THE INTERTWINING OF TWO STREAMS: TIKANGA, TE TURE WHENUA MAORI ACT 1993 AND TAINUI

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Introduction

Former Maori Land Court Chief Judge Eddie Durie holds that the Treaty of Waitangi is authority for the idea that New Zealand's law has "its source in two streams", that is, both English law and tikanga Māori.[1] Te Ture Whenua Maori Act 1993 (TTWMA) appears to support this by its recognition of the Treaty of Waitangi and its spirit of exchange.[2] The Minister of Māori Affairs at the time of TTWMA's enactment clearly thought this when he asserted that "concepts of tikanga Māori" were "at the heart of the Act."[3] For example, the Act's provision for a new type of trust, the 'whenua topu trust', aimed to promote and facilitate the use and administration of the land in the interests of the iwi or hapu, was thought to provide a land holding structure which would reflect tikanga Māori.[4] However, this paper will demonstrate that there are significant gaps between TTWMA and tikanga Māori. In response, some iwi have chosen to opt out of TTWMA regarding their land returned in Crown settlements of historical breaches of the Treaty of Waitangi.[5] In 1995, Tainui was the first group to opt out in this way. Since then, the two other iwi involved in the largest Treaty settlements, Ngāi Tahu, and more recently, Ngāti Awa, have followed suit.[6] This paper will look at this developing trend

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1 E. T. Durie, F W Guest Memorial Lecture 1996, *Will the Settlers Settle? Cultural Conciliation and Law*, (1996) 8 Otago Law Review 449, 461.

2 Te Ture Whenua Māori Act 1993, preamble.

3 Hon. Doug Kidd MP, (1994) 6 NZPD 833.

4 TTWMA, above n 2, s 216(2), and as explained in Law Commission, *Māori Customs and Values in New Zealand Law* NZLC SP 9, Wellington, 2001, 61.

5 Waikato Raupatu Claims Settlement Act 1995, (WRCSA) s 22.

6 Ngāi Tahu chose to have their land returned as general land. See Ngāi Tahu Claims Settlement Act 1998. Ngāti Awa chose to have theirs in a very similar title to Tainui,

by focusing on Tainui within the context of the idea that New Zealand law should take into consideration both English law and tikanga Māori.

The first part of this paper briefly outlines how the Treaty of Waitangi is authority for recognising tikanga Māori and how TTWMA relates to this. The second part outlines Tainui's story, while the third part examines the tikanga Māori as it relates to land, especially the concept of mana whenua. The fourth part looks at the land holding features of Tainui's settlement with the Crown, compared with TTWMA's whenua topu trust, and endorses Tainui's decision as one which best enabled them to assert their mana whenua.

A. The Treaty of Waitangi

Different aspects of the Treaty of Waitangi have been held as authority for the idea New Zealand law has its source in both English law and tikanga Māori. The first of these is the oral discussion at signings of the Treaty.

At the signing of the Treaty in Waitangi there was discussion around Māori concerns that their own laws and custom should be respected. The Governor adjourned to consider the issue and came back with the following response which was read out at the time[7]:

> The Governor says that the several faiths [beliefs] of England, of the Wesleyans, or Rome, and also of the Māori custom, shall be alike protected by him.[8]

This has been known as the fourth article of the Treaty. There were numerous other times in the Treaty's travels, where both oral and written promises of the same nature were made and officially recorded.[9] One such example is when the Treaty reached Kaitaia. Although the

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called the Awanuiarangi II title, and land may be directed to be 'protected land', which comes under the jurisdiction of limited specified sections of TTWMA. See Ngāti Awa Settlement Claims Act 2005, ss 154-159.

[7] Durie, above n 1 at 460.

[8] W. Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi*, (Wellington, 1980) 32, see also Waitangi Tribunal, *The Whanganui River Report* (WAI 167, 1999) 264.

[9] Law Commission, above n 4 at 72.

Governor could not attend the debate and signing, his explicit message that "The Queen will not interfere with your native laws or customs" was announced.[10] Eddie Durie regards as correct the American precedent of regarding verbal promises surrounding treaties with indigenous people of oral tradition, to be just as much part of the treaty as anything written down.[11] Similarly, the Waitangi Tribunal has found that these Crown representations are important in Treaty jurisprudence.[12] The Tribunal has also given weight to the importance of oral representations made by both sides, including the statement by Tamati Waka Nene saying that governor Hobson "must preserve our customs and never permit out lands to be wrested from us."[13]

In the second article of the Treaty, Māori are guaranteed:

