NO-TAKE MARINE RESERVES AND THE TREATY OF WAITANGI: A CRITICAL ANALYSIS

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Introduction

This article is intended as a case study on the potential impact of the Treaty of Waitangi on the protection and governance of our natural environment. It focuses on the modern promotion of a no-take marine reserve network by the Crown and the issues, obligations and opportunities that this presents in terms of the Treaty of Waitangi. The key tension is between the Article I authority of the Crown to legislate for effective environmental protection and the Article II guarantee of rangatiratanga over natural resources.

The no-take marine reserve has been chosen as an example of a management tool bearing some comparison to concepts within tikanga Māori, despite its wholly Pakeha-driven historical development, and of a statutory concept underpinned by a groundbreaking and proactive "Treaty clause" in the Conservation Act 1987.[1] Having situated marine reserves in their historical and political context, the article introduces and discusses the various respects in which Treaty principles could be said to be engaged by the promotion of marine reserves by the Crown. Marine reserves are, despite their unique attributes, only one of the "marine protected area" mechanisms envisaged by the New Zealand Biodiversity Strategy.[2] Accordingly, the current review of the Marine Reserves Act 1971 to, among other things, better reflect the Crown's Treaty obligations is outlined and then critiqued in the context of the statutory mechanisms specifically available for protecting and implementing Māori customary fisheries management interests. There

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[1] Conservation Act 1987 section 4. See below III A The Conservation Act and Treaty Principles; see generally Te Ohu Kai Moana, 'Submission to The Local Government and Environment Select Committee on the Marine Reserve Amendment Bill 2003' 15 ('Submission on the Marine Reserve Amendment Bill').

[2] New Zealand Government, *The New Zealand Biodiversity Strategy* (Wellington, 2000) Theme 3: Coastal and Marine Biodiversity.

remain, it is suggested, significant – but not insuperable – obstacles to successfully integrating the implementation of these mechanisms with a functioning marine reserve network. The article concludes by identifying an ongoing divide between policy and reality in relation to some specific aspects of marine reserve establishment and management. Recent interactions between local tangata whenua and other stakeholders in particular marine areas provide illustrations of the complex issues facing the responsible government departments, if implementation of the principles of the Treaty in this context is to be seriously attempted.

A: Marine Reserves

1. The Crown and Marine Reserves

The approach of the Crown Treaty partner to the marine environment was traditionally exploitative, managing activities in a piecemeal, reactive fashion. The environmental "ethic" was one that saw marine resources as inexhaustible and of purely instrumental value. A 1989 Law Commission paper provides a good example of this in the background to New Zealand's fisheries regime.[3]

However, there has been a gradual move in the last 40 years, influenced by international developments, towards an anticipatory approach to planning in recognition of the irreversible effects of human interference with natural systems.[4] The Crown's focus is now, according to the New Zealand Biodiversity Strategy (developed in partial implementation of our commitments under the Convention on Biological Diversity[5]), on precaution, sustainable use and the conservation of indigenous marine

[3] New Zealand Law Commission, *The Treaty of Waitangi and Maori Fisheries: A Background Paper*, NZLC PP9 (1989), p. 19 (*The Treaty and Maori Fisheries*).

[4] See generally New Zealand Biodiversity Strategy, 'Biodiversity Protection: An International Issue', www.biodiversity.govt.nz/picture/doing/international, at 14 August 2006; Ministry for the Environment, 'Multilateral Environmental Agreements', www.mfe.govt.nz/aws/meas, at 14 August 2006; Rio Declaration on Environment and Development (12 August 1992) A/CONF.151/26 (Vol I).

[5] (5 June 1992) 1760 UNTS 79, p. 143; see New Zealand Government, *The New Zealand Biodiversity Strategy*, supra n. 2, p. 135.

biodiversity.[6] Marine reserves were conceptualised during the early stages of this evolution in thinking and statutorily enabled by the Marine Reserves Act 1971 (MRA).

A marine reserve was originally defined for New Zealand as an area managed for the purpose of preserving it in a natural state as the habitat of marine life for scientific study.[7] What distinguishes it from all other marine management tools is a "no-take" approach that enables the protection and study of entire ecosystems. Ideally, marine reserves are free from all extractive activity but open to scientific research and to well-managed, non-consumptive use and enjoyment.[8] As the understanding of, and impetus for, marine reserves has evolved, they are now considered a "core tool" in the effort to preserve and protect our indigenous marine biodiversity.[9] They cannot perform this role as isolated entities; as such, the Department of Conservation (DoC) is now promoting the creation of a network of marine reserves and other protected areas to protect representative and unique marine habitats.[10] Although marine reserve proposals can be initiated by non-governmental groups (including Māori groups),[11] and the establishment process involves overlapping jurisdictions in relation to the functions of the Ministers of Conservation and Fisheries,[12] DoC has overall

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[6] New Zealand Government, *The New Zealand Biodiversity Strategy*, supra n. 2, Theme 3: Coastal and Marine Biodiversity; Department of Conservation (Marine Conservation Unit), *Protecting Our Seas: Tiakina a Tangaroa* (Wellington, 2005), p. 6 (*Protecting Our Seas*).

[7] Marine Reserves Act 1971 section 3.

[8] See generally Bill Ballantine, 'Networks of 'No-Take' Marine Reserves are Practical and Necessary' in Nancy L Shackell and J H Martin Willison (eds), *Marine Protected Areas and Sustainable Fisheries* (Science and Management of Protected Areas Association, Wolfville (Canada), 1995).

[9] Department of Conservation and Ministry of Fisheries, *Marine Protected Areas: Policy and Implementation Plan* (Wellington, 2005), p. 12 (*Marine Protected Areas*); Department of Conservation (Marine Conservation Unit), *Protecting Our Seas*, supra n. 6, p. 6.

