

THE  
REPORT ON THE  
AOTEAROA INSTITUTE CLAIM  
CONCERNING  
TE WĀNANGA O AOTEAROA



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REPORT ON THE  
AOTEAROA INSTITUTE CLAIM  
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WAI 1298

WAITANGI TRIBUNAL REPORT 2005



The cover design by Cliff Whiting invokes the signing of the Treaty of Waitangi and the consequent interwoven development of Māori and Pākehā history in New Zealand as it continuously unfolds in a pattern not yet completely known

A Waitangi Tribunal report

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The Honourable Parekura Horomia  
Minister of Māori Affairs



The Waitangi Tribunal  
141 The Terrace  
WELLINGTON

and

The Honourable Dr Michael Cullen  
Minister for Tertiary Education  
Parliament Buildings  
WELLINGTON

22 December 2005

Tēnā korua

We present to you our report on the urgent inquiry into the claim brought by the Aotearoa Institute Te Kuratini o Nga Waka Trust Board concerning the future of wānanga in New Zealand and, in particular, that of its koha or gift to the nation, Te Wānanga o Aotearoa (TWOA). A wānanga that is also a tertiary education institution (TEI), as TWOA is, has a dual set of accountabilities. One is to its founding people, in this case Ngāti Maniapoto, as a teaching institution that preserves and imparts their values to all who wish to learn in this way. The wānanga's other set of accountabilities is to the Crown, as a teaching institution responsible for using Government funds to deliver quality education (as defined by the Education Act 1989) to its students.

Every witness who appeared before the Tribunal acknowledged the remarkable success of TWOA in providing creative and innovative courses and methods of delivery that reach out to those, especially, but not exclusively, Māori, whom the mainstream education system has failed. The wānanga's rapid growth since signing the deed of settlement of the Wai 718 claim with the Crown in 2001 is testimony to this. But such growth has brought its own problems for TWOA in its governance, management, and quality assurance. Since 2003, the Crown has rightly exercised its responsibility to ensure that the public funds granted to the wānanga have been properly spent on producing quality educational outcomes. The question before the Wai 1298 Tribunal was whether the Crown had exercised its responsibilities in a manner that is in accordance with the special character of a wānanga (as defined in the Education Act 1989) and with the principles of the Treaty of Waitangi.

The Tribunal therefore focused on three issues:

- ▶ the nature of a wānanga that is also a TEI (described in chapter 2);
- ▶ how the relationship between the Crown and TWOA has been conducted (described in chapter 3); and

- ▶ how this relationship might better be conducted in the future, having regard to the relevant principles of the Treaty of Waitangi (described in chapters 4 and 5).

The Tribunal found that the Crown had breached the principles of the Treaty of Waitangi by failing to recognise the inclusive nature of the education provided by a wānanga and by failing to set up high-level mechanisms, as provided for in the Wai 718 deed of settlement, to resolve differences between the parties as they arose. The Crown's attempts to impose on TWA its own unduly limited conception of what a wānanga should be, and how and what it should teach, has led to the specific breaches of Treaty principles summarised in section 5.2.

In reaching our conclusions, we have focused throughout on better practice for the future. Our recommendations, set out in section 5.3, are intended to ensure that the relationship will be conducted in a respectful and supportive manner on both sides. We were encouraged by the Crown's acknowledgement before the Tribunal that there was room for improvement in its dealings with TWA. The Tribunal would urge, as a first step, that the Crown conclude a partnership agreement in the same or similar terms as the draft agreement prepared as part of the Wai 718 settlement. This would ensure the establishment of appropriate forums to deal with problems as they arise and to facilitate early participation and discussions regarding major policy changes and funding issues.

Heoi ano

## ABBREVIATIONS

app	appendix
CA	Court of Appeal
CD	compact disc
ch	chapter
doc	document
ed	edition, editor
EFTS	equivalent full-time students
J	justice (when used after a surname)
ltd	limited
MOE	Ministry of Education
no	number
NZLR	<i>New Zealand Law Reports</i>
NZQA	New Zealand Qualifications Authority
p, pp	page, pages
para	paragraph
PC	Privy Council
s, ss	section, sections (of an Act of Parliament)
sec	section (of this report, a book, etc)
TAMU	Tertiary Advisory Monitoring Unit
TEC	Tertiary Education Commission
TEI	tertiary education institution
TES	tertiary education strategy
TWOA	Te Wānanga o Aotearo
v	and
vers	version
vol	volume

‘Wai’ is a prefix used with Waitangi Tribunal claim numbers

Unless otherwise stated, footnote references to claims, statements, papers, and documents are to the record of inquiry, the index to which is reproduced in appendix III.

References to the TEC and MOE series of documents are to a bundle of documents submitted by the Crown that was not placed on the record.



## CHAPTER 1

### BACKGROUND

#### 1.1 INTRODUCTION

The Wai 1298 claim, made by Harold Maniapoto and Tui Adams on behalf of the Aotearoa Institute Te Kuratini o Nga Waka Trust Board, is summed up by the claimants as concerning the future of wānanga in New Zealand and, in particular, that of its koha or gift to the nation, Te Wānanga o Aotearoa (TWOA).<sup>1</sup> TWOA is both a wānanga – an institution and method for preserving and imparting the values of its founding people, Ngāti Maniapoto, to all who wish to learn through them – and a tertiary education institution (TEI), which is a Crown entity responsible for using Government funding to deliver quality education (as defined by the Education Act 1989 and its amendments) to its students. The Wai 1298 claim concerns disputed issues of control over TWOA, what it can teach, and to whom. The claim arises out of the tension between the Crown’s right and responsibility to govern and the self-determination or autonomy of the founding iwi, as found in and practised by its wānanga.

The wānanga was founded by a group of visionary members of Ngāti Maniapoto, led by Rongo Wetere, in an effort to improve the skills of their people. From small beginnings in Te Awamutu in 1983, it was granted formal status as a TEI in 1993. After lodging a Waitangi Tribunal claim for resources from the Crown in 1997<sup>2</sup> and reaching a deed of settlement with the Crown in 2001,<sup>3</sup> it grew very rapidly, expanding beyond its iwi base. By 2003, it had 10 campuses in the North Island from Māngere to Porirua, and various satellites throughout the country.<sup>4</sup> With 34,000 equivalent full-time students (EFTS) and more than 1200 equivalent full-time staff, it was by then one of the largest providers of tertiary education in the country – bigger than the University of Auckland. More than 63,000 students enrolled in 2003, of which 37,000 (or 59 per cent) were Māori, representing a third of all Māori students enrolled in TEIs in New Zealand.<sup>5</sup>

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1. Harold Maniapoto, oral evidence, 30 November 2005

2. See Waitangi Tribunal, *The Wānanga Capital Establishment Report* (Wellington: Legislation Direct, 1999)

3. Minister of Education, ‘Settlement of Wānanga Capitalisation Claim: Draft Deed of Settlement and Settlement Package for Te Wānanga o Aotearoa’, paper to Cabinet Policy Committee, POL(01)277, 8 October 2001 (doc MOE0006)

4. Te Wānanga o Aotearoa, *Annual Report 2003* (Te Awamutu: Te Wānanga o Aotearoa, 2004), p 47 (doc A1, app RW11, p 425)

5. Document A1, para 3; Te Wānanga o Aotearoa, *Annual Report 2003*, pp 17–20 (doc A1, app RW11, pp 395–398)

TWOA is now fulfilling both an educative and a social justice function for all Māori, and indeed for all New Zealanders. Claimant and Crown witnesses before the Tribunal were unanimous in praising the achievements of the wānanga in providing creative and innovative courses – especially in Māori language and tikanga and in literacy, numeracy, and other life and employment skills – as well as providing localised delivery systems that meet particular community needs. One of its major achievements has been to give a ‘second chance’ at learning to those whom the primary and secondary education system has failed.<sup>6</sup> The Secretary for Education, Howard Fancy, commented that ‘TWOA has achieved great things in attracting adult students back into tertiary education.’<sup>7</sup>

Such rapid growth did not come without cost. Inevitably, it seems, management systems could not keep up. From 2003, concerns were being raised by Crown agencies about quality assurance in the education being offered by the wānanga, especially by its satellites and sub-contractors, and about the capacity of its management systems to cope with the numbers of students enrolled. There were also concerns about the wānanga’s governance, especially after allegations of financial mismanagement, and even impropriety (including nepotism), were made in Parliament in February 2005. Because the Crown provides the bulk of the wānanga’s funding, it has been rightly concerned to meet its duties and responsibilities in this regard.

### 1.2 BACKGROUND TO THE CLAIM AND THE STRUCTURE AND FOCUS OF THE REPORT

The background to the Wai 1298 claim has been succinctly set out in the decision of Judge Stephanie Milroy and Joanne Morris granting the application for an urgent hearing on 25 October 2005. This document, paper 2.5.3, appears as appendix 1 to this report, and we do not propose to traverse this material in detail again here. It should be noted, however, that the Tribunal did not consider it appropriate to inquire into any matter involving the suspensory loan for TWOA that was provided for in its 2001 deed of settlement with the Crown but not paid by December 2004. Nor was it appropriate for the Tribunal to inquire into matters related to the financial crisis that TWOA experienced in February and March 2005, since these matters were then under investigation by the Auditor-General, who reported to Parliament on 6 December 2005. The Tribunal proposed instead to explore the implications of the Treaty of Waitangi for the relationship between the Crown and TWOA as institutions, and to focus on the partnership, protection, and process issues concerning the charter, profile, and future direction of TWOA.

The hearing was set down for 30 November to 2 December 2005 at Te Rapa Racecourse in

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6. TWOA has also provided work opportunities and further training for large numbers of Māori tutors, administrators, and the like.

7. Document A29, para 85

Hamilton. In addition to the presiding officer, Judge Milroy, and Ms Morris, the members of the Wai 1298 Tribunal were Dr Angela Ballara, the Honourable Doug Kidd, and Tuahine Northover.

A statement of issues for the inquiry was agreed on 16 November. As all subsequent evidence concentrated on these issues, the statement is reproduced in full here:

In light of the Waitangi Tribunal's jurisdiction, conferred by s 6 of the Treaty of Waitangi Act 1975:

- a) What is a wānanga? What do Treaty principles require about the way in which conceptions of a wānanga are best developed and implemented?
- b) What are the Treaty requirements for the respective roles and responsibilities of the Crown, TWA, the claimants and the wider iwi communities in protecting the wānanga?
- c) How does the conception of a wānanga shape its future direction? How do the Crown, TWA, the claimants and the wider iwi communities negotiate change in their conception of a wānanga in a manner that complies with Treaty principles?
- d) What does the conception of a wānanga mean for the content and negotiation of a charter and profile?
- e) When, as now, TWA's management and governance is being conducted by extraordinary means, what do Treaty principles require of the Crown in relation to TWA's current and future operations?
- f) What were the considerations that the Minister took into account in proposing the changes to the TWA charter and, in Treaty terms, are they appropriate considerations?
- g) In proposing those changes, has the Crown presented a coherent and accountable face to TWA, the claimants and the wider iwi communities?
- h) Given that the Tribunal is not inquiring into the reasons for the wānanga's present management and governance arrangements, how could the Crown's responsibilities be better fulfilled in the present circumstances? What is a reasonable and robust process in the present circumstances to negotiate the charter and profile, and what timeframe is appropriate? What practical measures or indicators can be used to assess the appropriateness of the process?
- i) What would Treaty principles require for a 'best practice' process for negotiation of the charter, profile and future direction of TWA between the Crown, TWA, the claimants and the wider iwi communities?
- j) How could the relationships between all the parties be improved and strengthened for the future so as to maintain standards of behaviour consistent [with] the Treaty?<sup>8</sup>

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8. Paper 2.3.3, app

The issues fall into three broader categories, relating to:

- (a) the conception of a wānanga, and the implications for TWOA ((a)–(d));
- (b) the relationship between the Crown and TWOA and the way in which this relationship has been conducted in the past ((d)–(h)); and
- (c) the ways in which this relationship might be better conducted in the future ((h)–(j)).

This report addresses each of these broader categories in turn. Chapter 2 deals with the question ‘What is a wānanga?’, giving the claimants’ views, the Crown’s views, and the Tribunal’s comments. Chapter 3 details the past and present relationship between TWOA and the Crown in relation to the Crown’s fulfilment of the terms of the 2001 settlement, its interventions in the governance and management arrangements of the wānanga, its negotiations over the future direction of TWOA, and its scrutiny of TWOA’s educational provision. Chapter 4 presents the Tribunal’s analysis of this relationship with respect to the relevant principles of the Treaty, the way in which these principles should guide the relationship between the parties, and whether or not the parties’ behaviour was consistent with those principles. In chapter 5, we present our conclusions, findings, and recommendations.

It should be stressed that, while the underlying reasons for past failures need to be acknowledged, rather than apportioning blame the Tribunal’s focus throughout is on better practice for the future. We see our role in this inquiry as being to provide a platform that will enable all the parties to move forward together in a united effort to sustain the undoubted educational achievements of Te Wānanga o Aotearoa for the good of the nation as a whole.

## CHAPTER 2

### THE CONCEPT OF A WĀNANGA

#### 2.1 INTRODUCTION

The question ‘What is a wānanga?’, which opened the Tribunal’s statement of issues, occupied a considerable amount of hearing time. It became clear that, on the one hand, the claimants had a consistently holistic and inclusive view of a wānanga and its relationship to its community. On the other hand, the Crown was seeking to marry the perceived role of a wānanga with its desire for increasing differentiation and specialisation (what it called ‘distinctive contribution’) in the tertiary sector.

The starting point for this Tribunal was the view of a wānanga adopted by the Wai 718 Tribunal in its 1999 *Wānanga Capital Establishment Report*.<sup>1</sup> This in turn was based on the definition of a wānanga provided in section 162(4)(b)(iv) of the Education Act 1989 (as added by section 36 of the Education Amendment Act 1990):

A wānanga is characterised by teaching and research that maintains, advances, and disseminates knowledge and develops intellectual independence, and assists the application of knowledge regarding āhuatanga Māori (Māori tradition) according to tikanga Māori (Māori custom).

As the earlier Tribunal commented, ‘This definition places a statutory responsibility upon wānanga to teach and conduct research within traditional Māori social structures.’<sup>2</sup>

The Tribunal went on to explain that, although wānanga are iwi-based and iwi-initiated institutions, they are open to everybody, regardless of ethnicity:

Wānanga, like their cousins – universities, polytechnics, and colleges of education – are providers of education that teach all who wish to learn. The difference between these institutions lies not only in what they teach but also in how they teach it. In other words, the difference lies in the system or ‘cultural mindset’ of delivery.<sup>3</sup>

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1. Waitangi Tribunal, *The Wānanga Capital Establishment Report* (Wellington: Legislation Direct, 1999), p 11

2. Ibid

3. Ibid, pp 20–21

This means that ‘Māori studies’, as taught in universities, ‘focuses on studying Māori society from a Pākehā perspective’, while ‘mātauranga Māori’ is about ‘studying the universe from a Māori perspective’.<sup>4</sup>

The Tribunal concluded that:

Wānanga is an ancient process of learning that encompasses te reo and mātauranga Māori. Wānanga embodies a set of standards and values. As a verb, ‘to wānanga’ is to make use of mātauranga Māori in all its forms in order to teach and learn. It is clear that te reo Māori and mātauranga Māori are taonga. Wānanga is given life by these taonga, and in the reciprocal nature of the Māori world, wānanga also serves to give life to te reo and mātauranga. Each is dependent on the others to nurture, sustain, and develop.<sup>5</sup>

The Tribunal found that wānanga, ‘as a system of learning, and a repository of mātauranga Māori, is a taonga in its own right’. Yet, it does not exist in isolation from te reo and mātauranga Māori:

Modern institutions claiming status as wānanga and calling themselves wānanga need to demonstrate that they recognise and incorporate the set of standards and values embodied by wānanga. Whether they do will in the end be judged by the communities they serve.<sup>6</sup>

The task before the present Tribunal, then, is to explore the set of standards and values embodied by wānanga in relation to TWOA.

## 2.2 THE CLAIMANTS’ VIEW

Claimant witness Rereamoamo Monte Ohia was an education officer in the Māori and Islands Division of the Department of Education’s head office in Wellington from 1984 to 1989. In that role, he was involved with the formulation of the Education Act 1989 and, in particular, discussions about the definition, vision, and possible future outcomes of wānanga.<sup>7</sup> In explaining his view of what the legislative focus on āhuatanga Māori and tikanga Māori meant for wānanga, Mr Ohia noted that the debates leading up to the Education Amendment Act 1990 addressed five particular concerns about the vision and possible future outcomes of wānanga:

- ▶ Obligations on the Crown, through the Treaty of Waitangi, to exercise proper governance over wānanga, to enable wānanga to express rangatiratanga, and to achieve equity

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4. Waitangi Tribunal, *The Wānanga Capital Establishment Report*, p 21

5. *Ibid*, p 48

6. *Ibid*

7. Document A26, paras 5–6

for Māori in education so as to close the growing educational disparity between Pākehā and Māori.

- ▶ The importance of wānanga that are TEIs having an equivalent status to universities, polytechnics, and colleges of education.
- ▶ The importance of wānanga being able to provide courses from bridging levels (basic literacy, numeracy, te reo Māori, and lifestyle courses) to degree levels and beyond.
- ▶ The role of wānanga in leading a revitalisation of Māori culture and learning and in providing education through tikanga Māori, which welcomes people of all ethnicities (including Pākehā, Māori, Pacific Islanders, Asians, and others).
- ▶ A better transition of Māori into society by providing appropriate mainstream courses.<sup>8</sup>

It is significant that, as Mr Ohia informed us, the term ‘āhuetanga Māori’ was preferred in the Act to terms like ‘Māoritanga’, ‘mātauranga Māori’, and ‘taha Māori’ because it was ‘untainted by previous use in policy’ and referred to ‘all aspects of Māori life of the past, present and future’. Mr Ohia observed that āhuetanga Māori can and should be defined only by Māori, through Māori language and concepts. English terms cannot adequately capture the full meaning of the term. This is shown by the translation of āhuetanga Māori as ‘Māori tradition’ in the Education Act 1989. Mr Ohia explained that āhuetanga Māori encompasses both traditions (which, although handed down from the past, are ever-evolving) and material and spiritual objects and concepts, including relationships.<sup>9</sup>

As for ‘tikanga’, Mr Ohia explained that the root word was ‘tika’, whose basic meaning is ‘right’ or ‘proper’. Therefore, ‘tikanga Māori’ emphasises the requirement of ‘doing things “right” [or properly] in Māori terms’’. The criteria Māori use to determine right from wrong are ‘firstly a set of Māori principles and values and secondly, customs that may become regulatory or procedural – a way of doing things’. But tikanga, he said, can also refer to ‘protocols, learning styles or a set process used to create a secure learning environment for learners.’<sup>10</sup>

Taken together, then, āhuetanga Māori and tikanga Māori’ according to Mr Ohia, ‘encapsulate a set of values and principles that establish the standards to underpin and inform all activities and ideas’. The Tribunal was given various views about what those sets of values and principles might include. We understood their essence to be:

- ▶ manaakitanga (caring, compassion, generosity, hospitality);
- ▶ rangatiratanga (independence, autonomy, self-determination);
- ▶ mana whenua (status in relation to the land or the local rohe);
- ▶ wawata (hope, expectations);

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8. Ibid, para 6

9. Rereamoamo Ohia, oral evidence, 30 November 2005; doc A26, paras 13–14

10. Document A26, para 15

- ▶ kotahitanga (unity, togetherness);
- ▶ whānaungatanga (family or family-style relationships and ties);
- ▶ whakamana (enhancement, upliftedness);
- ▶ kaitiakitanga (stewardship, protection);
- ▶ whakamā (shame as a means of emphasising responsibility and accountability);
- ▶ whakapapa (founders' or ancestors' genealogical relationship – literal or metaphorical – to descendants or beneficiaries) and;
- ▶ te reo (language, literacy, oracy).<sup>11</sup>

The values of kotahitanga and whānaungatanga in particular, according to Mr Ohia, require Māori to be inclusive, not exclusive. Further, in order to give full effect to āhuatanga Māori and tikanga Māori, wānanga must:

- ▶ incorporate all dimensions of Māori existence into their pedagogy, recognising the importance of both mātauranga Māori and life skills to succeed in the twenty-first century, in the best traditions of academic inquiry and critique;
- ▶ be in close contact with Māori stakeholder communities in order to engage with their many understandings and particular applications of āhuatanga Māori; and
- ▶ innovate and create new knowledge and applications.<sup>12</sup>

