Maori wahi tapu are cultural sites of spiritual value which can be loosely classed as 'sacred' sites. However, the word 'sacred' does not fully convey the spiritual value of wahi tapu - 'windows to the past' - which provide genealogical links for Maori and often merge recent history into the stories of creation.

The 1840 Treaty of Waitangi assured Maori of tino rangatiratanga, or full authority, over their taonga (treasures, including wahi tapti) but most Maori land, including wahi tapti, has since been alienated and is now in crown or private ownership. The issue of wahi tapu has recently had a higher profile as Maori try to clarify, and assert, their treaty rights, especially tino rangatiratanga, which the Crown has an obligation to 'actively protect'. Increased Maori political participation in the last two decades has catalyzed an increased crown role in the protection of wahi tapu, including the Treaty of Waitangi Act 1975, which established the Waitangi Tribunal to hear Maori treaty grievances and to make non-binding recommendations to the government.

There is a range of legislation which affects wahi tapu, but the Maori Affairs Act 1953 and the Historic Places Act 1980 are the two which have been most commonly used. Events in the last few years have highlighted their protective inadequacy and added to pressure for new legislation which facilitates assertion of rangatiratanga. The Resource Management Act 1991 and a proposed new Historic Places Act will increase the ability of Maori to protect wahi tapti, but it can be argued that the need still exists for a comprehensive act explicitly drafted to enable Maori to assert their full treaty rights - the control and protection of wahi tapu.

PART ONE: - HISTORICAL BACKGROUND

Introduction - The Treaty of Waitangi

It is not feasible to talk about Maori sacred sites in New Zealand without first referring to the genesis of the problems which Maori face today when trying to assert control and protection of their cultural sites. That genesis dates back to
the signing of the Treaty of Waitangi in 1840. In 1840 the British Crown sought to treat with the indigenous people of Aotearoa (New Zealand), the Maori. Various motives have been ascribed to the Colonial Office's desire for a treaty: a response to importunate missionaries and traders who sought some measure of control of lawless Europeans; fears that the French would claim sovereignty; and reports that land speculators were pre-empting crown acquisition by buying up large tracts of land.

The treaty was signed in 1840 between representatives of the Queen of England and about 500 Maori chiefs. It contained three main parts:

Article 1: The chiefs ceded sovereignty (kawanatanga or 'governorship') to the Crown.

Article II: The Crown guaranteed to protect the chiefs’ absolute authority (tino rangatiratanga) over their lands, villages, and all possessions including their taonga, or treasures, as long as they wished to retain them.

Article III: Accorded Maori all of the rights and privileges of British subjects.

History has shown that the two parties had differing expectations about how they would exercise power after the signing. As it transpired, the Crown used the treaty as the first step to substantive sovereignty, which soon evolved into a constitutional settler government. The Maori chiefs, on the other hand, relied heavily upon missionary interpretation and advice, and may have viewed the treaty as morally, rather than legally binding. Clearly the chiefs did not anticipate that rangatiratanga would be subsumed by kawanatanga. Some Maori scholars have suggested that the chiefs, already well-versed in Christian teachings, may have anticipated a situation analogous to the Middle East at the time of Christ. 11at is, the local chiefs and kings preserved their autonomy (rangatiratanga) but ceded governorship (kawanatanga) to imperial Rome. The prevailing attitude of the Maori signatories is probably exemplified by the famous comment of the chief Nopera Panakaraeo at Waitangi: 'The shadow of the land passes to the Queen, but the substance remains with us.'

Alienation of Maori land

Whatever the intentions of the signatories, the reality was less than joyous from the Maori point of view. In the decades that followed the signing of the treaty, most Maori land was alienated by a variety of means. Although alienation included willing sale by Maori, there were a number of less happy alienation processes. The most infamous of these was the confiscation of large tracts of land after the suppression of 'rebel' uprisings which had often been orchestrated by the colonial government. Not only did the Crown fail to protect rangatiratanga, but the colonial government worked deliberately in violation of the treaty to acquire Maori land for European settlers.
By the end of the nineteenth century most of the prime land in New Zealand was in Pekeha (European) ownership. That land contained a large number of Maori cultural sites which have since been desecrated or destroyed under the onslaught of economic development, for there has been limited Maori control and protection of sites on private and crown land. Indeed, those cultural sites which have survived intact have tended to be in areas where developmental pressure has been minimal, rather than through any Pakeha design or sensitivity.

