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**WHAT DOES CULTURE DO TO CORPORATE
GOVERNANCE? - CULTURAL INFLUENCE IN
THE CORPORATE GOVERNANCE OF
ORGANISATIONS**

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ABSTRACT

Global interest in corporate governance has grown considerably over the past decade, particularly in the wake of high profile corporate collapses. Following international trends, the discourse on corporate governance in New Zealand has gained significant momentum. In this environment the credibility of the governance of Māori and iwi organisations has been subject to escalating interest.

The aim of this paper is to explore how culture affects the corporate governance of organisations. It investigates the interface between culture and corporate governance and demonstrates the ways in which culture is incorporated in, and influences the governance processes of, organisations.

I argue that, as in similar experiences internationally, culture is relevant to both the development of governance structures and in the practical implementation of governance processes. To demonstrate this I utilise international case studies and the Māori Fisheries Act 2004 to analyse governance processes that are subject to divergent cultural influence.

My findings support the established view that culture is important in the development of an organisation's governance systems and processes and particularly for Māori and iwi organisations, significant for the implementation of culturally attuned corporate governance practices.

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I INTRODUCTION

A Corporate Governance Under the Spotlight

1. The global phenomenon

Corporate governance has been under the spotlight recently following dramatic and widely publicised collapses of major multi-national corporations such as Enron, WorldCom and in Australia, HIH. These corporate failures, which resulted in investors losing billions, sent shockwaves through the global markets bringing the debate on the importance of effective corporate governance to the fore.¹ New Zealand has not escaped the resulting international focus on financial reporting and corporate governance and like other jurisdictions has also heeded the call for the imposition of new internationally recognised standards.² In response to these developments other countries have implemented a variety of mechanisms such as corporate governance codes as well as principles and guidelines. In order to maintain its credibility in the international market,³ New Zealand has adopted corporate governance reforms through the Securities Commission's ("**Commission**") Corporate Governance in New Zealand - Principles and Guidelines, and the New Zealand Exchange Corporate Governance Best Practice Code. These standard setting initiatives are aimed at facilitating the development and expression of corporate governance principles and practices that suit local circumstances.⁴

2. Corporate governance defined

The term corporate governance does not have a universally accepted definition and numerous perspectives of what it means and how it is implemented exist. The 'management approach' to governance is concerned primarily with the

¹ Pat Barrett "Achieving Better Practice Corporate Governance In The Public Sector" (Keynote Address, CPA Australia's Government Business Symposium, Melbourne, 26 June 2002) sourced from <<http://www.anao.gov.au>> (last accessed 30 September 2005).

² Jane Diplock "New Regulatory Compliance Procedures for New Zealand" (Speech at the Twelfth One Stop Update for the Accountant in Business, Wellington, 15 October 2002); Cave, below n 3.

³ Shelley Cave "A New Era in Corporate Governance" (2003) 50(3) *New Zealand Management* 13.

⁴ Diplock, below n 12, 3; Michael Bos "Defining Corporate Governance" (2005) 13 *NZ Lawyer* 14.

strategic leadership of an organisation,⁵ where the 'ownership and control' approach mainly focuses on power relations and the division of wealth.⁶ On the other hand, the narrower view of corporate governance confines the notion to a strictly 'legal systems approach'. This approach conceptualises corporate governance structures as limited to the legal mechanisms that influence and control decisions and actions.⁷ With such a vast array of differing interpretations it is not surprising that the debate continues about the issue of defining the role, scope and meaning of corporate governance. Notwithstanding these various approaches, corporate governance is generally understood to encompass how an organisation is managed, its corporate structures, culture, policies and strategies and the ways in which it deals with its various stakeholders.⁸

Corporate governance can be most succinctly referred to as "the act of steering societies and organisations".⁹ Governance rules, guidelines and prescriptions have even been suggested as an attempt to actually align the drivers of corporate behaviour with the outcomes that society expects.¹⁰ Developing this concept, corporate governance can begin to be understood as being a part of the larger issue of how to organise economic activity in order to promote and achieve the more fundamental societal objectives relating to equity, fairness, freedom and responsibilities of the citizen.¹¹ The Commission defines corporate governance as

⁵ The New Zealand Business Council for Sustainable Development and Westpac New Zealand *Let's Settle This - Through Settlement to Sustainable Māori Enterprise* (New Zealand Business Council for Sustainable Development and Westpac New Zealand, Auckland, 2005) 46.

⁶ Amir N Licht, Chanan Goldschmidt and Shalom H Schwartz "Culture, Law, and Finance: Cultural Dimensions of Corporate Governance Laws" (Paper presented at Law and Economics Workshop, University of California, Berkeley, 28 January 2002) <http://repositories.cdlib.org/berkeley_law_econ> (last accessed 1 October 2005); Gregory Jackson "Sociological Perspectives" in Parkinson, John, Andrew Gamble and Gavin Kelly (eds) *The Political Economy of the Company* (Hart Publishing, Portland, 2000) 266.

⁷ Amir N Licht "The Mother of All Path Dependencies: Towards a Cross-Cultural Theory of Corporate Governance Systems" (2001) 26 Delaware J Corp L 147.

⁸ Barrett, above n 1; Nick Bradley "How to Measure and Analyze Corporate Governance" in International Financial Law Review *Corporate Governance 2003* (IFLR, London, 2003) 40.

⁹ Russell Taylor "Indigenous Capacity Building and the Relationship to Sound Governance and Leadership" (Australian Indigenous Leadership Centre National Native Title Conference, Alice Springs, 3-5 June 2003) <<http://www.aiatis.gov.au>> (last accessed 9 September 2005) 9.

¹⁰ Cave, above n 3, 16.

¹¹ R P Austin "What is Corporate Governance? Precepts and Legal Principles" (Paper for Legal Research Foundation Corporate Governance at the Crossroads Seminar, Auckland, 18 February 2005) 2; Matoroa Dodd "Nation Building and Māori Development - The Importance of Governance" (Paper presented at the 3rd Biennial Conference of the International Development Studies Network of Aotearoa/New Zealand, Palmerston North, 5-7 December 2002); Tabalujan, above n 53, 170; Gregory Jackson "Sociological Perspectives" in Parkinson, John, Andrew

the set of structures and behaviours by which a company or other entity is directed and managed.¹² The Commission intends these structures and behaviours to guide how objectives are set, strategies and plans are developed, how performance is monitored and reported on and how the risks faced by an entity are identified and managed.¹³ The New Zealand government also has a view on what corporate governance means in the New Zealand context. The New Zealand Treasury considers that:¹⁴

Governance concerns the ways in which groups of individuals arrange their collective efforts and resources in order to accomplish their objectives. It involves methods for determining how power is exercised, how decisions are made and how stakeholders have their say.

These several examples illustrate various interpretations of what corporate governance can mean and how it may be understood depending on the organisation, its role and its operating context. The essence of corporate governance is about how power is exercised and how decisions are taken. Corporate governance systems and processes can therefore be understood as the mechanisms that balance the various corporate relationships described above, thus regulating the rights and obligations arising from the exercise of those decision-making powers and functions.

B Fundamental Principles

Utilising case studies, this paper presents a comparative analysis of how the expression of corporate governance processes are informed by relevant cultural characteristics. The analysis will be based on fundamental principles drawn from the Organisation for Economic Co-operation and Development Principles of Corporate Governance ("**OECD Principles**").¹⁵

Gamble and Gavin Kelly (eds) *The Political Economy of the Company* (Hart Publishing, Portland, 2000) 265.

¹² Jane Diplock "Corporate Governance - Principles and Public Policy" (Address to School of Government, Victoria University of Wellington, Wellington, 3 November 2003) 3.

¹³ Diplock, above n 12.

¹⁴ John Whitehead and Barbara Annesley *The Context for Māori Economic Development - Background Paper for Hui Taumata 2005* (The Treasury, Wellington, 2005) 22.

¹⁵ Organisation for Economic Co-operation and Development *Principles of Corporate Governance* (OECD, France, 2004) 4.

The OECD Principles are a set of non-binding principles intended to assist governments in the evaluation and improvement of the legal, institutional and regulatory frameworks for corporate governance.¹⁶ The OECD Principles were developed in 1999 by the OECD Ad Hoc Task Force on Corporate Governance and subsequently amended in 2004 to take into account international developments in corporate governance.¹⁷ These principles are viewed as a way to promote fundamental governance standards that the OECD believe can be broadly applied to reflect the social, economic, legal and cultural circumstances of each country.¹⁸ The OECD Principles are seen as the benchmark upon which other good governance statements or guidelines can be based. The OECD Principles (listed in full at Appendix 1) have been grouped by the OECD into the main themes of; ensuring effective corporate governance framework, shareholder rights and ownership functions, equitable treatment of shareholders, stakeholders' roles, disclosure and transparency, and board responsibilities.¹⁹

The Anglo-Saxon model of corporate governance is concerned with ensuring that the firm is run in the interests of the shareholders. This shareholder-centric model is characterised by dispersed ownership, strong legal protection for shareholders and indifference to other stakeholders. However, not all corporate governance systems subscribe to this view. Others, such as Germany and Europe and the Asian countries discussed in Part III of this paper subscribe to a more stakeholder-focussed governance model. This in turn affects the corporate governance systems and processes of their organisations. Accordingly, there is not one common model that can apply universally to different organisations in different countries. Instead, it is widely accepted that there are common principles that form the basis of all governance models. These principles are often regarded as vital for building robust and effective governance systems for organisations. It is accepted that good governance requires strong mechanisms to promote accountability, transparent flow of information and separation of governance control from management functions.²⁰ Applying this proposition to the OECD Principles, these too can be further distilled to fit within the good

¹⁶ Licht, above n 7.

¹⁷ Organisation for Economic Co-operation and Development, above n 15.

¹⁸ Licht, above n 7.

¹⁹ Organisation for Economic Co-operation and Development, above n 15, 14.

²⁰ Jones, below n 63; TOKM, below n 167; Healey, below n 107.

governance principles stated above. For the purposes of this paper these fundamental principles have been more generically stated as being Ownership and Control, Transparency and Accountability. Ownership and Control encompasses owners rights, rights of the shareholder and ownership structures, political power, encouraging participation and representation and control. Transparency covers disclosure and reporting, self dealing, conflicts of interest and insider trading. Accountability includes governor's responsibilities, reporting, self-regulation and enforcement. These principles are consistently understood within Anglo-Saxon countries as being the core elements of good corporate governance and provide a broad and inclusive framework upon which the comparative analysis in this paper is based.²¹ These principles also form the basis of the Māori Fisheries Act 2004 ("MFA") which is discussed later in this paper.²²

²¹ Jones, below n 63; TOKM, below n 167; Healey, below n 107.

²² See discussion in Part II B.

II THE 'CULTURE MATTERS' PHENOMENON

A. 'Culture' Defined

Culture is an amorphous concept. Cornell and Kalt (1988) consider that culture is best conceived as a set of interpretations, understandings, and models of action that provide strategic guidance.²³ Culture has also been referred to as "a repertoire of socially transmitted and intra-generationally generated ideas about how to live and make judgments, both in general terms and in regard to specific domains of life".²⁴ The Oxford Dictionary defines culture as the distinctive customs, achievements and outlook of a society or group.²⁵ Although definitions vary, what is consistent in the differing articulations of culture, is that culture is essentially about values. Mead (2003) states that values relate to principles or standards of behaviour.²⁶ These cultural values represent the implicitly or explicitly shared ideas about what is normal, good, right and desirable in a society or cultural group.²⁷ They are the basis of the specific norms that tell people what is appropriate in various situations. In doing so, cultural values, shape social and other interactions.²⁸ Values are not only shaped by people's understandings of them, but can change in response to external influences.²⁹ Culture therefore encompasses social practices, customs, and values. Because of its broad application across and relevance to the social spectrum, culture underlies many social and legal phenomena.³⁰

²³ Stephen Cornell and Joseph P Kalt "Public Choice, Culture and American Indian Economic Development" (Weiner Centre for Public Policy, John F Kennedy School of Government, Harvard University, 1988) 23.

²⁴ Orlando Patterson "Taking Culture Seriously: A Framework and an Afro-American Illustration" in Lawrence E Harrison and Samuel P Huntington (eds) *Culture Matters - How Values Shape Human Progress* (Basic Books, New York, 2000) 208.

