THE ROLE OF THE WAITANGI TRIBUNAL AND THE DEVELOPMENT OF A BICULTURAL JURISPRUDENCE

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I. Background and Introduction

The Waitangi Tribunal's purpose is explicable in terms of the malady it was meant to cure. The proclamation of sovereignty that spawned our modern state was based upon a treaty between Britain and the Maori tribes—the Treaty of Waitangi. It was a treaty of cession in which the Crown undertook to protect native (Maori) interests (though in the Maori view it was equally an alliance in which the Maori authority, or rangatiratanga, would also be upheld).

The malady arose from the large number of settlers whose main purpose in coming here had nothing to do with maintaining the promises of the Crown. It was to the Treaty that Maori turned when land-loss and war threatened their physical well-being, and when amalgamation policies followed to challenge the survival of their culture and institutions. The Treaty however was not provided for in law and the three arms of government remained substantially mono-cultural.

Maori protest, about land and fishing losses, the destruction of their tribal ways and the failure to provide for their culture, was continued with barely a pause and before every forum until, in the heady days of the 1960s, it was taken to the streets.

The Waitangi Tribunal was established in response, in 1975 (though it did very little until 1982). It was comprised of the Chief Judge of the Maori Land Court and two others. Its task was to hear Maori complaints about current policies and practices of the Crown as measured against the principles of the Treaty, and to recommend any changes.

The claims ranged from language concerns to sewage schemes, covering diverse state policies in town planning, environmental management, resource use, public works, education, language promotion and fisheries control. They were generally upheld. In making recommendations the Tribunal was to propose a bicultural approach to lawmaking and administration and to the formation and delivery of public policy and services.

In the peculiar New Zealand milieu, and though Maori are a minority, the bicultural approach received some acclaim. The Tribunal's recommendations resulted in the re-writing of many Acts, the restructuring

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of government departments and the departmental auditing of proposed legislation for consistency with Treaty principles. The Tribunal's membership was expanded, in 1985 and 1988, and is now sixteen with seven Maori Land Court judges able to assist as presiding officers. The Tribunal now sits in divisions.

The constitution is uniquely bicultural, the Tribunal being comprised of both Maori and Pakeha personnel, demonstrating in the words of its empowering statute "the partnership between the two parties to the Treaty".[1] Few treaties (if any) between native and settler groups fall to be interpreted by a body representative of both sides and so the constitution of the Tribunal itself reflects an important principle.

In 1985 the Tribunal's jurisdiction was expanded to consider those old Maori claims against the Crown that some have likened to the contents of Pandora's box. Already one such claim has been concluded, the Tribunal's recommendations for a scheme of tribal restoration (as distinct from strict compensation) being accepted by both sides. Seventeen more claims are now being dealt with by Tribunal hearings, mediation under the Tribunal's direction, or independent negotiations. Research is progressing on many more. There are over one hundred claims.

The Tribunal's power is limited to that of making recommendations. There is some opinion that the resolution of Maori claims on strictly legal lines would produce impracticalities, at least for the Crown. There is another that strictly legal processes would not do justice to many Maori claimants either. On the other hand, however, the courts have intervened where they have been able to provide the force of legal sanction that the Tribunal lacks. A decision of the Court of Appeal in 1987, restraining the sale of Crown assets without a prior arrangement for Maori claims, was a spectacular example attracting enormous public interest.[2]

The interplay between the Tribunal and the courts, and the initiatives of the legislature and executive in promoting new Maori policy, has been a distinctive feature of the last five years. This article however is not about those matters. It is about the earlier thrust of the Waitangi Tribunal to promote a bicultural law and the way that has developed.

In considering the accommodation of Maori in the law, the Tribunal was faced with various options, including legal pluralism, and the division of legal services to provide separate units for Maori. It chose instead what might be described as a single jural order with bicultural capabilities as the option most expressive of the Treaty and best suited to the New Zealand milieu. But the Tribunal merely recommends. It does not itself initiate a new legal methodology, but is at best a harbinger of one to come.

This article considers the emergence of a bicultural approach by examining the way the Tribunal conducts its own operations, and by

[1] Treaty of Waitangi Act 1975, s. 4(2A)(a).
[2] *New Zealand Maori Council* v. *Attorney-General* [1987] 1 N.Z.L.R. 641.

considering the development of the law by the courts. It concludes that the moves to accommodate Maori circumstances, procedures and values predicate the growth of a distinctive bicultural legal regime, and one in which the Treaty will increasingly be seen as a source of law.

II. PROCEEDINGS IN THE WAITANGI TRIBUNAL

The Tribunal's proceedings reflect its mission, as broadly seen, to propose relief for the indigenous section of the community through full enquiry into their many Treaty claims against the state (which have previously lacked recourse to independent assessors), and to promote proposals that might engender a more enduring amity. It deals with past and present acts of state and is as much concerned with policy as law, dealing with claims against the Crown and "the practical application of the Treaty"[3] – factors that immediately suggest it should proceed without undue legalism.

To achieve its mission, the Tribunal adopts the legal mores and procedural protocols of both Maori and Pakeha cultures. Slavish adherence to the rituals of one may well invite the criticism that the means have determined the end. It must also be obvious that over-dependence on legal rules suited to the determination of more regular cases, of comparatively narrow compass or those founded on relatively "fresh" causes of action, is inappropriate when catering to claims against certain broad socio-economic policies of the state, or against Crown actions of last century. The Tribunal must aim for lasting settlements, and future criticism that the Tribunal's enquiries were overly restricted by technical rules could only discredit them.

Sensibly then, the Tribunal is directed by its governing statute to "inquire" into claims, rather than hear them,[4] and it may

- commission research,[5]
- act on unsworn testimony,
- receive as evidence statements, documents, information or other matters that would otherwise be legally inadmissible,[6]
- appoint its own counsel for any claim,[7] and
- adopt te kawa o te marae, or Maori customary modes of procedure.[8]

Indeed, the Tribunal has all the powers of a commission of enquiry (save that of awarding costs),[9] and may regulate its own procedures.

[3] Treaty of Waitangi Act 1975, long title.
[4] Ibid., s. 5(1)(a).
[5] Ibid., 2nd. sch., cl. 5A.
[6] Ibid., 2nd. sch., cl. 6(1).
[7] Ibid., 2nd. sch., cl. 7A(1).
[8] Ibid., 2nd. sch., cl. 5(9).
[9] Ibid., 2nd. sch., cl. 8(1). The limitation on the power to award costs may be seen as an advantage to Maori, especially where their claims are unsuccessful. In "successful" cases, the Tribunal has sometimes recommended the payment of claimants' costs, and these have been met. It should be noted that proceedings under the Treaty of Waitangi Act 1975 are restricted to claims by Maori against the Crown.

These special arrangements are not intended to create a Tribunal that is lax, a "kangaroo court" as it has been called, or one that is exotic, as the Maori Land Court, with its native component, is sometimes thought to be. Rather, they emphasise the inquisitorial function that must be undertaken to deal fairly with the types of claim that may be brought; and if as a result the Tribunals' powers and discretions are unusually wide it merely emphasises the greater responsibility that exists to exercise its authority in accordance with principle, not caprice or whim. This is particularly so since the Tribunal has more than the attributes of a commission that advises government on matters of policy. It also has duties characteristic of a court, to make findings of fact and interpretation in order to decide whether a claim is well founded.

Two of the Tribunal's distinctive procedures arise directly from the nature of its business and the needs of its clientele, relating respectively to pleadings, or the way claims are proposed, and to hearings on marae.

The Tribunal has willingly permitted the expansion, amendment or even substitution of claims, and has dealt with issues not mentioned in the claims as filed. It has not required that parties be bound to their pleadings but instead has striven to notify necessary changes to those interested, as they are made, and to allow for consequential adjournments (though it has added considerably to the time taken to dispose of cases). Some changes have fundamentally altered the original contention.

The need to give full licence to the reformulation of claims is due simply to the circumstances. It is usual, for example, that nominal claimants do not know of all the tribe's concerns. It may also be discourteous to pre-empt the mana of particular subgroups to introduce their concerns themselves. It is important to gather a tribe's claims together, however, and to provide an overall settlement where that is practical. From the Crown's point of view, the government should be apprised of the whole tribal bill before it is asked to pay any part; and, from the tribal perspective, an integrated and total settlement plan is more likely to benefit the common tribal good than discrete arrangements in respect of several matters. In each of the *Manukau, Muriwhenua* and *Ngai Tahu* cases,[10] numerous additions to the claim as filed were made in the course of the enquiry.

In other cases, some claims require separate treatment, as where the interests of the claimants and the tribe cannot be presumed to be the same. This was the case in the *Orakei* claim[11] where the Tribunal resisted the

[10] See Waitangi Tribunal *Manukau Report* (1985), *Muriwhenua Fishing Report* (1988) (both Govt. Printer, Wellington), and *Ngai Tahu Claim* Waitangi Tribunal claim no. Wai. 27.
[11] See Waitangi Tribunal *Orakei Report* (1987) (Govt. Printer, Wellington).

temptation to attach other tribal concerns on matters outside the Orakei area (and which still remain at large).

In addition, the Act itself may cause subsequent claim amendments. The Tribunal may commission research only after a claim has been filed,[12] while, in practice, it is easier to formulate a claim after the research has been done. To gain the benefit of Tribunal-commissioned research, at the Tribunal's cost, claimants have adopted the practice of filing claims that might best be described as pro forma, usually with accompanying requests that a researcher be commissioned, and that leave be given to amend the claim when the research is done.

