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THE GREATEST GOOD FOR THE GREATEST NUMBER?
RANGATIRATANGA AND THE REFORM OF LOCAL GOVERNMENT 1987-1990

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ABSTRACT

This paper examines the reform of local and regional government 1987-1990. This paper considers the treatment of the Crown's obligations to Maori interests under the Treaty of Waitangi during the process of local government reform, particularly the failure to meet Maori expectations for the recognition of their status as tangata whenua and the advancement of their interests. It reviews the implications of this failure for the administration of the Resource Management Act 1991, and, briefly, considers how well the provisions of that Act substitute for adequate structural arrangements for the recognition of te tino rangatiratanga.

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THE GREATEST GOOD FOR THE GREATEST NUMBER? RANGATIRATANGA
AND LOCAL GOVERNMENT REFORM 1987-1990

A INTRODUCTION

"Maori people have often unknowingly been confined by Pakeha definitions of sovereignty and legal rights, so that their traditional concepts of authority and rangatiratanga and have been subservient to the sanction and control of the Pakeha legal system." (1)

The 1987-1990 review of local government was intended to rationalise arrangements for the structure and conduct of business of local authorities, to whom were to be delegated sweeping responsibilities for the exercise of Crown powers of resource management and regulation, under the Resource Management Act 1991.

That Act has been widely and internationally advertised as a major advance in the treatment of indigenous interests in the management of natural resources. (2) A review of the outputs of New Zealand political and legal institutions provides dramatic support for such sentiments - since the mid-eighteenth Century, legislative provisions dealing positively with the interests of Maori and the Treaty of Waitangi are, for the most part, conspicuously absent. (3)

In a relentlessly positivist legal system, this invisibility ensured that Maori and Treaty interests were disregarded in economic, political and regulatory decisions. In this regard, the Maori and Treaty provisions of the Resource Management Act (4) constitute a substantial improvement in the position of Maori in statutory resource management. However, the Act is designed to operate through

the reform which resulted from the concurrent local government review - 13 Regional Councils, 1 Unitary and 79 Territorial Authorities, whose empowerment statute fails to acknowledge either the status of the tangata whenua or the significance of the Treaty to the operation of local government.

In this context, the interests of the tangata whenua (5) are subsumed to a regime whose infrastructure is inconsistent with Maori aspirations for the recognition of te tino rangatiratanga. In the absence of a resource base for Maori decision-making reflecting Maori priorities, in structural and practical terms, such advances as are made by the Resource Management Act can be, at best, interim solutions.

This paper considers the treatment of the Crown's obligations to Maori interests under the Treaty of Waitangi during the process of local government reform, particularly the failure to meet Maori expectations for the recognition of their status as tangata whenua and the advancement of their interests. It reviews the implications of this failure for the administration of the Resource Management Act 1991, and, briefly, considers how well the provisions of that Act substitute for adequate structural arrangements for the recognition of te tino rangatiratanga.

"Mana, mana ebbs and flows, especially mana tangata. Mana is given and it is taken away. It can never be assumed, but we can only know we have mana as it is reflected in the behaviour of others." (6)

B APPLICATION OF THE TREATY TO LOCAL GOVERNMENT

"The tangata whenua had adopted a structure based in essence on local responsibility. The whanau, hapu and iwi structure of government recognised local responsibility and it was not until the late nineteenth century the Maori people attempted to institute a centralised structure via a federation of iwi." (7)

"It is our submission that local government has been a major influence in the development of democracy and democratic values in New Zealand and that democracy should continue to be its raison d'être. In this respect, restructuring local government is not the same as restructuring central government administration; the civil and democratic rights of the citizen are at stake." (8)

The local government reform saw the expression of two conflicting views of the place of local government, the first of which acknowledges the political and historic role of the institution in the development of democratic government, and that the "first tentative steps toward democracy started at the local level and thus local government was parent to central government". (9)

By the same token, local government had progressively lost its original role as population and communications increased and the interrelationships between different policies and activities became more defined. In fact, the term "local government" had become a virtual misnomer in the face of the delegated statutory mandate conferred by parliament. In the modern reality, local government can be said to be a mere creature of statute, exercising only those powers and functions that have been delegated to them by the Crown. The task of the local government review would, on the basis of this perception of the place of local government, be concerned with determining what

functions could appropriately be delegated from the central level, and the form of the agencies which would fulfil those functions.

From its origins, however, local government in New Zealand has meant elected government, with a distinct constituency and financial base. The mandate of the local electorate has served to ensure that, while central government has the legal capacity to impose and enforce change, "*long established conventions of consultation and consent*" (10)

Although strictly speaking, local authorities cannot be considered to be agents of the Crown under present legal tests, due to their (limited) constitutional and financial independence, it should be noted that the criteria developed for such tests may not apply to the range and extent of powers and functions presently under delegation. (11)

The resulting uncertainty about the constitutional position of local authorities raises significant questions concerning the application of the Treaty to local government affairs.

The Waitangi Tribunal has determined that Article I of the Treaty conferred on the Crown the right to make laws for peace and good order and to protect Maori mana. (12) The first enabled the Crown to meet its obligations to meet the needs of the general public. The latter created an obligation on the Crown to exercise its power so as not to derogate from the interests protected in Article II.

Although the power conferred on the Crown must necessarily be extensive, (13) it is not an unlimited right. Each of the things exchanged in the Treaty was intended to act as a

limit on the other, requiring a balance to be effected in the event of conflict between the interests represented by the two Articles.

"The cession of sovereignty or kawanatanga enables the Crown to make laws for conservation control, resource protection being in everyone's interests. These laws may need to apply to all alike. But this right is to be exercised in light of Article II or the authority of the tribes to exercise control. In short, sovereignty is said to be limited by the right reserved in Article II. It follows that the Treaty fishing interests should not be qualified except to the extent necessary to conserve the resource." (14)

In Treaty terms, to the extent that the Crown has delegated certain of its law making or regulatory capacity, the powers and functions exercised by local authorities are expressions of kawanatanga conferred by Article I. The Waitangi Tribunal has suggested that the Treaty reaches beyond the Crown to those whose jurisdiction is derived from the Article I power. (15) The Treaty obliges the Crown to ensure that appropriate arrangements are made to uphold tribal rangatiratanga in the delegation of its law making powers and to empower the agencies receiving that delegation with the legislative capacity to uphold the Treaty guarantees.

"The concept of Te Tino Rangatiratanga is central to Maori understanding of what the Treaty is all about - Authority rather than subordination, and the right to possess what is their's and to control and manage resources in accordance with their own preferences. Te Tino Rangatiratanga is not necessarily even about 'partnerships'. It is a concept denoting full authority and mana." (16)

Rangatiratanga has been held (17) to incorporate aspects which include:

- the power to control and manage resources in accordance with Maori preferences and Maori customary practices;
- full authority with respect to Maori possessions and other interests;
- tribal self-management on terms similar to those applied to local government.

The authority of rangatiratanga and the responsibilities of kaitiakitanga are intrinsically linked. Without adequate power and authority Maori have no secure basis on which to fulfil their cultural and spiritual responsibilities. The existence of legal, political or economic impediments to the institutional ability of Maori to exercise their responsibilities to the natural world and future generations does not absolve them from these responsibilities nor ameliorate the cultural and spiritual harm suffered in consequence of failure to act. (18)

From the Maori perspective, the experience of disenfranchisement has only served to deepen aspirations for the reinstatement of Maori in the role they consider to be their natural entitlement as the tangata whenua, that of decision-maker, manager and protector, the self-same role which government had progressively devolved to local government in contradiction of the Treaty.

Rangatiratanga cannot be said to mean the right to govern for all, as that is the power reserved to the Crown pursuant to Article I. Accordingly the Crown may delegate

such of its powers and functions to other agents as it deems necessary to achieve good governance. (19) Instead, rangatiratanga attaches to interests and resources of importance to Maori, whose concern with policies and plans dealing with the interests and resources of others should reasonably extend only to ensuring they do not interfere with or impede the objectives of iwi for their taonga.

Amongst the principles to be considered with respect to the application of the Treaty to local government were those emerging from the deliberations of the Court of Appeal and the Waitangi Tribunal. (20) As summarised by Matunga and Campbell (21) at the time of the reform, these principles included:

- Customary concepts and institutions of authority should be accommodated in modern government and public decision-making about the use of the resources of the land;
- The right of Maori to possess what is theirs and to control and manage in accordance with their preferences and perceptions;
- That Pakeha and Maori Treaty partners act towards each other reasonably and with the utmost good faith;
- The Crown cannot divest itself of Treaty obligations or confer an inconsistent jurisdiction on others. The Crown should provide for its Treaty promises when vesting any responsibilities in local authorities;
- The nature of a good partnership includes not only an obligation to actively protect Maori interests in their lands and waters to the fullest extent practicable, but the obligation to redress past breaches of the Treaty;

- The Treaty is meant to provide a direction for future growth and development. It isn't inconsistent with the Treaty that the Crown and Maori agree upon a measure of compromise. This is consistent with the principle of partnership.

It must be acknowledged that some of these principles were beyond the capacity of local government to effect, notably those relating to redress for Treaty breaches. However, this did not limit the Crown's responsibilities in the review. The question to be considered was how the Crown's obligations to uphold Maori mana over their resources could be most effectively met in the context of the reform of local government. As the nature of the reform was a consideration of institutional arrangements, it was on these that Maori aspirations for their Treaty rights were to centre.

"[Local government reform] presents a chance to redress years of neglect. It provides an opportunity to bring the other Treaty partner - the iwi - into their rightful, central position in local government, with an equitable and just share of power and influence. It provides an opportunity to look at what the Treaty means in modern terms for local government and how Te Tino Rangatiratanga can be established." (22)

C THE REFORM OF LOCAL GOVERNMENT

1 Introduction

"The structural relationship that exists between Maori as tangata whenua and Pakeha who colonised New Zealand 150

years ago, is one of social, economic and political subjugation to the tyranny of majority rule. If there is a resource to be returned, power to be allocated, or finance to be guaranteed for some Maori initiative that would alter the structural relationship, then the transaction is limited or curtailed in a manner designed to maintain Maori subordination. Essentially, the coloniser decides and the colonised responds within the stultifying and suffocating parameters set." (23)

In December 1987, the Labour Government announced a comprehensive review of the structure and operation of the local government sector. (24) The principles of the review included decentralising decision-making and service delivery away from central government through increased delegation to regional and local communities. The government acknowledged that the review was overdue (25) and would need to cover the entire range of issues relating to organisation, funding, functions and accountability.

