Managing Our Treasured Home: The Conservation Estate and the Principles of the Treaty of Waitangi

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Since 1987, the principles of the Treaty of Waitangi have been explicitly relevant in the management of New Zealand's conservation estate. This article examines how the courts, the Waitangi Tribunal, and the Department of Conservation have interpreted and applied section 4 of the Conservation Act 1987.

1. INTRODUCTION

In 1987 a new legislative regime created the Department of Conservation and in doing so introduced the possibility for greater Maori involvement in conservation management. Section 4 of the Conservation Act 1987 states: “This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.” Although other statutes also require decision makers to have some level of regard to the Treaty principles, section 4 remains the strongest legislative direction with its ‘to give effect to’ aspiration. Phrases in other statutes range from “(not) to act in a manner that is inconsistent”;¹ to requiring that a “full and

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¹ Section 9 of the State-Owned Enterprises Act 1986.
balanced account” is taken of Treaty principles;\(^2\) to stating that it is a duty to “acknowledge”;\(^3\) “have regard to”;\(^4\) “take into account”;\(^5\) and more recently “recognise and respect”\(^6\) and “take appropriate account”\(^7\) of Treaty principles. The ‘to give effect to’ test is clearly pitched at a threshold not matched in other statutes. With this in mind, this article assesses the pedestal status of section 4. It examines how the courts, the Waitangi Tribunal and the Department of Conservation have interpreted this phrase.

It is timely to consider the role of the Treaty of Waitangi in conservation management for while other countries, such as Australia and Canada, are advancing environmental management rights for their indigenous peoples,\(^8\) New Zealand has indicated a pending retreat. In particular, this has come to the fore in the recent political environment with several parties stating that all references to the principles of the Treaty of Waitangi should be removed from legislation.\(^9\) Specific to the Conservation Act, the Department of Conservation itself, in May

\(^2\) Long Title to the Environment Act 1986.

\(^3\) Section 181 of the Education Act 1989.


\(^6\) Section 4 of the New Zealand Public Health and Disability Act 2000 and s 4 of the Land Transport Management Act 2003.

\(^7\) Section 4 of the Local Government Act 2002.


2004, issued an *Overview Report* identifying public concern with the Treaty.'\textsuperscript{10} The Report, compiled after the Department initiated a public submission process in regard to draft general policy documents for national parks and conservation legislation,\textsuperscript{11} highlighted several issues including: “clear messages about the extent to which preferential arrangements based on the Treaty relationship or Maori cultural values should be recognised”,\textsuperscript{12} and “concern about a perceived emerging “two-tier” citizen band with respect to rights to and in National Parks”.\textsuperscript{13} While it is uncertain how the Department will respond to these submissions in its final general policy statements, the review certainly indicates the topical nature of the Treaty’s role in the conservation realm. Although the scope of this article is limited to considering the trends in interpreting section 4, it brings to the fore the extensive developments that have occurred since 1987 in attaining a working understanding of Treaty principles.

This article is divided into five further parts. The first part provides an insight into conservation management in New Zealand. The second part briefly discusses the Treaty and its applicability to the conservation estate. The third part comprises an analysis of how the courts and the Waitangi Tribunal have interpreted section 4. The fourth part incorporates an assessment of the Department’s interpretation of the section 4 directive as evidenced in national park management plans. The final part concludes with a comment on the lasting impression of this study in that while it appears section 4 was the catalyst for a substantial policy shift post-1987, inconsistent interpretations in the judiciary and the Department, combined with recent political policy developments, suggest these new found Treaty insights remain vulnerable. This is despite the strength of the legislative direction in section 4.


\textsuperscript{12} *Overview Report*. ibid, at 3.

\textsuperscript{13} *Overview Report*. ibid, at 7.
2. THE CONSERVATION ESTATE

Today the Crown owns most scenically spectacular "mountains, forests, sounds, seacoasts, lakes, and rivers". This land constitutes our conservation estate. It is a sanctuary for our flora and fauna. It represents a time gone by, a glimpse of how New Zealand once was. It is a large estate, constituting more than 30 per cent of the country's landmass, and, to a much lesser extent, the bordering coastal waters. A variety of labels are used to protect these areas, such as national parks, reserves, wildlife areas, and marine mammal sanctuaries.

Prior to 1987, the Department of Lands and Survey was the principal government department responsible for managing natural and historic resources. However, while it held responsibility to manage, for example, national parks, it also held responsibility to purchase private land, develop Crown land and survey Crown land. Conservation was just one of its many mandates. In the 1980s, a call for institutional reform emerged and culminated with the passing of the Environment Act 1986, the Conservation Act 1987, and, later, the Resource Management Act 1991.

Pursuant to the Conservation Act, the Department of Conservation was created. Its mandate is to advocate and promote the conservation of natural and historic resources. In addition, it has a duty to: administer all Acts listed in the First Schedule of the Conservation Act (for example, the National Parks Act 1980); manage for conservation purposes all land and resources held under the Conservation Act; advocate the conservation of natural and historic resources; promote the benefits of conservation to present and future generations; educate and promote material relating to conservation; foster the use of natural and historic resources for recreation and tourism to the extent that this is not inconsistent with conservation; and advise the Minister of Conservation on relevant matters.

