

WAIKATO LAW REVIEW

TAU MAURI

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The Editor
Waikato Law Review
Te Piringa – Faculty of Law
Waikato University
Private Bag 3105
Hamilton 3240
New Zealand

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INTRODUCTION

The Māori title of this peer-reviewed journal, *Taumauri*, means to think with care and caution, to deliberate on matters constructively and analytically. The 2017 edition of the Waikato Law Review embodies the Review's values and goals: biculturalism, law in context and professionalism. It is fitting that in 2017, the year in which Te Piringa Faculty of Law celebrated its 25-year anniversary, the first two articles are examples of scholarly work that reflect all three of the Review's goals. The first provides an in-depth and insightful commentary on the landmark Supreme Court decision of *Proprietors of Wakatū v Attorney-General*.¹ The decision is described by author and distinguished barrister, Karen Feint, as "unquestionably the Court's most important decision yet on Māori legal issues" and as marking "a significant evolution in the understanding of the Crown-Māori relationship ... that may give rise to enforceable legal duties owed by the Crown". The case involves the question of whether the Crown may be held liable to Māori for breach of fiduciary duty. Posing an abstract question of law, Professor Alex Frame evaluated the possibilities of this previously untried legal remedy in the context of Aotearoa New Zealand in his article, "The Fiduciary Duties of the Crown to Māori: Will the Canadian Remedy Travel?"² Professor Frame's erudite analysis complements Karen Feint's commentary, and both will assist in understanding the complex issues raised in the Supreme Court judgments.

This journal cherishes the Faculty's goal of biculturalism, which carries a commitment to advancing and encouraging the Māori dimension in the legal system. There are a number of contributions in this Review that have a Māori or indigenous theme. Professor Richard Boast's article surveys the operations of the Native Land Court at Cambridge and considers the connections between the private sector and Māori land alienation.³ The article by Otago University academics, Dr Mick Strack and Dr David Goodwin, entitled "More than a Mere Shadow? The Colonial Agenda of Recent Treaty Settlements" provides a critique of the Treaty settlement process, and follows a long line of articles that have been published in the Waikato Law Review through the years which address this important issue.

It is a pleasure to publish two proceedings from the Takiri ko te Ata symposium, held in Tauranga in 2017. The symposium acknowledged the lifework and legacy of the late Matiu Dickson, a rangatira from Tauranga Moana and senior law academic at Te Piringa Faculty of Law, University of Waikato, to whom the 2016 edition of this Review was dedicated. In her tribute, Ani Mikaere writes about the legitimacy of tikanga (Māori law) and makes the clear and important distinction between law and "lore". To follow, Charlie Rahiri draws from the wisdom of Tauranga Moana leaders to share personal insights into the challenges of leadership in Māori society.

Two recently published books with Māori and indigenous themes are reviewed. Seanna Howard, Clinician, and Professor of Practice at the James E Rogers College of Law, University of Arizona provides the first review. Te Piringa Faculty of Law enjoys a relationship agreement with the University of Arizona law faculty. We are delighted that Seanna accepted our invitation to review *International Indigenous Rights in Aotearoa New Zealand*. This collection of scholarly

1 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.

2 Alex Frame "The Fiduciary Duties of the Crown to Māori: Will the Canadian Remedy Travel?" [2005] 13 Waikato Law Review 70.

3 The article names various tribal groups present in Cambridge in the 1800s. It is important to note that Ngāti Koroki-Kahukura and Ngāti Hauā are the mana whenua groups of this area.

works edited by Auckland University academic, Dr Andrew Erueti, focuses on the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration). Despite New Zealand endorsing the Declaration in 2010, little is known about how it came to be adopted by the United Nations General Assembly and what its role and status will be in New Zealand law. The timely collection critically analyses the Declaration and provides valuable insights into its drafting. I provide a review of *He Reo Wāhine: Māori Women's Voices from the Nineteenth Century*, a book that offers a glimpse into the valuable resources that lie in some of New Zealand's manuscripts and archival collections.

Over the years, the Waikato Law Review has published a number of contributions authored by legal practitioners, honouring the commitment to our Faculty goal of professionalism. In the 10 years since the introduction of the Property Law Act 2007, there have been more than 80 judgments on s 339 of that Act. Legal practitioner and Director of McCaw Lewis Lawyers, Thomas Gibbons, provides important practical insights on the s 339 remedy in his article, "Section 339 of the Property Law Act 2007: A Tragedy of the Commonly Owned". Gibbons pays special attention to contested issues, and critiques the approach taken by the Court of Appeal in the recent case of *Thomas v Mackintosh*.⁴

Recognising that "New Zealand is a nation of debt", Sascha Mueller's article asks the question: "Trimming the Fringe: Should New Zealand Limit the Cost of Borrowing in Consumer Credit Contracts?" The article explores the merits of limiting the cost of borrowing fringe loans (also known as "payday loans"). The article proposes changes to the credit contract consumer protection provisions and discusses alternative means to aid borrowers in vital need of credit.

It is no easy task to produce a high quality, peer-reviewed journal every year, and I take this opportunity to thank the authors, the peer reviewers in New Zealand and abroad to whom articles were sent, our student editors led by Philip McHugh, and Mary-Rose Russell, copy editor and proof-reader extraordinaire.

Linda Te Aho
Editor in Chief

4 *Thomas v Mackintosh* [2017] NZCA 549.

A COMMENTARY ON THE SUPREME COURT DECISION OF *PROPRIETORS OF WAKATŪ V ATTORNEY-GENERAL*

BY KAREN FEINT*

In 2017, the Supreme Court delivered a landmark decision, *Proprietors of Wakatū v Attorney-General*,¹ in which it held that the Crown owed fiduciary duties to the Māori customary owners of the land when it acted on their behalf in creating the Nelson tenths reserves in 1845. This is unquestionably the Court’s most important decision yet on Māori legal issues – and certainly the longest, with the judgment running to 353 pages. The decision marks the first occasion that the courts of Aotearoa New Zealand have recognised that the Crown can owe legally enforceable obligations to Māori in circumstances when it has undertaken to protect their property rights. This is a marked departure from the courts’ characterisation of the Crown’s relationship with Māori as being defined by Treaty of Waitangi obligations that lie within the political realm, and not the legal domain. The case is also notable for the fact that the plaintiffs sought remedies for historical wrongs through the courts, rather than the political Treaty settlement process.

I. THE FACTS

A. *The New Zealand Company’s “Tenths” Scheme*

In 1839, a private British colonisation venture, the New Zealand Company (NZC), arrived in Aotearoa eager to purchase as much land as it could from Māori before the country became a British colony. The NZC planned to build towns and profit from onselling the land to settlers. The “tenths” scheme was an integral component of the NZC’s plans, so called because one-tenth of all the land that the company acquired would be reserved and held in trust as endowment reserves for the Māori customary owners of the land (Tenths). The NZC portrayed the Tenths as being the “true” consideration for the land.²

Shortly after arriving at Kāpiti Island, the NZC agent Colonel William Wakefield entered into a deed of purchase with Ngāti Toa rangatira, and he then sailed to Queen Charlotte Sound where he signed another with Te Ātiawa rangatira (1839 Deeds). Both deeds ostensibly purchased the same area of approximately 20 million acres of land on both sides of Cook Strait. In reality, it is highly unlikely that the rangatira had any intention of selling their land (an entirely foreign concept in

* Barrister, Thorndon Chambers, Wellington. I was part of the legal team for the plaintiffs/appellants throughout the proceedings.

1 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 [*Wakatū SC*].

2 At [109] per Elias CJ. Although the scheme was ostensibly designed to protect Māori interests, it also served the NZC’s political objectives, as it was conscious of humanitarian concerns being raised in the United Kingdom about the impact of colonisation on the indigenous people of British colonies. Refer, for instance, to the 1837 *Report of the Parliamentary Select Committee on Aboriginal Tribes (British Settlements)* (Reprinted with comments by the “Aborigines Protection Society”, London, 1837).

Māori law) and it is doubtful that even Wakefield believed the 1839 Deeds to be entirely genuine,³ but the NZC had succeeded in putting a political stake in the ground before the establishment of New Zealand as a British colony.

In the Treaty of Waitangi in 1840, the Crown recognised Māori ownership of land held in accordance with tikanga Māori/ Māori law (customary title). Māori land could only be alienated by the Crown (under the doctrine of pre-emption).⁴ Pursuant to the Land Claims Ordinance 1841, pre-1840 purchases were null and void until they had been inquired into and found to be on “equitable terms”⁵ according to the “real justice and good conscience of the case”.⁶ If the purchase was allowed by the Crown, then customary title would be extinguished and the land would become Crown land available for grant. The Ordinance confirmed that the Crown was the only lawful source of title to land.⁷

Meanwhile, the NZC forged ahead with its plans to build its first settlements in Wellington and Nelson. In late 1840, the British government reached an accommodation with the NZC upon the basis on which the NZC would be allowed to proceed with its colonisation schemes. The agreement retrospectively adjusted and capped the amount of land the NZC could claim, according to the amount of money it had spent on colonisation, and (in cl 13) stated that the Crown would assume responsibility for reserving the Tenths in fulfilment of, and according to the tenor of, the NZC purchase terms (whereas in respect of all other lands, the Crown would make such arrangements as was deemed “just and expedient for the benefit of the Natives”).⁸ The NZC’s vigorous efforts to obtain a Crown grant without inquiry into the validity of its 1839 Deeds were staunchly rebuffed, as by law “the Crown could not grant what the Crown did not possess”,⁹ and accordingly the NZC was required to prove that customary title had been lawfully extinguished.

In 1841, the NZC landed in Te Tau Ihu o Te Waka a Māui (the top of the South Island). At Kaiteretera Beach, the NZC met with the local rangatira and presented them with “gifts” in support of their asserted purchase under the 1839 Deeds (since it was by then unlawful to purchase land directly from Māori). For their part, the rangatira welcomed Pākehā settlement, but they expected in doing so that they would maintain their mana/authority over the settlers.¹⁰ Thereafter, the historical narrative makes little mention of Māori agency, largely because from this point on tangata whenua seemingly had little knowledge of what the Crown was doing on their behalf, and even less control.

The NZC began laying out the town of Nelson, even though they had no legal right to do so as the land remained in Māori customary title. As Justice Clifford observed, there was at this point

3 Elias CJ described the New Zealand Company [NZC] claim as “one of the more audacious of the old land claims”: *Wakatū* SC, above n 1, at [10].

4 At [96] per Elias CJ.

5 Land Claims Ordinance 1841 4 Vict 2, cl 3.

6 At cl 6.

7 *R v Symonds* (1847) NZPCC 387 (SC) at 394 per Martin CJ.

8 As cited in *Wakatū* SC, above n 1, at [111] per Elias CJ.

9 This was a point taken by both Lord Stanley, the Secretary of State for the Colonies, and Commissioner Spain. The maxim *nemo dat quod non habet* means that the Crown could not grant interests in land it did not have. *Wakatū* SC, above n 1, [116] and [120] per Elias CJ.

10 As Professor David Williams stated, in giving evidence in the High Court, “Tikanga Māori did not cease when the ‘Tory’ sailed in”.

a “considerable gap between legal theory and on the ground ‘practical’ realities”.¹¹ The first NZC settlers arrived in Nelson in late 1841, and in 1842 the selection of “town” and “suburban” sections took place (each allotment comprised of a one acre “town” section, a 50 acre “suburban” section and a 150 acre “rural” section). At the same time, the Police Magistrate in Nelson selected the first Tenths’ sections on behalf of the Māori customary owners, comprising 100 town sections in Nelson and 100 suburban sections around Motueka and Moutere (5,100 acres in total). From 1842 onwards, the Tenths were treated as a trust, with intended trustees appointed, the sections leased out, and income received and held on trust.

Commissioner Spain was appointed to inquire into the validity of the NZC’s 1839 Deeds, and he started his inquiry in Wellington. It soon became apparent that the NZC “purchase” was nothing of the sort, and this necessitated considerable political manoeuvring by the Crown and NZC, since the presence of a large number of settlers on the ground rendered it unpalatable to reject the purchase. The solution that the Crown arrived at, and which Governor FitzRoy implemented with Commissioner Spain’s co-operation, was to preserve in Māori ownership the land that Māori occupied (since it stood to reason that Māori had never agreed to sell their homes and livelihood)¹² and to require the NZC to pay further financial compensation to the Māori customary owners of the land in order to “perfect” the sale. Commissioner Spain’s 1844 inquiry in Nelson was adjourned to allow payments of £800 to be made to the local hapū and their rangatira signed “deeds of release” relinquishing their claims to the land apart from their “pahs, cultivation, burial-places, and wahi rongoa”.¹³

In 1845, Commissioner Spain delivered his report into the Nelson purchase (Spain award) and found that the NZC’s purchase was on equitable terms and that it was entitled to a grant of 151,000 acres of land in Tasman Bay and Golden Bay, upon the terms that:

1. one-tenth (15,100 acres) was to be reserved for the Māori customary owners of the land;¹⁴ and
2. the land occupied by Māori – the pā, urupā and cultivations – was to be excluded from the grant, as it had not been sold.

Governor FitzRoy accepted Spain’s recommendations and issued a grant in identical terms to the Spain award in 1845. However, the NZC rejected the grant as unsatisfactory, as it still did not have enough land to complete its Nelson settlement. Following further political manoeuvring in London, fresh arrangements were reached whereby the Crown issued a grant in 1848 to the Crown lands across the top of the South Island, vested in trust in the NZC on the basis that the NZC would act as the Crown’s agent in selling land for the purposes of settlement.¹⁵ A stark difference between the 1845 and 1848 grants was that the 1848 grant only referred to the extant Māori reserves. The

11 *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 [*Wakatū HC*] at [112].

12 This was agreed to by the NZC at a key meeting that Governor FitzRoy convened in Wellington in January 1844, and which was attended by Commissioner Spain. *Wakatū SC*, above n 1, at [122] per Elias CJ.

13 *Wakatū SC*, above n 1, at [130]. Elias CJ thought the deeds important for their stipulation that land occupied by Māori had not been sold (at [131]).

14 Commissioner Spain recognised the hapū in occupation of the land as the customary owners, rather than the signatories to the 1839 Deeds, notwithstanding that his jurisdiction was to inquire into the validity of the 1839 Deeds. In 1892, the Native Land Court inquired into the beneficiaries of the Tenths, and found that the Māori customary owners of the land sold to the NZC were hapū/whānau of Ngāti Rārua, Ngāti Tama, Te Ātiawa and Ngāti Koata, and a list of the beneficial owners was drawn up (referred to as the 254 tūpuna).

15 These arrangements were effected by the New Zealand Company Loans Act 1847 (UK) 10 & 11 Vict c 112, and the NZC was granted a loan to enable its colonisation operations to continue (*Wakatū SC*, above n 1, at [193] and [196] per Elias CJ).

entitlement to a full tenth of 15,100 acres, and the exclusion of pā, urupā and cultivations, had vanished.

Thereafter, the Crown simply never fulfilled its commitment to give effect to the terms of the NZC purchase. The remaining 10,000 acres of “rural” sections were never selected, and nor were Māori pā, urupā and cultivations excluded from the NZC grant as they should have been. Further, the 5,100 acres of Tenths selected in 1842 were rapidly diminished with the disposal of 47 of the town sections in 1847 and various exchanges made over the years where suburban Tenths were exchanged for sections that Māori were living on (these exchanges were necessitated by the fact that their pā had not been reserved for them as they should have been). Consequently, there was a substantial shortfall in the “tenth” entitlement of 15,100 acres.

The Tenths were held on trust by the Crown and a succession of statutory trustees from 1845 until 1977, when a Māori incorporation of the beneficial owners, Proprietors of Wakatū (Wakatū), was formed to receive the remnant Tenths, putting the land back under Māori control for the first time in over 130 years.¹⁶

Led by kaumātua Rore Stafford, in 2010, High Court proceedings were launched to recover the remainder of the full “tenth”, asserting that the Crown owed duties to the customary owners arising from either the law of trusts, fiduciary duty or good faith. The plaintiffs were Wakatū, Rore Stafford and Te Kāhui Ngahuru (a trust established to represent all the descendants of the Māori customary owners).

B. Claim Dismissed by the Lower Courts

After a trial lasting more than six weeks, the High Court made favourable factual findings – that one-tenth of the Spain award should have been reserved for Māori, in addition to the pā, urupā and cultivations being excluded, and that the Crown had assumed responsibility for implementing the terms of purchase determined by Spain. However, the plaintiffs failed to persuade both the High Court and Court of Appeal that the Crown’s obligations were legally enforceable in the courts, essentially because the lower courts decided that the Crown’s obligations were political in nature.

In considering the question of whether the Crown’s obligations to reserve Tenths were legally enforceable, Justice Clifford’s reasoning was that they were not, because although part of the Crown’s role was to protect the interests of Māori, in doing so it was acting in a governmental capacity. The Crown was “involved in an exercise which fundamentally involved the balancing of competing interests”¹⁷ – those of the Māori owners against those of the settlers (living on land they did not own) and the population more generally. The Crown was therefore not able to act with the absolute loyalty required of a fiduciary. In reaching this conclusion, the Court relied on the “political trust” doctrine espoused in cases like *Tito v Waddell*,¹⁸ which postulates that when the Crown is acting as trustee, its duties may be in the nature of “higher” or “political” trust obligations, which (in contrast to private law duties) are unenforceable in the courts. The Court was also influenced by the Crown’s intention to establish a statutory trust, although in fact the necessary legislation was not passed until 1856.

¹⁶ The Wakatu Incorporation Order 1977.

¹⁷ *Wakatū* HC, above n 11, at [301].

¹⁸ *Tito v Waddell (No 2)* [1977] Ch 106.

And yet, there is an inkling in Clifford J’s judgment that such a doctrine is problematic when property rights are involved:¹⁹

The more I have thought about it, the more it seems to me that the Crown could not have been acting in a vacuum, in terms of some form of enforceable legal accountability to Māori, during that [1845–1856] period.

That doubt encapsulated what became the key issue on appeal.

Surprisingly, the High Court also found that none of the plaintiffs had standing to bring the claim, notwithstanding Wakatū’s position as trustee of the remnant Tenthhs and second plaintiff Rore Stafford’s status as the rangatira that had led the Tenthhs’ claim through both the Waitangi Tribunal and the High Court. The Court of Appeal allowed the appeal only in relation to the standing of Rore Stafford to bring the claim, in recognition that there has been a long tradition of rangatira bringing claims to the courts on behalf of the iwi and hapū they represent.²⁰ Otherwise, the Court of Appeal essentially agreed with Clifford J’s analysis that the arrangements “reflected agreements of a political nature which were to be realised in legislation”.²¹

II. THE SUPREME COURT’S DECISION

Kaumātua Rore Stafford succeeded before the Supreme Court, with the Court allowing his appeal by a 4-1 majority (with Elias CJ, Glazebrook J, Arnold and O’Regan JJ comprising the majority, and Young J dissenting). The Court made a declaration that the Crown owed fiduciary duties to the Māori customary owners of the Nelson settlement land to reserve 15,100 acres for their benefit, and, in addition, to exclude their pā, urupā and cultivations from the land obtained by the Crown following the 1845 Spain award.²²

The Supreme Court remitted the case back to the High Court to determine the outstanding matters relating to liability, loss and remedy in accordance with the reasons given in the Supreme Court. This will require determination of whether the Crown breached its duties, since that has not been the subject of High Court findings yet, as well as whether any of the Crown’s remaining defences can succeed.²³

Relevantly to the question of breach, however, the Supreme Court recorded in its “Summary of Result” the Crown’s acknowledgement that 10,000 acres of the 15,100 acre entitlement were never reserved as Tenthhs.²⁴ Elias CJ and Glazebrook J went as far as finding that this failure to get in trust property was a breach of the Crown’s duties, since there was no “lawful authority for such

19 *Wakatū* HC, above n 11, at [307].

20 *Proprietors of Wakatū v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 [*Wakatū* CA] at [30].

21 At [123] per Ellen France J.

22 *Wakatū* SC, above n 1, order A. The reference to the land obtained by the Crown is to the land to be granted to the NZC once its purchase had been determined to be on equitable terms by the Land Claims Ordinance inquiry. The legal effect of the Spain award was to extinguish customary title and vest it in the Crown, thereby making it available for grant to the NZC.

23 *Wakatū* SC, above n 1, at [4]–[7]. The remaining defences are laches, a limitation defence in relation to equitable compensation, and the effect of the Treaty settlements.

24 At [6]. The Summary of Result is useful for recording the majority decision by the court.

executive interference with an interest in property”.²⁵ They also considered it well arguable that the Crown had breached its duties in disposing of Tenthhs already held on trust.²⁶ The Crown had failed to identify any lawful authority to enable it to dispose of trust property, and the Crown’s role in making governmental decisions about the settlement could not justify a breach of trust.²⁷

Although the outcome is an emphatic 4-1 majority that the Crown owed fiduciary duties, there is a divergence in the reasoning underpinning that finding, and to make the analysis even more difficult the Court also splits different ways on different issues. Elias CJ centres the Crown’s duty in the constitutional context of the Crown’s obligations to Māori and its Treaty of Waitangi guarantees to protect Māori property rights, whereas the analysis of the other judges is more focussed on the transaction itself and the specific obligations that arose from the promise to create Tenthhs. In other key respects, the judgments of Elias CJ and Glazebrook J are most closely aligned, particularly in their finding that the fiduciary duties are those of trust, whereas the joint judgment of Arnold and O’Regan JJ does not even consider the trust argument. Significantly, however, a majority of three (Elias CJ, Arnold and O’Regan JJ) applied the Supreme Court of Canada decision of *Guerin*, which recognised that the Crown owes a sui generis fiduciary duty to indigenous people in relation to the surrender of their aboriginal title to the Crown.²⁸

The judges differ on standing, with only Mr Stafford having his standing recognised to represent the Māori customary owners. The minority of Elias CJ and Glazebrook J take a more flexible public law approach to accommodate the difficulties for Māori in taking collective claims. The Court also diverges on the legal status of the pā, urupā and cultivations after the Spain award,²⁹ with Elias CJ considering that customary title was extinguished, while the other three judges opine that it was not as that land had not been sold.³⁰

Finally, the majority are on common ground with their findings that Mr Stafford’s claims are not barred by the Limitation Act 1950 to the extent that they are within the trust property exception in s 21(1)(b) of that Act, and that the Te Tau Ihu iwi Treaty settlements do not bar the claims due to the savings clause in the legislation that preserved the right to have the proceeding finally determined.³¹

A. *The Crown’s Fiduciary Duties*

At a broad level, the common ground across the four judge majority is the agreement that fiduciary duties arose due to the Crown’s assumption of responsibility, on behalf of the Māori customary

25 At [436] and [496] per Elias CJ and [719] per Glazebrook J.

26 This included the failure to exclude pā, urupā and cultivations from the NZC land; the disposal of the 47 town sections; the exchanges of the suburban sections for occupied land, which was necessitated by the failure to reserve occupied land and had the effect of diminishing the tenths; and the grant of over 900 acres to the Church for a school at Whakarewa: *Wakatū* SC, above n 1, at [437]–[445] per Elias CJ and [587] per Glazebrook J. Although Glazebrook J is less definitive on this point, saying only that there may have been breaches, like Elias CJ she questions what explicit power the Crown could have had to dispose of trust property, stating that the Crown’s actions could not be justified on the basis that the Crown owed wider duties to the settlers (see [529] and [549]–[550] per Glazebrook J).

27 At [549] per Glazebrook J.

28 *Guerin v The Queen* [1984] 2 SCR 335. “Sui generis” is a Latin term meaning unique (literally “of its own kind”) (see <https://en.oxforddictionaries.com/explore/foreign-words-and-phrases/>).

29 *Wakatū* SC, above n 1, at [91], [401] and [417] per Elias CJ.

30 At [569] and [585] per Glazebrook J and [752] per Arnold and O’Regan JJ.

31 At [4]–[6].

owners, for implementing the terms of the NZC purchase as to reservation of the Tenth and holding them on trust, and exclusion of the pā, urupā and cultivations from the NZC grant. The key to the analysis is the Land Claims Ordinance 1841 process, since this is the mechanism by which customary title was extinguished, upon the conditions on which Spain had approved the alienation.³² When the Crown accepted the Spain award, this had the legal effect of vesting the land in the Crown and crystallising the Crown's fiduciary duties.³³ The land thereby became Crown land available for grant to the NZC, subject to the equitable interests of the Māori customary owners, in relation to both the 5,100 acres Tenth already allocated and the 10,000 acres that had not been reserved.

As the legal owner of the land, the Crown had the discretionary power to reserve the Tenth, and was obliged to act as a fiduciary with absolute loyalty to the customary owners in discharging its duties to reserve the Tenth and hold them on trust on behalf of the beneficial owners.³⁴ No question of balancing interests arose, as the rights of Māori and the NZC respectively had been determined by the Spain award.

The 1848 grant to the NZC did not affect the equitable interests of the customary owners, because – critically – the Spain award was the only mechanism by which customary title had been extinguished to the Nelson settlement land.³⁵ Moreover, the NZC was fully aware of the Tenth's entitlement, and thus took the Crown land subject to those equitable rights. After the collapse of the NZC in 1850, the land was re-vested in the Crown and the Crown could not reacquire land free from trust obligations.³⁶

Viewed in this way, it could be said that the strong fact situation drove the outcome, since equity typically imposes fiduciary duties upon any person who is responsible for acting on behalf of others in relation to their property rights. Glazebrook J's judgment most closely relies upon orthodox equitable principles in finding that there was an express trust, on the basis that the Crown had interposed itself into the contract between the NZC and the vendors, and consequently when the NZC's "conditional contract" was confirmed, the Crown held equitable interests on behalf of the Māori customary owners.³⁷ The fact that a statutory trust was ultimately intended did not mean that there was no intention in the interim to hold the property on trust, especially when a trust was in fact how the responsible officials conceived of the Tenth at this time.³⁸ In their joint judgment, Arnold and O'Regan JJ also focussed on the circumstances of the transaction, and concluded that the nature of the Crown's obligation was "delivering on the deal"³⁹ that the NZC had struck with Māori. They reasoned that:⁴⁰

32 At [330] per Elias CJ.

33 Refer, for instance, at [568] per Glazebrook J: "In my view the process of inquiry (to ensure any sale was just and equitable) and the Crown's acceptance of the results of that inquiry extinguished customary title over all of the land covered by the contract and made all of that land (including the Tenth land) demesne land of the Crown. This process preceded the 1845 grant and was not dependent on it." (Footnotes omitted.)

34 At [388]–[390] per Elias CJ, [582] per Glazebrook J and [785] per Arnold and O'Regan JJ.

35 Refer to [91], [188] and [192] per Elias CJ, [568] per Glazebrook J and [762] per Arnold and O'Regan JJ.

36 At [586] per Glazebrook J.

37 At [561] per Glazebrook J.

38 At [573].

39 At [785] per Arnold and O'Regan JJ.

40 At [782] per Arnold and O'Regan JJ. Note that on Elias CJ's analysis, it is not accurate to say that the NZC obtained "cleared title", as it was the Crown that obtained title, making the land available for grant.

The Crown's decision to accept Commissioner Spain's recommendations and allow the Company to obtain cleared title (albeit only to the extent of his award) crystallised the Company's obligations to Māori. Given the role that the Government assumed in relation to the Tenths reserves prior to the Spain award (for example, by appointing trustees) and its acceptance of the terms of that award, it is fair to say that the Crown stood in the Company's shoes, in the sense that it took it upon itself not only to ensure that the terms agreed by the Company were honoured (in particular, that land be reserved as agreed) but also to hold the Tenths reserves for the benefit of Māori in fulfilment of the Company's long-term obligations.

B. *The Crown's Constitutional Role in Relation to Māori*

While the reasoning in the section above appears on its face to sit within the bounds of conventional equitable principles, in my view it does not fully explain the basis for the decision, because it does not engage with the reality of the Crown's role in the transaction. The Crown can be "no ordinary fiduciary" when it "wears many hats and represents many interests".⁴¹ Only the Crown could have fulfilled the terms of the Spain award, and accordingly the transaction cannot be viewed in isolation from the constitutional context within which the Crown acted. To truly understand the basis for the Crown's duties, it is necessary to consider the Crown's role in the extinction of customary title, and the reasons why the Crown felt compelled to intervene in the NZC's affairs in the first place. The explanation lies in the undertakings that the Crown had made to not only recognise, but also protect, pre-existing Māori property rights.

The Chief Justice's judgment squarely confronts the constitutional role of the Crown and its relationship with Māori. Her judgment concludes that the Crown's obligations were founded in its undertakings to protect indigenous property and the vesting of the land in the Crown following the extinguishment of customary title.⁴²

The early constitutional arrangements – comprising the Treaty of Waitangi, the 1840 Charter⁴³ and the Land Claims Ordinance 1841⁴⁴ – were premised on the principle that Māori customary property rights were unaffected by the assumption of sovereignty by the Crown.⁴⁵ Moreover, the Crown's role was to protect those rights:⁴⁶

Such assumption of responsibility towards Māori in New Zealand began with the Treaty of Waitangi (a covenant which guaranteed to Māori the "full, exclusive, and undisturbed possession" of their lands and which set up the Crown's right of pre-emption) and the Charter of 1840 (which made it

41 *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [96] per Binnie J.

42 *Wakatū* SC, above n 1, at [91], [380] and [392] per Elias CJ.

43 Charter and Letters Patent for erecting the Colony of New Zealand 1840. The Charter provided that "nothing in the said charter ... shall affect ... the rights of any aboriginal natives ... to the actual occupation or enjoyment ... of any lands ... then actually occupied or enjoyed by such natives" (cl 3). The Charter restricted the Governor's power to grant land to "waste land", that is Crown land upon which Māori customary title had been extinguished.

44 The Land Claims Ordinance 1841 4 Vict 2 provided in cl 2 that "all unappropriated lands" within the colony were Crown land, "subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants".

45 "From the start, they were treated as pre-existing rights of property which were exclusive and inalienable and able to descend according to Maori custom" (*Wakatū* SC, above n 1, at [340] per Elias CJ). The decision relies on *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA); and see *R v Symonds* (1847) NZPCC 387 (SC) for a contemporary recognition of Māori customary title.

46 *Wakatū* SC, above n 1, at [380].

clear that the Māori interest in land was inalienable and that the interests passed to the descendants of the occupiers).

Under the 1840 Charter, the Crown had no ability to grant land unless customary title had been extinguished.⁴⁷ There were only two legal mechanisms for doing so, the direct purchase of Māori land by the Crown (exercising its sole right of pre-emption) or the Land Claims Ordinance 1841 inquiry to determine the validity of the pre-1840 purchases according to whether they were on equitable terms. Upon extinction of customary title, the land would become Crown land available for grant.

The purpose of the Crown's undertakings was to prevent exploitation of Māori.⁴⁸ It is this factor that invokes the seminal Canadian Supreme Court decision of *Guerin*,⁴⁹ in which it had been held that the Crown owed a "sui generis" fiduciary duty to an indigenous First Nation band when acting on their behalf in arranging a lease of their reserve land for a golf course, and that it breached that duty by letting the land on less advantageous terms than the band had agreed to. Under the Indian Act RSC 1952 c 149, s 18(1) regime, aboriginal title was inalienable, except upon surrender to the Crown, so that any sale or lease could only be carried out with the Crown acting on the band's behalf and in their best interests. The roots of the duty lie in the sui generis nature of aboriginal title, and the historical powers and responsibility assumed by the Crown to protect indigenous property and prevent exploitation.⁵⁰

The "enduring contribution"⁵¹ of *Guerin* was to distinguish the political trust concept on the basis that pre-existing property rights of indigenous people could not be taken away except by lawful process, and must therefore be enforceable in the courts.⁵² As Dickson J held in his majority judgment:⁵³

... the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.

It is this distinction that explains where the lower courts in *Wakatū* went wrong, since they treated the Crown as having acted in its governmental capacity, even though property rights were in play. They were reluctant to impose equitable obligations on the Crown in the absence of a written undertaking of trust or statutory authority.⁵⁴ However, as Elias CJ pointedly observes, it is a long standing precept of public law – dating back to the Magna Carta – that the Crown has no prerogative

47 At [100]–[101] per Elias CJ.

48 At [348].

49 *Guerin v The Queen*, above n 28.

50 *Wewaykum Indian Band v Canada*, above n 41, at [78] per Binnie J.

51 At [74] per Binnie J, cited by Elias CJ in *Wakatū* SC, above n 1, at [347].

52 *Guerin v The Queen*, above n 28, cited in *Wakatū* SC, above n 1, at [345]–[347].

53 *Guerin v The Queen*, above n 28, at 385 per Dickson J (emphasis added).

54 There was an adverse precedent in the Court of Appeal authority of *R v Fitzherbert* (1872) 2 NZCAR 143. In that case, a challenge to the grant of a Wellington tenths' section for a hospital was dismissed on the basis that the Crown had never declared any trust in writing. Elias CJ considered that *Fitzherbert* was wrongly decided. See *Wakatū* SC, above n 1, at [303]–[330], in particular [327]–[329].

powers to deal with the property of others except by the operation of law.⁵⁵ That principle applies equally to the property of Māori.

Crucially, the Chief Justice considered that the “alienation to the Crown of existing Māori property through the Land Claims Ordinance process was on terms which could only be fulfilled by the Crown”, and the Crown’s acceptance of that alienation “entailed assumption of responsibility to act in the interests of Māori whose interests were surrendered”.⁵⁶ In this regard, “in circumstances of necessary vulnerability given the embryonic legal order then in place”,⁵⁷ the Māori customary owners were “dependent on the Crown, in whom the land vested when cleared of native title, to protect their interests and fulfil the terms” of purchase.⁵⁸ There were no competing interests so far as the existing property rights of Māori were concerned, as these rights were “proprietary and exclusive”.⁵⁹ The Chief Justice concluded that the *Guerin* approach constituted the Crown as a fiduciary, adding the intriguing inference that Māori indeed have a stronger case than their Canadian counterparts for imposing obligations on the Crown.⁶⁰

The obligation to act in the interests of the Indian band in *Guerin* is entirely comparable with the obligation which arose through alienation under the Land Claims Ordinance through the terms approved in Spain’s award. As in *Guerin*, fiduciary obligations arose because the Crown acted in relation to “independent legal interests” (in *Guerin*, as in the present case, existing property interests) and on behalf of Māori. *The Crown’s obligations in the present case are, if anything, amplified by the nature and extent of Māori property and its recognition in New Zealand from the first engagements of the Crown in the Treaty of Waitangi.* The resulting obligation, as was recognised in *Guerin*, was “in the nature of a private law duty”; in this “*sui generis* relationship” it was “not improper to regard the Crown as a fiduciary”.

Therefore, although the Chief Justice agreed with the other judges that the circumstances of the NZC transaction imposed duties on the Crown to fulfil its terms, Her Honour also explicitly recognised that throughout the Crown was acting in its public capacity to fulfil its guarantees to protect Māori property:⁶¹

The Crown’s general engagements to Māori in relation to pre-existing property interests (inalienable except through the Crown), *and its assumption of responsibility to act on behalf of the native proprietors* (both under the Land Claims Ordinance procedure and in management of the reserves) *constituted the Crown a fiduciary on the approach taken in Guerin.*

Having applied *Guerin* to cast the Crown as a fiduciary, Elias CJ determined that the nature of the Crown’s obligations were those of trust.⁶² When the land vested in the Crown, the Crown was compelled in equity to hold the surrendered land in trust for the vendors of the land for fulfilment

55 *Wakatū* SC, above n 1, at [302], [331]–[339] and [436] per Elias CJ.

56 At [366] per Elias CJ.

57 At [413].

58 At [388].

59 At [389]–[390].

60 At [385] (emphasis added).

61 At [392] (emphasis added).

62 At [395], citing *Wilson J in Guerin v The Queen*, above n 28. She rejected the Crown’s argument (which had succeeded in the lower courts) that without any declaration of trust there was insufficient certainty of intention to create a trust, pointing out that no formality was required as “there is no magic to the creation of a trust”, and this was “simply application of the ordinary law to the Crown” (at [410]).

of the conditions upon which Spain approved the pre-1840 purchase.⁶³ As trustee, the Crown was obliged to get in the trust property by reserving the full tenth, hold the Tenths in trust for the Māori customary owners, and ensure that their occupied lands were excluded from the grant to the NZC.

C. Application of *Guerin*

Of the three judges who apply *Guerin*,⁶⁴ only the Chief Justice truly engages with what *Guerin* means. In this respect, however, Her Honour is in good company with the Cooke Court of Appeal, which back in the 1990s recognised the obvious historical parallels between the former British colonies, and pointed to a “substantial body of Commonwealth case law” supporting a fiduciary duty owed by the Crown to indigenous peoples.⁶⁵ Writing for the Court, President Cooke presciently foreshadowed the adoption of the *Guerin* principle in Aotearoa, opining that the Treaty of Waitangi is “major support” for a fiduciary duty to be owed by the Crown to Māori,⁶⁶ that the duty would arise in dealings relating to the extinguishment of customary title⁶⁷ and that if extinguishment happened “by less than fair conduct or on less than fair terms” it was likely to be a breach of the Crown’s duties.⁶⁸

Glazebrook J was the only majority judge that explicitly declined to apply *Guerin*, since in her view the duty did not depend on any “special fiduciary duty of the Crown in its dealings with the property of indigenous people”.⁶⁹ Interestingly, however, Her Honour also indicated that were it necessary to decide the point, the Chief Justice’s analysis had “much to recommend it”.⁷⁰ The inference that she would favour the *Guerin* approach if required to decide, is consistent with the other respects in which her judgment is aligned with Elias CJ.⁷¹ Moreover, on close analysis, Glazebrook J’s judgment takes a more nuanced approach than her refusal to adopt *Guerin* suggests, as the Crown’s public role in ensuring that pre-1840 transactions were equitable is key to her reasoning that the Crown’s conscience was affected.⁷²

In light of the Crown’s then concern to ensure that pre-1840 contracts were only validated if the transactions were just and equitable, it is inconceivable that it would have considered itself free to ignore the obligations to the customary owners that it had taken on with regard to the Tenths reserves.

63 At [401]–[402].

64 *Guerin v The Queen*, above n 28.

65 In reality, the “Commonwealth case law” referred to the Canadian jurisprudence, since in Australia, only dissenting opinions applied fiduciary principles (Toohey J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and Brennan CJ in *Wik Peoples v Queensland* (1996) 187 CLR 1). Refer to Elias CJ’s analysis in *Wakatū SC*, above n 1, at [365].

66 At [381], citing *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 306.

67 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 655. The Court intimated that the judgments in *Guerin* would likely be of “major guidance” in deciding such matters in New Zealand.

68 *Wakatū SC*, above n 1, at [381], citing *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 24.

69 *Wakatū SC*, above n 1, at [590] and n 957.

70 At [590].

71 For instance, Glazebrook J’s recognition of the constitutional context, her view that the Crown permitted the NZC to proceed with its town before the NZC’s title was confirmed, and her liberal approach on legal issues such as the express trust and standing.

72 *Wakatū SC*, above n 1, at [573] (footnote omitted). She also acknowledges that the 1840 agreement was a political compact, and that that was the basis that the Crown took on the NZC’s obligations, but considered that this did not mean that the obligations were not true trust obligations (at [581] and [589]).

If there was no trust, as the Crown now asserts, then part of the consideration for the sale would not have been honoured.

The joint judgment of Arnold and O'Regan JJ is the most difficult to unpick. On the one hand they acknowledge as “[a]n important part of the background”⁷³ the requirement for the Crown to lawfully extinguish Māori customary title, and explicitly apply *Guerin* (reasoning that the Crown’s assumption of responsibility for the implementation of the NZC’s obligations “brings into operation the *Guerin* analysis”),⁷⁴ but on the other, they state that they express no view about a “broader basis” for the fiduciary duty being founded in the Treaty of Waitangi or the Crown’s right of pre-emption.⁷⁵ This disavowal is difficult to reconcile with the ratio of *Guerin*, since the nature of aboriginal title and its inalienability except upon surrender to the Crown underpinned the imposition of legally enforceable obligations by the Canadian Supreme Court.⁷⁶

Key to Arnold and O'Regan JJ’s reasoning is the emphasis they place on the distinction in cl 13 of the 1840 agreement between the Crown’s role in ensuring the NZC met the Tenth’s commitments and the government’s role in otherwise reserving land for Māori.⁷⁷ They reason that the former is analogous to stepping into the shoes of a private company, but that the Crown undertook the latter function in the exercise of its general governmental responsibilities. However, on a *Guerin* analysis, this is simply not a valid distinction, since in both cases the surrender of Māori customary title is at issue. In either scenario, if the Crown has made a commitment to create reserves (say, in the latter case, to carve out a reserve on Crown purchase of a block), then the Crown equally has a duty to fulfil that term of the sale. It is hard to see why that would amount to an exercise of executive government responsibilities, since pre-existing independent property rights are concerned and the Crown would have no lawful authority to interfere with them (in the absence of legislation).

Arnold and O'Regan JJ also draw a distinction between the Crown’s role during the Land Claims Ordinance process, in which they consider the Crown was acting in its governmental capacity to ensure that pre-1840 purchases were fair, and the Crown’s duties to deliver the promised consideration following the Spain award, when the Crown was not called upon to take any decisions of a governmental nature, nor balance the interests of settlers and Māori.⁷⁸ That is, they considered the duty arose once the Spain award had determined the Māori entitlement, at which point the issue of competing interests did not arise. Again, however, arguably this sets up a false dichotomy, since in the 1840 agreement the Crown had interposed itself between the NZC and Māori on the basis of its public undertakings to Māori. Further, the *Guerin* duty is based on the surrender of customary title to the Crown, and the Canadian jurisprudence does not confine the fiduciary relationship only to situations in which the Crown can act with loyalty. Rather, it recognises the reality that the Crown is acting qua Crown, and that the existence of public law duties will not necessarily exclude the imposition of fiduciary duties.⁷⁹

73 At [730] per Arnold and O'Regan JJ.

74 At [784] per Arnold and O'Regan JJ; and see [779]: “We consider that the general approach adopted by the majority in *Guerin* applies to the present case”.

75 *Wakatū* SC, above n 1, at n 1012.

76 *Guerin v The Queen*, above n 28, at 376.

77 *Wakatū* SC, above n 1, at [738] and [780].

78 At [785] per Arnold and O'Regan JJ.

79 At [354] per Elias CJ, citing *Wewaykum*, above n 41, at [85].

The inconsistency in Arnold and O'Regan JJ's reasoning is highlighted by their finding that the Crown also owed a fiduciary duty in relation to the pā, urupā and cultivations that were supposed to be excluded from the NZC grant, given that Māori had not sold these lands and "that full title to land could only come through the Crown".⁸⁰ In this regard, then, the Crown was not simply stepping into the shoes of NZC, since a private company could not have fulfilled that duty. It was acting as the Crown.

