

# TREATY OF WAITANGI: IMPLICATIONS FOR THE OIL AND GAS INDUSTRY

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This paper gives an account of the various kinds of claims which may be made by Maori tribes and organisations:

- (a) In the courts under the doctrine of aboriginal title and in reliance on Acts of Parliament which *adopt* the Treaty of Waitangi.
- (b) Before the Waitangi Tribunal or in direct negotiations with the Crown.

Also outlined are the Treaty of Waitangi itself and the principles deduced from it by the courts and the Waitangi Tribunal, the nature of the claims currently being made by Maori tribes, and the way in which the Waitangi Tribunal and the Crown may attempt to resolve claims. Possible approaches to compensation where breaches of the Treaty are found are also discussed.

In relation to the oil and gas industry three areas in particular are discussed.

Firstly, the Crown's ownership of petroleum under the Petroleum Act 1937. Can this be successfully challenged in the courts or before the Waitangi Tribunal? To what extent might the outcome interfere with the Government's right to issue exploration or mining licences or licensees' rights to operate pursuant to existing licences.

Secondly, the case of Petrocorp and Others versus D J Butcher, heard in the High Court in June 1989.

Finally, Maori claims to the seabed in the territorial sea and the Exclusive Economic Zone.

I will begin this paper by sketching the legal basis for Maori claims generally and will then consider how Maori tribal claims may impact on the oil and gas industry.

Maori claims have to be considered at two levels:

- (a) Those which may be made in the ordinary courts on the basis of common law and the provisions of Acts of Parliament.
- (b) Those which rely entirely upon the principles of the Treaty of Waitangi and are the subject of hearings before the Waitangi Tribunal or direct negotiation between tribal groups and the Crown.

## CLAIMS IN THE COURTS

Claims in the ordinary courts depend either upon the so-called doctrine of aboriginal title or upon adoption by an Act of Parliament of the principles of the Treaty of Waitangi, in which aboriginal title is recognised and confirmed. There is a longstanding doctrine of the common law that when the British Crown acquired sovereignty over a new colony inhabited by indigenous people, the customary rights and practices of those indigenous people in relation to their land holding and other resources was undisturbed by the passage of sovereignty to the Crown except insofar as indigenous practices were inconsistent with the common law or were unreasonable or uncertain. The customary practices of the

Maori in relation to land and resources, such as fisheries, met the requirements of the common law in most respects. But, of course, the common law did not recognise the transfer of title from one tribe to another *by conquest* after 1840 since that notion was repugnant to the common law system.

This idea was not unique to New Zealand. It was applied in relation to the dealings of the British Crown in North America and was upheld by the United States Supreme Court in several cases involving Indian tribes in the early part of last century. It has also been applied by the Privy Council in a wide range of jurisdictions, notably in several appeals from African colonies. It was recognised by the Supreme Court of New Zealand in a landmark case as early as 1847. The common law rule is known as the doctrine of aboriginal title. *Aboriginal* is used here in its generic sense: all indigenous people occupying a territory at the time of acquisition of sovereignty by the Crown are known as aboriginal peoples.

So the rights of Maori tribes to their lands and resources would have survived the acquisition of New Zealand by Britain even without the Treaty of Waitangi. Land could not have changed hands by conquest after 1840 but the position as at 1840 would have been upheld and so would any transfers of land between tribes after that date in a manner consistent with the common law. But in fact the Treaty

contained a guarantee of aboriginal title. Article the First of the Treaty transfers sovereignty over New Zealand to the Crown. Article the Second guarantees the Maori tribes possession of their lands, estates, forests, fisheries and other possessions. It is now coming to be interpreted as a declaration of aboriginal title rights of the Maori.

For many years, from the 1870s until just recently, the New Zealand courts misinterpreted the legal position of aboriginal title rights. They said, correctly, that the Treaty of Waitangi had never become part of New Zealand domestic law because it had never been incorporated in an Act of Parliament, either imperial or local. Consequently, it was said by the judges, the guarantee of their rights contained in Article the Second was not legally binding and could be ignored. What this false idea overlooked was that the Treaty itself merely confirmed underlying common law rights. For more than a hundred years the courts completely overlooked the common law rights; only in the last few years has their force been reasserted.

