

JOINT-MANAGEMENT AGREEMENTS IN NEW ZEALAND: SIMPLY EMPTY PROMISES?

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*Ko Mataatua te waka,
Ko Pūtauaki te maunga tapu,
Ko Rangitaiki te awa,
Ko Ngāti Awa te iwi,
Ko Pahipoto te hapū,
Ā, ko Natalie Ramarihia Coates taku ingoa, ā, nō Whakatane ahau*

Kiaora tātou,

My name is Natalie Coates, Mataatua is my canoe, Pūtauaki is my mountain, Rangitāiki is my river, Ngāti Awa is my tribe and I am from Whakatane. The primary focus of this paper is joint management agreements in New Zealand. In particular I will be concentrating on joint management agreements that can arise under the *New Zealand Resource Management Act 1991* (the RMA).

For those who are unfamiliar with our governance structure, New Zealand not only has a legislature, which has the power to make laws and regulations, but we also have regional and local councils. These council bodies have a large degree of discretion to make decisions about what they think is in the best interests of their local community. Councils in New Zealand, for example, have the power to make regional and district plans. These plans stipulate what a person can or cannot do in relation to resources and their use. If an activity is not permitted, then an applicant must seek resource consent from the council. Currently, Māori have no real practical decision-making powers in this process. There are some Māori considerations that the local councils have to take into account when they are making their decisions, but this is quite different from Māori being the actual decision-makers.

The RMA is the Act that regulates resource use in New Zealand. It is the Act that governs the way that councils make plans and how they decide whether resource consents should be allowed. There are a number of provisions that ensure that Māori concerns are taken into account. For example councils have to take into account the Treaty of Waitangi,¹ the cultural wellbeing of the community,² *kaitiakitanga*³ (which is the Māori concept of guardianship over certain resources) as well as the relationship of Māori to the their ancestral lands, *wahi tapu* (sacred sites) and *taonga* (those things they hold precious).⁴ In 2005 sections 36B to 36E were inserted into the RMA.⁵ These provisions

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¹ RM, section 8.

² RMA, section 5.

³ RMA, section 7.

⁴ RMA, section 6.

⁵ *Resource Management Amendment Act 2005* (NZ).

have endowed local authorities with the power to make joint management agreements with public authorities, *iwi* (tribe) authorities and groups representing *hapū* (sub-tribes).⁶ These agreements allow parties to jointly perform or exercise any of the local authority's functions, powers or duties under the RMA pertaining to natural or physical resources⁷ and are primarily aimed at developing and encouraging collaborative projects between councils and Māori.

These joint management provisions have enormous potential for Māori. They are progressive provisions that recognise the dual heritage of New Zealand and the special status that Māori have as *tangata whenua* (the indigenous people of the land). They have the potential to restore to Māori a degree of *mana* (prestige) and also *tinorangatiratanga* (self-determination). They can also result in an improved relationship between *iwi* and local authorities.⁸

Despite the enormous potential of these provisions for Māori, there has only been one (very recent) joint management agreement made under the RMA. In this paper I thus investigate some of the barriers that potentially inhibit the creation of these types of agreements. I then identify how joint management agreements under the RMA differ from existing successful agreements between *iwi* and local authorities. Finally, I consider the one joint management agreement that has been made under the RMA, and how this agreement fits into my arguments.

POTENTIAL BARRIERS TO THE CREATION OF JOINT MANAGEMENT AGREEMENTS

There are a number of potential barriers that may inhibit the implementation of joint management agreements under the RMA. First, there are difficulties arising from the practical operation of the relevant statutory provisions. The RMA *prima facie* gives the parties to the joint management agreement the freedom to determine between themselves how the agreement is to be resourced.⁹ However, for a joint management agreement to be implemented the local authority *must* also be satisfied that the agreement is an “efficient” method of exercising the function, power or duty.¹⁰ The term “efficient” is problematic because if an agreement requires the local authority to use an increased amount of tax-payer money and resources to fund the administrative costs, as well as the extra time that may go into executing the agreement, the “efficiency” requirement may not be satisfied. Thus for an agreement to be “efficient” it is likely that the *iwi* will have to contribute both human and financial resources to the collaborative management process.¹¹ This is potentially problematic as a lack of financial resources is repeatedly identified by *iwi* as being the most significant barrier to their full participation under the

⁶ RMA, section 36B.