The Department is divided into two parts: Head Office and regional conservancies. Head Office constitutes the Director-General and nine managers. Three regional offices and thirteen area conservancies exist. The Head Office develops national policies, provides leadership, and national service and support functions, whereas the day-to-day work is mainly delivered from the regional and conservancy offices. In 1990, additional bodies were established to provide independent advice to the Department: the New Zealand Conservation Authority

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14 See s 4(2)(e) of the National Parks Act 1980.
15 See s 6(a) of the Conservation Act 1987.
16 Section 6(a) - (g) of the Conservation Act 1987.
and conservation boards.\textsuperscript{18} The Conservation Authority is intricately involved in conservation planning, policy and management advice. In general its responsibilities can be summarised as including: investigating any nature conservation matters that it considers are of national importance and advising the Minister of Conservation on such matters; considering and making proposals for the change of status of areas of national or international importance; encouraging and participating in educational and publicity activities for the purpose of bringing about a better understanding of nature conservation in New Zealand; and, advising the Minister annually on priorities for the expenditure of money.\textsuperscript{19}

Conservation boards provide for interaction between the community and the Department. Like the Conservation Authority, the boards are independent statutory bodies appointed by the Minister of Conservation. In comparison however, conservation boards operate at the regional level. Each board, for example, has the responsibility of: reviewing, amending and recommending the approval by the Conservation Authority of conservation management strategies; approving, reviewing and amending conservation management plans; advising the Conservation Authority on the implementation of such plans for areas within their jurisdiction; and advising the Conservation Authority on any proposed change of status of any area of national or international importance.\textsuperscript{20}

The Department itself has a singular mandate: conservation through the practice of preservation and protection. This is evidenced in the Act's definition of 'conservation':\textsuperscript{21}

\begin{quote}
the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.
\end{quote}

This management ethic of preservation and protection was not introduced by the Conservation Act; managers operating under the old institutional system of protecting, for example, national parks, were already practised in preservation policies.\textsuperscript{22} Section 4 of the Conservation Act, however, was new. This requirement

\begin{itemize}
\item \textsuperscript{18} See ss 6A and 6L of the Conservation Act 1987 (as amended by the Conservation Law Reform Act 1990).
\item \textsuperscript{19} Section 6B of the Conservation Act 1987.
\item \textsuperscript{20} See s 6M of the Conservation Act 1987.
\item \textsuperscript{21} Section 2 ‘Conservation’ of the Conservation Act 1987.
\item \textsuperscript{22} See s 3(1) of the now repealed National Parks Act 1952, and s 4(1) of the current National Parks Act 1980.
\end{itemize}
to interpret and administer the Act as to give effect to the principles of the Treaty of Waitangi has posed a significant challenge for decision-makers acting under the Act.

3. TREATY OF WAITANGI

The Treaty of Waitangi was signed in 1840 between Maori and the Crown. In the first article, Maori gave governance rights to the Crown, and in the second article, Maori retained chieftainship rights over their own properties - “te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa”, that is: “chieftainship over their lands, villages and all their treasures”, or, as the English version reads: “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”. It is said that the Treaty represented a “political agreement to forge a working relationship between two parties” is our founding document, and our first national environmental policy statement.

Thus, while the Treaty itself provided a model for how our environment could be managed, the Crown, historically, largely ignored it. From 1840, Maori were for the most part alienated from the management of significant natural resources. Once the Crown acquired ownership of the land, whether it was through legitimate or illegitimate purchases, confiscation, or use of legislation, such as public works legislation, the Crown assumed sole management authority

24 This is Professor Sir Hugh Kawharu’s English translation of the Maori version of the second article: see Kawharu, J., Waitangi: Maori & Pakeha Perspectives of the Treaty of Waitangi. (1989) Oxford University Press, Auckland, at 319-320.
25 See the second article of the English version, supra n 23.
26 Waitangi Tribunal, Muriwhenua Land Report. (Wai 45, 1997), at 386.
over the land and its resources.\textsuperscript{28} This occurred even though many of the 'mountains, forests, sounds, seacoasts, lakes, and rivers' were considered taonga\textsuperscript{29} and had been managed according to tikanga Maori for hundreds of years. Even tupuna taonga (ancestral taonga) like Aoraki/Mount Cook – the son of Raki (sky father)\textsuperscript{30} – were not exempt from the exclusive stance taken by the Crown. The mountain came under Crown ownership and management shortly after the signing of the Treaty of Waitangi in the late 1840s.\textsuperscript{31} Maori conservation management ethics (being more aligned with sustainable use rather than preservation)\textsuperscript{32} were given little respect, and, likewise, little opportunity to continue to be implemented.


\textsuperscript{29} Taonga, translated in a simple form, means ‘property’ or ‘resource.’ A more accurate translation may be “any material or non-material thing having cultural or spiritual significance for a given tribal group” Waitangi Tribunal, \textit{Ngawha Geothermal Resource Report}. (Wai 304, 1993), at 20. The expression is used in the Maori version of article 2 of the Treaty of Waitangi, see supra note 23.

\textsuperscript{30} See Schedule 80 of the Ngai Tahu Claims Settlement Act 1998 for an explanation of the Ngai Tahu’s cultural, spiritual, historic, and traditional values relating to Aoraki/Mount Cook.


in practice after the signing of the Treaty of Waitangi.\textsuperscript{33} Some 140 years after its signing, the Crown’s exclusive stance became unacceptable in many quarters.

In 1984, the Government formed a Working Party to consider major reform of the institutional management of natural and historic resources.\textsuperscript{34} It acknowledged that the then existing system had failed to “recognise either the conservation ethic practised by the Maori community or their rights guaranteed by the Treaty of Waitangi”,\textsuperscript{35} and commented that:\textsuperscript{36}

The views of the Maori community deserve special mention. Whereas the philosophy of the pakeha community has evolved from one based on the values of development to a belief that conservation must be integrated with development, the Maori people have traditionally practised conservation and lived off sustainable resources. Their relationship to all physical and natural resources is a personal one, and their view of the environment as a context of cultural identity is important. They have seen themselves, for much longer than conservation groups, as poorly treated by development-oriented administrations. They see their rights to “o ratou taonga katoa” (“all things prized by them”) guaranteed by the Treaty of Waitangi, and their partnership contract with the pakeha, ignored or overlooked.

A prominent catalyst for the Working Party’s stance was the work of the Waitangi Tribunal. The Tribunal had been established in 1975 to make recommendations on claims relating to the practical application of the Treaty and to determine whether Crown activities are inconsistent with the Treaty principles.\textsuperscript{37} It released

\textsuperscript{33} Perhaps the only exceptions were Ngati Tuwharetoa’s relationship with the Tongariro National Park (see s 4 of the Tongariro National Park Act 1894 and later statutes including the Tongariro National Park Act 1922, the National Parks Act 1952, and the current National Parks Act 1980), and Taranaki’s association with Egmont National Park (see section 17 of the National Parks Act 1952 as amended by section 2 of the National Parks Amendment Act 1977). For a discussion of the history of exclusiveness see also Ruru, J., \textit{Te Tiriti o Waitangi and the Management of National Parks in New Zealand} (2001, unpublished LLM thesis, Faculty of Law, University of Otago).


