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**An Economic Appraisal of *Nga Tipu Whakaritorito*:
A New Governance Model for Maori Collectives**

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Abstract

Interest in the governance of Maori collectives has grown considerably over the past decade as significant settlements have been made between the Crown and various tribes (iwi) under the Treaty of Waitangi, and also as Maori collectives take an increasing role in providing social service delivery on behalf of government to Maori communities. Maori collectives pose complex challenges in the design of optimal governance systems, given the many overlapping roles and relationships assumed by individual collective members, and cultural dimensions of Maori organisation typically based predominantly around lineage and social standing. The Maori Development Ministry, Te Puni Kokiri – like other agencies – argues that the wide range of governance entities currently used by Maori collectives for their various economic, social, political and cultural activities each have inadequacies that are exposed in the Maori collective context. It has proposed a new governance entity that it claims better meets the requirements of such collectives. This paper briefly describes and analyses the Maori collective governance problem from the perspective of the economics of governance, and provides an appraisal of Te Puni Kokiri’s proposal in this light. It is argued that the proposed new governance entity offers little more than existing available options, and in fact may not be meeting any particular deficit in the governance framework, for Maori collectives or otherwise. Standard and cooperative companies are shown to be more suitable for Maori collective governance than often thought. For the Te Puni Kokiri proposal to materially add to the governance options available to Maori collectives it will be important to consider it in the light of forthcoming proposals for assisting Maori collectives to establish their mandate and “voice.”

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1. Introduction

Maori society in New Zealand has traditionally been based around collectives involving some measure of kinship, although the dramatic shift in the Maori population from rural to urban areas since World War II have given rise to collectives based around other forms of association, such as cultural identity. The need for governance structures to reflect these realities has long been known, with inadequacies in long-standing special purpose governance models, such as Maori trust boards under the Maori Trust Boards Act 1955, being well documented (see, for example, Mason Committee (1994)). For example, under that Act trust board members are accountable to a government minister instead of its own tribal members, and trust powers and authorities are highly restricted.

The process of redressing historical grievances under the Treaty of Waitangi has given rise to a renewed interest in Maori governance structures. The government agency responsible for advancing Treaty settlement negotiations, the Office of Treaty Settlements (OTS), has adopted principles and policies to ensure that those purporting to represent claimant groups have an adequate mandate to do so, and that arrangements are in place for the proper governance of any assets transferred to claimants under Treaty settlements (Office of Treaty Settlements (2002)). Complementing this work, the Law Commission has prepared advice for the Maori Development Ministry, Te Puni Kokiri (TPK), OTS and the Maori Land Court on whether a generic post-settlement Maori governance entity ought to be developed, given limitations of existing, commonly-used governance structures (Law Commission (2002)), with further work in this area due for completion in April 2005. At a practical level, the Maori Fisheries Act 2004 stipulates various governance requirements for Maori tribes (iwi) in order for them to qualify for allocations of cash, fish quota and company shares arising from the Maori fisheries settlements (Treaty of Waitangi Fisheries Commission (2003)).

The need for good Maori governance structures does not derive exclusively from the Treaty settlements process, however. Maori collective organisations ranging from small family groups through to large pan-tribal associations have long been used and continue to be formed to conduct a wide range of economic, social and cultural affairs. They have also taken an increasing lead in social service delivery to Maori communities under contract to government or otherwise, for example in health, education and job training. With the devolution of resource management to regional government under the Resource Management Act 1991 (RMA), the engagement of local Maori groups in decision processes affecting the environment has become increasingly important. However, despite the considerable work undertaken in this area, and the long-known problems faced by Maori collectives in organising their affairs through available governance vehicles, to date only one iwi, the south Island's Ngai Tahu, enjoys

a tailor-made, general-purpose Maori governance entity (enacted under Te Runanga o Ngai Tahu Act 1996).¹

To assist Maori collectives in the formation of suitable governance entities, TPK has released a proposal for a new such entity – *Nga Tipu Whakaritorito* – intended to cater for what it describes as unique functions and requirements of Maori collectives not served by existing options (Te Puni Kokiri (2004a)). Emphasising the need for flexibility and reliability, the proposal is described as “the biggest development in the governance of Maori interests in over 50 years.” This paper provides an analysis of TPK’s proposal, drawing on insights from the economic theory and evidence on corporate governance.

The paper is organised as follows. Section two briefly backgrounds some of the issues particular to the governance of Maori collectives, with a summary of *Nga Tipu Whakaritorito* provided in Section three. Section four then sketches some of the general economic considerations relevant to the governance of various entities, with an application of these ideas to the governance of Maori collectives and appraisal of *Nga Tipu Whakaritorito* in particular, in Section five. Section six concludes.

2. Governance Issues Particular to Maori Collectives

The collective organisation of activity is entirely commonplace, and economic theory suggests that different types of collective organisation, where they arise other than by simple legislative fiat, evolve and endure if they represent efficient solutions to the costs of organisation.² Shareholders form companies through which to collectively own and operate economic assets. Cooperatives are formed by customer-owners (e.g. hardware or supermarket chains) or supplier-owners (e.g. dairy cooperatives) to do likewise, illustrating how the owners of such collective ventures also relate to their ventures in capacities other than simply as capital providers. Incorporated societies are formed so that people can engage in shared pursuits, such as sport, charity or the support of the arts, and as such can also relate to their members in more than one capacity (e.g. as both patron and consumer). Accordingly, it might be expected that Maori collectives share some of the issues encountered in these other contexts, and might benefit from some of the solutions they provide. It is therefore both useful and important that any discussion of Maori governance issues clearly delineates where those issues coincide with or diverge from those faced by other collectives. It might be considered that a completely distinct Maori governance entity is warranted simply as a matter of cultural preference, however, absent particular issues faced only by Maori collectives it would otherwise appear unnecessary to develop a new governance entity.³

¹ The author declares an interest in this legislation, having advised and represented Te Runanga o Ngai Tahu (and its predecessor, the Ngaitahu Maori Trust Board) in its Treaty settlement process through which the legislation arose, and assisted with the creation of the tribe’s current governance arrangements under its charter, or constitution (Te Runanga o Ngai Tahu (2003)).

² See Hansmann (1996) for a well-constructed survey and discussion.

³ Unless existing options are also inadequate for some types of non-Maori collectives, in which case any proposed solutions ought to be sought by Maori and non-Maori alike.

At the heart of most Maori collectives are the ties of kinship (whanaungatanga) and shared cultural identity (Maoritanga). These particular features can be both an advantage and a disadvantage, in that they provide a clear genealogical basis for determining “membership” of Maori collectives (i.e. lineage, or whakapapa), but also mean that the members of Maori collectives will typically be quite heterogeneous (e.g. as to interests, skills, age, etc). They also raise questions as to whether membership is automatic, or requires explicit opt-in, which affects the incentives of members to monitor the collective or otherwise involve themselves in its affairs. In these regards Maori collectives can in fact be likened to the wider national societies of which they are part. Importantly, such membership status is generally not transferable or disposable, although those not wishing to identify with their kin-based collectives can choose not to involve themselves with those collectives, albeit at potentially significant cost.⁴

With membership of Maori collectives being defined in terms of their members’ identity rather than interests or objectives, it is therefore unsurprising that they typically involve numerous and diverse functions, roles and objectives. Some collectively-owned assets might be held under the collective’s stewardship (kaitiakitanga) for non-commercial purposes for the benefit of present and future generations (e.g. tribal lands, such as traditional meeting-grounds, or marae).⁵ Such stewardship might also be collectively exercised in respect of non-owned resources (e.g. protection of waterways or other natural features under RMA processes). Alternatively, other collectively-owned assets might be used for commercial purposes, and might be happily bought or sold. Social and cultural developments are often priorities for Maori collectives, encompassing activities as diverse as support for language and traditional art skills, care for the young or elderly, and education and job training. These commercial and social aspirations frequently coincide in specific ventures (e.g. forestry development on tribal lands to turn them to economic advantage while providing tribal members employment training and opportunities).