Mr Ohia summed up in a striking way what education expressing āhuatanga Māori and tikanga Māori should be:

[It] is not and cannot be confined to teaching and research that can be limited to a narrow range of prescribed subject areas, nor is it concerned with the ethnic profile of the students that are taught. What matters is whether or not the education offered will facilitate a community to express the set of values described above [manaakitanga, rangatiratanga, mana whenua, etc].<sup>13</sup>

In his evidence for the claimants, Dr Ranginui Walker<sup>14</sup> provided a similar view of what education expressing 'āhuatanga Māori' at a wānanga should be:

In essence āhuatanga Māori is not necessarily concerned with the subject matter that is being taught on a course at a wānanga, neither is it necessarily concerned with the ethnicity

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11. Document A26, para 16

12. Ibid, paras 17–18

13. Ibid, para 19

14. The Crown asked to have noted its objections to Dr Walker, a member of the Waitangi Tribunal, giving evidence for the claimants. The basis of the Crown's objection was that a member of the Tribunal giving evidence in circumstances where the member was not a key claimant or where the member's evidence was not compiled prior to her or his appointment as a member raised the possibility of perceived bias on the part of the Tribunal hearing that member's evidence. The Crown also referred to the discomfort involved in cross-examining a Tribunal member before whom counsel may have to appear in future. The Tribunal has no power to disallow relevant evidence, but given the sensitivities attached to Dr Walker's appearance as a witness, the claimants agreed to limit his evidence to issues relating to the meaning of 'āhuatanga Māori' and to his role as a member of the New Zealand Qualifications Authority audit panel that performed a comprehensive audit of the wānanga in 2003.

of the students that a course might appeal to. What matters is the purpose and mode of delivery and whether or not a particular course will facilitate a community to express a particular set of values.<sup>15</sup>

From this, he concluded that āhuetanga Māori ‘develops organically out of the Māori people whose interests are served by a particular wānanga’ and that ‘it is not possible for the Crown to make an informed decision as to the relevance of a particular course that a wānanga wishes to teach for a particular community from on high without proper reference to the community’.<sup>16</sup>

### 2.3 THE CROWN’S VIEW

As the focus of tertiary education policy has shifted from access and participation in the 1990s to quality and relevance in the 2000s,<sup>17</sup> the Crown’s view of the character and functions of a wānanga has become more prescriptive in comparison with that expressed in the Education Amendment Act 1990. The tertiary education strategy (TES) introduced in 2002 devoted eight pages to strategy 2: ‘Te Rautaki Mātauranga Māori – Contribute to the Achievement of Māori Development Aspirations’. Not once in those eight pages was there any mention of āhuetanga Māori. Instead, the emphasis was on mātauranga Māori, defined as ‘knowledge and intellectual tradition that belongs to Māori’.<sup>18</sup> Strategy 2 accorded the three wānanga that are TEIs only three sentences, stating that they would be ‘working in partnership with the Crown to provide a growing range of quality learning opportunities and in the development of their research and teaching capabilities’. In line with the TES’s second objective – to achieve ‘increased differentiation and specialisation across the system’ – strategy 2 noted that, for Māori education providers, ‘Building quality and depth of provision rather than breadth will be a key focus for policy’.<sup>19</sup>

In an attempt to achieve greater clarity for this objective in relation to wānanga, the 2005 statement of tertiary education priorities for 2005 to 2007 declared:

In advancing the application of knowledge concerning āhuetanga Māori according to tikanga Māori, the role of the wānanga is to:

- ▶ provide quality Māori-centred tertiary education that supports and enhances te ao Māori [previously defined as the Māori world];

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15. Document A27, para 13

16. Ibid, para 19

17. Document A29, para 33

18. Ministry of Education, *Tertiary Education Strategy, 2002/07* (Wellington: Ministry of Education, 2002) (doc MOE0018), p 30

19. Ibid, pp 23, 33

- ▶ provide pathways for Māori students and learners into other tertiary education institutions;
- ▶ promote the development of kaupapa Māori provision at all levels of study; and
- ▶ advance knowledge by developing high quality Māori research and research capability.<sup>20</sup>

In his evidence for the claimants, Dr Walker said that he considered this statement to be ‘an inappropriately restrictive and inconsistent interpretation of āhukatanga Māori’:

It is applying a very narrow view which essentially tends towards delivering courses with a Māori cultural content to Māori. It fails to recognise that āhukatanga Māori is about the ethos and process rather than the subject matter and about the capacity of communities to determine for themselves what āhukatanga Māori should be within the context of their communities.<sup>21</sup>

In response, the Secretary for Education, Howard Fancy, saw the statement as providing a framework within which the character of each wānanga could be articulated.<sup>22</sup> Arguing that ‘the definitions do not need to be restrictively interpreted’, he placed ‘greater importance in any dialogue concerning wānanga to try to get to the essential or practical nature of the learning outcomes and quality of teaching and research outcomes that are implied’. He wanted to understand and to ‘have articulated in [a] way that different parties can understand within their respective world views – to the greatest extent possible – the intellectual core of the wānanga, and how this is defined . . . in ways that are centred within a Māori world view’. Such an articulation could ‘help inform how quality might be better assessed from a best of both worlds approach.’<sup>23</sup>

Mr Fancy accepted that a wānanga ‘is about a relationship between [an] institution, its students and its community’ and stated that ‘It is the essence of these relationships that is important in terms of the learning, teaching qualities and any reciprocal accountabilities’. He saw the challenge as being ‘to define and articulate the core essence, which becomes the defining characters [*sic*] of an institution as a wānanga.’<sup>24</sup> He considered that this challenge was being worked through in the negotiations over the revisions to TWOA’s charter, a subject to which we return in chapter 3.

Craig Workman, the principal Māori adviser for the Tertiary Education Commission (TEC), argued that the Crown had taken ‘a broad view of āhukatanga Māori’ and that a narrow view would be ‘simply requiring all TEI wānanga to deliver only teaching and research

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20. Ministry of Education, *Statement of Tertiary Priorities, 2005/07* (Wellington: Ministry of Education, [2005]) (doc MOE0031), p8

21. Document A27, para 24

22. Howard Fancy, oral evidence, 1 December 2005

23. Document A29, paras 41–43

24. *Ibid*, paras 43–44

initiatives that relate to Māori tradition, for example matters such as whakairo, whakapapa and te reo'. He considered that, if this narrower view had been intended, it might have been better expressed in the term 'mātauranga Māori'. According to Mr Workman, the Crown's broader understanding 'allows TEI wānanga to deliver a diverse range of teaching and research initiatives' and has 'included concepts relating to the modern application of āhuetanga Māori'.<sup>25</sup>

Mr Workman also considered, however, that āhuetanga Māori applies to course content, stating that the term is 'a noun that describes the body of teaching and learning content within wānanga settings in section 162(4)(b)(iv) of the Education Act':

Hence, while a broader conceptualisation of āhuetanga Māori is accepted, the way it is used in the Education Act cannot be solely described as a set of processes. This is not to say Māori processes, values and ways of doing and understanding the world are unimportant. The Crown agrees that these matters are vitally important components of the TEI wānanga concept. In relation to TEI wānanga, the Education Act captures, at least in part, the vitality of this aspect by ensuring teaching and research initiatives accord with tikanga Māori (Māori custom). Accordingly, it is both content and process considerations that are important in guiding the role of TEI wānanga.<sup>26</sup>

It followed, according to Mr Workman, that 'without a consideration of content at some point then effectively any body of knowledge (the French language for example) could be included within āhuetanga Māori'.<sup>27</sup> He also stated that the values accorded to āhuetanga Māori by Mr Ohia and Dr Walker, 'despite having some conceptual differences', are 'matters which contribute significantly to the development of shared understandings in this regard'.<sup>28</sup>

#### 2.4 THE TRIBUNAL'S COMMENTS

The word 'āhua' (of which āhuetanga is the gerund, or verb functioning as a noun) is given various meanings in dictionaries, none of which is 'tradition'. Herbert Williams' *Dictionary of the Māori Language*, cited by Dr Walker, gives for the noun 'āhua' the translations 'form' or 'appearance'. The verb 'āhua' means 'to form' or 'to make', and the passive form of the verb,

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25. Document A33, paras 21–23

26. Ibid, para 25

27. Ibid, para 26. In response to a question from Crown counsel, Dr Walker considered that a wānanga course in the French language would be justified where a community wanted such a course and it was taught according to Māori principles. He gave the example of a wānanga wishing to establish a relationship with a community or educational institution in French Polynesia, for which a knowledge of French would be invaluable. In oral evidence, Mr Workman agreed with Dr Walker that 'it would depend on the surrounding circumstances' whether a wānanga was justified in teaching a French course.

28. Ibid, para 25

‘āhuatia’, means to ‘be formed’ or ‘be near’. ‘Āhuatanga’ itself is translated as ‘likeness’,<sup>29</sup> but it is clear from other glosses of the word that it could also mean something ‘formed’ or ‘made’. Hori Ngata’s *English–Māori Dictionary* uses ‘āhuatanga’ to translate ‘likeness’ in the sense of ‘made in a form resembling’ rather than indicating an immediate physical correspondence. ‘Āhuatanga’ is commonly used in modern Māori to mean ‘circumstance’, and this is another of the meanings for the term given in Ngata’s dictionary.<sup>30</sup>

The word ‘tradition’ is translated by Ngata as ‘kōrero tīpuna’ (literally, ancestor stories) or ‘tikanga-ā-iwi’ (tribal custom), and ‘traditional’ as ‘tikanga tuku iho’ (customs or lore passed down). There are other ways of expressing this idea; frequent analogies are ‘ngārāo mua’ (ancient days), ‘ngātikanga o neherā’ (ancient customs), or lore or customs of ‘te ao kōhatu’ (of the ancient, pre-contact world). No scholarly source that we have consulted translates ‘tradition’ as ‘āhuatanga’, or vice versa.

‘Mātauranga Māori’ (the paradigm of Māori knowledge or Māori episteme) also includes tradition but is a broader collection of Māori knowledge or a set of subjects relating to esoteric and spiritual knowledge and theory, iwi and hapū traditions, lore, tikanga, ritenga, ritual, whakapapa, waiata, whai kōrero, Māori art forms, and other kinds of specifically Māori knowledge, based in the past but often used and evolving in the present, for the future.<sup>31</sup>

The Tribunal therefore considers that the gloss of the term ‘āhuatanga Māori’ as ‘Māori tradition’, as in section 162 of the Education Act 1989, is incomplete. While āhuatanga Māori can include tradition, that word alone cannot cover all that is implied in the term. In our view, āhuatanga has no limitations in breadth or depth, and can be glossed only in Māori (as ‘he mea whakaāhua’). Only those reared, experienced, and trained in āhuatanga Māori and tikanga Māori are fit and have the authority to interpret the term. In practice, we consider that only Māori linguistic experts and kaumātua working together should attempt to reach a consensus on the full meaning of āhuatanga Māori for any community.

Further, we are convinced by the linguistic evidence presented to us by Mr Ohia and Dr Walker that the inclusion of ‘āhuatanga Māori’ in the statutory definition of wānanga means that wānanga are required to teach more widely than within the confines of Māori tradition, ‘mātauranga Māori’, or ‘traditional’ Māori subjects. The ‘translations of ‘āhua’ as ‘form’ or ‘shape and of ‘āhuatanga’ as something ‘formed’ or ‘shaped’ indicate to us that the claimants are correct when they speak of āhuatanga Māori as a process or method of Māori teaching rather than a defined – and confined – set of subjects. We note that the Wai 718 Tribunal, as outlined at the start of this chapter, took a similarly broad view of the educative role of wānanga.

29. Herbert Williams, *A Dictionary of the Māori Language*, 7th ed (Wellington: Government Printer, 1971), p 4

30. Hori Ngata, *English–Māori Dictionary* (Wellington: Learning Media, 1993), pp 256–257

31. Te Maire Tau, ‘Mātauranga Māori as an Epistemology’, *Te Pouhere Kōrero Journal*, vol1, no1 (March 1999), pp10–23

This Tribunal therefore considers that the task of a wānanga is to teach by Māori methods and in a Māori way all those who wish to learn by those methods and in that way. Rather than defining a closed – or any – set of subjects, or a closed – or any – set of targeted learners, āhuetanga Māori describes a Māori method of teaching that facilitates a community to give expression to its values and principles. Those principles will have been established by the community the wānanga serves and will include the kinds of values described by Mr Ohia and Dr Walker. As the Wai 718 Tribunal concluded, the judgement as to whether or not a wānanga embodies those principles will in the end be made by the community it serves.



## CHAPTER 3

### RELATIONS BETWEEN THE WĀNANGA AND THE CROWN

#### 3.1 INTRODUCTION

As a wānanga that is also a TEI, Te Wānanga o Aotearoa has a dual set of accountabilities. In addition to its accountabilities to the community whose values it embodies, as described in chapter 2, it is accountable to the Crown for the use of the funding it receives and the quality of the education it provides. This chapter explores the relations between TWOA and the Crown in meeting the requirements of this second set of accountabilities up to the time of the urgent hearing. Two aspects are of particular importance for this inquiry: the extent of Crown intervention in the governance, management, and strategic direction of TWOA and the number and scope of quality audits and programme reviews being conducted by Crown agencies. The delay in payment of the suspensory loan and the wānanga's recent financial crisis will be mentioned, but only in order to establish the changing relations between TWOA and the Crown in recent months.

The events described below took place against the backdrop of a change in tertiary education priorities at the start of the twenty-first century. From access and participation, the 'drivers' of TWOA's programme provision and delivery, the priorities shifted to quality and relevance, with greater emphasis on differentiation and specialisation among TEIs (as outlined in section 2.3), or what came to be called their 'distinctive contribution'. Since 2003, this has led to the Crown setting limits on the growth of TEIs and a shift of resources away from the lower levels on the national qualifications framework – where TWOA's priorities and strengths lie – towards higher levels. The interactions between TWOA and the Crown must be seen in this context.

It should also be noted at the outset that in this case the Crown presents itself to wānanga not as a single entity but through several State agencies. Put simply, for wānanga the Crown has four faces. The wānanga has to deal with the Ministry of Education (MOE), which sets overall education strategy; the Tertiary Advisory Monitoring Unit (TAMU), which looks after the financial administration and governance of tertiary education organisations; the New Zealand Qualifications Authority (NZQA), which deals with the quality of education those organisations offer; and the Tertiary Education Commission (TEC), which allocates

Government funding. Each of these Crown agencies has stated that it wishes to see what Mr Workman called a ‘financially viable, quality, wānanga.’<sup>1</sup>

### 3.2 THE DEED OF SETTLEMENT AND BEYOND

#### 3.2.1 The deed of settlement

The first clear articulation of the appropriate balance between rangatiratanga and kāwanatanga in relation to wānanga was made by the Wai 718 Tribunal in 1999. It found that the Crown had breached the principles of the Treaty of Waitangi by ‘failing to honour its obligation actively to protect Māori rights in . . . tertiary education’; in particular, by failing to provide the three existing wānanga with capital establishment grants as it had done with mainstream TEIS. The Tribunal recommended that a one-off payment of a capital sum be made to each wānanga to compensate it for the expenditure of capital and labour that it had invested in land, buildings, plant, and equipment, and to cover the real cost of bringing its buildings, plant, and equipment up to a standard comparable with other TEIS and ‘commensurate with the needs of their existing and anticipated rolls over the next three years.’<sup>2</sup>

The Crown not only accepted these recommendations but wished to do more than provide compensation. The Secretary for Education, Howard Fancy, observed in his evidence that:

to redress the wrongs identified by the Tribunal, we looked to create a forward looking framework that centred on how each wānanga would improve education outcomes for Māori, the nature of the improvements and how the achievement of such outcomes should also be factored into the settlement.

. . . central to our approach was an emphasis on the importance of the benefits of the settlements flowing to Māori.<sup>3</sup>

TWOA identified that its major focus was on reaching out to newcomers to tertiary education and, in particular, on providing opportunities to learners who had not succeeded in the mainstream system. This was reflected in the growth projections and indicators set out in the settlement, which, according to Mr Fancy, recognised ‘the potential for strong growth in [TWOA’s] student base’. Four factors were especially important:

- ▶ the settlement was a Treaty settlement and therefore should benefit Māori in tertiary education;

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1. Document A33, para 3

2. Waitangi Tribunal, *The Wānanga Capital Establishment Report* (Wellington: Legislation Direct, 1999), pp 54, 55

3. Document A29, paras 7–8

- ▶ growth was to be concentrated on new participants in tertiary education rather than on shifting students away from other tertiary providers;
- ▶ growth in student numbers was not to come at the expense of quality; and
- ▶ growth in student numbers was to continue to be reflected in a high proportion of Māori students.<sup>4</sup>

The deed of settlement, dated 6 November 2001, set performance targets for settlement payments. Under it, the Crown would pay TWA \$25 million in 2001, \$10 million in 2002, and \$5 million in 2003, provided that its roll was at least 5795 EFTS in 2001, 6995 EFTS in 2002, and 8000 EFTS in 2003. Other performance targets to be achieved were that at least 80 per cent of students were to be Māori, at least 80 per cent of first-year enrolments were to be newcomers to tertiary education, the retention rate was to be at least 80 per cent, and the completion rate was to be at least 65 per cent.<sup>5</sup> Further quality and financial performance standards were also set.

It was further agreed that, if TWA had achieved 10,900 EFTS in 2003, additional capital would be provided by the Crown in 2004 to 2006 by way of a suspensory loan of \$20 million. The loan would be payable in three tranches – \$10 million in 2004 and \$5 million in each of 2005 and 2006 – and could be converted to non-interest-bearing equity in 2007 if unspecified objectives, agreed between the parties and relating to student numbers and quality, had been met.

Rapid growth followed at TWA: whereas the roll had been 2262 EFTS in 2000, in 2001 it was 6119 EFTS, and in 2002, 20,769. The total of \$40 million due to TWA under the settlement agreement was paid out. In 2003, its roll was 34,280 EFTS, and its projection for 2004 was 40,000 EFTS. In June 2003, however, the Crown introduced a ‘managing growth’ policy for tertiary education and imposed a ‘cap’ on the growth of each TEI of the greater of 1000 EFTS or 15 per cent a year, based on the EFTS achieved in 2002. In recognition of the fact that this would disproportionately affect TWA (and the Open Polytechnic), an exception was subsequently provided allowing TEIs to ‘bring forward’ potential future growth, which had the effect of limiting TWA’s funded enrolments to 32,000 EFTS in each of 2004 and 2005. In the event, however, student numbers at TWA fell to 28,000 EFTS in 2004. The drop was attributed by Rongo Wetere to an over-reduction of the TWA’s recruitment programme to meet the cap on growth and by others to a decline in student numbers across the tertiary sector and the falling demand for large TWA courses.<sup>6</sup> The proportion of Māori students

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4. Ibid, paras 11–12

5. In his evidence to the Tribunal, the Secretary for Education, Mr Fancy, said that the performance target that 80 per cent of students would be Māori was regarded as an indicator only, not an absolute figure or quota to be achieved (doc A29, para 17). In an email to Mr Fancy on 15 December 2004, referring to the figure of 80 per cent, the manager of TAMU, Allan Sargison, said that he thought ‘we just made that up to give meaning to the substance of wānanga’ (doc MOE0169).

6. Document A1, para 99; doc A32, para 24. It was not made clear to the Tribunal whether the fall in demand was due to a decline in demand for particular courses or to other factors, such as the very high level of employment overall.

also fell, from 77 per cent in 2002 and 59 per cent in 2003 to 49 per cent in 2004 (64 per cent if one programme, Kiwi Ora, a distance learning programme for new migrants begun in September 2004, was excluded – it accounted for about a third of the wānanga's EFTS).

