



ANNA SHACKELL

I am a born and bred Hamiltonian. My whakapapa is a mixture of the various cultures of the British Isles. My Mother, Ali Shackell, was born in England and immigrated to New Zealand in the late 1950s as a small child. My Father, Phil Shackell, was born in New Zealand, as were his parents and grandparents. My immediate family includes my parents, younger brother and sister, Ian and Megan, and my husband Michael.

I have very strong ties to my family and have become the person I am through their love and support. I also have very strong ties to the Baha'i Faith, which provides me with guidance and is the basis of all my beliefs.

While at Law School I took Maori Land Law, initially because there was no exam. However the paper was so brilliantly taught that it turned out to be one of the most enjoyable papers I have done at University. The research component of this course significantly deepened my understanding of Maori culture and the basis for the grievances that are now being aired through the Waitangi Tribunal.

I graduated from Auckland University with bachelor's degrees in Science and Law, in June 2005. I was admitted as a Barrister and Solicitor in February 2006. I joined Clendon Feeney in March this year and am really enjoying the work and the fantastic people that I have met.

It is a firm belief of mine that all New Zealanders should have an understanding of the Maori mindset and the basis behind Treaty grievances. It is only through this understanding that the wrongs of the past can be compensated and the people of New Zealand can move forward together as a united and multicultural people.

DIFFERENT WAYS OF VIEWING LAND ENTITLEMENTS IN AOTEAROA/NEW ZEALAND

ANNA SHACKELL

INTRODUCTION

This essay examines the relationship between the concept of “ownership” on one hand and the concepts of “kaitiakitanga” and “rangatiratanga” on the other. Rangatiratanga and kaitiakitanga are intricately related, both emanating from the same fundamental spiritual values. Ownership, however, provides a direct contrast to the other two concepts in that the building blocks that comprise it are significantly different. Rangatiratanga and kaitiakitanga have a clear link to spirituality or wairua, which derives from a Maori worldview. Rangatiratanga centers around the idea of individual and group authority that is derived from the gods, and kaitiakitanga is based on an acceptance of reciprocal relationships existing between humans and the world around them due to their common wairua origins. Ownership, as a concept, seems to have different meanings depending on the commentator. However, the idea of possessing an individual title that allows for the exclusion of all others by the “owner” is central to the concept of ownership.

In this essay the use of these concepts in statute law (the Land Transfer Act 1952 highlights ownership and the Resource Management Act 1991 specifically includes “kaitiakitanga”) will be discussed. This will reveal the problems associated with using Maori concepts in a law whose roots are so deeply embedded in English legal concepts.

PART I – OWNERSHIP, KAITIAKITANGA AND RANGATIRATANGA AS DISCRETE CONCEPTS

Ownership

The concept of ownership brings up a number of associated words, such as “exclusivity”, “controllability” and “possession” to name a few. It is a concept that is applied to many different circumstances and attributed

different meanings. James Turner¹ states that law regulates social relations by creating subjective rights, which allow one person to prevent another from doing something. In this sense, ownership is a subjective right and a set of rules governing what other people may or may not prevent the owner from doing to the thing owned. It is also what the owner may prevent others from doing or not doing in relation to the thing. In other words, for Turner, ownership is a preventative concept that determines relations between people and not between the owner and the thing owned. Conversely, John Salmond says ownership “denotes the relationship between a person and any right that is vested in him”.² For Salmond, therefore, what a person owns is a right. His idea of “right” extends to all classes of rights, and not only to rights, but to liberties, powers and immunities. Consequently, Salmond’s conception of ownership can be seen as a relationship between a person and what he owns, which is a right. However, Salmond goes on to say that ownership in its wide sense is about rights, but that in the narrow sense of the word, people generally speak of ownership of material things. In his view this is the original and most common meaning of the word ownership, which he calls “corporeal ownership”. Corporeal ownership can be distinguished from “incorporeal ownership”, which is the ownership of rights. For Salmond, the distinction is justified on the basis that corporeal ownership cannot be used in all circumstances, such as in cases where money is owed. Here, the person due does not own the money but owns a right to it. Turner, on the other hand, maintains that ownership is a relationship between people, and concerns only rights in rem (rights against the world). The person who owns “the thing” is protected by the law against all other people and this is their exclusive right and hence, it is a relationship between the owner and all other people.