Besides these, such collectives might also assume representational functions in terms of relationships with parties outside the collective (including regional and central government), and advance Treaty claims and receive Treaty settlement assets. These functions can extend into the political realm, both locally and nationally. Furthermore, Maori collectives can form a channel for social service delivery, such as marae-based smoking-cessation health programmes. Finally, those collectives with sufficient resources may wish to make distributions to their members, in either cash or kind.

Where Maori collectives are formed other than on the basis of kinship – such as urban Maori organisations which have developed in response to the urbanisation of Maori and loss of traditional

⁴ Unlike shareholders in listed companies, for example, members of Maori collectives are typically unable to liquidate their interest in the collectives’ assets by selling a proportionate claim over those assets to third parties. Instead, they must simply abandon the benefits that would otherwise accrue to them from their membership if they no longer wish to participate in the collective.

⁵ Indeed, such an emphasis on stewardship has often become a rationale for gross restrictions on asset alienation, with the intention of preserving asset ownership for future generations (see, for example, the Maori Land Act (Te Ture Whenua Maori) 1993). While this attitude may in part reflect a reaction to painful memories of the rapid and large-scale dispossession of Maori lands in the nineteenth century, as argued later, the effect of such mechanisms may well be self-defeating.

tribal affiliations – the above discussion can continue to apply, but now with possibly less clarity regarding membership criteria. In this case even greater heterogeneity of interests and member characteristics might be assumed, although the natural evolution of such collectives suggests they are sufficiently effective at meeting otherwise unmet organisational needs that any problems from this greater heterogeneity are outweighed. Indeed, Maori collectives are sometimes also formed without a precise kinship basis but with clearly defined objectives, such as the recently-formed Maori party which is to contest central government elections. To the extent that such collectives are based around voluntary and non-intergenerational membership it should be expected that existing governance entities will meet many of their associated governance requirements.

It is also important to recognise that Maori collectives can be distinguished from other collective organisations for reasons other than membership criteria and the nature and diversity of their functions.⁶ In particular, it might be expected that a Maori collective engaging in a similar activity to a non-Maori collective, with each using an identical governance entity, may well operate differently within that entity to its non-Maori counterpart. This is simply to recognise that there are aspects of Maori culture not shared with non-Maori that impinge on the *process* of governance, not just on the *structures* of governance.

In the first instance it should be recognised that traditionally the main Maori social unit is not the individual, but the family (whanau). Furthermore, social status/influence (mana) is traditionally conferred mainly by a person's familial proximity to a senior male line, rather than simple merit, although standing can be earned by deed. Similarly, Maori custom (tikanga) can also dictate that positions of responsibility are conferred on senior members of leading families, with the views of elders (kaumatua) being particularly regarded. As such, the control and use of resources is not always linked to ability or merit, but rather to social status flowing from bloodline and age. Unlike annual general meetings of typical non-Maori entities such as companies, gatherings (hui) of Maori collectives place considerable emphasis on the process of decision-making (e.g. discussion, or korero) and the desirability of consensus (as opposed to majority rule). This in turn reflects notions of mutual rights and obligations (and collective responsibility) of members in the kin-group, which perhaps explains a common preference for the delegation of representation rather than of authority in Maori collectives. Add to these factors particular notions of stewardship, spirituality, association with traditional locales, and traditional affinity with nature, and some distinctively Maori dimensions are added to the questions of Maori collective governance. The organisational question is whether these differences are sufficiently great that existing governance organisational structures and governance arrangements are unsuitable or otherwise deficient.

⁶ Which, as it happens, might not be so distinct from other organisations such as main-stream churches, involving as they do commercial, social service, religious and other arms, with overlaps between patrons, donors, members and beneficiaries. A comparison of organisational and governance structures of the Salvation Army or Presbyterian Church, for example, should be expected to throw up striking parallels with the organisational challenges faced by Maori collectives. Regrettably such comparisons are beyond the scope of this paper and left for future consideration.

Finally, the multifarious nature of activities conducted by individual Maori collectives has typically spawned a corresponding profusion of governance vehicles through which those activities are conducted. Companies (standard or cooperative) are used for commercial activities, sometimes via joint ventures with other parties. Various types of trust or incorporation under The Maori Land Act (Te Ture Whenua Maori) 1993 are used for the management of multiple classes of Maori-owned lands. Charitable trusts are often used for social service delivery, and other entities besides (e.g. Maori Trust Boards, incorporated societies, ordinary private trusts) can often be used in conjunction with each of these. In each case differing roles, powers, duties and constraints arise, not to mention significant direct costs, and the relationships between members, owners and beneficiaries can widely vary. Thus the questions of Maori collective governance extend beyond the simple appraisal of any one governance form, but to the governance of a multitude of such forms for varying purposes but with a common ultimate membership. Once again this can in fact be thought of as a reflection, setting aside cultural differences, of the continually thorny governance issues confronting the wider New Zealand society. However, the addition of Maori cultural distinctives has the potential to complicate Maori collective governance even further.

3. *Nga Tipu Whakaritorito* in Brief

In *Nga Tipu Whakaritorito* TPK states that Maori collectives face unique pressures in carrying out their diverse activities, and that such collectives require governance entities that are “representative, accountable, flexible, transparent and effective” (p. 8). The proposed governance model, which can be used by Maori collectives if they choose to, is based around three key elements: legal capability, minimum constitutional requirements, and procedures for creating a new entity. Each is expanded on below.

Legal capability includes the need for a distinct legal personality for Maori collectives, allowing collectives to own assets, sue and be sued, and do all those things that individuals or companies (for example) take for granted. Perpetual succession is seen as another necessary feature, allowing the collective to endure for the benefit of both present and future members (particularly where membership is determined according to lineage). This heading also touches on the need for Maori collectives to be able to provide benefits to members both collectively and individually, in whatever form they choose.

Minimum constitutional requirements are not set out in full by TPK, but six headings under which member agreement will be required as to constitutional minimums have been specified.⁷ First, a collective obligation of guardianship (*kaitiakitanga*) over ancestral lands, resources and sacred areas for current and future generations is to be included in Maori collective constitutions. Second, general representation requirements, such as membership criteria and registration, election of governors, and member involvement in decision-making, are to be specified. Third, accountability provisions in constitutions are to include the disclosure of and reporting against strategic documents such as strategic plans, processes for annual general meetings and annual reports (including open forums for governors to be questioned), duties and obligations of governors (to act in the best interests of current and future members, with civil liability exemption if they act honestly and in good faith for proper purposes), decision-making principles mirroring those in the Companies Act 1993 (with governors obliged to exercise the care, diligence and skill of a “reasonable representative”, and to inform themselves beforehand, when taking decisions), and special resolutions of members required for constitution amendments. Fourth, members are to have access to appropriate information (i.e. with exclusions for commercially sensitive materials). Fifth, roles and responsibilities of members and governors are to be specified, including processes for declaring and managing conflicts of interest. Sixth, the constitution of Maori collectives is to include dispute resolution procedures, both for disputes between members and governors, but also between members.

Finally, a process for establishing Maori collectives under the proposed new entity is briefly outlined. Registrations are to be the responsibility of the Companies Office. It is envisaged that collectives would first agree on a constitution satisfying the above minimum requirements, and then submit it to the

⁷ Further details of the minimum requirements under each heading, as well as issues requiring decisions by collectives when forming their constitutions, are expanded on in the appendix to *Nga Tipu Whakaritorito*.

Companies Office registrar for incorporation, requiring the registrar to ensure the minimum constitutional standards have been met. TPK raises the question as to whether some third party ought to verify that the collective's members have agreed with the constitution's provisions, and/or hear any member objections to the constitution. Assuming all requirements are met and any objections overcome, the new entity would be incorporated, although the registrar would have some not-yet-specified capacity to wind up or strike off an entity. Issues relating to the transition of existing Maori collective activities to the new entity are also discussed, and it is noted that the preferential Maori authority and charitable tax statuses should still be attainable (subject to the standard qualifying criteria) by the new entity.

