Defining Kaitiakitanga and the Resource Management Act 1991

The implementation of kaitiakitanga within the sphere of the Resource Management Act 1991 ("RMA") is inherently problematic. Any attempt to define Maori concepts within a foreign regime and in the English language is always difficult. A concept such as kaitiakitanga cannot be accurately translated into an equivalent Pakeha concept, as its origin is derived from a spiritual rather than an English jurisprudential background. In addition, there is no single Maori perspective on its meaning that is applicable to all iwi or hapu. Any such redefinition inevitably becomes an ill-fated attempt at decolonising the law.

Nevertheless, the concept of kaitiakitanga has been given a statutory definition by the RMA. This statutory recognition has left it open to abuse by allowing the Pakeha judicial system to interpret this Maori concept from a position of ignorance. Consequently, growing Maori discontent has led to an amendment of the definition in 1997 ("1997 amendment").[1] The following discussion begins by exploring the concept of kaitiakitanga. It then critiques this attempt by the legislature to meet the needs of the Crown's Treaty partner, and analyses the Planning Tribunal's interpretations of the original definition. Further analysis will focus on the amended definition to examine any effect it may have on the debate.

The Concept of Kaitiakitanga

The traditional Maori system of environmental management is holistic. It ensures harmony within the environment, provides daily checks and balances, prevents intrusions that cause permanent imbalances and guards against ecocide.[2] This holistic approach is derived from a Maori worldview based on values and beliefs quite distinct from those of the Pakeha. Maori attitudes towards the natural world reflect the relationships created through Ranginui (Sky father) and Papatuanuku (Earth mother). All of the natural elements, including humans, are their descendants and are thus related. This interconnectedness by way of whakapapa (genealogy) explains why Maori relate to the environment from a position of parity rather than ascendancy. Everything is inherently tapu (sacred) and is to be respected. This creates obligations on tangata whenua to respect all things within this genealogical matrix.

Every element within the realm of Rangi and Papa possesses mauri (life force) which is protected by a kaitiaki or atua (god).[3] Any neglect or harm done

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1 Resource Management Amendment Act 1997, s 2.

2 Minhinnick, *Establishing Kaitiaki* (Auckland: N.K. Minhinnick, 1989) 1.

3 Ministry of Maori Affairs, *Maori Values and Environmental Management* (Wellington: Manatu Maori, 1991) 3.

to an element's mauri is a breach of its tapu. Preserving the mauri of any element of the natural world is essential for its survival. Thus, rules governing conduct are established to ensure that human use of a resource does not affect its mauri. Regulation is provided through the concepts of tapu and rahui. Tapu can imply an absolute prohibition, which if violated would have detrimental consequences and in some cases, death.[4] Rahui is a temporary form of prohibition that is often used to preserve birds, fish or any natural product, particularly during the procreation season to encourage rejuvenation. The system recognises that it is necessary to balance human need with the preservation of the resource and the protection of its mauri. [5]

The kaitiaki therefore acts as both benefactor and beneficiary, in the sense that they protect the resource from harm while still reaping the benefits of the resource. An intrinsic part of this concept is the recognition that each generation has an inherited responsibility to protect and care for the natural world. Kaitiakitanga carries with it an obligation not only to care for the natural world, but also for each successive generation, by ensuring that a viable livelihood is passed on. [6]

Kaitiakitanga under the Resource Management Act

Under s 7 of the RMA, all persons exercising functions and powers in relation to managing the use, development and protection of natural and physical resources are required to "have particular regard" to certain specified matters including kaitiakitanga.[7] Until the 1997 amendment, kaitiakitanga was defined in s 2(1) of the RMA as:

> The exercise of guardianship; and in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself.

Analysis of this definition must recognise the statutory context in which kaitiakitanga has been interpreted and implemented. Its interpretation will often depend on its interaction with other factors listed in Part II of the RMA.[8] Its placement within s 7 immediately renders the concept subordinate to the purpose of the RMA, which is to promote "sustainable management of natural and physical resources"[9] and in doing so to "recognise and provide for" the matters of national importance contained in s 6. This placement abates the significance of kaitiakitanga within the RMA due to a hierarchical approach in which the words "recognise and provide for" in s 6 imply a stronger obligation than the words

4 Ibid.
5 Ibid.
6 Supra at note 1.
7 Resource Management Act 1991, s 7(a).
8 Part II sets out the purposes and principles of the RMA.
9 Resource Management Act 1991, s 5.

"regard must be had to" in s 7.[10] Furthermore, kaitiakitanga is only one amongst eight other matters, post 1997 amendment, that must be regarded by a decision maker.

On the other hand, the courts have interpreted the s 7 requirement to "have particular regard" to certain factors as imposing a duty to be on inquiry[11] and further, that the factors to be regarded must be recognised as important and carefully considered when coming to a decision.[12] However, this assistance seems futile in relation to kaitiakitanga, as it is contended that a real chance of partnership between the Treaty signatories was ignored with this intentional subordination of the central tenet of Maori resource management.