Antony Honore³ describes ownership as a series of legal rights, duties and incidents that a mature system of western law recognises as capable of being held by someone. It is because these systems recognise distinct interests in things that the concept of ownership arises. Honore states that there are common incidents of ownership that do not vary significantly between mature western systems. In nearly all systems, there will be things that these standard incidents do not apply to, but it

¹ J Turner, *Some Reflections on Ownership in English Law*, Canadian Bar Review, Vol XIX, 1941, 342.

² G Williams, *Salmond on Jurisprudence*, 11th edn, Street and Maxwell, London, 1957, 300.

³ A Honore, “Ownership”, *Oxford Essays on Ownership*, A Guest ed., Oxford University Press, 1961, 107.

would be incorrect to say that those systems do not recognise ownership. Honore states eleven common incidents which he regards as essential ingredients of a mature system of ownership. Systems which do not recognise them and vest them in a single person do not have what he calls a “liberal concept of ownership”, but have a “primitive” or “modified version of ownership”.

In Honore’s view, ownership is comprised of the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to security, right to the capital, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary. Therefore, in the context of land, in order for ownership of land to exist in a mature system, it must be possible to have exclusive possession of the land, have personal use and enjoyment of it, decide how to use the land and who will use it, have the rights to any income reaped from the land, the right to the capital value of the land including the power to sell, consume or destroy it, the right to remain the owner of the land so long as one remains solvent, the right to give the land to others by inheritance or gift, no set term on how long one can own the land for, liability to the interest in the land to be taken away for debt, and the ability to recognise rights lesser than ownership such as leases.

If a system recognises that things can be owned, then there must be rules that regulate how ownership is acquired and lost, and the way competing claims to a thing are ranked. The word “title” is often used to refer to a document evidencing the strongest entitlement. In New Zealand, in relation to land, this means a certificate of title issued under the Land Transfer Act 1952. In a sense, to have good title to land is to have the right to maintain or recover possession of land against all other persons.⁴ An owner, therefore, has some advantage over all other people, which will endure after all other rights in respect of the same property have ceased to exist, such as a lease or an easement. Turner⁵ suggests that this is the central pillar of ownership in English law.

All commentators who speak about ownership talk about the concept as an abstract one which has a different meaning for different people. For some commentators, only material objects such as land can really be owned. Other commentators speak of owning rights over material objects and not of actually owning the objects themselves. It is

⁴ G Hinde, D McMorland and P Sim, *Butterworths Land Law in New Zealand*, Butterworths NZ Limited, Wellington, 1997, 53.

⁵ *Turner*, supra n1 at 352.

misleading to think of ownership of a thing as exclusively being a relationship between the object and the owner, and it is also misleading to think of ownership as owning rights rather than things.⁶ Ownership is not just a bundle of rights. It also includes the relationship between the owner and the rest of the world. Honore concludes with a basic model of ownership that is a “single human being owning, in the full liberal sense, a single material thing”.⁷ This propounds the seemingly universal idea that ownership is a concept that involves individuals and objects that submit to their authority and that this relationship is indefeasible against all other people.

Kaitiakitanga

When European settlers arrived in New Zealand, they brought with them a law that was basically individualistic. Humans had authority over nature and were entitled to make large-scale modifications to the natural environment for personal and corporate gain. European settlers held views of ownership of land akin to the aforementioned concepts. This included ideas of individual exclusivity and the ability to exert authority over land owned in any way the owner desired in order to reap an income from it, sell, lease or otherwise. These ideas were in direct contrast to those of traditional Maori society. Therefore, right from the very beginning, Maori and Pakeha transactions and relations progressed from very different starting positions. For Maori, people did not have authority over nature or land, because they are part of it, and therefore belonged to it.⁸ This idea of belonging to the land is transmitted in the creation stories in which Papatuanuku, the personification of earth, is the Primordial Mother who married Ranginui and brought forth the gods and humankind. “Whenua” is the term given to land or earth, and it is also the term given to the after-birth or placenta. Therefore the use of the term “whenua” is a constant reminder that people are born out of the womb of the primeval mother.⁹ As children of Mother Earth, Maori love and respect her as a living organism who provides support for all her children, whether they be human, animal or plant. People live in a symbiotic relationship with all living organisms and contribute to the welfare of other species that belong to the primeval mother. Maori

⁶ Honore, *supra* n3 at 134.

