A STATE SERVANT LOOKS AT THE TREATY

By Alex Frame*

Tena ra koutou nga rangatira, nga tauira, nga tangata katoa o te motu o Nu Tirani—Kia ora koutou i raro o te maru a tatou whare tapu te Tiriti o Waitangi.

I. Introduction

This article undertakes three tasks, and is accordingly divided into three parts. In the first part, the central problem of the balance between "te kawanatanga katoa" of the First Article of the Treaty and "te tino rangatiratanga" of the Second Article is addressed. In the second part, I turn to a discussion of the government's most recent statement of policy in relation to the Treaty: the "Principles for Crown Action on the Treaty of Waitangi" of July 1989. It is not improper for an official who contributed to the advice on which the goverment made its decisions as to the final form of the "Principles for Crown Action" to point to some features of the statement of principles which have been little noticed by commentators. In particular, it may be useful to examine more closely the principle of "cooperation" with a view to comparing the concept with its alleged rival—that of "partnership". It is hoped to demonstrate that the former is both more fundamental and more useful than the latter to the development of policy at the practical level.

In the third and final part of the article, consideration will be given to the recently enacted Maori Fisheries Act 1989. It will be suggested that it represents an attempt, no doubt imperfect, to apply the "Principles for Crown Action" to the serious and intractable problem of Maori fishing rights.

II. Kawanatanga and Rangatiratanga: A Central Problem

The central political and legal problem of the Treaty of Waitangi is clearly the accommodation and reconciliation of the concepts of kawanatanga and rangatiratanga as they are found in the Treaty. When I was a law student a quarter of a century ago, the dictum of Chief Justice Prendergast held sway: the "Treaty" was not regarded as a Treaty properly so-called because, it was said, the Maori side lacked the capacity to

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conclude an effective international agreement.[1] When that view was exposed as wrong both as a matter of constitutional law and of contractual principle,[2] not to mention elementary morality, a fall-back position emerged that, in any case, the First Article of the Treaty ceded "sovereignty" to the Crown which could accordingly act with full liberty in a manner which Albert Venn Dicey was wrongly alleged to recommend.[3] The pattern thus emerged of seeking to "read down" the Second Article guarantee of "te tino rangatiratanga" in respect of specified matters. In modern times, some Maori commentators (and some Pakeha claiming to speak for Maori) have been engaged in a remarkable mirror image of the pattern I have just described. First, it was said in the 1970s that the Treaty was "a fraud" (i.e. pretending to be something that it was not in fact, which is the essence of Chief Justice Prendergast's finding). When that line was found to be no less logically problematical for Maori than for other New Zealanders, then the fall-back position emerged. The thrust became to "read down" the First Article and to inflate the Second Article to quite artificial proportions. In the first part of this paper I suggest that neither the First nor the Second Articles are capable of the extreme interpretations I have described, rather that *both* are strong statements and that each qualifies the other.

I shall briefly review what the First Article says in the Maori text, disregarding for the moment the English text altogether. The key words are: "Ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te Kawanatanga katoa o o ratou wenua". Points to note are the use of the intensifying "rawa" (give *completely*), the expression "ake tonu atu" (*forever*), the presence of the word "katoa" after "kawanatanga" (*all* the kawanatanga), and the indication that kawanatanga *pertains to the territories or lands*

1 *Wi Parata* v. *The Bishop of Wellington* (1877) 3 Jur.(N.S.) 72.

2 As to constitutional law, it is a futile exercise to enumerate the supposed characteristics of the "State" and to match to this list the actual characteristics of pre-Waitangi Maori tribal politics. The fact is that those authorised to speak and act on behalf of the British treaty-making power—the Crown—consistently and unmistakeably acknowledged the sufficiency of the Maori Chiefs as parties, and the effectiveness of the Waitangi accord as a treaty. The *Wi Parata* court was not free in 1877 to engage in some enquiry of its own into the credentials of the Maori party to the Treaty of Waitangi. International status is *entirely* a matter of *recognition* by the constituted organs of other states within the international community. The advisers of those states may look at many criteria deriving from their own policies, and including, no doubt, the degree of political organisation of the candidate, but a "State" comes into being *because it is recognised*, not because it meets this or that "definition" of statehood. Indeed, this was explicitly recognised by Richmond J.—who sat on the *Wi Parata* court in 1877—in *Hunt* v. *Gordon* (1884) 2 N.Z.L.R. 160. His Honour stated: "The Crown represents the nation in its foreign relations, and upon the subject of what is or what is not to be recognised as a foreign State or as a civilised Power the Municipal Courts of the empire must take their direction from the Crown . . . the Crown . . . is the highest, and indeed the only, authority upon this subject" (at 184). As to contractual principle, the Crown must surely be estopped from impugning the capacity of the Maori party which it dealt with as possessing that capacity.

