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Putting the
rangatiranga
into resource management?

The "Maaori provisions" in the Resource Management Act 1991

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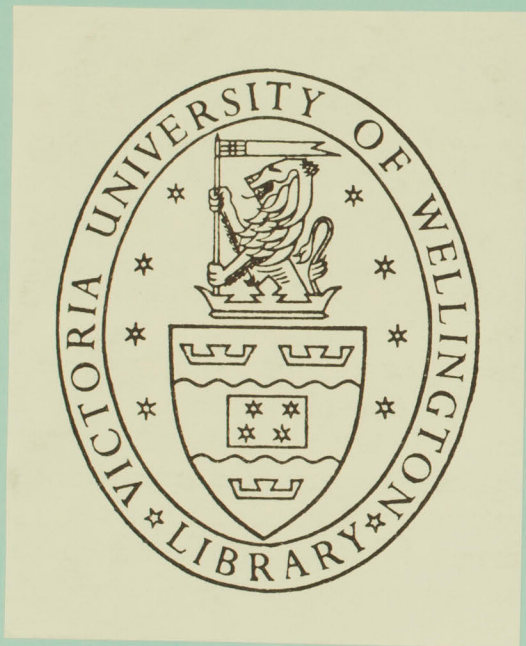
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INTRODUCTION

The focus of this work is the issues raised by the enactment in the Resource Management Act 1991 of provisions relating particularly to a Maaori interest in resource management. The paper begins by looking at legal treatments of a Maaori interest in the use of land and water in the past. It then examines the meaning and effect of the Maaori-related provisions in the new Act, and critically analyses its treatment of the issues of ownership of resources and consultation with Maaori. It raises a question, derived from the scholarship of legal pluralism, as to whether this kind of legislation is the best or only way to give effect to the Maaori perspective in resource management.

Resource management law reform: the context

The paper concludes that the likely cumulative effect of the "Maaori provisions" in the Resource Management Act 1991 is a strengthening of the conservation ethic in the Act, and provision for a Maaori expression of that ethic, but no real enhancement of Maaori *rangatiratanga* as properly understood. It further concludes that a range of responses to the Maaori-related imperatives of the Act can be expected from planners and decision-makers. This means that a Maaori input into resource management is likely to be much more fully recognised and implemented in some regions of the country than others.

Summary and implications for resource management

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 19,000 words.

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***"The common problem, yours, mine,
everyone's,
Is - not to fancy what were fair in life
Provided it could be, - but, finding first
What may be, then find how to make it fair
Up to our means."***

***Robert Browning, Bishop Blougram's
Apology***

I Introduction

At the time when the Resource Management Act was in its drafting stages, Treaty of Waitangi issues were very topical in government circles. Indeed, in the first draft of the legislation¹, it is apparent that the Treaty of Waitangi section in the seminal "Purpose and Principles" part of the legislation had been the focus of considerable attention. Three alternative formulations of a Treaty duty were offered, and most of the explanatory annotations to this part of the legislation were devoted to explicating these options. By contrast, the "Purpose" section (which at that stage made no mention of sustainability) appeared in only two alternative forms, with no annotations.

It was therefore apparent that the Treaty was of pressing concern to the creators of the new law. It was accepted that Treaty issues would have an important role to play in that law, but they were also potentially controversial, and difficult to define with precision. So the nature of the Treaty's role was not then clear² - and is in fact still a matter for debate now that the legislation is in its final form.

The context within which the law reform occurred - that context being historical, legal, and (perhaps most importantly) political - meant there were major constraints on the extent to which ultimate influence over the management, use and control of resources could be delivered to Maaori³. No reallocation of power, whether in the nature of property rights or local government political structures, was on the political agenda. The focus was better protection of the environment. Maaori input was likely to be fairly uncontroversial to the extent that the emphasis was on the areas where Maaori cultural imperatives coincided with ecological imperatives.

Thus although it is clear that now, for the first time since colonisation, Maaori have a specifically acknowledged part to play in the management of natural resources generally, it remains to be seen whether that part (borrowing here from theatrical idiom) is more in

¹ This "confidential draft" is dated 21 July 1989.

² Although much discussed - viz. the reports produced by the Ministry for the Environment during the period of the review: Directions for Change: A Discussion Paper (August 1988) at pages 14-16 and 27-28 in particular; and People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform (December 1988) at pages 23-24 and 32-34 in particular.

³ I use the double "a" spelling of Maaori because proper rendering of the Maaori language in its written form requires differentiation between a short and a long vowel. This can be shown by placing a macron over long vowels, but as my word processor does not provide this facility I use the alternative method of showing the double vowel where the sound is required to be lengthened.

the nature of a "walk-on" than a "dramatic lead"; whether it is more in the nature of a modest readjustment of emphases than anything approaching an expression of *te tino rangatiratanga*.

My original aim was to produce a paper that was in the nature of a practical guide designed for use by those having to give effect to the "Maaori provisions" of this legislation. However, since I commenced work on it, two publications have effectively pre-empted me: the Ministry for the Environment's The Resource Management Act: KIA MATIRATIRA: A Guide for Maori⁴ and the Office of the Parliamentary Commissioner for the Environment's Proposed Guidelines for Local Authority Consultation with Tangata Whenua⁵. These essentially achieve what I set out to do. So I decided to take a more critical and analytical approach.

I begin by looking into "The Past", to give an outline of the role of Maaori and the Treaty of Waitangi in the previous law relating to the use and management of land and fresh water. I have focussed on land and water because these are the resources in respect of which Maaori have made most effort in the courts to have their interest recognised, and because the length of this paper precludes my providing a complete overview of the legal relationship between Maaori and all natural resources.

Next, I move to "The Present". In this section of the paper I identify and analyse the meaning and effect of the provisions of the Resource Management Act which have particular application to Maaori. I look particularly to the likely cumulative effect of the "Purpose and Principles" provisions in Part II, and conclude that although issues of *rangatiratanga* are implicitly raised, the tenuous connection of those issues with sustainable management, stated in Section 5 as the overriding purpose of the Act, will probably preclude their having an effective part to play beyond the rhetoric of Iwi Management Plans.

The Act tries to have as little as possible to do with *rangatiratanga*⁶. *Rangatiratanga*,

⁴ Wellington, June 1992

⁵ Wellington, June 1992

⁶ *Rangatiratanga* is generally translated as chieftainship. The word connotes rights of ownership, control and authority. *Tino* is an intensifying word, so that *te tino rangatiratanga*, which is the phrase that appears in the Maaori version of Article the Second of the Treaty of Waitangi, might be rendered as "absolute chieftainship" or "utmost chieftainship". The Treaty of guaranteed *iwi Maaori "te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa."* The Queen of England was therefore agreeing to protect the Chiefs and tribes in the unqualified exercise of authority over their

raising as it does questions about the ownership of resources which underlie the right to dictate the means and terms of their management and use, was simply too hot to handle. The implications of sidestepping this fundamental issue need to be confronted, however, and I endeavour to do that in the section on "Ownership issues".

The protection of the Maaori interest in resources is provided in this Act by elaborate procedural requirements which planners and decision-makers must observe. I look at how these procedures are likely to work in practice. I investigate the social and cultural dynamic of consultation in the context of this Act, since the effectiveness of consultation lies at the heart of the procedural protections. I identify problems connected with consultation as a means of eliciting a Maaori viewpoint and input. These include the difficulties which consulters are likely to encounter in identifying the appropriate consultees in any area. This issue, which I call "representation", This refers to the need to identify, for consultation purposes, the relevant "iwi authority" - that is, which Maaori are entitled to speak for what land and resources. Overlapping spheres of influence, and differences of opinion as to the limits of authority of individuals and groups in any given area, are inherent features of Maaori society with which many of those acting on behalf of central, regional or local government in seeking to identify an authoritative Maaori voice are having to come to terms.

In Part IV of the paper, entitled "Another Perspective", I take a broader view, raising questions derived from the scholarship of legal pluralism about the appropriateness of the means which the state has chosen to recognise the legitimacy of a Maaori input in resource management - namely, by the enactment of procedural protections in a statute. The "centralist" orientation of New Zealand lawyers and policy-makers mean, I believe, that the implications of this choice were not fully appreciated, precisely because it was not recognised as a *choice*. I suggest that a wider view might more instructively have been taken, and advocate a more pluralist approach to upholding the rights of New Zealand's indigenous people.

I conclude that the attempt through the Resource Management Act to create a new and more meaningful role for Maaori in the decision-making processes relating to the use of resources in this country is more of a small step than a leap towards a partnership between the founding peoples of Aotearoa/New Zealand.

land, settlements, and all things treasured by them, unless they wished to sell to the Queen.

II THE PAST

The Treaty promise

Resource management in New Zealand has been characterised by a usurpation by the Crown of ownership of resources. The important incidents of ownership - management, control and use - have been exercised by the Crown through the Common Law and statute. Successive administrations have shown few qualms as to whether the rights asserted by the Crown were properly acquired.

Given the terms of Article the Second of the Treaty of Waitangi, it would not have been astounding had more questions been raised. However, the prevailing Paakehaa view seems always to have been that the only resource which required to be purchased from Maaori owners was land; other resources simply belonged to the Crown. Except in relation to fisheries, where litigation has resulted in Maaori being granted an ownership interest in the commercial fishery, this remains the *status quo*.

However, Article the Second states a guarantee by the Crown that Maaori will be protected in the continued possession of - and, indeed, *te tino rangatiratanga* over - their lands, settlements, and all their other treasures⁷ for so long as they desire to retain them. It follows that to the extent that resources, including but not limited to land, were

- * used, managed and controlled by Maaori as part of their exercise of *rangatiratanga*;
- * deemed by them to be *taonga* (treasures); and
- * title was not transferred by sale, or extinguished by other lawful means,

there is a strong argument that the Treaty guaranteed to Maaori that the Crown would preserve that situation for them. It is not, therefore, surprising that the *status quo* position described above has increasingly been the subject of challenge by Maaori interests.

In the context of a comprehensive review of the relevant precedents in his famous Huakina

⁷ Again, the relevant Maaori words in Article the Second (and the Maaori version of the Treaty, because of the *contra proferentum* rule, is the overriding one) are "*o ratou wenua o ratou kainga o ratou taonga katoa*". *Taonga* is a word whose translation has been the subject of debate in recent years, but a conventional translation is "treasure" or "thing highly prized or valued". The Waitangi Tribunal has been careful to emphasise that the term is not confined to items of tangible property, and in their reports have found it not to be limited to lakes, rivers, and burial sites, but to include fisheries (Te Atiawa Report 1983), language (Te Reo Maori Report 1986), and also radio spectrum (Radio Spectrum Report 1990).

decision⁸ in 1986, Chilwell J. stated in Paakehaa legal terms the kernel of the position espoused by many Maori where he said,

The Treaty of Waitangi contains promises which the Crown is obliged to perform, in exchange for legal accession to territory. Putting aside the question whether the Treaty was one of cession or not, on its face, the Treaty imposes obligations on the Crown vis-a-vis Maori people to act in accordance with the Treaty. Whether one sees the Treaty as a bilateral agreement recognising the rights of the tangata whenua (the original people here) in exchange for kawanatanga ("governorship" or in the English version "sovereignty") or as a unilateral declaration of a sovereign nation's intention to be bound, the Treaty has a status perceivable, whether or not enforceable, in law.

He then goes on to quote from Chief Judge Fenton's famous Kauwaeranga judgment⁹. The Judge said:

There is probably no case of a colony founded in precisely the same manner as New Zealand ie by contract with [Maoris], the Crown of England obtaining the sovereignty or high domain, and confirming and guaranteeing to the aborigines the useful domain, or the use and possession of all the lands.¹⁰

In like vein, the Court of Appeal in Re Landon and Whitaker Claims¹¹ reasserted the Crown's "solemn engagements" at page 49:

The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary rights. Whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it.

Notwithstanding the broad statements of principle above which acknowledge the duty of the Crown to recognise native title, the technical position as far as the law was concerned was that all title to land by English tenure must be derived from the Crown. This meant that the assertion of sovereignty over New Zealand entailed a vesting and residing in the Crown of the fee simple of the whole territory.¹²

⁸ Huakina Development Trust v. Waikato Valley Authority [1987] 2 NZLR 188, 206

⁹ Native Land Court, 3 December 1870, reprinted (1984) 14 VUWLR 227

¹⁰ (1984) VUWLR 227, at page 242

¹¹ (1872) 2 NZCA 41

¹² *Ibid*, page 49

In practice, and possibly because of the so-called "pre-emption clause" in Article the Second of the Treaty, the Crown has always distinguished between native title to land - which must be acquired by purchase or legislative extinguishment - and title to other resources, which is simply assumed to be part of the Crown's fee simple estate. Effectively then, and supported by the application of rules which in this context smack of legal sophistry, the Crown has arrogated to itself the rights of ownership of resources formerly belonging to Maaori, and has typically made specific provision neither for continuing Maaori use, nor for the exercise of Maaori cultural preferences in management.

In simple terms, then, the Treaty "promise" of which Chilwell J. spoke in the passage quoted above has not been honoured. And while the Treaty's status may have been "perceivable" in law, it has generally not proved capable of enforcement in the area of resource use and management.

Statutory provision for Maaori interests

Prior to the enactment of the Resource Management Act 1991, statutory provision for a particular Maaori interest in the use and management of the environment was virtually non-existent.