⁷ *Ibid* at 146.

⁸ E Durie, “The Law and the Land”, *Te Whenua Te Iwi, The Land and the People*, J Phillips ed., Wellington, 1987, 78.

⁹ M Marsden, *The Woven Universe: selected writings of Rev Maori Marsden*, C Royal ed., Estate of Rev. Maori Marsden, Otaki, New Zealand, 2003, 45.

Marsden¹⁰ has stated that people are the conscious mind of Mother Earth and, as such, they must enhance and maintain her life support system. Consequently, people do not own or exercise authority over mother earth. They belong to her and are recipients of her life-giving forces, and are therefore guardians.

The term Kaitiakitanga means guardianship, preservation, fostering, protecting and sheltering.¹¹ Kaitiakitanga is not simply a word with a single meaning and translation. It is about a relationship between humans and the environment, humans and the spiritual world, and between each other. The term Kaitiakitanga has been described by Merata Kawharu¹² as not being an old customary Maori word. It is a word that has come into use through Maori developing aspects of their culture due to opportunities created to define and justify their rights through the Waitangi Tribunal Claims process. In order to do this, words that encapsulated a wide range of ideas, responsibilities, rights and relationships were used. However, the underlying fundamental values and ideas that comprise kaitiakitanga have existed in Maori society since time immemorial. Kaitiakitanga incorporates the spiritual, environmental and human spheres and is a way of thinking, acting and behaving. Kawharu¹³ states that Kaitiakitanga contains a core of primary beliefs that includes the concepts of rangatiratanga and mana whenua, spiritual beliefs pertaining to tapu, rahui and mauri and social protocols such as manaaki, tuku and utu. Therefore, kaitiakitanga can be applied not only in relation to the environment, but also to people. Resources, be they human, material or non-material, were managed and developed, and concepts such as kaitiakitanga provided guidelines for use, explanations of the way things are, and how they ought to be.¹⁴ The exercise of Kaitiakitanga is carried out by “kaitiaki”, who are not only guardians or protectors, but also administrators and managers. Kaitiakitanga is about a two-way relationship between the kaitiaki and the resource, such that in the natural environment, the kaitiaki must care for and manage the resource and maintain its sustainability in order to receive the benefits of the resource.

¹⁰ Ibid at 46.

¹¹ Ibid at 67.

¹² M Kawharu, *Dimensions of Kaitiakitanga: An Investigation of a customary Maori principle of resource management*, Thesis submitted for Doctorate of Philosophy in Social Anthropology, Oxford University, 1998, 6.

¹³ Ibid at 8.

¹⁴ Ibid at 11.

The kin group that carries out the kaitiakitanga responsibilities can be the iwi, hapu, or a whanau unit within the hapu. These groups of individuals had responsibilities of managing resources so as to ensure survival and political stability in terms of retaining authority over an area.¹⁵ Whakapapa provided the framework for kaitiakitanga to operate. In order to act as a kaitiaki, a group would have to show their association and ties to the specific land and water resources through their whakapapa. People who can establish such connections are the tangata whenua of the particular area and have mana whenua in the land. Cleve Barlow¹⁶ states that mana whenua is the power associated with the possession of land and the power associated with the ability of the land to produce the bounties of nature. Therefore, mana whenua is concerned with the authority of people over land, but also the authority of the land over people, as humans are not in any way superior to the land, as it is the land that sustains the people. The role of humans in this reciprocal relationship is to sustain the resources through their role as kaitiaki.