²⁵ Oxford University Press *Shorter Oxford English Dictionary* (5th ed, OUP, Oxford, 2002).

²⁶ Hirini M Mead *Tikanga Māori - Living by Māori Values* (Huia, Wellington, 2003) 27.

²⁷ Licht, Goldschmidt and Schwartz, above n 6; Gorga, below n 35, 60.

²⁸ Licht, Goldschmidt and Schwartz, above n 6; Gorga, below n 35, 60.

²⁹ Licht, Goldschmidt and Schwartz, above n 6, 83; Lawrence E Harrison and Samuel P Huntington (eds) *Culture Matters - How Values Shape Human Progress* (Basic Books, New York, 2000) 123 xxviii; Francis, below n 36.

³⁰ Michael C Jensen "Value Maximisation, Stakeholder Theory, and the Corporate Objective Function" in Chew, Donald H (Junior) and Stuart L Gillan (eds) *Corporate Governance at the Cross Roads* (McGraw-Hill Irwin, New York, 2005); Gorga, below n 35, 60; Shen, below n 127, 22.

In the Māori context, tikanga is the term given to the customs, practices and rules that regulate the behaviour of Māori people.³¹ It is the practical application of tikanga that is judged, evaluated and understood in terms of values.³² Mead (2003) refers to these values as tools of thought and understanding that help organise behaviour and provide templates and frameworks to guide actions. However, this paper does not constrain the meaning of culture to a narrow interpretation of 'indigenous culture'. Because culture is founded on the notion of values, 'culture' can validly apply to any fora and any grouping. Furthermore, because values are not a fixed set of rules, rather a developing set of principles, culture can adapt to new situations by applying common principles (or values) to any situation. This is observed in the diverse application of the term 'culture', such as for example, its use in the concept of 'corporate culture', meaning the shared values, beliefs and assumptions that drive the behavioural norms in an organisation.³³

In order to provide clarity of meaning, culture is understood, in the analysis undertaken in this paper, as the socially informed and transmitted ideas and values of a specific cultural group as informed by that group's customs, traditions and heritage.

B. *The Interface Between Law and Culture*

Culture is not an independent variable. It plays an important and developmentally defining role in legal culture.³⁴ Because law and culture mutually inform and reinforce each other, the extent to which one influences the other varies depending on the conditions of the culture in which the relevant law is embedded.³⁵ Accordingly, there is a wide range of cultural variability in law both within and between culturally divergent countries.³⁶ It is the expression of

³¹ Mead, above n 26; Temara, below n 76.

³² Mead, above n 26.

³³ Eric Van den Steen "On the Origin of Shared Beliefs and Corporate Culture" (MIT Sloan Research Paper No. 4553.05, 26 August 2005) sourced from <http://www.ssrn.com/abstract=793884>.

³⁴ Lawrence M Friedman *The Legal System: A Social Science Perspective* (Russell Sage Foundation, New York, 1975) 76.

³⁵ Gorga, Erica Cristina Rocha "Does Culture Matter for Corporate Governance? A Case Study of Brazil" (John M. Olin Program in Law and Economics Working Paper Series, Stanford University, Stanford, 2003) 22 (sourced from <http://ssrn.com/abstract=410701>).

³⁶ Cardinal George Francis (O.M.I) "Law and Culture" (2003) 1 Ave Maria L Rev 1, 3.

this variability that can be seen in the implementation of legal institutions such as corporate governance systems.

Legislative examples of this interaction between law and culture is readily seen in the New Zealand context; within the MFA which contains culturally appropriate mechanisms to deal with membership determination, the disposal of collectively owned assets and dispute resolution based on tikanga Māori.³⁷ The Te Ture Whenua Māori Act 1993 also contains culturally attuned legal mechanisms that reflect traditional ownership concepts.³⁸ Other examples of the inclusion of cultural characteristics within legislation are the Education Act 1989 (regarding the definition of wānanga) and the Resource Management Act 1991 (regarding water use and protection of culturally sensitive information).

The MFA is the enacting legislation of the final allocation and distribution model of the Treaty of Waitangi ("**Treaty**") commercial fisheries settlement that was established by the Treaty of Waitangi (Fisheries) Settlement Act 1992. The settlement extinguished Māori customary rights to commercial fishing in exchange for certain property rights. The assets provided under the settlement are a proxy for the customary rights that were extinguished. Accordingly, it was seen as necessary to ensure that these culturally important assets could not be disposed of without the approval of iwi members or alienated from Māori ownership. The Treaty of Waitangi Fisheries Commission ("**TOKM**") was established to develop a model of allocation that addressed the distribution of the settlement assets and that took into account the special nature of the assets (being originally customary rights-based). The principles upon which the fisheries settlement allocation model is based are durability, compromise, fairness, allocation to iwi, intergenerational obligations and that the settlement ultimately be for the benefit of all Māori.³⁹ Analysis of Schedule 7 of the MFA identifies representation,⁴⁰ disclosure,⁴¹ membership,⁴² accountability,⁴³

³⁷ Māori Fisheries Act 2004, 7th sch, kaupapa 6(1)(a) and 6(2).

³⁸ Māori Fisheries Act 2004, Parts 7 and 9.

³⁹ Treaty of Waitangi Fisheries Commission "Supplementary Report by the Treaty of Waitangi Fisheries Commission to the Foreshore and Other Sea-related Legislation Select Committee on the Māori Fisheries Bill 2003" (MF61D) 2.

⁴⁰ Māori Fisheries Act 2004, 7th sch, kaupapa 1 and 2,

⁴¹ Māori Fisheries Act 2004, 7th sch, kaupapa 4.

⁴² Māori Fisheries Act 2004, 7th sch, kaupapa 5 and 6.

⁴³ Māori Fisheries Act 2004, 7th sch, kaupapa 7 and 8.

and separation of ownership and control,⁴⁴ as the principles integral to the governance of iwi organisations under the MFA. These principles align closely with the three fundamental principles of Ownership and Control, Transparency and Accountability previously discussed in Part I B.

The fisheries settlement model and the resulting legislation (the MFA) reflects Anglo-Saxon corporate governance ideals of performance in its design while also containing other important provision that reflect the underlying principles of the allocation model. The MFA prescribes the governance and management standards intended to protect the asset base and to promote efficient and accountable management of the assets. The governance preconditions under the MFA will require most iwi organisations to modify or amend their governance structures in order to receive the fisheries settlement assets provided by the settlement. This will have a significant influence on the future of the governance of iwi organisations. For this reason, the MFA is a pertinent example of legislative regulation of cultural characteristics in corporate governance.

3. *International Research*

Recent research suggests a renewed interest among legal scholars, multilateral institutions and the private sector in the significance of the role that culture may play in determining the shape of corporate governance systems. Cornell and Kalt have undertaken numerous studies to determine the fundamental elements of economic development and governance among indigenous nations in the United States and Canada.⁴⁵ Significantly they have proposed a concept called cultural match. The concept of cultural match is about the fit between the formal institutions of governance and indigenous conceptions of how authority should be organised and exercised.⁴⁶ Cornell and Kalt found that there is a need for a cultural match between the governance structures and procedures of an organisation and those it serves. A match of this nature facilitates more effective governance because the organisation is able to be governed in a manner consistent with the cultural interests of the members of the organisation. Their research

⁴⁴ Māori Fisheries Act 2004, 7th sch, kaupapa 9, 10 and 11.

⁴⁵ See <<http://www.ksg.harvard.edu/hpaied>>.

⁴⁶ Stephen Cornell "The Importance and Power of Indigenous Self-Governance: Evidence from the United States" (Indigenous Governance Conference, Canberra, Australia, 3-5 April 2002).

demonstrates that governance systems and processes must be culturally attuned in order to have legitimacy with those they govern.⁴⁷

A number of other international studies suggest culture plays an important role in corporate governance. Research by Licht, Goldschmidt and Schwartz ("**Licht et al**") (2001) found that cultural values determine the acceptance and expression of corporate governance processes and systems.⁴⁸ Licht et al (2001) investigated the differing expression of shareholder and investor rights between nations. Their research demonstrated that corporate governance laws exhibit distinct cultural characteristics and that this leads to differing corporate governance systems between nations. They theorised that this is because the corporate setting is imbedded within the larger socio-cultural setting. Their findings concluded that the expression of these culturally divergent systems was unique between nations because of the 'fit' they had within the particular culture.

Roe's study, which looked at the different methods of implementation of the same corporate governance law in different nations, supports Licht et al's (2001) research. Roe (2002) investigated the differing effect that culture had on the propensity to enter into interested party transactions without regard to the legal regulation of such transactions. He found that the expression of self dealing laws differed based on the prevailing cultural norms controlling and regulating behaviour. He also found that culture established the social context that would either facilitate or negate self dealing behaviour. He concluded that corporate law can be the same but cultural differences between those nations determine how corporate governance processes and systems are implemented in each nation.⁴⁹

Another study investigated how existing values in Brazilian society might prevent the adoption of corporate norms. The study found that both informal (culture and values) and formal (legal processes) institutions shape

⁴⁷ Stephen Cornell "Starting and Sustaining Strong Indigenous Governance" (Presentation at the Conference on Building Effective Indigenous Governance, Jabiru, Northern Territory, Australia, 5 November 2005); Manley A Begay and Stephen Cornell "What is Cultural Match and What Is It So Important?" (Presentation at the Conference on Building Effective Indigenous Governance, Jabiru, Northern Territory, Australia, 5 November 2005).

⁴⁸ Licht, Goldschmidt and Schwartz, above n 6; Roe, below n 49.

⁴⁹ Mark J Roe "Can Culture Ever Constrain the Economic Model of Corporate Law?" (2002) 69 U Chi L Rev 1255.

corporate governance.⁵⁰ In this study, the prevailing Brazilian traditions, history and culture constrained the successful uptake of corporate reforms. The reforms were implemented to strengthen the failings of the Brazilian capital markets. In Brazil, privatisation had resulted in a concentration of the voting power of large stockholders resulting in significant agency problems. The Brazilian corporate law reforms were introduced in response to these failings as well as to address significant international pressure towards the adoption of and conformance with better standards of corporate governance. However, the reforms failed because these drivers could not overcome the centrality of the Brazilian culture and cultural ideology.⁵¹ Gorga (2003) concluded that persistent cultural traits (such as patrimony) hindered the adoption of corporate norms designed to increase overall efficiency, because those norms were inconsistent with and could not overcome the deeply embedded Brazilian culture and ideologies.

These studies provide a clear indication that culture and values affect the way law is interpreted and applied.

Research also shows that culturally attuned governance systems are more effective than those that do not reflect or are inconsistent with the culture of the organisation and its members.⁵² In fact, research from Asia has shown that problems arise when foreign law is transplanted without due consideration of the domestic legal culture into which it is being applied.⁵³ Licht et al (2001) found that shareholder's rights were not so well protected in Asian countries where such laws were introduced by colonial powers. A good fit between the transplanted laws and the cultural context in which the laws had to operate did not exist.⁵⁴ Consistent with Licht et al's (2001) findings, Tabalujan (2002) found discrepancies between corporate governance as legislated and corporate governance in practice. Tabalujan (2002) analysed corporate governance behaviour in Asian markets. His analysis focussed on corporate behaviour

⁵⁰ Gorga, above n 35, 6.

⁵¹ Gorga, above n 35, 9.

⁵² Amir N Licht, Chanan Goldschmidt and Shalom H Schwartz "Culture Rules: The Foundations of the Rule of Law and other Norms of Governance" (William Davidson Institute Working Papers Series 2003-605, University of Michigan, Ann Arbor, 2003) 32 sourced from <<http://ideas.repec.org/s/wdi/papers.html>> (last accessed 19 September 2005).

⁵³ Benny S Tabalujan, Why Indonesian Corporate Governance Failed - Conjectures Concerning Legal Culture 15 Colum. J. Asian L. (2002) 141, 164.

⁵⁴ Licht, Goldschmidt and Schwartz, above n 6.

exhibited in banks because they are the most stringently regulated organisations in the Asian market and therefore, theoretically, more likely to have robust corporate governance structures and practices than other less regulated organisations. Tabalujan (2002) found that legal culture has an influence on the corporate governance behaviour of individuals within organisations. This anomaly is observed particularly where foreign legal systems are incorporated into a domestic legal culture that is not receptive to the import. As also observed by Licht et al (2001), such inconsistency affects the implementation of the transplanted law within that legal system.