The Resource Management Law Reform initiated by the Labour Government in the late 1980s was a complete review of the law as it related to the use and management of land, water and soil, geothermal and mineral resources, the coastal marine area (the area from mean high water springs to the 20 km limit of the territorial sea), and air. The Resource Management Act repeals 59 resource-related Acts. Of these, the foremost statutes were the Town and Country Planning Act 1977, the Water and Soil Conservation Act 1967, and the the Clean Air Act 1972. However, the review also covered the Soil Conservation and Rivers Control Act 1941, the Mining Act 1971, the Coal Mines Act 1979, the Geothermal Energy Act 1953, the Petroleum Act 1937, the Quarries and Tunnels Act 1982, and the Noise Control Act 1982.

In all of the Acts listed above, the only specific reference to the particular interest of Maaori in the use and management of natural resources was Section 3(1)(g) of the Town and Country Planning Act 1977. (This section was, however, imported by cross-reference

into the discretions exercised pursuant to the Mining Act 1971¹³.)

Use of land: The Town and Country Planning Act 1977

Section 3(1)(g), introducing a Maaori element into planning legislation for the first time, has been described by the Court of Appeal as "another sign of a heightened sensitivity to Maori issues"¹⁴. It provided for seven matters to be "recognised and provided for" as a matter of national importance. The seventh matter concerned the relationship between Maori people and their "ancestral land":

3. Matters of national importance - (1) In the preparation, implementation, and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for:

...

- (g) The relationship of the Maori people and their culture and traditions with their ancestral land.

It is difficult to know to what extent this particular relationship, or indeed the other six matters which were to be "recognised and provided for" in district schemes, was given effect in the schemes themselves. No survey has been done of the district, regional and maritime planning schemes to ascertain whether planners did take account of Maaori needs and concerns to the limited extent required by this legislation. In all likelihood, this particular imperative in the Act was subject to a wide variety of responses across the country - a diversity of response which may also be confidently predicted of the various regional authorities exercising powers and functions under the new legislation. This is a subject to which I shall return.

As far as the Planning Tribunal and the courts were concerned, Section 3(1)(g) had the effect of listing Maaori concerns with six other equally-ranked criteria. This involved a balancing of factors, none of which took priority over the others. However, because Section 3(1)(g) was a "matter of national importance" under the legislation, "the relationship of the Maori people and their culture and traditions with their ancestral land" could override factors of lesser importance mentioned in other sections.

¹³ Section 126(9)

¹⁴ Environmental Defence Society Inc and Tai Tokerau District Maori Council v. Mangonui County Council (1989) 13 NZTPA 197, 201 per Cooke P.

It will nevertheless be immediately apparent that the provision for recognition of the Maaori interest in the Town and Country Planning Act 1977 was very limited in scope. It allowed for Maaori cultural preferences to be taken into account, along with other factors, when planning issues concerning Maaori ancestral land was at issue. For the first ten years of the life of the Town and Country Planning Act 1977, "ancestral land" was interpreted to mean land still in Maaori ownership¹⁵. But in Royal Forest and Bird Protection Society v. W A Habgood Ltd¹⁶, Holland J. held that it was wrong to confine "ancestral land" to land currently owned by Maaori people. He said that ancestral land is land which has been owned by ancestors although not necessarily still in Maaori ownership. This approach was approved by the Court of Appeal in EDS v. Mangonui County¹⁷. McMullin J. noted in that case, however, that the circumstances in which the Maaori ties of ownership with the land were severed "may be very relevant"¹⁸ to whether the land should still properly be regarded as "ancestral land". The Judge considered that where there had been a voluntary disposal of the land by Maaori, the considerations in Section 3(1)(g) would be of "considerably diminished" impact.

Thus, those preparing, administering and implementing plans and schemes under the Town and Country Planning Act 1977 were obliged to recognise and provide for the relationship of Maaori with land with which they had an ancestral relationship, and this would frequently extend to a relationship with land no longer in Maaori ownership. This duty to recognise and provide for that relationship had, however, to be weighed with the other six considerations to which recognition and provision must be given. Where the considerations competed amongst themselves,

There is no legislative direction about their weights inter se. It is for the planning authority or the Tribunal on appeal to undertake a balancing exercise on the facts of each particular case.¹⁹

Thus, Maaori cultural preferences would not necessarily have priority even where the use of their own land was at issue, and in all likelihood the weight given to the Maaori

¹⁵ See Knuckey v. Taranaki County Council 6 NZTPA 609 and Quilter v. Mangonui County Council 296/77 and 38/78, decision 21 July 1978.

¹⁶ 12 NZTPA 76, decided on 31 March 1987

¹⁷ Per totam curiam, but see especially McMullin J. on page 221 (supra n.14)

¹⁸ Idem

¹⁹ Ibid, page 203, per Cooke P.

consideration would be less where the use of land or resources in non-Maori ownership was in question.

Perhaps the most recent judicial statement on the status under the Town and Country Planning Act of Maori interests arising from Treaty-based arguments (as opposed to a particular relationship with particular ancestral land) is in the judgment of Greig J in Te Whana Whanau Trust and others v. Hawera District Council²⁰. The appeal of Maori objectors who called no evidence on the merits of an application relating to an offshore drilling rig, but attacked the lack of Maori representation on the respondent's Standing Tribunal, the Tribunal's ignorance of Maori spiritual values, and the lack of appropriate consultation with the *tangata whenua*, was first heard by the Planning Tribunal²¹. The appeal was struck out. Te Whana Whanau Trust appealed to the High Court. Greig J felt bound to point out (at pages 8-9 of his judgment):

...it is necessary to note that the Town and Country Planning Act is not a statute in which Treaty considerations are specifically or directly imported into the Act or into the duties and functions of a Council or the Tribunal on hearing appeals. That is to be compared with the State-Owned Enterprises Act 1986 and other recent Acts which have made specific direct provision about the Treaty and its import. The Resource Management Act 1991, which comes into force on 1 October 1991 and which will take the place of the Town and Country Planning legislation...in s 8 provides that the principles of the Treaty of Waitangi shall be taken into account in achieving the purposes of the Act. The present Town and Country legislation means that cases such as New Zealand Maori Council v. Attorney-General [1987] 1 NZLR 641 can have little direct relevance to the issues before the Tribunal or before the Court in this case.

If the principles of the Treaty were to have little relevance to decisions made in respect of the use and management of land, what then of the ability of Maori to influence planning and management of other resources, whose governing statutes were completely silent on the subject of Maori and the Treaty?

²⁰ Unreported judgment of the High Court, Wellington Registry, 3 September 1991

²¹ Te Whana Whanau Trust v. Taranaki District Council (1990) 14 NZTPA 325

Use of water: The Water and Soil Conservation Act 1967

As regards the use and management of water, the governing statute was the Water and Soil Conservation Act 1967. That Act provided that the management of water resources was vested in the Crown, and that those resources, subject to certain specified exceptions, might be used by the holder of a water right. Such a right was obtained by application to regional councils (formerly regional water boards), with a wide right of public objection.

The only forward-planning mechanisms contained in the Water and Soil Conservation Act were water classification provisions (to fix minimum water qualities), water conservation orders (to protect outstanding natural features), a special provision to fix minimum and maximum flows and levels (which was used only rarely), and river management plans (which were not enforceable).

One of the features of the Water and Soil Conservation Act was the absence of any guidelines or criteria for bodies making decisions on any of these issues. The established test for determining whether a water right of any kind should be granted was an overall balancing of the advantages and disadvantages flowing from the exercise of the right²².

Water, in Maaori terms, might be described as having a high *taonga* status, with most significant bodies of water being extremely important to the cultural and spiritual life of the *iwi* within whose *rohe*²³ that body of water lies. Nevertheless, the Water and Soil Conservation Act makes no reference of any kind to the Treaty or Maaori interests. This meant that, for a long period, neither the catchment boards (later regional water boards) nor the Planning Tribunal (hearing appeals from the boards) were prepared to accept evidence of Maaori concerns in relation to water policy²⁴.

The adventurous 1987 judgment of Chilwell J. in the Huakina decision²⁵ marked a brave new direction, however:

²² Kear v. Minister of Works and Development [1982] 1 NZLR 319

²³ Tribal territory

²⁴ An example of the operation of this policy can be seen in McKenzie v. Taupo County Council (1987) 12 NZTPA 83, where Maaori spiritual and metaphysical concerns relating to a proposed marina on Lake Taupo went unheeded by the Planning Tribunal.

²⁵ *Supra*, n.8

...in *Huakina Development Trust v. Waikato Valley Authority*, Chilwell J, in an important and innovative decision, dramatically overturned longstanding regional water board and Planning Tribunal practice...At both the regional water board stage and the Planning Tribunal stage it was held that Maori spiritual values and the cultural relationship of Tainui to the waters of the region were not proper matters to be taken into account in balancing the benefits and detriments of the water right. The Water and Soil Conservation Act made no provision for that. Chilwell J, however, found that Maori spiritual and cultural values undoubtedly were relevant to the benefit-detriment analysis. The weight to be accorded such evidence was, however, a matter for the deciders of fact, for the regional water board and the Planning Tribunal on appeal.²⁶

Thus, although Maori cultural and spiritual values were for the first time brought into the mix of relevant factors, again they were to be accorded no particular priority.

The sophisticated, and indeed rather convoluted, reasoning of the *Huakina* decision provides that, because of the lack of guidelines for those exercising decision-making powers under the Water and Soil Conservation Act, such a decision-maker is entitled to refer to the Treaty of Waitangi as an extrinsic aid to interpretation.²⁷ Quite apart from the Treaty, the long title to the Water and Soil Conservation Act (to make better provision for the "conservation, allocation, use, and quality" of the water, and its provision for "the promoting and controlling [of] multiple uses of natural water") was held to allow for metaphysical considerations to be taken into account by a decision-maker. This meant that, where established factually, the traditional, cultural and spiritual relationships of a particular and significant group of Maori people with a particular body of water could not be excluded from consideration.²⁸

These principles were fully accepted by the Planning Tribunal in its compendious *Wanganui River Minimum Flow Appeals Report: Electricity Corporation of New Zealand Limited v. Manawatu-Wanganui Regional Council*²⁹.

This was a case in which traditional opponents - Maori and conservation interests on one

²⁶ Richard Boast, "The Treaty of Waitangi: A Framework for Resource Management Law", NZPC Report 1 (1989) VUWLR Monograph 1, at page 33.

²⁷ *Huakina* at page 210 (supra n.8)

²⁸ *Ibid*, page 223

²⁹ Decision W70/90

side and big business (Electricorp) on the other - waged a long-running and hard-fought battle before the the Regional Council and the Planning Tribunal. Eventually the matter went before the High Court - although not until after the Water and Soil Conservation Act had actually been repealed. Actions commenced under the old regime continued pursuant to the transition provisions of the Resource Management Act 1991.

This case concerned the desire by Electricorp to maximise the permitted draw-off of water from the Wanganui River and its upper tributaries. The Whanganui River Maori Trust Board, representing a number of *hapuu*³⁰ of the River, objected, arguing that the minimum flow should be the River's natural minimum flow. The Trust Board asserted that it was the right of the River *hapuu* to exercise authority over the River and determine its flows: this was a natural incident of their *тино rangatiratanga, mana*³¹ and *kaitiakitanga*³² over the River.

The Tribunal held "the cultural values of the tangata whenua" to be relevant for the purposes of Section 20J (under which minimum flows may be set)³³, and found that

...the Wanganui River is a taonga of central cultural and spiritual significance from which [the *hapu* of the River] derive status, prestige and mana.³⁴

The Tribunal stressed, however, that its duty was to exercise its jurisdiction according to law. In its extensive discussion on the role of the Treaty in the exercise of that jurisdiction, the Tribunal essentially followed the approach Chilwell J. had taken in the Huakina decision:

In our opinion, the recognition of the Treaty as part of the social fabric of the country leads in this case to no more than it did in the *Huakina* case. That is not that claims to authority in respect of the river (whether *тино rangatiratanga* or *mana* or *kaitiakitanga*) are to be given effect to. That would be beyond the lawful authority of this Tribunal. Rather, it is that the relationship of the tangata whenua to the river, its status as a taonga, and the effects of fixing a minimum acceptable flow in respect of it on their cultural, spiritual and other interests, are relevant considerations to the extent that they are established by

³⁰ Sub-tribes

³¹ Spiritual and temporal power, in this context closely connected with *rangatiratanga*.

³² Guardianship, stewardship.

³³ *Wanganui River Minimum Flow Appeals Report*, page 40

³⁴ *Ibid*, page 104

evidence, in the way indicated by Mr Justice Chilwell in the *Huakina* case. On that there was no issue among the parties to these appeals.³⁵

Electricorp argued for priority to be given to the rights of existing users of the water in the balancing of the relevant factors. The Whanganui River Maori Trust Board argued for priority to be given to Maaori factors, and the Department of Conservation argued for priority to be given to conservation factors. In the event, the Planning Tribunal opted for the retention of the test for balancing relevant factors established in *Keam v. Minister of Works and Development*³⁶ which Chilwell J. had applied in *Huakina*, namely that none should be accorded any particular priority.³⁷

The Planning Tribunal decided that, on a balancing of the relevant factors (including the Maaori interest), Electricorp's existing diversion rights should be substantially reduced from their pre-application level. The decision which had been the subject of the appeal to the Planning Tribunal had been more stringent still, setting a minimum flow that was nearer the natural minimum flow than that set by the Planning Tribunal. The Planning Tribunal's decision did not restore the River to its natural flow, as had been advocated by the Trust Board.

The case went on appeal to the High Court. Electricorp wanted the minimum flow decreased, and the Department of Conservation cross-appealed for an increased minimum flow. The Whanganui River Maori Trust Board was another cross-appellant, again seeking restoration of the minimum river level to its natural minimum flow. At the hearing, however, the Trust Board decided not to pursue its cross-appeal, but to await the outcome of the Electricorp and Department of Conservation appeals.

