says Cooke.[29] It would be a mistake (as readers of *Ansmic*[30] should know) for the draftsman to underrate the potency of this scarcely veiled threat.

The greatest opportunity afforded to New Zealand Courts to flex their muscles in wrestling with statutory interpretation resulted from the helter-skelter passage of legislation overturning the established economic order that followed the coming to power of the Lange administration in 1984. So in *Northern Milk Vendors Association Inc v Northern Milk Ltd*[31] the Court of Appeal asserted an entitlement to fill a gap in legislation by devising a solution "appearing to accord best with the general intention of Parliament as embodied in the Act – that is to say, the spirit of the Act".[32] In that case[33] as in the later case of *Auckland City Council v Minister of Transport*[34] Cooke P disavowed any usurpation of "the policy-making function, which rightly belongs to Parliament". These cases are best understood as a revival of the doctrine, provoked by the laconic brevity of medieval statutes, that it was open to courts to divine and apply to cases not specifically dealt with what came to be called "the equity of a statute". It was a doctrine that had by at least the early nineteenth century been thoroughly discredited.[35] "If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it; and I think to take a different course is to abandon the office of Judge, and to assume the province of legislation".[36]

It is instructive for a number of reasons to consider in more detail one such case, the Court of Appeal decision in *New Zealand Maori Council v Attorney-General*[37]. One reason is to see whether the disavowal referred to is supportable. Another is that we have the benefit of an account of the matter by the Minister responsible for the insertion in the statute in question of the section on which the Crown case foundered, G W R Palmer. A third is that that Minister was a qualified lawyer with experience as a law teacher who should have been better able to understand the significance of his actions than colleagues without that background.

The Minister to allay genuine Maori concerns procured the insertion into the State-Owned Enterprises Act 1986 in the course of its passage through Parliament of s 9 which reads as follows

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

Palmer has written

[29] "The Struggle for Simplicity in Administrative Law" in Michael Taggart ed *Judicial Review of Administrative Action in the 1980's* (Oxford University Press, Auckland 1986) 1, 10

[30] *Ansmic v Foreign Compensation Commission* [1969] 2 AC 147.

[31] [1988] 1 NZLR 530.

[32] 537 per Cooke P for the Court.

[33] 538

[34] [1990] 1 NZLR 265, 289.

[35] *Brandling v Barrington* (1827) 6 B&C 467.

[36] *Miller v Salomans* (1852) 21 LJ (Ex) 161, 197 per Pollock C B, see also 194 per Parke B.

[37] [1987] 1 NZLR 641

- D.F. Dugdale, Law Commissioner

> My intention was for this to announce that the government did not by passage of the State-Owned Enterprises Act 1986 seek to frustrate or jeopardise Maori rights. I did not envisage, however, that the provision would have an effect as dramatic as the one it did have in a case before the Court of Appeal. ... The Court of Appeal ruled that section 9 meant that the Crown was obliged to establish a system so it could consider, in relation to particular assets or particular categories of assets, whether such transfer would be inconsistent with the principles of the Treaty of Waitangi and would be unlawful. The Crown had to find a way to safeguard lands and waters in such a way as to avoid prejudice to Maori claims.[38]

The effect of the decision when coupled with Palmer's refusal to correct the decision by legislation ("it would have been violently unconstitutional") or appeal it[39] is immeasurable. There can be no doubt that the Court (though it could not have been entirely sure in advance that Palmer would take the decision lying down) intended an alteration of the political landscape. It was not left to commentators to assess the importance of the decision. "This case" the President's judgment commences "is perhaps as important for the future of our country as any that has come before a New Zealand court".[40] It is too soon (and in any event beyond the scope of this article) to determine whether the effect of *Maori Council* and the string of cases following it on New Zealand racial harmony has been harmful or benign. What is clear is that decisions of state aimed at the creation and preservation of such harmony call for the exercise of such statesmen's skills as forward vision, diplomacy, finesse and sensitivity to public opinion and are the preserve not of courts but of those elected to govern. It is moreover a perversion of their proper role for judges to approach the task of interpreting statutes in the spirit of counter-majoritarian crusaders.