[10] See Department of Conservation (Marine Conservation Unit), *Protecting Our Seas*, supra n. 6; Department of Conservation and Ministry of Fisheries, *Marine Protected Areas*, supra n. 9; Ballantine, 'Networks of 'No-Take' Marine Reserves are Practical and Necessary', supra n. 8.

[11] Marine Reserves Act 1971 section 5(1)(a); but see the Crown's intention to bring all future applications "into the Government's planning process", described at Department of Conservation and Ministry of Fisheries, *Marine Protected Areas*, supra n. 9, p. 11.

[12] Janet Mason, *The Relationship between Maori Non-Commercial Customary Fishing and the Establishment of Marine Reserves* (LLM Research Paper, Victoria University of Wellington, 2002), p. 39 (*Maori Customary Fishing and Marine Reserves*).

responsibility for approving their creation and (currently) for their day-to-day management.

It is important to note that the practical achievements that have given New Zealand a reputation as a world leader in marine protected areas began with a few determined scientists (especially in the 1970s), who were committed to local and tangata whenua involvement in the protective process and who recognised interests in the marine environment extending beyond science and exploitation.[13]

2. Tikanga and Marine Reserves

The traditional Māori view of the environment is holistic,[14] and rests on the "close interconnection between the physical (resources, species, landforms and processes) and the intrinsic (mauri, mana, wairua and whakapapa)".[15] Fisheries and other marine resources are gifts from Tangaroa. Complex management systems (tikanga) were developed to prevent over-exploitation of these taonga through practical management rules, ritual and protocol.[16] As the original kaitiaki of the local environment, tangata whenua have the right and responsibility to make decisions related to natural resources within their rohe.[17]

DoC considers that "there is little, if any, variance or tension between the indigenous code and conservation legislation. Both promote care and protection, and allow for sustainable management, to ensure the

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[13] See generally W J Ballantine, *Marine Reserves for New Zealand* (25, University of Auckland Leigh Laboratory Marine Science Series, Auckland, 1991).

[14] Office of the Parliamentary Commissioner for the Environment, *Environmental Management and the Principles of the Treaty of Waitangi: Report on Crown Response to the Recommendations of the Waitangi Tribunal 1983-1988* (Wellington, 1988) 23 (*Environmental Management and the Principles of the Treaty*); New Zealand Government, *The New Zealand Biodiversity Strategy*, supra n. 2, p. 2.

[15] Office of the Parliamentary Commissioner for the Environment, *Kaitiakitanga and Local Government: Tangata Whenua Participation in Environmental Management* (Wellington, 1998) ix (*Kaitiakitanga and Local Government*).

[16] Office of the Parliamentary Commissioner for the Environment, *Setting Course for a Sustainable Future; The Management of New Zealand's Marine Environment* (Wellington, 1999), p. 13.

[17] For a discussion of aspects of, and common uncertainties of Pakeha decision-makers relating to, kaitiakitanga, see supra n. 15.

survival of species."[18] Indeed, a theme that emerged from discussions with Māori prior to a 1988 Parliamentary Commissioner for the Environment Report was "respect and protect what is there, restore what is lost".[19] A comprehensive, restorative management approach and inherent respect for ecological limits on human activity are therefore consonant with tikanga. However, there are two aspects of marine reserves that may be more problematic. The first is the imposition of marine reserves by the Crown over an area where kaitiakitanga is actively exercised. Secondly, as DoC has noted, traditional management focuses on the "conservation and enhancement of indigenous species *permitting cultural use*".[20] Excluding all fishing from an area is not alien to Māori: rāhui, which are imposed to exclude access or harvest in a defined area, closely parallel marine reserves in their comprehensive scope. However, rāhui are temporary.[21] Te Ohu Kai Moana has stated that "permanent preservation without utilisation was not and is still not a feature of Māori resource management".[22]

3. The Lessons of the Past

History has contributed much to current aversion among some Māori to the establishment of marine reserves. Since the signing of the Treaty, Crown actions have consistently denied Māori access to natural marine resources and authorised their degradation.[23] The Waitangi Tribunal has made it clear, for example, that the historical assumption of control

[18] Department of Conservation, *Customary Use of Natural Resources Consistent with Kaitiakitanga, Wise Conservation and Conservation Legislation: Draft Policy* (Wellington, 2003), p. 2 (*Customary Use of Natural Resources*).
[19] Office of the Parliamentary Commissioner for the Environment, *Environmental Management and the Principles of the Treaty,* supra n. 14.
[20] Department of Conservation, *Customary Use of Natural Resources*, supra n. 18, p. 5 (emphasis added).
[21] Office of the Parliamentary Commissioner for the Environment, *Kaitiakitanga and Local Government*, supra n. 15.
[22] Te Ohu Kai Moana, 'Submission on the Marine Reserve Amendment Bill', supra n. 1, p. 12.
[23] New Zealand Law Commission, *The Treaty and Maori Fisheries*, supra n. 3, p. 23.

over fisheries without prior negotiation was contrary to the Treaty.[24] As a result:[25]

> "There is currently deep distrust among Māori people about the way natural and physical resources have been managed by the Crown for the last [166] years. It will be deeds, not mere talk, which demonstrate whether the Crown/Pakeha side should now be trusted and respected."

The reconciliation of marine reserves with tikanga Māori can depend on how they are presented to tangata whenua. For example, Ngati Konohi, who built strong relationships with DoC in the course of a joint application that culminated in the establishment of Te Tapuwae o Rongokako Marine Reserve at Whangara in 1999, have described "their" marine reserve as a kōhanga that will replenish the surrounding area and support future customary management initiatives.[26] Ngatiwai, by contrast, witnessed the imposition of a marine reserve over the culturally precious Poor Knights Islands very early in the life of the MRA. Tensions between the iwi Trust Board and DoC, which inherited the management of the reserve from the Ministry of Fisheries (MFish), continued eight years after a High Court decision that ordered the parties to enter meaningful discussions regarding the future of the area.[27]

It is of course important to recognise a distinction between the policies of the Crown Treaty partner and the views of non-Māori New Zealand citizens; some, for example, hold strong holistic views on the marine

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[24] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim: Wai 22* (Wellington, 1988) (*Muriwhenua Report*).