### 3.2.2 The suspensory loan

In July 2004, after earlier raising the matter informally, TWA wrote to TAMU requesting payment of the first tranche (\$10 million) of the suspensory loan since the target of 10,900 EFTS in 2003 had been exceeded. TAMU did not respond until late September. In late October, TWA requested the payment of the entire suspensory loan (\$20 million). The Crown had already appropriated funding for the loan of \$10 million in 2003–04 and \$5 million in 2004–05, and initially intended to release \$5 million in December 2004 and \$10 million early in 2005, subject to the completion of the loan agreement and to TWA meeting performance measures for its Māori student profile. MOE officials were concerned that less than 50 per cent of students at TWA were Māori, whereas the target for the earlier payments had been 80 per cent.<sup>7</sup> (It should also be noted that the target of 80 per cent was originally regarded as an indicator only, not a stipulation, and that the earlier payments had been made even though TWA had not met all of its reporting requirements.<sup>8</sup>)

In February 2005, TWA announced a major and unpredicted financial difficulty. From its October projections of a \$13 million surplus for 2004, the wānanga would record a deficit of \$2 million for the year, with \$14 million over-expenditure on operating costs and \$9 million on capital (60 per cent of budget). This was causing significant pressure on the cash flow at the start of the 2005 academic year. The Crown considered that this was further evidence that TWA did not have effective financial controls in place, and it was concerned that the suspensory loan money would be used to fund operational cash shortfalls rather than capital works to support growth.<sup>9</sup> At the end of February, following the allegations in Parliament of financial impropriety at TWA, the Government appointed Brian Roche as a Crown observer and announced that the investigation by the Auditor-General into potential conflicts of interest in TWA's Kiwi Ora programme would be extended to include further allegations about the wānanga's finances. Shortly afterwards, Mr Roche was also appointed Crown manager (a non-statutory intervention related to financial matters only) in order to stabilise TWA's financial situation and secure its longer term financial viability. A short-term Crown loan was made available to TWA and the funding for the suspensory loan was 'rolled over', pending the resumption of negotiations on the performance agreement needed to trigger its release.<sup>10</sup>

7. Allan Sargison to Howard Fancy (email), 15 December 2004 (doc MOE0169)

8. Ministry of Education, 'Te Wānanga o Aotearoa: Update', submission to Minister of Education, FP90/43/14/5, 23 December 2004 (doc MOE0171)

9. Document A12, paras 31–34

10. Ibid, app κ

### 3.2.3 The partnership agreement

As part of the Wai 718 settlement negotiations, the Crown proposed to create a partnership agreement spelling out the goals, principles, and commitments of the relationship between the three TEI wānanga and the Crown. Aspects to be addressed included:

- ▶ balancing the wānanga's responsibilities to their stakeholders with the Crown's goals for the TEI sector;
- ▶ ensuring educational quality in fast-growing institutions; and
- ▶ providing assurance that further capital injections would reflect soundly based development plans.<sup>11</sup>

A partnership agreement with TWOA and the other wānanga was discussed during 2001, and a draft was attached to the draft deed of settlement with TWOA. Among the principles listed was a commitment to the following partnership values in conducting the relationship between the Crown and the wānanga:

- i. Rangatiratanga: Autonomy. Recognising that each partner will have different lines of accountability. Enabling each party to develop and grow in its own way while recognising and acknowledging difference.
- ii. Kotahitanga: Unity. Agreement to work together towards a shared vision; and
- iii. Manākitanga: Goodwill. A commitment to work together within an environment of trust, respect and generosity towards each other. Recognising and understanding the capabilities and constraints each partner brings to the relationship.<sup>12</sup>

It was envisaged that the partnership would be given effect to by a programme of regular consultation between the parties, which would consist of 'at least annual meetings between Ministers, wānanga representatives at board chair or senior representatives of iwi involved in the governance of the wānanga, and the Secretary of Education' and 'regular meetings between the Secretary of Education and Wānanga Chief Executives'.<sup>13</sup> In addition, the Crown remained obliged to deal with each of the wānanga individually and according to its own circumstances.<sup>14</sup>

Keith Ikin, at that time a Crown negotiator of the deed of settlement with TWOA, gave evidence that the partnership agreement was never completed because 'the focus of discussions between the Crown and TWOA moved from implementing the partnership agreement to negotiating payment arrangements for the capital funding and the associated Settlement Deeds'.<sup>15</sup> Clause 11 of the deed of settlement did recognise that:

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11. Document A29, para 18

12. Minister of Education, 'Settlement of Wānanga Capitalisation Claim: Draft Deed of Settlement and Settlement Package for Te Wānanga o Aotearoa', paper to Cabinet Policy Committee, POL(01)277, 8 October 2001 (doc MOE0006), para 5(e)

13. Ibid, paras 7, 8

14. Ibid, para 10

15. Document A24(a), para 23

The parties wish to acknowledge and record their mutual commitment to a constructive future relationship and are currently agreeing principles to guide that relationship. These principles will be set out in a Partnership Agreement to be signed between the parties.<sup>16</sup>

The draft partnership agreement attached to the draft deed of settlement with TWA appears at appendix II.

### 3.3 THE TWA COUNCIL

TWA's council is its governing body and was first constituted in 1993. In mid-2002, the Crown appointed a 'development adviser', Graeme McNally, to assist the council to develop its governance role 'in accordance with the sort of "good practice" which the Crown might expect in a TEI'.<sup>17</sup> Certain deficiencies in the council's constitution and inward information flow, and in the work of its audit committee, were identified. According to the manager of TAMU, Allan Sargison, some progress was made in implementing a more robust governance structure, but two factors slowing progress were, in his view, the 'reluctance' of the then tumuaki (or chief executive officer) to view good governance as important, and the membership of the council, which included 'a majority of long-serving Councillors who have limited exposure to good governance practices'.<sup>18</sup>

In May 2005, the TWA council consisted of 14 members, including the tumuaki and four members appointed by the Minister of Education. There were five vacancies, including staff and student representatives. Under section 195D of the Education Act 1989, the Minister of Education, if he or she believes on reasonable grounds that there is a serious risk to the operation and long-term viability of a TEI and if other methods of reducing the risk have failed or are likely to fail, has the power to dissolve the institution's council and appoint a commissioner to take over all of the former council's powers. On 9 May 2005, the Minister of Education, Trevor Mallard, advised TWA that, because of the serious financial situation he considered the wānanga was facing, and in order to give 'the public confidence in the wānanga', he was beginning the process to appoint a statutory commissioner.<sup>19</sup> The TWA council responded with a comprehensive list of reasons why a commissioner should not be appointed.<sup>20</sup> Mr Roche, in his capacity as Crown observer, also advised the Secretary for Education that TWA's financial position had improved and that the council was

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16. Deed of Settlement between Te Wananga o Aotearoa Te Kuratini o nga Waka and Her Majesty the Queen in Right of New Zealand, 6 November 2001 (doc A1, app RW9), cl 11

17. Tertiary Advisory Monitoring Unit, 'At Risk Update: Te Wānanga o Aotearoa', paper to Minister of Education and Associate Minister of Education (Tertiary Education), FP90/43/14, 16 June 2004 (doc MOE0130), para 2

18. *Ibid.*, para 3

19. Document A1, app RW48

20. See doc A1, apps RW49–RW51

‘actively’ strengthening its governance and management arrangements.<sup>21</sup> Nevertheless, on 20 June the Minister advised TWA that he had formed a ‘preliminary decision’ to appoint a commissioner.<sup>22</sup>

A curious sequence of events followed. On 28 June, the council agreed to reduce its membership from 14 to five, which members included Craig Coxhead, a ministerial appointee and the chairperson since the beginning of 2004, and two other ministerial appointees.<sup>23</sup> Mr Coxhead told the Tribunal that the purpose of this move was to ‘provide confidence to the Minister and the Crown that governance and management arrangements were being dealt with adequately so that the appointment of a Commissioner could be avoided.’<sup>24</sup> It was not clear from the evidence presented to the Tribunal whether or not the Minister’s preliminary decision to appoint a commissioner had been withdrawn.

The legal validity of the reduction in council members was subsequently the subject of judicial review proceedings in the High Court. A central issue was whether all or any of six former members, including some Aotearoa Institute and iwi representatives who had been council members since the founding of TWA in 1993, had in fact resigned their office. If they had not resigned, the five-member council operating since 19 July 2005 would have wrongfully excluded current councillors. Even if the others had resigned, the five-member council might not be lawfully constituted (a minimum of 12 councillors is required by section 171 of the Education Act) and its decisions and actions since 19 July could therefore be *ultra vires*. That issue was not, however, before the court.

The High Court determined on 22 November that the six former members had effectively resigned and that their positions were vacant. This removed the immediate legal challenge to the council’s subsequent actions and enabled it to begin regularising its membership. At the Tribunal’s hearing, however, counsel for TWA advised that an appeal from the High Court’s decision had been lodged. If that is so, the council could be prevented from filling any of the contested places before the appeal is determined.

Mr Coxhead told the Tribunal that the six former members of the council would form part of a new body called Nga Tuara (supportive backbone) to provide guidance on tikanga and other matters. He maintained that, although this body had not yet been established, it would be ‘a way of ensuring that the people that created TWA retained a link into the governance of the institution.’<sup>25</sup> Mr Coxhead also said that the previous council had ‘identified a gap in the skill sets [it] required’ and had been considering for some time how to address this.<sup>26</sup>

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21. Document A1, app RW53

22. Ibid, app RW54

23. Council chair, Te Wānanga o Aotearoa, to Minister of Education, 5 July 2005 (doc MOE0251)

24. Document A36, para 18

25. Ibid, para 22

26. Ibid, para 17

**3.4 THE CHARTER AND PROFILE**

Every TEI is required by law (sections 159N and 159Y of the Education Act 1989, added in 2002) to produce a charter and a profile. These two documents were described by the chief executive of the TEC, Janice Shiner, as the ‘tools which generally govern the Crown’s relationship’ with TEIS.<sup>27</sup>

The charter expresses a TEI’s mission, special character, and role in the tertiary education system as a whole. It must be approved by the Minister for Tertiary Education and has a fixed term, ranging from one to eight years depending on the kind of TEI, its alignment with the TES and the statement of tertiary education priorities, and the assessment of risk. TWA’s current charter was approved by the then Associate Minister for Education (Tertiary Education), Steve Maharey, in 2003. It came into effect on 1 January 2004 and is due to expire on 31 December 2007.<sup>28</sup>

A TEI’s profile is prepared annually in negotiation with the TEC and is approved by the TEC’s board of commissioners. It demonstrates how a TEI will give effect to its charter by setting out:

- ▶ its operating plans, key policies, and proposed activities for the next three years;
- ▶ its objectives, performance measures, and targets;
- ▶ its short- to medium-term strategic direction; and
- ▶ those activities for which it seeks or receives funding via the TEC.<sup>29</sup>

The profile should be completed by 30 September each year, because it provides the basis on which Crown funding is allocated for the following academic year.

In February 2005, in response to concerns about the student numbers, quality of educational provision, governance, financial management, and short-term financial viability of TWA, the then Minister of Education, Trevor Mallard, announced a package of intervention measures (outlined in section 3.2 and in appendix 1). As part of this package, the Minister asked the TEC to negotiate changes to the wānanga’s charter, ‘in order to focus the institution on its core functions and strengthen governance.’<sup>30</sup> The Minister acted under section 159S of the Education Act 1989 rather than section 159Q, which would have allowed him to determine the changes himself. This was the first time either option had been used.<sup>31</sup> The Minister told TWA that its revised charter needed to take ‘as its starting point’ the definition of wānanga in section 162 of the Education Act (see sec 2.1 above), and he set a deadline of 30 June 2005, so that the profile for 2006 to 2008 could be completed by 30 September.<sup>32</sup>

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27. Document A30, para 17

28. Document A28, para 3

29. Document A30, para 21

30. Minister of Education, ‘Tertiary Education Issues’, Cabinet aide memoire, 28 February 2005 (doc TEC0073), para 5

31. Document A28, paras 7–8

32. Minister of Education to council chair, Te Wānanga o Aotearoa, 23 March 2005 (doc TEC0117), p 2

Rongo Wetere and Keith Ikin for the claimants, Craig Coxhead for TWOA, and Howard Fancy and Max Kerr (TEC group manager, liaison and development) for the Crown all provided the Tribunal with comprehensive accounts of part or all of the charter revision process, which involved the council and staff of TWOA and the heads and senior officials of MOE, TAMU, TEC, and NZQA.<sup>33</sup> It is clear from references in internal Crown documents to ‘what the Minister wants’ that the process was driven by the Minister of Education, who was seeking to reduce the size of TWOA and the scope of its activities to a focus on provision ‘by Māori for Māori’. The clearest expression of this came in one of TEC’s proposed additional sections to the draft charter produced by TWOA. The section was headed ‘Distinctive Contribution’ and stated:

. . . TWOA will be seeking to further develop and distinguish its specialist and expert role as a wānanga. This will involve enhanced strategic positioning, which is selective and focuses on services and learner groups whose needs can best be met by a wānanga.

To this end, TWOA has identified four areas of focus for its activities. These areas of focus are, in order of priority:

1. The delivery of mātauranga Māori targeted towards Māori learners, in a Māori context; (to uphold mātauranga Māori)
2. The delivery of core generic education . . . targeted towards Māori learners, in a Māori context; (to increase Māori participation in tertiary education)
3. The delivery of educational programmes . . . targeted towards mainly Māori learners, in a Māori context; (to present opportunities for Māori to succeed as Māori and be global citizens)
4. The delivery of mātauranga Māori to all New Zealanders (to support the development of nationhood that values diversity and reflects New Zealand’s unique history).<sup>34</sup>

Targets for the proposed ‘core activities’ listed above were provided in the same section by TEC. The percentage of EFTS taught in these areas was to be greater than 80 per cent by the end of 2006, greater than 95 per cent by the end of 2007, and 100 per cent by the end of 2008.<sup>35</sup>

TEC also indicated in a comment on TWOA’s draft that ‘we would expect to see the proportion of Māori students to move towards 65 to 75% of enrolments over next 3 years [from less than 50 per cent], as a result of a change in focus rather than any limits on non-Māori enrolments’ (emphasis in original).<sup>36</sup>

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33. Refer to the briefs of evidence of Rongo Wetere, Keith Ikin, Max Kerr, Howard Fancy, and Craig Coxhead (docs A1, A24, A28, A29, A36 respectively) and to the oral evidence of each of those witnesses.

34. Te Wānanga o Aotearoa, ‘Charter, 2005 to 2008 (Proposed Revisions): Working Draft, vers 10, 12 July 2005 (doc TEC0235), p 4

35. Ibid, p 5

36. Te Wānanga o Aotearoa, ‘Charter’, vers 9, 27 June 2005 (doc TEC0235), p 13

These amendments were opposed by TWOA's (reduced) council and did not appear in this form in its subsequent revisions of the charter. The TEC's desire to see such provisions incorporated into the wānanga's charter at this stage, however, created in TWOA a legacy of mistrust of TEC's intentions. Mr Coxhead considered that the Crown was 'effectively insisting that the Wānanga become an institution that was either exclusively or predominantly comprised of Māori students'. He also considered the Crown to have a 'unilateral, restrictive and limited interpretation of a wānanga' and resisted any references in the revised charter to 'ethnicity in terms of functions, range of provision and course profiles' or references that would 'limit TWOA to teaching only traditional Māori subjects'.<sup>37</sup> However, where the Crown's proposed amendments to the wānanga's governance and management arrangements and provisions for course quality in the charter were felt to strengthen TWOA, they were accepted by the council.

It should also be noted that, between March and June 2005, various Crown officials held meetings with TWOA in an attempt to convey precisely what was expected from the revisions to the charter. At the same time, at the Minister's request, officials were developing a 'model charter' incorporating the changes he wished to see. The Minister provided feedback as the model charter was developed. When TWOA submitted its own revised charter on 30 June, officials responded with a detailed list of 'key decision areas' that they considered were not yet covered, along with substantial sections of additional text drawn from the model charter. One small incident, noted by Mr Coxhead, perhaps encapsulates the Crown's approach at this point. On the title page of TWOA's revised draft charter is set out a karakia that, the Tribunal was told, is said every morning in classes. In accord with the desired emphasis on the definition of wānanga in the Education Act 1989, TEC proposed to replace the karakia on the title page with that definition. The fact that this proposal was subsequently dropped was described by Mr Workman as an example of TEC's flexibility, but that it was proposed at all suggests a lack of understanding of taha Māori on the part of some Crown officials.

TWOA then revised its version of the charter in the light of the Crown's detailed response and, after positive feedback from officials, submitted it on 10 August, along with an outline of the proposed profile for 2006 to 2008. This version of the charter was also found to be inadequate in certain areas by TAMU (though not by TEC). These areas included quality assurance, performance targets, and timelines. TWOA responded that this material was more appropriate for its draft profile, which was then being prepared. The Minister disagreed and indicated on 10 October that he was willing to gazette particular content for the charter if necessary.<sup>38</sup> This was one of the reasons for granting urgency for the Wai 1298 claim, and in announcing that decision the Tribunal asked both parties to suspend all critical actions or

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37. Document A36, paras 44, 48

38. Minister of Education to council chair, Te Wānanga o Aotearoa, 10 October 2005 (doc TECO298)

decisions relating to the acceptance of the revised charter and profile until its report had been released (see pp 63, 65). Negotiations on the charter have been suspended.

Although the charter on which the profile is supposed to be based had not been approved, and other programme and review issues had not been resolved, TWA submitted a draft profile on 14 October. The critical issue here was the projected size of TWA in terms of EFTS over the three-year life of the profile (2006 to 2008). While the outcome of other reviews of TWA's activities (see sec 3.5) was still not known, TWA and Crown officials agreed, following a proposal from TWA, that the profile would include a reduction in EFTS in 2006 to 25,500, in 2007 to between 24,000 and 22,000, and in 2008 to between 22,500 and 20,500.<sup>39</sup> Factors taken into account included:

- ▶ a reduction in the amount of provision offered through sub-contracting;
- ▶ a reduction in the geographical coverage of TWA's activities;
- ▶ findings from the A1/J1 review, when available (see sec 3.5.2);
- ▶ the Crown's new policy limit on the growth of any particular qualification beyond 200 EFTS; and
- ▶ the belief that many current TWA programmes were nearing the end of their apparent life-cycle.<sup>40</sup>

The Crown also considered that the Kiwi Ora and English as a second language programmes were not 'appropriate provision for a wānanga to offer', while TWA maintained that 'programmes designed to welcome migrants to New Zealand are an intrinsic part of a Wānanga's role from a tikanga perspective'.<sup>41</sup>

The Crown's interpretation of the relevant law was that, to meet TEC's allocation requirements for 2006, a revised profile had to be completed and submitted to TEC by the beginning of December. The Tribunal understands that this has been done.

### 3.5 AUDITS AND REVIEWS

The Crown has also subjected TWA's educational provision to intense scrutiny, particularly in the past year. As well as NZQA's programme for auditing course quality, there have been ongoing reviews by TEC of various programmes offered by the wānanga and their continued eligibility for Crown funding – what were described by officials giving evidence before the Tribunal as 'quality control' and 'volume control'.

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39. The acting chief operations officer at TWA, John Mote, commented to the Tribunal that 'There was certainly a push from the Government to reduce EFTS numbers at TWA' and that 'this has underpinned the Crown negotiations on the charter and profile' (doc A32, para 22).

40. Document A28, para 86

41. Ibid, para 87

**3.5.1 The NZQA audits**

The first major audit of the quality of the courses being offered by TWOA began a year after the deed of settlement was signed at the end of 2001. In 2002 and 2003, NZQA conducted focus reviews of two high-growth programmes, Mahi Ora (a distance delivery course in basic life skills leading to a national certificate in employment skills) and Te Ara Reo Māori (an introductory Māori-language programme). These audits found minimal non-compliances.

