ESSENTIAL FRESHWATER

Finding common support for the Treaty of Waitangi and its effect on basic issues of our unwritten constitution, in particular essential freshwater

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Introduction

This University's kind invitation to address a subject of my choice led me to select what appeared the most topical. It has raised a difficult pair of related questions on which there is a range of legitimate opinion – what is the role of the Treaty of Waitangi in our constitutional law; and what does it say concerning our water? Made in exercise of this Institution's privilege as critic and conscience of society, and relieved from the constraints of prior judicial roles to raise other options, these observations are tentative and invite challenge.

My conclusion is that the authors of current and proposed legislation, in responding to grave deficiencies in New Zealand's supply of essential freshwater, were right to see the Treaty as fundamental to the answers.[1] The legislation has been improved since the form published when I delivered an oral lecture on 17 May 2023. But as will appear, there is some difficulty in determining exactly what status is now accorded to the "other interests" added to mana whenua and territorial authorities as rights holders by the changes.

Overall, while identifying and seeking to improve inadequacies in that form, the proposed legislation does not yet in my view comply fully with today's Treaty requirements.

Fortunately Parliament remains seized of the Water reform and it appears that there will be opportunity for it to consider further public submissions.

The form published as at 17 May recognized, to its considerable credit, the interest in our water legislation of two essential sets of institutions: the mana whenua (local Māori) and territorial authorities. It failed however to address two others: both the Crown with its primary responsibility under Article 1 of the

[1] Some aspects of a former draft of this essay, prepared for the oral presentation on 17 May 2023 and now amended following subsequent Select Committee reports and a Bill amending the Water Services Entities Act 2022 and accompanying explanatory note, are required here to explain certain problems of the current form of the current and presently proposed legislation.

Treaty; and all other New Zealanders, namely Māori other than tangata whenua, and what Sir Edward Durie termed tangata tiriti: those of us whose right to call ourselves New Zealanders derives from the Treaty.

Redrafting since then has acknowledged the need for fundamental change: to recognize by involvement of the Commerce Commission the continuing Crown role contemplated in Article 1 of the Treaty, both to oversee and ensure the essential changes in the means of supply and other treatment of freshwater; and also "other interests" which are additional to those of mana whenua and territorial authorities.

But the assumption of the original legislation that it would deal adequately with our water problems did not identify and address their nature, complexities and size. Nor does the current redraft's response to the interests of those added groups.

To achieve adequate legislative reform requires understanding of the fundamental importance of freshwater to every New Zealander, beginning with health and nutrition and extending to a multitude of other interests. Wholesale change, while essential, because it potentially affects all such interests requires carefully planned prior consultation with the members of the community who alone have full knowledge of how it might affect them.

While the assessment by a member of the Select Committee that about 3,000 kilometers of streams run through Auckland, about half of it affecting private land, received last-minute change, there is further need to identify aspects of New Zealanders' safety and security in conditions of global warming,

There should also have been overarching recognition that a primary purpose of the Treaty of Waitangi, in addition to the protection of the Māori people against the asperities of colonial settlement experienced elsewhere and, unhappily, in New Zealand following the Treaty, was that that all New Zealanders - both

tangitata whenua and the contemplated immigrants - should live together in a harmony that demands their access to freshwater.

The afterthought (s76 Water Services Economic Efficiency and Consumer Protection Bill)) of a consumer dispute resolution service in relation to complaints cannot permit, let alone encourage, consumers to provide prior input to the system of systems control and operation of decision-making over which each of some 60 mana whenua as well as the ten entities together have authority.

Nor, while an improvement, does the bill's recommendation that "in provisions related to engagement in new section 461" "references to 'mana whenua' be replaced with the broader term 'interested persons' [which] is not defined in the Act or the bill" grapple with a core question. Merely implicit allusion to such persons, in that expression which is expressed to embrace mana whenua and may include territorial authorities both of which receive elaborate discussion elsewhere, treats all other New Zealanders as of an unexpressed status that would require expensive and unassisted analysis by the courts.

The bill also asserts that "as introduced [it] would also make partnering and engaging with mana whenua one of a [Water Services Entity's] functions (new section 13 in clause 7 of the bill as introduced)." But as later explained there is need to avoid or demystify the use of "partner" in the Treaty context.

I begin with

The Treaty of Waitangi

Surprisingly, while compliance with the Treaty of Waitangi or its principles is now a commonplace requirement, there remain in New Zealand law and

practice both relicts of an outmoded pre-independence Privy Council judgment, and general failure to factor in the vital Preamble to the Treaty.

Until 1947, when by enacting the Statute of Westminster Adoption Act New Zealand exchanged its Dominion status for that of full Sovereignty, the Treaty of Waitangi was regarded by UK treaty and colonial law applying in New Zealand as having no legal status. That had been determined by the Privy Council six years earlier in 1941, in *Hoani te Heuheu Tukino v Aotea Maori Land Board*.[2] The receipt of sovereign status should since 1947 always have been regarded as resulting in radical legal change: New Zealand then acquired authority to make and determine the legal status of different laws, among them the Treaty of Waitangi. I will argue that, despite a long reluctance of the courts to abandon *Hoani's* case, from having been a legal nothing that Treaty has now been recognized by Parliament, the judiciary and the community as fundamental law, subject only to Parliament's power to enact legislative change.

Parliament was right to see the Treaty as vital to the treatment of our water problems. Our water law is constitutional law. That law undoubtedly requires recognition of two important bodies - both the mana whenua and the territorial authorities - each of which has important legitimate interests in freshwater. But the requirements of that constitutional law, especially the Preamble to the Treaty which summarizes the very reason for the Treaty's existence, demand recognition of two more elements that did not receive original mention in our 2022-3 water law and still are under-emphasized. One is the Crown which has essential oversight functions identified in Article 1 of the Treaty. The other is all New Zealanders – both Māori and non-Māori – who are not identified as of mana whenua.

[2] [1941] NZPC 6, [1941] AC 308

Constitutional law

New Zealand has adopted what in the UK is termed an "unwritten constitution" but understandably has abandoned the former safeguard, of current significance there, of a second House of Parliament.

The rule recently confirmed by the UK Supreme Court in the first *Miller* constitutional case as to the authority of Parliament to make any law it chooses,[3] is applied in New Zealand. That court has also endorsed as "informative"[4] the judgment to which I next turn which is based on the protection of fundamental rights in an unwritten constitution by such leading UK authority as *Simms*[5] which we also apply in New Zealand:

> …the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost…In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document …

In a classic judgment delivered by the late Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151, citing *Simms*, he distinguished constitutional

[3] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 para 43
[4] At para 66
[5] *Secretary of State for the Home Department, Ex Parte Simms* [2000] 2 AC 115 *per* Lord Hoffmann at 131

cases and their standards from other classes of case in an unwritten constitution, stating:

> 62…..In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental … And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes… The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, [and] the Bill of Rights 1689

each of which remains law in New Zealand. He continued:

> 63. …A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights …, by unambiguous words on the face of the later statute.
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> 64. This development of the common law regarding constitutional rights, and as I would say constitutional statutes, is highly beneficial. It gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes …) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand.