That thorough and professional research is needed in most cases has been apparent from initial claim appraisals. Claimants may not know how a tribe lost its lands but the size of the original demesnes and the paucity of that left will cause them to ponder the justness of the result. Such lack of knowledge is not surprising when subsequent investigations often point to the most convoluted and confused circumstances, even more tortuous than tortious. Sometimes the losses are explained in conflicting tribal stories, orally passed on without corroborating sources, and claimants do not know which, if any, is right. It matters not, however, if research shows the claim to be ill-founded. The expenditure is justified in quieting an outstanding concern, and though it brings the tribe no material gain a full and honest explanation is also relief of a kind.

Then again, as one cause of action is disproved another may appear. Certain tribal land was thought to have passed to a church in one case, under a deed that was the subject of contention. Research showed that in fact the deed had been disallowed by the Land Claims Commission in the nineteenth century. It transpired that the Governor had come to the church's aid, granting the land under an ordinance enabling native land to be set aside for educational and other purposes. The claim thus acquired a different dimension, dwelling not upon the propriety of the deed but upon the probity of the Governor.

A claim may also be symptomatic of a deeper malady. In one case a tribe sold most of its land to Crown agents in parcels that were obviously too large. When government proposed that the balance should be allotted in individual ownership, the disintegration of all that remained was foreseen, and the tribe reacted by vesting the balance of the land in one person to hold intact for the people. To their great shame he sold it, treating the land as his own. A Supreme Court action to recover it failed. No trust was (or could have been) disclosed on the title and the court would not look beyond it.

Those things happened last century, but what has survived to this is the subsequent tribal decision, encapsulated now in several parliamentary

[12] See Treaty of Waitangi Act 1975, 2nd sch. cl. 5A(1). "The Tribunal may commission . . . any person . . . to investigate . . . any matter *relating to a claim* under section 6 of this Act".

petitions, to claim certain harbours and foreshores that might conceivably have lain outside the boundaries of the earlier sales. It was a desperate attempt to maintain that turangawaewae, or foothold, on which tribal integrity depends. So it is that the claim now before the Tribunal repeats the parliamentary petitions made by the claimants' forebears over many generations, without appreciating that the real malady arose from the initial purchases and the decision to individualise tribal lands against the tribe's wishes. Now that such acts of state can be contested some time-honoured claims are simply anachronistic.

The Tribunal therefore commissions research beyond that which a claim itself might require. It will seek a report on how land passed from a tribe, for example, where landlessness is obvious, in addition to the matters particularly complained of.

It might be thought the Tribunal itself is making the case for the claimants. The purpose however is to expose the whole past, to bring an end to claims rather than leave openings for later cases. The objective is to seek a firm base for lasting settlements, where a remedy is due, not merely to dispose of particular contentions.

The Tribunal, however, must involve all parties each step along the way so that they may be heard on any proposed procedures including the research methodology, the method of identifying issues and the form of the eventual hearing. It has need to ensure the independence of the researchers, that they might report openly to all parties and be available to them for questioning. It must also notify those affected of any changes to the claim, allowing them adequate time to re-arrange their own researches and submissions.

A second area where practice differs relates to proceedings on marae. It was a matter of moment in 1982 when the Tribunal opted for marae sittings to hear the Atiawa people in the *Motunui-Waitara* claim, the first Tribunal claim to result in formal recommendations.[13] A number of lawyers who were involved appeared to cope well enough with the shift to different surroundings and codes of conduct, though at that stage the proceedings were basically on general meeting lines with occasional customary overlays.

The Tribunal said in its report:[14]

> It is useful to record that each hearing was held on the Manukorihi Marae . . . the Tribunal was of the firm opinion that on their home territory the Maori people would be better able to express their feelings and make their concerns known. The Tribunal is completely satisfied that by adopting this procedure it was able to reach the real heart of the matter. This would not have been possible had the proceedings been held in a building such as a Courthouse or in proceedings conducted in the same manner as a court hearing.

[13] See Waitangi Tribunal *Motunui-Waitara Report* (1983), 2nd. ed. 1989 (Govt. Printer, Wellington).

[14] *Motunui-Waitara Report*, ibid., 5.

Since then the Tribunal has extended its use of Maori procedures when sitting on marae. It has also adopted other procedures when sitting off marae. In the more recent *Muriwhenua Fishing Report*, the position was seen this way:[15]

> Our inquiries involved hearings in both Maori and non Maori settings, the Tribunal sitting at marae at Te Hapua and Ahipara respectively for its first two hearings, and subsequently in public buildings in Kaitaia, Auckland and Wellington. The greater part of the Maori evidence was given on ancestral lands, in the Maori language and in a manner with which the elders were accustomed. Those parts of our proceedings were also chaired by a Tribunal member (who is) . . . an acknowledged kaumatua and expert on Maori protocol. Official responses and legal submissions enjoyed, for the most part, the haven of their own familiar surroundings, under conduct of (the legal members) . . .
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> It is not an easy task to capture elders' recollections of the past and the descriptions passed on to them . . . We adapted our procedures as far as we could to accommodate the many Maori witnesses who spoke, and to remove some constraints, we restricted the cross-examination of elders' evidence, requesting counsel to state their concerns so that we ourselves might invite a reply. We accepted group evidence and allowed some discussion as tribal members assisted elders in their recall of events and matters of oral tradition. We dispensed with sworn testimony having regard to the nature of the evidence, the inevitable mixture of fact and opinion, and the presence of kinfolk on a marae to provide the necessary sanction against errors or slanted accounting. We also listened to elders during site visits, in the company of counsel, for it was easier for them to talk of former villages, past events, fishing grounds and practices when standing on the land that recalled those matters to mind.

A tension remains between the need of counsel (and the Tribunal) to maintain an orderly presentation and the tradition that marae proceedings are conducted by local elders, who supervise the order and right of speaking. In practice the problem is not great. For years Maori have adapted marae procedures to cope with different circumstances and the survival of the kawa testifies to its flexibility. Invariably elders defer to the needs of counsel and the Tribunal, and effectively delegate their authority (as was formally done in Muriwhenua); but elders will not hesitate to intervene when an ope (visiting group whether Maori or Pakeha) arrives, for example, and wishes to listen or to be heard. Greetings are necessary for a number of reasons not least of which is the need to assure opposing groups that they are welcome and are invited to share the responsibility for maintaining amicable relationships.

Whether the Tribunal has in fact maintained fair hearings and the rules of natural justice is not a matter that we would (or should) develop here. We advert rather to the questions of policy involved and to the need to understand the procedures before judging them. Without that understanding there is a danger that they will be too readily dismissed or that marae proceedings will become little more than a court sitting in a

[15] *Muriwhenua Fishing Report*, ante n. 10, 11-12.

Maori setting. It is questionable that Maori culture should be so compromised, the very use of a marae dictating a necessary adherence to the principles of marae kawa and a substantial dilution of the protocol of the courts. To uphold the kawa, the Tribunal has been guided by its kaumatua, or senior Maori members, who, in association with local elders, conduct those sessions where Maori give evidence and who endeavour to uphold customary techniques and rules of debate and discussion, using the Maori language.

The Tribunal's marae sittings and proceedings are not meant to be justified by the quantity and quality of the Maori evidence gained alone, nor even by the focus that Maori kawa brings to finding workable solutions. It is equally necessary to maintain a respect for the laws of both cultures and not to assume that the British alone have laws and legal procedures. That in itself is an exemplification of the spirit of the Treaty of Waitangi.

Some prejudice is apparent in the predilection to describe tikanga Maori as lore, not law, as though some magico-religious elements place tikanga in a realm of its own. We might rather observe the contribution of divine inspiration to other legal systems, to Western law no less than to Islamic or Hindu law.

Law, defined broadly as rules of conduct made obligatory by social sanctions, is endemic to all communities. Western law is not universal, despite its adoption by many non-Western countries as a basis for their own state legal systems. Nor is indigenous law and practice invalidated because the peoples concerned have willingly received Western law, or have had it imposed upon them. Thus, Law Professor Masaji Chiba of Japan contends that, despite large-scale changes arising from the need for international or internal conformity, non-Western peoples have each cherished their indigenous law as an integral part of their cultural heritage.[16]

This needs emphasis. Some criticism of the Tribunal's marae procedures, in particular in relation to oaths, cross-examinations and translations, has assumed that the resultant findings of the Tribunal are weak or suspect for no other reason than that the protocols used were not the legal protocols of "received law". In this respect the Tribunal's specific statutory authority to adopt marae procedures offers an incomplete reply.

The Tribunal does not administer oaths on a marae, but there are probably few things so culture-laden as the techniques societies have developed to encourage speakers to tell the truth. For Maori, honest views and measured opinions come best from requiring that testimony be given on a marae, before one's ancestors, who are customarily revered, and before the living community as a whole. Those who have witnessed the

[16] Chiba (ed.), *Asian Indigenous Law in Interaction with Received Law* (1986) (see preface).

interruptions of the kuia (older women), will know how quickly an assertion is demolished if there is any opinion that the speaker is unworthy. For Maori, the truth "will out" on a marae, more readily than in an affidavit, or even before a court.

It needs to be added that, while Maori will submit to oaths and affirmations in court, whether through opinions honestly held or otherwise, they might rightly be offended by an attempt to administer the oath on a marae. It is not proper to suggest that a marae speaker is prone to dishonesty without providential goading.