I have said that the Treaty is not part of New Zealand domestic law. That was authoritatively determined in 1941 by the Privy Council and restated by the Court of Appeal in the *Maori Council* case in 1987. Another recent trend in New Zealand law, however, has been the incorporation by Parliament into various statutes of references to the Treaty of Waitangi or Maori rights. The *Maori Council* case itself turned on section 9 of the State-Owned Enterprises Act 1986 which directed that nothing should be done under that Act contrary to the principles of the Treaty. Section 4 of the Conservation Act is another example of a similar clause. The Town & Country Planning Act 1977 does not refer to the Treaty but stresses the importance of the relationship between Maoris and their traditional lands. Wherever provisions of this kind appear in a statute the Treaty comes to life as a matter of domestic law and is part of the law of New Zealand *within the area covered by the statute*. So, for example, the activities of a State-Owned Enterprise and the actions of the Crown in relation to State-Owned Enterprises must be in accordance with the principles of the Treaty and Maori claimants can enforce those rights by injunction or other remedies in the ordinary courts.

In the area of resource statutes a further step has been taken by the courts. As mentioned, the Conservation Act and the Town & Country Planning Act contain references to the Treaty or to Maori rights. An earlier statute, the Water and Soil Conservation Act, dating from 1967, does not. Nevertheless, in the *Huakina* case the High Court, noting that the influence of the Treaty now permeates the whole fabric of New Zealand society, stated that all of the resource statutes have to be read in a manner consistent with one another. Therefore the Water and Soil Conservation Act should be read in a manner which is consistent with the principles of the Treaty despite the absence of any reference in the statute. The 1967 statute is thus modified by implication from the references found in resource statutes passed at a later date by Parliament.

A further matter relating to aboriginal title should be mentioned. The Crown, in obtaining sovereignty by grant from indigenous people, is held by the courts to have assumed for itself a protective role. It owes indigenous people duties like those of a trustee or a fiduciary. Consequently when it takes steps to acquire from them land

or other rights, whether by way of contractual conveyance or Act of Parliament, the document by which those rights passed to the Crown is to be construed as narrowly as possible against the Crown. Aboriginal title rights are of two kinds, namely rights akin to ownership, known as *territorial* aboriginal title, and rights of user, known as *non-territorial* aboriginal title. Non-territorial rights are roughly the equivalent of easements and profits. An easement is the right to utilise land of another person in a particular manner; a profit confers a right to take from the land some part of the soil or natural produce. A grant of the right to take oil and gas is a profit.

One of the means whereby a court can narrowly construe a conveyance or an Act of Parliament which effects the passage of Maori rights to the Crown is by reading it down so that all that is transferred is the territorial aboriginal rights, leaving non-territorial rights still vested in the tribe. So a tribe may be found to have sold its right of occupation of land but to have retained the right to conduct hunter-gatherer activities on it, such as rights to harvest certain native plants or to catch birds or rights to pass over the land to obtain access to traditional fishing places.

Where title under the Land Transfer Act has issued all of such rights are likely to be found to have ceased, although there is an exception in the Land Transfer Act for easements which have been omitted from the title. Consequently a right of passage which has been continuously exercised by a Maori tribe might be claimable against a Land Transfer title. But that would be a very rare occurrence.

As long ago as 1909 the Crown legislated to protect its own land against Maori claims in reliance on customary rights. It did this in two sections of the Native Land Act of that year (now sections 155 and 157 of the Maori Affairs Act 1953). Section 155 states that:

*"... the Maori customary title to land shall not be available or enforceable by proceedings in any court or in any other manner as against her Majesty the Queen or against any Minister of the Crown or any person employed in any Department of State acting in the execution of his office ..."*

Section 157 states that Maori customary title is for all purposes deemed to have been lawfully extinguished in respect of all land which during the period of ten years immediately preceding 31 March 1910 was continuously in the possession of the Crown.

You will not be surprised to learn that lawyers acting for certain Maori tribes have been heard to suggest that these two sections may be contrary to the principles of the Treaty of Waitangi. However, the courts must uphold them whatever their view of that contention. But the sections would seem to be vulnerable to claims based on aboriginal title of a non-territorial kind. Furthermore, the provisions of the Limitation Act 1950, which prevent, or statute bar, an action being brought after a relatively short time from the date on which the right of action accrued, do not apply to non-territorial rights, such as easements or profits.