> We must construe these acts of parliament without allowing ourselves to be influenced by any of the political feelings of the present day as to the proper policy to be pursued with respect to Her Majesty's subjects professing the Jewish faith.[41]

The significance to the student of New Zealand legal history of *Maori Council* is threefold. It affords a measure of Palmer's own percipience.[42] More relevantly to the concerns addressed in the present article, it helps us to judge the worth of judicial disavowal of any usurpation of Parliament's policy-making function. It is impossible to read the judgments in *Maori Council* in the political context in which they were delivered and believe that any of the Judges really believed that what the Court determined to be the effect of the statute was what members of Parliament had wanted.[43]

[38] *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin 1992) 88, 89.

[39] Discussed by Palmer ibid p 89, 90.

[40] 651.

[41] *Miller v Salomans* (1852) 21 LJ (Ex) 1612, 191 per Parke B.

[42] "The transformation of Sir Geoffrey Palmer to wise old constitutional expert must remain forever a mystery" - D J Round, *Truth or Treaty* (Canterbury University Press, Christchurch, 1998) 131.

[43] See for example page 659 "My strong impression is that Members who took part in the final debate thought that the Act would have the effect now contended for by the Crown" (Cooke P).

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The third point (and of the heinous nature of his offence Palmer in his *apologia* betrays absolutely no sign of being aware) relates to the use at all in a statute of such an imprecise term as "the principles of the Treaty of Waitangi". As Richardson J noted[44] "it cannot yet be said that there is broad general agreement on what those principles are". So the Court of Appeal was left free to invent its own principles, including the proposition that the Treaty "signified a partnership between races".[45] Since then the judge-made concept "Treaty partnership" with all its ambiguities and uncertainties has passed into common usage and continues to excite expectations unlikely ever to be fulfilled. The President spoke nothing less than the truth when (rubbing salt into the wound) he observed "If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity".[46]

So how should legislation be framed to make it as judge-proof as possible? The answers are the obvious ones. The draftsman should not be beguiled by Woodhouse's praise of open-ended drafting, for the legislature can have no confidence that the detail supplied by the courts will be the detail contemplated by Parliament. The draftsman must dot every 'i' and cross every 't', and if this makes the product less readable the answer is that elegance must give way to armour-plate.

The draftsman should, it is suggested, hesitate before including in a Bill a statement of purpose and principle. Bennion has written

> Drafters dislike the purpose clause. They take the view that often the aims of legislation cannot usefully be or safely be summarised or condensed by such means. A political purpose clause is no more than a manifesto, which may obscure what is otherwise precise and exact ... The drafter's view is that the Act should be allowed to speak for itself.[47]

In a recent discussion of statements of purpose Alec Samuels mentioned their virtues, it is true, but dwelt upon their vices too.

> A general statement can be uncertain and can prove unhelpful in construing the detail in the statute, because general words can throw doubt upon particular words and indeed general words may be inconsistent with the particular words. General words could induce the drafter to draft with less than customary caution and attention to detail; and general words could induce the judge to pay too much attention to purpose and principle and too little attention to the detail.[48]

In other words, the effect of a purpose clause can be to slacken the tight rein that this article argues is called for. The case of *Sellers* already referred to[49] is an

[44] 673.
[45] 664
[46] 664.
[47] Francis Bennion *Statutory Interpretation* cited supra footnote 3, page 501.
[48] "Statements of Purpose and Principle in British Statutes" (1998) 19 Statute Law Review

example of judicial misuse of a purpose provision in the statute's long title to override clear and unambiguous words.

Anyone who might believe, like Woodhouse, that there exists a partnership between courts and Parliament should re-read *Maori Council* or the cases in which substantive effect was given by the Cooke Court to the New Zealand Bill of Rights Act 1990, a measure intended by Parliament to be no more than hortatory. The use of general terms like *considerable* or *inquiéter* or "principles of the Treaty of Waitangi", which really amount to a delegation of legislative power by Parliament to the courts, should be resorted to only if greater precision is entirely impossible. If the draftsman should be reduced to conferring a discretion the principles on which the discretion is to be exercised should be laid down.

