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UNIVERSITY OF WELLINGTON

*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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CONTENTS

Foreword <i>Claudia Geiringer and Rayner Thwaites</i>	vii
Constitution as a Catalyst: Different Paths within Australasian Administrative Law <i>Cheryl Saunders</i>	143
The Climate Change Response Act 2002: The Origin and Evolution of s 3A – The Treaty Clause <i>Anna-Marie Skellern</i>	167
Integrating Responses to Violators and Corporate Accomplices: A Role for the Security Council? <i>Shireen Daft</i>	193
Suspended Disbelief? The Curious Endurance of the Deterrence Rationale in International Criminal Law <i>Pádraig McAuliffe</i>	227
Book Review: <i>Tribal Constitutionalism – States, Tribes and the Governance of Membership</i> <i>Carwyn Jones</i>	263
1984 and All That: Opening Address to the EmpowerNZ Workshop <i>Hon Jim McLay</i>	267
EmpowerNZ: Drafting a Constitution for the 21st Century <i>Dean Knight and Julia Whaipooti</i>	287
Draft Constitution for the 21 st Century <i>Participants at the EmpowerNZ Youth Workshop</i>	301

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THE CLIMATE CHANGE RESPONSE ACT 2002: THE ORIGIN AND EVOLUTION OF S 3A – THE TREATY CLAUSE

*Anna-Marie Skellern**

This paper considers the origins and evolution of s 3A – the Treaty clause – in the Climate Change Response Act 2002. The paper examines the nature of the negotiations between political parties in an MMP system when a contentious piece of legislation is at issue. The author concludes that s 3A came about as a compromise measure to secure the necessary support of a minor party, against a backdrop of pressure on the Government to implement its international obligations. Section 3A developed as a result of two parties making mutually acceptable compromises to pass contentious legislation.

I INTRODUCTION

The issue of climate change generates intense debate.¹ Legislating in respect of divisive issues is inherently difficult for any government but the area of climate change creates particular challenges for the New Zealand government. New Zealand signed and ratified the Kyoto Protocol and, in so doing, undertook obligations to reduce greenhouse gas emissions.² As a result of its participation in the Kyoto Protocol, the government was required to balance its international responsibilities against the need to maintain the support of its voting public. In addition to managing the conflict between international and domestic interests, the New Zealand government has the responsibility to consider its continuing obligations under Te Tiriti o Waitangi – the Treaty of Waitangi. Public debate within

* Acting District Court Judge. This article is based on a paper completed in partial satisfaction of the requirements of an LLM from Victoria University of Wellington.

1 By climate change, I mean a change in climate attributed directly or indirectly to human activity that alters the composition of the global atmosphere: see Climate Change Information New Zealand <www.climatechange.govt.nz>.

2 Kyoto Protocol to the United Nations Convention Framework on Climate Change 2303 UNTS 148 (opened for signature 16 March 1998, entered into force 16 February 2005). New Zealand is included at Annex B to the Protocol.

New Zealand about the precise nature of the government's obligations under the Treaty is conducted with as much fervour as is the debate about climate change.

The legislative process through which s 3A of the Climate Change Response Act 2002 was enacted is the focus of this paper.³ This provision is what is commonly referred to as a Treaty clause. This Treaty clause places specific statutory obligations on the Crown and creates corresponding statutory rights for Māori, the purpose of which is defined as being to "recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi". The obligations on the Crown promulgated by s 3A could broadly be described as requiring consultation with, and opportunities for participation from, Māori in specified areas of the climate change legislation.

Section 3A was introduced into the legislation by the Māori Party as part of a bipartisan arrangement reached by them with the National Party (National) as part of the formation of a government after the 2008 election. The circumstances surrounding the origin and evolution of s 3A provide strong evidence that this section developed as a direct result of National's need to manage the clash of international and domestic interests. In balancing these interests, National provided opportunities for its political ally, the Māori Party, to advance the interests of its constituents. Section 3A is, in the words of legal commentators on climate change legislation, a product of "pure politics".⁴

This paper examines the origins of s 3A – first, in terms of the background to the legislation as it evolved since 2002 and, then, in terms of the negotiations both preceding the introduction of the Bill and during its passage through the House. The positions of a number of political parties are considered with a view to determining the extent of the compromises each was willing to make to pass this legislation. The paper also considers the drafting of s 3A and the construction of the clause compared to other Treaty clauses. The paper concludes that the potential risk to the future of s 3A lies ironically in the same political mechanisms responsible for its evolution: the uncertainties inherent in New Zealand's Mixed Member Proportional voting system (MMP).⁵ Under MMP, parties, as a matter of necessity, adjust their alliances and make concessions with other parties in the quest for ongoing control of government. One author describes the process in the following manner:⁶

MMP has radically changed the rules of the game. The objective is still the same, namely for governments to have their bills enacted into law, but the way in which this outcome is achieved is

3 Section 3A is set out in full in the Appendix.

4 Linda Clark and others "The ETS Deal – Pure Politics" (15 September 2009) Chapman Tripp <www.chapmantripp.com>.

5 Since 1996, MMP has been the system of voting in New Zealand. For an explanation of how the system works see Elections New Zealand <www.elections.org.nz>.

6 Ryan Malone *Rebalancing the Constitution: The Challenge of Government Law-Making Under MMP* (Institute of Policy Studies, Wellington, 2008) at 227.

fundamentally different. Ministers are no longer the omnipotent force they once were. Consultation and concession are now a vital component of implementing government policy through statute.

Further, subsequent compliance with provisions such as s 3A (that are dependent to some extent upon continuing good relationships between interested parties) has the potential to vary in direct correlation with the extent to which the major party in government continues to require support to implement its policies. During the first year post-enactment, compliance with s 3A was strong. The litmus test, however, will be what occurs if and when the Māori Party is no longer a crucial part of the government of the day's support arrangements.

II AN OVERVIEW OF THE CLIMATE CHANGE LEGISLATION – POST-2002

The difficulties in legislating for climate change are not the exclusive domain of any one political party. The Kyoto Protocol was signed under a National-led Government⁷ and ratified by a Labour-led Government.⁸ The Labour-led Government introduced the legislative framework for New Zealand to meet the Kyoto Protocol's requirements in the Climate Change Response Act 2002 (the initial 2002 Act). The Labour-led Government also enacted significant changes to the initial 2002 Act in 2008 by virtue of the Climate Change Response (Emissions Trading) Amendment Act 2008 (the 2008 amending Act).⁹ This legislation added the first New Zealand Emissions Trading Scheme (the 2008 ETS) to the initial 2002 Act. The 2008 ETS included all sectors in a scheme which placed a charge on all greenhouse gas emissions and rewarded carbon sequestration. The ETS was to be implemented over a five year period from 2008 to 2013.¹⁰

Soon after Parliament enacted the 2008 ETS, a general election was held, resulting in a change of government. Climate change had been high on the campaign agenda for all parties. In particular, National had campaigned strongly on the basis of a promise to moderate the climate change legislation.¹¹ In order to form a government under the MMP system, National entered into confidence and supply agreements with the ACT Party (ACT), the Māori Party and the United Future Party (United Future). The arrangement between National and ACT included an agreement to delay the implementation of the 2008 ETS pending a special select committee review of the scheme.¹²

7 Signed on 22 May 1998.

8 Ratified on 19 December 2002.

9 These amendments were introduced on 4 December 2007 as the Climate Change (Emissions Trading and Renewable Preference) Bill (187-1).

