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**LAND USE FOR PRE-1990 FORESTRY: WHO  
BEARS THE COST OF THE NEW ZEALAND  
EMISSIONS TRADING SCHEME?**

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*'This is one of the most critical issues facing this country and is at least similar to the Rogernomics policies of the 1980's.'*

Karamea Chris Insley  
Managing Director  
37 Degrees South

## INTRODUCTION

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This paper examines the legal implications the New Zealand Emissions Trading Scheme will have for landowners of 'pre-1990' forests. Owners of these forests, planted before 1 January 1990, are considered outside the scheme and are thus unable to gain any credit for reducing greenhouse gas levels. They are, however, still liable for the carbon released from their trees if deforestation occurs on their land. 'Post 1989' forest owners can choose to enter the scheme and gain the associated credits and liabilities involved.

Pre-1990 forest owners will be faced with a monetary penalty if they choose to deforest their land. If the trees are not replanted and an alternative land use is pursued, the landowner will be forced pay a considerable amount. The ultimate consequence of the scheme for these landowners is that they will only be able to use the land for one purpose: forestry. The legislative penalty is designed to stop the chainsaws from increasing New Zealand's contribution to greenhouse gas levels.

Despite international criticism of the emphasis placed on forestry to affect greenhouse gas levels, New Zealand has introduced a scheme that puts forestry as the initial driving force behind emissions reductions. Carbon stored in the growth of new forests must inevitably be released back into the atmosphere again, when trees are cut down or begin to decay. They are only a temporary initiative whilst the world adjusts to a lower fossil fuel economy.

This paper seeks to analyse the implications the scheme's deforestation controls have on the pre-existing legal rights of these landowners. It argues that these rights must not be swallowed up or discounted in the wake of climate change discourse, despite the apparent ease with which our government has done so. Significant private property rights and contractual bargains will be ignored, as will promises made to Maori in 1840. In addition to being inconsistent with the principles of the Treaty of Waitangi, the scheme also substantially reduces the value of historical grievance settlements. The government has in part reversed its apology to iwi, as Maori can no longer use their land in accordance with their visions. As iwi stand to lose tens of millions of dollars from the implementation of the scheme, iwis' ability to build a strong financial asset base for future generations is reduced. If the government excuses Maori of these deforestation liabilities, an ensuing claim for discrimination would be almost inevitable in light of Maori and non-Maori being treated so differently.

New Zealand prides itself on an image of environmental leadership. The government legitimised the quick introduction of the scheme on the basis of meeting our international commitments to the Kyoto Protocol and the survival of our export branding. However, this paper argues that this leadership goes too far when the harm caused to our economy and legal and social rights is irrevocable. In a blatant disregard for the promises entailed in our nation's founding document, the current design of the scheme will make a mockery of the recent progress we have made in race relations. By not properly attending to Maori claims, the government has put itself in politically compromising position.

Chapter One explains why the New Zealand Emissions Trading Scheme has been introduced into our legislation. It outlines why forestry is the first sector of the economy to be introduced to the scheme and the obligations that arise for landowners of pre-1990 forests. Chapter Two discusses how the deforestation controls interfere with private property rights. It argues that such an invasion of existing property and contractual rights, enforced retrospectively, cannot be legitimised by the need to initiate affirmative climate change action. Whilst this may be lawful, this chapter ultimately concludes that such action is irresponsible.

Chapter Three addresses the conflicts that arise between the scheme and the rights and guarantees promised to Maori in the Treaty of Waitangi. It leads to the conclusion that the Waitangi Tribunal, in similar fashion to its previous recommendations, may quite easily find that the Crown is in breach of its duty to actively protect Maori interests and facilitate the development of their resources. It also shows how Treaty assets already transferred to Maori in settlements will be substantially devalued under the scheme and may be subject to re-negotiation. The Crown will be taking back part of the wealth Maori gained from the settlement, which is entirely contradictory to the aim of settling a grievance.

Chapter Four scrutinises the rushed introduction of the scheme from a policy perspective and puts forward a case for reviewing the pre-1990 regime. Environmental controls and property rights must be balanced to achieve a socially desirable outcome. If they cannot be, the controls on property rights need to be legitimised on firm, justifiable grounds. Because the scheme fails these tests, this paper ultimately concludes that the trampling of legal rights demands reassessment of the scheme.

## CHAPTER ONE: THE IMPETUS FOR AN EMISSIONS TRADING SCHEME

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The relationship that we New Zealanders have with our natural surroundings provokes our conscience into protecting our environment. We socialise and trade internationally under the branding that we are 'clean and green,' cementing in us a duty to protect our environment from irrevocable damage. Maori arguably have an even stronger bond with the environment, and it is perhaps through their ancestry that New Zealanders attach themselves so strongly with the natural landscape. Anaru Rangiheua at the Rotorua regional consultation hui for climate change observed that,

*"The relationship that Maori share with the environment cannot be overstated. It is reflected through whakapapa, ancestral place names and tribal histories. The regard with which Maori holds the environment reflects the close relationship that Maori have with their ancestors, being direct descendants of Ranginui and Papatuanuku."*<sup>1</sup>

Climate change is now at the forefront of New Zealanders' conscience. Due to the implementation of domestic initiatives to curb the effects global warming, consumers are starting to feel the financial pinch necessary to achieve progress. The dramatic rise in oil prices throughout 2008 has placed pressure on the climate change debate and it is yet to be seen whether the consequences of that will be to reduce global emissions, as a consequence of the high price of oil leading to lower demand, or whether countries will argue that they cannot afford the cost of emissions reductions in the current economic climate.

New Zealand considers itself a world leader in climate change initiatives. Seventy percent of our energy use derives from renewable sources such as hydropower and wind schemes.<sup>2</sup> Our conservation estate saturates twenty-nine percent of our total land area<sup>3</sup> and compared with many other developed countries, New Zealand has a high level of forestry cover.<sup>4</sup> By 2020, the government intends to have increased this forest cover by 250,000 hectares<sup>5</sup> (ha) and to be carbon neutral.<sup>6</sup>

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<sup>1</sup> Indigenous Corporate Solutions Ltd, *Climate Change Consultation Hui: Summary of Key Themes* (2008) 25.

<sup>2</sup> Ministry for the Environment, 'New Zealand's response to Climate Change' (2005) available <http://www.mfe.govt.nz/publications/climate/response-climate-change-may05/html/index.html>, as at 14 April 2008.

<sup>3</sup> Convention on Biological Diversity, 'New Zealand – Details: Status and Trends of Biodiversity' available <http://www.cbd.int/countries/profile.shtml?country=nz#status>, as at 9 July 2008.

<sup>4</sup> Ministry for the Environment, 'New Zealand's response to Climate Change' above n 2.

<sup>5</sup> Ministry for the Environment, 'Signposting a Sustainable Future' (2006) available <http://www.climatechange.govt.nz/sustainable-nz/sustainable-future.shtml>, as at 29 March 2008.

## 1. Forestry's Role in Climate Change

From a climate change perspective, forestry plays a key role in reducing greenhouse gas (GHG) emissions. As forests grow and expand, they create carbon sinks that absorb carbon dioxide from the atmosphere faster than it is released. Actively growing forests can sequester between 3 and 35 tonnes of carbon dioxide per ha per year over the first 30 years of the forest's life.<sup>7</sup> Increasing forest cover is a substantial asset in reducing carbon dioxide emissions because trees absorb emitted carbon and sequester it to grow leaves, stems, bark and roots.

Climate conditions in New Zealand are well suited to forestry growth creating a unique forestry profile. As a percentage of our total land area, forests occupy twenty-nine percent. Of this, 6.4 million ha is indigenous forest and 1.7 million ha is planted forest.<sup>8</sup> The main species that is planted is *Pinus Radiata* because it grows extremely well in our climate, has many processing advantages and can be used for most purposes once felled. It also has a very short life span, taking only 30 years from planting to reach full maturity.

## 2. New Zealand's Kyoto Obligations

New Zealand has made a commitment to global climate change through the steady reduction of GHG emissions.<sup>9</sup> We have crystallised this commitment by ratifying the Kyoto Protocol in December 2002. The obligation requires New Zealand and other parties to reduce GHG emissions below a set level of allowable emissions. Listed in Annex B of the Protocol, New Zealand must reduce total GHG emissions to one hundred percent of 1990 levels.<sup>10</sup>

One emission unit is equivalent to one metric tonne of carbon dioxide gas. Ensuring that our commitment to the Kyoto Protocol is upheld, accounting of activities contributing to total emissions is mandatory and overseen by a compliance committee. A resulting determination of New Zealand's compliance is then assessed at the end of each commitment period, the first being commitment period one (CP 1) that began on 1 January 2008, and finishes on 31 December 2012. This is achieved by comparing total

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<sup>6</sup> Scoop Independent News "'Carbon neutral' policy added to scrap heap," 6 May 2008, available <http://www.scoop.co.nz/stories/PA0805/S00093.htm>, as at 10 July 2008.

<sup>7</sup> Greg Milner-White, 'The Legal Implications of Climate Change in New Zealand for the Forestry Industry' (2007) 11 *New Zealand Journal of Environmental Law* 141, 156.

<sup>8</sup> Ministry of Agriculture and Forestry, 'Forestry Resources,' available <http://www.maf.govt.nz/forestry/resources/>, as at 8 October 2008.

<sup>9</sup> As agreed to by parties to the Kyoto Protocol, Article 2. United Nations Framework Convention on Climate Change (UNFCCC), *Kyoto Protocol*, available [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php), as at 5 August 2008.

<sup>10</sup> *Ibid*, Annex B.

emissions with the allowable assigned amount of emissions provided for that commitment period.<sup>11</sup> If total emissions are less than or equal to the total assigned amount, New Zealand will be in compliance with its emissions reduction commitment and will not incur any financial liability. If New Zealand is not in compliance, the government must take responsibility for the difference, called the 'Kyoto Liability.'<sup>12</sup> The most recent New Zealand treasury estimate is that we will incur a \$NZ 480 million liability.<sup>13</sup> This is calculated by first estimating the quantum, which represents the projected balance of GHG emissions over the total assigned amount, drawn from agricultural, forest sink and deforestation data projections, as well as energy, transport and industrial process estimates. This figure is then multiplied by the international price of carbon, as the government is wholly responsible for buying units to account for the deficit.<sup>14</sup> The most recent estimate, made by the New Zealand treasury as at November 2007, was that carbon would cost 11.13 euros per tonne.<sup>15</sup> In New Zealand dollars, this is just over \$23 per tonne. Other sources suggest that the price may rise up to \$NZ 50 or 75 per tonne.<sup>16</sup> At these kinds of rates, the carbon will be worth more than the wood and the implications for long-term forestry are profound.

The Kyoto Liability is the cost that the New Zealand Government must pay for not meeting our climate change obligations. It is the reasoning behind the Government's desire to quickly implement a domestic scheme that will drastically reduce our current level of GHG emissions. This was manifested by the introduction of the Climate Change (Emissions Trading and Renewable Preference) Bill into the House, in December 2007. The committee of the whole house amended the original Bill and divided it into the Climate Change Response (Emissions Trading) Amendment Bill and the Electricity (Renewable Preference) Amendment Bill.<sup>17</sup> The Climate Change Response (Emissions Trading) Amendment Act 2008 was given royal assent on 25 September 2008 and creates a New Zealand Emissions Trading Scheme (ETS), a Kyoto recognised domestic mechanism for reducing GHG emission levels.<sup>18</sup>

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<sup>11</sup> UNFCCC, *Kyoto Reference Manual on Accounting of Emissions and Assigned Amounts* (2007) 8, available [http://unfccc.int/files/national\\_reports/accounting\\_reporting\\_and\\_review\\_under\\_the\\_kyoto\\_protocol/application/pdf/rm\\_final.pdf](http://unfccc.int/files/national_reports/accounting_reporting_and_review_under_the_kyoto_protocol/application/pdf/rm_final.pdf), as at 5 August 2008.

<sup>12</sup> As at 31 May 2008. New Zealand Treasury, 'New Zealand's Liability under the Kyoto Protocol,' available <http://www.treasury.govt.nz/government/liabilities/kyoto>, as at 10 July 2008.

<sup>13</sup> New Zealand Treasury, above n 12. It should be noted that this figure has decreased by 50% since January 2008. Figures since January 2008 are: January \$963 million, February \$948 million, March \$1,009 million, April \$485 million, May \$480 million.

<sup>14</sup> New Zealand Treasury, 'Calculation of the Provision for the Kyoto Liability,' available <http://www.treasury.govt.nz/government/liabilities/kyoto/calculation>, as at 10 July 2008.

<sup>15</sup> New Zealand Treasury, 'Carbon Price Information Releases,' available <http://www.treasury.govt.nz/government/liabilities/kyoto/carbonprice>, as at 10 July 2008.

<sup>16</sup> ICF International, 'Analysing the Price of Carbon in 2008-2012: Its Widespread Impacts,' available <http://www.icfi.com/publications/perspectives-2005/price-carbon.asp>, as at 29 July 2008.

<sup>17</sup> Climate Change Response (Emissions Trading) Amendment Bill, no 187—3A.

<sup>18</sup> Climate Change Response (Emissions Trading) Amendment Act 2008.

### 3. The Current Design of the ETS relating to ‘pre-1990’ forestry

The government has decided that in principle, New Zealand will use an emissions trading scheme as its core price-based measure for reducing GHG emissions and increasing forest sinks.<sup>19</sup> It is a ‘user-pays’ or ‘emitter-pays’ scheme designed to create disincentives for creating carbon emissions and incentives for reducing emissions. With regard to forestry, this is the creation of carbon sinks by afforestation or reforestation activities, which refer to the conversion of previously non-forested land to a forested state.<sup>20</sup> The deforestation of land (the conversion of forested land to a non-forested state) will incur a liability of surrendering one emission unit (called an ‘NZU’) per metric tonne of carbon emitted. This is to ensure that New Zealand does not contribute further to its total emissions by releasing existing carbon stores back into the atmosphere, without the replanting of trees to subsequently take it back in.