In my view, the Chief Justice's judgment is clearly the most authoritative, because her reasoning is grounded in the constitutional context that framed the basis of the Crown's actions, the vesting of the land in the Crown and the principles upon which *Guerin* was decided. The Crown intervened in the NZC transaction on behalf of the Māori customary owners precisely because it was the Crown, and had undertaken to respect Māori customary title and ensure property rights were only extinguished according to law. Fiduciary duties arose because the extinction of customary title vested the land in the Crown and gave it discretionary power to fulfil the terms of the NZC purchase. I do not, therefore, agree with Arnold and O'Regan's view that the Crown was effectively stepping into the NZC's shoes. The Crown was acting qua Crown and it could not permit a private company to perform public functions. It follows that the duties that the Supreme Court has recognised are not strictly speaking private law duties, although they are in the nature of private law duties and they give rise to private law remedies. They are truly sui generis.

D. Express Trust

From a precedential point of view, it is fortunate that Elias CJ and Glazebrook J were in the minority in recognising an express trust – a sui generis fiduciary duty based on *Guerin* is of far more significance for the development of the law concerning the legal relationship between Crown and Māori.

They recognised an express trust in relation to the entire 15,100 acres (including the 10,000 acres that had not been reserved), based on the Crown holding legal title to the land, its exercise of discretionary control in acting on behalf of the Māori customary owners in the Spain inquiry and its direct assumption of responsibility in the selection and management of the Tenthhs (including leasing them and receiving the income).⁸¹

The conceptual difficulty with an express trust lay with the 10,000 acres of unreserved Tenthhs, which raised the issue of whether the trust property could be identified. The conflicting authority on whether specific identification of trust property is required to establish the requisite certainty of subject matter for a trust was deftly resolved on the basis that there was no conceptual uncertainty, because there was clear entitlement of a fixed proportion of an identified geographical area and a ballot system for selecting the sections.⁸²

In any event, little turns on the express trust/fiduciary duty distinction, since the same practical outcome was achieved in terms of the limitation period – the land was held under an express trust or an institutional constructive trust, but either way the claim fits within the trust property exception to the limitation period (as is discussed below).

80 *Wakatū* SC, above n 1, at [786] per Arnold and O'Regan JJ.

81 At [394]–[397] and [414].

82 Elias CJ distinguished case law that found uncertainty of subject matter where trust property has not been segregated from generic property; see the discussion in *Wakatū* SC, above n 1, at [423]–[435]. Glazebrook J did not think it was necessary to resolve the conflicting cases because land is in a "special category" (at [579]).

E. Standing

The Supreme Court upheld the Court of Appeal's decision that "chiefs of high standing" have the customary authority under tikanga to bring representative claims on behalf of their people,⁸³ thereby recognising Rore Stafford's right as a rangatira and beneficiary to pursue the proceedings for the benefit of the collective customary group.

Significantly, however, a 3-2 majority (Arnold, O'Regan and Young JJ) ruled that the other appellants, Wakatū and Te Kāhui Ngahuru, did not have standing to take a representative claim on behalf of the Māori customary owners.⁸⁴ Notwithstanding Wakatū's historical connection with the Tenth (it was incorporated to receive the remnant Tenth), technically Wakatū was not a successor trustee, and as a matter of fact Wakatū's owners were not precisely the same collective group as the customary owners.⁸⁵ While Arnold and O'Regan JJ acknowledged that there may be a case for a more relaxed approach in relation to collective indigenous claims, they were uneasy about extending that to Wakatū, due to what they perceived as a contest as to representation between the court proceeding and the mandated body responsible for conducting the Treaty settlement process.⁸⁶ They also rejected the standing of Te Kāhui Ngahuru, a trust formed to represent the entire collective group of customary owners, since a trust cannot gain representative status merely because the trust's beneficiaries are members of the class whom the trustees claim to represent.⁸⁷

The outcome on standing is the most unsatisfactory aspect of the decision, and illustrates the many difficulties that Māori face in taking proceedings against the Crown: iwi/hapū have traditionally not been afforded legal recognition by the courts; there are potentially multiple parties who could claim to represent the collective; there may be a disjunction between traditional iwi/hapū and legal entities representing individualised ownership structures imposed by colonisation; and there may be conflict between the rights of hapū (the collective that traditionally holds land rights) and a wider collective (iwi or the "large, natural groups" with whom the Crown negotiates Treaty settlements). Further, the Crown regularly makes standing arguments in proceedings brought on behalf of Māori collectives.⁸⁸

The minority, comprising Elias CJ and Glazebrook J, were sympathetic to the procedural hurdles that Māori face in bringing collective claims, and were therefore prepared to accept the standing of both Wakatū and Te Kāhui Ngahuru. They considered that it was unjust to take a

83 At [494] per Elias CJ, [673] per Glazebrook J and [807] per Arnold and O'Regan JJ. Many historical cases were taken by rangatira in the name of the collective, for example *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

84 *Wakatū* SC, above n 1, at [796]–[802].

85 There had been changes in ownership for various reasons, including legislation that had compulsorily acquired the uneconomic shares of over 300 owners.

86 *Wakatū* SC, above n 1, at [800]–[801]. Accordingly, Arnold and O'Regan JJ considered that it would have been preferable for Wakatū to have sought a representation order to resolve the competing claims to represent the collective group. The claimant groups were not in fact the same, contrary to what Arnold and O'Regan JJ suggest, since the iwi represented a wider collective across Te Tau Ihu than the hapū/whānau with customary ownership of the Nelson settlement area.

87 At [810] per Arnold and O'Regan JJ.

88 *Refer to Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277, where the Crown challenged the standing of trustees even though they had a representation order, and finally conceded the point during the Supreme Court appeal.

technical approach to the legal status of Wakatū when it was the Crown that had transformed collective customary tenure into an individualised ownership structure.⁸⁹

Elias CJ and Glazebrook J considered that the courts need to adopt a more flexible approach to standing to recognise the collective nature of indigenous claims, which in line with public law principles would recognise the standing of anyone with an interest in the outcome of the proceeding, and not deny standing merely because there are potentially multiple representatives.⁹⁰

In support, they drew on:

1. the right to redress in the United Nations Declaration of the Rights of Indigenous Peoples,⁹¹ which affirms the right to “just and fair procedures” and “effective remedies” for dispute resolution;
2. the Canadian Supreme Court decision of *Manitoba Métis*, where the Court took a flexible and pragmatic approach and recognised the standing of an incorporated body to represent the collective interests of the Métis people, even though that body was not seeking relief in its own right;⁹²
3. the distinction drawn by the Supreme Court in *Paki*⁹³ between standing (those entitled to take a representative claim) and relief (those entitled to remedies), with the Court considering it was preferable to address representation of the collective at the relief stage rather than as a matter of standing.

Given that there will potentially be multiple representatives for collective Māori claims, there is much to be said for the *Paki* distinction, which avoids the problem of standing being used as a procedural hurdle to defeat a meritorious claim. However, in light of the majority decision, the safest procedural course for Māori collective claims remains to name an acknowledged rangatira as plaintiff. Consideration should also be given to seeking a representation order.⁹⁴

F. The Political Treaty Settlement Process

If the Cooke Court of Appeal had had an appropriate case on which to consider the Crown’s duties to Māori, perhaps things might have turned out differently, but as it is the political Treaty claims settlement process has monopolised the response to historical Māori grievances over the past two decades. The relationship that the political process has to the Crown’s legal obligations to Māori was first raised by McGrath J in *Paki v Attorney-General (No 2)*,⁹⁵ and then again in the Court of Appeal decision in *Wakatū*, where Ellen France J implied that there was no need to develop a fiduciary duty doctrine tailored to the Crown’s relationship with Māori due to there being other (political)

89 *Wakatū* SC, above n 1, at [665].

90 At [491] per Elias CJ, and [657] and [673] per Glazebrook J.

91 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007), cited in *Wakatū* SC, above n 1, at [491] per Elias CJ, and footnote 867 per Glazebrook J.

92 The Canadian Supreme Court considered that the “presence of other claimants does not necessarily preclude public interest standing; the question is whether this litigation is a reasonable and effective means to bring a challenge to court”; *Manitoba Métis Federation Inc v Canada (Attorney General)* 2013 SCC 14, [2013] 1 SCR 623 at [43], as cited in *Wakatū* SC, above n 1, at [491] per Elias CJ. A potential point of distinction is that only declarations were sought in *Manitoba Métis*, rather than private law relief.

93 *Paki v Attorney-General*, above n 88, cited in *Wakatū* SC, above n 1, at [491] per Elias CJ.

94 *Wakatū* SC, above n 1, at [641]–[662] per Glazebrook J and [800] per Arnold and O’Regan JJ.

95 *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 [*Paki (No 2)*] at [189]–[196] per McGrath J.

avenues of redress already being available.⁹⁶ Certainly as a matter of practice the Waitangi Tribunal jurisdiction, combined with the political Treaty settlement process, has had a chilling effect on the development of the common law. However, it does not follow that the Tribunal displaces the courts, as the roles and jurisdictions are different.⁹⁷ The Tribunal is a commission of inquiry that was established to provide an avenue for Treaty breaches not amenable to legal remedies, and make recommendations to the Crown on the practical application of the Treaty, but it was never intended to oust common law rights and remedies.⁹⁸ Matters of property are properly brought before the courts.⁹⁹ In Canada, the legal remedies sit alongside the political processes, and go some way towards rebalancing the disparity of bargaining power in the political process.¹⁰⁰

In *Wakatū*, between the High Court and Court of Appeal hearings, the Crown had entered into Treaty settlements with the four Te Tau Ihu iwi interested in the case, but had inserted a savings clause into the Ngāti Koata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014 to protect the plaintiffs' right to pursue the appeal.¹⁰¹ Although this clause explicitly protected the prosecution of the appeal, the Crown argued that its wording (which stated that it “does not preserve any claim by or on behalf of a person who is not a plaintiff”¹⁰²) precluded relief being provided for the benefit of the collective customary groups.

The majority gave short shrift to this argument and its implications for the right to justice.¹⁰³ The savings provision had been passed by Parliament with the intention of preserving the appellants' ability to pursue their private law claims and in full knowledge of the representative nature of the proceedings. There was a distinction between private law fiduciary claims and political Treaty settlements for Treaty breaches (a distinction drawn in the Select Committee report on the Bill, which considered that it would be “improper” to obstruct final determination of private law claims).¹⁰⁴ Accordingly it was “inconceivable” that Parliament would have made the “empty gesture” of preserving the appeal, but not permitting any meaningful outcome.¹⁰⁵

However, the Treaty settlements were not necessarily irrelevant, and Glazebrook, Arnold and O'Regan JJ considered that the savings provision was designed to ensure that no “double recovery” would occur as between the settlements and the proceedings.¹⁰⁶ Glazebrook J thought that a broad

96 *Wakatū* SC, above n 1, at [70], citing *Ellen France J in Wakatū CA*, above n 20, at [115].

97 *Wakatū* SC, above n 1, at [488] per Elias CJ.

98 As the Hon Matiu Rata explained in introducing the Treaty of Waitangi Bill to Parliament, (8 November 1974) 395 NZPD 5726, cited in *Wakatū* SC, above n 1, at [474] per Elias CJ. The Treaty of Waitangi Act 1975 provides the Tribunal with jurisdiction to inquire into claims that the Crown has breached the principles of the Treaty of Waitangi, and to make non-binding recommendations as to the action that ought to be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future (Treaty of Waitangi Act 1975, s 6(1) and (3)).

99 *Wakatū* SC, above n 1, at [695] per Glazebrook J and [488] per Elias CJ.

100 See, for example, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* 2004 SCC 74, [2004] 3 SCR 550.

101 Ngāti Koata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014, s 25(6)–(8).

102 At s 25(7).

103 Refer to the New Zealand Bill of Rights Act 1990, s 27(3).

104 *Wakatū* SC, above n 1, at [481] and [488] per Elias CJ and [695] per Glazebrook J.

105 At [825] per Arnold and O'Regan JJ; and see also [482] per Elias CJ and [714] per Glazebrook J (The Crown's “very narrow interpretation” of the savings provision would “effectively rob it of all meaning”).

106 At [716] per Glazebrook J and [826] per Arnold and O'Regan JJ.

view of the effect of the settlements would have to be taken in the High Court, given that the settlements covered all Te Tau Ihu Treaty claims (not just the Tenth), and the wider iwi (not just the hapū/whānau who were customary owners of the Nelson settlement lands).¹⁰⁷

G. *Doing Justice to a Historical Case – Defences Based on Time Bars*

The historical nature of the proceeding, which relates to events dating back over 170 years, is a constant undercurrent running through the decision. In his dissenting judgment, Young J argued that it is not possible to “do justice to a claim of this antiquity”,¹⁰⁸ as “[w]e cannot – at least with any confidence – recreate all the relevant thinking of the time”.¹⁰⁹ And yet, as the majority pointed out, the historical record was in fact relatively intact and the thinking of the time was clearly revealed in the more than 500 primary documents on the record. Young J’s scepticism as to whether it is possible to recreate the legal order or the historical events is not at all persuasive in light of Elias CJ’s judgment, which reviews the documentary record in painstaking detail in order to convincingly demonstrate that there is in fact a high degree of certainty about the legal and constitutional framework of the period, and that it is possible to establish what happened with sufficient certainty to impose legal duties on the Crown. This rather suggests that it is Young J’s approach that is ahistorical.¹¹⁰

Moreover, the majority acknowledges the need for courts to be responsive to grievances of indigenous peoples arising from the history of colonisation, and to recognise the historical prejudice that Māori have suffered which posed significant challenges in mounting a claim, including impoverishment and disempowerment by the authorities. It was also relevant that Māori had not sat on their hands, and there had been a history of concerted protest throughout the years, including an unsuccessful Court of Appeal case in 1872 in relation to the Wellington Tenth, which would have made the odds of succeeding with another court challenge seem “insuperable”.¹¹¹ As Elias CJ pointed out, “it is rather unrealistic to suggest that [indigenous people] sat on their rights before the courts were prepared to recognize those rights”.¹¹²

1. *Laches*

In remitting the proceeding to the High Court, the Court left open to the Crown the defence of laches (an equitable defence available where it is unjust in practice to grant a remedy due to the prejudice caused to the defendant by delay). It signalled, however, that delay on its own was insufficient and

107 At [695] and [716]–[717] per Glazebrook J.

108 At [949].

109 At [949].

110 It is also curious, as Elias CJ pointed out (at [382]) that Young J had accepted in *Paki (No 2)*, above n 95, at [281] that in principle a fiduciary relationship could be recognised “without undue awkwardness” in the circumstances in which “the Crown gained sovereignty over New Zealand and its radical title was burdened by customary ownership interests” and yet he rejects that possibility outright in *Wakatū*.

111 *Wakatū SC*, above n 1, at [466], citing the Court of Appeal decision in *R v Fitzherbert* (1872) 2 NZCAR 143, above n 54.

112 *Wakatū SC*, above n 1, at [467] per Elias CJ, citing *Manitoba Métis Federation Inc v Canada (Attorney General)*, above n 92, at [149]. The right to redress recognised in the *United Nations Declaration on the Rights of Indigenous Peoples*, above n 91, is also relevant in this regard; see art 40, cited in *Wakatū SC*, above n 1, at [491].

that the Crown would need to establish actual prejudice to mount the defence.¹¹³ As Glazebrook J pointed out, the Crown could not argue that it had relied on having unencumbered title to land in Nelson when there was no justification for it to have held that view.¹¹⁴ The more significant issue for determination by the High Court is whether the historical iwi Treaty settlements have affected the equities.

2. Limitation

The majority rejected the Crown's defence that the claims are time barred by the Limitation Act 1950, finding that to the extent that the claim seeks to recover trust property (that is, land still held by the Crown) or the proceeds of trust property, which is either in the possession of the Crown or has previously been received and converted to its use, it falls within the exception in s 21(1)(b) of that Act.¹¹⁵ This long-standing "trust property" exception applies to express and institutional constructive trusts, but not remedial constructive trusts.¹¹⁶

The Court confirmed that the Crown would hold any Tenths land, or any land that came into its hands that should have been part of the Tenths but was never reserved (that is, the rural Tenths), on institutional constructive trust, because such a trust arises with respect to a fiduciary whose obligations precede the impugned acts.¹¹⁷ The issue of whether equitable compensation would be time barred was left for the High Court to determine.¹¹⁸

III. CONCLUDING REFLECTIONS

Wakatū represents a significant breakthrough in Aotearoa New Zealand law for its adoption of the *Guerin* concept of a sui generis fiduciary relationship between the Crown and Māori that imposes duties (and remedies) in the nature of private law. In my analysis, I have acknowledged that doubts may be raised as to the extent to which the *Guerin* doctrine truly represents the ratio of *Wakatū*. However, it seems to me that as a matter of logic, the only way to rationalise the decision is on the basis that the Court accepted the principle that the Crown must be legally accountable when dealing with the independent legal property rights of Māori. In time, I think that principle will bed down. The true significance of *Guerin* was that it consigned the "political trust" doctrine into historical oblivion by drawing the critical distinction between independent legal interests enforceable at law, and interests created by executive action or the legislature. Both Elias CJ and Cooke P appreciated the meaning of *Guerin*, and regarded its approach as a logical extension of

113 *Wakatū* SC, above n 1, at [459] per Elias CJ, [690] per Glazebrook J and [817] per Arnold and O'Regan JJ (for instance, in relation to a specific instance where gaps in the records render it impossible to say what happened in relation to a particular section).

114 At [692].

115 *Wakatū* SC, above n 1, at [4].

116 The distinction recognised by *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA). Note that the trust property exception has been amended in the Limitation Act 2010, s 49.

117 *Wakatū* SC, above n 1, at [450]–[453] per Elias CJ, [686] per Glazebrook J and [815] per Arnold and O'Regan JJ, citing *Paragon Finance plc v DB Thakerar & Co*, above n 116, which in applying the equivalent of s 21(1)(b) of the Limitation Act 1950, distinguished between institutional and remedial constructive trusts, finding that only the former fall within the exception.

118 *Wakatū* SC, above n 1, at [4], [500] per Elias CJ, [687] per Glazebrook J and [816] per Arnold and O'Regan JJ.

the recognition of customary title, since the rule of law requires the Crown to be held to account if it infringes independent property rights.¹¹⁹

Wakatū can be seen as further undermining the orthodox legal position in *Te Heuheu Tukino v Aotea District Māori Land Board* that the Treaty of Waitangi is not directly enforceable in law. While it remains the case that the Treaty does not have direct legal status, it follows from *Wakatū* that the Treaty's Article II property guarantees are enforceable.¹²⁰ Nonetheless, some circumspection is required, for as Elias CJ warned, it is overstating the case to say that the Crown–Māori relationship itself gives rise to legally enforceable obligations:¹²¹

None of this is to suggest that there is a general fiduciary duty at large owed by the Crown to Māori. It is to say that where there are pre-existing and independent property interests of Māori which can be surrendered only to the Crown (as under the right of pre-emption) a relationship of power and dependency may exist in which fiduciary obligations properly arise.

It seems to me that the true legacy of the *Wakatū* decision is that it represents a breakthrough in the courts' willingness to intervene (in the absence of legislation) and hold the Crown to account into what has hitherto largely been cast as a political relationship. This development is consistent with, and indeed required by, the values underpinning the rule of law, for, as Williams J has argued in the High Court in rejecting the political trust reasoning of *Wi Parata*, "it would be wrong in principle and dangerous in practice for the courts to leave the Crown to 'acquit itself as best it may' as the 'sole arbiter of its own justice'".¹²² The role of the courts in protecting the legal rights of Māori is bolstered by contemporary conceptions of New Zealand's legal and constitutional framework and international human rights norms. The Supreme Court has observed that New Zealand legislation recognises "the importance of Māori society and culture in New Zealand",¹²³ pointing in particular to the right to culture of minorities in s 20 of the New Zealand Bill of Rights Act 1990, and the recognition that "land is a taonga tuku iho of special significance to Māori" in Te Ture Whenua Māori Act 1993.¹²⁴ Further, the Supreme Court has accepted that the principles in the United Nations Declaration on the Rights of Indigenous Peoples are consistent with the principles of the Treaty of Waitangi, and provide some support for the view that the principles of the Treaty should be construed broadly.¹²⁵

119 The Chief Justice, at [302], cited the Magna Carta as protecting property from being taken by the Crown, except by law.

120 I refer to property guarantees only, because courts would doubtless be far more reticent at recognising rangatiratanga/authority.

121 *Wakatū* SC, above n 1, at [391] per Elias CJ.

122 *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 at [63] per Williams J, in reference to *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC), the infamous 1877 decision in which Prendergast CJ stated that the Crown must be the "sole arbiter of its own justice" in acquitting its obligation to respect Māori property rights. As Elias CJ stated in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [13], *Wi Parata* is "discredited authority".

123 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [101] per Elias CJ.

124 Preamble to Te Ture Whenua Māori Act 1993; *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [43] ("land is of vital importance to Māori").

125 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 [*Mixed Ownership Model case*] at [92], in the context of an argument concerning the right to development; see also *Wakatū* SC, above n 1, at footnote 867 per Glazebrook J.

A. *The Development of the Law in Canada*

In Canada, the watershed of the *Guerin* decision in 1984, coupled with constitutional recognition of aboriginal rights in s 35 of the Constitution Act 1982,¹²⁶ resulted in extensive further development of the law over the following decades. While there are constitutional and legal differences between our jurisdictions, the Canadian jurisprudence may serve to forecast the direction in which the law might develop here. There are two main limbs, the sui generis fiduciary duty and the “honour of the Crown” concept. These concepts are complementary, and each has a different scope; the former, duties (and remedies) in the nature of private law when independent legal interests are at stake, and the latter relating to the exercise of governmental responsibilities when indigenous interests may be affected.¹²⁷

1. *Sui generis fiduciary duty*

A sui generis fiduciary duty may be recognised where there are:¹²⁸

1. cognisable independent legal interests (such as aboriginal title or other aboriginal rights); and
2. an undertaking by the Crown to act on behalf of the indigenous group, whether by statute, agreement or a unilateral assumption of responsibility, in circumstances in which the Crown exercises discretionary control. This connotes an undertaking of loyalty to act in the beneficiaries’ best interests.

It is also possible for an ad hoc fiduciary duty to arise, in the same way that a fiduciary duty can be recognised in private law.¹²⁹

The existence of public law duties do not necessarily exclude the creation of a fiduciary relationship,¹³⁰ and fiduciary duties have been recognised in Canada in relation to cognisable interests other than customary title.¹³¹ The Crown’s public law duties are accommodated by shaping the content of the Crown’s duties in a context-specific way, depending on the extent to which the Crown is required as the government to balance competing interests.¹³² For instance, in relation to the creation of a new reserve in which there is no underlying aboriginal title, the Crown’s fiduciary obligations may require process-oriented duties (such as acting in good faith, reasonably and with full disclosure), but once the reserve is created the Crown’s duties become more onerous, and the Crown will then be required to protect and preserve the First Nations’ property rights (for example, it may be required to prevent exploitative bargains, or even to withhold its own consent to surrender where the transaction is exploitative).¹³³

126 This is in the Canada Act 1982 (UK), sch B.

127 *Wakatū* SC, above n 1, at [355] per Elias CJ.

128 *Manitoba Métis Federation Inc v Canada (Attorney General)*, above n 92, at [61]; *Guerin v The Queen*, above n 28, at 384 per Dickson J.

129 *Williams Lake Indian Band v Canada (Aboriginal Affairs and Development)* 2018 SCC 4. This recent decision has a useful summary of the Canadian jurisprudence.

130 *Wakatū* SC, above n 1, at [354] per Elias CJ, citing *Wewaykum Indian Band v Canada*, above n 41, at [85] per Binnie J.

131 So, for instance, a breach of fiduciary duty may arise in the case of expropriation of an existing legal reserve: *Wakatū* SC, above n 1, at n 405, citing *Wewaykum*, above n 41, at [98].

132 See, for example, *Manitoba Métis Federation Inc v Canada (Attorney General)*, above n 92, at [49]; *Wewaykum Indian Band v Canada*, above n 41, at [83], [86] and [92].

133 *Wakatū* SC, above n 1, at [355], citing *Wewaykum Indian Band v Canada*, above n 41, at [86(3)], [94]–[100], [353] and [358]; *Semiahmoo Indian Band v Canada* (1998) 148 DLR (4th) 523 (FC) at 538.

2. Honour of the Crown

The other significant development in Canada has been the recognition of a constitutional duty on the Crown to act with honour in its dealings with indigenous First Nations. Even where no fiduciary duty is owed, the “honour of the Crown” may require the courts to intervene and provide public law remedies to protect aboriginal rights or title. The special relationship between the Crown and indigenous First Nations means that the “honour of the Crown is always at stake”.¹³⁴ The ultimate purpose of requiring the Crown to conduct itself honourably when exercising power is the “reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty”,¹³⁵ reflecting the constitutional protection of aboriginal rights (which are entrenched in s 35 of the Constitution Act 1982¹³⁶).

The duty arises when the Crown has actual or constructive knowledge of the potential existence of aboriginal rights or title, and contemplates conduct that might adversely affect those rights or title.¹³⁷ The content of the duty is determined by the strength and importance of the aboriginal right asserted and the degree of interference that the proposed conduct may have on it, so that it can be viewed as a spectrum, which may require bare consultation at one end, but compromise and accommodation of the aboriginal rights at the other.¹³⁸ The remedies can therefore have real teeth, since the courts are prepared to restrain developments if necessary to protect the infringement of aboriginal rights.

In the seminal case of *Haida Nation*, the Supreme Court of Canada invoked the honour of the Crown concept when British Columbia intended permitting the logging of red cedar trees on one quarter of the island of Haida Gwaii, even though the island was at that time subject to the unheard aboriginal title claim of Haida Nation, including a claimed right to harvest cedar.¹³⁹ The Court ruled that the province owed a duty of meaningful consultation, which might require workable accommodation to preserve the Haida interest pending resolution of their claims.¹⁴⁰

Manitoba Métis was a historical case relating to the circumstances in which Manitoba had become part of Canada. The Manitoba Act 1870¹⁴¹ provided for 1.4 million acres of land to be granted to Métis children, but the government failed to properly implement the entitlements. A fiduciary duty claim failed because a pre-existing communal aboriginal title interest was not at stake. Nonetheless, the Supreme Court considered that such a constitutional obligation to an Aboriginal group engages the honour of the Crown, and accordingly the Crown was required to act diligently to fulfil its statutory obligations. The Court made a declaration that the Crown had

134 *Manitoba Métis Federation Inc v Canada (Attorney General)*, above n 92, at [68], citing *R v Badger* [1996] 1 SCR 771 at [41].

135 *Manitoba Métis Federation Inc v Canada (Attorney General)*, above n 92, at [66].

136 Canada Act 1982 (UK), sch B.

137 *Wakatū* SC, above n 1, at [73]–[74]; *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511 at [35].

138 At the lower end of the spectrum, a construction of a road that could infringe hunting rights required only consultation: *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69, [2005] 3 SCR 388. In another case, a proposal to reopen a mine requiring the construction of a road through traditional territory raised serious concerns about the impact on wildlife and traditional uses of the land, and resulted in a mitigation plan that allowed the Court to conclude that the requirements of the duty to consult had been met: *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, above n 100.

139 *Haida Nation v British Columbia (Minister of Forests)*, above n 137.

140 At [77].

141 Manitoba Act 1870 (UK) 33 Vict c 3.

failed to act with diligence in implementing the statutory entitlements, in the expectation that that declaration would be deployed by the Métis in negotiations with the Crown.¹⁴²

B. *Where Might the New Zealand Courts Venture?*

The “honour of the Crown” concept provides an obvious path forward for the New Zealand courts to engage Treaty principles when the fiduciary standard is not met. After all, the concept is closely aligned with, if not identical to, the Treaty duty of acting with the “utmost good faith”,¹⁴³ so it does not require an undue stretching of legal principle to apply it here. However, although the concept is familiar, the Canadian remedies requiring active reconciliation and accommodation of indigenous interests would represent a significant step forward for the New Zealand courts. While Canadian law should not be transplanted here uncritically, it does make sense to learn from the substantial body of jurisprudence that has considered in depth how to balance the Crown’s executive government responsibilities with its obligations to its indigenous people.

New Zealand courts are likely to be more receptive to drawing on Canadian jurisprudence in the wake of *Wakatū*. To sum up the current state of the law, overall, it appears that Māori legal jurisprudence has been going through a growth period, following a long hiatus after the Cooke Court of Appeal years of the late 1980s–early 1990s. This development appears to be driven by a combination of factors – the social and political changes of recent decades that have recognised the Treaty of Waitangi as part of the country’s constitutional foundations and embedded the Treaty into executive government decision-making,¹⁴⁴ the increasing reach of administrative law; the establishment of the Supreme Court (with its statutory purpose to resolve important legal matters concerning the Treaty of Waitangi),¹⁴⁵ and (of practical significance) the existence of more Māori entities with sufficient resources to pursue litigation. Since the Supreme Court’s inception, the Court has shown a willingness to venture down the path of better defining the legal and constitutional relationship between the Crown and Māori.¹⁴⁶ The Court has endorsed the *Lands* (SOE) case¹⁴⁷ as a decision “of great authority and importance to the law concerning the

142 *Manitoba Métis Federation Inc v Canada (Attorney General)*, above n 92. Métis are a people of mixed indigenous and French ancestry.

143 President Cooke’s expression in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] at 664. Richardson J used the phrase “the honour of the Crown” in his judgment, drawing on Canadian authority at 682. See also “to act in good faith, fairly, reasonably and honourably towards the other”: *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304. Note, too, *Paki (No 2)*, above n 95, at [276] per Young J “There are many New Zealand cases in which the view has been expressed that the relationship between the Crown and Māori is either analogous to a fiduciary relationship or actually is fiduciary in character”.

144 The Treaty was recognised as “part of the fabric of New Zealand society” in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210. Matthew Palmer concludes that over the last 25 years there has been a “significant change” in the culture of executive government, and that the government complies with the Treaty as a “moral obligation”, whilst disavowing it having any legal force: Matthew SR Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008) at 225–226.

145 The Supreme Court was established as a court of final appeal, among others, to enable important legal matters relating to the Treaty of Waitangi “to be resolved with an understanding of New Zealand conditions, history, and traditions”: Supreme Court Act 2003, s 3(1)(a)(ii) (now replaced by s 66 of the Senior Courts Act 2016).

146 Whether the Court continues along this path may depend, amongst other things, on the composition of the Court. Elias CJ has been at the forefront of the development of these legal principles, and there are few judges that match her knowledge of Treaty law.

147 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*].

relationship between the Crown and Māori”.¹⁴⁸ The place of tikanga Māori (Māori customary law) within the law was explored in *Takamore*, and the Court determined that tikanga has always formed part of the values of the common law of New Zealand.¹⁴⁹ Interestingly, the Court has also left open the possibility that Māori customary title may subsist in rivers.¹⁵⁰

The Treaty of Waitangi now has a cognisable influence in law and legal interpretation, albeit that its precise legal status is still “incoherent” and its legal force “inconsistent”.¹⁵¹ Matthew Smith considers that the “spirit and principles” of the Treaty inform the exercise of discretion by decision-makers and can form the basis of a challenge on judicial review.¹⁵² In *Ririnui*, for instance, the Supreme Court was prepared to judge the actions of Crown ministers and a state-owned enterprise (SOE) according to Treaty standards. The case concerned a judicial review challenge to the sale of a farm by an SOE. The Supreme Court opined that the Crown’s Treaty obligations “are not confined to righting historical wrongs but are continuing and forward-looking”,¹⁵³ and declared that the Crown had acted unlawfully in not intervening to facilitate an iwi’s commercial purchase of ancestral land.¹⁵⁴

Yet for all these significant precedents, there is force to the observation made by academics Professor David Williams and Dr Claire Charters that while Māori legal jurisprudence has evolved through the establishment of principle, Māori have had rather less success in terms of achieving meaningful outcomes.¹⁵⁵ Effective remedies have often proven to be somewhat elusive for Māori, as the courts have preferred to encourage political solutions to be reached outside the courtroom – the 1987 *Lands* case and the 1989 *Forests* case (and the resulting resumption regimes) being classic cases in point.¹⁵⁶ In a more recent example, the *Mixed Ownership Model* case, the Supreme Court declined to intervene in the partial privatisation of SOEs, but did effectively put the Crown on notice that it expects to see progress made in providing for Māori interests in water, reasoning that “in the current legal and social environment, Māori can be confident that their claims will be addressed, something which was not as clear in 1987 as it is now”.¹⁵⁷ Perhaps the courts’ diffidence reflects a lingering view that to a large extent the Treaty relationship is political and the issues are for executive government to resolve.

148 *Mixed Ownership Model* case, above n 125, at [52].

149 *Takamore v Clarke*, above n 123, at [94] per Elias CJ.

150 *Paki (No 2)*, above n 95.

151 Matthew SR Palmer, above n 144, at 358.

152 *Matthew Smith NZ Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at 907.

153 *Ririnui*, above n 124, at [51].

154 At [143] for the declarations made on judicial review. This decision is particularly interesting because the SOE regime was established to enable SOEs to operate at arm’s length from the Crown, and yet in the circumstances, the Court found that the SOE had acted unlawfully as well.

155 Claire Charters “Maori Legal Issues in the Supreme Court 2004–2014: A Critical, Comparative and International Assessment” in Andrew Stockley and Michael Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015) 139 at 141–142 and 167, citing David V Williams “Customary Rights and Crown Claims: Calder and Aboriginal Title in Aotearoa New Zealand” in Hamar Foster, Heather Raven and Jeremy Webber (eds) *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, Vancouver, 2007) 155.

156 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*]; *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [*Forests*].

157 *Mixed Ownership Model* case, above n 125, at [115] and [147].

Even so, political solutions are not always an effective means of enforcing legal rights, particularly when the “tyranny of the majority” places constraints on what is politically feasible. It seems to me that in the past the courts have tended to be overly deferential to the executive, and that it is essential to upholding the rule of law that the courts are able to play a supervisory role in the Crown–Māori relationship in order to protect Māori legal interests. It is encouraging that the Supreme Court has proved more willing to intervene than its predecessor, although the lower courts remain far more cautious. In *Haronga*, for example, the Supreme Court enforced the statutory right of Māori claimants to seek resumption of Crown forest land, in circumstances where the Waitangi Tribunal had not been using its resumption powers in deference to the political Treaty settlement process.¹⁵⁸ The Supreme Court recognised that Māori were entitled to benefit from the quid pro quo of the 1989 Crown forests agreement, whereby the Crown was able to implement its corporatisation policy in exchange for Māori gaining the opportunity to seek from the Tribunal bespoke Crown forest remedies that would be binding on the Crown.¹⁵⁹ Although at one level the decision is entirely conventional as an exercise in statutory interpretation, it is notable that to reach that outcome the Supreme Court had to overturn the decisions of the lower courts, who were reluctant to cut across the political process. Further, the fact that the Tribunal has (with one exception) not exercised its resumptive powers since 1987 is a reflection of the access to justice issues for the many Māori claimants who preceded *Haronga* but did not have the means to take a judicial review challenge all the way to the Supreme Court.¹⁶⁰ Nonetheless, *Haronga* is a significant decision for upholding the principle that Crown–Māori agreements ought to be enforced by the courts.

Wakatū builds on the Supreme Court’s body of Māori legal jurisprudence, and notably not only by establishing an important precedent in principle, but by the prospect of a meaningful outcome through the proceeding having been remitted back to the High Court on liability and remedies. The *Wakatū* decision marks a significant evolution in the understanding of the Crown–Māori relationship, from one that is analogous to a fiduciary relationship and largely political in nature, to a relationship that may give rise to enforceable legal duties owed by the Crown. In time, I predict that *Wakatū* will have a far reaching impact on the law as the courts continue to build on the principles that define the circumstances in which the common law will intervene in the Crown–Māori relationship, in both a public and private law capacity, even though the situations in which fiduciary duties arise may prove to be relatively limited in practice.¹⁶¹ Perhaps I should finish on a cautionary note, however,

158 *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53. The Tribunal’s subsequent decision not to order resumption was quashed by the courts again in *Haronga v Attorney-General* [2015] NZHC 1115 and *Attorney-General v Haronga* [2016] NZCA 626, [2017] 2 NZLR 394.

159 *Haronga*, above n 158, at [76] (the purpose of the Crown Forest Assets Act 1989 “was to protect claimants by supplementing their right to have the Tribunal inquire into their claim with the opportunity to seek from the Tribunal remedial relief which would be binding on the Crown”); and [105] (“this jurisdiction was enacted as significant redress and as part of a bargain in which the Crown also gained something of value to it”); and see also [88].

160 The only occasion on which the Tribunal used its resumptive powers and made interim recommendations for the return of SOE land was in *Waitangi Tribunal The Tūrangi Township Remedies Report* (Wai 84, 1998).

161 The peculiar facts of *Wakatū* are hardly likely to be replicated in the modern age, although there are many other historical occasions in which the Crown has acted in similarly paternalistic fashion and likewise not honoured its commitments. However, the likelihood of many further historical fiduciary duty cases has largely been overtaken by the progress made in settling historical Treaty claims. The standard extinguishment clause in Treaty settlement legislation is very broadly drafted to encompass not only historical Treaty claims (that is, predating 21 September 1992), but also any historical claims based on rights founded in legislation or common law, including fiduciary duties, although the clause does not appear to have been tested in court. See, for example, s 24 of the Ngāti Koata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014.

for as a practitioner I am conscious of how important the composition of the appellate courts is, and in particular the influential role that the current Chief Justice, Dame Sian Elias QC, has had in the significant Supreme Court decisions in this area of law (much as Lord Cooke of Thorndon had during his era as President of the Court of Appeal). The development of the common law is by its nature uneven and *Wakatū* may prove to be a high water mark for many years to come.

Tāria te wā ...

THE NATIVE LAND COURT AT CAMBRIDGE, MĀORI LAND ALIENATION AND THE PRIVATE SECTOR

BY RP BOAST*

I. INTRODUCTION

In this article I survey the operations of the Native Land Court at Cambridge and note the perhaps surprising fact that many powerful leaders of the Auckland business community were present at the Court sittings. I then consider briefly the connections between the private sector and Māori land alienation and suggest that it is now time for New Zealand history to re-engage with the role played by the private sector in the loss of Māori land. It is necessary also to engage with the history of political debate in New Zealand concerning the respective roles of private capital and the state with respect to the Māori land market. I note also some of the perceptual problems involved in making the Crown the central focus of historical inquiry.

II. THE NATIVE LAND COURT AT CAMBRIDGE AND “THE NATIVE TRADE”

New Zealand’s Native Land Court, today the Māori Land Court, was first set up by the Native Lands Acts of 1862–1865. The Court became fully operational in early 1865, and it was soon having a significant impact on Māori land and Māori communities in many parts of the North Island. Its principal functions at this stage of its history were to “investigate” Māori land titles and to provide a mechanism by which those titles could be converted to freehold grants made to Māori individuals, in this way extinguishing the customary collective tenures. The Court’s importance as an institution has generated a rich historiography, much of it critical of the Court itself, of the legislation that established it and of its judges.¹ Historians have also had much to say about the deleterious effects of the Court on Māori landownership and the risks posed to Māori health and well-being by the Court sittings. In this short article I wish to focus on one component of the Court’s history, its sittings at Cambridge in the 1880s and the connections between the Court process and Auckland capital. The Court sat at many places, some of them very remote and difficult to get to (the Chatham Islands for instance), but its Cambridge sittings have a special quality. It is at Cambridge that the intersection between tenurial change and frontier capitalism can be seen most starkly.

Shortly after its establishment, the Native Land Court began to deal with cases in the Waikato and Taupō districts. Large parts of the Waikato had been confiscated under the New Zealand Settlements Acts, but some large areas had not been (principally on the Waikato Coast and in

* RP Boast QC, Professor of Law, Victoria University of Wellington. I would like to thank the two external reviewers for their helpful comments and suggestions.

1 Sir Hugh Kāwharu observed in his classic study of Māori land tenure that the Native Lands Act of 1865 was an “engine of destruction for any tribe’s tenure of land, anywhere”: IH Kāwharu *Maori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 15. See also, for example, Philippa Mein Smith *A Concise History of New Zealand* (Cambridge University Press, Cambridge, 2005) at 72–73.

the southeastern Waikato running from Cambridge to north Taupō). In addition, some confiscated blocks had been returned to Māori ownership, these blocks also falling under the jurisdiction of the Court: an example is the Tamahere block, lying between Cambridge and Hamilton and inside the confiscation boundary. These land blocks were open to court investigation as soon as the government or private sector buyers could tempt their Māori owners to bring their lands before the Court. Most of the cases relating to the southeastern Waikato lands, including the Tokoroa, Pātetere, Waotu, Matanuku, Maraetai and Whakamaru blocks, were heard at Cambridge. Today Cambridge is a quiet and rather picturesque Waikato town close to Hamilton, highly respectable and faintly English-looking with its deciduous trees, parks and colonial church buildings. It has, however, had a more interesting and certainly less reputable history than its present appearance might indicate.

In the period from the end of the Waikato war in 1864 until the so-called “opening” of the King Country in the mid-1880s, Cambridge, just inside the Waikato confiscation boundary, was in a highly strategic location. To the south and the east stretched a large area of unconfiscated Māori land extending almost to Taupō and Rotorua, in the possession primarily of Ngāti Hauā and Ngāti Raukawa. The Court’s Cambridge sittings began as early as 1866, presided over initially by Chief Judge Fenton (who in the same year presided over the Compensation Court’s Ngāruawāhia hearings). In 1868, the Cambridge court heard cases relating to blocks immediately adjacent to the confiscation boundary in the Maungatautari area. The Court decided to use Cambridge as its main Waikato base and Māori people thus began to flock to Cambridge when the Court was in session.

Cambridge was originally a military redoubt and when the first Cambridge cases began, facilities were limited. In 1866 Māori attending the Court had to sleep outside the redoubt in the fields:²

More than 150 natives attended the Court, and were compelled, during the time the Court sat, to sleep in the fields, as the officer in command, Captain Clare, would not allow any of them to come inside the redoubt, to occupy the many vacant huts there.

However, this soon began to change as Cambridge evolved into a centre of what was known at the time as “the native trade”. Throughout the 1870s and especially during the 1880s, Cambridge became notorious as the principal “Court town” of the Waikato. The Court was at its height in Cambridge roughly from 1879 to 1886. It declined in importance once the large blocks in the southeastern Waikato had been investigated. After 1886 the Court moved south into the King Country, where Otorohanga became a busy court town from 1886 to around 1900. In 1886 Judge Mair and Assessor Paratene Ngata investigated the huge Rohe Pōtae or King Country block, a block of nearly 1.6 million acres, and the Otorohanga Court was a busy institution dealing with the Rohe partitions until about 1910. Cases continued to be heard at Cambridge after 1886, but not as regularly. Today, the Māori Land Court has one of its regional registries located in Hamilton, where most of the current Waikato cases are heard.