A 'full audit' of TWOA against the quality assurance standard one for TEIS was begun by a six-member team for NZQA in July 2003 and completed in September, with a final report issued in December 2003. It found that 16 requirements were not being met, particularly in quality management systems. A subsequent NZQA report to the Minister of Education and the Associate Minister of Education (Tertiary Education) noted that 'TWOA has acted decisively following the audit by initiating reviews of a number of its policies, procedures and systems. It has also developed an extensive action plan to help it target the improvements it must make.'<sup>42</sup> An on-site verification visit by NZQA in June 2004 confirmed that 'key milestones' in the action plan had been achieved.<sup>43</sup>

In 2004, NZQA also began work on a programme of focused audits of TWOA every six months to ensure that all elements of NZQA's quality standard and all TWOA's campuses and key programmes would be reviewed over a two-year cycle. The first audit was conducted in November 2004. It focused on four elements of the quality assurance standard one, on four high-volume programmes, and on two campuses.<sup>44</sup> The audit report, released in February, listed four requirements, including the development of a wānanga-wide system to manage internal and external moderation systems and an urgent upgrade of some staff qualifications in the School of Education.<sup>45</sup>

In the first half of 2005, as part of the student component performance measure, NZQA reviewed the credit value of high-volume sub-degree courses at 11 polytechnics and two wānanga (including TWOA). TWOA was reviewed in May and issues were found concerning insufficient information and monitoring and the use of unregistered educational subcontractors. These issues have since been addressed.<sup>46</sup>

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42. Ministry of Education, 'Weekly Update: Interagency Work on Te Wānanga o Aotearoa', submission to Minister of Education, Minister Responsible for Tertiary Education Commission, and Associate Minister of Education (Māori Education), FP90/43/14/5/03TWOA update 0108, 5 August 2003 (doc MOE0071), app 3

43. Tertiary Education Commission, 'Meeting with Dr Rongo Wetere, Te Tumuaki/CEO of Te Wānanga o Aotearoa' on 11 November 2004, briefing note for Minister Responsible for Tertiary Education Commission, Minister of Education, Associate Minister of Education, and Minister of Māori Affairs, B/04/2134, November 2004 (doc MOE0160), para 89

44. The programmes were Greenlight, a home-based distance delivery course in literacy, numeracy, and life skills (then still being developed with assistance from Cuban educationists) leading to a certificate in adult learning skills; the certificate in small business management; the certificate in computing level 4; and Te Ara Reo Māori. The campuses were Gisborne and Huntly.

45. New Zealand Qualifications Authority, 'Quality Audit Report: Te Wānanga o Aotearoa', 1 December 2004 (doc TEC0020), p 24

46. New Zealand Qualifications Authority, 'Update on the Qualifications Authority Review of the Credit Value of High Volume Sub-Degree Courses', submission to Minister of Education, S5-003, 15 July 2005 (doc TEC0243), app 1

The next scheduled NZQA audit of TWA took place in June and July 2005 at TWA's head office in Te Awamutu. The audit examined the implementation of the requirements of the 2004 audit and focused on four further elements of quality assurance standard one: moderation; programme development; reporting on learner achievement (including record-keeping); and internal audit processes. Corrective action was found to be required in the first three areas. The focus of the programme development audit was on the academic board of TWA, which had the power to approve low-level courses. Because of concerns that the board's approval of certain courses had been premature, the programmes selected for the audit were Greenlight and Mauri Ora (a newly developed distance-learning programme built on Mahi Ora and providing an understanding of things Māori). In both cases, the audit found that the resources for the final module had not been fully developed, even though learners had been enrolled.<sup>47</sup> In the meantime, NZQA had requested that TWA submit all new qualification proposals to it for approval before they were submitted to TEC for funding, a proposal resisted by TWA.<sup>48</sup>

### 3.5.2 The A1/J1 review

In addition to NZQA's programme of audits, in 2005 TEC launched what was called the A1/J1 review of TEIS. As with the revisions to TWA's charter, the Tribunal was given a great deal of evidence about the origins, purposes, conduct, and outcomes of the A1/J1 programme review at TWA, especially by John Mote (TWA's acting chief operations officer) and Max Kerr (TEC's group manager, liaison and development).<sup>49</sup> The A1/J1 review aimed to assess the strategic relevance of high-volume sub-degree programmes in the areas of arts, social sciences, and 'general' (category A1) and business and law (category J1) at TEIS. The review considered a qualification across four dimensions – demonstration of need for the qualification, demonstration of performance, demonstration of outcomes, and contribution to the tertiary portfolio of provision – and the qualification had to show strategic relevance in all four.<sup>50</sup> The results of the review would then be used to determine future funding levels.

For the first round of the review, TEC selected the programmes to be reviewed based on four criteria, which included programmes with large EFTS volumes or rapid growth (or both) and those with limited assessment content. Such programmes represented a large proportion of TWA's educational activities. Because so many other aspects of the wānanga were already under scrutiny, TEC officials considered whether they should exempt it from the review but concluded that to do so would compromise the integrity of the whole review

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47. New Zealand Qualifications Authority, 'Quality Audit Report: Te Wānanga o Aotearoa', 12 August 2005 (doc TEC0291), pp 12, 13

48. Kevin Fisher to Susan Shipley, Max Kerr, and Craig Workman (email), 27 May 2005 (doc TEC0206)

49. See docs A28, A32

50. Document A28, para 56

process.<sup>51</sup> They do not appear to have consulted the wānanga in forming this view, and the Minister had made it clear that the A1/J1 review was a top priority.<sup>52</sup> TEC selected 11 of TWOA's programmes for review, including the advanced certificate in Te Ara Reo Māori, Kiwi Ora, Greenlight, the certificate in small business management, and the certificate in computing level 2. These programmes amounted to 65.4 per cent of the total EFTS at TWOA in 2004.

TWOA was given seven weeks (from 16 June to 31 July) to prepare its submissions for the review, during which period the scheduled NZQA audit also took place. TEC took nine weeks to evaluate the submissions.<sup>53</sup> Its initial assessment was that seven of the qualifications (amounting to 34.3 per cent of the 2004 EFTS) had 'low strategic relevance', among them Kiwi Ora, Greenlight, and the small business management and computing level 2 certificates, and that the others had strategic relevance except at specific sites. There were four possible outcomes for a finding of low strategic relevance:

- ▶ funding for the qualification might be removed from 2006;
- ▶ funding for the qualification might be reduced;
- ▶ funding for a multi-year qualification might be withdrawn over time; or
- ▶ remedial action for the qualification might be agreed between TWOA and TEC and funding removed if milestones were not met.<sup>54</sup>

In such cases, TWOA could make further submissions to have the assessment reviewed. However, in advising TWOA of these results, Mr Kerr proposed that the possible outcomes be addressed in the profile instead. He wrote: 'It is the TEC's opinion . . . that it may be difficult for the wānanga to provide the necessary evidence [or] even if it is possible, that this would extend the process well beyond the timeframe for the Profile.'<sup>55</sup> Such an approach was rejected by TWOA on several grounds:

- ▶ the review timeframe was too short;
- ▶ the proposal to address the outcomes in the profile would mean that the initial assessments could not be reviewed, which would 'leave a stain on TWOA's record' and was 'inherently unfair';
- ▶ the proposal indicated that the A1/J1 review was 'more about limiting numbers than quality and relevance';
- ▶ TEC had predetermined the matter; and
- ▶ the initial assessments contained errors and inconsistencies.<sup>56</sup>

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51. Max Kerr, oral evidence, 1 December 2005; Tertiary Education Commission, 'Prioritisation of Work on Te Wānanga o Aotearoa's Programmes being Conducted by TEC and NZQA', aide memoire, 11 May 2005 (doc TEC0187)

52. Susan Shipley to Kevin Fisher, Max Kerr, Craig Workman, and Colin Webb (email), 27 May 2005 (doc TEC0206)

53. Document A32, app JMO2

54. Ibid

55. Ibid, para 44

56. Ibid, para 47

TWOA has since made further submissions on several programmes, and the assessment of the certificate of small business management has been upgraded to provisional strategic relevance. Although TEC maintains that Kiwi Ora is not a 'core activity' for TWOA, it has received a provisional EFTS allocation for 2006 and 2007. The Greenlight programme was the subject of considerable (and sometimes conflicting) evidence before the Tribunal about entry levels, its state of development, and the availability of resources. It is clear that TEC funding for the programme has ceased until an external assessment of the quality of the full programme has been completed.

Mr Mote noted in his evidence that he considered the A1/J1 review to be 'an integral part of the Crown's proposals for "managing" TWOA.'<sup>57</sup> This was confirmed by an internal email from Kevin Fisher of TAMU stating that:

for the Minister to achieve what he is after in terms of a reshaping [of TWOA] will require:

- ▶ Charter changes
- ▶ A1/J1 review
- ▶ Additional powers for TEC to be able to limit volumes in programmes.<sup>58</sup>

The combined impact of the narrowed focus of wānanga as set out in the current statement of tertiary education priorities and the A1/J1 review, according to Mr Mote, could not be overestimated. He calculated that the programmes involved accounted for 14,233 of TWOA's EFTS in 2005 and that their removal would 'down size' the wānanga by about a third to a half.<sup>59</sup>

### 3.5.3 The 2005 interim report

In mid-2005, TEC also investigated other specific issues at TWOA. These included:

- ▶ the accuracy of qualification and course registers;
- ▶ the need to audit the quality assurance process to ensure that the actual delivery of programmes accorded with the curriculum content (in association with the A1/J1 review);
- ▶ the correct reporting of retention and completion information;
- ▶ the need to review the student management system; and
- ▶ follow-through of student and other TEI complaints about TWOA.

The interim report of this investigation in July raised issues about competition with similar programmes from other education providers (notably the Greenlight and English as a second language programmes), 'EFTS creep' (where a course consumes more EFTS than comparable courses), and the replication of national qualifications framework certificates in TWOA's local certificates. The report also found multiple enrolment irregularities, and

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57. Ibid, para 39

58. Kevin Fisher to Allan Sargison and Howard Fancy, 8 July 2005 (email) (doc TEC0233)

59. Document A32, para 52

it raised particular concerns about the EFTS level of the advanced certificate in Te Ara Reo Māori and the Kiwi Ora programme being funded from the tertiary education vote.<sup>60</sup> The Tribunal understands that steps are being taken by TWA to address these issues.

#### 3.5.4 The effect on TWA

The audit and review work outlined above was being done in tandem with the charter and profile negotiations described in section 3.4. Rongo Wetere, in evidence before the Tribunal, spoke of TWA being ‘audited to death’, and he felt that no TEI could cope with the work required by such intense scrutiny.<sup>61</sup> In early May 2005, TEC considered that ‘All three education agencies involved with TWA are mindful of the risk of over-loading the wānanga with potentially conflicting priorities for action’, and later that month it asked the Minister to note the ‘immense pressure’ that TWA was under.<sup>62</sup> The extent of that pressure was made clear by Mr Mote on 1 June. He noted that the external reviews and internal reviews to meet external requirements at that stage comprised the charter revision, the profile development, the suspensory loan negotiations, the A1/J1 review, the implementation of student component performance measures, an overlapping provision review, a strategic review of ‘pathways and staircasing’, a strategic review of the tertiary education workforce, the audit by the Office of the Auditor-General, and the audit by NZQA.<sup>63</sup>

Mr Mote was concerned about ‘the high level of resources required’ to meet the current expectations of all these reviews.<sup>64</sup> A joint task-force between TEC and NZQA was set up to prioritise and to coordinate the programme review work outlined above, but none of it was deferred. Indeed, when TEC proposed that the timeframe for rewriting the charter be extended, the Minister disagreed.<sup>65</sup>

At the same time, the institution also undertook a major review of its own programmes and structures.<sup>66</sup>

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60. Tertiary Education Commission, ‘Interim Report on the Investigation into Issues at Te Wānanga o Aotearoa’, [July 2005] (doc TEC0245), pp 2, 3

61. Rongo Wetere, oral evidence, 1 December 2005

62. Tertiary Education Commission, ‘Prioritisation of Work on Te Wānanga o Aotearoa’s Programmes being Conducted by TEC and NZQA’, aide memoire, 11 May 2005 (doc TEC0187); Tertiary Education Commission, ‘Inter-agency Work Programme in Relation to TWA’, submission to Minister of Education, 31 May 2005 (doc TEC0208), p 4

63. Acting chief operations manager, Te Wānanga o Aotearoa, to Tertiary Education Commission, 1 June 2005 (doc TEC0212), p 1

64. Ibid. Mr Mote noted on 4 November that the cost to TWA of meeting TEC’s documentation requirements in the first round of the A1/J1 review alone was about \$250,000 (doc A32, app JM03, p 1).

65. Tertiary Education Commission, ‘Priorities for Interagency Work Programme in Relation to TWA’, submission to Minister of Education, s/05/305, 1 June 2005 (doc TEC0214)

66. Document A32, paras 56–84

## CHAPTER 4

### **ANALYSIS OF THE FACTS, THE TREATY PRINCIPLES, THE CROWN, AND THE WĀNANGA**

#### **4.1 INTRODUCTION**

This chapter presents our analysis of the situation that has led to this urgent inquiry. We go on to consider the principles of the Treaty that are relevant to this inquiry, the way in which the principles should guide the relationship between the parties, and our view of whether the parties' behaviour was or was not consistent with those principles.

#### **4.2 THE KEY ELEMENTS OF THE URGENT INQUIRY SITUATION**

Having carefully considered all the evidence of the situation that was the subject of our urgent inquiry, the Tribunal has arrived at what it regards as the key elements of that situation. We present here, in summary form, our analysis of the parties' situation.

In 1999, when the Tribunal's Wai 718 report was issued, the Crown, represented by its education agencies and the relevant Ministers, believed that it understood the essential characteristics of a wānanga that is also a TEI. What has emerged during this inquiry, however, is that the Crown did not appreciate the full range of characteristics of a wānanga and, in particular, did not understand the nature and scope of āhuetanga Māori. As a consequence, over the last six years – which have been critical years for TWOA's development – the Crown agencies and officers who have dealt with TWOA have underestimated the nature and extent of the differences that exist between it and other TEIs. A closely related consequence is that, despite the stated intention in the Wai 718 deed of settlement that the Crown and wānanga would enter into a partnership agreement, the Crown failed to appreciate the vital need for such an agreement. In particular, the Crown and TWOA needed high-level mechanisms to discuss relevant issues on a regular basis and to develop solutions to any problems that might arise in their relationship. They also needed to agree on the principles that would underpin their ongoing relationship. The most recent draft of the partnership agreement that the Tribunal has seen (reproduced in appendix II) emphasises the values of kotahitanga,

rangatiratanga, and manaakitanga, which we consider to be entirely appropriate to the relationships sought.

Against the imperfect backdrop provided by the Crown's limited view of wānanga and the absence of suitable forums for TWOA and the Crown to build their relationship, the rapid growth of TWOA became problematic in terms of the Crown's responsibility for quality educational outcomes. The Crown's reaction, imposing a cap on the growth of all TEIS, was unilateral and made no provision for the disproportionate effect of the change on TWOA as compared with most other TEIS. While provision to ameliorate the effect was later negotiated, it took time to achieve that result through the only available channels of communication between TWOA and the Crown, and the changed situation had a significant, and greater than foreseen, impact on TWOA's EFTS and funding in 2004.

Then, when new allegations of possible governance and management failings at TWOA were made public early in 2005, the Crown – still lacking a high-level relationship with the wānanga and with a political imperative to contain the possible problems – reacted very strongly. Acting on the Minister's direction, officials had resort to the full range of tools (or 'levers of influence', as they were also referred to) lawfully available to the Crown in its dealings with TEI – some of which had never been used before. The purpose of this comprehensive effort was to bring TWOA 'into line', but that line was drawn according to the Crown's imperfect conception of what a wānanga is and what it should be doing. In addition, significant features of the tools include that:

- ▶ They were essentially prescriptive in nature (eg, the Crown's 'threat' of appointing a commissioner and of imposing charter revisions), which skewed the relative positions of the Crown and TWOA and took their relationship even further away from the promised partnership that had not been established.
- ▶ They were wielded by different arms of the Crown, including the various educational agencies involved with tertiary education. Thus, the charter revision process and A1/J1 review were led by TEC; the commissioner process was pursued through MOE and TAMU; TAMU also played a part in both the charter and the profile reviews; and, in the meanwhile, NZQA continued to review different aspects of TWOA's operations at six-month intervals.
- ▶ They were being implemented by officials who were not necessarily privy to the full picture of their own agency's involvement with TWOA, let alone the combined effect on TWOA's operations of the various Crown agencies' activities in relation to TWOA.
- ▶ Some were implemented in ways that prompted questions about their fairness. In this category, we would place:
  - TEC's slow response to the information that TWOA was obliged to provide within a very short timeframe for the A1/J1 review, the fact that a number of the initial review assessments were later changed, and the attempts to deal with the A1/J1 review outcomes as part of the profile process;

- TEC's development of a 'model charter' without sufficient consultation<sup>1</sup> and the inadequate time period that was envisaged for consultation on the revised charter;
- TAMU's attempts to shift into the charter material that was more appropriate for the profile; and
- the requirement that TWA's revised profile be submitted in advance of the charter which underpins it.

In all those circumstances, TWA found that it had no option but to react to each and every Crown effort directed at it, while also bearing the burden of the combined weight of those efforts. Thus, TWA was not assisted by the Crown to develop its own solutions to the possible problems. Its sole initiative, devised under pressure to avert the appointment of a commissioner, was to reduce the size of the TWA council in order to assure the Minister of improved governance performance. The fact that the council thereby lost long-standing founder members who represented the iwi highlights the misunderstanding of the vital role played by those members in legitimating TWA by maintaining its connections to its founding iwi.

The result was that the pressure on TWA to do what the Crown believed it should be doing was immense and unrelenting. Even when there was scope to lighten the burden by postponing some of the Crown's educational reviews and audits, this was not acted upon. Thus, although TEC considered deferring the A1/J1 review in relation to TWA until the wānanga was less preoccupied with other Crown-initiated processes, it decided, apparently without input from TWA, that the integrity of the review would be threatened. As has been noted in section 3.5, however, TEC then proceeded to conduct that review by means that left its outcomes open to challenge. Moreover, in response to Tribunal questions about the process, the steps taken were described as constituting 'action research'. Overall, the effect of the events outlined above is that, contrary to the very essence of a wānanga and of the relationship that should have been forged and then maintained between the Crown and TWA, the Crown has sought to impose its own unduly limited view of a wānanga on TWA.

In reaching this conclusion, we are confident that we have not underestimated the difficulties inherent in the situation that has faced the Crown and TWA during the past year, given the nature of the allegations made against key people involved in TWA's governance and management. The overriding point remains that the foundations for the continuing relationship between the institutions involved should have been laid six years ago, thereby enabling a shared and constructive response to be devised to any future difficulties that might arise. Instead, the Crown has sought to impose a unilateral, poorly coordinated, and, from the claimants' perspective, apparently destructive response on TWA. The Tribunal

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1. If the Crown wished to develop a model charter for wānanga, it could have consulted Māori tertiary education organisations – in particular, the three wānanga that are TEIs – through the wānanga association.

accepts that the Crown had every intention of supporting the continued existence of the wānanga, but to do that appropriately the Crown needed a better understanding of the concept of wānanga.

#### 4.3 THE TREATY RELATIONSHIP

Some of the misunderstandings between the Crown agencies, the claimants, and the wānanga revolved around the question of whether the wānanga was a Treaty partner. We need to get beyond this semantic debate to consider what the real relationship between the parties should be.

To help frame the analysis in this part of the report we refer to the *Te Whanau o Waipareira Report*. In that inquiry, a similar debate arose over whether Te Whanau o Waipareira Trust was a Treaty partner of the Crown. The Tribunal said:

The problem as we see it has been that the Crown and Māori have taken the principle [of partnership], as found by the Waitangi Tribunal and more emphatically by the Court of Appeal, to mean that a partnership in a somewhat contractual sense exists between the Crown and particular Māori groups, a viewpoint that has led to the question, Which groups? . . .

The Treaty partnership in our view is not a term of science but art, describing the expectations of Māori and the Crown, brought out by historical evidence, that both would work together in the new society, not one above the other but each acknowledging the status of the other. . . .

Thus, partnership describes a relationship between the Crown and Māori generally rather than a relationship between the Crown and particular classes of Māori persons, and while the partnership may have been spoken of as being between the Crown and iwi, in the sense of tribe, that is only because it was the position of the iwi that was then under consideration. The question whether any particular Māori group has Treaty rights is not to be answered by an inquiry as to whether the group is a Treaty partner, for the concept of partnership applies to all Māori and is primarily for the purpose of describing the way in which Māori and the Crown should relate to each other.<sup>2</sup>

This means that the responsibilities and obligations owed by the Crown and any particular Māori group to each other must be worked out in the context of that particular relationship, and through the guidance given by the principles of the Treaty of Waitangi, rather than by reference to a fixed template of behaviour predicated on identifying the Māori parties as

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2. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: Legislation Direct, 1998), pp 28–29

belonging to a certain category or class. Bearing that in mind, we now turn to consider the context of the relationship between TWOA and the Crown.

#### 4.4 KĀWANATANGA AND THE CROWN

The cession by Māori to the Crown of kāwanatanga under article 1 of the Treaty gives the Crown a right to determine tertiary education policy in accordance with the principles of good government and for the benefit of all New Zealanders. So, for example, the Crown is entitled to determine that there are too many courses of a similar nature in any particular subject or to put in place policies intended to encourage students to go on to higher learning and to encourage TEIs to adopt configurations to support those aims.