⁷ RMA, section 2.

⁸ See discussion in T Taiapa ‘Māori Participation in Environmental Planning: Institutional Reform and Collaborative Management’ (1999) 5(1) *He Pūkenga Kōrero, Koanga* 34.

⁹ RMA, section 36B(1)(c).

¹⁰ RMA, section 36B(1)(b)(ii).

¹¹ Gail Tipa *Indigenous Communities and the Co-management of Natural Resources: the Case of New Zealand Freshwater Management* (PhD thesis, University of Otago, 2003) 124.

RMA.¹² Thus, the “efficiency” requirement may raise practical impediments in the implementation of joint management agreements.

Another issue that could potentially be problematic is that either party can cancel the agreement at any stage.¹³ This may act as a deterrent to the creation of a joint management agreement as, if situations of conflict arise, the local authority will always have the “upper hand”. This is because if an agreement is terminated the function will revert back to being in the sole control of the local authority. Unless the parties trust each other, this could potentially discourage *iwi* from entering into joint management agreements.

Further barriers to the implementation of joint management agreements are identified by Dr Fikret Berkes.¹⁴ The barriers he identifies arise in regards to co-management agreements between the government and the native peoples of Canada.¹⁵ Both Canada and New Zealand share features including that the Indigenous population is a numerical and political minority. This means that some of these barriers that arise in the context of Canadian co-management agreements can be transferred to and framed within the joint management agreement context in New Zealand. One of the obstacles identified by Berkes is that current resource managers may be conservative in regards to relinquishing or sharing their power with native peoples.¹⁶ This lack of interest by local authorities in regards to proactively seeking to share their powers with *iwi* was noted by Rennie *et al* in regards to section 33 of the RMA, a section which allows for the complete transfer of a power or function from a local authority to an *iwi* authority.¹⁷ In discussing section 33 transfers it was noted that the single greatest inhibiting factor preventing these agreements appeared to lie in the people rather than the legislation.¹⁸

The reluctance demonstrated by councils to share their powers with *iwi* may also arise within the joint management agreement context. Reasons for this reluctance could be a lack of trust between the council and the *iwi* as well as a fear by councillors of political consequence. The nature of an electoral process is that the majority has the greatest political persuasion. Thus, if the majority of the community do not support the sharing of a function with *iwi*, the local authority members may suffer in the next elections. This is an inherent limitation within the local authority framework. Therefore, even though the legislation signals that the doorway is open for joint management agreements with Māori, because these agreements are optional, their implementation may be constrained by the

¹² Diane Crengle, *Taking Account the Principles of the Treaty of Waitangi – Ideas for the Implementation of Section 8 of the Resource Management Act 1991* (2003).

¹³ RMA, section 36E.

¹⁴ Dr Berkes is a Professor at the Natural Resources Institute at the University of Manitoba. See F Berkes, G Preston ‘Co-Management: The Evolution in Theory and Practice of the Joint Administration of Living Resources’ (1991) 18(2) *Alternatives* 12.

¹⁵ For the purposes of this paper co-management and joint management can be used interchangeably and both signify an agreement between two or more parties.

¹⁶ Diane Crengle, above n 12, 17.

¹⁷ See H Rennie, J Thompson and T Tutua-Nathan, *Factors Facilitating and Inhibiting Section 33 Transfers to Iwi* (2000).