10 Ministry for the Environment *Factsheet 16: Major design features of the emissions trading scheme* (INFO 318, September 2008). Forestry was to enter the ETS in 2008 and agriculture in 2013.

11 John Key "Campaign Blog: 23 October" (2008) John Key <www.johnkey.co.nz>.

12 "National-ACT Confidence and Supply Agreement" (16 November 2008) ACT <www.act.org.nz>.

In December 2008, the Emissions Trading Scheme Review Committee (the ETS Select Committee) was established. The ETS Select Committee was a cross-party body of Members of Parliament. ACT and National agreed on the outline of its terms of reference in their initial confidence and supply document signed on 16 November 2008.

The ETS Select Committee reported back to the Government on 31 August 2009. Following the release of its report, the Minister for Climate Change Hon Dr Nick Smith MP (the Minister) was intent on achieving legislative change in anticipation of the United Nations Conference on Climate Change in Copenhagen that was scheduled to commence on 7 December 2009. The Minister stated: "It is our ambition to go to Copenhagen in December with the policy and legislation for our emissions trading scheme settled."¹³ On 24 September 2009, just over three weeks after the report of the ETS Select Committee, the Climate Change Response (Moderated Emissions Trading) Amendment Bill (the 2009 amending Bill) was introduced to the House.¹⁴ United Future and, less predictably, the Māori Party (which had traditionally subscribed to the view that a carbon tax was the only way to legislate effectively in respect of climate change) supported the passage of the Bill. The Māori Party and National were ultimately able to make mutually acceptable concessions to pass the legislation. Section 3A formed a part of those concessions.

III THE POSITIONS OF THE POLITICAL PARTIES WITH RESPECT TO CLIMATE CHANGE

A Pre-2008 Election

The dynamics of the Māori Party's support for the 2009 amending Bill and the inclusion of s 3A, which is inextricably linked to that support, must be considered against the backdrop of the political landscape at the time. The 2008 ETS had proved to be an enormously contentious piece of legislation for the Labour-led Government. The Government was accused of being set to make enormous monetary gains from the ETS and was challenged to "come clean on ETS windfall profits."¹⁵

Meanwhile, a further complexity arose for the Labour-led Government in respect of the ETS legislation. On 1 September 2008, in a development which later proved highly significant in the evolving ETS legislation and the enactment of s 3A, Ngāi Tahu lodged a claim with the Waitangi Tribunal.¹⁶ It sought to re-open the Treaty settlement it had reached with the Crown in 1998. The basis for its claim included concern that the Crown had not met its information disclosure requirements in respect of the likely impact of an emissions trading scheme on pre-1990 forest

¹³ Nick Smith "Government Welcomes ETS Review Committee Report" (press release, 31 August 2009).

¹⁴ Climate Change Response (Moderated Emissions Trading) Amendment Bill 2009 (85-1).

¹⁵ Nick Smith "Labour Needs to Come Clean on ETS Windfall Profits" (press release, 20 May 2008).

¹⁶ The principal iwi of the southern region of New Zealand.

land.¹⁷ Similar issues were raised by Waikato-Tainui, Te Uri o Hau, Ngāti Awa and Ngāti Tuwharetoa. On the basis of advice from Helen Aikman QC, who concluded that there was no breach of the Crown's obligations under the Treaty, the Labour-led Government proceeded with the 2008 amending legislation.

The only issue in respect of the 2008 ETS that the Labour Party (Labour) and National agreed upon was, in retrospect, something of an ironic twist. The two major parties united to oppose a motion from the Māori Party to recommit the 2008 amending legislation to the Committee of the whole House to consider inserting a Treaty clause into the legislation.¹⁸ The motion failed. Speaking for the Māori Party, Hon Te Ururoa Flavell MP expressed the depth of disappointment generated by the rejection of the re-committal motion. Flavell issued a clear challenge to the major parties that: "This vote will influence the Māori Party in its decision-making, post-election."¹⁹ The strength of this assertion appears to have resonated with National and is relevant to the subsequent development of s 3A.

The Labour-led government enacted the initial ETS in the 2008 amending Act with a majority of 63 to 57. National's ongoing commitment to moderate the ETS if it became the next government was clearly signalled at that time in a speech by the then National Spokesperson for Climate Change, who stated that: "National will take a more cautious and considered approach. We will be making significant, pragmatic amendments to this emissions trading law to make it workable and realistic."²⁰ The realistic approach referred to could also be described as less threatening and immediate for the voting public and for National's potential support parties. Two of National's three future support parties, ACT and the Māori Party, were opposed to an ETS per se, while the third, United Future, opposed the form of the ETS introduced by Labour.

The Māori Party outlined its position on climate change in its 2008 election policy document.²¹ The policy document confirmed the need to address climate change and the Māori Party's commitment to a carbon tax. It also emphasised the need to reduce the impact of an ETS on low and modest income earners.²² The policy document also restated the Māori Party's overarching fundamental principle: the significance of the Treaty of Waitangi as "the founding document of our Nation."²³ The two policy areas of protecting people at the lower end of the economic spectrum and

17 "Reviewer to investigate Ngai Tahu claim" (2 September 2008) TVNZ <tvnz.co.nz>.

18 (10 September 2008) 650 NZPD 18724.

19 Te Ururoa Flavell "Māori Party Fights to Protect Treaty Settlements" (press release, 10 September 2008).

20 Nick Smith "ETS Shambles Parallels EFA" (press release, 3 September 2008).

21 Māori Party "Election Policy 2008" (2008) Māori Party <www.maoriparty.co.nz>.

22 Māori Party, above n 21.

23 Māori Party, above n 21.

honouring the Treaty provided fertile ground for the future negotiations between National and the Māori Party on climate change and the development of s 3A.

ACT, at this point, was campaigning most vociferously against any form of climate change legislation. In a speech to the public on 29 September 2008, ACT leader Rodney Hide stated: "We should dump the ETS and withdraw from Kyoto. We should not have to send our hard-earned dollars to the Russians."²⁴

B Immediately Post-2008 Election

Despite this strongly worded statement, immediately following the 2008 election, ACT gave the appearance of a willingness to moderate its position on climate change. ACT's confidence and supply agreement with National reflected that apparent shift in position. The agreement acknowledged that ACT had campaigned on a policy of abolishing the 2008 ETS but stated:²⁵

If a rigorous select committee inquiry establishes a credible case that New Zealanders would benefit from action by New Zealand ... ACT would be prepared to support legislation giving effect to such action.

