# THE TREATY OF WAITANGI

# A FRAMEWORK FOR RESOURCE MANAGEMENT LAW

by

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# *The Treaty of Waitangi - A framework for resource management law*

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## I INTRODUCTION

The objective of this paper is to consider the principles and the provisions of the Treaty of Waitangi as a framework for New Zealand's resource management laws. The necessity for such an analysis to be undertaken has now become critical as a consequence of the Government's resource management law review project (RMLR), coordinated by the Ministry for the Environment. This large-scale exercise, a complete review of all of New Zealand's statutes impinging on resource management (town and country planning, water and soil conservation, geothermal energy, mining, pollution control)[1] - and which has overtaken and absorbed an earlier review of coastal management law embarked on by the Department of Conservation - must obviously take some cognisance of the Treaty of Waitangi, as the principal reports thus far produced in the course of the review acknowledge explicitly.[2] The most recent RMLR report advises that the Government has decided already that an "active stance" must be taken in regard to Maori interests in the resource management area, that "new legislation should provide for more active involvement of iwi in resource management", and that "legislation should provide for the protection of Maori cultural and spiritual values associated with the environment" - all of these flowing from the government's recognition that resource management law must now take account of the Treaty.[3]

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1 The Acts covered by the review are: the Town and Country Planning Act 1977, the Water and Soil Conservation Act 1967, the Soil Conservation and Rivers Control Act 1941, the Mining Act 1971, the Coal Mines Act 1979, the Geothermal Energy Act 1953, the Petroleum Act 1937, the Quarries and Tunnels Act 1982, the Noise Control Act 1982 and the Clean Air Act 1972. Also included are the Environmental Protection and Enhancement Procedures, a non-statutory directive which establishes guidelines for environmental impact reporting.

2 The two principal productions to date are *Directions for Change: A Discussion Paper* (Ministry for the Environment, August 1988), and *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (Ministry for the Environment, December 1988) (subsequently referred to as *Discussion Paper and People, Environment, and Decision Making*). For references to the Treaty in the context of resource management law see *Discussion Paper, 14-16,* 27-28; *People, Environment and Decision Making,* 23-24, 32-34.

3 *People, Environment and Decision Making* (above, n 2), 5. It should also be noted that there is considerable Maori scepticism as to whether anything useful for Maoridom

As well as RMLR other important reviews of environmental and conservation legislation are proceeding, coordinated by the Department of Conservation. The Protected Areas Review is concerned with the legislation relating to national parks and reserves: an Issues Paper was released by the Minister of Conservation in July 1988.[4]

There is also the historic places review, focusing on the Historic Places Act 1980 and parts of the Town and Country Planning Act 1977. An Issues Paper[5] has recently been released by the Minister of Conservation, exploring the deficiencies of the existing statutes and inviting public submissions. As with the Protected Areas Review Issues Paper[6] considerable emphasis is placed on the obligations of the Crown which derive from the Treaty. Other reviews impinging on Treaty issues and resource management are the reviews of local and regional government, marine reserves, marine mammals protection and species protection. [7]

New legislation dealing with resource management, protected areas and historic places will, it can safely be assumed, make some reference to the Treaty. Whether the new legislation will fairly discharge the Crown's obligations remains to be seen. The task of determining what the Crown's Treaty-based obligations in this area might be has, in any event, not yet been addressed in detail by the Government; this would seem to be an essential prerequisite to reshaping resource management and conservation laws so that they conform to the Crown's Treaty-based obligations. It is on this question that this paper will focus. Does the Treaty allow for laws to be made for resource management at all? If so, are there limitations on what the Crown may do? What are the respective roles of the Treaty partners in the area of environmental management? How satisfactorily does the existing law conform to these requirements? These are the difficult conceptual and jurisprudential problems with which this paper will attempt to grapple.