Kāwanatanga also involves the active protection of tino rangatiratanga relating to taonga. The concept of rangatiratanga over taonga will be discussed further in section 4.5, but the principle of kāwanatanga requires the Crown to consider carefully the effect of executive action and changes in policy on all three wānanga, and to engage in consultation and negotiation with them at an early stage in order to understand how these taonga can best be protected while carrying out the Crown's policy intentions. Good kāwanatanga and the protection of rangatiratanga relating to taonga fundamentally depend on the Crown having a fully informed understanding of and respect for what a wānanga is. If the Crown has a misguided view of wānanga, then any policies or actions based on that view are likely to breach the principles of the Treaty.

Throughout this inquiry, all the parties agreed that the Crown has a right to ensure that resources are used in the most efficient and effective way possible to promote the broad aims for education policy set out in the Education Act 1989. Thus, the Crown has a right to intervene in a wānanga that is a TEI where, on reasonable grounds, it appears that the institution is in serious financial difficulties due to inadequate governance or management. No one disputed that this could include requiring alterations to the provisions of the charter to strengthen governance and management structures and procedures at the wānanga.

When considering the degree and manner of such Crown interventions in the affairs of TWOA, it is helpful to recall the following words from Lord Woolf in the Privy Council in *New Zealand Māori Council v Attorney-General*:

This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time . . . Again, if . . . a taonga is in a vulnerable

state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.<sup>3</sup>

TWOA is in a vulnerable state at present. The causes are complex and some of them lie within the responsibility of the wānanga. Changes in the funding policy and in the statement of tertiary education priorities have affected all TEIS, and other TEIS have experienced acute difficulties with these changes. But, given the size of TWOA and its heavy investment in courses affected by changes to Government policy, this wānanga in particular has faced a period of instability and uncertainty, which may be only partially alleviated by the acceptance of the profile proposed by the wānanga for 2006 to 2008. Any future changes in Government policy may have a further destabilising effect on all three wānanga, and the Crown must find supportive and protective ways to help them. For TWOA, this will be particularly necessary for some time to come.

#### 4.5 RANGATIRATANGA AND THE WĀNANGA

A wānanga that is constituted as a TEI under the Education Act 1989 is a Crown entity pursuant to section 7(1) of the Crown Entities Act 2004. However, to quote from the closing submissions of counsel for Te Whare Wānanga o Awanuiārangi:

that status [of wānanga as Crown entities] cannot remove the fundamental nature of their foundations, kaupapa and values, or their governance and management, which are firmly Māori. They were created by Māori, not the Crown, and are simply recognised by the Crown as tertiary education institutions.

Whare wānanga are the conduit for the Treaty relationship between the Crown and Māori (both Te Iwi Māori and iwi). However, this conduit operates in both directions as a conduit for the Crown's delivery of its obligations to Māori and as a conduit for Māori aspirations in relation to tertiary education. There are therefore a series of mutual rights and obligations, founded on the Treaty, that exist between the Crown and the Whare Wānanga and between the Whare Wānanga and Māori.<sup>4</sup>

That TWOA is a TEI does not mean that the Treaty of Waitangi is silent in the ongoing relationship between the wānanga and the Crown. On the contrary, as was found in the Wai

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3. *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)

4. Paper 3.3.1, paras 9, 10

718 inquiry, the creation and maintenance of wānanga by Māori iwi groups is an exercise of rangatiratanga under article 2. That Tribunal said:

The wānanga that have been recognised as TEIS have all developed out of the efforts of Māori iwi groups to provide tertiary education to, in the first instance, their own people; in the second instance, Māori students; and, in the third instance, anyone who wishes to embrace this particular form of education. As such, the efforts of these tribal groups to create and sustain TEIS is a vital exercise of rangatiratanga.<sup>5</sup>

In *Te Whanau o Waipareira Report*, the Tribunal discusses the concept of rangatiratanga that may be exercised by Māori groups other than iwi as follows:

Rangatiratanga, in this context, is that which is sourced to the reciprocal duties and responsibilities between leaders and their associated Māori community. It is a relationship fundamental to Māori culture and identity and describes a leadership acting not out of self-interest but in a caring and nurturing way with the people close at heart, fully accountable to them and enjoying their support. A Māori community defines itself by a relationship of rangatiratanga between its leaders and members; rangatiratanga gives a group a distinctly Māori character; it offers members a group identity and rights. But it is attached to a Māori community and is not restricted to a tribe.<sup>6</sup>

In the case of *Te Whanau o Waipareira*, the community concerned was those Māori of different iwi who came together as a community based around the Hoani Waititi Marae with the aim of giving assistance to Māori in need. Wānanga are another expression of rangatiratanga in that they are Māori-led organisations with Māori-centred values seeking to advance Māori educational status and aspirations.

Harold Maniapoto, in referring to the wānanga as the koha or gift of Ngāti Maniapoto to the nation, was restating the importance of TWOA to the iwi, and vice versa. The iwi are the original source of the rangatiratanga which has been devolved to wānanga. The legitimacy of the wānanga's rangatiratanga is maintained by being true to the vision with which the wānanga was founded, by the continuing relationship with the iwi, and by continuing to serve the needs of Māori intended to benefit from the wānanga. TWOA's growth into the rohe of other iwi means that it is required to develop ongoing relationships with those iwi. Where that relationship exists, those iwi also lend TWOA authority in their rohe, and are another source of the rangatiratanga exercised by the wānanga. In this context, the fact that the individual students served by the wānanga change over time does not matter, because the relationship with iwi continues.

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5. Waitangi Tribunal, *The Wānanga Capital Establishment Report* (Wellington: Legislation Direct, 1999), pp 47–48

6. Waitangi Tribunal, *Te Whanau o Waipareira Report*, pxxv

Although their rangatiratanga might spring from devolved iwi authority, wānanga exercise a different kind of rangatiratanga. The councils of wānanga have, over time, formally assumed a leadership responsibility to care for and nurture the educational needs and aspirations of Māori in a changing world by providing āhuatanga Māori education. In a corporate sense, they have assumed the rangatira role, and so develop and exercise their rangatiratanga in carrying out their responsibilities. TWA has courses that provide instruction in te reo and other aspects of traditional Māori culture, and it has Māori students from the founding iwi and others. Thus, TWA fulfils the requirements of a wānanga. But, as shown in chapter 2, āhuatanga Māori is a method of teaching and could be applied to all subjects. TWA was conceived with a breadth of vision that encompassed a range of courses delivered to Māori and others interested in learning in the environment and by the methods provided by the wānanga in accordance with āhuatanga Māori. In terms of the principle of rangatiratanga, whether the wānanga provides courses in other subjects to other students is a matter for the council, the iwi, and the other Māori communities who have an interest in the wānanga to determine. Thus, wānanga may determine the course of their own future development, subject to the Crown's kāwanatanga obligations.

However, in the exercise of kāwanatanga the Crown ought not to interfere with a wānanga's rangatiratanga by determining what courses, what size of institution, and what students do or do not 'fit' with the Crown's view of what a wānanga is, unless the Crown has a fully informed and respectful understanding of wānanga. Otherwise, such interference would not square with the wānanga's own right to rangatiratanga over its taonga, nor with its right, in concert with the iwi and other stakeholders, to develop the wānanga in ways that suit them, within the broad and facilitative definition of the role of a wānanga given in the Education Act 1989.

Over and above the statutory definition, the Wai 718 Tribunal recognised that 'Wānanga as a system of learning, and a repository of mātauranga Māori, is a taonga in its own right.'<sup>7</sup> Article 2 of the Treaty requires the Crown actively to protect the rangatiratanga of Māori in respect of their taonga. To quote again from the *Te Whanau o Waipareira Report*: 'While the term "taonga" is not easily defined, a spiritual link with the people and an obligation on them to protect it for future benefit is commonly a critical element.'<sup>8</sup>

The Crown did not deny that there was a Treaty element to the relationship with the wānanga. After all, the Crown entered into a deed of settlement with the wānanga, which reveals its acceptance of a Treaty relationship. However, the settlement did not and could not discharge all the Crown's Treaty obligations, because its obligation to protect the rangatiratanga of the wānanga is ongoing, and will endure while the wānanga remains a living

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7. Waitangi Tribunal, *The Wānanga Capital Establishment Report*, p 48

8. Waitangi Tribunal, *Te Whanau o Waipareira Report*, p 23

organisation. The parties to the settlement recognised that the relationship would be ongoing by the inclusion of provisions for a partnership agreement to be entered into between the parties. It may well be that the lack of such an agreement has led to this further inquiry.

At the same time, however, a TEI, whether or not it is a wānanga, is given certain responsibilities and privileges pursuant to the Education Act 1989. As an example of those responsibilities, we refer to sections 159L to 159S, which require that a TEI must have a charter and which set out the process for preparing and obtaining approval of that charter. Thus, the Minister has the right under section 159M to prescribe by public notice the content of charters and the criteria by which he or she will assess a proposed charter.

An example of TEI privileges is found in section 161(1) of the Education Act, which states the intention of Parliament to preserve and enhance the academic freedom and autonomy of institutions through the provisions of the Act. In section 161(2), ‘academic freedom’ is defined to include, among other things, ‘the freedom of the institution and its staff to regulate the subject matter of courses taught at the institution’ and the ‘freedom to . . . teach and assess students in the manner they consider best promotes learning’. Those freedoms are balanced by the requirements of section 161(3), which provides that institutions must:

act in a manner that is consistent with—

- (a) The need for the maintenance by institutions of the highest ethical standards and the need to permit public scrutiny to ensure the maintenance of those standards; and
- (b) The need for accountability by institutions and the proper use by institutions of resources allocated to them.

The question then is how to develop a harmonious and supportive relationship between all the parties – the Crown, the wānanga, the iwi, and the other stakeholder communities – that is consistent with the principles of the Treaty and that recognises the complexity of the role carried out by the wānanga.

#### 4.6 CONSULTATION

One of the keys to any successful relationship is communication. In terms of Treaty principles, this finds expression in the duty of consultation between Treaty partners. The duty of consultation was described in the *Napier Hospital and Health Services Report* as follows:

The active protection of Māori rangatiratanga, and of Māori people in general, requires the Crown to inform itself adequately in order to exercise its powers of sovereignty fairly and effectively. Partnership can scarcely proceed in ignorance of the views and wishes of the Māori partner. Ensuring equitable delivery of and outcomes from Government services

requires information from the beneficiaries of those services, and often their direct involvement in generating that information.<sup>9</sup>

In this claim, the situation is complicated because we are dealing not just with a bilateral Crown–Māori relationship but with a triangular relationship between the Crown, the wānanga (acting through its council), and the iwi. The Crown has a duty to consult with the wānanga as part of its general kāwanatanga duty to protect the wānanga’s rangatiratanga. The Crown must also recognise that the wānanga has a duty to consult its founding iwi through its or their designated representatives, whether elders or representatives of institutions, because of the unique nature of a wānanga. We agree with both Mr Coxhead and Dr Hook when they referred in evidence to the position of wānanga as being between iwi and Crown, owing obligations to both but not governed by either. The complexity of that role needs to be understood by all parties.

The principle of rangatiratanga requires that the founding iwi have some input into the future direction of the wānanga, to ensure the accountability of the wānanga to the iwi in terms of adhering to the founding vision. Ongoing consultation between iwi and wānanga, as reported to future high-level conferences with Crown policy makers by designated wānanga representatives, would also ensure that Māori educational aspirations are conveyed to the Crown. In the *Ngawha Geothermal Resource Report 1993*, the Tribunal said: ‘Before any decisions are made by the Crown, or those exercising statutory authority on matters which may impinge upon the rangatiratanga of a tribe or hapu over their taonga, it is essential that full discussion take place with Māori.’<sup>10</sup>

In the *Te Whanau o Waipareira Report*, the Tribunal commented that consultation on social services should include the relevant Māori groups in any particular area: ‘each Māori group in a district should be consulted about how delivery of and funding for social services might best promote the development of Māori communities in the district.’<sup>11</sup> However, the Tribunal said that:

because of the dynamic interplay of rangatiratanga, several Māori communities may coexist in one area, and each is entitled to similar consideration. So, for example, Ngāti Whatua as tangata whenua in West Auckland should also be consulted on services planning and funding priorities.<sup>12</sup>

The circumstances are somewhat different in the case of wānanga. Nevertheless, the principle of consultation with iwi groups having a strong interest in a wānanga (because the

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9. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 67

10. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), pp 101–102

11. Waitangi Tribunal, *Te Whanau o Waipareira Report*, p 226

12. Ibid

wānanga is operating in their rohe) is consistent with Treaty requirements. Such consultation serves to inform both the Crown and the council of wānanga. It is also a means for working towards a satisfactory Treaty relationship between the parties.

The use of co-opted members at council level is one way to achieve this, but the Tribunal would not wish the parties to assume that this is the only way iwi input could or should be obtained. There are other ways, and the wānanga has considered the possibility of setting up a group called Nga Tuara, which could be another avenue for continuing iwi involvement in the wānanga. What is important is that the spirit of the Treaty be recognised in whatever arrangements may be developed and that iwi input is not confined to token roles on ceremonial occasions. In particular, the iwi that were the founders of TWOA are entitled to be consulted in relation to the provisions of the revised charter.

Iwi representatives will need to remember that the wānanga is also a Crown entity responsible for promoting its students' best interests. Those students, approximately half of whom are Māori, are the intended beneficiaries of the wānanga, and their interests are of paramount concern to it. TWOA's growth and use of satellite campuses and distance delivery of courses also mean that communities in other localities have an interest in the wānanga's future direction. Nor should the staff of the wānanga be overlooked. While there are some non-Māori staff members, a strong majority of both the academic and the general staff of TWOA are Māori, so the wānanga is properly described as a Māori-led and Māori-centred organisation.

Section 171 of the Education Act 1989 provides that the council of a TEI must include staff and student-elected representatives as well as the Crown appointees. Section 171(4) refers to the desirability of the council's membership reflecting the ethnic and socio-economic diversity of the communities served by the institution, as well as displaying gender balance. The statute gives a clear and direct message that membership of the council is one of the primary ways of ensuring that TEIs remain accountable to the stakeholder communities and is in accord with the principles enunciated in the *Wānanga Capital Establishment Report*. There is also provision for co-opted members, who could represent the interests of some of the other groups referred to above. A fully constituted council is also a forum for balancing the views of the different stakeholders on the various issues that may arise.

The council, then, has the job of dealing with the Crown in such a way as to represent the aspirations of all the stakeholders. That responsibility falls to the council by virtue of its rangatiratanga duties to the people. The Crown also needs to recognise that the wānanga, through the council, is carrying out a kāwanatanga function by providing Māori with their article 3 right to equality of educational opportunity through the vehicle of āhuetanga Māori educational services. This has interesting implications for the relationship between the parties, which we discuss further in the next section.

**4.7 PARTNERSHIP/RELATIONSHIP**

Wānanga have, at least to a certain extent, both kāwanatanga and rangatiratanga functions. Thus, they must carry out Government policy, but at the same time they must be advocates for the needs and aspirations of Māori students, and those wishing to learn through āhuatanga Māori methods. Put another way, while wānanga may be TEIS, they must also be more than TEIS if they are truly to carry out all their responsibilities. They are unique organisations. The Crown, if it is to fulfil its kāwanatanga functions, must recognise the wānanga's overlapping and, at times, possibly conflicting duties. This complexity was foreshadowed in the *Wānanga Capital Establishment Report*, where the Tribunal found that it was not sufficient for the Crown to discharge its obligations under the Treaty by recognising the three wānanga as TEIS. The Tribunal said:

Recognition as TEIS has not afforded wānanga the security that they desired. Under the amendments made to the Education Act 1989 by the Education Amendment Act 1990, wānanga were both recognised as a category of TEI and, at the same time, denied access to establishment funding as TEIS. A question arises for the Tribunal as to whether recognition of wānanga as TEIS is a sufficient commitment to the Treaty by the Crown. In our clear opinion, it is not.<sup>13</sup>

The point the Tribunal was making was that, even though wānanga were TEIS, that did not mean that wānanga must simply abide by the policies and actions of the Crown. The Tribunal found that the partnership between Māori and the Crown involves the Crown acknowledging Māori 'expectations, aspirations, and rights in education.' The report went on to say:

Wānanga are statutorily charged with the task of maintaining, disseminating, and advancing mātauranga Māori. In the view of the Tribunal, the principle of partnership places a responsibility upon the Crown to support wānanga adequately enough to ensure that they are not prejudiced in their ability to carry out a Crown-appointed task.<sup>14</sup>

That analysis can be taken further because wānanga, as part of providing āhuatanga Māori education, may be involved in wider areas of education than just courses in traditional Māori knowledge. The responsibility assumed by wānanga is a broad one, and the support of the Crown must also be sufficient to encompass this broad purpose.

In the Wai 718 inquiry, the primary Crown support required was financial, but it would be an unduly narrow constraint upon the meaning of the Treaty relationship if financial support were all that was intended. We have indicated that the Crown could be supportive by consulting on high-level policy changes and other issues of significance to wānanga.

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13. Waitangi Tribunal, *The Wānanga Capital Establishment Report*, p 45

14. *Ibid*

Wānanga will also wish to develop and change with changing conditions. For instance, the demographic changes facing our country in the next 20 to 30 years will have an ongoing impact on the provision of education. Although the Tribunal in the *Fisheries Settlement Report 1992* was considering Māori fishing interests, its comments regarding the need for adaptability are as pertinent to changing educational needs:

Who can predict the future however? Circumstances change. The protection needed for today may be different for tomorrow. The essence of the Treaty is that it is all future looking. It is not about finite rules, or final pay-offs, no matter how handsome. It is about the maintenance of principle over ever-changing circumstances.<sup>15</sup>

In adapting to and negotiating changes, the principles of the Treaty require utmost good faith and a commitment to working through issues via real and meaningful consultation so that informed decisions can be made. This point has been made in many Tribunal decisions, but it is sufficient to quote from the *Report on the Mangonui Sewerage Claim*, where it was said: ‘Early discussions build better understandings in an area of cultural contact where the potential for conflict is high. Agreements may not be reached but new insights may be obtained and the subsequent debate may at least be better informed.’<sup>16</sup>

Consideration of the ways in which support can be offered leads us back to the need and duty for consultation on these matters as a part of building the relationship. One further matter complicates the relationship and consultation issues, and that is the multiple faces of the Crown in working through a number of agencies in the tertiary sector. We discuss that matter in the next section.

#### 4.8 THE MULTIPLE FACES OF THE CROWN

In the *Napier Hospital and Health Services Report*, the Tribunal commented on the plethora of agencies involved in the provision of health services and the difficulties in determining accountability as between the different agencies for any particular failure.<sup>17</sup> In that case, the difficulties were exacerbated by the contract-based system for the provision of health services, which depended for its smooth operation on performance monitoring of contract compliance. The education system does not provide quite the same difficulties, yet the number of Crown agencies involved may still present a complex and confusing picture. At various points, MOE, TEC, TAMU, NZQA, and the Minister all had some influence over and input into the wānanga’s operations. Each agency has different functions to perform and the

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15. Waitangi Tribunal, *The Fisheries Settlement Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 11

16. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim* (Wellington: Waitangi Tribunal, 1988), p 4

17. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, pp 59–60

carrying out of their separate operations may work reasonably well in more settled times. However, in troubled times the Crown ought to take more care in the way in which its agencies interact with wānanga and with one another.

At the same time, we must recognise that the Crown is also dealing with multiple parties with interests in wānanga. The Tribunal in the *Napier Hospital and Health Services Report* put it this way:

In modern times, Crown agencies seem often to have found it difficult to establish who they should be engaging with on what subjects. They encounter the diversities integral to any civil society – those of organisational scale (iwi/region/marae), of institutional type (runanga/incorporation/service provider), and of overlapping legitimacy (tangata whenua/pan-tribal/interest group). In addition, many Māori, especially those in the larger towns, have no affiliation to or representation in local Māori organisations.

The inherent difficulties of interfacing are a feature of this claim, in which contemporary grievances arise from a mainly urban context. Developing the general discussion any further is well beyond the scope of this report, but we make the observation that the partnership principle must inevitably extend beyond what is done, or not done, into how the parties establish and sustain the relationship itself. We also believe that it is important for the Crown to present a coherent and accountable face if it is to sustain a high-quality relationship with its Treaty partner.<sup>18</sup>

We raise these issues in order to highlight the complex nature of the interactions and relationships involved in the claim. If the parties are to develop robust and fully informed understandings on which to base any future relationship, these complexities will need to be factored into the discussions.