The Waitangi Tribunal

Maori have been expressing their grievances almost continuously since soon after the treaty was signed, but the inertia and indifference of the dominant Eurocentric society treated Maori grievances as mere background noise. By the 1970s, however, the renaissance of Maori culture, and reassertion of grievances dating back to 1840 forced society to reappraise the treaty.

As part of government response to those increased Maori demands for participation in the political process, particularly redress of grievances, the Labour Government loosened the lid of Pandora's Box and passed the Treaty of Waitangi Act 1975, the preamble of which states:

An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.

In 1985 the government threw away the lid of Pandora's Box altogether when it amended the act to allow the tribunal to hear claims backdated to 1840. The tribunal has since reported its findings and recommendations on a number of claims, but under the act, there is no obligation upon the government to implement them. Redress still relies upon the degree of 'good faith' and 'partnership' which the incumbent government chooses to interpret from the treaty. But the Crown has crossed the Rubicon, and given raised Maori expectations, it could be argued that it would not be in the long-term interest of Aotearoa for governments to ignore any Waitangi Tribunal recommendations.

It is important to note that the claims process can only be applied to crown, and not to private land. Considerable anxiety has been generated by misinformation which has led many Pakeha landowners to believe that their title was under a potential threat. This attitude has persisted in the face of constant government, and mainstream Maori reassurances that one injustice should not be replaced with another.
'Principles' of the treaty

The findings and recommendations of the Waitangi Tribunal began to refer to treaty 'principles', and in 1987 a special Court of Appeal unanimously confirmed that the treaty had established a partnership. Implicit in that partnership was the duty of Maori and the Crown to act 'reasonably and in the utmost good faith' towards each other.

In 1989, in an attempt to find a way of redressing grievances, the government sought to redefine the role of the Crown as a treaty partner in Principles for Crown Action on the Treaty of Waitangi. Prime Minister David Lange said in the introduction:

These principles are consistent with the Treaty of Waitangi, and with observations made by the Courts and the Waitangi Tribunal ... They are not an attempt to rewrite the Treaty of Waitangi. These Crown principles are to help the government make decisions about matters related to the Treaty. For instance, when the government is considering recommendations from the Waitangi Tribunal.

The principles, as well as stating the Crown's interpretation of the three articles, include the Principle of Redress: 'the government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur.' Treaty 'purists' claim that the treaty stands on its own and does not need government-initiated reinterpretation of 'principles'. Nevertheless, these principles have profound long-term implications for Maori cultural sites.

PART TWO: - MAORI CULTURAL SIIES

Definition of cultural sites

Maori cultural sites may be classed into two broad categories: 'everyday' sites and wahi tapu (sacred places). The everyday cultural sites include marae (the modern usage means the total village compound which still serves as a focal point for Maori communal events), pa sites (formerly fortified villages), quarries, and mahinga kai (specific fishing and other food gathering areas).

Wahi tapu - Windows to the past

The literal translation of wahi tapu is 'sacred place', but the modern translation of tapu as 'sacred' fails to capture its full essence, for the deep spiritual value of wahi tapu transcends mere sacredness.

Thereas urupa (burial grounds) are the most obvious examples of wahi tapu, there is a wide range of sites which may qualify, and these include: ana
tupapaku (burial caves), ossuaries, pa where battles have occurred, other sites where blood has been spilt, tauranga waka (sites where ancestral canoes have been beached) and some mountains.

Intricate and indissoluble bonds link the most important wahi tapu sites to their appropriate tribes. These sites may be associated with the creation stories of the local people and form one end of a continuum which moves from prehistory to the present and links the people genealogically to their past. Their whakapapa (genealogy) and history are identified by reference to land features with names that recall the tipuna (ancestors) who preceded them, and the events which shaped their lives. For example Hikurangi, the sacred mountain of the Ngati Porou, is the resting place of the canoe of Maui, the demi-god who is credited with catching the North Island (Te Ika a Maui - the Fish of Maui) while fishing, and drawing it to the surface.