In the event, the High Court³⁸ upheld the Planning Tribunal's decision and approach, finding the *Keam* balancing test appropriate. It is now unlikely that the Maaori cross-appellants will take their appeal any further.

Contemporaneously with the battle over water rights on the Wanganui River, another battle

³⁵ Ibid, page 61

³⁶ [1982] 1 NZLR 319

³⁷ *Wanganui River Minimum Flow Appeals Report* pages 71-72

³⁸ *Electricity Corporation Limited v. Manawatu-Wanganui Regional Council* Unreported decision of the Administrative Division of the Wellington High Court, AP 302/90, Judgment 3 June 1991 Jeffries J

was being waged over water rights in a North Island river, this time the Mohaka River. Here, the local Maaori people, the Ngati Pahauwera, were arguing against the Department of Conservation and canoeists who were seeking a Water Conservation Order on the Mohaka. As in respect of the Wanganui River, the Maaori argument was based on their claim to *rangatiratanga* over the river. They rejected the right of others to have a Water Conservation Order put in place: they wanted to be free to develop the river on their own terms. This put Ngati Pahauwera in the unusual situation, for a Maaori tribe, of arguing *with* Electricorp *against* the conservation lobby.

When Sheppard J. came to hear the matter in the Planning Tribunal³⁹, he completely rejected the *rangatiratanga* arguments put forward by Ngati Pahauwera, saying that they lacked any relevance to the jurisdiction of decision-makers under the Water and Soil Conservation Act 1967. In granting a Conservation Order that was more limited as to area than that sought, he confirmed the Kearm balancing test, and reaffirmed the limited Maaori elements to be taken into account in decision-making - the Maaori spiritual and cultural values in the water, and the use of the Treaty as an extrinsic aid to interpretation - which had been laid down by Chilwell J in Huakina and followed in the Wanganui River decisions.

At close of play on the Water and Soil Conservation Act, then, we see that Maaori cultural and spiritual values figured in a range of relevant criteria in decision-making under the Act. They were to be accorded no particular priority, no matter how high the *taonga* status to *tangata whenua* of the body of water in question.

³⁹ Re An Application for a Water Conservation Order in respect of the Mohaka River, Unreported decision of the Planning Tribunal, W20/92, Judge Sheppard, 8 April 1992

III THE PRESENT

Resource management law reform/Te tahuatuu o te taiao

The reform of the law relating to resource management in this country was not driven by Maaori- or Treaty-related concerns. Indeed, the problems associated with dealing with the always vexed "Maaori issues" might have acted in some governmental quarters as a deterrent to tackling an already awesome task.

The review of the many statutes relating to the use and management of resources had found that existing law was overlapping and contradictory, served confusing and sometimes conflicting ends, and left large gaps (such as ineffective pollution control). Moreover, existing law stood little chance of working effectively because of the many institutions and organisations involved in administering it. It also treated the environment in so many different ways, and divided it into so many discrete parts, that major environmental problems might not even be addressed, much less resolved.

The focus of the law reform came down to two areas of recognition: firstly, it was acknowledged that the reason for intervention (in a period where non-interventionism was very much in vogue) was to promote sustainable management of resources, an objective not being achieved by the existing regime. Secondly, it was recognised that in order to achieve sustainable management, the institutions and systems dealing with natural and physical resources had to be integrated so that the environment could be dealt with as a whole.

The recognition of the need to give better effect to Maaori interests in, and provide for greater Maaori involvement with, the control and use of resources came as a by-product of the recognitions set out above. As I have shown, the Maaori element in previous resource management statutes had been either limited or (more usually) non-existent. While the reform was not principally motivated by a desire to remedy this deficiency, in the period when the review was undertaken "the Maaori element" had become an integral part of the thinking of those involved in formulating the new regime. By the late 1980s, the Treaty was - as it certainly had not been before - acknowledged as "part of the fabric of New Zealand society"⁴⁰. Events in the recent past such as litigation in relation to fisheries and the transfer of assets to the new SOEs had brought officials and politicians to a new

⁴⁰ Chilwell J. in Huakina Development Trust v. Waikato Valley Authority (supra n.8), at page 210.

awareness of the need to take proper account of the rights of Maaori, particularly where natural resources were concerned. There was a recognition that Maaori arguments wore the clothing of legitimacy in terms of even a conservative reading of the Treaty of Waitangi, and evolution in public policy thinking (an evolution process still in progress) meant that it was no longer acceptable to continue to act as if the Treaty were no more than a historical curiosity.

Quite apart from the imperative to include Maaori which flowed from a better recognition of their Treaty rights, it was apparent that the Maaori perspective in resource management might be useful from a purely environmentalist point of view. There was a recognition that, inherent in Maaori culture as practised in the twentieth century was a considerably stronger conservationist ethic than that practised in Paakehaa culture. Maaori in fact claim to have been implementing a culturally- and spiritually-based policy of "sustainability" in their interactions with the environment for hundreds of years. The recognition of the need for a Maaori input in the New Zealand's Resource Management legislation can usefully be seen in the context of a growing recognition of the potentially important contribution of indigenous peoples to devising and implementing strategies to save the natural world from over-exploitation which is a feature of environmentalism globally.⁴¹

There was much debate over the form that the recognition of Maaori interests in the management of resources should take in the new legislation. The Crown had been badly burned by its experiences with Section 9 of the State-Owned Enterprises Act 1986, and

⁴¹ See, for example, Agenda 21 of the United Nations Conference on Environment and Development (final advanced version as adopted by the Plenary in Rio de Janeiro on June 14 1992) which in Chapter 26, entitled "Recognising and strengthening the role of indigenous people and their communities", recognises that indigenous people and their communities

have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. (Ch.26, page 2)

The view is expressed that

In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities. (Ch.26, page 3)

Principle 22 of "The Rio Declaration of Environment and Development" (Agenda 9, page 9 of the English text) is to very like effect. Earlier international instruments such as the ILO Indigenous and Tribal Peoples Convention (No 169) had expressed similar goals. A draft universal declaration on indigenous rights currently being prepared by the United Nations working group on indigenous populations for release in the International Year for the World's Indigenous People in 1993, will certainly elaborate this theme.

there was considerable resistance to enacting any provision which created overriding, mandatory obligations to comply with the imperatives of the Treaty of Waitangi or its principles. Equally, however, the appropriateness in the then-prevailing political climate of invoking the Treaty meaningfully in legislation concerned with natural resources could hardly be denied. It was a question of finding the right balance. Naturally, there was - and is - no consensus on the formula that was eventually decided upon.

Contemporary views on the new legislation

Shane Jones⁴² was quoted in Terra Nova recently as saying that, following the passing of the Resource Management Act,

Maori can now "exert more control over how decision-makers make decisions that may have an adverse impact on resources which Maori either own or have significant interests in", adding, "in that respect it's a significant change from earlier legislation."⁴³

Less sanguinely, Dr Maarire Goodall⁴⁴ commented that

"You might have hoped that the Resource Management Act had provisions which mandated something much closer to what the Waitangi Tribunal tried to suggest in several reports...And it just isn't there. I mean, the Act is permissive but it's not mandatory."

For the Act's consultative provisions to work, Goodall believes, "it very much depends on having people of good will, intelligence and knowledge on both sides". However, without mandatory Treaty compliance, the Act will help little in areas where there is no local government motivation towards fulfilling Treaty obligations. "The test of the Resource Management Act will be whether decisions made under it will be consistent with the Treaty, from the Government itself down to all those bodies exercising its delegated powers."⁴⁵

⁴² Member of the Te Aupouri tribe of the far north, former member of the Core Group on Resource Management Law Reform, and current Manager of Maruwhenua, the Ministry for the Environment's Maaori Secretariat.

⁴³ Martin de Jong, "Consult and Respect: Making the RM Act's consultative provisions work", Terra Nova, June 1992, page 50

⁴⁴ Ngai Tahu commentator on Treaty matters and former Registrar of the Waitangi Tribunal.

⁴⁵ Idem

These views serve as a useful introduction to my analysis of the ways in which the Resource Management Act will facilitate a new role for Maaori, as they reflect something of the diversity of responses to the new regime. Shane Jones's voice is the more optimistic of the two, seeing this legislation as a definite step forward for Maaori. Maarire Goodall cannot be so positive. He identifies clear problems, and seems frankly to doubt whether the role envisaged for Maaori will work. To these views, coming as they do from such well-informed Maaori spokesmen, I will return.

The key "Maaori provisions" of the Resource Management Act 1991

The features of the Resource Management Act which delineate the position of the Maaori perspective under the Act are primarily set out in four sections: Sections 5, 6, 7 and 8. These sections are set out at the commencement of Part II of the Act, the Part which is headed "PURPOSE AND PRINCIPLES". I have italicised the words which have particular significance for the focus of this paper.

The first section in Part II is Section 5, which states the purpose of the Act in these terms:

- 5. Purpose** - (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, *which enables people and communities to provide for their social, economic, and cultural wellbeing* and for their health and safety while -
- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
 - (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
 - (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Thus we see that the philosophy of sustainable management, which underpins this Act and is intended to have absolute priority⁴⁶, makes explicit the connection between sustainability of resources and the maintenance of cultural integrity.

Section 6 sets out the matters of national importance to which all those exercising powers under the Act must have regard in achieving the Act's purposes. The fifth matter of

⁴⁶ Ministry for the Environment/Manatuu moo te Taiao, The Resource Management Act KIA MATIRATIRA A Guide for Maori, June 1992, page 11

national importance to which recognition must be given and provision made under Section 6 is

(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

Section 7 sets out "Other matters", of which the first to which particular regard must be had by those exercising powers under the Act is

(a) Kaitiakitanga.⁴⁷

The last of the sections in Part II is Section 8, which I quote here in full:

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

Other relevant provisions

Although powers under the Act are to be exercised by a range of bodies and people holding specific offices⁴⁸, Maaori (often in the guise of *iwi* authorities) will usually be required to interface with local authorities (a term which comprises regional councils, district councils and city councils). Indeed, some *iwi* authorities may end up exercising functions, powers or duties transferred to them by local authorities pursuant to Section 33(2).

In practice, the interaction between local authorities and Maaori groups will usually arise in the context of the preparation of planning documents, and in relation to resource consent procedures. It is in these areas that the imperatives relating to Maaori contained in Part II (Purpose and Principles) will take effect.

⁴⁷ Section 2, the Interpretation section of the Resource Management Act, defines *Kaitiakitanga* as follows:

"Kaitiakitanga" means the exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself:

⁴⁸ These include the Minister for the Environment, the Minister of Conservation, the Minister of Maori Affairs, the Minister of Justice, Regional Councils, Territorial Authorities and the Planning Tribunal.

The Act provides for a hierarchy of planning documents which are variously called policy statements and plans.

National Policy Statements

At the top of the hierarchy are National Policy Statements⁴⁹ which are issued by the Minister for the Environment. National Policy Statements are intended to identify environmental issues which have greater than local significance, and need to be approached on a national basis. The Act specifically envisages that anything significant in terms of the Treaty of Waitangi might be a suitable subject for such a Statement.^{50 51} The planning documents of local authorities must be consistent with National Policy Statements.

Regional Policy Statements

At the next level down are Regional Policy Statements⁵², which must be prepared by every regional council. The Regional Policy Statement identifies the resource issues in that particular region, and provides a management strategy for those resources and those issues. The Statement must include matters of resource management significance to *iwi* authorities⁵³. This requirement will oblige regional councils to consult with *iwi* authorities on resource issues of significance to local Maaori. A Regional Policy Statement has to be consistent with National Policy Statements, New Zealand Coastal Policy Statements, and Water Conservation Orders⁵⁴.

Regional Plans

Regional councils may also choose to produce one or more Regional Plans, although they are not mandatory. A Regional Plan would deal with specific resource management issues in a region in greater detail than the Regional Policy Statement. A *runanga* or *iwi* authority (or any other person or legally constituted body) can request that a Regional Plan be

⁴⁹ Sections 45-55

⁵⁰ Section 45(2)(h)

⁵¹ The Ministry for the Environment in *Kia Matiratira* (supra, n.46) suggests that policies relating to *papakāinga* housing (housing development for Maaori people, usually on land near *marae*) might be a suitable subject for a National Policy Statement.

⁵² Sections 59-62

⁵³ Section 62(1)(b)

⁵⁴ Section 62(2)

prepared or changed⁵⁵, and a council is specifically enjoined by the legislation to consider the desirability of preparing such a plan where "any significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources" arise or are likely to arise⁵⁶. In preparing Regional Plans, regional councils have to bear in mind issues of consistency with other regional statements or plans of their own and neighbouring councils.⁵⁷

District Plans

The functions of territorial authorities (city and district councils) are set out in Section 31 of the Act, and a District Plan must always be in force for each district⁵⁸. This Plan has the purpose of assisting territorial authorities to carry out their functions so as to achieve the purpose of the Act⁵⁹. Such a Plan will set out the rules that will apply in the district to regulate, *inter alia*, noise emission, the storage, use, and disposal of hazardous substances, subdivisions, and activities on the surface of water in rivers and lakes⁶⁰. District Plans must not be inconsistent with National Policy Statements, Water Conservation Orders, or Regional Policy Statements.⁶¹

New Zealand Coastal Policy Statements and Regional Coastal Plans

In addition to these national, regional and district statements and plans, there are statements and plans in relation to the coastal environment. These fall under the aegis of the Minister of Conservation (New Zealand Coastal Policy Statement⁶²), and the regional councils (Regional Coastal Plans⁶³). Other statements and plans must not be inconsistent with the New Zealand Coastal Policy Statement, which may include a statement of policy concerning

⁵⁵ Section 65(4)

⁵⁶ Section 65(3)(e)

⁵⁷ Section 66(2)(d)

⁵⁸ Section 73(1)

⁵⁹ Section 72

⁶⁰ Second Schedule, Part II(1)

⁶¹ Section 75(2)

⁶² Sections 56-58

⁶³ Section 64

The protection of the characteristics of the coastal environment of special value to the tangata whenua including waahi tapu⁶⁴, tauranga waka⁶⁵, mahinga maataitai⁶⁶, and taonga raranga^{67,68}

Resource Consents⁶⁹

The scheme of this legislation is to allow property owners to use their land as they choose unless a regional, coastal or district plan says they cannot. Theoretically, a plan will only regulate those activities that are not sustainable, and/or have an adverse environmental effect on the land.