3 Dicey had criticised Austin's theory of sovereignty on grounds that it confused "political" with "legal" sovereignty. See, Dicey, *Law of the Constitution* (1885) 67-68.

of the Maori signatories (o o ratou wenua). Whatever "kawanatanga" is, it has been completely given, for ever, to the Queen; no-one else has any of it, and it pertains to all the territory of New Zealand. In sum, it is an enduring and exclusive territorial jurisdiction of some description, with each feature finding clear expression in the Maori text. It is not surprising, therefore, to find that the tribunals and other bodies referred to in the "Commentary" to the first of the "Principles for Crown Action on the Treaty of Waitangi", are in agreement that "sovereignty", in the sense of law-making power, is at the heart of the First Article.[4]

On analysis, the Second Article of the Treaty is revealed as a strong statement also. The relevant passage in the Maori text is as follows:

> . . . Ka wakarite ka wakaae ki nga
> Rangatira ki nga Hapu ki nga tangata
> katoa o Nui Tirani, te tino
> Rangatiratanga o o ratou wenua o ratou
> kainga me o ratou taonga katoa.

The Queen promises to the chiefs (rangatira), to the hapu, and to all the people of New Zealand (nga tangata katoa o Nu Tirani)[5] the full rangatiratanga of their lands, their living places (kainga) and all their treasures (taonga katoa).[6]

Why then might our ancestors, both Maori and Pakeha, have conceded to one another the fullness of that which we see to be given in the First and Second Articles of the Treaty of Waitangi? Part of the answer is no doubt that a problem postponed is a problem solved. However, I would suggest that it may be useful to consider both sides to the Treaty as engaging in an element of risk-taking. Maori conceded an "enduring and exclusive territorial jurisdiction" which tribunals have called "sovereignty" because Maori expected that the levels of immigration would not reach

[4] To the list of the New Zealand Maori Council, the Waitangi Tribunal, and the New Zealand Court of Appeal, could be added the Judicial Committee of the Privy Council which observed, in *Te Heu Heu's Case* [1941] 2 All E.R. 93: "Under art. 1 there had been a complete cession of all the rights and powers of sovereignty of the chiefs" (at 98). It is significant that a recent writer is able to dismiss the New Zealand Maori Council's 1983 acknowledgement that sovereignty was ceded as "outdated" (Kelsey, *A Question of Honour? Labour and the Treaty 1984-1989* (1990) 255). This technique of devaluing acknowledgements on grounds of the passage of time is one which Ms Kelsey would rightly criticise if it were employed by the Crown.

[5] I have heard the argument advanced that the Second Article guarantee is to *all* the people (Maori and non-Maori alike). The context would, however, indicate that the Second Article is directed at Maori alone. The English text supports the latter interpretation. A similar sort of argument suggests that "te Kawanatanga katoa o o ratou wenua" (in Article I) only cedes Kawanatanga in respect of lands properly alienated to the Crown or to Pakeha. That argument is even more clearly wrong because the plural (ratou) must refer to the Chiefs, not to the Queen.

[6] In an article written ten years ago, I put forward the idea that "taonga katoa" extended beyond purely physical "property" to culture, language, and custom. See Frame, "Colonising Attitudes Towards Maori Custom" (1981) N.Z.L.J., 105 at 106. The writing and publication of this article preceded the findings of the Waitangi Tribunal to the same effect.

an intensity which would displace Maori as the demographic majority. Had large-scale immigration not occurred, "sovereignty" would have been theoretical, as indeed it remained for many parts of New Zealand long after 1840. The historian James Belich has distinguished between "nominal" and "substantive" sovereignty:[7]

> Nominal sovereignty is the theoretical dominion of a sovereign—even a monarch who "reigns but does not govern". Substantive sovereignty is the actual dominion of a controlling power . . ..

The tentacles of administration follow settlement and it is these tentacles which turn nominal into substantive sovereignty. Busby had "nominal" authority over British subjects in New Zealand before 1840. The derisive Maori reference to Busby as a "man of war without guns" indicates a keen awareness of the difference between theoretical and actual power. If the Maori expectation was that "kawanatanga" would remain largely theoretical for demographic reasons, then the trends of immigration were bound to cause disappointment of that expectation.

However, a parallel expectation on the Pakeha side explains a corresponding Pakeha disappointment. What did it matter to concede "rangatiratanga" if Maori were, in time, to become joined in one general population? There can be little doubt that the likelihood of assimilation was a common idea among Pakeha, and indeed some Maori, at many stages of New Zealand history.[8] But assimilation did not occur and shows no sign of occurring. On the contrary, the assertion of cultural and political identity, of *mana motuhake*, is now stronger than at any time since the 1860s. Accordingly, the calls on the Second Article have not abated, but have intensified. Hence the modern predicament of New Zealand: each side conceded much in the Treaty in good faith but in the hope that the theoretical price would be mitigated by time, but, in fact, time has increased that price.