National, for its part, agreed to delay the implementation of the legislation and agreed to a review of the 2008 ETS by the ETS Select Committee.²⁶ The Māori Party's confidence and supply agreement with National did not contain specific commitments in respect of climate change but required both parties to act in accordance with the Treaty of Waitangi.²⁷

As a precursor to the cracks that subsequently developed into chasms in respect of climate change policy between National and ACT, the terms of reference for the ETS Select Committee did not include an examination of whether New Zealanders would benefit from action in respect of climate change. The Committee was directed on the clear basis that climate change was a legitimate issue to be dealt with and to: "Examine the relative merits of an emissions trading scheme or a tax on carbon or energy as a New Zealand response to climate change."²⁸

24 Rodney Hide "Dump the ETS" (speech to Public Meeting, Franklin Centre, Pukekohe, 29 September 2009).

25 "National-ACT Confidence and Supply Agreement", above n 12.

26 "National-ACT Confidence and Supply Agreement", above n 12.

27 "Relationship and Confidence and Supply Agreement between the National Party and the Māori Party" (16 November 2008) New Zealand National Party <www.national.org.nz>.

28 "Select Committee Details: Emissions Trading Scheme Review" (11 December 2008) New Zealand Parliament <www.parliament.nz>.

C The ETS Select Committee Review August 2009

The ETS Select Committee's report on 31 August 2009 included four minority reports, two of which were from National's support partners, the Māori Party and ACT. Both favoured a direct carbon tax over an ETS.²⁹ ACT continued to question the reliability of the science behind climate change. In adopting this extreme position, ACT inadvertently provided an opportunity for the Māori Party to enter the role of supporter for National in the ETS amendments. Labour differed on significant issues such as the timing of the entry of agriculture into the ETS and whether or not an intensity approach was the correct one.³⁰ The Committee did not make specific recommendations as to the form of legislation and instead suggested that "a full and comprehensive regulatory impact analysis be undertaken preliminary to any amendments to the Climate Change Response Act 2002."³¹

The report's section on the impact of an ETS for Māori identified four areas of concern exclusive to Māori. The first three issues were: the negative impact of the ETS on the value of forests that were part of Treaty settlements; the economic impact on Māori households who were at the lower end of the socio-economic spectrum; and the fact that Māori had only relatively recently received Treaty settlements and so were early on in the self-determination development continuum. In addition, a fourth issue was the potential alienation of land by the imposition of an encumbrance that was a tax on emissions, in contravention of the Te Ture Whenua Māori Act 1993.³²

The report's conclusion in respect of the treatment of Māori interests was to "recommend [to the Government] that the obligations of the Crown to Māori, including those under the Treaty of Waitangi, not be compromised by the New Zealand Emissions Trading Scheme."³³

D The Minister's Ongoing Negotiations across the Political Spectrum

A review of communications between the Minister for Climate Change and the Ministry for the Environment shows that, well before the release of the ETS Select Committee's report, Ministry officials were discussing amendments to the ETS legislation with the Iwi Leaders Group³⁴ and the

29 Emissions Trading Scheme Review Committee *Review of the Emissions Trading Scheme* (31 August 2009) [ETS Select Committee Report].

30 Labour promoted entry of the agricultural sector earlier than 2015, as proposed by National, and sought that credits to emitters should be allocated on the basis of an industry's historical emissions (rather than on the basis of the intensity of their actual emissions) with an uncapped number of units allocated to those receiving free allocation in exposed industries.

31 *ETS Select Committee Report*, above n 29, at 7.

32 At 72-77.

33 At 75.

34 The Climate Change Iwi Leaders Group was established in October 2007 to support Māori to participate in policy development in respect of climate change.

Māori Reference Group Executive.³⁵ The negotiations began as early as 13 May 2009 when "Ministers met with the [two groups] to discuss engagement over possible amendments to the NZ ETS."³⁶ At this point no formal reference was made to a Treaty clause being included in the ETS legislation but National was considering a number of options to secure the support required to pass a new Bill. On 10 August 2009, three weeks before the release of the ETS Select Committee report, Cabinet had already given approval for the Minister to issue drafting instructions to the Parliamentary Counsel Office for the amending legislation.³⁷ When seeking Cabinet authority to issue drafting instructions, the Minister made no express mention of an intention to include a Treaty clause in the amending legislation, but there was an apparent air of confidence from the Minister as to the political viability of the Bill.

The basis for the Government's determination to have the legislation passed before Copenhagen is explicable.³⁸ Although New Zealand had an ETS in place, it was not the moderated scheme that National had promised voters. It is not difficult to envisage the potential embarrassment for the Government in attending Copenhagen with an ETS in place that it did not support and was intending to amend. For the Māori Party, the pressure on National from the upcoming Copenhagen conference resulted in gains for its constituents that may otherwise not have eventuated.

The ongoing uncertainties as to cross-party support exposed by the ETS Select Committee report, coupled with the imminence of the Copenhagen conference, resulted in National redoubling its efforts to finalise the legislation after receipt of the report. In early October 2009, the Minister summarised proposals for amendments to the climate change legislation to the Cabinet Legislation Committee.³⁹ In this document, which was released to the public, the Minister stated his intention to include a Treaty clause in the amending legislation and acknowledged that such a clause had, at the very least, been part of the consultations with Māori that had already occurred. He noted "[t]he Bill complies with the principles of the Treaty of Waitangi"⁴⁰ and further that:⁴¹

35 The Māori Reference Group Executive was established from the Māori Reference Group in 2007 as a Māori consultative group on climate change.

36 Stuart Calman *ETS Report: Engagement with the ILG and the MRGE in Relation to Possible Amendments to the ETS* (Ministry for the Environment, Briefing Paper 09-B-02046, July 2009) at 2.

37 Cabinet Minute "Amendments for a Moderated Emissions Trading Scheme" (10 August 2009) CAB Min (09) 28/10.

38 For example Smith "Government Welcomes ETS Review Committee Report", above n 13.

39 Nick Smith "Climate Change Response (Moderated Emissions Trading) Amendment Bill: Approval for Introduction" (8 October 2009) <www.mfe.govt.nz>.

40 At [12].

41 At [14].

I have had high-level engagement with the Iwi Leadership Group in relation to the matters to be included in the Bill. I will work with the Māori Party on the introduction of a Treaty of Waitangi provision into the Bill at the committee stage.

The overriding purpose of the proposed amendments was to honour National's commitment to its voters to delay and moderate the impact of the climate change legislation. What emerged from the Minister's comments in respect of high-level engagement with the Iwi Leaders Group was his intention, also, to assuage the concerns of Māori interest groups.

Most of the Ministry's advice to the Minister in respect of the inclusion of a Treaty clause in the 2009 amending Bill has been withheld by the Minister under the Official Information Act 1982. However, the Minister did receive a warning from the Ministry for the Environment on 9 September 2009, concerning the addition of the proposed Treaty clause to the legislation. The one departmental recommendation from this time that is available for public scrutiny advised the Minister to: "Note the more parts of the Act that are covered by treaty clauses, the greater the risk of uncertainty, cost and delay from litigation."⁴²

A comparison between s 3A and Treaty clauses in other legislation shows that the warning from the Ministry was heeded, with a highly detailed and prescriptive drafting style being adopted. This point is expanded on in Part VI.