2 The Background to Reform

Twelve years after the signing of the Treaty of Waitangi, the Constitution Act 1852 was enacted, establishing a central government under a system of limited franchise and a set of six provincial councils with responsibility for administering local affairs. The Act recognised tribal rangatiratanga over their lands by allowing:

"[The] setting apart of districts in which the laws, customs and usages of the Aboriginal or Maori inhabitants of New Zealand should for the present be maintained of themselves, in all their relations to and dealings with each other." (26)

Matunga notes (27) that this provision was never implemented, nor was its intent carried over on enactment of the Maori Representation Act 1967 establishing the four Maori electoral seats.

Between 1876 and 1960, a number of reviews and inquiries into the business of local government (28) consistently failed to acknowledge the status of Maori as tangata whenua or the rights guaranteed under the Treaty.

Between the arrival of the first European settlers and the 1975 Maori Land March, Maori had been alienated from all but 2.5 million acres of the 66 million acres of land which they had originally controlled. The rate of alienation showed no sign of slowing, (29) where existing legislation afforded more opportunities for land seizure. Mounting protest at the continuing alienation culminated in the Land March coordinated by Te Roopu o te Matakite, a "*show of solidarity*" (30) that encouraged the government to act.

As a direct result of the mounting political protests, the government established the first comprehensive and enduring forum for resolution of Maori land and resource grievances arising out of breaches of the Treaty, in the form of the Waitangi Tribunal. (31) The Tribunal succeeded a range of one-off inquiries and commission prompted by Maori efforts to seek redress for breaches of the Treaty whose outcomes tended to be highly idiosyncratic and delivered little practical result. (32)

The recommendations of the Waitangi Tribunal are not binding on the government and its terms of reference and financial independence remain subject to political control. (33)

Initially, the jurisdiction of the Tribunal was confined to investigating breaches occurring after 1975 with a view to their avoidance in the future. Inevitably, a number of the initial claims concerned development projects with which local authorities were concerned, (34) a trend which would continue when the jurisdiction was extended in 1985 (35) to date from the signing of the Treaty. (36)

These reports emphasised that both the legislation which empowered them and the regulatory instruments - schemes and plans - produced by local government were expressions of kawanatanga and subject to the Treaty guarantee of te tino rangatiratanga. The Crown was held accountable for the actions taken by local authorities in breach of the Treaty as it had failed to legislate to oblige compliance with the Treaty and thus prevent the breaches from occurring.

In a parallel development, the government was moved to seek the advice of the statutory body established for consultation purposes, the New Zealand Maori Council ("NZMC").

The NZMC provided the government with advice on fourteen statutes which it considered contravened the provisions of the Treaty. Amongst the laws cited were the zoning provisions of the Town and Country Planning Act, the Public Works Act provisions allowing the taking of land for public purposes, and the Rating Act's default seizure and sale sections, all exercised by local authorities to the detriment of Maori desires to retain control of their lands. The NZMC recommendations included review of the commercial potential basis for valuation on which rates were set, and the incorporation of Maori interests and representation in planning decision-making.

The latter recommendation resulted in the enactment of two significant provisions in the review of Town and Country Planning laws. The first established "*the relationship of Maori and their customs and traditions with their ancestral lands*" (37) as a matter of national importance to be recognised and provided for in District Schemes. This section, which contained the strongest duty imposed with respect to the interests of the tangata whenua for a century, was to receive extraordinary treatment at the hands of the planning courts, with restrictive interpretations that succeeded in greatly reducing the potential of the provision for promoting Maori interests. (38)

The other significant provision (39) enabled the appointment of a representative of the local District Maori Council to sit on regional planning committees, a reference which was eventually amended (40) to allow local authorities to co-opt a "*representative of the tangata whenua of the region*" (41) to sit as an advisor on matters affecting Maori lands and important resources. These co-opted members had no capacity to influence the decision beyond the proffering of advice to those with voting powers. Co-option of advisors places the advisor and the authority at risk where issues of mandate and representation are not adequately addressed, particularly where authority boundaries transect those of tribal groups. As noted by the Royal Commission on Social Policy (42) a lone Maori voice is a poor mechanism for Maori input in the absence of support from, and accountability to, the tangata whenua.

Despite the dearth of legal guidance, (43) some authorities had taken positive steps to provide for Maori participation

within the local government system. Matunga promotes (44) the example of the Auckland Regional Authority, (45) who, after strong lobbying from the tangata whenua including the filing of a claim to the Waitangi Tribunal, decided in 1988 to increase tangata whenua representation on the planning committee to two members, in recognition of the different tangata whenua groups in the region, and the need to provide for Maori protocol on representation.

Similarly, the West Coast region established a "partnership committee" comprising one-half representation from Regional councillors and one-half representation drawn from the local community's tangata whenua and immigrant Maori groups. (46)

Unfortunately, these initiatives were not duplicated at the territorial level. Moreover, local government activities extended beyond land and water use planning to the activities of numerous special purpose bodies such as harbour and catchment boards who had no statutory mandate to recognise Maori interests. Such initiatives as were taken, did not reflect existing tribal structures and boundaries or confer any substantive rights to make decisions which reflected Maori values and priorities.

"The defects of local government from a Maori perspective not only relate to matters of representation and the need to share power and influence in a manner which is just, equitable and accords with Treaty guarantees; they also extend to systems of local government, how they are administered and how they perform." (47)

By the time of Bassett's 1987 announcement, the New Zealand local government and resource management system was fragmented and uncoordinated. More than 800 territorial and

special purpose authorities were engaged in administering 22 core resource statutes and more than 300 related laws and regulations. (48) The result was ad-hoc, unwieldy, expensive and, most importantly, had consistently failed to deliver appropriate environmental outcomes. (49)

D THE REVIEW PROCESS

1 Introduction

"[L]ocal government simply does not recognise Maori Te Tino Rangatiratanga. The current proposals for reform need to promulgate changes which will lead to the establishment of Rangatiratanga in local and regional government and 'good governance' for both Treaty partners." (50)

The reform of local government took place in essentially three phases. In the first, the reorganisation of more than 800 local government bodies into 13 regional, one unitary and 79 district councils was accomplished through a restructuring scheme promulgated by the Local Government Commission in June 1989, in time for local body elections that November. Following on directly from the reorganisation phase, officials developed policies on the constitution, electoral processes and accountability of the reformed authorities which were incorporated into the Local Government Reform Act, passed in May 1989. The final phase comprised a fundamental review of the funding and functions of local government, linking with the results of reform of resource management law and reviews of building controls, occupational health and safety, pest management and biosecurities.

The announcement of the local government review was followed by the establishment of a "*large ad-hoc cabinet committee*" (51) to oversee both the local government and resource management reforms, and the Officials Coordinating Committee on Local Government ("OCCLG"), drawn initially from Treasury, Environment, Internal Affairs, and the State Services and Local Government Commissions. These officials were responsible for most of the analytical work on the reform. (52)

Maori were not represented on the OCCLG until after the first phase of the reform was completed, at which time officials from Manatu Maori and the Maruwhenua Directorate of the Ministry for the Environment joined the group.

2 The First Phase Discussion Document

In April 1988, the OCCLG published and distributed "*to over 1200 interested organisations*" (53) a discussion document setting out in the broadest of terms the issues faced in the review and seeking answers to 108 questions posed. The discussion document process was extensively criticised in submissions complaining of the unreasonable six-week timetable for responding, the inconvenience and expense of responding in the designated format given the lack of resources faced by many interested groups, and the broad approach taken to complex issues in the document itself. (54)

The appropriateness of the process can be measured by its marked lack of success in attracting responses from Maori. Of more than 300 submissions received in the first phase of this process, only six were from Maori organisations. (55)

The discussion document identified a number of major principles for the reform, including the "*fundamental significance of the Treaty of Waitangi*". (56) Despite this apparent recognition, however, substantive comment on the Treaty was scant and confined to the final pages of the document, an indication of the significance attached to it by the OCCLG.

Three issues were raised in the discussion document relating to the relationship between local government and Maori. These were: (57)

- whether the Treaty of Waitangi should influence local government activities;
- whether the local government system should accord special status to Maori interests; and
- if so, what constitutional arrangements would be appropriate.

The OCCLG approached the issue of Maori interests as emanating from the Treaty but requiring to be established as "*special rights or needs not shared by other minority groups*", (58) rights which the OCCLG saw as largely in conflict with the principles of universal franchise democracy. There was no reference made in the OCCLG material of the principle of rangatiratanga.

Instead the document suggests that guaranteed Maori representation amounts to a value the benefits of which should be weighed against other societal values, such as "*traditional democratic principles of open election.*" (59)

Representing the Treaty interest as a "special group" interest fundamentally misinterprets the status which should be afforded to Maori as tangata whenua. Such an approach immediately raises issues for many New Zealanders to whom the idea of a privileged group right is anathema. In addition, the OCCLG failed to acknowledge that Maori cultural preferences may dictate different processes for the selection of representatives.

The OCCLG also declined to recognise the failure of populist democratic processes to respond positively to the needs and priorities of minorities, processes which ended with local government representatives who are:

- "* 90% men
- * 50% from a farming background
- * 100% Caucasian
- * 60% over the age of 50
- * 90% reasonably affluent
- * 75% retired or self-employed" (60)

Kerins notes that Kahungunu candidates who campaigned on the basis of te tino rangatiratanga and the Treaty were not successful as their kaupapa had the effect of:

"...frightening Pakeha voters away. ...No matter how justified Maori were to campaign under the Treaty, as it turned out, in doing so they were simply marginalised from the wider community. Simply by asserting their human right to be Maori, tangata whenua candidates were doomed to fail." (61)

Given the misrepresentation of their interests, responses to the questions raised in the discussion document with respect to Maori were predictably polarised. Responses

ranged from outright rejection of the relevance of the Treaty, usually without reasons proffered, to extensive analysis of its importance and impact on all of the activities of local government. (62)

On one end of this spectrum, the reaction from a number of local government agencies generally accorded with the view expressed in the following statement from the Local Government Association:

"Local Government, like other parts of government, is required to take account of the Treaty of Waitangi. The fundamental attribute of responsiveness means that local government has acknowledged the rights and values of the Maori people of New Zealand. It will continue to respond to their needs, including developing its consultative mechanisms. Because of the diversity of local circumstances, it will not be desirable to mandate specific requirements in the Local Government Act." (63)

The possibility that the responsiveness of local government to Maori needs and aspirations had a less than optimal history is not contemplated by the NZLGA. Presumably, their consideration of Maori interests did not go beyond the fact that each individual might choose to exercise their voting privilege to elect the representative of their choice. This despite the acknowledgement of other local authorities that the result of the majority of such elections is representatives who are profoundly unrepresentative.