#### a) Forestry’s Importance to the Scheme

The forestry sector is the first sector of the economy to come into the New Zealand ETS, effective since 1 January 2008. Due to its ability to influence the balance of carbon emissions substantially and in recognition of New Zealand’s unique emissions portfolio, the Finance and Expenditure Select Committee chose to not change forestry’s date of entry into the ETS. The committee stated that ‘a delay of one year could result in an additional 12 to 24 million tonnes of emissions from deforestation.’<sup>21</sup> If date of entry of forestry was delayed, New Zealand’s Kyoto Liability was feared to increase dramatically, especially considering the increased level of deforestation in 2007.<sup>22</sup> But these increasing rates of deforestation must be viewed with caution. The 2007 Deforestation Intentions Survey Final Report concluded that the increasing levels of deforestation were driven heavily by the announcement of the introduction of the ETS that would penalise deforestation after 31 December 2007.<sup>23</sup> Forest owners, in fear of huge penalties, took the opportunity to deforest whilst it was still economically viable, creating an upward spike in deforestation that was unlikely to be sustained.

<sup>19</sup> Ministry of Agriculture and Forestry, *Framework for a New Zealand Emissions Trading Scheme: Executive Summary* (MfE, 2007) 7.

<sup>20</sup> UNFCCC, *Kyoto Reference Manual*, above n 11, 69. Afforestation refers to land not previously used for forestry for more than 50 years, whilst reforestation refers to land not used for forestry for a much shorter period of time. Since the methodologies for calculating emissions and removals are the same, the two activities are treated as one.

<sup>21</sup> Climate Change (Emissions Trading and Renewable Preference) Bill, no 187-2, *As Reported from the Finance and Expenditure Committee*, 4.

<sup>22</sup> Dr Bruce Manley, *2007 Deforestation Intentions Survey Final Report* (2008) 4.

<sup>23</sup> *Ibid.*

### b) *Kyoto Carbon Accounting Rules*

The Kyoto carbon accounting rules apply to trees planted on or after 1 January 1990. These rules apply a set emission rate of 800 tonnes of carbon per ha of land deforested.<sup>24</sup> If the trees are replanted, the carbon is regathered and no changes to the carbon stock will occur.<sup>25</sup> If the trees are not replanted, the landowner is subject to the full liability of the 800 tonnes of released carbon. New Zealand has taken advantage of our very fast tree rotations by processing the forests for wood products and then replanting the trees to begin the rotation again. But under the rules, once the forests are harvested, the carbon stored in the trees is then released back into the atmosphere.<sup>26</sup> No allowance is made for the carbon that may still be stored in long-life applications like buildings, fences and furniture.<sup>27</sup> While there is a need for clear accounting rules, overlooking these carbon stores is illogical and is a key criticism of the emphasis placed on forest planting as the best method to reduce GHG emissions.<sup>28</sup>

### c) *'Pre-1990' and 'post-1989' forests*

The term 'post-1989' forests refer to forests planted after 1 January 1990. Owners of these forests can opt into the scheme if they so choose. This allows them to gain credits (NZU's) for the increases of carbon stored but if deforestation occurs, they then must surrender these units, which are tradeable on an international market.

'Pre-1990' forest owners cannot earn credits for the carbon stored in their forests. They cannot do so because they are outside of the Kyoto Protocol, being planted before 31 December 1989. However, under Article 3.4, deforestation is accounted for on any forest land regardless of when it was planted.<sup>29</sup> This leads to the unsatisfactory conclusion that whilst owners of pre-1990 forests cannot earn credits for the carbon they sequester, they are fully liable for the carbon emitted as a result of deforestation. Pre-1990 landowners have vigorously opposed these rules for CP 1, arguing that the rules create an arbitrary date distinction that has little environmental grounding. The argument put forward is that the atmosphere knows no difference as to when the tree was planted, it simply

<sup>24</sup> Ministry of Agriculture and Forestry, *Sustainable Land Management and Climate Change Discussion Paper: Options for a Plan of Action* (MAF, 2006) 62.

<sup>25</sup> Ministry of Agriculture and Forestry, *Forestry in a New Zealand Emissions Trading Scheme: Engagement Document* (2007) 30.

<sup>26</sup> Greg Milner-White, 'The legal implications of Climate Change in NZ for the Forestry Industry' above n 7, 157.

<sup>27</sup> Peter Clark, *Pre-1990 Forests and the ETS – A Solution?* (PF Olsen, 2007) available <http://www.climatechange.govt.nz/nz-solutions/climate-change-leaders-forum/pre-1990-forests-ets.shtml>, as at 10 April 2008.

<sup>28</sup> Ministry of Agriculture and Forestry, 'Sinks are a Temporary Answer to Climate Change Problems, Fossil Fuels are the Problem' *Compendium of Submissions Received on: Forest Sinks And The Kyoto Protocol*, available [http://www.maf.govt.nz/mafnet/rural-nz/sustainable-resource-use/climate/sinks-submissions/sinks-submissions-03.htm#P92\\_1709](http://www.maf.govt.nz/mafnet/rural-nz/sustainable-resource-use/climate/sinks-submissions/sinks-submissions-03.htm#P92_1709), as at 11 April 2008.

<sup>29</sup> UNFCCC, *Kyoto Protocol*, above n 9, art 3.4.

recognises that as a tree grows, carbon is being absorbed.<sup>30</sup> Flawed Kyoto rules should not determine a scheme that will entrench forest owners to inequitable restrictions on land use, force land into an uneconomic use or into uses that may be less preferable in terms of the overall emissions outcome. For example, if New Zealand produces dairy more efficiently than any other country, then arguably this is the better emissions outcome.

Resolution of the date distinction would restore investor confidence in the forestry sector. Freezing 1.2 million hectares of pre-1990 forestry land,<sup>31</sup> subject to heavy restrictions on land use would 'truncate forestry property rights in a manner that undermines investment incentives and reduces the value of existing investments.'<sup>32</sup> Removal of the distinction is also environmentally robust. All forests would be treated the same, which is entirely consistent with what the atmosphere sees.<sup>33</sup>

#### *d) The Actual Costs of Deforestation*

We are left with the situation that if a pre-1990 landowner wishes to deforest, that owner must buy NZU's equivalent to the emissions released and surrender them to the government. There are concerns that the overall deforestation liabilities could be anywhere between \$15,000 and \$65,000 per ha, with a likely average cost being above \$20,000.<sup>34</sup> This paper will assume an average cost of \$20,000 per ha for deforestation liability. This would vary also on account of the variances in the price of carbon and the location of the forest. These costs would make it economically impossible for a landowner to convert that owner's land to another use, even if the land was not best suited to forestry from an economic or environmental perspective. The highest and best value use could be obtained from conversion to dairy, as many of the forests planted many years before 1 January 1990 were not originally suited to dairy farming due to mineral deficiencies in the land.<sup>35</sup> Subsequent technology has revealed that an appropriate fertiliser easily remedies this. In her analysis of the costs for forestry conversion to dairy farming (ETS penalties aside), Iona McCarthy does take into account the cost of implementing an environmentally approved water supply. She concludes that if forestry land in a state of stump and slash can be purchased for under \$6000 then

<sup>30</sup> Personal Communication: Ross Green, Wairakei Pastoral Limited. Wednesday 23 April 2008.

<sup>31</sup> Out of New Zealand's exotic forestry, pre-1990 forests total 1.2 million ha, whilst post-1989 forests total 0.6 million ha. Peter Lough, 'Setting an emissions cap – the New Zealand approach,' available <http://www.oecd.org/dataoecd/38/34/40633829.pdf>, as at 10 April 2008.

<sup>32</sup> NERA Economic Consulting, *Review of University of Waikato/Covec Report on the Treatment of Pre-1990 Forests* (2008).

<sup>33</sup> Peter Clark, *Pre-1990 Forests and the ETS – A Solution?* above n 27.

<sup>34</sup> Flexible Land Use Alliance, 'Policy uncertainty contributes to deforestation,' available <http://www.flexiblelandusealliance.org.nz/background.html#deforestation>, as at 13 February 2008.

<sup>35</sup> Iona McCarthy, *Can't See the Forest Land for the Trees? An Economic Analysis of Dairy Conversion of Forestry Land* (Massey University) 2, available [http://finance-banking-property.massey.ac.nz/fileadmin/research\\_outputs/iona.pdf](http://finance-banking-property.massey.ac.nz/fileadmin/research_outputs/iona.pdf), as at 22 July 2008.

conversion is an efficient and financially profitable decision.<sup>36</sup> The ETS deforestation penalties raise this figure by at least \$20,000 per ha, immediately rendering conversion uneconomic.

Areas such as those surrounding the Kaingaroa Forest have been recently converted to dairy farming from forestry, as it is considered to be the highest and best value use for the land.<sup>37</sup> Paora Ammunsion, at the Papawai Regional Hui highlighted that,

*'We have 6000 ha of exotic forests that we are locked into as the land is leased out. For us, we know that the land is more profitable and suitable for dairy farming.'*<sup>38</sup>

At a cost of \$20,000 per ha, the carbon penalty attaching to that land is \$120 million.

This dilemma affects many landowners. It provides a good illustration of the arguments against the rushed implementation of the ETS. Obtaining the highest and best value out of privately owned land immediately becomes impossible for that individual. These landowners will forgo a \$10,000 per ha value increment resulting from the land use restriction, as the most profitable forestry land is valued at \$3000 per ha, whilst dairy farming land is valued at \$13,000 per ha.<sup>39</sup> The carbon cost of deforestation far outstrips that gain. Our forests are considered carbon neutral at worst, so there is argument for a revised ETS that is more rational from an environmental perspective and is more acceptable to private landowners wishing to utilise their land in the most profitable way.<sup>40</sup>

There are concerns that New Zealand should not have enacted a scheme based on a fundamentally flawed Kyoto Protocol. The ill will behind the 1990 date distinction is understandable considering that the atmosphere does not account of the date the trees were planted. The atmosphere is only affected by actual carbon levels, which are not dependent on where and when the tree that is affecting this balance is. By comparison, in the industrial sector it would be superficial and illogical to require a different standard of emission liability for factories built before and after 1 January 1990. The only standard required is that carbon emissions are reduced. As the current Land Use Land Use Change and Forestry rules (LULUCF) are only applicable to CP1, and are highly likely to change after 2012, it seems irresponsible for New Zealand to 'lock in place a long-term

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<sup>36</sup> Ibid, 9.

<sup>37</sup> Ibid, 2.

<sup>38</sup> Indigenous Corporate Solutions Ltd, *Climate Change Consultation Hui: Summary of Key Themes*, above n 1, 11.

<sup>39</sup> Personal Communication: Ross Green (email received August 18 2008).

<sup>40</sup> Peter Clark, *Pre-1990 Forests and the ETS – A Solution?* above n 27.

domestic policy that mirrors a flawed 5-year international policy.<sup>41</sup> The government has argued that the New Zealand ETS is designed to not only be compatible with the United Nations Framework Convention on Climate Change and the Kyoto Protocol, but to endure 'under a range of possible future scenarios for international climate change agreements.'<sup>42</sup> By passing legislation that is solely focused on meeting the requirements of CP1, the government is failing to look past Kyoto and is not taking into account a range of possible future scenarios. Maori especially argue that Kyoto rules are not suited to them and that it is not in their, nor New Zealand's, best interest to adopt policies that compromise future generations.<sup>43</sup> In its current design, the ETS is expected to cost more than \$900 million to the economy by 2012, and the loss of 22,000 jobs.<sup>44</sup>

#### *e) Legal Issues Arising*

So far, this paper has identified prominent policy and economic arguments against the implementation of the ETS. The case for reviewing the ETS legislation is further discussed in Chapter Four. There are also legal issues that should have been addressed and resolved before the scheme was passed as New Zealand law.

The first is a constitutional argument against restrictions of private land use that are applied retrospectively and interfere with pre-existing contractual relations. This argument is raised in the context of private landowner purchases and private landowners dealing with or developing land through contract mechanisms.

The second legal issue that arises is the possibility of a Waitangi Tribunal claim for a breach of the principles of the Treaty of Waitangi. This also encompasses the implications for land already returned to Maori (in response to a grievance) and land held on trust for future treaty settlements.

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<sup>41</sup> Ibid.

<sup>42</sup> Climate Change (Emissions Trading and Renewable Preference) Bill, no 187-2, Explanatory Note, 1.

<sup>43</sup> Indigenous Corporate Solutions Ltd, *Impacts of the Emissions Trading Scheme on Maori* (2008) 4.

<sup>44</sup> New Zealand Institute of Economic Research, 'The impact of the proposed Emissions Trading Scheme on New Zealand's economy: Public discussion document' (2008) NZIER 2008/02, ii.

## CHAPTER TWO: TAKING PRIVATE PROPERTY RIGHTS BY STATUTE

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The New Zealand ETS imposes land use restrictions on owners of private freehold land. By imposing a change of land use charge (conservatively \$20,000 per ha), the government effectively locked forestry land into one use in perpetuity. It is now uneconomic, yet not impossible, to convert land from forestry to another use, due to the heavy costs imposed by the scheme. There is little doubt that the New Zealand Parliament has the technical legal power to make this change through an Act of Parliament, by virtue of the principle of parliamentary sovereignty. However, imposing a retrospective penalty of such magnitude that effectively prohibits land use flexibility, argued to be crucial to New Zealand's economic development,<sup>45</sup> raises real issues as to whether Parliamentary Sovereignty is, or should be, subject to limits. New Zealand is no stranger to land controls and property restrictions, regulated by the Resource Management Act 1991 (RMA), but the retrospective application of the ETS deforestation controls undermines the notion that parliament can legislate free from limitation.