\textsuperscript{36} \textit{Environment 1986}, supra note 34, at 17.

\textsuperscript{37} See Long Title of the Treaty of Waitangi Act 1975.
several prominent reports in the early-to-mid 1980s that criticised the
government-sanctioned degradation of natural resources. It classified the actions
as breaches of the Treaty of Waitangi - in particular, its second article. Common
themes emphasised in many of the reports included that existing structures were
"unacceptably monocultural", and that any reform of the environmental system
must take into account the concerns of Maori as rightful partners in the
management of natural resources. Even though the Tribunal’s recommendations
for change had no binding force, the Government became acutely aware of the
issues.

The Government accepted the Working Party’s recommendations to establish
two new institutional bodies. The Ministry for the Environment was established
in 1986 and the Department of Conservation in 1987. The Ministry was directed
to take a full and balanced account of the principles of the Treaty; the Department
was directed to give effect to the principles of the Treaty.

4. JUDICIAL INTERPRETATION OF SECTION 4

At the time the Conservation Act was enacted, the Court of Appeal had just
released its landmark case, New Zealand Maori Council v Attorney-General, concerning the implications of a legislative direction, contained in the State-
Owned Enterprises Act 1986, that the Crown should not act inconsistently with
Treaty principles. Partnership, reasonableness and good faith, according to
this case, are the hallmarks of the expression ‘the principles of the Treaty of
Waitangi’. As the then President of the Court of Appeal, Cooke P, concluded:
"[Treaty] principles require the Pakeha and Maori Treaty partners to act towards
each other reasonably and with the utmost good faith. That duty is no light one.

38 For example: see Waitangi Tribunal, Report of the Waitangi Tribunal on the Motuni-Waitara
Claim. (Wai 6, 1983); Waitangi Tribunal, Report of the Waitangi Tribunal of the Kaituna
River Claim. (Wai 4, 1984); and Waitangi Tribunal, Finding of the Waitangi Tribunal on the
Manikau Claim. (Wai 8, 1985).
39 Parliamentary Commissioner for the Environment, Environmental Management and the
Wellington, at 4.
40 For further discussion, see Wheen, N. and Ruru., “Chapter Eight. The Environmental Reports”
in Hayward, J. and Wheen. N. (ed), The Waitangi Tribunal. Te Roopu Whakamana i te Tiriti
It is infinitely more than a formality”.44 All five judges in the case elaborated to include among the Treaty principles such notions as active protection, acting in an honest manner to ascertain facts before a decision is made, consulting one another, and recognising the right of the Crown to govern and the right of Maori to exercise, in certain circumstances, tino rangatiratanga. The Court also stressed the importance of not freezing Treaty principles in time: “What matters is the spirit. ... The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas”.45 While many other judicial decisions, including decisions from the Privy Council, have confirmed the underlying tenor of this decision that the Treaty principles are founded on partnership and good faith, they have been respectful of this insight and have avoided construing a finite list of Treaty principles.46

An early case to consider the actual wording of section 4 of the Conservation Act was *Re Pouakani Block Application*,47 a decision made by the Maori Land Court in 1988. This case concerned a dispute between a Maori land-owning trust and the Department of Conservation, as to land block boundaries bordering a Forest Park. Hingston J concluded:48

I am of the view that s 4 of the Conservation Act 1987 imposes an obligation on the Crown to ... act fairly, to ensure that the Maori people to be effected [sic] by any negotiations are properly represented. This at the very least, would require the Crown undertaking to meet the applicants [sic] legal and other costs irrespective of the outcome of negotiations. As well “partnership” means both parties together strive for an equitable solution and not approach the discussions as opponents. It may be difficult for those of us born to, and trained in the adversary method of solving problems to accept that there is another way – be that as it may – it has to be tried.

The most significant case specific to the section 4 direction in the Conservation Act is the Court of Appeal’s *Ngai Tahu Maori Trust Board v Director-General*

44 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 667.
45 Ibid at 663.
48 Ibid at 11, original emphasis.
of Conservation decision. Commonly referred to as the ‘whale watch case’, this 1995 decision clarified a significant point: the section 4 directive has relevance not solely to the Conservation Act, but also to those statutes listed in its First Schedule. More than twenty statutes appear in the First Schedule including the statute relevant to this case, the Marine Mammals Protection Act 1978. Other statutes listed include the National Parks Act 1980, Reserves Act 1977 and the Wildlife Act 1953. Yet the Court confined the ramifications of its section 4 findings on two fronts. While it accepted that a statute listed in the First Schedule should be interpreted and administered so as to give effect to the Treaty principles, this should only occur where the statute does not contain an internal reference to the Treaty and then only to the extent that the provisions in the statute are not clearly inconsistent with the Treaty principles.

In other words, confronted with any clear conflict between a provision in a statute like the Marine Mammals Protection Act 1978 and a Treaty principle, the provision in the statute trumps the Treaty principle and the Treaty principle loses. As will be shown in the study below, Department policy documents have embraced the Court of Appeal’s reading of section 4 in the whale watch case. To date this interpretation has not been challenged in the higher courts as to whether it is correct or not. Undoubtedly, the interpretation as it stands dilutes in real terms the impression first gained from the strongly worded ‘to give effect to’ section 4 direction.