"Studies have revealed that all local authorities are elected upon a democratic process, however, the composition of those authorities is stacked against the inclusion of minority groups or disadvantaged parties. For example, large municipalities generally consist of business/

professional people, smaller authorities of self-employed business people and county councils of middle-aged farmers. Interestingly enough very few Maoris (sic) sit on Councils and the opportunity for the working man to become involved is limited. For these reasons, the values of local government should be available for everyone to participate without creating a class structure for those elected." (64)

The resistance of Pakeha to the incorporation of the Treaty in local government responsibilities was generally founded on a combination of inability to comprehend the negative impact of the present power imbalance on the interests of Maori, and ignorance and fear about the implications of the Treaty for their own interests. "Many Pakeha thought that under the Treaty Maori were going to strip them of their possessions and force them into the sea." (65)

By contrast, submissions from Maori representatives emphasised the importance of the review as an opportunity to redress the asymmetrical power relations which the existing system only served to perpetuate, but only if alternative models were developed which empowered Maori to control their own destiny and lands.

"Electoral reform essentially evades [the issue of a Maori model for government] and when the chips are down it is tinkering with a Pakeha system, in a way which will not alter it, to allow the Pakeha to attain a relationship with the Maori specified in the Treaty of Waitangi." (66)

Although a number of submissions from authorities suggested that local government had obligations to act to increase Maori input through co-opting representatives on to committees and encouraging more to stand for election,

these solutions could not meet Maori expectations for their rights under the Treaty.

"Increasing Maori representation on local and regional government, while desirable in itself, does not constitute institutionalisation of the Maori right of self-determination." (67)

Maori assertions of te tino rangatiratanga through their submissions to the reform were poorly dealt with by those responsible for analysing the results of the consultation process. Constrained by the approach taken by the OCCLG and by their own lack of understanding of the issues being raised by Maori, the submissions analysts effectively sidelined Maori interests as those of another special interest group, to be regarded alongside those of women and the elderly. (68) In respect of each of these "interest groups" the issue of separate or special constitutional arrangements was thoroughly rejected by the majority of respondents as discriminatory and antithetical to democracy. (69)

Kelsey (70) notes that a further analysis of the Maori submissions was carried out under the aegis of RMLR at the instigation of the Environment Ministry, dissatisfied with the superficial treatment accorded them by the OCCLG. A substantially different picture emerged.

"The submissions attacked the 'unacceptable monocultural basis permeating the existing system of central and local government', the inadequacy of current democratic processes to ensure equal Maori representation, and the lack of effective and equal sharing of power between Maori and Pakeha at all levels." (71)

The OCCLG submissions analysts failed to appreciate that the common factor in assertions made throughout submissions from Maori groups was the principle of te tino rangatiratanga, variously expressed as local self-government and self-determination (72) the right to control use and development decisions affecting Maori lands (including rating, planning, health and building regulation), (73) an equal share of decision-making power, (74) and institutional arrangements which reflected Maori cultural preferences for government. (75)

Other issues of considerable significance to Maori were barely touched by the OCCLG submissions analysis. Of particular import was the matter of the boundaries to be drawn for the reformed authorities. At the time of the review the situation with respect to local government boundaries was chaotic, accurately described by Bridgeport (76) as a "mish-mash". Traditionally, size and boundaries for local authorities had been determined according to the appropriate community of interest to be represented, a somewhat intangible concept whose meaning and application in any given circumstance varied considerably depending on differing definitions as to the nature of the appropriate interest. In the review, communities of interest were identified around geographical and socio-economic factors such as land use patterns, cultural and historical interests, population distribution and a more amorphous sense of community. (77)

Maori submissions expressed strong support for consideration to be given to iwi tribal boundaries in the fixing of local authority boundaries, particularly at the regional level. Such consideration would reflect the status to be accorded to Maori pursuant to the Treaty and ameliorate difficulties being experienced by authorities

and iwi with respect to overlapping boundaries and representation of multiple iwi groups. (78) The importance of this recognition in Treaty terms was missed by the submissions analysts who instead referred to the assertions as "minority views" to be disregarded as against the majority preference for physical characteristics, such as river catchments, to apply. (79) This issue was eventually referred to the Maori Local Government Reform Consultative Group for their consideration.

As it turned out, by the time the discussion document was published, the first phase of the policy reform had already resulted in the production of a draft Local Government Reform Bill through which it was intended to empower the Local Government Commission to undertake the restructuring of local government and set out the criteria for that restructuring. In preparing the Bill in the absence of appropriate Maori consultation, the Government had, in effect, violated its own Cabinet directive (80) to ensure all legislation referred to Cabinet at the policy approval stage should address the implications for recognition of the principles of the Treaty of Waitangi.

The Local Government Commission was instructed to consult with the public and local government authorities, but retained powers of decision with respect to final reorganisation schemes. These schemes, eventually promulgated in June 1989, were to form the basis for a greatly reduced number of new authorities to be established, after local elections, on 1 November 1989.

The adequacy of the reform process' treatment of the Treaty was challenged by submissions to the Select Committee considering the Reform Bill, with the New Zealand Maori Council questioning how the reform could have reached

legislation stage without considering the impact of the Treaty on the structural changes proposed. (81)

Amongst those who could be consulted by the Commission were such "*Maori tribal bodies and other such authorities*" as the Commission deemed were necessary to consult. (82) The Commission took this to oblige them to write to Maori Trust Boards, seeking their advice. As Kerins notes (83) these Boards are primarily responsible for land administration and, as such, were poorly equipped to respond to Basset's request for advice on the complex subject of local government reform. Predictably, responses from Trust Boards were not forthcoming, reflecting the inadequate process used.

3 The Maori Local Government Reform Consultative Group

(i) Role and Appointment

The specially appointed Maori Local Government Reform Consultative Group ("MCG") established to consider Treaty issues did not meet until May 1988. (84) The members of the MCG were selected by the Crown without regard for the representation and accountability processes of Maori. Both issues of membership of the group and their independence from the then Minister of Local Government, Dr Bassett, were controversial. (85)

The briefing for the MCG included the instruction that they had neither the mandate nor the time to conduct public meetings, (86) a constraint which compromised the group's ability to respond to the Maori preference for discursive

hui as the forum for decision-making, and further undermined their standing in the Maori world.

"In Maori process terms, it is also debatable whether a Maori Consultative Committee, appointed by the 'other' Treaty partner, has the mana, the rangatiratanga to make representation on behalf of all Maoridom in this country."
(87)

As it happened, even the mandate conferred by the Crown to the MCG was severely limited. The MCG were given four main issues to consider, arising from submissions received during the OCCLG public consultation exercise:

- the application of the principles of the Treaty to local government activities;
- options for Maori involvement in local government;
- rating of Maori land; and
- recognition of iwi preferences in the fixing of boundaries.

(ii) Principles of the Treaty?

Following their initial deliberations, the MCG recommended that the government enact appropriate legislation to ensure that the functions of local government were carried out in a manner consistent with the Treaty of Waitangi.

In referring directly to the Treaty, rather than its principles, this recommendation exceeded the terms of reference set for the MCG. Those terms of reference

reflected a consistent approach to the Treaty by the Crown since the concept was first introduced into New Zealand legislation in the Treaty of Waitangi Act 1975.

The concept of the principles of the Treaty was based on positive intentions. It was designed to overcome difficulties associated with considering the literal words of the Articles alone.

The Treaty of Waitangi was signed in two texts, the English version signed by 39 chiefs, compared to the 500 signatories of the Maori version. The terms of the two texts are not translations one of the other, and do not convey precisely the same meaning. (88) The concept of the principles allowed greater latitude in interpretation and avoided conflicting views as to which text was to be preferred. (89)

The concept also recognised that the literal words of the Treaty's Articles assumed an ideal of equality of influence which had long passed into history.

"[I]t is an unspoken premise when one speaks of principles of the Treaty of Waitangi that land and estates, forests, fisheries and other properties transferred or taken at some earlier time often shrouded in history were transferred or taken allegedly contrary to the principles of the Treaty. So when one speaks of the principles one is not just referring to the letter of the Treaty but to the events that have occurred since it was signed." (90)

That the MCG declined to restrict its recommendation to the terms set by the Crown with regard to the principles also reflected a consistent position, in that Maori had generally rejected the concept as a unilateral redefining of the Treaty's terms. Maori opposition to the idea of

Treaty principles increased with the publication in 1989 of five principles on which the Crown proposed to base its response to obligations under the Treaty. (91)

The use of the phrase "*principles*" in such a context was a very poor choice by the government. It created considerable confusion as to whether the Crown principles were to be preferred over those which had already been expressed by the Waitangi Tribunal and the Court of Appeal.

Maori resistance to the Crown Principles was uniform, particularly as regards the denial of te tino rangatiratanga. (92) Kerins records (93) the response of the Kia Mohio Kia Marama Trust as typical of Maori reaction.

"[The Trust] claimed the government knew that the whole Treaty debate centred on the right of te iwi Maori to te tino rangatiratanga - absolute Maori authority. But it simply chose to ignore that fact. ...The principles have been seized on and made to mean the opposite of Te Tino Rangatiratanga."

4 The Hui on Maori Participation in Local Government

(i) Introduction

The only significant hui concerning the application of the Treaty to local government was called by the Maori Local Government Reform Consultative Group and did not take place until March 1989.

The Hui on Maori Participation in Local Government attacked the government's consultation performance throughout the

reform and recommended that the proposed legislative timetable be deferred until the findings of the hui had been adequately addressed. The role of the MCG in the Crown's performance of its consultation obligations received particular attention.

"The process for providing for Maori participation has been last minute, tardy, offensive and even bizarre. The Crown must realise that the unsatisfactory and inaccessible methods used to appoint the Maori Consultative Group are offensive to Maori people as they usurp our rights to select our own representation. ...It is noted with disappointment that because of self-imposed constraints imposed on the Maori Consultative Group of their role, (sic) full and effective negotiation on its part relating to the review based on a balanced cross-section of Maori opinion, carried out in a culturally appropriate manner has not occurred." (94)

While criticism of the MCG needs to be seen in light of the intent of the hui to have its recommendations treated seriously by government, responsibility for the processes used was laid directly at the door of the Minister of Local Government, Dr Bassett, who was called upon to resign. (95)

Bassett had enjoyed considerable freedom in the conduct of the reform, a fact which Kelsey characterises as payback for loyal support of the economic policies of Roger Douglas. (96) He was particularly resistant to the idea that the Treaty should be accorded status in the review.