A stark example of the effect the scheme will have in practice is the purchase of 76,000 ha of land by Wairakei Pastoral Ltd (WPL) in 2004.<sup>46</sup> The land is just outside the Kaingaora forest between Taupo and Reporoa, with trees of varying levels of maturity. WPL planned to convert 26,000 ha of this land into a full farming operations. WPL have already sold the trees to a forestry company, who will harvest the trees as they reach maturity. Instead of being replanted, WPL signed a 25 year lease to Landcorp Development Ltd to develop the felled land into pasture. The contract was to create a number of diary farms accommodating approximately 30,000 cows and 100,000 beef and sheep stock units. The trees were originally planted when the land was not suited for diary farming, but dairy farming is now considered the highest and best value use of the land. The contract was signed in September 2004, prior to the introduction of the ETS. However, because the land is considered pre-1990 forests, WPL as the landowner, is subject to the deforestation liabilities. If WPL were to continue to meet its pre-existing contractual commitments, it would be subject to a \$480 million dollar carbon credit cost.<sup>47</sup>

In this environment, it would be open for WPL to argue that it cannot uphold its pre-existing contractual obligations as the contract has now become completely uneconomic

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<sup>45</sup> Flexible Land Use Alliance, 'Land Use Flexibility: The Key to New Zealand's Economic Development for Over 100 Years,' available <http://www.flexiblelandusealliance.org.nz/background.html#landUse>, as at 13 February 2008.

<sup>46</sup> Personal Communication: Ross Green, above n 30.

<sup>47</sup> Assuming a rate of \$20,000 per hectare, which is likely to be conservative, over 24,000 hectares.

and potentially frustrated. The question that arises is whether Parliament can or should enact legislation, which retrospectively interferes with private contracts and land use, through the imposition of such sizable penalties.

## 1. Protection of Private Property Rights

Whilst New Zealand does have land use controls that restrict private property rights in land, the scheme will impose restrictions far beyond the contemplations of the RMA. These rights are considered fundamental principles inherent in New Zealand's legal history that can be argued to demand protection. The government will compensate landowners with the allocation of free NZU's, but in such small amounts, this is a mediocre response compared to the invasion in private property rights.

### *a) Land use Controls under the Resource Management Act 1991*

Private landowners do not enjoy unlimited use of their land. Section 9 of the RMA prohibits land uses and/or activities that have the effect of contravening regional or district plans, unless the use was an existing one or a resource consent specifically authorises the use. Under section 85 of the RMA, compensation for these controls on land use is not available.<sup>48</sup> Section 85(3) however, allows the Environment Court to modify the control imposed, if the plan renders the land 'incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land.'<sup>49</sup> In seeking compensation under the RMA, a landowner of pre-1990 forests needs to argue that the extent of the monetary deforestation penalty renders the land incapable of reasonable use. However, section 85(6) stipulates that a 'reasonable use' includes any potential use of the land. For the landowner, this could mean that the ability to engage in forestry is a reasonable use of the land and compensation for the deforestation controls is not available.

The test of whether the land is incapable of reasonable use is independent of the identity or characteristics of the landowner.<sup>50</sup> Thus, reasonable use is not synonymous with enabling the landowner to gain optimum financial return.<sup>51</sup> It is not whether the control is unreasonable to the owner but whether it serves its statutory purpose, as the focus is on the public interests not on private property rights.<sup>52</sup> In *Steven v Christchurch City Council* the court found that a provision in a plan that imposes an all or nothing quality on the

<sup>48</sup> Resource Management Act 1991, s 85.

<sup>49</sup> *Ibid*, s 85(3)(a).

<sup>50</sup> *Resource Management* (Brooker's, 1991) at A85.04.

<sup>51</sup> *Ibid*.

<sup>52</sup> *Hastings v Auckland City Council* EnvC A068/2001.

land owner's options for a property is likely to render it incapable of reasonable use.<sup>53</sup> In *Fore World Developments Ltd v Napier City Council* the court commented that the ability to undertake a range of permitted activities does not impose an unreasonable restriction on the use of the land or impose an unreasonable burden on an owner.<sup>54</sup> Although it may seem unreasonable to force landowners to engage in forestry when they do not have the desire or ability to do so, especially when the land was only bought for conversion purposes, compensation for landowners of pre-1990 forests is not likely to be available under the RMA. By achieving the statutory purpose of discouraging deforestation and by allowing forestry to continue as another use of the land, the ETS land use controls will not allow the landowner to argue that his land is 'incapable of reasonable use' by virtue of her inability to convert the land to its most financially profitable use. The Environment Court would most likely reject any claim for compensation.

#### *b) A Social and Economic Perspective*

Despite acceptance that land use controls are well known in New Zealand society and within the power of government, there is a strong argument for protecting individual property rights from a social and economic perspective. A fundamental principle of the common law is the protection of property for personal liberty and self-fulfillment.<sup>55</sup> The feudal system of law granted legal standing conditional on the ownership of land. Philosopher John Locke stated that 'supreme power cannot take from any man any part of his property without his own consent,' a representation of the utmost respect for individual autonomy and liberty.<sup>56</sup> Jeremy Bentham's 'first principle,' on which the rational society was founded, was the protection of property.<sup>57</sup> In a recent paper, Phillip Joseph argued that the right to acquire and possess property was the 'fundamental liberty upon which all other inherent rights of life and liberty depended.'<sup>58</sup> From an economic perspective, property rights generate wealth and are essential in generating financial investment. Land especially is considered crucial in developing personal wealth and financial value.

Pre-1990 forest owners will undergo a severe reduction in the value of their land by the land use restrictions imposed by the scheme. The ETS scheme substantially erodes private property rights and deems them subservient to the national climate change effort. In the case of WPL, a \$480 million penalty added to the fixed costs of the conversion

<sup>53</sup> EnvC C38/39.

<sup>54</sup> EnvC W029/06.

<sup>55</sup> Phillip Joseph, 'The Environment, Property Rights and Public Choice Theory' (2003) 20 *New Zealand Universities Law Journal* 410.

<sup>56</sup> John Locke, *Two Treatises of Government* (1690, Cambridge University Press, Student Edition vol II, 1988) at para. 138.

<sup>57</sup> D J Manning, *The Mind of Jeremy Bentham* (Longmans, 1968) 94, cited in Phillip Joseph, above n 55, 416.

<sup>58</sup> Phillip Joseph, 'The Environment, Property Rights and Public Choice Theory' above n 55, 415.

from forestry to dairy (\$250 million) leaves it with no other option but to discontinue its conversion. This was not anticipated at the time the contract was entered into and through the introduction of the scheme, WPL is forced to engage in the forestry industry or argue that the contract is frustrated.

### *c) The Compensation Response*

The New Zealand government argued that it is providing compensation to owners of pre-1990 forests for the restrictions on land use. However, this compensation package is received through an inadequate and flawed allocation of free NZU's. It leaves owners of forests wishing to deforest their land to the highest and best value use insufficient credits to do so, and gives owners of land that is best left in forestry a windfall gain of compensation credits they do not need.<sup>59</sup> The 21 million credits intended for assistance with these controls in CP 1 was originally going to be allocated on a pro rata basis to all landowners of pre-1990 forests.<sup>60</sup> The Finance and Select Committee recommended that the allocation be modified to more 'adequately assist those facing the greatest costs under the ETS [and] provide sufficient incentives to introduce alternative land uses.'<sup>61</sup> Under its recommendation, owners of pre-1990 forests purchased prior to 31 October 2002 were to be given 60 NZU's per ha, whilst those owners who purchased after 31 October 2002, were to be given 39 units per ha. The Climate Change Response (Emissions Trading) Amendment Act 2008 provides for a slightly different allocation than that recommended by the select committee. Purchasers of pre-1990 forests after 31 October 2002 still receive only 39 units per ha, but those landowners who purchased before this date will receive an allocation based on a stipulated formula.<sup>62</sup> After the units for CFL land (18 units per ha) and land purchased after 31 October 2002 have been distributed, the remainder of the total 21 million units that are available for all pre-1990 forest land will be distributed to every other pre-1990 landowner, according to how many hectares are owned.<sup>63</sup>

Under the select committee recommendation, the compensation is worth \$897 or \$1380 per ha.<sup>64</sup> This is between 5 and 7 percent of the \$20,000 per ha penalty and an even lesser percentage of the value lost if the benefit of the conversion would have been

<sup>59</sup> Wairakei Pastoral Limited, *Submission to the Finance and Expenditure Select Committee on the Climate Change (Emissions Preference and Renewable Preference) Bill* (29 February 2008) available [http://www.parliament.nz/en-NZ/SC/Papers/Evidence/d/1/2/48SCFESCEvidenceCCETRP\\_ET154-Wairakei-Pastoral-Ltd.htm](http://www.parliament.nz/en-NZ/SC/Papers/Evidence/d/1/2/48SCFESCEvidenceCCETRP_ET154-Wairakei-Pastoral-Ltd.htm), as at 11 August 2008.

<sup>60</sup> Ministry of Agriculture and Forestry, *Forestry in a New Zealand Emissions Trading Scheme: Engagement Document*, above n 25, 21.

<sup>61</sup> Climate Change (Emissions Trading and Renewable Preference) Bill, no 187-2, *As Reported from the Finance and Expenditure Committee*, 18.

<sup>62</sup> Climate Change Response (Emissions Trading) Amendment Act 2008, s 71(2)(c).

<sup>63</sup> *Ibid*, s 71(2)(c)(iii).

<sup>64</sup> Based on a carbon price of \$23 per tonne.

greater than the penalty. Compensation under the Act will be only slightly different to that recommended by the select committee. This does not even begin to adequately balance the need for upholding environmental protection and protecting individual property rights, as property rights are nearly totally discounted. Although it is within the legislature's legal power to do this, the question remains: is it appropriate for legal powers to be executed in this way?

## **2. Interference in Private Contracts**

The introduction of the deforestation penalties also represent a major invasion into pre-existing private contractual relations. The interference arises due to the retrospective nature of the legislative controls, which leaves landowners trying to escape contractual obligations without any compensation for loss of bargain. The government justifies its departure from precedent that avoids the retrospective application of legislation, by stipulating a date from which landowners were 'on notice' to the deforestation controls, giving them time to deforest free from the liability. This justification, however, ignores the long-term nature of forestry contracts and leases over the forest land.

### *a) WPL*

As an example, WPL's contractual agreement was reached with no anticipation of the deforestation controls because such costs were not foreseeable. In 2004, nothing more was known than that there was an issue and debate as to where the costs should lie; between individual owners or the community at large. The costs and the application of such rules to pre-1990 forests were also not known. Performance of WPL's contractually binding obligations would subject it to an additional \$480 million dollar cost. With no direction regarding cost allocation, the imposition of this retrospective liability fundamentally alters the nature of the contract from what was originally negotiated, which is an undesirable interference by the public sector into private contractual relations.

### *b) The West Coast Sawmillers*

The courts have, however, not intervened where the government has interfered in contractual relations. One such example is the case of the West Coast Sawmillers in 2000, who were left without compensation or remedy from a policy directive that eventually became legislation. The government issued a policy directive in 2000 to end indigenous beech logging on the West Coast. The local sawmillers who were processing the timber were left trying to argue that under their contractual commitments with

Timberlands<sup>65</sup> and the West Coast Accord,<sup>66</sup> they had been treated unlawfully or unconstitutionally. They argued that they had made significant investments in reliance of the contractual bargains made with Timberlands and on the Accord itself. Timberlands ceased logging under a government directive to cancel the Accord without compensation, which wasn't enacted as legislation until after the sawmillers brought their first case to the High Court. They were left with what Nicola Wheen described as 'desperate remedies,' which reflected the inherent weakness of their arguments for compensation and the ease at which the High Court dismissed them.<sup>67</sup>

In the first case the sawmillers brought to the High Court, *Lumber Specialties v Hodgson*, they argued that the government directive was unlawful or unconstitutional.<sup>68</sup> If successful on this point, Timberlands would not have been able to rely on their force majeure clauses that allowed contracts to be suspended "where circumstances 'reasonably beyond the control of a party,' including 'any Government policy or directive' arose."<sup>69</sup> If the directive was found to be unlawful, Timberlands would not be able to rely on these clauses for breach of contract and the sawmillers may have been able to seek damages accordingly. The sawmillers then proceeded to argue almost every ground of review that could make the directive unlawful, none of which were successful. They were ultimately left with no remedy at all.

The lessons of the sawmillers' first case can be applied to the policy directive that introduced the deforestation penalties for pre-1990 forests. Landowners who, like WPL, had contractually bound themselves to performing agreed obligations were faced with a policy directive that interfered with those contracts. This is especially controversial when the contract stipulated for the harvesting of trees on pre-1990 forest land, forcing the land owner to perform his or her obligations and pay the deforestation penalty. A force majeure clause of wider scope could have been an alternative escape route for some owners facing specific performance of their contracts, but no such clause could have been relied on by WPL. It had very specific clauses in its contract with Landcorp that did not include a change in government policy. Whilst the West Coast Accord may have alerted Timberlands to the possible change in policy by providing for a possible

<sup>65</sup> Timberlands was the State-Owned Enterprise (SOE) that managed production of the indigenous forests.

<sup>66</sup> C D A Milne, *Handbook of Environmental Law* (Royal Forest and Bird Protection Soc, 1992) states at p 225, cited in Nicola R Wheen, 'Desperate Remedies and the West Coast Sawmillers' (2001) 19 *New Zealand Universities Law Journal*, 351:

'The West Coast Accord was an attempt, in 1986, to resolve long-standing disputes over the management of Crown-owned native forests in North Westland. It was an agreement between the government, some conservation groups including Forest and Bird, time milling interests and West Coast local authorities, and provided for:

- the continued clear-felling of podocarp forests as a quid pro quo for creating a series of protected forest reserves and as a transition to exotic timber
- the long term sustainable management of some rimu forests...and the setting aside of 77,000 ha of beech forest for a possible sustainable management scheme.'

<sup>67</sup> Nicola R Wheen, 'Desperate Remedies and the West Coast Sawmillers' above n 66, 352.

<sup>68</sup> [2000] 2 NZLR 347.

<sup>69</sup> Nicola R Wheen, 'Desperate Remedies and the West Coast Sawmillers' above n 66, 352.

sustainable management scheme, no such change in deforestation policy was anticipated in 2004.<sup>70</sup>

The second case that the sawmillers brought to the High Court, *Westco Lagan Ltd v Attorney-General*, was no more successful than the first.<sup>71</sup> McGechan J followed the case of *Riley v The King*,<sup>72</sup> which held that legislation that makes a contract impossible to perform does not breach it. In the same way the Forests (West Coast Accord) Act 2000 was held to not breach the sawmillers' contract, the Climate Change Response (Emissions Trading) Amendment Act 2008 will not allow pre-1990 landowners to seek compensation for a breach of contract. Nicola Wheen stipulates that the two cases the sawmillers' brought before the courts, show how our 'constitutional arrangements let political mandates and commercial monopolies override certainty and private rights.'<sup>73</sup> The government, acting in a desire to drastically reduce deforestation levels, is interfering in a private contract and substantially altering the agreed bargain, as well as both the legal and financial position of both parties.