## CLAIMS BEFORE THE WAITANGI TRIBUNAL

The Waitangi Tribunal is a Commission of Inquiry established under the Treaty of Waitangi Act 1975. It has power to inquire into Maori claims of prejudice caused by

the Crown after 6 February 1840 where that matter was or is inconsistent with the principles of the Treaty. The jurisdiction also extends to proposals for future activity.

Where the Tribunal finds that a claim is well founded it may recommend to the Crown that action be taken to compensate for or remove the prejudice. It is only in relation to land which has been passed across to a State-Owned Enterprise that the Tribunal has any power to make binding decisions. In all other cases it can make recommendations only. It is then over to the Crown to make a political decision about whether to implement the recommendations. It should also be emphasized that the Tribunal makes an effort to try to make recommendations which are capable of implementation in practice. Although it may find that there has been a major injustice and that, theoretically, enormous compensation would be justifiable, it has so far refrained from making wide ranging recommendations. Thus, for example, in the Bastion Point decision, the *Orakei* case, the Tribunal concluded that the value of the land improperly taken from Ngati Whatua was now hundreds of millions of dollars. However, it was obviously impossible for the Crown to recover the land from private ownership or to find the money to pay equivalent compensation to the tribe. The Tribunal recommended, the tribe accepted, a settlement involving:

- (a) The vesting of certain park land on Bastion Point in the tribe, but remaining as a park jointly administered by the local authority and the tribe.
- (b) The vesting of a small area of adjacent land in the tribal Trust Board to be held for tribal purposes.
- (c) The payment of \$3 000 000 which was tagged so that it could be used only for the purpose of provision of housing for tribal members.

This settlement also illustrates two other important points. First, the claim is tribal. Because of deficiencies in the law a tribe is not yet recognised as a legal entity. Hence claims have to be brought in individual names. But the claims are still being made on behalf of the tribe and the proceeds of any claim goes to the tribe. The claim is for a tribal endowment. Payments and other benefits do not go to individual Maori.

Secondly, it is unlikely that payments of large sums of cash will be made on a basis whereby they can be used in the total discretion of a tribe. It is more appropriate that they be required to be used for specific agreed purposes. In many instances payments so made will relieve, to an extent, the welfare burden which would otherwise be carried by the Crown in respect of the Maori people who are beneficiaries of the facilities provided by those payments. In a sense, therefore, the payments would have to be made by the Crown in some form and the tribe is taking over from the Crown some responsibility for the welfare of its own members.

We have not yet seen recommendations from the Tribunal in relation to any of the large claims. No decisions have been released yet. However, it can be predicted with a fair degree of confidence that the Tribunal's approach will be the same, but, of course, on a somewhat larger scale.

In considering a claim made before it the Tribunal is guided exclusively by principles which have been found in the Treaty of Waitangi. The Court of Appeal has stated emphatically that you must look at the spirit rather than the letter of the Treaty; pointing to the fact that in the final few lines

of the English version the Chiefs "accept and enter into the [Treaty] in the full *spirit* and meaning thereof." The court says that you must look at principles rather than at terms: that is the only fair way of approaching the Treaty, given the character and circumstances of the transaction. It is also the only way of making the document a living document as New Zealand society changes.

The Court of Appeal said in the *Maori Council* case that the Crown offered the Maori tribes a partnership. Each party, like a partner, must act in good faith towards the other. Both parties must act reasonably and the Crown, as a sovereign, must act honourably in its relationship with Maori dom.

The Crown's duty has been said by the Court to be not merely passive. It *extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable*. It requires the Crown to make redress where there are genuine grievances arising out of breaches of the Treaty.

But the duty of acting reasonably and in the utmost good faith is not one-sided. Maori owe a duty to give reasonable co-operation to the Crown and they must be loyal to the Crown.

In considering whether there has been a breach of the principles of the Treaty the Waitangi Tribunal is not limited to a concern with whether the Crown acted in accordance with the law. Often the Crown passed an Act of Parliament in order to justify, sometimes retrospectively, actions which it had taken in relation to a tribe. Faced with such legislation a court of law is powerless unless it can construe the Act narrowly. The Tribunal does not have that problem, for it can simply declare that the Act of Parliament itself was a breach of the principles of the Treaty and it can recommend that Parliament should take action to repeal or amend the legislation. Obviously, however, this is merely a recommendation, which Parliament is legally free to ignore. Unless the claimants can find some remedy which can be successfully pursued in the ordinary courts, if the Government finds a recommendation politically unpalatable, it is unlikely to be implemented.