Throughout this period Labour and National had also been negotiating in attempts to establish agreement on an amended ETS. On 19 August 2009, the Opposition Spokesperson on Climate Change stated that "Labour, like the Government, wants a broad based agreement on an emissions trading scheme" but added the caveat that Labour would be irresponsible to "enter into a bi-party deal without decent, credible, and independent financial analysis."⁴³

Subsequently, on 15 September 2009, Labour abruptly announced its withdrawal from talks with National. It cited as the cause National's surprise announcement that it had reached an agreement with the Māori Party. The "furious" Labour leader Hon Phil Goff MP announced:⁴⁴

We were in the midst of negotiations and they have reached a separate deal, without notice, and that can only be seen as a breach of trust ... negotiations entered into by Labour in good faith, at the request of National, have ended because of bad faith on its part.

National, in turning away so resolutely from Labour to seek support from the Māori Party, was accused of being motivated purely by the quest for power. The Hon David Cunliffe MP stated that

42 Ministry for the Environment *Moderated NZ ETS: Free Allocation for Fishing Quota Owners and Insertion of a Treaty of Waitangi Clause* (Briefing Paper 09-B-02726, September 2009) at 3.

43 Charles Chauvel "No ETS Deal Without Proper Policy Analysis" (press release, 19 August 2009).

44 Phil Goff "Labour Cries Foul, Quits Climate Change Talks" (15 September 2009) TVNZ <tvnz.co.nz>.

"The pollsters said to John Key: 'Thou shalt not allow a deal with the Labour Party on climate, lest they be seen as statesmen.'"⁴⁵ Arguably, a more feasible explanation is that National found the concessions sought by the Māori Party more palatable than those sought by Labour. The Minister for Climate Change stated:⁴⁶

I have to say that we wanted to get an agreement with Labour ... Time got tight and – unlike my discussions with the Labour Party which leaked all over the place – our discussions with the Māori Party were totally confidential. The key difference was that Labour assumed there was only one deal, and that it was with Labour.

IV THE MĀORI PARTY – WHAT IS THE IMPORTANT THING? IT IS PEOPLE, IT IS PEOPLE, IT IS PEOPLE

The integrity of the Māori Party in supporting National's moderated ETS was attacked throughout each stage of the parliamentary process in the House.⁴⁷ Arguably, the Māori Party's support for the 2009 amending Bill exemplified the Party's high level of responsiveness to its constituents and adherence to its motto that the important thing to the Party is people. Formerly a Labour Minister, Hon Tariana Turia MP set up the Māori Party after resigning from Labour and Parliament on 17 May 2004. Her resignation was in response to Labour's apparent disregard for the principles of the Treaty of Waitangi, demonstrated by Labour sponsoring legislation to vest New Zealand's foreshore and seabed in the Crown.⁴⁸ Māori constituents voiced strong dismay at the route Labour was taking. A cooperative relationship that had hitherto seemed improbable between the Māori Party and National began to evolve.

Three of the principles espoused in the Māori Party Constitution are relevant to the accommodations eventually reached between National and the Māori Party over the ETS. The first is "[t]he party's ... commitment to Te Tiriti o Waitangi as the founding document of this nation",⁴⁹ the second is the Party's commitment to low and modest income earners and the third is the guiding principle of kaitiakitanga.⁵⁰ The term kaitiakitanga is Māori in origin and translates as the responsibility for "guardianship, protection, preservation or sheltering" of all resources.⁵¹

45 (24 November 2009) 659 NZPD 8019.

46 (24 November 2009) 659 NZPD 8019.

47 See (24 September 2009) 657 NZPD; and (24 November 2009) 659 NZPD.

48 Foreshore and Seabed Act 2004, enacted on 18 November 2004.

49 The Māori Party "The Rules of the Māori Party: Constitution" <www.maoriparty.org>.

50 The Māori Party, above n 49.

51 "Glossary" Te Ara Encyclopedia of New Zealand <www.TeAra.govt.nz>.

The inevitably negative impact of the ETS on the value of Treaty settlements and on the position of low income earners created difficulties in terms of reconciling the ETS with the Māori Party's Constitution. On the other hand, National's intention to moderate any scheme that was designed to preserve the environment was also problematic in view of the party's commitment to kaitiakitanga. The Māori Party faced considerable internal conflict in lending its support to National to enact the moderated ETS.

Tariana Turia had, until August 2009, focussed heavily on the concept of kaitiakitanga when speaking in regard to climate change legislation. An example of her strong position is reflected in an uncompromising speech she made on 27 August 2008:⁵²

Fundamentally, the Emissions Trading Scheme is limited by being nothing more than an Emissions Trading Scheme, when what we really require is an Emissions Reduction Programme. ...

Reducing our emissions is about honouring our commitment to those who have passed on, that we will leave this planet in a better state for those who come after us. ...

To make the world a better place, we need to live differently.

WE ALL need to live differently.

The ETS Select Committee minority report from the Māori Party stated categorically: "The Māori Party continues to oppose the introduction of an ETS ... we do not agree that an ETS will make a sufficient contribution to lowering our domestic emissions."⁵³

The report proceeded to endorse the introduction of a carbon tax regime on the basis that "a carbon tax is a simpler regime, which provides certainty on price".⁵⁴

On 27 August 2009, a few days before the ETS Select Committee's report was released, a point of order was raised in the House by Labour's Hon David Parker MP, who was a member of the ETS Select Committee. He sought a ruling that a minority report be tabled because a member of the Select Committee had "sought to change a minority report and has stopped publication of the report."⁵⁵ The minority report was that of the Māori Party. This action exemplified the intensity of the struggle within the Māori Party in reaching a final position. Ultimately, the Māori Party's change in position occurred in response to the wishes and needs of its people who received significant financial concessions and the addition of the Treaty clause as part of the pact with National in respect of the ETS legislation.

52 Tariana Turia "Māori Party on ETS" (press release, 28 August 2008).

53 *ETS Select Committee Report*, above n 29, at 113.

54 At 114.

55 (27 August 2009) 656 NZPD 5964.

V PROCEEDING THROUGH THE LEGISLATIVE PROCESS

A Introduction to the House and the First Reading

The Minister introduced the 2009 amending Bill to the House on 24 September 2009. At the outset he signalled his intention to move that the Bill be referred to the Finance and Expenditure Committee with an instruction for it to report back to the House on or before 16 November 2009 (that is, within a contracted two-month period). The advanced nature of the negotiations between National and the Māori Party were unveiled when the Minister acknowledged the support of the Māori Party in his introductory remarks:⁵⁶

Had it not stepped up to the mark, we would most likely have been forced to defer again introducing a price on carbon, and we would go to Copenhagen with the climate change policy unsettled. ... The changes agreed with the Māori Party have halved the cost to households, will see thousands more low-income homes insulated, will see the government working with iwi on afforestation schemes, will see better support for our fishing industry, and will see ongoing Māori involvement as we progress forward on climate change policy.

For its part, the Māori Party was less categorical and identified a need for further consultation as there was "a lot to talk about and nail down".⁵⁷ The Māori Party would support the Bill "in the expectation of our agreements being honoured".⁵⁸

The first reading debate proved tumultuous. The proposed Treaty clause featured prominently. Opposition members commented adversely on the manner in which the Treaty clause was to be introduced into the legislation. Hon Charles Chauvel MP was concerned that the Treaty clause would not be introduced by the Māori Party until the Committee of the whole House stage.