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will emerge from the RMLR, especially in view of the Government's will be excluded from the review process. This scepticism appears to extend to the Ministry for the Environment's own Maori Secretariat: see "Maori 'Cynical of Resource Management Reform'", *The Evening Post*, Wellington 10 September 1988.

4 See *Protected Areas Legislation Review: Issues for Public Comment* (Department of Conservation, July 1988). Statutes included in this review are the Conservation Act 1987, aspects of the Harbours Act 1950, the Hauraki Gulf Maritime Park Act 1967, some provisions of the Land Act 1948 and the Local Government Act 1974, the National Parks Act 1980, the Queen Elizabeth the Second National Trust Act 1977, the Reserves Act 1977 and the Wildlife Act 1953.

5 *Historic Places Legislation Review: Issues for Public Comment* (Department of Conservation, December 1988).

6 See *Protected Areas Legislation Review* (above, n 4), 35 (noting the desirability of statutory procedures which would encourage marae-based participation in protected areas management), and 46-47 (proposing incentives to encourage reservation of Maori land).

7 See *Historic Places Legislation Review* (above, n 2), 33-35.

The first part of this paper will focus on the implications of the language of the Treaty for resource management and conservation law. This will be followed by an analysis of overseas developments where similar issues have arisen. Here, particular emphasis will be placed on the framework developed by courts in the United States deciding cases arising out of resource disputes between Indian tribes and state governments. The next section will be a consideration of the variety of statutory references to the Treaty of Waitangi in the existing New Zealand statutes. The central part of the paper will examine how adequately Treaty issues are taken into account in the various areas of existing resource management and conservation law (mining, geothermal energy, town and country planning, water and soil conservation, fisheries management, historic places and archaeological sites, and environmental impact reporting and assessment). The last part of the paper will be an examination of the methods by which consideration of the requirements of the Treaty in this area can be improved.

This paper will not examine whether the Treaty *should* be relevant to resource management and conservation law in late twentieth-century New Zealand. This will simply be taken for granted, although it is of course recognised that there is no real consensus on this issue amongst Pakeha New Zealanders, as recent controversy over fisheries issues makes clear.[8] The Government has already decided that Treaty issues will be central to the current legislative reviews, and a number of statutes already make specific reference to Treaty principles.[9] It is too late in the day now to contend that the Treaty has no relevance in this area.

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8 For example, the President of the Fishing Industry Association, Mr David Anderson, has stated that the fishing industry "strongly questioned the existence of Maori rights" ("Industry to Fight Fisheries Claims", *The Dominion* 19 March 1988, p 3). In April 1988 a group of about 80 commercial fishermen gathered outside Parliament Buildings to protest against a recent District Court decision which dismissed charges against a Maori fisherman on the grounds that he was exercising a traditional fishing right (see "Maori Fish Case Provokes Protest", *The Dominion* 23 April 1988, p 2). With the release of the Waitangi Tribunal's *Muriwhenua Report* in June 1988 the President of the Federation of Commercial Fishermen, Mr Bob Martin, threatened that unless the Government took steps to change the Fisheries Act 1983, particularly s 88 (2), which protects Maori fishing rights, the industry would retaliate by flouting the quota management system ("Fishers Threaten To Flout Quota Law", *The Dominion Sunday Times* 12 June 1988, p 2). The same report led to claims by Whangarei MP John Banks and Bay of Islands MP John Carter that the Report advocated legalised racism and that it would lead to bloodshed and violence - claims angrily rejected by Maori leaders: see "Fisheries Decision 'Legalised Apartheid': Maoris Reject Predictions of Race Conflict", *The Dominion* 14 June 1988, p 2. Such controversy is not in itself surprising, and is paralleled by similar controversies - also over traditional fishing claims - which have occurred in Oregon and Washington: see Richard A Finnigan, "Indian Treaty Analysis and Off-Reservation Fishing Rights: A Case Study" (1975) 51 Washington Law Review 61, 92; John R. Schmidhauser, "The Struggle for Cultural Survival: The Fishing Rights of the Treaty Tribes of the Pacific Northwest" (1976) 52 Notre Dame Lawyer 30.