[25] Office of the Parliamentary Commissioner for the Environment, *Environmental Management and the Principles of the Treaty*, supra n. 14, p. 23.

[26] See Ngati Konohi, Department of Conservation and Ministry for the Environment, *Maori methods and indicators for marine protection: Ngati Konohi interests and expectations for the rohe moana* (2005) (*Ngati Konohi interests and expectations*); Nga Maunga ki te Moana Conservation Trust, *How-To Kit for Community Marine Reserve Applicants* (Whangarei, 2003) (*How-To Kit*); Vincent Kerr, Marine Conservation Consultant, to Northland Iwi Māori, 'Brief on Customary Use Regulations and Issues and Opportunities for Marine Conservation' (5 February 2001) Advice Paper.

[27] See *Ngatiwai Trust Board & Another v Smith* (22 December 1998) HC AK CP 39-98 Smellie J; Vincent Kerr, Marine Conservation Consultant, to Ngatiwai Trust Board and Department of Conservation (Northland Conservancy), 'Brief on Setting up a Management Committee for Marine Reserves' (20 May 2003) Advice Paper.

environment, while others consider most regulatory conservation measures to be threatening and unnecessary. This divergence of views becomes apparent in the course of any marine reserve application.[28]

B: The Treaty of Waitangi

1. The Conservation Act and Treaty Principles

Section 4 of the Conservation Act 1987 states that the Act "shall so be interpreted and administered to give effect to the principles of the Treaty of Waitangi". Although the MRA was enacted 16 years prior to the passing of the Conservation Act, it is now listed in the main Act's First Schedule. Consequently, it too is now governed by section 4, albeit only to the extent that its provisions are not clearly inconsistent with the principles of the Treaty.[29] DoC derives its powers and obligations from the Conservation Act and is therefore also governed by section 4.

More than a decade ago, a full bench of the Court of Appeal examined the operation of the Treaty relationship when section 4 of the Conservation Act is engaged, and emphasised several important elements.[30] Statutory provisions for giving effect to the principles of the Treaty of Waitangi in matters of interpretation and administration should not be narrowly construed.[31] Further, the positive or active components of the Crown's Treaty obligations may have more weight when reinforced by a statutory requirement, like section 4, that is itself positively framed.[32] The Court of Appeal has also noted generally that a breach of a provision of the Treaty will, of necessity, constitute a breach of its principles.[33]

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[28] A common objection to marine reserves from commercial fishers, for example, is that the Quota Management System under the Fisheries Act 1996 effectively ensures sustainability and that any further "interference" with fishing is unwarranted. For an example of sustained opposition to marine reserve establishment by recreational fishers, premised on a 'right to fish', see the Option4 website: www.option4.co.nz at 23 August 2006.

[29] Department of Conservation, *Customary Use of Natural Resources*, supra n. 18.

[30] *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA).

[31] Ibid., p. 558 Cooke P for the Court.

[32] Ibid., p. 561 Cooke P for the Court.

[33] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p. 693 Somers J.

DoC, in accordance with its section 4 obligations, in 2003 prepared a draft policy paper on "giving effect to" Treaty principles in its conservation initiatives.[34] Eight guiding principles were named and discussed: governance, citizenship, informed decisions, redress, kaitiakitanga, partnership, active protection and tino rangatiratanga. The last three have been described as "central" in New Zealand environmental management.[35]

In general terms, the Court of Appeal has emphasised that the duty of the Crown cannot be merely passive but extends to active protection of Māori in the use of their lands and other guaranteed taonga to the fullest extent practicable.[36] Another DoC draft policy, directed broadly to achieving consistency between customary resource use and both kaitiakitanga and conservation legislation, aspires "to partnerships with tangata whenua which are durable and founded on good faith, reasonable co-operation and fairness".[37] Yet the legal import of the term "partnership" in this context is not self-evident: the Waitangi Tribunal, for example, has emphasised the equal status of the Treaty partners, but the Courts have been generally more cautious, describing a relationship "akin to partnership".[38] The Law Commission has pointed out in the fisheries context that the concept of partnership is "valid and fruitful but insufficient".[39] The DoC draft policy specifically concerned with "giving effect" to Treaty principles in its work, as mandated by the Conservation Act, contains a more tangible promise to "determine and implement a reasonable and practicable degree of tangata whenua involvement in any particular case, covering a range of options from a right to be consulted to the exercise of tangata whenua control".[40]

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[34] Department of Conservation, *Giving Effect to the Principles of the Treaty of Waitangi in the work of the Department of Conservation: Draft Policy* (Wellington, 2003) (*Giving Effect to Treaty Principles*).

[35] Office of the Parliamentary Commissioner for the Environment, *Environmental Management and the Principles of the Treaty*, supra n. 14, p. 27.

[36] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p. 664, Cooke P.

[37] Department of Conservation, *Customary Use of Natural Resources*, supra n. 18, p. 2.

[38] See generally Te Puni Kokiri, *He Tirohanga o Kawa ki Te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Wellington, 2002), p. 77 (*A Guide to the Principles of the Treaty*).

[39] New Zealand Law Commission, *The Treaty and Maori Fisheries*, supra n. 3, p. 51.

[40] Department of Conservation, *Giving Effect to Treaty Principles*, supra n. 34, p. 5.