> …the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess…

This affirms and protects aspects of tikanga Māori, in particular recognising that Māori ways of holding land and other properties is different than English tenure as it may be collectively held. This article guarantees that this form of ownership shall be retained by Māori "as long as it is their wish and desire".[14] The second article of te Tiriti (the Māori version of the Treaty), guarantees Māori "te tino rangatiratanga o o ratou wenua, o ratou kainga me o ratou taonga katoa." Sir Hugh Kawharu has translated this as "the unqualified exercise of their chieftainship over their lands, villages and all their treasures."[15] Kawharu adds that this would have emphasised the Crown's intention to give the chiefs "complete control according to *their* customs",[16] thus

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[10] Durie, above n 1, at 460. For another example see Alan Ward *A Show of Justice: Racial amalgamation in Nineteenth Century New Zealand* (Auckland University Press, 1995), 45.

[11] Ibid. at 460.

[12] Waitangi Tribunal, *Muriwhenua Land Report* (WAI 45, 1997), 112-114.

[13] Ibid.

[14] The Treaty of Waitangi, Article 2.

[15] I. H. Kawharu, "Translation of Māori text", appendix, in *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* Edited by I. H. Kawharu (Oxford University Press, 1989), 319; 321.

[16] Ibid. at 319.

affirming the recognition of tikanga Māori, especially in relation to property.

However in the years following the Treaty, legislation, and particularly Māori land legislation, has had a history of not protecting or highly valuing tikanga Māori. The Native Lands Acts and their creature, the Native Land Court, have effectively extinguished many aspects of tikanga through reinterpretation of tikanga Māori.[17]

The most recent piece of Māori land legislation, Te Ture Whenua Maori Act 1993, was hailed as a historic turning point when it was enacted.[18] It was held to recognise a Māori view of land, affirm the Treaty and promote control of Māori land by Māori owners.[19] The preamble of the Act recognises the special relationship between Māori and the Crown created by the Treaty, and desires that "the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed".[20] This particularly affirms articles 1 and 2 of the Treaty, of which the latter has been cited above as authority for the recognition of tikanga. At the time of enactment of TTWMA, it was said in Parliament that the Treaty was "basic" to the Act,[21] and that "concepts of tikanga Māori" were "at the heart of the Act."[22]

There is authority contained in both English, Māori and oral versions of the Treaty for tikanga Māori to be protected and recognised in New Zealand's law. While TTWMA purports to recognise this, this paper shall go on to show that there are areas in which this aspiration is not being met. The story of the historical grievances of the Tainui people regarding Crown breaches of the Treaty, and their settlement with the Crown over these issues illustrates this.

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[17] Michael Belgrave, *Māori Customary Law: From Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, 1996), 43.

[18] See Hon. Doug Kidd MP (1992) 63 NZPD 12363.

[19] Ibid.

[20] TTWMA, above n 2, preamble.

[21] See Hon. Sonja Davies MP (1992) 63 NZPD 12419.

[22] Hon. Doug Kidd MP (1994) 6 NZPD 833.

B. Tainui: Nga Kōrero o Tainui

Around 1350 the people of Tainui sailed to New Zealand and settled in the central North Island.[23] The descendants formed different hapu who were united under the leadership of Pōtatau Te Wherowhero from the 1820s.[24] Though Te Wherowhero did not sign the Treaty of Waitangi, the colonial government applied the Treaty to all Māori.[25] The Treaty purported to guarantee protection of tino rangatiratanga over Māori lands, "which they may collectively or individually possess so long as it is their wish."[26]

While initially land sales were conducted in a way that was equal for both sides, Māori soon became aware that too much land was being sold too quickly. There was substantial pressure from the Crown to sell and land issues became very important for Māori.[27] As a result, Pōtatau Te Wherowhero was made the first Māori King in 1858, to preserve rangatiratanga in an increasingly challenging environment.[28] The chiefs of Tainui pledged their land to Pōtatau, giving him "mana-o-te-whenua", or "ultimate authority over their lands" in order to resist further alienation of their land.[29] In the same year notice was given that Tainui would refuse to sell lands south of the Mangatawhiri Stream.[30]

The New Zealand government of the time perceived the Kingitanga as a threat to their sovereignty and land purchase aspirations. In 1863 hostilities were initiated by the Crown sending military forces over the Mangatawhiri Stream.[31] A year later, Tainui had been forced back to the King country and under the New Zealand Settlements Act 1863, 1.2 million acres of Tainui land had been unjustly confiscated.[32] It was

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[23] R T Mahuta "Tainui, Kingitanga and Raupatu" in *Justice and Identity* edited by Wilson and Yeatman (Bridget Williams Books, 1995), 19.