These international studies are consistent with the view of the OECD that the basis for an effective corporate governance framework are appropriate and constructive legal, regulatory and institutional foundations upon which the market can rely. Effective corporate governance frameworks should typically comprises elements of legislation, regulation, self-regulatory arrangements, voluntary commitments and practices that are a result of a country's specific circumstance, history and tradition.⁵⁵ This approach is consistent with statements by multilateral organisations, such as the European Union Commission on Corporate Governance, that corporate governance mechanisms should be tailored to a country's own cultural and business traditions. Of these, culture is highly important.⁵⁶

These studies endorse the assertion made in this paper that culture does underlie corporate governance. Specifically, culture is significant in how law and in particular corporate governance systems are implemented.

D. The Relevance of Culture in the New Zealand Context

In New Zealand, debate on corporate governance has been particularly directed towards the governance of Māori and iwi organisations. This paper distinguishes between Māori organisations, those run by Māori; and iwi organisations, those run by Māori for their iwi. The credibility of the corporate

⁵⁵ Organisation for Economic Co-operation and Development, above n 15, 29.

⁵⁶ The EU Commission *Corporate Governance Action Plan 2003* noted in Stilpon Nestor "Developing the Capacity to Explain Corporate Governance: The New Challenge for European Companies (2003) in *International Financial Law Review Corporate Governance 2003* (IFLR, London, 2003) 49.

governance processes of Māori and iwi organisations has increasingly come under scrutiny from the media and general public.⁵⁷ Ongoing negative media attention alleging poor governance and excessive spending, the high profile nature of Treaty settlements (which are popularly perceived as 'public money'),⁵⁸ and the recently commenced distribution of fisheries settlements assets by the corporate trustee company of TOKM, Te Ohu Kai Moana Trustee Limited ("TOKMTL"), have drawn attention to corporate governance systems and processes implemented by both Māori and iwi organisations. This increase in attention has been further exacerbated by the multidisciplinary nature of Māori organisations.⁵⁹ As a result, Māori and iwi organisations are now required to seek a balance between social, political, economic and cultural objectives. These include participating in settlement negotiations, political decision making, interacting with government, managing assets that arise from the settlement of Treaty claims or other allocations as well as the provision of social services.⁶⁰ Māori and iwi organisations, especially those with a commercial focus, face challenges specific to these special roles and responsibilities. The main challenge faced by Māori and iwi organisations is the requirement to achieve dual legitimacy in both the cultural as well as legal contexts. This requires Māori and iwi organisations to unite cultural understandings and characteristics with modern commercial concepts and practices.⁶¹

Māori cultural values are informed from cultural values and beliefs specific to Māori (tikanga Māori). Mead (2003) provides an informative analysis of tikanga Māori which he articulates as unwritten norms based on values that guide behaviour and actions. He identifies these values as including

⁵⁷ Tait, below n 154; Fairfax, "Ngāti Ruanui responsible for settlement problems-minister" (16 September 2004) (sourced from <http://www.sutff.co.nz>); J Stokes "Iwi members feud over control of \$41m payout" (20 August 2004) *The New Zealand Herald*, Auckland, 1; J Stokes "Meremere jail consultation corrupt: lawyer" (25 March 2004) *Waikato Times*, Hamilton (sourced from <http://www.knowledge-basket.co.nz/>).

J Stokes "Private eye called in to check Tainui cash" (14 April 2004) *Waikato Times*, Hamilton, 1; J Stokes "Report claims double-dipping at Tainui" (19 June 2004) *Waikato Times*, Hamilton, (sourced from <http://www.knowledge-basket.co.nz/>).

⁵⁸ Mark Story "Māori Governance - Meeting the Cultural Challenge" (2005) 3:2 *The Director* 7, 8.

⁵⁹ Craig Coxhead and Guy Royal "Governance in Kaupapa Māori Organisations" (Presentation at New Zealand Māori Lawyers Conference, Christchurch, 16 September 2005).

⁶⁰ See Jones, below n 63; Te Puni Kōkiri, below n 64; Shane Jones (Keynote Address at Hui Taumata 2005, Wellington, 1 March 2005); Rob McLeod "Developing Assets" (Keynote Address, Hui Taumata 2005, Wellington, 2 March 2005).

⁶¹ Whitehead and Annesley, above n 14, 22; Story, above n 58.

whanaungatanga, manaakitanga (nurturing human relationships), mana (social status and power), tapu (sacred) and utu (reciprocity).

Consistent with international trends, commentators in New Zealand acknowledge that culture plays a role in governance.⁶² For example, Jones (2002) argues that good governance requires an understanding of and alignment with the values and cultural norms prevalent within the relevant society or group.⁶³ Fundamental cultural values and practices that are significant to the way governance structures and procedures are implemented in Māori and iwi organisations have been identified as including:⁶⁴

- Collective ownership (includes concepts of ownership, rights, and interests);
- Whanaungatanga (encapsulates the dynamics of Māori identity, inter-relationships and respective rights, obligations, and interests); and
- Kaitiakitanga (encapsulates connections to resources and obligations of guardianship over both tangible and intangible items).

This is by no means an exhaustive list of the cultural values and beliefs held by Māori. Māori are a heterogeneous group. No uniform or static view of cultural values and practices can be properly canvassed in the limited scope of this paper.⁶⁵ For the purposes of this paper, the culture of a Māori or iwi organisation is conceptualised as those agreed values upon which the entity is based and that are important to its members.

Drawing on the observations made in this Part II, what then does this mean for the corporate governance of Māori and iwi organisations? Academic literature establishes that the relationship between the legal and the non-legal elements in corporate governance are dynamic, each capable of influencing the

⁶² NZBCSD and Westpac New Zealand, above n 5, 47-52.

⁶³ Paul Jones *Māori Governance - Foundations for Indigenous Social Capability* (The Treasury, Wellington, 2002) 7.

⁶⁴ Te Puni Kōkiri *The Contemporary Environment of Māori Collectives* (Te Puni Kōkiri, Wellington, 2005) 3.

⁶⁵ See Mead, above n 26; New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (Study Paper 9, NZLC, Wellington, 2001); Mason Durie *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 2000).

content and expression of the other.⁶⁶ How then does this cultural influence manifest itself in Māori and iwi organisations? Is it through a cultural overlay or by culturally attuned systems? Cultural overlay is where culture informs and influences governance behaviour. In essence the cultural overlay is an informal mechanism by which culture influences corporate governance independently of any formal legal regulatory mechanism that is in place. Culturally attuned corporate governance systems exhibit cultural characteristics that are entrenched in the legal institutions that establish and regulate the organisation's governance systems and processes. This issue will be considered in more detail in Part IV C of this paper.

⁶⁶ Licht, Goldschmidt and Schwartz, above n 52, 12-13.

III WHAT DOES CULTURE DO TO CORPORATE GOVERNANCE? - A COMPARATIVE ANALYSIS

A *Introduction*

This section provides a comparative analysis of the differing ways that culture influences the expression and implementation of corporate governance.

As discussed in Part I, the fundamental concepts that sit behind the notion of good corporate governance are commonly articulated as being Ownership and Control, Transparency and Accountability.⁶⁷ This section provides an analysis of these fundamental principles to show that their expression is subject to divergent cultural influence. This analysis compares case studies from various jurisdictions as against New Zealand case studies specific to Māori and iwi organisations. Particular focus will be given to the MFA because of the influence it has on the future of corporate governance arrangements of iwi organisations.

B *Ownership and Control*

Control structures and ownership arrangements are an important element of corporate governance.⁶⁸ One way to analyse the influence of culture on the ownership and control of organisations is to examine culturally divergent property rights ideologies. The examination of property rights is useful because property rights are said to give shape to organisations as well as prescribe the mechanisms available to perform essential corporate governance functions.⁶⁹ Property rights are said to affect corporate governance in two fundamental and related ways.

⁶⁷ See NZBCSD and Westpac New Zealand, above n 5, 12; Whitehead and Annesley, above n 14; Licht, below n 75, 50; Jones, above n 63; New Zealand Law Commission, below n 137; Te Arawa Māori Trust Board *Post Settlement Governance Entity for the Arawa Lakes - Discussion Document* (Te Arawa Māori Trust Board, Rotorua, 2005); Te Puni Kōkiri *Hei Whakatinana i te Taurua Poo - Business Success and Māori Organisational Governance Management Study* (Te Puni Kōkiri, Wellington, 2003).

⁶⁸ Henry Hansmann and Reinier Kraakman "The End of History for Corporate Law" in Geoffrey N Gordon and Mark J Row (eds) *Convergence and Persistence in Corporate Governance* (Cambridge University Press, Cambridge, 2004) 215; Milhaupt, below n 69.

⁶⁹ Curtis J Milhaupt "Property Rights in Firms" in Geoffrey N Gordon and Mark J Row (eds) *Convergence and Persistence in Corporate Governance* (Cambridge University Press, Cambridge, 2004) 241.

Firstly, they determine the organisational structure of an entity, and secondly, they determine the legal controls for the entity.⁷⁰

The cultural characteristics that shape the expression of property rights are different for each cultural group. Analysis of differing ownership arrangements illustrates that property rights institutions are a fundamental cause of diversity between national governance systems. This is evident from international comparative research between Asian and Western concepts of the corporate entity.⁷¹ Research from Asian countries suggests that these property rights perceptions are founded on cultural concepts that include familial obligation and reciprocity,⁷² co-operation and trust,⁷³ patrimonialism (denoting a patriarchal system of relationships)⁷⁴ and piety.⁷⁵ Mana, whakapapa and kaitiakitanga are the cultural characteristics fundamental to the understanding and expression of property rights within the context of the corporate governance of Māori and iwi organisations. Mana is the ability to exercise authority or control over people and resources. Whakapapa can be understood as the foundation which provides an individual with their connection to other people, the natural environment and the spiritual world.⁷⁶ Kaitiakitanga (as stated previously in Part II *D*) relates to the protection of resources and obligations of guardianship.⁷⁷

Because Māori and iwi organisations are conventionally governed by a combination of formal and informal structures,⁷⁸ the culturally variant property rights characteristics of whakapapa, kaitiakitanga and mana are expressed through both legal (formal) and non-legal (informal) mechanisms.

⁷⁰ Milhaupt, above n 69.

⁷¹ Phillip Lawton "Berle and Means, Corporate Governance and the Chinese Family Firm" (1996) 6 *AJ Corp L* 357.

⁷² Lawton, above n 71.

⁷³ Curtis J Milhaupt "A Relationship Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law" (1996) 37 *Harv Int'l L J* 3.

⁷⁴ Tabalujan, above n 53.

⁷⁵ Amir N Licht "Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform" (2004) 22 *Berkeley J Int'l L* 159.

⁷⁶ Pou Temara "Brief of Evidence" (High Court of New Zealand, CIV-2004-463-000847, 21 September 2005).

⁷⁷ Te Puni Kokiri, above n 64.

⁷⁸ NZBCSD and Westpac New Zealand, above n 5, 52.

1. *Cultural Influence by formal means*

The ownership arrangements and control structures within the MFA can be seen as path dependent upon the cultural foundation of the property rights embodied in the fisheries settlement assets. The MFA determines the form in which those property rights may now be enjoyed and expressed. For this reason the MFA is a pertinent example of the expression of culturally variant property rights through formal processes ie culturally attuned corporate governance.

The MFA is a legislative and regulatory regime to both provide for and regulate legislative prescription of cultural influence in corporate governance and asset management. TOKM considers the ongoing protection of the assets and their ownership by Māori as fundamentally important because of the finality of the settlement and the rights that the assets represent.⁷⁹ This is an important distinction from historical Treaty settlements where rights have already been extinguished. In this instance, Māori lost their rights in commercial fisheries through the operation of the fisheries settlement deal. The cash and quota in this contemporary Treaty settlement is a proxy for those rights that were effectively exchanged (rather than extinguished) under the settlement through the exchange of the customary rights for the settlement assets.⁸⁰ Because this is an exchange of rights for assets, the assets have a heightened importance. This concept forms the basis of the continuing obligations imposed by the MFA to maintain the settlement assets in an inter-generational sense for future generations. For this reason, the fisheries settlement imposes unique ownership and control arrangements upon the management and use of the settlement assets.