If, in a plan, a local authority had chosen to regulate an activity, a person wishing to undertake that activity must obtain a resource consent from the relevant local authority or other agency. The consents required fall into these categories:

- * land use consent⁷⁰;
- * subdivision consent⁷¹;
- * coastal permit⁷²;
- * water permit⁷³; and
- * discharge permit⁷⁴.

⁶⁴ Undefined in the Act on account of the sensitivities surrounding the concept, but the term can be roughly translated as "sacred sites".

⁶⁵ Defined in Section 2 as "canoe landing sites".

⁶⁶ Section 2 gives this definition:

"Maataitai" means food resources from the sea and "mahinga maataitai" means the areas from which these resources are gathered:

⁶⁷ The Section 2 definition is "plants which produce material highly prized for us in weaving".

⁶⁸ Section 58(b)

⁶⁹ Part VI, Sections 87-150

⁷⁰ Sections 9 and 13

⁷¹ Section 11

⁷² Sections 12, 14 and 15

⁷³ Section 14

⁷⁴ Section 15

The relevant consent authority (which may be the Minister of Conservation, a regional council or a territorial authority, depending upon the consent sought) must serve notice on relevant *iwi* authorities if the application is required to be publicly notified.⁷⁵ Anyone (which obviously includes any Maaori or Maaori group) can play a full part in the procedures laid down for obtaining a resource consent, including making a written submission to the consent authority⁷⁶, participating in hearings and pre-hearing meetings⁷⁷, and appealing to the Planning Tribunal⁷⁸.

The resource consent procedure is an important part of the management regime set out in the Act. Maaori, like other citizens, can play an active role in this procedure. There is no specific provision giving priority to Maaori views, although the combined effect of the "Purpose and Principles" sections will have the effect of supporting the conservationist voice of Maaori⁷⁹.

Iwi Management Plans

"Iwi Management Plans", as they have become known, do not really form part of the hierarchy of plans described above. They are referred to in the legislation as "relevant planning document[s] recognised by an iwi authority". Regional councils and territorial authorities must have regard to them when they are

- * preparing or changing Regional Policy Statements⁸⁰;
- * preparing or changing Regional Plans, including Regional Coastal Plans⁸¹;
- * preparing or changing District Plans⁸².

The Act is silent as to what these "relevant planning documents" of *iwi* might contain, and how and/or when they will come into existence. Their existence is assumed, but whereas

⁷⁵ Section 93(1)(f)

⁷⁶ Section 96

⁷⁷ Sections 100 and 99

⁷⁸ Section 121

⁷⁹ See pages 24 to 29 *infra*

⁸⁰ Section 61(2)(a)(ii)

⁸¹ Section 66(2)(c)(ii)

⁸² Section 74(2)(b)(ii)

a few *iwi* have prepared resource management plans or related documents, very many have not. Some may not want to (which would put the onus on local authorities to seek *iwi* views from oral sources), while others (and there are probably more in this category) may have the desire but lack the resources. I will return to a discussion of issues surrounding Iwi Management Plans, and consultation with Maori generally, later in this paper⁸³.

What do these provisions mean and what is their effect?

The Ministry for the Environment has summed up the Maori content of this legislation in a statement of three duties which apply to all local government officials and others exercising a planning or decision-making role under the Act:

- 1 The duty to take into account the principles of the Treaty of Waitangi (section 8).
- 2 The duty to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga (section 6e).
- 3 The duty to have particular regard to kaitiakitanga (section 7a).⁸⁴

Accepting this as a useful summary, I want now to investigate the content of these duties, and their interaction with each other and with Section 5.

The overriding purpose of the Act, stated in Section 5, is sustainable management of natural and physical resources. "Sustainable management" is comprehensively defined (in Section 5(2)) as meaning management of the "use, development, and protection" of those resources so as to enable "people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety". This first half of the section, which emphasises the use and development of resources, sets out what has been called the "management function" of sustainable development⁸⁵.

⁸³ See pages 34 to 45 *infra*

⁸⁴ KIA MATIRATIRA, (*supra* n.46), page 11

⁸⁵ This is the terminology coined by Douglas Fisher in his article "Clarity in a Little While", *Terra Nova*, November 1991, Issue 11, page 50

The second half of Section 5 provides that, at the same time as ("while"⁸⁶) managing natural and physical resources in this way, the needs of future generations must be safeguarded (Section 5(2)(a)), as must the life-supporting capacity of ecosystems and their constituent parts (Section 5(2)(b)). Simultaneously, "any adverse effects of activities on the environment" must be avoided, remedied or mitigated (Section 5(2)(c)). This latter half of the section has been said to define the "ecological function" of sustainable management⁸⁷.

The anthropomorphic emphasis of Section 5 is immediately apparent. The *raison d'être* of sustainable management as defined in this Act is management of the environment so as to ensure that its usefulness to humankind will not be jeopardised. Protection and preservation on account of values intrinsic to the environment itself, or as an expression of a desire to maintain the integrity of life in all its forms, does not figure in this regime. As Douglas Fisher has pointed out,

So far as "protection" is concerned, it means in effect that resources are protected not for their own sake but for the sake of their potential use and development by people and communities.⁸⁸

But the human orientation of Section 5 also means that, to the extent that the "cultural wellbeing" of the Maaori community requires the upholding of their (generally higher) ecological standards, these may be an environmentally protective factor in decisions made under the Act on the use and development of resources.

The preoccupation with caring for the environment for the sake of people rather than for its own sake continues even in the statement of the "ecological function" in the second half of Section 5. The "potential of natural and physical resources" is to be sustained so as "to meet the reasonably foreseeable needs of future generations" (Section 5(2)(a)).

⁸⁶ In his article "Clarity in a Little "While"" (supra n.), Douglas Fisher takes a curious approach to the meaning of the word "while" as used in Section 5 to join the two halves of the definition of sustainable management. Whereas The Concise Oxford Dictionary (Sixth Edition) gives as its primary definition of "while" as a conjunction, "During the time that, for as long as, at the same time as", Fisher seems attracted to the idea that "while" in this context may mean "if", thereby according what he calls the "ecological function" (subsection 2(a)-(c)) priority over what he calls the "management function" (subsection 2). His suggested alternative meaning of "while" in this context is "and", which merely co-ordinates the "management function" with the "ecological function" and accords neither priority. This is so clearly the meaning suggested by the structure of the section, and the ordinary usage of the word "while", that I find Fisher's over-grammatical approach confusing and unhelpful.

⁸⁷ Ibid, page 50

⁸⁸ Idem

Clearly, the generations being referred to are human generations. Where Section 5(2)(b) talks of "Safeguarding the life-supporting capacity of air, water, soil, and ecosystems" it is to be supposed that human lives are among those to be supported by these features of the environment, although the need to secure the habitats of other life forms is also recognised.

Because Section 5 stands at the centre of the legislation and is the reference point for all decisions made under it, the other "purpose and principles" sections do not have an entirely independent existence. They stand in relation to Section 5. This is made explicit by the use of the words "In achieving the purpose of the Act..." which commence each of Sections 6, 7 and 8.

It is apparent, therefore, that the matters of national importance which must be recognised and provided for pursuant to Section 6 would be read subject to Section 5. That is, the matters of national importance are to be recognised and provided for *in achieving the purpose of the Act*, and that recognition and provision would only go so far as was consistent with the achievement of the purpose of the Act - namely, sustainable management. The regard which must be had to *kaitiakitanga* under Section 7(a), and account which must be taken of the principles of the Treaty of Waitangi under Section 8, would similarly need to be seen in relation to the overriding objective of sustainable management.

Two areas of emphasis emerge from the enactment of a recognition of a Maaori interest in resource management in Sections 6(e) and 7(a). They are

1. the *kaitiaki*, or guardianship, role of Maaori in relation to the physical environment of their *rohe* (tribal area) which is characterised by a commitment to and application of what we would now call a strong conservation ethic; and
2. the related role of the *mana* which an *iwi* has over its *rohe* which is, in different senses of the word *mana*, both a superset and a subset of their *rangatiratanga* in that *rohe*, and is essentially about absolute spiritual and physical power over the area in question.

While these two aspects of the relationship between an *iwi* and its *rohe* would once have been part of a seamless whole, it has become convenient to see them separately. This is because the *kaitiaki* role sits much more easily within the present system of allocation of

property rights and power than the *rangatiratanga* role, which constantly questions and threatens that allocation.

I consider that *both* these streams of Maaori culture emerge from a true reading of Sections 6(e) and 7. The "relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" was first and foremost one of power. The tradition of a particular *iwi* would usually dictate that *iwi* having absolute authority to determine what happened in relation to the resources in its *rohe*. Part of the expression of that power by each tribe over its *rohe* was the exercise of the *kaitiaki* role over the natural features of their environment. It can therefore be seen that *kaitiakitanga*, to which particular regard must be had by those exercising functions and powers under the Act (Section 7(a)), is not simply an indigenous encapsulation of a now-popular conservation ethic. It is a working part of the intricate web of powers and responsibilities attaching to the control and protection of a tribal domain which is comprised in the word *rangatiratanga*.

Section 8 is rather different, however. It directs those exercising functions and powers under the Act "to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)". The principles of the Treaty are not the terms of the Treaty: they are an extrapolation from the actual words used which is intended to get at the spirit of the agreement reached between *iwi Maaori* and the Crown in 1840. In court cases where the principles of the Treaty have been the subject of consideration, the courts have tended to take a more conservative line on the scope and nature of these principles than the Waitangi Tribunal in its various Reports. "*Rangatiratanga*" has, for instance, been argued for by Maaori as a principle of the Treaty in cases before the courts, but has been rejected. The courts have not enunciated reasons for their position, but they are probably the same reasons which (again unstated) dictated that the Resource Management Act would not confront issues of ownership of resources⁸⁹.

The Office of the Parliamentary Commissioner for the Environment has provided this useful precis of the relevant Treaty principles:

Principles of the Treaty of Waitangi have to date been defined by the Waitangi Tribunal and the Courts based on individual claims and cases that have come before them. Although the Courts are final arbiter of the principles of the Treaty where they have been imported into statute, the Courts have recognised the Tribunal's statutory role in defining principles and acknowledged their value to the Courts. The Courts and Tribunal have emphasised the

⁸⁹ See "Ownership issues" infra, pages 29 to 34

evolving nature of Treaty interpretation, and new legal cases may further clarify interpretation...

Two strong themes have emerged in these expressions of Treaty principles; *partnership*, and *active protection* of resources of importance to Maori in accord with Maori cultural and spiritual values. In order to obtain the information necessary for these principles to be fulfilled, genuine *consultation* is required. Thus consultation is an essential component of giving effect to the principles of the Treaty rather than an accepted principle of the Treaty itself.

Another key principle which has been stressed is the need to exercise *utmost good faith* in the development and exercise of partnership between tangata whenua and the Crown and its agents such as government departments and local authorities.⁹⁰
[Emphasis original]

Thus, the recognised principles of the Treaty which must be taken into account by those exercising powers and functions under this Act are in the nature of policy statements which provide an imperative for certain kinds of attitudes and action in relation to the Maori Treaty partner. The principles sidestep the issue of *rangatiratanga* in favour of a modern, equity-based social model which has little direct reference to traditional Maori structures.

It may be, however, that in "taking into account" the principles of the Treaty as directed by Section 8, those exercising functions and powers under the Act will be required, in the interests of partnership and active protection, to give particular weight to considerations arising from the application of Sections 6(e) and 7(a). In the appropriate case, this could lead decision-makers to be obliged to take account of issues of *mana* and *rangatiratanga*.

But there seems little scope for *rangatiratanga* to be recognised otherwise than in connection with, and in support of, Maori rights and preferences related to the exercise of *kaitiakitanga*. Recognition of the power and authority inherent in *rangatiratanga per se* would cut across the allocation of decision-making rights in this area to local authorities. Moreover, where *mana* and *rangatiratanga* are asserted by Maori in the context of a planning or decision-making process, they are not required to be taken into account except to the extent required to *achieve the purpose of the Act* - namely, sustainable management of natural and physical resources as prescribed in Section 5. Thus, a connection between *rangatiratanga* and some aspect of the definition of sustainable management would need

⁹⁰ Office of the Parliamentary Commissioner for the Environment/Te Kaitiaki Taiao a te Whare Paaremata, Proposed Guidelines for Local Authority Consultation with Tangata Whenua, (Wellington, 1992), page 5

to be shown in order for *rangatiratanga* to come into play.