Consequently, the concept of kaitiakitanga involves the management of land and the use of land. These are similar to the incidents of ownership described by Honore. Kaitiakitanga is vastly different, however, in that it has a spiritual core that regulates how people interact with the land. In traditional Maori society, no one individual or kinship group owned land in the sense that they held all rights in the land to the exclusion of all others.¹⁷ Different people exercised different rights over the land. The concept of kaitiakitanga, which centers around a reciprocal relationship between people and the land, regulated the way these rights were exercised. Therefore, land was not something that was owned or traded. It was something that the people belonged to, and through this gift of belonging that sustained all life, humans were vested with the obligation of kaitiakitanga.

Rangatiratanga

It is stated by Kawharu¹⁸ that no discussion of kaitiakitanga in the contemporary world can occur without first looking at the relationship between the Treaty of Waitangi, and more specifically, the concepts of rangatiratanga and kaitiakitanga. This is because both concepts come from the same body of values that define tribal and hapu status, identity,

¹⁵ Ibid at 14.

¹⁶ C Barlow, *Tikanga Whakaaro: Key Concepts in Maori Culture*, Oxford University Press, Auckland, 1991, 61.

¹⁷ R Boast et al, *Maori Land Law*, 2nd edn, Lexis Nexis, Wellington, 2004, 42.

¹⁸ *Kawharu*, supra n12 at 53.

rights and responsibilities.¹⁹ Ranginui Walker²⁰ states that the word rangatiratanga is a “missionary neologism”, and that prior to missionary arrival, the term “mana” was used instead to convey the same range of values.²¹ “Rangatiratanga” was used in Article Two of te Tiriti o Waitangi (Maori text) and is translated in the English version to mean rights of possession. However, it is argued by many commentators that rangatiratanga means more than mere possessory rights. While its literal translation is “chieftainship”, it also invokes a wider way of thinking and acting in accordance with that status.²² The term rangatiratanga has its stem in the word rangatira, which means a person of high rank – a chief.²³ Rangatira had authority over people, resources and lands, but existed in a reciprocal relationship with them all. Adding the suffix “tanga” to rangatira invokes relationships with gods, ancestors, lands and resources.²⁴ Rangatiratanga was, therefore, chieftainship and authority. Although spiritually endowed, this was also a powerful political tool.

Rangatiratanga can be understood in terms of an individual or a group. In terms of individual rangatiratanga, it is a system of authority derived from the gods, which is bestowed on the Rangatira. Kawharu²⁵ states that although this is known as mana, it came to also be known as rangatiratanga after contact with missionaries. Rangatiratanga is not only derived from the gods, but also through the application of the rangatira’s responsibilities of managing the land and resources and allocating rights of use to various people within the group. Because the relationship between the hapu and their chief is reciprocal, the rangatira was the beneficiary of his or her people’s support and confidence. A chief’s administrative and charismatic authority would not survive without the support of the people.²⁶ Therefore, the hapu exercised its group rangatiratanga over its leaders as a balance against their individual rangatiratanga, supporting them in their leadership and gaining from that leadership at the same time. On this basis, rangatiratanga closely links to kaitiakitanga. There is an important distinction that needs to be made, however, between the two. It is that while rangatiratanga is about power

¹⁹ Ibid.

²⁰ R Walker, “The Treaty of Waitangi: as the focus of Maori protest”, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, IH Kawharu ed., Oxford University Press, Auckland, 1989, 264.

²¹ R Walker, *Struggle Without End: Ka Whawhai Tonu Matou*, Penguin, Auckland, 1990.

²² *Supra* n20 at 319.

²³ B Biggs, “Humpty Dumpty and the Treaty of Waitangi”, *ibid* at 310.

²⁴ Kawharu, *supra* n12 at 54.

²⁵ Ibid.

²⁶ Ibid at 57.

and authority, kaitiakitanga is about the practical expression of that authority through the administration or management of people, land or resources.

In the context of land, therefore, the greatest difference between the concepts of rangatiratanga and ownership is that ownership is concerned with individual rights whereas rangatiratanga is so intertwined with the group's interests as to be part of the collective group rights and authority.