As to cross-examination, there is authority for the view that it is not as of right before Commissions of Inquiry.[17] Regard must be had to the ostensible purpose for which the enquiry is conducted. The thesis here, however, is that while no direct questioning of speakers occurs on a marae, a form of cross-examination still prevails, and is generally adequate for the Tribunal's purposes. The would-be interrogator states the point of concern, or the alternative point of view, leaving it open to the first speaker to elaborate or explain, and so that doubts are cast if no adequate response is made. This probably would not work for criminal proceedings, where another standard is required, but it operates well for the Tribunal, which is primarily concerned with matters of history, culture and opinion, and where the would-be questioner can dispute the point in issue in submissions or evidence to be given later.[18]

Quite apart from proceedings on the marae, the adversarial system has needed further modification to cope with the voluminous quantity of historical and other scholarly opinion that is received. In the *Ngai Tahu* claim,[19] and with the consent of counsel, only limited questions of clarification were put at the conclusion of such evidence. Opposing counsel were invited to submit written questions and comments later, to which a written rejoinder would be filed, leave being given to recall the witness should that be necessary. This system worked well both in clarifying differences and saving considerable sitting time and costs. It is doubted that extensive oral examination assists the resolution of complex historical issues.

There is some interest also in the use of interpreters. The Tribunal does not employ sentence-for-sentence translations. Marae etiquette does not favour the interruption of a speaker and the interpreter must maintain

[17] *Badger* v. *Commission of Inquiry into Industrial Relations on the Whangarei Refinery Expansion Project Construction Site* [1985] 2 N.Z.L.R. 688.

[18] It is not intended to address the propriety of conducting sittings of the general courts and tribunals on marae. Suffice it to say that, in the authors' opinion, guilt determination in criminal proceedings ought to be determined in the courts. Marae kawa is helpful where mediation, consensus seeking or problem-solving is involved. It will also assist the appeasement of those wronged but not the identification of the wrong-doer (except to the extent that the setting might encourage a confession).

[19] *Ngai Tahu Claim*, ante n. 10.

a written note of what was said, to be delivered later. In addition, the Tribunal acknowledges a difficulty in translating between Maori and English. Languages of common stock, like English, French and German, appear to translate easily from one to the other, but not so Maori and English, where the underlying thought concepts are not the same.[20] Accordingly, and contrary to the norm, the Tribunal may engage, as interpreters, persons of the claimant tribe familiar with the nature of the claim and with the people giving evidence. They may hold discussions with witnesses in order both to clarify and expound what is meant and to ensure that the literal translation is expanded to convey any fuller intent. It is seen as helpful that the interpreters should have rapport with local elders. The elderly sometimes leave gaps, assuming that the listeners know more than they do. The interpreters must occasionally encourage them to expand upon their statements and urge them to develop other areas of knowledge they are known to have.

In the Tribunal's case, of course, there are Maori-speaking members competent to intervene if it appears that the interpreter is overly leading. Counsel may also use their own interpreter and challenge the official account or the conduct of the translation service. Quite often, local people offer immediate translations for lawyers and others present.

This discourse on marae proceedings ought not to obscure the fact that the Tribunal hearings are not limited to marae. The Tribunal will sit in public halls if interested persons wishing to be heard are more comfortable there, or will hear legal argument and closing submissions in courtrooms if counsel so prefer. In the *Ngai Tahu* case, for instance, almost all the extensive Crown and Fishing Industry evidence was given in public venues off marae. But Maori kawa in a modified form was followed there too. Final submissions of both the claimants and the Crown were, however, at the express wish of all counsel presented on marae in the presence of the tangata whenua.

The fact that some matters may be heard in courtrooms ought not to be seen as predicating a trend to more legalism. Stricter court procedures may be necessary when the Tribunal deals in areas where it may effectively decide, rather than recommend,[21] but the Tribunal has not opted for more legalism as a matter of general policy. The position is rather, as was said above, that the Tribunal will respect the legal mores and procedural protocols of both Maori and Pakeha cultures. If it suits the convenience of counsel to present legal argument and submissions in accordance with the rules that lawyers know, and in a courtroom, the Tribunal will

[20] In a recent visit to Japan a number of law professors made similar comments to the Tribunal Chairperson about the difficulties of translating documents between English and Japanese.

[21] A recommendation of the Tribunal that certain former Crown land that has passed to or through a State Enterprise be returned to Maori ownership, may become binding – see State-Owned Enterprises Act 1986, s. 27B as inserted by Treaty of Waitangi (State Enterprises) Act 1988, s. 10.

endeavour to oblige. It is not a case of opting for more of one system than the other, but of maintaining a balance, and of considering what seems best for the occasion.

In all, the Tribunal's procedures are various, and endeavour to meet the needs of the Maori, Pakeha and legal representatives who appear. They are bent to provide an informed data base, contained in public reports that through comprehensiveness and integrity of approach might gain a measure of Maori and Pakeha acceptance, and from which political decisions can be made. The acceptability of those reports depends not only upon the standing and special expertise of Tribunal members and the calibre of commissioned researchers, but upon the proper portrayal of Maori and Pakeha perspectives given in the cultural milieu of their choice. If they are to endure, the ultimate decisions and settlements must be based on comprehensive reports gained without undue constraint or haste.

In this respect, review in the general courts is helpful. Some legal risk-taking is inevitable in meeting cross-cultural needs and in coping with voluminous historical material, risks from which the Tribunal might resile if aggrieved persons were unable to contest particular conclusions, or the fairness of proceedings, elsewhere.[22] To ensure lasting settlements, the parties must maintain recourse to some supervisory authority for the determination of any complaints.

III. DEVELOPMENT BY THE COURTS

While the Tribunal's reports have been credited with an initiative in bringing a bicultural dimension to law and public policy, the Tribunal is not the only player in the field. This part of this paper considers developments within the courts.

The role of the courts is central. The Tribunal has a specialist function and should not be seen as an alternative. The claims it hears are either non-justiciable or those that cannot adequately be dealt with in the general courts due to, for example, a deficiency in the law that prevents Maori circumstances from being fully addressed. Thus the Tribunal is bound to ask if any claimants have an adequate remedy at law, and, if they have, it may decline to consider the matter further.[23] Likewise, if a claim is outside the law the Tribunal may propose legislative intervention so that

[22] The Tribunal's reports are admissible in the general courts, and may be seen as helpful, but the findings are not binding on those courts – *Runanga o Muriwhenua Inc.* v. *Attorney-General*, unreported, Court of Appeal, 22 February 1990, C.A. 88/89, and *Ngai Tahu Maori Trust Board* v. *Attorney-General*, unreported, Court of Appeal, 27 February 1990, C.A. 42/90.

[23] Treaty of Waitangi Act 1975, s. 7(1)(c).

future claims of a similar type may be properly dealt with in the courts thereafter.[24]

The Tribunal's experience in Maori "planning claims" illustrates this. In reviewing certain proposed works in the *Motunui-Waitara* claim[25] it concluded that the relevant planning legislation had prevented the Planning Tribunal from giving proper weight to Maori interests and values. After examining those matters itself the Waitangi Tribunal recommended against the works. The Tribunal nonetheless resisted pressure that the Waitangi Tribunal should maintain a continuing role in assessing Maori "planning claims". In that case and subsequently it has asserted that the planning laws should be changed to put Maori interests squarely (and fairly) within the Planning Tribunal's purview.[26]

One factor against that course and favouring the severance of judicial services has been the Waitangi Tribunal's special expertise to deal with Maori matters. This part of our article will suggest that the development of a bicultural perspective in the general courts will enable an integrated legal system to be developed.

Government was earlier minded to get the majority of Maori claims before the general courts in one fell swoop. A government White Paper of 1986 made a full frontal attempt to land the Treaty on New Zealand's legal foreshore, in a draft Bill of Rights that would have secured it as part of the supreme law, giving the Treaty full legal recognition.[27]

For a number of reasons that proposal did not proceed, but court activity did, and to such an extent as to recall to mind a verse from Arthur Clough:[28]

> For while the tired waves, vainly breaking,
> Seem here no painful inch to gain,
> Far back through creeks and inlets making
> Came, silent, flooding in, the main.

The infusion of a Treaty jurisprudence, with associated steps to accommodate Maori needs within existing law, has been marked by judicial enterprise in five areas –

[24] See Treaty of Waitangi Act 1975, s. 6(3). The Tribunal may recommend to the Crown that action be taken ". . . to prevent other persons from being similarly affected in the future".

[25] See ante n. 13.

[26] The same approach as was taken in the *Motunui-Waitara Report* (ante n. 13) was taken in the *Manukau Report* (ante n. 10), the *Kaituna River Report* (1984) and the *Mangonui Sewerage Report* (1988) (all Government Printer, Wellington).

[27] *A Bill of Rights for New Zealand – A White Paper*, presented to the House of Representatives by Leave by Hon. Geoffrey Palmer, Minister of Justice (Government Printer 1985), and see *A Bill of Rights for New Zealand*, papers collated for Legal Research Foundation Inc. Seminar, Auckland, 16 August 1985.

[28] "Say Not the Struggle Naught Availeth", Arthur Henry Clough (1819-1861).

1. the interpretation of Maori legislation,
2. the application of general laws to Maori circumstances,
3. the development of special statutory provisions for Maori,
4. the re-examination of relevant common law, and
5. the review of legislation against the principles of the Treaty.