I discern nothing contrary to New Zealand values in applying such distinction here. In my view such classification would give effect to our current conventions and is open to our courts to adopt.

If they were to do so, the Treaty is a primary candidate for inclusion in the constitutional category. Functionally it expresses the Māori receipt, in exchange for their pre-Treaty sovereignty, of future Crown protections of Article 2 in addition to those of Article 3, as well as the overarching purposes of the Preamble. As will appear, these entail strict compliance with its purpose of safeguarding the interests both of mana whenua and also of the New Zealanders – Māori and non-Māori - who are not identifiable as mana whenua; and in addition the Sovereign's Government charged with Article 1 oversight of the new country.

Again, if the courts were to apply such principles, stipulation of new law such as dealing with Te Mana o te Wai, given the same status as the Treaty, should also meet its "constitutional" standards as to consideration of relevant interests.

The Preamble

The Vienna Convention on the Law of Treaties 1969 (later further discussed) applies retrospectively. In *Moohan v The Lord Advocate* (2014)[6] Lord Kerr said that an international convention:

> 63. … is not to be read as if it were a Westminster or a Holyrood statute. It is an instrument of international law, to be interpreted according to that system's markedly distinct canons of interpretation. These are encapsulated in article … 31 … of the Vienna Convention on the Law of Treaties ..
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> Article 31
>
> General rule of interpretation
>
> …

[6] [2014] UKSC 67, [2015] 1 AC 901

> 2. The context for the purpose of the interpretation of a treaty shall [include] its preamble …

The purpose of the Treaty of Waitangi, clearly expressed in the Preamble, is that New Zealanders live together in harmony.[7] While awareness of colonial abuse of indigenous people elsewhere, including losses of 50% of an indigenous population, required its special protections envisaged by James Stephen of the Colonial Office, and provided by Article 2 (discussed below). It was outrageous that those protections were defied; addressing them remains a major function of our civic responsibility. Apart from those special protections, the Treaty, which should in my view now be treated as basic law, and other aspects of the law recognize all New Zealanders as of equal worth.

The Preamble (in the Māori version) of the Treaty states:

> *Victoria, the Queen of England, in her concern to protect the chiefs and the subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order* considers it just to appoint an administrator one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands and *also because there are many of her subjects already living on this land and others yet to come*. So *the Queen desires to establish a government so that no evil will come to Maori and European living in a state of lawlessness*. So the Queen has appointed "me, William Hobson a Captain" in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents to the chiefs

[7] Ned Fletcher's recent book *The English Text of the Treaty of Waitangi* (Bridget Williams Books 2022) begins and ends with Sir Edgar Williams' advice that the Treaty's purpose, overseen in London by James Stephen, Permanent Under-Secretary of the Colonial Office, was to protect Māori from the fate of other indigenous societies who had been oppressed by European settlers. To that end the Treaty Preamble contemplates a single society of Māori and non-Māori at peace under the rule of law.

of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

(Italics added)

In *Ngāti Maru Ki Hauraki Inc v Kruitof* (2004) [8] I held that the Preamble required interpretation of the treaty so as to to protect a New Zealander of Dutch descent.

Article 1

The Māori version of Article 1 was translated by Sir Hugh Kawharu as:

> The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.

Article 1 sovereignty means supreme authority.[9] It is long settled in New Zealand as being that of Parliament and I do not enter the debate about the term *kawanatanga*, as to which Sir Hugh, selecting "complete government", made comment:

> There could be no possibility of the Māori signatories having any understanding of government in the sense of "sovereignty" i.e. any understanding on the basis of experience or cultural precedent.

[8] HC Hamilton Registry Registry CIV2004-485-330 11 June 2004; [2005] NZRMA 1
[9] *The Law Debenture Trust Corporation Plc v Ukraine* [2023] UKSC 14 para 14.

Predominant current opinion is that[10] the Treaty now confers both of the former Māori and British sovereignties on the New Zealand Crown, comprising the Sovereign and his Governor-General; the Parliament which makes laws and of which the majority has power of government assisted by New Zealand's Police, the Armed Forces, public servants, local bodies and others; and the independent judiciary. This is not the occasion to address that topic.

Article 3

> **Article the Third (Māori version)**
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> For this agreed arrangement therefore concerning the Government of the Queen, *the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England*
>
> **(English version)**
>
> In consideration thereof *Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects*.

The Article 3 "rights and privileges of British (now 'New Zealand') subjects" include the two basic elements pronounced in *Calvin's Case* (1608)[11] - of protection by, and loyalty to, the Crown. But in modern New Zealand society they extend much further, embracing human rights entitlements and such other

[10] Unlike opinions expressed in *Haasland v Brackeen* (US Supreme Court 15 June 2023)

[11] Coke's Reports 1a, 77 English Reports 377 in which following the merger of the English and Scots Crowns Sir Edward Coke CJ and 14 colleagues held a Scot entitled to all the rights of an English subject.

decencies, fundamental to democratic society, as voting rights, health, education and shelter, and including the due performance by the Crown of its Article 1 powers.

I will return to the crucial provisions of Article 2.

Drinking Water and the Treaty

The Havelock North Drinking Water Inquiry exposed fundamental deficiencies in New Zealand's systems of dealing with our drinking water and resulting disease. That has led to water legislation – the Water Services Act 2021 and the Water Services Entities Act 2022 – that has given rise to major debate about the role and application of the Treaty of Waitangi in New Zealand's constitution.

During my six decades in law, most of it in New Zealand, I have experienced some aspects of the Treaty. But I have now concluded there is compelling need for other experience to be added to our education and decision-making concerning freshwater. As, together with fresh air, the most basic need of life, its control, supply, distribution and disposal in my view require further consideration of how informed and balanced protection by Parliament can rectify omissions in our unwritten constitution.

Since we lack other obvious guidance from that constitution it is unsurprising, and I believe appropriate, that Parliament should have turned for guidance to the Treaty of Waitangi, signed 183 years ago and, I consider, of distinctly greater significance than has generally been recognized. For reasons that follow I respectfully endorse that choice, although not all of the manner in which that has been legislated.

The Treaty is in my view fundamental to our legal system and our identity as New Zealanders. Our reception of the common law has in my view brought with it recognition of Parliament as our ultimate lawmaker. As I will explain, that status is consistent with the Preamble and specifically Article 1 of the Treaty

As well as New Zealand's general acceptance that what Parliament enacts as legislation is our law, there is now in my view what may be called a powerful presumption, or convention, that Parliament will recognize the status of the Treaty as setting norms with which the law should comply. That convention was substantially followed by the full New Zealand Court of Appeal in *Ngāti Apa v Attorney-General* [12] in 2003. It confirmed potential Māori rights in the foreshore and seabed, but was however overruled by the Foreshore and Seabed Act 2004. However, in compliance with the convention just described, that statute was itself repealed seven years later by the Marine and Coastal Area (Takutai Moana) Act 2011.