Accordingly, it is unlikely that Sections 6(e), 7(a) and 8 will work to reinvigorate or even give recognition to *rangatiratanga* in its true sense. Their cumulative effect will much more often, and much more naturally in the statutory scheme, be to give weight to Maaori conservationist practices and preferences in planning and decision-making. This will give those preferences more status in the mainstream of resource management than they had pursuant to Section 3(1)(g) of the Town and Country Planning Act, and makes their recognition and observance more readily justiciable.

This reading of the effect of the Maaori content of the "Purpose and Principles" sections is consistent with the careful determination of this legislation carefully to steer around issues relating to *rangatiratanga* and therefore *mana* and ownership.

Ownership issues

Having identified the working parts of the Resource Management Act, the next thing to focus on is this intention is to leave at large the question of ownership of the resources.

In Kia Matiratira: A Guide for Maori⁹¹, the Ministry for the Environment makes clear in the first page of the substantive material that the aim of the legislation is to involve Maaori in decision-making, not to address issues of ownership:

This guide, *Kia Matiratira*, explains those parts of the Act that have implications for the development and self determination of Maori people.

It is aimed at assisting Maori development of their resources. One way to assist is to reduce those barriers which prevent Maori from participating in decision making processes. The Act sets out to remove barriers by making it easier for tangata whenua to have access to decision making in resource management issues.

The Act does not deal head on with Maori concerns as to *rangatiratanga* over resources such as water bodies, the coast, and land. This publication is not the forum for debating the issues of *rangatiratanga* and *kawanatanga*. There are avenues such as the Waitangi Tribunal, the Courts, and direct korero with

⁹¹Supra n.46

the Crown for grievances felt by tangata whenua.⁹²

The same emphasis on "active involvement"⁹³ in management and decision-making processes by Maaori came through during the planning stages of the legislation. There is an acknowledgement of the need to provide for the protection of Maaori cultural and spiritual values associated with the environment⁹⁴, but not to the extent that those cultural and spiritual values involve *rangatiratanga*.

Quite clearly, issues of *rangatiratanga* have had to be sidelined in this legislation precisely because they conflict head-on with the Crown's ownership and control of resources. The Resource Management Act is an expression of the Crown's sovereignty, which in relation to natural resources entails an expression of ownership and control over those resources. To deny that legislation establishing a regime in relation to use, management and control of resources is an expression of the power of the state which is fundamentally inconsistent with the Maaori claim to *te tino rangatiratanga* over those same resources seems to me to be futile.

Andrew Sharp⁹⁵ agrees. In his recent article "SOVEREIGNTY: Te Tino Rangatiratanga"⁹⁶ he says:

...in their pure forms, sovereignty and rangatiratanga are simply incompatible, and ... people should clearly see this if they are to argue to any practical effect.⁹⁷

He elaborates the point as follows:

⁹² Ibid, page 7

⁹³ Resource Management Law Reform/Te Tahuatuu o te Taiao, People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform, (Ministry for the Environment, Wellington, December 1988), page 5. As the basis for further investigations and consultation, the Government "agreed that new legislation should provide for more active involvement of iwi in resource management, including statutory requirements for consultation, and noted that the question of opportunity for greater Maori participation in local and regional government is still to be looked at in the context of the reform of local and regional government".

⁹⁴ Idem

⁹⁵ Associate Professor of Political Studies at the University of Auckland, author of Justice and the Maori - Maori Claims in New Zealand Political Argument in the 1980s (Oxford University Press, Auckland, 1990)

⁹⁶ In New Zealand in Crisis: A debate about today's critical issues David Novitz and Bill Willmott Eds., (GP Publications Limited, Wellington, 1992), pages 26-31

⁹⁷ Ibid, page 26

To be a sovereign power in the land is, as its etymology suggests, to be "above" all others. In England and in New Zealand, in theory and in practice, sovereigns make law; making law, they ultimately control all property, all derivative authorities, all rights and all the liberties that their subjects have...

Whether officials assert or deny the possibility of limiting or dividing sovereign power, they do not question the pervasive legitimacy and power (the hegemony, as it's called by neo-Marxists) of the legal system, and the centrality of sovereignty within it.

Now, the problem is that the claim to tino rangatiratanga can challenge this legal hegemony and that sovereignty. It can do so by claiming that the hegemony of the legal system is not total and that sovereignty is divided: that sovereign power is limited and divided by the terms of the Treaty.⁹⁸

The fact that the Resource Management Act does not state in terms that exercise of the right to create a regime for the access, use, control and management of resources is an exercise of ownership rights which are inconsistent with the ownership of resources inherent in *rangatiratanga* does not make it any the less so.

There have been concessions to Maori sensitivities in respect of ownership issues, however. For instance, it was recognised early on in the reform process that it would be inappropriate to issue water rights in perpetuity until such time as Treaty of Waitangi claims to water resources had been addressed.⁹⁹

The failure of this reform to confront the ownership issues underlying the use of resources in this country will be seen by many to be a shortcoming. It may be, however, that the Maori claims in respect of rights to resources simply constituted - and continue to constitute - too great a threat to the existing allocation of property rights in New Zealand, to the legal order which underpins that allocation of rights, and indeed to the very basis of sovereignty itself, to be countenanced.

Andrew Sharp puts the matter this way:

...in so far as Maori claims to tino rangatiratanga parallel and indeed exceed those of the state, they will be rejected.

⁹⁸ Ibid, pages 27-28

⁹⁹ People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform, (supra, n.93), pages 7 and 37

Should they be rejected? Yes, because the alternative is flatly impossible in obvious ways impossible to detail here. Should they be made? Yes. Because the exaggeration and inflation of claims is not only a way of bargaining, but expresses the fact that Maori identity and cultural practices are not actually integrated into the state system of New Zealand/Aotearoa.¹⁰⁰

On a philosophical note, he concludes:

In the end, though, our arguments ought not to be in terms of the opposition between sovereignty and tino rangatiratanga but about the detailed ways in which we propose to live as two people bound, for better or worse, in a single political system.¹⁰¹

If it is true, as suggested above, that the ownership issues inherent in any claim to *rangatiratanga* (in its true sense) over resources are so intertwined with the issue of sovereignty that they are not really capable of resolution while the present legal and political *status quo* prevails, then it is unlikely that the ownership issue will ever be confronted other than in a very piecemeal fashion. It is therefore profoundly to be hoped that a meaningful position for Maori in resource management *can* be located *without* a fundamental reallocation of ownership rights, and preferably under the regime so recently legislated.

It would be fair to say, though, that there is no small degree of skepticism among many Maori people (and others) who doubt that the new Act will usher in changes that are sufficiently fundamental to make the crucial differences sought. Maarire Goodall's doubts have already been recorded here¹⁰². Another commentator not at all optimistic about the prospects for a big leap forward states his view that:

Some positive changes can be expected under the new regime, especially in areas which do not have an immediate impact on preservation of the economic status quo, but the real driving forces - the 'ownership' power and control structures - have not changed and have a significant vested interest in resisting change.¹⁰³

¹⁰⁰ New Zealand in Crisis (supra, n.96) page 30

¹⁰¹ Idem

¹⁰² See page 17 supra

¹⁰³ Pita Rikys, "RESOURCES: Treaty Rights and Private Property" in New Zealand in Crisis (supra n.96) page 110

It should be the case, however, that positive changes can be effected at least to a modest extent without fundamentally altering the political and legal *status quo*. For instance, the Waitangi Tribunal (whose fine appreciation of New Zealand's *realpolitik* obliges it to look for solutions within the *status quo*) has made many constructive suggestions in relation, for instance, to the management of water resources which do not impinge directly on the underlying title. In its Manukau Report (1985) the Tribunal talked of the ability to delegate authority to *kaitiaki*; in its Te Atiawa Report (1984) the Tribunal suggested changes to the granting of permits, the setting of conditions, and to review procedures; they have encouraged the pursuit by local authorities of waste disposal methods which are compatible with Maaori values in water; they have advocated the recognition in decision-making processes of the *mauri*¹⁰⁴ associated with lakes, river and coastal waters (Motonui Report 1983). These measures would all enhance the status of *tangata whenua* values in water, without conceding anything in terms of ownership rights.

Other commentators have also ventured constructive suggestions as to how Maaori interests can be accorded priority where appropriate in the use and management of water:

One obvious answer is that those rivers which have the status of taonga should be returned to tribal ownership and management. An alternative is returning ownership and improving tribal input into management. The bed of the Waikato, or the Wanganui, might be returned, but management of the water should remain with the water boards (or regional councils) but with changes to the management structure of such bodies...The objective would be to allow tribal input into policy questions, the devising of water management plans, determining water classifications and so on. Many tribes are seeking a 50-50 participation in management, and in many cases this will have to be very seriously considered (for example, Lake Taupo, the Wanganui River, the Waikato River). For some rivers and lakes complete ownership and management also deserves serious consideration, especially when the water has a special status and where the river or lake has not already been subject to sustained exploitation (for example, the Arahura River, Lake Waikaremoana, Lake Rotoaira, possibly the upper Wanganui River). This would be subject to the Crown's right to intervene in the interests of conservation...¹⁰⁵

While the severing of ownership from management issues which is comprised in some of the suggestions set out above can be a tenable and pragmatic approach to both racial and environmental issues, it should probably also be conceded (in order, as Andrew Sharp says,

¹⁰⁴ Life force

¹⁰⁵ Richard Boast, (*supra* n.26), page 35

to argue to "practical effect"¹⁰⁶) that while issues of ownership are excluded from the resource management matrix, *rangatiratanga* too is off the agenda. What we are talking about is an accommodation of Maaori interests within a political and legal reality where the decisions are made by others, but within a process that permits - and perhaps even guarantees - a role for Maaori. How much difference this can make to the outcomes remains to be seen. But there must be some doubt as to whether involvement in decision-making on resources will contribute significantly to the "development and self determination of Maori people"¹⁰⁷, an element of the legislation identified by the Ministry for the Environment.

Adequacy and efficacy of consultation

"Consultation" on the Resource Management Act began in the stages when it was the "RMLR" - Resource Management Law Reform. Maaori all over the country were spoken to about the changes to New Zealand's resource management regime that were under consideration. They were asked their preferences as to the shape the new law should take. Maaori gave their views.¹⁰⁸ The "RMLR Core Group", the "RMLR project team" and the staff of the Ministry for the Environment listened. This process was called "consultation".

A Canadian Indian has been quoted as describing his own experience of consultation with indigenous people as "being in the same building when the decisions are being made"¹⁰⁹. This particularly cynical statement expresses the frustration of an individual who perceives consultation to be a procedural sham in which the consultees play a shadowy and inconsequential role. There is no doubt that there are many Maaori people who would concur in this view.

At the other end of the consultation continuum are those who feel complete confidence in the process of "consultation" as a means of ascertaining the views of indigenous people. Such individuals would claim legitimacy for the final form of the Maaori provisions of the Resource Management Act, and in fact the use of the Act as a means for providing for

¹⁰⁶ Op.cit. at page 22

¹⁰⁷ *Kia Matiratira* (supra n.46) page 7; Op.cit. at page 29 above

¹⁰⁸ Philippa McDonald, "Consultation with Iwi", 1991 97 *Planning Quarterly*, page 8

¹⁰⁹ Quoted in Pita Rikys, "RESOURCES: Treaty Rights and Private Property" in *New Zealand in Crisis* (supra n.96), page 110

Maaori interests in the environment, on account of the fact that extensive (and expensive) "consultation" took place with Maaori people during the period when the law was taking shape. Such people tend to be on the controlling end of consultation processes rather than participants in them.

The two sides of this story can be further amplified.

On the one hand, the fact that consultation with *iwi* was undertaken by government and its agencies as a necessary part of the law reform process was in itself a step forward in terms of the role of the Treaty of Waitangi in New Zealand public life. It was a recognition by government of at least some of the imperatives of the relationship of partnership which had been addressed by the Court of Appeal in the landmark Maori Council case¹¹⁰. It also went some way towards acknowledging the special relationship between Maaori people and certain aspects of the environment to which Chilwell J. had given legal recognition in his Huakina judgment¹¹¹.

On the other hand, however, "consultation" as an exercise almost always - and perhaps even by definition - involves a stronger and a weaker party: the consulter is the stronger party, has control over the agenda, and determines what weight will be attached to the views of the consultee in any decision-making.

The way in which consultation bears on the Crown/Maaori dynamic in a situation where Maaori are theoretically equal partners under the Treaty has, of course, been commented upon by others:

Many say in fact that consultation does not go far enough to implement the Treaty - that it is shared decisionmaking, and/or tribal autonomy, that was contemplated by at least the Maori Treaty partner. In fact, the National Council of Churches in 1986 commented that:

"We have to consider seriously the appropriateness of asking Maori people to be advisors in their own land. The Treaty of Waitangi was meant to affirm the partnership, not Maori people merely advising..." (Bob Scott quoted in *The Royal Commission on Social Policy*.)¹¹²

¹¹⁰ New Zealand Maori Council v. Attorney-General [1987] 1 NZLR 641

¹¹¹ Huakina Development Trust v. Waikato Valley Authority [1987] 2 NZLR 188

¹¹² Philippa McDonald, (supra n.108), page 8

So whereas looking through some eyes we can see that acknowledging the need to consult with Maaori interests in relation to the management of resources is a major - perhaps even excessive¹¹³ - concession to the significance of the Treaty, other eyes see the matter quite differently.

To them, the appropriateness of consultation is very much in question when, as they see it, the Treaty imperative is *te tino rangatiratanga*. Even for the Court of Appeal, a quintessentially Paakehaa body, the Treaty demands a relationship in the nature of *partnership*. Partnership connotes a degree of equality of contribution rather than a Crown-determined level of involvement by Maaori which is invited on Crown terms.

