because the way in which this transfer was taking place might have extinguished the possible return of these taonga. In response, the Crown promised to consult with Tainui but had not done so when, in 1988, it proposed to sell Coalcorp to private concerns. In response to Board protests the Crown in June 1988 guaranteed that it would negotiate this matter with Tainui. No negotiations took place with the Crown. When in February 1989 nothing had happened, the Board applied to the High Court to stop the sale.

The High Court sent the matter on to the Court of Appeal which heard the case. Three hundred and fifty persons travelled on the Tainui Express train to Wellington in support. In October 1989 the Court of Appeal found in favour of the Board, prevented

the transfer, and admonished the government that it should be negotiating on this issue.[3]

Thus began the current round of negotiations to settle the raupatu land claim. Negotiations have been part and parcel of the search by Tainui for redress throughout the years since the grievance occurred. Over that time Tainui has been at war, sought peace, negotiated through various tribal leaders, sent deputations direct to England, been the subject of a Royal Commission, had a full and final settlement, re-opened the claim, accessed the court system, filed a claim with the Waitangi Tribunal, and re-entered negotiations.

Throughout this time, Tainui has begun to rebuild an economic base from the ashes of war and land confiscation. Faith in itself and the visions of Tawhiao have seen Tainui persevere in its endeavours to develop and not concentrate exclusively on redress. This has been an important part of the process over the past 130 years. The statistics of today reveal the crisis which faces the tribe and require the acceleration of the development strategy at an urgent pace.

The *Coalcorp* case provided the incentive for the claim to be placed at the negotiation table. At the suggestion of the Court of Appeal the parties were encouraged to find resolution through the direct negotiation process. That was five years ago. Where are we now?

IX 1989 - THE *COALCORP* CASE[4]

This case deserves mention, albeit briefly. The importance of the Court of Appeal's decision reflects the turning point of the relationship between the tribe and the Government. An attempt at achieving resolution through a negotiated position as opposed to one that stems from an adversarial mindset is the key that has resulted in the progress made to date.

The issue here revolves around the climate in which we all found ourselves in the late 1980s. Economic policies of both National and Labour in response to the external economic changes that were occurring at the time saw the sale of state owned assets as a necessity to recovery. Whether this was an accurate strategy to employ is best left to another debate. What it meant to Maori and non-Maori was the impediment to resolution of Maori claims through the return of land and land based taonga held by the Crown. As a means of paying for the excesses of the past, these assets were required to be liquidated to repay the country's overseas debt and start it on the path of economic recovery. This is still stated as the case.

A consequence of this policy was the determination that state coal operation (via coal mining licences) be sold to a private interest. The claim of Tainui would be affected by such action.

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3 *Tainui Maori Trust Board* v *Attorney-General* [1989] 2 NZLR 513.

4 Above n 2.

The *Coalcorp* case was therefore significant to the position the parties found themselves in at the end of 1989. Cooke P in his concluding statements in his judgment made the following suggestions:[5]

> A negotiated settlement which recognised as regards coal that Tainui are entitled to the equivalent of a substantial proportion but still considerably less than half of this particular resource could be suggested as falling within the spirit of the Treaty of Waitangi.

The suggested negotiations had already been considered by the parties in 1988 and the case gave impetus to resolving the wider raupatu issue through this process.

At the time the Labour Government was in power. Two weeks prior to the national election, Tainui was made an offer of settlement. The offer was a cash settlement of $9 million. The value of the loss had been calculated at a base minimum of $12 billion. The Labour Government's offer was rejected. Negotiations then commenced with the National Government in 1990.

Prior to this both parties had considered the use of negotiations as a means of resolution. In 1986, Tainui filed a claim with the Waitangi Tribunal over the raupatu lands, the Waikato River and the West Coast Harbours. The claim was filed by myself, the Tainui Maori Trust Board and Nga Marae Toopu (an organisation of Tainui marae).

In March 1987 the Crown began to accelerate the transfer of Crown assets to SOEs. Both Tainui and the New Zealand Maori Council filed claims in the High Court to prevent the sale of such assets. The Crown verbally undertook through the Solicitor-General that there would be no transfer of assets under claim by Tainui. Five months later the Coal Mines Act 1979 was amended allowing the sale of the Crown interest in this resource. Tainui were not consulted despite the undertaking given. The Crown stated that its attempt to sell off Coalcorp did not create any conflict between section 9 and sections 27 to 27D of the State-Owned Enterprises Act 1986.