My argument is that, like the Foreshore and Seabed Act but in an almost opposite manner, the 2022-3 water legislation, despite improvement from its initial form, still fails fully to comply with the Treaty convention, and should be amended to do so. That legislation originally granted control of water to two sets of New Zealanders. One was mana whenua - the term defined for an identified area as meaning the iwi or hapū holding and exercising, in accordance

[12] [2003] NZCA 117; [2003] 3 NZLR 643 which cited the principle settled by the Privy Council (*Nireaha Tamaki v Baker* (1901) 14 App Cas 46; *St Catherine's Milling and Lumber Co v The Queen* [1901] AC 561 *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399)*;* and accepted by the final Courts of Canada *Delgamuukw v British Columbia* (1997) [1997] 3 SCR 1010 , and Australia *Mabo v State of Queensland (No. 2)* [1992] HCA 23; 175 CLR 1, of legal right to indigenous title.

with tikanga, authority or other customary rights or interests in that area. The other set was territorial authorities. Each has essential interests in water control.

But as I have noted, the overarching purpose of the Treaty, expressed in its Preamble, included concern for the interests of two further essential parties: the Sovereign's Government charged with oversight of the new country; and also the New Zealanders who are not identifiable as mana whenua. Some will be Māori; others are those to whom the 1840 Preamble referred as Europeans but each of whom is also a New Zealander.

Breaches of the Crown's Treaty obligations to Māori, from armed conflict followed by confiscation through a gamut of other acts and omissions, have contributed to the adverse and other social data affecting our indigenous people. That is despite notable effort to the contrary by Māori and non- Māori. Recognition of the need to repair breaches has seen substantial public support given to relatively recent changes.

In the lecture of 17 May 2023 I expressed the hope for similar support for the recognition in our recent water legislation not only of important local body interests, but to an appropriate extent Māori perspectives of mana whenua, mātauranga, tikanga, and te ao Māori[13] as to how the outrage of water pollution should be met.

Such support had however been restrained by the problem just identified – that the legislation did not accompany consideration of those legitimate factors with

[13] Water Services Entities Act 2022 s5

the two further considerations: of the concerns of New Zealanders who are not "mana whenua"; and of the responsibilities of the Crown.

Consultation with non-mana whenua

Absence of consultation with non-mana whenua may have contributed to the statistic that 10,000 New Zealanders had made submissions on the new water legislation. Such submissions are necessarily less focused than, and no substitute for, an initial identification of the issues, followed by opinions then given by the New Zealand community in response to consultation.

That is not to propose decision by referendum. As Brexit shows, use of referenda to deal with complex public issues has its problems. In New Zealand we do not have the habit and experience of the Swiss in the process of public education that is essential to their success.

We do however have long experience of what lawyers call natural justice - before a really important decision is made, to hear both sides. For constitutional reasons we did it over the topic of our national flag. Water is more complex, but of ultimate importance. It is also more difficult, because it concerns a minority's Treaty rights, that cannot be fairly responded to by simple majority vote. Yet while consultation should not dictate a result, it is likely to assist informed decision-making on freshwater which - although undoubtedly a *taonga* - is one of which in my view the Preamble would not permit exclusivity for mana whenua/territorial authorities in relation to the whole of New Zealand's resources.

A new section 461 proposes a degree of extension of "mana whenua" by its replacement by "interested persons". But they are not yet seen as fundamental to the Treaty and to the entire water reform.

The responsibilities of the Crown

The second originally unmet, and since the introduction of the Commerce Commission only partially met, legitimate concern is the essential need for Crown oversight and leadership of essential massive reform of how our most essential need other than clear air is to be met. Yet again that not yet seen by the new legislation as fundamental to the Treaty and to the entire water reform.

Treaty considerations

I will return to the status of the Treaty, of which each of these two latter considerations is a major factor. Consultation is an element of the Preamble's requirement of a sense of community – access to freshwater is implicit in its contemplation of immigrants. And Crown acceptance and performance of the leadership role is the subject of both Article 1[14] and of Article 3´s[15] right of all subjects to the protection of the Crown.

[14] **Article the First (Māori version)** (repeated for convenience)

The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.

(English version)

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

[15] **Article the Third (Māori version)** (repeated for convenience)

The need for compliance with the Preamble

Since, together with clean air, ready access to pure drinking water is the most basic requirement of life, it is imperative that our systems of law and its administration actually meet that standard. But the second Havelock North Drinking Water Inquiry's Report of 2017, identifying the disgraceful quality of those systems, including close location of drinking water sources to obvious health hazards, accompanied by complacency and resulting in disease, established overwhelming need for major nation-wide response to a systemic problem.

The problems of water pollution and their remedy are well beyond the capacity of any Government Department charged generally with that immense topic.[16] The Drinking Water Inquiry's conclusions establish breach of the Crown's obligation, both at common law and under Article 1 of the Treaty by which it acquired sovereignty, to protect its citizens.

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England

(English version)

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[16] As by s3A of the Health Act 1956 providing:

Without limiting any other enactment or rule of law, and without limiting any other functions of the Ministry [of Health] or of any other person or body, the Ministry shall have the function of improving, promoting, and protecting public health.

I have argued that to seek appropriate answers Parliament was appropriately taken back to the Treaty. I have noted its responses were founded on the water legislation.

The Treaty

The Treaty, having been ignored until 1947 as having no legal significance, is now fervently debated as our fundamental constitutional document. The judgment in *Hoani* that the Treaty formed no part of New Zealand law turned on a rule of the English common law, recently stated in the Brexit case *R (on the application of Miller) v Secretary of State for Exiting the European Union* (2017),[17] which

> rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state. As Lord Kingsdown expressed it in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22, 75, treaties are "governed by other laws than those which municipal courts administer". The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.

The combination of the Treaty of Waitangi and a battery of legislative constitutional changes, including the Statute of Westminster Adoption Act 1947, the British Nationality and New Zealand Citizenship Act 1948, the Treaty of Waitangi Act 1975, the (NZ) Constitution Act 1986, s9 of the State-Owned

[17] [2017] UKSC7; [[2018] AC 61 para 55

Enterprises Act 1986, and the Senior Courts Act 2016, have together given New Zealand, its legislature, executive and judiciary, full and exclusive sovereignty over our affairs.

Those changes lifted the Treaty into the very different category appreciated by our Court of Appeal in *Ngāti Apa v Attorney-General* [18] in 2003 and by Parliament in repealing the Foreshore and Seabed Act 2004 by the Marine and Coastal Area (Takutai Moana) Act 2011 so as to confirm potential Māori rights in the foreshore and seabed. For all these reasons, *Hoani's case* from eight decades ago is now distinguishable as written pre-sovereignty, and its application in a number of post-sovereignty judgments of the Court of Appeal as well as one of the Privy Council ought not, in my respectful view, to be followed.

