

**SUBMISSION BY THE ROYAL FOREST & BIRD PROTECTION SOCIETY  
OF NEW ZEALAND INCORPORATED  
ON THE PRINCIPLES OF THE TREATY OF WAITANGI BILL**

To: Committee Secretariat Justice Committee  
Parliament Buildings  
Wellington

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**Contents**

|   |    |
|---|----|
| Introduction and summary.....                                     | 2  |
| Forest & Bird’s work with iwi and hapū .....                      | 4  |
| The purpose of the Principles of the Treaty of Waitangi Bill..... | 5  |
| Proposed principles.....  | 6  |
| Potential implications for the Resource Management Act 1991.....  | 8  |
| Broader concerns with the Bill.....                               | 10 |
| Conclusions .....   | 11 |

## Introduction and summary

1. The Royal Forest and Bird Protection Society Incorporated (Forest & Bird) has been Aotearoa New Zealand's independent voice for nature since 1923. Forest & Bird's constitutional purpose is:

To take all reasonable steps within the power of the Society for the preservation and protection of the indigenous flora and fauna and the natural features of New Zealand.

2. Forest & Bird is a key participant in district and regional planning and consenting decisions across New Zealand. It is a staunch defender of RMA requirements to sustain the life-supporting capacity of ecosystems, maintain biodiversity and protect significant indigenous vegetation and significant habitat of indigenous fauna. Forest & Bird has over 100,000 members and supporters who are passionate about protecting and restoring nature in rural and urban areas throughout the country.
3. New Zealand is a biodiversity hotspot. Plants and animals here evolved in isolation for millions of years, creating an astonishing number and diversity of endemic species including flightless birds and giant snails, found nowhere else on earth. Unfortunately, New Zealand has one of the worst extinction rates in the world on the planet, with many more plants and animals threatened with extinction than anywhere else.
4. New Zealand has the dubious distinction of having the highest proportion of threatened species in the world.<sup>1</sup> Of our terrestrial species that have been assessed, 76% of native freshwater fish, 25% of native freshwater invertebrates, 33% of native freshwater plants, 46% of vascular plants, 74% of terrestrial birds, 66% of native birds, and 94% of reptiles are either threatened or at risk of being threatened with extinction, as well as our bat species (two threatened, two at risk, one is unknown). In our marine environment, the largest in the OECD, where we have more species of breeding seabird than any country, 90% of those seabirds, and a quarter of our marine mammal species are threatened or at risk of extinction.<sup>2</sup>

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<sup>1</sup> Bradshaw CJA, Giam X, Sodhi NS (2010) Evaluating the Relative Environmental Impact of Countries. PLoS ONE 5(5): e10440. <https://doi.org/10.1371/journal.pone.0010440>.

<sup>2</sup> MfE & StatsNZ. (2022). New Zealand's Environmental Reporting Series: Environment Aotearoa 2022. Publication number: ME 1634

5. When it comes to the unique ecosystems found here in Aotearoa, of the 71 ecosystems identified as rare, 45 are threatened with collapse, including 16 ecosystems in inland alpine areas.
6. Due to the highly threatened status of our native species and ecosystems, New Zealand has a national and a global responsibility, through our international agreements (Convention on Biological Diversity and the Kunming-Montreal Global Biodiversity Framework), to ensure that these are protected through appropriate legislative and policy instruments. Nationally, this is set out in the Aotearoa New Zealand Biodiversity Strategy – Te Mana o te Taiao, which sets the strategic direction for protecting our biodiversity through our various statutory tools for the next thirty years.
7. Research shows that more than any other country, New Zealanders' concept of national identity is heavily tied to our connection to the land and to nature. This is despite us having a highly urbanised community (around 87% of us live in cities in towns).<sup>3</sup> This research described that New Zealanders consider our connection to nature as 'spiritual, almost soulful'. International anthropological research describes New Zealanders having a "partnership with nature" and that "to separate New Zealanders from the land, would be akin to severing an artery." For Māori, this connection is one of whakapapa, to describe one's identity by the mountains, rivers, lakes and oceans that determine who you are.<sup>4</sup>
8. Protecting natural resources is fundamental to New Zealand's economy and 70% of our exports rely on the ecosystem services provided by our natural resources, according to the Sustainable Business Council of New Zealand.
9. Internationally renowned economist and author, Professor Tim Jackson, previously the Economics Commissioner for the UK Sustainable Development Commission, defines prosperity as "our ability to flourish as human beings – within the ecological limits of a finite planet".<sup>5</sup>
10. Over the past 50 years, New Zealand has been taking tentative steps towards establishing a more sustainable relationship with our natural environment. It is no coincidence that this has been accompanied by an increasing