¹⁸ Diane Crengle, above n 12, 44.

democratically accountable system within which they operate. A statement by an anonymous Māori person illustrates this point:

The Resource Management Act has always provided the opportunity for Māori to participate at planning level, but it never happens because there is no willingness, we have no political weight. So we are shut out, and we become one voice amongst other constituencies.¹⁹

For joint management agreements to be implemented *iwi* thus need a willing local authority.²⁰ This willingness, however, may not necessarily be forthcoming unless the council trusts the *iwi* authority, they see it in their interests to share the function,²¹ and the joint management agreement also has a degree of political backing from the wider community.

Another barrier that Berkes recognises as posing difficulties to Canadian co-management agreements, that may also apply to New Zealand joint management agreements is that conflicts of interest may be present between the native group and other non-native resource users.²² The problem is encapsulated in the Latin expression *nemo iudex in sua causa*, which translates as no one should be a judge in his own cause. Decisions made under joint management agreements have the same effect as though they were made by a local authority.²³ Thus, in accordance with the common law requirement that public decision making must be procedurally fair, the validity of a decision can be challenged if there is either actual or perceived bias evident.²⁴ If an *iwi* authority has a role in the decision making process in respect of a resource in which they have a direct interest, there is the potential for allegations of bias against the *iwi* to be made. The problem inherent within joint management agreements is aptly illustrated in the question ‘...how could *iwi* authorities possibly act unbiasedly when this is their ancestral mountain and Mr Smith wants to quarry at the base of it?’²⁵ If decisions under joint management agreements end

¹⁹ Linda Te Aho, ‘*Contemporary Issues in Māori Law and Society*’ (2005) 13 *Waikato Law Review* http://www.waikato.ac.nz/law/wlr/2005/wlr_2005_teAho.pdf (Accessed 1st October, 2008).

²⁰ This statement is based on the decision made in *Hauraki Māori Trust Board v Waikato RC* (2004) 9 NZED 374, that held that it is beyond the jurisdiction of the Environment Court to direct that a local authority must transfer its powers under section 33 of the RMA. This reasoning is also likely to apply to joint management agreements.

²¹ This is a point that was recognised by Rennie et al (above n 17) in their discussion on section 33 transfers to *iwi*. They indicated that unless councils see it in their own interest to initiate transfers to *iwi*, it is improbable that these transfers will occur. See also H Rennie, J Thompson and T Tutua-Nathan, ‘Towards Transferring RMA Powers, Functions and Duties to Iwi: A Case Study with Ngāti Awa’ (Unpublished report commissioned by the Minister for the Environment’s Sustainable Management Fund, 2000).

²² Diane Crengle, above n 12. This was also a point addressed by A Castro and E Neilson ‘Indigenous people and co-management: implications for conflict management’ (2001) 4(4-5) *Environmental Science & Policy* 229. Note that whether such conflicts can actually occur within joint management agreements is dependent on the interpretation of ‘relevant community of interest’. If for example ‘relevant community of interest’ is interpreted as requiring an *iwi* to represent all those with an interest in the resource, then conflicts of interest will clearly not arise.

²³ RMA, section s36D.

²⁴ This is stated by the Controller and Auditor General, ‘Guidance for members of local authorities about the law on conflicts of interest’ (2007) <http://www.oag.govt.nz/2007/csonflicts-members/part1.htm> (Accessed 6 October 2008).

²⁵ Diane Crengle, above n 12, 43.

up being “automatically” subject to judicial review because of perceived bias of the decision makers, there is little incentive for *iwi* authorities to become involved as decision makers. It should be recognised that council members are also exposed to the issue of bias. They may, for example, have a personal interest in a resource or a decision, or they may have strong opinions against a proposal based on their background or religious beliefs. I would argue, however, that it is more likely that Māori will face these issues because joint management agreements are primarily going to be formed over resources in which Māori have a direct interest and it is, therefore, probable that they will (be perceived to) already have a preconceived view about how those resources should be used or managed. Thus although the test for bias is a strict one, as it must be said that a decision maker or body had a ‘closed mind’²⁶ the probability of some form of perceived bias arising is exacerbated by the likelihood that joint management agreements will concern resources in which *iwi* authorities have a direct interest.