The hierarchy and complexity of wahi tapu classification is compounded by the people of each iwi, hapu or whanau (tribe, sub-tribe or extended family) having their own definition which is valid only to Diem. No iwi, hapu or whanau would be so presumptuous as to define wahi tapu for another group. In many instances the existence and/or location of wahi tapu is known only to the local tribe, subtribe or family, who would not consider making that information public. Furthermore, within each group the location of some wahi tapu may only be known to a few kaumatua, or elders and wahi tapu have been lost because kaurnatua have died before their knowledge was passed on.

PART THREE: - WHO PROTECTS SACRED SITES?

Rangatiratanga

To recapitulate, in the Treaty of Waitangi the Crown has a duty to protect rangatiratanga ‘... the unqualified exercise of their chieftainship over their lands, villages and all their taonga’. In the century which followed the treaty the crown manifestly failed in that protective duty and Maori lost ownership and control of innumerable cultural sites to crown and private ownership. Without question, many sites have vanished from collective memory.

There are three levels of difficulty in assertion of rangatiratanga over wahi tapu and other cultural sites:

1. Maori land: Maori are only able to asset rangatiratanga, to an approximation of its full extent, over cultural sites which are on Maori land. 2. Crown land, including national parks and protected areas: it may be apparent that if the treaty relationship of good faith or partnership between Maori and the Crown is reaffirmed, then Maori should be in a position to negotiate with the Crown to gain greater control and protection of cultural sites on crown land. The last decade has witnessed a greater willingness by the Crown to participate in this
negotiation process. 3. Private land: Assertion of rangatiratanga over wahi tapu on private land presents an infinitely more intractable problem for Maori. Private land titles may have been in non-Maori ownership for generations and in many cases the current owners win have little sympathy for Maori who are concerned with a wahi tapu site, especially if there is any possibility of monetary pain to the landowner.

**Legislative protection of cultural sites**

The range of legislation which protects wahi tapu, usually in an indirect manner, is administered by several government agencies. Yet no specific act exists to protect wahi tapu or to enable Maori to assert rangatiratanga over these sites. In other words, kawanatanga is still ascendent over rangatiratanga.

The Historic Places Act 1980:

The principal protective legislation is the Historic Places Act 1980, but its mechanisms have proved to be insufficient from a Maori point of view. The Waitangi Tribunal was moved to comment: 'Bluntly put, there is one standard for sites of significance to New Zealanders as a whole, and another lesser standard for sites of significance to Maori people' (The Report of the Waitangi Tribunal on the Manukau Claim, July 1985:62).

A review of the Historic Places Act in 1989 found it to be inadequate in its approach to protection of Maori heritage values, and to provisions for Maori decision-making. The review recommended that these deficiencies be rectified, with due weight being given to Maori wishes, especially regarding Maori land.

The Maori Affairs Act 1953:

The main legislation which Maori have used to protect cultural sites is the Maori Affairs Act 1953. Section 439 provides for the creation of a Maori reservation for communal purposes, including a:

village site, marae, meeting place, recreation ground, sports ground, bathing place, church site, building site, burial ground, landing place, fishing ground, spring, well, catchment area or other source of water supply, timber reserve, or place of historic or scenic interest, or for any other specified purpose whatsoever.

A later amendment, Section 439A, reflects the Crown's increased recognition of the importance of Maori cultural sites, and refers to any piece of land 'by reason of its historical significance or spiritual or emotional association with the Maori people'.

Section 439 evolved at a time when it seemed possible that all Maori land could be alienated in the near future. The use of trusts to administer 439 reserves prevents the covert or 'accidental' alienation of Maori land and is a particularly effective way of protecting new urban marae which have often been built on newly acquired General land. Legislation enabled 439 reserves which are less than 2.63 hectares to avoid paying rates. This is an important measure as Maori land had often been alienated in the past because the Maori owners could not meet rate debts.