I make one final point of a general nature. The only defendant before the Waitangi Tribunal is the Crown. But except in relation to claims to SOE land under the Treaty of Waitangi (State Enterprises) Act other affected parties will be heard by the Tribunal and are allowed to call evidence and examine and comment upon witnesses and material provided by the claimants and the Crown. However, the parties to the proceedings are the claimant tribe and the Crown and the relief which can be recommended by the Tribunal is directed to the Crown alone. Hence private land is protected. In theory, though rarely, if ever, in practice the Tribunal might recommend the resumption of land in private ownership but, except where the land has passed through a State-Owned Enterprise and has its title tagged as being liable to resumption, the Crown has no legal obligation to act on the recommendation. Indeed, the present Government has on many occasions made it clear that it would not accept such a recommendation. (I can conceive that there might be some very rare exceptions where the Crown might feel compelled to take back private land as the only means of settling a claim but I stress that I am not aware of any examples at the present time and the present Government has promised not to do so).

Any such move by the Crown, which would involve use of the Public Works Act, would create enormous political difficulties. In my experience Maori leaders, as distinct from Maori activists, are well aware of this situation and are not asking for the resumption of private land. The most that they may ask for is that the Tribunal recommend to the Crown that the Crown endeavour to recover land from private ownership by voluntary purchase from the owners. But if the owners are unwilling to sell, the Crown will do no more. Therefore claims which relate to land now in private ownership usually seek appropriate compensation by the vesting of alternative Crown land or something of equivalent value.

## OIL AND GAS

The Petroleum Act 1937 expropriated all oil and natural gas found under any land and vested it in the Crown. Prospecting and mining for petroleum is not permitted except pursuant to a licence granted by the Crown. The licensees have exclusive rights to prospect or mine and such other rights, consistent with the Act, as are necessary for the effective carrying out of their operations. As you will be only too well aware, royalties are payable to the Crown at a rate specified in the mining licence, that rate being determined by the Minister. I note that the Minister has no power to increase the rate unless the specified term of the licence is increased.

A licensee has a right of entry on land to exercise its powers, doing as little injury or damage as possible to the property and rights of other interested persons, including the land owner. Reasonable compensation has to be paid for any interference.

The Petroleum Act applies to all land in New Zealand including offshore areas. It is quite clear cut in its effect. In my view it is most unlikely that a court could read it down so as to preserve any Maori rights in respect of petroleum. The Crown is clearly the legal owner of petroleum and entitled to issue licences and take royalties for so doing. No Maori tribe is likely to be successful in a claim in the ordinary courts to prevent oil and gas exploration and recovery unless there is a breach of the Petroleum Act or some other relevant legislation. So far as I can determine, however, the relevant legislation is not expressed to be subject to the principles of the Treaty of Waitangi or to other Maori rights. In summary, then, neither aboriginal titles rights at common law nor any existing statutory recognition of the principles of the Treaty is likely to impede the oil and gas industry.

However, I earlier described the Petroleum Act as effecting an expropriation. To the extent that the rights of a Maori tribe or individual Maoris to petroleum were expropriated a claim could be brought before the Waitangi Tribunal and the Tribunal might well find that there has been a breach by the Crown of the guarantee in Article the Second. It is not my understanding that the Maori, as at 1840, understood the presence of petroleum on their land, except presumably where it was bubbling to the surface, or that they placed any value on it. Nevertheless, their customary rights over land may have given each tribe rights of control and usage of petroleum along with the rest of the things to be found on or under their land. The question of whether they had rights under customary law (or lore) to unknown minerals, which they did not exploit, has yet to be considered by the Tribunal.

But the taking of petroleum by the Crown under the Petroleum Act without the consent of Maori land owners or payment of compensation is arguably a breach of the Treaty. If the petroleum was within the phrase *lands and estates* or the expression *taonga* (in the Maori version of the Treaty), it would be protected by the guarantee in Article the Second.