Under the present regime it is questionable whether *iwi* would even *want* a joint management agreement within the RMA context²⁷ which confines an *iwi* authority has to act within the parameters of the RMA. Thus, when exercising a power, representatives of the *iwi* authority they have to act fairly and judicially in accordance within the RMA and court decisions, even if they disagree with the result. Hence, even if a proposal is repugnant to the Māori provisions within the Act, Māori concerns have to be balanced with other matters of national importance.²⁸ In *Te Runanga o Taumarere v Northland Regional Council*,²⁹ for example, it was made clear by the courts that Māori interests within the RMA were not absolute. Therefore an *iwi* authority under a joint management agreement may be forced to make a decision which is contrary to Māori interests and aspirations. The *iwi* authority may find this difficult or undesirable, particularly given the criticisms that have been directed at the RMA in terms of it not giving sufficient priority to Māori interests.³⁰ As Todd Taiepa states ‘[M]āori must...be given the opportunity to formulate their own unique approaches to resource management. It is not appropriate that they be coerced into mimicking Western management systems’.³¹ On this view, joint management agreements which operate strictly within the confines of the RMA may thus be an inappropriate forum for Māori to exercise a degree of self-determination in regards to resource management.

RMA JOINT MANAGEMENT AGREEMENTS AND AGREEMENTS UNDER THE TREATY OF WAITANGI SETTLEMENT PROCESS

²⁶ *Riverside Casino Ltd v Moxon* [2001] 2 NZLR 78.

²⁷ Note that this argument is made in regards to section 33 transfers by Robert Joseph, ‘Māori Values and Tikanga Consultation under the RMA 1991 and the Local Government Bill – Possible Ways Forward’ (Paper presented at the Inaugural Maori Legal Forum Conference, Te Papa Tongarewa, Wellington, 9 – 10 October 2002) <http://lianz.waikato.ac.nz/PAPERS/Rob/2002TePapa2.pdf> (Accessed 6 October, 2008).

²⁸ See, for example, *Watercare Services Ltd v Minhinnick* [1998] NZRMA 113.

²⁹ [1996] NZRMA 77.

³⁰ For example see the criticisms that the Waitangi Tribunal in the *Whanganui River Report* directs at the RMA.

³¹ Todd Taiepa ‘Collaborative Management: Enhancing Māori Participation in the Management of Natural Resource’ (1999) 4(2) *He Pūkenga Kōrero Ngāhuru* 31.

There are clearly a number of barriers inhibiting the implementation of joint management agreements within the RMA. However there are already a number of joint management agreements between local councils and *iwi*, which emerged as part of the Treaty of Waitangi settlement process, that are functioning effectively. An example is the joint management agreement between Ngati Whatua o Orakei and the Auckland City Council. This agreement was a direct product of the *Orakei Act 1991*,³² which was a negotiated settlement between Ngati Whatua and the Crown. This Act vested title of a reservation in Ngati Whatua. However, the reservation is controlled by a Board consisting of three representatives from the *iwi* and three representatives from Auckland City Council for the benefit of the public as well as *hapū* enjoyment. As demonstrated in the words of the late Sir Hugh Kawharau,³³ this partnership has ultimately been a resounding success: ‘The arrangement has worked successfully and without untoward incident since its inception in 1992... It is a benign but efficient regime; and here at least the mana of Ngāti Whātua stands tall, intact and protected’.³⁴

The agreements that have emerged from the Treaty of Waitangi settlement process are a good point of comparison because they might provide some insight as to what is required for effective joint management agreements to develop. Further it was these agreements that acted as the impetus for the incorporation of joint management, agreements into the RMA.³⁵

The joint agreements that have arisen from the Treaty of Waitangi process have a number of characteristics³⁶ that distinguish them from RMA joint management agreements. One of the main differences is that they are generally incorporated into statutes that have been passed to finalise Treaty of Waitangi settlements.³⁷ Councils are therefore *required* by legislation to enter into these joint management agreements and have a working relationship with the *iwi* authority. The mandatory nature of these agreements thus clearly eliminates the problem of reluctance by councils to enter into a dual management type of agreement with *iwi*. Another difference is that joint management agreements arising from a Treaty of Waitangi settlement context usually concern land that has either been vested back into the ownership of the *iwi*,³⁸ is a reserve³⁹ or is Crown owned land.⁴⁰

³² *Orakei Act 1991* (NZ)

³³ The former Chairperson of the Orākei Reserves Board.