A great deal is known about the Cambridge sittings of the Court in the 1880s. This is because such careful attention was paid to the Court’s activities by the newspapers. The Cambridge cases in the 1880s were covered on a more or less day-to-day basis by the *Waikato Times*, published in nearby Hamilton. The *Waikato Times* provided a massive amount of material on the realities of the Native Land Court process which I have only sampled here. As a newspaper source for information on the day-to-day workings of the Native Land Court, the *Waikato Times* is rivalled

2 “Waikato – Native Lands Court” *Daily Southern Cross* (Auckland, 24 October 1866) at 5.

only by the *Poverty Bay Herald*, published at Gisborne, which devoted much space to Native Land Court sittings in the Gisborne–East Coast region, sometimes publishing entire decisions of the Court verbatim. This careful reportage of the Court’s activities was carried out for highly practical reasons. The editors of both newspapers very well knew that the deliberations of the Native Land Court would be of very great interest to their Pākehā settler readerships. Today, the newspapers are a vital source for gaining a good understanding of the Native Land Court. The Court’s primary form of record are its minute books, which record the Court’s judgments and the evidence given in the cases. The minute books are certainly a pivotal record and are regularly used by historians, ethnographers and by Māori people interested in studying family history or investigating the tenurial history of their properties. The minute books have their limitations, however, and give no indication of what the actual hearings were like. This is something that only the newspapers can provide.

From the columns of the *Waikato Times* it becomes clear that by the 1880s, Cambridge was not merely a venue for the court sittings. Rather it was the centre of an entire commercial system that had grown up around title investigations and partitions in the Court. The actual hearings and judgments were in fact just the tip of the iceberg of a network of lawyers, Māori agents, land agents, conductors (kaiwhakahaere), and tavern-keepers and storekeepers.³ Cambridge was also a base for a number of the South Waikato land colonisation companies, strategically positioned in Cambridge close to the Court and to the large throngs of Māori people in attendance. During the hearings there was a “native encampment” at Cambridge where most Māori people stayed, although those who could afford it sometimes stayed in the town’s numerous hotels. Other towns were jealous of Cambridge’s brittle prosperity based on the Native Land Court. The citizens of Tauranga and Rotorua would have liked to have seen more of the “native trade” coming their way. In thanking Fenton for having some important cases transferred from the Cambridge court to Rotorua in 1883, the *Bay of Plenty Times* commented that:⁴

... we would remind our friends at Cambridge that they have had pretty well a monopoly of Native Land Courts for the last three years, and it is high time that the publicans, storekeepers, and camp followers of that inflated wooden hamlet should rely more in future on their own resources than on those of their neighbours.

The *Bay of Plenty Times* looked forward to the day when “[t]he surplus wooden tenements of that spectral, and ere long to be deserted township” would be re-erected at Rotorua.⁵ The “native trade”, it appears, was really worth having.

Court hearings were important events, especially large-scale investigations of title and important partitions, and often many Māori people were present at the Cambridge hearings, on occasion returning home from time to time to manage their cultivations. Māori attending the Court at Cambridge were mostly from the Waikato region, but occasionally – depending on the blocks being heard – they might come from further afield, including Rotorua, Maketu and even the East Coast.⁶ When the Pātetere cases were being heard in 1881, local Ngāti Raukawa leaders

3 “Advertisement” *Waikato Times* (Hamilton, 28 May 1881) at 1.

4 “WEDNESDAY, January 24, 1883” *Bay of Plenty Times* (Tauranga, 24 January 1883) at 2.

5 At 2.

6 “Native Lands Court” *New Zealand Herald* (Auckland, 4 June 1880) at 5.

asked the Court to adjourn in order to allow those in Court to welcome their kin who had travelled to Cambridge from the Otaki region:⁷

To-day Judge Symonds fixed to proceed with Messrs. Dilworth and Howard's Whaiti and Kuranui block ... but Teimana and the Ngatiraukawa chiefs applied for an adjournment until to-morrow, in order to give a reception to the natives of the same tribe from Kapiti. There is a great feast to-day, and presents of food and liquor have been made by the natives of the district to the visitors.

Large numbers of people were in attendance at the principal hearings. When Chief Judge Fenton opened the 1880 Cambridge sittings “[t]here was a large attendance of natives”.⁸ In May 1881, Major William Mair found that the always difficult task of completing the Māori census was made even worse by so many Waikato Māori people being on the road to Cambridge to attend the Court sittings.⁹ When the Crown claim to Pātetere was about to be heard at the Cambridge court in February 1881, it was expected that over a thousand people would be present.¹⁰ On 24 February 1881 the *Waikato Times* reported that “[t]he attendance of natives was very large, and considerable interest appeared to be taken in the proceedings”.¹¹

Admittedly, large attendances were not a universal rule; some cases were much more important than others. Sometimes partitions and other less exciting cases were heard in nearly empty courtrooms. While the Te Whetu No 2 case was slowly making its way through the Court in January 1883, “[v]ery few natives” were present.¹² At times, Māori people found it difficult to get to the Court. It sometimes happened that in succession cases the applicants did not make it to the Court at all, in which case the applications were dismissed for non-appearance.¹³ The vagaries of the weather in the South Waikato could make it difficult for people to get back and forth: “Few natives have returned from Waotu, owing to the nature of the weather” the *Waikato Times* reported in April 1883.¹⁴ On other occasions, Māori present in Court would ask for adjournments. The Court was normally prepared briefly to suspend proceedings for a day or two at the request of those present in order to allow people to attend a tangi¹⁵ or to go to political meetings at Whatiwhatihoe and elsewhere.¹⁶ Generally, however, the big cases ran on consecutively for weeks and drew large attendances.

Nor was it only the Māori community that took an interest in the hearings. The cases at Cambridge were seen as nationally significant and were reported as far away as Otago. The progress of the

7 “The Patetere Cases” *New Zealand Herald* (Auckland, 23 February 1881) at 5.

8 “The Native Land Court” *New Zealand Herald* (Auckland, 11 May 1880) at 5.

9 “Census of the Maori Population, 1881” Major Mair, Native Agent, to Under-Secretary, Native Department 1881 AJHR G-3 at 3: “the Natives in this part of the colony were all on the move to attend the Native Land Court at Cambridge”.

10 “The Native Lands Court” *Waikato Times* (Hamilton, 19 February 1881) at 2.

11 “The Native Lands Court, Cambridge: The Patetere Block” *Waikato Times* (Hamilton, 24 February 1881) at 2.

12 “The Native Lands Court, Cambridge” *Waikato Times* (Hamilton, 30 January 1883) at 2.

13 See, for example, “The Native Lands Court, Cambridge” *Waikato Times* (Hamilton, 22 December 1883) at 2: “The attendance of the natives was very small, and most of the cases were dismissed for non-appearance”.

14 “The Native Lands Court, Cambridge” *Waikato Times* (Hamilton, 12 April 1883) at 2.

15 “Native Lands Court, Cambridge: Yesterday’s Sitting” *Waikato Times* (Hamilton, 29 March 1881) at 3. “On the application of Mangakahia, the Land Court adjourned till to-morrow, as the natives are attending a tangi over the native drowned on Sunday.”

16 “The Cambridge Native Lands Court adjourned” *Waikato Times* (Hamilton, 28 October 1882) at 3.

cases was monitored carefully by the newspapers, especially by the *Waikato Times*, for the simple reason that as far as the Pākehā community was concerned, there was a direct correlation between investigations completed in the court and lands coming on to the market for private purchase.¹⁷ Many non-Māori people were in town as well during the cases, mostly because they had interests of some kind in the blocks being investigated. On occasions, local people apparently came along just to enjoy the evidence and the repartee. In April 1881, the *Waikato Times* reported:¹⁸

A number of European ladies and gentlemen were present, and took great interest in the proceedings. Some of the replies to the questions given by the witnesses caused great merriment, and showed the native witnesses equal to the occasion. The evidence as given was fully explained by the interpreter, both in the English and Maori.

A significant illustration of the commercial importance of the Native Land Court occurred in 1881 when the Trustees of the Cambridge Public Hall decided to seek to have the Crown pay them rent for the period when the Hall was used for the forthcoming year's sittings. One public-spirited citizen, a Mr Raynes, wrote to the *Waikato Times* to protest against the folly of this course, which might, he thought, have the disastrous consequence of driving the Court out of Cambridge:¹⁹

I presume it is hardly necessary to point out the monetary and commercial benefits which the township derived from the presence of upwards of a thousand natives, besides European visitors interested in the various blocks, and officials connected with the business of the Court. But probably the fact may not be generally known that the persons who are now foremost in preferring this claim against the Government for rent, are the very men who derived the lion's share of the profit and advantages arising from the holding of the Court in the Public Hall. That such a claim is now made is calculated, I think, to raise some doubts in the mind of the Chief Judge of the Native Lands Court as to the expediency of holding another Court in Cambridge, and thus the selfish greed of the persons preferring a claim for rent may not only result in a commercial injury to the township, but may recoil on their own heads. Though my own business renders me practically independent of the native trade, I should be sorry to see it diverted to Kihikihi or elsewhere, and therefore I am prepared at once to erect at my own cost, a substantial building, affording ample accommodation for 600 people, if the Government will accept the use of the same free of rent for the next sittings of the Land Court.

This is a highly revealing document. Having the Court in town was good for business, and the "native trade" was a vital part of the local economy. That the proposed special-purpose courtroom needed to be big enough to accommodate up to 600 people is a commentary on the scale of the cases in its own right.

Nationally prominent barristers such as John Sheehan, former Native Minister in the Grey Government, and Walter Buller, who had a very large native lands practice, routinely appeared in the big cases that went through the Cambridge Land Court (Whakamaru, Waotu,

17 This is obvious, but see, for example, "Native Lands Court" *Evening Post* (Wellington, 13 July 1880) at 2:

The Native Land Court at Cambridge is about to close its proceedings, which will have a great effect in advancing the prosperity of Auckland. About 400,000 acres of land have been dealt with—an immense stretch of country comprehending the Upper Waikato District, and extending to Taupo and over into the Tauranga District. The blocks which have last been under the view of the Court have been Whaiti and Tauranui [sic – Kuranui?], comprehending 140,000 acres, and no part of this is embraced by Government proclamation prohibiting all dealings or rendering them illegal, so that purchasers have not that difficulty to deal with.

18 "Native Lands Court, Cambridge: Yesterday's Sitting" *Waikato Times* (Hamilton, 9 April 1881) at 2.

19 Letter by Audus Raynes to *Waikato Times* (Hamilton, 18 June 1881) at 3.

Waotu North and other blocks).²⁰ Buller, for instance, represented Arekatera Te Wera in the Waotu block case in 1882.²¹ Sheehan acted for the section of Ngāti Raukawa that was prepared to refund the Crown for advances made in Pātetere, “the value thereof appropriated by the Government in land”; he was opposed by another section of Raukawa represented by James Mackay and Hamiora Mangakahia (“Mr Sheehan watching the case on behalf of certain Europeans interested”²²).²³ In 1882 Buller, along with FA Whitaker, were at Court in Cambridge during the Matanuku block hearings “watching the European interest”.²⁴ The Court routinely partitioned blocks between European purchasers and non-sellers,²⁵ just as in the case of Crown purchasing it would partition between Crown and non-sellers’ portions. Partitioning of blocks between sellers and non-sellers was something that purchasers, or their lawyers, would want to scrutinise carefully.

The cases could often be very complex, and could necessitate very long closing addresses by counsel after the evidence had been heard, the evidence often being tested by prolonged cross-examination.²⁶ Sometimes just the cross-examination of a single witness could last for an entire day. This demanded specialist legal skills. However, a lawyer such as Sheehan did not appear only on the large investigations of title; he also managed routine business such as successions and “subdivisions” (partitions) too.²⁷ Many cases were run by Māori “conductors” (kaiwhakahaere), experienced para-legals who were in reality de facto Māori barristers. The government sometimes played a role in the cases as well, and would be represented in Court by a government agent, usually Major William Mair for cases in the Waikato. In some of these cases, including the Tokoroa block and the various subdivisions of Pātetere, there was a complex interplay between the government as purchaser and private purchasing, the latter typically being conducted by the agents for the various land companies and associations. At Cambridge, however, the government was just one of many parties involved in just some of the cases: in most cases and in most blocks the government played no role, and was not active as a purchaser. The Native Land Court at Cambridge was mainly a private sector world.

As well as the barristers, judges, conductors, Crown Agents and court officials, there were the native agents who managed things behind the scenes. The reason why so many people attended the hearings was not necessarily so they could take part in the cases directly as parties or witnesses,

20 See, for example, “Native Lands Court, Cambridge: Yesterday” *Waikato Times* (Hamilton, 1 February 1883) at 3:

The Te Whetu case was before the Court to-day. Harry Symonds was called as a witness on behalf of the claimant Mahi, and examined by Mr Sheehan and Arekatera.

21 “Native Lands Court, Cambridge: Yesterday” *Waikato Times* (Hamilton, 14 October 1882) at 2.

22 “The Native Lands Court, Cambridge” *Waikato Times* (Hamilton, 12 March 1881) at 2.

23 “The Native Lands Court, Cambridge: The Patetere Block” *Waikato Times* (Hamilton, 24 February 1881) at 2. Hamiora Mangakahia was a very skilled and prominent conductor but he later became disillusioned with the Native Land Court system and one of its most prominent critics.

24 “Native Lands Court, Cambridge” *Waikato Times* (Hamilton, 7 October 1882) at 2.

25 “Native Lands Court, Cambridge” *Waikato Times* (Hamilton, 10 September 1881) at 3:

Orders in sub-division were made in favour of the European purchasers for the portion acquired by them, and to the non-sellers for the balance in the following blocks:—Te Whetu, Kokako, Mangakarata, and Te Pukerunga.

26 “Native Lands Court, Cambridge” *Waikato Times* (Hamilton, 12 April 1883) at 2: “The addresses of counsel in the Whakamaru re-hearing finished to-day, at twelve o’clock; when the Court adjourned till 2 o’clock, to-morrow, to consider their decision.”

27 “Native Lands Court, Cambridge” *Waikato Times* (Hamilton, 3 March 1883) at 2.

but rather to be on hand to be included in the owners' lists. The latter, a somewhat invisible but pivotal component of the process, were compiled by the native agents out of court once the principal hapū or ancestral names had been settled by the Court. Newspapers frequently referred to this process, which could be very time consuming ("all lists for the Waotu case are not yet complete" the *Waikato Times* reported on one occasion²⁸). A great deal of the business of the Native Land Court was done informally outside the courtroom.²⁹ Counsel would ask the Court to adjourn so that the agents could compile lists of names: for example "[o]n the application of Mr Mackay, the Court adjourned till the following morning, so as to enable the agents to complete certain lists of names".³⁰ Or on another occasion (Whaiti Kuranui No 2), on the application of the conductor, McDonald, "an adjournment was granted to allow of the matter being considered outside".³¹ The frequency of out-of-court settlements and agreements means that it is not always safe to rely on the court records and minutes as conveying a complete picture of the process. Much of the real debate and title-arranging took place behind the scenes, out of sight and not recorded in the Court's minute books. There is no record of the details of these negotiations, and exactly how the process of name-identification worked is unclear. It seems likely that people would try to get their names into as many blocks as they could, waiting around outside the courtroom to learn of the results of the cases in order to know whether they could claim admission. Some of the judges actually welcomed the fact that large numbers of people were at the hearings, as this meant for more reliable lists of owners. Judge Maning, for instance, revealingly stated to Fenton in 1874 that "the larger the number of natives assembled at a sitting of the Court the less chance there is of any difficulty arising in the future from any of the persons having interests from being overlooked".³²

What *is* clear, however, is that a lot of drinking seems to have gone on during the hearings. Successful claimants would sometimes treat one and all to drinks in the taverns. When judgment was given in the Waotu No 1 case in 1882, the jubilant successful claimants "disbursed £100 in liquor, so that the whole place is in a fair way of becoming a scene of dissipation".³³ During the court hearings a lot of cash was circulating amongst Māori, and this would only have come from the (mainly) private purchasers, including the representatives of the various land companies and associations. This adds to the likelihood that very often the real point of the cases was to secure titles not so much for Māori, but for purchasers from Māori, whose shares would be cut out at the subsequent partitions.

Many non-Māori New Zealanders watched the goings-on in Cambridge askance. Many Pākehā New Zealanders were anything but enthusiastic about the role played by Auckland-based land

28 *Waikato Times* (Hamilton, 13 February 1883) at 2.

29 See, for example, "Native Lands Court, Cambridge" *Waikato Times* (Hamilton, 7 April 1881) at 2:

The business done on Tuesday was not of any public importance, the Court only sitting for a short time and adjourning in order to allow of the agents to settle boundaries, &c., outside.

Or, to give another example, "Native Lands Court, Cambridge" *Waikato Times* (Hamilton, 24 March 1881) at 2:

The agents handed in lists of claimants for the different subdivisions of the Whaitē [sic] Kuranui Block, and an adjournment was then made to mark off the boundaries. On resuming, orders [were] made for Nos. 2B. and 5A.

The Court was adjourned for the day to allow the lists of names in respect to subdivision 4 being arranged.

30 "Native Lands Court, Cambridge" *Waikato Times* (Hamilton, 19 March 1881) at 2.

31 "Native Lands Court, Cambridge" *Waikato Times* (Hamilton, 22 March 1881) at 2.

32 FE Maning to FD Fenton (BPOP 4309 4a, Archives New Zealand, Auckland, 20 April 1874).

33 "Native Lands Court" *Hawera and Normanby Star* (Taranaki, 24 November 1882) at 3.

companies in the Māori land market. Such monopolisation meant that ordinary New Zealanders would miss out on the opportunity to become family farmers. Left-leaning politicians wanted the state to play an active role in the Māori land market and to ensure that policies were in place to prevent land aggregation. To a radical-liberal newspaper such as the *Wanganui Herald*, which was run by John Ballance, later to become Native Minister in the Stout–Vogel Government (1884–1887) and then Liberal Premier in 1891, the Cambridge Court was simply a nest of corruption. This view was one aspect of a left-wing critique of commercial and financial interests dominating and profiting from the Māori land market at the expense of ordinary settlers. “Land rings”, acting in collusion with their political friends in the conservative Hall–Bryce Government, were engaged, according to the *Herald*, in dubious dealings behind the scenes which would lead to the land being locked up in the hands of speculators and financiers to the detriment of the “small man” and close settlement. The Pātetere block was perceived as an invidious example of this.³⁴ How accurate this picture might be is difficult to say, but certainly the judges of the Cambridge court were well aware of the fact that private business interests were really driving many of the cases. As will be seen, prominent Auckland businessmen were openly seen in Court all the time. Clearly they were not there accidentally or just to enjoy the repartee. It seems to have been common knowledge what the effects of any particular award in the Court would be for private purchasing interests.

Cambridge was a frontier town in many senses. It was close to a military and political frontier, the boundary of the independent King Country. It was also, in a broader sense, a frontier of global capitalism. In particular it was part of the economic frontier of the fast-growing and ambitious city of Auckland, already on the path that would lead to it supplanting Dunedin as the commercial and financial capital of the country.

III. AUCKLAND CAPITALISTS AND THE NATIVE LAND COURT

It has already been mentioned that Auckland business leaders were seen from time to time in the Native Land Court at Cambridge. At the hearing of the Whaiti-Kuranui block in November 1881 “[a] large number of Europeans, including Messrs. E. B. Walker, Williams, Dilworth, Howard, F. A. Whitaker [a Hamilton lawyer], Grace and Campbell were present, together with the interested natives and their friends”.³⁵ This was not the only occasion when prominent business leaders were in the Court. In 1882 a certain Major Jackson, “one of the provisional directors of the proposed Auckland Native Land Colonization Company” was at Cambridge when the Matanuku block was passing through the Court.³⁶ FA Whitaker was in Court with Walter Buller, keeping an eye on things on the same occasion. Most of these people were prominent leaders of the Auckland business and financial community or their lawyers. James Dilworth was an Auckland businessman and accountant who had made a fortune from commissariat contracts during the New Zealand wars. John Howard was the latter’s partner in certain business undertakings relating to the Whaiti-Kuranui block in the southeastern Waikato.

The Whaiti-Kuranui block was not merely of passing interest, but was at the centre of a complex property speculation in which most, perhaps all, of these rich and powerful individuals were involved in some way. There was a surge in the formation of land companies in the United Kingdom

34 See *Wanganui Herald* (Wanganui, 21 December 1880) at 2.

35 “Native Lands Court, Cambridge” *Waikato Times* (Hamilton, 12 November 1881) at 2.

36 “Native Lands Court, Cambridge” *Waikato Times* (Hamilton, 7 October 1882) at 2.

and in Auckland in the years from 1879 to 1883, as Professor Stone has pointed out. A number of these were involved in Māori land-buying in the Waikato.³⁷ Some Māori found the complex financial and commercial entanglements caused by “the companies” at Cambridge burdensome and stressful, and looked to the Native Land Court to assist them. When the Court investigated the Tokoroa block in 1880, a number of Raukawa leaders thanked the Court for the care that it had taken with the evidence and for the clarity and fairness of its findings. One chief, Aperahama, said that his heart was “exceedingly grateful”; “my head has been lifted up by the Court; and pleased at the Government releasing me; also at the removal of the hands of the Companies from me.”³⁸

As important as who was present at the Cambridge sittings is who was not. Most conspicuously absent was the Crown. The southeast Waikato was not a zone dominated by the Crown as purchaser of Māori land, a contrast with Rotorua after 1881 or the King Country after 1891. The latter regions were both incorporated into pre-emptive districts where private purchasers were excluded and Māori could alienate land only to the state. Land purchasing in the large area from Cambridge to Taupō, however, was dominated by the private sector and the land companies. As mentioned, there was some contestation between the government and the private sector in some of the Waikato blocks, but for the most part the government did not play a prominent role in the area and was not directly engaged in land-buying. Apart from its role as instigator and designer of the Native Lands Acts, “the Crown” was not responsible for Māori land alienation in the south Waikato at this time. This fact merits some further brief reflections.

IV. THE GOTHIC CROWN

The Native Land Court has naturally been the focus of sustained attention in the Waitangi Tribunal in recent years. Many of the Tribunal reports have addressed the subject of the Native Land Court and the Native Lands Acts. Examples are its reports relating to the Gisborne or Tūranga,³⁹ Central North Island,⁴⁰ Kaipara,⁴¹ Hauraki⁴² and Urewera⁴³ regional inquiries. The discussion of the Native Land Court in the Tribunal’s Gisborne Report (*Turanga*) takes up 140 pages, seeking a “fresh perspective” in the hope that “we might finally resolve one of the enduring subjects of debate between Crown and claimants in Treaty jurisprudence and historiography”.⁴⁴ But resolution has turned out to be difficult, and the Native Lands Acts and the Native Land Court have continued to be central to the Waitangi Tribunal’s inquiries. Following *Turanga* (2004), the Tribunal found it necessary to discuss the Court at length again in its Central North Island, Kaipara, Hauraki, Urewera, National Park and Whanganui reports, and no doubt it will need to be traversed again in its Rohe Pōtae (King Country) report currently being written. In its *Central North Island* report, the

37 RCJ Stone *Makers of Fortune: A Colonial Business Community and its Fall* (Auckland University Press, Auckland, 1973) at 183.

38 (1886) 6 Waikato MB 5–6.

39 Waitangi Tribunal *Turanga Tangata Turanga Whenua* (Wai 814, 2004) at 395–537. The key section of this report for present purposes is ch 8 “The Native Land Court and the New Native Title”.

40 Waitangi Tribunal *He Maunga Rongo: Central North Island* (Wai 1200, 2008).

41 Waitangi Tribunal *The Kaipara Report* (Wai 674, 2006).

42 Waitangi Tribunal *The Hauraki Report* (Wai 686, 2006).

43 Waitangi Tribunal *Te Urewera* (Wai 894, 2009) at 14.

44 Waitangi Tribunal *Turanga Tangata Turanga Whenua* (Wai 814, 2004) at 397.

Tribunal noted that notwithstanding that “the operations of ... the Native Land Court and their impact on Maori communities have been key issues in many previous Tribunal inquiries”, nevertheless “these issues remain some of the most important and most contested in the Central North Island inquiry”.⁴⁵

There is now a substantial scholarly literature on Waitangi Tribunal historiography.⁴⁶ I do not plan to review this burgeoning literature here, and wish to draw attention to only one issue in particular, this being the emergence and subsequent quasi-reification of “the Crown” as the central focus of historical inquiry and the principal agent of Māori dispossession. Some historians are doubtful about the Tribunal’s alleged creation of the “Gothic” Crown, or of the way the Crown has emerged as “Frankenstein’s monster”. According to Michael Belgrave:⁴⁷

The link between the emerging historiography and the legal structures on which Tribunal history rests is clear, especially in the reconstruction of the personality of government and the Tribunal’s Frankenstein-like recreation of the Crown ... The Crown has become all-seeing, all-knowing, and, most importantly, all-responsible. The general term “government” or even particular governments have correspondingly disappeared from much of the research prepared for the Waitangi Tribunal and its reports.

A little later in Belgrave’s article, for good measure, the Crown, as a creation of Frankenstein, has also become “Gothic”:⁴⁸

As Grant Young has commented, there is something essentially Gothic in the way that these historical narratives are structured. The Crown becomes a super-human abstraction, bigger than life, and made in the image of postcolonial fears, imperialism, racism, and military aggression. The Crown is also the personification of a troubled and troubling past.

Giselle Byrnes has pinpointed some of the particular problems when a legal concept (“the Crown”) has become transmuted into a historical actor, with its own hopes, schemes and dreams.

45 *Waitangi Tribunal He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008) vol 2 at 446.

46 See, for example, MPK Sorrenson “Towards a Radical Interpretation of New Zealand History: The Role of the Waitangi Tribunal” (1987) 21 *New Zealand Journal of History* 173; Giselle Byrnes *The Waitangi Tribunal and New Zealand History: The Role of the Waitangi Tribunal* (Oxford University Press, Melbourne, 2004); Michael Belgrave *Historical Frictions: Maori Claims and Reinvented Histories* (Auckland University Press, Auckland, 2004); Jim McAloon “By Which Standards?: History and the Waitangi Tribunal” (2006) 40(2) *New Zealand Journal of History* 194; Giselle Byrnes “By Which Standards?: History and the Waitangi Tribunal – A Reply” (2006) 40(2) *New Zealand Journal of History* 214; Giselle Byrnes “A Radical Reinterpretation of New Zealand History: Apology, Remorse, and Reconciliation” in Katie Pickles and Catharine Coleborne (eds) *New Zealand’s Empire* (Manchester University Press, Manchester, 2016) 245. This literature intersects with a rapidly growing literature on New Zealand historiography generally, too voluminous to cite here: some important recent contributions are Paul McHugh “The politics of historiography and the taxonomies of the colonial past: Law, history, and the tribes” in Anthony Musson and Chantal Stebbings (eds) *Making Legal History: Approaches and Methodologies* (Cambridge University Press, Cambridge, 2012) 164 and Mark Hickford “Looking Back in Anxiety: Reflecting on Colonial New Zealand’s Historical-Political Constitution and Laws’ Histories in the Mid-Nineteenth Century” (2014) 48 *New Zealand Journal of History* 1.

47 M Belgrave “The Tribunal and the Past: Taking a Roundabout Path to a New History” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 2005) 35 at 37. Belgrave must mean that the Tribunal itself is Frankenstein. (Frankenstein was the creator of the monster, not the monster itself.) “The Crown” is a monster made and given life by the Waitangi Tribunal, a heavy responsibility seemingly.

48 Belgrave, above n 47, at 39. Belgrave is referring to a paper by Dr Grant Young entitled “The Waitangi Tribunal and Gothic Histories of New Zealand” (paper presented to the Antipodean Gothic Conference, Massey University, Albany, December 2002). The Crown as a Gothic Frankenstein monster is a really frightening concept.

One problem identified by Byrnes is that the individual motivations of particular officials are rarely explored in any depth in Waitangi Tribunal reports. They are, rather, a component of the all-knowing, all-responsible “Crown”, which is all that anyone needs to know:⁴⁹

In many reports, European officials are not named but simply designated as anonymous “Crown officials”. When they are mentioned by name, these characters appear as transitory and fleeting ghosts, resurrected simply for their role in, machination of, or culpability for a particular event.

I would add that this blurring of individuality is one reason why Tribunal reports can be somewhat lifeless if read as works of history. Clearly people such as Grey, Fenton, McLean, FitzRoy, Bryce, McKenzie, Balance and Seddon were not the same, nor would they necessarily even have identified themselves particularly with “the Crown”. Some were conservatives, others were radical liberals; some were English, some Scots, one (Ballance) was Irish. Another problem identified by Professor Byrnes is the tendency of the Waitangi Tribunal to conflate “the settlers” and “the Crown” into a single entity: “[a] further feature of the Tribunal’s historical narratives is their tendency to negate difference within the European settler community, with the assumption that all settlers were of a common mind, and that governments and settlers almost always shared the same views”.⁵⁰ In fact “the Crown” (let us say the colonial state, and most particularly the state before the advent of responsible government) and “settlers” could often be at odds. Ian Hunter has emphasised this in the case of the prolonged debate relating to jurisdiction over Aboriginal people in early New South Wales:⁵¹

Arguments regarding conquest, rights, and sovereignty emerged from a long-standing culture of English political thought. This was organised around the poles of the defence of time-immemorial common law rights against Crown prerogative versus the assertion of Crown sovereignty as the condition of existence of the common law and its rights. In the common law colonies, this bifurcated political language played into a repeated pattern of colonial political conflict.

A focus on “the Crown” is problematic for a full historical understanding of the Native Land Court in the Waitangi Tribunal, because courts are not usually understood as forming part of “the Crown”. One way of escaping from this difficulty is to argue that the Native Land Court displayed such little independence and integrity as a court that it does not deserve to be regarded as such, and should rather be perceived as part of the state (and thus “the Crown”) for all practical intents and purposes. A brilliant argument along these lines was made some years ago by David Williams.⁵² Imperfect as the Native Land Court may have been, however, it is in my view difficult to make a case that it was merely a state agency. Its judges clearly regarded themselves as judges, not officials, and relationships between the government and the Court could be tense at times. Ordinarily the government did not directly interfere in the Court but left it to its own devices.⁵³ Some historians have, in contrast to Williams, argued that the Court was far *too* independent and have accused the Native Land Court judges of simply ignoring directions from Parliament that they found

49 Giselle Byrnes *The Waitangi Tribunal and New Zealand History* (Oxford University Press, Melbourne, 2004) at 123.

50 At 124.

51 Ian Hunter “Natural Law, Historiography, and Aboriginal Sovereignty” (2007) 11 *Legal History* 137 at 160.

52 D Williams “*Te Kooti Tango Whenua*”: *The Native Land Court 1864-1909* (Huia, Wellington, 1999).

53 See generally RP Boast *The Native Land Court 1862-1887: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2013) at 189–195.

uncongenial.⁵⁴ Another important aspect of this question is that the Court was (and is) a body in a state of constant evolution. The Native Land Court in 1900 is not the same institution as the Native Land Court in 1865. The Waitangi Tribunal, while not uncritical of the Native Land Court, has for the most part treated it as indeed a court, and not as an arm of the executive government. The one occasion where the Waitangi Tribunal did so was in its *Te Roroa* report (1992), where the Tribunal remarked:⁵⁵

For the purposes of this claim, we regard the Native Land Court as an agency of the Crown by reason of the court's powers and authority being conferred by statute. Notwithstanding the separation of powers in administration, it is an arm of the Crown and of the State. We also regard the New Zealand Historic Places Trust as an agency of the Crown, given its statutory purposes and functions.

This has not been the Waitangi Tribunal's usual stance. The Tribunal does not see itself as having the function of reviewing specific decisions of the Native Land Court (although it can come close to doing exactly that on occasion). More typically the Tribunal fixes its attentions on the legislation and policies that established and underpinned the Native Land Court: the original Native Lands Acts were beyond doubt an act of "the Crown", however we choose to define the latter. This analytical strategy has given the Tribunal sufficient purchase to explore the impacts of the Native Lands Acts and its principal institutions.⁵⁶

However, a remorseless focus on "the Crown" can mean that the role of the private sector escapes attention. New Zealand was capitalist, and was dominated by British investment. Land companies, banks and British investors were an important component of the Māori land story in the 19th century, too often presented simply in terms of legislation, government purchasing and the Native Land Court. It is true that even after the enactment of the Native Lands Acts of 1862–1865 the principal purchaser of Māori land continued to be the government ("the Crown", if you will), as this writer has shown elsewhere.⁵⁷ But the role of the private sector was hardly insignificant. The Native Lands Acts were, after all, originally enacted to privatise the Māori land market and to allow Māori to sell land directly to the private sector once they had a Native Land Court title. A focus on "the Crown" can mean that many important realities are missed. This is clearly demonstrated by the operations of the Native Land Court at Cambridge in the 1880s.

V. UNEXAMINED QUESTIONS

Much more needs to be known about the links between private finance, land settlement and Māori land alienation in the 19th century, and it could even be said that the time has arrived when attention could perhaps be diverted from "the Crown" for a while and concentrated instead on private capital

54 Alan Ward *A Show of Justice: Racial "amalgamation" in nineteenth century New Zealand* (Auckland University Press, Auckland, 1995) at 213.

55 *Waitangi Tribunal Te Roroa Report* (Wai 38, 1992) at 31.

56 The issue of the Tribunal's role with respect to decisions of the Native Land Court has come up in numerous inquiries. It received particularly full consideration in the Tribunal's *The Tarawera Forest Report* (Wai 411, 2003). This report was concerned with a decision by the Māori Land Court to amalgamate into a single title 40 land blocks located in the Bay of Plenty region. The Tribunal found that there was no evidence that the Crown had interfered in the Court's decision-making, but that the relevant jurisdictional provisions (ss 435 and 438 of the Maori Affairs Act 1953) were inconsistent with the principles of the Treaty of Waitangi.

57 RP Boast *Buying the Land, Selling the Land: Governments and Maori Land in the North Island of New Zealand 1865–1921* (Victoria University Press and Victoria University of Wellington Law Review, Wellington, 2008) at 32–40.

and the private sector. I do not mean to suggest that the role played by the private sector in the 19th century Māori land market has been entirely neglected. On the contrary, the connections between the Auckland business community, Māori land and national politics were thoroughly studied by RCJ Stone of Auckland University some years ago.⁵⁸ Stone has had few successors, however, and compared to the outpouring of historical writing on the role of the colonial state, the literature on the private sector and private land buying looks very thin by comparison. Moreover, the role of the private sector, land companies and banks was not limited to the Waikato. The situation was much the same on the East Coast, especially in the Gisborne region, which has an intricate history dominated by the Native Land Settlement Company and the East Coast trusts, and also by the complex local fallout caused by bank failures in the United Kingdom.⁵⁹ This neglect of the world of banking, finance and land companies in most recent research is easy to explain, as it can be largely attributed to the accident of the Waitangi Tribunal's historical jurisdiction, firmly oriented as it is to the actions and omissions of "the Crown". Understanding the role of the private sector is no part of the Waitangi Tribunal's task. It is, however, an important dimension of the history as a whole. Also neglected is the mountain of reported case law in the New Zealand Law Reports before 1910 dealing with complex cases relating to Māori land titles, many of them concerned with commercial and property questions.

Another consequence of the emphasis on the Crown's role as Māori land buyer and as the prime architect of the Native Lands Acts is that the focus can be shifted away from the settler community to the state, perhaps creating a comforting impression that the former played only a minimal role. It needs to be remembered that the dairy farms of the Waikato were either once confiscated land, or land which was at one time investigated by the Native Land Court. This may be an uncomfortable reality, but there is nothing to be gained by pretending otherwise. Blaming everything on "Crown", "Gothic" or not, eliminates some important dimensions of historical inquiry, and in particular the processes by which land formerly in Māori customary title has ended up in private hands, whether immediately or mediately of the Crown, or by direct purchase by private sector buyers from Māori following title investigations in places like Cambridge. The Tribunal narratives stop at the point when Māori-owned land passes into the hands of "the Crown", and do not inquire into what happened to it after that. This is also explained by the Tribunal's jurisdiction. Yet what happened to the land once the Māori title had been extinguished is an important component of the whole story. For the most part the state did not keep the land it acquired, but instead sold it to European purchasers, who received clear title as Crown grantees.

Cui bono? Who benefited? The history of land policy generally needs to be better connected to the history of Māori land alienation. New Zealand politics revolved very much around the question

58 See RCJ Stone "The Maori Lands Question and the Fall of the Grey Government, 1879" (1967) 1 *New Zealand Journal of History* 51; RCJ Stone *Makers of Fortune: A Colonial Business Community and its Fall* (Auckland University Press, Auckland, 1973).

59 On developments at Gisborne, see RP Boast *The Native Land Court: Volume 2, 1888-1909: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2015) at 199–220. These complex developments are an important part of the background to the decision of the Privy Council in *Assets Co Ltd v Mere Roihi* [1905] 1 AC 176 (PC). The plaintiff company was set up by a British statute (City of Glasgow Bank Liquidation Act 1882) to hold the assets of the failed City of Glasgow Bank, which crashed spectacularly in 1878, taking many enterprises in Britain and in the British colonies down with it. The Bank had been engaged in extensive land speculation in New Zealand, mainly in the East Coast. Cases involving the Assets Company clogged the New Zealand courts for decades: see, for example, *Matai v The Assets Co* (1887) 6 NZLR 359 (SC) and *Hami Tikitiki v Assets Co (Ltd)* (1899) 18 NZLR 226 (CA). The 1905 Privy Council decision in *Assets* was a consolidated appeal from three separate decisions of the New Zealand Court of Appeal.

of who was to benefit from Māori land acquisition. Should land be allowed to fall into the hands of large purchasers and land companies? Or should the state make an effort to protect the “small man”? The Liberal Government of 1891–1912 made a determined effort to protect small settlers and to prevent the development of a rural land-owning oligarchy. New Zealand and Australia stand out as countries where governments made a great deal of effort to prevent land aggregation and to pursue the goal of close settlement. Overseas visitors noticed this immediately. In 1923 the Argentinian economist Raúl Prebisch, at that time at the beginning of his long and distinguished career, visited New Zealand and Australia and was immediately struck by the fundamental differences between these two countries and Argentina and Chile. Notwithstanding many attempts at land reform in his own country, no homesteading policy had ever been introduced there and land ownership remained concentrated in the hands of a narrow oligarchy.⁶⁰ Prebisch believed that the policies pursued in Australia and New Zealand had been remarkably successful and deserving of emulation in South America. Compared to Latin American countries New Zealand and Australian governments were effective regimes, responsive to their electorates and able to translate policy into practical outcomes.

One Latin American country which has some similarities with New Zealand is Uruguay. Uruguay emerged as an independent republic in 1828 and gained its first constitution in 1830. Like Australia and New Zealand, it attracted high rates of immigration from Europe in the 19th century. In the late 19th and the early 20th century, Uruguay and New Zealand successfully built prosperous agricultural economies largely based on exports to Britain. These similarities have been emphasised by two Uruguayan economic historians, Jorge Álvarez and Luis Bértola, who have pointed out that New Zealand and Uruguay share “a temperate climate, an abundance of land in relation to a relatively small settler population, and a high rate of immigration of people of European origin”.⁶¹ Both countries also share a tradition of state involvement in economic development and a commitment to a welfare state. Yet over the course of the 20th century, New Zealand has performed much better than Uruguay (although the position of both countries

60 On Prebisch’s visit to New Zealand (where he met Malcolm Fraser, the government statistician who was an internationally prominent figure in the discipline of statistics at that time) and Australia in 1923, see Edgar J Dosman *The Life and Times of Raúl Prebisch: 1901-1986* (McGill-Queen’s University Press, Montreal, 2008) at 48–51. Prebisch, sometimes regarded as the JM Keynes of Latin America, is a key figure in modern economics; despite on the whole being a political moderate, he was a strong believer in economic justice and policies that would break the dependency status of countries, such as Argentina, on Europe and the United States. Not surprisingly his ideas became both marginalised and caricatured during the ascendancy of neoliberalism in the United States and Britain in the 1980s, but recently his ideas (equally unsurprisingly) are staging something of a comeback, as evidenced by Dosman’s well-reviewed biography.

61 J Álvarez and L Bértola “So Similar, So Different: New Zealand and Uruguay in the World Economy” in Christopher Lloyd, Jacob Metzger and Richard Sutch (eds) *Settler Economies in World History* (Brill, Leiden, 2013) 493 at 493. See also J Álvarez and others “Agricultural institutions, industrialization and growth: The case of New Zealand and Uruguay in 1870–1940” (2011) 48(2) *Explorations in Economic History* 151. See also JE Álvarez Scanniello *Instituciones, Cambio tecnológico y distribución del ingreso: Una comparación del desempeño económico de Nueva Zelanda y Uruguay (1870-1940)* (Tesis de Maestría en Historia Económica, Facultad de Ciencias Sociales, Universidad de la República Oriental del Uruguay, Montevideo, 2008). This is the only full-length comparative economic history of New Zealand and a Latin American country of which I am aware, although there is something of a tradition in Uruguay to compare Uruguay’s fortunes and misfortunes with those of New Zealand (it would be worthwhile for New Zealand scholars to make an equivalent effort). On recent developments in Uruguayan historiography set against the wider Rioplatense region (namely, Argentina, Paraguay and southern Brazil), see William Acree “Uruguay, Gateway to Nineteenth-Century Cultural History of the Río de la Plata” (2013) 11 *History Compass* 292.

has declined in relative terms⁶²). One problem that confronts Uruguay is the monopolisation of its rural land by a small landowning oligarchy, compounded by the massive growth of Montevideo, the one major city in the country. In Uruguay “the young state was financially and politically weak for most of the 19th century, which made it impossible to distribute land in any rational or systemic manner”.⁶³ As early as the 1870s, most of the country was already in private hands. As a great modern medievalist has pointed out, “land, once given, on whatever legal terms, is hard to get back, except by force”.⁶⁴ Nor did – or does – Uruguay possess any equivalent to the Torrens system of title registration pioneered in South Australia and quickly adopted in New Zealand, which has made conveyancing of property both cheap and reliable in New Zealand. Political and fiscal reforms designed to break up large estates have been tried in Uruguay but “were frustrated, which contrasts with what happened in New Zealand”.⁶⁵ The authors, Álvarez and Bértola, believe that this is one factor which serves to explain the different economic performance of the two countries. The example of Uruguay again underscores the point that it is as important to understand the distribution of land acquired from indigenous populations as it is to understand the effects and means of its initial acquisition. In New Zealand historiography, the former has in recent times been somewhat neglected in comparison to the latter.

To conclude this brief and somewhat impressionistic survey, I would like to repeat the suggestion that the time has come for a new look at the connections between banks, financiers, land companies and the effects of government policies, designed to protect small settlers, on Māori land alienation and impoverishment. What if it turns out that it was the advance of international capitalism that really counted, rather than “the Crown”? Those Auckland businessmen sitting at the back of the Cambridge Native Court hearings in the 1880s need to be placed on centre stage.

62 Both New Zealand and Uruguay underinvest in research and development (compared with, for example, Finland), which Álvarez and Bértola believe is one reason for this relative decline.

63 Álvarez and Bértola, above n 61, at 511. See also Álvarez and others, above n 61, at 157, noting that because of “continuous political instability” and other reasons, the Uruguayan state “lost its control over public lands in favour of latifundia, being unable to determine precisely their extension and localization in the national territory.” By 1940 “land ownership is substantially more concentrated in Uruguay than in New Zealand”: at 163. From 2000 to 2010 there has been yet further concentration (and also “foreignisation”) of land ownership in Uruguay as mega-companies have been allowed to purchase or lease vast areas: see Diego Piñeiro “Land grabbing: concentration and ‘foreignisation’ of land in Uruguay” (2012) 33 *Canadian Journal of Development Studies/Revue canadienne d’études du développement* 471.

