

Ten Years of the Resource Management Act for Maori

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For 10 years now Maori have worked with the new regime established by the Resource Management Act 1991. When the Act was first promoted in the Resource Management Law Reform one of the cornerstones of the reform was to be the recognition of Maori cultural and spiritual values and the Treaty of Waitangi.

Before I look at what has happened over the last 10 years I will briefly touch on matters leading up to the enactment of the Resource Management Act 1991 (RMA91).

The Town and Country Planning Act 1977 was one of the precursors to the RMA and it dealt little with Maori cultural and spiritual matters or of course the Treaty of Waitangi. That change in 1978 when Section 3 of the TCP Act was amended to provide for as a matter of national importance – “The relationship of the Maori people and their culture and traditions with their ancestral land”. It took some time before the definition of “ancestral land”, which had previously only related to land having been in continual ownership of Maori¹ to be extended² to an approach that allowed the Maori people to show ‘some factor or nexus between their culture and traditions and the land in question, which affects the relationship of the Maori people to the land.’

A significant influence in the development of a more general understanding of tikanga Maori and the environment. This came through a number of cases before the Waitangi Tribunal in the 1980s. The *Motunui-Waitara Report* of the Tribunal came out in 1983 and dealt with the issue of the discharge of effluent onto shellfish gathering beds of cultural and spiritual significance for the Te Atiawa people. This case was followed by similar cases in the

¹ *Knuckey v Taranaki County Council*, 6 NZTPA p 609

Manukau Harbour regarding among other things sewage discharge from Auckland, Kaituna River regarding a proposal to discharge sewage effluent from Rotorua. These and other cases became the backdrop for the Resource Management Law Reform.

Resource Management Law Reform

I will not go through the process of the resource management law reform except to highlight a few matters from the reform as they affected Maori.

It became clear early in the reform process that the issue of ownership of natural resources was pivotal for Maori. A task group of senior Maori practitioners brought together in the course of the reform published a statement of position that included the following:

The question of ownership rights in the Treaty must not be fudged, diluted or diminished. The Treaty gave ownership to the Maori people by virtue of tino rangatiratanga. There can be no backing off this. It is incumbent not upon the Maori but upon the Government to establish any claims of ownership in cases of litigation between Maori people and the Government. The bottom line in terms of partnership is equity between Maori and Pakeha.³

The Ministry for the Environment later in 1988 put out a paper where the Minister stated

The new law will be both practical and just. The principles of the Treaty of Waitangi form an important component for the decisions made in this review. The new Resource Management Planning Act will provide for more involvement of iwi authorities in resource management, and for the protection of Maori cultural and spiritual values associated with the environment.

In January 1989 Maruwhenua, the Maori secretariat of Ministry for the Environment put out the following statement in notes to Maori at hui:

The ownership of natural resources is of great concern to iwi. However, Government has decided that Maori ownership issues concerning natural resources are complex and cannot be resolved through the review of resource management laws. They are recognised as a key

² *Habgood v Royal Forest and Bird Protection Society*, HC, 1987

³ Part of a press statement from a task force set up after a hui at Taumata in 1988

issue to be followed through alongside the review, for example through the activities of the Waitangi Tribunal, and by negotiation between the Crown and iwi.

Ownership of Natural Resources and the Treaty Claims Settlement Process

And that statement probably holds true today as the matters of “ownership” issues about natural resources are still being dealt with before the Waitangi Tribunal and through the settlement negotiations process. None have proved to be easy and few have been resolved.

An example of one natural resource which has been dealt with is Pounamu (nephrite greenstone) for which the ownership has been transferred to Ngai Tahu in the South Island both in and on land as well as in the territorial sea. Other resources such as rivers and lakes have proved to be a greater challenge and few have made it through the process. The settlement of ownership of the bed of Lake Taupo with the Ngati Tuwharetoa tribe is one successful example along with the caves at Waitomo. However the situation of the Waikato river was left out of the first Waikato-Tainui settlement and is now being brought to a conclusion.