This convergence of disappointments may seem a less than heartening image for the sesquicentennial year. However, mutual recognition of the difficulty of reconciling "te kawanatanga katoa" and "te tino rangatiratanga" can provide a basis for a new commitment to the spirit of the Treaty. That shared recognition can remove the temptation to downgrade either element, and the tendency to impute bad faith. It can recommit us to the intention of the signatories that what was important to each would have a place in the life of the new nation.

[7] Belich, *The New Zealand Wars* (1988) 21.

[8] See, for example, the views of two speakers in a 1912 Parliamentary debate. First, Mr Young (Waikato): "I feel sure the time is not far distant when the Maori race will be absorbed into the people occupying this county. That is inevitable under the laws of nature . . ." ((1912) 161 N.Z.P.D. 951). Secondly, Mr (later Sir) Peter Buck (Te Rangihiroa): "Sir, every Maori must realise that the time will come when the Maori will be absorbed by the pakeha. There was a time when we absorbed the pakeha, but now things are changed . . ." ((1912) 161 N.Z.P.D. 943).

III. THE "PRINCIPLES FOR CROWN ACTION ON THE TREATY OF WAITANGI"

1. *Background*

In March 1989, the (then) Deputy Prime Minister, Mr Palmer, asked his Cabinet colleagues to agree to the preparation by a group of officials of a paper which would attempt to set out the principles upon which the government proposed to act in relation to issues arising under the Treaty of Waitangi. The principles "must necessarily include assertions of Crown rights as well as obligations, and of the rights of all New Zealanders as well as the rights of tangata whenua". Mr Palmer explained that "what is *not* here proposed is that the Crown attempt some unilateral re-making of the Treaty . . . what is proposed is that the Crown, as a Treaty partner, clarify the principles on which it intends to act in Treaty matters".[9]

At its meeting on 5 April, Cabinet Policy Committee accepted Mr Palmer's recommendation and directed that a paper be prepared accordingly by the Treaty of Waitangi Officials Coordinating Group.[10] On 22 May 1989, Cabinet considered the resultant Paper and "agreed to adopt the five principles detailed in the Appendix . . . that will guide its activity in dealing with issues that arise out of the Treaty of Waitangi".[11] The same meeting also directed that publication of the "Principles for Crown Action" be arranged. On 4 July 1989 the "Principles" were published and announced by the Prime Minister, Mr Lange. On 7 July, the "Principles" were the subject of a major address by the Deputy Prime Minister, Mr Palmer, at the Australasian University Law Schools Conference at Victoria University of Wellington.[12] In late 1989, Mr Palmer, by this time Prime Minister, cited the "Principles" on two occasions as the basis for government action.[13]

2. *Text of the "Principles"*

For ease of reference the bare text of the five principles is set out below:

[9] Memorandum for Cabinet Policy Committee from the Deputy Prime Minister, Mr G W R Palmer, 31 March 1989.

[10] POL. (89) M9/2, 5 April 1989. The decision was confirmed by full Cabinet on 10 April, CAB. (89) M11/11.

[11] CAB. (89) M16/19, 22 May 1989.

[12] Two versions were published. A full version contained substantial commentaries on each principle, and texts of the Treaty. A shorter version stated the principles with compressed explanatory notes. In a careful article appearing in "Project Waitangi Newsletter" (December 1989) and attributed to "Waitangi Consultancy Group", the observation is made that "the shorter version has given rise to speculation, particularly in the media, that the government is pulling back from its previous stance on the Treaty of Waitangi. However, the longer version, which has not been widely reported in the popular press, shows that the government's position is much the same as it has been in practice since it took office".

[13] First at the Kingitanga Poukai at Te Awamarahi Marae near Tuakau on 24 November, and again in an address to the Wellington District Law Society on 14 December.

1 The Kawanatanga Principle *The Principle of Government*

The first Article of the Treaty gives expression to the right of the Crown to make laws and its obligation to govern in accordance with constitutional process. This sovereignty is qualified by the promise to accord the Maori interest specified in the second Article an appropriate priority.

2 The Rangatiratanga Principle *The Principle of Self Management*

The second Article of the Treaty guarantees to iwi Maori the control and enjoyment of those resources and taonga which it is their wish to retain. The preservation of a resource base, restoration of iwi self management, and the active protection of taonga, both material and cultural, are necessary elements of the Crown's policy of recognising rangatiratanga.

3 The Principle of Equality

The third Article of the Treaty constitutes a guarantee of legal equality between Maori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality although human rights accepted under international law are incorporated also.

The third Article also has an important social significance in the implicit assurance that social rights would be enjoyed equally by Maori with all New Zealand citizens of whatever origin. Special measures to attain that equal enjoyment of social benefits are allowed by international law.