The Resource Management Act is, nevertheless, a statement of confidence in the ability of consultation processes to facilitate a meaningful role for Maaori in resource management. It is only by consultation with *tangata whenua* that regional and territorial councils will access the necessary advice and information to enable them to recognise and provide for matters of significance to Maaori and to take into account the principles of the Treaty of Waitangi¹¹⁴. Only the local Maaori people can reliably inform councils as to the views of that group living in that area so as to facilitate this perspective being fed into planning and decision-making. This give and take of advice and cultural, political and legal information should amount to more than merely being in the same building when decisions are being made.

But the experience of the Canadian Indian quoted above needs to be heeded. The Parliamentary Commissioner has found in her investigations, as the Royal Commission on Social Policy did before her, that Maaori generally have a jaundiced view of being subject

¹¹³ The Ministry for the Environment's publication People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform/Te Iwi me te Taiao: Te Whakatau Hou a te Kawanatanga (December 1988) reports (pages 12-13) that in the first phase of the Resource Management review, in response to the release of an information kit in May 1988, 400 written and 500 oral submissions were received. Then Directions for Change: A Discussion Paper was released by the Ministry for the Environment in August 1988. In phase two of the review, meetings and hui were held throughout New Zealand, and the questions and comments from the public were noted in a departmental database. To this database were added the 693 submissions that had been received as reactions to the Discussion Paper. The Ministry for the Environment's next publication was People, Environment, and Decision Making, which provides general synopses of the views offered by the public. It is apparent that many people advocated the role of the Treaty, and the influence and control of Maaori, being kept to a minimum.

¹¹⁴ As required by Sections 6(e), 7(a) and 8

to a consultation process.¹¹⁵ They have "a high degree of scepticism about the value of making submissions and the likelihood of fundamental changes ever being made to the position of Maaori"¹¹⁶.

This attitude on the part of Maaori people immediately raises a question as to whether *iwi* will be prepared to support this legislation by participating fully in the planning and decision-making processes. Although some Maaori groups will already have a disposition one way or the other towards being involved in the kind of consultation processes envisaged in the Act, most will be open to persuasion.

But what will happen in situations where Maaori are unforthcoming, and councils are disposed to take a minimalist approach, effectively requiring Maaori to take the initiative and set the agenda?

Interestingly enough, the Parliamentary Commissioner for the Environment relied, in her recent publication¹¹⁷ on the definition of consultation propounded by McGechan J. in a recent High Court case Air New Zealand Limited v. Wellington International Airport Limited¹¹⁸. In considering whether Wellington International Airport Limited had "consulted" with the international airlines on landing fees at Wellington Airport (as required by the legislation), the Judge said:

Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.¹¹⁹

After considering "consultation" at some length, in the course of which the Judge observed that consultation must be "no mere formality"¹²⁰, must be "allowed sufficient time"¹²¹,

¹¹⁵ Proposed Guidelines for Local Authority Consultation with Tangata Whenua (supra n.90), page 3

¹¹⁶ Royal Commission on Social Policy, The April Report, 1988, Vol.I, pages 272-273

¹¹⁷ Proposed Guidelines for Local Authority Consultation with Tangata Whenua (supra, n.90) pages 2-3

¹¹⁸ High Court Wellington Registry, CP No 403/91, Mc Gechan J, 6 January 1992

¹¹⁹ Ibid, page 8. The quotation is taken from another of McGechan J.'s judgments in West Coast United Council v. Prebble (1988) 12 NZTPA 399.

¹²⁰ Air New Zealand Limited v. WIAL, page 7

¹²¹ Ibid, page 8

but is ultimately not subject to generalisation depending rather on context¹²², he concluded that the consultation which had taken place between Wellington International Airport Limited and the airlines was not adequate to be properly so-called.

The Court of Appeal has, however, differed from him on this very point. In its very recent judgment on appeal from McGechan J.'s decision¹²³, the Court of Appeal focussed on the failure of the airlines to respond when they had the opportunity. McKay J. said:

Its [Wellington International Airports Limited's] obligation was to consult, and on the evidence and on the Judge's findings, it did that in a way which gave the Airlines every opportunity to seek such information as they required and to put forward any matters they wished. Their failure to do so does not mean that they were not consulted.¹²⁴

And,

There was no obligation on WIAL to do more than consult properly and with an open mind before making any final decision.¹²⁵

The Court's concluding statement is significant:

The Judge's [ie McGechan J.'s] findings of fact, fully supported by the evidence, make it clear that the Airlines were properly consulted before any decision was made. Mr Thom, as chairman of WIAL, went into the consultation process with an open mind and gave the Airlines every opportunity to state what information they wanted and to put forward any matters they wished. The Airline representatives deliberately refrained from putting forward their case for tactical reasons, but cannot rely on this as invalidating the consultation process...If the party having the power to make a decision after consultation holds meetings with the parties it is required to consult, provides those parties with relevant information and with such further information as they request, enters the meetings with an open mind, takes due notice of what is said, and waits until they have had their say before making a decision, then the decision is properly described as having been made after consultation. It is immaterial that those parties may have had other concerns which for their own

¹²² Ibid, pages 7-8

¹²³ Wellington International Airport Limited v. Air New Zealand Limited CA 23/92, per McKay J., 24 September 1992

¹²⁴ Ibid, pages 43-44

¹²⁵ Ibid, page 44

reasons they chose not to put forward.¹²⁶

Thus we see the Court of Appeal taking a considerably more summary approach to the imperatives of consultation than that adopted by McGechan J. (and endorsed by the Parliamentary Commissioner for the Environment). It is an approach which puts considerably more responsibility on the consultees, requiring them to be forthright, seize the moment, and put their cards on the table. It is immediately apparent that this style of conduct does not accord with Maaori cultural preferences, where positions typically evolve slowly, and nuances certainly take some time to emerge.

The consultation between Wellington International Airport Limited and the airlines of course took place in a commercial context. Consultations under the Resource Management Act would take place in a different context. Moreover, the statutory scheme for consultation in the Resource Management Act providing for a Maaori input is considerably more complex than merely requiring "consultation" *per se*. Consultation will, it is true, very often be the *means* of fulfilling those statutory obligations. It would certainly be arguable that the Treaty principles' emphasis on active protection and dealing in good faith will have the effect of requiring the consulter under the auspices of the Resource Management Act to take more of a "McGechan J approach" than a "Court of Appeal approach" as set out in the decisions referred to above.

There can be no doubt that the level and quality of participation by Maaori will be very influenced by the approach of those who control these processes.

It is absolutely clear that local government officials involved in planning and decision-making related to resource management cannot take a merely passive role if consultation processes under the Act are to succeed. Apart from the "active protection" principle of the Treaty which is invoked in Section 8, the terms of Section 6(e) dictate that those exercising functions and powers under the Act must "recognise and provide for" the relationship of Maaori and their culture to resources, and to have "particular regard to" *kaitiakitanga* under Section 7(a). It will not be possible for those matters to be actively recognised, provided for and given particular regard unless *information* is sought from Maaori as to, for instance,

- * what are the features of the relationship of the local *iwi* with their ancestral lands?;
- * over what land does that *iwi* claim a special interest?;

¹²⁶ *Ibid*, pages 45-46

- * what are the special sites within the *rohe*?; can the *iwi* reveal the whereabouts of *waahi tapu*?
- * what other *taonga* define the relationship of that *iwi* with that land?; and
- * what are the principles of *kaitiakitanga* upheld by that *iwi*, and how are they implemented?

The Maaori cultural and spiritual values underlying their resource management preferences will need to be communicated and understood in order for those with powers under the Act to fulfil their statutory mandate. This will require the establishment of positive relationships between local and regional authorities and *iwi* in their area. A perfunctory or tokenistic response will almost certainly fail to build the framework for the detailed interchanges over months and years which will be required if the "consultation" provisions of this Act are to work.

One obvious source of information such as that outlined above will be the "relevant planning document recognised by an *iwi* authority affected"¹²⁷ by the particular plan being prepared or the decision being made. The Office of the Parliamentary Commissioner for the Environment points out that *iwi* management resource plans are only one source of the information councils will need in order to fulfil their duty under Section 6(e) to have regard to matters of importance to *tangata whenua*:

Councils should not presume to know what issues affect *tangata whenua* and in what way. Only *tangata whenua* themselves can identify what these matters are, and they may or may not have the desire and/or resources to spell them out in *iwi* planning documents.¹²⁸

In order to overcome the problem of lack of resources, the Commissioner's Guidelines advise councils to fund *iwi* to enable them to prepare their own planning documents for ongoing reference by both resource management authorities and *tangata whenua*¹²⁹. This is offered as a cost-effective approach for both parties because the existence of a policy document of general application would be likely to lessen the need for continual *ad hoc* consultations as issues arise.

Iwi are certainly much more likely to be disposed to take an active role in the various

¹²⁷ Sections 61(2)(a)(ii), 66(2)(c)(ii), 74(2)(b)(ii)

¹²⁸ Proposed Guidelines for Local Authority Consultation with Tangata Whenua (supra n.90), page 23

¹²⁹ *Idem*

planning and consent processes if the relevant local authorities recognise that the dedication of time on an ongoing, unpaid basis is not realistic.

Maaori groups are already subject to a condition variously called "submission fatigue" and "consultation burn-out". There are many, many public issues upon which Maaori are now called to comment, and many issues which confront them also from within their own social and political structures. All of these require meetings to be called, documents to be considered and analysed, reports to be written.

In any *iwi* group there are usually only a few people who have the necessary time, commitment, and expertise to be referred to when the group's views are sought on important, official matters. Those people are turned to again and again, and they are rarely paid for their efforts. There is considerable pressure on them from within the group to perform, and the agency seeking the views or advice will typically also apply pressure relating to the limited timeframe within which the advice must be available. As the Treaty obligation to seek a Maaori perspective becomes more entrenched, these people will be called on more and more. There is no doubt that the provisions of the Resource Management Act will add to their workload, and one wonders when the limits of their ability to contribute will be reached. There must come a point when they cannot make the required commitment, or cannot make it in time or sufficiently well, simply because of the endless demand.

The Act does not confront this problem. It tacitly endorses the present position where those controlling the process are paid and supported institutionally, but the resource problem of those being called upon to participate in it is not the subject of consideration. Some local authorities will doubtless see the necessity to find funds to support the Maaori input to the processes of the Resource Management Act, but others will not. This is likely to be an issue which local authorities and their officers will be faced with on a day-to-day basis.

The problem will not be made easier by the fact that, in any one area, consultation with the relevant "iwi authority" as required by the Act will mean coming to grips with the vexed question of representation. At the time when the Resource Management Law Reform was in progress, it was envisaged that there would be companion legislation which would address the representation issue by setting up "Runanga" as legislatively recognised representative bodies of Maaori. This companion legislation, the Runanga Iwi Act, was repealed as one of the first acts of the National Government in 1990. As a result, there

is no clear answer to the question "What is an *iwi* authority?" provided either within the Resource Management Act or outside it. Local authorities themselves will be required to find answers to the following critical, but often difficult, questions: which groups in their area can claim *manawhenua*¹³⁰ in the geographical area concerned?; do other groups challenge that claim?; how many people do the various groups represent?; do they represent a *hapuu* or *iwi* interest?; should the local authority also consider the views of groups who, while not having a *manawhenua* interest in the area in question nevertheless have historical connections with it?; should the views of *tauiwi*¹³¹ be considered; and who are the mandated spokespeople of the relevant groups?

Local authorities will need to acquire expertise in devising a policy on these issues, and in implementing the policy. This is a basic prerequisite to ensuring that, when engaging in consultation, those running the process are talking to the right people. I would not be at all surprised if it transpires that this "representation" problem is the one that councils find most intractable.¹³²

Even where well-disposed people from councils and properly mandated *iwi* come together for consultation on a resource management issue, potential difficulties lie in wait. Cross-cultural communication is never easy. Joan Metge and Patricia Kinloch put it this way:

On the basis of our experience working with Maoris and Samoans in their dealings with Pakehas, we...have become convinced that a good deal of miscommunication occurs between members of these groups because the parties interpret each others' words and actions in terms of their own understandings, assuming that these are shared when in fact they are not - in other words, because of cultural differences that are not recognised because we all take our own culture very largely for granted and do not question its applicability. A culture can be simply and usefully defined as "as system of shared understandings" - understandings of what words and

¹³⁰ The manifest control and authority that confers *tangata whenua* status on the group which has it. "Mana whenua" is defined in the Resource Management Act as "customary authority exercised by an *iwi* or *hapu* in an identified area".

¹³¹ Maaori people whose tribal base is elsewhere, but who live in the geographical area in question.

¹³² The Ministry of the Environment, in their 1991 publication *Consultation with Tangata Whenua*, identify the question "Who should be consulted?" as a "tricky and frustrating" one (page 13). The answer to the question in any area may include, they say, obvious *rangatira* (paramount chiefs) like Sir Hepi Te Heu Heu of Ngati Tuwharetoa, elected bodies of *iwi*, charitable trusts, incorporated societies, trust boards, statutory trusts, individuals, groups of people, or a number of corporate bodies representing two or three *iwi*, and many others. Local authorities are encouraged with the advice that "Diligent and sensitive investigation should always help. It requires a strong commitment but the results should be worthwhile." (page 13)

actions mean, of what things are really important, and of how these values should be expressed. These understandings are acquired in the process of growing up in a culture and most become so thoroughly internalised that we cease to be aware of them, coming to think of them (if at all) as "natural" or at least "second nature", not only the right but the only conceivable way of doing and looking at things, identifying "our way" as "the human way".¹³³

Both parties to the consultation, but particularly those controlling the process, will need to be alert to areas of misunderstanding, distrust, and confusion. The consulters will have to be at pains to ensure that the Maaori consultees rate the experience as useful and satisfactory, because this will greatly influence their willingness to support decision-makers and participate in the future.¹³⁴ Application of the necessary skills to ensure successful consultations will dictate the acquisition on the part of local government officials of sufficient cultural insight to ensure that the process does not proceed entirely on Paakehaa terms. There will be many ways of achieving this, and Maaori people will often help, but acquisition of a basic range of awarenesses to enable the issue to be properly addresses is the first, crucial step.