#### *c) Retrospective Application of the Legislation*

The interference in pre-arranged private contracts occurs because of the retrospective application of the deforestation controls. Although the scheme will apply only to deforestation that occurs after 1 January 2008, landowners may be already subject to long term leases or contractual obligations that expose them to the \$20,000 per ha penalty. This is especially true for forestry, a long-term investment operating with 30 – 80 year investment horizons. The purchase, lease or contract may have been entered into some time before contemplation of the scheme and run for an extended duration past 1 January 2008. As continuance of the contractual obligations would be uneconomic, landowners may seek to avoid these obligations by canceling the contract. Similarly, landowners may have already purchased assets or concluded other contracts on the basis of their freedom to contract, which are also interfered with. This intrusion by the public sector into private contracts destroys individual autonomy and commercial efficacy. Although referring to an enactment that subsequently makes a once lawful act unlawful, Thomas J's reasoning is applicable to the current scenario,

*'What manifestly shocks our sense of justice, is that an act, legal at the time of doing so, should be made unlawful by some new enactment. Citizens have*

<sup>70</sup> The government argues that the owners of pre-1990 forestry were on-notice to the deforestation penalties since 31 October 2002. However, there is evidence to the contrary that such penalties were not even remotely anticipated.

<sup>71</sup> *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40.

<sup>72</sup> [1934] AC 176.

<sup>73</sup> Nicola R Wheen, 'Desperate Remedies and the West Coast Sawmillers' above n 66, 351.

*acquired rights and acted on the basis of those rights in the expectation that they will not be arbitrarily or unfairly deprived of them by a sovereign Parliament in the future. It is for this reason that the presumption against retrospectivity is generally framed as a presumption against taking away existing or accrued rights.'*<sup>74</sup>

Landowners who previously had the right to deforest the tress on their land are now deprived of that right through an Act of Parliament. Whilst the government has not gone so far as to make deforestation unlawful, it has made it virtually uneconomic by imposing a severe penalty. Thomas J does go on to stipulate, however, that the presumption against retrospectivity must not be directed to shielding citizens from changes in the law that give effect to changes in government policy, which do not unfairly impinge upon their existing rights.<sup>75</sup> The presumption against retrospective law making gives pre-1990 forest owners a strong argument that their existing legal rights or obligations under a contract should not be revoked by a new enactment.

*c) Escaping Contractual Liability: WPL as an example*

Facing retrospective legislation that substantially alters a contractual bargain, landowners will need to escape the contract to avoid the deforestation liabilities. In the case of a forestry right agreement for the harvesting of trees on pre-1990 forest land, the forestry company may seek specific performance of the contract. WPL, having sold the physical trees still on the land, can no longer control the deforestation. The ETS does provide an exception to the general proposition that the deforestation penalties lie solely on the landowner. If a landowner can prove that a land use decision has been legally delegated to another party and he or she no longer has any choice as to whether or not deforestation proceeds, the landowner will be able to apply to the administering agency (MAF) to have the obligation transferred to that third party for the duration of the contract.<sup>76</sup> If WPL can establish that the forestry company can enforce specific performance of the contract and remove the trees that they are legally entitled to remove, WPL could argue they longer have the land use decision whether or not to deforest and fall into this limited exception.

The alternative relief a landowner in this situation could seek is that the contract has become frustrated in the wake of the deforestation penalties. The landowner must prove

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<sup>74</sup> *Foodstuffs (Auckland) Ltd v Commerce Commission and Anor* [2002] 1 NZLR 353, at para. 50, cited in John Prebble, Rebecca Prebble and Catherine Vilder Smith, 'Retrospective Legislation: Reliance, The Public Interest, Principles of Interpretation and the Special Case of Anti-Avoidance Legislation' (2006) 22 *New Zealand Universities Law Journal*, 292.

<sup>75</sup> *Ibid*, at para. 52.

<sup>76</sup> Ministry of Agriculture and Forestry, *Forestry in a New Zealand Emissions Trading Scheme: Engagement Document*, above n 25, 23.

that due to unforeseen contingencies occurring after agreement has been reached, performance of the contract becomes either impossible or only possible in a radically different nature from that contemplated.<sup>77</sup> There must be failure of something that goes to the very heart of the contract. It is insufficient to show that performance will cause hardship or inconvenience. Thus, the landowner must prove that the deforestation penalty of \$20,000 per ha has substantially altered the nature of the contract, rendering it substantially different in purpose and effect from what was originally agreed. Considering the extensive economic cost-benefit analysis preceding a decision to invest in forestry, it could be established that agreement was only entered into because it was a financially viable decision at the time of the agreement. By fundamentally altering the rationale for a party to enter into the contract, which is motivated by the prospect of some financial gain, the severe deforestation penalties completely change the purpose and effect of the contract.

Whilst frustration does provide an escape route for a landowner facing the deforestation liabilities, it does not actually help that landowner achieve his or her wish to convert the land to a higher and better use. In addition, while the landowner may be able to escape contractual liability, the interference in pre-existing contractual relations remains for both parties. The landowner has lost the contract to convert and the purchaser of the forest has lost the contract to purchase the trees.

#### *e) Notice of the Deforestation Controls*

The Government has responded to the above arguments by claiming that the forestry industry has been 'on-notice' to the imposition of deforestation controls since 31 October 2002. It argued that landowners wishing to deforest were given sufficient notice to allow this. This is not in fact true and the market's response show this. The introduction of the liabilities has resulted in the worst deforestation figures in 50 years, but these were not seen until 2006 when landowners actually realised they were going to be subject to the penalties.<sup>78</sup> The National Party Climate Change Spokesman Nick Smith, has said that according to The Ministry of Agriculture and Forestry's National Exotic Forest Description Annual Report (2007),

*"In 2002, only 2.8% of harvested forest was not replanted. By 2003 this had grown to 3.6%. In 2004, 4.2% of all forest harvested was not replanted and in 2005 it was 18%. In 2006 it was 33% and these latest shocking statistics, for the*

<sup>77</sup> *Davis Contractors Ltd v Fareham U.D.C* [1956] A.C. 696, 729, per Lord Radcliffe, cited in H. G. Beale, *Chitty on Contracts* (28 ed, Sweet & Maxwell, Vol. 1, 1999) 1173.

<sup>78</sup> Scoop Independent News, 'Worst Deforestation figures in 50 years revealed,' 10 June 2008, available <http://www.scoop.co.nz/stories/PA0806/S00135.htm>, as at 16 September 2008.

*year 2007, show 35% of felled forests remain so...This chainsaw massacre of 3.4 million trees is a direct consequence of the Government's disastrous climate change policies. Foresters have been so desperate to avoid massive liabilities that they have chosen to instead, chop the lot down."*<sup>79</sup>

These statements indicate that by 2006, the government's deforestation policy had accelerated carbon emissions and increased the Kyoto Liability. This adds further weight to the argument that the introduction of the \$20,000 per ha penalty was an ill-thought out policy that not only interfered with private forestry contracts, but also contributed to New Zealand's emissions portfolio in the interim. Whilst it may be argued that an increased deforestation rate was inevitable before 1 January 2008, this is an unacceptable consequence of a policy designed to encourage afforestation. It proves that the ETS in its current design is inherently flawed and is not suitable to New Zealand's economy or emissions profile.

Whilst the policy is contradictory in its very nature, the stipulated date that landowners were deemed to know of the penalty is also arbitrary. The ETS provides that from 31 October 2002, landowners and those who have an interest in pre-1990 forests, were deemed to have been on notice to the introduction of deforestation liabilities. The consequences of this date are reflected in the revised allocation of free NZU's to pre-1990 forests. The reduced allocation package for landowners who purchased after 31 October 2002 is justified on the basis of the relative knowledge of the deforestation controls and the associated opportunity to deforest before 1 January 2008.

The assumption that landowners were put on notice is flawed for two reasons. First, 31 October 2002 is inconsistent with actual policy statements. Government policy in 2004 was to cover deforestation up to 21 million tonnes of emissions units over CP1.<sup>80</sup> The Forestry Industry Framework Agreement initiatives, publicly released on 19 May 2004, stated that the government would still meet the costs of deforestation emissions, which would not have given any indication to pre-1990 forest owners that the government intended them to be subject to deforestation liabilities.<sup>81</sup> Nor were possible deforestation management options available for public viewing until December 2006, when the 'Sustainable Land Management and Climate Change' discussion document was released. This document outlined three possible methods to manage deforestation, one

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<sup>79</sup> Ibid.

<sup>80</sup> This is taken from The Forestry Industry Framework Agreement: Initiatives for 2004/05, released by Hon Jim Anderton and Hon Jim Sutton in May 2004, as the official government position. Beehive, 'Budget 2004: Government – Forest Industry Partnership,' 19 May 2004, available <http://www.beehive.govt.nz/release/budget+2004+government+--+forest+industry+partnership>, as at 16 September 2008.

<sup>81</sup> Ibid.

of which was to introduce a market based tradable permit regime that would subject pre-1990 forest owners to the liabilities of deforestation.<sup>82</sup> It is difficult to impute knowledge onto landowners as early as 2002 when government policy was to the contrary in 2004 and the possibility of personal deforestation liability was only publicly discussed in 2006.

Second, having a specified date ignores the long-term nature of forestry purchases and contracts for multiple rotations. Even though landowners may have been aware of the upcoming deforestation liabilities, they still may not have been able to deforest due to the specific requirements of a forestry right agreement or long-term lease over the land. This is especially the case for Maori pre-1990 exotic forests, which are commonly leased to 3<sup>rd</sup> parties.<sup>83</sup> Many of these Maori lessors were unable to deforest their lands before 2008, as the land use decision was not in their hands.

Thus, it can be seen that the interference in private contracts cannot be legitimised by the government. Trying to exert an assumption that landowners had extensive forewarning of the controls, which is inconsistent with actual policy, is a fallacy that does not excuse the statutory interference in pre-existing contractual relations.

#### *f) Statutory Exemptions from Retrospectivity*

There is significant precedent for excluding pre-existing contractual arrangement when enacting new legislation. The Climate Change Response (Emissions Trading) Amendment Act 2008 does not follow this line of precedent, as it applies the pre-1990 deforestation controls retrospectively and does not ensure that pre-existing contractual bargains are left uninterrupted. This is especially prevalent in the Income Tax Act 2007. In every part of the Act, there is a subpart headed 'Z,' which stipulates the terminating provisions for that part and expressly provides for situations or agreements that are not to be affected by the Act. For Part C headed 'Income,' subpart CZ 1 stipulates that the Act does not apply to any share purchase agreement (relating to employment income) entered into before 19 July 1968. Similarly, part EZ 33 allows the old financial arrangements rules to apply to financial arrangements entered into before 20 May 1999. The Companies Amendment Act 1993 also contained a provision exempting any contracts made before its commencement from application under the Act.<sup>84</sup> The

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<sup>82</sup> Ministry of Agriculture and Forestry, *Sustainable Land Management and Climate Change Discussion Paper: Options for a Plan of Action*, above n 24, 65.

<sup>83</sup> Climate Change Iwi Leadership Group & Maori Reference Group Executive, *Submission to the Finance and Expenditure Select Committee on the Climate Change (Emissions Preference and Renewable Preference) Bill* (29 February 2008) available [http://www.parliament.nz/en-NZ/SC/Papers/Evidence/c/4/0/48SCFESCEvidenceCCETRP\\_ET230-Climate-Change-Iwi-Leadership-Group-and.htm](http://www.parliament.nz/en-NZ/SC/Papers/Evidence/c/4/0/48SCFESCEvidenceCCETRP_ET230-Climate-Change-Iwi-Leadership-Group-and.htm), as at 11 August 2008.

<sup>84</sup> Companies Amendment Act 1993, s 20: **Transitional provisions in relation to contracts made by companies;**

provisions under the Companies Act 1955, in relation to form, continued to apply, which shows a direct legislative attempt to avoid contracts being retrospectively interfered with. Under section 141(3) of the Credit Contracts and Consumer Finance Act 2003, subpart 3 of Part 3 of the Act does not apply to a buy-back transaction made before the commencement of this subsection. Thus, it is clear that there is direct legislative intent for legislation not to apply retrospectively, where contractual obligations will be altered.

By ignoring this precedent, the scheme alienates itself from legislative convention. It also further shows that the scheme has not been properly thought out and is a hasty reaction to the fears of not meeting New Zealand's Kyoto commitments. For the sake of international compliance, New Zealand has introduced a legislative regime that substantially encroaches on traditional rights in property and contract.

The analysis above appears to show that the government was technically able introduce legislation that abrogates existing property and contract rights. However, it also shows that the government ought not to have taken that action. Whilst the government believed that affirmative climate change action validated the interferences, not nearly enough weight was given to individuals who relied on legal rights engrained in our common law. That same reasoning can be applied to Maori, who have relied on the rights and guarantees promised to them in the Treaty of Waitangi.

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'Nothing in section 42 of the principal Act, as substituted by section 19 of this Act, applies to a contract made by or on behalf of a company before the commencement of this Act and the provisions of section 42 of the principal Act, as in force immediately before the commencement of this Act, shall continue to apply in relation to any such contract as if that section had not been repealed.'