64 Chris Wickham *Framing the Early Middle Ages: Europe and the Mediterranean, 400-800* (Oxford University Press, Oxford, 2005) at 59.

65 At 59.

MORE THAN A MERE SHADOW? THE COLONIAL AGENDA OF RECENT TREATY SETTLEMENTS

BY MICK STRACK AND DAVID GOODWIN*

I. INTRODUCTION

The Treaty settlement process is now well entrenched in the New Zealand government's agenda.¹ Through it, the Crown has recognised historic breaches of the Treaty of Waitangi and aims to settle those, assuming that this will be the end of the matter. The settlement process has enjoyed some high profile economic successes, which include wider contributions to the national economy,² but there has also been some criticism of the ways Māori are still suffering as a result of a colonial mind-set on the part of the state. This is manifested in the manner in which agendas have been set for negotiations; limits defined to what can be claimed; decisions about which individuals and groups are worthy of engagement with the state (in other words, picking the winners and the losers); the requirement for indigenous groups to create western-style corporate (and capitalist) structures even to begin "negotiations"; and the modes and methods of subsequent settlement allocations. Indigenous groups are left frustrated by a reluctance on the part of the Crown to let them assert their self-determination (*tino rangatiratanga*), and leaving them still seeking scraps of recognition from the colonial table and being expected to be grateful for whatever is offered.

While New Zealand's Treaty settlement process and outcomes have been criticised in a rather piecemeal and disconnected manner,³ in Canada, Coulthard has addressed Crown and First Nations relationships more coherently and, alongside some practical examples, has applied a more theoretical critique of those relationships.⁴ Coulthard sees conventional settlements between

* Dr Mick Strack, Senior Lecturer, National School of Surveying, University of Otago, mick.strack@otago.ac.nz and Dr David Goodwin, Senior Lecturer, National School of Surveying, University of Otago, david.goodwin@otago.ac.nz.

1 See Office of Treaty Settlements <www.govt.nz/organisations/office-of-treaty-settlements/>.

2 For example, the Ngāi Tahu settlement discussed later in this article.

3 See, for example, A Mikaere "Settlement of Treaty Claims: Full and Final or Fatally Flawed?" (1997) 17 NZULR 425; Malcolm Birdling "Healing the Past or Harming the Future: Large Natural Groupings and the Waitangi Settlement Process" (2004) 2 NZJPL 259; C Coxhead "Where are the Negotiations in the Direct Negotiations of Treaty Settlements?" (2002) 10 Waikato Law Review 13; Andrew Rueti "Māori Rights to Freshwater: The Three Conceptual Models of Indigenous Rights" (2016) 24 Waikato Law Review 58; Linda Te Aho "The 'False Generosity' of Treaty Settlements – Innovation and Contortion" in A Rueti (ed) *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, Wellington, 2017) 99.

4 See Glen S Coulthard "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6 Contemporary Political Theory 437; Glen Sean Coulthard *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, Minneapolis, 2014).

the Crown and indigenous peoples as demonstrating a fatal flaw, in requiring “recognition” of the indigenous peoples.⁵ By starting from a goal of recognition, indigenous peoples are immediately “on the back foot.” It is as if they are not sovereign people with their own autonomy, but are subservient to the colonial state from whom they must seek recognition of their legitimate status under the Crown’s authority. Much of the following commentary seeks to incorporate Coulthard’s position and to examine the extent to which the same process is occurring in Treaty settlements with the Crown in Aotearoa New Zealand.

This article is structured in three parts. The first section considers the way that the Crown goes about setting rules, with the usual starting point being to require that indigenous peoples seek recognition, and thereafter by assuming the right to set agendas and to insist on adherence to western legal norms. The second section discusses the complicating factors in the way of Tribal lands, boundaries and composition, and how it may be difficult to root out, once it is established, a western system of rights-holding that comes in as part of a colonisation package. The third section examines the process and the outcome of five specific settlements where the Crown has apparently recognised some components of a Māori right to a wilderness area and to waterways by vesting the fee simple title of some lake beds to an iwi authority, of a national park to itself as Te Urewera and of the Whanganui River to itself as Te Awa Tupua. These cases raise questions about what is actually offered by the Crown, what iwi have gained by these settlements and whether the settlements can really be called “full and final” in the light of continuing Treaty breaches by the Crown.⁶

II. THE CROWN’S WAY OF SETTING RULES

A. *Recognition Seeking*

Although Māori have suffered significant land loss through treatment they have received from the Crown, with only about six per cent of New Zealand being Māori freehold land, Māori nonetheless exist in this country on the basis of their indigeneity and their longstanding occupation of the land. Viewed in this way, “Māori have no need of the Treaty to assert the legitimacy of their presence in this land.”⁷ Having said that, the Treaty formed the basis of the establishment of colonial power in Aotearoa, and it provides one important avenue by which Māori may uphold their rights and their mana in this land. It is also noted in passing that there are other avenues, namely direct application to the courts on the basis of customary rights;⁸ direct negotiation with the Crown on the basis of customary law, rather than Treaty law; and assertions of iwi independence practised in isolated communities beyond the normal reach of New Zealand law and society.⁹ But in each of these forums the Crown holds the upper hand and can proceed on the basis of its rights of

5 Coulthard “Subjects of Empire”, above n 4, at 451 “colonial powers will only recognize the collective rights and identities of Indigenous peoples insofar as this recognition does not throw into question the background legal, political and economic framework of the colonial relationship itself.

6 Not acting in good faith, not actively protecting Māori interests, not acting as an honourable partner and not recognising Māori rangatiratanga.

7 David V Williams “Indigenous Customary Rights and the Constitution of Aotearoa New Zealand” (2006) 14 Waikato Law Review 120 at 133.

8 The common law doctrine of aboriginal rights.

9 For example, the activities in Ruatoki that eventually led to the 2007 police invasion of Tūhoe communities in Te Urewera.

kāwanatanga (government), leaving Māori to approach the colonial tribunals, courts and forums, cap in hand, seeking recognition and redress.

Coulthard provides a searching critique of the ways that indigenous peoples are forced into a subservient position when recognition is sought.¹⁰ He describes how recognition-seeking implies that indigenous peoples have “bought into” the whole system of colonial power relations. In New Zealand’s case, the implication is that Māori need state recognition to affirm their place on this land, and need to call on the state to restore their mana, their culture, their tikanga. In general, struggles for recognition force indigenous peoples to start from a position of weakness and ultimately leave them at the mercy of powerful states. Watson questions how it is possible to “become reconciled with a state and its citizens who have not yet acknowledged your humanity, let alone your status as the first peoples of the conquered land?”¹¹

Further problems with recognition-seeking include first, that indigenous peoples may be forced to over-emphasise their distinctiveness from the coloniser, and by so doing may freeze their practices in some pre-contact state. This is out of kilter with the natural evolution of tradition, which naturally “goes through a process of selection, reformation and fashioning by each generation.”¹² To assert their claims for recognition, indigenous groups may have to distort the cultural characteristics of their lived reality in order to emphasise the distinctive nature of their practices (tikanga), which contrast with the colonial norm. For example, attitudes about ownership, possession and occupation on the land¹³ are expressed so frequently that those attitudes often become embedded in formalised statements about cultural meanings that then “bind people to static and anachronistic understandings of their culture.”¹⁴

Secondly, in seeking recognition from the Crown, iwi have been forced to establish western, capitalist-style corporate structures that generally diverge significantly from traditional forms of group relationships based on whakapapa (genealogy) and tūrangawaewae (ancestral land; literally, a standing place for the feet).

B. “Negotiating” Settlements

Treaty settlements generally include an apology; some monetary compensation, primarily for land lost that cannot be restored to iwi; the right of pre-emption on surplus Crown land; and some cultural redress including name changes, recognition of special places and participation on conservation decisions. However, through its Treaty right to govern, the Crown sets the agenda for

10 Coulthard *Red Skin White Masks*, above n 4.

11 Irene Watson “Settled and unsettled spaces: Are we free to roam?” in Aileen Moreton-Robinson (ed) *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, Crows Nest, NSW, 2007) 15 at 20, cited in Sarah Maddison, Tom Clark and Ravi de Costa (eds) *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage* (Springer, Singapore, 2016) at 4.

12 Hana O’Regan *Ko Tahu, Ko Au: Kāi Tahu Tribal Identity* (Horomaka, Christchurch, 2001) at 72.

13 For example, that Māori do not own the land, but that they are owned by the land. While conceptually that may have some validity, the statement hardly encapsulates the extent of either a customary or a modern concept of Māori property.

14 A Eisenberg “Self-Determination versus Recognition: Lessons and Conclusions” in Avigail Eisenberg and others *Recognition versus Self-Determination: Dilemmas of Emancipatory Politics* (University of British Columbia Press, Vancouver, 2014) 293 at 295. However, see also Linda Te Aho “Te Awa Tupua (Whanganui River Claims Settlement Bill – the endless quest for justice” (2016) September Māori Law Review.

what can be “negotiated” and what can be offered, and it is clear that the state is in control.¹⁵ While there are some examples of innovations in what can be offered – for example, see the Whanganui river settlement described below – in the 30 years of considering the historic breaches of the Treaty (since the Treaty of Waitangi Act 1975),¹⁶ the usual formula is now well established and does not accommodate much in the way of recognition of *te tino rangatiratanga*. Certain “bottom line” assumptions by the Crown are evident and are well entrenched in common law or statute. For example, nobody can own the foreshore and seabed¹⁷ (notwithstanding the remote possibility of a customary marine title being granted);¹⁸ nobody can own water, nor in some cases, apparently, the space that the water occupies (see the discussion about lakes and rivers below); and the Crown claims ownership of minerals.¹⁹ These overriding assumptions largely strip Māori title of any substance and leave a mere shadow.²⁰

In the actions of the Crown, one Treaty principle is emphasised – *kāwanatanga*, the right of the Crown to govern; and another principle is downplayed – that of *tino rangatiratanga*, the right to self-determination. The Crown’s governorship has led to a western model of government in New Zealand in which individualised tenure and a market economy are axiomatic:²¹

Māori can engage in the negotiation process only on the state’s limited terms, in its systematic attempt to replace traditional usage rights in land with individual tenure in a market economy.

The *modus operandi* of western governments is often to divide and rule: to pick winners and losers, and enter into discussions with Māori elites (business persons) while refusing discussions with

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- 15 See Coxhead, above n 3, at 27: “The process is more in line with ‘take it or leave it’ than negotiation” and Te Aho, above n 3, at 91 “claimant groups feeling forced to work within a framework not of their making”.
- 16 Note, claims for breaches occurring since 21 September 1992 are considered contemporary claims (Ka Tika ā Muri, *Ka Tika ā Mua: Healing the Past and Building a Future* (2nd ed, Office of Treaty Settlements, Wellington, 2015)).
- 17 The common law assumed that the foreshore and seabed was owned by the Crown, the Foreshore and Seabed Act 2004 (s 4(a)) stated that the Crown owns the public foreshore and seabed and now the Marine and Coastal Area (Takutai Moana) Act 2011 states that the public foreshore and seabed is incapable of ownership (s 11(2)).
- 18 Notwithstanding that a significant area of the foreshore and seabed is held in private title (see K Kelly *Foreshore Project Final Report* (LINZ, Wellington, 2003) <www.linz.govt.nz/system/files_force/media/file-attachments/foreshore-report-2003.pdf?download=1>) and is not part of the public foreshore and seabed. This was made explicit during investigations of the foreshore and seabed that were undertaken at the time that the Foreshore and Seabed Act 2004 extinguished Māori customary title and the possibility that Māori could make a claim against the Crown for customary title to the sea.
- 19 By the common law, the Crown owns all royal metals – gold and silver (See David V Williams “*Gold, the Case of Mines* (1568) and the Waitangi Tribunal” AJLH 7 (2003) 157 at 161). By the Crown Minerals Act 1991, all petroleum, gold, silver and uranium existing in its natural condition is the property of the Crown (s 10) and every mineral in its natural condition on land alienated from the Crown since 1991 is the property of the Crown (s 11).
- 20 It is interesting to reflect on the words of Nōpera Panakareao in 1840: “The shadow of the land goes to the Queen, but the substance remains with us” cited in John Caselberg (ed) *Maori is my Name: Historical Maori Writings in Translation* (John McIndoe, Dunedin, 1975) at 50.
- 21 Evan Te Ahu Poata-Smith “The Changing Contours of Maori Identity and the Treaty Settlement Process” in Janine Hayward and Nicola R Wheen (eds) *The Waitangi Tribunal, Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Books, Wellington, 2004) 168 at 183.

smaller hapū groupings, and less powerful or lower status Māori (like “protestors and radicals”). The Crown is expert at offering symbolic concessions²² that promise much but amount to little:²³

... groups may be co-opted by promises of minor and symbolic concessions in place of policies that respond to deeper demands for justice, which are more difficult to attain and which are likely to pose fundamental challenges to the state.

In this way, any moral critique is diverted onto Māori. Māori are expected to be compliant, grateful and not to object to nor protest against unfair treatment and coercion. Recognition (of past wrongs) and, similarly, reconciliation (settling past wrongs) have an implicit assimilationist agenda; that when it is sorted out, we can all progress together – “one law for all.”

C. *Crown Rules Imposed on Māori: The Foreshore and Seabed*

The conflict that arose in 2003 with the Māori claim on the foreshore and seabed illustrates the Crown’s intransigence to non-western points of view. Initially the Foreshore and Seabed Act 2004 extinguished customary title, but ongoing discontent forced the Crown to introduce the Marine and Coastal Area (Takutai Moana) Act 2011, which appeared to open the door to the possibility of Māori customary rights claims to the foreshore and seabed. However, these customary rights have to be supported according to Crown rules rather than tikanga. Māori are required to prove that they are members of a continuously established group that has held and exercised (exclusive) rights to the foreshore and seabed in the same way since 1840. Joseph notes the implicit assumptions that the Māori community asserting the claim “existed in 1840 and that its customary practices have continued unabated and in the same ossified form since that time.”²⁴ To be required to furnish such proof is unrealistic, since:²⁵

... colonisation, urbanisation and now globalisation have substantially changed Māori community practices, identity and representation since 1840. The threshold tests are therefore arguably legislated as impossible barriers to the successful asserting of customary rights.

The Act thus redefines Māori groups, identity and customary practice out of existence. More generally, Māori are still not adequately able to bring their tikanga and their perception of the environment to a reasonable recognition by the courts:²⁶

Even when they are included, Māori concepts and principles are subsidiary to Western concepts. The result is that although Māori law is often included in legal discussions, it rarely produces positive outcomes for Māori.

22 See the examples of settlement packages described below in this article.

23 Eisenberg, above n 14, at 296.

24 Robert Joseph “Unsettling Treaty Settlements: Contemporary Māori Identity and Representation Challenges” in Nicola Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 151 at ch 11.

25 At 153.

26 See Nin Tomas “Maori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights” in David Grinlinton and Prue Taylor (eds) *Property Rights and Sustainability* (Brill NV, The Netherlands, 2011) 219 at 231, n 36: “Western legal scholarship has been increasingly obsessed with allocating, defining and refining an ever-increasing body of ‘rights’, and to a lesser extent the ‘duties’, and ‘obligations’ in a world where scarcity of natural resources is creating problems on a global scale.”

Western legal scholarship²⁷ has emphasised ownership of natural resources and rights to things. “Thus Māori have been forced to try to gain a foothold within a framework based on foreign values and principles that conflict with their own.”

In summary, the way in which western legal paradigms override Māori custom goes against the now widely recognised Treaty of Waitangi principles of partnership, good faith and assertion of tino rangatiratanga. For their part, Māori have actively pursued these principles:²⁸

Through war, protest, and petition, the single thread that most illuminates the historical fabric of Maori and Pakeha contact has been the Maori determination to maintain Maori autonomy and the Government’s desire to destroy it.

In terms of the Treaty, the Crown and Māori are partners who should act with the utmost good faith towards each other, and the Crown should provide active protection of tikanga Māori, yet the Crown continues to feel free to extinguish customary title,²⁹ in spite of current statutory protections.³⁰ If the Treaty principles were taken seriously, the Crown would not be taking an adversarial stand against their “partners” so regularly, but should support Māori in their efforts to have their customary rights recognised.

III. COMPLICATING FACTORS: TRIBAL LANDS, BOUNDARIES, COMPOSITION AND RIGHT HOLDING

The previous section looked critically at the Crown’s way of setting rules. But it also needs to be recognised that the challenge of meshing socially-based tenure systems with more bureaucratic and hierarchical western systems is far from simplistic. This section focuses on some of the complicating factors. The colonising process viewed the complex nature of Māori rights as problematic, just as communism amongst the natives was seen as a problem,³¹ the solution of which was to negotiate those rights out of existence.³² Possible complicating factors in the process were tribal lands and boundaries and tribal composition and rights holding, with a degree of overlap existing between these. Traditional tribal boundaries were fuzzy and elastic depending on the relationships, alliances and power of neighbouring hapū. It suited the colonial authorities to encourage defined and individual title to land and to fix boundaries in order to eliminate doubt and dispute,³³ but the

27 At 232.

28 Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996) at 6.

29 See, for example, the Foreshore and Seabed Act 2004, s 4.

30 In Te Ture Whenua Māori Act 1993, s 145.

31 In justifications for the Native Land legislation of the 1850s and 1860s, Richmond J wanted to destroy the “beastly communism” of Māori society. See David V Williams *A Simple Nullity? The Wi Parata Case in New Zealand Law & History* (Auckland University Press, Auckland, 2011) at 143.

32 Several hundred customary rights claims have been lodged with the Crown and with the High Court, with none yet settled. Iwi claimants have a difficult time ahead.

33 Te Ahu Poata-Smith, above n 21, at 171: “many Māori have come to accept an over-simplified and truncated version of Māori land tenure and tribal boundaries as tradition. . . . such interpretations obscure the dynamism and complexities of Māori political and social relations, and the considerable variations that existed both before and after European contact.”

way in which this was done was often simplistic and had a knock-on effect in terms of later tribal histories:³⁴

Unfortunately, many tribal histories have uncritically accepted and sometimes perpetuated ethnological accounts based on the notion that iwi or “tribes” were contiguous “principalities” or discrete kingdoms ruled over by “principal chiefs”. To some extent, these developments reflect the influence of colonial administrative models that attempted to codify Māori land tenure and social and political relations, with all their complexity and fluidity, into simplified and truncated hierarchy of single tribes with politically subordinate “sub-tribes”. They also reflect the influence of the Native Land Court, as judges and assessors redefined features of traditional Māori social and political organisation to fit a preconceived legal order based on capitalist private property and the ownership of discrete territories by iwi.

The idea of defined territories is central to western tradition. Māori traditional territories were rather more elastic, and relationships within those territories were similarly flexible. The Waitangi Tribunal records that “traditionally hapu defined themselves by genealogical descent, and only coincidentally by the occupation of land.”³⁵ Such genealogical descent may be complex. Te Ahu records how “there has always been the potential for Māori to identify strongly with multiple hapū and iwi.”³⁶

When the Crown imposed its own interpretations of how territories and relationships should be recognised, it was not only frequently simplistic, but also robbed customary tenure of its flexibility:³⁷

... the codifying of customary land tenure and the recording of “holdings” ultimately led to a solidification of Māori descent practices, and, in the long term, a restriction of rights in previously accessible land.

Metge also notes that “once lists and maps were made they came to be accepted as definitive and ‘right’, and the fluidity of the traditional system was frozen.”³⁸

Misconceptions were also possible over the nature of rights versus responsibilities, an area where western and Māori thinking can be radically different. Some authors appear to equate property ownership with tino rangatiratanga. For example, in reference to the settlements that have enabled some Māori input into management of resources, Wheen and Hayward note that “they do not speak of the kind of influence and control that ownership of resources might bring, which is central to the exercise of Māori tino rangatiratanga”.³⁹ From a western perspective, title to real

34 At 172.

35 Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 14.

36 Te Ahu Poata-Smith, above n 21, at 172.

37 At 174.

38 J Metge *Maoris of New Zealand: Rautahi* (Routledge & Kegan Paul, London, 1976) at 129, as cited in Te Ahu Poata-Smith, above n 21, at 174.

39 Nicola Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) at 202.

property emphasises rights, for example rights to use, enjoy, exclude and alienate (see later). In contrast, Sharples notes that:⁴⁰

... rangatiratanga is asserted through the collective exercise of responsibilities – to protect, to conserve, to augment and to enhance over time for the security of future generations. Both seek to increase value, but the question is, how do you value the resource? The profit you can make? Or the Taonga's contribution to the survival of the group?

Māori responsibilities even extend to embrace the numinous, since “for the Maori people the waters and their natural resources are the source of spiritual life.”⁴¹ How can ownership support tino rangatiratanga, and how can a fee simple title adequately incorporate this very different perspective on land and water and nature?

A. Group Structure

A further complication in the colonising process was the structure of indigenous groups. The Crown has sought to achieve a middle path between groups that, at one extreme are too large and powerful, and at the other, unmanageably small. Thus on the one hand, the Crown continues the colonial practice of “divide and rule” by ensuring that no pan-tribal authorities are acknowledged, but, on the other, it insists that a sufficiently large group is incorporated, with whom to negotiate.⁴² The state will not enter into negotiations (or at least will not complete any settlement) without ensuring that an iwi has created a corporate governance structure that is confirmed in statute to represent the iwi. Representatives of iwi with whom the Crown will consider negotiating have to meet Crown-established criteria rather than those according with tikanga. The management structure created for the purpose of negotiating a Deed of Settlement and subsequently applying a Crown settlement offer is not the iwi *per se*, but only represents the iwi. That structure exists solely to satisfy the Crown that a fiscally responsible and mostly representative authority will administer a settlement.⁴³ “The Crown has pressured Māori groups to organise and codify into ‘large natural groupings’ ... in a form that fits its own notions of political organisation, representation and governance.”⁴⁴ The Crown’s promise of economic reward provides an incentive to do so.

Successes following settlements provide the Crown with justification that their systems are effective and appropriate for all claimants. For example, Ngāi Tahu, having accepted an economic settlement of \$170m in 1998, now has assets amounting to \$1.5b.⁴⁵ Ngāi Tahu has demonstrated to

40 Pita Sharples “*Pita Sharples: Maori perspectives on water resources*” *The New Zealand Herald* (online ed, Auckland, 15 December 2008) as cited in Nin Tomas, above n 26, at 233.

41 Waitangi Tribunal *Manukau Report* (Wai 8, 1985) at 38.

42 See Birdling, above n 3, at 282–283:

In the rush to achieve full and final settlements, spurred on by public demand for an expeditious settlement process, the Crown has opted for a policy of negotiating only with large natural groupings. The effect of this has been to shut out the smaller groups which traditionally dominated Maori society, unless they amalgamate into larger groups. The policy is not based on *tikanga*, nor on a desire from Māori to be defined in large-group terms; it exists because it is easier for the Crown to do things this way.

43 The features of most of which are transfer of monetary compensation and transfer of title to some land, and the hugely significant cultural redress component and Crown apology.

44 Joseph, above n 24, at 161.

45 Te Rūnanga o Ngāi Tahu *Annual Report 2016* <www.ngaitahu.iwi.nz/>.

the Crown that the settlement process works; it has demonstrated effective corporate, environmental and social responsibility; it has employed outside of the iwi to have the best people available to succeed in the corporate world; and it has invested wisely in profitable ventures and in its own people.⁴⁶ However, while “[p]rofit and economic development are important, ... so too are cultural, social and political development”⁴⁷ and:⁴⁸

... any agreement that sees financial return as the equivalent of rangatiratanga, or that accepts as its values-base the belief that profit is the same as redress for colonisation will not be full and final – and it will sadly cause division and discontent.

Coulthard comments that where a legal approach to self-determination dominates, it can help to produce “a class of Aboriginal ‘citizens’ whose rights and identities have become defined solely in relation to the colonial state and its apparatus,” and where self-determination is via economic development, this can help create “a new elite of Aboriginal capitalists whose thirst for profit has come to outweigh their ancestral obligations to the land and others.”⁴⁹

B. Rights Holding: An Unequal Battle between Introduced and Customary Law

A final complicating factor concerns fundamentally different ways of holding rights, and how western systems of rights holding tend to be established as part of a wider process of colonisation. The English law imported into and accepted in Aotearoa New Zealand⁵⁰ is based on the doctrine of tenure.⁵¹ This tenure arrangement, which has its roots in the English feudal age, gives the Crown allodial title to all land,⁵² out of which it can then grant interests or estates in land. A fee simple title is the closest form of title to full ownership, and provides the freedoms to buy, sell and exchange; to use and occupy; to hold exclusively; to take a profit from; and even to lay to waste. Lesser forms of title can be granted, including leases, life estates and various forms of shared title. Such a system cannot easily accommodate customary (or native) title, and since the Native Land Court process of the 1860s, Māori have been required to extinguish their customary title in order for the Crown to recognise their property interests and record these on a fee simple title derived from the Crown. An interesting component of this process (which has implications for current Crown vesting orders) was the requirement of the 1860s Native Land Court process that Māori had to

46 Recent commentary questions this policy and suggests that more emphasis should be placed on employing within the iwi: See Ward Kamo “Best person for the job” (2017) 75 *Te Karaka* 8 at 9: “What are we saying to our Ngāi Tahu people every time we reject them for a role and then hand that role to a non-Ngāi Tahu?”

47 Joseph, above n 24, at 162.

48 Moana Jackson “Maori Can and Will Say ‘No’” *Kia Hiwa Ra* (September 1997) at 17 as cited in Maria Bargh “The Post-settlement World (So Far): Impacts on Māori” in Nicola Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 166 at 169.

49 Coulthard “Subjects of Empire”, above n 4, at 452.

50 Notwithstanding the condition that English law was only imported “so far as applicable to the circumstances of the said Colony”: English Laws Act 1858 21 & 22 Vict 2, s 1.

51 The English feudal tenure arrangements whereby the Crown holds the allodial title to all land and can then grant an estate or interest in the land as a fee simple title.

52 At least this is the common law position. An alternative interpretation might suggest that Māori hold the underlying possession of (and title to) all land until their customary title is legitimately extinguished, and the Crown only acquires fundamental title when customary title is transferred to Crown title. Perhaps that is why the Crown responded so extremely to the Court of Appeal’s decision in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) that the foreshore and seabed may still be customary land; previous Crown assumptions were questioned and even overturned.

bring their claims for customary title to the court alongside a full survey of that land in order for a fee simple title to be issued. This financially crippling imposition was imposed on Māori as if there were no alternative.⁵³ The introduced English law was thus able to subsume Māori customary title, despite Māori fighting many losing legal battles to overcome its powerful hold.⁵⁴

English common law came in “on the back of” colonisation, and in order to understand the pervasiveness of that law we need to look more widely at the colonial process. While it is easy to write off colonisation as simple arrogance,⁵⁵ complex factors were at play, three of which form the succinct title of Jared Diamond’s book, guns, germs and steel.⁵⁶ In New Zealand, European diseases weakened and probably killed about half of the Ngāi Tahu population in the 1830s.⁵⁷ European boats were superior to ocean-going waka, European muskets took tribal warfare to a new level and wheels, blankets, horses and cooking utensils were also significant in that they were attractive to aboriginal societies and gave colonists a strong bargaining position, often coupled with a misplaced sense of superiority. In New Zealand, the colonial office recognised in the 1830s that something needed to be done about the lawless activities of Europeans living in New Zealand and about the New Zealand Company and private individuals buying land off Māori. Where it came to civilising influences, the British were confident of their product. There was never any doubt in their minds that their rule would be other than a boon. In Normanby’s opinion:⁵⁸

... the benefits of British protection and the laws administered by British Judges would far more than compensate for the sacrifice by the natives of a national independence which they are no longer able to maintain.

A problem with colonisation is that it is a package, which frequently:⁵⁹

... entails a complex system of racial, cultural and political domination that establishes a hierarchical arrangement between the coloniser and the colonised. The process of colonialism exploits indigenous peoples, destroys their national society, and displaced aboriginal cultures.

In New Zealand’s case, the Crown has subsequently admitted wrongdoing. The fact that Treaty settlements are being legislated for in the modern era recognises that the processes of colonisation implemented since 1840 put Māori at a disadvantage in comparison with the incoming settlers. Now that this has been acknowledged, and remedies are being implemented, those colonial attitudes and methods should no longer prevail. But the fact is that those attitudes have proved to be extraordinarily persistent. Coulthard, quoting Alfred, points to a tendency for “symbolic acts

53 However, it can now be seen that the Crown is not so insistent on this requirement for itself. It seems that the Crown can issue a fee simple title, without a title document, without a survey plan and without any spatial definition – as we see in the recent Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, explained below.

54 See the long history of litigation about the Whanganui River set out in Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999).

55 L. de Bernières *Birds Without Wings* (Vintage, London, 2014) at 260: “The naturally superior must rise to the top by any means, because their superiority legitimates the means.”

56 Jared Diamond *Guns, Germs, and Steel: The Fates of Human Societies* (WW Norton, New York, 1997).

57 Harry Evison *Te Wai pounamu =: The Greenstone Island: a history of the southern Maori during the European colonization of New Zealand* (Aoraki Press, Wellington, 1993) at 86.

58 Paul Moon *Te Ara Ki Te Tiriti: the path to the Treaty of Waitangi* (David Ling, Auckland, 2002) at 111.

59 Roger Maaka and Augie Fleras *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (Otago University Press, Dunedin, 2005) at 40.

of redress while actually ‘further entrenching in law and practice the real basis of its control’.⁶⁰ Bargh⁶¹ laments that the Crown “does not question the fundamentals upon which its political power is based and instead continues behaviour already proven to be contrary to Te Tiriti”⁶² and Stevens⁶³ comments that “the Treaty settlement process has simply reinvented state authority.” Maddison and others⁶⁴ “despair in the ways in which colonial assumptions are able to reproduce themselves in policy and practice.” The question now is how we can turn matters around and do things differently. A fundamentally different paradigm is needed, one which recognises the persistence of colonial norms and explores radically different alternatives with an open mind. This leads on to a section where specific examples are considered of Crown settlement offers.

IV. CASES OF TITLE ANOMALIES EMBEDDED IN CROWN SETTLEMENTS

Five cases are now considered, chosen to illustrate a number of anomalies embedded within the Crown settlement offers and arrangements from an ownership perspective. Foremost is the set of rights conveyed. In accepting a fee simple title to land (see earlier), river or lake beds, Māori are receiving a title derived from the Crown and this could be expected to include the bundle of rights developed and accepted under English common law⁶⁵ rather than the bundle of rights of customary law.⁶⁶ As part of many settlements, in order to receive the benefits, Māori are forced to extinguish or

60 Taiaiake Alfred *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ontario, Oxford University Press 1999) at xiii, cited in Coulthard *Red Skin White Masks*, above n 4, at 155.

61 Bargh, above n 48, at 166.

62 See also Maaka and Fleras, above n 59, at 281:

The foundational principles that govern a colonial constitutional order ... include

- a) Crown preference to relate to indigenous peoples as historically disadvantaged ethnic minorities rather than relatively autonomous political communities;
- b) Crown preoccupation with indigenous peoples as problems with needs rather than peoples with rights;
- c) Crown inclination to approach indigenous peoples as junior partners rather than a constitutional partnership;
- d) Crown rejection of a bi-national (“nation-to-nation”) framework in exchange for multi/bicultural models of accommodation;
- e) Crown insistence on a one-size-fits-all citizenship rather than a customised belonging;
- f) Crown adherence to “liberal pluralistic” models of universalism that dismisses indigenous difference as superficial or unimportant; and
- g) Crown belief that the so-called “indigenous problem” is solvable within the existing institutional framework and power-sharing matrix.

63 Michael Stevens “Settlements and ‘Taonga’: A Ngāi Tahu Commentary” in Nicola Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 124 at 137.

64 Sarah Maddison, Tom Clark and Ravi de Costa (eds) *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage* (Springer, Singapore, 2016) at 2.

65 Those rights to alienate, to exclude, to use and profit from, and which focus on land as a commodity with primarily economic character. GW Hinde and others *Principles of Real Property Law* (2nd ed, LexisNexis, Wellington, 2013) at [3.008]: “The most important rights enjoyed by a tenant in fee simple are possession, use and enjoyment, and alienation.”

66 Those rights that have scarcely been defined, but include a vast and diverse array of rights, responsibilities and cultural attachments that pre-exist English law in Aotearoa New Zealand and derive from long-standing occupation.

denounce their customary rights. For example, in accepting the fisheries deals, Māori have had to sign away future claims to their customary rights.⁶⁷ Something is gained in exchange for something lost. In recent waterways settlements, iwi relinquished their customary title to rivers or lakes – including their innate relationship with the waterbody as an ancestor and as a whole and indivisible entity – in exchange for a fee simple title to a river or lake bed without the water. The Crown thereby gained security and certainty about the rights to the river, which they did not have prior to these settlements, and it may be supposed that Māori also acquired something of value in gaining a fee simple title to the riverbed. However, the fee simple title granted is inalienable and has no right to exclude,⁶⁸ so it is difficult to imagine how any practical use or economic profit could be gained. While it could be argued that there is a powerful symbolic value in the new arrangements, this hardly equates with what was taken from Māori.

Specifically, the question is raised of how the vesting of a fee simple title to the riverbed can contribute to an understanding of a customary relationship with the river for which the iwi has been fighting for so long; those reciprocal relations and obligations of a people with their physical and metaphysical ancestors. The iwi has been persuaded to accept extinguishment of the “luxuriant variety”⁶⁹ of their customary title in exchange for an extremely limited title derived within an alien legal system that only values land as a form of wealth accumulation; a commodity with an economic exchange value. Further, the fee simple title gained carries virtually none of the rights which would normally attach to such a title and would imbue it with value. In particular, there are no rights of alienation, exclusion or practical use. It would seem that the colonisers see logic in this, but it is a peculiarly western logic with ownership at its centre. Māori have long asserted a view that the land cannot be owned, but rather that they belong to the land,⁷⁰ so perhaps the Crown should instead offer some symbolic interest that avoids any consideration of ownership. After all, the Crown asserts that nobody should own water and rivers. On the face of it, such a symbolic offering has been made with Te Awa Tupua, by diverting ownership away from the iwi and creating the river as its own legal entity and owning itself, but a fee simple title to the river or lake bed with no meaningful rights contradicts any expectation that Māori conceptions are included.

A. *Ngāi Tahu Claims Settlement Act 1998*

In the Ngāi Tahu Claims Settlement Act 1998, Crown title to the bed of several lakes (most notably Waihora – previously known as Lake Ellesmere near Christchurch) was vested in Te Rūnanga o Ngāi Tahu as a fee simple title, in the expectation that a full bundle of rights to the

67 Stephanie Milroy “The Māori Fishing Settlement and the Loss of Rangatiratanga” (2000) 8 Waikato Law Review 63.

68 All public rights of use and enjoyment are retained in the vesting from the Crown.

69 See James C Scott *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, New Haven, 1998 at 36: “The fiscal or administrative goal toward which all modern states aspire is to measure, codify, and simplify land tenure . . . Accommodating the luxuriant variety of customary land tenure was simply inconceivable.”

70 Notwithstanding the arrangements established in the 1860s by the Native Lands Acts that enabled customary possession to be converted to Māori freehold title – an individualised tenure of a similar nature to the western form of ownership – “the incidents of the new title were those of the laws of England”: *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) at 624.

lake bed was acquired. This includes the bed⁷¹ and the air space above, but explicitly excludes ownership of the water, aquatic life and public structures on the bed,⁷² and the minerals beneath the bed.⁷³ This vesting of the bed in part recognises the cultural importance of the lake and allows for some management authority over the lake, but it also largely protects all existing public rights to the lake.⁷⁴ The Act added some responsibilities and authority to Ngāi Tahu, but only in a minor way does it recognise customary tenure, and it is a far cry from providing for the lake to be an indivisible entity.

B. Te Arawa Lakes Settlement Act 2006

In 2006, the Te Arawa Lakes claim was settled with the establishment of Te Arawa Lakes Settlement Act 2006. This claim encompassed many of the lakes in the Rotorua district. Crown title to the beds of the lakes was vested in the iwi (Te Arawa Lakes Trust), but a new exclusion was created, defined as the Crown stratum (“**Crown stratum** means the space occupied by water and the space occupied by air above each Te Arawa lakebed”).⁷⁵ As far as the authors are aware, there is no precedent for such a thing as Crown stratum able to be separated from the bed of a river or lake.⁷⁶ This Crown stratum does not have a unique parcel appellation: it is merely the residual estate of the Crown. This means that everything⁷⁷ above the lake bed is effectively still owned by the Crown and public interests in the water, aquatic life, access, and recreation are unaffected. While the lake bed here may still include the space beneath the bed, the Crown continues to retain ownership of all minerals in that space.⁷⁸ This represents yet more fragmentation of the full and indivisible entity that should be incorporated in a full customary title to a lake. The lake beds are inalienable, although the trust may grant a lease, licence or easement to these. However, it is difficult to see how the iwi may profit from these grants, nor do they hold any meaningful customary value. It may well be questioned what the value of the bed of a lake is, when all other interests, including the water, are retained by the Crown.

C. Ngāti Pāhauwera Treaty Claims Settlement Act 2012

In 2012, several lake beds of Ngāti Pāhauwera in Northern Hawkes Bay were vested in fee simple in the trustees of the Ngāti Pāhauwera Tiaki Trust, but this time, it was subject to an additional

71 The Act does not explicitly define the extent of the “bed” but the Resource Management Act 1991, s 2 interpretations may reasonably be assumed to apply: “the space of land which the waters of the lake cover at its highest level without exceeding its margin” (para (b)(ii) of the definition of “bed” in s 2) and “land” includes what is “covered by water and the airspace above” (para (a) of the definition of “land” in s 2).

72 Ngāi Tahu Claims Settlement Act 1998, s 171.

73 Section 20(3)(b).

74 Section 173.

75 Te Arawa Lakes Settlement Act 2006, s 11.

76 Linda Te Aho “Ngā Whakataunga Waimāori: Freshwater Settlements” in Nicola Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books Ltd, Wellington 2012) 102 at 108 describes the Crown stratum as “a new construct”.

77 Includes both the space and the “things” in that space.

78 Which by logical inference includes everything in that space. See the Crown Minerals Act 1991, s 11 which describes and defines what the Crown retains of the subsurface minerals – the wide definition of minerals would appear to include everything which may be down there except any air or water.

Conservation Covenant that gave the management responsibilities of the beds to the Department of Conservation, which further restricted any rights that could have been exercised by the iwi. In the survey of this title, the plans defining the lake bed include two stratum estates with the boundary between them being the lake bed. The lower stratum vests in fee simple in Ngāti Pāhauwera and the upper stratum is retained by the Crown, without title. Once again, the Crown holds all the effective rights to “the space occupied by water and the space occupied by air above the water.”⁷⁹

D. *Te Urewera Act 2014*

Te Urewera National Park covered over 2,000 km² of rugged mountain and forest-covered land, much of which is practically inaccessible. It is a unique remnant of the primeval bush that originally covered a large part of Aotearoa New Zealand. After many years of conflict and mistrust between Ngāti Tūhoe and the Crown, a fairly radical settlement was made with the iwi in respect of its tūrangawaewae – the home lands of the iwi – Te Urewera. Te Urewera Act 2014 confirmed the settlement between Tūhoe and the Crown whereby Te Urewera ceased to be a national park and became a legal entity with “all the rights, powers, duties, and liabilities of a legal person.”⁸⁰ Te Urewera is described in the Act in distinctly non-legal terms:⁸¹

- (1) Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty.
- (2) Te Urewera is a place of spiritual value, with its own mana and mauri.
- (3) Te Urewera has an identity in and of itself, inspiring people to commit to its care.

Crown title to Te Urewera was thus vested in its own legal entity – effectively the land of Te Urewera owns itself. This arrangement is “undoubtedly legally revolutionary.”⁸² The verbal description implicitly recognises the rights of nature,⁸³ but more explicitly recognises the rights of the iwi to take control of their land: to assert their rangatiratanga; recognise mātauranga Māori; and exercise their tikanga, including kaitiakitanga and manaakitanga – in a word, Tūhoetanga.⁸⁴

An important aspect of Te Urewera Act is that it removes the conventionally western perspective on land preservation that is exemplified by national park status: namely, that wilderness areas should be protected and restored and, apart from encouraging access to view the scenery, resource use must not be allowed.

Te Urewera breaks with convention by upholding the indigenous concept that nature can be protected in conjunction with human use – people are part of the environment. Permits for taking indigenous fauna and flora can now be granted where the preservation of the species is not adversely affected, and for the restoration of customary practices relevant to the relationship of iwi

79 Ngāti Pāhauwera Treaty Claims Settlement Act 2012, s 26(2), definition of “Crown stratum”.

80 Te Urewera Act 2014, s 11(1).

81 Section 3(1)–(3).

82 Jacinta Ruru “Tuhoehoe-Crown Settlement – Te Urewera Act 2014” [2014] October Māori Law Review.

83 As Christopher Stone concluded, a “changed ecological consciousness.” See Christopher Stone “Should Trees Have Standing? Toward legal rights for natural objects” Southern California Law Review 45 (1972) 450, as cited in Nim Tomas “Maori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights” in David Grinlinton and Prue Taylor (eds) *Property Rights and Sustainability* (Brill NV, The Netherlands, 2011) 219 at 238.

84 Te Urewera Act 2014, s 5.

with Te Urewera. This settlement appears to encompass a level of rangatiratanga rarely allowed for in other settlements.

E. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017

There is a long history of iwi claims to the Whanganui River.⁸⁵ Although many courts recognised that Māori were in full possession of the river and the surrounding lands at the time of the Treaty of Waitangi,⁸⁶ the courts nevertheless required Māori to argue colonial common law concepts that resulted in decisions against Māori in their claim for title to the river. Māori had to claim the bed of the river because that is the extent of the ownership recognised by the common law, when what they actually wanted to claim was the possession and rights over the whole river as an entity in itself.⁸⁷ In this protracted legal battle “The Crown has systematically undermined the rights, interests and responsibilities of the Whanganui iwi.”⁸⁸

When the Waitangi Tribunal finally examined the very close relationship of Atihaunui with the river they stated:⁸⁹

We are satisfied that, in Māori terms, the river was a single and indivisible entity, a resource comprised of water, banks, and bed, in which individuals had particular use rights of parts but where the underlying title remained with the descent group as a whole, or conceptually, with their ancestors. Thus, the river is ... called a tupuna awa, or a river that either is an ancestor itself or derives from ancestral title.

The final settlement accepted the river as its own legal entity, and therefore owning itself. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 states “Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person”⁹⁰ and “Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.”⁹¹

However, despite this acknowledgement of the indivisibility of the river, conventional statutory definitions of the bed prevail, and only the Crown-owned parts of the bed are included. The river

85 EJ Haughey “Maori Claims to Lakes, River Beds and the Foreshore” (1966) 2 NZULR 29; Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999).

