

THE TREATY OF WAITANGI AND RESOURCE MANAGEMENT LAW REFORM IN NEW ZEALAND: CURRENT DEVELOPMENTS

By

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1. Introduction

At the present time the New Zealand government is conducting a major review of the entire body of statutory resource management law. The statutes under investigation include the Town and Country Planning Act 1977, the Mining Act 1971, the Coal Mines Act 1979, the Geothermal Energy Act 1953 and the Water and Soil Conservation Act 1967. The review (known as the Resource Management Statutes Law Reform), (RMSLR) has, however, coincided with a resurgence of interest in the Treaty of Waitangi, a process which is itself currently causing intense debate in New Zealand. This has naturally led to considerable attention being given in the course of the review to the relationship between New Zealand's rapidly developing body of autonomous 'Treaty' law and the wider field of natural resources law.

The truly remarkable efflorescence of the law relating to the Treaty of Waitangi has involved legislative changes; the publication of an influential series of reports by the Waitangi Tribunal (set up pursuant to the Treaty of Waitangi Act 1975 to hear Maori claims against the Crown for breaches of the Treaty); and decisions of the ordinary courts. Most important of the latter was the Court of Appeal decision in *New Zealand Maori Council v. Attorney-General*.¹ In a parallel development, the New Zealand High Court has accepted that the common law of aboriginal title applies in New Zealand, which sharply differentiates New Zealand from Australian law in this regard.²

The most innovative contribution has undoubtedly been that of the Waitangi Tribunal, which has the power to make non-binding recommendations to the Crown. In a series of eight major reports, beginning in March 1983, the Tribunal has developed a new jurisprudence, taking as its starting point the provisions of the English and Maori texts of the Treaty of Waitangi (1840). The reports are typically long, detailed, and very wide-ranging. They are undoubtedly important historical studies in their own right. The Tribunal is generally perceived as an expert body entitled to considerable deference in the High Court and Court of Appeal. Australian readers might be surprised to learn that the Waitangi Tribunal's work has not been particularly concerned with 'land claims'. An issue that has bulked considerably larger is control and management of natural resources, especially fisheries. Four of the eight main reports — *Motonui* (1983), *Kaituna River* (1984), *Manukau Harbour* (1985) and *Mangonui Sewerage* (August 1988) were concerned almost wholly with environmental questions — water pollution, shellfish contamination, fisheries decline, the effects of reclamation and sewage disposal. The *Muriwhenua Fishing Report* (June 1988), dealing with a tribal claim to fisheries off the far north of the North Island, was also largely

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1. [1987] 1 NZLR 641. For a discussion of the background to and the judgments in this case see R.P. Boast "New Zealand Maori Council v Attorney-General: The Case of the Century?" [1987] NZLJ 240. Other important cases are *Huakina Development Trust v. Waikato Valley Authority* [1987] 2 NZLR 188; *Ngai Tahu Maori Trust Board and Others v. Attorney-General*, unreported, High Court, Wellington. C.P. 559/87, 12 November 1987.

2. *Te Weehi v. Regional Fisheries Officer* [1986] 1 NZLR 680; cf *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141.

concerned with an environmental matter — the dismaying decline of New Zealand's in-shore fisheries over the last few decades.

2. Treaty-based constraints on New Zealand Natural Resources Law

New Zealand lacks a written constitution, and New Zealanders are unfamiliar with government's freedom to legislate being restricted in any way by constitutional restraints. A particularly significant development, therefore, is the Waitangi Tribunal's development of a body of principle (albeit set out in non-binding recommendations) which suggests that the New Zealand parliament's legislative authority is constrained by the Treaty of Waitangi.

The starting point is Article II of the Treaty of Waitangi:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess.

The Maori text of the Treaty is rather different, however. Instead of "exclusive and undisturbed possession" the chiefs, sub-tribes and all the Maori people are guaranteed "te tino rangatiratanga" (full authority) "o o ratou whenua o ratou kainga me o ratou taonga katoa" (of their lands, villages — literally "places where their fires burn" and all things important to them). In return for safeguarding *rangatiratanga*, which can perhaps best be thought of as tribal authority and autonomy, the chiefs at Waitangi ceded *kawanatanga* ("governorship"), that is to say, the power to make laws and govern for the good of all.