4 The Principle of Cooperation

The Treaty is regarded by the Crown as establishing a fair basis for two peoples in one country. Duality and unity are both significant. Duality implies distinctive cultural development and unity implies common purpose and community. The relationship between community and distinctive development is governed by the requirement of cooperation which is an obligation placed on both parties to the Treaty.

Reasonable cooperation can only take place if there is consultation on major issues of common concern and if good faith, balance, and common sense are shown on all sides. The outcome of reasonable cooperation will be partnership.

5 The Principle of Redress

The Crown accepts a responsibility to provide a process for the resolution of grievances arising from the Treaty. This process may involve courts, the Waitangi Tribunal, or direct negotiation. The provision of redress, where entitlement is established, must take account of its practical impact and of the need to avoid the creation of fresh

injustice. If the Crown demonstrates commitment to this process of redress then it will expect reconciliation to result.

Some critics became so frustrated that the "Principles for Crown Action on the Treaty of Waitangi" were *not* an attempt to rewrite the Treaty that they decided to falsify the title so as to manufacture a better target![14] In any case, what the criticism suggested was that it was open to any body *except* the Crown to declare its policy in relation to the Treaty (or even to declare what the Treaty meant). Accordingly, when the New Zealand Maori Council announced its understanding of the "Principles of the Treaty" in 1983, no criticism was forthcoming that the Council was trying to rewrite the Treaty.[15] Recently, a group of "independent analysts" responsible for a Report commissioned and released by the Iwi Transition Agency, appeared quite comfortable with the propriety of their discovery and statement of the "elements of Tino Rangatiratanga".[16] Only the Crown in its Executive form, which is responsible for implementing policy in relation to the Treaty, is apparently precluded from stating what its policy is in relation to these matters.

One criticism of the "Principles for Crown Action" has been that the Fourth Principle—the "Principle of Cooperation"—is in some way a retreat from the notion of "partnership". This latter term had achieved currency following its adoption by the Court of Appeal in a 1987 judgment.[17] Indeed, it can be confessed that the group of officials charged with preparing the "Principles for Crown Action" for ministerial consideration first attempted to formulate a "Principle of Partnership". A number of problems quickly became apparent. First, the Court of Appeal had employed the expressions "reasonable cooperation" and "partnership" somewhat interchangeably. Secondly, the aura of legal precision surrounding the term "partnership" proved to be deceptive. In fact, neither the statutory definition of "partnership" ("the relation which subsists between persons carrying on a business in common with a view to profit")[18] nor more elaborate explanations of learned commentators[19] provided any

[14] For example, a "Project Waitangi Newsletter" (of August/September 1989) contained an article entitled "What Have They Done to the Treaty?" ascribed to "Nga Kaiwhakamarama I Nga Ture (Maori Legal Service)". The article began: "The Government recently published its 'Principles of the Treaty of Waitangi' . . ." The single quotation marks are, whether intentionally or otherwise, grossly misleading. In the same article, Kawanatanga is described as "a limited right of authority for the Crown to exercise authority over those who are not Maori".

[15] Te Wahanga Tuatahi; New Zealand Maori Council, 1983. The quotation marks are, in this case, correctly placed.

[16] "Report of the Iwi Transition Agency Working Group", 30 January 1990. The document was compiled for, and disseminated by, the Iwi Transition Agency.

[17] *New Zealand Maori Council* v. *Attorney-General* [1987] 1 N.Z.L.R. 641.

[18] *Partnership Act* 1908, s. 4(1).

[19] Burgess and Morse, *Partnership, Law and Practice in England and Scotland* (1980) summarise the essence of partnership as follows: "It is that the association so sanctioned—

guidance as to the allocation of power between "partners". Indeed, this subsequently came to be explicitly recognised by the Court of Appeal when their Honours warned against any mechanical 50/50 model of partnership:[20]

> This Court has already said in the Forests case that partnership certainly does not mean that every asset or resource in which Maori have some justifiable claim to share must be divided equally . . . There may be assets in the building up of which, even if Maori have some fair claim to share, other initiatives have still made the greater contribution.

Indeed, the more one looked at the Court of Appeal's use of the concept of "partnership" in the *New Zealand Maori Council* case in 1987, the more it became apparent that the principal assistance it provided as an analogical device related to the duty to consult and to disclose "in the utmost good faith". This special nature of the "partnership" relationship was simply but effectively expressed by Lord Eldon in *Const* v. *Harris* in 1824:[21]

> In all partnerships whether it be expressed in the deed or not, the partners are bound to be true and faithful to each other.