I emphasize that it does not however follow that the Treaty controls Parliament. Neither the Treaty nor any modern New Zealand court has made such assertion.

Neither the Vienna Convention nor the *Iron Rhine* principles later discussed go so far. On the contrary, the principle of Parliamentary dominance has in modern times been an assumption of New Zealand constitutional law: I have mentioned the restatement by the full UK Supreme Court in the Brexit case.

I regard as convincing the argument that, subject always to Parliamentary supremacy, the Treaty has come to enjoy a status in New Zealand domestic law that is close to the opposite of the "nothing" of a treaty that it had possessed in England, and in New Zealand before 1947. The Senior Courts Act 2016 now gives the Supreme Court jurisdiction:

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[18] [2003] NZCA 117; [2003] 3 NZLR 643 which cited the principle settled by the Privy Council (*Nireaha Tamaki v Baker* (1901) 14 App Cas 46; *St Catherine's Milling and Lumber Co v The Queen* [1901] AC 561 *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399) ;and accepted by the final Courts of Canada *Delgamuukw v British Columbia* (1997) [1997] 3 SCR 1010 , and Australia *Mabo v State of Queensland (No. 2)* [1992] HCA 23, of indigenous entitlement to rely on the common law.

> on important legal matters, including matters relating to the Treaty of Waitangi, which would formerly have been determined by the Judicial Committee of the Privy Council.

I have mentioned both the Court of Appeal's judgment in *Ngāti Apa v Attorney-General* in 2003 and Parliament's repeal of the Foreshore and Seabed Act 2004 by the Marine and Coastal Area (Takutai Moana) Act 2011

Any such argument is a matter which the Supreme Court, or the New Zealand Parliament, can finally determine. It could it perhaps be assisted by Article 31(1) and (2)(b) of the Vienna Convention later mentioned.

Treaty rights are best known for those confirmed to Māori by Article 2. The water legislation emphasizes those of mana whenua: the local Māori of an area. But I have emphasized the Preamble's insistence that "no evil will come to Māori and European" extends protection also to rights of other New Zealanders.

I turn to the important Article 2.

Article 2

Sir Hugh Kawharu translated the Māori version of Article 2

> The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures.

The English version from which the Māori version was broadly taken states:

> **Article the Second**
>
> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and

> Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession …

What do these signify in relation to water? The Treaty of Waitangi was made between sovereigns: Queen Victoria for the British Crown and leaders of the Māori whom three British statutes had recognized as sovereign, a status they are said to have relinquished in favour of the Queen by Article 1. There are some well-established principles for interpretation of international treaties.

That is seen from the *Iron Rhine* case[19] in the Permanent Court of Arbitration.[20] A treaty signed in 1839 between Belgium and The Netherlands was interpreted for its current effect on 24 May 2005, 166 years after its execution. Unlike the present case it did not include the passing of sovereignty from one party to the other; nor was there doubt that both sides well understood all nuances of the other's native French or Dutch. So, while offering in its judgment valuable analysis focussed on how a modern tribunal should approach an elderly treaty intended to have future effect, I emphasise that the *Iron Rhine* award did not require what I will call the "proportionate generosity of interpretation" that I suggest is essential to the Treaty of Waitangi, because of greater familiarity of Crown and Māori signatories with the nuances of their own respective language. In particular, "taonga" is not simply to be read down to conform with a transliteration of the English "and other properties" version of its subject-matter. It must be read as contemplated by the Māori signatories' "and all their treasures" in 1840.

[19] https://pcacases.com/web/sendAttach/478

[20] Judge Rosalyn Higgins, President, Professors Soons and Schrans, Judges Tomka and Simma

The *Iron Rhine* parties had agreed that Belgium should have rail access to Germany on an east-west axis across a strip of The Netherlands. The issues included how to manage the increase in importance over such period of environmental considerations and the increased cost of the measures now required to deal with them. At para 45 the tribunal stated:

> It is now well established that the provisions on interpretation of treaties contained in Article… 31 …of the Vienna Convention [on the Law of Treaties 1969] reflect customary international law, and thus may be (unless there are any particular indications to the contrary) applied to treaties concluded before the entry into force of the Vienna Convention…
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> There is no case after the adoption of the Vienna Convention … in which the ICJ and any other leading tribunal have failed so to act.

I interpolate that on 6 April 2023 this principle was similarly stated by the International Court of Justice in The Hague in *Guyana v Venezuela Arbitral Award of 3 October 1899*.[21]

Article 31 of the Vienna Convention on the Law of Treaties states:

> General rule of interpretation

[21] https://www.icj-cij.org/sites/default/files/case-related/171/171-20230406-JUD-01-00-EN.pdf para 87

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

…

2. The context for the purpose of the interpretation of a treaty shall [include] its preamble …

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty, or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its application;

(c) Any relevant rules of international law applicable in the relations between the parties.

The environment

As to the last, the Iron Rhine Tribunal wrote:

58 … As to international environmental law … "environment" is broadly referred to as including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate conservation, management, protection and sustainable development, and protection for future generations.

This topic is of importance to the Treaty of Waitangi in assessing New Zealand's future, including the need for social harmony emphasized by the Preamble - here as regards management of both water and health, and due consultation in fundamental law reform.

The Tribunal continued:

> 59. … international … law require[s] integration of appropriate environmental measures … "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts … This duty … has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities taken in implementation of specific treaties between the Parties … "new norms have to be taken into consideration and … new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past." …
>
> *Perspective*

As to perspective, the Tribunal stated:

> 79. … [R]egard should be had … to juridical facts as they stood in 1839. … The great advances that were later to be made in electrification … and so forth could not been foreseen by the

parties. But some terms are "not static, but were by definition evolutionary" … The parties to the Covenant must consequently be deemed to have accepted them as such … Where a term can be classified as generic "the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time [as in the case of] 'natural resources'".

80 … "the Treaty … not [being] static, … is open to adapt to emerging norms of international law"

81… [There is] general support … today for evolutive interpretation of treaties … [the] purpose of a treaty is to create longer lasting and solid relations between the parties … it is hardly compatible with this purpose to eliminate new developments in the process of treaty interpretation

83 … the entirety [of the Treaty] with its careful balance of the rights and obligations of the Parties, remains in principle applicable to [modernisation]

84 It is reasonable to interpret [the Treaty] as envisaging future work .. Dynamic and evaluative approach to guarantee [operation] through time. Concept of reasonableness [may include] provisions of international law as they apply today.

91 … careful balancing of rights

These general concepts have potential relevance to the Treaty designed to cope with problems that had motivated James Stephen as arising from prospective arrival of the visitors and new settlers.