[24] Ibid. at 20.

[25] Ibid.

[26] Treaty of Waitangi, article 2.

[27] Mahuta, above n 23 at 22.

[28] WRCSA, above n 5, s 1, para B.

[29] WRSCA, above n 5, s 1, para C.

[30] Mahuta, above n 23 at 22.

[31] WRCSA, above n 5 , s 1, para D, E.

[32] WRSCA, above n 5, s 1, para E, F.

recognised in the Court of Appeal in 1989 that the land was confiscated in breach of the Treaty of Waitangi and its principles.[33]

Around 314,000 acres were later returned to Māori ownership.[34] However this land had been changed from customary tenure to individualised title. This was done by means of the Māori Land Court and the Native Lands Acts of 1862 and 1865. Furthermore, much of the land was returned to Kaupapa (or 'loyalists') who had fought with the Crown, and also to people who were not of Tainui tribes.[35] The Waitangi Tribunal has found that tenure reform was an enforced denial of the right of Māori to hold their land according to tikanga Māori.[36] They also found that tenure reform was a breach of the Treaty of Waitangi guarantee in article 2 of tino rangatiratanga of their lands, held collectively or individually.[37] The war waged against Tainui, confiscation of their lands and tenure reform have had devastating effects for Tainui that have lasted for generations.[38]

Throughout this history, Tainui held their land in accordance with tikanga Māori and in particular, with the concept of mana whenua. It is important to understand more fully what this means, in order to understand the way they have chosen to hold their returned land today.

C. Mana Whenua

1. Tikanga Māori and mana whenua

Broadly speaking, tikanga Māori can be interpreted as Māori customary law.[39] 'Tikanga' can be translated as "system, value or principle which is correct, just or proper," having derived from the root word 'tika,' which means the correct or true way.[40] Chief Judge Williams of the

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[33] *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, 516.

[34] Ibid.

[35] Ibid.

[36] Waitangi Tribunal, *Rekohu Report* (WAI 64, 2001) 184.

[37] Ibid. at 185.

[38] WRSCA, above n 5, s 1, para G and para N.

[39] Law Commission, above n 4 at 15.

[40] J. Williams, 'He Aha te Tikanga Māori?', paper presented at the Mai I Te Ata Hapara conference, Te Wānanga o Raukawa, Otaki,11-13 August, 2000, 1.

Māori Land Court has described it as "essentially the Maori way of doing things."[41] Eddie Durie identifies a number of fundamental Māori values, which act as "conceptual regulators of tikanga."[42] Values he includes are whanaungatanga, manaakitanga, aroha, wairua, utu and mana.[43] Mana has been categorised into four main ideas by kaumatua Cleve Barlow: mana atua, mana tupuna, mana tangata and mana whenua.[44] Mana whenua can be seen as being made up of both a physical and metaphysical dimension.[45] The physical concept of mana whenua as the "political authority possessed by a group over a given piece of land" will be the main focus of this paper.[46]

To fully appreciate the meaning of mana whenua the wider spiritual beliefs must also be understood. [47] Māori hold many spiritual beliefs that are crucial to understanding the way they relate to the land. Lenihan believes the spiritual dimension of mana whenua can be seen as an embodiment of these cultural concepts.[48] One important belief is that Māori are descended from the land, in the sense that Papatuanuku, the earth mother conceived the Māori ancestors.[49] The word whenua means both land and placenta, so the term tangata whenua reflects this belief that they are people from the earth's womb.[50] Thus Māori regard themselves as being owned by the land, rather than owners of the land.[51] Regarding use rights to a particular piece of land, the community's right was by descent from the earth of the place.[52] The individual's right to use the land arose from membership of that

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[41] Law Commission, above n 4 at 15.

[42] E. T. Durie, Custom Law, (unpublished confidential paper for the Law Commission January 1994) 4-5, as cited in Law Commission, above n 4 at 5.

[43] Ibid.

[44] Cleve Barlow *Tikanga Whakaaro, Key concepts in Maori culture* (Oxford University Press, 1991) 61-62.

[45] Lenihan, "Māori Land in Māori Hands" (1997) 8 AULR 570, 573.

[46] Ibid.

[47] Mason Durie, *Te Mana, Te Kawanatanga-the politics of Māori self-determination* (1998) 30.

[48] Lenihan, above n 45 at 573.

[49] *Muriwhenua,* above n 12 at 23.

[50] Ibid.

[51] Ibid.