## CHAPTER THREE: THE TREATY OF WAITANGI & SOVEREIGNTY

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Maori are very active participants in the climate change engagement and consultation process. The Climate Change Maori Reference Group (MRG) and the Climate Change Iwi Leadership Group (ILG) have been conducting regional hui to include Maori in the consultation with government officials. Hapu and iwi all over New Zealand agree it is a very real and important issue that will affect their lands, waterways, flora and fauna, and consequently their rights and responsibilities in relation to rangitiratanga and kaitiakitanga.<sup>85</sup> Linda Te Aho has found that,

*'Inextricably linked to concepts of whanaungatanga and rangatiratanga is the special relationship that Maori share with the environment and the resources within.'*<sup>86</sup>

Despite Maori enthusiasm for climate change initiatives, the ETS does not protect Treaty rights, nor does it protect the right of Maori to develop Maori land. Based on climate change strategies that may impinge on property rights guaranteed by the Treaty of Waitangi, a claim may be brought to the Waitangi Tribunal for a breach of the Treaty principles. As a Treaty partner, the Crown has a duty to actively protect Maori interests, which includes a right to develop land.<sup>87</sup>

Further problems arise in the case of Treaty settlements. Land already returned to Maori in previous settlements will instantly be devalued due to the land use constraints imposed by the scheme. Land that only has one economic use has much less value than land that can be used for a range of purposes. As such liabilities were not contemplated at the time of settlement, and particularly where the settled land was negotiated on its highest and best value use, there may be a case for the claimant to re-open the settlement. Past and future settlements must be addressed, as all CFL land that is subject to resumption to Maori claimants are pre-1990 forests. The exclusion of indigenous forests from the ETS is criticised heavily by Maori, depriving them of credits

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<sup>85</sup> Linda Te Aho, 'Contemporary Issues in Maori Law and Society, Crown Forests, Climate Change and Consultation – towards more meaningful relationships' (2007) 15 *Waikato Law Review* 138, 145.

<sup>86</sup> *Ibid*, 138.

<sup>87</sup> Waitangi Tribunal, *Radio Spectrum Development and Spectrum Management Final Report* (Wai 776, 1999) available <http://www.waitangi-tribunal.govt.nz/reports/viewchapter.asp?reportID=9b5ed50e-e089-4d64-8961-aea664b9a08d&chapter=1>, as at 17 September 2008.

for the carbon sequestration inside 700,000 ha of land.<sup>88</sup> Ultimately, Maori are not given credit for being net carbon savers.

## 1. Consistency of the ETS with the Treaty of Waitangi

Maori claimant groups could make a claim to the Waitangi Tribunal that the ETS does not adequately protect the rights guaranteed to them by the Crown under the Treaty of Waitangi 1840. Maori were barred from challenging the Bill, as was made clear in the High Court and subsequently confirmed in the Court of Appeal.<sup>89</sup> The Court of Appeal stipulated that if the Court were to issue a declaration that had the effect of deterring the introduction of the Bill, this would breach what Cooke P called the ‘established principle of non-interference by the Courts in parliamentary proceedings.’<sup>90</sup> This statement confirms the position that was taken in the *Sealords Case*, where clauses in the deed of settlement that promised to introduce further legislation, agreed to between the Crown and Maori, were not enforced by the Court.<sup>91</sup> The Court stipulated that ‘Parliament is free to enact legislation on the lines envisaged in the deed or otherwise. Whether or not it would be wise to do so and whether there is sufficient mandate for any such legislation are political questions for political judgment. The Court is not concerned with such questions.’<sup>92</sup> However, we now are now past this point and the Act can be the subject of review by the Tribunal and the courts.

### a) Jurisdiction of the Tribunal

Section 6 of the Treaty of Waitangi Act 1975 gives the Waitangi Tribunal jurisdiction to look at ‘any Act (whether or not still in force)...any policy or practice adopted by or on the behalf of the Crown.’<sup>93</sup> The New Zealand ETS is within this wide jurisdiction. Maori can argue that the imposition of the deforestation liability will impinge on the rights of Maori landowners or forest owners and violates Article two of the Treaty. Article two guarantees Maori the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties as subjects of the Crown.<sup>94</sup> The scheme’s restrictions on land use prevent Maori landowners from exercising their rights to manage and develop their lands.

<sup>88</sup> Roger Pika, Damian Stone and Kate Radka, ‘Emissions Trading for Maori’ 7<sup>th</sup> *Annual Maori Legal Forum* (Te Papa, Wellington, 29 July 2008).

<sup>89</sup> *New Zealand Maori Council v Attorney-General* [2007] 1 NZLR 318.

<sup>90</sup> *Ibid*, at para. 83.

<sup>91</sup> *Te Runanga O Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (the *Sealords Case*).

<sup>92</sup> *Ibid*, 309.

<sup>93</sup> Treaty of Waitangi Act 1975, s 6(1)(a)-(c).

<sup>94</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (*Whale Watching case*) 8.

A supplementary argument for breach of the duty of active protection may also be brought. The Tribunal in the *Radio Spectrum Development and Spectrum Management Final Report* stated that upon lodgement of a claim, the Tribunal is required to consider whether claimants have been prejudiced by acts or omissions of the Crown that are in breach of the principles of the Treaty.<sup>95</sup> The Tribunal noted that the wording of section 6 makes it clear that it is the principles of the Treaty, not the provisions, which need to be taken into account.<sup>96</sup>

#### *b) Principles the ETS breaches*

Claimants could argue that the ETS breaches two key principles of the Treaty. There is potential to argue that more than two principles are breached, but in respect of deforestation controls on pre-1990 forestry, the principles of development and active protection are more than adequate for a likely Tribunal claim.

##### *i) Development*

The Tribunal in the *Radio Spectrum Development and Spectrum Management Final Report* reviewed the principle that Maori have a development right for not only properties specified in the Treaty (lands, forests and fisheries), but over unspecified 'other properties' or taonga.<sup>97</sup> Maori are entitled to develop their properties and to have a fair and equitable share in Crown-created property rights, including those made available by scientific and technical developments. In its report on the CNI Claims, the Tribunal built on this analysis by setting out six key components of the Treaty right to development,

1. *the right as property owners for Maori to develop their properties in accordance with new technology and uses, and to equal access to opportunities to develop them;*
2. *the right of Maori to develop resources in which they have a proprietary interest under Maori custom, even where the nature of that property right is not necessarily recognised in, or has no equivalent in, British law;*
3. *the right to positive assistance, where appropriate to the circumstances, including assistance to overcome unfair barriers to participation in development (especially barriers created by the Crown);*
4. *the right of Maori to retain a sufficient land and resource base to develop in the new economy, and of communities to decide how and when that base would be developed;*

<sup>95</sup> Waitangi Tribunal, *Radio Spectrum Development and Spectrum Management Final Report* (Wai 776, 1999) at 3.0, available <http://www.waitangi-tribunal.govt.nz/reports/viewchapter.asp?reportID=9b5ed50e-e089-4d64-8961-aea664b9a08d&chapter=1>, as at 17 September 2008.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, at 3.3.6.

5. *the opportunity for Maori to participate in the development of Crown-owned or Crown-controlled property or resources in their role, and to participate at all levels (including both employment opportunities and at an entrepreneurial level); and*
6. *the right of Maori to develop as a people, in a cultural, social, economic, and political sense.*<sup>98</sup>

From this the Tribunal concluded that ‘at its most fundamental, this right of development is recognised as inherent to the property guarantees of the Treaty, because a right of development is part of the full rights of property ownership.’<sup>99</sup> The deforestation penalties will impinge on the right expressly guaranteed to Maori to be able to develop their lands. Many iwi have seen the opportunities in dairy farming and have also considered the inevitable land use conversion in a New Zealand economy based heavily on agriculture. Paul Quinn highlighted the loss of development at the Whanganui Iwi Leaders National Climate Change Hui,

*‘Ngati Awa paid full value for the forest – but the ETS diminishes both our value and our future opportunity. For forest lands better used for other high-return purposes, it will be difficult if not impossible for Maori to deforest. This is the case for Ngati Awa and Ngai Tahu.’*<sup>100</sup>

A tribunal examining a claim on the basis that the ETS restricts development rights could follow the approach taken in the CNI report. The Tribunal ultimately found that Maori have a Treaty right, ‘as property owners, to develop the properties and taonga guaranteed to them by the Treaty if they so choose and under their own authority (tino rangitratanga).’<sup>101</sup> Such a right includes the ability to profit from use of their lands, in a way that they see fit, which the ETS does not currently allow for.

#### ii) Active Protection

The Court of Appeal in the *Lands Case* confirmed that ‘the duty of the Crown is not merely passive but extends to active protection of the Maori people in the use of their lands and waters to the fullest extent reasonably practicable.’<sup>102</sup> Using lands and waters to the ‘fullest extent’ includes the right to develop them under their own authority.<sup>103</sup> The principle of active protection could be used to argue that Maori future interests in their

<sup>98</sup> Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims* (Stage I, Part IV, Wai 1200, 2007) 42, available <http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/1200/B6EC6D59-51DA-481F-84AD-DB14C1A7EC40.pdf>, as at 16 July 2008.

<sup>99</sup> *Ibid*, 11.

<sup>100</sup> Indigenous Corporate Solutions Ltd, *Climate Change Consultation Hui: Summary of Key Themes*, above n 1, 9.

<sup>101</sup> Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, above n 98, 39.

<sup>102</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (*Lands Case*).

<sup>103</sup> Waitangi Tribunal, *Radio Spectrum Development and Spectrum Management Final Report*, above n 95, 16.

lands will be ignored, due to the impending deforestation controls. Land that is valued higher for other uses will be locked into forestry in perpetuity. Active protection of the sufficiency of land for present and future needs requires further consideration by the Crown.<sup>104</sup> Maori have substantial pre-1990 forest assets that will be devalued by the deforestation liability, as well as any returns from the harvesting of those forests. The ETS does not take into account the reduced ability to use land under Maori *tino rangitiratanga*, nor does it actively protect the future use of Maori land.<sup>105</sup>

*c) Crown's Right to act in the National Interest*

The recognised right of the Crown to act in the national interest dilutes the potency of a Waitangi Tribunal claim for breach of the above principles. Article one of the Treaty 'ceded to the Queen absolutely what the English text...describes as sovereignty and what the Maori version...describes as kawanatanga (governance).'<sup>106</sup> Either version enables Parliament to act in the national interest and enact 'comprehensive legislation for the protection and conservation of the environment and natural resources.'<sup>107</sup> The *Whale Watching Case* stipulated that the rights and interests of everyone in New Zealand, Maori and Pakeha alike, must be subject to the overriding authority in Article one. However, the Court eventually concluded that due to the unique nature of Ngai Tahu's involvement in commercial whale watching activities off the coast of Kaikoura, the Director-General of conservation had failed to sufficiently take into account the interests of Ngai Tahu under the principles of the Treaty. The Waitangi Tribunal has also recommended that the Crown's ability to act in the national interest be limited by rights guaranteed to Maori in Article two.<sup>108</sup> In the Petroleum Report, the Crown argued that the nationalisation of New Zealand's oil resources, through the Petroleum Act 1937, was justified by Article one as being in the national interest. The Tribunal ultimately concluded that because a Treaty interest was created in favour of Maori for the loss of legal title to petroleum, the Crown was in breach of Treaty principles to exclude petroleum-based remedies from settlements.<sup>109</sup> The Report on the Muriwhenua Fishing Claim also limited the Crown's power to act in the national interest,

*'The cession of sovereignty or kawanatanga gives power to the Crown to legislate*

<sup>104</sup> Waitangi Tribunal, *The Mohaka ki Ahuriri Report* (Wai 201, 2004) 67, available <http://www.waitangi-tribunal.govt.nz/reports/view.asp?ReportID=D6D0C6A3-EFE6-4507-B4B3-6DD4BF5C5552>, as at 17 September 2008.

<sup>105</sup> *tino rangitiratanga* = chiefly authority. Janine Hayward and Nicola R Wheen, *The Waitangi Tribunal – Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Books, 2004) 273.

<sup>106</sup> *Whale Watching case*, above n 94, 8.

<sup>107</sup> *Ibid.*

<sup>108</sup> Waitangi Tribunal, *The Petroleum Report* (Wai 796, 2003) available <http://www.waitangi-tribunal.govt.nz/reports/viewchapter.asp?reportID=a181419d-48ad-4ecf-98bc-439454654765&chapter=2>, as at 17 September 2008.

<sup>109</sup> *Ibid.*, at 7.1.

*for all matters relating to 'peace and good order'; and that includes the right to make laws for conservation control. Resource protection is in the interests of all persons. Those laws may need to apply to all persons alike. The right so given however is not an authority to dis-regard or diminish the principles in article the second, or the authority of the tribes to exercise a control. Sovereignty is limited by the rights reserved in article the second.'*<sup>110</sup>

Whilst the government may argue that the protection of forests in the ETS is justified in the national interest and overrides the rights guaranteed to Maori in Article two, the Tribunal will most likely dismiss this argument and follow its preceding findings.

#### *d) Right to Share in New Technologies*

An assumption of the exclusive right of ownership in natural resources and new technologies has led to the Crown alienating its treaty partner from exercising their *tino rangitiratanga*. Historical examples of such alienation assumptions are those surrounding fisheries, the foreshore and seabed and radio frequency waves. In all three instances, Maori have sought a right to share in these natural resources or new technology and claimed that the unilateral assumption of Crown ownership is contrary to the rights and guarantees of the Treaty. It is expected that Maori will adopt this approach once again for the case of carbon credits.

Maori may argue that the Crown's assumed right to own and distribute NZU's is in no way different to the *Report on Claims Concerning the Allocation of Radio Frequencies*.<sup>111</sup> The Crown was selling AM and FM radio frequencies, with some reservations made for Maori frequencies. Maori claimants alleged that the reserved frequencies were inadequate to protect Maori interests in language. They claimed that Maori have rangitiratanga over radio frequency allocation in that firstly, 'nothing in the Treaty of Waitangi allows or foreshadows any authority on the part of the Crown to determine, define or limit the properties of the universe which may be used by Maori in the exercise of their rangitiratanga.'<sup>112</sup> The claimants then argued that 'where any property or part of the universe has, or may have, value as an economic asset, the Crown has no authority under the Treaty to possess, alienate or otherwise treat it as its own property without

<sup>110</sup> Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) at 11.6.1, available <http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/22/796C25F5-7F61-4F4F-8C50-EED0218276F3.pdf>, as at 17 September 2008.

<sup>111</sup> Waitangi Tribunal, *Report on Claims Concerning the Allocation of Radio Frequencies* (Wai 150, 1990) available <http://www.waitangitribunal.govt.nz/reports/summary.asp?reportid=%7B079F3543-0DDE-48E5-81B5-827FDFD73F12%7D>, as at 17 September 2008.