Maori Involvement in Resource Management

As for the involvement of Maori in the resource management processes covers by the RMA there can be little doubt this has moved from almost nil prior to 1988 to quite a high level today. This was probably at its highest level when firstly the New Zealand Coastal policy statement, the Regional Policy Statements, Regional plans were being drafted and consulted over by the relevant authorities. However the most intense involvement should have been with the formulation of the District Plans. This area was probably the greatest opportunity to ensure that Maori cultural and spiritual values entered the planning process, that processes of kaitiakitanga are provided for and that the Treaty of Waitangi principles are observed at a practical level.

Iwi Management Plans

The practice of the production of “Iwi Management Plans” has probably been fairly limited and their effectiveness as a means to achieve the goals mentioned above is also limited. Provisions written into policy statements and plans are most likely to be effective. Even less effective in my view has been recourse to the Environment Court over resource consent matters. The one exception to this being an effective way of asserting tino rangatiratanga has been over the issue of consultation especially by a consent authority.

Cultural Impact Reporting (Assessment of Environmental Effects)

Under the 4th schedule of RMA91, the requirements for assessing environmental effects are set out. These provide the basis for what can be termed Cultural Impact reporting. The clause in the schedule include:

- 2 (a) effects on those in the neighbourhood and where relevant, the wider community including any socio-economic and cultural effects;
- (d) Spiritual or cultural or other special value for present or future generations.

Cultural impact reports have been a useful tool especially in major projects to flesh out potential issues and deal with them by mitigation measures including design changes and so avoid having matters go to dispute.

Matters coming before the Waitangi Tribunal

In each of the new district inquiries resource management and environmental matters arise and are dealt with. The issues raised are quite variable. I have an example from the Gisborne District inquiry which includes some 16 claims. The extract below comes from the Statement of Issues (SOI) produced by the Tribunal from various Statements of Claim (SOC) and the Crown’s Statement of Response (SOR)

Environmental Issues

In many of the SOC's claimants have raised matters that can generally be termed environmental issues. These include both general issues such as deforestation, land clearances, erosion, and flooding, as well as specific instances of prejudice suffered as a result of the loss of or damage to important resources and taonga.

It appears self evident that since 1840 the natural landscape in Turanga has altered in fundamental and profound ways. Forests have been cleared, the course of rivers changed, land reclaimed, a harbour created, and pastures planted. It appears self evident that various natural resources were modified in the process that were of importance to Turanga Maori, such as kai moana, timber and forest resources, flax, and birds. It also appears self evident that there has been pollution and environmental despoliation in various forms. On the matter of consultation, the Crown has conceded that with respect to much twentieth century environmental legislation, little or insufficient regard has been required by decision-makers to be had to the cultural values and ancestral landscape of Rongowhakaata. (SOR 434.1) I presume that such comments would equally apply to other Turanga Maori.

The Tribunal needs to consider carefully how it approaches environmental issues pleaded in SOC's. It must ensure that its inquiries into such issues are focused in order to provide practical outcomes for the parties. The Tribunal cannot commence a general inquiry into environmental change from 1840 and nor would such an inquiry likely assist claimants. With that in mind, the Tribunal proposes to inquire into specific instances of loss or significant despoliation of resources or taonga:

Where the loss of the resource or taonga is significant;

Where the Crown could reasonably have prevented such loss;

Where the resource or taonga is of particular importance to one or more Turanga claimant groups;

Where the Tribunal has jurisdiction and is not constrained by the Treaty of Waitangi (Fisheries) Settlement Act 1992, the jurisdiction of the Environment Court or any other like legislation or Court; and

Where the Tribunal believes it has sufficient expertise required to investigate into such matters.

From the SOC's a number of these more specific issues appear to have been advanced, with varying degrees of specificity in pleadings. These include:

Loss of freshwater ponds of Waipaoa, Te Arai and Mangatu Valley (SOC 1: 150(d), SOC 11: 22.6);

The work of the Poverty Bay River Board and Poverty Bay Catchment Board in flood protection schemes and the accompanying loss of the Awapuni Lagoon (SOC 1: 150(e)-(h); SOC 4: 137(a)-(c); SOC 11: 22.3)

The construction and development of Gisborne Port (SOC 1: 152; SOC 4: 137(d); SOC 11: 23.3);

Paokahu refuse tip (SOC 1: 153; SOC 4: 137(e));

Pakowhai community relocation due to flooding and siltation (SOC 3: 88)

Counsel should provide the Tribunal with submissions on whether and how they intend advancing evidence on these matters at the judicial conference of 24 September 2001. Counsel should also consider whether some of the matters are more properly considered under the rubric of public work acquisitions. I note that the issue of land acquisition and afforestation at Mangatu has been addressed separately in this statement of issues.