PART II – THE DEVELOPMENT OF NEW ZEALAND LAW – ALL-IN-TOGETHER

When Europeans first began arriving in New Zealand, “sales” of land were made by Maori to settlers. These land gifts were called “tuku whenua”. The concept of sale and its underlying meanings were completely foreign to Maori who believed that these early European arrivals were making a gift in order to live and share the land with them.²⁷ While it may have been clear to Maori that they were gifting the land, this was not necessarily the view held by non-Maori or the newly established governing powers. Many early settlers thought that the land at the center of the transactions was being completely alienated by Maori.²⁸ In their view, all of the incidents of title identified by Honore were being passed to them in the deal of sale and purchase. But for Maori, “tuku” can best be likened to a form of lease, which is only one of the eleven incidents described by Honore. However, unlike a lease in the European world, tuku is a dimension of kaitiakitanga that is guided by the principle of reciprocity. In accordance with this principle, donors and receivers had continuing responsibilities to each other, and established or affirmed new relationships widely recognised within Maori society. When government arrived in New Zealand after the signing of te Tiriti, these early sales were validated by the passing of laws, and new sales were made with official government agents. It became clear very quickly that a sale did not mean the sharing of a sense of belonging to the land. It meant exclusive possession, which allowed land to be used as a commodity capable of being divided, allotted, possessed and traded.²⁹ Once the land was given, there was no returning

²⁷ Durie, supra n8 at 78.

²⁸ M Mutu, “Defining Maori Terminology Used in Hearings of The Waitangi Tribunal and Resource Management Planning”. Seminar paper presented at Waipapa Marae, University of Auckland, 1994. Cited in *Kawharu*, supra n12 at 47.

²⁹ Durie, supra n8 at 78.

of it in the manner of *tuku* or gifting that was the only proper way in Maori society.

Under English Common Law, the Crown has radical title of the entire territory and subjects can only derive their individual titles from the Crown and no one else. The Land Transfer Act 1952 (LTA) sets out how land is generally dealt with in New Zealand. It reflects ideas of ownership of land as being an exclusive, individual concept. It is a system of title by registration.³⁰ An indefeasible title represents the greatest security a person can have. Once a certificate of title is registered, it is virtually unchallengeable. Only the Crown in Parliament can remove individual property rights, and there are constraints as to how the Crown may do this.³¹ The underlying concepts of this Act are completely foreign to traditional *tikanga* Maori concepts. In Maori society, it is the *hapu*, rather than the individual, that has authority, and individual rights are obtained through *whakapapa* and *whanaungatanga* connections. *Rangatiratanga* and *mana whenua* are concerned with the territorial occupation, power and authority of the group. This concept is not concerned with who “owns” the territory in an LTA sense. The fact that other people have a registered title to the land does not affect the *rangatiratanga* and *mana whenua* of the *hapu*. In Maori eyes, the Crown’s actions are constrained by the Treaty of Waitangi, and courts are in breach of the Treaty by not recognising the guarantees under it. One of these guarantees is that Maori have the unqualified exercise of *rangitiratanga* over their lands, villages and *taonga*.

The Te Ture Whenua Maori Act 1993 recognises land as a *taonga tuku iho*, or treasure that has been handed down through the generations. Under this Act, the role of the Crown is to facilitate the use and administration of Maori land. However, the relationship between the Maori land system and the land transfer system is problematic.³² In theory there is no Maori Land Title System and Maori land very clearly comes within the LTA. In reality there is a dual system of recording titles in New Zealand – the Land Transfer System and the separate system run by the Maori Land Court. It has been held by Justice Hammond³³ that on the question of primacy between the two systems, “the Land Transfer Act trumps the Maori Affairs legislation”. The Te Ture Whenua Act itself also clearly brings Maori land under the Land Transfer Act. This means that an equitable interest cannot be recorded on

³⁰ *Breskvar v Wall* (1971) 126 CLR 376 at 385-6.

³¹ For example see the Public Works Act 1981.

³² *Boast*, supra n17 at para 15.2.4.

³³ *Registrar-General of Land v Edward Marshall* (HC Hamilton, AP 30/94).

Land Transfer titles even though such orders are made by the Maori Land Courts. As mentioned above, rangatiratanga is not affected by other people owning the land and therefore in such cases can be seen as an equitable interest. However, because of its equitable nature, it cannot be registered in the Land Transfer System, even though the Maori Land Court may record that a hapu has rangatiratanga and mana whenua over a particular piece of land.