The "good faith" implication of the "partnership" concept is nevertheless to be weighed against the potentially misleading implications of "50/50 ownership" and "one race, one vote" which are also inherent in the "partnership" metaphor. The matter is, with respect, well expressed in Mr Paul Temm QC's recent publication, where the author states:[22]

> So it must be said at once that the fact that the Treaty created a partnership between the Crown and the Maori New Zealanders does not mean that there is an equal partnership between them. It does not mean that Maori New Zealanders are entitled to fifty percent of all the seats in Parliament, nor to fifty percent of all the tax revenue, nor to fifty percent of all the positions in the public service, nor to fifty percent of all broadcasting time on national radio and television. And it certainly does not mean that Maori New Zealand is entitled under the Treaty to half of all Crown property in the country.
>
> Claims of these kinds have been asserted from time to time but they are all based on the false foundation that a partnership necessarily means an equality between the partners.

} insert to p. 11.

The second problem relates to whether "partnership" can provide a *guide to action* for state officials. Is there not a likelihood that officials will see "partnership" as something purely abstract, unrelated to day-to-day operations of government agencies? A more practical concept seemed to be called for—one pointing to *activity* rather than abstraction. The idea of

the partnership—existed for the purpose of carrying on a business, that in carrying on such business each partner was normally liable without limit for the debts and liabilities of the partnership" (at 1).

[20] *Mahuta* v. *Attorney-General*, unreported, Court of Appeal, 3 October 1989, C.A. 126/189. The passage is from the typescript judgment of Cooke P., at 32.

[21] (1824) Turn. and R. 496 at 524.

[22] Temm, *The Waitangi Tribunal: The Conscience of the Nation* (1990) 98-99. It should immediately be added that one of the main thrusts of Mr Temm's readable text is to urge that the Treaty be honoured and to assert the practicability of redress.

cooperation (literally "working together") appeared to offer that more practical concept with administrative relevance.

The concept of cooperation has the advantage that most people know, at the everyday level, what cooperation is and can recognise its presence or absence with considerable accuracy. It should be stressed at the outset that the word "cooperation" will here be used in its formal sense without the connotations of a particular political or industrial philosophy and, certainly, it is not used in that colloquial, figurative, ironic sense which implies coercion. The term will be used in its standard dictionary sense of "working together to same end" (Concise Oxford Dictionary). Cooperation is a behavioural strategy for achieving ends difficult or impossible to achieve otherwise.

Analysis[23] of the defining characteristics of "cooperation" exposes seven such characteristics:

1. *Two (or more) parties:* the two parties are mutually accepted as distinct and as proper parties. The cooperation is logically tied to these two parties and if as a result of the passage of time one or other party should cease to exist and be accepted as having ceased to exist, the cooperation also ceases to exist.
2. *Acting as free agents:* neither party is in any way coerced into participation either by the other party or by any external force.
3. *Engaged together in purposeful activity:* a cooperation cannot consist merely in, say, passive cohabitation. Some active and purposeful joint enterprise is required, such as "actively ensuring peaceful and productive cohabitation".
4. *That is based on a shared understanding:* both parties must be party to a shared understanding which includes agreement reached as to: the facts of the situation, the nature of the goal to be achieved, means to be employed in achieving the goal, role allocations and rights and rules to be observed. To the extent that the shared understanding lapses, the cooperation lapses.
5. *And commitment:* parties must both genuinely desire to, and accept responsibility to, contribute actively to the cooperation. Commitment to the cooperation's success is a *sine qua non.*
6. *Both coordinating their respective actions:* the participants' respective contributions to the cooperation cannot be entirely identical as in mere "concerted" action: each must contribute in a (to some extent) *different* but coordinated way for their joint activity to be truly cooperative. In making their own contribution each party is thereby committed to enabling or facilitating the contribution of the other party.

[23] I have been ably and generously assisted by a philosophically-trained friend (D. J. Melser M.A. (V.U.W.)), whose thinking and written comments I have freely used in setting out the seven characteristics.

7. *To a common goal:* the goal to be achieved is not only agreed upon but is sincerely believed by both parties to be mutually beneficial.

Where any of conditions 1-7 lapse, an undertaking ceases to be truly cooperative. In practice, ancillary measures—having the sole purpose of preserving the cooperation—are required to maintain the seven conditions. First, there needs to be inter-party solicitude. If one party languishes through loss of morale or proper legal status or is practically disabled in a way relevant to its contributing to the primary cooperation, the primary cooperation is threatened. Each participant thus has a duty to the cooperation to ensure the welfare of all participants. Secondly, various educational and cultural measures are required to reinforce conditions 4 and 5 on a long-term basis.

These seven characteristics define an ideal, fully-realised form of cooperation. In practice, not all the characteristics will always be evident; nevertheless they are always present in principle. Indeed, cooperation is a versatile, durable, and accessible strategy.