(ii) The recommendations

Despite its opposition to the MCG process of consultation, the hui concurred with that group's initial recommendation

that legislation require all the structures and functions of local government be subject to an obligation to give effect to the Treaty. In addition, the hui asserted that providing for tangata whenua groups to appoint 50% of local authority representatives would effectively recognise the rangatiratanga of those groups over the resources important to them. (97)

To further cement the preeminent place of the Treaty in the operations of local authorities, the hui proposed the establishment of Standing Committees in all authorities whose purpose would be to ensure compliance with the Treaty.

"The Committee shall have the absolute power of veto in regard to any policies and activities found to contravene the Treaty [and] shall be made up exclusively of Maori members of that authority." (98)

In their enthusiasm to express the prerequisites for rangatiratanga under the aegis of a local authority, the hui appears to have failed to note that the Treaty guaranteed a high priority to be afforded to Maori interests where these would be directly impacted but otherwise required a balance to be effected between the interests of both the parties. The Crown's dismal performance on this point notwithstanding, it would seem therefore unreasonable to exclude representation from one of the parties on a matter as significant as the application of the Treaty in a particular circumstance.

In sum, the hui recommended that tangata whenua be empowered to carry out all powers, functions and responsibilities of local authorities with respect to any

activity affecting their people or their lands, waterways and other resources of significance to them. (99)

To complement this right, and improve the capacity of local authorities to understand and respond to Maori cultural priorities, the hui recommended that each agency maintain a "Maori Secretariat made up of Maori Personnel with specialist skills" whose function was to provide administrative back-up for the proposed Standing Committee and advice to the authority on ensuring its policies and actions took account of the appropriate Maori protocol.

(iii) The Minister's response

In December 1988, the Minister of Local Government released a statement which defined the purposes and principles of local government as including: (100)

- to recognise the existence of different communities within New Zealand; and
- to promote the identity and values of these communities.

The fundamental task for the review was to determine how these purposes might be achieved so as to deliver to the communities to be served, a system of local government which met their needs in an effective, meaningful and participatory fashion. Despite such sentiments, the efforts of the Hui on Maori Participation to advise the government on the most appropriate way to recognise and promote Maori and Treaty interests in the operation of local government were not appreciated by the Minister.

The December 1988 document gave no guidance as to how Maori interests might be dealt with in the review, merely announcing that the anticipated input of the MCG would be considering such issues. In the event, the MCG presented the recommendations of the hui as the basis for their submission.

Its recommendations were rejected by the Cabinet Committee while the Minister of Local Government sought to undermine the Maori Consultative Group's act of solidarity, claiming that the group had been hijacked by activists. (101) The MCG submission was not, the Minister said, "*the advice that I think they intended to give us.*" (102)

E THE BILL FOR ESTABLISHMENT OF MAORI ADVISORY
COMMITTEES

1 Introduction

In the event, however, the government belatedly responded to the pressure for recognition of te tino rangatiratanga with the release, less than two months before elections were scheduled to be held, of their proposals for recognition of the Treaty. The draft Bill for the Establishment of Maori Advisory Committees in Local Government and Explanatory Statement was prepared for distribution for general comment and intended to cover:

- appropriate recognition of the Treaty;
- arrangements for direct Maori representation; and
- structural arrangements for consultation and Maori input. (103)

The public consultation round gave the first concrete opportunity for discussion of substantive issues regarding Maori representation, despite the attempt to constrain the debate to the proposal on offer from the Crown. In the Explanatory Statement the OCCLG explained that a mandatory consultative mechanism had been chosen as the model for Maori participation and would be "*one of the means of facilitating recognition of the Treaty in local government*", together with proposals for resource management consultation then being considered in Resource Management Law Reform.

2 Maori Advisory Committees ("MAC's")

The consultation mechanism elected by the OCCLG was a committee of appointed iwi representatives to be established within each territorial and regional authority. The Maori Advisory Committees were to have the power to consider and make recommendations on matters affecting Maori. Ultimately, their recommendations were subject to adoption, or rejection, by the elected representatives of the authority to whom decision-making power was reserved.

Although in a number of instances, the provision for a mandatory consultation mechanism would have improved the performance of many authorities in this area, for some, the proposal did not go as far as their own, already initiated, arrangements. Concern was expressed by these and other local government agencies during the submissions process that the draft Bill's mandatory principle did not afford sufficient flexibility for the development of solutions suitable to the individual circumstances of the region or district. Many authorities considered it more desirable to establish a discursive relationship with local tangata

whenua in order to determine the most appropriate and effective mechanism for their input. (104)

"It will be an extremely difficult exercise to create, by a broad brush technique, one kind of mechanism which fits across the country. There are different concentrations of Maori people in different parts of the country, there is a different history of settlement of Maori people in different parts of the country, and the migration of Maoris (sic) within the country has meant that many of them are living in areas where their ancestors had no previous association." (105)

Maori, in contrast, centred their opposition to the draft Bill on the mere advisory role given to MAC's. The draft Bill provided (106) for the MAC's to tender their advice or recommendations to the elected authority who were then obliged to consider all *"matters that it is required to consider or it considers relevant, [and to] have regard to the principles of the Treaty of Waitangi."* (107)

The jurisdiction of the authority in this respect was extraordinarily wide, allowing the introduction of any number of related and ancillary matters, provided that the authority considered they were relevant to the case at hand. No right of appeal was provided for in the event that a local authority elected to overrule the advice of its MAC. As a result, the Bill was seen by most submissions from Maori (108) to offer no guarantee that MAC recommendations would be heard or acted upon by the authority.

It could not, therefore, be regarded as having improved the situation with respect to the equitable distribution of decision-making power, or furthered the partnership

envisaged by the Treaty. A consultation mechanism without real decision-making capabilities was hardly an adequate expression of te tino rangatiratanga. Not only were Maori denied the right to make decisions on resources important to them, their expressions of cultural and customary preferences could be dismissed by the Pakeha power-holders for whatever reason they saw fit to apply.

"Generally speaking, consultation is very one-sided. Maori do all the advocating by organising their information in a manner that is acceptable to the arbiters. The arbiters are invariably Pakeha or political creatures who exist by virtue of the Pakeha constituency. After the information has been produced and this small part of the process moderated, there is no guarantee that the outcome will reflect the interests of Maori." (109)

Maori were also concerned that the MAC proposal would usurp the role of iwi runanga in representing the interests of the tangata whenua. A creation of Pakeha statute, existing only within the bounds of Pakeha institutions, ought not to be a substitute for adequate interface between the Crown's representatives and the runanga who are rightful and authoritative voice of iwi. In such circumstances, it would be undesirable to intrude into the direct relationship between authorities and runanga, except perhaps where, as with a number of regions, the boundaries of the authority transect the traditional territories of more than one tribal group.

Even in such circumstances, the establishment of Maori Advisory Committees raises substantial mandate and accountability issues for the tangata whenua representatives. The right to portray the view of an iwi requires consensus support from that iwi, consensus which

can only be achieved, in most instances, through extensive discussion and debate on and around the marae in accordance with Maori protocol and tribal time frames. Invariably, the tangata whenua would incur costs in human and financial terms, whereas the time constraints under which the authority was required to operate may effectively limit the capacity of the MAC to provide sound, mandated advice. No attention was given to these matters by the draft Bill, a fact which further undermined the credibility of the proposal in light of Maori custom and practice.

"[T]ikanga Maori is central to Maori consciousness. It has to be safeguarded. It should not be dismissed as impracticable or burdensome by local government. This will only lead to a further erosion of our heritage." (110)

During the submissions analysis it became apparent that little thought had been given to the nature of the issues to be referred to MAC's and the resources to be allocated to them for their activities. (111)

Under the draft Bill, the principle function of a MAC was to consider matters of concern to the tangata whenua and, if it wished, to make submissions to the authority on the appropriate policy to be followed. (112) Bridgeport states (113) that most of the comment on MAC functions centred around the issue of how matters of concern would be identified and referred. The majority of Pakeha submissions sought greater definition of the issues it could be expected would be of concern to tangata whenua, so as to ameliorate the possibility of conflict and inject greater certainty into the relationship between MAC's and Council, especially as regards access to Council documentation.

As the Hui on Maori Participation in Local Government had noted, if adequate care is not taken with the process for referral of information to committees established for the purpose of giving Maori input into policies and resource consent proposals, matters of importance will invariably be missed, leading to increased tension in the working relationship between MAC, iwi and Council. Significance cannot reliably be ascertained by other than the representatives of the tangata whenua, nor will the import of any given policy be necessarily apparent to Pakeha.

Kerins has documented (114) the dangers associated with Pakeha "gate-keepers" being responsible for the transmission of information between Council and iwi Standing Committees.

"The [Hawkes Bay Regional Council's] Maori Standing Committee as a consultative system operates on the premise that the Pakeha members of the Committee when advocating for Maori within the structure of regional government, will on the one hand, have a diachronic (historical) perspective of Maori issues, and on the other will perform their role objectively - or free from personal prejudice. The system is built on the assumption that Council-Iwi relations operate within a political, social and cultural vacuum."
(115)

Considering this, it would be reasonable to assume that those responsible for determining which issues were significant and warranted further attention, and which did not, would make such deliberations based on a sound knowledge of the Treaty, and the history, preferences and priorities of the tangata whenua. In reality, the only persons qualified to so decide must be the representatives of the tangata whenua themselves.

It is clear that the Hui on Maori Participation in Local Government had these issues firmly in mind in couching their recommendation to the Minister on the referral of information to Standing Committees established within local authorities. The purpose, it was said, of such Standing Committees shall be "*to vet all the policies and activities of [the] authority*". (116)

The draft Bill also proposed (117) that MAC's should not be committees of the respective authority, a provision which was seen by Maori submissions to be an appropriate means of upholding the autonomy of the MAC and which would allow its operations to take more account of Maori protocols than would be possible were the authority's committee rules to apply.

On the other hand, many local authorities expressed concerns about the lack of accountability which such autonomy implied, especially in light of the obligations of the Council to fund the MAC's activities. (118)

3 Membership of Maori Advisory Committees

The draft Bill provided that the membership of MAC's would consist of people appointed from iwi groups represented within the region or district concerned. (119) This provision attracted substantial comment from authorities concerned that MAC membership should be extend beyond the tangata whenua to encompass representation of all Maori resident within their boundaries. This criticism applied particularly to the larger metropolitan areas.

"Upper Hutt City Council notes that MAC membership should be representative of local Maori rather than be confined to

the tangata whenua of the area. There are no iwi within Upper Hutt that are recognised as tangata whenua of the City in its present form. They say that the Bill, as drafted, would result in a MAC being made up of Maori without direct interests in the Upper Hutt community to the exclusion of local Maori who are not tangata whenua." (120)

As a result of such concerns, the submissions argued that membership should be on the basis of residence or land holding within the boundaries of the authority.