#### **4.9 ORITETANGA – ARTICLE 3 (EQUALITY OF CITIZENSHIP)**

In the previous sections, we dealt with articles 1 and 2 of the Treaty. Article 3 is also relevant to this inquiry because, while TWA is an institution, the staff and students of TWA are individuals who are also affected by the Crown's actions in relation to the wānanga. Article 3 provides that Māori have all the rights and privileges of British subjects in addition to the guarantees of protection of their taonga provided under article 2. In Wai 718, the principle of orititanga was interpreted to require the Crown to protect wānanga as repositories of te reo and mātauranga Māori and to provide students who attended wānanga with adequate resources to pursue their education there.<sup>19</sup>

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18. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 60

19. Waitangi Tribunal, *The Wānanga Capital Establishment Report*, pp 51–52

In the context of this claim, the claimants argued that the wānanga was entitled to be given the same freedoms and privileges as are vouchsafed to others under the Education Act 1989.<sup>20</sup> The claimants considered that, if the Crown approached the Education Act holistically, article 3 would help to ensure TWOA's academic freedom to determine the courses to be taught (s 161(2)(c),(d)) and the restoration of the full council as the governing body of the wānanga (s 171).<sup>21</sup> It would also include the right of TWOA to serve students in terms of their educational needs rather than in terms of their ethnicity, so long as Māori students were not disadvantaged.

While the Tribunal agrees that wānanga have the privileges set out in the Education Act 1989, we do not see the exercise of those privileges as an expression of the principle of orititanga, because it is individual citizens who have the rights under article 3.

As individual citizens, the students and staff of the wānanga have the right to the benefits of the principle of orititanga. The students choosing to attend a wānanga are entitled to āhuatanga Māori education in accordance with their rights as New Zealand citizens, on the basis that wānanga and the Crown will adhere to the provisions of the Education Act. Students and staff have the right to expect that the council of the wānanga will comply with the statute by ensuring that there are student and staff representatives on the council and that the council will be otherwise properly constituted.

#### 4.10 TREATY BREACHES

The principles of the Treaty detailed above ought to guide the relationship between the parties. In this section, we consider whether the actions of the Crown are consistent with those principles. For simplicity's sake, we have tended to ascribe each breach to a dominant principle or principles, but in fact there is some overlap between the applicable principles.

In our view, the fundamental error made by the Crown was that it had a mistaken and unnecessarily restrictive view as to the nature of a wānanga. This is a breach in Treaty terms of the principle of kāwanatanga to be properly informed and respectful about wānanga as taonga, and of the principle of rangatiratanga, by which wānanga, through their councils, exercise authority over their taonga. That in turn shows a failure by the Crown to consult, in order to become properly informed about wānanga. The Crown simply overrode the understandings of the iwi, TWOA, and the other stakeholder communities as to their conception of a wānanga, to the extent of trying to micro-manage TWOA by requiring, for example, that material that would ordinarily go in the profile be put into the charter. The Tribunal emphasises what a serious breach the failure to acquire a proper understanding of the nature of

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20. Paper 3.3.3, paras 179–180

21. Ibid

wānanga is on the part of the Crown. In our view, all the other breaches stem from this initial mistake.

The Crown's mistaken view of wānanga led it to allow the matter of the partnership agreement to drop, a matter the Tribunal treats with grave concern, especially since it was part of the deed of settlement between the parties. The Crown ought to have taken further steps to follow up on the agreement with TWA. This is a clear breach of the partnership principle, which requires that parties deal with each other honourably and with utmost good faith – if a deed of settlement is signed requiring certain actions to be completed, then that is what should happen. Had the partnership agreement been put in place, the Crown might have avoided the breaches of the Treaty that occurred in the period from February 2005 to date. At the same time, some responsibility must be taken by TWA for not following through with the partnership agreement, so that TWA did not fulfil its part in the relationship either.

The lack of a partnership agreement ought to have prompted the Crown to put in place other processes by which high-level consultation could take place, so that, when the Crown was contemplating policy changes, matters could have been raised with the wānanga at an early stage. The three wānanga have formed the Tau Ihu group, which could act as a consultation mechanism, but in February 2005 there was no formal process by which TWA could engage with high-level officials about the various issues facing the wānanga. This lack of formal process is another breach of the partnership principle in that there simply was no ongoing close relationship between the parties by which they could consult each other and work through problems.

From the period beginning in February 2005, the Crown began to use the various 'tools' referred to in section 4.2 to mould the wānanga to fit the Crown's mistaken view of wānanga. The disproportionate effect on TWA of the cap on growth (as compared with other TEIS) should have been acknowledged earlier by the Crown so that more supportive measures could have been put in place sooner. Combined with the unrelenting pressure applied to the wānanga because of the number and extent of the reviews, the effect of the Crown's actions was far from being protective and supportive, and was, in the Tribunal's view, a breach of the principle of active protection. The breach was compounded by the very tight timeframes for compliance with the reviews, which created further pressures on TWA.

The review of the charter, which is the wānanga's most important document, clearly must involve consultation by TWA with iwi and other stakeholder communities. The timeframe initially set by the Crown for the review seemed to take little or no account of the issues around such consultation. While the Crown might argue that it is solely the wānanga's responsibility to consult, there must be some recognition by the Crown that this not a quick and easy process, particularly when many of the iwi members of the council had resigned in an attempt to stave off the appointment of a commissioner. Moreover, the wānanga, in consulting with iwi, is fulfilling a Crown responsibility. The Crown's action in setting such

a tight timeframe is a breach of the duty to protect and support the wānanga, but can also be seen as a failure to fulfil the duty to consult by failing to enable the wānanga to consult properly.

The council was reduced to five by the resignations of several members. Those resignations were a response, perhaps misconceived, to the Minister's announcement that he was considering the appointment of a commissioner. In our view, while the council remains at this reduced size it is unable to undertake the consultation necessary for the charter review. In Treaty terms, it is not sufficiently representative of the founding iwi or the other stakeholder communities and therefore may not be able to undertake adequately the advocacy role for those communities to the Crown. In expecting the reduced council to conduct the charter consultation, the Crown further breached the principles requiring proper consultation with the Treaty partner. Without wishing to labour the point, the Crown seems to have believed that it had no responsibilities to facilitate the consultation or to support TWA to carry it out. As we have shown above, that view is not correct. The Crown also seems to have failed to understand the importance of the iwi members of the council in terms of TWA's accountability to the founding iwi. That misunderstanding relates back to the Crown's fundamental misconception as to the nature of wānanga.

As we showed in chapter 3 and section 4.2, various Crown agencies imposed various reviews and requirements on TWA, with little appreciation of their combined effect on the wānanga. The partnership between the Crown and Māori requires that the Crown present a clear and accountable face. That principle was breached by the Crown agencies in their dealings with TWA in that it was not until June 2005, when John Mote complained about the resources that TWA was having to put towards the reviews and the pressures that they caused, that the Crown agencies worked more closely together. Even then, recognition by the Crown of the combined weight of the agencies on TWA was missing. That was shown by the Crown's refusal to delay the A1/J1 review when the timing of its implementation was not urgent. This also constitutes a breach of the principle of active protection and showed a lack of understanding of the support that the Treaty requires for wānanga.

The Tribunal acknowledges that the Crown had serious concerns about the situation at TWA from 2004 onwards and that, in these difficult circumstances, it is more likely that action will be taken without the necessary consideration as to whether such actions fulfil Treaty requirements.



## CHAPTER 5

### CONCLUSIONS, FINDINGS, AND RECOMMENDATIONS

#### 5.1 CONCLUSIONS

In the *Wānanga Capital Establishment Report*, the Tribunal found as follows:

Two of the principal reasons for the development of modern wānanga by Māori were to address the current underachievement of Māori in tertiary education and to help in the development of New Zealand society generally. Another primary objective of wānanga is to help revitalise te reo Māori and mātauranga Māori.<sup>1</sup>

These reasons underpin the philosophy of the founders of TWOA. TWOA was founded with the aim of bringing back to education those who failed to thrive in the primary and secondary education system in our country. That goal encompassed the children of the founding iwi, other Māori, and all New Zealanders. With innovative courses and programme delivery, TWOA has become one of our largest tertiary education providers within a remarkably short space of time. That phenomenal growth is a wonderful tribute to the founders, staff, and students of TWOA. However, it is also the source of many of the problems currently besetting the wānanga. That the wānanga has survived a great number of reviews and inquiries testifies to the determination of all those involved to protect and nurture an institution which is dealing with educational and social issues that we face going forward into the twenty-first century. We share the concern of John Mote when he said:

In the end we have no choice but to be successful in reaching these targets, because to fail would remove from thousands of New Zealanders the promise of a better future through tertiary study. We all know that our tauira don't have a choice, without TWOA the majority of them have nowhere to go.<sup>2</sup>

During the hearing of this inquiry, Crown representatives made a praiseworthy commitment to ensuring that TWOA is a healthy, viable wānanga. The overarching theme for this

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1. Waitangi Tribunal, *The Wānanga Capital Establishment Report* (Wellington: Legislation Direct, 1999), p 53

2. Document A32, para 84

inquiry has been to ensure that all parties understand and agree on, if not what a wānanga is, then at least how to discover what it is. As we have seen, a wānanga is not an organisation defined by the Crown; rather, it is created, developed, and maintained according to the philosophy and aspirations of the iwi and all the communities of interest associated with it. While te reo and mātauranga Māori will always be an important part of a wānanga, they are not the only subjects that may be taught there. If wānanga are to be a vehicle for the improvement of wider Māori educational outcomes, then other subjects will be just as important. As can be seen from the above quotation, this was envisaged by the claimants and the Tribunal when the Wai 718 claim was heard. Revitalisation of te reo and mātauranga Māori was seen as a primary objective at that time but not the only objective.

Wānanga are not to be confined by the Crown to a particular preconceived notion of their student body, breadth of educational function, or modes of delivery. The Crown must accept that the principles of the Treaty allow wānanga to adapt to meet changing times and changing needs. The Tribunal supports a broad and generous approach to the interpretation of the roles of a wānanga as set out in the Education Act 1989 and the TES. That interpretation should not be narrowed while pursuing short-term aims as set out in subsidiary documents such as the statement of tertiary education priorities. TWOA's charter ought to reflect its aims for the next period of time, rather than being a result of undue Crown pressure to produce a charter suitable for the Crown's conception of a wānanga.

Having said that, the Tribunal also acknowledges the right of the Crown, under the principle of kāwanatanga, to make policy for the tertiary sector that may affect the wānanga. Wānanga that are also TEIs are required to comply with the requirements of the Education Act under the same principle. The Crown is entitled to intervene where any TEI fails to comply with statutory requirements or where, through inadequate governance and financial mismanagement, it faces serious difficulties. However, wānanga are unique educational organisations, and, in accordance with the Treaty relationship between the parties, the Crown must take care to deal with them as the special institutions they are. The Treaty relationship must be acted upon at the micro-level, where Government officials deal with wānanga staff, as well as at the macro-level of policy making. This is not to privilege Māori over others but to accept that, through historical inadequacies in the education system, particularly in educational outcomes for Māori, wānanga must provide catch-up education for many students. The extra difficulties that this duty imposes may mean that wānanga require more protection or specialised assistance. In the case of TWOA, it has specifically tried to reach out to all members of our society. The Crown is now moving in the direction of improving its relationship and dealings with TWOA. The Tribunal lends its utmost encouragement to that process.

**5.2 SUMMARY OF FINDINGS**

Our findings are as follows:

- (a) We find that wānanga are expressions of the educational aspirations of Māori and that they are established by iwi to teach by Māori methods and in a Māori way all those who wish to learn by those methods and in that way.
- (b) We find that āhuatanga Māori is a Māori method of teaching that facilitates the delivery of education through Māori values and principles.
- (c) We find that TWOA has responsibilities to ensure that:
  - (i) council membership is increased to meet the statutory requirements;
  - (ii) a partnership/relationship agreement is entered into in accordance with the deed of settlement of the Wai 718 claim; and
  - (iii) founder members and the iwi are consulted properly on matters affecting the future of TWOA, as are other stakeholders of the wānanga.
- (d) We find that the claim is well-founded<sup>3</sup> in that the Crown has breached the principles of the Treaty in failing to protect the rangatiratanga of TWOA as a wānanga, with resulting prejudice to the claimants, by:
  - (i) attempting to define wānanga in such a way as to confine wānanga to the teaching of te reo and mātauranga Māori to a predominantly Māori student body, and attempting to force TWOA to comply with that mistaken definition through the charter process;
  - (ii) failing to ensure that a partnership/relationship agreement was concluded with TWOA in accordance with the Wai 718 deed of settlement;
  - (iii) failing to ensure that continuing consultation and negotiation took place between TWOA and the Crown at the level of the council and the Minister for Tertiary Education and the Secretary for Education, so that issues could be dealt with appropriately;
  - (iv) failing to make adequate allowance in its dealings with TWOA for the wānanga's vulnerability due to the disproportionate effect of the growth cap, the various reviews, and the timeframes for compliance imposed on it;
  - (v) failing to ensure that the founding iwi, in particular, and other communities associated with the wānanga were given an adequate opportunity to consult on changes to TWOA's charter by insisting on an unusually tight timeframe;
  - (vi) putting TWOA in a position where council members resigned in an attempt to avoid the appointment of a commissioner, leading to a council that could not undertake consultation with iwi and other stakeholders;

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3. See section 6 of the Treaty of Waitangi Act 1975, which confers the Tribunal's jurisdiction.

- (vii) failing to ensure that Crown agencies dealing with TWOA acted in a coherent and properly coordinated way and in accordance with an ongoing Treaty relationship; and
  - (viii) failing to ensure that Crown agencies implemented the various reviews with an understanding of the protection and support that the Crown ought to provide for wānanga.
- (e) We find that the Crown has, to some degree, ameliorated the breaches of the principles of the Treaty that occurred prior to the filing of the urgent claim by allowing more time for consultation on the charter, coordinating agencies dealing with TWOA, and confirming that it is not the Crown's intention to drastically reduce the size of TWOA by way of changes to the charter. The Crown has also indicated its concern that deficiencies in council membership be rectified, and the Tribunal understands that steps are now being taken to fill council vacancies. The Crown has also said that, if requested, it will assist TWOA to conduct the wider consultation on the charter. We note that the Crown conceded that, while its agencies attempted to do their best, there was room for improvement in their dealings with the wānanga.

### 5.3 RECOMMENDATIONS

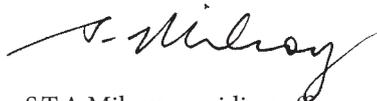
The Tribunal considers that most of the breaches referred to above could have been avoided or at least ameliorated earlier had the draft partnership agreement that was prepared as part of the settlement of the Wai 718 claim been concluded. That agreement was intended to provide all three wānanga that are recognised as TEIS with multi-level opportunities to have early and intensive participation in discussions and negotiations with the Crown regarding policy changes and strategic funding issues. The Tribunal commends the Crown on the development of the draft and sees it as a matter of common sense for the Crown to complete that partnership agreement. If that is not possible, then we urge the Crown to provide structures that would give the three wānanga as a group participation at the highest levels along similar lines to that envisaged in the draft agreement, as well as providing for one-to-one relationships between the Crown and individual wānanga. A one-to-one relationship with TWOA must be based on a full understanding of the nature of wānanga – and this wānanga in particular – and must recognise the aims of the founding iwi and the stakeholder communities for its development. TWOA and the Crown will need to develop common understandings and also set out a process for negotiating change or for dealing with difficulties that may arise. Such a process must be based on openness and trust.

Our main recommendation is therefore that the Crown use its best efforts to conclude the partnership agreement or to set up a structure which provides for similar high-level

opportunities for the three wānanga to engage with the Crown, as well as providing for one-to-one relationships with individual wānanga. Our other recommendations for Crown action are as follows:

- (a) to assist TWA to bring the council up to the statutory requirements as soon as possible;
- (b) to renegotiate the present version of the proposed charter with a view to making such amendments as may seem appropriate, bearing in mind the findings of this Tribunal;
- (c) to assist TWA to consult the stakeholders as fully as possible in respect of the revised charter;
- (d) to assist TWA financially and administratively in meeting the costs and carrying out the tasks involved in dealing with the reviews, audits, and inquiries undergone by TWA;
- (e) to meet the proper costs and disbursements of the claimants incurred in the preparation and presentation of their claims; and
- (f) to acknowledge formally the invaluable and innovative contribution made by the Aotearoa Institute and the founders of Te Wānanga o Aotearoa to education in Aotearoa/New Zealand.

Dated at *Wellington* this *22<sup>nd</sup>* day of *December* 2005



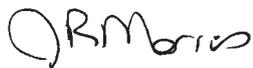
ST A Milroy, presiding officer



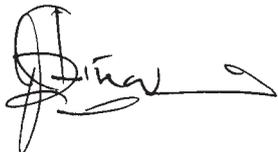
A Ballara, member



DL Kidd, member



JR Morris, member



JT Northover, member



APPENDIX I

**DECISION ON URGENCY**

**Note:** Minor stylistic and typographic changes have been made to this document.

WAITANGI TRIBUNAL

WAI 1298

CONCERNING the Treaty of Waitangi Act 1975

AND the claim by Harold Maniapoto and Tui Adams  
on behalf of the Aotearoa Institute Te Kuratini o  
Nga Waka Trust Board

**DECISION OF JUDGE STA MILROY AND MS JR MORRIS**  
**ON APPLICATION FOR URGENT HEARING**

**INTRODUCTION**

Harold Maniapoto and Tui Adams of the Aotearoa Institute Te Kuratini o Nga Waka Trust Board filed this claim on 19 September 2005, together with an application that it be heard urgently. On 20 September 2005 the chair of the Waitangi Tribunal referred the urgency application to us for consideration. Crown counsel responded to the application for urgency on 7 October 2005 and a memorandum in reply was received from claimant counsel on 12 October 2005. A judicial conference was held on 13 October 2005 in Wellington to allow counsel for the claimants and the Crown to make submissions and respond to queries from the Tribunal on the urgency application.

In accordance with the Tribunal's procedures, the claim has been registered and allocated a number (Wai 1298). A record of inquiry, listing all documents filed in respect of the claim, has been established. References cited in this decision are to documents contained in the Wai 1298 record of inquiry.<sup>1</sup>

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1. For example, claim 1.1.1; doc A1

**THE CLAIM**

The Aotearoa Institute is the parent body from which Te Wānanga o Aotearoa (TWOA) developed.<sup>2</sup> The claimants' position is that they are acting 'on behalf of Te Wānanga o Aotearoa and all of the iwi communities that created that institution' to support and protect TWOA in relation to actions done or omitted by the Crown that the claimants say are in breach of the principles of the Treaty of Waitangi.<sup>3</sup>

The actions complained of relate to the governance and management of TWOA in the period from around November 2004 to the present time. The claimants allege that the Crown has taken or will take control of TWOA, thus denying its tino rangatiratanga over its present and future direction. The claimants also allege that the Crown has failed to protect the taonga that is TWOA, and has failed to follow due process by not consulting with the claimants and the interested communities on critical decisions for TWOA's future.<sup>4</sup>

In brief the claimants' main grievances are as follows:

1. The Crown, in breach, allegedly, of the deed of settlement signed with TWOA in November 2001, failed to pay moneys due under a suspensory loan by the end of December 2004 when conditions for payment of the loan had been met. The claimants say the non-payment of the loan was a significant cause of the cash crisis suffered by TWOA.
2. The Crown took preliminary steps to appoint a statutory commissioner in circumstances where the claimants say the grounds for appointment of a commissioner under section 195D of the Education Act 1989 had not been met.
3. The claimants say that, as a result of pressure on TWOA brought about by means of 1 and 2 above, the Crown was able to take control of TWOA by measures including:
  - ▶ the appointment of a Crown manager in March 2005; and
  - ▶ the downsizing of the council of TWOA, so that the majority of the council are Crown appointees, contrary to the requirements of section 171 of the Education Act 1989.
4. The Crown and the council are presently negotiating changes to the charter for TWOA which the claimants fear will irreversibly change the current structure of TWOA without consulting the claimants or interested communities, in contravention of Treaty principles concerning partnership, protection, and due process.<sup>5</sup>

At the judicial conference, the claimants emphasised that the claim must be heard urgently because, although the present charter is for the period 2004–07, it is currently being reviewed at the direction of the Minister of Education and critical decisions on the future of TWOA are being made right now. The claimants assert that those decisions will be contrary to their wishes and the wishes of the communities that created TWOA, and that once the proposed charter is set in

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2. See Waitangi Tribunal, *The Wānanga Capital Establishment Report* (Wellington: Legislation Direct, 1999), pp13–14

3. Claim 1.1.1, para 1

4. Paper 3.1.1, pp3–5

5. Papers 3.1.1, 3.1.12

place it will be impossible to change it back again, because change requires the agreement of the Minister.