[52] Ibid.

community.[53] While descent would give a right of entry into the community, participation in the community and adherence to its standards were crucial to belonging in the community.[54]

The concept of turangawaewae, as a place where one belongs, refers to the ancestral land over which one's whānau, hapu or iwi holds mana whenua (in the political sense).[55] Ancestral lands are also the place where one's ancestors were born, lived and died, and where their placentas and bones were buried.[56] Thus the land is not regarded as something that can be divided, rented or sold permanently but a place that could provide for the community, and which gives "a sense of identity, belonging, and continuity."[57]

Mana whenua has also been submitted as an alternative claim to prove ownership rights in land.[58] However this is outside the scope of this paper.

2. "Violence to traditional ethics"?

The Waitangi Tribunal has claimed that the concept of mana whenua comes from a nineteenth century attempt to "conceptualise Māori authority in terms of English legal concepts."[59] As such, it was held to be a modern thought which "does violence to traditional ethics."[60] The Tribunal's main problem with the concept of mana whenua is how it has been incorporated into statute. In assessing claims of both Moriori and Ngāti Mutunga to the Chatham Islands, the Tribunal had to deal with the definitions given in the Resource Management Act 1991 for mana whenua and tangata whenua. Mana whenua is defined as

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[53] Ibid. at 24.

[54] Ibid. at 24.

[55] Lenihan, above n 45 at 571.

[56] Ibid. at 572.

[57] Ibid.

[58] For more on this aspect of mana whenua, see Māori Appellate Court decisions *Ngati Toa Decision* 8 December 1994, 21 Nelson MB 1, and *Re a claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Trust Board*, 12/11/90, Te Waipounamu District, Case Stated 1/89, 4 South Island Appellate Court Minute Book, folio 673.

[59] *Rekohu Report*, above n 36 at 28.

[60] Ibid. at 24.

"customary authority exercised by an iwi or hapu in an identified area".[61] Tangata whenua "in relation to a particular area, means the iwi or hapu, that holds mana whenua over that area."[62] The Tribunal concluded that they could not support the statutory meanings because they seem to only allow for one group to be the tangata whenua. They concluded that both claimants are tangata whenua:

While the statutory definition of mana whenua is problematic, the issues that the Waitangi Tribunal has with its use can be addressed. It is recognised that traditionally more than one group might have mana over the same piece of land in the form of different use rights.[63] Therefore the concept that more than one group may hold mana whenua is acceptable. The general Courts are starting to recognise this, as demonstrated in *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*.[64] Judge Jackson's decision is based on the premise that more than one hapu may hold mana whenua in the same area.[65]

Also it is noted that the Waitangi Tribunal is not entirely consistent in its approach to mana whenua, as in other reports it recognises the concept in a more positive manner. For example, in the Te Roroa Report they note that "traditions record that Manumanu had mana whenua over Waipoua".[66] Similarly, in Te Whanau o Waipareira Report, it was recognised that Waipareira's functions were performed "within the mana whenua of Ngāti Whatua".[67] The Te Pouakani Report talks of the mana whenua of the land being vested in Tia, who was an original member of the Te Arawa canoe, thus affirming mana whenua as a traditional idea.[68] The process of preparing a claim for the Tribunal itself acknowledges the relevance and traditional nature of

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[61] Resource Management Act 1991, s 2 (1).

[62] Resource Management Act 1991, s 2 (1).

[63] See Andrew Erueti, "Māori Customary Law and Land Tenure: An Analysis" in *Māori Land Law*, edited by Richard Boast et al. (LexisNexis, 2004), 42.

[64] *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111.

[65] *Rekohu Report*, above n 36 at 29.

[66] Waitangi Tribunal, *Te Roroa Report* (WAI 38, 1992) 5; 6.

[67] Waitangi Tribunal, *Te Whanau o Waipareira Report*, (WAI 414, 1998) 3.

[68] Waitangi Tribunal, *Te Pouakani Report* (WAI 33, 1993) 17.

mana whenua by including in the traditional evidence to be prepared, a "written mana whenua report".[69]

3. A foundation of Tino Rangatiratanga

Te Ture Whenua Maori Act 1993 states in its long title that its purpose is to reform the laws relating to Māori land in accordance with the principles set out in the preamble.[70] The first principle is that of recognising the Treaty of Waitangi. In particular the Act aspires to reaffirm the exchange of kawanatanga for the "protection of rangatiratanga embodied in the Treaty of Waitangi".[71] It is the contention of this paper that mana whenua is an essential element of rangatiratanga. Therefore mana whenua ought to be able to be exercised effectively and supported within TTWMA.