³⁴ H Rennie, J Thompson and T Tutua-Nathan, above n 17.

³⁵ See the second reading of the Resource Management & Electricity Legislation Amendment Bill by Hon David Benson Pope (Associate Minister for the Environment) (2005) 627 NZPD 22272.

³⁶ These characteristics are in addition to the fact that the Treaty settlement process that such agreements emerged from arose after a politically charged and long debate about what the Treaty, New Zealand’s founding document, meant and how to deal with promises contained therein and historical breaches of promises.

³⁷ See for example see the *Ngāti Tūwharetoa (Bay of Plenty) Claims Settlement Act 2005*, the *Te Arawa Lakes Settlement Act 2006* and the *Ngai Tahu (Tutaepatu Lagoon Vesting) Act 1998*.

³⁸ For example in the *Ngati Tahu (Tutaepatu Lagoon Vesting) Act 1998* a former wildlife reserve was vested in Ngai Tahu for management purposes.

³⁹ An example of this is the co-management agreement that exists between the Hutt City Council and Te Runanganui o Taranaki Whānui ki Te Upoko o te Ika a Maui that concerns Te Whiti Park. This park is administered under *the Reserves Act 1977*.

⁴⁰ For example the Taharoa Domain Committee which is made up of representatives of Kaipara District Council in partnership with *tangata whenua* representatives from Te Roria and Te Kuihi. This committee

To a large extent this removes, or at least greatly minimises, conflicts of interest as other groups are less likely to have a personal proprietary interest in the resource. A final difference is that the currently operative agreements that have arisen from the Treaty settlement process tend not to require the *iwi* to “step into the shoes of” the local authority in the same way that RMA joint management agreements do. Instead, within Treaty settlement process agreements, *iwi* are generally on a committee to provide an *iwi* perspective and to advocate a Māori view. An example of this can be seen in the Memorandum of Understanding concerning the Rotorua Lakes Strategy Joint Committee, which is made up of representatives from Environment Bay of Plenty, the Te Arawa Trust Board and Rotorua District Council.⁴¹ Under this agreement the primary role of the Te Arawa Trust Board is to provide cultural advice pertaining to the restoration of the Rotorua Lakes. Thus the *iwi* is not an embodiment of the local authority. Rather, they partake in the decision making process in their own capacity.

THE TAUPO DISTRICT COUNCIL AND TŪWHARETOA MĀORI TRUST BOARD JOINT MANAGEMENT AGREEMENT⁴²

In the above discussion I have identified a number of barriers that are likely to inhibit the implementation of joint management agreements, which may be summarised as: joint management agreements must meet “efficiency” criteria; there is no true partnership as agreements can be cancelled at any time; councils may be reluctant to share power and may find it politically inexpedient to do so; decisions under joint management agreements may be subject to challenge due to perceptions of bias and conflicts of interest on the part of the *iwi*; and *iwi* are not empowered to *iwi* perspective and to advocate a Māori view so may not wish to participate. However, this leaves me with the outstanding issue of the one joint management agreement that has been created under the RMA. How does this fit into my arguments and how has it overcome the barriers aforementioned?

The agreement made between the Taupo District Council and the Tūwharetoa Māori Trust Board at the beginning of 2009 is a positive step as it demonstrates a willingness by the Council to have a working and functional relationship with the *iwi*. In 2006 the population of the Taupo District was 28.17% Māori, considerably higher than the national Māori population of 14.16%⁴³ and this may help to account for the Council’s willingness to share power. In addition, in 2004 the Council undertook a community outcomes consultation process, which was finalised in 2005. The first of community outcome listed in documents to come from this process is ‘recognising the special

establishes long term outcomes and actions for the Taharoa Domain, which is made up of Crown land that has been set aside as a recreation reserve.