In tikanga Maori terms, the role of taurahere or immigrant Maori is to support, rather than displace, the tangata whenua in their endeavours. This role becomes particularly significant where the management and control of natural resources are concerned. The local authority assertions with respect to representation for immigrant Maori fundamentally misinterprets the rationale for and role of the MAC.

According to the draft Bill the purpose of establishing the MAC's was:

"To provide for consultation and discussion between Tangata Whenua and regional councils and territorial authorities."
(121)

The motivation for the Bill, from a Maori perspective at least, was the Crown's obligations to recognise the special status to be accorded to the tangata whenua under the Treaty, and to give effect to te tino rangatiratanga. It was not intended, again from the Maori perspective, to redress the problem of minority representation in an elected democracy, per se. In fact, Maori advocates had resisted such a focus since it was first presented by the

Crown's representatives in the OCCLG Discussion Document, as it raised difficult and unpopular issues with respect to other ethnic, cultural and gender-based minority views. More importantly, it derogated the status of the interests of the tangata whenua to those of any other 'special interest' group.

On the other hand, many of the activities of the reformed local authorities will extend beyond natural resource management, to encompass wider socio-economic related outcomes. In these matters, local immigrant Maori would be expected to have valuable input in terms of the needs and priorities of their own communities. Culturally appropriate community resource programmes, such as supporting kohanga reo and urban marae, are an example. In such instances, however, local authorities need to construct arrangements distinct from those which are established in recognition of the interests of the tangata whenua under the Treaty.

For some Maori making submissions, the question of MAC membership also raised issues of representation internally within the iwi, based largely on concern that existing iwi "authorities" such as tribal trust boards were arguably not representative of all tangata whenua interests. Some went so far as to suggest that powers of Ministerial appointment or review by other Pakeha institutions such as the Maori Land Court might be preferable in the event of conflict over membership. Notwithstanding these concerns, Bridgeport notes (122) that the majority of Maori submissions, including that of the Maori Local Government Reform Consultative Group, supported the appointment of MAC membership by iwi.

The draft Bill's provision for a maximum membership of the MAC also attracted adverse comment in the submissions.

(123) Some authorities sought to further limit numbers to accord with precedent such as the community boards and put a lid on expenses which the authority would be expected to meet. For others flexibility was the key, as they considered that authorities should be empowered to construct the membership numbers to suit their own circumstances. It would be somewhat inequitable for smaller authorities, submitters noted, (124) to be required to establish and fund a MAC disproportionate in size to the authority itself, or to the numbers of Maori residing in the community.

At the other end of the spectrum, uncertainty about the outcome of the Iwi Runanga legislation (125) also tended to suggest flexibility in numbers would be desirable.

"The New Zealand Government Association says that the limit of ten members is too rigid. They say that, until the Runanga Iwi legislation is in place, it is impossible to tell how many iwi may ultimately incorporate. The Association notes that some regions may have more than 10 iwi within their boundaries. A possible approach would be for the Bill to make provision for membership to be decided by negotiation between the iwi authorities and the local authority - providing that the membership of the MAC does not exceed the number of councillors on the local authority." (126)

4 Conclusion

The government's MAC proposal suffered from being a compromise between two diametrically opposed positions - universal representation being pitted against the status conferred on Maori under the Treaty. As something of a predictable result, the proposal ended up satisfying no-one

in particular. It certainly failed to gain the support which it would have needed in order to overcome the heated resistant of some local authority advocates, and the reluctance of the government itself to promote Maori interests, apparent throughout the reform.

The majority of submissions from Pakeha were in conflict with those received from Maori - for many authorities even a subordinate position for iwi within their structures was unacceptable without control over selection and conduct of the mechanism being vested in the authority.

Those Maori who expressed guarded support for the initiative were obliged to qualify that support by their view of the MAC proposal as tokenism for failing to advance te tino rangatiratanga. The response of the Ngai Tahu Maori Trust Board (127) was typical:

"Seeing that the Bill seems to be determined to ignore the Rangātiratanga principle inherent in Article II of the Treaty of Waitangi, it is appropriate for us to state our opposition to it on that count. The practical business of living [however] suggests to us that it is desirable to salvage what can be salvaged from this inadequate treatment of the Treaty".

In fact, recognition of the Treaty itself, was scant in any form, being confined to an obligation to have regard to its principles in considering the advice from MAC's, a provision carefully designed to avoid making the Treaty a relevant consideration with respect to the administration of local government in general.

"The submissions on the Maori Advisory Committee Bill reveal the conflict between tangata whenua groups and local

government. The submissions reveal Maori were past the stage of acting in an advisory position within monocultural Pakeha institutions. They were seeking an equal say in the decision-making process along with the Crown and stated that the Treaty of Waitangi was the charter for that relationship." (128)

F RESULTS OF THE REFORM

In December 1989, both the Iwi Runanga and Resource Management Bills were introduced to parliament. Although the timeframe for submissions to the draft Bill for establishment of MAC's had been delayed to allow submissions to take account of the contents of those bills, (129) considerable uncertainty remained as to the interface between the reforms. More importantly, the complexity and controversy surrounding RMLR and Iwi Runanga distracted the attention of both Maori advocates and Crown officials. In the ensuing melee, the Local Government Reform (No 8) Bill slipped quietly into oblivion. It was never revived.

It found a small legacy, however, in the establishment in a number of, primarily, regional authorities of Maori Standing Committees and other consultative mechanisms. (130) The proposal therefore served a purpose of raising the awareness of local government and increasing their acceptance of the need to improve their performance on consultation with Maori.

Local government reform reduced more than 800 authorities to 93, 13 at the regional level and the remainder concerned with districts. These authorities have wide ranging responsibility for the control and management of all natural and physical resources in New Zealand. (131) Regional Councils and territorial authorities continue to

be directly elected. Their boundaries were determined on the basis of whole water catchments (Regional Councils) or the bounds of cities, or old boroughs and counties (territorial authorities).

As far as consultation with Maori goes, Councils continue to be able to exercise the powers they held prior to the review - to appoint Standing Committees for special purposes from their elected ranks onto which may be co-opted non-elected representatives as the Council sees fit.

Those Maori Standing Committees, even where established, do not have the powers of most other Standing Committees in that they are reliant on elected representatives' advocating for their recommendations to be accepted by the authority, as non-elected persons may not exercise any decision-making power.

Far from improving the situation with regard to the representation of Maori and Treaty interests, local government reform can be regarded as having worsened the Maori position. The amalgamation which the Local Government Commission schemes entailed served to further distance the operation of local government from the communities they serve. Increases in Council territorial areas did not necessarily result in increased opportunities for interested persons to gain election to them. Instead, Maori candidates, still handicapped by a dearth of resources and a hostile majority, must now compete for fewer places in order to exercise any real decision-making power.

G RESOURCE MANAGEMENT LAW REFORM

1 Introduction

Concurrently with announcement of the impending local government reform, the Minister for the Environment announced government's intention to undertake a comprehensive review of resource management law with an objective of integrating land use planning statutes, water and soil conservation legislation, the law relating to minerals and environmental assessment procedures.

To quote the then Minister for the Environment introducing the third reading of the Bill:

"We run a much more liberal market economy these days. Economic and social outcomes are in the hands of the citizens to a much greater extent than they have previously been. The Government's focus is now on externalities - the effects of those activities on the receiving environment - and those effects have too often been ignored."

Accordingly, processes established by the Act were intended to enable communities to find the least cost means of securing maximum benefit from resources subject only to certain environmental constraints and the obligation to accommodate a number of values which were too important to be left to the vagaries of majority rule democracy (132) In this respect, the government accepted that their Treaty obligations required that the Act give status to Maori values and concepts and provide express opportunities for Maori participation. (133)

The government established the following guidelines as the basis for the reform: (134)

- a The primary goal for government involvement in resource allocation and management is to produce an enhanced quality of life, both for individuals and the community as a whole through the allocation and management of natural and physical resources.
- b Resource management legislation should have regard to the following, sometimes conflicting, objectives:
 - i to distribute rights to resources in a just manner, taking into account the rights of existing right holders and the obligations of the Crown. The legislation should also give practical effect to the principles of the Treaty of Waitangi;
 - ii to ensure that resources provide the greatest benefit to society. This requires that rights to use or conserve resources are able to move over time to uses in which they are valued most highly, and that the least-cost way is adopted to achieve this transfer;
 - iii to ensure good environmental management, which includes considering the needs of future generations, the intrinsic value of ecosystems, and sustainability;
 - iv to be practical.

Property rights were an important part of the reform. The market could take care of many resource conflicts, but it

was unable to protect certain important values, such as future generations, Treaty issues, intrinsic values, and third party impacts.

The RMA was intended to operate in tandem with the extensive reforms to local and regional government. It was not intended to be operate as a panacea for a lack of structural representation for Maori.

2 Representation

The Resource Management Act deals in a number of Maori representative forms, requiring consultation and protection of the interests of the *tangata whenua* (the people holding customary authority over the area), (135) while creating obligations to confer with iwi authorities in the preparation of plans, (136) the notification of consents and the transfer of powers and functions. (137)

Uncertainty about representation of iwi for the purposes of the Resource Management Act had been intended to be resolved by the recognition of specific iwi authorities pursuant to the Runanga Iwi Act 1990. Unfortunately, the repeal of that Act created certain practical difficulties for local authorities who find the pluralism of Maori society and the number of tribal voices a source of confusion and uncertainty.

At present, wiser decision-makers generally avoid accidental interference in Maori political processes by consulting as widely as possible. Others seek to choose who to consult with, often with a view to avoiding strong tribal advocates. Ultimately, tensions between Maori development and protection objectives are likely to force

some kind of legal resolution, the nature of which remains to be seen.

3 Ownership of Resources

Early in the RMLR exercise it became clear to government that Maori were seeking a comprehensive change to political and economic arrangements for the allocation, management and control of natural resources as a pre-condition for effective Maori participation. In particular, Maori fundamentally challenged the right of the Crown to devolve management responsibilities to regional and local government as failing to recognise that ownership rights to the resources were guaranteed to Maori by the Treaty of Waitangi and had been wrongfully subsumed to the Crown in breach of its provisions. (138)

The government recognised that several iwi had lodged claims with the Waitangi Tribunal relating to the ownership of resources. At the same time, market-oriented interests were seeking the privatisation of all natural resources. Recognising that the implications of the Treaty for the ownership and management of resources were complex and controversial, the government determined that they would require a careful case by case approach which could not be appropriately undertaken in the process of RMLR.