Mason Durie holds that the generally agreed upon foundations of tino rangatiratanga include mana wairua, mana tangata, mana Ariki and mana whenua.[72] He defines mana whenua as the iwi or hapu's right "to exercise authority in the development and control of resources that they own or are supposed to own and to interact with the Crown according to their needs and inclinations".[73] He goes on to say that mana whenua is strongest in relation to tribally owned resources.[74]

Thomas J of the Court of Appeal however, has recognised a meaning of mana whenua that is much less than rangatiratanga. In *McRitchie v Taranaki Fish and Game Council*, a case about customary fishing rights, it was accepted in the facts that "the hapu or iwi held mana whenua and tino rangatiratanga over the river since time immemorial".[75] However these concepts were substantially distinguished. Thomas J said that by

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[69] The Claims Process, Waitangi Tribunal site: <http://www.waitangitribunal.govt.nz/claims/claims_intro.asp at 16/5/07>

[70] TTWMA, above n 2, long title.

[71] TTWMA, above n 2, preamble.

[72] Mason Durie, 'Tino Rangatiratanga' (1995) 1 He Pukega Korero: A journal of Māori Studies 44, 45.

[73] Mason Durie, 'Tino Rangatiratanga' in *Waitangi Revisited: Perspectives on the Treaty of Waitangi* edited by Michael Belgrave et al. (Oxford University Press, 2005)3, 9.

[74] Ibid.

[75] *McRitchie Kirk v Taranaki Fish and Game Council* [1999] 2 NZLR 139, 154 (Dissenting judgement of Thomas J).

assertion of mana whenua, Māori sought recognition of "the power and influence associated with the possession of their taonga," compared to the recognition of tino rangatiratanga, which would accept the hapu's "authority to control" the river.[76] Thus the aspect of control over their resource was reduced to mere influence.

There is much authority for mana whenua having a stronger and closer relationship with tino rangatiratanga than the Court of Appeal suggest. One of the main authorities is found by looking at how Māori saw the Māori version of the Treaty of Waitangi (Te Tiriti o Waitangi) in relation to concepts of mana as it related to the land, and the guarantee of tino rangatiratanga contained in the Treaty.

In the 1835 Declaration of Independence, the phrase 'mana i te whenua' was used to affirm sovereignty of the chiefs over their land.[77] However the word 'mana' in relation to the land, was not used in Te Tiriti o Waitangi. Article 2 of Te Tiriti confirmed that Māori rangatira may exercise "te tino rangatiratanga o ratou whenua". Sir Hugh Kawharu has translated this as "the unqualified exercise of their chieftainship over their lands".[78] 'Mana' and 'rangatiratanga' are "inextricably related words" according to the Waitangi Tribunal in Te Atiawa Report.[79] The Tribunal developed this in the Orakei Report, where they concluded that tino rangatiratanga is equated with full authority and to Māori meant mana.[80] The Tribunal also notes that in 1860, at the conference in Kohimarama of 200 Māori chiefs that discussion on the Treaty was virtually always put in terms of the mana that had been guaranteed them.[81] For example one chief was recorded as saying, "The Queen stipulated in the Treaty that we should retain the mana of our lands".[82]

Notable historians agree with the closely related idea of mana whenua

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[76] Ibid. at 156.

[77] Precious Clarke, 'Te Mana Whenua O Ngati Whatua O Orakei', (2001) 9 Auckland U. L. Rev. 562, 570.

[78] Kawharu, above n 15 at 319, 321.

[79] Waitangi Tribunal, *Te Atiawa (Motunui-Waitara) Report* (WAI 6, 1983) 51.

[80] Waitangi Tribunal *Orakei Report*, (WAI 9, 1987) 188.

[81] Ibid.

[82] Ibid.

and rangatiratanga. Claudia Orange writes of the fear Māori had at the time of the signing of Te Tiriti that the "mana of the land might pass from them" but holds that this fear was quelled by the guarantee of rangatiratanga in Te Tiriti.[83] Ranganui Walker asserts that had mana whenua been ceded to the Crown in article 1, instead of "te kawanatanga katoa," Māori would not have signed.[84] Thus the meaning of mana whenua must be stronger and closer to rangatiratanga than "the complete government"[85] as "te kawanatanga katoa" was translated by Sir Hugh Kawharu. Similarly, Peter Shands considers that "te kawanatanga katoa" that was ceded does not "connote an equivalent for mana whenua or sovereignty to be vested in the Crown".[86]

Seen this way, Tainui's vesting of mana-o-te-whenua to King Pōtatau was an assertion of their right to have authority over the land and to control it as they desired. For Ranganui Walker the concepts of sovereignty over the land and mana whenua are the same, and he holds that the King was a symbol of these ideas.[87] As Sir John Gorst noted in 1864, Tainui meant to have a system that would protect them and their land from possible encroachment on their rights and enable them to uphold tikanga where they wished.[88] Importantly, as per Mason Durie's definition of mana whenua, it enabled them to "interact with the Crown according to their needs and inclinations".[89]

4. Mana whenua and the dynamism of tikanga

If one does not accept that mana whenua was traditionally held as a foundation of tino rangatiratanga, it is contended that mana whenua may still be seen as an example of the dynamism of tikanga.