The whale watch case extracted several Treaty principles relevant to the conservation estate. The Crown’s right and duty to govern was emphasised—the rights and interests of everyone in New Zealand, Maori and Pakeha and all others alike, must be subject to the overriding authority in Parliament to enact comprehensive legislation for the protection and conservation of the environment and natural resources.\(^\text{49}\) The Crown’s fiduciary duties owing to Maori and Maori rights to exercise tino rangatiratanga (unqualified exercise of chieftainship over their lands) were restated in reference to previous judicial decisions.\(^\text{51}\) Emphasised was the point that the Treaty principles “require active protection of Maori interests” and “to restrict this to consultation would be hollow”.\(^\text{52}\) Moreover, the Crown and Maori must act as reasonable Treaty partners, and Maori have a right of development. The stated principles were entirely consistent with the

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49 Ngai Tahu Maori Trust Board v Director-General of Conservation [1995] 3 NZLR 553 (CA).
50 Ibid at 558.
51 Ibid at 558-559.
52 Ibid at 560.
Treaty jurisprudence being developed at that time in the courts in cases like the Court of Appeal state-owned enterprises 1987 case discussed above.\(^{53}\)

A more recent High Court case, *Te Waero v Minister of Conservation and Auckland City Council*,\(^{54}\) concerns whether the Minister of Conservation was required by section 4 to consult with a specific iwi when classifying public land as recreation reserves under the Reserves Act 1977 (an Act listed in the First Schedule of the Conservation Act like the Marine Mammals Protection Act 1978). Harrison J stated: “consultation is not of itself a discrete, substantive Treaty principle”.\(^{55}\) Rather, the need to consult arises only when a Treaty interest has been identified. Harrison J held that there were no specific Treaty principles relevant to the classification decision in this case.\(^{56}\) Thus, there was no need to consult.\(^{57}\) However, Harrison J observed in obiter that “The Department should have had a mechanism in place for specifically identifying any Treaty interests which may be relevant and thus should be taken into account by the Minister when considering classification.”\(^{58}\) Although this was an important ‘rap on the knuckles’ for the Department, the Justice’s choice of words is interesting. ‘Take into account’ is the threshold test for decision makers acting, for example, under the Resource Management Act,\(^{59}\) but it is not the test for those operating under the Conservation Act where to ‘give effect to’ is the threshold test.

The only other case to discuss section 4 is *McRitchie v Taranaki Fish and Game Council*.\(^{60}\) In 1998, the majority of the Court of Appeal in deciding the *McRitchie* case held that Maori have no customary fishing rights to take trout. In reaching this conclusion several statutes were examined, including the Conservation Act. While the then President of the Court Richardson P cited

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54 *Moana Te Aira Te Uri Karaka Te Waero v The Minister of Conservation and Auckland City Council* (HC, Auckland, M360-SW01, 19 February 2002, Harrison J) (HC).

55 Ibid at para 61.

56 Ibid at para 70.

57 This case aligns with other judicial discussions, for example, see *Carter Holt Harvey Ltd v Te Runanga o Tinwhareia ki Kawerau* [2002] 2 NZLR 349 paras 27-31. While Justice Heath in this case summarised Treaty principles, consultation is not included. Instead, he states that the duty to consult arises out of the relationship of Treaty partners, see paras 27-31.


60 *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 (CA).
section 4 in his opening statement of the majority judgment, the section was not thereafter discussed. However, Thomas J, in his dissenting judgment, examined section 4 at length, along with another provision in the Act, section 26ZH. This section states: “Nothing in this Part of this Act shall affect any Maori fishing rights”. Thomas J stated: 61

Section 4 recognises the fundamental constitutional status of the treaty, and it and s 26ZH are not to be demeaned. Parliament should not be thought to have enacted these provisions as mere window-dressing. If, therefore, it is found that the guarantee of “their … Fisheries” to Maori under the treaty includes the right to fish for food, irrespective of the species inhabiting the particular fishery, s 4 requires effect to be given to that guarantee. It requires the Act to be “interpreted” as well as administered to give effect to the principles of the treaty.

However strong, this statement still only comprises part of the dissenting judgement, and has not yet been picked up on in later cases.

Turning now to the Waitangi Tribunal, it has the functions of investigating claims of Crown breaches of Treaty principles and recommending redress. It has measurably advanced the discussion and understanding of the Treaty principles in the conservation realm. 62 In summary, the Tribunal’s position is manifest in two ideas. First: the section 4 expression means that while the Crown has a right to govern, this right is qualified by the Maori right to exercise rangatiratanga. Although in exceptional circumstances the Crown may override this fundamental right of rangatiratanga, it may only do so as a last resort and if this is in the national interest. However, the “national interest in conservation is not a reason for negating Maori rights of property”. 63 Second: if the resource in question is highly valued and of great spiritual and physical importance, then it is to be considered a taonga, and the Crown is under an affirmative obligation to ensure its protection to the fullest extent reasonably practicable. 64

The Tribunal has progressed its first idea (that kawanatanga is generally subject to rangatiratanga) to a level where the courts, including the Court of Appeal in the whale watch case, have not gone. While the Court of Appeal in that case recognised the Crown’s right to govern and the Maori right to exercise tino rangatiratanga, it did not consider how the two should operate together.

61 Ibid at 162.
62 For a detailed discussion of the Tribunal’s reports concerning the environment see Wheen, N. and Ruru, J, supra note 40.
Instead it focused on the first right, the Crown’s governance right: “The rights and interests of everyone in New Zealand, Maori and Pakeha and all others alike, must be subject to that overriding authority”.65 Even though it emphasises kawanatanga, it skips how kawanatanga, as an overriding authority, might relate to the right to exercise tino rangatiratanga. It simply focused on fiduciary duties, active protection, good faith and so on — in other words, how the Treaty parties should operate towards one another. It did not turn on what a right of tino rangatiratanga encompassed nor how it could operate alongside a Crown right to govern.

The Waitangi Tribunal, in comparison, has emphasised that cession of sovereignty to the Crown by Maori was qualified by the retention of tino rangatiratanga. Referred to as the leading Treaty principle, or the overarching and far-reaching Treaty principle, is the Tribunal’s finding that: “Maori ceded sovereignty to the Crown in exchange for the protection by the Crown of Maori rangatiratanga”.66 The Tribunal has therefore been able to reach a level of comprehension between the rights, concluding that while the Crown has a right to govern, it must be proven to be in the national interest before governance is used to override an exercise of tino rangatiratanga.