⁴¹ *Memorandum of Understanding: Rotorua Lakes Restoration*

<http://www.ebop.govt.nz/media/pdf/Rotorua-Memorandum-of-understanding.pdf> (Accessed 6 October, 2008).

⁴² The text of the Agreement can be found at

<http://www.taupodc.govt.nz/Documents/Policy/Tuwharetoa%20Council%20Joint%20Management%20Agreement/Joint%20Management%20Agreement.pdf> (Accessed 20 September 2009).

⁴³ See Statistics New Zealand 2006 census figures, available at

http://search.stats.govt.nz/nav/ct2/population_censuscounts/ct1/population/0 (Accessed 10 October 2009).

cultural relationship Ngati Tuwharetoa and its hapu have with land and water',⁴⁴ which suggests that community willingness to recognise Ngati Tūwharetoa Tuwharetoa interests. There is also good history of partnership between Ngati Tūwharetoa and government, in particular in relation to joint development of the Lake Taupo forest⁴⁵ the form of the

However, because of its limited scope there is limited actual power sharing. The agreement only applies in regards to resource consents and plan changes that affect multiply owned Māori land.⁴⁶ This limitation reduces the barrier identified earlier, that other people may have a vested interest in the resource and are therefore likely to claim bias on behalf of the *iwi*.⁴⁷ It does however mean that the agreement is quite limited in its application. Another limitation of the scope of this agreement is that it is *optional* for those to which the agreement applies, to be heard by the joint committee (the council and the Tūwharetoa *iwi* authority). In essence it confines the decision making scope of the joint committee to those instances where an applicant thinks that it will be beneficial for their application to have the *iwi* authority as part of the administrative process. As well as negating concerns about bias or conflicts of interest, this restriction that ensures that Council members also do not have to worry about getting voted out of their positions for "forcing" a potentially unpopular administrative procedure on an unwilling population.

CONCLUSION

The existing joint management agreement thus demonstrate that joint management provisions in the RMA are not hollow and empty promises and that is possible for agreements for Māori to be involved in the practical decision making process. However this agreement also shows that for an agreement to be created, and for the many barriers to be overcome, the agreement is likely to take a very restricted form. Whilst this helps to overcome barriers relating to the unwillingness of councils to share power and fears of bias, it also suggests that that Māori will have to accept compromise and limits on true power sharing in order for a joint management agreement to come into existence.

This agreement however is only the first under the RMA. Perhaps with time, if the relationships between councils and *iwi* groups are fostered and developed, more joint management agreements will come into existence and the scope of joint management agreements will ultimately expand. Or perhaps, in order to turn joint management agreements under the RMA from legislative concept into actual practice, further modifications to the RMA will be needed to help overcome existing barriers.

⁴⁴ See Taupo District Council, 'Towards 2019: Community outcomes and monitoring' <http://www.taupodc.govt.nz/Documents/Policy/LTCCP%202009%20to%202019%20Towards%202019/Vol%201%20Community%20Outcomes%20and%20monitoring.pdf> (Accessed 6 October 2009).

⁴⁵ See FAO, 'In search of excellence: exemplary forest management in Asia and the Pacific' <http://www.fao.org/docrep/007/ae542e/ae542e07.htm> (Accessed 10 October 2009).

⁴⁶ The definitions part of the Agreement defines Māori land as 'land which is subject to the Te Ture Whenua Act 1993 and land that is registered at the Māori Land Court.' Multiply owned Māori land is defined as being 'where there are 3 or more owners of Māori Land.'

⁴⁷ There is also a provision in the agreement requiring all parties to declare potential conflicts of interest, which helps to limit concerns about bias.