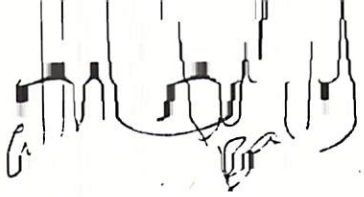

Prepared for Auckland Forest & Bird

11/10/94

LEGAL OPINION REGARDING THE AUCKLAND CITY COUNCIL'S OBLIGATIONS UNDER THE RESOURCE MANAGEMENT ACT 1991

RE: TREATY OF WAITANGI

A. INTRODUCTION: We refer to our earlier submissions (dated 5 September 1994) on the future use of the land known as Te Toki Road Land ("Te Toki"). On the last page of that submission we advised "that we have, as environmental lawyers, serious reservations about the submission made to the Auckland City Council by the Piritahi Marae, on behalf of the Waiheke Sports Club. We consider it potentially misleading as to the legal requirements of the Resource Managment Act."

We offer the Community Board our legal opinion because we are concerned that, should the Board (on behalf of the Auckland City Council) base its decision regarding Te Toki on the Marae's interpretation of the Resource Management Act ("RMA"), this decision could well be subject to a strong and successful legal challenge.

From the outset we state clearly that we are in no way experts in matters of traditional, or contemporary, Maori culture. We offer no opinion regarding these matters. We do, however, have substantial expertise in the area of environmental law, and thus limit our opinion to the legal issues involved. We also wish the Board to be aware that our legal opinion does not, in any way, represent our personal views regarding the appropriateness of RMA provisions relating to the concerns of Maori people.

B. A SUMMARY OF THE MARAE'S SUBMISSION: The Marae's submission appeals to the Council to "take into account its obligations under the Treaty of Waitangi", in its deliberations on the future of Te Toki.[1] It is argued that this requires the Council to consider the concept of "wairua" which, due to Maori involvement in the sports club over a period of years, has "seeped into the land from where it can not be removed." This process is said to be the "basis" of: (a) the club's opposition to being moved; and (b) the argument that development of Te Toki as a sports field, together with a linking walkway through the wetlands, would "protect and add to the spirit [wairua]".[2]

It was,further argued, presumably as an ancillary argument given that the above is said to be the "basis" of the club's opposition, that the Council's obligations under the Treaty of Waitangi require it to implement the Maori concept of "utu". In the context of Te Toki this was argued to mean that two sports fields at Te Toki and two sports fields, between the existing club rooms and the Wilma Rd walkway, should be developed. This "utu" is to be given in recognition of the contribution of the Maori people to the local community and for their involvement in the purchase of the Whakanewha block.[3]

Finally, after some general discussion of the principles of the Treaty of Waitangi, together with specific provisions of the RMA relating to Maori matters, the Marae's submission argues that: "[i]t should be seen in the RMA that Maori concerns are a pivotal point of the entire Act."[4] It concludes that the Council should "give the Maori community what it wants".

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[1] Marae's submission, pargraph 1, page 1.

[2] Marae's submission, paragraghs 2-4, page 1.

[3] Marae's submission, pages 2 and 3.

[4] Marae's submission, pages 3-4 (emphasis added).

C. LEGAL ISSUES: The above summary raises the following legal issues, which will be discussed in this opinion:

issue 1: what are the Council's obligations under the RMA? In particular, what are the Council's obligations under section 8, which refers to the principles of the Treaty of Waitangi?; and

issue 2: what is the relative importance of Maori concerns, within the context of the RMA? Are they a pivotal point as claimed?

D. DISCUSSION OF LEGAL ISSUES:

Issue 1 - the Council's obligations under RMA s.8:

The full text of section 8 is as follows:

> "**8. Treaty of Waitangi** - In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."[5]

A few fundamental points about the Treaty and this section need to be made clear from the outset.

First, the Treaty can only be enforced to the extent that it is given effect to within domestic legislation. Thus the Treaty as such is not legally enforcable, but only "principles of the Treaty" in so far as they are incorporated into the RMA. This means that the Council is not at liberty to look into the Treaty in general terms, rather it must limit itself to a consideration of Treaty principles within the context (thus according to the structure and wording) of the RMA.