86 See, for example, *R v Morison* [1950] NZLR 247 (SC) and *Re the Bed of the Whanganui River* [1955] NZLR 419 (CA).

87 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 states in s 69(14):

The Crown acknowledges that the litigation between 1938 and 1962 relating to the ownership of the bed of the Whanganui River—

- (a) was in part a reaction to the Crown’s actions affecting the Whanganui River; and
- (b) was required to be framed in terms of English law as a claim for a title to the riverbed, rather than to the River as an indivisible whole; and
- (c) resulted in several findings between 1938 and 1954 that Whanganui Iwi had held the bed of the Whanganui River at 1840 under their customs and usages; and
- (d) remains one of the longest cases in New Zealand legal history; and
- (e) was pursued at significant financial and emotional cost to the hapū and whānau of Whanganui.

88 Te Aho, above n 14, at 10.

89 Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at xiv.

90 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14(1).

91 Section 12.

continues to be defined by reference to adjoining parcels; it is not depicted as a distinct parcel and does not have a separate title. The bed is defined as:⁹²

- (a) ... the space of land that the waters of the Whanganui River cover at its fullest flow without overtopping its banks; and
- (b) includes the subsoil, the plants attached to the bed, the space occupied by the water, and the airspace above the water.

However, the Act then details the limits⁹³ to what is granted – it does not affect any private property rights and does not create any rights to the water or aquatic life. The status of the river as conservation land or national park was extinguished but re-established immediately after the river was vested in Te Awa Tupua.⁹⁴ The shingle and sand is included but all other minerals are retained by the Crown under the Crown Minerals Act 1991.

It would be easy to be seduced by the novel beauty and the form of the vesting of the river in its own legal personality, which at face value certainly appears to adopt a Māori vision of the river as an ancestor.⁹⁵ However, the limits of the vesting, and what the Crown retains for itself, are incompatible with the concept of the river as a whole and indivisible entity. Te Awa Tupua is the bed,⁹⁶ including the sand, gravel and the subsoil but not the other minerals; it is the space above the bed, but not the water or the aquatic life; and it includes customary interests in the whole river but protects all public rights.⁹⁷

An undetermined length of the riverbed is privately owned⁹⁸ (by the common law assertions of the *ad medium filum* principle⁹⁹) and these areas attach (in a non-specific way) to the adjoining upland fee simple parcels. Other parts of the riverbed that are within the National Park or other conservation land, are Crown-owned but do not have a certificate of title (now referred to as a Computer Register (CR)). Therefore, those parts of the river that are now vested in fee simple in

92 Section 7, definition of “bed”, paras (a) and (b).

93 Section 16.

94 The river status will return to National Park or Conservation estate upon the settlement date and the functions, powers and duties of the Department of Conservation arising under the Conservation Act 1987 or National Parks Act 1980 continue to apply, rather than being exercised by Te Pou Tupua.

95 See especially Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 13 (“Tupua te Kawa”).

96 But only the formerly Crown-owned bed, not any privately owned parts of the bed.

97 Te Aho, above n 3, at 100–101 acknowledges that “for all its innovation, the settlement still falls short of the recommendations of the Waitangi Tribunal” but “it appears to provide the strongest opportunity for more effective participation by Māori”.

98 There has been no cadastral survey of the river to gather the evidence about what parts are held by the Crown and what parts are included in a private title. The final determination is ultimately one for the courts.

99 The private ownership of the river is merely a function of the arcane common law presumption, which is rather tenuous. In a rather similar fashion, the Foreshore and Seabed Act 2004 protected dubious and tenuous private title rights and only claimed the public foreshore for the Crown. If the principle of public access to the foreshore was actually important, then the Crown would have the authority to override any private title claims. This settlement only vests the public river, not the private river, even though the Crown has a similar authority to override a common law title to a river.

Te Awa Tupua, do not have a CR, nor is it expected that a CR will be issued.¹⁰⁰ Here is a fee simple title – a grant from the Crown of an interest or estate – without any title document (CR), and without any spatial definition (surveyed boundaries) and without any of the rights that normally attach to a fee simple estate.

F. Practical Considerations for Rivers

Because riparian boundaries move, and old surveys have sometimes defined adjoining land parcels when banks were in different positions, and because of the uncertainty of common law rules about Crown ownership of rivers, the definition and issuing of a river parcel title would not be simplistic, and surveys and legal determinations would similarly be extremely complex. On the other hand, the Crown could boldly legislate to extinguish private title to rivers, and allow for a river title to be defined by description rather than by spatial dimensions and cartography. Such a solution could deal with the anomalies of the vesting of the fee simple title to Te Awa Tupua, but a deeper issue is that common law and colonial property systems would still be used to address what should be a customary law solution, one that would have allowed Māori values to be embraced. It is questionable whether an undefined fee simple title allows Māori to assert rangatiratanga.

V. DISCUSSION AND CONCLUSIONS

There appears to be some uncertainty about how Māori should respond to the Crown's settlement proposals. Should they take what is offered and pragmatically work with that until they get an opportunity to seek more, or should they hold out on principle for a full restoration of rangatiratanga?¹⁰¹ Or should Māori rely on the Treaty and its principles (as defined in statute and negotiated with the Crown) or take a more conventional legal approach and seek judicial restoration of their customary rights?¹⁰²

The legal solution devised for recent settlements shows some willingness to capture tikanga Māori but it is in fact western in inception.¹⁰³ We have seen that a fee simple title to river and lake beds was offered, which on the face of it labels customary title as an inferior or worthless form of possession, and in its stead promises Māori the grant of a Crown-derived property right and a bundle of property rights that will provide autonomy and rangatiratanga. By the common law, the Crown has sovereign and territorial authority over all land and water and has the power to issue a fee simple title that transforms that territorial authority over land into a parcel as property. In other words, to offer a commodity, with all the “properties” of a market commodity – alienability, use and

100 Land Information New Zealand “Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 registration guidelines” (LINZG 20766, 5 May 2017) at [7.1.2]. Note that the Land Transfer Act 1952, s 65(2) states: “No certificate of title shall issue for an undefined interest.”

101 Although Te Aho, above n 76, observes that settlements may “represent important incremental progress”, when they are “full and final” by statute, there is much that may be lost by a compromised settlement.

102 Settling with Māori is often confused – “at times a Treaty-based rationale, at others, a recognition of socio-economic disparities and often a blurred combination of both.” Mason Durie *Ngā Tai Matau: Tides of Māori Endurance* (Oxford University Press, Melbourne, 2005) at 180.

103 Te Aho, above n 3, at 103 concludes that although settlements “go some way to recognising special relationships between Māori and their lands and waters, they are tainted with inequity and constrain the ability of Māori as indigenous peoples to be free and self-determining.”

enjoyment, ability to choose from a wide selection of uses and ability to withhold from enjoyment by others (exclusivity). But the fact is that the fee simple title offered is spatially undefined, devoid of all practical and exclusive rights and leaves Māori still dependent on the Crown, holding an empty vessel of land with neither rights nor authority; the shadow and not the substance of useful rights. That is not to say that Māori may not be able to assert some management authority, express mātauranga Māori or practise or renew their tikanga, but to offer a common law property right while systematically excluding the full range of possessory rights seems disingenuous.

A different legal approach could be to achieve a more satisfactory form of settlement with an entirely new form of tenure that more closely resembles customary tenure and makes no pretence of granting property to iwi. This would not necessarily have to be western, in fact Williams questions the assumption that English law is “the epitome of modern civilisation” and has to apply as it might have done in the nineteenth century.¹⁰⁴ Such a new form of title could acknowledge the spiritual, social and cultural relationships with land that Māori seek, and it could acknowledge the partnership between Māori and the Crown to actively protect one another’s interests. There need be no expectation that this novel form of title should embody any property rights established by English common law. It would be a form of customary title while acknowledging the changed relationships since the Treaty of Waitangi.

The Whanganui settlement shows that there is an appetite for innovative solutions – the creation of Te Awa Tupua as its own legal entity – so it is disappointing that the fee simple form of property is the “fall back” response. A new form of customary title could much more appropriately restore iwi mana over the river and, if perceived as necessary, allow for public rights to co-exist. The health of the river, the Treaty relationship/partnership between Māori and the Crown and iwi autonomy could all be enhanced. A real departure from colonial law such as this has the potential for demonstrating that colonialism is a thing of the past, that the Crown’s answers are not inherently better and that Māori can look forward to a post-colonial Aotearoa where Māori solutions can be implemented.

In conclusion, there are multiple paths to resolution. Some provide short-term wins, others look to what a spokesperson for Te Awa Tupua has called “the long game”, suggesting that the current arrangement was a tool – a means to an end – but not an end in itself. From this perspective, the resolution of claims for indigenous people need not be “an end in itself, but one stage in an evolving and ongoing relationship between partners.”¹⁰⁵ Although the Crown expects the settlement of claims to be full and final, as having restored rights to the indigenous people and restored the honour of the Crown, this path carries colonial overtones and is no recipe for a constructive constitutional partnership.

104 Williams, above n 7, at 133.

105 Maaka and Fleras, above n 59, at 288.

SECTION 339 OF THE PROPERTY LAW ACT 2007: A TRAGEDY OF THE COMMONLY OWNED?

BY THOMAS GIBBONS*

I. INTRODUCTION

The Property Law Act 2007 (PLA 2007) came into force on 1 January 2008. In the 10 years since its introduction, there have been over 80 judgments on s 339 of the PLA 2007 and related provisions. This article begins by outlining the s 339 remedy, which allows a court various discretionary remedies in respect of co-owned land; namely: a division of the property; a sale to a third party; or a buy-out by one owner. This is followed by an examination of the background to s 339, which sits alongside other provisions within the PLA 2007, and which was a product of deliberate law reform. Key cases that have arisen under s 339, and the nature of judicial discretion applied in these cases, are considered, with particular reference to some of the “hard cases” that highlight the difficulties of applying s 339.

Special attention is paid to contested issues. A number of points have arisen on more than one occasion, such as the position of equitable owners, division of cross-leases, and the extent to which s 339 applies when the parties have a written agreement addressing co-ownership issues. The article concludes by critiquing the approach taken by the Court of Appeal in the recent decision in *Thomas v Mackintosh*,¹ arguing that clearer statements of principle are needed for s 339 of the PLA 2007 to have useful practical application.

II. THE LEGISLATIVE CONTEXT

This section of the article outlines the background to s 339 and its context within the PLA 2007. The PLA 2007 started life as a New Zealand Law Commission preliminary paper in 1991 and a formal report in 1994.² The 1991 preliminary paper noted that partition legislation dated back to the Partition Acts of 1539 and 1540, with New Zealand gaining specific legislation through the Partition Act 1870. These provisions had then been carried through to the Property Law Act 1952, though in amended form.³ These provisions were designed to allow a court the flexibility to order a sale, as well as partition. Section 140(1) of the Property Law Act 1952 read as follows:

* Director, McCaw Lewis, Hamilton. Some ideas in this article are based on a seminar paper delivered as part of the Auckland District Law Society’s CPD programme in early 2017, entitled “Beyond a Moiety”, though the article has been significantly revised for these purposes.

1 *Thomas v Mackintosh* [2017] NZCA 549.

2 See Law Commission *The Property Law Act 1952* (NZLC PP16, 1991); Law Commission *A New Property Law Act* (NZLC R29, 1994).

3 Law Commission *The Property Law Act 1952* (NZLC PP16, 1991) at [167]–[168].

140 In action for partition Court may direct land to be sold

- (1) Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates request the Court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale accordingly.

This contains the rather old-fashioned word “moiety”, a term which also exists in the fields of anthropology and chemistry and which means a half-share. That is, the co-owners bringing the application were required to hold a half-share in the property in order to achieve a partition or sale.

The Law Commission noted two key difficulties. The first was the lack of flexibility for a co-owner, as the 1952 legislation provided that a court could only order partition or sale. It could not refuse to make any order at all, unless the application was made by someone with less than a half share in the land. Where subdivision was impeded by other restrictions, the court only had the ability to order a sale, and could not order one party to buy the other party out unless requested by that party. Further, the court was not empowered to consider the sentimental value of the property.⁴

The preliminary paper of the Law Commission followed this brief analysis with a question on whether the court should be given more flexible powers. This was answered in the affirmative in its formal report, which followed in 1994, and which set out draft legislation, along with the comment:⁵

745 These sections replace ss 140–143 of the 1952 Act. They were discussed in paras 167–173 of NZLC PP16. They relate to all kinds of property, both real and personal. They enable a **co-owner** (who may be a joint tenant or a tenant in common: see definition in s 3), or a mortgagee of a co-owner (where the mortgagee is entitled to exercise a power of sale), or a creditor who has obtained a charging order over the interest of a co-owner, to apply to the court for an order

- for the sale of the property and division of the proceeds among the co-owners, or
- for the division of the property in kind among the co-owners, or
- for one or more co-owners to purchase the share in the property of one or more other co-owners at a fair and reasonable price.

The court has a discretion and may choose not to make any order at all.

As we can see from these comments, the proposed legislation allowed significantly more flexibility than the 1952 Act. However, the draft released in 1994 had a long gestation and it was 2007 before legislation was put into place. This came into effect on 1 January 2008.⁶

It is useful at this point to provide an outline of the relevant legislative provisions (ss 339–343 of the PLA 2007). These are also printed in an appendix to this article. In essence, s 339 specifies three potential remedies that are available to co-owners:⁷ a sale (and division of proceeds); a division of the property among co-owners; and an order that one party buy the share of the other. The order

4 At [169]–[170].

5 Law Commission *A New Property Law Act* (NZLC R29, 1994) at [745].

6 See generally Jody L Foster *A Practitioner’s Guide to the Property Law Act 2007* (2nd ed, LexisNexis, Wellington, 2014) for commentary on the Property Law Act 2007.

7 Co-owners may include joint tenants and tenants in common: see Property Law Act 2007, s 4.

must not contravene s 340 of the PLA 2007, and must take into account the factors detailed in s 342. The court may order a valuation of the property, and may also make supplementary orders under s 343. An order may be registered under the Land Transfer Act 1952 (and, in due course, under the Land Transfer Act 2017).⁸

On its face, then, the breadth and scope of s 339 provides a significant weapon for disgruntled or devious co-owners, as well as those caught by difficult circumstances, to get the court to intervene in the property rights of others. It is hard to read the cases, a number of which are outlined below, without a sense of tragedy – the tragedy of the commonly owned, perhaps, rather than the tragedy of the commons.⁹ There are estranged sisters, parents, families. There are broken relationships. There are situations of eviction. Applications to the court under s 339 are not made in situations of happiness; they are made in situations of pressure, fallout and an inability of co-owners to co-operate. In these situations, a co-owner can get a co-owned property sold, divided or have themselves or another party bought out. Section 339 can be seen both to reflect a situation of “governance property”.¹⁰ As Alexander has put it:¹¹

I ... distinguish between two types of property, which I call exclusion property (EP) and governance property (GP). Exclusion property, according to exclusion theorists, consists of one owner with virtually all control over the asset; therefore, a defining characteristic is that the owner’s rights are in rem in nature Governance property, by contrast, is multiple ownership property. Because of the relationship between an owner’s rights and interests, GP requires governance norms—the devices regulating ownership’s internal relations.

Alexander goes on to note that “governance property, not exclusion property, is the dominant mode of ownership today”.¹² While it has been argued that exclusion is at the heart of property,¹³ that exclusion and governance are both ways of delineating property rights¹⁴ and that property is about agenda-setting,¹⁵ the ability for one co-owner to seek the exclusion of another drastically complicates ownership. To borrow Alexander’s terminology, s 339 and the related provisions of the PLA 2007 provide an important device regulating the internal relations between co-owners.

A key limit on the court’s power under s 339 is contained in s 340. Section 340(1) provides that no order for division of a property may subdivide property in a way that contravenes s 11 or pt 10 of the Resource Management Act 1991 (RMA). Section 339 is a tool for sale, division or buy-out. It is not a tool for subdivision. Where a court determines that an order for division would contravene the RMA, s 340(2) of the PLA 2007 specifies that it must choose another order.

Section 341 sets out the parties that may apply for an order, including a co-owner, a mortgagee (if entitled to exercise the power of sale) and a person with a charging order over any property of a co-owner. Every co-owner, person with an estate or interest in the property that may be affected,

8 See generally Thomas Gibbons *A Practical Guide to the Land Transfer Act* (LexisNexis, Wellington, 2017) and KA Sanders “Land Law” [2016] NZ L Rev 789 regarding the Land Transfer Act 2017.

9 See Garrett Hardin “The Tragedy of the Commons” (1968) 162 *Science* 1243.

10 See GS Alexander “Governance Property” (2012) 160(7) *Pennsylvania Law Review* 1853.

11 At 1855–1856.

12 At 1858.

13 See Thomas W Merrill “Property and the Right to Exclude” (1998) 77(4) *Nebraska Law Review* 730.

14 See Henry E Smith “Exclusion Versus Governance: Two Strategies for Delineating Property Rights” (2002) 31 *Journal of Legal Studies* 453.

15 See Larissa Katz “Exclusion and Exclusivity in Property Law” (2008) 58(3) *University of Toronto Law Journal* 275.

and person entitled to benefit under an instrument relating to the property, must be served. The court may, however, dispense with service.

Section 342 sets out the factors that the court must have regard to in making an order under s 339. These are:

- the extent of the share in the property of the applicant;
- the nature and location of the property;
- the other co-owners and the extent of their shares;
- the hardship that would be caused to the application if an order was refused, compared to the hardship caused to any other person in making the order;
- the value of any contribution by any co-owner to improvements or maintenance on the property; and
- any other matters the court considers relevant.

The further orders that a court may make are outlined in s 343. If an order is made under s 339, then a court may:

- require payment of compensation by any co-owner to another;
- fix a reserve price for sale;
- direct how expenses from sale or division are to be borne;
- direct how proceeds from sale, or interest on the purchase, are to be divided or applied;
- allow a co-owner to make an offer on a sale, on terms the court considers reasonable (including as to non-payment of a deposit and setting-off of price);
- require payment of a fair occupation rent; and
- provide for or require other matters or steps the court considers necessary or desirable.

Sections 339–343 form part of what could be called the “property law toolbox”: miscellaneous powers of the court that allow for remedial relief.¹⁶ This section of the paper has outlined the issues with the partition and sale remedy in the Property Law Act 1952 that s 339 and related provisions of the PLA 2007 were designed to resolve. It now moves into a discussion of relevant case law, beginning with the first cases to draw on the new legislation.

III. NASCENT CASE LAW

In the first cases on s 339, we see the court grappling with its expanded jurisdiction. This section outlines those first cases, with particular comment on how the courts perceived and managed this transition.

Holster v Grafton,¹⁷ the first case under s 339, concerned a property co-owned by Mrs Holster with her son Christopher and daughter Karryn Grafton. Grafton had been estranged for more than a decade, and the mother and son sought an order to force Grafton to sell her 1/6 share to them. Holster contended that Grafton’s 1/6 share only vested upon Holster’s death; while Grafton contended that her 1/6 share was unencumbered, relying on the presumption of advancement for clear title as to a 1/6 share.

¹⁶ See Property Law Act 2007, pt 6.

¹⁷ *Holster v Grafton* (2008) 9 NZCPR 314 (HC).

The Court commented:¹⁸

I do not think that Mrs Grafton would, or could in good conscience, take advantage of her legal interests as a tenant in common and apply for an order for sale or partition of the property in the present circumstances.

This can be seen to indicate two things: the relevance of Property Law Act 1952 thinking, at least in the early days of the PLA 2007, and the importance of conscience and equity in the exercise of the remedy under s 339.

The Court described ss 339 and 342 as follows:¹⁹

Like their predecessor these sections are a reform of the common law but not a complete abrogation of it. At common law partition was a matter of right. The law was reformed to empower the Court to order sale in lieu. Once a co-owner applied for relief under s 140 Property Law Act 1952 then the Court had the option of ordering either partition or sale. See *Fleming v Hargreaves and Anor* [1976] 1 NZLR 123, 127.

The Court at the time did not think that s 339(1)(c) enabled a court to impose a sale by valuation upon a party that did not wish to sell, and commented that even if it did:²⁰

... it does not follow that the increased power in the Court will lead to a ready imposition of an order imposing on a person with a proprietary interest a requirement to sell that interest to a co-owner. ... [the provisions] should be understood to be remedial. There remains a basic value or respect for property rights.

As we will see, a different approach was taken in later cases, and it can only be surmised that the court remained constrained not just by notions of property rights, but also by the shadow of the Property Law Act 1952.

As noted above, s 342 of the PLA 2007 sets out various factors that a court must take into account in making an order under s 339. *Holster v Grafton* began what has become a common practice (though not quite a precedent) by stepping deliberately through each of the mandatory s 342 factors.²¹ Two deserve particular attention: the description of “hardship” in s 342(d) as being a “value laden criteria ... to be read consistent with the policy of the statute which respects property rights of tenants in common, but seeks to resolve conflicts fairly”;²² and the “other matters” at s 342(f), which took into account the gift by Holster to Grafton. This gift was found to be significant, as “[t]he law does not allow an effective gift to be taken back”,²³ and the Court did not uphold the application.

Holster v Grafton concerned an intergenerational conflict between estranged family members – a phenomenon that belies the views of Tolstoy that “[h]appy families are all alike; every unhappy

18 At [25]. See also at [27].

19 At [39].

20 At [43].

21 A number of cases have taken this approach, though the recent decision in *Chang v Lee* [2017] NZCA 308 demonstrates an exception: the Court of Appeal undertook very little consideration of s 342 factors (see at [30]).

22 See *Holster v Grafton*, above n 17, at [50].

23 At [53].

family is unhappy in its own way”,²⁴ by occurring in a number of cases.²⁵ The second case on s 339, *Jacobson v Guo*²⁶ concerned another common theme in later cases: the use of s 339 within the context of a relationship property dispute.²⁷ Jacobson and H Guo were in a relationship from 2005 until 2007, and bought a property together in 2006, owned half by Jacobson and half by H and X Guo as trustees. Following separation, there were unsuccessful attempts to sell the property, and Jacobson, believing the Guos were obstructing the sale, sought orders under the PLA 2007.

H Guo emphasised that she wanted the property sold, but that summary judgment was not an appropriate method to determine the issue. The Court noted:²⁸

- [4] I accept that sub-part 5 has effected a change to the law and in particular, the presumption for sale on the application of an owner who has 50% or more of the property which was formerly contained in the Property Law Act 1952 no longer applies under s 342 of the Property Law Act 2007. That presumption has been replaced by a requirement of the Court to assess the hardship that would be caused to the applicant by the refusal of the order in comparison to the hardship that would be caused to any other person by the making of the order.
- [5] It is highly likely that this change in the law may result in a situation where fewer applications for summary judgments succeed because of the increased likelihood of there being disputed facts that would need to be resolved to determine the relative hardship suffered by the parties.
- [6] However, in this case, there is really no defence offered ...

The Court ordered sale, a listing agent, a valuation, a sale programme, an auction, a reserve price based on the valuation, a backup sale by the Registrar and an order as to division of the net sale proceeds, with an adjustment for occupation rent. The Court also noted that its judgment on occupation rent was influenced by there being no Family Court proceedings under the Property (Relationships) Act 1976 in place.²⁹

Jacobson v Guo highlights not only the ability of s 339 to help a party with a relationship property issue convert a house into cash (through sale), but also the scope of summary judgment. Emphasis was placed on the uncontested facts, but despite the apparent tentativeness of the Court in *Jacobson*, s 339 orders have been made on application for summary judgment in a number of cases.³⁰

Having dealt with some cases arising immediately after the passage of the PLA 2007 and the emergence of s 339, we now move on to some “hard cases” that warrant attention, both due to

24 See Leo Tolstoy *Анна Каренина* (Русский вестник, 1877) (translated ed: Constance Garnett (translator) *Anna Karenina* (The Floating Press, 2008) at 15).

25 See *Morgan v Morgan* [2016] NZHC 2363, for a recent example where a property jointly owned by mother and son was occupied by the son’s family, without rental payment, and where a sale was ordered because of hardship factors.

26 *Jacobson v Guo* (2008) 9 NZCPR 850 (HC).

27 See *Whimp v Bigham* [2016] NZHC 1261, for a recent example where a property was purchased by joint tenants in a relationship, but one of them never moved into the property. A comparison of hardship led to a sale order, on the basis that it was unreasonable to expect one party to continue to contribute to a property from which that party had obtained no benefit, and which does not appear likely to realise a capital gain – the value having fallen between 2009 and 2015. A s 339 decision should not, however, be seen to resolve relationship property issues; even where sale is ordered, proceeds may remain relationship property.

28 *Jacobson v Guo*, above n 26, at [4]–[6].

29 At [10].

30 See the cases outlined in section V.B, below.

their facts, and to the way in which the Court in each case has permitted the s 339 remedy to be exercised.

IV. HARD CASES

It is a well-known legal aphorism that “hard cases make bad law”.³¹ This section of this article considers two particular cases on s 339, which warrant discussion because of their difficulty and interest. In each case, the court was required to deal with finely balanced issues and the complexities inherent in exercising a discretionary remedy in a contested situation. Each case also illustrates broader policy issues.

*Bayly v Hicks*³² concerned a unique 516 hectare farm property in the Bay of Islands, with a beach, farmland, woodland and amazing views. The property was owned by Bayly (as to a half share) and M and J Hicks (as trustees, as to the other half share). Bayly and J Hicks were estranged sisters. Bayly, who farmed the property, sought an order for division; while Hicks, who lived elsewhere, counterclaimed for sale (later altered to a different division). The High Court declined to divide the property on the basis sought by either Bayly or Hicks, and instead, in an interim judgment, proposed an alternative division of the property into three lots, with two going to Bayly and one to Hicks, along with further orders, including a further hearing to consider the three lot subdivision.

Bayly appealed, arguing that the alternative proposal was without jurisdiction, while Hicks supported the decision. The High Court had held that the stalemate and “deadlock” between the parties would cause continued “friction and antagonism”³³ unless the issue was resolved, and had held that a three lot subdivision most fairly apportioned values for the property. In essence, Bayly’s argument was that the judge could not divide the property in a different manner to what the parties proposed, and that there were legal difficulties inherent in the three lot concept. The Court of Appeal took a different view, holding that Bayly’s statement of claim did not itself seek approval of a particular proposal, and stating that the High Court had done what the statement of claim asked for: considered the evidence and submissions and determined appropriate relief.

Observing that case law prior to the PLA 2007 was now largely “otiose”, as the PLA 2007 allowed a “broad discretion” as long as the factors in s 342 were taken into account,³⁴ the Court of Appeal felt it unlikely that the broad list of discretionary powers in s 339 was subject to an implied limitation to only grant an order expressly sought by one party: a consideration of hardship, for example, might lead a court to order sale where the parties had sought division. Putting it simply:³⁵

There must be an application under s 339, and the boundaries of the discretion are set out in s 339(1). However, there is no requirement that the orders made can only be those that were specifically sought by a party. Such a restriction would unduly cramp the scope and efficient operation of what is clearly remedial legislation.

31 See Paul Heath “Hard Cases and Bad Law” (2008) 16 *Waikato Law Review* 1 for discussion.

32 *Bayly v Hicks* [2012] NZCA 589, [2013] 2 NZLR 401.

33 At [11].

34 At [25].

35 At [27].

This broad discretion was repeated at [32], with the Court of Appeal noting that the Court should:³⁶

... stand back from the submissions and proposals of the parties, and consider what, on an overview, taking into account the relevant considerations, is the most just and practical way through the impasse before the court ...

This suggests that s 339 be read as comparable to an equitable remedy, based on principles of fairness and broad discretion. Where a new proposal was raised, it was important to have a hearing on it, to satisfy considerations of natural justice.³⁷ In addition, the Court “should not lightly come up with a different proposal to that of the parties”, with any alternative proposal to be triggered by a relevant consideration, and no final decision to be reached until the parties had considered the proposal and offered evidence and submissions.³⁸ There could be difficulties for a Court that proceeded with a judge’s proposal in the place of “implacable opposition from both parties”, but this was not the case here, as Hicks supported the alternative proposal.³⁹

The Court asserted that the broad discretion under s 339 was “not so well-suited” to summary judgment applications,⁴⁰ particularly compared to the equivalent provision in the Property Law Act 1952. This echoes the concerns in *Jacobson v Guo*.

Having determined that the Court could look beyond the application sought, the Court of Appeal also outlined the impact of s 340 and the relationship between the PLA 2007 and the RMA. Section 340 was “only to be expected”, as it would be surprising if the Court “had the ability to ride roughshod over the procedures and substantive provisions of the Resource Management Act”.⁴¹ Some might say it would be less surprising these days, given the number of exceptions to normal RMA procedures that have arisen,⁴² but it is worth noting that these have arisen through express statutory provision. Importantly, however, the Court of Appeal noted that s 340 did not require all RMA issues to be resolved before a hearing:⁴³

... it can readily be seen that it will often be the case that resource consents to the possible options before the court will not have been obtained at the time of hearing. This should not necessarily preclude a court from making an interim order, setting out the court’s interim view as to the appropriate division, giving the parties an opportunity to obtain the necessary consents or provide evidence as to whether such consents could be obtained. It could be very wasteful of costs for parties to be required to obtain consents to their proposals before they go to court, when their proposal may in the end not be favoured.

These comments raise several interesting points. First, it is useful that an interim order can provide for a division, subject to resource consent for a subdivision being obtained later. However, it is suggested that, in at least some situations, the cost of investing in a consent may be significantly less than the cost of proceeding to a further hearing. It seems useful to know whether the land is capable of subdivision or not before division is sought as a remedy. Secondly, it is unclear whether

36 At [32].

37 At [34].

38 At [41].

39 At [45].

40 At [31].

41 At [29].

42 See Housing Accords and Special Housing Areas Act 2013.

43 *Bayly v Hicks*, above n 32, at [30].

a co-owner might oppose an application for subdivision consent as an affected party; it may be practically useful to seek as part of the order a requirement that the relevant co-owner not oppose any application for subdivision consent, with any objection being dealt with at the PLA 2007 hearing rather than separately.⁴⁴

The Court of Appeal issued its decision in November 2012. The parties returned to the courtroom in November and December 2015. This later judgment outlines the Court's further directions and involvement in the appointment and scope of expert analysis.⁴⁵ While the earlier judgment had proposed three lots, the newer proposal was for five (lots 1 and 3 held together, and lots 2 and 4 held together, with lot 5 ultimately being an access lot, with an ability for either party to require its vesting as legal road). The Court noted that proceedings were served on all interested parties, including the owners of an adjoining property and the Council. The Court set out a number of further points:

- (a) There was no single right or ideal partition for this property, and the nature of the division would depend on the property at hand. Here, there were multiple uses, and while Bayly had farmed the property (and Hicks had not), this did not mean that Hicks could or should continue to farm without any interruption from partition. A near equal division was preferable.⁴⁶
- (b) The Court's primary obligation was to the interests of the owners seeking the partition, not future generations.⁴⁷ The experts' proposal was preferred to Hicks' proposal, for a range of reasons, including the independent nature of the experts, sensitivity to the geography and nature of the property, the roughly equivalent land areas resulting, the ability of each party to subdivide further, the ability for each party to derive productive farmland, the existing fence lines and the "reasonable separation" of the parties' interests, which offered a chance to reduce family tensions.⁴⁸ The experts' "fair and reasonable partition" recognised the equality of the parties following the division.⁴⁹
- (c) Any monies received from the council upon the creation of esplanade reserves would be allocated to the party losing the benefit of land affected, as the payments were compensatory in nature.⁵⁰

Plans were attached to this judgment.⁵¹ The long saga of the *Bayly v Hicks* division deserves attention for its relatively thorough analysis of the provisions of s 339 and cognate sections of the PLA 2007, even if the property at hand was a unique one, leading to specific division outcomes.

44 The prevalence of the RMA on questions of subdivision is also discussed in a Family Court context in *Harley v Registrar-General of Land* [2010] 3 NZLR 120 (HC).

45 See *Bayly v Hicks* [2015] NZHC 3248.

46 At [8] and [49].

47 At [63].

48 At [79].

49 At [83].

50 At [117] – [118].

51 On the usefulness of this approach, see Carol M Rose *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press, Colorado, 1994) at 276–278.

The costs judgment noted that costs and disbursements of the Hicks' from 2009 to 2016 were almost \$300,000, with an order for nearly \$55,000 in costs being made.⁵²

A hard case on division deserves to be followed by a hard case on the buy-out remedy: the remedial limb which attracted considerable suspicion in *Holster v Grafton*. In *Lake Hayes Property Holdings Ltd v Petherbridge*,⁵³ Petherbridge owned one unit of nine in a unit title development beside Lake Hayes, near Arrowtown, a site with commanding views. Lake Hayes Property Holdings (LHP), a financier of a former investor/developer who had become an owner, held the other eight units, and wanted to sell the complex for redevelopment. LHP applied to the Court to dissolve the body corporate and cancel the unit plan under s 188 of the Unit Titles Act 2010; and also sought orders under s 339 of the PLA 2007 for the sale or division of the land. The presale market was difficult at the time, and LHP identified that a sale of the entire site would make the best market proposition. A number of offers were made to Petherbridge, who declined each, while suggesting alternatives.

After considering a range of legal and practical issues under the Unit Titles Act 2010, the Court ordered cancellation of the unit plan, largely based on LHP's ownership interest of over 90 per cent, the non-functioning body corporate and the dated construction. The Court held that it was "just and equitable" to cancel the unit plan under s 188.

This meant that LHP and Petherbridge would become co-owners in shares (Petherbridge as to 9.15 per cent, LHP as to 90.85 per cent). In terms of s 339, LHP's preferred order was that LHP purchase Petherbridge's share at a fair and reasonable price. Petherbridge opposed a compulsory sale of her interest, turning to *Holster v Grafton* (outlined above), and drawing on the Court's comments in *Holster* that s 339 did not expressly allow a court to impose sale on a co-owner; that such a power should not be implied; and that even if present, should not be readily imposed.

The Court, however, did not agree. It preferred the view of LHP's counsel that s 339 could allow the Court to order that one co-owner purchase the share of another. In the Court's view:⁵⁴

... there is no basis upon which to read down, or unduly cramp, the ordinary meaning of the words used by Parliament, namely that this Court may require a co-owner to purchase the share of another for a fair price. ... an order requiring the purchase of the share of an unwilling co-owner will not be lightly imposed, given that a proprietary interest in land is at stake.

The Court then considered various options. Petherbridge's proposal for a 176m² lot, plus right of way, would require a land use consent and non-complying subdivision consent. An order of this nature would need to be conditional, and the area of Petherbridge's stratum title was 83m², significantly less than the total 278m² required for the fee simple lot, right of way and related easements. This would devalue the site and lessen its appeal to purchasers.

Four particular factors under s 342 were taken into account: the number of co-owners and the extent of their shares; the nature and location of the property; the value of contributions to improvements and/or maintenance; and comparative hardship. The ownership shares here were 90.85 to 9.15, the location of Petherbridge's unit impeded redevelopment and contributions were neutral.

52 See *Bayly v Hicks* [2016] NZHC 504.

53 *Lake Hayes Property Holdings Ltd v Petherbridge* [2014] NZHC 1673.

54 At [64].

The most important issue under s 342 was comparative hardship. Drawing on *Holster v Grafton*, the Court noted hardship connoted an adverse effect of significant impact to a co-owner. LHP argued that its dominant ownership share should not be ignored, nor its reasonable wish to realise the value of its asset, and that Petherbridge's assertion of her amenity interests should not outweigh LHP's interests. After traversing the history of attempts at a sale, the Court itself focused on the "deadlock" that had arisen by the time LHP filed the proceeding. While Petherbridge argued that a forced sale of her unit would compromise her interests, the Court was satisfied that the parties were deadlocked, and held that:⁵⁵

... the only commercially sensible course is to offer the whole property for sale as a redevelopment proposition. ... To achieve this would require that Ms Petherbridge's property rights be sacrificed, whichever form of order is made. I accept that imposing an order which defeats the property rights of a co-owner should not be done lightly. It is a step of last resort.

The Court also emphasised that Petherbridge's property was a holiday home, not her family home, perhaps ignoring the attachments to baches or holiday homes that many New Zealanders form.

LHP sought an order requiring purchase, on the same terms as in January 2013: \$274,500 plus a share of proceeds over \$3m. Petherbridge argued that the Court should make an order compensating her for the windfall to LHP and the hardship she would face. The Court declined to grant these orders, unsure as to whether they were permitted:⁵⁶

... s[ection] 343 enables ancillary orders to be made where in justice some adjustment is required as between the co-owners, whether arising from a petition or a sale. Despite the broad terms of the section, I do not read it as contemplating payment of compensation over and above payment of the fair market price.

The Court, therefore, ordered cancellation of the unit plan, and made an order pursuant to s 339(1)(c) of the PLA 2007 requiring LHP to purchase the 9.15 per cent share of Petherbridge for \$274,500, plus 9.15 per cent of the excess over \$3m if the site was sold within 12 months. On the one hand, the decision can be acclaimed as a mark of the creativity of property lawyers (or perhaps litigators) in seeking this kind of conjoint order; on the other hand, the decision can be attacked as involving the disposition of a landowner with a separate unit title from her home. The decision can be acclaimed as advancing economic efficiency, through the potential for redevelopment of the site;⁵⁷ or attacked as demonstrating a diminution of property rights. More than anything, perhaps, it can be recognised as illustrative of the scope of s 339.

This section has considered two hard cases on s 339. The first, *Bayly v Hicks*, outlines a situation where the Court ordered a division different from that initially sought by either party. The second, *Lake Hayes Property Holdings Ltd v Petherbridge*, outlines a situation where a s 339 order, in conjunction with an order under the Unit Titles Act 2010, led to a person being ousted from their holiday home. Together, these decisions highlight the broad remedial flexibility of s 339.

55 At [86]–[87].

56 At [97].

57 The issue of economic and policy efficiency in redevelopment has recently been considered in Craig Fredrickson *Arrested (re)development: A study of cross lease and unit titles in Auckland* (Technical Report 2017/025, Auckland Council, October 2017).

V. CONTESTED ISSUES

Not all cases involve the complex mix of facts and legal principle in *Bayly v Hicks* and *Lake Hayes Property Holdings Ltd v Petherbridge*. However, cases under s 339 continue to arise and many issues continue to be contested. This section of the article outlines various issues that have arisen and been determined, though many of the issues remain unresolved in a more general sense.

A. Māori Freehold Land

*Walker v Walker*⁵⁸ has affirmed that s 339 may be applied to Māori freehold land, as well as general land. In that case, however, the Court did not exercise its discretion and the application was dismissed, with the Court noting that “the kaupapa of the Te Ture Whenua Maori Act should be given considerable weight”.⁵⁹

B. Summary Judgment

The Courts have, on a number of occasions, commented on the difficulty of summary judgment, but, conversely, this remedy has been granted on a number of occasions: see *Holster v Grafton* (above), *MacKenzie v Smythe* (below), *Ramsey v Mercer*, which comments on other decisions in which summary judgment has been granted,⁶⁰ and *Keery v Thomas*.⁶¹

On the other hand, summary judgment was declined in *Castle Marsden Trust Ltd v Vowles*.⁶² In this case, the Court had difficulty weighing up the respective hardship incurred to the co-owners: it seems important to make this clear if summary judgment is to be achieved. Overall, the “factual permutations [were] too many and varied” for the Court to grant summary judgment.⁶³ Similarly, in *Nicholson v Dunick*, summary judgment was declined, with the Court noting that while summary judgment was sometimes granted, a full hearing was generally more appropriate.⁶⁴

C. Cross-leases

*MacKenzie v Smythe*⁶⁵ concerned cross-lease neighbours,⁶⁶ where the fee simple was held in a 2/3 share (MacKenzie) and a 1/3 share (Smythe). MacKenzie sought partition, while Smythe sought to retain her cross-lease title, along with the protections it offered. MacKenzie sought subdivision into three fee simple titles by way of a summary judgment application. Trawling through the steps in s 342, the Court referred to:

58 *Walker v Walker* [2012] NZHC 543.

59 At [52].

60 *Ramsey v Mercer* [2013] NZHC 2659 at [16].

61 *Keery v Thomas* [2015] NZHC 113.

62 *Castle Marsden Trust Ltd v Vowles* [2014] NZHC 3220.

63 At [71].

64 *Nicholson v Dunick* [2017] NZHC 2126 at [83].

65 *MacKenzie v Smythe* [2012] NZHC 1113.

66 A cross-lease is a kind of composite ownership, where co-owners have an undivided share in the fee simple of a property, and each co-owner leases a building on the property. See Fredrickson, above n 57; and DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (LexisNexis, Wellington, 2013).

- (a) the co-ownership shares (2/3 (MacKenzie) and 1/3 (Smythe) – that is, a majority holding;
- (b) the nature and location of the property, including separate access for each, and the lack of connectedness;
- (c) the extent of the shares;
- (d) the hardship – balancing existing rights under the cross-lease with the stalemate/deadlock.

As the Court usefully put things:⁶⁷

It is clear that a fundamental principle underlying the right to partition a property is the need to terminate co-ownership in cases of deadlock between the co-owners. ... matters between the plaintiffs and the defendant have reached a stage of acrimonious dispute and deadlock such that partition to terminate their co-ownership is appropriate.

Summary judgment was granted in *MacKenzie*, with the Court noting that the form of partition was yet to be determined, as was compensation. As in *Bayly v Hicks*, the parties were to consider the partition line, compensation, cost-sharing and other matters.

Conversely, in *Nicholson v Dunick*,⁶⁸ the Court declined to order summary judgment for a s 339 application within a cross-lease context. The Court observed that:⁶⁹

If one party denies there is a deadlock, and is prepared to carry on with the contractual relationship, the court must be very slow to intervene. To that extent, the term “deadlock” is indeed too strong to describe the current state of the parties’ relationship.

In this case, one of the parties identified a number of benefits of remaining within the cross-lease framework, and while a decision that declines summary judgment is not necessarily the end of the matter, the Court appeared to have some potential sympathy with this view. The ease with which a cross-lease can be subject to a s 339 order therefore remains a matter of uncertainty.

D. Equitable Interests

A recent issue that has arisen is the extent to which a beneficial interest might allow a claim under s 339. In *Fraser v Butler*,⁷⁰ it was argued that a beneficial co-owner could make a claim. The argument in response was that s 339 only allowed relief for a co-owner (emphasis added), and that the definition of “owner” in the PLA 2007 in s 4 meant a legal, registered owner. This was contrasted with the position under the Property Law Act 1952, which allowed broader scope for an interested party to make a claim.⁷¹ However, there was commentary supporting the view that a non-registered party could make a claim, and this had been permitted on a constructive trust basis in *Read v Almond*.⁷²

The Court agreed that an equitable owner could be a co-owner for the purposes of s 339 on three grounds. First, the definition of “co-owner” did not exclude an unregistered owner. Secondly, s 140 of the Property Law Act 1952 had allowed for an equitable owner to bring a claim under that provision. The Law Commission’s recommendations were for more flexible powers and had less

⁶⁷ *MacKenzie v Smythe*, above n 65, at [69].

⁶⁸ *Nicholson v Dunick* [2017] NZHC 2126.