There are about 200 new applications annually to the Maori Land Court for 439 reserves, usually to protect urupa and marae. Applications are increasing at a rate of 2-3% per annum and are another reflection of Maori determination to protect taonga, especially urupa, before they are lost. Most 439 reserve applications are for sites on Maori land but the act does not exclude 439 reserves on general land. These would be very difficult, however, because the private landowner would have to assent to the application.

Reference to Wahi Tapu in Legislation

Explicit mention of wahi tapu in legislation did not even occur until the State Owned Enterprises Act 1986 was amended by the Treaty of Waitangi (State Enterprises) Act 1988. The 1986 act sought to transfer certain crown lands to the new state-owned enterprises. In the landmark Appeal Court case in 1987, the New Zealand Maori Council sought a judicial review of the act because they believed that the transfer process would be a breach by the Crown of Section 9 of the 1986 Act. Section 9 states that nothing in that act permits the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi. As discussed earlier, the Court's unanimous decision was that the treaty partners had a duty to act 'reasonably and in the utmost good faith'.

New safeguards were included in the Treaty of Waitangi (State Enterprises) Act 1988; including power for the Waitangi Tribunal to make a binding recommendation for the return to Maori ownership of land or interests in land transferred to State enterprises under the act, and requiring the Waitangi Tribunal to hear any claim relating to any such land as if it had not been so transferred.

The act recognises the importance of revesting alienated wahi tapu to the appropriate iwi rather than transferring tide to the state-owned enterprise. Section 27D refers to wahi tapu as 'being land of special spiritual, cultural, or historical tribal significance.... The word 'tribal' indicates that legislators are beginning to understand that values relating to wahi tapu are shaped by local custom and history and will vary from iwi to iwi.

Three other acts, the Crown Forest Assets Act 1989, New Zealand Railways Corporation Restructuring Act 1990 and the Education Amendment Act 1990,
have been passed to take account of Maori land claims when crown lands are transferred to state-owned enterprises. Although these acts signal government's belated recognition of the importance of wahi tapu, they relate to a relatively limited number of events over a fairly short time span. Their importance, historically, may be that they were the forerunners of more comprehensive legislation which enables Maori to assert rangatiratanga over their wahi tapu.

National parks and protected areas

Only a small proportion of the thousands of wahi tapu are located in the 12 national parks. Ironically, New Zealand's first national park, Tongariro was gifted to the nation 'for the use of both Maoris and the Europeans' by Te Heuheu Tukino IV, Horonuku, paramount chief of the Ngati Tuwharetoa tribe in 1887. Tongariro is the ancestral mountain of Ngati Tuwharetoa and, at the time of gifting, held the remains of Horonuku's father, Te Heuheu Tukino H, Mananui, a chief of great rank. Because Ngati Tuwharetoa had supported Rewi Maniapoto's struggle against General Cameron's forces at the battle of Orakau, there was a risk that the wahi tapu sites would be confiscated by the colonial government. To avert this possibility Horonuku, on counsel from his son-in-law Lawrence Marshall Grace, gifted the peaks of the three mountains to the Crown as a national park. A condition of this gift, however, was that the paramount chief was to be one of the trustees - a condition that persists in legislation today. The original gift was but a fraction of today's national park, which grew to its present size by the inevitable colonial process of accretion.

Two other parks, Mount Egmont (Taranaki) National Park and Whanganui National Park each have legislative provision that one of the 12 members of their controlling Conservation Board shall represent local tangata whenua (the Maori tribes who have an historical association with the area) interests. No such legislative provision exists for the other 14 conservation boards although they have an average of about three Maori members per board.

The conservation boards and the national New Zealand Conservation Authority were established by the Conservation Law Reform Act 1990. The authority's functions extend over the whole conservation estate, and include national parks. Two of the 12 members are appointed after consultation with the Minister of Maori Affairs. The conservation boards have kept the functions of the national parks and reserves boards which includes the recommendation and approval of conservation management strategies and plans.
PART FOUR: WHERE TO FROM HERE?