2. The "Spirit of the Treaty" for Marine Reserves: Articles I and II

The following quote from *Ngai Tahu Maori Trust Board v Director-General of Conservation* helps to locate the promotion of marine reserves within the text of the Treaty:[41]

> "Clearly, whatever version or rendering is preferred, the first article [of the Treaty] must cover power in the Queen in Parliament to enact comprehensive legislation for the protection and conservation of the environment and natural resources. The rights and interests of everyone in New Zealand, Māori and Pakeha and all others alike, must be subject to that overriding authority."

Te Ohu Kai Moana, in describing this right to make laws for environmental sustainability under Article I, has emphasised that the objective of sustainability must have "the highest possible priority" accorded to it when situations involving conflict over limited resources arise.[42] This said, an acknowledgement of the responsibility of rangatira and kaitiaki for the state of the environment within their rohe moana reveals that it parallels that of the Crown under Article I; it is a necessary corollary of authority and cannot be abandoned. Accordingly, the Crown's responsibility to preserve the marine environment can also be seen as sourced in the principle of active protection, because degradation "adversely affecting the continued use or enjoyment of …resources whether in spiritual or physical terms" is in itself an infringement of rangatiratanga and leads to the erosion of mana.[43]

The Crown's authority and obligation to legislate effectively for the protection of the marine environment is therefore not in question. Even so, the Waitangi Tribunal notes that this "is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise a control".[44] In other words, there is

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[41] *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, p. 558 (CA) Cooke P for the Court.
[42] Te Ohu Kai Moana, 'Submission on the Marine Reserve Amendment Bill', supra n. 1, p. 9.
[43] Te Puni Kokiri, *A Guide to the Principles of the Treaty*, supra n. 38, p. 98.
[44] Waitangi Tribunal, *Muriwhenua Report*, supra n. 24, p. 232.

reciprocity between Articles II and I that needs to be resolved.[45] Te Ohu Kai Moana has asserted that "the options chosen to conserve resources must have the least possible impact on Article II Treaty rights …while achieving the objective of sustainability."[46]

There is an obvious argument that the *imposition* of marine reserves by the Crown is not acceptable because it makes no concession to what the Waitangi Tribunal has termed a "duty to protect the Māori duty to protect".[47] However, assuming that marine reserves are not irreconcilable with tikanga Māori the key to promoting them consistently with the Treaty must be able to be found. Several submissions during the MRA review process requested full provision in the Act for Māori as a Treaty partner as the only legitimate way forward.[48] DoC's response, through the Marine Reserves Bill 2002 (MR Bill) and in practice, is discussed throughout this article.

3. Overview of the Legislative Position in New Zealand

The MRA was enacted 16 years before the Conservation Act 1987, and is silent on Treaty rights and interests. The recent review of the MRA was prompted by this and by a need to update both the purpose of the Act and the creation process in light of general international developments and the New Zealand experience.[49] The MR Bill, as it currently stands (reinstated in the 48th Parliament, awaiting a select committee report and further readings in the House), is in many respects a comprehensive overhaul of the MRA. As it addresses Treaty issues specifically, it operates as an indication of the Crown's evolving attitude towards the place of the Treaty in marine reserve work.

The updated general purpose of the MR Bill is to protect and preserve New Zealand's indigenous marine biodiversity. With this in mind, one

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[45] See New Zealand Law Commission, *The Treaty and Maori Fisheries*, supra n. 3, p. 51.
[46] Te Ohu Kai Moana, 'Submission on the Marine Reserve Amendment Bill', supra n. 1, p. 8.
[47] Waitangi Tribunal, *Te Whanau o Waipareira Report: Wai 414* (GP Publishing, Wellington, 1998), p. 84.
[48] Boffa Miskell Ltd, *Tapui Taimoana: Reviewing the Marine Reserves Act 1971. Summary of Submissions* (prepared for the Department of Conservation, 2001), p. 41 (*Reviewing the Marine Reserves Act*).
[49] Department of Conservation, *Marine Reserves Bill: Policy Background and Key Features* (Wellington, 2002), p. 1 (*Policy Background and Key Features*).

of the Bill's stated specific aims is to "recognise and reflect the [existing] statutory obligations to Māori".[50] Most submitters in the MRA review process supported the inclusion of some form of Treaty clause, with one stressing that "the Treaty forms a basis for the protection of the marine environment".[51] The drafters' chosen solution was to repeat section 4 of the Conservation Act verbatim in clause 11. It is hard to see what this achieves in practice, since the Bill would be governed by section 4 in any event. The MR Bill does, however, also attempt to give more specific recognition to tangata whenua and iwi or hapu who have customary access to the proposed marine reserve area within the marine reserve application process. To this end, it requires:

> (a) Specific consultation with them from an early stage (clauses 48 and 53(3));
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> (b) The Minister to consider whether there is an undue adverse effect on their ability to undertake customary food gathering, or on their relationship with the area (clause 67(2)(c)). However, an adverse effect is not "undue" if the Minister is satisfied that the benefit to the public interest outweighs it;[52] and
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> (c) Once a reserve has been established, tangata whenua to be included on any management board or advisory reserve committee that may be appointed (clause 27), and to be consulted on any management plan (clause 40).

It is interesting that Te Ohu Kai Moana, in its capacity as a Māori representative group, expressed the view in its submission on the MR Bill that any purpose beyond the strictly ecological is not appropriately included in marine reserves legislation.[53] This stands in marked contrast to the many submitters who applauded the educational and community

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[50] Ibid., p. 2.

[51] Boffa Miskell Ltd, *Reviewing the Marine Reserves Act*, supra n. 48, p. 43.

[52] As to the interpretation of the word "undue" (or, more accurately, "unduly") as it appeared in section 5(6) of the Marine Reserves Act 1971 (albeit not in relation to Māori interests), see *CRA3 Industry Association Inc v Minister of Fisheries* [2001] 2 NZLR 345 (CA).