Delighted to be able to deflect the privatisation lobby, (139) the government therefore decided that the Resource Management Law Reform was not the appropriate place to resolve issues of title, that entitlements would therefore not be altered by the Act nor issues relating to Maori ownership of resources dealt with in the reform. The government did note, however, support for the establishment and strengthening of arrangements to enable the Crown and

Maori to resolve outstanding ownership conflicts through negotiation. (140)

One result of this decision was that sole rights to allocate water resources continued to be vested with the Crown.

H THE RMLR PROCESS

1 Introduction

In dramatic contrast to the local government review, Resource Management Law Reform reflected Government's commitment to a rights-based approach to responding to the Crown's obligations to actively protect Maori and Treaty interests as a fundamental tenet of the reform. The reform was centred on an over-arching commitment to wide-ranging, intensive and well-resourced consultation in the preparation of proposals for reform. (141)

2 Resourcing of Maori Participation

The Resource Management Law Reform was notable for the provision of a range of alternate mechanisms for Maori participation in the process that were more effective and responded appropriately to Maori cultural preferences, particularly with respect to oral communication and timeframes for consensus decision-making. These mechanisms included:

- an intensive set of meetings conducted according to Maori protocol held at traditional community meeting places

- an open-door policy on accepting and incorporating submissions at any time in the review that more easily accommodate tribal timeframes
- provision of a free phone service for recording of oral submissions
- comprehensive funding and human resource assistance to tribal organisations for the preparation of written submissions
- meeting of personal and travel costs of participants in hui (142)

Formal structural arrangements for advocating Maori interests were also important to the successful integration of those interests in all aspects of the reform. The Government established a Core Group of four people charged with coordinating the RMLR process, including one charged with facilitating consideration of the Treaty.

The RMLR consultation exercise was the largest and most comprehensive process for participation by Maori in the formulation of policy and law ever undertaken by the New Zealand government. It engendered an exceptional response from Maori which served to further underline the interrelationship between the integrity of resources and the environment and the social, cultural, economic, physical and spiritual wellbeing of Maori communities. It also raised Maori expectations for the integration of their concerns to an unprecedented level.

I POWER AND AUTHORITY UNDER THE RESOURCE MANAGEMENT ACT
1991

1 The Principles

The Resource Management Act introduced to law a number of positive obligations on decision-makers to deal specifically with a range of Maori value-systems and interests. These include:

- A requirement to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu and other taonga (143)
- A requirement to have particular regard to kaitiakitanga (144)
- A requirement to take into account the principles of the Treaty of Waitangi (145)
- A requirement to state resource management issues of significance to tribal authorities in Regional Policy Statements; (146) and
- Multiple requirements to consult and inform tribal organisations in the preparation of plans and policy statements and with respect to all consent applications (147)

The ancestral relationship provision has been carried over from the old Town and Country Planning Act regime, (148) and is the only provision dealing with Maori or Treaty interests with any substantial judicial history. Held by the Planning Tribunal for the first 11 years of its

legislative existence to be limited land, being Maori land or Maori freehold land, continuously and currently owned by Maori and associated with the burial of ancestors, (149) the term "*ancestral land*" was finally determined by the High Court to apply much more widely to lands concerning which a variety of cultural and/or historical associations might be held by the tangata whenua. (150)

As that which is to be recognised and provided for is a relationship, there must be a nexus apparent between that relationship, the customs and traditions which might reasonably apply to the circumstances and the proposed use of the land. (151)

Kaitiakitanga represents a complex set of rules and beliefs about the nature of human responsibilities to the natural world, based on reciprocity and kinship, concepts of guardianship and an ethical obligation to act to protect the integrity of resources in stewardship for future generations. (152) Its incorporation into statute has great potential, offering some authority for the notion that Maori environmental knowledge and practice should make an integral contribution to decision-making.

Notwithstanding Maori preferences for direct enactment of the terms of the Treaty, its principles are a powerful vehicle for the introduction of Maori cultural concepts of authority (*rangatiratanga*) and value (*taonga*) into statutory resource management. (153) The principles are based on an exchange of rights which allows Government to set policy, objectives and rules for the conservation of natural resources, subject to the obligation to actively protect Maori rights to self-regulation. They are also premised on the establishment of a decision-making

partnership between Crown and Maori, characterised by good faith, reasonable co-operation and mutual compromise.(154)

Each of these provisions is subject to limiting judicial interpretation and restrictions on the weight to be accorded it in comparison to other priorities. Taken together, however, they confer strong statutory authority for the elimination of planning and policy impediments to the capacity of Maori to identify with and enjoy their lands and other significant resources.

2 Mechanisms For Decision-Making By Maori

(a) Introduction

Maori participation under the Resource Management Act 1991 will always be limited by the failure of local government reform to provide for any structural recognition of the right of the tangata whenua to exercise te tino rangatiratanga, and accordingly, to decide how and for what purposes resources are to be managed and used.

Of itself, the Resource Management Act can do little to improve that situation as ultimate decision-making authority continues to reside with the elected, invariably Pakeha authorities. That fact notwithstanding, the Act does provide for certain opportunities for Maori participation, limited by the statutory mandate, and the willingness of often unwilling local authority representatives to give full effect to the intent of the provisions.

(b) Transfer of Functions

The Act permits extensive delegation of Council functions through transfer to public authorities whose definition

includes tribal authorities. (155) Councils remain responsible for the exercise of the delegated functions. In theory, tribal organisations should be able to seek an active role in management through transfer of relevant local authority functions, including the power to make decisions on resource consent applications.

The power of delegation depends, however, on a number of criteria including efficiency, adequate representation of a community of interest and the possession of technical or special capability or expertise. In reality, the decisions are likely to be firmly based on fiscal and political conditions. Under-resourced tribal organisations are likely to find it difficult to establish the criteria and generate the political will needed for a successful delegation.

(c) Resource Consents

The Act does not explicitly provide for Maori to make, or necessarily to have a significant share in the making of, decisions on the allocation of resources, other than when powers are transferred to an iwi authority under section 33 of the Act.

This does not necessarily mean, however, that it is outside the powers of Councils to make provision and recognition for tangata whenua input into decision making with respect to particular resources in their policies and plans.

The issue of how a Council should take into account the principles of the Treaty is a matter for their discretion. It is arguable, therefore, that the principle that iwi have the right to exercise rangatiratanga over their resources requires a recognition of their input into decisions made affecting those resources.

This view only consider the provisions of the Act, however, and there are other legal principles which apply, principally the principles of natural justice and fairness. These become relevant for two reasons.

First, Councils will need to ensure that its treatment of other parties involved in the processes is fair and reasonable.

Second, Councils will need to be wary of involving tangata whenua in decisions where they have a vested interest in the outcome. That is, where they are making submissions on consents. This creates a tautologous difficulty. By the very nature of the issues involved, tangata whenua will generally be concerned with input into decision making where their interests are affected, for example where a consent is likely to affect their relationship with taonga, prejudice a Treaty claim, or fail to regard mana whenua, for example. In such a case it would be contrary to the rules of natural justice to have the tangata whenua given a right of "veto" on consents.

(d) Heritage Protection Authorities

The RMA expressly provides for the protection of heritage places of special spiritual, cultural or historical significance to the tangata whenua. It also establishes a process for iwi authorities to apply to the Minister for the Environment for approval to act as a Heritage Protection Authority with respect to any place they have an interest in protecting. Although the Minister may refuse an application on public interest grounds and serious cost implications apply, these provisions represent a major improvement in the institutional ability of Maori to act to

themselves define and seek to protect the places important to them, albeit subject to the purpose and principles of the Act.

(e) Consultation

As a vehicle for the integration of Maori perspectives in decisions, consultation should ideally be measured by tangible results that go beyond the mere seeking of advice. In the past, Maori views expressed in consultation have been too frequently ignored in the final decision. If the consultation requirements of the Resource Management Act are to succeed in establishing a partnership between Maori and consent agencies, those agencies will need to recognise the special status afforded to indigenous Maori under the Act as more than "*just another interest group*".

Even if this recognition is forthcoming, there will continue to be serious limitations on the extent to which consultation mechanisms can provide the kind of proactive participation that Maori have and will continue to seek in the management of their resources. Ultimate authority for making the decisions is not vested in Maori.

Resourcing of tribal authorities to fulfil consultation functions is also a serious problem, identified as a major barrier to effective participation under the Act. (156) Tribal authorities are often very poorly resourced in both human and financial terms. The emphasis on written material and the tight timeframes prescribed under the Act (157) require levels of expertise and administrative organisation which most tribal authorities are not resourced to provide.

(f) Iwi Resource Management Plans

The RMA obliges Councils to have regard to relevant planning documents recognised by iwi authorities in the preparation or change of plans and policy statements. (158) In so doing, the Act has provided an important impetus to the application of modern and traditional planning techniques to contemporary Maori resource management. The duty to have regard to such plans is, however, weak, and little recourse remains to iwi who feel that their objectives having been given insufficient consideration.

The focus and contents of such planning documents are matters for autonomous decision by Maori. They are rarely limited to matters under consideration in the Act, frequently including development strategies and initiatives for restoring tribal economic bases, as well as detailing and prescribing requirements on cultural and spiritual values. Although the weakness of the duty on local government cannot ensure the integration of iwi planning objectives, the facility for recognition of iwi management plans has potential as a mechanism for proactive Maori input and affirmation of the rights of the tangata whenua to act on and influence the management of natural resources important to their communities.

J CONCLUSION

The 1987-1990 reform of local government arrangements has been described as the most Treaty-inconsistent of all of the then Labour governments policy reviews. (159) Certainly, Maori expectations for the recognition of their tangata whenua status and rights to exercise te tino rangatiratanga were not met by a process which marginalised

the Treaty at every step. Although the end result - the demise of the draft Local Government Reform (No 8) Bill, was contributed to by the dominance of the Iwi Runanga and Resource Management reforms in Maori public and political arena, it was also a reflection of the impossible task of reconciling two fundamentally conflicting views about the place of the Treaty in the operations of New Zealand local government.

At one end of the spectrum stood the guardians of electoral democracy, the philosophical basis on which local government is established, whose foundation is principles of universal franchise that invariably result in the subsuming of minority interests to those of the majority in pursuit of the "*greatest good for the greatest number*".

(160) Under such principles, the idea of special or distinct representation for any one "special interest group" has the effect of creating a reprehensible and discriminatory privilege.