<sup>112</sup> *Ibid*, 9.

recognising the prior claim of Maori rangitiratanga.<sup>113</sup> With regard to the ETS, the Crown may find itself defending the claim that upon creating NZU's that carry significant unknown economic value (that affect property rights by being regarded as deforestation permits), the Crown has unilaterally assumed ownership in them, without recognising the equitable share the Treaty guarantees to Maori.

It has been widely established that Maori have a right to share in new technologies as they reveal themselves.<sup>114</sup> The right to share in resources cannot be fossilised as at 1840 and only limited to resources known or used at that time. The Treaty of Waitangi is an evolving and living document, whose principles remain the same as they were in 1840, but 'what has changed are the circumstances to which those principles apply.'<sup>115</sup> At the Iwi Leaders National Climate Change Hui in Te Whanganui a Tara, Kathy Ertel stated,

*'There is an assumption that the Crown has the right to allocate these resources – carbon credits...When the fisheries dispute arose, the Crown was making fish into a commodity and then allocating it on the assumption that they owned it. This was challenged and we know the result.'*<sup>116</sup>

When the Treaty was signed 'all lay in the future,' including the expectation that the Treaty would be honoured and resources would be allocated equally. As radio wave technology was developed, a quota management system for fisheries was developed, so too has a tradable permit for carbon emissions been developed. The alienation of Maori from the management, distribution and right to an equitable share in this resource may lead to a contemporary claim for breach of Treaty principles. Two examples of this are the allocation of only 18 NZU's to CFL land (in which Maori hold a beneficial ownership) compared to 60 units for lands purchased before 2002 and the Crown's assumed ownership in distributing the credits. As 'the ceding of kawanatanga did not involve the acceptance of an unfettered supremacy over resources, neither Treaty partner can have monopoly rights in terms of the resource.'<sup>117</sup> The Treaty demands Maori to have an equitable share in the newly developed regime for carbon credits.

Maori have a strong claim to the Waitangi Tribunal that the ETS, in its current design, is inconsistent with the rights and guarantees of the Treaty of Waitangi. The government must actively protect Maori rights in the development of their lands and their right to

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<sup>113</sup> Ibid.

<sup>114</sup> *Lands Case*, above n 102 and Waitangi Tribunal, *Report on Claims Concerning the Allocation of Radio Frequencies*, above n 111 and Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims* above n 98 and Waitangi Tribunal, *Radio Spectrum Development and Spectrum Management Final Report* above n 95.

<sup>115</sup> *Lands Case*, above n 102, 692.

<sup>116</sup> Indigenous Corporate Solutions Ltd, *Climate Change Consultation Hui: Summary of Key Themes*, above n 1, 7.

<sup>117</sup> Waitangi Tribunal, *Radio Spectrum Development and Spectrum Management Final Report*, above n 95, at 3.1.

share in new technologies, and not let the rights of indigenous peoples be swallowed up in the exercise of legislative power.

## 2. Parliamentary Sovereignty & the Treaty

Recent controversies over the foreshore and seabed legislation, and the historic \$500 million treaty settlement for CNI iwi have pushed Treaty issues to the forefront of private and public debate in New Zealand. Whilst this debate has examined the constitutional significance of the ‘founding document of New Zealand,’ it questions the traditional notion that Parliament is supreme in its law making capacity, enjoying unfettered sovereignty. It can no longer be said that the insistence on ‘the basic legally unalterable rule of our system recognises Parliament’s substantively unlimited law-making authority’ is the accepted position in New Zealand.<sup>118</sup> The Chief Justice Dame Sian Elias further stipulates that ‘parliamentary sovereignty is an inadequate theory of our constitution,’ believing that the exchange of promises made in 1840, inherently renders the ‘untrammelled freedom of parliament’ non-existent.<sup>119</sup>

The ETS legislation is another piece of wood that goes into the fire of this debate. Parliament has hastily rushed through ETS legislation that Maori consider contrary to their property rights guaranteed under the Treaty. Maori are also well aware that the deforestation controls will immediately reduce the value of previously agreed Treaty settlements.<sup>120</sup> Disregard for these concerns brings Parliamentary sovereignty back into the firing line and demands that the document ‘of the greatest constitutional importance to New Zealand,’ acts as a bridle on the government’s law making powers.<sup>121</sup>

In a recent article, David Williams argues that rights of indigenous peoples are far too vulnerable to attack in times of stress and emergencies.<sup>122</sup> Although not a time of absolute emergency, the world is staring down the barrel of the real consequences of ignoring the phenomenon of global climate change. The New Zealand government believes that we should lead the way in implementing domestic initiatives to curb the consequences of apathy, which was the driving mentality behind the rushed introduction of the Climate Change Response (Emissions Trading) Amendment Act 2008. This rationale is questionable when the costs to individual property rights, indigenous rights

<sup>118</sup> Richard Ekins, ‘The Relevance of the Rule of Recognition’ (2006) 31 *Australian Journal of Legal Philosophy* 95, 102.

<sup>119</sup> Sian Elias CJ, ‘Sovereignty in the 21<sup>st</sup> Century: Another spin on the merry-go-round’ (2003) 14 *Public Law Review* 148, 163.

<sup>120</sup> This position was made clear when Ngai Tahu submitted a last minute historical claim to the Waitangi Tribunal on 1 September 2008 that the ETS legislation would reduce the value of their 1998 settlement with the Crown.

<sup>121</sup> *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 516.

<sup>122</sup> David V Williams, ‘The Treaty of Waitangi: A ‘Bridle’ on Parliamentary Sovereignty?’ (2007) 22 *New Zealand Universities Law Journal* 598, 599.

and the economy as a whole are weighed against our contribution to global emissions (0.2%).<sup>123</sup> Williams then suggests that the potential for tyranny by a bare majority of the members of the House of Representatives, is the twenty-first century equivalent of the royal absolutism that existed in English seventeenth century.<sup>124</sup> He believes that methods to limit parliamentary sovereignty are necessary so that Treaty rights are not trampled in the future. He foresees social discord and political turmoil if some form of constitutional bridle does not restrain parliamentary sovereignty in its present form.<sup>125</sup> It seems that Williams does not see the Treaty as already presenting a limit on parliamentary sovereignty. It can be convincingly argued, that the Treaty itself has already inhibited Parliament's ability legislate at will and is progressively acquiring more weight in our constitution that cannot be ignored.

Dame Sian Elias takes a different approach to Williams. In advocating that our constitution has already moved on from 'a monolithic and obsolete view of the fundamentals of law as a quest for the power that trumps,' she admits that Parliament is the supreme legislator, but it legislates under the law of the constitution.<sup>126</sup> She does not seek ways to bridle the sovereignty of Parliament in the future. She argues that Parliament never had it.<sup>127</sup> As the Treaty is one of the founding documents of our constitution, it can be argued that since 1840, parliamentary sovereignty was always subject to the rights and guarantees it conferred to Maori.

Although the Supreme Court Act 2003 provides that 'nothing in this act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament,'<sup>128</sup> the Chief Justice recognises the inbuilt tension of the provision and suggests that the rule of law requires recognition that the Treaty imposes limits on the sovereignty of Parliament.<sup>129</sup> David Baragwanath also notes that,

*'the Treaty should be a mandatory consideration when it is relevant to decision-making and adjudication. It is not simply a protection for Maori...it is an expression of the rule of law...that even in the absence of entrenched rights we cannot tolerate any tyranny of the majority.'*<sup>130</sup>

<sup>123</sup> Ministry of Agriculture and Forestry, *Sustainable Land Management and Climate Change Discussion Paper: Options for a Plan of Action*, above n 24, 17.

<sup>124</sup> David V Williams, 'The Treaty of Waitangi: A 'Bridle' on Parliamentary Sovereignty?' above n 122, 599.

<sup>125</sup> *Ibid.*, 620.

<sup>126</sup> Sian Elias CJ, 'Sovereignty in the 21<sup>st</sup> Century: Another spin on the merry-go-round,' above n 119, 149 & 162.

<sup>127</sup> *Ibid.*, 162.

<sup>128</sup> Supreme Court Act 2003, s 3(2).

<sup>129</sup> Sian Elias CJ, 'Taking Power Seriously,' *The Eighth Sir David Williams Lecture* (University of Cambridge, Cambridge, 16 May 2008) available [http://www.cpl.law.cam.ac.uk/Media/dame\\_sian\\_elias\\_taking\\_power\\_seriously\\_transcript.pdf](http://www.cpl.law.cam.ac.uk/Media/dame_sian_elias_taking_power_seriously_transcript.pdf), as at 19 September 2008.

<sup>130</sup> David Baragwanath, 'The Evolution of Treaty Jurisprudence,' *Harkness Henry Lecture* (University of Waikato, Hamilton, 24 September 2007) 14, available

Arguably, Parliament ignored this statement when it enacted the ETS, especially when it placed substantial limits on Maori pre-1990 forest owners. Williams notes that since 1992, there have been two significant incidents of Maori outrage at governmental violation of Treaty rights: the Hirangi and fiscal envelope hui that rejected the Crown's treaty claims settlement policy in 1995; and the Hikoi Takutaimoana in 2004 that rejected the Foreshore and Seabed legislation.<sup>131</sup> If Parliament has not learnt that sovereign law making power is conditional on the Treaty of Waitangi guarantees, there may a third incident of Maori outrage opposing the ETS legislation.

### 3. Past Treaty Settlements

Ancillary to a claim that the scheme is in breach of the principles of the Treaty, is a claim for the re-examination of previously negotiated treaty settlements. Ngai Tahu brought this issue into public awareness when they lodged a last minute historical claim to the Waitangi Tribunal for a contemporary breach of the Treaty of Waitangi. They asserted that under the ETS deforestation penalties, the value of their 1998 settlement would be decrease by 'millions of dollars.'<sup>132</sup> Ngai Tahu's claim could set a benchmark for other iwi to argue that their treaty settlements have become instantly devalued upon the Act's entry into force. The possible implications for the government are comprehensive and add further weight to the argument that the implementation of the ETS is going to cost more than its environmental value.

#### *a) Negotiating in Bad Faith?*

Ngai Tahu's claim to the Tribunal is founded on two arguments. The first of these is that the government conducted the settlement negotiations in bad faith. Ngai Tahu argue that because the flow on effects of signing Kyoto (such as the deforestation restrictions) were not revealed in negotiation of their 1998 settlement, the Crown would be in breach of its duty under the Treaty in act in the utmost of good faith.<sup>133</sup> However, difficulty arises in that the Kyoto was not signed until 1999 and ratified in 2002. Ngai Tahu have to base their claim on the premise that the government knew of the likelihood of deforestation controls during the 1997 Kyoto negotiations. Thus, as Ngai Tahu were not told of these possibilities, they argue that the Crown breached the principles of the Treaty.

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<http://www.waikato.ac.nz/law/news/2007/2007%20Harkness%20Henry%20Lecture%20-%20David%20Baragwanath%20-%20The%20Evolution%20of%20Treaty%20Jurisprudence.pdf>, as at 19 September 2008.

<sup>131</sup> David V Williams, 'The Treaty of Waitangi: A 'Bridle' on Parliamentary Sovereignty?' above n 122, 620.

<sup>132</sup> New Zealand Press Association, 'ETS pushes Ngai Tahu to revisit treaty claim' *NZ Herald*, 2 September 2008, available [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10530168](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10530168), as at 2 September 2008, per Ngai Tahu chairman Mark Solomon.

<sup>133</sup> New Zealand Herald, 'Tighten Lid on Treaty Claim' *NZ Herald*, 8 September 2008, available [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10531005](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10531005), as at 17 September 2008.

However, Ngai Tahu may have difficulty establishing that the Crown even owed them a duty to reveal this information in the first place. The Court of Appeal in the 2007 *New Zealand Maori Council* case recognised prior judicial statements that the Crown's duty to Maori creates responsibilities *analogous or akin* to fiduciary duties, but limited them to analogy only and did not apply them strictly.<sup>134</sup> The Court made it clear that the Crown does not have a fiduciary duty in the private law sense that is enforceable against the Crown in equity.<sup>135</sup> If Ngai Tahu argues that the Crown did have a duty to relay information from the Kyoto negotiations that would foresee possible deforestation controls, they will have difficulty with the Court of Appeal's ruling on this point. Their claim would also question whether two different branches of the Executive, negotiating respective deals, should communicate to each other the possible ramifications of their actions. Such a duty would be onerous and would not take into account the fact that all future implications may not have been considered at that point in time. If the Tribunal did accept Ngai Tahu's argument, the discovery of evidence relating to exactly what the government knew during settlement negotiations and how much of this information was relayed to Ngai Tahu will be relevant.

#### *b) Substantial Devaluation of the Settlement Package*

Second, Ngai Tahu argue that the introduction of legislation that leaves previously agreed settlement assets substantially devalued is a contemporary breach of Treaty principles. Tainui could also argue this same line of reasoning. The duty of active protection is particularly relevant, requiring the Crown to protect the economic base of an iwi for future generations, and to protect assets provided as part of a Treaty settlement.<sup>136</sup> Enacting legislation that substantially erodes the intended economic base of a settlement may be a breach of this duty.

Ngai Tahu submit that they are in a unique position. Out of all persons and organisations in New Zealand, they believe they are most unfairly affected by the restrictions on pre-1990 land use.<sup>137</sup> They have land most suitable for conversion to its highest and best value commercial use, which they purchased before October 2002, but were unable to take advantage of the 2002 – 2008 period to deforest due to long term cutting licenses

<sup>134</sup> *New Zealand Maori Council v Attorney-General*, above n 89, at paras. 80-81. The court cited Cooke P in the *Lands Case*, at 664 and the *Sealords Case*, at 304.

<sup>135</sup> *Ibid*, at para. 81.

<sup>136</sup> Te Runanga o Ngai Tahu, *Submission of Te Runanga o Ngai Tahu on the Climate Change (Emissions Preference and Renewable Preference) Bill to the Finance and Expenditure Select Committee* (29 February 2008) 16, available [http://www.parliament.nz/en-NZ/SC/Papers/Evidence/0/1/5/48SCFESCEvidenceCCETRP\\_ET77-Te-Runanga-o-Ngai-Tahu.htm](http://www.parliament.nz/en-NZ/SC/Papers/Evidence/0/1/5/48SCFESCEvidenceCCETRP_ET77-Te-Runanga-o-Ngai-Tahu.htm), as at 11 August 2008.