It is widely accepted that while tikanga is based upon fundamental

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[83] Claudia Orange, *The Treaty of Waitangi* (Allen & Unwin 1987), 58.

[84] Ranganui Walker, "The Treaty of Waitangi as a focus of Māori Protest" in *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* Edited by I. H. Kawharu (Oxford University Press, 1989), 264.

[85] Kawharu, above n 15 at 321.

[86] Peter Shands, Settling Treaty Grievances, (1997) 8 Auckland U. L. Rev. 742.

[87] Walker, above n 84 at 271.

[88] Sir John Eldon Gorst *The Maori King* (Reed Publishing, 2001), 37.

[89] Mason Durie, above n 73 at 9.

principles, it has the ability to change and adapt to circumstances.[90] Therefore mana whenua can be seen as part of the development of the concept of mana, that by asking King Pōtatau to take the mana-o-te-whenua, it was a timely Māori-initiated response to threats of further loss of Tainui land. Furthermore, the concept of mana whenua has been evolving in the changing political and legal climate of New Zealand's last 150 years, and will continue to be a valuable concept in the future. This is in accordance with the view that tikanga Māori is based upon continuous reflection on the core principles, involving "a dialogue between the past, the present and the future."[91] Kaumatua Cleve Barlow supports this idea by including mana whenua as one of the four major usages of mana that have developed in modern times:[92]

The Privy Council has recognised that while custom relating to land was based on traditional tikanga as it was before the Pākehā arrived, it developed in the process of adapting to the changing circumstances.[93] The Waitangi Tribunal has also recognised significant developments in tikanga Māori in response to the contact with Europeans. In the Ngāti Awa Raupatu Report, they found that the killings of Volkner and Fulloon were not excused in Māori customary law, because of the influence of missionary ideas.[94] The Tribunal acknowledged that throughout the changes, Māori law was not impaired or replaced, but rather augmented.[95]

In *Tararua District Council* the main issue was who the tangata whenua of the Tararua district were.[96] While the Māori Appellate Court acknowledged that mana whenua was a much-debated concept and did not come to any firm conclusions on a meaning, the dynamism of Māori social, political, economic and cultural affairs was emphasised throughout the judgment.[97] Thus the Court felt it should not be exactly bound by the way title was determined in the 19th century, and in the

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[90] Hirini Moko Mead, *Tikanga Mäori, Living by Mäori Values* (Huia Publishers, 1970), 21.

[91] Law Commission, above n 4 at 3.

[92] Barlow, above n 44 at 62.

[93] *Hineiti Rirerire Arani v Public Trustee of NZ* [1919] NZPCC 1; 6.

[94] Waitangi Tribunal, *Ngäti Awa Raupatu Report* (WAI 46, 1999) 74-75.

[95] Ibid. at 30.

[96] *Tararua District Council* (23 June 1994)138 Napier MB, 1.

[97] Ibid. See 4, 5, 6, 7.

discussion on mana whenua and politico-social structures, held that Māori society was never static.[98]

Whether one accepts the concept of mana whenua as traditional or as a legitimate nineteenth century development in tikanga Māori, it is contended that it is a foundation of rangatiratanga. As such, according to the preamble of TTWMA, it should be a concept that is supported and able to be exercised within the Act. The last part of this paper will show how attempts have been made in TTWMA to achieve this end, but also how these attempts have not been met with enthusiasm by Māori. In particular, Tainui's response shall be examined.

D. The Whenua Topu Trust and Tainui's Settlement

1. The Whenua Topu Trust

Whenua topu trusts are one of five specific trusts for Māori land set out in Te Ture Whenua Māori Act 1993 that are constituted by the Māori Land Court and are limited by TTWMA.[99] It was envisioned that the provision of a whenua topu trust in section 216 TTWMA would be used to enable Māori owners to retain their land in accordance with tikanga Māori values regarding land tenure.[100] However, in the year ending 30 June 2004, there were only 51 blocks of land in whenua topu trusts.[101] It is the contention of this paper that one of the reasons is that iwi or hapu want to be able to assert tikanga and mana whenua, and can do this most effectively outside the confines of TTWMA.