Interpretation of s 7(a) – Prior to the 1997 Amendment

Prior to the 1997 amendment, the high water mark of acceptance of kaitiakitanga by the judicial system was undoubtedly *Haddon v Auckland Regional Authority*.[13] In this Planning Tribunal decision, Haddon, on behalf of his hapu, requested an inquiry into a recommendation from the Auckland Regional Council to the Minister of Conservation to extract sand from the seabed three to four kilometres off the coast of Pakiri Beach. He argued that, as tangata whenua, he and his hapu were the traditional kaitiaki over the resource. Judge Kenderdine determined that the hapu should be able to exercise kaitiakitanga over the sand resource and to give guidance on how, and to what extent, it should be developed. She recommended that the Minister adopt a three step process with regard to the consent to the restricted coastal activity in order to give ss 6(e) and 7(a) a "meaningful effect" in Maori terms. That process involved:[14]

(i) Recognising that the resource represented the ancestral land and waters of the hapu. (The Tribunal observed that such recognition would help affirm the mana whenua of the hapu);

(ii) Providing for practical recognition of the hapu's ancestral relationship with the coastal resources (for example, being a member of the team monitoring the resource); and

(iii) Providing for kaitiakitanga over the resource and its future.

Despite this recognition of kaitiakitanga, the Tribunal held that the proposed

10 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257, 272 per McMullin J. This decision was based on the previous legislation, the Town and Country Planning Act 1977, ss 3(1), 4.

11 *Gill v Rotorua District Council* (1993) 2 NZRMA 604, 616.

12 *Malborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220, 228.

13 [1994] NZRMA 49.

14 Ibid, 59.

sand extraction was well within the principles of sustainable management, which is the over-arching purpose of the RMA under s 5, and therefore allowed it to proceed. The Tribunal also commented that the resource was renewable, and that potential for the payment of royalties for further extractions could be of benefit to the hapu.

These comments illustrate that the positive advancements made by the Tribunal appear hollow and fall well short of the mark. To suggest that future royalties could be of benefit to the hapu undermine the very foundations of kaitiakitanga, and the aims of the hapu. Tribal taonga and protection of the mana and mauri of those resources cannot be reduced to mere commodities for which royalties are paid. Furthermore, the fact that the resource is renewable does not divorce it from its cultural and spiritual significance. It is apparent that the Tribunal's ideology behind what is sustainable management, and the values that underpin the Maori concept of a prima facie similar literal objective, are dichotomous.

In *Sea-Tow Ltd v Auckland Regional Council*,[15] which also concerned the extraction of sand from the seabed, the Tribunal recognised the tangata whenua's mana and kaitiaki role from the inclusion of their representative in the working party for the sand study. The Tribunal suggested that the kaitiaki role could be further recognised by the regional council transferring its monitoring functions to the tangata whenua. The Tribunal warned, however, that the onus was on the regional authority and not the Minister to delegate these functions.[16]

The application of kaitiakitanga in the RMA came before Judge Kenderdine again in *Whakarewarewa Village Charitable Trust v Rotorua District Council*,[17] in which she stated that "[k]aitiakitanga ... most properly requires the control to be vested in an iwi authority".[18] As there was no clear iwi authority, the Tribunal held that the Rotorua District Council was required to assume the role of kaitiaki.[19] This view of control by entities other than tangata whenua denotes another serious divergence away from the real sense of kaitiakitanga.

Rural Management Ltd v Banks Peninsula District Council [20] concerned a proposed sewage outfall to the sea from a new subdivision. The local runanga were opposed and preferred a land-based alternative. Discharge of sewage into the sea, no matter how well treated, is highly offensive to Maori. Although in physical terms the discharge may not pollute the sea, it would harm the spiritual relationship Maori have with the sea, and the obligation of the kaitiaki would not be fulfilled. In this case, the interpretation of kaitiakitanga was limited to the statutory definition in the RMA, and the physical evidence. Kaitiakitanga was stated to be applicable not only to Maori, but also to consent authorities and

15 [1994] NZRMA 204.
16 Ibid, 217.
17 Planning Tribunal, W61/94, 25 July 1994.
18 Ibid, 21.
19 Ibid, 22.
20 [1994] NZRMA 412.

applicants. The consent authority was the regional council, which had imposed what it considered to be extremely high standards on the developer. The Council felt satisfied that, as the appropriate kaitiaki, it had lived up to the concept of kaitiakitanga.

The Tribunal's view could be said to be reasonable, as it simply applied the definition given in the RMA. The failure to adequately recognise the spiritual relationship, the very essence of kaitiakitanga, however, clearly shows the Tribunal's inability to embrace the full meaning of the concept. Here the kaitiaki in the true sense of the word, that is, the tangata whenua, could not rely on s 7(a) to exercise the ethic of kaitiakitanga, even in a limited form.

Nevertheless, in *Te Runanga o Taumarere v Northland Regional Council*,[21] Judge Sheppard noted that, while kaitiakitanga was defined in s 2(1) of the RMA, "the application of the concept to particular circumstances can be the subject of evidence and submissions ... on behalf of those who claim the status of kaitiaki".[22] This may assist the Tribunal to interpret kaitiakitanga in a manner more consistent with the Maori understanding of the term, although the constraint of a statutory definition remains.