4. The Economics of Governance

4.1 Terminology

Before proceeding some definitions are in order. For this paper's purposes "governance" will be given the same meaning as in *Nga Tipu Whakaritorito*, namely "the people, structures, systems, policies and processes by which an organisation operates." This compares, for example, with OECD (2004) in which corporate governance refers to "a set of relationships between a company's management, its board, its shareholders and other stakeholders . . . [providing] the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined." As noted by TPK, governance is to be contrasted with "management", or the day-to-day running of an organisation, with managers (or more normally, the chief executive officer) taken to be responsible to governors (or directors of the board), and governors in turn elected by and responsible to the collective's members.

Following Hansmann (1988, 1996), the term "owner" will refer to a party having the right to both control an organisation, and appropriate that organisation's "residual earnings" (meaning all net cash returns and capital gains accruing to that organisation after its committed outgoings have been satisfied). Thus, for example, the owners of a company – its shareholders – are those with the formal right to elect the company's board of directors by voting at company general meetings, and who are legally entitled to the company's post-tax net profits (whether paid as dividends or retained and capitalised into its share price).

Hansmann uses the term "patrons" to describe any parties that transact with an organisation, whether as suppliers, customers, donors, subsidisers, service delivery contractees or capital providers (including lenders). In the present context such patrons can be taken to include "members" of Maori collectives, who are likely to exercise varying degrees of control over their collectives, and will transact with the collectives in various capacities (e.g. providing labour services, receiving social, cultural and other services, or supplying goods). Such members may also take the role of "beneficiaries", in that they may qualify for the special provision of goods, services or distributions from the collective. Indeed, Maori

collective members may simply “belong” to such collectives rather than receive tangible benefits, but in a sense this simply means that they receive benefits of a more psychic kind. Of course Maori collective member/beneficiaries may also assume control functions directly, through also being governors and/or managers of those collectives. Such possible multiple coincidences of roles are not unique to Maori collectives, in that, for example, shareholder managers of companies not only own those companies and supply them with capital and labour services, but they may also purchase the goods or services their companies produce and/or sit on their boards of directors.

Where members of Maori collectives may fail to have the character of owners is in their lack of legal formal control over the collective (e.g. as is the case for some trusts, with wide discretions granted to their trustees and trust beneficiaries having limited scope to remove or appoint trustees). Alternatively, they may be unable to *appropriate* the residual earnings of the collective. If they are bound to the collective by kinship and possess no alienable ownership claim like a company share, or otherwise are unable to receive distributions of residual earnings from the collective, then the nature of Maori collectives in fact begins to mirror that of so-called “nonprofit” organisations, which are commonly held to have no owners in the legal (or economic) sense. As noted by Howell (2000), nonprofits are actually commonly engaged in profit-seeking activities, and instead should be differentiated in terms of how they generate their profits, how the benefits of their profits are shared and applied, and the objectives and motivations governing the distribution process. The lack of appropriable profits, often because they are retained in the organisation for its future activities rather than distributed, define nonprofits and provide a likely overlap with many Maori collectives.

4.2 The Corporate Governance Problem

Becht *et al.* (2002) state that the corporate governance problem arises whenever an outside investor in a firm wishes to exercise control in a way that differs to how that control is exercised by the firm’s manager. This is the classic problem arising from the “separation of ownership and control” identified for large US corporates by Berle and Means (1932), and developed by authors such as Jensen and Meckling (1976) and Fama and Jensen (1983a,b) into the branch of economics known as “agency theory.” Such a separation is expected, for example, when large capital investments are required (i.e. beyond the financial resources of owner-managers), and/or specialised knowledge is required to manage organisations, giving rise to comparative advantages in capital provision and risk-bearing/management (i.e. investor-owners) and asset management (i.e. managers).

Such authors suggest that where owners (“principals”) and managers (“agents”) are not one and the same, it should be expected that their interests will from time-to-time or in certain circumstances diverge, for example with managers not working as hard as owners might like, pursuing pet projects at the owners’ expense, or otherwise expropriating owners’ wealth. It is therefore in the interest of both the owners and managers to expend resources to mitigate such agency problems. For example, owners can appoint boards of directors to oversee managers on their behalf, and auditors to verify the

accuracy of information provided to them by management. Or they might apportion some of their investment returns to management via managerial share ownership, or compensation tied to financial performance, to more closely align managers' interests with their own and thereby reduce managers' incentives to engage in value-harming behaviours. For their part managers may benefit, for example, by bonding their performance to their firms' owners, such as agreeing with owners to managerial advancement and remuneration being tied to the delivery of key outcomes.

However, it is impossible to costlessly write, monitor and enforce contracts between owners and managers to eliminate all divergences between owners' and managers' interests in all possible present and future states of nature. For example, there are inevitable direct and indirect transaction costs incurred for each contracting activity. The future is uncertain and hence not all contingencies can be specified, let alone contractually addressed. There can be significant asymmetries in skill and information between managers and owners meaning that performance contracts are often easily skewed in favour of the more informed or skilful party (in this case, usually managers), and hard to monitor (since managers typically control the flow of information and better understand it). And some matters are not capable of being addressed contractually, for example where property rights are inadequately specified, or not capable of specification (e.g. managerial tenure cannot be locked in by owners because slavery is legally prohibited).

There are other means available to owners, however, to reduce the impact of divergences between managers' incentives and their own. For example, debt financing can be used to reduce the amount of "free cash flow" (i.e. cash flow in excess of that required for worthwhile investments) being dissipated by poor management,⁸ and to place constraints on managerial opportunism (such as those contained in loan covenants, for example, limiting managerial discretions over investments). Like the use of external equity capital, the use of debt capital also increases the monitoring of management by other parties, with advantages for incumbent owners. While the interests of lenders and outside equity providers may not wholly coincide with those of the incumbent owners – and the theory and evidence indicates that agency costs also arise between different capital providers, not just between owners and managers – where there are overlaps of interests the incumbent owners can benefit from the resources expended by such other parties to protect their interests from poor management. Ultimately, however, due to the impossibility of eliminating all possible divergences between owners' and managers' interests, it must be expected that resources will be expended by parties affected by the agency problem only to the point where the marginal benefit of expending those resources equals the marginal cost of doing so, meaning that there will always be residual costs due to the agency problems that remain.

Jensen (1993) broadens the agency discussion, identifying four main classes of force controlling a firm. First is the controlling influence of capital markets, with investors having direct incentives to monitor the performance of their investments, and through ownership transferability having the ability to pass control of poorly performing companies to new owners, who can ultimately have senior managers

⁸ See Jensen (1986).

replaced with better performers. Indeed, the threat of takeover and management dispossession is argued to be a significant discipline on management.⁹ Second are the relatively blunt controlling forces provided by the legal, political and regulatory systems. Companies, securities and criminal laws and regulations, for example, mandate the respective general rights and duties of owners, their delegates (i.e. directors) and managers, and provide sanctions for breaches of these. However, no amount of such mechanisms can force good firm performance; generally they merely discourage or punish poor performance. Third is the influence exerted by product and factor markets. Managers of firms in competitive environments face particular disciplines to perform well or else risk losing their jobs when their firm fails. Those which do not earn sufficient returns to justify paying the required market price for productive inputs (e.g. labour, raw materials) are similarly at risk of failure. Managers are also disciplined by their desire to maintain their good reputation should they face the prospect of re-entering the managerial labour market at some future date, voluntarily or otherwise.¹⁰ Last are the commonly-used internal control mechanisms of firms, headed by boards of directors which appoint the chief executive officer, monitor his or her performance and regulate his or her remuneration, and vet the firm's strategies and major transactions on behalf of shareholders. Some or all of these forces will effectively constrain undesirable managerial performance to some degree, and to varying degrees depending also on the type of organisation (i.e. for organisations other than shareholder-owned firms).