The Crown's response to the urgency application is as follows:

1. The Office of the Auditor-General (OAG) is already conducting an inquiry into, among other things, the capital acquisition strategy of TWA. The suspensory loan was for capital expenditure. The Crown says that if the Tribunal were also to conduct an inquiry into the suspensory loan issue there would be significant overlap with the OAG inquiry that would require unnecessary duplication of cost and effort at the expense of the taxpayer. Additionally, the Crown says that TWA had not met the conditions for payment of the suspensory loan.
2. The Crown submits that the appointment of a statutory commissioner is not appropriate for Tribunal inquiry because the Minister has only taken preliminary steps, and has not made a final decision. On the Crown's analysis the claim would be merely speculative. If the Minister did appoint a commissioner, the Crown submits that the claimants would be able to take judicial review proceedings to test the legality of the Minister's actions.
3. The Crown rejects the notion that a cash crisis at TWA means that the claim should be heard urgently, on the grounds that the Crown has advanced an emergency loan to TWA and, on the claimants' own evidence, the financial situation of TWA, while still difficult, is not critical.
4. The Crown submits that the reduction in size of the TWA council was undertaken voluntarily by the council, as was the appointment of a Crown manager. The point is that, since the actions were not those of the Crown, they are not subject to inquiry pursuant to section 6 of the Treaty of Waitangi Act 1975.
5. The Crown also says that although the charter is in the process of being negotiated, with completion expected within a month, an inquiry would not be warranted unless the charter were seriously flawed.<sup>6</sup>

In summary, the Crown's submissions are that an urgent inquiry is not needed because the Crown has not taken action which would found an inquiry; there is an OAG inquiry underway with which any Tribunal inquiry would overlap inefficiently; other remedies are or would be available to the claimants in respect of the non-payment of the suspensory loan and, should it occur, the appointment of a statutory commissioner; and the financial situation of TWA is not so perilous as to make an inquiry necessary at this stage.

#### KEY EVENTS

Before considering the grounds for urgency, it is helpful to state briefly the key events leading up to the filing of the claim. In setting out these events we have been unable to follow a strictly

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6. Paper 3.1.8

chronological approach because events relating to one set of issues have occurred at the same time as events relating to other issues. Accordingly, while mindful that they are interwoven, we have set out the events under headings that reflect the issues dealt with during a particular period of time.

#### **Deed of settlement and suspensory loan**

The claim has its genesis in the deed of settlement dated 6 November 2001 and signed between TWA and the Crown following the recommendations of the Tribunal in the *Wānanga Capital Establishment Report*. The deed provided for payment of an ‘initial sum’ for capital expenditure and also of ‘additional redress’ which was contingent on TWA achieving specified performance targets through 2002 and 2003, including specified student enrolments. As well, the deed provided that should TWA exceed the 2003 student enrolment target by a considerable margin then, subject to the achievement and maintenance of high quality standards and the completion of a performance agreement, a suspensory loan of \$20 million further capital would be available, with payment to be made in tranches beginning in 2004.

The claimants argue that TWA was entitled to the suspensory loan because the student enrolment target was met and the Crown raised no standards issues with TWA during their dealings about the loan in 2004. The Crown argues that the fundamental difficulty in the way of making payment under the loan arrangement is that there has been a failure to agree performance requirements. A major stumbling block for the claimants, it seems, concerns the target set concerning the proportion of Maori students to be enrolled at the wānanga.

The deed of settlement also provided that a partnership agreement would be negotiated between the Crown and TWA ‘to acknowledge and record their mutual commitment to a constructive future relationship’. That agreement has not been signed off. We were advised that a draft agreement was sent by the Crown to TWA in May 2001 but TWA did not regard it as a priority to sign at that time, because the relationship was healthy.

After the deed was signed in late 2001, there followed two years of rapid growth in enrolments at TWA, such that original projections for 2004 would have seen it reach 40,000 equivalent full-time students (EFTS). Late in 2003, the Crown imposed a ‘cap’ on growth of EFTS for all tertiary education institutions which had the effect of curtailing TWA’s growth to about 28,000 EFTS in 2004.<sup>7</sup>

In 2003, it seems there were two New Zealand Qualifications Authority (NZQA) reports on TWA. According to claimant counsel, the first report, completed in March 2003, found that all requirements were satisfied. The second report, completed in December 2003, followed an audit that focused, amongst other things, on course design; development and review mechanisms; systems for quality assuring course delivery; timely resourcing of programmes; processes for

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7. Te Wānanga o Aotearoa, ‘Finance Report: November 2004 Results’, 2004, p 2 (doc A1, app RW33, p 725)

student enrolment and record keeping, including recording and reporting student results; course delivery methodologies; and internal review and audit mechanisms. That report indicated dissatisfaction with a number of aspects of TWA's performance.<sup>8</sup>

During 2004, TWA made a number of informal and formal approaches to the Ministry of Education to raise the issue of the suspensory loan. It made a formal request on 9 July 2004 to draw down the loan and, from that time, the loan was figured into TWA budget calculations.<sup>9</sup> The claimants say that it was not until 16 December 2004 that TWA was given any real indication that there were difficulties with the loan's payment. Those difficulties related to the deed of settlement's specification, in relation to the 'additional' redress to be paid by the end of 2003, that TWA would have a profile of 80 per cent Maori students with an enrolment of 8000 EFTS.<sup>10</sup> By December 2004, TWA had about 28,000 EFTS, with enrolments being about 45 per cent Maori.<sup>11</sup>

### **Financial issues and the question of appointment of a commissioner**

The Office of the Auditor-General began an inquiry in September 2004 into potential conflicts of interest in relation to the Kiwi Ora programme at TWA.

In February 2005, member of Parliament Ken Shirley made a series of allegations of financial mismanagement, nepotism, and dubious course quality against TWA. In late February 2005 TWA was in the midst of a financial crisis, which the claimants primarily attribute to the delay in payment of the suspensory loan. By March 2005, TWA's financial situation necessitated a loan from the Crown. By an agreement dated 16 May 2005 the Crown provided a loan facility of \$20 million (with an initial drawdown of \$10 million) to be used by TWA as required. The terms of the loan included reporting requirements to the Tertiary Advisory Monitoring Unit, the continued appointment of the Crown manager (Mr Roche), and the appointment of a chief operating officer whose role is specified by the Crown manager and the Secretary of Education.<sup>12</sup> Under this arrangement the TWA council essentially delegated all financial control of the institution to the Crown manager as agent of TWA. The cost of the Crown manager is borne by TWA. The Tribunal understands that the loan facility, which expires shortly, is likely to be extended.

On 20 June 2005, the Minister of Education informed the council of TWA that he had formed the preliminary view that the existing council should be dissolved and a statutory commissioner appointed.<sup>13</sup> On 28 June, TWA's council resolved to reduce its number from 14 to five in order to dissuade the Minister from appointing a commissioner. The five remaining members included three Crown appointees. The council also resolved that departing members were to become

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8. Document A12, app B, pp 9–25

9. Document A1, paras 106–107

10. Ibid, paras 126–129

11. Paper 2.5.2, app A

12. Paper 3.1.16, app H

13. Minister of Education to council chair, Te Wānanga o Aotearoa, 20 June 2005, p1 (doc A1, app RW54, p 853)

members of a body to be known as Nga Tuara (supportive backbone). The role of that group was described to the Minister by the chair of the TWA council as providing ‘the tikanga and whakapapa linkage between the Council and the various campuses around the country’. In addition, the group would become the puna wairua (the well of inspiration and spiritual support) and would assume ‘a care-taking role of the “mauri” of the Wānanga.’<sup>14</sup> We note that there appear to be differences between the claimants’ view of the position of the departing members and the Crown’s view. The Tribunal was advised by Crown counsel that the Minister is still considering whether to proceed with the appointment of a commissioner.

In the meantime, the Auditor-General’s inquiry expanded to include, amongst other things, matters concerning TWA’s procurement policies and practices; capital acquisition strategy; travel policies and practices; conflicts of interest; and the relationship between TWA and Aotearoa Institute.<sup>15</sup> The Tribunal understands that the Auditor-General’s report is likely to be released in December 2005.

#### **Charter, student profile, and future direction of TWA**

By letter dated 23 March 2005, the Minister of Education set out his expectations for a ‘significant review of the charter of Te Wānanga o Aotearoa as part of the changes currently underway for the Institution.’<sup>16</sup> The letter goes on to state that it would be necessary ‘to ensure close alignment between the role of the Wānanga set out in the revised charter and the development of the performance measures for the suspensory loan being sought as part of the Wānanga’s Deed of Settlement’. The letter then sets out a range of matters to be covered by the revised charter, which was to be completed in time for the development of the student profile for the period 2006–08. A student profile sets out expectations or guidelines for the make-up of the student body. The deadlines that were set were 30 June for the proposed charter to be ready for submission to the Tertiary Education Commission, and 30 September for submission of TWA’s student profile.

TWA provided a copy of the draft charter to the Minister on 30 June 2005. By letter dated 15 July 2005, the Minister of Education indicated areas of the revised charter that needed further change.<sup>17</sup> These areas included the need for TWA to refocus on its core provision; to build its governance role and capability; to make ‘quality provision’ of paramount importance; to agree a charter, profile, strategic business plan, and recovery plan acceptable to all parties; to reassess TWA’s network of national provision; and to agree on a period of consolidation. The Minister’s letter includes the following:

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14. Paper 3.1.16, app F

15. Paper 3.1.8, app A

16. Paper 3.1.16, app B

17. Ibid, app C

It is very important that the charter spells out clearly the core essence of the Wānanga to provide a framework for change in the level or type of future provision; and then for there to be a clear pathway, and measures of progress, toward change in the Wānanga's activity.<sup>18</sup>

It appears from the brief of evidence provided by the Ministry of Education that, by 2008, TWA is expected to ensure that the percentage of EFTS taught in areas of 'core' activities is 100 per cent, with Maori making up 65 to 75 per cent of enrolments.<sup>19</sup> The core areas of focus would be:

1. the delivery of mātauranga Maori targeted towards Maori learners, in a Maori context;
2. the delivery of core generic education, built upon the areas where TWA has a comparative advantage and established core capabilities, and targeted towards Maori learners, in a Maori context;
3. the delivery of educational programmes targeted at meeting Maori development or employment needs, targeted towards mainly Maori learners, in a Maori context; and
4. the delivery of mātauranga Maori to all New Zealanders.<sup>20</sup>

By letter dated 28 July, the chair of the TWA council advised the Minister as to progress on the draft charter and that staff had started work on the profile in order to meet the 30 September deadline. The letter also sets out a timeline for a restructuring plan, with implementation set for the period October–December 2005.<sup>21</sup> By letter dated 5 August 2005, the chair confirmed that the key decision areas set out in the Minister's letter of 15 July 2005 had been included in the draft charter and that TWA was willing to consult with all parties during the charter process.<sup>22</sup>

The Tribunal notes that the latter stages of revision of the charter have taken place since the reduction in size of TWA's council.

#### GROUNDS FOR URGENCY

The matters the Tribunal takes into account when considering an application for an urgent hearing are as follows:

- ▶ the nature and significance of the claim;
- ▶ the claimants are or are likely to suffer irreversible prejudice by reason of the legislation, policies, processes, or acts of the Crown that are alleged to be in breach of the principles of the Treaty;
- ▶ the claimants have no other remedies reasonably available to them;
- ▶ there are no other matters which would militate against the holding of an inquiry; and
- ▶ the claimants are ready to proceed to a hearing.

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18. Ibid

19. Document A12, p 12

20. Ibid, pp 12–13

21. Paper 3.1.16, app D

22. Ibid, app E

**Nature and significance of the claim**

Under this head the Tribunal must consider whether the claimants have made out a serious case that merits inquiry by the Tribunal. On the information available to us at this time, the key events outlined above seem to show increasing intervention by the Crown in the affairs of TWA, with critical decisions as to the future direction of TWA being made at this time, and with implementation expected in the near future.

***Suspensory loan***

The key events raise mixed legal and Treaty issues concerning the suspensory loan and the financial situation faced by TWA which came to a crisis point in about March–April 2005. Those issues are serious but are tied to the allegations about financial mismanagement which are being investigated by the Auditor-General.

***Appointment of commissioner***

The preliminary steps taken by the Minister for the appointment of a commissioner also raise serious issues but are also tied to the financial situation of TWA. The Minister has not yet appointed a commissioner.

***Charter, student profile, and future direction of TWA***

These raise the question of the role that the claimants, and the communities that created TWA, ought to be able to play in determining the future direction of TWA, as well as the role of the Crown in those decisions. They also raise the issue of what might be expected of the Crown, in Treaty terms, in ensuring that the claimants can take up that role. In essence it raises the question of what a wānanga is, and how best to achieve a proper conception of a wānanga that will inform the process of putting a charter in place to guide the future of TWA.

Underlying all these issues is the question of the partnership between the Crown and TWA, and what that partnership might mean for their dealings with all those to whom TWA is a taonga. The Tribunal is satisfied that this part of the claim raises significant issues in relation to one of the largest tertiary education providers in the country, and that there is sufficient evidence to show the claimants have a case that requires an answer.

***Irreversible prejudice***

The Minister has not yet appointed a commissioner, so that there is no immediate prejudice in relation to this issue.

At this point, although the suspensory loan has not been paid, TWA has received loan finance from the Crown to assist in stabilising its financial situation. Interest is payable on this temporary

loan, but it would also have been payable on the suspensory loan. The main disadvantages to TWOA of the temporary loan are that it must be repaid, and that it comes with conditions that include the appointment of a Crown manager at significant cost to TWOA. If the non-payment of the suspensory loan were found to be wrongful, the financial prejudice could be compensated for by payment of moneys. As such this does not constitute an irreversible prejudice.

If, however, TWOA and the claimants are entitled to exercise tino rangatiratanga over TWOA, but the Crown has wrongfully prevented them from doing so at a critical time in TWOA's development by the terms of the temporary loan agreement, then that is a prejudice which cannot be compensated by money.

The Tribunal has little doubt that if the draft charter and profile is put in place and implemented it will mean a significant and ongoing change to the vision and future of TWOA as conceived by its original founders, the claimants. If the claimants are correct in their assertion that they have not been consulted on the future direction of TWOA in accordance with Treaty principles, then they will have suffered irreversible prejudice by reason of loss of a degree of control and input into the future of the institution that they created.

The Tribunal is satisfied that if the claimants make good their case they will suffer or are likely to suffer irreversible prejudice in respect of the following:

- ▶ the issue of whether the Crown, by the terms of the temporary loan agreement, wrongfully constrained the exercise of tino rangatiratanga by TWOA and the claimants; and
- ▶ the issues regarding the charter, student profile, and future direction of TWOA.

#### **Other reasonable remedies**

It is possible that the claimants could take action in the general courts in relation to the suspensory loan agreement as set out in the deed of settlement. They may also be able to take judicial review proceedings if the Minister were to appoint a commissioner in circumstances where the statutory requirements for appointment had not been fulfilled. However, we accept the claimants' argument that this would not address the underlying Treaty issues raised by the claim.

The Tribunal is satisfied that there is no other remedy that would satisfactorily address the Treaty issues.

#### **Other matters**

The Tribunal is of the view that it would be inappropriate to inquire into any matter involving the suspensory loan. The contractual aspects of the suspensory loan are properly within the jurisdiction of the general courts. Other contested matters relevant to the loan are within the ambit of the inquiry currently being conducted by the Auditor-General.

Further, the outcome of the Auditor-General's report inevitably will affect perceptions of the terms of the temporary loan agreement. It is, therefore, premature to inquire into the temporary loan. Moreover, the link between the suspensory loan and the temporary loan is such that we consider it inappropriate for the Tribunal to inquire into those matters.

However, the Tribunal sees no countervailing considerations in relation to the partnership, protection, and process issues concerning the charter, profile, and future direction of TWA. To focus on those issues is to focus on the implications of the Treaty in the relationship between the Crown and TWA as institutions, rather than on the soundness of financial decisions made by particular individuals. Accordingly, while the other events and issues form a dramatic backdrop, the essence of the Treaty-based concerns is for the future.

### **Readiness for hearing**

The Crown has argued that the claimants are not ready to proceed because the focus of the latest claimant evidence is on the composition and consultation processes of TWA's council. The Crown says that those issues should first be addressed by the council rather than the Crown. This submission does not, in our view, take account of the present circumstances whereby the Crown has a majority of appointees on a much-reduced council, TWA is managed by the Crown manager, and the revision of the charter is at the direction of the Minister. Indeed we think that these factors raise the very issues which should be the subject of a Treaty-based inquiry. The Tribunal is satisfied that the claimants are ready to proceed.

### **DECISION**

The Tribunal grants that part of the urgency application that relates to the Treaty issues surrounding the revised charter, student profile, and future direction of TWA. Accordingly, the inquiry will focus on:

- ▶ the role that the claimants ought to be able to play in determining the future direction of TWA;
- ▶ the role of the Crown in those decisions;
- ▶ the Treaty responsibilities of the Crown in ensuring that the claimants can take up their role; and
- ▶ the question of what a wānanga is, and how best to achieve a proper conception of a wānanga that will inform the process of putting a charter in place to guide the future of TWA.

**HEARING TIMEFRAME AND PRELIMINARY STEPS**

Given the limited nature of the inquiry we anticipate that three days will be sufficient time for the hearing. The only time available for the hearing prior to Christmas is 30 November to 2 December 2005.

The Tribunal considers that it would be appropriate for the current TWA council to be involved in the inquiry and asks the Crown to advise *within one week* (ie, no later than 1 November 2005) whether the council would wish to be joined as a party or be involved in some other way.

Claimant counsel is asked to review the various interlocutory applications for summons of witnesses and discovery of documents to see if these are now necessary or require some amendment and to advise the Tribunal *within one week*.

In order to assist the Tribunal to prepare a draft statement of issues, Crown counsel is asked to make a formal response, *within two weeks*, to those parts of the statement of claim that will be the subject of the Tribunal's urgent inquiry.

The Tribunal will issue a draft statement of issues as soon as possible after receiving the Crown's response and will invite submissions from counsel prior to finalising the issues.

We trust that, in the spirit of partnership, TWA and the Crown will suspend all critical actions or decisions relating to the acceptance of the revised charter and student profile and any consequential actions or decisions until the Tribunal's inquiry and report are completed. For its part, the Tribunal undertakes to report on this claim, at least in an interim manner, before the end of 2005.

Dated at Wellington this 25th day of October 2005.

Judge STA Milroy

Ms JR Morris

Acting with the authority of the chairperson of the Waitangi Tribunal



APPENDIX II

**DRAFT PARTNERSHIP AGREEMENT**

**DRAFT PARTNERSHIP AGREEMENT**  
**BETWEEN THE CROWN AND THE WĀNANGA**

Partnership Agreement dated ..... between Her Majesty the Queen ('the Crown') and the councils of Te Wānanga o Aotearoa, Te Whare Wānanga o Awanuiarangi, and Te Wānanga o Raukawa.

**Purpose of this agreement**

- 1 This agreement sets out the framework for an ongoing relationship between the Crown and the councils of the three statutory Wānanga (Te Wānanga o Aotearoa, Te Whare Wānanga o Awanuiarangi and Te Wānanga o Raukawa).
- 2 The purpose of this agreement is to record the mutual commitment of the parties:
  - a to work together in good faith to safeguard and promote the mutual interests of the parties and to address any conflict or tension openly and constructively;
  - b in particular, to work together to create strong, sustainable Wānanga which serve the respective educational and cultural objectives of the communities they serve; and
  - c to act in ways that enhance the mana of both parties.

**The form of the agreement**

- 3 The agreement has three parts:
  - a the goals of the partnership;
  - b the principles which underlie the partnership; and
  - c a number of specific ongoing commitments to give effect to the partnership.