(The relevant case-law has been fully analysed in recent dissertations[29] and no more than a summary is proposed here).

1. *The interpretation of Maori legislation*

Until recently, special legislation for Maori did not provide a fertile field for the development of a Maori common law.[30] With one exception it has revolved around the servicing of Maori through state or statutory agencies with a peripheral role only for the courts. The exception has been the provision in the Maori Affairs Act 1953 (and its numerous predecessors) for the judicial administration of Maori lands (and family matters, until 1967), through a Maori Land Court.[31] There was still little room for a case-law development, however, for Maori land legislation has consistently presented a tightly prescriptive scheme to "regularise" Maori affairs within Western precepts.

Judicial activism nonetheless came about. It began in the 1960s in response to Maori demands for greater control of their lands. The Maori Land Court developed a previously obscure section of its rather large statute to provide for a new form of land trust. The subsequent growth of Maori land trusts was spectacular. In the 1970s, the same provision was used to aggregate numerous titles under one hapu or tribal trust, although such tribalism was the very thing that Maori land legislation had originally been meant to destroy.[32]

Gradually the court extended the interpretation of its governing Act in the light of customary preferences, recognising traditional perceptions of group rights and kin structures, for example, to modify its approach to partition and alienation.[33] (It was about this time that the

[29] A number of articles have appeared in the New Zealand Universities Law Review, in the New Zealand Law Journal, and in publications of the New Zealand and District Law Societies and of the New Zealand Planning Council. Many of the modern cases are reviewed by Williams, "Maori Issues II", June 1989, New Zealand Recent Law Review, 177-183.

[30] A point taken in *The Maori Land Courts*, Report of the Royal Commission of Inquiry, 1980 (Government Printer, Wellington).

[31] The Maori Fisheries Act 1989 has since added to the jurisdiction of the Maori Land Court and further extensions are proposed in the Runanga-Iwi Bill.

[32] For a detailed account see McHugh, *The Fragmentation of Maori Land* (1980) Legal Research Foundation Publication No. 18.

[33] Some of the formative Maori Appellate Court decisions include: on alienation, *re Tikouama 3B2* (1975) 14 Waikato- Maniapoto A.C.M.B. 362, *re Horowhenua 9A6B* (1981) 13 Whanganui A.C.M.B. 50, and *re Motukawa 2B22A* (1981) 13 Whanganui A.C.M.B. 20; and on partition, *re Manawatu-Kukutamaki 7E1B* (1981) 13 Whanganui A.C.M.B. 76; *re Tarawera C6* (1982) 9 Takitimu A.C.M.B. 286; and *re Harataunga West 3B* (1982) 16 Waikato- Maniapoto A.C.M.B. 356.

Department of Maori Affairs began to publish the Maori Land Court's decisions).[34]

Such judicial enterprise has had effect. The court was influential in shaping the opinion that led to a major rewrite of the Maori land legislation. The current Maori Affairs Bill represents a total change in direction. It acknowledges Maori customary preference and shifts the structure of the statute from prescription to the identification of principles and objectives. It challenges the Maori Land Court to fill in the many interstices in the branches of the Act through the development of a body of case-law.

In a final touch, the Runanga-Iwi Bill has introduced provision for tribal self-management bodies. Though long denied to Maori people, such a proposal was contemplated in the Treaty of Waitangi (Maori text). Thus the Waitangi Tribunal proposed "formal recognition to properly structured tribal bodies".[35] Tribal self-management is also provided for in the Draft Universal Declaration on the Rights of Indigenous Peoples.[36]

2. *The application of general laws to Maori circumstances*

Such progress has been made recently in accommodating Maori in the general law that we could too easily overlook the fact that the changes of the 1980s were a reversal of the trend of the thirteen preceding decades.

Occasional cases in the annals of legal history may illustrate the judicial amelioration of law in the light of customary practice—though not necessarily to profit Maori.[37] More usually, however, the courts declined to admit of any Maori dimension unless Parliament directed.[38] In that respect judicial practice reflected the official policy for the amalgamation of Maori into Western social, political and legal regimes.[39] Special statutory provisions were viewed as temporary aberrations until assimilation could

[34] See *Tai Whati—Judicial Decisions affecting Maori and Maori Land 1958-1983*, Dept. Maori Affairs 1983 with 1986 supplement.

[35] See *Mangonui Sewerage Report*, ante n. 26, 41.

[36] U.N. document E/CN. 4/Sub:2/1989/33. Refer articles 23 and 24.

[37] See for example *Baldick* v. *Jackson* (1910) 30 N.Z.L.R. 343. The decision, that an Imperial Act recording the Crown's ownership of whales was inapplicable in New Zealand having regard to Maori whaling practices, was not in order to uphold a Maori whaling right, but to disallow the Crown's claim to the ownership of whales as against the non-Maori appellant.

[38] It is not intended to review the array of cases that reject Maori claims to modify the application of laws having regard to their customs, or their claims based upon either the colonial common law or the Treaty of Waitangi. Many other writers have done so but some specialist treatment is provided in three theses: Williams, *The Use of Law in the Process of Colonisation* (1983) Ph.D. thesis, University of Dar es Salaam; Hackshaw, *The Recognition of Native Customary Land Rights at Common Law* (1984) LL.B. (Hons.) thesis, University of Auckland; and McHugh, *The Aboriginal Rights of the New Zealand Maori at Common Law* (1987), Ph.D. thesis, University of Cambridge.

[39] This historical view is adopted from Ward, *A Show of Justice—Racial Amalgamation in Nineteenth Century New Zealand* (1974).

take its course. Accordingly, when in 1960 the Hunn Report listed the special statutory provisions for Maori then remaining, it was to promote not their embellishment but their removal,[40] just as the 1978 Royal Commission of Inquiry into the Maori Land Courts contemplated the courts' early demise.[41]

Current wisdom ought not therefore to deprecate the iniative taken in the judicial attempts to accommodate Maori that began in the last decade. In *Riki* v. *Codd*, for example, the High Court reviewed the circumstances invariably pertaining to elderly Maori as a class, in disallowing a lease of Maori land as an unfair bargain.[42] That approach was taken further by the High Court in 1982, on a family protection case involving Maori litigants in a dispute over an estate comprised mainly of Maori land. The usual application of the relevant law was materially adjusted in the light of the special attitude the Maori were shown to have towards both land and informally adopted children. The rationale was a requirement that the court should pay regard to prevailing social attitudes.[43]

That view was taken yet further by the Planning Tribunal in 1983. In *Auckland District Maori Council* v. *Manukau Harbour Maritime Planning Authority and Liquigas Ltd.*,[44] it was held that, in Maritime Planning, where regard was to be had to "the public interest", Maori cultural values had also to be considered. That would have represented no major conceptual shift except that the Planning Tribunal added that under the same heading the Crown's Treaty obligations were also relevant.

Quite independently, the High Court was to come to a similar conclusion in *Huakina Development Trust* v. *Waikato Valley Authority*,[45] again in respect of a planning matter. As an aspect of public interest, the Treaty was deemed relevant as part of the "social fabric".

Throughout this period the Waitangi Tribunal had urged that Maori values be provided for in planning legislation, the Tribunal reaching that conclusion on its construction of the principles of the Treaty of Waitangi (which is, of course, the only yardstick that it is directed to employ).[46] It did not follow that either the Planning Tribunal or the High Court had need to consider the Treaty. Maori people's values are not Treaty-dependent. Their interests are part of the public interest, their societal norms an aspect of the general social fabric. The Treaty, however, has consistently ranked so high in Maori reckoning that any promotion of

[40] Hunn, *Report on Department of Maori Affairs* (1960) (Government Printer, Wellington), 173-176.
[41] Ante n. 30, 127.
[42] *Riki* v. *Codd* [1981] N.Z.C.P.R. 242.
[43] *Rogers* v. *Rogers and Tatana* unreported, High Court, Whangarei, 1982, A.34/81.
[44] (1983) 6 N.Z.T.P.A. 167.
[45] [1987] 2 N.Z.L.R. 188.
[46] See *Motunui-Waitara Report*, ante, n. 13 and *Manukau Report*, ante n. 10 for the Tribunal's specific recommendations.

Maori interests may not be complete if the Treaty is not advanced with it. The accommodation of Maori values and interests and the recognition of the Treaty may amount to the same thing.