The elaboration of 'Treaty law' by the Tribunal has centred on a careful, case by case exploration of *kawanatanga* and *rangatiratanga*. In the recent *Muriwhenua Fishing Report*, for example, the Waitangi Tribunal considered the implications of the language of the Treaty for natural resources law. It first found that up till the present time, government policies had paid no attention whatever to local tribal rights. Most significantly, this had involved, amongst other things, the establishment of a quota management system of fisheries administration, by which perpetual property rights in the resource had been alienated to third parties. In short, government policies had exalted *kawanatanga* to the detriment of *rangatiratanga*; and this imbalance was not in accordance with the Treaty.

This is not to say, however, that the Crown lacks general authority over the resource. It is not contrary to the Treaty, observed the Tribunal, "that the Crown has sought to provide laws directed to resource maintenance".³ But such laws must also take due account of the *rangatiratanga*, the tribal rights of self-management, protected by Article II of the Treaty of Waitangi. The Waitangi Tribunal expands on this analysis as follows:

The cession of sovereignty or *kawanatanga* gives power to the Crown to legislate for all matters relating to "peace and good order"; and that includes the right to make laws for conservation control. Resource protection is in the interests of all persons. Those laws may need to apply to all persons alike. The right so given however is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise a control. Sovereignty is limited by the rights reserved in article the second.⁴

Moreover:

Unless absolutely necessary, the Crown should not restrict the Treaty right fishing of the tribes to counter over-fishing not caused by them even if it is necessary to restrict the general public fishing, commercial or otherwise.⁵

3. *Muriwhenua Fishing Report*, June 1988, 227.

4. *Ibid.* at 232.

5. *Ibid.*

The Tribunal's work has established, probably to the extent that it is now beyond serious argument in New Zealand, that the Maori people do have a special status. The Maori people, or more precisely, the various Maori tribes, have rights to autonomy and to tribal self-regulation of resources. The position that is evolving in New Zealand has marked similarities with Canada and the United States. The Waitangi Tribunal has found certain United States precedents highly persuasive. The *Muriwhenua* Report, for instance, paid close attention to the Federal District Court decision in *United States v. State of Washington*⁶ which deals with Indian treaty rights and the anadromous fishery resource in the state of Washington.

3. The Resource Management Statutes Review

Most of New Zealand's resource management statutes already make some form of reference to treaty principles.⁷ Whatever new legislation emerges from the present review is, however, likely to considerably strengthen the position of the Treaty in the general law of resource management. The difficulty at present is in devising means by which this goal can be accomplished. The process is to a degree constrained by the government's decision that the review will not be used to resolve issues of resource ownership, but only of management.

A useful example is provided by geothermal energy, with which New Zealand is very richly endowed. Section 3 of the Geothermal Energy Act 1953, vests the sole right to exploit this resource in the Crown. Various problems have arisen. Ngati Whakauae, a sub-tribe of Te Arawa occupying land on the shore of Lake Rotorua are understandably dismayed by a government agency's recent efforts to require the tribe to pay a resource rental for steam used to heat village houses and buildings. In other areas there have been complaints that consultation processes with tribes affected by large-scale geothermal construction projects are inadequate. A new attempt to rewrite the Geothermal Energy Act obviously should attempt to remedy such difficulties, which could be done by improving consent procedures to take into account tribal interests, by giving increased tribal representation on decision-making authorities, and by creating new procedures to deal with such problems as that posed by Ngati Whakauae's situation at Rotorua. The current review of resource statutes thus provides a unique opportunity for New Zealand to remodel its resource management laws in order to accommodate the principles of the Treaty as these have been interpreted by the Courts and the Waitangi Tribunal.

6. (1974) 384 F Supp 312 (also known as the *Boldt* decision).

7. See e.g. Conservation Act 1987 s.4; Environment Act 1986, Long Title para (c)(iii); State-Owned Enterprises Act 1987 s.9. Section 88(2) of the Fisheries Act 1987 stipulates that "Nothing in this Act shall affect any Maori fishing rights". An equivalent provision has been in existence since 1877. The full legislative history is set out in *Muriwhenua Fishing Report*, at 321-329. Section 126(9)(d) of the Mining Act 1971 requires the Planning Tribunal to take into account, in determining applications for mining licences, "the relationship of the Maori people and their culture and their traditions with their ancestral land. This seems to be generally equivalent to a statutory reference to the Treaty itself, and the Planning Tribunal has taken Treaty principles into account in determining the scope of s.126(9)(d). See *Re an Application by City Resources Ltd*, unreported, Planning Tribunal, Wellington, 6 May 1988 (Min 24/87).