The concept of "cooperation" is thus shown to be more fundamental, more specific in its implications, and therefore more demanding of the parties, than that of "partnership". Cooperation is the *actual activity* without which "partnership" is a mere abstraction. The way in which this conclusion is expressed in the "Principles for Crown Action" is that "the outcome of reasonable cooperation will be partnership".

Whether or not the Treaty of Waitangi had originally a truly cooperative basis, the question that needs to be answered by New Zealanders, both Maori and non-Maori, is whether they are prepared to enter into a cooperative relationship of the sort elaborated in the paragraphs above.

Some clearly are not, and it may be interesting to consider which of the defining characteristics of cooperation are the obstacles in particular cases. Others are understandably confused by difficulties of identifying the parties who are to cooperate. These difficulties arise on both sides: who are the modern successors to the Maori side? Who is the modern successor to "the Crown" and how can the constitutional certainty that it represents *all* New Zealanders be reconciled with the separate identity of the Maori party for the purpose of the cooperation? These are difficulties to challenge our philosophers and our politicians: they will require patient analysis—and perhaps ingenuity and originality—but they are at least capable of solution.

These solutions must take account of three cultural realities: that of Maori; that of European and other settlers; and a third resulting from two centuries of interaction between the two. Some would prefer to ignore one or other corner of this triangle, but each forces itself into the equation.

I began with a greeting to the chiefs, the scholars, and all the people of New Zealand and wished them life within the protection of the Treaty of Waitangi which was compared to a sacred meeting-house. Within this

meeting-house we will all find ancestors, and we all have rights and a place to stand.

IV. THE MAORI FISHERIES ACT 1989: PRINCIPLES FOR ACTION IN ACTION

1. *Background*

The history of the journey from the Waitangi Tribunal's recommendations in the Muriwhenua claim to the passage of the Maori Fisheries Act in the final sitting days of Parliament in 1989 is lengthy, and its recounting must await another occasion.[24]

My present purpose is more limited: it is to sketch the scheme of the Act, to relate that scheme to the five "Principles for Crown Action", and finally to consider certain observations on the Act made by the President of the Court of Appeal in the course of delivering judgment in February 1990. (This judgment was on a series of appeals on procedural matters arising from Maori challenges to the validity of the Quota Management System erected by the Fisheries Amendment Act of 1986).

The Maori Fisheries Act 1989 is based on a proposal by the (then) Deputy Prime Minister, Mr Palmer, in October 1988, for an "interim" arrangement which could fill the vacuum left when the two sides of the "Joint Working Group on Maori Fisheries" reached deadlock and reported separately.[25]

Following the Joint Working Group's reports, a Bill was introduced which purported finally to settle the Maori fisheries claim. Although the manner of its achieving finality attracted almost overwhelming Maori criticism, some elements were acceptable to Maori.

The essence of Mr Palmer's plan was that Maori rights of access to the courts and the Waitangi Tribunal for adjudication of claims as to the meaning and effect of section 88(2) of the Fisheries Act 1983 would be preserved,[26] whilst a practical attempt would be made to "get Maori fishing now" in recognition of an entitlement under Article II. The core of the proposal was that ten percent of quota for each species be delivered to Maori over four years, and that $10 million be provided "to assist Maori into the industry".[27]

[24] Indeed, that history might need to cast its net back to the Select Committee hearings on the Fisheries Bill in 1982 where the present form of section 88(2) of the Fisheries Act 1983 was settled. It would need also to traverse significant judicial pronouncements: in particular, those of Williamson J. in *Te Weehi*'s case, [1986] 1 N.Z.L.R. 680.

[25] The work of the Group was, however, of considerable use in identifying areas of agreement and disagreement, and in demonstrating that the theoretical positions of the two sides could neither be reconciled nor resiled from, and that a more pragmatic and gradual approach might therefore be necessary.

[26] Section 88(2) provided that "nothing in this Act shall affect any Maori fishing rights". The Maori Fisheries Bill as first introduced and sent to the Select Committee would have precluded further adjudication.

[27] Mr Palmer's press statement of 28 October 1988 set out the core elements and recorded a measure of support from both the Maori representatives and from the fishing industry.

Two additional elements already contained within the Maori Fisheries Bill as introduced were grafted on to Mr Palmer's proposal. First, a management system was required for the stressed rock-lobster fishery. Secondly, a mechanism and process were required by which a degree of Maori control could be recognised over at least some fishing areas which were specially linked to particular hapu and iwi.

In an attempt to put detail on Mr Palmer's proposals, discussions were held between Crown and Maori representatives, in which fishing industry representatives also participated.[28] One possibility was that a joint submission might be formulated for the Select Committee on the Maori Fisheries Bill chaired by the Member for Tasman, Mr Ken Shirley. In the event, although a measure of general approval for the interim package was reached, complete agreement could not be secured and on 20 March 1989 a Crown submission dated 17 March was forwarded to the Select Committee. It proposed a compromise in the manner of bringing rock-lobster under the Quota Management System: "Term Quota" would be allocated for a limited period instead of the quota in perpetuity which had been allocated for species previously brought under the regime. The new model meant that a permanent property right was not created: the analogy in property law was that a "leasehold" rather than "freehold" interest would be granted. The Crown submission also proposed general lines upon which iwi and hapu control of some coastal areas could be reconciled with the interests of the general public. Mr Shirley's Select Committee heard the Crown and many other submissions and did much further work in refining and making workable the elements of the proposal.