The Tribunal and the Court of Appeal’s understandings of the Treaty fail to mirror on this first point essentially because the Tribunal says kawanatanga is subject to rangatiratanga, whereas the Court of Appeal says rangatiratanga is subject to kawanatanga. A future re-examination of the Court of Appeal’s decision may disrupt the Court’s interpretation that other legislative provisions override Treaty principles. This would only succeed however, if the courts developed the Tribunal reasoning and accepted that the national interest in conservation is not a reason for negating Maori rights of property. For example, it would have to hold that any inconsistency between a policy directive, such as conservation or preservation, should give way to a Treaty principle. It is certainly arguable that this should be the true interpretation of the strongly worded section 4 directive to give effect to the principles of the Treaty. However, the majority judgment in the McRitchie case at any extent does not suggest movement in this direction — in fact, it is silent on the implication of section 4. Moreover, the Waitangi Tribunal jurisprudence is of course not binding on the courts. Even though the courts have stated that the Tribunal’s opinions “are of great value to the Court”,67 and

65 Ngai Tahu Maori Trust Board v Director-General of Conservation [1995] 3 NZLR 553 (CA) at 558.
"are entitled to considerable weight", the courts are free to dismiss these Tribunal statements.

Nonetheless, in regard to the second part of the Tribunal’s position, there appears to be more alignment between the Court of Appeal and the Tribunal. Both seem to accept that the requirement for a natural resource or activity must fall within the category of a taonga before the Crown should be subjected to certain duties to protect it. The Court of Appeal appears prepared to read taonga broadly: “Although a commercial whale-watching business is not taonga or the enjoyment of a fishery within the contemplation of the treaty, certainly it is so linked to taonga and fisheries that a reasonable treaty partner would recognise that treaty principles are relevant.”

The enactment of the section 4 directive recognised, at long last, the relationship Maori have with the conservation estate landscapes and the guarantees agreed to in the Treaty of Waitangi. In the jurisprudence since developed, there remains potential for further clarification of the exact effect of section 4. However, before pronouncing the need for further judicial intervention, it is prudent to consider the practical effect of section 4 at the ground level. As the following analysis will show, the Department of Conservation, has, at least in recent years, seriously turned its mind to this section 4 directive.

5. DEPARTMENT OF CONSERVATION
AT THE GROUND LEVEL

This part of the article attempts to provide an insight into some of the initiatives and policies adopted by the Department of Conservation since 1987 under the guise of giving effect to the Treaty of Waitangi. The insight is limited to examining references to the Treaty principles in national park management plans. For the purposes of this article, the examination has been divided into three eras in order to illustrate the impact law can have on initiatives at the ground level of policy management: the late 1980s; the 1990s; and the early 2000s.

Fourteen national parks exist and it is a statutory requirement that each has a management plan in place and that they be reviewed at intervals of not more than ten years. It is common for the review process itself to take many years. It can involve the publication of discussion review documents and draft plans designed to entice public comment. As at the date of writing, thirteen operative

68 Moana Te Aria Te Uri Karaka Te Waero v The Minister of Conservation and Auckland City Council (HC, Auckland, M360-SW01, 19 February 2002, Harrison J) (HC), at para 59.
69 Ngai Tahu Maori Trust Board v Director-General of Conservation [1995] 3 NZLR 553 (CA), at 560.
70 See ss 45-48 of the National Parks Act 1980.
plans exist. Two of these plans were published in the late 1980s, five in the 1990s and six in the 2000s. Due to its recent creation, a management plan for the Rakiura National Park has yet to be completed. Three draft plans are in circulation, and three further parks have notified the intention to review their operative plans.

5.1 1987-1989

It is fair to conclude that, initially, the Department was slow to take up its legal duty to give effect to the principles of the Treaty of Waitangi. In its published documents from 1987-1989, few references were made to the Treaty. National park management plans exemplified this trend. Of those plans published in the 1980s (two prior to 1987, and six between 1987-1989), only one mentioned the Treaty of Waitangi: “The Department of Conservation in the management of the park will have full regard to the Treaty of Waitangi and the traditional rights of tangata whenua”. There was no elaboration on how this could occur. Poignantly, the statement used the expression ‘full regard’ rather than the section 4 words ‘to give effect to’. Those plans show what little effect section 4 had on conservation management at the ground level in the early years of the operation of the Conservation Act.

74 It was officially gazetted on 28 February 2002 and opened on 9 March 2002.
76 See Department of Conservation website www.doc.govt.nz for information announcing the review of the management plans for the Arthur’s Pass National Park, Mt Aspiring National Park and Whanganui National Park.
77 Department of Conservation, Te Urewera National Park Management Plan (1989), at 56.
5.2 1990-1999

The Department embraced a very different approach in the 1990s as is evidenced in the national park management plans of that time. Five of the thirteen now operative plans were published in the 1990s – all in the first half of that decade: 1990-1994.\(^7\) In stark contrast to those plans published in the 1980s, four of the five plans refer to the Treaty principles.\(^79\) Three state that the principles must be given effect to, while the other opts for the ‘have regard’ approach, evidencing a continuing mis-interpretation of the section 4 ‘to give effect to’ direction. The four inclusive plans primarily discuss the duty in the context of consultation. For example: “An important aspect of Treaty relationships between the Crown and Maori concerns a duty of consultation. This duty is not a casual one. It applies to the functions of the Department”\(^80\)

One plan, the Arthur’s Pass NPMP (1994), goes further and not only identifies relevant Treaty principles, but does so in a national park management context. The four principles identified – essential bargain, partnership, active protection and tino rangatiratanga – are explained as:\(^81\)

The ‘essential bargain’ principle gives the Crown power to legislate for National Parks thereby ensuring a legal requirement, if needs be, to support the active involvement and participation of the Crown’s Treaty partners in the management of parks. The principle of ‘partnership’ and its implementation must involve the Crown’s Treaty partners to a greater extent in the policy, planning, and decision making process of the park estate. The principle of ‘active protection’ requires the Department to protect taonga within the park, and to provide for access to resources for traditional purposes within the constraints of the National Parks Act 1980. ‘Tribal Rangatiratanga’ is a principle not well understood but includes the recognition, and acknowledgement that the Crown’s Treaty partners have a right to exercise authority over their traditional resources and to manage them in a way the iwi consider appropriate. The extent to which rangatiratanga can be actively exercised within the national park is a matter still to be resolved.