The "unqualified exercise of their chieftainship over their lands, villages and all their treasures"

as well as

"the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess"

undoubtedly embrace the optimum entitlement - the *rangatiratanga* of the Māori language version - of the assets specifically mentioned. They are all either individual, or closely held community, items capable of exclusivity.

What is less obvious is how far, viewed from an 1840 Māori perspective, the term "taonga (treasures)" is to be taken. Taonga may or may not be exclusive: the Māori language has been commonly accepted as a taonga, not as one to be exclusive of non-Māori, but rather one whose use is to be encouraged, to be shared as one of New Zealand's legal languages.

What might be relevant is Stephen's desire to avoid diminution of Māori authority over what was of value to them, in contrast to abuse of indigenous norms elsewhere, yet catering for the reasonable needs of the contemplated immigrants. To address such valuable elements as sunshine, wind, sea, rainfall and other forms of water is no simple task. Certain aspects, among them specific fishing places, boat launching areas, water sources supplying villages might perhaps be viewed differently from more general resources to which immigrants might seek shared access.

As with the sea access the subject of the Foreshore and Seabed experience, there are various options, of which the first is wise and imaginative vision of how the Treaty should be applied. That must include careful identification and appraisal of the interests involved.

The water legislation however treats the whole of New Zealand's water as an asset whose control is in certain respects shared equally between mana whenua and territorial authorities, but legislative authority over which, at least in its original form, was exclusively the unfettered entitlement of mana whenua, unless a 75% vote[22] can be achieved to depart from its dictates.

The Treaty and the unwritten constitution

To achieve the purpose of the Preamble:

- Article 1 provides for British sovereignty which is now under the New Zealand Crown the role of our Parliament, Executive and Judiciary;
- Article 2 guarantees protection to Māori of their taonga;
- Article 3 added Māori to the category of British, now New Zealand, subjects.

I have noted that so long as New Zealand lacked sovereign status, British law denied the Treaty status as legally enforceable. I have expressed the view that its status changed at independence, and it should now be recognized as our constitutional foundation.

Since none of our legislation, including the Constitution Act 1986, pretends to act as a full "Constitution" we must currently rely on a combination of what the judicial oath terms "the laws and usages of the realm". Including as recognized

[22] S169

by *Ellis v The Queen* [2022] NZSC 114, 115 Māori usages, together these comprise what is fairly termed New Zealand's "unwritten constitution".[23]

Such so-called "unwritten" constitution has profound advantages. Coupled with our unicameral Parliament it can respond rapidly to urgent problems, of which the grave health hazards recounted by the Report of the Havelock North Inquiry are an example.

But it can also give rise to inadequately considered attempts - to answer them in a manner which in fact is at odds with rather than achieving the purpose of the Preamble. It requires instead meticulous compliance with the rule of law.

Legal rights are obviously fundamental to the Treaty's stipulation that the Treaty's stipulation of "*government so that no evil will come to Maori and European living in a state of lawlessness*".

Such rights must never be removed without due cause, due process, and full compensation. In the case of treaty rights, they may exist in perpetuity. It follows that no such rights may be created or amended so as to infringe inconsistent rights of others. That is why, to comply with the rule of law, meticulous care and consultation are required before creating new rights.

I have given as example of infringement the 2004 Foreshore and Seabed Act that deprived Māori owners of the security of title to their beachfront property and gave it to the Crown; while their non-Māori neighbours retained theirs without impediment. Like many others I opposed that measure as unfair to Māori[24] and was relieved when in 2011 it was repealed. I will return to its lessons.

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[23] For discussion see *Thoburn* footnote 1

[24] "What is distinctive about New Zealand law and the New Zealand way of doing law? New Zealand law and Māori" Address to the Law Commission's 20th Anniversary Seminar Wellington 25 August 2006

There are in my view reciprocal reasons for concern about the Water Services Act 2021 and the Water Services Entities Act 2022 read in the light of the wisdom of the Iron Rhine award:

> 81… [There is] general support … today for evolutive interpretation of treaties … [the] purpose of a treaty is to create longer lasting and solid relations between the parties … it is hardly compatible with this purpose to eliminate new developments in the process of treaty interpretation.

Here the "new developments" include the changes in New Zealanders' relations with freshwater, among them the demands of a different population, in the 183 years since 1840.

It is right that the water legislation should ensure that decision-makers take into due account perspectives of New Zealand's Māori people already mentioned as mana whenua, mātauranga, and te ao Māori.

It will be recalled that the definition of "mana whenua" is:

> *"mana whenua"* for an identified area, means the iwi or hapū holding and exercising, in accordance with tikanga, authority or other customary rights or interests in that area

Until the Water Services Economic Efficiency and Consumer Protection Bill that term appeared 185 times in 43 sections of the Water Services Entities Act 2022 (the Entities Act). Aside from local authorities, until that bill there was no consideration of others' interests in water.

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https://www.lawcom.govt.nz/sites/default/files/audioFiles/Law%20Com%20Anniversary%20Address%20Baragwanath.pdf

Moreover section 4 treats another concept, Te Mana o te Wai, later discussed, as having the same status as the Treaty of Waitangi:

> ***Duties to give effect***
> (1) All persons performing or exercising duties, functions, or powers under this Act—
> **(a)** must give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi; and
> **(b)** must give effect to Te Mana o te Wai, to the extent that Te Mana o te Wai applies to those duties, functions, or powers.

I will return to the topic of Te Mana o te Wai, which appears to be described by the Ministries for the Environment and for Primary Industries as "essential freshwater",[25] and which is given such constitutional emphasis.

Section 3 is to establish 10 water services entities ("entities") each covering a separate part of New Zealand and related legislation.

In accordance with the Legislation Act 2019 calling for "… high-quality legislation for New Zealand that is easy to find, use, and understand", the main purpose of the Water Services Act is stated as "to ensure that drinking water suppliers provide safe drinking water to consumers …"[26]

The proposed ten entities are responsible for dealing with major classes of land-based water – including drinking water, storm water and wastewater.

Each entity is controlled by a "regional representative group" responsible for —

- appointing and removing the entity's board members under this Part; and

* participating in the process of setting the entity's strategic direction and performance expectations

[25] At p1 of "Essential Freshwater Overview Factsheet" available at environment.govt.nz
[26] S3(1)

They are subject to the section 4 duties to give effect both to the Treaty and to Te Mana o te Wai.

Each entity's regional representative group is required to include an equal number of—
(a) territorial authority representatives; and
(b) mana whenua representatives.

Returning to Te Mana o te Wai

The term ***Te Mana o te Wai*** (the mana of the water), a key provision of the statute given 57 mentions, is not given an English translation. It is printed in bold and defined in section 5 as having:

> the meaning set out in the National Policy Statement for Freshwater Management issued in 2020 under section 52 of the Resource Management Act 1991 and any statement issued under that section that amends or replaces the 2020 statement …; and
> applying, for the purposes of this Act, to water (as that term is defined in section 2(1) of the Resource Management Act 1991)

That definition is immediately followed by another:

> **Te Mana o te Wai <u>statement for water services</u>** means a statement provided by mana whenua to a water services entity under a 143 of the Entities Act.