Second, the obligations that the Crown has under principles of the Treaty are not necessarily the same as those of the Council. This distinction between the position of the Crown and that of local authorities was recently discussed in the case of *Hanton v ACC*.[6] The Planning Tribunal indicated that it is important to give section 8 a fair, large and liberal construction, "...but the Tribunal would not be entitled to give the section an effect beyond the scope of the words used."[7] It is worth quoting relevant parts of that decision:[8]

> Although s 8 requires consent authorities to take into account the principles of the Treaty, we do not find in its language any imposition on consent authorities of the obligations of the Crown under the Treaty or its principles. ... [W]here the consent authority is not a Minsiter of the Crown, but a local authority or some other person, we do not find authority in s 8 for the proposition that by exercising duties under the Act it is subject to the obligations of the Crown under the Treaty. Rather the consent authority is to take those principles into account in reaching its decision.

What this means is that it is not the role of local authorities to satisfy the claims of Maori people under the Treaty or its principles. This is the role of the Crown alone. To interpret section 8 otherwise would result in local authorities being able to make decisions regarding satisfaction of Maori claims under the Treaty. Applying the

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5 Emphasis added.

6 *Hanton v Auckland City Council* (Planning Tribunal, Decision A 10/94, 1 March 1994)

7 K Palmer "Cosultation with the tangata whenua under the Resource Management Act" Resource Management Bulletin, issue 2, 21, 22.

8 See above n 6, page 20.

interpretation in *Hanton v ACC*, to the Marae's submission means that: although the principle of "utu" may, or may not, be relevant under the Treaty, the giving of "utu" is the sole responsibility of the Crown.

In more general terms, the above interpretation of section 8 means that local authorities are not under any duty or obligation to give effect to the principles of the Treaty. But, they must take those principles into account in reaching a decision.

What then are the "principles of the Treaty" which the Council should take into account in reaching a decision on the future of Te Toki?

A number of guides exist, together with decisions of the Waitangi Tribunal, on the scope and content of Treaty principles.[9] However, it is important to be aware that these sources, including the decisions of the Waitangi Tribunal, are not legally binding.[10] The decisions of courts are still the most authoritative guide and in this respect, the leading case is still the Court of Appeal's decision in *New Zealand Maori Council v Attorney General*.[11] The main principles from that case are discussed as follows:[12]

(a) **Partnership and reasonable co-operation:** This principle implies a duty on the Crown and Maori to act towards each other in good faith. However, as has been pointed out, this does not imply the existence of an equal partnership.[13] This means, in the context of the RMA that the views of Maori must be heard "but that they may not necessarily be reflected in the actual result of the decision making process."[14] Acting in utmost good faith was said, by the Court, to involve acting reasonably.

(b) **Active Protection:** According to the President of the Court of Appeal, this means that "the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable".[15] This duty of active protection must be balanced against the principle of partnership. As the Waitangi Tribunal has noted, the obligations of the Crown and the objectives of conservation may, in certain circumstances, come into conflict. As one commentary points out: "The Waitangi Tribunal, for its part, has taken the view that under the kawanatanga (Crown's authority to make laws) ceded to it in Article I [of the Treaty] the Crown can make conservation laws of general application, which may on occasion need to override specific Maori grievances."[16]

(c) **Consultation:** The Court of Appeal did not go so far as to say that compliance with the principles of the Treaty obliged the Crown to consult with Maori. Rather, the consultation principle depended on the circumstances of the case. [17]

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9 See Handbook of Environmental Law (Royal Forest and Bird Soc) 248-249, and generally.

10 See above n 9, 248.

11 [1987] 1 NZLR 641.

12 The Court stated that the list is not exhaustive, different circumstances could result in other principles.

13 See above n 9, 249.

14 See above n 9, 249.

15 See above n 11, 664.

16 See above n 9, 250.

17 The Planning Tribunal's decision in *Hanton v ACC* (referred to above) was consistent with the Court of Appeals opinon. As the Tribunal pointed out, the role of a local authority was to follow a detailed code of procedure which did not overlook the place of the tangata whenua, but which omitted any express duty of consultation. However, the Tribunal did note that where a natural or physical resource, subject of a resource consent application, was the object of a valued relationship by Maori, an adviser preparing a report of the application should investigate and report on the extent to which the proposal would effect that relationship (pg 21).