The late introduction of the Treaty clause to the House appears to have been a deliberate stratagem by the Minister. In a briefing the night before the introduction of the Bill, the Minister had indicated that a Treaty clause was "to be inserted in the final version of the legislation. But ... will not be introduced by the Māori Party until the Committee of the whole House stage".⁵⁹ Chauvel also noted with concern that other concessions to the Māori Party would not be included in the Bill and would be dealt with by variations to Government policy elsewhere.

The tenor of Labour's speeches in the first reading debate reflected Labour's frustration and bitterness that National had entered into an arrangement with the Māori Party while negotiating with Labour. The Green Party opposed the proposed amendments. Sir Roger Douglas, MP for ACT, was

⁵⁶ (24 September 2009) 657 NZPD 6856.

⁵⁷ At 6868.

⁵⁸ At 6868.

⁵⁹ At 6858.

strident in his condemnation of the deal between National and the Māori Party to introduce a Treaty clause, arguing that:⁶⁰

... the deal-making that went on around it, is of the worst kind. ...

Already we hear that the emissions trading scheme legislation will include a Treaty of Waitangi clause, which means that Treaty settlements will be looked at afresh, that iwi fishing interests will be allocated carbon credits, ... As it turns out, National has the support of the Māori party only for the bill to be referred to the select committee. It is obvious who has the leverage here.

The Bill passed its first reading by a narrow majority of 63 votes to 58 and the House referred it to the Finance and Expenditure Committee.

B The Finance and Expenditure Committee

The Finance and Expenditure Select Committee described the enormity of its task and the haste with which it was required to act in reporting on the Bill in its statement:⁶¹

The bill was introduced on 24 September 2009 and was referred to us for report by 16 November 2009.

By the submission closing date of 13 October 2009 we had received 379 written submissions, the majority of which were from individuals. We heard from 128 submitters over five days between 15 October and 27 October 2009.

Māori were well-represented in the 379 submissions to the Committee. Confusion as to how far advanced were negotiations over the Treaty clause is evident at this point. The speeches of members of Parliament at the first reading of the Bill suggest the inclusion of a Treaty clause was a virtual certainty. Two prominent Māori groups, Te Rūnanga o Ngāi Tahu and the Iwi Leaders Group, however, continued to lobby for the inclusion of a Treaty clause in their submissions to the Select Committee. Te Rūnanga o Ngāi Tahu, in proposing a Treaty clause, raised the issues of kaitiakitanga, of the financial impact of the legislation upon its members and of the almost inevitable devaluation of Treaty settlement assets as a result of an ETS.⁶²

The Iwi Leaders Group was not coy about the power held by the Māori Party. In a call for input into its submissions it noted that:⁶³

60 At 6865.

61 Finance and Expenditure Committee *Report on the Climate Change Response (Moderating Emissions Trading) Amendment Bill* (16 November 2009) at 2.

62 Te Rūnanga o Ngāi Tahu "Submissions to the Finance and Expenditure Select Committee on the Climate Change (Moderated Emissions Trading) Amendment Bill".

63 Iwi Leaders Group "Iwi Leadership Group Viewpoint – Hauraki" (28 October 2009) Hauraki <www.hauraki.iwi.nz>.

The National Party can only progress this Bill through agreement with the Māori Party. The National Party, if it has agreement with the Māori Party, will pass this Bill under urgency by 26/11 and before Copenhagen.

In its submissions to the Select Committee, the Iwi Leaders Group raised as its paramount concerns: kaitiakitanga, inter-generationalism, iwi economic interests and the need for equitable outcomes. Accordingly, it sought the following amendments to the Bill:⁶⁴

- a. Insertion of a Treaty clause;
- b. Complementary measures – we encourage the Committee to consider providing statutory ... safeguards for a range of complementary measures, with particular emphasis on buffering exposed communities from experiencing disproportionate burdens from the Bill.

The Māori Party was frank about the influence of iwi leaders on its policy-making. In an interview on 18 October 2009 about exactly what the Māori Party required to give the Bill its full support, Turia stated:⁶⁵

Well I think in the end, it's not so much particularly what the Māori Party want, it is what the iwi leadership want, and they are the ones who have been leading the dialogue, they have been asking us to definitely sign up to it.

What emerges from the Finance and Expenditure Committee's report is a formal acknowledgement of the shift in the Māori Party's position as it adjusted and adapted its approach to align with National. Although subtly worded, the change is fundamental. It is a qualified acceptance of an ETS rather than a carbon tax. Although at this point retaining a minority view, its position is recorded as follows:⁶⁶

... the Māori Party preferred a fixed price on carbon through a carbon tax, because it would provide for greater control over activity. ... However the current context is that we have an emissions trading scheme in place. ... For the Māori Party the worst-case scenario is for nothing to happen.

The Māori Party set out four objectives to be met, both in the legislation and in a wider policy sense, for it to give its outright support to the Bill. These objectives reflected the submissions by the Iwi Leaders Group and Ngāi Tahu:

- ensuring that vulnerable communities did not bear an unfair burden under the scheme;
- delivering increased environmental sustainability across a number of policy areas;

⁶⁴ Iwi Leaders Group for Climate Change "Submissions to the Finance and Expenditure Select Committee on the Climate Change (Moderated Emissions Trading) Amendment Bill" at [2].

⁶⁵ Interview with Tariana Turia (Guyon Espiner, TVNZ, 18 October 2009).

⁶⁶ Finance and Expenditure Committee, above n 61, at 22.

- Te Tiriti o Waitangi/Treaty of Waitangi being provided for in the scheme so that, no matter what future changes are made, Treaty settlements are respected;
- amendments in terms of fishing, farming and forestry for the Māori economy.⁶⁷

The Māori Party's report also set out what was required from the Treaty clause in its statement that: "This clause must provide more than simple procedural participation and deliver substantive outcomes that accommodate the full breadth of Treaty rights and interests."⁶⁸

One possible explanation for the late introduction of the clause into the legislation is that the final form proposed for the clause was still under negotiation. The other equally plausible explanation for the late introduction is that little was likely to be achieved by putting it before the Select Committee given the virtual inevitability of the Committee being split, due to the wide array of views on the legislation.

The Finance and Expenditure Committee produced five minority reports because of the "widely divergent views on this bill amongst ... members".⁶⁹ The minority reports cited multiple concerns with the Bill, including concern about amendments being introduced by way of Supplementary Order Paper as an example of bad process.

National, supported by United Future and the Māori Party, was not deterred. The Minister wrote to the Chairman of the Iwi Leaders Group on 19 November 2009, outlining his hope to see the Bill passed. He acknowledged the concerns of the Iwi Leaders Group and iwi generally about the impact of an ETS and confirmed his intention to add a Treaty clause to the legislation. He specified:⁷⁰

That clause would place an explicit obligation on the Crown to consult with Māori on areas of delegated legislation and decision-making of most importance to Māori. Critical amongst those is the involvement of Māori in reviews of the ETS.