Te Mana o te Wai statements for water services are the subject of the elaborate Subpart 4.[27]

[27] It states:

> **143 Mana whenua may provide Te Mana o te Wai statements for water services**
> (1) A Te Mana o te Wai statement for water services may be provided to a water services entity by mana whenua—
> **(a)** whose rohe or takiwā includes a water body in the service area; or
> **(b)** whose interests in the service area are recognised in a Treaty settlement Act.
> (2) A Te Mana o te Wai statement for water services provided under subsection (1) may—
> **(a)** be provided by an individual iwi or hapū, or by a group of iwi or hapū:
> **(b)** relate to 1 water body, or to multiple water bodies.
> (3) Mana whenua who have provided a Te Mana o te Wai statement for water services under subsection (1)—
> **(a)** may review the statement at any time; and
> **(b)** following a review, may provide a new statement that replaces the statement that was reviewed, in which case the reviewed statement expires when it is replaced.
> (4) A statement provided under subsection (1) or (3)(b) expires after 10 years.
>
> **144 Water services entity must respond to Te Mana o te Wai statement for water services**
> (1) As soon as practicable after receiving a Te Mana o te Wai statement for water services under section 143, the board of a water services entity must—
> **(a)** acknowledge receipt of the statement; and
> **(b)** engage with the mana whenua who provided the statement in accordance with section 206 in relation to the preparation of a response to the Te Mana o te Wai statement for water services.
> (2) A response to a Te Mana o te Wai statement for water services must include a plan that sets out how the water services entity intends (consistent with, and without limiting, section 4(1)(b)) to give effect to Te Mana o te Wai, to the extent that it applies to the entity's duties, functions, and powers.
>
> **145 Obligation to publish response to Te Mana o te Wai statement for water services**
> The board of a water services entity must make its response to a Te Mana o te Wai statement for water services publicly available by publishing a copy on an Internet site maintained by, or on behalf of, the entity in a format that is readily accessible—
> **(a)** as soon as practicable after issuing the response; and
> **(b)** in any event, within 2 years after receiving the statement to which it relates.

While the legislation does not in terms state that the 60 potential issuers of Te Mana o te Wai statements are legislators, since statements of negative response can provide resistance only if mana whenua appointees agree (specific negative response by the board may require a 75% majority), I find it difficult to see what else was originally intended.

Moreover as is later noted, nor are there specified limits as to what the statement may contain.

In summary, the mana whenua were given roles:

(1) of appointing 50% of the regional representative group of each of the ten entities which comprises 12 or more representatives[28], at least 60 in all, the other 50% being appointed by territorial authorities;

(2) thus:

- controlling appointment of 50% of each entity's board members;[29]
- participating in setting the entities' strategic direction and performance expectations;
- reviewing their performance;
- approving their appointment and remuneration policy;[30]

(3) of creating the Te Mana o te Wai statements for water services that in effect constitute legislative proposals that are to be given very special consideration and potential effect.

[28] S 27(2)
[29] S 28
[30] s

It may be repeated that *"mana whenua"* for an identified area, means the iwi or hapū holding and exercising, in accordance with tikanga, authority or other customary rights or interests in that area. The effect of their further board appointment authority was that:

> The regional representative group [50% appointed by mana whenua] must appoint members to the board appointment committee who, collectively, have knowledge of, and experience and expertise in relation to,—
>
> (a) performance monitoring and governance; and
>
> (b) network infrastructure industries (for example, water services network infrastructure industries); and
>
> (c) the principles of the Treaty of Waitangi; and
>
> (d) public health; and
>
> (e) the environment; and
>
> (f) [mana whenua's own] perspectives of mana whenua, mātauranga, tikanga, and te ao Māori; and
>
> (g) perspectives of consumers and communities; and
>
> (h) perspectives of local government.

In Treaty terms the issues for which mana whenua received equal or greater authority than territorial authorities fall squarely within the Crown

responsibility under Article 1, to protect both the Māori people and other New Zealanders in terms of their health,[31] and also in relation to sound government.

It may perhaps be thought that the water legislation is an attempt to embrace both of these, by a system of co-governance providing that the entities comprise 50% local government and 50% mana whenua.

Its basic concept is said to be Te Mana o te Wai. But here there is the drafting omission already mentioned: instead of providing a substantial English language definition of Te Mana o te Wai, s14 states simply:

> (1) In this Act, **Te Mana o te Wai** has the meaning set out in the National Policy Statement for Freshwater Management.
> (2) When exercising or performing a function, power or duty under this Act, a person must give effect to Te Mana o te Wai, to the extent that Te Mana o te Wai applies to the function, power or duty.

Te Mana o te Wai is further defined in s6 of the Water Services Entities Act 2022 as created under s52 of the Resource Management Act 1991.

I have noted that is followed immediately by another definition - of "Te Mana o te Wai statement for water services", defined as "a statement provided by mana whenua to a water services entity under section 143 of the Entities Act". At least until the Water Services Economic Efficiency and Consumer Protection Bill there was no definition or limitation of what such statement may provide, and of what effect it has in law, beyond the following:

> Section 143 provides that "A Te Moana o te Wai statement for water services may be provided to a water services entity by mana whenua –
>
> (a) whose rohe or takiwā includes a water body in the service area; or

[31] See also text at footnote 13

(b) whose interests in the service area are recognised in Treaty settlement Act …

Section 144 requires the board of the water services entity to acknowledge receipt of the statement and "engage with the mana whenua who provided the statement in accordance with s 206 in relation to the preparation of a response to the statement for water services." Section 206 applies to engagements that an entity must undertake relating to the preparation of such response and imposes obligations of reasonableness of conduct by the entity.

The entity's obligations include preparing a plan setting out how it intends to conform with s4(1)(b) stating that all persons exercising authority under the Entities Act "must give effect to Te Mana o te Wai, to the extent that Te Mana o te Wai applies to those duties, functions, or powers."

I have recognized it is appropriate that, paralleling the Supreme Court's initiative in *Ellis*, the water legislation recognize the vital importance to local Māori of all aspects of water. Undoubtedly, as the Waitangi Tribunal has recognized, their interest extends well beyond consumption of water and its use for navigation, through conservation, and concern extending in important instances familiar to this University to culture as recognized in the *Iron Rhine* criteria, spiritual beliefs and practices, and indeed ancestry. It, or instances of it, will have been essential to Māori throughout history and, in Article 2 terms, are taonga.

The Supreme Court has noted[32] that the Waitangi Tribunal has gone so far as at one point to see these as adding up to the *exclusive right to control access to*

[32] *New Zealand Māori Council v Attorney-General* [2013] NZSC 6 para 17

and use of the water while it was in their rohe. That would presumably extend to all the freshwaters of New Zealand, comprising those of the ten entities of the Entities Act.