The Plan expressly recognises that “past arrangements for representation by and consultation with Ngai Tahu did not adequately provide a basis for developing a management partnership for the park”\(^82\) and that “current management attitudes

\(^7\) Arthur’s Pass NPMP (1994); Fiordland NPMP (1991); Mount Aspiring NPMP (1994); Paparoa NPMP (1992); and Tongariro NPMP (1990), supra note 72.

\(^79\) The odd one out is Tongariro NPMP (1990), supra note 72.

\(^80\) Fiordland NPMP (1991), supra note 72, at Appendices p 5.

\(^81\) Arthur’s Pass NPMP, supra note 72, at 19.

\(^82\) Arthur’s Pass NPMP, supra note 72, at 25.
have a philosophical base that is exclusive of any conservation concepts of Maori.83 It recognises that a “new framework based on a negotiated partnership will have to be developed to meet the Crown’s obligation inherent in the treaty principle to protect Ngai Tahu’s rangatiratanga and provide Ngai Tahu with opportunities for participation in all aspects of the park’s management”.84 Moreover, it recognises the challenge posed by the section 4 directive; “The re-introduction of ‘tikanga Maori’ to management practice in the park is seen as essential and desirable and adding a new/old dimension to management philosophy. The uniqueness of introducing tikanga Maori is poorly understood and the development of a philosophy to meet all aspirations will be a major challenge during the plan’s lifetime”.85

This plan represents an impressive insight into the practical implications of understanding and giving effect to Treaty principles, especially when considering the plan was published in 1994, a year before the Court of Appeal whale watch case. Prior to that case, it had been argued that the section 4 directive solely applied to the Conservation Act, and not to those Acts listed in its First Schedule. However, this plan, along with the three other Treaty inclusive plans published in the first half of the 1990s, clearly illustrate that the Department, by 1995, was already reading, in some situations at least, the section 4 direction in the Conservation Act to apply to First Schedule listed statutes, namely the National Parks Act 1980. Of even more significance, the Arthur’s Pass NPMP had attempted to grapple with the practical application of the Treaty principles, recognising the potential conflict between governance and rangatiratanga that had been hinted at in the Court of Appeal’s state-owned enterprises 1987 case, but not explored in the whale watch 1995 case.

While the Arthur’s Pass NPMP was the last operative plan to be published in the 1990s, four draft plans were published in this decade; all in the second half of the 1990s.86 It is interesting to briefly canvass these drafts as they were formulated in an era of intense Treaty principles stimuli. Predominantly, various judicial decisions, including the whale watch case, were made during these years,87 along with the implementation of the Kaupapa Atawhai structure within the Department of Conservation which sparked the publication of the Kaupapa

83 Arthur’s Pass NPMP, supra note 72, at 26.
84 Arthur’s Pass NPMP, supra note 72, at 25.
85 Arthur’s Pass NPMP, supra note 72, at 26.
87 For example, see cases cited at supra note 46.
Atawahi Strategy\textsuperscript{88} in 1997, the Conservation Authority's publication of its Maori Customary Use of Native Birds, Plants and other Traditional Materials interim report and discussion paper in 1997,\textsuperscript{89} the Department's publication of its Restoring the Dawn Chorus strategic business plan in 1998,\textsuperscript{90} and, of course, the enactment of the Ngai Tahu Claims Settlement Act 1998.

All of these initiatives had a major impact on how the Department interacted with Maori. The implementation of the national network of Kaupapa Atawhai Managers in each conservation conservancy guaranteed for the first time Maori voices within the Department.\textsuperscript{91} The Kaupapa Atawhai Strategy identified a vision statement that would see "The department, Maori and the community at large working co-operatively to conserve the natural and historic heritage of New Zealand for present and future generations".\textsuperscript{92} The number one goal was "To interpret and administer conservation legislation so as to give effect to the principles of the Treaty of Waitangi".\textsuperscript{93} The Customary Use publication highlighted the need to debate the issue of Maori customary use of native plants and animals within the conservation estate, and the Dawn Chorus publication listed the need to establish and maintain effective relationships with iwi Maori as a key step forward in the progress of achieving the Department's conservation vision.\textsuperscript{94}

More specifically, the Ngai Tahu Claims Settlement Act 1998 had a profound effect in altering existing conservation management structures in many parts of the South Island by introducing new conservation devices to better enable Ngai Tahu involvement. For example, Te Runanga o Ngai Tahu now has rights to nominate persons to sit on the Conservation Authority and conservation boards.\textsuperscript{95} The Settlement Act declared several areas within the conservation estate to be Topuni (areas which have Ngai Tahu values) and/or statutorily acknowledged areas (areas in which Ngai Tahu have cultural, spiritual, historic and traditional

\textsuperscript{91} For information on Kaupapa Atawhai see Department of Conservation website: \url{http://www.doc.govt.nz/Community/005-Conservation-and-Maori/index.asp} (accessed 1 October 2004).
\textsuperscript{92} Kaupapa Atawhai Strategy, supra note 88, at 2.
\textsuperscript{93} Kaupapa Atawhai Strategy, supra note 88, at 5. See also discussion at 6-7.
\textsuperscript{94} Dawn Chorus, supra note 90, at 11.
\textsuperscript{95} See ss 272(1) and 273(1) of the Ngai Tahu Claims Settlement Act 1998, and ss 6D(1), 7B and 7C of the Conservation Act 1987.
association). If an area has been cloaked with a Topuni status, decision makers must have particular regard to those Ngai Tahu values; 96 if an area has been statutorily acknowledged, decision-makers must have regard to the Ngai Tahu association. 97 The Settlement Act also introduced ‘Department of Conservation protocols’. The protocols can be used to establish how the Department will exercise its functions, powers and duties in relation to specified matters within the Ngai Tahu takiwa, address how the Department will interact on a continuing basis with Te Runanga o Ngai Tahu, and provide for Te Runanga o Ngai Tahu’s input into its decision-making process. 98 Moreover, measures have been created to recognise the special relationship Ngai Tahu have with Aoraki/Mount Cook, including a name change, and the opportunity for the mountain to vest in Ngai Tahu ownership for a limited period (up to 7 days). 99