Protection of the assets through the ownership and control restrictions imposed by the MFA is, TOKM considers, consistent with the way in which the assets would traditionally have been 'owned' and dealt with (ie a collectively owned asset).⁸¹ The requirement that members of an iwi organisation affiliate through descent from a primary ancestor ensures that the cultural characteristic of whakapapa is expressed within the ownership and control frameworks of that

⁷⁹ Treaty of Waitangi Fisheries Commission *Ahu Whakamua - Report for Agreement* (Treaty of Waitangi Fisheries Commission, Wellington, 2002) 46.

⁸⁰ Treaty of Waitangi Fisheries Commission, above n 39, 4.

⁸¹ Treaty of Waitangi Fisheries Commission, above n 79.

organisation.⁸² As discussed in Part II D, membership through kinship will often allow individual members to access the benefits derived from collectively held assets, such as those arising from the Māori fisheries settlement, without having any individual ownership rights to the assets. It is this expression of collective ownership based on kinship within a corporate ownership framework that is unique to Māori. In effect, the MFA is replicating within a legislative framework the property rights concepts associated with the customary rights that the assets represent. Interestingly, and consistent with the analysis above, the MFA does not confer the full complement of Western property rights upon iwi organisations or members. The restrictions in the MFA limit the liquidity of the assets. This is also related to the collective genesis of the rights which the fisheries settlement assets represent.⁸³ This example illustrates the mutually reinforcing relationship that culture and law have. Cultural characteristics have informed the development of the MFA and influenced the expression of the culturally informed property rights the MFA establishes.

The concept of kaitiakitanga also features strongly in the restrictions the MFA imposes. In the context of the MFA, kaitiakitanga is understood to be analogous to the concept of sustainability and encompasses the wise and prudent management of the resource.⁸⁴ This principle is represented in the MFA through the imposition of restrictions on the use of the settlement assets and through broad duties imposed upon the elected representatives. Section 12(1)(a) of the MFA requires iwi organisations to act for the benefit of all the members of the iwi. This obligation extends to future as well as present members. This obligation reflects the collective nature of the original rights upon which the assets are founded. Sections 69 and 161 of the MFA also act to safeguard the assets. Section 69 restricts the disposal of income shares by the entity. Section 161 restricts alienation of settlement quota assets. The restriction in section 161(1) ensures that only Māori organisations may hold settlement quota that is the subject of the MFA. Sections 69 and 161 operate to establish a restricted class of ownership rights consistent with the property rights framework from which the settlement

⁸² Māori Fisheries Act 2004, s5 (see definition of "Member of an Iwi").

⁸³ New Zealand Institute of Economic Research *Preserving Fisheries Quota for Māori - Report to the Treaty of Waitangi Fisheries Commission* (NZIER, Wellington, 2002) 7.

⁸⁴ Iwi Forum *Te Amorangi Hei Mua - A Model for Allocation of the Fisheries Settlement developed by the Iwi Forum* (Treaty of Waitangi Fisheries Commission, Wellington, 2002) 13.

assets derive. Further restrictions, such as the requirement to register quota interests (section 157) and member approval of settlement quota sales (section 162) reinforce the assertion that the MFA entrenches the property rights concepts specific to a Māori property rights framework.

Further protections, consistent with the concept of kaitiakitanga, are provided by separating ownership from management and requiring independent director mechanisms. Kaupapa 9 of Schedule 7 of the MFA relates to the separation of ownership from management between the parent entity, the asset holding company and any commercial fisheries company established by the iwi organisation. This reinforces the transparency between the responsibilities of each entity. It also produces clear lines of accountability as well as recognises the importance of keeping the various functions separate ie political representation, asset protection, and commercial enterprise.

Analogies can be drawn between the system of regulation set out in the MFA and ownership arrangement developments in Japan. Historically, the Japanese organisation was founded on the Confucian system and strictly family owned and managed.⁸⁵ The Confucian value and belief system is still a central component of Japanese culture.⁸⁶ Accordingly, the Japanese firm is still is often a reflection of cultural traits for example, the primacy of the family and co-operation and trust, rather than a reflection of formal rules.⁸⁷ However, in response to external influences these ownership structures have gradually opened up to non-kin investors and professional managers in the early part of this century. Legal reforms, such as the 2003 amendment to the Japanese Commercial Code, provide for an greater variation in ownership structures and arrangements. The reforms allow for even more choice in corporate governance systems. Organisations may now choose to utilise the traditional Japanese corporate governance system which comprises a 'board of statutory auditors' structure or can implement a new organisational control structure based on a 'company with

⁸⁵ Dwight H Perkins "Law, Family Ties, and the East Asian Way of Business" in Lawrence E Harrison and Samuel P Huntington (eds) *Culture Matters - How Values Shape Human Progress* (Basic Books, New York, 2000) 234.

⁸⁶ Perkins, above n 85.

⁸⁷ Milhaupt, above n 73, 5.

committees' system.⁸⁸ These options provide organisations the opportunity to use the United States-style corporate structure (board of directors and audit, nomination, compensation and special assets committees).⁸⁹ This example shows that even though Japanese corporate governance rests on a foundation of culture, formal regulation (ie law) has played a major role in shaping the modern ownership and control relationships in corporate Japan.⁹⁰ The MFA will have an analogous impact upon iwi organisations.

Further, international research suggests that Asian concepts of the corporate entity and property rights institutions are distinctly different from the Western (Anglo-Saxon) viewpoint. Lawton (1996) argues that the Western concept of the corporate entity creates a juristic 'person' separate and distinct from its members and informed by western property rights concepts.⁹¹ The Asian (and in particular, Chinese) perception of this 'person' is not separate but connected to and imbued with overtones of reciprocal relations centred around the importance of family.⁹² Similarly, in South Korea, property rights arrangements are based on traditional Confucian values. This has resulted in the development of firms that are relatively small and clustered into highly diversified groups with ownership and management concentrated in the family grouping. This conglomerate structure is called a chaebol and is a derivative of the Japanese ownership structure.⁹³ Chaebol are a model of family capitalisation that unite ownership and control. This is distinct from the governance and management separation that is observed in Anglo-Saxon corporate governance models. Commentators relate these features to Korea's long Confucian heritage which places a strong emphasis on the traditional extended family and filial piety.⁹⁴

What these examples show are that there are marked differences in the ownership structures of companies in different countries. This corporate ownership and structure diversity is consistent with the implications of culturally

⁸⁸ Mitsuru Tanaka "Japanese Corporate Governance" in *International Financial Law Review Corporate Governance 2003* (IFLR, London, 2003) 125.

⁸⁹ Freshfields "Recent Amendments to the Japanese Commercial Code - An Overview" (February 2003) sourced from <http://www.freshfields.com/> (last accessed 8 October 2005).

⁹⁰ Milhaupt, above n 73, 7.

⁹¹ Lawton, above n 71.

⁹² Lawton, above n 71, 348.

⁹³ Licht, above n 75, 24.

⁹⁴ Licht, above n 75, 26.

divergent property rights concepts. The conclusion to be drawn from the examples provided, is that culturally informed characteristics influence the ownership and control arrangements of organisations.

2. *Cultural influence by informal means*

In a more generic sense (as distinct from the property rights analysis above) expression of cultural concepts through informal processes can be observed in both the behaviour of individuals within the organisation as well as in the constitutional and policy documents of the organisation.

In the Indonesian context, patrimonialism is suggested as the key element of Indonesian legal culture that directly affects corporate governance behaviour.⁹⁵ Tabalujan (2002) suggests that it is possible for patrimonial tendencies to affect corporate governance such that corporate institutions and relationships are viewed through a familial obligation, as opposed to legal, perspective.⁹⁶ An example of this approach can be seen in the corporate rescue strategy implemented for Bank Summa. The controlling family held 70 per cent of the shares with market value of \$US974 million. The bank had underperforming loans totalling \$850 million of which \$700 million was owed by Summa Group entities. The controlling family went to extraordinary lengths to save the bank and assumed responsibility when there was no legal obligation to do so.⁹⁷ This case study shows the pervasiveness that cultural factors, such as loyalty and familial obligation, have in the expression of ownership arrangements and control elements of corporate governance.

Implementation of cultural characteristics in constitutional and policy documents is illustrated in the, New Zealand context in iwi organisations such as Te Rūnanga ā Iwi o Ngāpuhi Charitable Trust ("**TRAION**"). TRAION is an iwi organisation who acts on behalf of the tribe of Ngāpuhi. TRAION utilised the template constitutional documents developed by TOKMTL as a basis for modifying their organisational structure and corporate governance to fit with the requirements of the MFA. In addition, they also amended the constitution to

⁹⁵ Tabalujan, above n 53, 165.

⁹⁶ Tabalujan, above n 53, 165.

⁹⁷ Tabalujan, above n 53, 141.

reflect the cultural values and beliefs specific to their iwi. TRAION were able to add the cultural match that Cornell and Kalt discuss by incorporating specific cultural objectives as well as tribally relevant representation and dispute resolution mechanisms. Specifically, this cultural overlay requires Ngāpuhi to, among other things drive the spiritual, cultural, social on economic growth for the Ngāpuhi people; be guided by the principles embodied in the Treaty, kaitiakitanga and ahi kā; make decisions consistent with the tikanga of Ngāpuhi; and develop, promote and abide by the tikanga and spiritual values of Ngāpuhi in all its operations.⁹⁸ A common cultural feature in the governance of iwi organisations is that elected representatives are often appointed from the organisation's membership. This is the case in respect of TRAION representatives who must be registered members,⁹⁹ elected by wards but have an overriding duty to represent the interests of all members¹⁰⁰ as well as be active in their ward.¹⁰¹ This document was recently ratified by TRAION and its members and accepted by TOKMTL as meeting the constitutional requirements of the MFA. This is an example of cultural characteristics (specifically, tribal tikanga) being imported into the governance processes of the organisations, over and above those cultural characteristics that the MFA provides for. Of future interest will be how the cultural characteristics are actually expressed, interpreted and implemented in the governance processes of the organisation.

A relevant example of the potential for a disjunct between form and practice, is the Tainui litigation.¹⁰² The underlying issue in this series of litigation was the inconsistency between the cultural artifices and commercial governance practices surrounding governance, representation and accountability. In order to circumvent this disjunct, some Māori and iwi organisations have introduced culturally informed legal institutions into their governance systems. Te Wānanga o Aotearoa ("**Wānanga**"), a Māori organisation that has been criticised recently for governance shortcomings, has introduced an advisory board called Nga Tuara

⁹⁸ Te Rūnanga ā Iwī o Ngāpuhi Charitable Trust Deed, cl 3.2.

⁹⁹ Te Rūnanga ā Iwī o Ngāpuhi Charitable Trust Deed, 1st Sch, Part A, paragraph 2.

¹⁰⁰ Above n 99.

¹⁰¹ Te Rūnanga ā Iwī o Ngāpuhi Charitable Trust Deed, 1st Sch, Part A, paragraph 7.

¹⁰² *Mahuta v Porima* (22 September 2000) M238/00; *Mahuta v Porima* (9 November 2000) M290/00; *Porima v Te Kauhanganui o Waikato Inc Soc Ors* (26 September 2000) M208/00; *Porima & Ors v Waikato Raupatu Trustee Company Ltd* (20 February 2001) M330/00; *Porima v Te Kauhanganui o Waikato Inc* [2001] 1 NZLR 472.

into the governance systems of the organisation. Nga Tuara is comprised of respected individuals (some of whom are previous Wānanga directors) with institutional knowledge and tikanga expertise.¹⁰³ It is hoped that this mechanism will meet the Anglo-Saxon standards of 'good corporate governance' whilst still recognising and providing appropriate mechanisms for the expression of cultural influences. In this way, the Wānanga has incorporated a model similar to the German two-tier governance system. The German model was developed to provide for a wider stakeholder focus. It links persons other than the owners with the organisation, thus facilitating wider stakeholder participation in the governance of the organisation. This solution provides the Wānanga, and potentially other Māori or iwi organisations, with the ability to provide for stakeholder participation that is culturally attuned. This advisory board model allows these organisations to incorporate informal influences within the framework of the legal institutions. This is a pragmatic solution to the acknowledged challenge faced by Māori organisations to fit the demands of the commercial world with the cultural characteristics specific to their organisation.¹⁰⁴

What each of these examples show is that cultural characteristics inform the ownership arrangements of organisations through the way in which culturally divergent property rights perceptions are expressed in the formal corporate governance frameworks as well as the informal corporate governance processes of the organisation. Accordingly, culture is integral to the formation of corporate governance ownership arrangements as well as the expression of ownership rights.