Beyond the problems of simple agency, where those who own organisations are not identical to those who manage them, additional problems arise when investor-ownership is dispersed, rather than concentrated in the hands of one or only a few owners, giving rise to a collective action problem among owners. When investors have small ownership stakes in an organisation relative to other owners, or if their ownership stake is small relative to their total wealth, they face weakened incentives to monitor their investment stake and incur the costs of coordinating actions with other owners having like interests. Indeed, this encourages them to free-ride on the monitoring and control activities of other, typically larger parties. Where the interests of these other parties coincide with those of the smaller owners, the presence of large, controlling owners has proven to be a particularly effective discipline on managerial performance, especially when combined with legal protections against shareholder wealth expropriation by management and large shareholders (although these benefits to smaller owners decline when such larger owners approach outright firm dominance).¹¹ However, where organisations have multiple objectives and heterogeneous owners it should be expected that owners' interests will commonly diverge, and the problems of collective action will be significant.

Similarly, Hansmann (1996) predicts that particular collective action problems will arise when managerial decisions affect different owners in different ways, such as when owners patronise their organisation in different ways, or when their personal circumstances differ. And where interests differ, collective choice mechanisms are required, involving costs additional to those arising due to agency

⁹ Karpoff and Rice (1989) argue that the lack of takeover threat due to non-transferability of ownership of native corporations created under the 1971 Alaskan Native Claims Settlement Act contributed directly to their poor relative financial performance, and increased control contests, manager and board turnover, and inter-shareholder disputation, as emphasised in the context of the Maori Fisheries Bill by Meade (2003, 2004).

¹⁰ See Fama (1980).

¹¹ See, for example, Becht et al. (2002), or Shleifer and Vishny (1997).

problems. The first such class of additional costs relates to the cost of non-welfare maximising decisions being taken by the organisation, particularly where voting processes are capable of distortion and/or are skewed towards the “median” voter. The second relates to the direct costs of political mechanisms required for decision-making. These include the time, cost and effort of owners to become informed, lobby and form alliances (as well as the costs of parties acting strategically), and the resulting decision cycles with costly reversals and opportunism caused by instability as the balance of power within an organisation alternates. These collective choice costs, Hansmann argues, can be mitigated when there are accepted criteria for balancing interests, such as making decisions for the collective rather than individual good. Ostrom (2000) similarly suggests that collective action (and monitoring) problems can be resolved when patrons of an organisation devise their own patronage rules (with local enforcement and graduated sanctions for rule breaches), define patronage criteria, and relate patronage costs with patronage benefits in some proportionate manner.¹²

The discussion thus far has traversed the problems of agency and collective action which characterise organisations with multiple owners and some degree of separation between owners and management, and outlined some of the ways in which these problems can be mitigated, however incompletely. Before relating these ideas to the problems of Maori collective governance, and *Nga Tipu Whakaritorito* in particular, it will first be useful to briefly set out a framework for characterising and assessing different forms of ownership.

4.3 An Ownership Framework

Coase (1937) famously addressed the fundamental question – why do we have firms? His conclusion was that the boundaries of a firm – the extent to which it owned or otherwise controlled its productive resources “in-house” – reflected the relative costs and other difficulties of procuring those resources by contracting in their respective external markets. Thus a firm might own a specialised machine rather than contract with an external owner to provide that machine’s services, for example, if the latter approach risked it being exposed to the external party exploiting the firm’s dependence on that relationship. A balancing of relative transaction costs – internal versus external – can thereby influence the extent of an organisation.

Authors such as Fama and Jensen (1983a,b) extend the work of Coase by suggesting that when left to natural forces, the organisational forms that survive over time are those delivering products demanded by their customers at the lowest price while covering both production and organisational costs. Hansmann (1988, 1996) argues similarly, suggesting that over time we should expect to see organisational forms evolving by virtue of market forces in such a way that ownership of those organisations is assigned in a way that minimises the sum of two kinds of costs. The first costs are

¹² Flavin (2004) applies Ostrom’s ideas in the context of Maori ownership and governance of “common pool resources,” being resources that are non-exclusive (all members of the group can access the resources) and rivalrous (the consumption of the resource by some reduces the amount available to others).

those of market contracting, for example where certain patrons of an organisation are exposed to: market power being wielded against them by other patrons (e.g. up-stream suppliers with monopoly advantages); *ex post* “lock-in,” where relationship-specific investments are required and/or the patrons cannot costlessly exit their contract, conferring an element of market power on other patrons by virtue of the market contract having been entered into; and information asymmetries, such as when the patrons are vulnerable to other patrons exploiting their superior knowledge regarding the quality of products or services supplied. In each case these costs of market contracting can be mitigated to some degree by the vulnerable patrons owning those patrons (e.g. suppliers) with the upper hand.

Ownership imposes its own costs, however, and these are the second costs that must be included in the ownership-determining, twin-cost class minimisation. As discussed above, the costs of ownership include the agency costs arising from the separation of ownership and control: both the costs of mechanisms to mitigate divergences of interests between owners and managers, and those residual costs due to managerial opportunism which cannot be completely eliminated by such mechanisms. They also include the costs of collective decision-making, including the costs of sub-optimal decisions as well as the direct costs of implementing mechanisms to facilitate collective decisions. Finally, they include the costs of risk-bearing, with some parties more naturally able to bear the risks of fluctuating residual earnings, and to diversify those risks. With this framework in mind, Hansmann is then able to explain the factors contributing to the observed persistence of various organisational forms – investor-owned companies, cooperative companies, nonprofits, etc – in particular spheres of social and economic activity. He also notes that *formal* ownership can tend to fall to particular patrons of an organisation even where they are not well-placed to exert *effective* control, provided their ownership minimises the combined costs of ownership and market contracting, and/or no other class of patrons is better-placed to exercise effective control.

Accordingly, investor-owned companies can be viewed as a natural outcome where the costs of contracting for investment capital are large relative to the costs of securing other productive inputs, and where other classes of patrons (e.g. workers) are not better-placed to exert effective control. Supplier- or customer-owned cooperatives, by contrast – which represent more general versions of investor-owned companies – can be the natural outcome when there are imperfections in downstream or upstream markets respectively, and the interests of the cooperatives’ customer- or supplier-owner patrons are relatively homogeneous (thereby mitigating conflicts of interest and associated costs of collective action). Hence dairy farmers might be natural owners of downstream processing, for example, if there are otherwise regional monopolies in dairy processing. And nonprofit organisations – in which no patrons are able to appropriate those organisations’ residual earnings, meaning they are thus without owners – commonly arise where there are severe information asymmetries between classes of patron, suggesting that the vulnerable class of patrons might benefit from owning the organisation, but where such ownership is precluded due to those patrons being unable to exercise effective control because the costs of doing so are high relative to the value of their transactions with the organisation. The most efficient result in this case is organisations without owners, instead being

run by managers in trust for its patrons. For reasons expanded on below, this latter model may commonly arise for Maori collectives.

5. The Economics of Maori Collective Governance

5.1 In General

Before appraising *Nga Tipu Whakaritorito* in the light of the above discussion, a few related topics are briefly traversed. First, the correspondence between the existing economic governance models and Maori collectives is shown. Second, the tendency for Maori collectives to organise their various activities via a range of governance structures is argued to be consistent with the predictions of the economics literature, begging the question as to how a new, overarching governance entity will improve the governance of such activities. It is left to an appendix to more fully explore the pros and cons of such an overarching entity. Third, the possibility of traditional Maori authority hierarchies providing a useful analogue for the governance benefits associated with the presence of large, controlling shareholders is explored. Finally, some cautions regarding the governance implications of concessional tax statuses, such as charitable and Maori Authority tax statuses, are noted.

Even where Maori collectives are governed according to traditional models of authority based around senior members of leading families, it remains appropriate to describe the collectives' members as principals, and such senior figures as their agents. This is particularly where the senior figures face strong fiduciary obligations to act in the interests of the wider collective.¹³ Thus the principal-agent framework described above can be translated into the Maori collective context. Conversely, the common inability of collective members to appropriate residual profits suggests the standard principal-agent analysis as applied to widely-held companies requires modification to take account of the more "non-profit" organisational character of Maori collectives. Indeed, the likely heterogeneity of member types and interests in such collectives, plus their multiple relationships with the collective, emphasise the need for governance models that account for more than just the problems arising from dispersed ownership and divergences between managers' and owners' incentives. The Hansmann framework is adopted for this purpose.