It is, therefore, imperative to briefly canvass the four draft plans published in the second half of the 1990s to consider whether these initiatives had an impact on the Department’s application of section 4. Not surprisingly considering the political and legal environment in the later part of the 1990s, all the draft plans endorsed the Treaty principles. The most progressive of the four was the Westland/Tai Poutini draft plan (1999). It built on what the Arthur’s Pass NPMP had done and been developed in the Kaupapa Atawhai Strategy; it listed relevant Treaty principles, but did so in a manner that was to become the mainstay of subsequent national park management plans and proposed drafts. In brief, first, it stated that ‘giving effect’ to Treaty principles was a management objective, but that the Treaty objective should be pursued only so long as it will not create any inconsistencies with the NPA 1980. 100 The qualifier, obviously, resulted from the Court of Appeal’s 1995 whale watch decision. Secondly, it encapsulated the Treaty principles in eight statements falling under five headings: essential bargain; co-operation; duty to be informed; active protection; and avoid prejudicial actions. It prefaced the list with a discussion of that the judiciary had emphasised that these principles are still evolving. The stated principles were to: 1) recognise the Crown’s authority to make laws for the good order and security of the country; 2) recognise the right of Maori to exercise Iwi authority and control over their own land, resources and taonga; 3) recognise the rights of Maori and non-Maori alike to equality of treatment and privileges of citizenship; 4) act reasonably and in good faith; 5) make informed decisions; 6) where appropriate and to the fullest extent practicable, to take active steps to protect Maori interests; 7) avoid

98 Section 281 of the Ngai Tahu Claims Settlement Act 1998.
100 Westland/Tai Poutini draft NPMP, supra note 86, at 36.
action which would create new Treaty grievances; and, 8) avoid actions which would prevent redress of claims.\textsuperscript{101}

The operative and draft plans published in the 1990s illustrate a real advance by the Department in understanding the implications of the section 4 directive. The early focus on the duty to consult as arising from the Treaty relationship aligned with the Court of Appeal state-owned enterprises 1987 case discussion and the later High Court \textit{Te Waero} case. Likewise, the subsequent development of the Treaty principles emphasised those first discussed in the state-owned enterprises case, and reinforced in a conservation estate context in the whale-watch case. While the Arthur’s Pass NPMP indicated an attempt to recognise the potential conflict between the principles of kawanatanga and rangatiratanga, the Westland/Tai Poutini draft NPMP avoided the conflict in a manner similar to the Court of Appeal in its whale-watch case. As is discussed below, subsequent draft and operative plans published in the 2000s have replicated in close form the Westland/Tai Poutini draft NPMP’s eight Treaty principles.

\textbf{5.3 2000–2004}

Six of the thirteen current operative national park plans were published between 2001 and 2004.\textsuperscript{102} These plans consolidate the approach of the draft plans published in the later half of the 1990s. All six state that it is either a management objective or a primary objective to give effect to the Treaty principles. Most do as the Westland/Tai Poutini draft did and list the Treaty principles in eight statements attached to the plan as an appendix. The Urewera NPMP (2003) differs slightly in that it states an extra Treaty principle; principle 4 reads: the right of Maori to undertake their duty of Kaitiakitanga (guardianship) over their land, resources and taonga.\textsuperscript{103} Other plans single out kaitiakitanga for special discussion. For example, the Egmont NPMP (2002) states that as a management objective to give effect to the Treaty principles, it is a policy objective to recognise the role of the tangata whenua as kaitiaki of nga taonga o te Kahui Maunga (the treasures of the these ancestral tribes before the coming of the great migration).\textsuperscript{104}

The odd one out of these six plans is the Nelson Lakes NPMP (2002). The listed objective of kaitiakitanga is stated as to “manage the park in line with the principles of the Treaty of Waitangi, so far as they are not inconsistent with the National Parks Act 1980”.\textsuperscript{105} The disturbing fact here is the reversion to the late 1980s/early 1990s miss-interpretation of section 4’s direction to give effect to the Treaty principles. While the oversight is remedied somewhat in its implementation

\textsuperscript{101} Westland/Tai Poutini draft NPMP, supra note 86, at 122-123.
\textsuperscript{102} See NPMPs listed in supra note 73.
\textsuperscript{103} Urewera NPMP, supra note 73, at 177.
\textsuperscript{104} Egmont NPMP, supra note 73, at 39.
\textsuperscript{105} Nelson Lakes NPMP, supra note 73, at 37, emphasis added.
policy statement - “The Department will give effect to its statutory obligations and the principles of Treaty of Waitangi”\(^{106}\) – the plan makes little attempt to discuss the content of Treaty principles. The Kahurangi NPMP (2001) is dangerously close to this precedent. Although it does state that it is a primary objective to give effect to Treaty principles,\(^{107}\) the policy statement under the chapter heading “Treaty of Waitangi” reads: “To actively protect and provide for the interests of iwi”.\(^{108}\) However, the Nelson Lakes NPMP does not even list the common eight principles in an appendix in a like manner to other published plans. Instead it opts to refer the reader to the Nelson/Marlborough Conservation Management Strategy for a discussion of Treaty principles as they relate to that conservancy.\(^{109}\)

Nonetheless, the Nelson Lakes NPMP does focus on the effect of the Ngai Tahu Claims Settlement Act 1998. In doing so however, at the expense of discussing Treaty principles, it has suggested the conflation of Treaty principles with the negotiated Ngai Tahu/Crown agreement. If this is an indication of a future trend, it is wrong in law. The section 4 directive is an overarching directive independent of negotiated settlements. Treaty principles still continue to exist throughout the conservation estate and are not confined to areas, for example, that have been cloaked in a Topuni status. A negotiated settlement does not override the legal duty to interpret and administer the Conservation Act, and those Acts listed in its First Schedule, in a manner which gives effect to the principles of the Treaty of Waitangi. Those principles cannot be said to equate with what has simply been negotiated. However, this mixing of Treaty principles with negotiated settlement duties appears isolated to the Nelson Lakes and, to a lesser extent, the Kahurangi NPMP. The Aoraki NPMP (2004) does not do this, nor does the draft Fiordland plan (2002).