Peihopa v. *Peihopa*,[47] a High Court decision of 1984, has particular significance not just for its sensitivity to the nature of Maori transactions but for its reversal of an earlier opinion. The finding that the Maori transferee of Maori land had taken as trustee for his extended family, compares with the refusal of the courts in the last century to look behind transactions and declare a trust when, to prevent the fragmentation of their tribal estates, Maori had vested their lands in tribal leaders.[48]

Then, in 1988, the costs to Maori in returning deceased persons to their tribal homes was held "reasonable by New Zealand standards", for the purposes of accident compensation, thus softening an earlier decision of 1975 that the costs of tanihanga hui were not.[49]

3. *The development of special statutory provisions for Maori*

The growth of a bicultural dimension is particularly to be seen in the courts' interpretation of special statutory provisions for Maori. For many years, provisions for Maori in general statutes were invariably too specific to provide scope for much case-law development. In 1977, however, following the urging (and draftsmanship) of the New Zealand Maori Council in the last moments of the select committee hearings, government introduced to the Town and Country Planning Act a direction that planning should consider, inter alia, "the relationship of the Maori people to their ancestral land".[50]

The novelty of such a general provision for Maori was reflected in Planning Tribunal attempts to give meaning to the section by defining "ancestral land" (was it Maori land, general land owned by Maoris, or did it mean graves?).[51] It was not until 1987, in *Royal Forest and Bird Protection Society Inc.* v. *Habgood*,[52] as upheld in the Court of Appeal in *Environmental Defence Society and Tai Tokerau District Maori Council* v. *Mangonui County Council*,[53] that it was the relationship that was seen to be important not the definition of the land. In other words, customary Maori attitudes to land had also to be brought into account. This

[47] Unreported, High Court, Whangarei, 1984, A.37/82.
[48] See for example *Ani Kanara* v. *Mair* [1886] N.Z.L.R. 216.
[49] *Estate Stirling Brothers* (1988) A.C.A.A. decision 303/88 and *Re Wall* (1975) A.C.A.A. Decision 1.
[50] Town and Country Planning Act 1977, s. 3(1)(g).
[51] See for example *Knuckey* v. *Taranaki County Council* (1980) 6 N.Z.T.P.A. 609; *Quilter* v. *Mangonui County Council* (1978) Planning Tribunal No. 1 Division, T.C.P. 38/78; *Emery* v. *Waipa County Council* (1979) Planning Tribunal No. 1 Division T.C.P. 549/78; *N.Z. Synthetic Fuels Application* (1982) 8 N.Z.T.P.A. 138; *Auckland D.M.C.* v. *Manukau County Council* (1985) 9 N.Z.T.P.A. 167.
[52] (1987) 12 N.Z.T.P.A. 76.
[53] (1989) 13 N.Z.T.P.A. 197.

realisation was largely a reflection of the mental shift effected during the preceding ten years.

Since then the legislature has adopted different approaches to accommodate Maori needs in general statutes, making direct reference to the Treaty in some cases, defining particular Maori concerns in others, and using a combination of both in yet other cases again. Thus the provisions in section 4 of the Conservation Act 1987 that the Act is to give effect to the principles of the Treaty, and in the long title to the Environmental Act 1986 providing for the Treaty's principles to be brought into account, may be compared with the direction in the Law Commission Act 1985 that the Law Commission should seek a Maori dimension in its proposals for law reform. The former invites a judicial interpretation of the Treaty, leaving an uncertainty in the interim, the other is the succinct application of a Treaty principle and a Waitangi Tribunal recommendation.[54]

There are occasions when it is helpful that an Act should be subject to the Treaty as is argued below, but it is debatable whether it is wise to refer to the Treaty, without further amplification, when the motivating purpose seems capable of description. In this context it is helpful to bear in mind certain descriptions of the Treaty by the Waitangi Tribunal and the judiciary that ". . . it was not intended as a finite contract but as the foundation for a developing social contract"[55] and that "[t]he Treaty has to be seen as an 'embryo' rather than a fully developed and integrated set of ideas".[56]

One may therefore wonder whether, in the Resource Management Bill that provides for the assessment of a Maori perspective in a range of planning and resource use activities, it is necessary to add in clause 6 an additional duty to consider the Treaty when exercising functions under the Bill. By way of comparison the Children, Young Persons and Their Families Act 1989 seeks to cater to Maori needs by providing specifically for Maori whanau, hapu and iwi linkages to be brought into the reckoning on certain matters. The Act does not and need not refer to the Treaty. Nor was there any need for the State Sector Act 1988 to do so when it was able to provide (in section 56) that the employers must have regard to the aims and aspirations of the Maori people.

The Local Government Amendment Act 1989 illustrates how an Act may refer to the Treaty while yet providing certainty. It states that "having regard to the principles of the Treaty the purpose of [. . . the] Act is to

[54] In *Kaituna River Report*, ante n. 26 pp. 19-20, 33, the tribunal recommended that new legislation should be assessed against the Treaty. A government instruction to departments to assess any Treaty implications in legislation they might propose was contained in Cabinet-Office Circular C.O. (86) 10 of 23 June 1986.

[55] *Motunui-Waitara Report*, ante n. 13, 52.

[56] Per Cooke P., *New Zealand Maori Council* v. *Attorney-General* [1987] 1 N.Z.L.R. 641 (C.A.) at 663.

provide for consultation and discussion [between local governments and Maori advisory committees]", and then proceeds to set out the necessary structure and arrangements. It derives from an opinion of the Waitangi Tribunal, in considering the relationship between local authorities and Maori communities, that "the objection rights in planning laws do not fulfil Treaty obligations when there is not the facility for prior consultation with the tribes".[57]

4. *The re-examination of relevant common law*

A significant initiative to accommodate Maori circumstances within existing law came from Williamson J. in *Te Weehi* v. *Regional Fisheries Officer*.[58] The initiative was significant because the doctrine on which it relied had not been employed in New Zealand this century though it had been used in other countries of comparable circumstance and jurisdiction. The doctrine was significant for it depended upon neither statutory provision nor the Treaty. The doctrine, or the common law rule of aboriginal title, considers that any native use or occupation of land or waters before cession, enures as a legal right thereafter unless it is extinguished by conveyance or statute. In this case, it was thought that a customary fishing right had not been extinguished.

It was a major decision insofar as nothing like it had been contemplated in New Zealand before. Nevertheless, while the doctrine provides a place for Maori people within the law, it does not necessarily assist the development of a more bicultural view. It could be, for example, that the doctrine, which derives from a Western legal perspective, gives something much less than Maori people would see themselves as rightfully possessing in terms of the Treaty.[59]

5. *Review of legislation against the principles of the Treaty*

Justification for an express reference to the Treaty without further amplification would appear to arise when a government wishes to honour its Treaty undertakings but is uncertain of the application of the Treaty to the particular case or does not wish to prejudice any alternative Maori opinion. In that instance it may provide for the subservience of the Act to the Treaty, so that either the Crown or the Maori may be free to obtain an authoritative and binding opinion from the courts. That is precisely what happened during the passage of the State-Owned Enterprises Bill in 1986 when the Waitangi Tribunal mooted that the Bill might be contrary to the Treaty and when, due to the exigencies of the situation, Parliament

[57] *Mangonui Sewerage Report*, ante n. 26 47.

[58] [1986] 1 N.Z.L.R. 535 (S.C.).

[59] A view put forward by Boast in "Treaty Rights or Aboriginal Rights?" [1990] *N.Z.L.J.* 32 at 33.

considered that the Bill should proceed but Maori should not want for access to a court of final determination.

The result was the enactment of the Bill with a provision that nothing in it should be inconsistent with the principles of the Treaty of Waitangi, paving the way for the celebrated and landmark decision of the full bench of the Court of Appeal in *New Zealand Maori Council* v. *Attorney-General*, and which provided authoritative directions on the Treaty and its principles.[60]

The terms of that decision need not be examined here. What was significant, for the purposes of this article, was the court's appreciation of the Maori circumstance and its resolve to provide fairly for it, despite the limitations thereby placed on a most significant (and urgent) aspect of the government's economic strategy.

IV. CONCLUSIONS

The growth of a bicultural jurisprudence in New Zealand coincides with national and international movements, an increased social and political interest in the Treaty of Waitangi on the domestic front and a search for a definitive statement on indigenous peoples' rights on the world scene. The formation of opinion in the international community can be traced through the conventions and draft declarations of the International Labour Organisation (I.L.O.),[61] the United Nations Working Group on Indigenous Populations (U.N.W.G.I.P.)[62] and the reports of the committees to which New Zealand must account under the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. The draft declaration of the U.N.W.G.I.P. in particular, calls upon states to "honour treaties" (article 27), and (in article 28), proposes that states should recognise, for indigenous populations,

> The individual and collective right to access and prompt decision by mutually acceptable and fair procedures for resolving conflicts or disputes and any infringement, public or private, between states and indigenous peoples, groups or individuals. Those procedures should include, as appropriate, negotiations, mediation, arbitration, national courts and international and regional human rights review and complaints mechanisms.

[60] See ante, n. 6. The Court of Appeal has since dealt with further Maori claims against the disposal of Crown assets in *New Zealand Maori Council* v. *Attorney-General*, unreported, 20 March 1989 C.A. 54/87, relating to forests, and in *Mahuta* v. *Attorney-General*, unreported, 3 October 1989, C.A. 126/89, relating to coal. In each case, injunctions issued against the Crown restraining the sales.

[61] See *International Labour Organisation Convention (No. 107) on Indigenous and Tribal Populations 1957*, and revision (No. 169) adopted 27 June 1989.

[62] See first revised text of the *Draft Universal Declaration on the Rights of Indigenous Peoples* following the 7th (1989) session of the United Nations Working Group on Indigenous Populations, doc. E/CN. 4/Sub:2/1989/33.

In New Zealand the Waitangi Tribunal provides one such forum, both its purpose and procedures being tailor-made for the task except that it is constrained by its general limitation to recommendations.

In addition, however, the courts, where final determinations are made, have also made much progress in equipping themselves for the purpose, through some innovation in the interpretation and application of the law now freed to some degree from the shackles of "old-world" legalism.

Central to the new development has been the interest in the Treaty of Waitangi arising from political policies and the work of the Waitangi Tribunal. While legislative provisions and juridical interpretation do not (and need not) recite the Treaty in many cases, the accommodation of Maori within the law can be seen as an aspect of Treaty implementation. It is appropriate that in some cases a statute will specifically recite the Treaty as authority for particular provisions.