The Resource Management Act is the first Act to legislate for kaitiakitanga and has wide-ranging implications for the involvement of Maori groups in resource management policy and application. The Act does not deal with ownership rights directly but rather with the management of resources including use, development and protection. Sections 6, 7 and 8 of the Act provide a uniform set of criteria that include references to distinctively Maori values and the Treaty of Waitangi. However, the Act has been criticised by the Waitangi Tribunal in its *Ngawha Geothermal Resource Report 1993* as being inadequate.³⁴ Kawharu³⁵ has stated that the weakness of the Treaty provision (s8) and the kaitiakitanga provision (s7(a)), the lack of specific recognition of the relationship between rangatiratanga and kaitiakitanga, definitional problems and the failure to include the concept of “mauri” have caused mixed feelings about the Act.

The incorporation of te Tiriti into the law is important as it shows a recognition of tribal authority, or in the words of the te Tiriti, “rangatiratanga”. It should be noted that the Act refers to Treaty principles rather than the actual words of “kawanatanga” and “rangatiratanga” as set out principally in te Tiriti. Principles are developed from reading the two texts of Te Tiriti and the Treaty together, and authoritative statements have been made by the courts that the “Treaty principles” should be relied on rather than the words.³⁶ This has been criticised by Maori as the principles are only the practical expression of the Tiriti Articles, and it is the Articles that give rise to the rights and responsibilities of the two parties.³⁷ Principles have largely been developed in the political and judicial arena. While they may be important to Maori, it is kawanatanga and rangatiratanga that are more fundamental. Consequently, it has been argued by Kawharu,³⁸ that principles should not be seen to replace the Articles of te Tiriti in the

³⁴ *Ngawha Geothermal Resource Report – WAI 304*, 1993, 144-145.

³⁵ *Kawharu*, supra n12 at 154.

³⁶ *NZMC v Attorney General* [1992] 2 NZLR 576.

³⁷ *Kawharu*, supra n12 at 161.

³⁸ *Ibid.*

Act, even where laws have made specific reference to them. Another criticism of s8 is whether the words “to take into account” requires those exercising functions under the Act to actively provide for te Tiriti guarantees. Peter Nuttall and James Ritchie³⁹ have stated that “to take into account” is non-specific, and decision-makers are under no obligation to provide for Tiriti guarantees. However, there is no single viewpoint and therefore it is difficult for Maori to obtain any certainty regarding their specific rights under this Act.⁴⁰ Consequently, while the concept of rangatiratanga is inherently present in the Act through the inclusion of te Tiriti in section 8, the role it plays is uncertain.

One of the main criticisms of section 7(a) of the Resource Management Act is the definition of kaitiakitanga. In 1995, the definition was amended to restrict its application to Maori, and more specifically, to tangata whenua. The definition now states that kaitiakitanga is “the exercise of guardianship by tangata whenua of an area...”. This prevents the term being co-opted by Regional Councils who have described their role as being that of kaitiakitanga, thus displacing the Maori claim.⁴¹ This example shows the dangers of misinterpreting cultural concepts, which can occur when they are not properly interpreted in law.⁴² As has been seen, kaitiakitanga has a very broad interpretation and means more than simply guardianship. It is applicable not only within the social sphere but refers to Maori perspectives on the use, management and control of natural resources. Therefore, the definition given in the Act is only a partial acknowledgement of the concept’s meaning. Moreover, it is not for the Crown to define Maori spiritual values, enshrine them in legislation and then apply that definition to all tangata whenua. The meanings and application of kaitiakitanga would have differed amongst hapu. This is because the concepts that inform it have been alive for centuries and while central ideas may be uniform, regional differences would have occurred. Consequently, to define a concept that is multifaceted and has regional differences with one meaning that is applicable to all creates ambiguity. It would be more beneficial to give the term kaitiakitanga status in the Act, but without providing an absolute definition. This would enable

³⁹ P Nuttall and J Ritchie, *Maori Participation in the RMA: An analysis of the Provision made for Maori Participation in Regional Policy Statements and District Plans Produced under the RMA*, Tainui Maori Trust Board, University of Waikato, Hamilton, 1995.