Applying the above principles to the Marae's submission, we suggest that a proper and fair assessment of the Council's role would be to "hear" the views of Maori people regarding Te Toki and take those views into account when reaching a decision (Partnership and Reasonable Co-operation). But in doing so the Council should be aware that it is not under any legal obligation to reflect those views in its decision.

As regards the principle of active protection, the Council should ask itself whether decisions about Te Toki involves "the protection of Maori people in the use of their land and waters..". We do not understand the Marae's submission to be a claim that the existing sports fields, used by the Sports Club, are "Maori land". Rather that due to the presence of "wairua", those fields and the club rooms are of particular spirtual significance. Nor, is the Te Toki land, which the Marae argues should be developed into sports fields, itself claimed to be Maori land.

Clearly, the concept of "utu" does not come within this principle of active participation either (refer also to comments above regarding enforcement of the Treaty and the differing roles of the Crown and local authorities). However, it is perhaps relevant to point out here a further matter regarding the claim for "utu". The Marae's submission referred to the 1983 Motunui case, heard before the Waitangi Tribunal. A quote from that case, regarding the giving of gifts, was used. Part of that quote was as follows:"That then was the exchange of gifts that the Treaty represented. The gift of the right to make laws, and the promise to do so, so as to accord the Maori interests an appropriate priority"[18]. As the above discussion on the principle of active protection illustrates, Maori interests should be accorded appropriate priority but this must be achieved within the context of the law. As will be demonstrated below, Maori interests are to be given appropriate priority within the context of an Act (the RMA), the stated purpose of which is to "promote the sustainable management of natural and physical resources."[19]

Issue 2 - the relative importance of Maori interests: As mentioned above, the Marae's submission claims that Maori concerns are "a pivotal point" of the entire Act. In support it was suggested that the Act has three main "motives"(?): sustainability; interests of the Maori people; and environmental and ecological values. Of these three "motives"(?), sustainability and environmental/ecological values, were argued to be "in orbit around Maori concerns".[20] These claims require consideration of the hierachy of considerations within Part II of the RMA.

We wish to point out some very well accepted tenants of the RMA's interpretation, which are contrary to the above interpretation adopted by the Marae's submission.

First, the (singular) purpose (as opposed to "motives") of the RMA is clearly and unequivocally stated as follows: "**5. Purpose** - (1) The purpose of this Act is to promote the sustainable management of natural and physical resources."[21]

Section 5(2) defines sustainable management as follows:

> In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while-

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[18] Marae's submission, page 2, emphasis added.

[19] RMA, section 5.

[20] Marae's submission, page 4.

[21] Emphasis added. See also the preamble of Act which states: "An Act to restate and reform the law relating to the use of land, air, and water."

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably forseeable needs of future generations; and
(b) Safeguarding the life-suporting capacity of air, water, soil, and ecosystems; and
(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Thus "sustainable management", as defined by s 5(2) is the sole purpose of the Act! As can be seen from s 5(2) there are two primary aspects of sustainable management. The first part of section 5(2) refers to human developmental needs, whereas (a)-(c) refers to ecological concerns. The relationship between the two parts of s 5(2) has been a matter of dispute, due to uncertainty over use of the word "while".[22] However, a Board of Inquiry recently gave guidance on this point, in the process of reporting on the New Zealand Coastal Policy Statement. The Board said: "...Subsection (2) does not call for a balance to be struck between two competing objectives; it requires that management of natural and physical resources be carried out in a way which achieves the objectives (applies the constraints) specified in (a), (b) and (c)."[23] This then is the purpose of the RMA; achievement of a particular and special type of management.

However, on a proper interpretation of the structure and wording of sections 6, 7 and 8, it is clear that Maori interests are relevant, albeit to a limited extent.

Sections 6, 7 and 8 contain a number of principles or factors. Section 6 describes five "matters of national importance". Section 7 describes eight "other matters" and section 8 refers to the "principles of the Treaty of Waitangi".

The function of these principles is made clear by the introductory words of each section: "In achieving the purpose of this Act...". These words clearly suggest that the factors or principles set out in sections 6-8 are subsidiary to the purpose of the Act, sustainable management. In other words, as the Ministry for the Environment points out: "[t]he environmental focus of the Act's purpose is further reinforced by a series of principles to be considered in achieving sustainable management."[24]

Furthermore, the introductory wording to each of these sections suggests a hierachy between them:

section 6:	"...shall recognise and provide for..."
section 7:	"...shall have particular regard for..."
section 8:	"...shall take into account...".