In its broadest terms the Treaty was an arrangement to provide for two peoples in one country. A law that leaves one section of the community without redress for its legitimate grievances, or that cannot accommodate those cultural preferences of Maori that might reasonably be provided for, is untenable in Treaty terms, and, increasingly, in international terms too. The Treaty of Waitangi may also be seen as a source of law. It is the authority on which sovereignty was proclaimed and English laws introduced. It is also the authority on which Maori claim the continuance of their own rangatiratanga.

While the 1940 Privy Council decision in *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*[63] still holds, that the Treaty does not form part of the domestic law save to the extent that Parliament has provided, recent decisions show the proclivity of the courts to invoke the Treaty as an aid to statutory interpretation. This seems set to be taken further when state responsibilities are under review, if the proposition that treaties of cession are binding upon the Crown in its executive (as opposed to its parliamentary) capacity is affirmed.[64]

Through the interplay of the Waitangi Tribunal, the courts and specific legislative provisions, it is suggested that a bicultural methodology in the management of law can be seen to be emerging. While no comparative analysis has been made at this stage, it is conjectured that such a development in law may be distinctive, and may be seen as a unique contribution from New Zealand to the international debate on indigenous peoples' rights.

[63] [1941] A.C. 308.

[64] The proposition is from McHugh, ante n. 38, and see McHugh, "The Role of Law in Maori Claims" [1990] N.Z.L.J. 16 at 17.

Chief Judge Durie

Waitangi Day
6.2.96

Wellingtonians are said to be cautious of anything from north of the Bombay Hills. If that is so then His Worship the Mayor deserves a special commendation for acknowledging the events at Waitangi. I appreciate too the way he has gone about it.

Some see Waitangi Day as a chance to extol local development. For me, before all else Waitangi Day acknowledges the Crown, the Treaty, Maori and Pakeha and the foundations of the State; and each deserves a black tie tribute.

I feel honoured, as we must all do, that Sir Maurice and Lady Casey share the occasion with us. Since I have descent from the first founder of this district, from Tarataraika for whom Wellington harbour named, and as I have links with the tangata whenua as well, I have some claim here as of right; but Sir Maurice and Lady Casey are special guests. I was touched by the thought that Sir Maurice retired from the Court of Appeal in the year of President Mandella's visit. With all respect to Chief Justice Corbett of South Africa, whom I hold in high regard, I felt that Sir Maurice contributed more than most judges to the President's eventual release from Robben Island.

For my part, on an occasion like this, I would avoid anything too contentious. I propose mentioning only two matters - Wellington Tenths, and Maori sovereignty.

The first is raised since Wellington's caution about northern events began 156 years ago, and because, as a Wellingtonian, I would like to stand in the city's defence. It began when Edward Wakefield made some unkind remarks about Waitangi. He held out for his own transaction, which was a deed of cession for Wellington. He may have had a good case. Lt Governor Hobson, as he then was, and Edward Wakefield, both hoped that Maori would benefit from European settlement, but their approaches were not the same. Hobson sought to reserve to Maori the Queen's royal protection. Wakefield sought to reserve to Maori, 10% of the land. While personally I am attracted more to principle then to price, I would not presume to say who was offering the better deal. More particularly I would not predict the outcome were the choice put

today, of a royal protection, or 10% of all that one could see.

Having attempted that small defence of Wellington's historical position I should now mention Maori sovereignty; and having a moment ago referred to President Mandella I should add that just before the President arrived, a prominent promoter of Maori sovereignty was sentenced to 21 days. I heard at least one Maori opinion that the latter was shortchanged. It was thought that it had assisted the President, in achieving that high office, that his term was 23 years.

Personally, I support most of what I understand of Maori sovereignty, but not the language used nor the tactics employed. For example, I do not think 'sovereignty' is a helpful word, in this context, today. State responsibility, not the absolute power that sovereignty implies, is more appropriate for the modern world. Indeed if it is true that Maori ceded sovereignty, then I think they did the best thing to give it away. It has simply been the cause of too strife and much war.

Aboriginal autonomy is the better term, in my view, and is used in Canada, Australia and USA. It enables us to talk of the problem without playing power games.

Aboriginal autonomy, as I understand it, means approximately that indigenous people should be recognised as having status as the first inhabitants, and should be enabled and assisted if need be to determine their own policy, manage their own resources, develop their own structures of representation, and if need be, to negotiate policy affecting them with the state.

This arrangement appears to have won acceptance in Canada, Australia and United States and it appears to have worked well in improving indigenous and national performance, and in effecting conciliation and peace. I would like to think the same could happen here. I suggest violent protest has significantly diminished in Australia as a result of this change.

It seems to be the growing international view that autonomy is the inherent or god given right of all peoples in their native countries. To deny the right is to cause pain. To acknowledge it is to bring relief - and to everyone. I think of it not as a threat, but an opportunity.

For some years the Waitangi Tribunal has had the task of examining historical records. I would say the single thread that most illuminates the historical fabric of Maori and Pakeha contact over 200 years, has been the Maori determination to maintain their own autonomy, and official attempts to constrain it.

The effective proclamation of autonomy begins with the missionaries, even before the Treaty was signed. It permeated the Treaty discussions. No Maori would have signed the Treaty had any been led to believe that their authority or autonomy would be diminished in any way. The same opinion was apparent in the Maori Parliaments that Governor Browne arranged. It was the main issue in the New Zealand wars. It is central to an understanding of Kingitanga, Paimaririe, Te Whititanga, Ringatu, Ratana, Kotahitanga, Repudiation Movement, and much later it was central to the operation of Maori Trust Boards, Maori Councils, New Zealand Maori Council, Black Power, National Maori Congress, the Maori Economic Development Summit Conference 1994, the Runanga Iwi Act and the like. Through 200 years of history the Maori presumption of autonomy has not changed. Nor can it, for it is that which all peoples in their native territories naturally possess. They have ceased to be a people if it is no longer there.

It is a further feature of this history, that until the 1980s, Maori autonomy, being seen as natural, was presented naturally and not as a threat or demand. Though it was perceived as a threat it was not presented that way. The consistent Maori position was there was a place for both Maori and Pakeha provided Maori autonomy was respected and maintained.

On the eve of the New Zealand wars of the 1860s, as government was preparing to attack him, the Te Atiawa leader Wiremu Kingi wrote simply to the Governor "You should remember that the Maoris and Pakehas are living quietly upon their pieces of land, and therefore do not you disturb them". When the military commander responded with an ultimatum, a virtual declaration of war alleging Kingi was in rebellion, Kingi replied: "Friend, Colonel, salutations to you in the love of our Lord Jesus Christ. You say that we have been guilty of rebellion against the Queen but we consider we have not" (and he then went on to explain his position. He concluded)

"This is my word to you. I have no desire for evil, but, in the contrary, have great love

> for the Europeans and Maoris. Listen, my love is this, put a stop to your proceedings, that your love of the Europeans and Maoris may be true. I have heard that you are coming to Waitara with soldiers, and therefore I know that you are angry with me. Is this your love for me, to bring soldiers to Waitara? This is not love; it is anger. I do not wish for anger; all that I want is the land".

The Taranaki wars, that lasted over nine years, opened with that correspondence. It is difficult to see, that the Maori right of autonomy, which was the issue in that war, was presented as a threat, or was seen by Maori as other than the necessary foundation for peace.

The Kingitanga was established to promote Maori autonomy and it too was attacked. Yet the imagery the Kingitanga used, as the Governor knew full well, was that of

> "the Queen on one side, the Maori King on the other, God over both and love uniting them together". What was the threat in this? The symbols were barely different from that now deployed on the New Zealand Coat of Arms.

After the war Maori adhered to the same position. Te Whiti maintained an autonomous village at Parihaka where 1,500 Maori lived. It was a magnificent and wealthy place described by one media reporter as "vastly superior to any European community of a similar size and existing under similar conditions". In 1881 it was invaded by 1,589 troops and destroyed. Yet before the invasion Te Whiti urged no counter action and addressed his people in these terms -

> "Though the lions rage I am for peace ... though I be killed I yet shall live; though dead I am alive in the peace which shall be the accomplishment of my aim. The future is mine and little children when asked hereafter as to the author of peace shall say - Te Whiti - and I shall bless them".

I have difficulty comprehending why Maori autonomy was seen as threatening 100 years ago. Were it not for the more strident manner of its presentation now, I would have difficulty in understanding why it is still seen as a threat. Australia introduced proposals for Aboriginal

autonomy or self-government about 10 years ago. Since then, from my own assessment from visits there, Aboriginals have stepped forward at least 20 years. Economic activity and the absence of protest there is now profound.

I was intrigued when Cathy Freeman gave expressions to the new deal a few years ago when she won the 500 metres at the games. You will recall she carried the Aboriginal flag on one side, the Australian flag on the other and that both were united in pride. Prime Minister Keating actually rescued Cathy from her manager's criticism. The Prime Minister implied she had properly presented the Australian position.

Aboriginal autonomy is about conciliation by empowerment. It assumes that peace between peoples depends not upon the aggregation of power but its just distribution. It assumes that diversity is not divisive when there is common purpose. It is a subject that has re-entered the international stage and not only because this is the International Decade of Indigenous People. As state tensions have eased conflict between peoples remain, as Bosnia and Rwanda well show, and the next millennium may need to talk not only of United Nations but of the need for United Peoples. Aboriginal autonomy was put down in New Zealand, and the gradual development of a representational structure was destroyed. Some help will now be needed to rebuild it.