⁴⁰ A Mikaere, “Maori Issues”, [1994] *NZ Recent Law Review*, 265.

⁴¹ *Rural Management Ltd v Banks Peninsula District Council* [1994] NZRMA 412 at 414.

⁴² *Mikaere*, supra n40 at 266.

Maori to apply their own interpretations if and when necessary. However, this in turn may give rise to other difficulties of having to choose between different interpretations given by competing groups. Either way, the problems associated with providing legal definitions on one hand while not compromising their wider cultural meaning on the other, remain.

CONCLUSION

The concepts of Rangatiratanga and kaitiakitanga are closely intertwined. Rangatiratanga provides an umbrella of authority and power under which kaitiakitanga can be exercised. Rangatiratanga is about collective group rights and territorial rights. Kaitiakitanga refers to the nature of the relationship between people and the land from which their authority arises and on which they exert their power. The notion of ownership is fundamentally different from the way land was treated in traditional Maori society. Ownership is about a series of individual, private rights that are held by people and which can be traded. In Maori society, land was not a commodity that was traded. Rather, it was “whenua” – something that every person had a spiritual connection to and was in a reciprocal relationship with.

New Zealand law regarding ownership of land is encapsulated in the LTA. Under this Act, land is the subject of individual, private ownership that is indefeasible. Although the concepts of kaitiakitanga and rangatiratanga are present in the Te Ture Whenua Maori Act 1993, they have been trumped by the LTA. In the RMA, both Maori concepts have important implications. Because the RMA is not concerned with the ownership of land, Maori concepts have greater application within the RMA process of decision-making. While there are criticisms of the RMA, it has set a precedent in recognising tangata whenua rights. Although, challenges lie ahead, regarding how to give greater recognition and provision to rangatiratanga and kaitiakitanga in the RMA, the ultimate goal of sustained management for future generations is one that is shared by Maori and the rest of New Zealand society.

APPENDIX TO SECTION B

Te Tiriti o Waitangi and the Treaty of Waitangi (Source: Claudia Orange, *The Treaty of Waitangi*, Allen and Unwin, Wellington, 1987, 257-259.)

Te Tiriti o Waitangi (Maori Text)

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira - hei kai wakarite ki nga Tangata maori o Nu Tirani - kia wakaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu - na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanaranga kia kaua ai nga kino e puta mai ki te tangata maori ki te Pakeha e noho ture kore ana.

Na kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane amua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o to wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te tuatahi

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu - te Kawanatanga katoa o o ratou wenua.

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu - ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te

hokonga o era wahi wenua e pai ai te tangata nona te wenua - ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini - Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

[signed] W. Hobson Consul & Lieutenant Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu. Ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Note: This treaty text was signed at Waitangi, 6 February 1840, and thereafter in the north and at Auckland. It is reproduced as it was written, except for the heading above the chiefs' names: ko nga Rangatira o te Wakaminenga.

The Treaty of Waitangi (English text)

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and secure to them the enjoyment of Peace and Good Order has deemed necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the first

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 the respective Territories as the sole sovereigns thereof.

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; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon

between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the third

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.

[signed] W. Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

Note: This English text was signed at Waikato Heads in March or April 1840 and at Manukau on 26 April by thirty-nine chiefs only. The text became the "official" version.

Editors Note: Most Maori signed the Maori text of Te Tiriti which retains "tino rangatiratanga" or "absolute authority" to Maori hapu. The English text, however, cedes "sovereignty" absolutely, to the Crown of England. The debate about how the two fit together in a constitutional democracy is ongoing and the relationship between Maori and the Crown is constantly being reviewed. Although not legally recognised, the Treaty/te Tiriti remains the hallmark by which many New Zealanders, Maori and Pakeha alike, evaluate the justice of Crown actions.

SECTION C

THE FORESHORE AND SEABED

NIREAHA TAMAKI v BAKER

**UNDERSTANDING NEW ZEALAND'S LEGAL HISTORY
SINCE 1840**

and

**UPDATE ON FORESHORE AND SEABED
DEVELOPMENTS SINCE 2004**