The draftsman must be aware of the judicial claim that (as Lord Steyn has recently put it)

> Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and tradition of the common law. And the courts may approach legislation on this initial assumption. But this assumption has only prima facie force. It can be displaced by a clear and specific provision to the contrary.[50]

He must anticipate that judicial stance and provide where it is required the "clear and specific provision to the contrary" that will leave no room for argument.

This all amounts no doubt to a counsel of perfection. But adherence to these rules is essential if unelected judges are not to succeed in making off with a law-making power that our constitution confers on elected members of Parliament. That Parliament is supreme is not a rule of law but a matter of political fact.[51] Attempts by courts to sap that supremacy should be identified as the political acts that they are. It is the duty of the draftsman (the maintenance of the rule of law demands as much) to do nothing to make such undermining easier.

David Round's piece on judicial activism is in the same issue.

[50] *Reg v Home Secretary ex parte Pierson* [1998] AC 539, 587.
[51] The arguments of H W R Wade to this effect in "The Basis of Legal Sovereignty" [1955]

> "Kaitiakitanga" means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

W M Karaitiana has offered this explanation of the new definition:[66]

> In this context kaitiakitaka refers to the act of applying the celestial and terrestrial curricula to guard the mauri (lifeforce) of the resource and the wairua (ordained spirit) of the relationship of the people with [the] resource as a creation from God.

By and large, the "other matters" have been relatively innocuous, seldom exercising strong influence on the overall evaluations of decision-makers. But they can assume greater significance where section 5 and 6 points are not raised.[67] The only one of the matters without an environmental flavour is section 7(b) - "the efficient use and development of natural and physical resources". But the effect of this provision is equivocal. The Environment Court considered section 7(b) in *Baker Boys Ltd* v *Christchurch City Council*,[68] a case concerning an application for consent to a supermarket, saying:[69]

> Perhaps a weak evidential presumption is raised by section 7(b) that market forces should be left to work, and that strengthens if section 5(2)(a) and (b), and section 6 matters are not an issue. . . . Of course if there is such a presumption it is rebuttable . . . .

The case does, though, illustrate a point made extra-judicially by his Hon Judge J R Jackson[70] — " . . . everything under the RMA has transaction costs: lawyers and planners fees being the most obvious, but they are by no means the only ones".

(d) S 8 — Treaty Principles

This section enjoins functionaries to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)". This short provision has been the source of great difficulty and confusion, and much litigation.[71] The phrase "principles of the Treaty" almost excites reverence, a worshipful attitude. And yet as

in RMA s 2. The terms "tangata whenua" and "tikanga Maori", falling within the definition, are separately defined in RMA, s 2.

66 "Core Values and Water Resources" [1999] NZLJ 337, 340: the author employs the South Island Maori spelling of "kaitiakitanga". See also Hayes, "Defining Kaitiakitanga and the Resource Management Act 1991" (1998) 8 Auck U L Rev 893.

67 *Marlborough Ridge Ltd* v *Marlborough District Council* [1998] NZRMA 73, 85.

68 (1998) 4 ELRNZ 297.

69 Ibid, 319. The decision was appealed to the High Court — *Foodstuffs (South Island) Ltd* v *Christchurch City Council* (1999) 5 ELRNZ 308 — but s 7(b) was not discussed.

70 "Metamorphosis", paper for the New Zealand Planning Institute Conference (20 March 1998) 5, footnote omitted. His Honour chaired the Environment Court in the *Marlborough Ridge* (supra n 67) and *Baker Boys* (supra n 68) decisions.