The Resource Management Act 1991

The Resource Management Act 1991 provides for heritage protection authorities, which can require that a heritage order be included in a territorial authority's district plan (see Appendix A ‘Creation of Heritage Orders’ and Appendix B ‘Heritage Protection Authorities’). Tribal authorities can become heritage protection authorities on approval from the Minister for the Environment, or can recommend to the Minister of Maori Affairs or to a local authority, that they act as heritage protection authorities on behalf of the tribe. Although this is a significant step towards Maori protecting their sacred sites, these mechanisms do not fully enhance rangatiratanga for they do not enable tribal authorities to become heritage protection authorities directly as of right.

A heritage protection authority can ask local government to include a heritage order in a district plan for the purpose of protecting any place 'of special significance to the tangata whenua (Maori) for spiritual, cultural, or historical reasons'. This would include, in tribal terms, any wahi tapu site. Although these sections of the Resource Management Act do provide a potential protective mechanism, there are several appeal processes available to persons or organisations affected by that heritage order. The end result of a long, litigious and costly process could be that a tribe fails in its attempt or, if it is determined to protect a site, is forced to purchase the site under the Public Works Act 1981. It may be self-evident that this prospect would be so daunting that, in many cases, Maori would be reluctant to pursue this means of protecting wahi tapu.

Historic Places legislation

As discussed earlier, a review of the Historic Places Act 1980 identified major weaknesses in its ability to protect Maori cultural sites. It has since been proposed that a new Historic Places Act serve as a complement to the Resource Management Act 1991.

In preparing a new Historic Places Act officials have been asked to consider a number of options for increasing Maori participation and representation in the protection of historic places. Among these options is a Maori Heritage Council to stand alongside the existent Historic Places Trust Board. This council, composed of Maori members appointed by the Minister of Conservation, after consultation with the Minister of Maori Affairs and the Maori members of the Historic Places Trust Board, would have a status more consistent with the partnership principles of the Treaty of Waitangi. The council could ensure that the Historic Places Trust met the needs of Maori in the protection of cultural sites; would help develop relevant programs to identify and protect cultural
sites; and could advise and assist the trust board on all issues relating to Maori cultural sites.

It is likely that heritage covenants will be carried over from the old act. Heritage covenants are voluntary, low-cost, non-confrontational agreements with private landowners to covenant a section of a land title for protection purposes. This covenant would be tied to the title and could not be removed on the sale of a property. This mode of protection might be particularly useful in situations where the wahi tapu is on a part of a title which would not affect the resale value of a property. Clearly, if a wahi tapu were located where it might have an adverse effect on resale value, the imposition of a heritage covenant would rely upon an owner who was especially benevolent, or who planned to keep the property within the family.

**Silent files**

As has been noted, many Maori are reluctant to reveal the presence of wahi tapu to outsiders. 'Me use of a 'silent file' or register is a means of maintaining the secrecy of the site but still providing a protective mechanism. A silent file, kept in confidence by the appropriate tribe, sub-tribe, or family, lists the location of that group's wahi tapu. Land titles, which Maori know to contain wahi tapu, could be marked in local authorities' plans, to show that some part of the property was recorded in a silent file as having a wahi tapu. The precise location would not need to be recorded on the local authorities' plan. If any development was planned on that title, then the local authority would have the responsibility to check with the holders of the silent file to ensure that wahi tapu were not threatened before approval was given for development to proceed.

The use of silent files has already been documented in a comprehensive resource management plan prepared by the Ngai Tahu tribe Te Whakatau Kaupapa - Ngai Tahu Management Strategy for the Canterbury Region, November 1990:

There are sites known to most Ngai Tahu and these are described with particularity. Other sites may be the wahi tapu of smaller groups - sometimes as small as an extended family. In these cases, the groups or families will make their own decisions as to what, if anything should be revealed at the time when any development affecting that site is proposed. In an attempt to assist in the resolution of problems at this level, the Ngai Tahu Maori Trust Board has offered its services as an intermediary between the planners, the developers and those to whom the sites are sacred.