Taking the evolutionary perspective of ownership following Hansmann, the specific organisational forms currently used by Maori collectives for particular types of activity are a natural and efficient governance solution. Thus, where a Maori collective has commercial interests, those interests are naturally managed by companies with professional managers and boards of directors combining inside and outside directors. Recognising that Maori collectives often have limited capital resources and/or have highly diffuse membership, and that their commercial interests are often of insufficient scale to warrant public share-market listing, the capital, management and monitoring resources of third parties are

¹³ Comparisons with monarchies are appropriate here – even kings can lose their heads if they fail to care for their subjects.

often accessed by undertaking joint ventures. Where non-commercial assets of cultural significance are held for the benefit of present and future generations, it is likely that trust structures are most suitable.¹⁴ Certainly there is merit in commercial assets at risk of failure being legally ring-fenced from assets of cultural significance, albeit with consequent limitations on the borrowing capacity of the entities concerned.

Conversely, where for example a collective engages in social service delivery on behalf of government agencies, relying on government grants or contracting to deliver services in exchange for payment, nonprofit- or trust-type arrangements are then arguably most efficient. In this case the government agencies making the grant are concerned to see that it is used for the intended, specific purposes, and not simply appropriated as distributions or capital withdrawals by owners of the collective. By opting for a nonprofit or trust structure, there are no owners to appropriate the grant. By having boards relatively free of manager-insiders, and sometimes with representatives of the granting agencies, the collective can warrant to the granting agency that it is insulated from managerial capture and thus exercises independent oversight of how monies are applied. Each of these are useful counter-tensions to the problem that inevitably arises in such organisations, namely that their managers' incentives are more likely to be weakly aligned with those of the granting agency (and members/beneficiaries), that they are thus more inclined to engage in opportunistic behaviours (such as taking excessive perks, or fraud), and they enjoy significant informational advantages over their boards, members/beneficiaries and grantors which facilitate such behaviours.

Thus it should be expected that Maori collectives will continue to require particular organisational structures through which to undertake specific ventures. To suggest otherwise is to suggest that "one size fits all," which is most likely untrue, or that there are benefits to organising Maori collectives' multifarious activities through appropriate structures but under the oversight of some general purpose, overarching governance vehicle. The Appendix to this paper discusses the pros and cons of an overarching governance structure, taking as a useful illustration the tribal governance model adopted by the major South Island tribe, Ngai Tahu.

In a sense the overlaying of traditional Maori approaches to resource management on contemporary legal governance structures – with senior members of prominent families tending to have management responsibility whether or not they are best qualified to do so – provides an analogue for the beneficial monitoring role found to be played by large, strong shareholders in companies. But such benefits are found to be strongly associated with the degree to which such control rights are proportional to the ownership interests held by large monitoring shareholders,¹⁵ and hence the concentration of control in senior collective members cannot be presumed to be so beneficial. For cultural reasons it may be regarded as appropriate to centralise power in the hands of a ruling elite, democracy aside, particularly where there are cultural factors ensuring effective fiduciary obligations on that elite or if this is an

¹⁴ Albeit private trusts must be wound up within 80 years of their creation. By contrast, charitable trusts are not time-limited, but instead suffer other limitations such as charitable purposes and public benefit tests.

¹⁵ See Shleifer and Vishny (1997), and Dyck and Zingales (2004).

efficient means of resolving collective action problems. On the other hand, imposing an extra layer of overarching governance and executive power may bring costs from increased bureaucracy, which must be weighed against any such gains. In any case, absent positive rationales for a new layer of centralised governance in Maori collectives, whether dominated by senior members of prominent families or otherwise, it must be asked if the associated extra layers of agency costs and intensified collective action costs are justified.

Finally, it is worth discussing the governance implications of concessional tax statuses (e.g. charitable or Maori Authority) attaching to many activities undertaken by Maori collectives. Where Maori collective activities are charitable in purpose, they can qualify for charitable tax status exempting them from income tax. Where Maori assets are inalienable, heavily encumbered and/or ownership is highly fractionated, the bodies holding such assets can qualify for a concessional Maori Authority tax rate (19.5% versus the standard company rate of 33%). In the case of charitable status, it would seem fair that the private provision of benefits to the public (which no longer precludes kin-groups when applying the relevant public benefit test) should enjoy tax relief where the same or similar benefits would otherwise be provided by the state and funded through the tax system. In the case of Maori Authority tax status, such a concessional tax rate is apparently justified due to institutional constraints impinging on the value of particular Maori assets (such as alienability restrictions under the Maori Land Act (Te Ture Whenua Maori) 1993, reducing their market value and bankability).

The salient point from a governance perspective is that such tax relief cannot be assumed to fully flow through to the member-beneficiaries of the relevant Maori collectives. By increasing free cash flows available to collective managers, particularly where those collectives are not owned (e.g. due to managerial information asymmetries and high costs of ownership) and managers thus have greater scope to act opportunistically than in owned structures, it should be expected that at least some of the tax relief will be dissipated. Increased free cash flows – relative to like organisations not enjoying tax relief – provide managers with greater scope to consume perks, defraud, and expend resources on poor investments. By providing such organisations with a financial head-start on like organisations not enjoying tax relief this can give a false sense of comparable or superior managerial performance, or alternatively provide a taxpayer subsidised buffer for poor performance. Thus the “bird in the hand” of tax relief could in fact be costing more than “two in the bush.” Certainly if restrictive structures such as charitable trusts or incorporate societies are adopted simply to achieve concessional tax status where those structures are not otherwise beneficial, this may involve considerable governance, performance, value and asset-preservation trade-offs.

5.2 *Nga Tipu Whakaritorito*

In principle it should not hurt the members of Maori collectives to have one more governance option available to them for arranging their affairs. If poor existing governance arrangements meant that governors not currently subject to effective controls could consolidate their authority by adopting a new

structure along the lines of that proposed by TPK, this might be regarded as retrograde. So long as the adoption of the new structure requires a robust mandate from members of the affected collective, however, the proposed structure may present a useful option in certain circumstances, and otherwise can be ignored without cost.

This hints at two fundamental questions that must be raised regarding *Nga Tipu Whakaritorito* – (1) what particular characteristics of Maori collective governance does it address, and (2) how does it better suit those characteristics than existing governance options? As to the first, perhaps the most likely answer is that it provides a vehicle through which Maori collectives can organise their multifarious affairs at an overarching level, and do so in a way recognising that members may in many spheres lack the characteristics of owners, and that the interests of future generations of members must also be considered. In this way it perhaps offers a governance vehicle that Maori can call their own without assuming the cultural perceptions and other “baggage” associated with structures derived from English law (trusts, companies, etc). Additionally it may offer cultural and economic advantages where centralised governance over collective affairs brings net advantages not shared with a more decentralised governance approach.

As to the second question, there is little that the model appears to offer over and above existing governance options. As argued above, and anticipated by TPK, Maori collectives will continue to use a variety of governance structures for different types of activity, and on economic arguments this is appropriate. Thus the proposed model is likely to complement rather than supplant the use of existing structures, although there may be activities where the new model is adopted as the vehicle of choice. Where existing governance models are poor fits for Maori collective requirements – as is argued to be the case with private trusts due to their limited life, and incorporated societies due to their prohibition on the pursuit of pecuniary gain – it may in fact be simpler to provide statutory exemptions from these constraints in the case of certain types of Maori collective. This is commonly done in respect of trusts, as is the case for Maori Trust Boards under the 1955 Act, and the new fisheries commission, Te Ohu Kai Moana, under the Maori Fisheries Act 2004. That way the advantage of established understandings and case law as to the operation of such vehicles can be preserved (even if modified). If such an approach were adopted, however, it must be asked whether non-Maori collectives satisfying similar qualifying criteria (e.g. churches) might also be able to access those exemptions. It must also be asked whether the gains from doing so result in vehicles that are sufficiently distinct from other existing alternatives: if incorporated societies could be used for pecuniary gain, they would then look little different to companies.