On the same date the Minister wrote on a without prejudice basis to Mark Soloman, Chairman of Te Rūnanga o Ngāi Tahu.⁷¹ He set out a proposal to settle Ngāi Tahu's new claim under the Treaty. The Minister's settlement proposal was for Ngāi Tahu and four other iwi, all of which had settled Treaty of Waitangi claims before the initial 2002 Act, to set up an entity to use 35,000 hectares of

⁶⁷ At 22 and 23.

⁶⁸ At 23.

⁶⁹ At 2.

⁷⁰ Letter from Hon Dr Nick Smith to Dr Apirana Mahuika (Chair of Iwi Leadership Group) regarding proposals to add Treaty clause to legislation (19 November 2009) at 1.

⁷¹ Letter from Hon Dr Nick Smith to Mark Soloman (Chairman of Te Runanga o Ngāi Tahu) regarding proposals to settle Treaty grievances re the ETS (19 November 2009).

Crown land for a period of 70 years. That entity would be entitled to retain 100 per cent of any offset carbon credits (known as New Zealand Units) earned for that duration.⁷²

C Second Reading, Committee of the Whole House and Third Reading

On 24 November 2009, just eight days after the Finance and Expenditure Committee's minority reports were released, the second reading, Committee of the whole House stage and third reading were held under urgency.

The Treaty clause was introduced at the Committee of the whole House, by the Māori Party's Rahui Katene MP, as an amendment to Supplementary Order Paper 98, in the name of Hon Nick Smith MP.⁷³ The clause is set out in full as an Appendix to this article. "In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi", it placed obligations on the Minister or Chief Executive to consult with Māori in respect of forestry and fishing allocations, the making of regulations and Orders in Council, and the gazetting of targets. It also provided for Māori participation in future review of the 2002 Act as a whole.

The requirement for the Minister to consult with Māori in the areas of most fiscal relevance to them – fishing, farming and forestry – was an important feature in securing the support of the Māori Party for the Bill. These areas have traditionally formed the foundation of the Māori economy. Introducing a Māori perspective in implementing the legislation was also a critical concern.

Labour, while expressing ongoing concern as to the process by which s 3A had been introduced, indicated that they would support s 3A. Hon David Parker MP described the Treaty clause in the following manner: "So far as I have been able to gauge from reading it now, it looks quite a well-drafted clause. It is likely that Labour will support that amendment."⁷⁴

The inclusion of s 3A in the legislation is, however, part of a wider picture. Additional significant concessions for Māori, which were signalled correctly by Charles Chauvel to be outside the framework of the legislation,⁷⁵ were also fundamental to the agreement ultimately reached by National and the Māori Party. The Māori Party listed the following gains made by it for its constituents:⁷⁶

- Impacts of power and petrol price charges will be halved.

⁷² New Zealand Units – offset carbon credits – are units issued by the Registrar of the New Zealand Emission Unit Register: see <www.eur.govt.nz>.

⁷³ (24 November 2009) 659 NZPD 8000.

⁷⁴ (24 September 2009) 659 NZPD 7984.

⁷⁵ (24 September 2009) 657 NZPD 6858.

⁷⁶ Tariana Turia and Pita Sharples "Māori Party Makes Gains in ETS Negotiations" (media statement, 14 September 2009) <www.maoriparty.org>.

- A specific proposal to enhance the Government's energy efficiency assistance (including home heating and insulation) for low income households.
- Treaty clause in the legislation to ensure Crown's obligations to its Treaty partner are not compromised by the ETS.
- Recognition that iwi have issues with respect to deforestation provisions and their specific Treaty settlements where they have unknowingly been disadvantaged.
- A commitment from Government to work with iwi and the Maori Party to find solutions for iwi with forests returned in Treaty settlements pre-ETS.
- Climate Change Iwi Leadership Group to play an ongoing role in international negotiations to allow for offsetting.
- Potential for Treaty partners to be jointly involved in afforestation programmes to deliver both climate change and biodiversity benefits.
- Maori Party to be consulted closely on review of the Permanent Forest Sink Initiative and terms of reference and membership of the reference group.
- Allocation of NZUs to iwi quota holders in respect of the fisheries industry.
- Maori Party to be consulted, and iwi agricultural interests represented, in an agricultural advisory group.
- Maori Party input into a National Policy Statement under the Resource Management Act on indigenous vegetation to protect New Zealand's unique biodiversity.
- Government to work with the Maori Party to invest in domestic research priorities and an international initiative to address agricultural greenhouse gas emissions.
- Maori Party input into ongoing dialogue on a broader environmental policy programme.

With these concessions in place, the Māori Party continued to support the Bill and it passed its third reading with s 3A intact – though not without a parting shot from Labour's Hon David Parker MP, who again drew attention to his party's concerns about the process by which s 3A was introduced in the following statement:⁷⁷

We have agreed to the Treaty clause in this legislation, which says that Treaty principles ought to be honoured in terms of consultation around forms of regulation. I felt somewhat uncomfortable doing that, because it did not go through the normal select committee process and it was just dumped in the bill yesterday.

VI THIS TREATY CLAUSE

Does s 3A satisfy the Māori Party's vision of a broad, meaningful Treaty clause⁷⁸ or is it, as described by Green Party MP Metiria Turei, "a very complicated clause" which is "very narrow in its

⁷⁷ (24 November 2009) 659 NZPD 8059.

⁷⁸ Finance and Expenditure Committee Report, above n 61, at 23.

approach"?⁷⁹ The drafting directions to the Parliamentary Counsel Office for s 3A have been withheld by the Minister under the Official Information Act on the basis of legal professional privilege.⁸⁰ Although the specific drafting instructions cannot be examined, s 3A can be reviewed on the basis of well-established principles and a comparison with other Treaty clauses.

Treaty clauses are included in domestic legislation because the Treaty of Waitangi does not directly create legal rights or obligations. The Treaty has been described as existing in "a shadowland: half in and half out of the law."⁸¹ Treaty provisions now appear in a wide number of statutes that "vary in the effect they give to the Treaty".⁸²

As one author points out, the force of such provisions differs markedly amongst statutes.⁸³ For example, s 4 of the Conservation Act 1987 requires that the Act "be interpreted and administered" to "give effect to the principles" of the Treaty. This can be compared with s 9 of the State-Owned Enterprises Act 1986, which is worded negatively to require that: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi." A less compelling form is found at s 8 of the Resource Management Act 1991, which requires only that persons exercising functions and powers under it "shall take into account" the principles of the Treaty of Waitangi.

Section 3A differs markedly from these older Treaty clauses in the detail afforded to the obligations placed upon the Crown to give effect to the principles of the Treaty of Waitangi. Section 3A includes nine specific areas in which the Minister must consult with Māori in decision-making under the Act.⁸⁴ As already noted, these relate to forestry and fishing allocations, the making of regulations and Orders in Council, the gazetting of targets and Māori participation in future review of the climate change legislation. This is consistent with Legislation Advisory Committee guidance on the drafting of Treaty clauses,⁸⁵ which states that "[w]here possible the Māori rights or interests affected should be identified in the legislation, together with specific

79 (24 November 2009) 659 NZPD 8022.