This view on the question of what account should be taken of the Treaty, and what arrangements should be made for te tino rangatiratanga, was promulgated from the outset of the reform by the Crown's representatives, a position from which the Crown was ill inclined to subsequently retreat, representing, as it undoubtedly did, the majority Pakeha view. As a result, the government's tokenistic proposal for the establishment of Maori Advisory Committees was poorly thought out and found predictably little support.

The opposing view is based firmly on the guarantees implicit in Articles I and II of the Treaty of Waitangi, that the Crown would not exercise its power to govern for the good of all so as to derogate from the rights of iwi to manage their resources according to their own cultural

priorities and customary preferences, nor avoid these obligations by conferring an inconsistent jurisdiction on its local government agents.

"Maori people are tangata whenua of Aotearoa. They have a rangatira status guaranteed by Te Tiriti O Waitangi and yet they have been subordinated in the political and administrative life of local government since its inception in 1876." (161)

Local government reform sought to rationalise and strengthen local government arrangements through, inter alia, amalgamation of some 800 territorial and special purpose authorities into 87 Regional, District and City Councils, to increase efficiency and accountability and to devolve power to the appropriate level of government having regard to function and community of interest. In contrast to RMLR, Maori interests were not given substantive priority from the outset of the local government review, nor reflected in decisions identifying the appropriate communities of interest. The resourcing and conduct of consultation processes generally reflected the low priority afforded these concerns.

The reform highlighted the difficulty of reconciling differing cultural approaches to political authority. The Maori preference is for appointing representatives by consensus and debate. These processes conflict fundamentally with notions of universal franchise that are the basis of elected government.

Ultimately, solutions to these conflicts proved elusive and attention shifted to interim solutions seeking a more secure form of Maori participation to compensate for the unbalancing effects of ordinary election processes and give

effect to the Crown's Treaty guarantees. A variety of arrangements were proposed for securing Maori structural participation including conferring a statutory obligation on Councils to establish Maori Advisory Standing Committees with solely advisory functions.

In the event, however, the resulting legislation did not provide for any explicit participation by Maori in local government decision-making outside of the usual electoral process. This failure had important implications for the adequacy of Maori participation in resource management processes. With a few notable exceptions, Maori candidates for election to local government are rarely successful, especially where they openly advocate for Maori or Treaty interests. In the New Zealand local government system, elected councillors have ultimate authority for decision-making and are rarely inclined to devolve that authority to others.

As a result, the inclusion of Maori issues in Council processes is generally controlled by non-Maori gatekeepers, responsible for presenting Maori views and advocating for the desired decisions. Maori do not have the institutional ability to represent their own objectives directly in decision-making fora.

The absence of any recognition in the empowering Local Government Act, even a token one, that Maori represent a distinct constituency whose rights and interests must be accorded priority, is a sorry commentary on the commitment of successive governments to their obligations under the Treaty. It has proven to be a significant limiting factor in the administration of the Resource Management Act 1991, whose promotion of Maori and Treaty interests cannot compensate for or overcome the lack of concrete

representation afforded to Maori within the structures of local government.

"If the Treaty is to become a more significant part of regional and local government in the future, a decentralised approach (that is, from central government) to advise on Treaty obligations, needs to be established at the local government level, to ensure that local government performs in accordance with Treaty obligations." (162)

FOOTNOTES

(1) Jackson M "A Maori Criminal Justice System" in Race, Gender, Class (New Century Press, Christchurch 1989) 38

(2) See eg W Rob Storey Speech to the United Nations Conference on Environment and Development, Rio De Janeiro, June 1992, transcript available from the Ministry for the Environment, Wellington.

(3) The exception may be the former s.88(2) of the Fisheries Act, which, until its repeal as part of the Sealord Settlement, exempted Maori customary fishing activity from the regulatory regime.

(4) The Act contains a range of provisions dealing positively with the heritage interests of Maori, including an obligation on decision-makers to recognise and provide for the relationship of Maori and their customs and traditions with their ancestral lands, water, sites, wahi tapu and other taonga (section 6 (e)), to take account of the principles of the Treaty of Waitangi (section 8); and to have particular regard to kaitiakitanga (section 7(a)), Resource Management Act 1991.

(5) Translating concepts from one language to another can be likened to trying to grasp tight a handful of water. Each Maori term used in this paper has a meaning which is distinctive and contextual, consequently they elude precise translation into Pakeha. For this reason, inter alia, no glossary of Maori terms has been included in this paper. Persons seeking Pakeha translations are recommended to refer to Williams Dictionary of the Maori Language (Government Printer, Wellington, 1971)

(6) Awatere-Huata D, "Indigenous Peoples Rights", paper presented to the 1993 New Zealand Law Conference on Law and Politics 84, 86

(7) Waihemo County Council Submission on the Reform of Local Government, reported in The Bridgeport Group "Synopsis of Submissions on Reform of Local and Regional Government: Report to the Officials Co-ordinating Committee on Local Government" (OCCLG Wellington June 1988) 13

(8) Mulgan R and Wood G Submission on the Reform of Local Government, reported in Bridgeport, *ibid* 12

(9) Waihemo County Council, *supra* note 7

(10) Mulgan & Wood *supra* note 8

(11) Crengle Taking into Account the Principles of the Treaty of Waitangi: Ideas for the Implementation of Section 8 Resource Management Act 1991 (Ministry for Environment, Wellington, January 1993) 10

(12) Ibid

(13) "The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy." New Zealand Maori Council v Attorney General [1987] 1 NZLR 641, 665

(14) The Waitangi Tribunal Muriwhenua Fisheries Report 1987

(15) Based on the established principle of the Treaty that the Crown may not avoid its Treaty obligations by conferring an inconsistent jurisdiction on others. See eg The Mohaka River Report (Waitangi Tribunal Division, Department of Justice, Wellington, 1992) 69

(16) Matunga H Local Government A Maori Perspective, Report Prepared for the Maori Local Government Reform Consultative Group (January 1989) 14

(17) For a review of the findings of the Waitangi Tribunal and Court of Appeal with respect to the principle of rangatiratanga and their application to resource management, see Crengle supra note 11, 11-13

(18) See eg Mihinnick N Establishing Kaitiaki (The Print Centre, Auckland 1989)

(19) See eg the Waitangi Tribunal, Mohaka River Report (Waitangi Tribunal Division, Department of Justice, Wellington, 1992) 69

(20) Each charged with considering the "principles of the Treaty" rather than the literal compact; the Waitangi Tribunal pursuant to the Treaty of Waitangi Act 1975, and the Court of Appeal through adjudication on the State Owned Enterprises (Treaty of Waitangi) Act 1986.

(21) Matunga and Campbell, The Treaty of Waitangi and Auckland's Water Supply - Implications for Future Development (Auckland Regional Authority Works Committee, Auckland, 1988) as quoted in Matunga supra note 16, 6

(22) Matunga ibid 14

(23) Walker R, "Graveyard or Seedbed?", Korero, New Zealand Listener 8 April 1989, quoted in Kerins S "Relations Between The Hawkes Bay Regional Council and Ngati Kahungunu" Unpublished Master of Arts Thesis (University of Auckland, Auckland, 1992) 63

(24) Bassett Hon Dr M "Foreword to the Discussion Document by the Minister of Local Government", reproduced in Bridgeport supra note 7, 66-67

(25) The 1987 announcement came more than a century after the last substantial review of local government operation. Kerins supra note 23, 64-65

(26) S.71 New Zealand Constitution Act 1852

(27) Matunga H "Local Government: A Maori Perspective" Report Prepared for the Maori Local Government Reform Consultative Group ("MCG") (MCG, Wellington, January 1989) 2

(28) For example, the Ward Inquiry 1912, Commission of Inquiry into Local Government 1931, Local Government Bills of 1936, 1951 and 1953, and the Inquiry into Local Government of 1960, Matunga ibid

(29) Approximately half of all lands remaining in Maori ownership were alienated in the decade immediately preceding the Land March

(30) Kerins supra note 23, 36

(31) Established pursuant to the Treaty of Waitangi Act 1975

(32) For example, the McKay Royal Commission on Inquiry into Landless South Island Natives, 1886-87 and the Gilfedder and Haszard Commission, 1914 are just two of numerous royal commissions and commissions of inquiry held with respect to Ngai Tahu tribal land. See The Ngai Tahu Report (Waitangi Tribunal Division, Department of Justice, Wellington 1990) 1003-1031

(33) The servicing wing of the Tribunal is a division of the Justice Department. The department is also responsible for negotiation of settlements on behalf of the Crown, an arrangement which has attracted criticism for creating the potential for control of the Tribunal through application of financial pressure. pers comm Tom Bennion, Waitangi Tribunal, Wellington, March 1993

(34) See for eg, the reports of the Waitangi Tribunal into claims regarding the Waiiau Pa Power Station (1978), Motunui-Waitara (1983), and the Kaituna River (1984), available from the Waitangi Tribunal Division, Department of Justice, Wellington.

(35) Pursuant to the Treaty of Waitangi Amendment Act 1985

(36) Examples include the reports of the Waitangi Tribunal into claims regarding Mangonui Sewerage (1988) Auckland Regional Authority Maori Representation (1987) and Kakanui Sewerage Scheme (1990), available from the Waitangi Tribunal Division, Department of Justice, Wellington.

(37) s.3 1 (g) Town and Country Planning Act 1977

(38) The interpretation given to the term "ancestral land" is the most dramatic example. There, the Planning Tribunal progressively upheld an interpretation which restricted the application of the section to lands, with the legal status of Maori land, being continuously in the legal ownership and occupation of the descendants of the ancestral occupiers. After nearly two decades of application, this interpretation was comprehensively rejected by the superior courts as unnecessarily limiting. Royal Forest & Bird Protection Society -v- Habgood (1987) 12 NZTPA 76

(39) s.6 Town and Country Planning Act 1977

(40) Pursuant to the Town and Country Planning Amendment Act 1987

(41) Matunga supra note 27, 2

(42) Royal Commission On Social Policy Report of the Royal Commission On Social Policy "Future Directions" Vol II, (Government Printer, Wellington, April 1988) 67

(43) The Town and Country Planning Act 1977 applied only to land use planning and required the balancing of the ancestral relationship with other matters of national importance "giving no guaranteed protection of Maori interests when decisions are made." Matunga supra note 27, 3

(44) Ibid

(45) Elected on the basis of parliamentary electorates giving a guarantee of at least two Maori members, representing the Northern and Western Maori electorates.