The Resource Management Amendment Act 1997

Opposition to the statutory definition and interpretation of kaitiakitanga resulted in the 1997 amendment to s 2(1) of the RMA. Kaitiakitanga is now redefined as:[23]

> [T]he exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethics of stewardship.

The 1997 amendment makes it clear that kaitiakitanga is only applicable to the exercise of guardianship by the tangata whenua of an area. This correctly clarifies the view formed in *Rural Management Ltd* that non-Maori could claim the status of kaitiaki, which is a distinctly Maori concept and role. As Minhinnick illustrates:[24]

> Kaitiaki cannot be filled by a group from anywhere because the status of kaitiaki stems from long tribal associations. Only tangata whenua can be kaitiaki, can identify kaitiaki, and can determine the form and structure of kaitiaki.

The Board of Inquiry to the New Zealand Coastal Policy Statement may have also influenced the change. The Board emphasised that "an interpretation of

21 [1996] NZRMA 77.
22 Ibid, 93.
23 Emphasis added.
24 Supra at note 2, at 4.

kaitiakitanga must of necessity incorporate the spiritual as well as physical responsibility of tangata whenua."[25] Kaitiakitanga relates to "the mana not only of the tangata whenua, but also of the gods, the land and the sea."[26] Furthermore, "[l]ocal authorities and consent authorities need to be aware that tangata whenua read far more into the interpretation of kaitiakitanga than just the surface meaning of the words written in English."[27] The enhanced definition provides a positive step towards the convergence of the judicial interpretation of the statute and Maori understanding of the term.

Although the concept, and duty, of kaitiakitanga under the RMA is now limited to the tangata whenua of an area, the 1997 amendment has made a further change that may weaken the role of Maori as kaitiaki. Section 7(aa) inserts "The ethic of stewardship" as a further matter to be considered in addition to s 7(a) "kaitiakitanga".[28] This appears to create an overlap with s 7(a), as it now seems that a consent authority of the Environment Court could consider whether any person or body was exercising the ethic of stewardship in terms of s 7(aa). Thus, the legislature has given with one hand, but has taken with the other. It has defined kaitiakitanga as being exclusive to tangata whenua, but has negated the exclusiveness of stewardship (a component of kaitiakitanga) through the insertion of s 7(aa).

The inclusion of the words "in accordance with tikanga Maori" in the definition of kaitiatikanga, however, should remedy many of the problems. It is a subtle redefinition of a Maori concept based on stewardship. As Tomas states, "[k]aitiakitanga is a concept, which has roots deeply embedded in the complex code of tikanga."[29]

Concern remains however, in regard to the use of the words "guardianship" and "stewardship" to define kaitiakitanga. Both terms tend to cloak the concept of kaitiakitanga in Pakeha terms of lesser importance and entirely different origins. The role of the kaitiaki is considerably more significant than simply that of a guardian or steward. It is a vital component in the spiritual and cultural relationship of tangata whenua with their land.

Conclusion

A pessimistic view towards the inclusion of kaitiakitanga in the RMA is easily justified from the Tribunal's interpretations of the statutory definitions thus far. Overall, it has placed a pro-development slant on the overriding purpose of sustainable management, while subordinating an apparently equivalent Maori

25 *Report and Recommendations of the Board of Inquiry into the New Zealand Coastal Policy Statement* (1994) 17.

26 Ibid.

27 Ibid.

28 Palmer, "Resource Management Act 1997" (1998) 2 BRMB 103.

29 Tomas, "Implementing Kaitiakitanga under the Resource Management Act" (1994) 1 NZELR 39.

concept. The Tribunal is not solely to blame for the erosion of kaitiakitanga, as the RMA itself allows only limited scope to fulfil the true sense of the concept. The 1997 amendment however, has provided much needed clarification. Despite this, the broader problem of inadequate recognition of Maori as a Treaty partner remains. This is illustrated by the lack of importance given to Maori concepts in the RMA. The treatment of kaitiakitanga within the RMA further reflects the Crown's unwillingness to rightfully return to Maori, or even share, control in the decision-making process over natural resources.

In light of the 1997 amendment to re-establish the focus of s 7(a) of the RMA on tangata whenua, coupled with other provisions for proper consultation, it is hoped that Maori can have a more constructive role in the decision-making processes embodied in the RMA. A positive example of this role was recently seen in the tribal area of Ngati Awa in Whakatane, where in 1996 a new shopping sub-division was proposed near the banks of the Whakatane River. In the outer perimeter of the proposed site was a sacred Paru, a site used to dye clothing such as Piupiu and Korowai. It was not until this area was fenced and landscaped to the specifications of the Ngati Awa Runanga that the approval of the sub-division was given.

In the debate over where the correct balance should be struck in implementing "sustainable management", it is hoped that the beliefs and views of Maori people be recognised, for they contain valuable insights and lessons.

Te toto o te tangata, he kai; te oranga o te tangata, he whenua.
Food supplies the blood of man; his welfare depends on the land.

Selwyn Hayes
Ngai Tai, Whakatohea.