There are those, of course, who are not interested at all in investigating the question of the quality of consultation. They simply reject consultation as a proper means of facilitating a Maaori input into resource management. The regime should, they believe, have had a much harder-edged Maaori component. Maarire Goodall's views along these lines have already been discussed.¹³⁵ In a similar vein, Hirini Matunga laments the fact that iwi management plans are given a different status in the Act from the plans generated by regional and territorial authorities. He expressed his doubts in relation to the legislation (then in Bill form) as follows:

No provision is made for the iwi to have any active equitable role in this process. There is no requirement that regional and district plans be consistent with iwi management plans. If the aim of this Bill is integrated resource management, one would have assumed that consistency across the three types of plans ie regional, district and iwi would have been essential.

Perhaps of greatest concern is the lack of statutory recognition given to iwi management planning as a valid resource

¹³³ Talking Past Each Other: Problems of Cross-Cultural Communication, (Victoria University Press, Wellington, 1978, Reprinted with additions 1991), page 8

¹³⁴ Proposed Guidelines for Local Authority Consultation with Tangata Whenua (supra n.90) page 3

¹³⁵ See pages 17-18 supra

management mechanism. Despite earlier references in the reform to iwi management plans, they are only included in the Bill as "incidental" subordinate appendages to regional and district plans.

If this Bill is to have any meaningful validity in terms of the Treaty substantial changes need to be made to it to:

(a) Recognise iwi management plans as a valid and important resource management mechanism.

(b) Provide for iwi management plans to be prepared by the iwi in negotiation with the resource management agencies ie regional and territorial local government.

(c) Require that consistency be achieved through regional, district and iwi plans.¹³⁶

While Hirini Matunga's views are clearly not without substance, there can be little doubt that making reference to, and conformity with, *iwi* management plans a *requirement* of local authorities in carrying out their own planning exercises would have raised serious questions as to the Crown's right to compel *iwi* to produce documentation recording their own resource management imperatives. Moreover, there would be the inevitable problem of planning documents of different *iwi* in an area being inconsistent with each other. How would a local authority "achieve consistency" in that circumstance? The problems associated with the approach advocated in the quotation above are manifold. An administrative nightmare could ensue which would preclude achievement of the Act's goal of sustainable management.

In the context of seeking information from *iwi*, the Parliamentary Commissioner for the Environment provides this pithy caution:

Consultation is a means to establish the appropriate role for tangata whenua in resource management, not an end in itself.¹³⁷

These words really go to the heart of the matter. After all the talking is done, will *actions follow* that will materially change the position of Maori in decision-making affecting resources? Pita Rikys thinks not:

At first sight, this piece of legislation seems to represent a brave new world. It contains a provision requiring that account be taken of the Treaty of Waitangi, recognition of Maori spiritual and cultural values, consultation, requirements, and even contains specifically Maori concepts like Kaitiaki. But, it is what

¹³⁶ Hirini Matunga, "Maori and Treaty of Waitangi Issues", March 1990 Planning Quarterly, page 19

¹³⁷ Idem

it does not do that will determine its effectiveness, and what it does not do is shift the balance of power. Primary responsibility for resource management under the act shifts from central to local government. what it fails to do is make any change at all to the structures of local government at either the political or bureaucratic level (where the power and control will be exercised) that will ensure effective Maori participation and proper appreciation of Maori and Treaty issues. The strongest requirement in the new act is a requirement to *consult Maori*.¹³⁸

[Emphasis original]

I do not incline to the dismissive tone adopted by Pita Rikys. But I think I must agree with him that the structure and culture of local government bureaucracies will frequently prove a barrier to change. Structural change has not accompanied this reform. It merely changes the procedures that the structures must follow.

Thus, while the Resource Management Act provides a procedural framework within which Maaori *can* become an integral part of resource management, with their perspective fully reflected in key planning documents and resource consent decisions, there is no inevitability that this will occur. Because the Act is, as Maarire Goodall has said¹³⁹, permissive rather than mandatory, there is probably scope under the new regime for little to change.

IV ANOTHER PERSPECTIVE

Questions raised by the study of legal pluralism

In legal pluralist terms, this paper represents an augmentation of the annals of centralist discourse. I have provided an appraisal of the Maaori-related content of the Resource Management Act, dealing with that Act essentially on its own terms. But before concluding, I want to step outside this positivist tradition to raise some questions about the means by which we have chosen to recognise the legitimacy of a Maaori input into resource management - that is, by incorporation in a statute. These questions arise from an area of still relatively-new legal scholarship called "legal pluralism".

John Griffiths' seminal and much-quoted 1981 article addressed at answering the question

¹³⁸ "RESOURCES: Treaty Rights and Private Property" (supra n.96), page 110

¹³⁹ Op.cit. at page 17 supra

"What is "legal pluralism"?" concluded with some passages which are central to an understanding of this branch of the study of law. Griffiths said:

Any sort of "pluralism" necessarily implies that more than one of the sort of thing concerned is present within the field described. In the case of legal pluralism, more than one "law" must be present...

Legal pluralism is an attribute of a social field and not of "law" or of a "legal system". A descriptive theory of legal pluralism deals with the fact that within any given field, law of various provenance may be operative. It is when in a social field more than one source of "law", more than one "legal order", is observable, that the social order of that field can be said to exhibit legal pluralism.¹⁴⁰

New Zealand's social order, like all others, exhibits legal pluralism. A locus classicus of thinking about the multiplicity of normative orders is the interaction of the state and indigenous peoples. Viewed in Griffiths' terms, groups of Maori people operate within New Zealand society as "semi-autonomous social fields", and the customary or folk law that regulates the activities of the members of the field operates contemporaneously with (and usually subordinate to) the overarching regulation of the state law¹⁴¹.

Griffiths explains:

...it follows that law is the self-regulation of a "semi-autonomous social field". The idea that only the law of the state is law "properly so called" is a feature of the ideology of legal centralism and has for empirical purposes nothing to be said for it. Distinctions can, where appropriate, be made between more or less differentiated forms of law. The self-regulation of a semi-autonomous social field can be regarded as more or less "legal" according to the degree to which it is differentiated from the rest of the activities in the field and delegated to specialized functionaries. But differentiated or not, "law" is present in every "semi-autonomous social field", and since every society contains many such fields, legal pluralism is a universal feature of social organization.¹⁴²

[Emphasis original]

I do not think it is necessary to investigate in any detail the degree to which law is

¹⁴⁰ John Griffiths, "What is legal pluralism?", (1981) 19 Journal of Legal Pluralism pages 1-55, page 38

¹⁴¹ The term "semi-autonomous social field" was first coined by Sally Moore and explicated in these terms in her work Law as Process: An Anthropological Approach (Routledge & Kegan Paul, London, 1978). John Griffiths analyses and approves her analysis in "What is "legal pluralism"?" (ibid).

¹⁴² "What is "legal pluralism"?" (supra n.140) at page 38

differentiated in the "semi-autonomous social field" of Maaori society. For these purposes, it suffices to identify the fact that Maaori have a range of complex norms relating to the use and management of the environment which can be characterised as Maaori environmental folk law, or customary law. The Resource Management Act, with its wide-ranging provisions for "consultation" with Maaori groups, envisages Maaori preferences shaped by this folk law, and stated in conformity with it, being fed into the decision-making system established by the state. In other words, the state law has chosen to recognise the existence of Maaori environmental folk law, and has used the Resource Management Act to enforce that recognition by state machinery which is not "indigenous" at all.

This kind of recognition of indigenous peoples' norms by the state is characterised by Griffiths as being pluralism in the "weak" sense:

"Legal pluralism" besides referring (in the "strong sense" which is the subject of this article) to a sort of situation which is morally and even ontologically excluded by the ideology of legal centralism - a situation in which not all law is state law nor administered by a single set of state legal institutions, and in which law is therefore neither systematic nor uniform - can also refer, within the ideology of legal centralism, to a particular sub-type of the sort of phenomenon regarded as "law". In this ("weak") sense a legal system is "pluralistic" when the sovereign (implicitly) commands...different bodies of law for different groups in the population. In general the groups concerned are defined in terms of features such as ethnicity, religion, nationality or geography, and legal pluralism is justified as a technique of governance on pragmatic grounds. Within such a pluralistic legal system, parallel legal regimes, dependent from the overarching and controlling state legal system, result from "recognition" by the state of the supposedly pre-existing "customary law" of the groups concerned. While such pluralism is not limited to the colonial and post-colonial situation, that is certainly where it is best known.¹⁴³

[Emphasis original]

The centralist ideology described by Griffiths has been all-pervasive in New Zealand's politico-legal culture. It will be noted that both Shane Jones and Maarire Goodall in the passages quoted above¹⁴⁴ accept that an incorporation in the new resource management regime of a statute-based Maaori role is necessary and desirable. Both seek for Maaori a major role in the Paakehaa-created decision-making structures enshrined in the new legislation.

¹⁴³ Ibid, page 5

¹⁴⁴ See page 17

Those supporting Maaori aspirations to strengthen and uphold Maaori culture in New Zealand seem not to have queried whether "the Maaori perspective" *should* be provided for by means of incorporation in a statute.

This can be accounted for partly by the fact that Maaori "victories" of recent years - victories resulting not only in "wins" in court, but more importantly in changing the political agenda so as to make the Treaty of Waitangi a live issue at a national level - have arisen primarily as a result of the invocation of the Treaty principles in legislation¹⁴⁵. This has encouraged a tendency towards perceiving political power for Maaori as flowing from requirements in legislation to take account of, or (preferably) act consistently with, the Treaty of Waitangi or its principles.

I think that there has also been a general acceptance by Maaori people¹⁴⁶ of the pervasive "centralist" view of the law which prevails in New Zealand. The politico-legal culture of this country is extremely statute-oriented in its search for solutions to any problem, and what has often been viewed by the majority culture as "the Maaori problem" has not proved any exception. Nor has this approach been seriously questioned, so far as I am aware, by any of the minority cultures.

There is no doubt that in the past Maaori folk law has been in conflict with state law relating to the environment. The general (state) law has routinely permitted uses of the environment which do not accord with the norms observed by Maaori. Cases under the Water and Soil Conservation Act, for instance, have often arisen where Maaori have opposed uses of the water which are inconsistent with the Maaori relationship with and traditional respect for the *mauri* or life force of the body of water concerned.

There is no doubt that one way of reducing the likelihood of these conflicts arising is, by enabling, or requiring, Maaori preferences in this regard to be taken into account in the

¹⁴⁵ The legislation in question is the State-Owned Enterprises Act 1986, which invoked the Treaty of Waitangi in Section 9. The way in which litigation based on this legislation, and claims before the Waitangi Tribunal, have been used by Maaori to change the political agenda is the subject of my 1991 LLM Research Paper entitled: "Leverage through litigation: the new Maaori politics".

¹⁴⁶ There have been exceptions. Moana Jackson, for example, has for many years been lobbying for a parallel legal system for Maaori, particularly in the area of criminal offending. He does argue, however, that "without political authority, justice is a meaningless concept" ("JUSTICE: Unitary or Separate" in *New Zealand in Crisis*, Edited by David Novitz and Bill Willmott, GP Publications Limited, Wellington, 1992), page 175.) This means that Jackson argues not so much for a Maaori legal order in the pluralist sense as a species of Maaori sovereignty of the kind sought by the likes of Donna Awatere and Atareta Poananga in the 1970s and early 1980s. Arguments for Maaori sovereignty of course fall within the centralist ideology identified by Griffiths.

granting of resource consents and the preparation of planning documents. This is the approach taken by the new legislation.

There must be a danger, though, that in the process of providing the necessary information to enable these preferences to be given force, Maaori will have to provide both a linguistic and cultural translation of the relevant concepts. This may involve a reduction and reconstitution of those concepts so as to make them comprehensible and acceptable to a Paakehaa audience, and this process could lead over time to their fundamental alteration and even debasement. There would assuredly be a loss to Maaori if their environmental norms were to become in some sense codified and reduced so as to make them useful and palatable in the new environmental regime, rather than understood in the context of the complex spiritual world-view with which they were traditionally inextricably linked.

This is the fear being expressed by Chris Webber, where he provides a Maaori perspective on the Coastal Management regime implemented by the Resource Management Act:

With the new requirements to "consult", Maori input to coastal management will be stretched. Spokespeople are being asked to withdraw from holistic views of their iwi to suit the needs of authorities with different jurisdictions. This is quite the opposite of rangatiratanga: centralised management by iwi over the resources within their boundaries.¹⁴⁷

The Law Reform Commission of Australia expressed related concerns in the context of their *Report on the Recognition of Aboriginal Customary Laws*¹⁴⁸, saying:

...both codification and general incorporation of Aboriginal customary laws carry with them the danger that Aboriginal people would lose control over their laws, and that there may be unwarranted intrusion into and disclosure of secret matters.¹⁴⁹

The Commission favoured what it called "functional recognition" of Australian customary law, that is recognition on an issue-by-issue basis. Recognition of Maaori customary norms in the Resource Management Act is an example of a functional recognition, but as the Commission pointed out:

¹⁴⁷ "Whole or Part: A Maori View" Contribution by Chris Webber to a Special Feature on Coastal Management in *Terra Nova*, February 1992, Issue 14, page 18

¹⁴⁸ Report No 31 of the Australian Law Reform Commission, Summary Report, Australian Government Publishing Service, Canberra 1986

¹⁴⁹ *Ibid*, page 20

A criticism of functional recognition is that it involves the general legal system dictating the extent to which it is prepared to recognise customary laws rather than conceding full recognition. However any form of recognition that takes place within the framework of the general law is subject to the same criticism.¹⁵⁰

While the Commission's latter observation is undoubtedly true, the consequences of it should not be lost sight of. The general legal system dictates not only the extent to which it is prepared to recognise the customary law concerned, it also dictates the context within which the recognition will take place, and the nature of the recognition.