It is commonly suggested that companies are not a suitable governance option for Maori collectives. While they allow for (but do not require) activities to be conducted for pecuniary gain, can make distributions and be wound up, have long-established understandings of shareholder rights, director obligations, duties of care and liabilities, and perpetual succession, it is thought that they are inappropriate due to their individual ownership structure. In the light of the rapid dispossession by Maori of their lands under the individualisation of land titles in the nineteenth century this sentiment

should come as no surprise.¹⁶ In short it appears that companies could do a great many things desired of a Maori collective if it were not for this reservation. In part, however, the reservation would appear to be misplaced.

It should be emphasised that ownership of company shares is not equivalent to ownership of that company's assets. Legally a company is an entity distinct from its owners, and so the sale of shareholdings by individual shareholders is not the same as selling part of the asset. Should control of the company pass to others by virtue of such share sales then control (not legal ownership) of those assets will also pass, it is true, but if this is considered undesirable, mechanisms can be used to avoid the type of dispossession occurring under individualisation of land titles. The most obvious such mechanism is to specify that any shares offered for sale by owners of Maori companies must first be offered to other existing shareholders – such pre-emptive rights are common among joint ventures and other tightly-held companies. While they will naturally depress the value of those shares – they not only limit their marketability but also reduce the discipline on company managers posed by the threat of takeover – they help ensure control of the company remains with a given group. Alternatively, a cooperative company structure could be implemented, under which any shareholders wishing to sell their ownership stake would have to sell it back to the cooperative.

Such mechanisms might represent a better balancing of the desire of Maori collectives to ensure control of their assets does not pass unfettered to outsiders, while providing an important discipline on their managers – the ability of members to sell out and take value with them if the venture is being managed poorly. The use of standard companies, or especially cooperative companies, would also allow for distributions to be made to collective members, and to be made in unequal proportions to different classes of members. Where a member selling out of (i.e. back to) the collective and taking value with them is regarded as depriving their descendants of their birthright, it could be specified in the company's constitution that such descendants have an automatic right to assume their ancestors' ownership stake being held by the company. Furthermore, the mechanism for determining what that ancestor should be paid when selling out of the collective could limit such payment to only some measure of their own life-time interest in the collective (i.e. leaving the residual as their bequest to their descendants to be held in the collective on trust until they take their membership). Alternatively, each collective member and any of their descendants could be issued with a single voting share ownable only by them for their lifetime, alienable or otherwise, as a means of ring-fencing ongoing ownership to present and future members, while allowing for the potential for partial realisation or liquidation of member interests (and putting governors and managers on notice that poor performance can be sanctioned by members, if only for a generation).

On a different tack, dual share classes could be adopted with control belonging with the collective, for example. Such is the model adopted under the Maori Fisheries Act 2004 and more recently by kiwifruit cooperative Satara.¹⁷ A possible advantage of such a model is that it can – if properly constructed –

¹⁶ See Gilling (1994).

¹⁷ See "Satara to list investor shares," *Dominion Post*, 9 December 2004.

enable Maori collectives to more easily access external capital and encourage monitoring of the collective's management by external parties than can un-owned entities. If poorly constructed they can come at considerable cost.¹⁸ Similar advantages could be gained at likely less cost by using a single share class with control retained by the collective's members. The essential point is that there is considerable latitude in how companies and cooperative companies are structured and run, meaning that they might well be adapted to suit the cultural and particular needs of Maori collectives, without the need for a new governance entity. They could, for example, adopt constitutional provisions requiring member disputes to be subjected to dispute resolution processes of the collective's choosing, thereby providing a means for resolving inevitable internal disputes among members and as between members and governors according to Maori custom and protocol. A new model is not essential to achieve this. Numerous variations are possible to achieve the various required ends, but it is beyond the scope of this paper to fully explore what form they might take and how they might work.

Significantly, TPK has stipulated little detail as to the shape of the proposed new collective, even allowing for the fact that it is intended to be very general purpose and to afford collective members with considerable latitude as to how they will order their affairs. Since much of this latitude is available through more fully specified companies, the fact that the proposed model lacks detail and the common understanding that comes through years of application and testing through the courts means that it is potentially at a serious disadvantage relative to new models. If there were no existing model offering a sufficiently comprehensive range of solutions for Maori collective problems then it might be tolerable to start afresh with a completely new and untried alternative. If this is not the case then there may be merit in persisting with "the devil you know."

At its heart the TPK proposal lacks some important governance ingredients. While providing for membership criteria, distributions to members and governor appointment processes, it is silent on critical details such as the ability of creditors or members to wind up the collective and distribute its assets. As distasteful as such topics may be, they are critical in a governance sense in that they define bottom line sanctions against poor management. Where the ownership interests – however attenuated – of Maori collective members are locked in to structures lacking transferable ownership claims, currently they must either persist with collectives that fail to meet their needs, or walk away and leave their ownership interest unclaimed (and still under the control of poor governors and/or managers). Trustee appointment processes may or may not allow dissatisfied trust beneficiaries to wrest control and/or assets from poor governors or managers. Incorporated society constitutions may provide for reallocations of control rights over assets limited to non-pecuniary use. However, a truly functional new Maori collective governance entity should provide its members with the maximum operational flexibility as well as the important option to liquidate the collective and start afresh if its governance or

¹⁸ See Meade (2003, 2004), and Dyck and Zingales (2004). Where dual share classes create divergences between control and income rights there is strong empirical evidence that this causes value divergences between share classes with greater and lesser control rights. Where all control rights vest in one share class, the remaining share classes lose significant value, being little more than "junk bonds". This may seriously hamper the ability of companies with control entrenched in one group of shareholders from raising new capital, particularly if it is needed to rescue companies failing due to poor management. Thus entrenched ownership – to ensure ongoing ownership or otherwise – can in fact prejudice long-term financial viability.

management fails. Both ordinary and cooperative company structures offer such advantages without the need for a new governance model.

Another feature that could usefully be included in any new proposal for Maori collective governance, but which is not in *Nga Tipu Whakaritorito*, would address the importance of instating structural separations between various collective activities. As discussed in the appendix, the Ngai Tahu governance model, as detailed in the tribe's charter, requires structural separations between political and executive functions, and between commercial and non-commercial activities. Similar requirements are imposed under the Maori Fisheries Act 2004, and Tainui has adopted similar measures. While the overheads of such separations may be unwarranted where Maori collective activities are small or easily monitored despite involving multiple functions and objectives, for larger collectives such separations can be critical. By clarifying roles and objectives at a structural level they facilitate performance monitoring and enable the use of refined contracting and incentive arrangements that compensate for the absence of comparable mechanisms available to other types of organisation (e.g. profit-motivated companies with observable share prices and transferable shares). It is possible that such structural separations, where warranted, could do more to improve the governance of Maori collectives than a new form of governance entity (whether used in an overarching role or in its own right). In many cases existing governance entities are adequate to achieve these separations, as they appear to be for both Ngai Tahu and Tainui.

Finally, a potential distinction of a new Maori collective governance entity that would set it apart from existing options – and one which TPK is currently seeking to develop apart from the current proposal – would be provisions providing mandate to any particular Maori collective. It can be said that Maori do not want for choice of governance models; rather they lack processes for coalescing around and working within existing governance structures. A notable absence is the ability for any Maori collective – whatever governance model it adopts – to claim to be the sole “voice” of that collective. Thus, for example, as a matter of law New Zealand has companies, trusts, incorporated societies and other legally recognised corporate persons. Aside from Ngai Tahu, however, with its own legal personality legislation, stating that Te Runanga o Ngai Tahu is for all purposes to be recognised as the tribe's representative,¹⁹ Maori tribes have no legal standing. The same can be said of hapu, whanau, non-Maori families or clans, or non-traditional Maori groupings such as urban Maori organisations.