But in summarizing the conclusions of the Waitangi Tribunal's 618-page 2023 *Stage 2 Report on the National Freshwater Fisheries and Geothermal Resources Claims* the Tribunal repeats from its Stage 1 report a less absolute proposition:

> [pp526] … kaitianga rights exist in a sliding scale. At one end of the scale full kaitiaki control of the taonga will be appropriate. In the middle of the scale, a partnership arrangement for joint control with the Crown or another entity will be the correct expression of the degree and nature of the Māori interest in the taonga (as balanced against other interests). At the other end of the scale kaitiakitanga should have influence in decision making, but not be either the sole decision makers or joint decision makers, reflecting a lower level of Māori interest in the taonga when balanced against the interests of the environment, the health of the taonga, and the weight of competing interests.
>
> This scheme is not incompatible with Māori having residual property interests in - or indeed full ownership of - water bodies that are taonga. Rather that would be a factor to be considered in terms of the weight accorded the kaitiaki interest vis-à-vis other interests in the resource.

Apart from its provisions for local bodies, as already noted, the water legislation however contains no analysis of what those other interests may be, or any attempt to reconcile them, conferring exclusively on mana whenua both appointment of half the 120 or more regional representative group members, plus the sole legislated power to promote the criteria the enterprises must apply to the control of New Zealand's fresh water.

Discussion

While self-evidently water was a fundamental taonga essential to pre-Treaty life of mana whenua, it was essential also to life of Māori not identified as mana whenua. It was equally essential to the non-Māori who, the Preamble made plain, were to live in harmony with all Māori.

Article 2 of the Treaty emphasises the need to confirm for Māori the interests of value to them. By well-settled international law the usages of an indigenous community are presumed to be part of the new colonial law. They were endorsed by the Māori Language Act 2014 recognising that language as a taonga of iwi and Māori, Māori being the kaitiaki of the Māori language, and the Māori language being an official language of New Zealand. It has been presumed to be law in our, like other democratic, societies.

But process matters. The important Article 1 function of law-making given to the Crown, like the supply of water, affects the whole community.

Consultation

Until the Water Services Economic Efficiency and Consumer Protection Bill there was no provision for interests other than those of mana whenua and territorial authorities. Such concern of lack could have been met by conducting and applying to a review of Parliament's Water legislation some basic principles which by the Local Government Act 2002 it requires of local bodies. Foremost among them is consultation with those potentially affected by major planning and decision-making, [33] just like the common law of natural justice.

[33] See for example *Whakatane District Council v Bay of Plenty Regional Council* [2010] NZCA 346

To ensure the public support for water reform properly given to past reparations for Treaty breaches, there could be consultation on whether in 1840 te tino rangatiratanga extended so far, in fact or actual contemplation, as to require in modern conditions recognition of exclusive mana whenua rights in half a duopoly, let alone a certain degree of monopoly concerning Te Moana o te Wai statements, of rights over water control throughout New Zealand.

While mana whenua and local bodies both have considerable interest in many aspects of freshwater, its conservation, control, aesthetics, consumption and other uses, there is a myriad of water-related activities in New Zealand. They extend from the mighty lakes and rivers that contribute to New Zealand's identity, through farm watercourses and drains to many types of consumer and observer, to the sewage disposal systems public and private. Investment of many kinds of cost and effort, including massive projected cost of adequate reform and maintenance, extends public interest right across our society.

The existing and proposed reforms engage with the Treaty which is of constitutional importance across the New Zealand community. While Māori and local bodies can justly point to commendable concern and activity, the current and future health, economic and other considerations affecting future generations also require optimum procedures and potentially engagement of more than the two categories originally recognized by the Water legislation and now extended to some extent to the Crown and "other interests

Further aspects of the Article 1 functions

The Treaty emphasis of the legislation begins with the responsibility of the Crown's Article 1 elements to provide democratic oversight of the necessary amended system for all New Zealanders. That has received some attention

from the new role of the Commerce Commission in the Water Services Economic Efficiency and Consumer Protection Bill.

That requires both continuing and monitoring of a massive national operation with both national and potential international components that, while concerned with each local area, also requires seamless complementarity among them.

A vital systemic contribution to the work of Article 1 is the role of the Crown as tie-breaker, initially overlooked and now with, introduction of the Commerce Commission, the subject of the Water Services Economic Efficiency and Consumer Protection Bill. That aside, what is to happen under current legislation in the event of difference between local bodies and mana whenua within and beyond an enterprise that requires resolution, when the 75% support for change to meet major problems required by the legislation[34] cannot be achieved? While amiable resolution of difference is an agreeable ideal, the statute's employment, without expressed justification, of concepts of co-governance and co-management of ten regional geographical entities, and consideration only of the territorial authorities in their service area and those holding mana whenua, in my view pays insufficient regard to the reality of competing views over a vast area. Expression of legitimate difference of opinion is a valuable function of a varied community. It is seen for example in judicial differences in major appeals. Whereas differences in a multi-judge court are readily resolved by one side's forming a majority, that option is unavailable for differences between local bodies and mana whenua. The stability of society requires recognition of their likelihood, and ready means of dispute resolution. Under Article 1 it is the Crown's responsibility to resolve that by further means, including its own capacity for investigation and legislative intervention. Simple delegation to territorial authorities and mana

[34] S169

whenua of our water problems does not in my view sufficiently address their nature and extent.

"Partnership"

In legal terms "partnership" is a word with two quite distinct and inconsistent meanings. One, formal and justiciable, is of a specific relationship enforceable in court; the other is of a non-justiciable relationship involving acting amicably together with one another.

It may be that the recognition of interest in water control only of territorial authorities and mana whenua is based on a notion that the Treaty of Waitangi is a legal partnership between Crown and Māori. But significant decision-makers, including Cooke P in the SOE case later mentioned, and Parliament in s4(2A) of the Treaty of Waitangi Act 1975[35], have used "partnership" in what appears to be a non-justiciable sense of the relationship between the Crown and Māori signatories, implying the Preamble's human need to identify as companions. As Lord Cooke made clear, both in lacking legal partnership's access to ready dispute resolution and, fundamentally, because of the Crown's exclusive possession of sovereignty, as well as absence of mention in the Treaty of "partnership", any notion that the Treaty entails conventional legal partnership is importantly incorrect. The Crown's first obligation under Article 1 is to provide sound government. Inevitable impasses between territorial authorities and mana whenua would entail fundamental breach of that obligation.