71 The text of s 8 will be found in the Appendix. The Ministry for the Environment published its Working Paper 3, *Case Law on Consultation* in June 1995 (24 pp). By June

- I. H. Williams, Senr Lect. in Law, Univ. of Otago

solemnly enacted in section 8 the phrase, while having an ineffable quality, is empty. As the Rt Hon Mike Moore, Labour member and sometime Prime Minister, observed in his valedictory statement to Parliament:[72]

> This Parliament has passed legislation . . . without really knowing what it means. I am not quite sure what "taking into regard the spirit of the Treaty of Waitangi" means, but let us do it anyway. We are painting by numbers. We have no clear picture and vision of where we are going. Therefore we are surrendering the rights and prerogative of Parliament. Because we do not know what it means, we expect a court or some commission to determine what it means.

The phrase "principles of the Treaty" is evocative, and yet the process of ascertaining Treaty principles has required invention and creation rather than the discovery of precepts that had been ascertained but had become lost. The Privy Council has said that " . . . the 'principles' are the underlying mutual obligations and responsibilities which the Treaty places on the parties".[73] As Mr Moore indicates, it is the courts that have filled the vacuum created by Parliament. It has been said that —[74]

> In attempting to create a body of concepts and doctrines to interpret [the] expression ["principles of the Treaty"] the Courts are really carrying out a kind of constitutional interpretation.

Prof J F Burrows remarks that " . . . provisions [such as section 8], imposing positive duties to have regard to and comply with the *principles* of the Treaty, require the Courts to give meaning and content to those principles. In other words the Courts have in a sense to interpret the Treaty".[75] The Parliamentary populism of section 8 and kindred provisions marks a breach of the fundamental understanding of our democratic society — that the people elect representatives to Parliament to make laws and allow the formation of a government that will appoint judges who administer the laws.

The doubts inherent in having the courts announce the content of Treaty principles are reinforced by their constant-blossoming quality. The Environment

1999 it had published a second edition *Case Law on Consultation* (RMA Working Paper, 28 pp). Having devoted some 20 pages to litigation on whether s 8 imposes a duty of consultation (sometimes thought to be a Treaty principle) Beverley remarked: "Thus far lack of express provision has been a catalyst for the issue of consultation in the resource consent procedure. The absence of a clear directive has allowed the courts room to explore the application of section 8 in a specific context of the RMA": "The Incorporation of the Principles of the Treaty of Waitangi into the Resource Management Act 1991 - Section 8 and the Issue of Consultation" (1997) 1 NZJEL 125, 146. See also Beverley, "The Mechanisms for the Protection of Maori Interests Under Part II of the Resource Management Act 1991" (1998) 2 NZJEL 121.

72 (1999) 579 NZPD 18734, quoted (1999) 22 TCL 363.

73 *New Zealand Maori Council* v *Attorney-General* [1994] 1 NZLR 513, 517.

74 Boast et al, *Maori Land Law* (1999) 278.

75 *Statute Law in New Zealand* (2nd ed, 1999) 303; see also Harris, supra n 41, 268. For a further discussion of Treaty principles see Round, *Truth or Treaty?* (1998) 122 et seq.

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Court remarked on this feature in *Mason-Riseborough v Matamata-Piako District Council*, saying:[76]

> Clearly the principles are not to be [found] in stone like the Ten Commandments. It is not possible to promulgate a comprehensive or complete set of Treaty principles. Indeed it is undesirable to attempt to promote a definitive or exclusive set of Treaty principles because the Treaty is a living and continuing document which calls to be interpreted and applied not simply as at 1840 but in a contemporary setting. Cooke P said of the Treaty — *"What matters is the spirit"*.

To this may be added the complication that commentators have now identified two views of tikanga Maori —[77] the "traditional view" and the "pragmatic (or informed) view".[78] To exemplify the latter view, the authors cite evidence given by Sir Tipene O'Regan, who spoke of —[79]

> ... the dynamic and evolving character of traditional Maori values. ... [I]t is the capacity for dynamic adaptation which is the particular genius of Maori culture and its associated values. ... [W]e should follow the historical precept of our tupuna and permit our values to flourish in accordance with the changing environment and the expansion of human knowledge and capacity.