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<sup>3</sup> <https://www.doc.govt.nz/globalassets/documents/conservation/biodiversity/anzbs-2020.pdf>

<sup>4</sup> Clifton, J. 2010: Choice, bro. The Listener, 3 July 2010

<sup>5</sup> Tim Jackson *Prosperity Without Growth: Economics for a Finite Planet* (Routledge: 2011)

understanding of, and respect for, the Treaty obligations of the New Zealand Crown.

11. During this period, the work of the Waitangi Tribunal has been influential, casting light on the extent to which Treaty breaches have gone hand in hand with the taking and exploiting of New Zealand's natural resources, often for the benefit of private corporate interests.
12. Some of New Zealand's most progressive and promising policy directions, such as Te Mana o te Wai and Te Mana o te Taiao, have been supported and guided by Treaty principles. If key central and local government bodies such as the Department of Conservation and regional councils are not able to work effectively in partnership with iwi and hapū, the ability of these policies to achieve their objectives will be severely undermined.

### **Forest & Bird's work with iwi and hapū**

13. Since its incorporation, Forest & Bird has worked together with iwi and hapū across the motu in the spirit of Te Tiriti, pursuing the shared objective of protecting Aotearoa New Zealand's remaining indigenous biodiversity.
14. Some significant examples of achievements involving cooperation with iwi and hapū have included Forest & Bird's work with:
  - Ngāi Tūhoe in our campaign to end the commercial logging of native timber in Te Urewera
  - Ngāti Porou and Ngāti Kahungunu to protect wetlands and rivers in the Hawke's Bay
  - Ngāi Tahu and the Department of Conservation on a joint campaign to secure New Zealand's first World Heritage Site in Fiordland.
  - Mōtītī Islanders to establish Marine Protected Areas in the Bay of Plenty
  - Ngāti Kuta and Te Uri o Hīkīhiki to establish Marine Protected Areas in Mimiwhangata and the Bay of Islands.
  - Ngāti Hine Ngāpuhi to protect kūkupa and to address forest collapse due to introduced pest species in Te Tai Tokerau Northland.

15. Forest & Bird feels strongly that Parliament should not be taking steps that will undermine the important role that iwi and hapū play in protecting Aotearoa New Zealand's precious natural environment.

### **The purpose of the Principles of the Treaty of Waitangi Bill**

16. The stated purpose of the Bill is to set out the principles of the Treaty of Waitangi in legislation, and to require these principles to be used where relevant when interpreting legislation.
17. However, the Bill's ability to achieve its stated purpose is hamstrung by the undeniable fact that the principles subsequently set out in the Bill do not accurately reflect either the text or the spirit of the Treaty. This problem for the Bill is then compounded by clause 9, which confirms that: "Nothing in this Act amends the text of the Treaty of Waitangi/te Tiriti o Waitangi".
18. This creates a fundamental internal conflict within the Bill, which would need to be resolved by the Courts, inviting complex, protracted and probably fruitless litigation under many pieces of significant national legislation.
19. As an organisation, Forest & Bird's core advocacy work is carried out under the umbrella of the Resource Management Act 1991 (RMA) and the Conservation Act 1987, both of which include Treaty principles clauses. Forest & Bird therefore has a particular interest in avoiding, as far as possible, legal uncertainty about how these Acts should be interpreted and applied.
20. Forest & Bird also considers that it would simply be bad law to legislate for a set of principles that are plainly contradicted by the same text (the Treaty / te Tiriti) which they purport to be derived from and give effect to.
21. Because clause 7(2) of the Bill would preclude the use of well-established Treaty principles, Forest & Bird's understanding is that the Courts would be obliged to interpret the principles set out in the Bill, as far as possible, in a manner that is consistent with the text of the Treaty / te Tiriti, while also having regard to the Bill of Rights Act 1990, New Zealand common law (including principles of tikanga Māori),<sup>6</sup> and international law (as reflected,