C Transparency

Transparency is about providing stakeholders with confidence in decision-making processes. Transparency can be implemented both through internal governance procedures as well as through external legal or regulatory mechanisms. It helps to ensure that the assets are being used in the interests of all financial stakeholders and enhances the processes of scrutiny and accountability

¹⁰³ Coxhead and Royal, above n 59.

¹⁰⁴ See NZBCSD and Westpac New Zealand, above n 5, 52; Coxhead and Royal, above n 59; Jones, above n 63; Te Puni Kokiri, above n 64.

in the organisation.¹⁰⁵ Specifically, transparency can prevent insiders engaging in related party transactions, fraudulent accounting, abuses of power and corruption.¹⁰⁶ A strong disclosure regime that promotes real transparency is a pivotal feature of good governance.¹⁰⁷ In comparison, weak disclosure and non-transparent practices can contribute to unethical behaviour and a loss of market integrity.¹⁰⁸

1. Independence

Licht (2003) has identified that perceptions of the concept of independence differ between cultures.¹⁰⁹ The Anglo-Saxon model of corporate governance strongly subscribes to the value that the principle of independence provides for ensuring well functioning corporate governance systems. It recommends that at least a substantial number of board members should be independent.¹¹⁰ However, the exact definition or understanding of what 'independent' means varies between individuals, countries and cultures.¹¹¹ Research has found that Koreans can not fulfil the role of independent directors as effectively or in line with expectations in the United States because of their different cultural constructs.¹¹² Korean perceptions manifest in culturally divergent values and beliefs, including a cultural preference for conformity against individuality and a different understanding of the scope and meaning of independence.¹¹³

¹⁰⁵ See Barrett, above n 1, 9; Shen, below n 127, 22; Joern Berglund Nielsen "Transparency, Accountability and Doing the Job" in Edward Te Kohu Douglas and Mark Roberston-Shaw (eds) *Ngai Tatou 2020: Indigenous Governance and Accountability* (Foundation for Indigenous Research in Society and Technology, Auckland, 1999; Organisation for Economic Co-operation and Development, above n 15; Nick Bradley "How to Measure and Analyze Corporate Governance" in *International Financial Law Review Corporate Governance 2003* (IFLR, London, 2003) 40.

¹⁰⁶ Shen, below n 127, 29-33; Licht, Goldschmidt and Schwartz, above n 52, 10.

¹⁰⁷ Joseph Healey *Corporate Governance and Wealth Creation in New Zealand* (Dunmore Press, Palmerston North, 2003).

¹⁰⁸ Organisation for Economic Co-operation and Development, above n 15, 49.

¹⁰⁹ Licht, above n 75, 45.

¹¹⁰ See for example, The Committee on the Financial Aspects of Corporate Governance *Report on the Financial Aspects of Corporate Governance ("Cadbury Report")* (CFACG and Gee and Co Ltd, London, 1992); Organisation for Economic Co-operation and Development, above n 15; Committee on Corporate Governance *Final Report ("Hampel Report")* (CCG and Gee and Co Ltd, London, 1998); and New Zealand Securities Commission's *Corporate Governance in New Zealand - Principles and Guidelines* (New Zealand Securities Commission, Wellington, 2003).

¹¹¹ Licht, above n 75, 45.

¹¹² Licht, above n 75, 44.

¹¹³ Licht, above n 75, 45.

This differing view of independence is observed in the governance of Māori and iwi organisations. This can be accredited to the centrality of the Māori cultural concepts of whanaungatanga and shared cultural identity.¹¹⁴ Whanaungatanga is integral to informing the cultural perception of independence in Māori and iwi organisations. As previously discussed, whanaungatanga embodies the kinship relationships that are founded on blood links and reinforced by cultural factors such as ageism and seniority of bloodlines. Mead (2003) refers to these concepts as encompassed within the broader principle of mana. Mana affects inter-personal relationships so that all interactions are overlaid by cultural factors.¹¹⁵ Ageism impacts on the interactions between directors of differing ages and social status. Kaumātua (respected elders) are afforded greater respect by those of lesser age, irrespective of the role each may have within the governance structure of the organisation.¹¹⁶ This influences the ability of each individual to act independent of this cultural overlay when interacting in the context of the governance and management of the organisation. Bloodline seniority also impacts on interactions in a similar way as ageism. These both have real and visible impact on the governance and management of Māori and iwi organisations as well as on the dynamics and effectiveness of the governance board itself.¹¹⁷

Allegations of nepotism, favouritism and lack of independence have been made against Māori and iwi organisations on a regular basis recently. The Wānanga is currently the subject of an Audit by the Office of the Auditor General, focused on the Wānanga's procurement policies and practices, particularly in respect of selected transactions where Wānanga councillors, employees and their close relatives are involved. This perception of nepotism and lack of independence Coxhead (2005) argues, can be referenced to the exponential growth of Māori and iwi organisations. What were previously small enterprises of limited cash and asset base are now multi-million dollar organisations with substantial economic and political influence. During their initial development

¹¹⁴ Richard Meade *An Economic Appraisal of Nga Tipu Whakaritorito - A New Governance Model for Māori Collectives* (New Zealand Institute for the Study of Competition and Regulation Inc, Wellington, 2005).

¹¹⁵ Mead, above n 26.

¹¹⁶ Coxhead and Royal, above n 59.

¹¹⁷ Coxhead and Royal, above n 59.

these organisations utilised family and associates who they could trust and who worked for the cause rather than for financial incentive. This is the concept of whanaungatanga in practice. This culturally informed institutional history is embedded within the organisation. As these organisations have grown in size and asset base they have come under increasing external scrutiny to dispel those entrenched practices and comply with the Anglo-Saxon good governance standards that oppose such coalescing of interests. In response, some Māori and iwi organisations have added an extra layer of governance systems to combat this cultural influence. For example, advisory bodies of kaumātua as in the Ngāti Awa example of the Kāhui Kaumātua. Some organisations, such as Tainui Group Holdings ("TGH") have even restructured their governance systems to prevent cultural influence. TGH's original board was comprised of shareholder representatives. However, in the face of poor accountability and poor financial asset performance, TGH modified their board composition to a blend of independent and representative membership.¹¹⁸ This governance structure was implemented to facilitate independence in decision-making.

However, even the implementation of such good governance practices is subject to cultural influence. Conflicts registers of Māori and iwi organisations show a large number of inter-relationships and interests between owners, directors and stakeholders. This is a product of the Māori cultural focus on inter-relatedness and familial connections (whanaungatanga and whakapapa).¹¹⁹ It is also interesting to note that the application of good governance systems for Māori and iwi organisations consistently requires of those organisations a level of compliance over and above that which other (non-Māori) organisations must comply with. A case in point is the requirement that individuals list iwi affiliations in the Wānanga conflicts register.¹²⁰ Therefore, conflicts of interests and self regulation issues are more difficult for Māori and iwi organisations because they have to account for and attempt to overcome, in a manner acceptable to regulators, the additional cultural overlay inherent in their governance processes and systems. Indeed, the complexity of Māori social and cultural

¹¹⁸ NZBCSD and Westpac New Zealand, above n 5, 60.

¹¹⁹ Coxhead and Royal, above n 59.

¹²⁰ Coxhead and Royal, above n 59.

understandings creates an extra overlay that other (non-Māori) organisations do not have to manage.

The MFA has also attempted to deal with cultural characteristics. Kaupapa 10 of Schedule 7 of the MFA imposes the requirement for the asset holding entity to have a majority of independent directors. The MFA specifies that the directors of that entity may not make up more than 40 per cent of the representatives from the parent organisation. In the author's opinion, this provision not only protects against self dealing, but also acts to mitigate any loss of transparency by clearly separating the governance and management functions.

2. *Disclosure and reporting*

Disclosure practices vary widely both within and across countries.¹²¹ This is because the environment (which includes social, political and economic factors) in which organisations operate affects financial reporting and disclosure.¹²² Culture impacts upon disclosure choices through both the personal values and beliefs of the decision-maker as well as the external cultural drivers that impinge on or sustain the expression of that cultural belief.¹²³ In other words, culture impacts on how disclosure decisions are made because those in charge of the disclosure decisions are affected by their own cultural values. For example, it is widely accepted that cultural considerations can be and are incorporated into financial reporting and disclosure by organisations through reporting methods such as quadruple bottom line reporting. How the 'cultural' bottom line is expressed is culturally specific to each country. Research has shown that the United States' disclosure system is a construct of the United States culture, developed to identify corporate governance information significant to the United States' perspective alone. It is not surprising then that the United States' disclosure system has been found to be insensitive to cultural characteristics different from that of its founding culture.¹²⁴

¹²¹ Ole-Kristian Hope "Firm-level Disclosures and the Relative Roles of Culture and Legal Origin" (2003) 14 JIFMA 218.

¹²² Hope, above n 121.

¹²³ Hope, above n 121.

¹²⁴ Licht, above n 7, 26.

In Asian countries, the pervading cultural influence of group obligation is evidenced by widespread fraudulent information disclosure.¹²⁵ Commentators argue that this is a remnant of the Confucian precepts that persist in Asian society, forming the basic guidelines for the formation of attitudes and the expression of practices. Laws are viewed as merely a device of the government to restrict behaviour and not regarded as representing either the culturally informed guidelines or principles on which the society is actually based.¹²⁶ Initiatives to resolve this issue in the Asian markets include strengthened regulation for information disclosure requirements, imposition of standard formats for disclosure and strengthened control over related party transactions.¹²⁷

In the authors experience most iwi organisations are constituted as trusts or incorporated societies registered under the Charitable Trust Act 1957. Such organisations are not required to file annual returns thereby reducing accountability to their members. The Charities Act 2005 ("Act") attempts to provide greater transparency in the operations, activities, purposes and financial data of charities. Importantly, the Act imposes a requirement to file an annual return (which will be publicly available) with the Charities Commission, who are charged with monitoring charities' activities.¹²⁸

Methods to account for cultural influences and the lack of accountability by iwi organisations to their members are observed in Schedule 7 of the MFA. Kaupapa 7 of Schedule 7 requires the entity to report annually to its members. In particular, the MFA contains a requirement for the organisation to report on interactions with other iwi organisations in relation to fisheries matters.¹²⁹ Matters that must be reported to the members at each annual meeting include steps to increase membership, comparisons between performance and objectives, audited accounts and quota sale and exchange information. The disclosure requirements of the MFA place a positive obligation upon iwi organisations, who

¹²⁵ Seymour Martin Lipset and Gabriel Salman Lenz "Corruption, Culture, and Markets" in Harrison, Lawrence E and Samuel P Huntington (eds) *Culture Matters - How Values Shape Human Progress* (Basic Books, New York, 2000) 123.

¹²⁶ Boye De Mente *Korean Etiquette and Ethics in Business* (NTC Business Books, Lincolnwood, Illinois, 1990) 49.

¹²⁷ Professor Sibao Shen "China's New Corporate Governance Measures after its Accession into the WTO (2004) 17 AJ Corp L 6, 9.

¹²⁸ Charities Act 2005, s 41.

¹²⁹ Māori Fisheries Act 2004, 7th Sch, kaupapa 7(2)(a)(v).

are subject to the MFA, to disclose key minimum information and thereby mitigates against cultural influences that may predispose weak or non-existent disclosure. Interestingly, the MFA does not go as far as to entrench in legislation 'culturally attuned' disclosure. However, it is an approach that allows scope for the operation of such cultural influence whilst ensuring that minimum disclosure and reporting standards are adhered to.