Despite their verbal undertaking the Crown sold assets in the raupatu area. As a result, the tribe sought to have the undertaking confirmed in writing. This was eventually done a year later in March 1988. In this month the suggestion that the parties begin to negotiate with each other was discussed. This seemed more appropriate for several reasons. Significantly, the costs of litigious avenues were debilitating to the under-resourced tribe. Formalised discussion and negotiation through such a process was reflective of the partnership status of the parties under the Treaty.

Tainui had made approaches to the English Sovereign on two previous occasions and received the response that Tainui should talk to the New Zealand Government. For the Crown, it needed a quick resolution of the issues to allow it to proceed with its strategy

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5 Above n 2, 529.

of economic recovery through asset sales in whatever modified form resulting from these negotiations.

Whilst the format for negotiations was being developed, the Crown informed Tainui in June 1988 that it was to sell Coalcorp. Throughout the rest of 1988, continuous attempts were made by Tainui to pin the Crown down on when negotiations would begin and what would be included. Insignificant efforts were made by the Crown at getting the process started and honouring the March undertaking. During this period the Crown sought indicative bids for the corporation.

Frustrated by the lack of goodwill or competence, Tainui filed proceedings with the High Court on 6 March, 1989 to oppose the transfer of coal mining licences and protect the claim it had lodged with the Waitangi Tribunal. A letter dated December 1988 indicated the position that the Crown would consider in its approach to the negotiations. It recognised the principle of "i riro whenua atu, me hoki whenua mai" as the basis on which Tainui would negotiate. As already discussed in this paper, this is the fundamental and unswerving principle upon which the Tribe bases resolution.

The call for return of lands pertains to the lands owned by the Crown and not privately owned properties. The significance of having Crown owned lands returned rests in the activity of the last century wherein the Crown through its armed forces took the tribal estate from the people. It is symbolic that it is now Crown lands that should be returned. Important also is the approach the parties took to each other. Goodwill is part and parcel of any negotiation when a durable resolution is being sought. It also ensures that progress can be made without mistrust.

In 1989, at the Court of Appeal hearing, the Crown produced an affidavit citing its Crown holdings at 163,000 acres. Today the quantum of lands in Crown possession is 90,000 acres. This diminution of what was under claim, whether defendable or not, had the effect of polarising the parties into the role of respectful adversaries. The inequity of resources between the Crown on one side and Tainui on the other was a distraction to Tainui who had to source negotiation costs from their own resources. This is not new to Tainui, who through fundraising by marae communities and personal pledges from individuals raised the money required to stop the Crown in the Court of Appeal. It also had the effect of including the people in the process and fuelling the tribe's determination to seek justice. The opportunity it gave the Crown was to control the process and determine unilaterally the ability of Tainui to fund itself. Having to remind the Crown that it owes funding monies to cover costs of negotiation gave an ambiguous meaning to partnership and goodwill.

The adoption of negotiated resolution and the whole area of settling Maori land claims was certainly still in a state of evolution and development. It is perhaps because of this that "teething" problems resulted. Unfortunately, these problems are still being experienced.

X DIRECT NEGOTIATIONS

With the favourable outcome of the Court of Appeal action, declarations were made preventing the Crown from selling its interest in Coalcorp until Tainui's interest had been quantified. Just under a year after the Court's decision, Tainui approached the Crown to buy Coalcorp's operations in the Waikato. Surprisingly, the Crown refused the offer stating that it preferred to liquidate the asset through public tender. This ran contrary to the eager attempts to sell the Corporation prior to the case filed in the High Court by Tainui. The Tainui offer was based on commercial considerations which met the Crown's desire not to undersell assets. The rationale for this could only be seen as punishment for winning in Court. It also added to the insight that much of what happens in this country is by political will, not judicial process.

Another point of frustration in those early days was the insistence to adhere to a resolution based on the 1946 settlement. The "full and final" aspect and the monetary compensation were viewed as a reason to "narrow" negotiations rather than find a just resolution. The fixation with the 1946 legislation failed to account for the recent developments in Treaty jurisprudence and the inappropriateness of the 1946 settlement in today's context. The Crown's response was to re-value the settlement sum made back then and use the 1946 settlement as the base for any negotiated outcome.

Another offer was made - The return of 3,000 acres of Coalcorp lands ($10 million), a monetary settlement based on the 1946 formula capitalised at an amount of $6.7 million, legislation to give effect to the offer and an undertaking to review jointly Tainui's recovery from the effects of raupatu. The total value of this offer was $20 million. This was seen as woefully inadequate by Tainui and acceptable only if it were to be treated as an interim step in a much larger settlement offer.