Thus persons exercising functions under the Act must: "recognise and provide for" matters of national importance (s.6), "have particular regard for" other matters (s.7) (a less demanding obligation), and "take into account" principles of the Treaty of Waitangi (s.8) (an even less demanding obligation).[25]

Clearly then, section 8 is just one of many factors (out of a total of 14) to be taken into account, in achieving sustainable management.

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[22] See D E Fisher "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives" in Resource Management, Brooker & Friend, and J Milligan "Pondering the "While"", Terra Nova (May 1992), 50.

[23] See Final Report of the Board of Inquiry on the New Zealand Coastal Policy Statement (1994), 111. See also K Palmer "The New Zealand Coastal Policy Statement" (1994) NZELR 35.

[24] Resource Management Information Sheet Number 6, Ministry for the Environment, December 1991.

[25] Compare with the wording of the State-Owned Enterprises Act 1986, section 9: "Nothing in this Act shal permit the Crown to act in a manner which is inconsistent with the principles of the Treaty of Waitangi."

Specific Maori concerns can also be addressed under sections 6(e) and 7(a). Section 6(e) refers to "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga." Section 7(a) refers to Kaitiakitanga.[26] Again, each of these factors are subsidiary to the purpose of the Act and merely two of many (fourteen) factors to be considered. In short, Maori interests are in no way "a" or even "the" pivotal point of the RMA. As was recently pointed out in an article on "kaitiakitanga" in the section 7(a) of RMA, "[t]here is no provision within the Act which allows Maori interests to prevail over others."[27]

In the light of the above it can be seen that there is nothing "paradoxical" (as claimed by the Marae's submission) at all in the Acts approach to Maori interests. Of a total of fourteen factors to be considered, three relate specifically to Maori interests, the rest to other values, most of which are ecological rather than human centred.

The points made above can perhaps best be re-enforced by reference to some recent cases involving the Auckland City Council.

In *Haddon v ACC* [28] 30,000 cubic metres of sand was to be removed from the sea, 3 kms off Pakiri Beach and transported to replenish the beach at Mission Bay in Auckland. Mr Haddon, on behalf of the tangata whenua of the area, claimed that his people had long been the guardians of the sand resource and that the removal would be an offence to the nature of that resource and his family's ownership of the resources in the area. In addition, waahi tapu sites (in this case sacred sites containing the remains of ancestors) existed in the sandhills which should not be taken to the shores of another tribe. The sands were considered treasured taonga of his hapu, important to the mana and identity of his tribe.[29]

The Tribunal recognised the identity of the hapu to be bound to that of the sands and recommended that the hapu be allowed to exercise a limited form of Kaitiakitanga over the resource. However, the proposed extraction was within the principles of sustainable management, as it had no adverse effect itself on the environment.[30]

To summarize, if we are to use the metaphor of "orbit" - all of the fourteen factors in s 6,7 and 8 "orbit", to varying degrees, around sustainable management and not Maori interests. On the other hand, we believe that if the Treaty had been dealt with differently by the New Zealand legal system; ie if it were directly enforceable, then Maori interests under the RMA could arguably have been given greater significance. They could not, however, in principle, outweigh the environmental concerns of all members of New Zealand society.

Finally, we wish to mention that the Marae's use of Maori concerns under the RMA, as a 'sword' for the achievement of development, is extraordinary. Here we refer to the Marae's argument that the development of Te Toki into sports fields, together with a linking walkway through the wetlands would protect and add to the spirit.[31] Although we are not aware of any specific authority on this point, a case of some significance was recently decided by the Planning Tribunal. In *Cook Island Community Centre Society (HB) v Hastings District Council*[32] an appeal was made against a consent to open a funeral parlour, to cater principally for Maori funeral preparation, opposite the

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[26] Defined in section 2 of the RMA to mean the exercise of guardianship and stewardship. See however, N Tomas "Implementing Kaitiakitanga under the RMA" (July 1994) NZELR 39.

[27] See N Tomas, above n 26, 41.

[28] [1994] NZRMA 49.

[29] See Tomas, above n 26, 41-42.

[30] K Palmer Resource Management Bulletin (March 1994) 10-11.

[31] See above n 2.

[32] 31/3/94, Planning Tribunal (W 19/94).