It may be that the inevitable reductivism of Maaori environmental inputs into the resource management process is all the more critical in circumstances where the Maaori hold on the cultural reference points for the environmental norms are not universally understood or experienced by Maaori themselves. As a by-product of fitting their perspective into the Paakehaa legal slot provided, will Maaori attention be diverted from revitalising the Maaori cultural understanding of these norms (a revitalisation process which can only come from within *Maaori* structures) in a *Maaori* context?

Observations on "indigenous environmental law" in the Central Moluccas and the recent enthusiasm of the Indonesian government for incorporating them in state policies contain interesting parallels:

At present, local environmental knowledge is decreasing rapidly. Many villagers have astonishingly little knowledge of their environment and the technologies that were commonly used as shortly ago as their grandfathers' generation. General discrimination of such knowledge as "traditional" and "backward", modern school education, and replacement of local knowledge by government knowledge, for example through agricultural extension, and the transmission of western scientific knowledge have made it difficult to maintain such knowledge...

Such earlier knowledge cannot simply be revitalized if outsiders, state governments, ecologists and academics suddenly show greater respect and appreciation for it. Nor can ideal notions of *sasi*¹⁵¹ be moulded into a well functioning part of social organisation unless simultaneously the further political, economic

¹⁵⁰ Ibid, page 21

¹⁵¹ Similar to the Maaori practice of *raahui*, basically the prohibition of use of resources under pressure.

and cultural context is remodelled as well.¹⁵²

There is no easy solution to these issues. But it is important to understand the sense in which the Resource Management Act is an example of a policy of imposing what is, from the perspective of Maaori customary or folk law, a completely alien set of rules. That set of rules provides a purported recognition of aspects of Maaori folk law by requiring as part of the decision-making process a consideration by the decision-makers of Maaori environmental preferences. Those preferences will, however, be examined and weighed within a completely foreign legal context.

I have argued above that this incorporation of Maaori folk law into state law is likely to involve a transformation of the indigenous law. Already Maaori environmental norms have been transported from their original customary context into other situations, and as a result they have inevitably changed and developed. Change is intrinsic to all cultures, and is not necessarily negative. Maaori folk law is a dynamic social force and I am not suggesting here that it should be "preserved" in any artificial way, and thereby rendered static and unresponsive.

It cannot be denied, however, that the kind of change that might very well occur in the legislative context provided by the Resource Management Act could be very fundamental indeed. The feeding of Maaori environmental information into the Resource Management Act processes will demand a high input of resources from Maaori if they are to participate fully, and I foresee the possibility that this could become the primary locus of the discussion, application and operation of Maaori environmental norms. This may mean that, over time, Maaori indigenous environmental norms will be in danger of losing their "indigenous" character altogether, simply becoming an indistinguishable part of the international ethos of ecological soundness.

On the other hand, if the state does not co-opt indigenous modes into the mainstream of general law, they are likely to be marooned. The customary nexus of which Maaori traditional norms were originally a part has already reeled under the impact of "the horrors of colonisation"¹⁵³, and has to a considerable extent lost its spiritual force and potency.

¹⁵² F von Benda-Beckmann, K von Benda-Beckmann and A Brouwer, "Changing "indigenous environmental law" in the Central Moluccas: Communal regulation and privatisation of Sasi", Paper presented to the 1992 Congress of the Commission on Folk Law and legal Pluralism on "Resources, rules and identity in state and unofficial laws", Wellington, New Zealand, 27-30 August 1992

¹⁵³ Moana Jackson, "JUSTICE: Unitary or Separate" in New Zealand in Crisis (supra n.96)

Concepts like *tapu*¹⁵⁴ and *raahui* would, I believe, only rarely be understood and practised now in the same way that they were when the gods reigned over Maaori life, and *tapu* was their unquestioned means of control.

So although the Resource Management Act may constitute a final colonisation and transformation of Maaori environmental norms, it may also ensure that they survive and, even if in a derived form, gain currency and strength in the politico-legal mainstream.

It will be apparent that I do not provide answers to the questions raised by looking at the Resource Management Act through the prism of legal pluralism. I wanted simply to use this prism to cast light on issues which seem to me to be important, notwithstanding that they have generally been overlooked in discussion of the Maaori elements of the Resource Management Act. This discussion has focussed rather on how *strong* the invocation of the Maaori perspective needs to be, rather than whether an Act of Parliament is the only, or preferable, way to give effect to the traditional Maaori norms.

Perhaps this discussion should have ranged more widely. As Marc Galanter¹⁵⁵ says,

Every legal system has to address the problem of the autonomy and authority of the various other sorts of normative ordering with which it coexists in society. The big legal system faces the question of how to recognize or supervise or suppress the little systems. Legal centralism is one style of response to this generic question of legal ordering, and its exhaustion suggests the need for reflection on other models.¹⁵⁶

In New Zealand, and in relation to the question of resource management, I do not believe that we *have* reflected on other models. If the "Maaori provisions" of the Resource Management Act which will be the subject of discussion in the rest of this paper prove successful in providing for a meaningful and culturally positive expression of Maaori environmental norms, then for practical purposes other models may be irrelevant. But if the detriments of the legislated approach outweigh the benefits, then we may have to revisit these issues. We may have depart from our practice of looking out from within the official

¹⁵⁴ *Tapu* is a very subtle and complex concept which I do not pretend to understand as it was traditionally understood. In simple terms, however, I think it is safe to describe it as spiritual power and influence derived from the gods.

¹⁵⁵ In "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law" (1986) 24 *Journal of Legal Pluralism* pages 1-47

¹⁵⁶ *Ibid*, page 28

legal order,

abetting the pretensions of the official law to stand in a relationship of hierarchic control to other normative orderings in society¹⁵⁷

and identify the *real* choices that confront us.

V CONCLUSION: THE FUTURE

Thus, while the combined effect of Sections 5, 6, 7 and 8 provide a legislative context within which really recalcitrant councils could find their decisions the subject of judicial review, the language of the Act, as Maarire Goodall pointed out, is at the end of the day permissive and not mandatory. Decision-makers are required to

- * "have regard to" the contents of *iwi* planning documents and the concept of *kaitiakitanga*;
- * "take account of" the principles of the Treaty of Waitangi; and
- * give recognition to and provide for the relationship of Maaori with ancestral lands, water, sites, *waahi tapu*, and other *taonga*,

in achieving the purpose of the Act. In practice, these requirements will certainly oblige councils to go through the *form* of a consultation process with Maaori, but doubts linger as to whether they will also mean that decision-makers are obliged also to take on board the *substance* of a real partnership with Maaori in resource management. What confidence can reasonably be had that councils will not comply merely with the form of the procedures laid down in the Act, incorporating a Maaori version of the conservation ethic in plans or decisions where it is convenient to do so, without any significant movement towards a *sharing* of the management and control of resources?

Frankly, the auguries are not good. The Parliamentary Commissioner for the Environment, Helen Hughes, set out the conditions in which the new processes will take effect in the Preface to her Office's recent publication:

My investigations have found generally that local government feels pressured by multiple community demands and statutory

¹⁵⁷ Galanter, (supra n.155), page 20

time constraints, and is uncertain about the practical local implications of the principles of the Treaty and the requirements for consultation. Tangata whenua we have spoken to for the most part believe that even when consultation does take place, tribal concerns, cultural differences, and rights under the Treaty are not taken seriously by either local or central government.¹⁵⁸

I recently attended a meeting of Regional Council officers¹⁵⁹ who had an involvement with the "iwi consultation" aspects of Councils' work. An enormous disparity in the preparedness of Councils for the new dawn of Treaty awareness was evident. While some Councils had established standing committees and *iwi* liaison officers, some clearly had made no preparation for the new Treaty-related functions they would have to perform, and had little idea as to where to start. I would speculate that territorial authorities have been no more consistent in their response.

It follows, in my view, that the performance of local authorities in relation to a fulfilment of their duties to *tangata whenua* under this Act is likely to range from excellent to poor. Those in the "poor" category may well get their come-uppance, as Kia Matiratira bluntly advises *iwi*:

If Maori have not been involved, or if their stated aims have not been provided for, then a regional council is very much open to challenge in front of the Planning Tribunal or the Courts. Iwi should expect that regional councils will have to provide very sound reasons as to why they chose a particular path.¹⁶⁰

Those regional or territorial authorities with a fair-to-average response to the new imperatives will not usually be called to task. While it is available to *iwi* to seek judicial review of councils, treading the litigation track to keep decision-makers in line is not likely to be the solution that *iwi* are looking for. This is particularly so given that the costs of bringing cases to court will frequently constitute a complete barrier to Maaori groups. Again, the Act does not address the funding issue. The original conception was for Legal Aid funding to be available for "applications, submissions, and appeals under the Resource Management Act 1991..."¹⁶¹, but this provision was repealed by a 1991 amendment of

¹⁵⁸ Proposed Guidelines, (supra, n.90), page iii

¹⁵⁹ This workshop on iwi consultation was held at the Wellington Regional Council offices on 24 June 1992.

¹⁶⁰ (Supra, n.46), page 16

¹⁶¹ Section 19(1)(k) of the Legal Services Act 1991

the Legal Services Act. As a result, petitioners before the courts on matters under the Resource Management Act will be obliged to pay for it themselves. This circumstance could be argued to be a considerable constraint on the effectiveness of the legislation generally, and on the ability of Maaori to ensure that they play a meaningful role within it, in particular.¹⁶²

I am prepared to accept as a premise that maintenance of political viability and the integrity of sovereignty meant that no government would confront the issues relating to *rangatiratanga* over, and ownership of, resources - notwithstanding that these issues are so clearly raised by the review of New Zealand's resource management regime.

But even so, this legislation could have done better in its Maaori-related content. It could have made it harder for councils to perform their Treaty duties badly and get away with it. It could have provided Maaori with some areas of veto which would have given councils no *choice* but to knuckle down and come to grips with Maaori preferences and Maaori rights. It could have been accompanied by structural change, providing a different role for Maaori in local government. This was the original intention of the Labour Government.¹⁶³ Likewise, their original intention was to provide legal aid to ensure that the provisions of the Act had a reasonable prospect of being properly policed by the courts. These good intentions have gone astray.

There is no doubt that, in some regions where councils and Maaori groups have already established positive working relationships (or are determined to do so), a duty to "take account" of and "have regard" to Maaori interests will suffice. In those areas, we may indeed see a positive and irrevocable movement in the direction of creating a new cultural

¹⁶² A school of thought has developed which holds that the parameters of the Resource Management Act may not be laid down by the courts as a result of litigation, which was initially thought to be the likely process. This school of thought points to the fact that litigation serves to define words in legislation that are uncertain. Section 5 of the Resource Management Act, the key section, is however said to be particularly comprehensive and clear. As a result, potential litigants are more likely to submit their proposed development to a particularly thorough *factual analysis* to establish whether the data corresponds with the requirements of Section 5, and the other "Purpose and Principles" sections. This kind of approach will in most, if not all, cases yield a fairly certain answer which will preclude the need to proceed to try the matter in court.

Even if would-be developers do elect to adopt this pragmatic approach, however, I consider that litigation is more likely to be required to play a role to ensure that the appropriate weight is given by decision-makers and planners to the Maaori-related imperatives contained in the legislation. It may therefore be that the lack of available legal aid to fund litigation under the Act will be of disproportionate significance to Maaori.

¹⁶³ People, Environment, and Decision Making (supra n.93) page 5

paradigm for resource management in New Zealand. The determination and positive energy of a few individuals in key positions within councils and Maaori groups alike could make a tremendous difference, and in some felicitous circumstances I am certain that they will.

But I fear that there are many obstacles in the way of things changing generally, dramatically, or soon. An essentially permissive regime like this one is prey to inertia, and prejudice, and poverty. It is prey to a resistance to change which is endemic in most organisations: regional and territorial authorities are unlikely to prove exceptions to the rule. The new role for Maaori in resource-related decision-making is only one aspect of a piece of complex legislation which is making many new demands on councils. At the same time, many Maaori groups are under pressure, and ill-equipped to rise to the many challenges posed by this Act.

A more coherent picture of the strengths and weaknesses of the new resource management regime will emerge as it is progressively put into practice. Its Maaori content may give rise to a more committed and consistent response than I am predicting. I certainly hope so. My fear is simply that the tools for ensuring compliance with the Act's standards have not been as fully supplied as the statements of intent. As a result, I foresee Maaori aspirations for recognition of their norms and rights being advanced mainly where they coincide with the Act's conservation imperatives. For better outcomes, it will be necessary to look to fortuitous circumstances where goodwill and cultural awareness on the part of planners and decision-makers meet energy and optimism on the part of *tangata whenua*. In these situations, we may indeed see the creation of pockets of paradise where the environment is protected in partnership.

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