(46) West Coast Unitary and Regional Authorities quoted by The Bridgeport Group "Reform of Local and Regional Government: Synopsis of Submissions on Bill for Establishment of Maori Advisory Committees In Local Government and Explanatory Statement" (OCCLG Wellington April 1990) 27

(47) Matunga supra note 27, 5

(48) Gow L "Resource Management and Local Government Reform" Speech to the Local Government Conference, January 1990, available from the Ministry for the Environment, Wellington, 10

(49) Ibid

(50) Matunga supra note 27, 5

(51) Kerins supra note 23, 69; The members of the Cabinet Committee on the Reform of Local Government and Resource Management Statutes were Palmer, Basset, Butcher, Caygill, Clark, Douglas, Goff, Shields, Neilson, Woollaston and Wetere.

- (52) Ibid
- (53) Matunga supra note 27, 12
- (54) Bridgeport supra note 7, 5
- (55) Ibid, 10
- (56) Ibid, 87
- (57) Officials Coordinating Committee on Local Government, Reform of Local and Regional Government (Government Printer, Wellington February 1988) 23
- (58) Ibid
- (59) OCCLG, quoted in Kerins supra note 23, 70-71
- (60) OCCLG, ibid 36
- (61) Bridgeport quoting a United Council submission, supra note 7, 38
- (62) Kerins supra note 23, 94-95
- (63) Bridgeport, supra note 7, 43
- (64) New Zealand Local Government Association ("NZLGA") "Reform of Local Government: Statement of Principles" (NZLGA, Wellington, April 1988) 5; The "responsiveness" is referred to as the ability to respond sensitively, positively and in a timely manner, to local community needs." Id, 2
- (65) Cambridge Borough Council quoted in Bridgeport, supra note 7, 14
- (66) Kerins supra note 23, 94
- (67) Te Tai Poutini Tribal Authority "Submission on the Reform of Local Government" quoted in Bridgeport supra note 7, 45
- (68) Te Whanau O Waipareira Trust "Submission on Local Government Reform" quoted in Bridgeport Ibid
- (69) Demonstrated by a persistent treatment of the Maori interest in conjunction with those of other underrepresented groupings, eg "Some authorities note they have taken advantage of the working party concept to co-opt members of the public onto committees. These have been used to obtain the views of Maoris (sic) and elderly people on local issues." Bridgeport supra note 7, 41
- (70) Ibid

(71) Kelsey J "A Question of Honour? Labour and the Treaty 1984-1989" (Allen & Unwin, Wellington 1990) 169

(72) Ibid

(73) Te Whanau O Waipareira Trust, quoted in Bridgeport supra note 7, 45

(74) Bridgeport, ibid

(75) See eg the Submission of the Te Tai Poutini Tribal Authority "Governments in Aotearoa are going to have to come to grips with this issue of 50% Maori representation.", quoted by Bridgeport, ibid

(76) Ibid, 44

(77) Ibid, 29

(78) Ibid

(79) Such as were experienced by the iwi holding mana whenua over parts of the Auckland Regional Authority jurisdiction. See Report of the Waitangi Tribunal Into Maori Representation on the Auckland Regional Authority, Wai 25 (Waitangi Tribunal Division, Department of Justice, Wellington, 1987)

(80) Bridgeport supra note 7, 30

(81) Cabinet Paper [ALG (86) M 3/8] "Policy Development: Recognition of the Treaty of Waitangi" 23 June 1986, referred to by Bridgeport ibid, 45

(82) NZMC Legislation Committee Feb 23 1989, quoted in Kerins supra note 23, 75

(83) Kelsey claims that Bassett was pressurised by the then Minister for the Environment Geoffrey Palmer to alter his anti-Treaty position, out of concern that Palmer's RMLR would be affected. Kelsey supra note 71, 173

(84) Kerins supra note 23, 81

(85) Ibid, 73

(86) Ibid, 77

(87) Kelsey supra note 71, 171

(88) The main differences being represented by the Article I references to sovereignty (English) and kawanatanga (Maori) and the Article II references to exclusive possession (English) and rangatiratanga (Maori). For a general discussion of the circumstances surrounding the signing of the Treaty and the significance of the different versions see Orange C The Treaty of Waitangi (Allen & Unwin Wellington 1987)

(89) Although the Waitangi Tribunal had expressed its preference for the Maori text, based on the "contra proferentum" principle of international Treaty interpretation, that is, that bilingual treaties should be construed, in the event of ambiguity, against the drafting party. See eg The Orakei Report (Waitangi Tribunal Division, Department of Justice, Wellington 1987) 128-129

(90) Heron J in New Zealand Maori Council -v- Attorney General [1987] 1 NZLR 641, 646

(91) "The Crown and the Treaty of Waitangi: A Short Statement of Principles on Which the Crown Proposes to Act (Government Printer, Wellington 1989) ("The Crown Principles")

(92) Redefined as self-management. Principle 2 Principle of Self-Management, Crown Principles)

(93) Kerins supra note 23, 45

(94) Preliminary Statement of the Hui on Maori Participation in Local Government, quoted in Kerins supra note 23, 77

(95) "Minister Told To Resign by Maori Hui" Dominion Newspaper, Wellington, 4 March 1993

(96) Kelsey supra note 71, 63

(97) Report of the Hui on Maori Participation in Local Government, (MCG, Wellington, April 1988)

(98) Ibid

(99) Ibid

(100) Proposals for the Reform of Local and Regional Government (Office of the Minister of Local Government, Wellington December 1988) 2

(101) In fact hui participants represented "a large cross-section of experienced people involved closely with local government". Kerins supra note 23, 76

(102) Bassett, quoted in Kerins ibid, 8

(103) OCCLG Reform of Local and Regional Government: Bill for the Establishment of Maori Advisory Committees in Local Government and Explanatory Statement (Government Printer, Wellington, October 1989) ("the draft Bill")

(104) See eg Bridgeport supra note 46, 18-23

(105) New Zealand Society of Local Government Managers, quoted in Bridgeport, *ibid*, 24

(106) Proposed section 114Z(A) of the draft Bill

(107) Proposed section 114Z(C)(3) of the draft Bill

(108) See Bridgeport supra note 46, 20-21

(109) Te Aupouri Maori Trust Board, Submission on the Bill for the Establishment of Maori Advisory Committees" available from the Department of Internal Affairs, Wellington, November 1989. 3

(110) Te Aupouri Maori Trust Board, *ibid*, 4

(111) See Bridgeport supra note 46, 21

(112) Proposed section 114Z(A) of the draft Bill

(113) Bridgeport supra note 46, 44

(114) Kerins supra note 23, 124-125

(115) *Ibid* 124

(116) Report of the Hui on Maori Participation in Local Government supra note 97

(117) Proposed section 114X(4) of the draft Bill

(118) Bridgeport supra note 46, 31

(119) Proposed section 114Y of the Draft Bill

(120) Bridgeport supra note 46, 33

(121) Proposed Section 114W of the draft Bill

(122) Bridgeport supra note 46, 34

(123) See eg Bridgeport *ibid* 35-36

(124) See eg Napier City Council quoted by Bridgeport, *ibid* 35

(125) See accompanying text *infra* notes 135-137

(126) Bridgeport supra note 46, 35

- (127) Ngai Tahu Maori Trust Board submission quoted in Bridgeport supra note 46, 10
- (128) Kerins supra note 23, 87
- (129) Bridgeport supra note 46, 3
- (130) The Parliamentary Commissioner for the Environment documents the establishment of three such initiatives, within the regional authorities for Auckland, Hawkes Bay and the West Coast, each established following the demise of the draft Bill. Parliamentary Commissioner for the Environment ("PCE") Proposed Guidelines for Local Authority Consultation with Tangata Whenua (PCE, Wellington, June 1992) 10-11
- (131) Excluding Crown-Owned Minerals. Resource Management Act 1991
- (132) See eg Report of the Review Group on the Resource Management Bill (Review Group on the Resource Management Bill, Wellington February 1991) 5-6
- (133) Resource Management Law Reform, People, Environment and Decision-Making: the Government's Proposals for Resource Management Law Reform (Ministry for the Environment, Wellington, December 1988) 19
- (134) Ibid, 12
- (135) See eg Section 8 (Principles of the Treaty), Section 65(3)(e) (Preparation of regional plan re tangata whenua concerns), and Section 189(1)(a) (Protection of areas of significance to the tangata whenua); Resource Management Act 1991
- (136) See eg First Schedule Clauses Clause 3 (1)(d); Resource Management Act 1991
- (137) Section 33 (1)(a); Resource Management Act 1991
- (138) Maruwhenua Maori Secretariat, Ministry for the Environment, Synopsis Report on the Hui at Taumutu on Maori Participation in Resource Management Law Reform available from the Ministry for the Environment, Wellington (1989)
- (139) Personal communication, Professor Sir Geoffrey Palmer, Wellington, June 1993
- (140) Resource Management Law Reform, People, Environment and Decision-Making: the Government's Proposals for Resource Management Law Reform supra note 133, 24

- (141) Over 1339 groups and individuals made 1664 submissions in the first seven months of the reform, in addition to many formal and informal meetings and discussions. Resource Management Law Reform, People, Environment and Decision-Making: the Government's Proposals for Resource Management Law Reform *ibid*, 11
- (142) Personal communications Shane Jones, Member of Core Group for Resource Management Law Reform, Wellington, February-April 1993
- (143) Section 6(e); Resource Management Act 1991
- (144) Section 7(a); Resource Management Act 1991
- (145) Section 8; Resource Management Act 1991
- (146) Section 62 (1)(b); Resource Management Act 1991
- (147) *Supra* note 135
- (148) Being the former Section 3(1)(g); Town and Country Planning Act 1977
- (149) See eg Brighouse -v- Dannevirke County Council (1981) NZTPA 173
- (150) Royal Forest & Bird Protection Society -v- Habgood (1987) 12 NZTPA 76
- (151) See eg Kingi -v- Rotorua District Council (1986) 11 NZTPA 122
- (152) Marsden and Henare Kaitiakitanga: A Definitive Introduction to the Worldview of the Maori (Ministry for the Environment, Wellington, June 1993)
- (153) Crengle D, Taking into Account the Principles of the Treaty of Waitangi: Ideas for the Impleemntation of Section 8; Resource Management Act 1991 (Ministry for the Environment, Wellington, January 1993)
- (154) *Ibid*
- (155) Section 33(1); Resource Management Act 1991
- (156) Parliamentary Commissioner for the Environment ("PCE") Proposed Guidelines for Local Authority Consultation with Tangata Whenua (PCE, Wellington, June 1992) 10-11
- (157) Including just 10 working days for notification of consents, Section 95; Resource Management Act 1991
- (158) Section 61(2)(a)(ii); Resource Management Act 1991

- (159) Kelsey supra note 71, 186
- (160) Bridgeport supra note 7, 46
- (161) Matunga supra note 27, Executive Summary
- (162) Ibid, 15

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