<sup>137</sup> Te Runanga o Ngai Tahu, *Submission of Te Runanga o Ngai Tahu on the Climate Change (Emissions Preference and Renewable Preference) Bill to the Finance and Expenditure Select Committee*, above n 136, 1.

still in place.<sup>138</sup> Ngai Tahu especially seek redress in light of the fact that they directly told the Crown at the beginning of negotiations that they were not interested in the forests, and that once the cutting licenses were exhausted, they would convert the land to dairy farming.<sup>139</sup> The grievance is compounded by the extent of pre-1990 forests Ngai Tahu purchased under its 1998 settlement. Ngai Tahu currently hold 84,000 ha of CFL land, 38,000 ha of which is intended for conversion.<sup>140</sup> If it were to continue with the conversion, Ngai Tahu would be subject to a \$760 million penalty.<sup>141</sup> The land and thus the entire settlement package will instantly decrease in value by a substantial amount, as its conversion to another use will be entirely uneconomic.

Te Runanga o Ngati Awa (Ngati Awa) are in a similar position, receiving their settlement in 2005. Upon instruction from an independent land valuation, Ngati Awa paid the full market value for the land in their settlement with the expectation of an unfettered property right.<sup>142</sup> They submit that the deforestation controls will place strict conditions on land use decisions, thereby 'resulting in significant diminution in asset value.'<sup>143</sup> Ngati Awa also raise the point that, along with four other iwi (two being Ngai Tahu and Tanui) they are being penalised for agreeing to negotiate with the Crown earlier rather than later. The ETS is effectively 'penalising their foresight' by devaluing the agreed settlement with no anticipation of the deforestation liabilities that they are currently faced with.<sup>144</sup>

The Crown's current line of response is that the increased allocation of NZU's for lands purchased before 31 October 2002 is adequate compensation, and that both tribes should have taken the opportunity to deforest whilst they still could. If the iwi can establish that they could not deforest due to cutting licenses, then the Tribunal may find that the breach of the original settlement is a valid ground for redress.

### c) *The Relativity Clause*

Ngai Tahu and Tainui also have another mechanism to have their settlements re-examined with the Crown. Both settlement deeds contained a relativity clause, stating that if the value of all Treaty settlements exceeds a \$1 billion 'fiscal cap,' then they would

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<sup>138</sup> *Ibid.*, 2.

<sup>139</sup> New Zealand Press Association, 'ETS pushes Ngai Tahu to revisit treaty claim' *NZ Herald*, above n 132.

<sup>140</sup> 37 Degrees South Limited and Cognitus Advisory Services Ltd, *Maori Impacts from the Emissions Trading Scheme: Detailed Analysis and Conclusions* (MAF, 2008) 47.

<sup>141</sup> 38,000 hectares x \$20,000 per ha = \$760 million.

<sup>142</sup> Te Runanga o Ngati Awa, *Submission to the Finance and Expenditure Select Committee on the Climate Change (Emissions Preference and Renewable Preference) Bill* (27 February 2008) available [www.foma.co.nz/documents/TRONASelectCommSubmissionFinal.doc](http://www.foma.co.nz/documents/TRONASelectCommSubmissionFinal.doc), as at 11 August 2008.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

receive seventeen percent of the additional payout.<sup>145</sup> Tainui have already sought government clarification on the implications that the Treelords (CNI) settlement has on their own settlement, considering that at February 2008, the total amount committed to settlements was already \$817 million.<sup>146</sup> But as only half of the CNI settlement will be counted (\$200 million) and all previous settlements still need to be converted into 1994 dollars, the Office of Treaty Settlements believes that \$1 billion cap will not be exceeded for a few more years.<sup>147</sup> The overall effect of the relativity clause is that it may be able to provide a last resort avenue of redress for Tainui and Ngai Tahu, who have the clause stipulated in their deeds of settlement. These iwi, however, are the only iwi that have this right of redress, as the Crown abandoned this policy in 2000 so that each claim could be treated on its own merits and does not have to be fitted into a predetermined budget.<sup>148</sup> Iwi that settled after this policy change will be left with no course of redress if the deforestation penalties are not re-examined alongside the previously negotiated treaty settlements. Such an approach may cause political turmoil and resentment amongst many iwi affected.

#### 4. Future Settlements

In the same way that the deforestation controls will impact on use of land already returned to Maori as settlement of a grievance, it will impact on the future return of CFL land to claimants. It may also change the nature of a Treaty settlement. Land returned as an apology in response to a historical grievance will now be returned with limitations on its use. It may be argued that this does not truly reflect the overall objective of the settlement process; that the land should be returned to Maori as their land, free from land use restrictions and controls, appropriately compensating them from the dispositions of the late 1800's and early 1900's.

All CFL land is subject to Maori beneficial ownership and is pre-1990 forest land. Upon resumption to Maori ownership, the liabilities that come with pre-1990 forests will be borne by Maori. The land returned will be valued at much lower price per ha, reflecting its sole use as forestry land, being uneconomic to deforest at \$20,000 per ha. There is some benefit behind this however, as claimants can obtain a larger area of land with their set quantum. Providing that the settlement quantum is not manipulated in light of the ETS, iwi will be able to purchase a larger acreage of land with a set quantum because the land will be valued at a lower price per ha. Accordingly, the iwi will be able to gain

<sup>145</sup> Alan Ward, *An Unsettled History: Treaty claims in New Zealand today* (Bridget Williams Books, 1999) 49 & 57.

<sup>146</sup> Yvonne Tahana, 'Iwi look at Treelords deal top-ups' *NZ Herald*, 26 June 2008, available [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10518432](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10518432), as at 2 September 2008.

<sup>147</sup> *Ibid.*

<sup>148</sup> Office of Treaty Settlements, *Healing the Past, building a future: Guide to Treaty Claims and direct negotiations with the Crown* (Office of Treaty Settlements, 1999) 88.

more land and more associated rentals that the Crown Forestry Rental Trust (CRFT) has been accumulating on its behalf. Rentals are considered the jewel of the settlement as they are received over and above the quantum. Future settlements will not provide Maori with flexible land that they would have hoped to enjoy as part of a Crown apology, but it will provide Maori with the ability to purchase a larger area of land and more accumulated rentals. Iwi who have already settled will be disadvantaged relative to iwi settling in the future.

The Te Pumautanga o Te Arawa settlement provides an example of the Crown and iwi negotiating around the issue of ETS deforestation liabilities. Te Arawa settled in 2006, consisting of a \$36 million quantum and \$40 million in associated rentals.<sup>149</sup> Te Arawa, aware of the impending ETS negotiations, covenanted to keep the lands in forestry for 28 years from the date of their reversion. By doing so, the iwi was able to conduct valuations on a forestry only basis, which avoided the consideration of compensation for deforestation liabilities and highest and best use valuations.<sup>150</sup> The forestry covenants and the land valuations attached to them allowed Te Arawa to gain a greater amount of CFL land and accumulated rentals from the CRFT. Most notably, the settlement returned land to the iwi seeking redress for an historical grievance with severe restrictions on how that land could be used in the future.

The CNI iwi collective signed terms of agreement with the Crown in June 2008 that has enabled detailed negotiations regarding the settlement to proceed. The collective of seven iwi,<sup>151</sup> who represent over 100,000 people, signed 'the largest single treaty settlement package to be developed to date,'<sup>152</sup> on 25 June 2008.<sup>153</sup> Becoming the 'largest single land owner in the forestry sector and one of the largest investors,' the CNI collective will receive 90% of the 176,000 ha of CNI forests.<sup>154</sup> Although the settlement process has yet to be completed, it is anticipated that the monetary value of the 90% is approximately \$200 million. Once the valuation assessment has been agreed upon, the actual value of the land may be higher or lower. The collective will also receive \$250 million in accumulated rentals and \$40 million in NZU's.<sup>155</sup> The establishment of the Forest Management Company, whose long term goal to establish a vehicle to manage

<sup>149</sup> Yvonne Tahana, 'Forest-claim agreement points to improving relations between tribes,' *NZ Herald*, 1 April 2008, available [http://www.nzherald.co.nz/topic/story.cfm?c\\_id=252&objectid=10501280](http://www.nzherald.co.nz/topic/story.cfm?c_id=252&objectid=10501280), as at 2 May 2008.

<sup>150</sup> Te Runanga o Ngati Awa, *Submission to the Finance and Expenditure Select Committee on the Climate Change (Emissions Preference and Renewable Preference) Bill*, above n 142.

<sup>151</sup> Ngai Tuhoe, Ngati Manawa, Ngait Tuwharetoa, Ngati Whakaue, Ngait Whare, Ruakawa and the Affiliate Te Arawa Hapu/Iwi.

<sup>152</sup> Dr Michael Cullen, 'Presentation of Settlement Proposal,' 30 April 2008, cited in CNI Iwi Collective, *Iwi Endorsement Sheet*, available <http://www.cniforest.co.nz/Uploads/Files/CNIForest/CNI%20Info%20Sheet.pdf>, as at 23 September 2008.

<sup>153</sup> New Zealand Press Association, "Iwi 'walks path' to biggest ever Treaty settlement" *NZ Herald*, 25 June 2008, available [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10518293](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10518293), as at 28 June 2008.

<sup>154</sup> *Ibid*, per Maori Affairs Minister Parekura Horomia.

<sup>155</sup> CNI Iwi Collective, *Iwi Endorsement Sheet*, above n 152.

and expand the valuable and large scale forestry interests of CNI iwi, indicates that the collective will take the land for forestry purposes and continue it for forestry purposes.<sup>156</sup> The allocation of NZU's as part of the settlement seem to also act as compensation for the deforestation liabilities for pre-1990 forest land. The interim conclusion from this settlement package is that the land will be taken for future forestry purposes, with some added compensation for the restriction on land use conversion in the form of NZU's. Although it is not known whether the land was returned contingent on long term forestry covenants, it seems that the CNI collective were able to take the land on a forestry only valuation, giving them a greater acreage of CFL, with the added bonus of compensation for not being able to deforest this land. From the perspective of the iwi, this deal is possibly the best settlement package they could have received, aside from the return of land free from the deforestation liabilities.

Although the date for historical claims has now passed, the Tribunal still has to consider over 1000 claims filed just before the September 2008 deadline. Some of these may require the Tribunal to consider the possible return of CFL land to claimants, from the 10% of CNI forests remaining in Crown ownership that are not being transferred to the CNI iwi collective. These claimants may or may not want to follow the method of settlement that Te Arawa or the CNI collective took. Knowing that land could yield much higher returns if put to a better commercial use, iwi may be unhappy to simply accept forestry as the only method to build up an economic asset base for the future. However, iwi claiming under this mindset ultimately have little course for redress. By being fully aware of land use restrictions and thus entering into negotiations on an equal information footing, the claimants will have to strike a deal that will have these liabilities attached to the land. Iwi engaging in future treaty settlement negotiations must be very clear as to the criteria they want the land valued on and should address the deforestation liabilities in negotiations, as they are now deemed to be on notice to these issues. If they do not, they may find themselves agreeing to a settlement that does not fully realise their potential for a sustainable economic asset base. Above all, they must act according to the established principle of caveat emptor.<sup>157</sup>

## **5. New Zealand Bill of Rights Act Claims**

Maori rights and interests that conflict with the ETS legislation cannot be ignored. The government will have to take remedial action or face political retaliation from Maori groups. If the government fails to do so, it may expose itself to a potential discrimination claim under the New Zealand Bill of Rights Act 1990 (NZBORA). If the government

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<sup>156</sup> Ibid.

<sup>157</sup> Buyer beware

somehow exempts Maori from the deforestation liabilities, Pakeha landowners may also bring a discrimination claim under the NZBORA. They may argue that there must one rule for both peoples in respect of pre-1990 land use decisions and that by making allowances for Treaty settlements, the government will be discriminating against Pakeha.

#### *a) Maori Claim*

If the Crown does not actively protect Maori interests in light of possible Treaty breaches, iwi may argue that the ETS is discriminatory under section 19 NZBORA.<sup>158</sup> With respect to the Treaty and Treaty settlements, Maori may be able to establish a claim for discrimination (on the grounds of race) because only Maori stand to lose property rights guaranteed to them in the Treaty and Treaty settlements.<sup>159</sup> Pakeha are not guaranteed rights under the Treaty and are not able to gain redress in Treaty settlements, so if the impending legislation takes away property rights that only exist for Maori, the legislation will be prima facie discriminatory. Many facets of the ETS do apply to all New Zealand citizens, both Maori and Pakeha, but the specific effects it will have on Treaty settlements are only detrimental to Maori. This reasoning is consistent with the Attorney-General's report on the Foreshore and Seabed Bill in 2004.<sup>160</sup> As required under section 7 NZBORA, the Attorney-General reported to the House of Representatives whether any provision in the Foreshore and Seabed Bill was inconsistent with any of the rights and freedoms contained in NZBORA. The report accepted there is significant argument for a prima facie breach of section 19, being freedom from discrimination on the grounds of race.<sup>161</sup> The rationale for discrimination was founded on the legislation differentiating between categories of rights holders due to their race. Only Maori stood to lose their customary rights to the Foreshore and Seabed, as the legislation expressly exempted existing freehold rights.<sup>162</sup> Under both the Foreshore and Seabed Act 2004 and the Climate Change Response (Emissions Trading) Amendment Act 2008, Maori are divested of rights that only Maori could have. These are customary titles to the foreshore and seabed, and property rights guaranteed under the Treaty or Treaty settlement. As

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<sup>158</sup> It must be noted that by virtue of section 4, a court cannot strike down ETS legislation that is inconsistent with the NZBORA. The symbolic significance of a NZBORA claim, both for Maori and Pakeha, does have significant political ramifications that must be addressed.

New Zealand Bill of Rights Act 1990, s 4: **Other enactments not affected;**

'No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights) –

- (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) Decline to apply any provision of the enactment –

by reason only that the provision is inconsistent with any provision of this Bill of Rights.'

<sup>159</sup> 'Race' is a prohibited ground of discrimination under the Human Rights Act 1993, s 21(1)(f).