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<sup>6</sup> For an explanation of the legal status of tikanga Māori, see New Zealand Law Commission Study Paper *He Poutama* (NZLC SP24, 2023).

for example, in the United Nations Declaration on the Rights of Indigenous Peoples<sup>7</sup>).

22. This litigious process would be extremely costly and inefficient and would have very uncertain outcomes. Pending final clarification from the Supreme Court, the uncertainty itself would have wide-ranging and unpredictable impacts on many aspects of New Zealand's society, economy and environment.
23. At a time when New Zealand faces the twin threats of climate change and biodiversity loss, such significant uncertainty would risk undermining the effective actions required to protect and restore our natural environment.

### **Proposed principles**

24. Forest & Bird will leave it to other submitters with greater knowledge and expertise to explain the ways in which the proposed principles are inconsistent with both the text and the spirit of Te Tiriti.
25. However, Forest & Bird does have some comments on the wording of Principle 3. Specifically, Forest & Bird asks the Committee to reflect on the fact that Principle 3 would be incompatible with minority rights guaranteed under the Bill of Rights Act 1990.
26. This incompatibility is of particular concern to Forest & Bird both because it potentially restricts the adoption of mātauranga Māori-based practices that would benefit New Zealand's indigenous biodiversity, and because it would create further significant legal uncertainty for everyone (including Forest & Bird) who relies on legislation that refers to Treaty principles while going about their day-to-day business.
27. Forest & Bird understands that, conventionally, it is equality before the law (or equal protection of the law) that is guaranteed,<sup>8</sup> not "the equal enjoyment of the same fundamental rights".<sup>9</sup> This distinction means that the law can protect minority rights (and thereby help to promote equality of all people)

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<sup>7</sup> Resolution adopted by the General Assembly on 13 September 2007,

<sup>8</sup> Bill, cl 6(1) & 6(2)(a)

<sup>9</sup> Bill, cl 6(2)(b), this appears to be a novel formulation in legal terms.

without needing to insist that everyone in society must have “the equal enjoyment” of minority rights.

28. This important distinction can be found throughout international human rights law. For example, Article 7 of the Universal Declaration of Human Rights states that:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination

29. Similarly, Protocol No.12 to the ECHR (prohibition on discrimination) refers in its preamble to:

... the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law...  
Reaffirming that the principle of non-discrimination does not prevent State Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.

30. Likewise, the International Covenant on Civil and Political Rights,<sup>10</sup> begins by affirming that equal and inalienable rights derive from the inherent dignity of the human person, and goes on to affirm that these rights are not “the same” for everyone:<sup>11</sup>

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

31. In Aotearoa New Zealand, rights of minorities are guaranteed by s 20 Bill of Rights Act 1990.

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members

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<sup>10</sup> Ratified by New Zealand on 28 December 1978

<sup>11</sup> Article 27

of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

32. It seems obvious that it would not be possible for those who do not belong to a minority group to be “entitled to the equal enjoyment” of the fundamental right guaranteed by s 20 of the Bill of Rights Act.
33. Therefore, the Bill as currently drafted is plainly inconsistent with the Bill of Rights Act, inviting further litigation and uncertainty until this inconsistency can be resolved by the Courts. Again, this kind of legal distraction and uncertainty would be likely to have a negative impact on Forest & Bird’s ability to fulfil its core organisational functions.

### **Potential implications for the Resource Management Act 1991**

34. Under the RMA, the Treaty principles clause in s 8 operates in conjunction with s 6(e):

#### **Matters of national importance**

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance...