Also in this year, the Crown released an information booklet on "The Direct Negotiation of Maori Claims". In the foreword to the booklet, the Hon W Jeffries refers to the Government's commitment to enter into direct negotiations with Maori. This was seen as a compliment to the Waitangi Tribunal process either before or after the deliberation of a Tribunal recommendation.

The process was to be based on the "principles of the Treaty" recognising:

(a) the nature of the power that was given to the Crown in the Treaty - the principle of government;
(b) the extent of Maori interests which the Crown has promised to protect - the principle of rangatiratanga;
(c) that all New Zealanders, Maori and non-Maori, need assurance that they will be treated fairly - the principle of equality;
(d) that Maori and Government and all New Zealanders will be required to work together to achieve a just resolution of outstanding grievances - the principle of co-operation;
(e) that the Government is responsible for providing effective processes for the resolution of grievances - the principle of redress.

It is on these criteria and with this background that the Crown approached the negotiations with Tainui. How effective this has been must be considered in the light of the newness of the process for both parties and the complexity and magnitude of the claim. The 1980s saw the swell of Maori discontent and a merging of traditional and fringe groups including a Paakeha understanding of a less sanitised version of history. Without doubt, coming to grips with the process required a major mind shift and a concentration on mutual outcomes as opposed to one-up-manship. Another influencing factor has been the need for New Zealand to recover from its economic hangover.

The successful resolution of this dilemma is keenly sought by Tainui. Evident in the appalling statistical data is the vulnerability of Tainui people to the adversities of economic recession. If anything, Tainui's economic and social lot is determined by the state of the economy. Recent redundancies in traditional industry such as the Huntly mines and the Affco Freezing Works have exacerbated the problem of economic inequity. It is with this in mind that the approach by Tainui is not to seek a settlement sum that the country can afford.

What was viewed as appropriate, taking into account the country's finances, was a settlement that was generational. Generational is not unlike full and final in that it attempts to achieve a result that is lasting. Having faith in the robustness of the Crown's economic policy would justify the provision of a limited settlement and the revisiting of the success of that settlement at a later date, by another generation.

If the durability of settlement has been achieved through hard work and sacrificing today for tomorrow, a later audit of the benefit of the settlements will suggest that we all carry on with our lives. If the audit shows otherwise and the country has managed to stabilise economically, a decision can be made to assess whether the settlement should be reviewed. This does not give a right to automatically have a settlement re-negotiated; it merely provides for a review of the durability of settlement.

Considering the quantum of lands taken under the New Zealand Settlements Act 1863 and the manner in which they were confiscated and defended, the return of 3% of the lands today can reasonably be viewed as an interim offer. The development of the Crown's "fiduciary duty" argument in this area would support the preference of a generational settlement. Recent developments have shown that politically, the current Government is unable to negotiate anything but a full and final settlement. The public of New Zealand demands this.

As I understand it, the Crown in opting to involve itself in direct negotiations, has accepted a threefold process:

Phase 1 requires the Crown and Tainui in this case to engage in preliminary discussions to ensure that the nature of the claim is fully understood. In this instance, the report of the Sim Royal Commission and the Manukau Report of the Waitangi Tribunal clearly established the nature of the raupatu claim.

Phase 2 requires the development of a Crown position and brief for negotiations. Until recently, no position was conveyed by the Crown to Tainui. The December

release of the Crown's policy proposal on the settlement of Maori claims came well after negotiations commenced and a likely settlement package had been considered. To this extent Tainui was operating on the original basis of land for land (accepting the Crown's land holdings of 90,000 acres as the "peg in the ground"). No natural resource policy had been mentioned; nor was "full and final" settlement considered an issue.

Phase 3 involved the negotiations themselves. What Tainui has found as the linch pin to effectively participate in this process is to do the home work, and to be better than the Crown in all aspects of the process. Handicapped by limited resources and concerned with its obligations to its people, achieving this was difficult.[6]

The urgency to re-acquire a tribal estate and an economic base, to have vindicated the branding of its people as "rebels" and their deaths in the war of 1863 was the brief by which the Tainui negotiating party sat at the table with the Crown. This required all associated with the negotiations to understand the fundamentals of this claim and to prioritise their lives to the resolution of raupatu.

Since 1992, the Tainui negotiating team met and worked with the Crown team through the Treaty of Waitangi Policy Unit ("TOWPU") now known as the Office of Treaty Settlements ("OTS"), on a regular basis. The negotiations have been enlightening, sometimes frustrating, certainly difficult but optimistic. As long as there was dialogue and Tainui were seated at the table there was always the prospect that resolution could be achieved.