It is helpful to conclude these comments with some observations about Maori and the Crown. During the history described Maori maintained that the Crown was on their side, by which they presumed to claim that they were in the right. To understand this position we have also to understand, what I believe to be the case, that for Pakeha and Maori, the meaning of the "the Crown" has not been the same.

Some years ago I was stopped in my tracks when certain older Maori complained that the Waitangi Tribunal required claims to be brought against the Crown. They complained that their claims were against the Government, not the Crown, and they said it was wrong that the Crown should be blamed. It was clearly important to them, that in their view, the Crown had done no wrong.

I was reminded of this again later when talking to a member of the Maori Battalion. We were at his home where photographs on the wall of Michael Savage and Peter Fraser told of the family leaning. I was trying to recall with him whether it was Fraser who was Prime Minister at the time of the war. He sternly told me that while he had enormous respect for Peter Fraser, he wanted me to understand that he gone to war not for the Government but for the Crown.

Since then I have done my best to explain the legal view. I did so over lunch to some elders during a Tribunal sitting. I mentioned first, certain legal maxims, that the Crown's honour is to be preferred to its profit, and again, that the Crown can do no wrong. I then went on to explain that in legal terms the Crown included Parliament, the Ministers and their Departments and the Courts. There was a stoney, silent response.

About a month later on the next Tribunal's visit, the same were waiting for me at lunch time. I discovered there was certainly no difficulty with the thought that the Crown could do no wrong. There was agreement on that. I was then asked to explain however, did I really mean that the Crown included government. I knew the argument was lost before it had begun and no account of explanation would change their views.

I later came to appreciate that the matter had some history. Even before the Treaty was signed the missionaries were talking of the Crown as some sort of millennial prophecy by which a perfect law would come to be and everything would be put right.

I then began to note how often, and without any disrespect, Maori put the Crown as something beyond local affairs. Taurua of Nga Rauru and Pakakohi put it this way when later describing his experience following his surrender during the New Zealand wars.

> On the 13 June 1869 I was taken prisoner and removed to Wellington, where I remained three months before being tried. When my trial came on I waited to see what would be done about the land .... I was told "Taurua, you and your people have done wrong in rebelling against the Queen". I answered "I have not done wrong, I have not carried arms against the Queen but against you, and now you say it's done against the Queen".

Somehow this view of the Crown has survived, at least amongst an older generation. I don't think the younger group care much at all. But if we are not to talk past each other I do think we have to understand this old Maori view of the meaning of the Crown. I am still not sure precisely what it is but I know what it is not. It is not the government. It is not even the monarch but has to do with that which the monarch bears. The Privy Council could be getting warm I suspect, though nobody has said so, that for many older Maori it meant simply - the perfect law - the one that would come and put everything right.

Your worship when I opened I contended that Waitangi Day was to acknowledge the Crown, the Treaty, Maori and then I mentioned others I want to finish by saying that out of respect for the old people, that order was intended.

NEW ZEALAND LAW SOCIETY

Seminar

THE TREATY OF WAITANGI

Leaders:

His Honour Chief Judge ETJ Durie
PB Temm QC
W M Wilson
S Kenderdine

April 1989

W. H. Wilson

6. The Treaty signifies a partnership and requires the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith.

7. The Crown has a duty to remedy past breaches of the Treaty.

The last of these principles raises the interesting question of whether the failure of the Crown without reasonable justification to give effect to the substance of a Tribunal recommendation may in itself constitute a further breach of the Treaty. In the words of Sir Robin Cooke at pages 664-5 of the Maori Council case:

> "A duty to remedy past breaches was spoken of. I would accept that suggestion, in the sense that if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it - which would be only in very special circumstances, if ever. As mentioned earlier, I prefer to keep open the question whether the Crown ought ordinarily to grant any precise form of redress that may be indicated by the Tribunal".

What is clear is that the development and redefinition of the principles of the Treaty will be a continuing and difficult task for the Tribunal and the Courts.

5.7 The Future

Despite its inauspicious beginnings, I believe that in recent years the Tribunal has performed a valuable role by providing a vehicle for Maori claims to be researched, a forum for grievances to be expressed and responded to by the Crown and a source of recommendations to Government as to possible solutions. In doing so the Tribunal has at all times been conscious of, and has on many occasions referred to, the necessity to ensure that in attempting to remedy the injustices of the past we do not create new injustices.

We are at a critical point in the history of race relations in this country. On the one hand, Maori expectations that long standing grievances will be addressed have now been raised by the recent recognition of some of those claims by Parliament, the Courts and the Tribunal. On the other hand, it would be naive to pretend that there is not a developing backlash among other sectors of the community against what is seen as preferential treatment for Maori. Meanwhile the rhetoric of extremists on both sides is producing emotive responses both for and against their position.

The Tribunal may be able to assist in reconciling the present widely divergent views within the community. Hopefully it can do so by exposing breaches of the Treaty which have occurred over the years and making practical and realistic recommendations to compensate for these breaches. At the same time the Tribunal must identify those claims which are not well-founded or where relief is not appropriate.

In order to carry out its functions successfully the Tribunal must have the confidence of the country as a whole. It requires in particular the support of the legal profession, support which I am sure will be readily forthcoming.

5.5 The Workload of the Tribunal

The Tribunal at present has approximately 160 claims listed as awaiting hearing. Without seeking to minimise the extent of this backlog, it is misleading to extrapolate the recent history of approximately one claim being determined per year to conclude that even the claims already notified will take more than a century to clear. Firstly, the increased membership and resources of the Tribunal will enable it to sit in a number of divisions concurrently. Secondly, many of the 160 claims can be grouped into single claims. Thirdly, some claims should be capable of resolution by agreement between the claimants and the Crown, possibly assisted by the involvement of Tribunal members or officers as mediators, once some general principles have been established by decided claims. Almost certainly other claims will not be pursued. As against this it must be accepted that there is a considerable potential for claims by SOE's to clear the memorials against titles to their land.

Taking all these factors into account, it is realistic to expect that within the next few years the backlog of claims will be substantially reduced.

5.6 The Principles of the Treaty of Waitangi

It must be remembered that the function of the Tribunal is to investigate whether the actions complained of are inconsistent with the principles of the Treaty, not with either or both of its two texts. The phrase "the principles of the Treaty" is likewise used in other legislation, such as the State Owned Enterprises Act 1986, the Environment Act 1986 and the Conservation Act 1987. It is therefore necessary to attempt to determine what are the principles of the Treaty.

Professor Orr has recently made a very helpful analysis of the decisions which have discussed these principles. He prefaces his conclusion with the important point that it is not possible to formulate a comprehensive or complete set of Treaty principles. The Tribunal has articulated only those principles which it has thought relevant to the cases before it, adopting a case by case approach. The Court of Appeal did likewise in the Maori Council case. Moreover it is undesirable to attempt to formulate a definitive or exclusive set of principles because the Treaty is a living document which calls to be interpreted and applied not simply as at 1840 but in a contemporary setting.

Having made these observations, Professor Orr identified the following principles of the Treaty.

1. The gift to the Crown of kawanatanga (the right to govern) was in exchange for the protection by the Crown of Maori rangatiratanga (full authority).

2. There are limits on the authority of the Crown to govern.

3. There is a tribal right of self-regulation.

4. The Crown has the right of pre-emption and reciprocal duties.

5. The Crown has an obligation actively to protect Maori Treaty rights.

6.4 The Principles of the Treaty

The phrase "the principles of the Treaty of Waitangi" is not nearly as incomprehensible as it might first sound. The purpose of this section of the paper is to distil out the principles from the NZ Maori Council case and also the Muriwhenua Fisheries findings. The Parliamentary Commissioner's Office has provided an excellent synthesis in "Environmental Management: The Principles of the Treaty of Waitangi'[69] from those and other Waitangi Tribunal reports and I do not propose to unnecessarily duplicate them here.

"Principles" are applied because of the difficulties with the literal words of the texts of the Treaty.[70] Mr Justice Somers in the NZ Maori Council case sees them as the same today as they were in 1840. "Only the circumstances have changed".[71] And Mr Justice Cooke sees the need "for their broad unquibbling and practical interpretation".[72] Mr Justice Casey in that case cites with approval the definition given to the word 'principle' in the Shorter Oxford Dictionary as "fundamental motive or reason of action".[73]

In relation to the section 9 of the SOE Act which contains the very powerful statutory provision

> "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."

Justice Casey went on to make a significant statement. He thought that the deliberate choice of the expression

> " '... Inconsistent with the principles of the Treaty' in preference to one such as 'inconsistent with its terms or conditions' points to an adoption in the legislation of the Treaty's actual terms understood in the light of the fundamental concepts underlying them. It calls for an assessment of the relationship the parties hoped to create by and reflect in that document, and an inquiry into the benefits and obligations involved in applying its language in today's changed conditions and expectations in the light of that relationship." (emphasis added)[74]

Thus section 9 of the SOE Act imports the Treaty's actual terms into the legislation and forces the parties to re-examine the fundamental concepts underlying them.

Earlier Mr Justice Casey says that the thrust of the Article was not only the protection of Maori land but the "uses and privileges" associated with it.[75] Thus there is direct relevance of this dicta to forestry leases, mineral interests and

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69 Appendix J & K.

70 NZ Maori Council case per Bisson J at 714. On the text itself see Bruce Biggs 'Humpty Dumpty, the Treaty of Waitangi' "Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi". Edit by I H Kawharu, op cit at 300.