3. *Asset protection*

Culture informs behaviour and perceptions of the appropriate responses for certain situations as well as informing perceptions of third party behaviour.¹³⁰ Studies show that culture appears to be one of the factors that influence self dealing because it affects the way self dealing is viewed and regulated and the way individuals behave.¹³¹ Research has also shown that self dealing is more prevalent in countries where the culture is predisposed against showings of wealth and materialism.¹³² Research on insider trading and self dealing rates in Japan, Korea and Germany has shown that insider trading is tolerated more in these countries than in the United States. In fact, in some instances there was a total lack of stigma associated with this type of behaviour.¹³³ In contrast, the United States holds a very hostile stance towards insider trading. This adverse view of self dealing is rationalised as being founded on ethical principles based on egalitarianism and equity. These principles have a greater influence on the legal culture of the United States. In essence, the United States has culturally informed value dimensions that condemn such behaviour. This condemnation has promoted the expression of anti-self dealing rules.¹³⁴ Competitive pressures have been acknowledged as a factor in the convergence of cultural attitudes towards insider trading. However, it can still be reasonably asserted that nations will differ considerably in the degree their cultural values impact on their compliance with or enforcement of insider trading regulation.¹³⁵

¹³⁰ Licht, Goldschmidt and Schwartz, above n 6, 6.

¹³¹ Licht, above n 7, 21.

¹³² Roe, above n 49.

¹³³ Licht, above n 7, 77.

¹³⁴ Licht, above n 7 71.

¹³⁵ Licht, above n 7, 72-73.

Conflict of interests are a major issue for Māori and iwi organisations, where officeholders (or governors) are elected as representatives of a group via ward systems (for example a hapu or marae). This dynamic provides interesting and difficult issues because representative officeholders tend to confuse actual or perceived obligations to the group that elected them with their primary (often statutory) duties and obligations to the organisation.¹³⁶ An example illustrating this type of issue is when a decision is required to be made in the best interests of the organisation that is not in the best interests of the hapu or marae that the director represents. This is an important justification for separating the political and governance aspects of an organisation.

Legislative mechanisms are a tangible legal technique used to regulate and set behavioural standards for directors.¹³⁷ In New Zealand, the most apparent regulator of directors actions and decisions is the Companies Act 1993. Obligations in relation to good faith, exercising powers, compliance with corporate documents, protection of shareholder wealth and fiscal responsibility set the standards that directors are measured against.¹³⁸ The MFA has dealt with the issue of self interest and conflicts of interest both through statutory and procedural methods. The MFA legislative mechanisms to avert such outcomes include the separation of ownership from management, the imposition of 'strategic governance' obligations, and the requirement that directors on the management entity do not comprise more than 40 per cent of members from the governing body.¹³⁹

The separation of governance and management of the asset is important for the responsible and transparent management of the assets.¹⁴⁰ Combined with the 'strategic governance' requirement under Kaupapa 11 of Schedule 7 of the MFA, these mechanisms set clear legislative limitations on the extent to which cultural factors can influence the decisions made by, and actions of, representatives or directors. This facilitates the ability to focus on relevant obligations only and reduces the scope for confusion surrounding roles and

¹³⁶ Coxhead and Royal, above n 59.

¹³⁷ New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (Study Paper 13, NZLC, Wellington, 2002).

¹³⁸ Companies Act 1993, ss 130-139.

¹³⁹ Māori Fisheries Act 2004, ss 12(1)(d), 16(1)(e) and 7th Sch, kaupapa 9-11.

¹⁴⁰ Treaty of Waitangi Fisheries Commission, above n 39.

responsibilities. However, it is important to note that the statutory limitation will not guard against culturally influenced actions of governors or directors that are within the scope of their roles and responsibilities.

The procedural method implemented by TOKMTL to deal with conflicts of interests is through the template constitutional documents TOKMTL have developed to assist iwi organisations in complying with the MFA. The conflicts of interests clause in the template constitutional documents are an example of how differing cultural perceptions of independence are dealt with within the framework of Anglo-Saxon corporate governance mechanisms. The clause states:¹⁴¹

No trustee will be interested in a matter where that Trustee is a member of a [Iwi/Hapu/Whanau] and where his or her interest is not different in kind from the interests of other members of that [Iwi/Hapu/Whanau].

This clause accounts for the unique cultural characteristics that directors are also likely to be members of the organisation and whakapapa and whanaungatanga factors will inform the actions and behaviours of the directors.

D Accountability

Accountability provides for the monitoring and sanctioning of delegated authority.¹⁴² The concept of accountability is founded on power relationships. The essence of this power relationship is that the party holding power owes certain duties (such as giving account of and explaining decisions or actions) to the party subject to the power. This obligation operates to prevent abuse by the power holder. Accountability features as a highly desirable element of good governance practice. A commonly held view is that accountability facilitates effective governance because it makes the organisation accountable to its many stakeholders through reporting requirements and control structures.¹⁴³

¹⁴¹ Te Ohu Kai Moana Trustee Limited *Template MIO Constitutional Deed* (TOKMTL, Wellington, 2005) cl 4.14.

¹⁴² Robert Monks and Nell Minow "The Director's New Clothes or, the Myth of Corporate Accountability" in Chew, Donald H (Junior) and Stuart L Gillan (eds) *Corporate Governance at the Cross Roads* (McGraw-Hill Irwin, New York, 2005) 52.

¹⁴³ Barrett, above n 1.

A number of accountability mechanisms are provided for in the MFA to ensure an iwi organisation is and remains accountable to its members.¹⁴⁴ The first is the reporting and disclosure requirements. These reporting obligations ensure that key statutory actions and decisions are transparently reported to members.¹⁴⁵ The second mechanism is through the election or appointment of office holders as set out in Kaupapa 1 and 2 of Schedule 7. Once elected an office holder has, by operation of section 12(1) of the MFA, a specific statutory duty to represent the interests of all members of the iwi irrespective of whether the officeholder is elected by a particular group of stakeholders. This wider accountability is a direct attempt to exclude any cultural influence associated with a ward system of representation that is based on whakapapa and open to influence by the Māori cultural values of whanaungatanga and whakapapa.

A further accountability mechanism built into the MFA is the protection afforded to the settlement assets if they are to be sold or exchanged. For example, section 162(1) requires a multiple-step process to be complied with in order to sell settlement quota. Firstly, the proposal to sell must be notified to members; and secondly, the proposal to dispose of the settlement quota needs to be approved by 75 per cent of the adult members who vote. This approval imposes limitations that are more onerous than other similar statutory provisions, such as the Companies Act 1993 shareholder approval of major transactions, because it applies in every instance that the iwi organisation wishes to dispose of settlement quota. However, in light of the important cultural values that under-pin the protection mechanisms set out in the MFA, member's approval to the disposal of collective assets is in this instance appropriate.

1. *Financial accountability*

As has been previously stated, people from different cultures exhibit differences in their perception and judgment. This directly affects corporate

¹⁴⁴ Treaty of Waitangi Fisheries Commission *He Tohu Arahi - A Guide to Representation on Iwi Organisations* (Treaty of Waitangi Fisheries Commission, Wellington, 2001).

¹⁴⁵ Māori Fisheries Act 2004, 7th Sch, kaupapa 7.

governance.¹⁴⁶ In particular, cultural factors have been shown to have an effect on accounting and auditing systems.¹⁴⁷

Although commentators have identified a trend towards the harmonisation of international accounting standards they assert that culturally related differences in accounting and auditing systems still persist.¹⁴⁸ They account this to the fact that accounting rests on principle-based judgments and decision-making. For example, although Korea has implemented accounting reforms that include aspects of international accounting standards and external auditor requirements, the cultural environment of accounting still remains substantially unchanged from the time prior to the reforms. Cultural characteristics favouring accounting flexibility and secrecy persist despite the efforts to enhance transparency and accountability in accordance with Western concepts of good governance.¹⁴⁹ In some instances reforms have been implemented according to the letter of the law but against its intention. This is the experience in Korea where firms reacted to the law reforms by staffing the mandatory audit committees with people close to or affiliated with the chaebol controlling families rather than with wholly independent persons.¹⁵⁰

Some legislative reforms are purposely implemented to engender confidence from the market and investors. The Sarbanes-Oxley Act 2002 ("SOA") was enacted, following the Enron corporate collapse, as a political reaction to give assurance to the public that the corporate governance failures were remedied by a tangible legal mechanism.¹⁵¹ The collapse exposed massive profit manipulation, deceptive accounting and lackadaisical audit practices.¹⁵² The SOA prescribes financial reporting requirements, assumes jurisdiction over accountants and requires lawyers to disclose fraud up the chain of command. It is a mechanism to foster a change from the CEO-centric culture of

¹⁴⁶ Licht, above n 75, 6.

¹⁴⁷ Licht, above n 75, 6.

¹⁴⁸ Licht, above n 75, 50.

¹⁴⁹ Licht, above n 75, 53; see also Licht, Goldschmidt and Schwartz, above n 6, 28.

¹⁵⁰ Licht, Goldschmidt and Schwartz, above n 6, 28.

¹⁵¹ James A Brickley, Clifford W Smith (Junior) and Gerald L Zimmerman "Corporate Governance, Ethics and Organisational Architecture" in Chew, Donald H (Junior) and Stuart L Gillan (eds) *Corporate Governance at the Cross Roads* (McGraw-Hill Irwin, New York, 2005) 104.

¹⁵² Diplock, above n 12.

United States corporations to a culture of accountability with the ultimate goal of corporate performance and increased shareholder value.¹⁵³

The financial accountability of the Wānanga is a relevant local example of the differing effect that cultural characteristics have on how accountability requirements manifest as a result of the differing ownership and control arrangements in Māori and iwi organisations. In early 2005, the Wānanga was on the verge of insolvency and required a \$20 million Government loan to prevent financial collapse. The loan received intense criticism from the media, the New Zealand public and opposition parties based on the perception that the Wānanga lacked appropriate financial management and accountability mechanisms sufficient to account for the \$239 million in tax payer funding it had received.¹⁵⁴ In the author's opinion, this highlights the differing external controls to which Māori and iwi organisations are subject to by their shareholders or stakeholders. Some Māori organisations (as in the case of the Wānanga) do not have members that could be seen as analogous to shareholders or beneficiaries. Without this active shareholder or owner participation, organisations lack the rigor of external control that iwi organisations have.

In contrast, iwi organisations are more accountable because their members have a vested interest in actively enforcing accountability mechanisms. Notably, iwi organisations subject to the MFA, owe particular rights to their members which may be enforced before the Māori Land Court, as the court of first instance. Furthermore, members' rights manifest as an interest or benefit that is not tradeable. This is in contrast to the full complement of rights afforded in an Anglo-Saxon shareholder governance model. In addition, the iwi organisation takes a fiduciary type role in respect of the assets,¹⁵⁵ which are also often regarded by members as collective assets.¹⁵⁶ For example, TRAION is a common law trust that holds assets on behalf of the members of the iwi of Ngāpuhi. The fiduciary relationship between TRAION and members of the Ngāpuhi iwi is typical of iwi organisations. The relationship between iwi member and iwi

¹⁵³ R William Ide "Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight" (2003) 54 Mercer L Rev 829.

¹⁵⁴ M Tait "\$20 million loan to save Wānanga" (9 May 2005) *The New Zealand Herald*, Auckland <<http://www.nzherald.co.nz>> (last accessed 5 September 2005).

¹⁵⁵ Māori Fisheries Act 2004, s 12(1)(a).

¹⁵⁶ Coxhead and Royal, above n 59.

organisation carries with it the possibility of litigation as well as other statutory accountability mechanisms. Māori organisations are therefore subject to less stringent accountability regulation than iwi organisations.

These examples illustrate that both the cultural characteristics of the asset as well as the governance and ownership arrangements determine the extent to which the organisation will be held accountable by its members or owners.