**Goals of the Partnership**

- 4 The parties commit to the following goals for the partnership:

- a to create and foster a high trust environment which allows the partners to work together while growing within their own tikanga and pursuing their own interests and priorities;
- b to provide New Zealanders with an effective choice to access tertiary education (including ahuatanga Māori) which meets international quality standards;
- c to ensure that each of the three statutory Wānanga has a capital base which enables them to function as major national providers of ahuatanga Māori tertiary education, through providing facilities up to a standard comparable to other tertiary institutions and commensurate with the needs of their students (as recommended in the Waitangi Tribunal's *Wānanga Capitalisation Report 1999 [Wānanga Capital Establishment Report] (Wai 718)*);
- d To provide a framework for the three statutory Wānanga and the government to work together towards agreed outcomes in terms of:
  - i. tertiary education participation and achievement for Māori;
  - ii. efficient use of resources;
  - iii. enhanced teaching and research capability, appropriate to individual Wānanga profiles; and
  - iv. effective representation of Wānanga interests through Te Tauihu o nga Wānanga.

#### **Principles of the Partnership**

- 5 The following principles will guide the partnership:
  - a acknowledgment that the Treaty of Waitangi is the basis of the relationship between the Crown and the Wānanga;
  - b acknowledgment of the importance of the Wānanga as institutions of higher learning and cultural preservation;
  - c acknowledgment of the shared interests of the parties in the development and promulgation of education policy and legislation that benefits the public at large;
  - d acknowledgement of the Crown's wider interest in managing the allocation of public financial resources;
  - e commitment to the following partnership values in the conduct of the relationship between the Crown and the Wānanga:
    - i Rangatiratanga: Autonomy. Recognising that each partner will have different lines of accountability. Enabling each party to develop and grow in its own way while recognising and acknowledging difference.
    - ii Kotahitanga: Unity. Agreement to work together towards a shared vision; and
    - iii Manākitanga: Goodwill. A commitment to work together within an environment of trust, respect and generosity towards each other. Recognising and understanding the capabilities and constraints each partner brings to the relationship.

**Processes for Working Together**

6 The partnership will be given effect by a programme of regular consultation between the parties. This will consist of meetings at least on an annual basis between Ministers and Wānanga representatives at Board Chair or similar level, at which the operation of the partnership will be reviewed, and any matters affecting the operation of the Wānanga and the interests and priorities of the Crown in Māori tertiary education will be discussed.

7 It is envisaged that the participants in this meeting will be:

- a the Minister of Education;
- b the Minister of Māori Affairs;
- c the Associate Minister of Education (Tertiary Education);
- d Wānanga Board Chairs or senior representatives of iwi involved in the governance of the Wānanga;
- e the Chair of Te Tau Ihu o nga Wānanga, where considered appropriate by the three Wānanga; and
- f the Secretary of Education.

8 The governance level meeting will be supplemented by regular meetings between the Secretary of Education and Wānanga Chief Executives, to identify issues to be discussed within the partnership process, gather information and analysis to aid discussion of issues, and monitor progress in implementing joint projects that are commissioned as part of the partnership.

9 The parties may alter the processes associated with working together from time to time.

10 Nothing in this agreement shall affect the obligations of the Crown to also deal with each of the Wānanga individually and according to each Wānanga's own circumstances. Nor shall it affect the rights and obligations of the Crown and each of the Wānanga in relation to any settlement agreements that are or have been reached in respect of the Wai 718 claim.

11 The Ministry of Education agrees that it will provide to the Wānanga all relevant strategic and policy information in order to ensure the effective implementation of this agreement. This undertaking will be limited only by statutory or contractual confidentiality requirements, for example, relating to commercially sensitive information or budget process.

**Term**

12 This agreement records a commitment to a long-term ongoing relationship. The parties acknowledge that over time the nature and focus of the relationship will evolve to reflect changing circumstances.

**Statutory and contractual obligations of the Ministry of Education and other Crown agencies**

13 The Wānanga acknowledge that the Ministry of Education is a Government department and that this agreement will not require the Ministry to act in any way contrary to its obligations pursuant to ministerial or cabinet direction, or under relevant legislation, or pursuant to any contractual obligations it has established with other parties.

14 The Wānanga agree that nothing in this agreement shall be taken to mean that the Ministry of Education or any other Crown agency or department in any way abrogates its statutory or contractual responsibilities. The Wānanga further agree that they will take all steps within their power to ensure that the Ministry and any other relevant Crown agency or department is able to comply with the same.

**Representations**

15 The parties agree that they will not make any statements on the other's behalf to any third party without the express authorisation of the other party.

**Confidentiality**

16 The parties agree that unless otherwise required by law, or by mutual agreement, they will keep confidential all information acquired as a result of this agreement.

**Payment**

[To be considered further: possible provision for payment to the Wānanga in respect of costs associated with carrying out this agreement, possibly by way of support to Te Tauihu o nga Wānanga.]

**Parties may amend this agreement**

17 The parties may at any time and by mutual agreement amend this agreement to reflect:

- a changes to goals to reflect changing circumstances;
- b addition of new statutory Wānanga; or
- c any other changes as both parties agree are necessary.

## APPENDIX III

### RECORD OF INQUIRY

#### RECORD OF HEARINGS

##### THE TRIBUNAL

The Tribunal that heard the wānanga claim comprised Judge Stephanie Milroy (presiding), Angela Ballara, Doug Kidd, Joanne Morris, and Joe Northover.

##### THE COUNSEL

Mai Chen and Catherine Marks acted for the claimants; Annsley Kerr and Helen Carrad for the Crown; Spencer Webster for Te Wānanga o Aotearoa; and Matanuku Mahuika for Te Whare Wānanga o Awanuiārangi.

##### THE HEARING

The claim was heard at the Te Rapa Racecourse Function Centre in Hamilton from 30 November to 2 December 2005.

#### RECORD OF PROCEEDINGS

\* Document confidential and unavailable to the public without leave from the Tribunal

##### 1. STATEMENTS

###### 1.1 Statements of claim

###### 1.1.1 Wai 1298

A claim by Harold Maniapoto and Tui Adams on behalf of the Aotearoa Institute Te Kuratini o Nga Waka Trust Board concerning Te Wānanga o Aotearoa, 19 September 2005

**1.2 Final statements of claim**

There were no final statements of claim.

**1.3 Statements of response**

1.3.1 Crown counsel, statement of response to Wai 1298, 8 November 2005

**1.4 Statements of issues**

1.4.1 Tribunal, draft key questions for Wai 1298, 7 November 2005

**2. TRIBUNAL MEMORANDA, DIRECTIONS, AND DECISIONS**

**2.1 Registering new claims**

2.1.1 Presiding officer, memorandum directing registrar to register statement of claim 1.1.1 as Wai 1298, 11 October 2005

**2.2 Amending statements of claim**

There were no memoranda amending statements of claim.

**2.3 Concerning judicial conferences and hearings**

2.3.1 Presiding officer, memorandum requesting Crown response to application for urgency, scheduling judicial conference, and disclosing personal contact with Te Wānanga o Aotearoa, 23 September 2005

2.3.2 Presiding officer, memorandum confirming inquiry timetable, status of council of Te Wānanga o Aotearoa, and conference venue, 7 November 2005

2.3.3 Presiding officer, memorandum concerning statement of issues and possibility of other wānanga joining inquiry, 16 November 2005

2.3.4 Presiding officer, memorandum concerning appearance of Dr Ranginui Walker as witness and late filing of Crown documents, and granting interim confidentiality orders for Crown documents and leave for Te Whare Wānanga o Awanuiārangi to be heard, 21 November 2005

**2.3.5** Presiding officer, memorandum concerning evidence of Dr Ranginui Walker and requesting notification of proposed Crown witnesses, 22 November 2005

**2.3.6** Presiding officer, memorandum concerning admissibility of Crown evidence and granting claimant counsel's applications for witness summons and videotaping of hearing, 29 November 2005

#### **2.4 Concerning Tribunal research commissions**

There were no memoranda concerning Tribunal research commissions.

#### **2.5 Concerning other matters**

**2.5.1** Chairperson, memorandum appointing Judge Stephanie Milroy and Joanne Morris to determine application for urgency, 20 September 2005

**2.5.2** Presiding officer, memorandum granting confidentiality order over certain Crown evidence, 14 October 2005

**2.5.3** Judge Stephanie Milroy and Joanne Morris, decision granting urgency to Wai 1298, 25 October 2005

**2.5.4** Chairperson, memorandum appointing Tribunal to hear Wai 1298, 8 November 2005

**2.5.5** Presiding officer, memorandum concerning status of Dr Ranginui Walker as Tribunal member, 14 November 2005

**2.5.6** Registrar, summons for Allan Sargison to give evidence at Wai 1298 hearing, 29 November 2005

### **3. SUBMISSIONS AND MEMORANDA OF PARTIES**

#### **3.1 Pre-hearing stage, including all judicial conferences**

**3.1.1** Claimant counsel, memorandum supporting application for urgency, 19 September 2005

**3.1.2** Dr Tui Adams, declaration supporting Wai 1298 claim, 9 September 2005

- 3.1.3** Harold Maniapoto, declaration supporting Wai 1298 claim, 9 September 2005
- 3.1.4** Claimant counsel, memorandum seeking right of reply to Crown submissions on application for urgency and raising no objection to appointment of presiding officer, 26 September 2005
- 3.1.5** Crown counsel, memorandum seeking extension for filing of response to application for urgency and raising no objection to appointment of presiding officer, 28 September 2005
- 3.1.6** Claimant counsel, memorandum concerning Crown request for filing extension, 29 September 2005
- 3.1.7** Claimant counsel, memorandum requesting production of Crown documents, 4 October 2005
- 3.1.8** Crown counsel, memorandum in response to application for urgency, 7 October 2005
- 3.1.9** Claimant counsel, memorandum concerning legality of reduced Te Wānanga o Aotearoa council, 10 October 2005
- 3.1.10** Crown counsel, memorandum seeking interim confidentiality order and leave to file brief of evidence, 11 October 2005
- 3.1.11** Claimant counsel, memorandum seeking witness summonses, 12 October 2005
- 3.1.12** Claimant counsel, memorandum in response to Crown submissions on application for urgency (paper 3.1.8), 12 October 2005
- 3.1.13** Claimant counsel, memorandum requesting production of Crown documents, 13 October 2005
- 3.1.14** Claimant counsel, memorandum concerning Crown request for interim confidentiality order, 13 October 2005
- 3.1.15** Dr Tui Adams, declaration supporting Wai 1298 claim, undated
- 3.1.16** Crown counsel, memorandum concerning review of Te Wānanga o Aotearoa's charter and reduction of its council membership, consultation, and Crown loan agreement, 17 October 2005

- 3.1.17** Crown counsel, memorandum seeking time to consider claimant brief (doc A1(a)), 18 October 2005
- 3.1.18** Claimant counsel, memorandum concerning Crown request for time to consider claimant brief (paper 3.1.17), 18 October 2005
- 3.1.19** Claimant counsel, memorandum concerning reduction of Te Wānanga o Aotearoa council, 18 October 2005
- 3.1.20** Crown counsel, memorandum concerning claimant evidence and finalisation of J1/A1 and charter reviews and profile of Te Wānanga o Aotearoa, 20 October 2005
- 3.1.21** Claimant counsel, memorandum concerning inquiry timetable, 27 October 2005
- 3.1.22** Crown counsel, memorandum concerning inquiry timetable, 28 October 2005
- 3.1.23** Claimant counsel, memorandum concerning Crown submissions on inquiry timetable (paper 3.1.22), 28 October 2005
- 3.1.24** Counsel for Te Wānanga o Aotearoa, memorandum seeking leave to join inquiry and concerning inquiry timetable and Tribunal request for suspension of decisions on charter and profile of Te Wānanga o Aotearoa, 1 November 2005
- 3.1.25** Claimant counsel, memorandum concerning review of interlocutory applications for witness summonses and document discovery and seeking evidence from Crown, 1 November 2005
- 3.1.26** Claimant counsel, memorandum concerning inquiry timetable, 1 November 2005
- 3.1.27** Crown counsel, memorandum seeking seeking extension for filing of documents, 4 November 2005
- 3.1.28** Claimant counsel, memorandum seeking seeking extension for filing of documents if Crown extension granted, 4 November 2005
- 3.1.29** Counsel for Te Wānanga o Aotearoa, memorandum objecting to summoning of witnesses and stating that wānanga employees are free to appear as witnesses, 4 November 2005
- 3.1.30** Claimant counsel, memorandum suspending request for witness summonses but reserving leave to renew application, 8 November 2005

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- 3.1.31** Crown counsel, memorandum concerning timetable for finalisation of profile of Te Wānanga o Aotearoa, High Court proceedings, and matters the subject of an inquiry by the Auditor-General, 10 November 2005
- 3.1.32** Claimant counsel, memorandum concerning Crown counsel's statement of response to Wai 1298 (statement 1.3.1), 10 November 2005
- 3.1.33** Claimant counsel, memorandum concerning Tribunal's draft key questions for Wai 1298 (statement 1.4.1), 11 November 2005
- 3.1.34** Crown counsel, memorandum concerning Tribunal's draft key questions for Wai 1298 (statement 1.4.1), 11 November 2005
- 3.1.35** Claimant counsel, memorandum disputing need to finalise profile of Te Wānanga o Aotearoa, 11 November 2005
- 3.1.36** Claimant counsel, memorandum concerning Crown submissions on Tribunal's draft key questions (paper 3.1.34) and Crown's late filing of documents, and seeking evidence from Crown, 14 November 2005
- 3.1.37** Crown counsel, memorandum seeking leave for late filing of attached documents, requesting that those documents not be placed on the record, and seeking confidentiality order for same, 15 November 2005
- 3.1.38** Crown counsel, memorandum raising concerns over appearance of Dr Ranginui Walker for claimants, 17 November 2005
- 3.1.39** Counsel for Te Wānanga o Aotearoa, memorandum concerning witnesses to be called and participation of other wānanga in inquiry, 18 November 2005
- 3.1.40** Counsel for Te Whare Wānanga o Awanuiārangi, memorandum seeking leave to join inquiry, 18 November 2005
- 3.1.41** Claimant counsel, memorandum in response to Crown submissions on appearance of Dr Ranginui Walker (paper 3.1.38), 18 November 2005
- 3.1.42** Claimant counsel, memorandum concerning evidence sought from Crown and requesting list of Crown witnesses, 21 November 2005

- 3.1.43** Crown counsel, memorandum restating concerns over appearance of Dr Ranginui Walker for claimants, 21 November 2005
- 3.1.44** Claimant counsel, memorandum concerning finalisation of profile of Te Wānanga o Aotearoa, 22 November 2005
- 3.1.45** Claimant counsel, memorandum concerning filing of evidence, 22 November 2005
- 3.1.46** Crown counsel, memorandum listing witnesses to be called and subject matter of their evidence, 23 November 2005
- 3.1.47** Claimant counsel, memorandum concerning filing of evidence and listing witnesses to be called, 23 November 2005
- 3.1.48\*** Crown counsel, memorandum concerning confidentiality of parts of *Forbes v Cox-head* unreported, 22 November 2005, Frater J, High Court, Hamilton, CIV-2005-419-1498, 24 November 2005
- 3.1.49** Crown counsel, memorandum concerning finalisation of profile of Te Wānanga o Aotearoa, 25 November 2005
- 3.1.50** Claimant counsel, memorandum concerning delay in filing of Crown evidence and non-appearance of Crown witness, 25 November 2005
- 3.1.51** Claimant counsel, memorandum concerning filing of revised briefs of evidence of Dr Ranginui Walker (doc A27), Rereamoamo Ohia (doc A26), and Rongo Wetere (doc A1(b)), 25 November 2005
- 3.1.52** Claimant counsel, memorandum concerning admissibility of Crown evidence, 28 November 2005
- 3.1.53** Claimant counsel, memorandum requesting leave to videotape Tribunal hearing, 25 November 2005
- 3.1.54** Crown counsel, memorandum in response to claimant submissions on admissibility of Crown evidence (paper 3.1.52), 28 November 2005
- 3.1.55** Claimant counsel, memorandum concerning summoning of Allan Sargison, 29 November 2005

**3.2 Hearing stage**

There were no papers relating to the hearing stage.

**3.3 Opening, closing, and in reply**

3.3.1 Counsel for Te Whare Wānanga o Awanuiārangi, closing submissions, 6 December 2005

3.3.2 Crown counsel, closing submissions, 7 December 2005

3.3.3 Claimant counsel, closing submissions, 9 December 2005

3.3.4 Counsel for Te Wānanga o Aotearoa, closing submissions, 9 December 2005

**4. TRANSCRIPTS AND TRANSLATIONS**

**4.3 Audio recordings**

4.3.1 Māori CD, 2 December 2005

4.3.1 English CD, 2 December 2005

**5. PUBLIC NOTICES**

**5.1 Judicial conferences**

There were no public notices of judicial conferences.

**5.2 Hearings**

5.2.1 Registrar, public notice of Wai 1298 hearing, 11 November 2005

**RECORD OF DOCUMENTS**

\* Document confidential and unavailable to the public without leave from the Tribunal

**A. DOCUMENTS RECEIVED TO END OF HEARING, 2 DECEMBER 2005**

A1 Rongo Wetere, brief of evidence, 3 vols, 15 August 2005

(a) Rongo Wetere, brief of evidence, 16 October 2005

A1—*continued*

(b) Rongo Wetere, brief of evidence, 25 November 2005

A2 Richard Te Moananui, brief of evidence, 15 September 2005

A3 Bentham Ohia, brief of evidence, 15 September 2005

A4 Katerina Bennett, brief of evidence, 15 September 2005

A5 Natana Ihaka, brief of evidence, 16 September 2005

A6 Alan Livingston, brief of evidence, undated

A7 Michael Stiassny, brief of evidence, 15 September 2005

(a) Michael Stiassny, brief of evidence, 27 November 2005

A8 Sir Graham Latimer, brief of evidence, 9 September 2005

A9 Meng Foon, brief of evidence, 8 September 2005

A10 William Hopkins, brief of evidence, 13 September 2005

A11 Walter Penetito, brief of evidence, 16 September 2005

A12\* Elizabeth Eppel, brief of evidence, 11 October 2005

(a) Elizabeth Eppel, brief of evidence, 28 November 2005

A13 Eleanor Barton, Arana Collett, Mana Forbes, Barry Hopkins, Carolyne Nia, Napi Waaka, notice of agreement to reduce membership of Te Wānanga o Aotearoa council, 29 August 2005

A14 William Hopkins, brief of evidence, 14 October 2005

A15 Margaret Evans, brief of evidence, undated

A16 John Harré, brief of evidence, 22 November 2005

A17 Hira George, brief of evidence, 22 November 2005

A18 Trevor Moeke, brief of evidence, 21 November 2005

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- A19** Kelvin Sanderson, brief of evidence, 18 November 2005
- A20** Dr Ngapare Hopa, brief of evidence, 22 November 2005
- A21** Harold Maniapoto, brief of evidence, 23 November 2005
- A22** Margaret Aull, brief of evidence, 22 November 2005
- A23** Veronica Tawhai, brief of evidence, 23 November 2005
- A24** Keith Ikin, brief of evidence, 23 November 2005  
(a) Keith Ikin, revision of 23 November 2005 brief of evidence (doc A24), 28 November 2005  
(b) Keith Ikin, brief of evidence, 1 December 2005
- A25** Erunui Te Moananui, brief of evidence, 23 November 2005  
(a) Erunui Te Moananui, revision of 23 November 2005 brief of evidence (doc A25), 28 November 2005
- A26** Rereamoamo Ohia, brief of evidence, 25 November 2005
- A27** Dr Ranginui Walker, brief of evidence, 25 November 2005  
(a) Dr Ranginui Walker, 'Quality Assurance in Tertiary Education from a Māori (Indigenous) Perspective', paper delivered to the International Network of Quality Assurance Agencies in Higher Education conference, Wellington, 31 March 2005
- A28** Max Kerr, brief of evidence, 28 November 2005
- A29** Howard Fancy, brief of evidence, 28 November 2005
- A30** Janice Shiner, brief of evidence, 28 November 2005
- A31** Gary Hook, brief of evidence, undated
- A32** John Mote, brief of evidence, 30 November 2005
- A33** Craig Workman, brief of evidence, 28 November 2005
- A34** Nicholas Russell, affidavit as to service of witness summons, 29 November 2005

**A35** Te Ururoa Flavell, brief of evidence, 26 November 2005

**A36** Craig Coxhead, brief of evidence, 28 November 2005

**A37** Various delegates to World Indigenous Nations Higher Education Consortium, letters of support for Te Wānanga o Aotearoa, 27 November – 2 December 2005