To constitute a whenua topu trust the Court must be satisfied that the constitution of the trust would "promote and facilitate the use and administration of the land in the interests of the iwi of hapu."[102] This trust is different from the other Māori trusts in that its purpose is a

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[98] Ibid. at 5.

[99] TTWMA, s 211.

[100] Law Commission, above n 4 at 61.

[101] Ministry of Justice Annual Report, 1 July 2003- 30 June 2004. (http://www.justice.govt.nz/pubs/reports/2004/annual-rpt-04/partc.html#Special%20 Jurisdictions) at 14/5/07. This number can be compared with 11,176 blocks with Whānau Trusts, 6 713 blocks with Ahu Whenua Trusts, and 3302 blocks with Kai Tiaki Trusts also set up by 30 June 2004. No Putea trusts had been set up.

[102] TTWMA, s 216 (2).

collective one.[103] The emphasis is on the benefit to the *whole* group, rather than to promote the interests those individual "persons beneficially entitled to the land".[104] In this respect the whenua topu trust is touted as an example of tikanga being recognised. However there are several discrepancies between this trust and the effective exercise of tikanga concepts, in particular mana whenua. For example, it is difficult to see how iwi or hapu would be able to fully exercise mana whenua over their land when it is the Court rather than the iwi themselves who, firstly, determine the criteria to be met before a whenua topu trust is set up, and secondly, determine whether these criteria are met. The Court must also be satisfied that the owners of the land have had sufficient notice of the application, along with sufficient opportunity to discuss and consider it, and that there is no "meritorious objection" to the application.[105]

In a whenua topu trust the assets of the trust must be held for Māori community purposes, as defined in section 218.[106] Similarly any income from the trust must also be applied for Māori community purposes.[107] It is conceivable however that an iwi or hapu may wish to apply their income for purposes which are not covered under the definition of Māori community purposes in section 218 (2). The Court may order income be applied otherwise than as specified in section 218, but only for the general benefit of members of the iwi or hapu.[108] This leaves the iwi or hapu bound by the legislation's definition of what constitutes

[103] There are four other Māori trusts provided for in TTWMA. The first is the Putea trusts, where the interests in land are managed for those beneficially entitled to that interest but any income must beheld for Māori community purposes (s 212 (2), (6)). Whanau trusts manage interests in land for the benefit of descendants of any tipuna named in the order (s 214 (3)) or those beneficially entitled to the interests in the land (s (5)). The Ahu whenua trust manages the land for the benefit of those beneficially entitled to the land (s 215 (2)) while the Kai tiaki trusts manages interests in Māori land for the benefit of the person beneficially entitled to those interests (s 217 (1),(5)). The Whenua topu trust is the only one where land is managed for the benefit of the whole iwi or hapu, whether they are beneficially entitled to the land of not.

[104] TTWMA, s 215(2).

[105] TTWMA, s 216(4).

[106] TTWMA, s 216(5).

[107] TTWMA, s 218(1).

[108] TTWMA, s 216(5).

Māori community purposes, or by what the Court may decide to otherwise order.[109]

Section 216(6) provides that no one shall succeed to any interests in a whenua topu trust. However, the Court is given the power to deem interests held for a person named in the order, and pay them and their successors income if the Court is satisfied that it is necessary to protect interests of those with a large interest in land vested in the trust.[110] This insists on recognising individual ownership. The Law Commission found that by focussing on individual rights of ownership, the Māori view of how land is customarily held is ignored.[111] Also the Court can terminate the trust at any time, and the land will be vested back to those individuals legally entitled.[112] This means that the collective land holding is not secure.

The general powers of trustees are limited not only by other sections of TTWMA, for example regarding alienation or decision making processes[113] but also by the Court's discretion. According to section 226 the Court may confer such powers on trustees as the Court thinks fit and may impose limitations or restrictions on trustees.[114]

It was envisioned that upon receiving Crown settlements, iwi could put their land in the whenua topu trust.[115] However this option clearly has substantial drawbacks for iwi looking to assert tikanga, and in particular mana whenua. In response, iwi such as Tainui have come up with their own land holding options.

2. Tainui's final settlement with the Crown

Following decades of negotiations, Tainui and the Crown finally came to a settlement enacted in the Waikato Raupatu Settlement Claims Act

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[109] TTWMA, s 216(5).

[110] TTWMA, s 216(7), (8).

[111] Law Commission, above n 4, at 25.