If the TPK proposal were to represent a major step forward for Maori collectives, it would provide a means for securing the agreement of collective members that the new entity is their mandated representative (to whatever degree desired). Ironically there has been a model for such a mechanism – however imperfect – namely the Runanga Iwi Act 1990 (repealed 1991). That Act provided tribe members with a right to incorporate their tribe under a charter of their choosing, amalgamate that tribe with others, and critically, section 26 provided that all such incorporated tribes would be recognised by

¹⁹ Section 15, Te Runanga o Ngai Tahu Act 1996. Indeed, Te Runanga o Ngai Tahu has a statutory monopoly on the legal recognition of Ngai Tahu tribal members. From a governance perspective this places greater importance on internal control allocation mechanisms to compensate for the lack of control contestability and ability of tribe members to sell out if they feel the tribe is poorly governed or managed.

the Crown and all local and public authorities as the authorised “voice” of the tribe. Furthermore, section 25(4) of the Act provided the necessary empowerment of a legal personality, namely that incorporated tribes would be “a body corporate, having perpetual succession and a common seal, with the power to purchase, accept, hold, transfer, and lease property, and to sue and be sued, and having all the rights, powers and privileges of a natural person.”

While the Runanga Iwi Act placed emphasis on the importance of tribes as “an enduring, traditional and significant form of social, political, and economic organisation for Maori” (section 6), a new governance entity providing for the mandating of Maori collectives need not make any presumption about the level of social organisation to which it should apply. So long as no collective could obtain mandate without first securing authority to do so from its members, and provided that any level of mandated collective could merge or de-merge with other mandated collectives, individual Maori would then be free to determine the level of social aggregation that best met their needs, and revise that determination over time and/or as circumstances dictated. It would be useful to see what proposals TPK is to make in this regard for the current governance proposal to be fully appreciated and evaluated.

6. Conclusions

This paper is intended to provide a tentative framework for the identification and resolution of governance issues particular to Maori collectives, as well as an indicative appraisal of TPK’s proposed new Maori governance entity. The issues are more complex than for many typical governance situations, but in many respects they may pose no greater challenge than those faced by similar non-Maori organisations. It is beyond the scope of this appraisal to do full justice to the issues.

The challenges of Maori corporate governance mean that there will inevitably be compromises and residual costs in existing arrangements that deserve attention and improvement where possible. Having said this, the new proposed governance entity could not offer a panacea, in that no one entity will be appropriate for the wide range of activities engaged in, and circumstances facing, Maori collectives and their members. While it might prove to be the vehicle of choice for certain Maori collective activities, it is more likely that it will complement rather than supplant existing, more special-purpose structures. Where it is adopted as an overarching governance entity for collectives currently undertaking their various activities through multiple other structures, this will introduce costs and difficulties of its own, but perhaps it will also bring countervailing economies of scale and scope in the governance process – or simply more naturally reflect traditional Maori authority structures – to justify its adoption all the same. Since Maori collectives will be free to adopt or ignore the model as they see fit, it should at least represent an option that is potentially valuable, rather than an obligatory and potentially costly imposition.

As it stands, however, the TPK proposal offers little more than can already be achieved through a lateral application of the Companies Act 1993 and/or Co-operative Companies Act 1996.²⁰ As such it is questionable whether a new and untried model is worth proposing, as opposed to existing models being refined where they have obvious limitations for Maori collectives. The problem of private trusts having a limited life could easily be addressed, for example, as it has often already been addressed, by providing for perpetual trusts for qualifying collectives. In this case, however, it would be worth considering whether such options should also be made available to non-Maori who satisfy the relevant criteria. Indeed, to the extent the TPK's proposal does not inherently address issues unique to Maori collectives, it should be made more generally available. To the extent that it offers little that is new, however, that would probably be redundant, as existing models would once again suffice.

If the TPK proposal provided processes for legitimating the mandate of Maori collectives, at whatever level of social organisation they might represent, such as was provided for tribes by the repealed Runanga Iwi Act, they would offer something genuinely new and potentially advantageous to those collectives, over and above simple legal personality. With TPK currently developing proposals in this regard it is not possible to fully assess the extent to which *Nga Tipu Whakaritorito* advances the governance of Maori collectives.

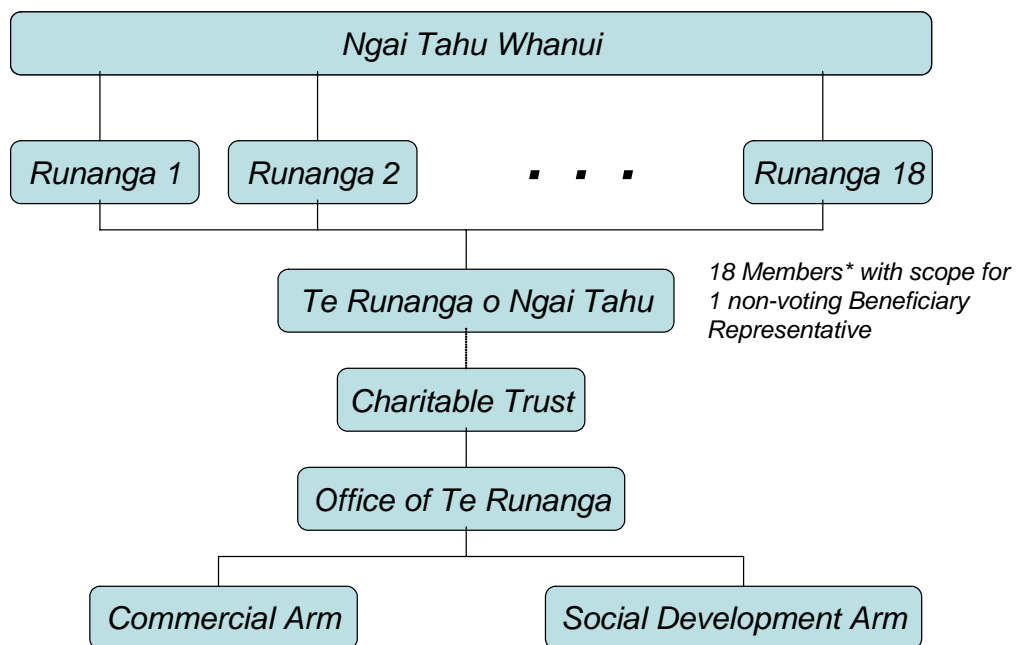
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²⁰ This is evidenced by the fact that Ngai Tahu transferred its governance functions from the existing Ngaitahu Maori Trust Board to a company structure in 1993, years before the tribe gained legal identity through Te Runanga o Ngai Tahu Act 1996. While the company so formed lacked legal recognition as the tribe's sole representative "voice", and legal ownership of certain assets remained with the Trust Board, tribal governance could then take place under the tribe's self-created charter.

Appendix – Pros and Cons of Overarching Governance

Nga Tipu Whakaritorito suggests that Maori collective governance will benefit from a more centralised, overarching governance layer through which members of Maori collectives will more efficiently govern their multifarious activities. This in part reflects the model adopted by the South Island’s major tribe, Ngai Tahu, which incorporates a tribal “parliament” – Te Runanga o Ngai Tahu – created by statute (Te Runanga o Ngai Tahu Act 1996) to be the collective “voice” of the tribe, with representatives appointed by each of 18 sub-tribes (runanga), and under which other governance structures have been instituted, as illustrated below. Here “Members” refer to members of Te Runanga, not the approximately 30,000 individual members of the tribe (Ngai Tahu Whanui).

Figure 1 – Ngai Tahu Tribal Governance Structure



* Increasingly work undertaken by Committees of Te Runanga

The conduct of Te Runanga, and of its executive, and the commercial and social development arms of the tribe, are regulated by a charter designed and adopted by the tribe (currently, Te Runanga o Ngai Tahu (2003)). Importantly, the political functions of Te Runanga are distinguished from the operational functions of its executive and the tribe’s commercial and social development arms. Equally important is the distinction between the profit-making function of the tribe’s commercial arm, and social and cultural development functions of the social development arm (funded by the returns generated by the commercial arm). Under each of these arms it is possible to institute specific and appropriate organisational sub-structures through which to undertake the tribe’s various commercial, social and cultural activities (with political activities remaining the preserve of Te Runanga and its executive).