Of course, silent files and any iwi resource management plans are dependent upon the degree of compliance and cooperation of local government with the iwi authorities. To this end, the Resource Management Act states that when
local authorities are preparing and changing any management plans they should have regard for any iwi plans. A regional council also should consider the need to prepare a plan whenever any significant need or demand for the protection of natural and physical resources or of any site, feature, place, or area of regional significance is identified. There is no doubt that this can apply to most wahi tapu and other Maori cultural sites.

The act also provides that a local authority may protect information in a consent application for a variety of issues if withholding the information is required to avoid disclosure of the existence, or location, of a wahi tapu (section 42A). This includes holding the relevant meeting in private. This part of the act recognises the importance of respecting Maori wishes that their wahi tapu are not disclosed to the general public, and possible depredations and desecration by souvenir hunters. It must be noted, however, that it is the local authority that will decide whether the location and particulars of a wahi tapu will be made public, by weighing Maori values against ‘public interest’.

Other legislation

Recent legislation has been a substantial move, compared with the first 150 years, towards Maori control and protection of cultural sites, including wahi tapu. As has been pointed out, however, the Crown still remains the dominant partner in almost all contexts. Maori will not be appeased until a situation exists where iwi, hapu and whanau have rangatiratanga over their wahi tapu. To this end, an option favoured by some Maori would be a discrete wahi tapu act which addresses the issues of wahi tapu on Maori, crown and private land. Although the concept of such an act has been aired, there is little prospect of a wahi tapu act materialising in the short to medium term. It would also be unrealistic to expect any substantive change from the status quo for wahi tapu on private land.

Some Maori will always claim, and history justifies it to some extent, that the Anglo legal system will never be capable of recognising rangatiratanga. The only appropriate mechanisms to protect wahi tapu, from that point of view, would be extra-legal mechanisms based upon Maori law.

CONCLUSIONS

The essential bargain of the Treaty of Waitangi is that the Crown, in return for cession of Maori sovereignty, would actively protect rangatiratanga so that iwi Maori have full authority over their taonga, including wahi tapu. Most of the previous 150 years have been characterised by Pakeha indifference to Maori cultural and spiritual values associated so intimately with the land. The cost to Maori of that indifference has been a great reduction in their effective rangatiratanga. But that does not mean that rangatiratanga cannot be reasserted. The key to the renaissance of rangatiratanga, apart from Maori
determination to prevail, is the acceptance and willingness of the dominant Pakeha culture to realise the spirit of the treaty.

The last two decades have witnessed some movement of the Crown in that direction. There has been belated recognition that current legislation is not sufficient for, and is often inimical to, full expression of rangatiratanga. Reviews of existing legislation and findings of the Waitangi Tribunal and the courts have been unequivocal on the inadequacies of existing structures and processes.

New legislation has moved to rectify some of the omissions, but none has been sufficient to fully allay Maori fears. Although the Resource Management Act 1991 and a possible new Historic Places Act move towards the Crown actively protecting rangatiratanga, a discrete wahi tapu act may be the only comprehensive answer to the need for Maori to reassert rangatiratanga over their sacred sites.

ACKNOWLEDGMENTS

To the members of the Natural Resource Unit for their advice and peer review; to Hemi Kingi (Ngati Tuwharetoa - Te Arawa) and to our resident kaurnatua Akuhata Tangaere and Waho Tibble (ngati Porou) for their wisdom and support.

E mihi kau ana ki aku hoa mahi mo a ratou kupu awhina

GLOSSARY OF MAORI WORDS

Aotearoa  New Zealand
hapu    sub-tribe
iwi     tribe
kaurnatua  tribal elder
kawanatanga  governorship; kawana is a missionary transliteration of 'governor'
marae  village compound
Pakeha  non-Maori, usually in reference to a person of European descent
rangatiratanga  the unqualified chieftainship over their lands, villages and all their treasures
taonga  'treasures' including tangible and intangible, e.g. language
tipuna  ancestors
wahi tapu  literally 'sacred place'
whakapapa  genealogical table traditionally recited by memory whanau an extended family, which may be very large
REFERENCES