- (e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga:

35. It was Forest & Bird’s legal arguments in the Kaitorete Spit case that led to the High Court finding that ancestral land does not rely on current occupation, establishing an important and far-reaching definition of Māori ancestral land.<sup>12</sup>
36. The Bill would be in direct conflict with RMA s 6(e). This is because clause 7 of the Bill states that:

#### **Principles of Treaty of Waitangi set out in section 6 must be used to interpret enactments**

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<sup>12</sup> *Royal Forest and Bird Protection Society Inc v W A Hapgood Ltd* (1987) 12 NZTPA 76 (HC)



- (1) The principles of the Treaty of Waitangi set out in **section 6** must be used to interpret an enactment if principles of the Treaty of Waitangi are relevant to interpreting that enactment (whether by express reference or by implication).
  - (2) Principles of the Treaty of Waitangi other than those set out in **section 6** must not be used to interpret an enactment.
  - (3) This section applies despite any other enactment, except **section 8**.
37. Under clause 7, above, RMA s 6(e) would also need to be interpreted according to Principle 2 of the Bill,<sup>13</sup> and because the rights of Māori under s 6(e) “differ from the rights of everyone”,<sup>14</sup> it would potentially become impossible for decision-makers to give effect to s 6(e).
38. Cases in which s6(e) has been instrumental in protecting significant environmental values are too numerous to list in this submission. Central to the significance of s6(e) is that the relationships of Māori with their ancestral lands, water, sites, wāhi tapu, and other taonga are fundamentally different to relationships based on individual property rights (i.e. “the rights of everyone”).
39. The apparent effect of the Bill would therefore be that legislation that refers to Treaty principles cannot also protect the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga.
40. Forest & Bird considers it unlikely that the Courts would be able to find that Parliament could legitimately intend such a perverse outcome. Again, this would result in the need for judicial interpretation and accompanying delay and uncertainty while the inherent contradictions in the Bill are ironed out.

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<sup>13</sup> Bill, cl 6

<sup>14</sup> Bill, cl 6(2)

## Broader concerns with the Bill

41. There is a wider risk with the Bill that it could accelerate the extraction and export of raw natural resources without proper consideration of Treaty obligations or environmental effects.
42. Limiting consideration of factors, such as Treaty principles, which can act as a constraint on these kinds of activities would be detrimental to our natural world.
43. All New Zealanders rely on natural ecosystems for our health and well-being, and the health and well-being of future generations. Legislation that undermines environmental protections is short-sighted and irresponsible.
44. The Bill displays a narrow focus on property rights, but property rights tend to treat ecosystems and habitats as commodities, which can be understood and treated in purely economic terms. According to the conventional western legal approach, property rights are not directly accompanied by responsibilities to care for the natural world. They are instrumental rights, i.e. rights to use and exclude others, and they generally treat the natural world merely as a collection of commodities to be used, bought and sold.
45. In contrast, *te ao Māori* (including norms such as *whakapapa*, *whanaungatanga*, *kaitiakitanga*, *manaakitanga*, and *aroha*)<sup>15</sup> is based in deeper reciprocal relationships which do include responsibilities, and which may prevent commodification or development in appropriate cases.
46. Forest & Bird considers that *mātauranga Māori* has great potential to encourage and support a wider societal shift towards care and responsibility for our natural environment, and especially our indigenous biodiversity.<sup>16</sup> *Te Tiriti* and its principles can help us all to construct a more socially and ecologically just economy and society.
47. This has been a consistent theme of Forest & Bird's kaupapa since the Society was founded by Val Sanderson in 1923, valuing *tangata whenua* knowledge and understanding of the natural world and using tools such as

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<sup>15</sup> See, for example, Law Commission Study Paper *He Poutamu* (NZLC SP24).

<sup>16</sup> See, for example Betsan Martin, Linda Te Aho and Maria Humphries-Kil (eds) *ResponsAbility: Law and Governance for Living Well With the Earth* (Abingdon, Routledge: 2019)

the Forest & Bird magazine to share insights from te ao Māori with our membership.

## **Conclusions**

48. Part of the cumulative impact of this far-reaching legislative reform is that it will negatively impact our natural heritage. Excluding the consideration of current Treaty principles is likely to result in worse outcomes for indigenous biodiversity and ecosystems.
49. Forest & Bird opposes the Bill in its entirety.