⁶⁹ At [81].

⁷⁰ *Fraser v Butler* [2017] NZHC 120.

⁷¹ At [31]–[32].

⁷² *Read v Almond* [2015] NZHC 2797.

flexibility been intended, Parliament would have expressly provided for this. Thirdly, the s 339 regime could apply to all kinds of property, not just land. This supported the notion that “co-owner” was to be read flexibly, and not restricted to “registered co-owner”. The notion of a “co-owner” was distinct from the definition of “owner” in s 4 of the PLA 2007.⁷³ The breadth of s 339 was also relevant:⁷⁴

Fifthly, the broad purpose of the s 339 regime appears to have been to permit those who wish to realise their interest in a property, but who cannot readily do so because ownership is shared with others who do not agree to a sale, to seek the assistance of the court in realising their interest. Thus, mortgagees who have become entitled to sell are entitled to apply under s 341(1)(b), while mortgagees who have not become entitled to exercise their power of sale have no such right. And holders of registered charging orders over an estate or interest in a property, who might be expected to have an immediate right to apply to the court for an order for the sale of that estate or interest, are also entitled to apply s 341(1)(c). If that is the broad purpose of the s 339 regime, there seems to be ... no good reason why persons with immediate equitable ownership interests in the relevant property would not also have been put within the group of those who are entitled to ask the court for its assistance in realising their individual ownership interest in the commonly held property. For that reason too, I consider that the holders of present equitable ownership interests in a property are within the definition of “co-owner” for the purposes of ss 339 and 341.

The availability of other remedies (for example, under the Trustee Act 1956) did not limit the Court’s jurisdiction under s 339, and the fact that this case concerned an express trust, rather than a constructive trust, did not affect the potential application of s 339 to an equitable or beneficial owner.⁷⁵

Things have moved quickly. Within the same year, the courts ordered the division of a property based on equitable interests⁷⁶ and on the basis of a resulting trust,⁷⁷ although the potential issues with this approach were not canvassed in any detail in either case. After being a point of vigorous contention, it seems to have very quickly become settled law that a s 339 order can be based on an equitable interest.

E. Property Sharing Agreements

Section 339 and the related provisions in the PLA 2007 are silent on whether they can or should be applied differently if the co-owners have an agreement in place. It is a difficult question – should co-owners effectively be allowed to contract out of the legislation? In *Ramsey v Mercer*,⁷⁸ Mercer signed up to buy a property with insufficient funds. His sister and brother-in-law (the Ramseys) lent \$220,000 to help with the purchase, and entered into a property sharing agreement providing for the loan to be repaid on the sale of another property. The sale was delayed and the Ramseys

⁷³ *Fraser v Butler* [2017] NZHC 120 at [44]–[51].

⁷⁴ At [52].

⁷⁵ At [54]–[55].

⁷⁶ *Holland v Holland* [2017] NZHC 1037.

⁷⁷ *Chang v Lee* [2017] NZCA 308.

⁷⁸ *Ramsey v Mercer* [2013] NZHC 2659.

sought an order for sale. Mercer argued that he had complied with the property sharing agreement, but the Court held that the agreement was relatively loose, noting:⁷⁹

Invariably when people become co-owners of a property, there will be some sort of agreement among them as to their co-ownership. Such agreements can range from vague understandings to detailed prescriptions, as in rules for gated communities. When agreements expressly provide for the circumstances before the court, the agreement will govern whether and which remedies are available. But often agreements between co-owners do not address the circumstances the court has to consider. In those cases s 339 allows the court to make orders, notwithstanding any agreements.

That is the case here.

This analysis seems to be saying that s 339 can prevail over a property sharing agreement, but is not entirely clear on whether this would be the case if the agreement had expressly contemplated s 339. That is, to reiterate the question above, could a property sharing agreement expressly contract out of the ability to apply to court under s 339? It is submitted that the answer is “no”. A comprehensive property sharing agreement could be influential in determining relief, but should not be decisive. That is, remedies under s 339 should be available notwithstanding any agreement to the contrary.⁸⁰ This position is supported by *Jiang v Huang*,⁸¹ though the Court in that case did not expressly comment on the issue of the relationship between the parties’ agreement and s 339.

Less certain than a written agreement is an oral agreement. *Coffey v Coffey*⁸² concerned a property owned by family members as tenants in common in 1/6 shares. The defendants referred to an “oral family agreement” that the property not be sold.⁸³ There were naturally uncertainty issues with an oral agreement of this nature, and it is safe to surmise that an oral agreement will not affect the Court’s jurisdiction under s 339.

However, caution must be taken in the exercise of the remedy. In recent times a decision of the High Court in *Mackintosh v Thomas*,⁸⁴ was set aside on appeal.⁸⁵ Norman Thomas had left the bulk of his estate, including interests in several farm properties, to his daughters Marr and Syme. Norman’s son, Philip Thomas, was not a beneficiary under the will but had farmed on the properties in partnership with Norman, and lodged caveats against the properties, claiming an interest either under a partnership or under a constructive trust. Following issues with Norman’s estate, and a mediation, a Heads of Agreement was signed among the various family members.

Partly in reliance on the terms of the Heads of Agreement, the High Court made orders under s 339 of the PLA 2007 that Philip buy out the interests of Norman’s estate in one of the farms (the “Mays block”). This was on the basis that the relevant co-owners were Philip (as to a half share) and the executors of Norman’s estate (as to the other half share), though Philip maintained a constructive trust claim over this latter half share. The High Court was comfortable it had

79 At [38]–[39].

80 Ultimately, in *Ramsey v Mercer*, sale was ordered (in summary judgment), but the Court did not provide any directions as to sale, preferring to leave the parties to work together on the sale or to return to the Court if necessary.

81 *Jiang v Huang* [2017] NZHC 2340.

82 *Coffey v Coffey* [2012] NZHC 1765.

83 At [62], and following.

84 *Mackintosh v Thomas* [2016] NZHC 3141.

85 *Thomas v Mackintosh* [2017] NZCA 549.

jurisdiction, based on s 339 of the PLA 2007 and based on the relevant co-owners being Philip and the estate.⁸⁶

Philip appealed, on the basis that there was no jurisdiction to make this order until Philip's constructive trust claim was resolved: put another way, he should not be ordered to buy out a half share that he was arguably already entitled to under a constructive trust; and if he was entitled to the estate's half share, then the estate would not be a co-owner.⁸⁷ The professional executors of Norman's estate (Mackintosh and Hall) opposed the appeal, arguing there was jurisdiction for the orders, both under s 339 of the PLA 2007 and under the Trustee Act 1956. In particular, they submitted that, as part of the Heads of Agreement, Philip had agreed to abandon any claims against the estate and to discontinue his proceedings. The executors also argued that constructive trustees could make a claim under s 339 as co-owners of a legal or equitable estate.⁸⁸ There was also argument as to whether the High Court had correctly applied s 342 of the PLA 2007, especially the "hardship" criterion.

The Court of Appeal concluded that, in seeking to find an urgent solution, the High Court had misread the Heads of Agreement, which provided not just for Philip to acquire the Mays block, but also for there to be no money payable for this. An order requiring Philip to buy the estate out of the Mays block for value was not consistent with the Heads of Agreement. The appeal was therefore allowed and the decision of the High Court set aside.

The Court of Appeal's conclusion seems correct: if the Heads of Agreement provided that Philip would not have to pay for the Mays block, it seems unreasonable for him to be required to do so. However, there are some difficulties with the decision. The decision did not really resolve the jurisdictional issues that were raised, particularly in respect of the position of a constructive trustee. The decision in *Scott v Scott (No 2)*⁸⁹ was cited in argument as authority for the proposition that a constructive trustee was not a legal co-owner, and so not within the scope of s 339. The Court of Appeal's comments on this point are however somewhat nebulous:⁹⁰

[46] Had Heath J had the benefit of the argument presented to us on behalf of Philip and had *Scott v Scott (No 2)* been drawn to his attention, we consider that it is unlikely that he would have made the order under challenge. Indeed on analysis the true tenor of the first respondents' submission is that the fair and reasonable price which Philip was directed to pay was not the consideration for the acquisition of the estate's half share but rather was a temporary funding arrangement pending reimbursement from Eleanor and Alison in accordance with the formula provided in cl 37.

[47] While in the circumstances as they were then understood the order would have been viewed as a sensible and just outcome for pragmatic reasons, we accept Mr Evans' submission that requiring that Philip purchase the estate's half share was not appropriate in the absence of a determination of the extent of his interest in the Mays Block.

86 At [29]–[30], drawing on *Mackintosh v Thomas* [2016] NZHC 3141 at [11]–[13].

87 At [36]; see also at [8]. Reference was made to *Scott v Scott (No 2)* HC Tauranga CIV-2004-470-94, 5 August 2009, where it was held that a constructive trustee was not a legal co-owner, and so had no standing under s 339 (at [37]). Note that the Court of Appeal's judgment suggests at [38] that there was argument about partition, whereas it seems that the High Court decision was for buy-out.

88 At [40]–[41].

89 *Scott v Scott (No 2)* HC Tauranga CIV-2004-470-94, 5 August 2009.

90 *Thomas v Mackintosh*, above n 85.

It is unclear precisely what para [46] is saying. It perhaps suggests that *Scott v Scott (No 2)* is good authority, but is not certain on this, and the Court of Appeal's statements could equally be read to mean that insufficient attention was given to the Heads of Agreement, or that a buy-out of the estate's half share should not have been ordered until constructive trust issues were determined. The latter has some attractiveness, as it avoids making too much of a precedent out of uncertain words. That said, it seems plausible that the Court of Appeal's decision as a whole will be read as supporting the finding in *Scott v Scott (No 2)*. It is submitted here that this is not a correct reading of *Thomas v Mackintosh*. The Court of Appeal has referred to *Scott v Scott (No 2)*, but has not endorsed it.

Further, significant reliance seems to have been placed on the Heads of Agreement. It is entirely reasonable for the Court of Appeal to want to give effect to an agreement between parties. However, the decision suggests that one of the reasons for the Court of Appeal to overturn the High Court's decision on s 339 was to ensure the Heads of Agreement were given proper effect. It was outlined above that a proper reading of case law to date is that a written agreement between co-owners is influential on, but not determinative of, a s 339 application. It is difficult to assess whether the Court of Appeal agrees with the existing line of authority or not. The Court's findings seem to indicate that it wanted to give effect to the Heads of Agreement and the s 339 order in the High Court was inappropriate because of this, but as the Court of Appeal did not comment more broadly on the issue, it is difficult to know the correct position.

It is submitted that the preferred position remains that outlined above: that a written agreement cannot oust the Court's jurisdiction under s 339, even if the written agreement purports to do so expressly. When the Court is assessing the exercise of its powers under s 339, a written agreement will be relevant under s 342. In particular, it will (potentially) be relevant in determining hardship under s 342(d), as failure to be able to enforce a written agreement is almost certainly a kind of hardship; and it will (definitely) be within the catch-all of "any other matter" in s 342(f). More broadly, the Court of Appeal's opaque comments mean that it is difficult to identify any broader principle at work, and the decision is probably best treated as confined to its facts rather than as providing any statement of precedent or distillation of principle.

VI. CONCLUSION

Section 339 of the PLA 2007 was designed as a remedial provision, allowing more flexibility than was permitted by the equivalent s 140 of the Property Law Act 1952. A large number of cases on s 339 have emerged. This article has examined the background to s 339 and the initial cases, which showed the courts grappling with a new, more flexible jurisdiction in the shadow of the old. It has discussed two particularly "hard cases", one in which the Court developed a solution outside of that which the parties had sought, and another in which the use of the s 339 remedy led to a unit owner losing her holiday home. The article has then reviewed various current issues, highlighting that the flexibility inherent in s 339 means that there is little consistency in the exercise of the court's powers.

In evaluating recent cases concerning the application of s 339 when the parties have a property sharing agreement in place, this article has criticised the vagueness of various comments of the Court of Appeal in *Thomas v Mackintosh*. The approach taken in this case – a rare appellate judgment on s 339 – shows the difficulty of discerning key principles on fairly basic issues. On this particular issue, this article has sought to demonstrate that a written agreement is best considered

a relevant factor in the grant of relief, rather than serving to oust the ability to seek relief, or being determinative of the relief that will be granted.

However, the lack of clarity on this point – as well as other contested areas identified in this article – highlights a further difficulty. Section 339 is, and has been approached as, a remedial provision. However, the disparities in approach and conclusion among different cases mean that it is practically impossible to determine how the courts will act in a particular case. Cross-leases may be subject to division because of deadlock on one occasion, but not on another. The issue of equitable co-owners may be heavily contested and then quickly settled. The position of parties subject to a written agreement has been considered in a number of cases, but remains uncertain. It is useful to have remedial flexibility, but this flexibility is at the price of certainty in specific situations before they reach the courts.

It was noted at the beginning of this article that the s 339 cases often involve difficult situations of governance property, often between family members, whether in relationships, in situations of estrangement or among different generations. Co-owners will often seek to document their own arrangements, but remain at all times subject to s 339 of the Property Law Act 2007. For some, it is a useful device for regulating their internal arrangements as co-owners. For others, cases under this provision reveal what could be called a tragedy of the commonly owned.

VII. APPENDIX: SECTIONS 339–343 OF THE PROPERTY LAW ACT 2007

339 Court may order division of property

- (1) A court may make, in respect of property owned by co-owners, an order—
 - (a) for the sale of the property and the division of the proceeds among the co-owners; or
 - (b) for the division of the property in kind among the co-owners; or
 - (c) requiring 1 or more co-owners to purchase the share in the property of 1 or more other co-owners at a fair and reasonable price.
- (2) An order under subsection (1) (and any related order under subsection (4)) may be made—
 - (a) despite anything to the contrary in the Land Transfer Act 1952; but
 - (b) only if it does not contravene section 340(1); and
 - (c) only on an application made and served in the manner required by or under section 341; and
 - (d) only after having regard to the matters specified in section 342.
- (3) Before determining whether to make an order under this section, the court may order the property to be valued and may direct how the cost of the valuation is to be borne.
- (4) A court making an order under subsection (1) may, in addition, make a further order specified in section 343.
- (5) Unless the court orders otherwise, every co-owner of the property (whether a party to the proceeding or not) is bound by an order under subsection (1) (and by any related order under subsection (4)).

- (6) An order under subsection (1)(b) (and any related order under subsection (4)) may be registered as an instrument under—
- (a) the Land Transfer Act 1952; or
 - (b) the Deeds Registration Act 1908; or
 - (c) the Crown Minerals Act 1991.

340 Order under section 339(1)(b) subject to restrictions on subdivision of land

- (1) No order under section 339(1)(b) (and no related order under section 339(4)) may subdivide land contrary to section 11 or Part 10 of the Resource Management Act 1991.
- (2) A court that concludes that an order under section 339(1)(b) (or a related order under section 339(4)) would contravene subsection (1) may make an order of that kind that does not contravene that subsection, or may instead make an order under section 339(1)(a) or (c) (and any related order under section 339(4)).

341 Application for order under section 339(1)

- (1) An application for an order under section 339(1) (and for any related order under section 339(4)) may be made by all or any of the following people:
- (a) a co-owner of any property;
 - (b) a mortgagee of any property of a co-owner or co-owners if, under the mortgage and subpart 7 of Part 3, the mortgagee has become entitled to exercise a power of sale;
 - (c) a person with a charging order over any property of a co-owner or co-owners.
- (2) Every person who is one of the following must, if not already a party to the proceeding on that application, be served with a copy of that application:
- (a) a co-owner of the property;
 - (b) a person who has an estate or interest in the property that may be affected by the granting of the application;
 - (c) a person claiming to be a party to, or entitled to a benefit under, an instrument relating to the property.
- (3) The court to which that application is made may, by order made on an application for the purpose, change, or dispense with service on, the people who must be served under subsection (2).

342 Relevant considerations

A court considering whether to make an order under section 339(1) (and any related order under section 339(4)) must have regard to the following:

- (a) the extent of the share in the property of any co-owner by whom, or in respect of whose estate or interest, the application for the order is made;
- (b) the nature and location of the property;
- (c) the number of other co-owners and the extent of their shares;
- (d) the hardship that would be caused to the applicant by the refusal of the order, in comparison with the hardship that would be caused to any other person by the making of the order:

- (e) the value of any contribution made by any co-owner to the cost of improvements to, or the maintenance of, the property:
- (f) any other matters the court considers relevant.

343 Further powers of court

A further order referred to in section 339(4) is an order that is made in addition to an order under section 339(1) and that does all or any of the following:

- (a) requires the payment of compensation by 1 or more co-owners of the property to 1 or more other co-owners:
- (b) fixes a reserve price on any sale of the property:
- (c) directs how the expenses of any sale or division of the property are to be borne:
- (d) directs how the proceeds of any sale of the property, and any interest on the purchase amount, are to be divided or applied:
- (e) allows a co-owner, on a sale of the property, to make an offer for it, on any terms the court considers reasonable concerning—
 - (i) the non-payment of a deposit; or
 - (ii) the setting-off or accounting for all or part of the purchase price instead of paying it in cash:
- (f) requires the payment by any person of a fair occupation rent for all or any part of the property:
- (g) provides for, or requires, any other matters or steps the court considers necessary or desirable as a consequence of the making of the order under section 339(1).

TRIMMING THE FRINGE: SHOULD NEW ZEALAND LIMIT THE COST OF BORROWING IN CONSUMER CREDIT CONTRACTS?

BY SASCHA MUELLER*

I. INTRODUCTION

New Zealand is a nation of debt. New Zealanders have the ninth highest household debt to income ratio in the world,¹ and this debt has been steadily increasing since the 1990s.² This is due, in part, to high housing prices and the cost of house ownership in New Zealand. But a substantial part of household debt is private debt: loans of smaller value that are either unsecured or secured against depreciating assets. Most of these loans are granted by mainstream lenders such as banks and credit unions. However, a growing proportion of debt is owed to non-mainstream lenders: small operators who promise quick and easy cash, even to borrowers with poor credit history who would otherwise not be able to access credit.³ In the period 2008–2010, over 130,000 New Zealanders had accessed credit from non-mainstream lenders and had a combined outstanding debt exceeding \$500 million.⁴

The majority of non-mainstream borrowers are able to repay their debt on time.⁵ For these borrowers, non-mainstream loans are a means to finance holidays or other luxury purchases, which are paid off over time. However, some borrowers turn to non-mainstream lenders out of desperation, as they require funds to cover essential living costs. Often having poor credit history, these borrowers are considered too risky by mainstream lenders. This situation can lead to irresponsible lending practices by non-mainstream lenders, which in turn further deteriorates the borrower's already precarious financial situation. Some lenders extend short-term loans which carry very high interest rates, often between 600–800 per cent. Together with disproportionately high credit fees, these loans can be very expensive. Borrowers with already stretched funds may be unable to repay these loans, thus slipping into a debt spiral.

* Senior Lecturer, School of Law, University of Canterbury.

1 Trading Economics “Household debt to income” <www.tradingeconomics.com>.

2 Reserve Bank of New Zealand “Household Debt” <www.rbnz.govt.nz>.

3 Ministry of Business, Innovation and Employment *Lender Desk-based Survey 2015* (June 2016) at 22–23.

4 Ministry of Consumer Affairs Regulatory Impact Statement: *Responsible Lending Requirements for Consumer Credit Providers* (October 2011) at 3.

5 Colmar Brunton Social Research Agency *Using a Third Tier Lender: Experiences of New Zealand Borrowers* (Wellington, 2011) at 7.

Research from the United States, the United Kingdom and Australia usually refer to such loans as payday loans, because they were originally designed to be repaid at the borrower's next payday.⁶ However, the term is nowadays used more broadly, and refers to low amount credits that are lent for a relatively short term and are usually not available from mainstream banks. In the United Kingdom, the Financial Conduct Authority (FCA) refers to these loans as "high-cost, short-term credit"; these are loans that carry an annual interest rate equal to or in excess of 100 per cent, that are unsecured, and that run for a term of less than 12 months.⁷ Similarly, the Australian National Consumer Credit Protection Act 2009 (Cth) refers to "small amount credits", which are unsecured loans of \$2,000 or less for a term no longer than one year.⁸

In New Zealand, the regulatory environment does not focus on the nature of the financial product, but rather on the nature of the lender. The Ministry of Consumer Affairs has divided finance providers into three tiers: registered banks (first tier), building societies and credit unions (second tier), and any other finance provider (third tier).⁹ The latter are commonly referred to as third-tier lenders or other lenders. While they provide a wide range of financial products, small loans are provided almost exclusively by other lenders.

Not all other lenders engage in irresponsible lending practices. The Ministry of Consumer Affairs defined the term "fringe lender" as a lender who specialises in cash loans of small amounts with short repayment terms, charges high interest rates and administration fees and provides immediate availability of cash by requiring little paperwork and/or credit checks.¹⁰ This definition is closest to the definitions used in the United Kingdom and Australia, as it is narrower than third-tier or other lenders. This paper will therefore use the terms "fringe lenders" and "fringe loans".

The recent consumer credit reform¹¹ attempted to address fringe lenders by introducing new responsible lending principles applicable to all creditors. However, the legislature decided against introducing limits on interest rates, a step that both the United Kingdom and Australia had previously taken. The Ministry of Business, Innovation and Employment (MBIE) argued that such limits were blunt tools that would act as targets rather than limits and that would exclude low-income borrowers from being able to access credit, even if the need for credit was vital. But

6 See, for example, Andrew J Serpell "Protecting the Desperate: The Regulation of Payday Lending" (2015) 43(1) Federal Law Review 147; Paul Ali, Cosima McRae and Ian Ramsay "The Politics of Payday Lending Regulation in Australia" (2013) 39(2) Monash University Law Review 411; Paul Ali, Cosima Hay McRae and Ian Ramsay "Payday Lending Regulation and Borrower Vulnerability in the United Kingdom and Australia" [2015] 3 JBL 223; Marcus Banks and others "'In a perfect world it would be great if they didn't exist': How Australians experience payday loans" (2015) 24 International Journal of Social Welfare 37; Greg Marston and Lynda Shevellar "In the Shadow of the Welfare State: The Role of Payday Lending in Poverty Survival in Australia" (2014) 43 Journal of Social Policy 155; Dean Wilson *Payday Lending in Victoria – A Research Report* (Consumer Law Centre Victoria Ltd, Melbourne, 2002).

7 FCA Handbook "High-Cost Short-Term Credit" <www.handbook.fca.org.uk>.

8 National Consumer Credit Protection Act (Cth) 2009, s 5(1), definition of "small amount credit contract".

9 Ministry of Business, Innovation and Employment, above n 3, at 6.

10 Ministry for Consumer Affairs *Third-tier Lender Desk-based Survey 2011* (July 2011) at 7.

11 Credit Contracts and Consumer Finance Amendment Act 2014.

the veracity of these arguments is far from certain, and some studies suggest that interest rate caps mainly benefit borrowers.¹²

This paper explores the merits of limiting the cost of borrowing fringe loans. It proposes changes to the credit contract consumer protection provisions and discusses alternative means to aid borrowers in vital need of credit.

II. FRINGE LOANS: THE CONTEXT

A. *Adverse Effects of Small Loans*

Fringe loans may have adverse effects on consumers, particularly if the consumers are in a financially precarious situation (vulnerable borrowers). These loans carry very high costs of borrowing and as they are often unsecured, lenders tend to compensate with higher interest rates. Fixed costs also represent a higher proportion of the principal debt, due to the small size of the loan relative to the principal debt, and fees are therefore very high. Fringe lenders claim that the short term of small loans requires a higher interest rate than in longer term loans in order to be profitable.¹³ Annual interest rates therefore commonly range from 100 per cent to 800 per cent, and can, in extreme cases, exceed 1000 per cent.¹⁴

Despite this high cost of borrowing, such loans may also be beneficial to consumers, the loans often being used for discretionary purposes: to finance holidays, weddings or gifts.¹⁵ Fringe loans are also used to meet essential living expenses, such as groceries and other household items, unexpected bills like car repairs, or other emergency situations.¹⁶ In the United Kingdom and Australia, fringe loan consumers tend to have an income below the national average, have little to no savings and receive government welfare.¹⁷ At the same time, their other household costs, such as food, petrol, utilities, education and medical costs, are steadily increasing.¹⁸

In such an environment, a small loan may enable a person to meet an unexpected expense or a shortfall in cash and thereby bridge a temporary gap between income and expenses until the next pay cheque.¹⁹ In the long term, however, fringe loans can leave vulnerable borrowers exposed

12 See, for example, Neil Ashton *Payday Lending Report – Draft Literature Review* (Consumer Action Law Centre, Sydney, undated) at 31; Ali, McRae and Ramsay “Payday Lending Regulation”, above n 6, at 237–239; Financial Conduct Authority *Proposals for a price cap on high-cost short-term credit* (United Kingdom, July 2014); Colmar Brunton Social Research Agency, above n 5, at 7.

13 Ali, McRae and Ramsay “The Politics of Payday Lending Regulation in Australia”, above n 6, at 424; *My Pay Day Loan Ltd v Lepou* [2009] DCR 890 (DC) at [37].

14 Denise McGill, Stephen G Corones and Nicola Howell “Regulating the cost of small loans: overdue or overkill?” (2012) 30(3) *Company and Securities Law Journal* 149 at 151; Centre for Social Impact *A Global Snapshot of Financial Exclusion 2014* (Sydney, March 2014) at 48.

15 Financial Conduct Authority, above n 12, at 17; Colmar Brunton Social Research Agency, above n 5, at 7.

16 Colmar Brunton Social Research Agency, above n 5, at 7; Nicola Howell, Therese Wilson and James Davidson “Interest Rate Caps: protection or paternalism” (Centre for Credit and Consumer Law, Queensland, December 2008) at 52; Serpell, above n 6, at 148; Ali, McRae and Ramsay “Payday Lending Regulation”, above n 6, at 225.

17 Serpell, above n 6, at 148; Financial Conduct Authority, above n 12, at 17; similar empirical research of small loan consumers in New Zealand does not exist.

18 Howell, Wilson and Davidson, above n 16, at 4.

19 At 5.

and even cause their debt to spiral out of control.²⁰ Particularly where borrowers require the loan to meet essential living expenses, it is likely that they will have difficulty meeting repayments; their income is already low, and the added expense of repaying the loan means that there is less money available to meet essential expenses in the future.²¹ Indeed, in a survey of 2,000 fringe loan consumers in the United Kingdom, 44 per cent reported having missed at least one repayment in the past year, and half of the surveyed reported experiencing financial distress.²²

The vulnerability of fringe loan borrowers is further exacerbated by the fact that they are more likely to borrow repeatedly from fringe lenders, oftentimes concurrently.²³ The practice of rolling over a loan is particularly concerning: if the borrower cannot repay the loan, it is refinanced by taking out a new fringe loan. This way, short-term fringe loans can become long term fringe loans, with much higher interest rates than comparable loans from mainstream banks.²⁴

Another feature of many fringe loan contracts, which may be problematic for vulnerable borrowers, is the mechanism by which the debt repayments are collected. Many fringe lenders use continuous payment authorities (direct debit) to service the small loan repayments. These are generally timed to coincide with the debtor's payday, so that as soon as the debtor receives the pay cheque, the lender deducts the repayments.²⁵ This increases the likelihood that rather than missing a payment and having to pay a small default penalty, a low-income borrower will have to take out another fringe loan to meet living essentials; effectively, this creates a rollover situation that potentially traps the borrower in a long-term, high-cost loan.²⁶

Combined, these factors substantially raise the risk of continuing indebtedness by a borrower who already has insufficient cash to cover essential living costs. The subsequent debt spiral has severe consequences for the borrower's financial and social situation, as well as that of their family. The New Zealand Families Commission has found that borrowers often prioritise debt repayments over their transport and healthcare costs, as well as their families' food and clothing needs.²⁷ Financial issues are also a major cause for stress and associated mental health issues; shame and frustration, as well as the lack of finances, can lead to the inability to partake in normal social activities.²⁸

B. Reasons to Enter Fringe Loan Contracts

One reason why vulnerable borrowers turn to fringe loans is that they feel they have no other choice, either because they have no access to other forms of financing, or they perceive they have no such access. The rapid rise of fringe lending over the last decade can, at least in part, be attributed to the

20 At 5.

21 At 54; see also Ali, McRae and Ramsay "Payday Lending Regulation", above n 6, at 229.

22 Financial Conduct Authority, above n 12, at 17; see also Ali, McRae and Ramsay "Payday Lending Regulation", above n 6, at 229–230.

23 Ali, McRae and Ramsay "Payday Lending Regulation", above n 6, at 231.

24 Howell, Wilson and Davidson, above n 16, at 55–56; Serpell, above n 6, at 149.

25 Ali, McRae and Ramsay "The Politics of Payday Lending Regulation in Australia", above n 6, at 423.

26 At 423–424; Serpell, above n 6, at 174.

27 Families Commission *Escaping the Debt Trap: Experiences of New Zealand Families Accessing Budgeting Services* (Wellington, 2009) at 64–67.

28 At 70; Serpell, above n 6, at 154.

Global Financial Crisis of 2008.²⁹ In the wake of the global economic downturn, most mainstream lenders have limited their supply of credit and tightened their lending practices. This has made it harder for low-income borrowers, or those with poor credit histories, to obtain mainstream credit.³⁰ The credit risk of these borrowers and the fact that fringe loans are not as profitable as larger loans means that mainstream lenders rarely, if ever, enter into fringe loans with vulnerable borrowers.³¹

Some scholars point out that the reduction in welfare spending and the financialisation of traditionally state-funded services, such as education and health, have contributed to the steady rise in living costs.³² This has created demand for fringe loans to meet the gap between low income and increased costs; fringe lenders have stepped into this gap created by welfare-reduction. To that end, fringe lenders act as a sort of “shadow welfare state.”³³ The fringe loan industry has accordingly expanded rapidly. In New Zealand, the number of “other lenders” had increased by 60 per cent between 2006 and 2011, and by another 20 per cent by 2016.³⁴ Similar trends are visible in the United Kingdom and Australia.³⁵

However, high living costs and lack of accessible mainstream loans are not the only reasons why borrowers increasingly turn to fringe lenders. Fringe lenders operate on a very successful business model that focuses on speed, anonymity and convenience.³⁶ A study conducted for the New Zealand Ministry of Consumer Affairs found that fringe borrowers perceived the application process of fringe lenders to be faster and easier than that of mainstream lenders.³⁷ Existing debt or poor credit history was often not considered an obstacle to obtaining credit, and fringe lenders were perceived as friendly and trustworthy. In contrast, mainstream lenders were seen as inflexible and uncooperative. This led to beneficiaries and borrowers with poor credit history generally not approaching mainstream lenders at all, as they assume that mainstream lenders do not deal with people in their particular situations.³⁸ Moreover, as mainstream lenders’ application processes were perceived as much slower than those of fringe lenders, their loans were not viewed as suitable for emergency situations and cash flow problems which require fast access to loans.³⁹

29 Ali, McRae and Ramsay “Payday Lending Regulation”, above n 6, at 225.

30 University of Bristol *The impact on business and consumers of a cap on the total cost of credit* (Personal Finance Research Centre, 2013) at 20; Marcus Banks and others *Caught Short: Exploring the Role of Small, Short-Term Loans in the Lives of Australians: Final Report* (University of Queensland and RMIT, 2012) at 5; Colmar Brunton Social Research Agency, above n 5, at 11.

The decline in credit availability to some borrowers can be traced back to the beginning of the deregulation of the banking sector in the 1980s and 1990s, which has led to banks discouraging low-income borrowers from accessing their services by raising fees and discontinuing loan facilities tailored to low-income borrowers’ needs: see Marston and Shevellar, above n 6, at 158.

31 Chant Link & Associates *A Report on Financial Exclusion in Australia* (November 2004) at 6; Howell, Wilson and Davidson, above n 16, at 50 and 52.

32 Marston and Shevellar point out that caution is warranted when speaking of a declining welfare state, but use the Australian example to show that certain groups in society have experienced a steady decline in welfare help over the past 20 years; Marston and Shevellar, above n 6, at 161–162.

33 At 161; see also Banks and others, above n 6, at 45.

34 Ministry of Consumer Affairs, above n 10, at 12; Ministry of Business, Innovation and Employment, above n 3, at 22.

35 Ali, McRae and Ramsay, above n 6, at 225.

36 Howell, Wilson and Davidson, above n 16, at 52.

37 Colmar Brunton Social Research Agency, above n 5, at 12.

38 At 11–12.

39 At 11.

Fringe lenders nurture this perception of easy and fast loans. Most lenders operate websites that include online application forms, and many offer same day or overnight decisions on loan applications.⁴⁰ Their websites are usually easy to navigate and emphasise ease and speed of obtaining credit rather than interest rates, fees or repayment amounts.⁴¹ They often use aspirational images and phrases in their advertisements, and provide positive customer feedback and images of happy borrowers. The aim is twofold: it normalises fringe borrowing and downplays the associated risks; and it takes advantage of the fact that fringe borrowers often do not trust large mainstream lending institutions and choose their lender based on recommendations from family or friends.⁴² Customer testimonials on their websites act as a stand-in for such personal recommendations.

Despite borrowers' perception that fringe lenders are more approachable and convenient than mainstream lenders, the high cost and short term of fringe loans can be detrimental to vulnerable borrowers. If fringe loans are taken in order to meet essential living costs, borrowers are likely to be desperate: they may be unable to save even small sums for unexpected expenses, and not taking the loan will have dire consequences for them. They often disregard the loan's terms and conditions, as any help that is offered to them is welcome.⁴³ Some borrowers have reported that they were reluctant to challenge loan terms for fear that they would not get the loan.⁴⁴

These perceptions open the door for exploitative business practices by some fringe lenders.⁴⁵ Lower-income borrowers are targeted by the store locations and advertising of fringe lenders. A recent Australian study of the location of fringe lender stores in Victoria showed that almost 80 per cent of stores are located in lower socio-economic status areas.⁴⁶ Research in the United States came to similar findings.⁴⁷ While no scientific studies into such correlation has been conducted in New Zealand, general surveys of the lending industry have noted that third-tier or other lenders are disproportionately represented in South Auckland, an area of lower socio-economic status.⁴⁸ Fringe loan advertisements often focus on downplaying the importance of credit history and on normalising borrowing and over-indebtedness.⁴⁹ When advertising in newspapers, the vast majority of fringe lenders in New Zealand (94 per cent) advertise in free-of-charge community newspapers, and newspaper advertisements tend to focus on borrowing to meet living essentials. Online lenders often use incentives also, such as vouchers and prizes for inquiring or taking out a loan.⁵⁰

Some United States studies have also noted a correlation of fringe lending with ethnic minorities.⁵¹ These studies suggest that ethnic minorities are often specifically targeted by fringe

40 Ministry of Business, Innovation and Employment, above n 3, at 23.

41 Ministry of Consumer Affairs, above n 10, at 18-19; Ministry of Business, Innovation and Employment, above n 3, at 31-36.

42 Serpell, above n 6, at 152; Centre for Pacific Studies "Pacific Consumers' Behaviour and Experience in Credit Markets, with Particular Reference to the 'Fringe Lending' Market" (Ministry of Consumer Affairs, Wellington, 2007) at 64.

43 Howell, Wilson and Davidson, above n 16, at 53.

44 Centre for Pacific Studies, above n 42, at 13.

45 Howell, Wilson and Davidson, above n 16, at 53.

46 Ali, McRae and Ramsay "Payday Lending Regulation", above n 6, at 253.

47 At 248 for further references.

48 Ministry of Consumer Affairs, above n 10, at 15; Ministry of Business, Innovation and Employment, above n 3, at 24.

49 Ali, McRae and Ramsay "Payday Lending Regulation", above n 6, at 224; Ministry of Consumer Affairs, above n 10, at 19.

50 Ministry of Consumer Affairs, above n 10, at 19; see also Wilson, above n 6, at 50.

51 For further references, see Ali, McRae and Ramsay "Payday Lending Regulation", above n 6, at 248.

lenders. A 2006 study conducted by the New Zealand Ministry of Consumer Affairs into Pacific consumer behaviour found that similar practices exist in relation to Pacific consumers.⁵² It found that fringe lenders often played on Pacific socio-cultural obligations, such as obligations towards family members and the church, to convince them to enter small loan contracts.⁵³ Another study found that particularly Tongan and Samoan local newspapers carried a substantial number of fringe lending advertisements, many using Tongan and Samoan languages.⁵⁴ While there is no equivalent direct research into the effects of fringe lending on Māori, Māori experience with fringe lenders is likely to be similar to that of Pacific consumers. Many Māori and Pacific consumers are low-income earners and are therefore more vulnerable to exploitative lending practices.⁵⁵

Overall, fringe loans may be beneficial when they are used as temporary relief due to an unexpected bill or other cash flow issues. However, if the borrower is unlikely to be able to repay the loan due to low-income or pre-existing debt, the high cost and potentially exploitative lending practices can be highly detrimental. In the short term, the already precarious financial situation of the borrower is exacerbated by the additional repayment costs.⁵⁶ In the longer term, this can lead to debt spirals, which force the borrower continuously to borrow to meet the repayments of the previous loans.⁵⁷

III. THE STATUTORY FRAMEWORK AND RESPONSIBLE LENDING

Regulation of consumer borrowing has, in recent years, tried to incorporate concepts of responsibility into the lending market, both on the demand side, with disclosure requirements, and on the supply side in terms of responsible lending requirements.⁵⁸ In New Zealand, credit contract regulations have traditionally focussed on the former.⁵⁹ The Credit Contracts and Consumer Finance Act 2003 (CCCFA) seeks to empower borrowers by creating competition between lenders and providing borrowers with information better to guide their decision-making on whether to enter into the loan agreement.⁶⁰ The CCCFA requires lenders to disclose certain information, such as the overall cost of borrowing, the amount of interest payable on the loan and the consequences of missing repayments.⁶¹ When advertising, during negotiations and in the credit contract itself, interest rates

52 Ministry of Consumer Affairs, above n 10, at 18 and 19; Ministry of Business, Innovation and Employment, above n 3, at 28–31.

53 Centre for Pacific Studies, above n 42, at 11 and 29–31.

54 Ministry of Consumer Affairs, above n 10, at 16.

55 Centre for Pacific Studies, above n 42, at 9–10; Chris G Sibley and others “The Gap in the Subjective Wellbeing of Māori and New Zealand Europeans Widened Between 2005 and 2009” (2011) 104(1) *Social Indicators Research* 103 at 113–114.

56 Consumer Credit Legal Centre (NSW) Submission in relation to the Financial System Inquiry (April 2014) at 21; Financial Counselling Australia *What Financial Counsellors Say about Payday Lending* (October 2011) at 8–9.

57 Howell, Wilson and Davidson, above n 16, at 55–56.

58 Iain Ramsay “Consumer Law, Regulatory Capitalism and the ‘New Learning’ in Regulation” (2006) 28(1) *Sydney Law Review* 9 at 12.

59 Ministry of Consumer Affairs, above n 4, at 3.

60 Cabinet Business Committee *Responsible Lending Requirements for Consumer Credit Providers* (Wellington, October 2011) at 1.

61 Credit Contracts and Consumer Finance Act 2003, s 17 and sch 1.

must be displayed on a per annum basis; this is to make it easier for borrowers to compare interest rates offered by different lenders.⁶² Credit fees may only compensate lenders for the actual costs they have in connection with setting up the credit contract; it must not be a secondary profit pathway by which lenders can artificially lower their interest rates.⁶³ The rationale behind these requirements is that exploitative lending behaviour is a result of an information asymmetry between lender and borrower that allows the former to take advantage of the latter's being misled by disinformation. Consequently, a well-informed borrower will be able to determine whether the terms of a loan are a fair bargain and can then freely decide whether they want to contract with the lender.

A review of New Zealand credit laws between 2007 and 2011 revealed that the reliance of the CCCFA on borrower responsibility was not sufficient to prevent exploitative lending behaviour. Such a system tends to promote bad lending behaviour, as it does not incentivise lenders to act responsibly (if a borrower enters into a disadvantageous credit contract, they only have themselves to blame because information was provided for them).⁶⁴

But, there are a variety of reasons why a well-informed borrower may enter into an exploitative credit contract. Lack of financial literacy may cause the borrower to ignore the information, either because it is not understandable as it is written, or because the borrower thinks they are unable to understand it.⁶⁵ Also, availability-bias comes into play; this describes people's tendency to take in only information that reconfirms their current beliefs and desires while ignoring adverse facts. A desperate borrower may thus subconsciously underestimate the burden of the loan repayments, sliding further into over-indebtedness.⁶⁶ And most importantly, well-informed borrowers are able to avoid unfair contract terms only if they have a variety of financial products from which to choose; a well-informed borrower may still enter into an unfair bargain if it is believed that there are no other choices available.⁶⁷

Consequently, the Credit Contracts and Consumer Finance Amendment Act 2014 (CCCF Amendment Act) introduced a set of responsible lending principles, which shift some of the responsibilities of preventing unfair loan agreements onto the lender.⁶⁸ The principles impose a set of obligations on lenders that are designed to ensure that they act responsibly towards borrowers. Lenders must exercise care and diligence, and act ethically when advertising, during contract negotiations and during any subsequent dealings with the borrower in relation to the loan.⁶⁹ The foremost obligation is the requirement for lenders to assess the borrower's financial situation and actively to assist the borrower to reach an informed decision. If the proposed loan agreement does

62 Credit Contracts and Consumer Finance Act 2003, s 37; Richard Scragg "Credit Contracts and Consumer Finance Act 2003" in Henry Holderness (ed) *Introduction to Commercial Law* (5th ed, LexisNexis, Wellington, 2016) 723 at 749.

63 Credit Contracts and Consumer Finance Act 2003, ss 41–45; *Sportzone Motorcycles Ltd (in liq) v Commerce Commission* [2016] NZSC 53, [2016] 1 NZLR 1024 at [110]–[117].

64 Kunibert Raffer "Risks of Lending and Liability of Lenders" (2007) 21(1) *Ethics and International Affairs* 85 at 85.

65 Richard Tooth *Behavioural economics and the regulation of consumer credit* (New Zealand Law Foundation, Wellington, 2012) at 9.

66 Jason J Kilborn "Behavioural Economics, Overindebtedness & Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions" (2005) 22 *Emory Bankruptcy Developments Journal* 13 at 19.

67 Ashton, above n 12, at 31.

68 Credit Contracts and Consumer Finance Act 2003, pt 1A; the principles are broadly in line with the Australian responsible lending requirements in the National Consumer Credit Protection Act 2009 (Cth), ch 3; Ministry of Consumer Affairs, above n 4, at 10; see Scragg, above n 62, at 727–728.

69 Credit Contracts and Consumer Finance Act 2003, s 9C(2).

not meet the borrower's requirements, or if the borrower could suffer financial hardship under the agreement, then the lender must not enter into the contract, as that would not be acting responsibly.⁷⁰ Breaches of the responsible lending principles can incur both civil and criminal liability.