80 Letter from Minister for Climate Change Issues to Anna Skellern refusing request for information under the Official Information Act 1982 (24 May 2011).

81 Matthew Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207 at 207.

82 Legislation Advisory Committee "Guidelines on the Process and Content of Legislation – 2001 edition and amendments" (May 2001) [LAC Guidelines] at 76.

83 Palmer, above n 81, at 208.

84 See Appendix.

85 LAC Guidelines, above n 82, at ch 5. The Legislation Advisory Committee was established in 1986 to provide advice to departments on development of legislation and on drafting instructions to the Parliamentary Counsel Office.

means of protecting them".⁸⁶ A similar approach can be seen in another statute of the same vintage: the Environmental Protection Authority Act 2011. This statute establishes the Māori Advisory Committee to advise the Environmental Protection Authority on policy, process and decisions.⁸⁷ Reference to concrete obligations is, however, the exception rather than the rule in Treaty clauses found in New Zealand legislation.

The specificity of s 3A is, however, arguably a double-edged sword. While the terms of s 3A provide some certainty as it "means that a Court (or anyone else for that matter), can focus on interpreting *how Parliament* intended to 'recognise and respect' the principles of the Treaty by turning to the specifics",⁸⁸ two aspects of s 3A have the potential to place limitations upon the breadth and force of this Treaty clause.

The first possible restriction on the effectiveness of s 3A lies in the question as to what is meant by the requirement that the Minister "consult" with Māori. The Court of Appeal has provided an interpretation of the term consultation, stating that it involves "listening to what others have to say, considering their responses and then deciding what will be done."⁸⁹ The judicial interpretation of the term does not, however, insert any requirement for agreement at the conclusion of such dialogue. The extent of consultation required is, therefore, open to interpretation by the Minister of the day.

The second restriction is that, in circumscribing the issues in respect of which the Minister is required to consult with Māori, the Act creates no overarching provision for Treaty principles to be considered. It is true that s 3A begins by acknowledging the Crown's "responsibility to give effect to the principles of the Treaty of Waitangi" – a broad statement of obligation that can be equated to the language contained in robust Treaty clauses such as s 9 of the State-Owned Enterprises Act. But whereas that section is cast in the language of enforceable obligation, the opening language of s 3A is nothing more than a statement of purpose and does not create any enforceable legal obligation.

These possible limitations are inherent in the structure of s 3A, and leave little room for the flexibility that the Court of Appeal considered necessary in the interpretation of s 9 of the State-Owned Enterprises Act in *New Zealand Māori Council v Attorney-General* where the Court declared:⁹⁰

⁸⁶ LAC Guidelines, above n 82, at 131.

⁸⁷ Environmental Protection Authority Act 2011, ss 4 and 18.

⁸⁸ Palmer, above n 81, at 211.

⁸⁹ *Wellington International Airport Limited v Air New Zealand* [1993] 1 NZLR 671 (CA) at 675.

⁹⁰ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 673.

... the Treaty must be interpreted according to its principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise.

An argument for optimism in respect of the effectiveness of s 3A is, however, found in the section of Matthew Palmer's article which poses the question, "Why Refer to the Treaty?". The author considers the place and interpretation of the Treaty in legislation. He suggests two distinct but complementary purposes underlying Treaty clauses:⁹¹

... I suggest that the most important reason to refer to the Treaty of Waitangi in legislation is if the state wishes to reinforce the symbolic value of the Treaty. ... The second reason to refer to the Treaty in legislation is if Parliament intends to create some legal effect that is relevant to the Treaty. This is the instrumental value of legislation: its practical effect.

Section 3A can be said to be constructed in a manner that serves both symbolic and instrumental purposes. The symbolism of the provision is contained in its statement of purpose: "to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi". In referring to the principles of the Treaty, the formulation of s 3A "indicates that it is the spirit and intent of the Treaty which is important rather than its bare words",⁹² and also that the specific obligations imposed on the Crown will be interpreted and applied in light of these overarching principles.

Section 3A is also instrumental in nature. It requires ongoing consultation by the Minister with Māori in respect of pre-1990 forest land, fishing allocation and regulation-making. As well as these obligations of consultation, s 3A(d) is a further instrumental provision that relates to the appointment and conduct of a review panel. It requires the Minister to:

... ensure that the review panel has at least 1 member who, in the Minister's opinion, has the appropriate knowledge, skill, and experience relating to the principles of the Treaty of Waitangi and tikanga Māori to conduct the review ...

It additionally requires the terms of reference for the review panel to incorporate reference to the principles of the Treaty of Waitangi.

With the inclusion of both instrumental and symbolic purposes in the one piece of legislation that "combine to reinforce each other",⁹³ s 3A has the potential to be an effective Treaty clause, despite lacking general application. The fact that its two purposes strengthen each other is a further source of

91 Palmer, above n 81, at 209.

92 At 208.

93 At 212.

confidence in the effectiveness of this Treaty clause, particularly in comparison with those provisions referred to above that are drafted in a manner that is purely symbolic in nature.

VII IMPLEMENTATION AND ADJUSTMENT

A Has the Crown Complied with s 3A?

1 The Review Panel

An examination of the efficacy of s 3A during the course of 2011 already revealed a number of areas in which compliance by the Crown could be tested. The panel to review the ETS was set up in December 2010 and commenced its review in February 2011. It included two members who have knowledge, skill and experience of the principles of the Treaty of Waitangi and tikanga Māori, thereby satisfying and indeed exceeding the requirements of s 3A(d)(i), which requires only one such member. The members appointed were Chris Karamea Insley⁹⁴ and Dr John Wood.⁹⁵ Section 3A(d)(iii) requires reference to the principles of the Treaty of Waitangi in the terms of reference for the panel. The terms of reference complied with this provision in the requirement that: "The panel will have regard to the principles of the Treaty of Waitangi in conducting its review."⁹⁶

The panel invited submissions from Māori interest groups and the final report of the panel confirmed that "[t]he Panel has heard extensively about the impact of the ETS on Māori".⁹⁷ Its recommendations included significant areas in which the impact of the ETS on Māori could be ameliorated. Examples of these recommendations are:

- the continuation of measures such as the home insulation programme to mitigate the impacts on vulnerable households, including Māori;⁹⁸
- the Government's continuation and strengthening of the existing afforestation schemes to encourage greater Māori participation in respect of pre-1989 forests;⁹⁹ and
- developing amendments to the Act to reduce application requirements for Māori freehold land in multiple ownership.¹⁰⁰

94 A company director with specialist knowledge of forestry and tikanga Māori and a sound understanding of the Treaty of Waitangi.

95 Chief Crown Negotiator for Ngāi Tūhoe and the Whanganui River.

96 Ministry for the Environment *NZ Emissions Trading Scheme (NZ ETS) Review 2011: Terms of Reference* (2011) at 2.

97 Emissions Trading Scheme Review Panel *Doing New Zealand's Fair Share: Emissions Trading Scheme Review 2011* (Ministry for the Environment, Final Report, June 2011) at 9.