It may also be that the drafters considered that in Treaty terms territorial authorities are appropriate to exercise Crown Article 1 functions, and the contemplated mana whenua appropriate to protect Māori rights. Certainly, both

[35] Requiring appointees to the Waitangi Tribunal "to have regard to the partnership between the 2 parties to the Treaty"

territorial authorities and mana whenua have vital interests and essential roles in our watercourses and water facilities. Members of mana whenua have provided much needed leadership in conservation, including outstanding initiatives to restore water quality, extending as already noted to the respect of describing great rivers as ancestors; territorial authorities have funded, provided and maintained often expensive, if sometimes inadequate, drainage, sewerage and other systems. Territorial authorities have incurred the cost and other burdens of water control and disposal. But even together, they do not capture the Crown's ultimate Article 1 responsibility to protect due performance of the other Treaty obligations.

The future importance of water

It is not apparent that the range of legitimate and potential interests in adequate water systems has been fully appreciated.

In the case of the foreshore, the 2003 *Ngai Apa* judgment of the Court of Appeal, overturned the following year by the Foreshore and Seabed Act 2004, did not refer to the Preamble and analyse how Māori and other New Zealanders would deal with the questions it raises. I think it unlikely that the more thoughtful and generously expressed Marine and Coastal Area (Takutai Moana) Act 2011 would be construed as codifying answers to them. I hope that mutual respect of interested parties will mean foreshore and seabed may be avoided as a case for legislation beyond that statute and environmental law. Water however is another matter.

The allocation of water rights being both fundamental and effectively perpetual, there is compelling need to take the greatest care for New Zealand's as yet unforeseeable future, by ensuring that the Crown's responsibility for protection of future mana whenua, other Māori, and other New Zealanders' interests in

water exists and is sustained throughout the country. While, at least until the Water Services Economic Efficiency and Consumer Protection Bill, the Crown may have sought to delegate to local bodies performance of its Article 1 responsibilities in relation to water, those Article 1 responsibilities require major and fully considered as well as urgent further attention of both Government and Parliament. And while some local bodies and holders of mana whenua will have the means and incentives to provide optimally against future contingencies, there are likely to be others that will require Crown intervention to help do so.

Potential concerns as to international relations include trade and security. The myriad calls for water by and beyond an increasing population in our State, that possesses many natural advantages in a troubled world, have the potential to put the kind of risks and therefore price on water that have seen the first UN water conference in 50 years.[36]

While conservation has long been a focus of attention, led in many areas by mana and tangata whenua who have received world-leading positive responses, the current legislation does not address the range of the many elements of water and its control systems that need to be considered. As well as in its provision to households and farms, which has been the subject of planning legislation and debate in various courts, water is drawn on for commercial and other purposes, among them the production of electricity. There are the actuality and the greater potential of its contribution to replacing fossil fuels becoming a heavily demanded financial asset. Yet that has not been factored specifically into the simple bipartite division of authority between territorial authorities and mana whenua.

[36] theguardian.com/world/2023/mar/24/united-nations-water-conferenc-new-york-pledges

Te Rūnunga O Te Ika Whenua Society v Attorney-General (1993)[37] raised the topic of electricity generation from dams, which requires responses to that topic given no specific answer in current legislation. Cooke P for the Court of Appeal held as to Article 2:

> the Treaty must have been intended to preserve for [Māori] effectively the Māori customary title, as mentioned in the fisheries case …. But, however liberally Māori customary title and Treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Māori Chiefs and Governor Hobson in 1840. No authority from any jurisdiction has been cited to us to suggest that aboriginal rights extend to the right to generate electricity.

He added:

> If the granting of rights to generate electricity has prejudiced their Treaty or fiduciary or customary rights without consent, Māori may have some ground for complaint and may claim relief through the Waitangi Tribunal or possibly in the ordinary Courts. On the extent of the jurisdiction of the ordinary Courts the very full discussion and finely-balanced difference of opinion in the High Court of Australia in *Mabo* would require close study.

This would seem a topic warranting public consultation.

Need for guidance

[37] [1993] NZCA 218; [1994] 2 NZLR 20

A final factor concerns insecurity due to incomplete compliance with the Legislation Act; in particular lack of specificity on vital aspects of dealing with water.

Water problems are not new. The water topic entails analysis of two related points of relevance to the adoption and expression of Māori concepts in New Zealand water law. One is the meaning of the concepts. The other is the reasons for and purposes of their adoption.

In seeking a remedy for the problems I have identified I hope we might find comfort in how the Foreshore and Seabed Act 2004 was fixed. The Resource Management Act 1991 had provided these definitions:

- "kaitiakitanga" as meaning:

  the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to we natural and physical resources; and includes the ethic of stewardship.

- "tangata whenua" in relation to a particular area as:

  the iwi, or hapu, that holds mana whenua over that area.

- "mana whenua" as:

  customary authority exercised by an iwi or hapu in an identified area

Anticipating section 3 of the Legislation Act, of which I have stated the purpose:

> … to promote high-quality legislation for New Zealand that is easy to find, use, and understand

Parliamentary counsel in drafting[38] reasonably distinguished between terms thought to require definition, and by contrast "iwi" and "hapu" which were considered sufficiently familiar to readers as to require no explanation.

The definition of "kaitiakitanga" in the Resource Management Act 1991 is vital to conservation and was simply adopted in the short-lived Foreshore and Seabed Act 2004. But in s 40 of that subsequent Act the 1991 definition was employed in a very different provision, stating:

> (1) The purposes of a foreshore and seabed reserve are:
>
> (a) to acknowledge the exercise of kaitiakitanga by the applicant group … in respect of which a finding is made by the High Court under section 33; and
>
> (b) to enable that area to be held for the common use and benefit of the people of New Zealand.

Read in isolation, section 33 empowered the High Court to make a finding that the group would, but for the vesting of the full legal and beneficial ownership of the public foreshore and seabed in the Crown by section 13(1), have held customary rights to the area at common law.

But by striking contrast, that ostensible acknowledgement of the sensitive term kaitiakitanga was concurrently overtaken by its use in the later s 40(1)(b) to demolish customary Māori rights at common law. Comparison of the Foreshore and Seabed Act 2004 with the Marine and Coastal Area (Takutai Moana) Act 2011 which repealed it, carefully prepared after consultation, is illuminating. The latter retains the RMA definition of kaitiakitanga, but in the context not of removing rights but of "Participation in conservation process" (s47) and in relation to a wahi tapu or wahi tapu area (s79(2)(b)). In meaning it is respectful to Māori; in effect it uses the term positively, recognizing Māori participation as

[38] See Legislation Act 2019 s 67(a)

assisting conservation process, instead of its predecessor's denigration, curtailing their involvement by immediate allusion to expropriation.

There will always be challenges, as even to such formerly pure waters as Parengarenga in the Far North which had seemed to an outsider visiting by sea and land a classic case of beneficial tino rangatiratanga. But there seemed there to have been mutual recognition and respect that typified the ideals of the Treaty: decent behaviour that begets trust. Can these be carried across to freshwater?

As we approach the bicentenary of the Treaty it is to be hoped New Zealanders can together achieve similar success with our water legislation. It is for Parliament to determine its procedures in response to what I respectfully suggest is a double fundamental constitutional change: as to freshwater, and as to the Treaty.

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