Such a model can be criticised for a number of inefficiencies to which it gives rise. By forcing individual tribe members to participate only indirectly in the governance of the tribe's commercial and social/cultural arms – via their involvement in sub-tribe elections and thereby Te Runanga – and not allocating transferable ownership claims in the tribe, the structure replicates much of that observed in the state sector. The public choice economics literature identifies how such arrangements can attenuate performance disciplines on governors and managers, since they offer members little advantage and hence incentive to involve themselves in the governance process (leading to “free-riding” on the governance actions of others), and encourage so-called “rent-seeking behaviour” by interest groups with the incentive to organise and “capture” the organisation's political processes to secure advantage at the expense of other members.²¹ Such concerns lay at the heart of many of the state-sector reforms implemented in New Zealand since the mid-1980s and elsewhere, such as the creation of stand-alone and largely autonomous state-owned enterprises through which commercial activities could be undertaken with clearer objectives and reduced political influence over their objectives and operations. The gains from such reforms are well-documented internationally,²² and the Ngai Tahu structure has sought to implement some of their key features to mitigate the problems of the political organisational model.

A similar line of criticism can be levelled based on a significant economic literature on the relative performance of conglomerates versus “pure-play” (i.e. single-purpose) companies.²³ Fuelled by a belief that internal capital markets were more efficient at allocating capital than public capital markets, a wave of conglomerate company mergers occurred in the 1960s and 1970s, only to be unwound in the 1980s. The so-called “M-form” or multidivisional firm was seen as a way to coordinate multiple activities at the “head office” level, while maintaining initiative and innovation through divisional independence. In practice it gave rise to cross-subsidies from well-performing divisions to bad, and has come to be regarded as substituting bureaucratic decision-making by managers with incentives not wholly-aligned with those of their owners, for market-based resource allocation by investors with the strongest incentives to make value-maximising decisions free of agency conflicts.

Having Maori collectives undertake their various activities through stand-alone structures tailored to each is analogous to the “pure-play” model currently favoured for company organisation (absent compelling other reasons for horizontal mergers, which often fall foul of competition watchdogs concerned at the creation or acquisition of market power). In this sense it might be questioned why some overarching governance entity is required, other than perhaps to reflect more traditional Maori authority hierarchies. Individual members of the collective would retain incentives to involve themselves in the control of any or all of those particular entities engaged in activities that are of sufficient interest, whereas the imposition of an intermediary layer of governance might remove them so far from the control of their favoured entities that they lack incentive to continue such involvement, leaving managers with further reduced monitoring and accountability, and hence incentives to manage

²¹ See, for example, Gwartney and Stroup (1992).

²² See Megginson and Netter (2001), or Djankov and Murrell (2002).

²³ See Bolton and Scharfstein (1998).

well. It should be noted that the agency costs identified earlier can be significant with only one degree of separation between owners and the managers of their assets: with additional governance layers further principal-agent relationships are created (i.e. between governors or upper managers and lower-level managers), compounding agency issues already present. Also, with increasing centralisation of governance it should be expected that the problems of collective action will be intensified, given that control is centralised along with governance responsibilities, and the nexus of control between individual members and specific activities in which the collective engages becomes correspondingly weakened. Where members of the collective have interests in some of the collective's activities but not others, they can involve themselves more in those of interest, and by virtue of this internal market for control keep collective action problems to a minimum.

Introducing an extra overarching governance layer also risks a loss of transparency in the operations of the collective's various sub-activities, in that reporting to the collective's members would tend to occur at a more consolidated level with an overarching governance body in place. An advantage of decentralised governance is that, all other things being equal, it naturally presents a more precise picture of an entity's activities and performance, thereby facilitating more refined specification of objectives, accurate monitoring and performance evaluation, and hence greater ability to implement managerial incentive mechanisms to ensure managers' interests are better aligned with their owners or other principals. Indeed, the political/executive and commercial/non-commercial divisions were implemented in the Ngai Tahu governance scheme precisely to this end. Where multiple activities are combined under a single governance – and hence reporting – structure, it becomes more difficult to specify clear objectives for managers, monitor their performance and provide them with effective interest-aligning incentives.

In such cases it is natural to fall back on the more blunt form of principal protections offered by gross prohibitions on various types of activity or behaviour, such as restrictions on asset alienation as specified in the Maori Land Act (Te Ture Whenua Maori) 1993 or Maori Fisheries Act 2004.²⁴ Instruments of this nature are inherently value-reducing (e.g. they limit the ability of external capital to be raised against the associated assets to fund their development, or reduce their marketability), and do not encourage desirable managerial behaviours; at best they reduce but do not eliminate undesirable practice. Where activities are particularly hard to monitor, and the managers of those activities enjoy significant informational advantages over their principals – as might be argued for many Maori collective activities – it is no surprise that many of them are conducted via trusts or nonprofits and hence are effectively un-owned. This too may be regarded as a blunt solution to the problem of ensuring intergenerational benefit from assets currently owned by the collective.

Where the value of collective assets is invariant to how those assets are managed – such as might be the case for non-commercial or culturally significant lands with little commercial application, locking those assets up in trust ownership does not prejudice their value and offers a means of ensuring

²⁴ See Holmstrom and Milgrom (1991). In Ngai Tahu's case such restrictions have been kept to a minimum, for example to ensure prudent gearing ratios, and basic levels of asset diversification.

ongoing ownership of those assets. By definition this means they will remain available for the benefit of future generations, whatever that benefit may be. However, where the value of collective assets is sensitive to how they are managed, placing them into trusts or nonprofit bodies may in fact prejudice their value by exposing them to management which is subject to only weak performance disciplines, resulting in their value being dissipated rather than preserved for the benefit of future generations. Such considerations are important in the context of the Maori Fisheries Act 2004.²⁵

Against these reservations must be balanced various factors in favour of a more centralised, overarching governance layer over Maori collectives' various entities. Indeed, it must be acknowledged that not all activity is conducted through "pure-play" vehicles and that multidivisional organisations continue to exist even when left to market forces. The Coasian explanation for the boundaries of the firm can apply equally where there are economies of scope suggesting horizontal integration within organisations, for example where managerial or other specialist expertise, or other inputs, are common to production processes across divisions.²⁶ Thus, for example, an overarching governance entity may be justified if there are economies of scope, and/or scale, in the process of governing, provided these benefits are not outweighed by increased conflicts arising across the multiple sub-entities being governed.

If each activity in which a Maori collective engages is so small as to not warrant monitoring by individual members, or if it can be presumed that individual members of the collective lack the resources or skills to directly monitor the management of each such activity, then there may be a case for an overarching governance entity to provide professional monitoring services on their behalf. This may be increasingly so as the members of Maori collectives become geographically dispersed and/or their assets become less tangible and proximate, meaning it is therefore harder for the collective's members to monitor and control the use of its assets than might traditionally have been the case.²⁷ Of course this then begs the question as to how the performance of that overarching entity is to be monitored, although it may be more feasible for collective members to directly monitor performance at this level of aggregation. Thus the use of an overarching governance entity may introduce certain inefficiencies, yet still represent an efficient balancing of tradeoffs confronting more complex governance situations. The costs of the political governance model are known to be significant, so there would need to be very strong costs from not having an overarching governance entity to warrant its adoption.

²⁵ See Meade (2003, 2004).

²⁶ See Teece (1980).

²⁷ This point was well made by Flavin (2004). Indeed, the very nature of Maori governance processes, placing as they do great emphasis on physical presence and engagement in debate as opposed to postal proxy votes, biases governance participation in favour of the proximate and the available. As stated by one submitter to the Mason Committee (1994) review of the Maori Trust Boards Act 1955: "A hui is not the best way of electing someone, or indeed of conducting any worthwhile business. One third of the people who attend hui do so because they are retired and they are able to attend, one third attend because they have a real interest in what is happening, and a further third attend because they are stirrers."

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