2. *The Act considered against the "Principles for Crown Action"*

The Maori Fisheries Act 1989, which was the result of the activity sketched above, may be analysed in terms of the "Principles for Crown Action". The need to "get Maori fishing now" and to resolve the uncertainty and confusion surrounding the Maori fishing rights issue, the imperative of conservation of the fishery (particularly the rock-lobster stocks), and the need to provide processes for adjudicating claims, may all be seen to point to the "Kawanatanga Principle"—the principle of government.

The creation of the Maori Fisheries Commission and the terms of reference under which, in granting fish quota or assistance to Maori, it has regard to Maori custom and economic and social considerations[29] is an attempt to give practical effect to the "Rangatiratanga Principle". The statutory process for the declaring of the new "Taiapure—Local

[28] As is recorded in the Crown Submission to the Select Committee, meetings were held on 7, 14 and 15 March. The present writer was privileged to have led the Crown side and to have convened the sessions.

[29] Maori Fisheries Act 1989, s. 8. A subsequent amendment requires the Commission to consult with representatives of "tribes having a customary interest in the taking of fish".

Fisheries"[30] is explicitly prefaced by a declaration that it is aimed at making "better provision for the recognition of rangatiratanga" and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi.[31]

The principle of equality finds scope in several ways: the requirement that hapu and iwi rule-making in "taiapure" must be non-discriminatory is an example. The abandonment of the "Idi Amin clauses"[32] (which would have precluded Maori access to the courts and the Waitangi Tribunal) might be seen as another.

The "Principle of Cooperation" is at the heart of the structure of the Maori Fisheries Commission. Flexibility is provided for the Commission to seek that blend of quota and of money which best meets the Commission's objectives from time to time. Indeed, the agreement in late February 1990 that the Maori litigants would "pause and step back from the court case at this time", and the giving by the Crown of certain assurances, can be seen as a good practical example of the "Principle of Cooperation", with all the elements of consultation, good faith, balance and common sense in evidence.[33]

The "Principle of Redress" is also evident in the Maori Fisheries Act and the processes leading to it. Courts, the Waitangi Tribunal, and direct negotiations have all been involved, as has the final decision-making of Parliament. Furthermore, the remedies had regard, as foreshadowed in the "Principle of Redress", to their "practical impact" and to "the need to avoid the creation of fresh injustice". For example, the Crown was unwilling to countenance compulsory acquisition of existing quota. Indeed, the entire thrust of Mr Palmer's plan was to reject a "species by species, beach by beach" consideration of the Treaty right—which might reveal very substantial Maori entitlement to some species in some areas, and no entitlement at all to other species—in favour of an across-the-board ten percent.

The remedy is nevertheless of a substantial order of magnitude and is expected to cost the public purse in excess of $100 million over the next four years. In addition, the "taiapure" provisions have yet to be explored for potential advantage to Maori. Mr Paul McHugh, who has made a

[30] The expression "taiapure" was recommended by the Maori Language Commission as best conveying the sense of the policy of the Select Committee that relatively small, discrete areas could, following investigation and opportunity for objections to be heard, be declared to be subject to the regime. The word "tai" refers to the marine environment and "apure" means "patch". The present writer recalls as a child being called "pupure" by Tahitian classmates—the reference was to freckles which are unusual in a Polynesian context.

[31] Section 54A of the Fisheries Act 1983 as inserted by Section 74 of the Maori Fisheries Act 1989.

[32] The (then) Prime Minister, Mr Lange, appears to have been the originator of the colourful phrase "Idi Amin clauses", in 1988, to describe the provisions of the early Maori Fisheries Bill which would have severed Maori from the judicial and Tribunal processes in respect of fishing rights.

[33] See the Prime Minister's press statement entitled "Maori Fisheries" of 28 February 1990.

notable contribution to the development of legal thinking on the applicability of common law rights to Maori tribes, has recently written that:[34]

> Giving people language rights does not shift political power, but give them assets worth hundreds of millions of dollars and you have transferred economic and political power.

The Maori Fisheries Act 1990 does transfer assets with values of the order recommended by Mr McHugh. Indeed, I doubt whether any comparable measure of recognition of Maori Treaty rights can be pointed to anywhere in New Zealand history.