<sup>160</sup> Attorney-General, *Report on the Foreshore and Seabed Bill* (2004) available <http://www.justice.govt.nz/bill-of-rights/bill-list-2004/f-bill/foreshore-seabed-bill.html>, as at 23 September 2008.

<sup>161</sup> Richard Boast, *Foreshore and Seabed* (LexisNexis, 2005) at 12.4.

<sup>162</sup> *Ibid.*

Maori are deprived of these rights and Pakeha are not, the threshold for a prima facie breach of section 19 NZBORA is reached.<sup>163</sup>

Although finding a prima facie breach of section 19, the Attorney-General concluded that the infringement in Foreshore and Seabed legislation was nevertheless 'demonstrably justified in a free and democratic society' under section 5 NZBORA.<sup>164</sup> The same justification could be applied to the Climate Change Response (Emissions Trading) Amendment Act 2008. In the need to drastically reduce our emissions portfolio and be in compliance with our international commitments to Kyoto, the Attorney-General argued that the breach could be considered demonstrably justified. However, this is where the Attorney-General's reasoning on the Foreshore and Seabed Bill can be differentiated.

The principal reason the Attorney-General gave for introducing the Foreshore and Seabed legislation was not to discriminate, but rather to clarify the law for Maori and non-Maori.<sup>165</sup> The ETS legislation results in confusing the law for Maori and non-Maori, leading to claims for breaches of the Treaty. The Attorney-General emphasised the vital importance the coastline has for New Zealand as an island nation, being a major part in the economic, social, and cultural lives of all New Zealanders.<sup>166</sup> The actual effect of Foreshore and Seabed Act 2004 is that Maori are generally prohibited from having customary title recognised in the public foreshore and seabed. The effect of ETS legislation is that private property rights, which individuals have already relied upon and invested heavily in, are severely undermined.

Furthermore, in the Foreshore and Seabed Bill, the Attorney-General stipulated that,

*'the bill seeks to achieve a balance that recognises and protects Maori customary interests, recognises and protects the interests of the general public (including Maori) and resolves the substantial uncertainties resulting from the Court of Appeal's decision in Ngati Apa.'*<sup>167</sup>

The ETS legislation may on the face of it seek to protect the interests of the general public in taking action to reduce carbon emissions and fight the adverse effects of climate change. But the actual legal effect of the legislation is to substantively restrict private property rights for Maori and Pakeha, and infringe Treaty of Waitangi rights guaranteed to Maori. The ETS does not achieve a balance that protects Maori customary interests,

<sup>163</sup> Attorney-General, *Report on the Foreshore and Seabed Bill*, above n 160, at para. 76.

<sup>164</sup> *Ibid*, at para. 102.

<sup>165</sup> Richard Boast, *Foreshore and Seabed*, above n 161, at 12.4.

<sup>166</sup> Attorney-General, *Report on the Foreshore and Seabed Bill*, above n 160, at para. 88.

<sup>167</sup> *Ibid*, at para. 103.

protects the interests of the public, nor does it resolve any uncertainties. Most notably, the Attorney-General's report on the consistency the Climate Change Response (Emissions Trading) Amendment Bill had with the NZBORA did not discuss any potential conflicts the ETS had with the Treaty of Waitangi.<sup>168</sup> The advice only addressed consistency with section 14 (freedom of expression), section 21 (unreasonable search and seizure) and section 25(c) (presumption of innocence). Further advice has not been provided on a possible breach of section 19, which may itself be a breach of the Attorney-General's section 7 duty.<sup>169</sup>

The discrimination against Maori cannot be justified by the government's climate change objectives. Although deforestation controls may be the least cost option for reducing carbon emissions, it is not an option that is suitable to the environmental, social and economic structure of New Zealand. Land use flexibility has been an essential factor in the development of our economy. Our primary sector has been able to respond to market signals and subsequently change the proportion of our land devoted to different products in order to achieve the highest and best returns.<sup>170</sup> Wool, forestry, lamb and now dairy, have each been the driving force behind our economic growth, only possible by retaining land use flexibility.<sup>171</sup> By preventing this, the government is putting our economy in a vulnerable position that will not be able to respond to changing global markets as we need to.

#### *b) Pakeha Claim*

The Crown cannot ignore the potential breaches of the Treaty of Waitangi. In conducting a suitable response, it will have to pass new legislation that remedies these concerns. If the government legislates to alleviate all Maori from the deforestation liabilities, it must also legislate in favour of all other Pakeha landowners too. If only Maori were excused from the penalties in light of the Treaty, all other Pakeha landowners of pre-1990 forests may be discriminated against, under section 19 NZBORA, on the basis that they are non-Maori. The contrary view is that no discrimination against pakeha can exist, if the government is acting solely on the basis of fulfilling a promise made in the Treaty. This

<sup>168</sup> The Bill was renamed as the Climate Change (Emissions Trading and Renewable Preference) Bill following the advice from Attorney-General, *Consistency with the New Zealand Bill of Rights Act 1990: Climate Change Response (Emissions Trading) Amendment Bill* (2007).

<sup>169</sup> New Zealand Bill of Rights Act 1990, s 7: **Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights;**

Where any Bill is introduced into the House of Representatives, the Attorney-General shall, -

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill, -

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

<sup>170</sup> Flexible Land Use Alliance, 'Land Use Flexibility: The Key to New Zealand's Economic Development for Over 100 Years,' above n 45.

<sup>171</sup> *Ibid.*

will be correct, as a matter of law, if that is the sole basis on which the government acts, and if it exempts Maori totally. Pakeha would not be discriminated against as Pakeha were never promised any special rights under a Treaty and because the amending legislation would only be curing the rights previously promised to Maori. However, the accompanying backlash at policy and political levels could well be too high for a government that has introduced retrospective legislation with far reaching consequences.

## CHAPTER FOUR: THE CASE FOR REVIEWING THE PRE-1990 REGIME

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The cost of the ETS legislation for private property and contract rights, and for the rights and guarantees promised to Maori under the Treaty of Waitangi, expose it to substantial legal criticism. It significantly alters the legal position of pre-1990 landowners, both Maori and non-Maori. Hui have been conducted all over New Zealand, producing unanimous Maori opposition to the trampling of rights guaranteed under the Treaty and Treaty settlements. In this debate, policy arguments against the introduction of legislation cannot help but arise. Policy is antecedent to law, so when the implementation of an environmental regime encroaches on established legal rights, the legitimacy of the policy behind that regulation should be scrutinised. Phillip Joseph's scrutiny of the policy incentives behind the RMA environmental controls is a useful comparison for the ETS legislation. He believes the RMA ought to recognise a landowner's rights to compensation, arguing that in order to achieve the socially optimal outcome, the community or taxpayer must compensate the landowner for the loss of productive land use or development opportunity caused by environmental controls.<sup>172</sup> The loss of productive land-use and development under the ETS is arguably much greater than under the RMA, which owners of such land should be compensated for. Joseph best summarises the argument by saying that,

*'Land use must be regulated in order to protect ecosystems and conserve natural resources. All property owners must accept that environmental management will inflict some notional or real reduction in the value of their property. But a balance must be struck. In upholding the need for environmental protection, property rights must not be discounted or undervalued, as undeserving of legal protection.'*<sup>173</sup>

It is inevitable that environmental controls, such as the deforestation penalties, constrain the exercise of property rights.<sup>174</sup> This is an inevitable consequence because someone must own the land, there being no such thing as property that is not owned.<sup>175</sup> When environmental policies dictate uses of land that would otherwise be uninhibited, the value of that property will decrease to reflect the limited uses of the land. Owners of pre-1990 forests face severe devaluation of their land and the government compensation package

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<sup>172</sup> Phillip Joseph, 'The Environment, Property Rights and Public Choice Theory' above n 47, 409.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Under the principle of bona vacantia, which literally means vacant goods and is the legal name for ownerless property that passes into Crown ownership.

is entirely inadequate. What must now be addressed is how to strike the balance Joseph advocates. How can the value of private property rights be upheld in the face of controls that must ultimately devalue them? The answer to this question lies in policy. If the ETS controls undervalue the intrinsic worth of property right, it will fail to achieve the optimal regulatory outcome.<sup>176</sup>

Several factors need to be considered in balancing the need for deforestation controls and upholding the legal protection of property rights. First, the balance will be affected by how the introduction of the controls is justified. Whilst the liabilities only arise for the individual, the government (despite forestry sector warnings) ratified Kyoto, deeming it to be in the overall best interests of the nation (general taxpayer).<sup>177</sup> As the scheme was introduced to meet Kyoto obligations, its existence is justified on a national level and not on an individual basis. Thus, it is illogical to demand a specific group of individuals meet the compliance penalties, when the government, on behalf of the whole of New Zealand, made itself wholly responsible for meeting the Kyoto liability. Under this reasoning, the general taxpayer is best suited to meeting the costs of deforestation.

The overwhelming need for the environmental control will also affect this balance. If the environmental situation is dire, there is greater room to argue that property rights should be sacrificed. Whilst the government argues that such is the case for New Zealand, the deforestation controls are being introduced in the context of the Kyoto Protocol, not in the context of New Zealand's unique environment. The deforestation controls are being introduced because they are the least costly to implement and have the greatest ability to affect our carbon emissions, not because deforestation levels at present signify a concerning need to curb this activity for the sake of our environment.<sup>178</sup> Our forests are considered carbon neutral at worst<sup>179</sup> and agriculture is actually the greatest contributing factor, making up 49% of our emissions profile.<sup>180</sup> The size of the intrusion on private property rights, taking into account the effect the deforestation penalties have on land values, is overwhelming in comparison to the need to curb deforestation for the sake of New Zealand's environment.

In creating an arbitrary distinction between different groups of New Zealanders, which is not justified on environmental grounds, the intrusion on property rights loses further legitimacy. It is widely acknowledged that the Kyoto cut-off date in respect of forests

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<sup>176</sup> Phillip Joseph, 'The Environment, Property Rights and Public Choice Theory' above n 55, 411.

<sup>177</sup> Peter Clark, *Pre-1990 Forests and the ETS – A Solution?* (PF Olsen, Version 3, 2008) available <http://www.climatechange.govt.nz/emissions-trading-scheme/input-and-engagement/climate-change-leadership-forum/2008-02/pre-1990-forests-ets-version-3.html>, as at 12 August 2008.

<sup>178</sup> *Ibid.*

<sup>179</sup> Peter Clark, *Pre-1990 Forests and the ETS – A Solution?* above n 27.

<sup>180</sup> Ministry for the Environment, 'New Zealand's response to Climate Change,' above n 2.

(1990) is artificial and does not reflect the positive environmental contribution of New Zealand's plantation forests. It was introduced very late in negotiations in an attempt to address concerns relating to northern hemisphere forests; concerns that New Zealand does not share.<sup>181</sup> The arbitrary date creates two groups of landowners that now have a different set of private property rights. Post-1989 owners can elect to stay out of the scheme and not face any property right restrictions under the ETS. There is no choice for pre-1990 forest owners. There is no environmental reasoning behind creating different legal rights for these two groups of landowners. Thus, the controls are not reasoned from an environmental perspective, which favours the protection of pre-existing legal rights.

Finally, the environmental controls cannot be applied evenly without discrimination. They apply only to those owners of land who own forests planted before 1 January 1990 and if Maori are excluded from the liabilities, will only apply to Pakeha. If Maori are forced to face the liabilities, the controls cannot apply evenly to all iwi. Those iwi who have already settled with the government will stand to have their settlements substantially devalued. Iwi that have yet to settle will be able to gain more land to account for the deforestation penalties and gain more associated rental payments from the CFRT. There is discrimination between owners of land by date and possibly by race. Maori cannot have the controls applied to them evenly, due to the discrepancies between previously agreed Treaty settlements and those settlements that have taken or will take the ETS into account. If an environmental control is going to interfere with existing property rights, it must be applied evenly and without discrimination. As the deforestation liabilities under the ETS are discriminatory, there is little room to argue that the interference in pre-existing legal rights is legitimised.

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<sup>181</sup> Peter Clark, *Pre-1990 Forests and the ETS – A Solution?* above n 178.

## CONCLUSION

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The New Zealand Emissions Trading Scheme is fraught with legal and policy issues that demand urgent attention. The government has missed the opportunity to take a more considered approach to dealing with domestic climate change action, which our larger trading partners are moving more slowly towards, rather than simply following flawed international rules. In choosing to act first in the international community and make an example out of our willingness to protect the environment, the government has trampled heavily on pre-existing legal rights, creating a series of unfair, colliding outcomes between owners of forests, and Maori and Pakeha. In doing so, the government has also failed to compensate private landowners for the taking of private property rights and has ignored its Treaty of Waitangi obligations.

The national and international politics behind the introduction of the scheme have been implicit throughout this paper. Justifications given lie in the international branding of New Zealand products, coloured by our overwhelming respect for environmental issues, and by our rich history of protecting our natural surroundings. Whilst it can be argued that maintaining a global reputation is critical to the success of a small country dependent on export markets and foreign investment, the cost of leading the world in reducing carbon emissions is completely out of balance with our contribution to the overall levels. When we only account for 0.2% of global emissions worldwide, why do we want to be considered leaders in climate change initiatives when are they are going to cause substantial and irrevocable harm to our economy and the rights of our citizens?

What this paper cannot explain is why the authors of the scheme thought they could avoid addressing the blatant trampling of legal rights achieved by the scheme. The allocation package of NZU's is transparent and once the actual workings of the scheme are understood, the inadequacy of the compensation package will be realised. It will be too little too late, however, to argue this once the scheme becomes integrated into New Zealand's economy. That is why attention must be brought to the issues this paper addresses now, when the scheme can be more easily adjusted and before further inequities are created. The rushed nature of the legislative process that has led to these flaws is a matter of great concern.

How the government (whoever that may be) responds to these claims should be a matter of considerable public and legal concern. Maori have been very active in bringing their claims to the attention of the legislature, which if ignored, may create social and political

unrest. After only just recovering from the bruises of the Foreshore and Seabed legislation, race relations may fall beyond repair if these claims are not addressed adequately. The challenge the government now faces is how to properly remedy these claims, without creating further discriminatory legislation.

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