It is unclear how effective the introduction of responsible lending principles has been in reducing predatory lending behaviour. A desk-based survey of lenders in New Zealand found that the overall number of "other lenders" had increased by almost 25 per cent between 2011 and 2015.⁷¹ However, this number includes mobile sellers, which were not included in the 2011 survey; and for the most part of the survey period, the responsible lending principles did not apply, as they only came into effect in June 2015. Most cases handled by the Commerce Commission and the courts revolve around disclosure and credit fee breaches, rather than breaches of the responsible lending principles.⁷² In the United Kingdom, the Office for Fair Trading's Irresponsible Lending Guidance was revealed to have little effect on fringe lenders, as lenders simply choose to ignore the requirement to assess the borrower's financial capabilities.⁷³ This was possible because the assessment was not strictly mandatory, but failure to do so was merely a factor in the decision about whether a lender acted irresponsibly. Although this assessment has since become mandatory, it is unclear whether this had an effect on irresponsible lending. Similar uncertainty exists in Australia, where a complex system of inquiry into borrowers' financial capabilities is laid onto the lenders. Ali, McRae and Ramsay suggest that the sheer complexity of the assessment means that it is more likely that lenders will avoid their obligations; in turn, the cost of enforcement rises significantly if the responsible lending requirements are to be effective.⁷⁴

IV. LIMITING THE COST OF CREDIT

Even if responsible lending principles affect exploitative lending behaviour, they may not be sufficient to reduce it in any substantive way. Breaches of responsible lending principles, particularly the requirement to assess the borrower's financial capabilities, rely on consumers' complaints and can only be sanctioned after the fact. In addition, small loan borrowers are unlikely to lodge complaints, particularly as they are often desperate and lack the knowledge or confidence to do so.⁷⁵ Desperation may also lead the borrowers to misrepresent their true financial position, or their financial situations may change suddenly.⁷⁶ While these occurrences cannot be attributed to the lender, they can, nonetheless, lead to highly detrimental obligations on borrowers.

So it is surprising that the changes to the CCCFA under the CCCF Amendment Act do not actually address the one factor with arguably the most adverse effect on borrowers: the overall cost of credit. The cost of credit depends mainly on credit fees and interest rates. The CCCFA

70 Credit Contracts and Consumer Finance Act 2003, s 9C(3).

71 Ministry of Business, Innovation and Employment, above n 3, at 22.

72 See, for example, Commerce Commission "Fines reach nearly \$900,000 in Commission mobile trader prosecutions" (12 July 2017) <www.comcom.govt.nz>.

73 Ali, McRae and Ramsay "Payday Lending Regulation", above n 6, at 240.

74 Ali, McRae and Ramsay "The Politics of Payday Lending Regulation in Australia", above n 6, at 449–450.

75 McGill, Corones and Howell, above n 14, at 34.

76 Serpell, above n 6, at 162–163. Note that the Credit Contracts and Consumer Finance Act 2003 contains provisions concerning unforeseen hardship, but the debtor can only apply for relief within certain statutory time periods. These are somewhat short, and debtors often only realise too late that these provisions exist: Credit Contracts and Consumer Finance Act 2003, ss 55–59A.

has always limited the amount of credit fees to those that are purely compensatory; creditors may only charge for costs they have actually accrued.⁷⁷ But the CCCFA does not address interest rates, which are the main reason for the high cost of credit of small loans. Therefore, despite the fact that the CCCF Amendment Bill had broad cross-party approval, the main criticism raised during the parliamentary debates was the lack of the inclusion of an interest rate cap on consumer credit contracts.⁷⁸ Many opposition members of Parliament pointed to comparable jurisdictions that had introduced such caps and thought that New Zealand should follow suit rather than fall behind their comparator nations.

The CCCFA provides only limited regulation on interest rates: rates must not be charged in advance; must be displayed on a per annum basis; and default interest rates must only be charged if the debtor defaults on payments, and only apply to the amount in default.⁷⁹ The level of interest is only indirectly regulated through the Act's oppressiveness provisions.⁸⁰ If a court finds an interest rate to be "oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice,"⁸¹ it can reopen the credit contract and adjust the rate.⁸² However, the courts have traditionally been reluctant to interfere with contracts entered into in a free market and only find oppressiveness in clear and extreme cases. Although excessive default interest rates have in the past been found to be oppressive where the level of a default interest rate far outweighed the amount by which the borrower was in default,⁸³ courts will generally apply a risk evaluation to determine whether the higher interest rates are justified.⁸⁴ In *My Pay Day Loan Ltd v Lepou*,⁸⁵ the Court had to evaluate a 520 per cent interest rate on a loan with the principal amount of \$147.00, to be repaid by five fortnightly instalments. The Court found that while the annual interest rate seemed high, the actual amount payable was much lower, as the loan was short-termed. This also meant that it would be unfeasible for a payday lender to charge low interest rates, as the short-term would make the profit-margin too low. The high interest rate was therefore not found to be oppressive.

Many overseas jurisdictions have some form of interest rate cap, including many American states and European countries.⁸⁶ Almost half of the American states have an interest rate cap of around 36 per cent per annum, and some have banned payday lending altogether.⁸⁷ In Japan, interest rates are capped at 15–20 per cent per annum, depending on the size of the loan, and the overall amount lendable by any one creditor is also restricted.⁸⁸ In France, the interest rate limit

77 Credit Contracts and Consumer Finance Act 2003, ss 41–45; *Sportzone Motorcycles Ltd (in liq) v Commerce Commission*, above n 63, at [110]–[117].

78 (17 September 2013) 693 NZPD 13404.

79 Credit Contracts and Consumer Finance Act 2003, ss 36–40.

80 Part 5.

81 Section 118.

82 Section 127.

83 *Robson v Shortt* HC Auckland CIV-2007-404-223, 21 December 2007 at [54].

84 *Greenbank New Zealand Ltd v Haas* [2000] 3 NZLR 341 (CA) at [26].

85 *My Pay Day Loan Ltd v Lepou*, above n 13.

86 Centre for Social Impact, above n 14.

87 Timothy E Goldsmith "Interest Rate Caps, State Legislation, and Public Opinion: Does the Law Reflect the Public's Desires" (2014) 89(1) *Chi-Kent L Rev* 115 at 117.

88 Ministry of Business, Innovation and Employment *Briefing for Commerce Committee on Credit Contracts and Financial Services Law Reform Bill: Cost of Finance Caps* (29 November 2013) at 15.

depends on a floating rate, but is generally below 28 per cent per annum.⁸⁹ While Germany has no statutory interest rate caps, the courts have determined an interest rate ceiling above which an interest rate is considered to be usury. This is the case if the interest rate exceeds twice the average interest rate for the same financial product.⁹⁰ Many more countries have some form of interest rate cap, ranging from strict universal caps on all loans to complex tiered systems where the interest regulation depends on loan amount and/or type of financial product.⁹¹

A. *The Merits of Interest Rate Caps*

The merits of interest rate caps are subject to much debate. In the United Kingdom, for example, two reviews found interest rate caps to be an inappropriate tool when addressing the issue of payday lending.⁹² They suggested that capping the cost of borrowing would have a significant impact on lender behaviour to the disadvantage of many borrowers: lenders would treat the cap as a target, restructure their credit products or leave the market altogether. This in turn could lead to a higher rather than lower cost of borrowing and a reduction of credit available to higher-risk borrowers. The recommendations of these studies led the government initially to disregard price caps as a tool for addressing the issues with payday lending.⁹³ However, the FCA has since introduced interest rate caps in the United Kingdom, following its own study on the impact of price regulation of credit contracts.⁹⁴ While acknowledging the disadvantages of interest rate caps, these were outweighed by the advantages of protecting vulnerable borrowers.

The CCCF Amendment Bill never included any provisions specifying limits on interest chargeable on a consumer credit contract. The focus of the Bill had always been responsible lending, information disclosure and other types of consumer protection such as strengthening unforeseen hardship and oppressive credit contract provisions.⁹⁵ The possibility of interest rate caps to limit the overall cost of borrowing had been raised, however, during the select committee stage of the Bill. The Commerce Committee asked the responsible Ministry, (MBIE), to prepare a report on the potential impact of interest rate caps.⁹⁶ The subsequent report highlighted the advantages and disadvantages of a limit on the cost of credit, which broadly followed the arguments set out in the previously mentioned United Kingdom studies.⁹⁷ The Ministry ultimately recommended against the introduction of interest rate caps, as these were “blunt tools” which could lead to unintended consequences. Instead, it recommended that the focus of consumer credit legislation should be on reducing unfair and exploitative practices by ensuring best lending practices and fostering

89 Centre for Social Impact, above n 14, at 32.

90 Ministry of Business, Innovation and Employment, above n 88, at 14.

91 See, for example, European Commission *Financial Services Provision and Prevention of Financial Exclusion* (2008) at 104–106.

92 University of Bristol, above n 30, at 116; Office of Fair Trading *Review of high-cost credit: final report* (United Kingdom, 2010) at 9–10. Note that the Office of Fair Trading is no longer operative with its function dispersed to other agencies.

93 Ali, McRae and Ramsay “Payday Lending Regulation”, above n 6, at 243.

94 Financial Conduct Authority, above n 12; Financial Conduct Authority *Detailed rules for the price cap on high-cost short-term credit* (November 2014) at 6–7.

95 Ministry of Consumer Affairs, above n 4, at 3.

96 Ministry of Business, Innovation and Employment, above n 88, at 1.

97 At Annex A.

competition.⁹⁸ Ultimately, the Commerce Committee followed the Ministry's recommendation and interest rate caps were subsequently disregarded.⁹⁹

The aim of interest rate caps is to reduce the overall cost of borrowing; as discussed earlier, high-cost loans can have significantly harmful effects. High cost of borrowing affects lower-income borrowers disproportionately and can lead to the reduction of asset-building capacity and eventually over-indebtedness.¹⁰⁰ Moreover, a study by the Centre for Social Impact found a correlation between lack of financial regulation and levels of so-called informal lending (non-mainstream lending, which includes fringe lending).¹⁰¹ It found that in New Zealand, 11 per cent of loans were informal, almost twice as many as in the top four ranked countries, of which three had interest rate caps. The purpose of interest rate caps is therefore to lower the overall cost of borrowing and to reduce the amount of informal lending, both in the interests of vulnerable borrowers.

In comparison to responsible lending principles, interest rate caps are easier to enforce. While the enforcement of responsible lending principles relies on borrowers' complaints, interest rates have to be prominently displayed on lender's premises and their websites, making it easier for watchdogs to discover breaches; they therefore have an immediate effect on the lending industry and its behaviour.¹⁰² On the other hand, there is a risk that where fringe loans are used to finance the sale of an item, the resulting loss to the lender due to the reduced interest rate will simply be added to the sale price of the item, leaving the consumer with no net benefit.¹⁰³ This is particularly relevant as borrowers make use of mobile sellers because of the belief that they will not be able to buy the required item elsewhere, due to lack of money and credit worthiness. They therefore do not act like other consumers and will not be deterred by inflated prices.¹⁰⁴

According to the MBIE report on interest rate caps, their effectiveness is uncertain. The MBIE report suggests that while interest rate caps may lower the cost of borrowing for some financial products (such as high-cost short-term loans), they could become targets for lenders. This would lead to an increase of the cost of borrowing for many financial products to the detriment of the majority of consumer borrowers.¹⁰⁵ However, it is unlikely that mainstream lenders would set their interest rates at the top of the allowed limit. A study of the FCA in the United Kingdom found that out of five countries that had introduced interest rate caps, none reported this as an issue.¹⁰⁶ Neither had any of the Australian mainstream lenders protested the interest rate caps during the consultation prior to their introduction in Australia; in fact, most of them were in favour of interest rate caps.¹⁰⁷ The reason is that interest rate caps are generally set at a substantially higher value than

98 At 7; see also Anna Ellison and Robert Forster *The impact of interest rate ceilings: The evidence from international experience and the implications for regulation and consumer protection in the credit market in Australia* (Policis, London, 2008) at 7.

99 Credit Contracts and Financial Services Law Reform Bill 2014 (104-2) (select committee report) at 17.

100 European Commission, above n 91, at 104; Howell, Wilson and Davidson, above n 16, at 22.

101 Centre for Social Impact, above n 14, at 18–19.

102 Credit Contracts and Consumer Finance Act 2003, s 9K; see also McGill, Corones and Howell, above n 14, at 34.

103 Ministry of Business, Innovation and Employment, above n 88, at 11.

104 Colmar Brunton Social Research Agency, above n 5, at 17.

105 Ministry of Business, Innovation and Employment, above n 88, at 13; see also University of Bristol, above n 30, at 101; Office of Fair Trading, above n 92, at 56.

106 Financial Conduct Authority, above n 12, at 17.

107 Howell, Wilson and Davidson, above n 16, at 90.

mainstream interest rates tend to be. Competitive market forces prevent mainstream lenders from charging such high interest rates on their financial products. Such interest rate caps would almost exclusively affect fringe lenders and thus work exactly as intended.

Another argument stated in the MBIE report is that annualised interest rates are not a useful measure of the cost of credit and that they are misleading.¹⁰⁸ The requirement to display interest rates on an annual basis was introduced by the Credit Contracts Act 1981 as a measure to make loan offers comparable between lenders.¹⁰⁹ But short-term loans were exceedingly rare at the time and the effects of having to display their interest rates on an annual basis were not considered. By definition, short-term loans generally run for far less than one year. The full cost of an annual interest rate will not be achieved, as the debt will be repaid after a few weeks or months. The annual interest rate therefore makes short-term loans seem more expensive than they are.

This argument has some merit, particularly for those borrowers who are not vulnerable and have higher incomes. But as discussed above, the issues with current small loans affect low-income borrowers much more severely; and it is the aim of the consumer credit law reform to provide better protection for consumers, especially against exploitative lending practices.¹¹⁰ According to a 2011 study, almost 20 per cent of New Zealanders who borrow from third-tier lenders are not able to repay their loan in time.¹¹¹ That means that for a substantial number of borrowers, short-term loans run for longer than first anticipated; for some borrowers, the loan may be rolled over several times and thus continue for more than one year. In this context, an annual interest rate is more likely to be representative of the true cost of borrowing.

B. Financial Exclusion

A major argument, and one that both opponents and proponents of interest rate caps acknowledge, is that lowering the cost of borrowing for small loans may further financially exclude low-income borrowers.¹¹² Financial exclusion from credit, in its broadest sense, means that certain people have no access to any financial products or services.¹¹³ As discussed earlier, the reason that many borrowers turn to fringe lenders is that they are financially excluded from accessing mainstream loans. This may be due to their credit risk, costly charges for maintaining financial services (fees, transaction costs and the like) and the fact that small loans are not regarded as profitable by mainstream lenders.¹¹⁴ Increased compliance costs due to responsible lending provisions likely exacerbate mainstream lenders' unwillingness, as they are more likely to undertake thorough risk assessment in compliance with the law.¹¹⁵ However, the fact that many borrowers take out fringe

108 Ministry of Business, above n 88, at 11.

109 Scragg, above n 62, at 749.

110 Ministry of Consumer Affairs, above n 4, at 5–7.

111 Colmar Brunton Social Research Agency, above n 5, at 7; similar results have also been found in Australia, see Ashton, above n 12, at 11.

112 Ministry of Business, Innovation and Employment, above n 88, at 1; Credit Contracts and Financial Services Law Reform Bill 2014 (104-2) (select committee report) at 17; Ali, McRae and Ramsay "The Politics of Payday Lending Regulation in Australia", above n 6, at 416.

113 Chant Link & Associates, above n 31, at 29.

114 Dawn Burton *Credit and Consumer Society* (Routledge, New York, 2008) at 92.

115 Serpell, above n 6, at 163.

loans to meet essential living costs indicates the importance of such loans. In fact, access to credit has been identified as an essential finance service that should be open to all people.¹¹⁶ This creates a gap in the financial market, which fringe lenders are able to fill.

The concern with lowering the cost of borrowing by way of capping interest rates is that it may render fringe loans unprofitable. Fringe lenders allege to have small profit margins despite their high interest rates.¹¹⁷ Reducing fringe loan profitability may drive many fringe lenders out of the market, increasing the risk that some borrowers will further lose access to credit.¹¹⁸ This concern is supported by the example of the introduction of interest rate caps in Oregon: within one year, about 75 per cent of payday lenders had exited the financial market.¹¹⁹ In Quebec, which has a 35 per cent interest rate cap on loans, no payday lenders operate at all.¹²⁰ And after interest rate caps were introduced in Australia in 2013, the number of payday lender outlets fell by about one third, although this was mainly due to consolidation and it is uncertain whether it was a consequence of the interest rate changes.¹²¹

Further financial exclusion may force desperate borrowers to access informal loans, either from family and friends, or from underground money lenders. France and Germany, which both have some form of interest rate caps, had higher incidents of illegal trading than the United Kingdom, before it introduced interest rate caps in 2015.¹²² Using informal or illegal loans effectively removes all consumer protection from the borrower, leaving them more disadvantaged than if they borrowed from a current fringe lender.

But the link between interest rate regulation and rate of informal lending is far from clear. Higher incidents of illegal lending in France and Germany are likely due to different standards of what is considered legal lending.¹²³ In the United Kingdom, the FCA found that fewer than five per cent of borrowers who failed to secure a loan turned to illegal lenders; and consumer advocates in Australia did not notice an increase of illegal lending since interest rate caps were introduced.¹²⁴ This suggests that a reduction of lending outlets does not adversely affect access to credit by low-income borrowers. In fact, the Oregon study found that although uptake of payday loans did decrease to some extent, payday loan borrowers could now borrow under improved conditions and were accordingly advantaged.¹²⁵

The viability of the argument that fringe lenders need high annual interest rates due to their small margins of profit is also uncertain. According to an Office of Fair Trading report in the

116 Chant Link & Associates, above n 31, at 32; European Commission, above n 91, at 12; Office of Fair Trading *Vulnerable Consumers and Financial Services: the Report of the Director General's Inquiry* (United Kingdom, 1999) at 19.

117 See, for example, *My Pay Day Loan Ltd v Lepou*, above n 13, at [35].

118 Ministry of Business, Innovation and Employment, above n 88, at 12.

119 Jonathan Zinman "Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap" 2010 34(3) *Journal of Banking and Finance* 546 at 548.

120 Stephanie Ben-Ishai "Regulating Payday Lenders in Canada: Drawing on American Lessons" (CLPE Research Paper 16, 2008) at 32.

121 Financial Conduct Authority, above n 12, at 109.

122 Ministry of Business, Innovation and Employment, above n 88, at 13.

123 European Commission, above n 91, at 105.

124 Howell, Wilson and Davidson, above n 16, at 64; Financial Conduct Authority, above n 12, at 11.

125 Zinman, above n 119, at 553.

United Kingdom, fringe lenders in the United Kingdom had exceedingly high profit margins.¹²⁶ And while no similar studies have been conducted in Australia or New Zealand, Ali, McRae and Ramsay suggest that the strong financial position of Australia's largest small loan provider (Cash Converters) indicates a healthy profit margin there as well.¹²⁷

This suggestion is supported by the fact that fringe lenders are not subject to the same competitive market forces as mainstream lenders. The reason is that fringe loan borrowers do not fall within the neoclassical "rational actor" model.¹²⁸ These borrowers often have no access, or believe they have no access, to mainstream credits. They may lack the capacity to save even small sums to cover unexpected expenses. If they require the loan to cover essential living costs, they are also desperate to attain credit, no matter what the source is – anyone who is willing to help them quickly is welcome.¹²⁹ This means that fringe loan borrowers are less likely to credit shop for the best available deal. In this context, disclosure requirements do not prevent disadvantageous credit terms.¹³⁰ In fact, a New Zealand poll revealed that third-tier borrowers generally do not consider a loan's terms and conditions, including interest rates, when choosing a lender.¹³¹ Their decisions are rather based on such factors as speed, convenience and friendliness of staff, as well as on personal recommendations from friends and family.¹³² That also means that lenders may be incentivised to neglect their responsible lending duties to inquire into the borrower's financial capabilities.¹³³

Consequently, it appears unlikely that the high cost of borrowing of fringe loans is simply the result of small profit margins. It is more likely that they are a function of an uncompetitive market that allows lenders to charge higher interest rates free of concerns that borrowers will choose a cheaper option.¹³⁴ The lack of competitive market forces may also mean that fringe lenders operate less efficiently, as inflated costs of borrowing compensate for inefficiencies. That would explain the fact that after the introduction of interest rate caps in Oregon and Australia, the number of payday lender outlets fell, but lenders did not disappear entirely: only lenders who could adapt their operations to run more efficiently were able to continue to be profitable.

Despite this, the danger remains that interest rate caps will reduce access to credit for low-income borrowers at least slightly by decreasing the number of fringe lender outlets. In its proposal to introduce price caps in the United Kingdom, the FCA estimated that around 11 per cent of consumers may no longer have access to high-interest, short-term loans.¹³⁵ But even if access to credit is somewhat reduced, it appears that the detrimental effects of fringe loans on vulnerable borrowers outweigh the risk of further financial exclusion from accessing credit. The effects of repayments on already stretched funds and the risk of debt spirals and associated social issues

126 Office of Fair Trading, above n 92, at 34–35.

127 Ali, McRae and Ramsay "Payday Lending Regulation", above n 6, at 226; Cash Converters also operates as a small loan provider in New Zealand. See also Howell, Wilson and Davidson, above n 16, at 22.

128 Howell, Wilson and Davidson, above n 16, at 19; Wilson, above n 6, at 82.

129 Howell, Wilson and Davidson, above n 16, at 53.

130 Ashton, above n 12, at 31.

131 Colmar Brunton Social Research Agency, above n 5, at 3.

132 Centre for Pacific Studies, above n 42, at 64; Howell, Wilson and Davidson, above n 16, at 52; Ali, McRae and Ramsay "Payday Lending Regulation", above n 6, at 240.

133 Ali, McRae and Ramsay "Payday Lending Regulation", above n 6, at 247.

134 Ronald J Mann and Jim Hawkins "Just until Payday" (2007) 54(4) *UCLA L Rev* 855 at 882.

135 Financial Conduct Authority, above n 12, at 11 and 27.

mean that at best, fringe loans merely postpone financial exclusion of vulnerable borrowers; at worst, these borrowers will likely suffer more hardship than if they had not entered into a fringe loan.¹³⁶

V. LIMITING THE COST OF BORROWING IN NEW ZEALAND

Responsible lending principles are useful for informing potential borrowers about the details of the loan and may act as a warning sign by illustrating the burden of borrowing to the borrower. In some cases, they reduce the likelihood of borrowers exceeding their financial capabilities. To that end, they need to be retained, if not strengthened. But in other cases, the uncompetitive small loan market and irrationally acting consumers render responsible lending criteria ineffective. Desperate and vulnerable borrowers either won't understand the disclosed information or they will ignore it in order to escape their desperate situation. And some lenders will exploit this situation and ignore responsible lending principles, particularly as such principles are difficult to enforce.

Further legislative intervention is therefore justified in order to enhance consumer protection in the fringe lending environment. Limiting the cost of borrowing through clear interest rate and credit fee caps will protect both vulnerable and other borrowers better; the fringe lenders that continue to operate will offer fringe loans at a much reduced cost, as the Oregon example illustrates.¹³⁷ Other improvements include limiting the amount of times a loan may be rolled over, a register for small loans and supporting alternative financial products in cooperation with the credit industry.

A. *Interest Rates and Credit Fees*

As discussed earlier, many overseas jurisdictions limit the amount of interest on fringe loans in one way or another. It is difficult, however, to draw comparative conclusions regarding the effects of interest rate caps on lenders and borrowers from these examples. Cultural differences decrease the accuracy of comparisons between jurisdictions, as the understanding of what is considered formal and informal lending, underground or illegal lending, and general legal principles, differ.¹³⁸ In order to determine whether interest rate caps are appropriate for New Zealand, it is more useful to concentrate on the experiences of Australia and the United Kingdom, both of which are similar to New Zealand in terms of culture as well as legal tradition.

Australia introduced a system of interest rate caps nationwide in 2013.¹³⁹ Prior to 2009, consumer credit was governed by the Uniform Consumer Credit Code. Under the Code, small loans with excessively high interest rates could mainly be challenged if they were found to be unconscionable or unjust (similar to oppressiveness in the CCCFA). But as courts were conservative when it came to applying these rules, the Code was regarded as having little effect on preventing predatory lending behaviour.¹⁴⁰ Consequently, several states moved to introduce their own interest rate caps

136 Howell, Wilson and Davidson, above n 16, at 60; Consumer Credit Legal Centre (NSW), above n 56, at 21; Financial Counselling Australia, above n 56, at 8–9.

137 Zinman, above n 119, at 553.

138 European Commission, above n 91, at 105.

139 Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Cth), sch 3.

140 Howell, Wilson and Davidson, above n 16, at 8–9.

during the 1990s.¹⁴¹ The replacement of the Uniform Consumer Credit Code with the National Credit Code in 2009 was the first step in a plan by the Australian government to reduce predatory lending.¹⁴² It reduced the opportunities for Code avoidance by removing a number of exemptions from the Code, and it introduced responsible lending requirements compelling lenders to assess the suitability of the loan for the borrower before entering into the contract.¹⁴³ Since July 2013, a tiered system of interest rate regulations has been incorporated in the National Credit Code. Loans for less than AUD 2,000, and a term of less than 16 days, are prohibited.¹⁴⁴ That means that the traditional payday lending model of providing credit until the next fortnightly payday is effectively banned. Instead, consumers of short-term loans are now more likely to have more than one pay cheque available to repay the loan. Interest rates for all other unsecured loans of less than AUD 2,000 with a term of less than one year are capped at a monthly rate of 4 per cent (48 per cent per annum).¹⁴⁵ In addition, the establishment fee must not exceed 20 per cent of the total amount borrowed, and the cost of a loan is capped at twice the borrowed amount.¹⁴⁶ Although this still allows effective per annum credit costs (including fees) on short-term loans of 200–300 per cent, this is a significant reduction from the costs prior to introducing the new regulations, which regularly amounted to 600–800 per cent per annum.¹⁴⁷

Until recently, the United Kingdom did not provide for interest rate caps. It was feared that such caps would reduce the ability for some to access credit, reduce the supply of credit overall and weaken competition in the credit market.¹⁴⁸ Since the early 2000s, the fringe lending industry experienced a surprising level of growth, resulting in exceptionally high levels of fringe lending. Some of these fringe lenders would promote products with per annum interest rates of up to 6,000 per cent.¹⁴⁹ In 2014, the FCA released a consultation paper proposing the introduction of interest rate caps.¹⁵⁰ After a period of consultation, the FCA announced the introduction of a price cap on so-called “high-cost, short-term credits”, which took effect in January 2015.¹⁵¹ The cap has three elements: (1) interest rates and other credit fees are capped at a total 0.8 per cent of the loan amount per day (equivalent to 292 per cent per annum); (2) default fees must not exceed £15 and the default interest rate must not exceed the initial interest rate; and (3) total cost of borrowing is limited to a maximum of 100 per cent of the loan amount.¹⁵²

The provisions limiting cost of borrowing in the United Kingdom and Australia have the same three elements: a cap on interest rates, a cap on credit fees and a cap on the overall cost of borrowing. The substantial difference between the permitted interest rates in the United Kingdom

141 For example, Consumer Credit (New South Wales) Act 1995 (NSW), s 11; Consumer Credit (Victoria) Act 1995 (Vic), ss 39 and 40; Consumer Credit Act 1995 (ACT), s 8B.

142 National Consumer Credit Protection Act 2009 (Cth), sch 1.

143 McGill, Corones and Howell, above n 14, at 153 and 155.

144 National Consumer Credit Protection Act 2009 (Cth), s 133CA.

145 National Credit Code (Cth), s 31A(3).

146 National Credit Code (Cth), s 31A(2) and 39B(1).

147 Ministry of Business, Innovation and Employment, above n 88, at 6; Centre for Social Impact, above n 14, at 27.

148 Ministry of Business, Innovation and Employment, above n 88, at 5.

149 Centre for Social Impact, above n 14, at 48.

150 Financial Conduct Authority, above n 12.

151 Financial Conduct Authority *Detailed rules for the price cap on high-cost short-term credit*, above n 94.

152 At 5.

and Australia may be a consequence of the permitted credit fees that can be charged in each jurisdiction. A credit fee of £15 seems reasonable compensation for costs incurred while entering into the credit contract. Small loan credit contracts are generally simple and straightforward, and lenders nowadays often use online application forms to streamline the process.¹⁵³ This should help keep costs low. However, the introduction and augmentation of responsible lending principles result in an increase in compliance costs for lenders. That means that the costs for conscientious fringe lenders may, at times, exceed £15. The higher possible interest rate compensates for these situations. Conversely, the generous amount for credit fees in Australia will almost always exceed the £15 allowed in the United Kingdom. It is therefore more viable to have a lower interest rate cap, as it is unlikely that credit fees will not be able to compensate lenders for their costs of establishing the small loan contract.

The Australian model lends itself better for limiting borrowing costs in New Zealand. While restricting credit fees to a certain percentage of the loan amount potentially raises issues, the current provisions in the CCCFA already sufficiently deal with them. Allowing a percentage to be charged as a credit fee obviously allows lenders to charge more if the initial principal debt is higher; this is the case even if the lender's effort and cost of establishing the loan is potentially the same. It can thus be seen as a hidden cost of borrowing, as the advertised interest rate is the same, but the overall amount payable under the loan is disproportionately higher for higher value loans. Lenders can boost their profit surreptitiously by charging the highest amount possible for credit fees. In New Zealand, however, the CCCFA already limits credit fees to the cost actually accrued by the lender.¹⁵⁴ Unless the loan amount is very small, it is unlikely that credit fees will reach 20 per cent of the borrowed amount. That allows for a lower interest rate cap because lenders are unlikely to make a loss on credit fees. A cap of 48 per cent appears to be viable for many fringe lenders in Australia and could be the interest limit in New Zealand as well. It should be noted, though, that it is easier to enforce a firm credit fee limit than one based on percentages. It may therefore be arguable that the United Kingdom model, while potentially harder on lenders, would be more easily implemented and would benefit borrowers more.

In case borrowers are unable to repay their loan on time, the overall amount payable under the loan amount should also be limited. Otherwise, increased default fees may lead to the situation in which the borrower needs a long time to pay off the debt, or may even never be able to do so. Meanwhile, the debt keeps growing, leading the debtor into a debt spiral. New Zealand should follow Australia and the United Kingdom and limit the cost of borrowing to 100 per cent of the amount borrowed.

However, these rules should only apply to short-term consumer credit contracts. Although it is unlikely that either mainstream lenders or most retailers who offer deferred payment sale products will be affected by the interest rate cap, the limit to the overall amount chargeable may unreasonably affect them. Longer-term credit contracts may justifiably accrue a higher repayment amount simply due to the length of the contract term. The rules should therefore only apply to consumer credit contracts not exceeding a term of 12 months.

In order to prevent lenders from avoiding these limits by simply refinancing the loan, the number of times a loan may be rolled over should be limited. Although the Australian Consumer

153 Ministry of Business, Innovation and Employment, above n 88, at 23; Ali, McRae and Ramsay "The Politics of Payday Lending Regulation in Australia", above n 6, at 419.

154 Credit Contracts and Consumer Finance Act 2003, ss 41–45.

Credit and Corporations Legislation Amendment (Enhancement) Bill 2011 (Cth) initially included a ban on rolling over payday loans, the ban was removed during the legislative process. Instead, such loans are presumed to be unsuitable for borrowers. Lenders must prove the loan's suitability by undertaking reasonable inquiries into the borrower's financial position.¹⁵⁵ In contrast, the FCA has limited the number of rollovers for payday loans in the United Kingdom to two.¹⁵⁶

New Zealand should follow Australia and introduce an unsuitability assumption; it would make it easier for borrowers to enforce their rights and be an incentive for lenders to adhere to the responsible lending principles. However, due to the general difficulties of enforcing responsible lending principles as discussed earlier, an unsuitability assumption by itself may not sufficiently deter lenders from repeatedly rolling over fringe loans. A firm limit on rollovers, as exists in the United Kingdom, is easier to enforce. Therefore, both an unsuitability assumption and a two-time limit on rollovers should be incorporated into the CCCFA.

B. Alternative Financial Products

These proposed changes to the CCCFA will improve consumer protection, particularly regarding vulnerable borrowers. However, the possibility of further financial exclusion still exists for some borrowers. In the United Kingdom, the FCA acknowledged this possibility, but did not consider it necessarily a disadvantage for borrowers. Instead, the FCA hoped that it might encourage borrowers to seek alternative methods of dealing with their lack of finances, such as seeking financial advice.¹⁵⁷

Financial education programmes and budgeting services need to be further extended and financially supported to reduce the likelihood that a person lacks funds to meet essential costs.¹⁵⁸ By the time low-income borrowers seek out advice, they are often already in dire need of a loan. If the changes to lending rules will further financially exclude these borrowers, the rules will have the opposite of their intended effect. It is therefore important to ensure that alternative means of funding exist in case a borrower cannot meet essential living costs.

The main reason for the proliferation of fringe lenders is the reluctance of the mainstream finance industry to service low-income, high-risk borrowers. One way of bringing mainstream lenders back into the small loan market is to promote and facilitate Corporate Social Responsibility (CSR) initiatives. The concept recognises that due to the necessity of access to financial products and mainstream lenders' major role in the financial industry, they are not merely private businesses; mainstream lenders resemble utility providers and should thus have responsibilities beyond that of ordinary businesses.¹⁵⁹ In recent years, some mainstream banks have begun to research the effects of financial inclusion to better understand the impact on vulnerable borrowers.¹⁶⁰

In the United States, the Community Reinvestment Act 1977 formalises CSR by incentivising mainstream lenders to service the needs of the entire community, including low-income borrowers.

155 Ali, McRae and Ramsay "Payday Lending Regulation", above n 6, at 246.

156 Financial Conduct Authority *Detailed proposals for the FCA regime for consumer credit* (United Kingdom, 2016) at 63.

157 Financial Conduct Authority, above n 12, at 11 and 27.

158 European Commission, above n 91, at 93–94.

159 Chris Connolly and Khaldoun Hajaj *Financial Services and Social Exclusion* (Financial Services Consumer Policy Centre, University of New South Wales, March 2001) at 36.

160 For example, ANZ *Corporate Sustainability Review 2016* (2016) at 44–45.

Lenders are periodically assessed on a range of factors to determine to what extent they meet this aim. Based on the assessment, lenders are assigned one of the following public ratings: “outstanding”, “satisfactory”, “needs to improve” or “substantial noncompliance”.¹⁶¹ Although there are no legal sanctions associated with any of the ratings, they have nonetheless proved to be beneficial.¹⁶² Some mainstream lenders have found innovative methods to meet the purpose of the Act, including financial literacy programmes and matching funds initiatives. It also incentivised mainstream lenders to find ways of sustainably offering financial services to higher risk customers. In return, lenders use the ratings in their marketing material.

Another way of aiding financially excluded borrowers is through a so-called no interest loan scheme (NILS). In New Zealand, consumers can borrow up to \$1,000 for up to 12 months interest free, or up to \$5,000 for up to 36 months at a rate of 6.99 per cent per annum.¹⁶³ As such schemes are not-for-profit, they depend on industry and government support. The NILS offered by Good Shepherd in New Zealand is supported by the Bank of New Zealand, Kiwibank, the Ministry of Social Development, the Salvation Army and other community organisations. However, NILS loans may only be used for one-off purchases, such as household items or car repairs; they cannot be used to meet everyday essential needs, such as purchasing food.¹⁶⁴

These initiatives are a step in the right direction, but they are not sufficiently widespread to offer a real alternative to fringe loans. More can be done to bring mainstream lenders back into the short-term, high-risk loan market. For example, as part of their registration, lenders could be required to contribute to a guarantee fund that compensates mainstream lenders if high-risk loans to low-income borrowers default.¹⁶⁵

VI. CONCLUSION

The availability and prevalence of fringe loans has been steadily increasing over the last two decades. They fill a gap which mainstream lenders opened when they withdrew from the short-term, high-risk loan market. In that context, fringe loans play an important role in the lending industry. Not only do they allow consumers to finance luxury purchases in a quick and convenient way, they also allow low-income borrowers to acquire emergency funding during unexpected shortfalls of cash. But the high-cost nature of fringe loans can lead the latter to slide into a debt spiral from which they may not be able to recover.

Although the law has responded by introducing responsible lending requirements for lenders, these are unlikely to suffice in protecting low-income borrowers against detrimental fringe loan terms. Disclosure requirements are unhelpful if borrowers are desperate and do not consider credit terms to begin with, and, responsible lending requirements are difficult to enforce.

Therefore, further government intervention in the regulation of fringe loans is justified. The CCCFA should be amended to include a limit on the overall cost of borrowing. An interest rate cap

161 Community Investment (Regulation BB) (US) 12 CFR § 228.21(c).

162 Michael S Barr “Credit Where it Counts: The Community Reinvestment Act and Its Critics” (2005) 80(2) NYU L Rev 513.

163 See <www.goodshepherd.org.nz>.

164 Banks and others, above n 6, at 44; see also <www.goodshepherd.org.nz>.

165 European Commission, above n 91, at 94.

of 48 per cent per annum and the overall cost of borrowing should be limited to 100 per cent of the borrowed capital if the term of the loan does not exceed 12 months. In addition, the responsible lending principles should include an unsuitability assumption, rollovers of loans should be limited to two occasions and a register of consumer loans should be established.

These new rules may cause some fringe lenders to exit the lending market and so further financially exclude some low-income borrowers. Ideally, vulnerable borrowers would not need to access fringe lenders at all; the reason that they increasingly have to do so is, at least by some accounts, due to changes of the welfare state and deregulation of the financial industry over the past two decades. Therefore, the government should increase its investment and support of alternative lending products such as corporate social responsibility programmes and no interest loan schemes. In the short term, however, tighter controls of fringe lenders may help to protect the most vulnerable borrowers.

TAKIRI KO TE ATA SYMPOSIUM

The Takiri ko te Ata symposium was held in Tauranga in 2017 as a celebration of leadership, sharing, knowledge and excellence – and, in particular, an acknowledgement of the lifework of the late Matiu Dickson, a rangatira from Tauranga Moana and senior law academic at Te Piringa Faculty of Law, University of Waikato. In the year of his passing, the 2016 edition of the Waikato Law Review was dedicated to Matiu to acknowledge his legacy of leadership and friendship, and his deep commitment to tikanga (Māori law) and to te reo Māori (the Māori language). Takiri ko te Ata translates as “Dawn of a New Day”, and the symposium, co-hosted by iwi of Tauranga Moana and the University of Waikato, provided an opportunity to consider new pathways to a brighter collective future underpinned by tikanga Māori. A key theme of the symposium was Māori leadership. The two contributions published in this part of the Waikato Law Review are based on presentations delivered at the symposium by rangatira who, like Matiu, are luminaries in te reo and tikanga: Ani Mikaere and Charlie Rahiri.

I. MATIU DICKSON: THE MEASURE OF THE MAN

BY ANI MIKAERE¹

*E tika ana kia mihi a Ngāi Tūkairangi, nō koutou te tangata nei; nā koutou anō te pōwhiri
i tū ai inanahi i Hungahungatoroa. Tēnā koutou.*

*Ka mihi hoki au ki ngā iwi o Tauranga Moana: Ngāiterangi, Ngāti Ranginui, Ngāti Pūkenga,
tēnā koutou katoa.*

Ka huri au ki te whānau Dickson: Helen, koutou ko ā kōrua tamariki, ā kōrua mokopuna.

*E tangi tonu ana te ngākau i te wehenga atu o tō koutou hoa rangatira, tō koutou pāpā,
tō koutou koroua. E kore e mimiti te aroha ki a koutou.²*

In a former life I was, like Matiu, a legal academic. We worked together at Waikato Law School (as it was then) for a number of years. You might say that both of us fell within the general description “Māori lawyer”. However, I am not sure that either of us ever really felt comfortable with that label because, as I want to explore further today, there is an irreconcilable tension in trying to be both Māori and a lawyer.³

1 Ani Mikaere (Ngāti Raukawa, Ngāti Porou) is a barrister and solicitor and teaches Māori law and philosophy at Te Wānanga o Raukawa.

2 Acknowledgements to the peoples of Tauranga Moana and to Matiu Dickson’s family who were present at the symposium.

3 For more on this, see A Mikaere “On Being Māori and being a Lawyer: The Musings of a Māori Legal Academic” in *Ki Te Ao Mārama* (Te Hunga Roia Māori o Aotearoa 10th Anniversary Hui-ā-tau 1998 Conference Proceedings, University of Waikato, 20–23 August 1998) at 70.

A very wise Mohawk woman by the name of Patricia Monture Angus once suggested that there is a crucial difference between the Indigenous person who happens to be a lawyer and the lawyer who just happens to be Indigenous.⁴

There is nothing wrong with making the choice to be a lawyer who just happens to be an Indigenous person. The problem arises when the lawyers who have made this choice do not honour the fact that the choice has disconnected them from their people ... Such lawyers can and do still provide good service to our communities. However, the kind of law they practice on the behalf of Indigenous people and communities must have certain limits as these lawyers are not part of the people and they cannot speak for the people.

Matiu was very clearly a Māori who happened to be a lawyer, not the other way around. That is one of many reasons why it was such a pleasure to work with him and, quite apart from that, simply to know him. It is also why having someone like him at Waikato is so important for the Law School if its commitment to biculturalism is to have any credibility.⁵ He must be sorely missed; it will be extraordinarily difficult, perhaps impossible, to replace him.

Patricia Monture Angus also talked with disarming honesty about her journey as an Indigenous person who studied, and subsequently taught, the law of the coloniser. She explained how she came to realise that law was not the answer to the problems that her people faced:⁶

Every oppression that has been foisted on Aboriginal people in the history of Canada has been implemented through laws ... Law is not the answer. It is the problem. My experience of law has been about coming face to face with oppression, both my own (individual) and that of other Aboriginal people (systemic and individual). This is why the study of law is so profoundly painful for so many Aboriginal people.

Here in Tauranga Moana, I doubt whether there is much that I could tell you about the complicity of what Pākehā call “the law” in colonisation. After all, your tūpuna (ancestors) were subject to some of the most blatant instances of legalised theft ever executed by the Crown, courtesy of the euphemistically-named “New Zealand Settlements Act” (it should more accurately have been called the “How to steal vast quantities of land and get away with it Act”) of 1863. Iwi throughout the land could doubtless provide a lengthy list of Pākehā “laws” that have been implemented – and that continue to operate – to their detriment.

It is important to realise, however, that the negative impact of “the law” on Māori does not stop with the endless list of self-serving pieces of colonial legislation, designed to put a legal gloss on the immoral conduct of the Crown. Perhaps the most insidious (and therefore the most damaging) impact of Pākehā law has been the way it has rendered *our* law invisible. Even referring to Pākehā law as “the law” suggests that there is no other law – that tikanga is something less than law.

So, for example, we are often told that we had “lore”, as opposed to “law”. What does it mean for us to accept this description of tikanga? The *Concise Oxford Dictionary*⁷ defines “law” as

4 P Monture Angus “At the Boundary: Indigenous Lawyers in the 90s” in *Ki Te Ao Mārama* (Te Hunga Roia Māori o Aotearoa 10th Anniversary Hui-ā-tau 1998 Conference Proceedings, University of Waikato, 20–23 August 1998) at 7.