9 See eg Conservation Act 1984 s 4; Environment Act 1986, Long Title (iii); State-Owned Enterprises Act 1987 s 9.

committees. Iwi authorities could also run licensing procedures for those inland and coastal fisheries under Maori control. These parallel systems could then be linked by sharing common judicial appeal and review institutions in the Planning Tribunal and the courts. It seems, however, that the government's vision is somewhat narrower.

The Local and Regional Government Reform has run into some criticism from Maoridom for failing to consult adequately in the spirit of the *Maori Council* decision. Dr Bassett's rejection of a proposal from the Maori local government reform consultative group that Maori people appoint one-half of the representatives on local authorities is hardly surprising. But dissatisfaction with the Government's approach has also been expressed by Sir Graham Latimer of the New Zealand Maori Council. According to a report in *The Dominion*, 4 March 1989:

> Maori Council chairman Sir Graham Latimer has condemned the pattern of local government reform, saying its failure to observe the principle of partnership was an insult to Maoridom.
> A three-day national hui convened by the Maori consultative group on local government reform ended in Lower Hutt yesterday.
> Sir Graham said the reform's silence on Maori local government issues showed the Government's Maori affairs policy *Te Urupare Rangapuu* (Partnership Response) had already been sidelined.
> Despite the 1987 Court of Appeal decision on the Treaty of Waitangi, the approach of Local Government Minister Michael Bassett and his officials toward the treaty and the principle of tribal management had been almost contemptuous, Sir Graham said.
> It appeared Dr Bassett was condemning Maoridom to a further master-servant relationship with local government bodies.

Certainly the guiding principle of the reform should be the Treaty and its guaranteed protection of rangatiratanga and taonga. The difficulty is the complexity and regional variations of Maoridom. What is appropriate for Ngati Kahu may not be appropriate for Ngati Tuwharetoa or Te Arawa. A real effort to implement local government structures which conform to the Treaty will almost certainly conflict with the government's aim to establish a tidy and simplified system.

### *D Summary*

1 In terms of resource management, the Waitangi Tribunal, partly by a process of creative adaptation of North American cases, has already developed a useful and coherent model of the respective roles of the Crown and of Maoridom. Conservation laws, within certain defined limits, are a valid exercise of kawanatanga.

2 Statutory references to the Treaty and to Maori interests in conservation and resource management statutes are vague and confusing. Some make no reference to either the Treaty or Maori interests (such as the Geothermal Energy Act). Those statutes which do refer to the Treaty use a confusing variety of

formulae. All these provisions should be replaced by a clear and standardised reference to the Treaty, preferably in a central coordinating statute.

3 In areas such as mining, geothermal energy, fisheries, water management etc, the current resurgence of the Treaty is already having a major impact on courts, tribunals and government agencies. This impact is of course uneven and is constrained by the limitations of the relevant statutes. Nevertheless there is clearly a 'new thinking' very much in evidence which will probably continue to develop and which is unlikely to be affected to any great extent by attempts of central government to reverse the trend.

4 Resource ownership questions are more difficult than resource management. Litigation is probably unavoidable in such areas as ownership of fisheries, minerals or petroleum. The law in New Zealand is undeveloped and authoritative answers are required to a number of issues. Without such authoritative decisions it is difficult to see how negotiations can succeed. Negotiations are just as expensive, time-consuming and difficult as litigation.

5 The Treaty itself arguably contains within it a guarantee of environmental protection.

6 The basic principle should be tribal self-management of tribally owned resources and of other resources which, even if not tribally owned, are tribal taonga which can appropriately be managed tribally (such as fisheries reserves).

7 The present conjunction of RMLR and Local and Regional Government Reform is an ideal opportunity for instituting a system of tribal self-regulation.