XI NEGOTIATING INTERNALLY

A feature of the process to settle claims is the understanding of oneself. Claims are often the subject of counterclaim, opposition and ridicule. It is incumbent on any negotiator to inform the people of what is going on. This does not mean that they must visit each and every tribal member and discuss the issues or progress to date over a cup of tea. It is incumbent on each Tainui person to concern themselves with what is going on, how they access tribal networks and forums of debate and discussion. Within Tainui, the Poukai rounds are an intensive and extensive process unique to Tainui where people meet to discuss on marae any issue pertinent to the tribe. There are 28 Poukai held annually at different marae. In addition there is Nga Marae Toopu, a bi-monthly gathering of 60-odd marae, wherein a report on the raupatu negotiations is received and issues discussed.

Within the tribe there is a whole network to disseminate and receive information. The process of direct negotiation includes by necessity this network. Likewise, the Crown must consult with itself. The Minister of Justice must adhere to the Crown's own internal processes. Cabinet, as a minimum, must be in agreement as to the funding of negotiations, the content of negotiation and the parameters of negotiation.

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6 Background papers containing materials used for reference purposes by Deputy Chief Judge McHugh in an address to the Native Title and Trans Tasman Experience Conference (Sydney, 1994).

Like Maori, they must also agree on whether the proposal of an offer to settle is acceptable or not.

What has developed as a result of negotiating this settlement is a reconfiguration of ourselves as a tribe and a people. Whether this is a direct result of the negotiation process per se or settlements in general is unclear. Times have definitely changed since Te Puea struck a settlement with Labour. How Waikato obtains consent and mandate is constantly challenged. The legal requirements of the relevant statute that governs the Board, and the threats of Court challenge, internally and externally, of the tribe, have placed the Board in the position of having to protect itself and its beneficiaries.

Already the Board has been challenged over the return of two former defence properties - Hopuhopu and Te Rapa. The challenge is to the vesting of the property in the tribe as a whole. The 33-odd individuals who took the action through to the Maori Appellate Court are now seeking judicial review in the High Court.

Consultation on the proposed settlement offer and the presentation of a Heads of Agreement by the Crown was taken to a Hui-a-Iwi. Attendance at this hui was limited to only those beneficiaries registered on the Board's Roll of Beneficiaries as provided under legislation. This has been opposed as undemocratic, thuggish and lacking in tikanga. The reality is that abiding by tikanga will see an action taken in the Courts on process. Unfortunately, to minimise the risks, strict adherence to legal processes is now required. The Board, in its consultation, has been criticised for excluding people who are not on its beneficiary roll. The settlement is made for the Board's beneficiaries and no one else. If this process is not followed, Court action will inevitably result.

To determine the acceptance or rejection of the Deed of Settlement, all beneficiaries registered on the Board's roll over the age of 18 will receive a voting form. Currently 12,000 are eligible. They will receive an information package containing the Crown's presentation of the Heads of Agreement, legal commentary (warts and all) by the Board's legal advisor, a list of the Board's continuing consultation hui with dates and venues, a section on a post settlement phase (if settlement occurs or not), a suggested tribal governance structure for discussion, an explanation as to how lands will be held on a tribal basis, and how people and marae will benefit.

This package will be mailed out this month and two months will be available to recipients of the package to consider the contents, attend the hui and ask questions of their Board representatives. Within the privacy of their own homes, they can decide whether to accept the offer or reject it. At the end of the day, the decision will be the people's to make.

The negotiations between Tainui and the Crown have been educational. Without any precedent both sides have undergone a massive learning curve.

XII THE CROWN OFFER

During 1994, as a result of the work of preceding years, the prospect of a resolution materialised. The Crown had determined that an offer be put to Tainui. This coincided

with the Crown's release of its policy in respect to the settlement of Maori claims. The offer and the policies are now seen as inextricably entwined. On 21 December 1994, the Crown personally presented the offer to a Hui-a-Iwi at Turangawaewae Marae. The offer was contained in a Heads of Agreement or an "Agreement in Principle". The agreement records the substantive agreement achieved on all items. The Heads of Agreement is a non-binding agreement to progress towards a settlement. Both parties have the option to proceed no further. There is a timeframe of six months in which agreement must be reached to settle. Whether this occurs or not has yet to be seen.

The Crown offer is land based on the principle of "i riro whenua atu, me hoki whenua mai". It also contains an acknowledgement that the Crown breached the Treaty of Waitangi when it invaded the Waikato and that the people were wrongly labelled rebels.