2. *Enforcement of rights*

Cultural influences affect the decision-making processes that determine whether any matter will be enforced (for example, by litigation) or resolved through other means. Studies have indicated that the effect of cultural values continues to be important in affecting the degree to which Western corporate insolvency ideas are applied by creditors in debt enforcement.¹⁵⁷ Other international research also suggests that culture and ideology can explain the failure in many countries to create efficient laws that achieve adequate levels of enforcement.¹⁵⁸

In China there has historically been a view that insolvency laws are unnecessary.¹⁵⁹ Companies and individuals favoured the resolution of issues without resort to the law or litigation.¹⁶⁰ This outlook was driven by the primacy afforded to the importance placed on maintaining relationships and an aversion to pursuing personal interests.¹⁶¹ The cultural value placed on self-reliance also encouraged people to use their own means to deal with issues rather than the legal system, which was perceived as irrelevant to their social values. The persistence of the Confucian value system has therefore guided dispute resolution in China towards amicable, rather than the adversarial, resolution of issues. Accordingly, greater leniency is shown towards an insolvent investor in China, than in Europe or the United States.¹⁶² Similarly, in Indonesia the ethnic and religious diversity

¹⁵⁷ Roman Tomasic, Peter Little, Angus Francis, Kam Kamaru and Kui Hua Wang ("**Tomasic et al**") "Insolvency Law Administration and Culture in Six Asian Legal Systems" (1996) 6 *AJ Corp L* 248.

¹⁵⁸ Gorga, above n 35, 79.

¹⁵⁹ Tomasic et al, above n 157, 252.

¹⁶⁰ Tomasic et al, above n 157, 282.

¹⁶¹ Tomasic et al, above n 157, 248.

¹⁶² Tomasic et al, above n 157, 258.

has lead to the use of negotiation and compromise as a way of handling insolvency problems.¹⁶³

Taiwan's insolvency law and practice is also influenced by models and values similar to those in China.¹⁶⁴ Literature establishes that local customs still play an important part in relation to the handling of corporate debt in Taiwan.¹⁶⁵ The import of custom (culture) was even noted by the committee drafting the new insolvency law reforms. In an attempt to codify cultural preference towards informal dispute resolution a provision was introduced that allows the debtor to apply to the courts or the Chamber of Commerce for an amicable settlement prior to the instigation of formal bankruptcy proceedings. This is an apparent melding of the Confucian preference for alternative dispute resolution processes (ie settling disputes through reliance upon personal relationships rather than law) and Western insolvency law administration. It is a clear example of how culture can impact on the development and implementation of law. Such a culturally attuned legal transplant is more likely to be successfully implemented than laws that are inconsistent with the values of that culture.

This preference for resolving disputes using alternative methods is demonstrated in the example of Ngāti Kahungunu ki Wairarapa Māori Executive Taiwhenua Iwi Authority Incorporated ("**Authority**"), the representative organisation of Wairarapa-based Ngāti Kahungunu. In 2001 the Authority became insolvent with debts of approximately \$500,000. The Authority negotiated with creditors to reach a compromise pursuant to the Incorporated Societies Act 1906. The deal also ensured that creditors did not make claims against either the assets of the Authority's health service or against any fisheries settlements assets.¹⁶⁶ This is an example of where cultural preference for dispute resolution produced a more culturally acceptable outcome (through the protection of Treaty settlement assets) outcome than an adversarial process would have.

The MFA allows for the implementation of culturally attuned and informed dispute resolution processes within a legislative framework. Kaupapa 8

¹⁶³ Tomasic et al , above n 157, 284.

¹⁶⁴ Tomasic et al , above n 157, 257.

¹⁶⁵ Tomasic et al , above n 157, 278.

¹⁶⁶ NZPA "Offer to Creditors from Iwi Authority" (18 August 2001) *The Dominion*, Wellington 9 <<http://io.knowledge-basket.co.nz>> (last accessed 1 September 2005).

of Schedule 7 of the MFA sets out the requirement for a dispute resolution procedure to deal with disputes between members and the entity. TOKM considers that dispute resolution mechanisms are essential to the successful implementation of the allocation model and the overarching obligation that the settlement is ultimately for the benefit of all Māori.¹⁶⁷ Under the MFA, iwi organisations who are subject to the MFA must expressly set out a method for resolving intra tribal disputes; the clear preference being resolution of disputes in a form other than by recourse to the courts.¹⁶⁸ The MFA therefore prescribes a regime that favours alternative dispute resolution over adversarial processes.

The MFA allows iwi organisations to create dispute resolution processes that are culturally relevant for adoption in the constitutional documents of the iwi organisations.¹⁶⁹ Part 5 of the MFA prescribes a four-step process for the resolution of disputes under the MFA. This includes the requirement that disputing parties attempt, in the first instance, to resolve the dispute.¹⁷⁰ Other options include the referral of the dispute to TOKMTL for determination,¹⁷¹ and referral of the dispute to the Māori Land Court.¹⁷² The statutory right to refer disputes to the Māori Land Court also provides the organisation and its members with a culturally attuned forum for determination of the issues as the Māori Land Court can utilise tikanga experts to provide culturally relevant dispute resolution procedures in respect of disputes referred to it under the MFA.¹⁷³ The Court has also been given broad powers to make a wide variety of orders in respect of disputes referred to it under the MFA.¹⁷⁴ This includes providing advice on disputes,¹⁷⁵ hearing, determining and making orders,¹⁷⁶ and requesting reports.¹⁷⁷ In summary, the MFA dispute resolution models provide iwi with the ability to apply their own, distinct cultural values and understandings to the dispute

¹⁶⁷ Treaty of Waitangi Fisheries Commission *He Kawai Amokura - A Model for Allocation of the Fisheries Settlement Assets Report to the Minister of Fisheries* (Treaty of Waitangi Fisheries Commission, Wellington, 2003) 102.

¹⁶⁸ Treaty of Waitangi Fisheries Commission *Dispute Resolution Procedures* (Treaty of Waitangi Fisheries Commission, Wellington, 1995).

¹⁶⁹ Māori Fisheries Act 2004, 7th Sch, kaupapa 10.

¹⁷⁰ Māori Fisheries Act 2004, s181(1).

¹⁷¹ Māori Fisheries Act 2004, s181(2).

¹⁷² Māori Fisheries Act 2004, s182.

¹⁷³ Māori Fisheries Act 2004, ss 26E(4), 26F(4) and 26G(5).

¹⁷⁴ Māori Fisheries Act 2004, s 182(2).

¹⁷⁵ Te Ture Whenua Māori Act 1993, s 26B.

¹⁷⁶ Te Ture Whenua Māori Act 1993, s 26C.

¹⁷⁷ Te Ture Whenua Māori Act 1993, s 26H.

resolution process they choose to use and would also allow for organisations to utilise processes that are culturally distinct to their specific tribal group.

In summary, culture influences accountability through the ways in which it incentivises members, shareholders and owners to enforce accountability mechanisms in respect of the organisation. Culture also influences the preference of what forum or form enforcement of rights will take.

IV WHAT DOES CULTURE DO TO CORPORATE GOVERNANCE? - LESSONS FOR NEW ZEALAND

A Culture Does Matter

The view that culture forms an important part of the development and implementation of corporate governance was contrary to the mainstream corporate governance thinking of the past decade. Until recently, corporate governance was seen as a product of governance drivers as shaped by Anglo-Saxon (specifically United States) governance needs and jurisprudence.¹⁷⁸ Not surprisingly, until recently corporate governance literature largely ignored the role of culture in corporate governance. Some writers acknowledge that as a result of this lack of focus there is a lacuna in comparative corporate governance literature on culture, and that the effects of culture are ambiguous.¹⁷⁹ However, as illustrated in this paper, recent research has established that culture is a fundamentally important element in corporate governance systems and processes. That said, culture is not the only pre-requisite for good corporate governance, and does not in itself guarantee effectiveness of corporate governance systems.¹⁸⁰ As seen in the example of Brazil, cultural influence can actually impede the imposition of strategies that would make governance more effective, according to Anglo-Saxon corporate governance standards.

Culture has been shown to affect how laws are perceived, complied with and implemented. Culture is therefore of vital import to both the development of governance structures and in the practical implementation of governance processes. The question of whether cultural characteristics will be manifested in a cultural overlay or entrenched in the corporate governance legal institutions (ie whether culture has structural or procedural influence) was raised in Part II *D*. The analysis undertaken in Part III supports a 'half-way house' response. As seen in both international and local examples, cultural characteristics are incorporated within legislation as well as being a norm that operates outside of the legal institutions to influence behaviour and actions in a corporate governance context.

¹⁷⁸ Licht, above n 7.

¹⁷⁹ Licht, above n 7, 25.

¹⁸⁰ Whitehead and Annesley, above n 14; Licht, Goldschmidt and Schwartz, above n 6.

Because cultural values and beliefs are embedded in both social and legal institutions,¹⁸¹ the extent to which corporate governance systems are compatible with the entrenched cultural characteristics determines what particular corporate structures and governance rules are implemented, as well as how they are implemented. This is because underlying social attitudes (cultural values and beliefs) are reflected in the expression of the law and in the informal norms that are inherent in and determine that expression.¹⁸² Therefore, acknowledging culture and ideology as a central feature of corporate governance assists in the analysis of why differing nations have different patterns and expressions of corporate governance.

It has also been shown that culture can benefit corporate governance systems and processes. It does this by facilitating culturally compatible governance. This was observed most clearly in the Korean studies, where Korea has developed its own version of corporate governance that is based on an amalgam of imported legal elements and local cultural characteristics and practices.¹⁸³ This supports the assertion in this paper that corporate governance systems are developed for their own cultural circumstances.

However, some commentators caution against widespread uptake of cultural considerations in corporate governance. They argue that such a focus runs the risk of caricaturing nations or relying on myths or stereotypes.¹⁸⁴ However, in the author's opinion, this argument appears to rely on the assumption that the expression of culture is static. If this is the case then the expression of culture will be captured in legislation to the detriment of the development of culturally attuned legal systems. Entrenchment of the expression of culture, rather than the core values that underpin the relevant culture, will result in legislation that becomes quickly outdated and flawed.¹⁸⁵ Such legislation would cease to reflect an appropriate cultural match and therefore reduce the legitimacy that the organisations enjoys from those it governs. In contrast, culture, like the social

¹⁸¹ Licht, Goldschmidt and Schwartz, above n 6.

¹⁸² H Patrick Glenn *Legal Traditions of the World* (Oxford University Press, Oxford, United Kingdom).

¹⁸³ Licht, above n 75.

¹⁸⁴ Licht, above n 7.

¹⁸⁵ For example, the Maori Trust Boards Act 1955 which prescribes the expression of cultural values, and has been widely criticised as paternalistic and outdated. Whilst the scope of this paper does not allow a full analysis of this issue, I note it for completeness.

forces that inform and shape it, changes and develops in response to differing pressures, both internal and external, although the outward expression of culture or the way in which it influences governance (or other legal) systems may vary with time and circumstance. The fundamental metaphysical assumptions that form the basis of the cultural values remain consistent.¹⁸⁶ Therefore, where cultural characteristics are to be provided for in legislation or legal frameworks, it is imperative that it is the core (metaphysical) values that are represented. It is these that are important for the continued expression of those values in a culturally consistent and legitimate manner. The MFA illustrates this approach. It is an example of the successful legislative incorporation of cultural characteristics within the corporate governance systems and processes of iwi organisations.

B Lessons for New Zealand

In the context of Māori and iwi organisations, recent literature acknowledges the integral role culture plays in governance efficacy. However, how culture (and in particular the specific principles and values of Māori culture) impacts on the corporate governance of Māori and iwi organisations is a relatively green fields area. Implementing the philosophies of accountability, transparency and stewardship in Māori and iwi organisations faces unique challenges because of the influence that Māori cultural factors play in the implementation and development of the governance processes and systems of the organisations.¹⁸⁷

The MFA is an interesting statutory creature as it will change the face of iwi politics and governance. The MFA provides for the expression of distinctly Māori cultural characteristics in the exercise of corporate governance. However, because of its foundation in Anglo-Saxon governance models, the MFA, in the author's opinion, will over time ensure that the governance of iwi organisations will align with Anglo-Saxon (western) notions of participation and control. As seen in the example of Japan, such legal reform will change how cultural characteristics are expressed in corporate governance. This change may result in the westernisation of previously culturally determined expressions of corporate

¹⁸⁶ Per Witherspoon in Mead, above n 26, 351.

¹⁸⁷ Coxhead and Royal, above n 59.

governance. This is because incorporation of cultural characteristics and values within legislation will alter the expression of those characteristics in line with the legal framework into which it is placed. Such incorporation will facilitate the expression of those cultural characteristics as well as standardise their expression. In the attempt to enable the cultural characteristics or values to be upheld, the effect could in fact be to permanently alter them. This reinforces the assertion made above that it is important that the values, rather than the expression of the values, be represented. Accordingly, because the MFA is a relatively new piece of legislation, time will tell what impact it will have on the expression of and perhaps even the transformation of Māori cultural values, beliefs and practices as they are expressed in corporate governance.