[53] See Te Ohu Kai Moana, 'Submission on the Marine Reserve Amendment Bill', supra n. 1, p. 21.

values of existing marine reserves.[54] Arguably, if a marine reserve increased awareness of the natural environment and encouraged a local conservation ethic, this could only facilitate the exercise of kaitiakitanga.

C: A Specific Treaty Nexus: Marine Reserves and Customary Fishing

1. The Fisheries (Customary Fishing) Regulations

The MRA review process cannot be considered in isolation from other marine management legislation that engages Treaty principles, particularly legislation that gives Māori a direct avenue for exercising kaitiakitanga over defined marine areas. This section considers the current status of Māori customary fishing rights and whether the MRA is more likely, in either its current or proposed form, to help or hinder their expression.

Following the well-known "Sealords" deal, most aspects of Māori customary fishing rights were explicitly extinguished under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (TOWFCS Act).[55] Section 10(d) of the TOWFCS Act extinguishes any rights or interests Māori may have had in non-commercial customary fishing except to the extent they are provided for in regulations made under what is now section 186 of the Fisheries Act 1996. The Fisheries (Customary Fishing) Regulations were made for the North and South Islands in 1998 and 1999 respectively. They contemplate fisheries management undertaken by MFish or Māori that "will not intrude on or overlap but will co-exist with the management of marine life in marine reserves established under the MRA".[56] Specifically, the Regulations have no force within marine reserves.[57]

Two principal customary management mechanisms are specified in the Regulations, both of which are within the range of "marine protected areas" broadly contemplated by the New Zealand Biodiversity

[54] The author's father, Vincent Kerr, and the author were among the latter group.
[55] Mason, *Maori Customary Fishing and Marine Reserves*, supra n. 12, p. 39.
[56] Ibid., p. 21.
[57] *Ngatiwai Trust Board & Another v Smith* (22 December 1998) HC AK CP 39-98, p. 4 Smellie J.

Strategy.[58] Taiāpure are local fishery areas of special significance to iwi or hapu, managed by a committee that *advises* the Minister of Fisheries on appropriate regulations for the sustainable management of fish resources. Mātaitai reserves are discrete areas, which may exist within taiāpure, where tangata tiaki/kaitiaki are authorised to manage and control the non-commercial harvest of kaimoana. Any Māori committee, marae committee or any kaitiaki may make bylaws restricting or prohibiting the taking of kaimoana, which apply to everyone. However all bylaws remain subject to the Minister's approval. DoC and MFish have recently clarified the Crown's understanding that:[59]

> "Neither [mātaitai nor taiāpure] can be proposed primarily for biodiversity protection. Nevertheless, sustainable utilisation of fisheries resources and protection of marine biodiversity are not mutually exclusive. If tangata whenua so wish, it is possible that these tools could be applied in such a way that they can contribute to the MPA network."

2. Customary Fishing and Marine Reserves

There is longstanding concern that the establishment of marine reserves can operate as a de facto extinguishment of customary fishing rights.[60] In fact, customary fishing is, at present, possible within marine reserves if authorised by the Minister of Conservation by notice in the Gazette or if an authorising condition is imposed under the Order in Council creating the marine reserve.[61] In accordance with the TOWFCS Act, this cannot give rise to legal rights to *require* the Minister to permit customary fishing.[62] However, if requested the Minister must *consider* preserving customary fishing rights within a proposed marine

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[58] New Zealand Government, *The New Zealand Biodiversity Strategy*, supra n. 2, p. 63 and 67 Other marine protection mechanisms, such as marine parks and partial fisheries closures, are outside the scope of this article.

[59] Department of Conservation and Ministry of Fisheries, *Marine Protected Areas*, supra n. 9, p. 14.

[60] Mason, *Maori Customary Fishing and Marine Reserves*, supra n. 12, p. 23.

[61] *Ngatiwai Trust Board & Another v Smith* (22 December 1998) HC AK CP 39-98, p. 4 Smellie J.

[62] Mason, *Maori Customary Fishing and Marine Reserves*, supra n. 12, p. 30.

reserve, notwithstanding that the MRA does not specifically address these rights.[63]

The MR Bill will prohibit all fishing in marine reserves, with no exceptions, in clause 13(1). This is because:[64]

> "[E]xperience internationally and in NZ is that 'no-take' provides significantly better protection for marine life and is important to achieving a natural state in reserves. Allowing fishing would also make it far more difficult and expensive to manage and enforce marine reserves."

Some Māori submitters during the MRA review argued that this "one out, all out" rule would constitute a breach of Article II (albeit not section 4 of the Conservation Act, which such a clearly-worded rule would impliedly override if necessary).[65] A "flexible" marine reserve system, where conservation purposes and low-impact customary extractive use could co-exist, was commonly proposed as an "alternative" option.[66] The difficulty with this view is that it does not recognise the special need for no-take areas that exists regardless of how much progress is made in implementing other forms of marine protection.[67] Further, planning the establishment of no-take areas to avoid customary fishing grounds will not always be possible, the special obligations separating customary fishing from other extractive interests notwithstanding, because the network design concept requires a comprehensive range of unique *and* representative areas to be protected.[68]

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[63] *Ngatiwai Trust Board & Another v Smith* (22 December 1998) HC AK CP 39-98 Smellie J.
[64] Department of Conservation, *Policy Background and Key Features*, supra n. 49, p. 4.
[65] Boffa Miskell Ltd, *Reviewing the Marine Reserves Act*, supra n. 48, pp. 26 and 39.
[66] Ibid.
[67] See C M Denny and R C Babcock 'Do partial marine reserves protect reef fish assemblages?' (2004) 116 *Biological Conservation* 119.
[68] See Bill Ballantine, 'Networks of 'No-Take' Marine Reserves are Practical and Necessary', supra n. 8; Department of Conservation and Ministry of Fisheries, *Marine Protected Areas*, supra n. 9, p. 12.