98 At 62.

99 At 63.

100 At 64.

The apparent level of consultation with Māori and attention to the detailed concerns raised by Māori interest groups indicates an adequate level of compliance with s 3A by the Review Panel in this period.

2 *Consultation*

The Minister's obligations to consult under s 3A also appear to have been substantially complied with. The input of Māori is evident in the regulations brought into force under the 2002 Act since the enactment of s 3A. For example, the influence of Ngāi Tahu is evident in the allocation of fishing quotas.¹⁰¹ Ngāi Tahu were consulted and had an opportunity to make submissions in respect of the insertion of minimum thresholds for fishing quotas. Ngāi Tahu's preferred approach (that no minimum threshold be required) was ultimately accepted in the allocation plan.

Amendments to the Forestry Sector Regulations in 2011 also provided an example of meaningful consultation by the Minister with Māori.¹⁰² The Ministry notified and offered briefings to Māori bodies, including the Iwi Leaders Group, the Māori Reference Group and the Federation of Māori Authorities, in respect of the proposed changes to the Regulations. The Federation of Māori Authorities subsequently received a face-to-face briefing.¹⁰³ The issue of concern for Māori was the assessment of carbon sequestration for exotic versus indigenous species. Their submissions were received and the assessment process amended in a manner which addressed their concerns. In response to a direct question in the House from Rahui Katene MP as to the general effectiveness of s 3A, the Minister stated that s 3A was an effective Treaty clause because:¹⁰⁴

... in any of the regulations we have developed for the emissions trading scheme we have had to make extra efforts to consult iwi and to ensure that their views are reflected in the decisions that the Government makes.

B The Evolving Nature of the ETS Legislation

While the ongoing adjustment of the ETS as a whole is already evolving,¹⁰⁵ any significant adjustment to s 3A appears less likely. Although political parties are increasingly divided as to the desirability of including Treaty clauses in legislation, in the words of the Legislation Advisory Committee, the Treaty has "been judicially described as 'part of the fabric of New Zealand society'

101 Climate Change (Fishing Allocation Plan) Order 2010 (SR 2010/134).

102 Climate Change (Forestry Sector) Amendment Regulations 2011.

103 A national collective of Māori authorities.

104 (19 October 2010) 667 NZPD 14543.

105 For example see the Climate Change Response (Emissions Trading and Other Matters) Amendment Act 2012.

... and has become a constitutional standard."¹⁰⁶ The risk to the efficacy of s 3A lies in the inherent uncertainty as to the level of good faith of future governments in terms of consultation with Māori. To be effective, s 3A relies on the government of the day interpreting the need to consult in as full a sense as did the Government of 2008–2011. The words of the Minister are, however, likely to be prophetic when he stated categorically "climate change and ETS policy will change going forward and the reviews of the ETS will be pivotal in determining future policy in this area."¹⁰⁷ As long as the review panel includes a minimum of one member fluent in tikanga Māori and Treaty issues, input into the evolution of the ETS as a whole from a Māori perspective at least seems assured. The continuing high level of consideration given to this input is less certain due to the real likelihood of changing loyalties among political parties under the MMP system.

VIII CONCLUSION

The process by which s 3A evolved illustrates the compromises and concessions political parties must make to enact legislation in an MMP system. The timing of the then impending Copenhagen conference was critical to the haste with which National needed to pass its amended ETS. National had to satisfy its voting public but maintain international integrity by having in place an ETS it could support. The Māori Party was willing to compromise its principles in order to provide responsive representation to its powerful lobby groups and constituents. Formal recognition of the Treaty of Waitangi was critical for the Māori Party. If the Māori Party had refused to negotiate on the ETS, National would almost certainly have obtained the support it required elsewhere. The Māori Party then stood to lose the significant financial concessions it gained in policy areas, as well as the consultation with and participation by Māori required by s 3A. The answer to the question implicit in the statement: "In the end the Māori Party has traded a lot, although the price it extracted has yet to be seen",¹⁰⁸ is that the Māori Party extracted a great deal more than it would have, had it chosen not to participate in the enactment of National's moderated ETS.

106 LAC Guidelines, above n 82, at 72.

107 Letter from Hon Dr Nick Smith to Dr Apirana Mahuika (Chair of Iwi Leadership Group) regarding the inclusion of a Treaty clause in the ETS legislation (19 November 2009) at 2.

108 Clark and others, above n 4.

APPENDIX
CLIMATE CHANGE RESPONSE ACT 2002

3A Treaty of Waitangi (Te Tiriti o Waitangi)

In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi,—

- (a) with respect to section 2B (which relates to Orders in Council in relation to Part 5 of Schedule 3), before recommending the making of an Order in Council under section 2A(8) or (9), the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Māori that appear to the Minister or chief executive likely to have an interest in the order:
- (b) with respect to section 75 (which relates to consultation on a pre-1990 forest land allocation plan), before making a recommendation under section 72, the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Māori that appear to the Minister or chief executive likely to have an interest in the pre-1990 forest land allocation plan:
- (c) with respect to section 76 (which relates to consultation on a fishing allocation plan), before making a recommendation under section 74, the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Māori that appear to the Minister or chief executive likely to have an interest in the fishing allocation plan:
- (d) with respect to section 161 (which relates to the appointment and conduct of a review panel),—
 - (i) the Minister must, when appointing members to a review panel under section 160(6), ensure that the review panel has at least 1 member who, in the Minister's opinion, has the appropriate knowledge, skill, and experience relating to the principles of the Treaty of Waitangi and tikanga Māori to conduct the review; and
 - (ii) the review panel must consult with the representatives of iwi and Māori that appear to the panel likely to have an interest in the review; and
 - (iii) the terms of reference for the review panel must incorporate reference to the principles of the Treaty of Waitangi:
- (e) with respect to section 161G (which relates to regulation-making powers in relation to eligible agricultural activities), before recommending the making of a regulation under section 161G(1), the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Māori that appear to the Minister or chief executive likely to have an interest in the regulation:

- (f) with respect to section 162 (which relates to regulations adding further activity to Part 2 of Schedule 4), before recommending the making of a regulation under section 162(1), the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Māori that appear to the Minister or chief executive likely to have an interest in the regulation:
- (g) with respect to section 163 (which relates to regulations relating to methodologies and verifiers), before recommending the making of a regulation under section 163(1), the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Māori that appear to the Minister or chief executive likely to have an interest in the regulation:
- (h) with respect to section 164 (which relates to regulations relating to unique emissions factors), before recommending the making of a regulation under section 164, the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Māori that appear to the Minister or chief executive likely to have an interest in the regulation:
- (i) with respect to section 224 (which relates to the gazetting of targets), before the Minister responsible for the administration of this Act may set, amend, or revoke a target, the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Māori that appear to the Minister or chief executive likely to have an interest in the target:
- (j) with respect to section 225 (which relates to regulations relating to targets), before recommending the making of a regulation under section 225(1), the Minister must consult, or be satisfied that the chief executive has consulted, representatives of iwi and Māori that appear to the Minister or chief executive likely to have an interest in the regulation.