8 More generally, New Zealanders need to make themselves more aware of developments on the above lines in North America and elsewhere. New Zealand's problems are not unique. Canada, the United States and Australia are all having to come to terms with the legacy of colonialism. This process of coming to terms can be, if sometimes stressful, also positive and rewarding.

9 Finally, there are no quick-fix and easy solutions. Waitangi Tribunal claims will simply have to be worked through. Litigation over a number of basic issues will have to occur. A new legal framework is being set in place, and it is absurd to suppose that the trend can either be reversed or that all the implications and consequences can be swiftly and easily put in place.

## *POSTSCRIPT*

While this paper was in the final stages of preparation for publication, on 3 October 1989, the Court of Appeal gave judgment in the proceedings brought by Tainui relating to the Crown's proposal to transfer coal mining licences to Coalcorp.[168] In this decision all five judges held that a coal mining licence was an 'interest in land' (and thus fell within the clawback provisions of the Treaty of Waitangi (State Enterprises) Act 1988), and that the sale of surplus properties by Coalcorp as agent was governed by the requirements of section 9 of the State-Owned Enterprises Act 1986 and the requirements laid down by the Court of Appeal in *Maori Council* v *Attorney-General.*

The decision was on a narrow point, but in his judgment Cooke P makes a number of points of more general interest. He repeated his observation, made earlier in *Maori Council,* that "the Court should be slow to ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty",[169] although in this case it was not necessary to apply any such principle as both issues could be resolved "quite readily on the standard principle of looking for the natural and ordinary meaning of legislative words in their context".[170] Cooke P further noted that the confiscation or raupatu issue had already been investigated in detail in the 1927 Royal Commission on Confiscated Native Lands. "No doubt," observed Cooke P, "the findings of the Commission go far to explain the fact that for the purposes of this case the Crown has not challenged that a considerable proportion of Raupatu lands were confiscated in breach of the Treaty".[171]

Since the facts of the matter are well known, there would, in Cooke P's view, be little to be gained by a Waitangi Tribunal investigation. It would be preferable for the Treaty partners to "work out their own agreement" in a process in which "judicial resolution should be very much a last resort".[172] Cooke P was also willing to accept that coal "can be classified as a form of taonga".[173] He indicated that while the concept of partnership certainly does not mean "that every asset or resource in which Maori have some justifiable claim to share should be divided equally"[174], any settlement should take into account the taonga status of the coal and Maori contributions to the industry.

> A negotiated settlement which recognised as regards coal that Tainui are entitled to the equivalent of a substantial proportion but still considerably

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168 *Re Te K Mahuta and Tainui Maori Trust Board.* v *Attorney-General and others, Unreported, 3 October 1989 (CA 126/89).*

169 Ibid, per Cooke P, p9.

170 Ibid.

171 Ibid 34.

172 Ibid 37.

173 Ibid 38.

174 Ibid 32.

less than half of this particular resource could be suggested as falling within the spirit of the Treaty of Waitangi.[175]

It is therefore probably best to regard Cooke P's judgment as a further commentary and refinement of the partnership concept first explored in the Court of Appeal's 1987 *Maori Council* decision. The emphasis given by Cooke P that partnership does not mean a fifty per cent share of every resource in which there is some legitimate claim was earlier emphasised by the court in the 1989 state forests case: *New Zealand Maori Council* v *Attorney-General*.[176] Further developments and refinement can be expected. It is still an open question, however, whether the 'partnership' approach is as satisfactory as the Waitangi Tribunal's preferred option of a case by case exploration of the implications of kawanatanga, rangatiratanga and taonga. The writer's personal view is that a Waitangi Tribunal report on the confiscation issue would actually be an outstandingly useful contribution. While the Report of the Sim Commission of 1927 is a valuable document, it could not compare with an authoritative up-to-date review of the whole issue by the Waitangi Tribunal.

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175 Ibid 381.

176 Unreported, 20 March 1989, CA 54/87.