3. Marine Reserves and the Customary Management Mechanisms

Many Māori submitters in the MRA review, unsurprisingly, raised integration with tangata whenua-based management tools as a critical means of recognising Treaty principles.[69] There is clearly a need for the MRA to avoid compromising the effectiveness of the Customary Fishing Regulations. As the statutory expression of the Crown's continuing obligation under Article II to allow for "customary food gathering by Māori and the special relationship between tangata whenua and places of importance for customary food gathering",[70] these Regulations should arguably be accorded some precedence in marine conservation planning. This holds notwithstanding that rights flowing from the Regulations may not formally hamper the Crown's ability to create marine reserves.[71]

One immediate difficulty is that the Regulations and the MRA are administered by different government agencies. It is notable in this regard that while DoC and MFish's latest joint policy document stresses the need for a "good level of integration of legislative tools",[72] the MR Bill removes the existing formal concurrence role of the Minister of Fisheries in marine reserve applications. It will be interesting to see whether this has an effect on the degree to which customary management considerations weigh in the Minister of Conservation's final deliberations on marine reserve establishment.

It would seem obvious that mātaitai reserve and marine reserve initiatives should be integrated as early as possible if both conservation objectives and the active protection of rangatiratanga are to be achieved. However, the Crown has generally chosen to focus on supporting the establishment of mātaitai near *existing* marine reserves to benefit from "spill-over" of fish and other marine life, and it appears that Māori support for marine reserve proposals has often been given

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[69] Boffa Miskell Ltd, *Reviewing the Marine Reserves Act*, supra n. 48, p. 41.

[70] See Fisheries Act 1996 section 186.

[71] Email from Vincent Kerr, Marine Conservation Consultant to the author, 10 April 2004. Compare in this respect Marine Reserves Act 1971 section 5(6) and Marine Reserves Bill 2002, cl. 67(2)(c).

[72] Department of Conservation and Ministry of Fisheries, *Marine Protected Areas*, supra n. 9, p. 11.

on this basis.[73] The problem with this approach is that, as Mason points out, the "cumulative effect of proposing to establish a mātaitai adjacent to or in close proximity to a marine reserve could possibly result in the mātaitai application failing to meet the conditions [of] the Customary Fishing Regulations in relation to existing commercial fishing".[74] If Māori are not made aware of this interplay during a marine reserve proposal, bad faith on the part of the Crown could well be asserted once the situation becomes clear, and marine reserves may come to be seen as a threat to future customary management opportunities. Furthermore, the statutory mātaitai establishment process has been criticised as time-consuming, arduous and fraught with difficulty.[75] If Māori feel effectively backed into an "either/or" position with respect to supporting a local marine reserve initiative, it is no wonder that they may approach it with mixed feelings. An irreconcilable tension may be perceived between the need to ensure protection of the rohe moana and the potential for exercising any effective control over the process of protection.

Mason has argued that customary fishing should be allowed as an interim measure in defined sections of new marine reserves, to allay concerns about long-term opportunities for customary management.[76] Such areas would be reserved for future mātaitai applications, which would automatically have passed preliminary hurdles such as having no unduly adverse impact on commercial fishing (one of the criteria for marine reserve establishment in section 5(6) of the MRA). This would be a practical and open step towards partnership and would demonstrate that DoC takes the active protection of customary fishing interests seriously. It could also contribute to willingness on the part of Māori to work with the Crown on future initiatives and to co-operation between DoC and MFish. Having said this, the concern of scientists would be to ensure that the ecological core of the marine reserve is not compromised. There is a minimum viable size for each particular reserve; this would need to be calculated with regard to the real size of the permanent no-take area. Such a plan would also need to be carefully articulated and publicised to avoid allegations of "special treatment"

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[73] Mason, *Maori Customary Fishing and Marine Reserves*, supra n. 12, p. 39.
[74] Ibid., p. 28.
[75] Ibid., p. 34.
[76] Mason, *Maori Customary Fishing and Marine Reserves*, supra n. 12, p. 38.

from non-Māori and of interference with the Customary Fishing Regulations from Māori.

4. Illustrations

The potential interaction between marine reserve and taiāpure/mātaitai establishment has been manifested in different ways, with differently perceived results, throughout the country. In the Akaroa Harbour, in a process that has been ongoing since the early 1990s, a significant taiāpure application has recently been approved on the condition that 8 per cent of its area be excluded to enable a longstanding marine reserve application to progress (in effect, the converse of the Mason proposal discussed above).[77] This approval is consistent with a 1999 agreement, negotiated by the Minister of Conservation with tangata whenua, marine reserve applicants and other stakeholders, that the marine reserve process would be put on hold until the taiāpure was established.[78] A national recreational fishing lobby group is now, somewhat ironically, relying heavily on the importance of kaitiakitanga in its opposition to the revived marine reserve application. Emphasising that the proposed reserve would be carved out of the area over which customary management rights have been asserted, Option 4 claims that its establishment would necessarily deny tangata whenua "their right and obligation to exercise kaitiakitanga (guardianship) within their rohe", in breach of the Crown's obligations as Treaty partner.[79] This bold claim is, in the author's submission, neither accurate (consider the Ngati Konohi experience discussed below) nor particularly constructive. To take just one example, it assumes that the taiāpure application could and would have gained Crown approval in the absence of the compromise with other stakeholders evidenced by the 1999 agreement. From another perspective, that agreement and its aftermath, while undoubtedly controversial, can be seen as demonstrating the potential for prioritisation of meaningful tangata whenua involvement in regional marine planning.

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[77] See Fisheries (Akaroa Harbour Taiapure) Order 2006; Department of Conservation, 'Akaroa Harbour (Dan Rogers) Marine Reserve proposal', www.doc.govt.nz at 23 August 2006.