71 Ibid at 692.

72 Ibid at 655.

73 Ibid at 702.

74 Supra at p 702.

75 Ibid at p 700.

geothermal water on Maori land or expropriated Maori land the subject of the claims.

The President of the Court affirmed Senior Counsel's approach in the NZ Maori Council case to interpreting the principles. He advocated the phrase

> "... should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty. But the State Owned Enterprises Act itself virtually says as much in its own field. The questions in this case are basically about the practical application of the approach in the administration of this Act."[76]

Thus any interpretation has to be broad and effective in order to give effect to the principles and there is justification for taking into account the developments in respect of indigenous peoples rights in international forums.[77] The President gives the fiat to a broad interpretation not only in the context of the SOE Act but also when analysing ambiguous legislation or working out an express reference to the Treaty.

In legislation elsewhere, the phrase, namely section 4 of the Conservation Act 1987 which states:

> "This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi."

and the Long Title to the Environment Act 1986 which includes (inter alia) the phrase:

> "An Act to provide for the principles of the Treaty of Waitangi"

will have much lesser force than section 9 of the SOE Act. However the Conservation Act will attract direct challenge to the use of statutory power should section 4 be contravened, whilst the Long Title to the Environment Act will doubtless be subjected to the inventive scrutiny of lawyers as they attempt to read into it the various issues relating to Maori concerns which are not covered satisfactorily within its main provisions.

Meanwhile the implications of the phrase "the principles of the Treaty of Waitangi" are undoubtedly beginning to be felt in the fields of state enterprises, resource development and resource protection as its application proves an effect threshold test for Crown endeavours and local authorities as Crown agents in the administration of much of the Crown legislation and control of local works. In this way, the principles themselves should begin to have the effect of constitutional guarantees and these guarantees will eventually impact on other areas within our society. Gradually our constitutional framework will be coloured in by "Treaty Principles".

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76 Ibid at p 656.

77 See Benedict Kingsbury's work 'The Treaty of Waitangi: Some International Aspects'. "Waitangi Maori and Pakeha Perspectives of the Treaty of Waitangi" ed by I H Kawharu at 12.

1. The Principle of Partnership

> "The Treaty signified a partnership between races, and it is in this concept that the answer to the present case has to be found. For more than a century and a quarter after the Treaty, integration, amalgamation of the races, the assimilation of the Maori to the Pakeha, was the goal which in the main successive Governments tended to pursue. Now the emphasis is much more on the need to preserve Maori taonga, Maori land and communal life, a distinct Maori identity.
>
> In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State Owned Enterprises Act are not used inconsistently with the principles of the Treaty."[78]

Implied in the judgment is the recognition of a distinctive and separate Maori culture. The duty of the need to preserve taonga, land, community life and the separate Maori identity is no light one and if there is a breach in the context of State Owned Enterprises "the Court will insist it be honoured".[79] It is a strong dictum.

2. The Principle of Reciprocal Obligations

which flows on from the concept of partnership. Mr Justice Richardson saw this as the core concept of the Treaty. Basically the principle is the guarantee of protection in return for the cession of sovereignty.[80] It also stems from the gift of pre-emption of Maori lands; the guarantee to protect what remained of Maori taonga after sale is part of the reciprocal Crown duty. From this flows the importance of acting fairly and reasonably towards Maori in considering the exercise of powers governed by an Act which includes the principles of the Treaty. The obligation of good faith is necessarily inherent in such a basic compact as the Treaty.[81]

3. The Principle of Active Protection

> "The duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practical. ... I take it as implied in the proposition that as usual, practicable means reasonably practicable"[82]

"Active protection" must of necessity put the Crown on the alert - and inquiry, which might inevitably lead to consultation.

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78 NZ Maori Council case per Cooke P at 664. See also Casey J at 703 & 704.
79 NZ Maori Council case per Cooke P at 667.
80 Ibid at 682.
81 Ibid at 684.
82 Ibid at 664 per Cooke P. See also Casey J at 702.

4. The Principle of Honest Effort to Ascertain the Facts

This flows from honesty of purpose as between the parties. The onus is on the Crown when acting within its sphere of conduct to make an informed decision and it must be sufficiently informed as to the relevant facts and the law - which might not inevitably involve it in consultation.[83] (But see 3 above). In some cases extensive consultation and co-operation will be necessary.

5. The Principle of the Right of Redress for Breach

This is outlined by Mr Justice Somers[84] and is a very important one for the Crown. The principle is analysed through the law of partnership

> "... a breach by one party of his duty to the other gives rise to a right of redress by the other - a fair and reasonable recognition of and recompense for the wrong that has occurred." (emphasis added)

Thus His Honour sees the recompense as not justiciable in the ordinary Courts but before the Waitangi Tribunal; Mr Justice Casey also addresses the question of redress for past breaches and sees it as an obligation on the Crown,[85] whilst the President of the Court says that it would only be "special circumstances" that would justify the Crown withholding redress.[86]

> "A duty to remedy past breaches was spoken of. I would accept that suggestion, in the sense that if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it - which would be only in very special circumstances, if ever. As mentioned earlier, I prefer to keep open the question whether the Crown ought ordinarily to grant any precise form of redress that may be indicated by the Tribunal."

6. The Principle of Mutual Benefit

The Tribunal identifies that both parties expected to gain from the Treaty, but in its view neither partner can demand its own benefit without an adherence to reasonable objectives of mutual benefit.[87]

7. The Principle of Options

The general purpose or object of Article the Second is that nothing would impair the tribal interest, as from time to time apparent, in maintaining from the sea sustenance, livelihoods, communities, a way of life and full economic

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83 NZ Maori Council case per Richardson J at 682, 683.
84 Ibid at 693.
85 Ibid at 696.
86 Ibid at 664.
87 Muriwhenua, p 194.

opportunities. There was a duty on the Crown to ensure that Maori retained sufficient resources for their subsistence and economic wellbeing.[88]

The Treaty envisages:[89]

(a) protection of tribal authority, culture and customs with a corresponding conferral on individual Maori of the same rights and privileges as British subjects;

(b) that Maori could develop along customary lines or assimilate into a new way. There was also a third alternative - to walk in two worlds, this option being open to all people;

(c) that there may be a reduction of tribal need but it is not necessarily displaced.

In my view this allows Maori to interchange his rights and privileges under Article the Second and Article the Third.

8. The Principle of Consent

In exchange for this cession of sovereignty and the acceptance of European settlement, Maori would not be relieved of their important properties, which included their interest in fishing, without their full consent.[90]

9. The Principle of the Maori Right to Exercise Rangatiratanga (Tribal self-regulation)

The Court of Appeal continued to develop the concept that is implicit in Article the Second - that there are tribal authorities headed by Rangatira well capable of managing their own resources. Peace law and order was what they sought from the Crown.[91]

The current Crown policies on future devolution to the iwi authorities appear to recognise this principle.

10. The Principle of the Right to Govern Without Undue Shackles

Sir Robin Cooke in the NZ Maori Council case realises the dangers of fettering unreasonably the right of a democratic government to govern.[92]

> "The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected government to follow its chosen policy. Indeed, to try and shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other co-operation."

88 Ibid 213-235.
89 Ibid p 195.
90 Muriwhenua at 239.
91 NZ Maori Council case per Bisson J at 715.
92 Ibid at 665-6.

11. The Principle of the Crown Guarantee to Individual Maori of full exclusive and undisturbed possession of their lands.

This emerges from the dicta of Mr Justice Bisson and in his view is the most important principle within the context of the SOE Act. However, earlier he recognised "other properties' translated in the English text of Article the Second, extends to Maori customs and culture.[93]

12. The Principal of Negotiation for Interference with Rights

Following on from that in terms of the Treaty, the Crown has to negotiate for a right of public entry into tribal possessions

> "In terms of the Treaty, it is not that the Crown had a right to licence the traditional user. In protecting the Maori interest, its duty was rather to acquire or negotiate for any public user that might impinge upon it. In the circumstances of Muriwhenua, where the whole sea was used, and having regard to its solemn undertakings, the Crown ought not to have permitted a public commercial user at all, without negotiating for some greater right of public entry. It was not therefore that the Crown had merely to consult, in case of Muriwhenua, the Crown had rather to negotiate for the right."[94]

6.5 The State Owned Enterprises Act 1986 and the Significance of the Transfer of State Assets

The Significance of Section 9

Apart from the powers which allow Ministers to convert Crown into state assets the significance of the State Owned Enterprises Act 1986 lies in the fact that:

> "Municipal Law, that is to say Section 9 of the State Owned Enterprises Act 1986, recognises the Treaty of Waitangi by expressly limiting the Crown's power to act under the 1986 by reference to the Treaty principles."[95]

Section 9 therefore influences all decisions the Crown is likely to make under the Act. It has the effect of "constitutional guarantee" within the field covered by the Act. Thus Treaty obligations are carried into Municipal Law making Maori rights enforceable by the Courts directly.[96]

The Court was able to find in the NZ Maori Council case that steps had to be taken by the Crown to provide protection for actual and prospective Maori claims to the Waitangi Tribunal in the business of transferring lands and assets to the SOE's. To

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93 NZ Maori Council case at 715.

94 Muriwhenua Report op cit at 307.

95 NZ Maori Council case per Somers J at 692.

96 See also Greig J's observation in Ngai Tahu Maori Trust Board v Attorney-General (interim decision) (CP 559/87, 610/87, 614/87 12.12.1987) in respect of fisheries.