The above analysis focuses on the transplantation of cultural characteristics into an Anglo-Saxon legal framework and assumes that the corporate governance of Māori, iwi, or other non-Western organisations must necessarily be measured against its conformity to Anglo-Saxon corporate governance ideologies. However, there is an alternative position, where the analysis is shifted in favour of reference to a tikanga or kaupapa Māori framework. Māori and iwi organisations could be measured against tikanga or kaupapa.¹⁸⁸ Such an analysis may provide greater insights into the drivers behind cultural characteristics in corporate governance. In this way, instead of a focus on how culture negatively impacts upon Western 'good corporate governance', the viewpoint could be how cultural characteristics enhance these systems and processes.¹⁸⁹ The focus is instead on Māori concepts of good governance rather than using Anglo-Saxon corporate governance models to reduce the influence of or measure those factors.¹⁹⁰ Royal (2005) anticipates that Māori and iwi organisations will eventually start to set out their own kaupapa Māori good governance processes. Coxhead (2005) considers that quadruple bottom line reporting and accounting will also result in changes in the perception of what good governance means for Māori and iwi organisations.

¹⁸⁸ Coxhead and Royal, above n 59.

¹⁸⁹ Per James Johnston in Story, above n 58.

¹⁹⁰ Coxhead and Royal, above n 59.

Such processes allow substantial scope for the expression of cultural characteristics within the boundaries of and consistent with Anglo-Saxon good governance practices. In this way Māori and iwi organisations can set their own culturally attuned good governance processes and systems. This concept is consistent with that proposed by Licht et al (2004) who argue for the development of culturally compatible corporate governance. In the authors opinion, a potentially limitless opportunity exists for Māori and iwi organisations to achieve cultural match and culturally attuned governance if the kaupapa Māori measurements and focus, as suggested by Coxhead and Royal (2005), come to fruition. In applying Licht et al's (2004) analogy to the New Zealand context, this could result in 'good Māori governance' that is different from but equally as efficient and valid as 'Anglo-Saxon good governance' models. This more likely to result in more robust and efficient organisations than could perhaps be otherwise attained.

V CONCLUSION

Culture affects how laws are developed, perceived, complied with and implemented. Specifically, corporate governance is shaped by both informal (cultural and social) as well as formal (legal) mechanisms. Culture can also be incorporated in the governance structures and processes of organisations through both informal (cultural overlay) and formal (culturally attuned legal frameworks) means. Culture is therefore a highly relevant and powerful factor influencing both the development and expression of corporate governance.

The analysis undertaken in this paper demonstrates the differing ways in which culture is expressed and influences fundamental elements of Anglo-Saxon corporate governance.

Culturally informed characteristics influence the ownership arrangements and expression of rights in organisations. This is particularly so for those iwi organisations subject to the MFA where collectively owned assets are held by one entity with enforceable participatory rights in respect of key governance decisions are held by iwi members.

Cultural influences overlay the implementation of governance processes that regulate transparency mechanisms such as independence and disclosure and reporting. In order to account for this cultural influence, some organisations have implemented structural remedies such as advisory boards, restructuring, and internal or procedural mechanisms. The MFA has legislated to reduce cultural influence that results in undesirable outcomes in respect of transparency.

Culture also influences accountability through the ways in which it incentivises members, shareholders and owners to enforce accountability mechanisms in respect of the organisation. Culture also influences the preference of what forum or form enforcement of rights will take.

These findings also apply to the New Zealand corporate governance context. They have particular relevance for Māori and iwi organisations, for whom culture is significant for the implementation of culturally attuned corporate governance systems and processes. Māori cultural values (tikanga Māori) are

expressed in both the development and expression of corporate governance in Māori and iwi organisations.

The MFA is an example of the successful legislative incorporation of cultural characteristics within the corporate governance systems and processes of iwi organisations. This will impact on the future governance of iwi organisations. Specifically, the entrenchment of cultural characteristics will change the way that these cultural characteristics are expressed in the corporate governance context. In the authors opinion, the incorporation of cultural characteristics into Anglo-Saxon legal frameworks will result in a westernisation of the expression of those cultural characteristics. If the legal construct upon which the cultural characteristics are transplanted is inconsistent with the cultural values, then this may result in a disjunct between the two systems, rendering the cultural characteristics a liability rather than an asset.

Such a disjunct could be mitigated by the use of the kaupapa Māori focus. Accordingly, Māori and iwi organisations should be able to set and measure their own culturally attuned governance processes and systems. This will result in 'good Māori governance' that is different from but equally as efficient and valid as 'Anglo-Saxon good governance' models.

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APPENDIX 1

OECD Principles of Corporate Governance 2004

I ENSURING THE BASIS FOR AN EFFECTIVE CORPORATE GOVERNANCE FRAMEWORK

The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities.

- A. The corporate governance framework should be developed with a view to its impact on overall economic performance, market integrity and the incentives it creates for market participants and the promotion of transparent and efficient markets.
- B. The legal and regulatory requirements that affect corporate governance practices in a jurisdiction should be consistent with the rule of law, transparent and enforceable.
- C. The division of responsibilities among different authorities in a jurisdiction should be clearly articulated and ensure that the public interest is served.
- D. Supervisory, regulatory and enforcement authorities should have the authority, integrity and resources to fulfil their duties in a professional and objective manner. Moreover, their rulings should be timely, transparent and fully explained.

II THE RIGHTS OF SHAREHOLDERS AND KEY OWNERSHIP FUNCTIONS

The corporate governance framework should protect and facilitate the exercise of shareholders' rights.

- A. Basic shareholder rights should include the right to:
1. secure methods of ownership registration;
 2. convey or transfer shares;
 3. obtain relevant and material information on the corporation on a timely and regular basis;
 4. participate and vote in general shareholder meetings;
 5. elect and remove members of the board; and
 6. share in the profits of the corporation.
- B. Shareholders should have the right to participate in, and to be sufficiently informed on, decisions concerning fundamental corporate changes such as:
1. amendments to the statutes, or articles of incorporation or similar governing documents of the company;
 2. the authorisation of additional shares; and
 3. extraordinary transactions, including the transfer of all or substantially all assets, that in effect result in the sale of the company.
- C. Shareholders should have the opportunity to participate effectively and vote in general shareholder meetings and should be informed of the rules, including voting procedures, that govern general shareholder meetings:

1. Shareholders should be furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting.
 2. Shareholders should have the opportunity to ask questions to the board, including questions relating to the annual external audit, to place items on the agenda of general meetings, and to propose resolutions, subject to reasonable limitations.
 3. Effective shareholder participation in key corporate governance decisions, such as the nomination and election of board members, should be facilitated. Shareholders should be able to make their views known on the remuneration policy for board members and key executives. The equity component of compensation schemes for board members and employees should be subject to shareholder approval.
 4. Shareholders should be able to vote in person or in absentia, and equal effect should be given to votes whether cast in person or in absentia.
- D. Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed.
- E. Markets for corporate control should be allowed to function in an efficient and transparent manner.
1. The rules and procedures governing the acquisition of corporate control in the capital markets, and extraordinary transactions such as mergers, and sales of substantial portions of corporate assets, should be clearly articulated and disclosed so that investors understand their rights and recourse. Transactions should occur at transparent prices and under fair conditions that protect the rights of all shareholders according to their class.

2. Anti-take-over devices should not be used to shield management and the board from accountability.

F. The exercise of ownership rights by all shareholders, including institutional investors, should be facilitated.

1. Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights.

2. Institutional investors acting in a fiduciary capacity should disclose how they manage material conflicts of interest that may affect the exercise of key ownership rights regarding their investments.

G. Shareholders, including institutional shareholders, should be allowed to consult with each other on issues concerning their basic shareholder rights as defined in the Principles, subject to exceptions to prevent abuse.

III THE EQUITABLE TREATMENT OF SHAREHOLDERS

The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.

- A. All shareholders of the same series of a class should be treated equally.
 - 1. Within any series of a class, all shares should carry the same rights. All investors should be able to obtain information about the rights attached to all series and classes of shares before they purchase. Any changes in voting rights should be subject to approval by those classes of shares which are negatively affected.
 - 2. Minority shareholders should be protected from abusive actions by, or in the interest of, controlling shareholders acting either directly or indirectly, and should have effective means of redress.
 - 3. Votes should be cast by custodians or nominees in a manner agreed upon with the beneficial owner of the shares.
 - 4. Impediments to cross border voting should be eliminated.
 - 5. Processes and procedures for general shareholder meetings should allow for equitable treatment of all shareholders. Company procedures should not make it unduly difficult or expensive to cast votes.
- B. Insider trading and abusive self dealing should be prohibited.
- C. Members of the board and key executives should be required to disclose to the board whether they, directly, indirectly or on behalf of third parties, have a material interest in any transaction or matter directly affecting the corporation.

IV THE ROLE OF STAKEHOLDERS IN CORPORATE GOVERNANCE

The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.

- A. The rights of stakeholders that are established by law or through mutual agreements are to be respected.
- B. Where stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights.
- C. Performance-enhancing mechanisms for employee participation should be permitted to develop.
- D. Where stakeholders participate in the corporate governance process, they should have access to relevant, sufficient and reliable information on a timely and regular basis.
- E. Stakeholders, including individual employees and their representative bodies, should be able to freely communicate their concerns about illegal or unethical practices to the board and their rights should not be compromised for doing this.
- F. The corporate governance framework should be complemented by an effective, efficient insolvency framework and by effective enforcement of creditor rights.

V DISCLOSURE AND TRANSPARENCY

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

- A. Disclosure should include, but not be limited to, material information on:
1. The financial and operating results of the company.
 2. Company objectives.
 3. Major share ownership and voting rights.
 4. Remuneration policy for members of the board and key executives, and information about board members, including their qualifications, the selection process, other company directorships and whether they are regarded as independent by the board.
 5. Related party transactions.
 6. Foreseeable risk factors.
 7. Issues regarding employees and other stakeholders.
 8. Governance structures and policies, in particular, the content of any corporate governance code or policy and the process by which it is implemented.
- B. Information should be prepared and disclosed in accordance with high quality standards of accounting and financial and non-financial disclosure.
- C. An annual audit should be conducted by an independent, competent and qualified, auditor in order to provide an external and objective assurance to the board and shareholders that the financial statements fairly

represent the financial position and performance of the company in all material respects.

- D. External auditors should be accountable to the shareholders and owe a duty to the company to exercise due professional care in the conduct of the audit.
- E. Channels for disseminating information should provide for equal, timely and cost efficient access to relevant information by users.
- F. The corporate governance framework should be complemented by an effective approach that addresses and promotes the provision of analysis or advice by analysts, brokers, rating agencies and others, that is relevant to decisions by investors, free from material conflicts of interest that might compromise the integrity of their analysis or advice.

VI THE RESPONSIBILITIES OF THE BOARD

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

- A. Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.
- B. Where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly.
- C. The board should apply high ethical standards. It should take into account the interests of stakeholders.
- D. The board should fulfil certain key functions, including:
 - 1. Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestitures.
 - 2. Monitoring the effectiveness of the company's governance practices and making changes as needed.
 - 3. Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession planning.
 - 4. Aligning key executive and board remuneration with the longer term interests of the company and its shareholders.
 - 5. Ensuring a formal and transparent board nomination and election process.

6. Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions.
 7. Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.
 8. Overseeing the process of disclosure and communications.
- E. The board should be able to exercise objective independent judgement on corporate affairs.
1. Boards should consider assigning a sufficient number of non-executive board members capable of exercising independent judgement to tasks where there is a potential for conflict of interest. Examples of such key responsibilities are ensuring the integrity of financial and non-financial reporting, the review of related party transactions, nomination of board members and key executives, and board remuneration.
 2. When committees of the board are established, their mandate, composition and working procedures should be well defined and disclosed by the board.
 3. Board members should be able to commit themselves effectively to their responsibilities.
- F. In order to fulfil their responsibilities, board members should have access to accurate, relevant and timely information.

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