[78] See Option 4, 'Akaroa Harbour (Dan Rogers) Marine Reserve Application' (submission to the Department of Conservation, 13 June 2006) Appendix One: Pohatu Agreement.

[79] Ibid., p. 3.

To take a different illustration, many iwi are aware of the strong partnership between East Coast/Hawke's Bay Conservancy and Ngati Konohi to form Te Tapuwae o Rongokako Marine Reserve, described earlier in this article.[80] That application arose in response to demands by tangata whenua for effective protection of the rohe moana, and the DoC staff involved have stressed the need to be educated about rāhui, taiāpure and mātaitai to fit marine reserves into the bigger picture.[81] As the process began before the enactment of the Customary Fishing Regulations, Ngati Konohi – which has majority representation on the marine reserve's advisory committee – is now planning mātaitai and taiāpure to flank the reserve.[82] Hone Taumaunu, a local kaumātua, has emphasised that "unless you have a marine reserve as a reservoir, with a taiāpure or mātaitai you're just protecting a barren area".[83]

Finally, in the South Island, according to the Biodiversity Strategy website, Ngāi Tahu and DoC "have made positive progress on a strategy for developing marine protected areas for much of the South Island (including marine reserves, taiāpure and mātaitai)".[84] This bore some legislative fruit in 2005 with the establishment of the Fiordland (Te Moana o Atawhenua) Marine Area, which to date includes eight no-take marine reserves. The empowering Act had, among its aims, both the acknowledgement of the importance of kaitiakitanga and the facilitation of co-operation between management agencies and the newly-established Fiordland Marine Guardians body (which includes Ngāi Tahu representation) to assist in achieving the "integrated management" of the area.[85]

5. Summary

Some may see *any* imposition of marine reserves within their rohe as a breach of the Treaty. However, it is arguable that the creation of no-

[80] At B 2 The Lessons of the Past.
[81] Nga Maunga ki Te Moana Conservation Trust, *How-To Kit*, supra n. 27.
[82] See Ngati Konohi, Department of Conservation and Ministry for the Environment, *Ngati Konohi interests and expectations*, supra n. 26; Department of Conservation, *Te Tapuwae o Rongokako Marine Reserve Operational Plan* (2003).
[83] Nga Maunga ki Te Moana Conservation Trust, *How-To Kit*, supra n. 25.
[84] http://www.biodiversity.govt.nz/seas/biodiversity/protected/reserves.html at 16 May 2006.
[85] Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 section 3.

take reserves over or near customary fishing areas can, if carefully managed, be seen as an example of the reciprocity between Articles I and II in action. The establishment of a particular no-take marine reserve may be demonstrably legitimate as necessary for the creation of a functioning marine reserve network. However, in return, it is submitted that the Crown (through its responsible Ministers) may need to guarantee to tangata whenua an *even higher* level of involvement than normal in the marine reserve process, *combined with* meaningful support for customary management initiatives in other parts of the rohe moana.

This, if translated into law, would be a step beyond the MR Bill, where customary interests still effectively "lose" the contest if outweighed by the public interest in reserve establishment during the application process. It would recognise that active protection of rangatiratanga is non-derogable and that compromise has to be mutual and meaningful. It would also require genuine co-operation between the responsible government departments.

D: The Divide between Policy and Reality

The final section of this article describes some ongoing difficulties in translating section 4 of the Conservation Act into positive improvements in the marine reserve establishment process and in the position of local tangata whenua with respect to their rohe moana.

1. Involvement in Marine Reserve Applications

A significant aspect of the MR Bill is the formalised obligation to consult with local tangata whenua in the preparation of a marine reserve proposal.[86] Although this was flagged as one method of giving practical effect to section 4,[87] history has shown that consultation is

[86] In this respect the author notes that on 18 May 2006 a Member's Bill, the Marine Reserves (Consultation with Stakeholders) Amendment Bill, passed its first reading in Parliament. This Bill has been introduced to compensate for a perceived failure of the MR Bill to ensure consultation with existing users and broader community groups early in the application process.

[87] Department of Conservation, *Policy Background and Key Features*, supra n. 49, p. 5.

only a means to the end of giving effect to central Treaty principles such as active protection.[88]

Māori views on consultation vary in part according to previous experience with Crown agents.[89] The Whangarei Harbour marine reserve application is an example of a groundbreaking proposal by a local high school with a serious focus on opportunities for tangata whenua involvement.[90] It also provides an example of issues arising when there are many groups claiming mana whenua, mana moana status, and of how key people in applicant groups and iwi authorities can change over time and points of contact can get lost. The difficulties and disagreements within both Māori communities and DoC as to who to consult over a particular area have been well documented.[91] This can be a significant obstacle to integrating DoC and Māori aspirations for the local marine environment.

Further, iwi authorities have sometimes not responded to consultation initiatives until an application is publicly notified; this can create frustrations for DoC staff and external applicants who may perceive a lack of willingness to engage.[92] It needs however to be emphasised that reasons for silence can include "inadequate resources to participate given multiple and conflicting demands …and the view that response in the past had consumed scarce tribal resources with little or no benefit in return".[93] Ngatiwai, for example, now refuse to engage unless consultation is seen as a step towards the recognition of tino

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[88] See *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, p. 560 (CA). On the facts it was held that "a reasonable Treaty partner would not restrict consideration of Ngäi Tahu interests to mere matters of procedure", although the Court was careful to say that the decision's precedent value was likely to be very limited in different factual situations. See also Te Puni Kokiri, *A Guide to the Principles of the Treaty*, supra n. 38, p. 86.

[89] Office of the Parliamentary Commissioner for the Environment, *Proposed Guidelines for Local Authority Consultation with Tangata Whenua: Background Information* (Wellington, 1992), p. 16 (*Local Authority Consultation with Tangata Whenua*).

[90] See the formal application document at
http://www.forest-bird.org.nz/Marine/reserves.asp at 16 May 2006.