Several issues have arisen since I was mandated to sign the Heads of Agreement by the Hui-a-Iwi on 21 December 1994. The primary concern of the motu is that Tainui has set a precedent for the rest of the tribes. Let me address some of these concerns and hopefully dispel some of the myths and misinformation currently circulating:

1 Waikato has not settled its raupatu claim with the Crown. The 21 December 1994 signing did not produce a settlement between the parties.

2 Waikato stipulated that the Heads of Agreement contain a section which states:

> an acknowledgement by the Crown that the decision Waikato-Tainui takes, having considered all of the above, is a decision that Waikato-Tainui takes for itself alone and does not purport to affect the position of other tribes (Para 7.1 xiii).

3 Waikato will not be used as the "patsy" for anyone's policies. Other tribes have the responsibility to make up their own minds about settlements and Government policy. This settlement is for Waikato, nobody else.

4 Waikato has stipulated that the Heads of Agreement state:

> that knowledge of the Crown's proposed policy for settling natural resources claims does not reflect acceptance of that policy by Waikato-Tainui (Para 7.1v).

5 Reference should be made to Kia Hiwa Ra newspaper's September 1994 edition for Waikato's position on the proposed policies.

6 Criticism has been launched at the size of the settlement. It has already been stressed that this is not a cash settlement. How the Crown values the settlement is their concern.

7 The value of the Waikato raupatu claim is seen by the Crown as reflecting:

- the final amount of land confiscated and the death and destruction visited on Waikato-Tainui (it being the largest confiscation by area);
- the manner by which Waikato-Tainui's grievance came about;
- the seriousness with which the Crown views raupatu (Para 7.1xv);
- Accordingly the redress represents 17% of the value of the redress set aside by the government for historical claims under the Treaty of Waitangi including the existing settlement of the fisheries claims (and approximately 20% of the redress for all claims excluding the said fisheries claims) (Para 7.2).

8 How the Crown intends to "pay" for this settlement is up to it. If it's current policies are rejected by Maori, this claim will form 17% (or 20% excluding fisheries) of any value for redress set aside by the Crown for settlements.

9 Full and final only pertains to the raupatu lands south of the Mangataawhiri. The raupatu argument will still apply to the Waikato River, the West Coast Harbours, and the Maioro and Wairoa blocks. The raupatu claim cannot be full and final until the entire grievance is addressed and resolved.

10 Lastly, even if a Deed of Settlement is signed, settlement cannot be effected unless legislation is passed by a substantial majority of the House of Representatives (Para 10.1):

I have spent some time on the offer that has been placed before Tainui, specifically those parts which most concern people. Tainui got to the stage of having the offer made through sheer hard work, the strength of their convictions, having the courage to endure Maori and Paakeha persecution over the past 100-odd years, and an indomitable will to see that the raupatu claim was resolved.

What people need to understand is that Waikato has a history which is peculiar to itself alone, namely:

(a) Potatau's signing of the Declaration of Independence
(b) The Treaty of Manukau
(c) Kingitanga
(d) Raupatu
(e) Conscription
(f) Charismatic leadership
(g) Unity
(h) An enduring belief in itself

XIII WHERE TO FROM HERE?

With or without settlement the fact remains that Tainui's survival as a people rests on its desire to commit to a forward thinking pro-active strategy. The grievance of the claim is felt as keenly now as it was during the death and destruction visited upon the tribe in 1863-65. What needs to be achieved now is the sustaining of the tribal entity and the creation of an economic base with or without a settlement.

The realities of our social, economic and political status today will not be cured solely by a negotiated settlement. Whatever form settlement takes will require an ability to decolonise. It will require an acceptance of the mutuality of co-existence, a restructuring of the Board under the Maori Trust Boards Act 1955 and vision. The equity of that relationship is as much in our court as anyone else's.

Also important to this strategy is the vesting of lands returned in a title which to all intents and purposes is inalienable. This model already exists in respect to the vesting of Te Rapa and Hopuhopu in Potatau Te Wherowhero, the first Maori King. Title is held under Te Wherowhero for the whole Tribe, and collective benefit from these lands is for the Tribe as a whole. It is an attempt to return the lands to a status held prior to the confiscations and the impact of the Maori Land Court.

As an alternative to the courts, international forums, the Waitangi Tribunal or civil insurrection, this process of direct negotiation has both its advantages and disadvantages. What has been learnt is that, at the end of the day, outcomes rest solely on the political will of both parties to settle.