The subject of waste water disposal has also been raised as an issue of concern to Turanga Maori, particularly in SOC 7 (TROTAK) and SOC 11: 23 (Ngai Tamanuhiri).

There are, however, some significant impediments for this Tribunal to inquire into these matters. First, while Prue Kapua, then of Walters Williams, appeared at the 1993 hearings for TROTAK in regard to the wastewater hearings, I too was involved in the case. This involvement precludes me from presiding over an inquiry into any wastewater matters in the Gisborne inquiry district from 1993 onwards.

Secondly, the matter of the Gisborne District Council's management of waste water is currently before the Environment Court. This constitutes a direct conflict of jurisdiction with the Waitangi Tribunal. The only sensible course of action here is to defer any inquiry into post-1991 Resource Management Act issues of wastewater disposal until after the Environment Court procedures have been exhausted, and to then convene a separate Tribunal for this purpose.

It is premature at this stage, though, to signal whether or not such an inquiry should be a matter of urgency. It will be up to counsel to apply to the Tribunal for urgency in the normal way.

The Crown's position on the wastewater issue is that the matter to be inquired into, if at all, is whether the process currently available to address the issues is consistent with the principles of the Treaty of Waitangi. (SOR 530.5) This position appears to be consistent with the need to defer these issues to a later and separate inquiry, particularly if claimants remain dissatisfied at the conclusion of the Environment Court hearings.

Nevertheless, I believe that there is room for the Tribunal's Gisborne inquiry to hear evidence on pollution through wastewater disposal in the period *prior* to 1991, inasmuch as such pollution potentially constitutes a historic loss, and as such a loss conforms to the categories listed above. In this case, counsel should provide the Tribunal with submissions on whether and how they intend advancing evidence on these matters at the judicial conference of 24 September 2001.

Waitangi Tribunal Reports dealing with RMA91

The Tribunal has heard and continues to report on RMA matters where there is no direct conflict of jurisdiction. In the Whanganui River Report the Tribunal found that

As a consequence of the foregoing acts and omissions of the Crown and provisions of the Resource Management Act 1991, the Crown failed to protect the Treaty rights of Atihaunui to exercise their rangatiratanga over their river for so long as they wish; failed to facilitate the Treaty right of Atihaunui to manage and control and exercise autonomy over their river; and failed to act reasonably towards their Treaty partner, in accordance with Treaty principles.

The Tribunal in this instance proposed either that the river is vested in its entirety in Atihaunui and that any resource consent application would require the approval of the owner – Atihaunui; or

That the Whanganui River Maori Trust Board becomes a consent authority to act severally or jointly with the current consent authority for any particular case.

This matter has yet to be addressed by the Government who are seeking to start negotiations with Atihaunui on the Whanganui River.

Concluding Comments

The RMA promised a lot for Maori in terms of having the Maori voice heard in resource management matters. Many Maori are perhaps disappointed with how things have turned out. In part the provisions especially in Part II of the RMA, section 6(e), 7 (a) and 8 lacked the force to oblige Local Government in particular to develop a more partnership arrangement

with Maori. Case law has not developed these sections greatly. Some say the cases taken have not been the “right ones” to spur the develop of understanding of matters such as kaitiakitanga and the use of the terms waahi tapu and taonga.

The availability of the Waitangi Tribunal process being more culturally friendly than the Environment Court has meant that matters have been raised more in the Tribunal than in other judicial bodies.

The lack of cohesive and mandated representative Maori bodies has hindered focussed involvement in resource management except in areas such as the Southern South Island (Ngai Tahu). It looks like being another 10 years at least until there are widespread cohesive and mandate Maori organisations participating fully and effectively in resource management matters. By then the RMA is likely to have been substantially reviewed.