In fact, the future trends apparent in the two more recent draft plans, Fiordland (2002) and Tongariro (2003) indicate a new approach to the Treaty principles: their inclusion in the main text, rather than encasement in an appendix. Moreover, the principles in the Tongariro draft are restated in a different manner to past plans. The Tongariro draft copies the Urewera NPMP by stating the same nine, instead of eight, Treaty principles. However, in stark contrast to previous plans, several objectives follow each principle. For example, principle one, kawanatanga – the authority to make laws for the good order and security of the country – is aligned with the section 4 directive to mean that in doing this the Treaty principles must be given effect.\(^{110}\) Principle two, rangatiratanga – the right of Maori to exercise traditional authority and control over their land, resources and taonga – is explained in two parts. First: “To recognise and actively promote the exercise by iwi of tino rangatiratanga over their land and resources and taonga of

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106 Nelson Lakes NPMP, supra note 73, at 38.
107 Kahurangi NPMP, supra note 73, at 30.
108 Kahurangi NPMP, supra note 73, at 32.
109 See Nelson Lakes NPMP, ibid, at 37 and 38.
110 Tongariro NPMP, supra note 75, at 45.
significance to them”. Second: “To identify with iwi opportunities for them to exercise an effective degree of control over traditional resources and taonga that are administered by the department, where this is not inconsistent with legislation”. The plan even attaches a note to this rangatiratanga discussion: “An effective degree of control may vary from full authority at one end of the spectrum to a right to be consulted at the other end”.

These operative and draft plans published in the 2000s suggest that the Department views Treaty principles as evolving, just as the Court of Appeal stressed the importance for the Treaty in its state-owned enterprises 1987 case. It also suggests that while there are inconsistencies between the plans, some conservancies are confidently forging ahead in developing Treaty principles relevant to its specific area. Interestingly, none of the plans have attempted to develop the Waitangi Tribunal position on the tension between kawanatanga and rangatiratanga. Additionally, two of the plans suggest similar confusion with the threshold tests – ‘to give effect to’ compared with, for example, ‘in line with’ and ‘have regard to’ – just as was evidenced in the High Court 2002 Te Waero case.

6. COMMENT

The inclusion of the Treaty principles in the Conservation Act clearly marked a turning point in conservation management in New Zealand. While it took some years for the Department to seriously turn its mind to the section 4 directive, by the turn of this century, there is clear evidence that it had not simply replicated the direction in policy documents, but had sought to understand the implications of the Treaty in the context of conservation management. The understanding evidenced at the ground level – albeit here only shown at the level of national park management plans – is impressive. Although the scope of this article has not allowed an examination of other Department of Conservation policy documents, or even a thorough, wider examination of national park management plans, the insight is valuable in that it establishes a positive trend of attempting to do as the legislation requires: interpreting and administering conservation legislation as to give effect to the principles of the Treaty.

111 Tongariro NPMP, supra note 75, at 46.
112 Tongariro NPMP, supra note 75, at 46.
113 Tongariro NPMP, supra note 75, at 46.
114 New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 (CA). See discussion above, in particular, the text attaching to supra note 44.
115 In regard to this examination, the scope of the article has not allowed for a thorough examination of national park management plans. However, if this had been allowed, a trend towards recognising Maori associations with land within national park boundaries would also have been clearly evidenced. For example, it is now common for plans to have policy on Maori customary use of indigenous flora and fauna, use of Maori language, and respecting Maori cultural associations with areas within parks, such as mountains or water. See any of the recent national park management plans for examples, and for a comparative examination see Ruru, supra note 33, at chp 9.
While none of the national park management plans to date adequately grapple with the potential conflict between the Crown’s right to govern and the hapu right to exercise tino rangatiratanga, the plans appear consistent with the courts’ current interpretations of the Treaty. Even though the Waitangi Tribunal has indicated that the Crown, in its right to govern, can only override the right of rangatiratanga in situations of national interest, with conservation explicitly stated as not constituting such an exception, both the courts and the Department have not gone this far. However, to be fair, the courts have not yet been explicitly asked to decide on this issue; to date it is not an argument that has been put to a court. If confronted with such an issue it would be interesting to see how the court would deal with it. Any consideration would require a focus on the ‘to give effect to’ threshold test, thus distinguishing jurisprudence decided under other legislative threshold tests, for example, to ‘take into account’ as used in the Resource Management Act 1991. It would call for an unique examination of the Treaty principles in a conservation estate context.

Even though scope may exist to strengthen the understandings of the section 4 directive, the political reality cannot be ignored especially as a general election looms. The work of the past fifteen plus years to see the Treaty principles being given effect to in conservation management remains vulnerable. However, the permeating influence of the Treaty on the ground as evidenced in management policy documents will be hard to undo overnight, and rightly so. Much thought and effort has gone into understanding the content of Treaty principles in this context. While the section 4 directive posed as a significant challenge back in 1987, today it is commonplace to discuss and give effect to Treaty principles in a positive, all-encompassing manner. This should not be undone lightly.

Accepting that it is a hard task to evaluate existing management practices in order to recognise indigenous peoples’ associations, New Zealand has come a long way in recent decades. Where we are at currently is a positive embrace of Treaty principles. While there remain inconsistencies and confusions, this is to be expected for a jurisprudence that is still in its early stages of development. It is crucial that New Zealand does not let this, or other political motivations, halt the movement forward to better understanding Treaty principles. From 1840 to 1987, Maori were mostly alienated from the management of the conservation estate. The call made here is to move forward, not backwards.