[91] See Mason, *Maori Customary Fishing and Marine Reserves*, supra n. 12, p. 34.

[92] The author was a member of the Whangarei Harbour marine reserve applicant group and worked for the Department of Conservation's Marine Policy Unit as a consultant in 2003.

[93] Office of the Parliamentary Commissioner for the Environment, *Local Authority Consultation with Tangata Whenua,* supra n. 89, p. 25.

rangatiratanga; they are "sceptical about the ability of the Crown …to accept their values and to actively protect their taonga".[94]

Environment Court Judge Kenderdine has commented that the "issue of consultation must be viewed in the light of …the inability of iwi to respond and keep responding in any meaningful way without support structures in place".[95] Ngatiwai have stated that they "cannot spare resources to develop a definite long-term strategy for environmental planning …and require assistance with resources in order to articulate and communicate their views on issues of importance to the tribe".[96] Many tangata whenua agree that environmental efforts can be constrained by always being in "react mode".[97]

2. Management of Marine Reserves

The MRA makes no positive provision for tangata whenua involvement in management of marine reserves once established. However, tangata whenua have generally been represented on advisory committees or Conservation Board sub-committees established under the Conservation Act to represent the local community's interest in the management of a particular reserve.[98] While DoC cannot delegate its overall management responsibility, such committees, if they exist, can develop the reserve management plan (if required under the Conservation Act) or a less formal operational plan. The obvious problem with an advisory committee approach is that the Crown Treaty partner retains all real power; it rests on a premise similar to that of consultation during the application process. Most submissions from Māori during the MRA review urged greater autonomy of reserve management bodies; there were also calls for the management of marine reserves and of mātaitai and taiāpure to be integrated.[99]

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[94] Ibid., p. 15.
[95] *Director-General of Conservation v Marlborough District Council* (22 September 1997) EC W89/97, 19 Judge Kenderdine.
[96] Office of the Parliamentary Commissioner for the Environment, *Local Authority Consultation with Tangata Whenua,* supra n. 89, p. 20.
[97] Office of the Parliamentary Commissioner for the Environment, *Kaitiakitanga and Local Government*, supra n. 15, p. 76.
[98] Conservation Act 1987, sections 6N and 56.
[99] Boffa Miskell Ltd, *Reviewing the Marine Reserves Act*, supra n. 48, p. 76.

Clause 20 of the MR Bill enables the Minister of Conservation to appoint a "management body" (a flexible term that could encompass most existing iwi organisations) to take over the entire day-to-day management of a reserve. However, the Minister must first be satisfied that the proposed body would have the resources to do so. This is an example of the limitations of well-intentioned statutory "opportunities" for the exercise of rangatiratanga. An important step is taken in recognising that Pakeha institutions are unlikely to empower the expression of Māori management aspirations.[100] But genuine recognition of the principle of active protection would have required practical assistance to enable tangata whenua to take this step towards tino rangatiratanga. An argument that the MRA is not concerned with social or economic assistance is simply not viable in the context of a proactive Treaty clause like section 4. The MR Bill, arguably, needed to be backed by legislation or policy that could ensure the existence of the necessary means to carry its provisions into effect.

Conclusion

Marine reserves are a fascinating way to examine the potential of environmental management in New Zealand. They can be viewed as representing an evolving environmental ethic on the part of the Crown that is increasingly consonant with tikanga Māori in relation to the marine environment. Arguably, the creation and management of marine reserves provides an ideal opportunity for giving some real weight to section 4 of the Conservation Act. This is because marine reserves are initiated (generally), based and enforced locally and their conceptual basis is consistent with the exercise of kaitiakitanga.

The Treaty implications of marine reserve creation, especially in relation to tangible rights like customary fisheries, are now seriously and consistently considered by the Department of Conservation at the policy formation level.[101] However, because the MRA was passed before section 4 was even envisaged, attempts to reconcile its operation with the principles of the Treaty have of necessity been relatively

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[100] Office of the Parliamentary Commissioner for the Environment, *Environmental Management and the Principles of the Treaty*, supra n. 14, pp. 20-21.

[101] See Department of Conservation, *Giving Effect to Treaty Principles*, supra n. 34; Department of Conservation, *Policy Background and Key Features*, supra n. 49.

superficial. The much-improved MR Bill is promising but insufficient.[102] It does not address some of the key issues preventing tangata whenua from engaging effectively with DoC, which include historically-founded distrust of the Department's marine initiatives and inadequate resourcing of iwi organisations.[103] Consequently, it misses a genuine opportunity to support a measure of rangatiratanga. Further, the Bill does not propose integrating the establishment of marine reserves with the kaitiaki responsibilities engaged in relation to the vast majority of our coastline.

While encouraging progress has been made on the ground in several regions, no-take marine reserves have not been universally recognised as an appropriate vehicle through which to explore the strengthening of the connection between tangata whenua and their resources.[104] This perception may stem from the view that marine reserves are essentially a "scientific" exercise in the realm of the Crown's Article I authority. It indicates, arguably, that either the nature of the Department's obligations to actively protect rangatiratanga is not yet fully understood or that there is not yet genuine commitment to their inevitable implications. To aim for true compliance with section 4 requires, as Nganeko Minhinnick put it some years after the Manukau claim, the ability to trust that Māori will act as effective guardians of marine areas within their rohe. Marine reserves provide one of our strongest chances to develop this trust and to reap its benefits.

[102] See Te Ohu Kai Moana, 'Submission on the Marine Reserve Amendment Bill', supra n. 1, p. 15.
[103] See Vincent Kerr, 'Submission to the Local Government and Environment Select Committee on the Marine Reserve Amendment Bill 2003' p. 2.
[104] See generally Te Ohu Kai Moana, 'Submission on the Marine Reserve Amendment Bill', supra n. 1.