3. *The Act considered by the Court of Appeal*

A number of significant, and (with respect) helpful observations were made by the President of the Court of Appeal in the course of giving judgment on behalf of the court in the Muriwhenua interlocutory cases in February 1990.[35]

First, the President of the Court of Appeal, Sir Robin Cooke, gave a clear signal that the decision of the Full Court of the Supreme Court in *Waipapakura* v. *Hempton*[36]—which decided in effect that there were no Maori fishing rights over and above those of the general public—might not be considered as correctly stating the law. This decision was described as "a dubious authority".[37]

Secondly, his Honour the President seems to conclude that the expression "Maori fishing rights" in section 88(2) of the Fisheries Act 1983 is a reference to Treaty rights,[38] but that the application of those rights requires that "the realities of life in present-day New Zealand" be taken into account in a "balancing and adjusting exercise". His Honour thought that:[39]

> The question becomes whether the provisions of the Maori Fisheries Act 1989 are a sufficient translation or expression of traditional Maori fishing rights in present-day circumstances.

On this approach, his Honour considered that:[40]

> the Maori Fisheries Act 1989 might be seen as an interim measure, planned to operate until at least 1993, and thereafter falling for review if necessary in the light of experience

[34] McHugh, "The role of law in Maori claims", (1990) N.Z.L.J. 16.

[35] *Te Runanga o Muriwhenua and others* v. *Attorney-General and others*, unreported Court of Appeal, 22 February 1990, C.A. 88/89, 133/89, 188/89 and 189/89.

[36] (1914) 33 N.Z.L.R. 1065.

[37] Typescript judgment of Cooke P., at 33.

[38] At 36.

[39] At 38.

[40] At 39.

of its working in the meantime. Three or four years or more is not long in perspective in this kind of problem. As far as it goes, the 1989 Act is a significant advance. Possibly the Treaty and the statutes are met by this step at this stage—provided that it is plain to all concerned that, as the Minister stated on the third reading of the Bill, it is not necessarily an ultimate solution.

It may be considered that this outcome represents a kind of progress. Certainly, there is a growing recognition that rigid theoretical positions do not produce workable solutions. As Matiu Rata (a leading figure in the invention of the Waitangi Tribunal, and in the pursuit of Maori fishing rights) has observed, the Maori Fisheries Act 1989 creates institutions which represent "the dawning of a new era in New Zealand fishing".[41]

[41] *Evening Post*, 7 March 1990.

BOOK REVIEW

WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI, edited by I. H. Kawharu. Auckland. Oxford University Press, 1989. 329 pp., including glossary, appendix and index. New Zealand price $29.95.

As one may expect from its title, this book is divided into two parts. Part I consists of six essays representing the Pakeha input. Part II contains a further six, written by Maori. We are told in the introduction that the book "may be likened to a forum in which Treaty issues and experience are explored from the two 'sides', Crown and Maori" (p. xi).

A closer examination however reveals a rather less balanced approach than the title and the introductory comments would suggest. In fact the entire collection is dominated by Pakeha legal academics. Their contributions make up all but one of the essays in Part I, and they account for over half of the total 312 pages of text. The cumulative effect is to create a very strong impression that the book's principal aim is to provide such writers with the opportunity to engage in general debate on the Treaty as a topic of mutual academic interest. This is not necessarily to suggest that there is no place for this type of discussion, but rather that a book which purports to represent a two-way exchange of views between Treaty partners is not the place for it. The situation is compounded by the fact that the Maori contributions make up the smaller and second Part of the collection.

The first impression, then, that will be gained from the arrangement of these essays is one of imbalance. Unfortunately, a more careful study of the actual content of the contributions proves that impression to be well-founded.

Virtually all the contributors either explicitly base their views on the assumption that the signing of the Treaty coupled with the surrounding events resulted in the cession of sovereignty as provided by the Pakeha text, or at very least they appear not to regard it as being an issue. Since this in effect involves a denial of the concept of te tino rangatiratanga as guaranteed by the second article of the Maori text, and considering the crucial role that this guarantee played in securing the agreement of the Maori signatories, the paucity of discussion on this point is extraordinary. Only two writers satisfactorily acknowledge the implications raised by the differences between the two texts. Walker for example notes that the Maori chiefs continued to believe they were sovereign "notwithstanding the meaning the colonizer chose to read into the Treaty of Waitangi as a transfer of sovereignty" (p. 278). Williams points out that the English text envisaged "a transfer of power, leaving the Crown as sovereign and Maori as subjects" while the Maori text was about "a sharing of power and authority" (pp. 79-80). An illustration of what such power-sharing could mean in practice is provided by Durie, who describes a major constitutional change which has been suggested by the New Zealand Maori Council and which would effectively replace the current principle of one person, one vote with that of one partner, one vote (p. 297). However, most of the contributors adopt the cession of sovereignty as the baseline for their discussion, as indeed does the summary on the back cover!