A potential for growth and development is an asset to any culture and any community. But section 8 occupies a central place in a complex and inter-connected legislative scheme. How are the "underlying mutual objectives and responsibilities" of which the Privy Council spoke[80] to be revealed with the assurance apt in a law for all communities if the values on which the principles are based are, as Sir Tipene says, "dynamic and evolving"? Section 8 yields, not law, but another occasion for ongoing dispute and litigation. All communities bear the costs of this.

3 Central Government Omissions

It was always contemplated that the RMA would supply a framework within which more detailed provisions would be developed.[81] Central and local government were each to develop the detail. At the initiative of central government the Act allows the development of national environmental standards (a special sort of statutory regulation)[82] and national policy statements,[83] and it

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76 (1997) 4 ELRNZ 31, 47, citing Cooke P in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 663 (Environment Court's emphasis).

77 "Tikanga Maori" is defined in RMA, s 2 as meaning "Maori customary values and practices".

78 Gould and Daya-Winterbottom, "Blood, Sweat, and Fears" [1999] NZLJ 342, 343.

79 Idem, citing evidence that led to consent orders made by the Environment Court in *Te Runanganui O Taranaki Whanui Ki Te Upoko O Te Ika A Maui Inc v Wellington Regional Council* Decision W48/98, noted (1999) 3 BRMB 10.

80 Supra, n 73.

81 See the Explanatory Note to the Resource Management Bill, ii.

82 RMA, ss 43 and 44.

83 RMA, ss 45-55.

mandates the creation of a New Zealand coastal policy statement.[84] Janet McLeauchlan said in 1992, "If central government is to delegate these broad powers [of management] it should take responsibility for generating relevant information ... That should be a priority for regulations and national policy statements".[85] There have been numerous calls for national standards and policy statements,[86] but the Government has chosen to ignore or reject them. Rather than create legislative standards, Government's policy has been to develop guidelines on some topics.[87] Central government has seriously hampered the work of others attempting to implement the legislation. Susan Rhodes, an experienced legal practitioner, has remarked:[88]

> The lack of central government direction on significant environmental issues is a tremendous frustration to applicants [for resource consent] and submitters, as well as to local authorities, who have to litigate standards on individual applications on a local basis.

The inaction of central government has made implementation of the 1991 legislation the more fraught and its results the more uncertain. The Government's course may in part be explicable by the procedural requirements attending the development of standards and policy statements. But Government has long known of this problem,[89] and has only recently begun steps that may overcome it.[90] Meantime a significant vacuum remains.

4 Local Government Functions and Plans

Local authorities are prime agents in implementing the legislation, along with central government and the Environment Court. And yet, "The RMA does not

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84 RMA, ss 56-58. A statement was promulgated on 5 May 1994.

85 Supra n 3, 552-553.

86 See eg OECD, *Environmental Performance Reviews, New Zealand* (1996) 110; Somerville, "The Resource Management Act 1991 — an Introductory Overview" in *Resource Management* (1991-) 13. The Hon Simon Upton, Minister for the Environment, reported that the legislative review yielding the Amendment Bill introduced on 13 July 1999 had generated 18 submissions calling for national policy statements on various topics — "National Direction or National Interference", address to Resource Management Law Association (1 October 1999) 2.

87 See eg *Air Quality — Compliance Monitoring and Emission Testing of Discharges to Air* (Ministry for the Environment, 1998), *Water Control Guidelines Nos 1 and 2* (1992, 1994) and the Minister's address, supra n 86. It was announced on 20 January 1999 that a national policy statement on biodiversity would be developed to explain s 6(c): the Minister acknowledged that " ... Central government has provided virtually no guidance about how the objective of section 6 is to be advanced ..." — *Environment Court* 25 (26 January 1999) 1.

88 "Proposals for Amendments to the Resource Management Act — An Applicant's/Submitter's Concerns" in *Resource Management Act Amendments: the more it changes, the more it stays the same?* (Auckland District Law Society, 27 April 1999) 31.

89 The then Minister for the Environment, the Hon Rob Storey, described the national policy statement mechanism as " ... too cumbersome, costly and slow ..." — *Environment Update* (Ministry for the Environment, April 1993).

90 See the 1999 Resource Management Amendment Bill, cls 17-21.