5 For more on Waikato Law School’s commitment to biculturalism, see S Milroy “Waikato Law School: An Experiment in Bicultural Legal Education” (LLM thesis, University of Waikato, 1996); see also A Mikaere “Rhetoric, Reality and Recrimination: Striving to Fulfil the Bicultural Commitment at Waikato Law School” (1998) 3(2) *He Pukenga Kōrero* 4.

6 Patricia Monture Angus *Thunder in my Soul: A Mohawk Woman Speaks* (Fernwood Publishing, Halifax, 1995) at 69.

7 RE Allen *Concise Oxford Dictionary* (8th ed, Clarendon Press, Oxford, 1990).

meaning “a body of rules enacted or customary in a community and recognised as enjoining or prohibiting certain actions and enforced by the imposition of penalties”.⁸ “Lore”, on the other hand, is defined as “a body of traditions and knowledge on a subject or held by a particular group” with both “herbal lore” and “gypsy lore” provided as examples.⁹

Characterising tikanga as “lore” conveys the sense that tikanga lacks the necessary authority or comprehensiveness to constitute “real” law. It reflects a colonising arrogance that continues to assert the legitimacy of European systems of law over and above those of peoples whom Europe, for many centuries, categorised quite unapologetically as less than human. According to this mind-set, Māori (like gypsies)¹⁰ are acknowledged as possessing “traditions” and even “knowledge”, but only European powers (colonising powers in particular) are perceived as having law.

We all know, of course, that this is quite wrong. We know that tikanga is law. Like peoples throughout the world, our tūpuna developed their own unique theoretical tradition in order to explain the mysteries of the universe, and to understand their place within it. This tradition embodied a philosophy of life that was both reflected in, and reflective of, their social norms and practices. It was developed over time immemorial as they journeyed throughout the Pacific, and further refined here in Aotearoa over many centuries. It enabled them to make sense of the world around them, while also providing the foundations for a code of behaviour that allowed them to survive and to thrive.¹¹

Some people use the concepts of āronga (worldview); kaupapa (principles or values); and tikanga (practice) to explain the connection between the development of a distinctive theory of life and the practical expression of that theory through law. According to Te Ahukaramū Charles Royal, for example:¹²

[E] hāngai ana te āronga ki te Ao e noho ai tātou. Koinei ā tātou whakaaro nui mō te Ao e noho ai tātou. Nā, e takea mai ana ā tātou kaupapa i reira, i taua āronga. Nā, ka tupu hoki ngā tikanga i ā tātou kaupapa. Tōna rite kei te rākau e tupu mai ana i te whenua.

From the particular āronga that our tūpuna developed emerged certain fundamental principles or kaupapa, such as whakapapa, whanaungatanga, manaakitanga, rangatiratanga,¹³ and so on. From those kaupapa emerged the tikanga, the codes of behaviour that ensured the practical expression of these values in the way that humans interacted with one another and with the world around them.

The key point here is that while Britain was being shaped by the forces within Europe, developing its own theoretical tradition, articulating its fundamental values and then formulating law to express those values in a practical sense – our tūpuna were doing exactly the same thing in

8 At 670.

9 At 702.

10 The gypsies, of course, have been treated as sub-human throughout Europe for over 500 years: see, for example, Philip Brown “Who are the Roma people?” (2013) New Internationalist <www.newint.org/blog/2013/10/28/roma-minority-prejudice> and Isabel Fonseca *Bury Me Standing: The Gypsies and Their Journey* (Vintage Books, New York, 1995).

11 For a fuller discussion on the position that tikanga is law, see A Mikaere “He Aha te Ahunga Tikanga?” in Kim McBreen (ed) *Ahunga Tikanga* (Te Wānanga o Raukawa, Otaki, 2012) 1 at 9.

12 TAC Royal *Te Ngākau* (Mauriora-ki-te-Ao/Living Universe, Te Whanganui-a-Tara, 2008) at 65. Editor’s note: these words in te reo Māori explain the connections described in the preceding paragraph.

13 Whakapapa (genealogy), whanaungatanga (relationships), manaakitanga (caring for), rangatiratanga (chieftainship, self-determination).

our own part of the world. When the British arrived here, intent on “bringing law to the natives”,¹⁴ they were wilfully blind to the fact that law was already here. They could not (or would not) comprehend that tikanga was, and still is, the first law of this land.

In fact, I would go further than that. Tikanga is not merely the first law of Aotearoa: it is, in reality, the *only* legitimate law in this country. I am supported in this view by Te Tiriti o Waitangi – and I am not talking about that peripheral, English-language document that hardly any signatories saw or signed, and that even fewer of them understood. I am talking about Te Tiriti o Waitangi, the Māori-language document that was signed by the overwhelming majority of signatories (including those who signed here in Tauranga Moana, and in my own rohe too).

In signing Te Tiriti, our tūpuna reaffirmed their tino rangatiratanga, delegating kāwanatanga¹⁵ to the Crown. Since the lawyers and the judges have got their claws into Te Tiriti (thanks to the Treaty of Waitangi Act 1975, and subsequent pieces of legislation), a good deal of utter nonsense has been written about the meaning of rangatiratanga and kāwanatanga. People who have no understanding of te reo Māori, or of tikanga, have come up with some highly implausible interpretations of Te Tiriti, suggesting, for example, that kāwanatanga equates with sovereignty or that rangatiratanga is some kind of limited ability to “manage” our iwi affairs beneath the overarching authority of the Crown. It is time that we put a stop to this kind of idiocy and reasserted our authority to determine what the words mean.

I have a feeling that rangatiratanga is a relatively new term. I am not sure that it was used by our tūpuna before the missionaries came along and decided that it might be a convenient word to describe the concept of the kingdom of God. But it was built upon a much older word, of course, rangatira. We know that rangatira means, literally, the weaving together of a group. This makes perfect sense in light of our understanding that a rangatira is someone who is absolutely crucial to the cohesiveness of the whānau, the hapū, the iwi.

So, for me, rangatiratanga is all about social cohesion: what is it that enables the hapū and the iwi to function effectively; to be socially, politically, economically viable; to survive and to thrive? More than anything, what gives any group the ability to function and to endure is the fact that its members share a set of common understandings about the world: about how they came to be, about what matters, about how they should behave. Exercising rangatiratanga means that it is our fundamental principles, grounded in our own theoretical framework, that dictate the way that we live. It means living according to our own tikanga, our own law.

What, then, does kāwanatanga mean? When our tūpuna signed Te Tiriti they had experienced some pretty poor behaviour on the part of some of the British citizens (whalers, traders, land sharks and missionaries) who they had already met. In my own rohe, for example, William Wakefield made his presence felt during late 1839, claiming to have purchased almost a third of the total area of what was subsequently to become known as New Zealand, based on a small number of sketchily drafted agreements and one or two vague conversations with a few individuals in the

14 It was quite common for early colonists to talk in such terms. In 1858, for example, Governor Gore Browne approved the publication of a summary of English laws for the specific purpose of better informing Māori about the legal system of “the Nation into which they have been incorporated”. The introductory comments reassured Māori that they were “fortunate” because “[a] wise and a generous people, the English, have settled in his land; and this people are willing to teach him, and to guide him in the well-made road which themselves have travelled for so many generations; that is, in the path of the perfected law”: FD Fenton *The Laws of England; compiled and translated into the Maori Language* (JF Leighton, Auckland, 1858) at ii.

15 The right to govern.

Cook Strait region.¹⁶ Our people were not impressed. I can see why, in May 1840, rangatira¹⁷ such as Te Rauparaha, Rangi Topeora and Te Rangihaeata may have felt it advisable to sign an agreement with Queen Victoria, whereby she undertook to accept responsibility for the conduct of her own people while they were in our land.

However, I do not believe for one moment that these rangatira regarded their actions as amounting to an acceptance of Queen Victoria's authority over them. If it had been suggested that they were subjecting themselves to British law, they would have thought the very idea preposterous. I am sure that Henry Williams, who bore Te Tiriti to our region, would have been well aware that to explain the document in those terms would have guaranteed the failure of his mission. At that time, the authority of the rangatira was unquestioned – indeed, unquestionable – and there was absolutely nothing in the grant of kāwanatanga to the Queen that suggested any intention to change that reality.

Some will doubtless argue that this is purely hypothetical, because the fact is that, whatever our tūpuna may have thought they were signing up for, kāwanatanga has ended up running the show. We might not approve of the way that this situation has eventuated, but the best that we can do now is to just get on with it. I, for one, think there is rather more to it than that.

Yes, kāwanatanga eventually assumed control, as a result of a process that Mohawk, Taiaiake Alfred, has so aptly called a gradual triumph of germs and numbers.¹⁸ And yes, we live with the results of that process every day: paying our taxes; exercising our right to vote even though we know full well that the system is a violation of our rangatiratanga and is overwhelmingly weighted against us; willingly complying with those Pākehā laws that conform with our own understandings of what is right; and either tolerating or challenging those that we regard as manifestly unjust, or just plain stupid.

But we should never lose sight of the fact that what so many people now refer to as “the law” gained ascendancy as a result of the Crown grossly overstepping the limits of the kāwanatanga that was assigned to it by our tūpuna – cheating, lying, stealing, falsely imprisoning, murdering – and then, once it had the numbers to do so, passing legislation to retrospectively justify what it had done. We should never be fooled into thinking that the Crown, or the law that it assumes the right to inflict upon us, has legitimacy. The only legitimate law in this country is OUR law. Crown law, in reality, is imposter law.

Why is it so important for us to remember these things? I believe it is about whakapapa. It is about fulfilling our obligations to generations past, present and future.

16 Wakefield claimed to have purchased 160,000 acres from Te Āti Awa in the Port Nicholson purchase of 27 September 1839, a purchase that the Waitangi Tribunal describes as having subsequently been “overlaid” by two further deeds, signed at Kapiti and at Queen Charlotte Sound. The Kapiti deed, signed by Te Rauparaha and 10 others on 25 October 1839 “purported to purchase a huge area of land on both sides of Cook Strait. In the South Island, this included all land north of a line from 43 degrees south ... In the North Island, it included all land south of a line from about 38 degrees south on the west coast (near Mokau) to about 41 degrees south on the east coast”: Waitangi Tribunal *Te Whanganui a Tara me ona Takiwa* (Wai 145, 2003) at 59. Only a fraction of this land was subsequently found to have been purchased fairly: Ranganui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin Books, Auckland, 2004) at 99.

17 Chiefs, leaders.

18 Taiaiake Alfred “From Sovereignty to Freedom” in Stephen Greymorning (ed) *A Will to Survive: Indigenous Essays on the Politics of Culture, Language, and Identity* (McGraw Hill, New York, 2004) 111 at 121.

I know that my tūpuna – as I am sure your tūpuna did – fought incredibly hard to defend their rangatiratanga, to hold back the tide of an ever-encroaching and seemingly insatiable kāwanatanga. They endured such heartbreak. They were forced to make impossible choices. They did the best that they possibly could, under extraordinarily challenging circumstances, just to ensure that we survived. Now that we have survived I believe that we owe it to them, and to our mokopuna, not simply to settle for what we have been left with but rather to continue to struggle for what is rightfully ours.

This is as much about what is in our minds as it is about anything else. One of the most damaging aspects of colonisation is what it has done to our confidence in the validity of our own law and in our ability to reclaim it, to develop it, to practice it. In the same way that we were once brainwashed into believing that te reo Māori was without value, we have been indoctrinated into accepting that we had no real law – that whatever we did have (tikanga) might have been sufficient for “the old days” but that it is incapable of being developed to meet our current and future needs. We have been browbeaten into believing that while tikanga may be well-suited to the marae, it cannot possibly serve our needs in the “real world”. Sometimes we even blame ourselves for what has happened to us, accusing one another of being ignorant and convincing ourselves that we can no longer be trusted to interpret and apply our own tikanga.

All of this is a product of what Moana Jackson has described as the attack on the Indigenous soul, a phenomenon that is central to the process of colonisation:¹⁹

To oppress a people, to set in place the bloody success of colonization, it is necessary to destroy the soul ... For the Māori, the attack on their soul was so terrible it led to a weakening of faith in all the things which had nourished it. The demeaning of the values which cherished it, the language which gave it voice, the law which gave it order, and the religion which was its strength, was an ongoing process which ultimately affected the belief of Māori in themselves.

Of course, the idea that tikanga is not “real law”, or that we cannot be trusted to interpret and implement it, is nonsense. We are neither ignorant nor helpless. Tikanga is not just for the old days or limited to the marae. Tikanga was built on timeless truths. It was designed with our long-term survival in mind. Most importantly of all, it is unique – just as there is no other language that is quite the same as te reo Māori, there is no other body of law in the universe that is quite the same as tikanga. The consequences of losing our tikanga are as serious as the consequences of losing te reo: we risk losing a crucial part of who we are.

Moreover, just like te reo, it is we who must take control of restoring tikanga to its rightful place within our daily lives; nobody else is going to do this work for us. To adapt what another speaker told us earlier today about the future of te reo, “kei ō tātou ringaringa te oranga o ā tātou tikanga”.²⁰ How, then, might we go about achieving the restoration of tikanga as law?

One way of reclaiming tikanga is for us to consciously carve out tikanga spaces, and then to work on gradually expanding the boundaries of those spaces. At Te Wānanga o Raukawa, we have been developing our tikanga space for a number of years now. We started by identifying a set of fundamental principles (kaupapa). All aspects of our work (teaching, research, administration) are

19 M Jackson “The Treaty and the Word: The Colonization of Māori Philosophy” in Graham Oddie and Roy W Perrett (eds) *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 1 at 4.

20 The survival of our laws and values is in our hands.

regarded as opportunities to express one or more of those kaupapa. In 2003 a kaupapa-tikanga framework was developed, identifying various tikanga (policies, practices and organisational arrangements) as suitable ways of giving expression to the kaupapa. The framework has been utilised for a steadily increasing range of purposes, including: strategic planning, measuring institutional performance, annual reporting, internal programme evaluation, external audit processes, assessing applications for conference leave support and conducting annual staff discussion.

I think it would be fair to say that our confidence as tikanga theorists and practitioners has grown as the years have passed and as we have gained experience. I would not want to suggest that it has been easy, but it has been extremely rewarding. Our belief in the efficacy of tikanga has proven to be well-founded. Practical expressions of kaupapa have been found to meet our every requirement. At the same time, consistency has been maintained with the philosophical traditions developed by our tūpuna over the millennia. Our faith in the kaupapa, as both a source of innovation and a means of preserving the integrity of the āronga developed by our tūpuna, has been reinforced.

Just as importantly, doing this work has encouraged us to change our default setting. When a problem arises, our first question is not “what does the Education Act say?”, or “what does the Tertiary Education Commission dictate?” Our first question, unerringly, is “what do the kaupapa say?” This is a crucial shift in thinking. If we all began by making that mental shift, making tikanga our starting point instead of defaulting to Pākehā law – and then doing that in concert with others, carving out and expanding the spaces within which tikanga sets the standard – imagine where that could lead us.

Before finishing today, I should probably note that I am not sure that Matiu always approved of the way that I expressed my views. He had such a lovely, diplomatic, gentle way with people and I think that sometimes he found me a little blunt! But while we may have differed sometimes in the way that we delivered our message, I believe that there was often a high degree of agreement on the message itself.

One of the programmes that I have been involved with over the years at Te Wānanga o Raukawa is the Ahunga Tikanga programme. It is a programme of study that is explicitly premised upon the understanding that tikanga is the first law of Aotearoa. Some years ago I asked Matiu to come and spend a day with our master’s class. It might seem odd that I should ask someone trained in imposter law, someone who has practiced imposter law, someone who taught imposter law – to come and teach in a programme of study that asserts tikanga as the only legitimate law in Aotearoa. But, as I am sure those of you who knew him well can imagine, he was very comfortable in that space.

And I was not in the least bit surprised by the ease with which he conducted himself within that setting. As I said at the beginning of my kōrero, Matiu was a Māori who just happened to be a lawyer. His love for his old people, for his marae and for his whānau defined him. He was a Māori through and through. Five odd years of legal training and a lifetime of working in imposter law could not change that. That, to me, was the measure of the man.

II. MĀ WAI RĀ TE MARAE E TAURIMA? THE IMPORTANCE OF LEADERSHIP IN TAURANGA MOANA

BY CHARLIE RAHIRI²¹

*Ina aro atu ana te oranga ki ngā mea pai, ka rere te wairua, ka taea ngā mea katoa
When our lives are attuned to good things, when the mind is clear and the spirit flows freely,
all is possible²²*

These words were penned by Dr Maharaia Winiata, a leader and scholar who is buried beside the whare tipuna (meeting house) at Hūria Marae. Maharaia was a direct descendant of Ngāti Ranginui chief Paraone Koikoi, who had been forcibly brought to Tauranga to witness the confiscation of his people's land. It was Maharaia's mother's hope that education would be the means by which her son could help his people recover from the crippling effects of confiscation. Maharaia stood for a people destitute but resolute, deprived but resonant. He was a forward thinker, always looking for ways to reaffirm our place as Tangata whenua. He advocated for a better life for Māori people, and more specifically, people in Tauranga Moana. In a time when the people had nothing, he established a carving school in Hūria and commissioned the building of a new meeting house, "Tamateapokaiwhenua", which was eventually opened in 1956 by King Korokī. It was rebuilt in 2004 and opened by his daughter, Te Arikiniui, Dame Te Ataairangikaahu. This whare (house) was erected as a symbol of resilience, and the beautifully adorned carvings, tukutuku woven panels and kōwhaiwhai²³ tell our story, one that is full of ups and downs, adversity and challenge, connection, camaraderie, war, disagreement and love; it tells of our beginning and our end, from whence we have come and to where we will go. It tells a carefully woven whakapapa, proud, strong and resolute.

In his thesis "The Changing Role of the Leader in Maori Society",²⁴ Maharaia provides insight of a commitment to Māori aspirations and cultural values and western ideology. An early theme of Maharaia's thesis refers to the hereditary pattern of Māori leadership pre-colonisation, exploring the changes in the role and structure of the Māori leader impacted by loss of land, culture and identity with a sympathetic focus. It concludes with an account of an adaptive Māori society wanting to maintain a self-determined leadership structure, this was written in the 1950s and sadly we still struggle with these concepts today. Are there synergies? Evidently! Are they transferable? Absolutely!

Maharaia describes the establishment of movements such as the Kīngitanga as a system to protect our self-determination. He also talks about the Kīngitanga as an enduring institution dedicated to improving the social aspirations of the people through political campaigning to influence change for our people whilst protecting our traditional belonging and sense of pride.

21 Ngāti Ranginui leader.

22 Maharaia Winiata, cited in Tauranga Boys' College Newsletter, November 2012.

23 Tukutuku are woven panels and kōwhaiwhai are painted panels that adorn traditional meeting houses.

24 The thesis was published as Maharaia Winiata *The Changing Role of the Leader in Maori Society: A Study in Social Change and Race Relations* (Merran Fraenkel (ed), B & J Paul, Auckland, 1967).

The challenges Maharaia asserts in “The Changing Role of the Leader in Maori Society” are those that continue to have implications for Māori today. These notions of leadership are central to the reasoning that Maharaia availed in his thesis. I would like to share an excerpt from that thesis that is applicable to our discussions today and it this that guides my presentation. It reads:²⁵

If my research has achieved no other purpose than to confirm through my association with leading British social anthropologists, the conviction that it is possible for the Maori people and their culture to assume an integral part in the wider New Zealand society, then my period of study was worthwhile.

So what does this mean? And how is this applicable today? *Mā wai rā te marae e taurima?*²⁶

Leaders are born and developed on the marae. That is my firm belief and my interpretation of Maharaia’s work and legacy. The marae is our place to stand. It is where we afford the utmost respect to our elders and where we bestow upon manuwhiri²⁷ a welcome befitting of royalty no matter who they are. We have heard today other people’s recollections of Matiu and how he was raised under the panekoti o ōna kuia.²⁸ I was fortunate to have a similar upbringing. We have also heard about how you have to create your own kete,²⁹ and I totally agree with that as well. As Maharaia’s mother did with him, and Matiu’s kuia with him, and many of us here today have similar experiences, we were sent to learn the tools of the Pākehā. Not to bring them home to adopt them, but as tools to be confident and strong in order to walk in both worlds; to learn how to play and sometimes manipulate the game on our home field. The Pākehā world will never be kaupapa Māori,³⁰ whether it be Parliament, government agencies or “mainstream” schools. But through decolonising our minds and understanding the separation of both worlds, we can make that little bit of difference in both worlds.

So what of the words and templates left for us from leaders like Maharaia? “The Changing Role of the Leader in Māori Society” is forever relevant, and forever applicable. For me in terms of our Iwi, Ngāti Ranginui, there is a visible gap between our koroua and kuia nō te ao kōhatu,³¹ the next generation, us, my generation and the generation below us. Perhaps the symptomatic effects of raupatu³² have all but destroyed the reo and tikanga of the generation above us? Perhaps they are the generation that were spoken about this morning, who are the 25 per cent of Māori that have limited if any Māori language at all. My generation make up the 25 per cent that will have a little more language, and the generation that follows us are the 25 per cent that will be versed in te reo me ōna tikanga katoa.³³ What has this got to do with leadership in our iwi? Everything. Our leadership needs to step up or step aside. As the Honourable Te Ururoa Flavell, former Crown Minister and Māori Party Member of Parliament, said this morning, it is not acceptable that we

25 Maharaia Winiata *The Changing Role of the Leader in Maori Society: A Study in Social Change and Race Relations* (Merran Fraenkel (ed), B & J Paul, Auckland, 1967, reproduced in 2014 by the University of Waikato) at 24.

26 Who will tend to and uphold the marae in the future?

27 Visitors.

28 Under the petticoats of his nannies.

29 Woven baskets.

30 Derived from Māori principles and values.

31 Koroua – male elders, Kūia – female elders, nō te ao kōhatu – from the old world.

32 Land confiscation.

33 Māori language, laws and values.

compromise our tikanga and kawa³⁴ for the sake of time and outside duties. What I mean is that I have seen on our marae the taking of short-cuts, due to limited knowledge, limited timeframes and busy lifestyles. We must decolonise our minds and lead by example.

Whakaputamōhio,³⁵ we have a few of them. I am probably one of them, and proudly so. I grew up on the marae. I grew up surrounded by te reo and tikanga. I know the chain of ascension to the paepae³⁶ and I have no problem being in the kitchen, on the paepae, harvesting food or being the kaikarakia.³⁷ But I am the exception, certainly in my whānau anyway. By default people like me have to step into positions of leadership because when we have gatherings such as tangi, huritau and mārena³⁸ within our family, it is the people like me that others come to for help and guidance and it is a heavy job. It is often a lonely job, one that forces you to think about the amount of pressure many of our whānau that have not necessarily been connected to the marae will understand. It is a job that sometimes I wish my father and uncles would become more versed in. The pressure to continuously perform is at times unbearable and I have to say that at times we do not care for our leaders enough. This is a sentiment shared by our esteemed elder, Dr Morehu Ngatoko,³⁹ in his memoirs he wrote for the whānau. He said

... growing up in Hūria, around the marae you learn the structure, you learn about hononga, you learn about manaakitanga, you learn that everything we have, we have fought for. You learn humility, you learn how to support your leaders because there will be a time when you have to step up, and you have to be ready to do so. So make sure you have the tools to do just that.

He also talked about the leaders of his time and was able to name some notable leaders from Tauranga Moana, which brings me to my next point. I often struggle with who our people see as true leaders. I have judged Manu Kōrero speech competitions here in Tauranga and I guess this is a plea to our people, to our teachers and our schools. We have so many leaders from Tauranga Moana who have achieved amazing things, yet we feel so reluctant to honour their legacies through our teaching. I recently walked through Tauranga Boys' College and saw a huge mural of Sir Apirana Ngata.⁴⁰ It is beautiful. But there is no mural of Maharaia Winiata, no mural of Hohua Tutengaehe, no mural of Hori Ngatai, of Tupaea, all leaders of our people from whom we can learn so much. Tauranga Girls' College has a whare dedicated to Tauranga Moana leaders. They are the exception. Turning back to Manu Kōrero competitions, it bothers me as a judge at regional and national level when our kids get up and make paradigms of virtue of Māori leaders that have carved a national presence for their awesome work, which is beautiful, and I am in no way demeaning their work. But I ask, why are we so hesitant to talk about legacies left by leaders from Tauranga Moana? Why don't we talk about the great deeds and feats of our tūpuna who come from here? I want to acknowledge and congratulate the organisers of this symposium in acknowledging the works and efforts of Matiu. This is a great and timely start. In the past four years we have lost so many leaders within

34 Laws, values and protocols.

35 People who seem to know it all.

36 The platform from which formal oratory takes place on marae, the speaking benches.

37 Person who administers prayer.

38 Funerals, birthdays, weddings.

39 Since the symposium, this esteemed elder has passed away.

40 A leader from the East Coast iwi of Ngāti Porou.

our moana. It is not until they die that we speak of their enormous feats for Tauranga Moana and te motu whānui.⁴¹ We need to get better at acknowledging them when they are alive.

I attended the Kīngitanga day⁴² last year with the whānau from Hūria and saw the large wall hangings with pictures of the Māori kings and prominent leaders of Waikato-Tainui. Each one displayed a brief summary of the story of their leadership and their achievements. I saw that and thought, I want to do that at home. Why can't we provide that to every school and rūnanga⁴³ so that our present and future generations know the achievements and commitment of our own tūpuna. So that they know the true essence of leadership and what it takes to be a leader and equally, what it takes to support them, free of pūhaehae and harihari kōrero.⁴⁴

In summary, I think we have a long way to go in terms of filling the evident void of leadership within our Iwi. We have some strong leaders, but they are the minority. So how do we grow, nurture and develop more leaders to ensure that our reo, tikanga and kawa are maintained and upheld? We need to do this so that we do not promote "leaders" who learn, memorise and recite generic whaikōrero.⁴⁵ This is not good enough. If you do not want to learn – move aside. You are needed in the kitchen. How do we ensure that the marae remains the heart of every whānau, hapū and iwi? How do we ensure that the people who we support through scholarships, come back to work with us and for us? How do we do this so that our people are not shy to come home? We need our leaders to be shining lights and to lead the way. They do not need to be perfect, not at all. As an āpotoro,⁴⁶ I often get this thrown at me, "you can't talk like that, you are an āpotoro." My answer is always, "I am an āpotoro, not a saint".

In my humble view, our leaders need to be shining lights in terms of commitment to te reo, to tikanga, to the marae, to education and most importantly, to the people. I end with these inspirational words:⁴⁷

As we let our own light shine,
we unconsciously give other people permission to do the same.
As we are liberated from our own fear,
our presence automatically liberates others

And when we are moving in the positive, our destination is the brightest star, much like this
symposium

Tākiri ko te ata, the dawn of a new day.

41 Wider Aotearoa New Zealand.

42 A day set aside by the University of Waikato to honour the Māori King movement, or Kīngitanga.

43 Tribal organisation.

44 Jealousy and gossip.

45 Formal speeches.

46 Apostle of the Rātana faith.

47 Marianne Williamson *A Return to Love: Reflections on the Principles of "a Course in Miracles"* (HarperOne, 1992) at 190.

BOOK REVIEW

INTERNATIONAL INDIGENOUS RIGHTS IN AOTEAROA NEW ZEALAND by Andrew Erueti (Editor), Victoria University Press, Wellington, 2017, 300 pp, recommended retail price \$40.

I first met the editor of this collection when he was an advisor for Amnesty International. He wrote an *amicus curiae* brief for the Hul'qumi'num Treaty Group case I had been working on before the Inter-American Commission on Human Rights. To this day, I use this *amicus* brief as a model for my clinical students learning international human rights advocacy. The editor draws on this work experience, his academic background and his years of involvement with the United Nations (UN) system to compile and contextualise this impressive collection of essays. He brings together leading experts and scholars in the field of indigenous rights to tell the story of Aotearoa New Zealand's journey that began with an initial vote against the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), to its eventual endorsement and now its current position on domestic implementation. On the one hand, New Zealand stands out as a leader in the progressive realisation of indigenous peoples' rights, through the establishment of the Waitangi Tribunal, the negotiation of Treaty of Waitangi settlements and the inclusion of Māori people in civil and political life. However, as the book describes, there are impediments to the full attainment of indigenous rights in New Zealand as affirmed in the Declaration.

The theme of the book is the implementation of the Declaration in Aotearoa New Zealand. Broken into three parts spanning 10 chapters, Part I examines the substance of the Declaration, Part II, its application and Part III its use as an advocacy tool. A copy of the Declaration is included as an appendix for easy reference to its articles. At just over 200 pages of text, the book is a manageable read and is logically organised into easily digestible chapters that canvas topics such as Treaty negotiations, mining and child rights. This collection of essays was compiled from a two-day symposium hosted by the Te Piringa Faculty of Law, University of Waikato in June 2014. Its publication date, September 2017, corresponds with the 10-year anniversary of the adoption of the Declaration on 13 September 2007.

The book begins with the editor introducing the Declaration and providing a concise explanation of its content and legal status, its place within the international human rights framework and its influence on domestic law and policy. He proceeds with an introductory chapter on the historical background and evolution of the indigenous rights movement and the two decades it took to negotiate a consensus on the Declaration. The editor explains the decolonisation process and offers it as a framework for interpreting the Declaration together with a human rights approach. He proposes this "mixed-model" to accommodate regional differences between northern and southern indigenous peoples.

Chapter 2 attracts the reader's attention with its catchy title: "The Treaty and Human Rights in New Zealand Law: Can We Add the Declaration and Stir?" Kirsty Gover skilfully examines the intersection and interaction of the New Zealand Bill of Rights Act 1990 (NZBORA), the Treaty of Waitangi and the Declaration. By applying the "principles of legality" and the "presumption of consistency with international law," alongside norms of non-discrimination, Gover shows how the Declaration can either have the effect of restricting or strengthening Māori rights. She points to "interpretive" and "limitation" provisions of the Declaration that may effectively trump indigenous rights through a balancing of interests with non-beneficiaries. What follows is a discussion of the

“legitimate differentiation” between the concepts of “separate rights” for different racial groups versus specific or permanent “special measures” needed to redress historical wrongs. Gover has written a very compelling essay, although it may be a challenging read for those not schooled in the law or who lack a basic understanding of New Zealand’s legal system.

Chapter 3 begins Part II of the book on the application of the Declaration. Justice Matthew Palmer and Matthew Smith co-author this piece on the legal status and effect of the Declaration in New Zealand. They approach the topic as self-described “constitutional realists”. Noting that the Declaration has not been incorporated into domestic law, they provide examples of indirect application in administrative law through statutory interpretation and as a reflection of customary international law. The authors underscore the role of the Declaration in “amplifying the Treaty [of Waitangi]” because it is a more precisely worded legal instrument. They explain how lawyers and judges can take advantage of this legal specificity to more easily identify relevant provisions to support their positions. The essay ends with a discussion about how the New Zealand courts have treated the Declaration.

Claire Breen’s chapter (Chapter 4) explores “the extent to which the indigenous child’s right to health and education can be more effectively realised under the guiding role of the Declaration” and the United Nations’ Convention on the Rights of the Child (UNCROC). The essay explains how the Declaration can be used to construe, compliment and give effect to the rights and general principles contained in the UNCROC, a binding treaty that New Zealand has ratified. Breen provides facts and figures on the state of Māori children’s health and education and attributes poor outcomes to the state’s failure to adhere to international standards. She submits that the Declaration and the UNCROC can be read in conjunction to provide stronger protections for children’s rights. The author concludes by pointing out guidance offered by treaty bodies and other UN human rights mechanisms that further define state duties under the Declaration.

Chapter 5 examines the Treaty of Waitangi negotiation process as a mechanism for settling land claims and for reconciling past grievances. Linda Te Aho identifies the problems with Treaty settlements and then looks to the Declaration for assistance in improving the process. The essay describes the growing trend towards iwi-government co-management agreements and highlights the novel approach adopted in the Whanganui settlement, conferring legal personality on the Whanganui River. Te Aho recommends that the Declaration be applied as an interpretative tool to clarify and give greater meaning to the rights contained in the Treaty of Waitangi.

In Chapter 6, Erueti co-authors an essay with Sarah Down on indigenous rights in the context of mining activities. The chapter begins with a brief overview of Declaration articles that protect indigenous rights to natural resources specifically: the right to free, prior and informed consent as affirmed by other human rights bodies; the right to lands and resources; and the right to self-determination. The authors explore other normative standards on business and human rights, namely the UN’s *Guiding Principles on Business and Human Rights*, which sets out the Protect, Respect and Remedy Framework created by former UN Special Representative John Ruggie.¹ We see that New Zealand falls short in meeting these international standards but the authors show how the state has made attempts to protect Māori interests through statute, regulations, co-management agreements and Treaty settlements. The chapter concludes by suggesting a more equitable distribution of mineral wealth in New Zealand that accords with international human rights norms.

1 *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (United Nations, New York and Geneva, 2001).

Claire Charters' Chapter 7 begins Part III of the book and makes a call to action in her essay on "using" or "losing" the Declaration. She has an interest in seeing the Declaration come to life after participating in the negotiations and drafting, as well as contributing to, the Declaration's early influence on the work of the UN. Charters cleverly offers ways to encourage state interaction with the Declaration and prove its relevance at the national level. Using case studies, she shows how advocates can invoke the Declaration in domestic courts, tribunals and parliamentary proceedings to encourage compliance with international norms. Charters explains the legal significance of the Declaration and its authoritative influence on international institutions in articulating indigenous peoples' rights. She makes a strong case for domestic application of the Declaration quoting the New Zealand Court of Appeal that "legislation should be read in a way which is consistent with New Zealand's international obligations" and the Waitangi Tribunal's statement that "[the Declaration] articles are relevant to the interpretation of the principles of the Treaty of Waitangi."

In Chapter 9 we see how the United Nations has taken steps to create a global action plan for implementing the Declaration. Tracey Whare shares her experience preparing for and attending the 2014 World Conference on Indigenous Peoples. As an active participant, she speaks first-hand about the role of indigenous peoples in effectively shaping the process, revealing the complexities of such large-scale consultations and efforts to reach consensus. The author discusses how the World Conference resulted in an "Outcome Document" that reflects indigenous peoples' priorities and contains commitments by UN member states to undertake concrete action to implement the Declaration.² She then undertakes an analysis of specific recommendations from the Outcome Document applied to the New Zealand context and concludes by sharing valuable lessons learned from this participatory process.

Chapters 8 and 10 provide important practical advice on how to use the Declaration in advocacy efforts within the UN system, namely the UN Special Procedures and the Universal Periodic Review. The essays further explain how indigenous advocates can take reports from these UN mechanisms that refer to the Declaration to influence domestic law and policy.

In Chapter 8, Fleur Te Aho identifies the ways in which UN Special Procedures can be leveraged to advance implementation of the Declaration. She relies on empirical research to draw her conclusions, giving added credibility and weight to her work. The role and function of Special Procedures mandate holders is discussed with an obvious focus on the benefit of the UN Special Rapporteur presence on the rights of indigenous peoples. The author explains how the Declaration guides the work of the UN Special Rapporteur and mentions that New Zealand has issued a standing invitation to receive visits from the Rapporteur. We learn that previous rapporteurs have conducted missions to the country and offered recommendations to improve the human rights situation of Māori. Specific direction is given on how to reference these authoritative, but non-binding, reports of the UN Special Rapporteur in domestic fora.

Natalie Baird, in Chapter 10, provides an overview of the Universal Periodic Review (UPR) process. She explains its role in pressuring states to endorse the Declaration and to further its implementation. In this final chapter of this collection, the author explores how indigenous peoples can use the UPR process to obtain state commitments to realise the rights contained in the Declaration. The limitations of the UPR peer review process are discussed, including its diplomatic

2 *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples* GA Res 69/2, A/Res/69/2 (2014).

nature and overly broad recommendations. Suggestions for addressing these shortcomings include regularly referencing standards in the Declaration to frame UPR recommendations with more specificity. The author's use of tables and interpretive guides to decipher the UPR reports is very helpful. She concludes by providing an overview of the UPR process and the New Zealand experience, including a unique government-sponsored monitoring mechanism.

I appreciate how this book ends on both a positive and practical note by identifying strategies and tools for invoking the Declaration to improve the human rights situation of indigenous peoples on the ground. It is a must-read for academics and advocates alike.

SEANNA HOWARD*

* Clinician, Professor of Practice, James E Rogers College of Law, Indigenous Peoples Law and Policy Program, University of Arizona.

BOOK REVIEW

HE REO WĀHINE: MĀORI WOMEN'S VOICES FROM THE NINETEENTH CENTURY by Lachy Paterson and Angela Wanhalla (Authors), Auckland University Press, Auckland, 2017, 384 pp, recommended retail price \$49.99.

He Reo Wāhine gives voice to Māori women speaking to important issues of the late 19th century. Land was the defining issue of New Zealand race relations during that time, so it is not surprising that many of the examples taken from speeches, evidence, letters and testimonies relate to encounters with the state and in particular, to the loss of ancestral land. The book is comprised of eight chapters arranged around particular themes, the first of which is land sales. The others are: accounts of war; raupatu and compensation; politics and mana; Māori women's petitions; legal encounters and testamentary acts; religion; and private matters. The chapters illustrate how Māori women participated in a range of legal processes and institutions, and how colonialism impacted upon their communities and their personal lives.

The Native Land Court was established in the 1860s to facilitate the alienation of land from Māori and was particularly destructive of relationships in Māori society.¹ In the aftermath of land confiscations and the ensuing decisions of compensation courts, a number of Māori women asserted their rights to land in letters written to government officials. Some exemplar letters contain claims of "non-rebel" status, indicating that the women were distancing themselves from resistance movements in order that they be allocated land. Others sought state assistance to help them deal with the suffering that resulted from landlessness.

The book includes fascinating accounts of women such as Takiora (Lucy Grey), who was paid for providing traitorous information to the then Native Minister, Donald McLean, about Parihaka resistance leaders, Tītokowaru and Te Whiti, in Taranaki. That this was a treacherous business is evidenced by her words: "he mea korero huna ki ahau, kia mohio koe, kei rongona, kei mate ahau", (there are things in this letter that were spoken secretly to me. You should know, in case others hear, and I am killed.)²

Though Māori women were landowners and rangatira in their own right, the text of Meri Te Tai Mangakahia's petition seeking the right for Māori women to vote in Te Kotahitanga (the Māori parliament) illustrates how "the patriarchal power systems inherent within colonialism were overlaid on Māori society."³ Another example may be found in the discussion on testamentary declarations, including the oral tradition of ōhākī. There, the authors demonstrate how the law proved to be a powerful tool of colonialism. Māori women's customary rights to convey and bequeath their lands became subject to the same restrictions that applied under the English law of coverture where property belonging to a woman became her husband's upon marriage.

The tragic story of a murder-suicide as a result of a relationship breakdown was widely reported in the settler press, which printed personal letters of a woman who signed as Hinemoa.

1 Sir Hugh Kawharu famously described the court as a "veritable engine of destruction of any tribe's tenure, anywhere." IH Kawharu *Maori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 15.

2 Lachy Paterson and Angela Wanhalla *He Reo Wāhine: Māori Women's Voices from the Nineteenth Century* (Auckland University Press, Auckland, 2017) at 162.

3 At 151.

Hinemoa's story demonstrates the potential of public records for providing a glimpse into the emotional turmoil of private lives.

Whilst many of the writings selected for inclusion in *He Reo Wāhine* are formal in nature, Māori women were more likely to have expressed such emotion through traditional waiata (sung poetry). The lament, which appropriately brings the collection to a close, is a classic example of this form. It is a lament written by Te Paea in 1856 for her deceased husband, and is rich with metaphor:⁴

Ka ngaro ra e taku manu kohe ata. Tena ka tiu, ka wehe i a au, i.

(For he who was my talking bird, that sung. So sweetly at the dawn of day, has disappeared forever from my gaze).

By setting out the original Māori language text of letters and petitions followed by translations, the book provides some valuable insights for those interested in te reo Māori. There are some lovely examples of the language used in the letters selected:

Ani, "tenei ano ahau e ora atu nei" (I am well).

meingatia iho ... e Ta kia ngohengohe rawa kia rite ki te pepi whanau hou (Make me as malleable as a newborn baby) – a prayer that shows the impact of Christianity on Māori women.

ka nui taku ako kaore e rongu, ne... (I have tried my best to teach him, he did not listen) a mother's apology for the adulterous "sins" of her son.

Even when letters express exasperation or anger, they often end with the charming acknowledgement, "nā tō hoa aroha" (from your loving friend).

He Reo Wāhine also illustrates some of the risks of relying upon English translations to tell the women's stories. The 1891 petition of a 78-year-old woman tells of the suffering from want of warm clothes and food brought about by the uncompensated seizure of her lands. It demonstrates how te reo Māori was paraphrased by translators in a way that diminishes the power of the words and its style. In the translation there is no mention of the woman's age, nor does it present the repeated reference to her suffering.

Māori women have made valuable contributions to Māori struggles for justice in Aotearoa New Zealand in the wake of colonisation. *He Reo Wāhine* brings to light some of those contributions which, for the most part, have been barely visible in historical records which predominantly presented the feats of Māori men. Those records were often overlaid by interpretive comments of Christian males of European descent.⁵ Such interpretations came to be internalised by Māori males. For example, Patu Hohepa quotes an example from 1891 of men challenging, on the basis of gender, the right of women to be trustees on a Māori land block.⁶ Tania Rei provides a further example of a Māori male speaking in the Legislative Council against Māori women being granted the right to vote and citing Christian doctrine in support.⁷ Part of the struggle for justice by Māori

4 At 315.

5 Aroha Yates-Smith "Hine! E Hine! Rediscovering the Feminine in Maori Spirituality" (PhD Thesis, University of Waikato, 1998) at 4.

6 P Hohepa and DV Williams *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 29–30.

7 Tania Rei *Māori Women and the Vote* (Huia, Wellington, 1993) at 32.

women has been to highlight and correct flaws in historical records.⁸ Thankfully, there is now an accumulation of literature verifying that before 1840, Māori women were not only nurturers, but also significant leaders and advocates in Māori society.⁹ *He Reo Wāhine* is a timely addition to this body of literature. The selection of writings offered in the book provide a glimpse into the valuable resources that lie in some of New Zealand's manuscripts and archival collections, a gateway for prospective researchers to the rich history of Aotearoa New Zealand.

LINDA TE AHO*

8 Ani Mikaere "The Balance Destroyed: Consequences for Māori Women of the colonisation of Tikanga Māori" (Mana Wahine Thesis Series, International Research Institute for Māori and Indigenous Education, University of Auckland, Auckland, 2003) vol 1.

9 See Linda Tuhiwai Smith "Maori Women: Discourses, Projects and Mana Wahine" in S Middleton and A James (eds) *Women and Education in Aotearoa 2* (Auckland University Press, Auckland, 1992) 33 at 35; and H Jahnke "Maori Women in Education" in P Te Whaiti, M McCarthy and A Durie (eds) *Mai i Rangiatea: Maori Wellbeing and Development* (Auckland University Press, Auckland, 1997).

* Associate Professor, Te Piringa Faculty of Law, Waikato University.