Assuming that the Tribunal does find a breach of this kind, what kind of non-binding recommendation is it likely to make? One of the factors which I have just mentioned, that Maori do not appear to have placed any special value on petroleum, will be of importance. Another important consideration is the high risk and high cost of exploration and exploitation of oil and gas. If a tribe had remained the owner of petroleum under its land it would presumably have had to accept a relatively small ownership share, or carry, in return for the work to be done and expenditure incurred by explorers. The analogy with the position of the Crown (carried interest plus royalty) is obvious.

As I have already stressed, the claim before the Tribunal is against the Crown. Presumably the Crown has driven as hard a bargain as it can in its own interests. So it is unlikely that the Tribunal would recommend anything more than that the successful claimant tribe should have vested in it the residual proprietary rights possessed by the Crown, that is, that the tribe should have the Crown's carried interest and the royalty. There are good arguments that any recommendation should be for something less than the whole of the Crown's proprietary rights. After all, the Crown would continue to bear the cost of supervising the industry.

I should stress at this point that I am here assuming that oil and gas has been found on land which is either still in Maori ownership or in respect of which the tribe can successfully argue that its rights to minerals etc. had never been properly divested prior to the passage of the Petroleum Act 1937. Where the Crown had properly acquired all interests in land no such question will arise. In particular, I think it will be difficult for Maori tribes to make successful claims in respect of oil and gas found under the seabed. It is true that the tribes have been successful in relation to fishing rights but it should be remembered that the basis of the Tribunal's *Muriwhenua* decision is that the Maori conducted a business of fishing in the waters around New Zealand and that that business was one of the rights guaranteed to them by the Treaty. Moreover, since the Fishing Act 1983 expressly recognises Maori fishing rights, action has been possible in the courts to protect the rights as now declared by the Waitangi Tribunal. The process of working out the exact nature of the rights and the sharing of the resource continues at the time of writing of this paper.

However, Maori rights in relation to land were not rights of ownership in the European sense but more in the nature of rights of exclusive occupation and enjoyment. Rather than the land belonging to Maori, Maori felt that they belonged to and were part of the land which they possessed. Such a concept is understandable in relation to dry land and to fisheries, including sedentary fisheries such as oyster beds, but it is rather less credible in relation to the sea floor which except in the shallows was unseen by Maori, unexplored and unoccupied. To the extent that the three mile limit applied and is found to be relevant to a Maori claim, it can also be said that Maori rights beyond that point in the high seas were shared with the rest of the world. It does not follow from a

finding that a tribe had an exclusive fishery that the tribe also had rights to the seabed below the place where the fish swam.

One court case concerning the oil and gas industry has touched upon some of the issues raised in this paper. It was the unsuccessful claim by Taranaki Maori that the sale by the Crown of the shares in Petrocorp to Fletchers should be halted. The High Court struck out these proceedings on the basis that only when the statute pursuant to which the action was being taken required the Crown to have regard to the principles of the Treaty could the Crown be restrained from selling its assets. Petrocorp was not a State-Owned Enterprise within the State-Owned Enterprises Act 1986. Hence, section 9 of that statute did not apply. There was no other relevant statute containing a *Treaty of Waitangi* clause. The Crown had made a political decision to sell the Petrocorp shares and that decision was not *justiciable or controllable* by the Court. The applicants had no legal right that could be affected by the sale of the shares and hence their action could not succeed.

This does not mean that the claimants will necessarily fail before the Waitangi Tribunal for, as I have endeavoured to explain, if there has been an expropriation of petroleum from

their land contrary to the principles of the Treaty, the Tribunal can make a recommendation that they should receive compensation in some form regardless of the fact that the petroleum in question legally belongs to the Crown under the Petroleum Act. The Crown still has a carried interest and a right to a royalty in respect of licences held by Petrocorp. Relief of an appropriate kind can be given to the tribe despite the sale of the Petrocorp shares and without prejudicing Petrocorp or its new shareholder. I am not acquainted with the factual basis of this claim and make no prediction about whether it will eventually be successful before the Waitangi Tribunal.

All I will say in closing, is that I think it most unlikely that the Crown would agree to hand over control of the issue and management of the petroleum licencing regime even if the financial benefits presently flowing to the Crown under that regime are wholly or partially passed over, in relation to particular licences, to successful Maori claimants. I would also expect that the Crown could successfully argue for retention of benefits as against those claimants at least to a level necessary to meet the Crown's continuing expenses in relation to the oil exploration industry.