[112] TTWMA, s 241(1).

[113] See for example TTWMA ss 150A, 172.

[114] TTWMA, s 226 (1), (2).

[115] Video recording: Toitu te Whenua: A guide to Te Ture Whenua Māori Act 1993 (Wellington Maori Legal Services, 1996) (copy filed at University of Otago Library).

1995. As part of the settlement, 14,483 hectares of Crown-controlled land was transferred to Tainui, along with $65 million to acquire lands.[116] Land that was returned as part of the settlement was put either in the status of general land or is held by a land holding trustee, registered in the Land Transfer Act in the name of Pōtatau Te Wherowhero.[117] These arrangements and their significance are explained in the Act:

> Land transferred to Waikato under the deed of settlement will be held communally in a trust to be established by Waikato and part of that land will be registered in the name of Pōtatau Te Wherowhero as provided for in this Act, that name giving expression to the significance of the pledges made by the chiefs to Pōtatau Te Wherowhero and of the reaffirmations of those pledges, as expressed in the kawenta, by those who have continued in support of the Kingitanga.[118]

The land in the name of Te Wherowhero is to be held communally for the whole of the iwi,[119] as is the collective benefit from these lands for the whole iwi, under the mana of the Kingitanga.[120] Section 22 of the Waikato Raupatu Settlement Claims Act makes it clear that nothing in TTWMA shall apply to the land holding trust or land held in the name of Pōtatau Te Wherowhero.

Tainui have been careful to design the trust deed which governs the land held in Te Wherowhero title to reflect how the land holding was when they were able to most effectively exercise mana whenua. The land in registered in the name of Pōtatau Te Wherowhero is practically inalienable, thus ensuring Tainui remain in control of their lands:[121]

> The trust deed for the trust to be established by Waikato will provide that no land of the trust that is registered in the name of Pōtatau Te

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116 Waikato-Tainui Deed of Settlement, Office of Treaty Settlements, http://nz01.terabyte.co.nz/ots/DocumentLibrary/Waikato-TainuiDeedofSettlement.pdf on 16/5/07.

117 WRCSA, above n 6, s 19(1)(a).

118 WRCSA, above n 5, s 1, paragraph U.

119 WRCSA, above n 5, s 1, paragraph U.

120 WRCSA, above n 5, s 1, paragraph W.

121 WRCSA, above n 5, s 1, paragraph V.

> Wherowhero shall be sold or mortgaged to, or be capable of being vested in or transferred to any person or body, and that no land may be transferred out of the name of Pōtatau Te Wherowhero without the consent of the "custodians of Te Wherowhero title" referred to in that trust deed.[122]

There are three of these custodial trustees who are appointed to protect the title, and who are drawn from the judicial leadership of Tainui.[123] These provisions for the inalienability of the title are akin to the tikanga idea that as a taonga and part of their whakapapa, land cannot be permanently sold or transferred.[124] Effectively Tainui has created a new land status that is akin to how land was customarily held by Māori according to tikanga Māori.

The land holding trust and the Te Wherowhero title allows Tainui to most effectively exercise mana whenua over their land. According to Tainui's legal advisor Shane Solomon, Tainui felt that the Pōtatau title would reflect "land holding as it was prior to the land confiscations, prior to the establishment of the Māori Land Court and prior to the wholesale loss of lands" from Māori holding.[125] Tainui preferred that the Māori Land Court would not be able to "interfere with how (Tainui) view land tenure for the tribe".[126] Tainui also believed that the being under the jurisdiction of the Māori Land Court would mean the continually possibility of ending up in Court on any kind of dispute, interfering with how they chose to manage their land.[127]

The way Tainui have chosen to manage their returned lands has enabled them to trace their history back to when mana whenua was vested in the first King Pōtatau Te Wherowhero. In the 1860s this was an assertion of their right to exercise mana whenua, to have authority over the land and to relate to it as they desired according to tikanga Māori. The land now being held in the inalienable title of Te

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[122] WRCSA, above n 5, s 1, paragraph V.

[123] Mahuta, above n 23 at 31.

[124] *Muriwhenua Report*, above n 12 at 25.

[125] Video recording: Marae - the Māori Land Court (NZ Channel 1, 1998) (copy filed at University of Otago Library)

[126] Ibid.

[127] Ibid.

Wherowhero allows Tainui the same today. By holding land in a title set up by an Act of Parliament and registered in the Land Transfer system, yet reflecting tikanga Māori and in particular, mana whenua, Tainui have successfully affirmed New Zealand's law as one with "its source in two streams."[128]

[128] Durie, above n 1 at 461.