NEW ZEALAND FISH & GAME COUNCIL

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TO: Bruce Mason

FROM: Bryce

RE: Your Treaty Partnership paper. DATE: 29/6/94

How about resubmitting this to the Govt, via Doug Graham, specifically asking him if he believes your logic/conclusions are flawed in any way.

Seperately you could ask DOC for its opinion — I did at the last "Partnership/NGO" meeting, and have again today, as per the attached fax.

In fact, you should ask it of each of the 3 leaders of the other 3 parties as well.

Chapman Tripp Sheffield Young
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MEMORANDUM

TO: Mr W B Johnson, Director, New Zealand Fish and Game Council, P O Box 13-141, Wellington

FROM: Sir Geoffrey Palmer and W J Attrill, Chapman Tripp Sheffield Young, Wellington

DATE: 18 July 1994

THE PRINCIPLES OF THE TREATY OF WAITANGI

1. You have sought our opinion (which is set out below) on "the principles of the Treaty of Waitangi", as those principles have been developed by the Courts in recent years.

2. In order to understand the content, status and effect of the Treaty principles, it is important to also understand not only the nature of the Treaty of Waitangi itself, but also the important position it now occupies in New Zealand's constitution and the role played by each of the branches of Government (and the Waitangi Tribunal) in moulding, applying and developing the Treaty principles themselves. We have for this reason prefaced our discussion of the Treaty principles with a brief examination of these wider legal, and constitutional, issues.

I. INTRODUCTION

3. There is, unfortunately, no definitive statement of "the principles of the Treaty of Waitangi" or of how those principles should be applied in any particular case. The principles are (in theory, at least) not identical to the exact words of the Treaty, although increasingly it is becoming difficult to discern any difference between the principles and the Treaty text. In the important recent decision of New Zealand's highest court, the Privy Council, in the broadcasting assets case (New Zealand Maori Council v Attorney-General, unreported, P.C. 14/93, 13 December 1993), the Privy Council said (at page 5):

> "Both the 1975 [Treaty of Waitangi] Act and the [State-Owned Enterprises] Act refer to the 'principles' of the Treaty. In their Lordships' opinion the 'principles' are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty). With the passage of time, the 'principles' which underlie the Treaty have become much more important that its precise terms."

4. The Treaty itself is a remarkably brief document. It is cast in wide terms and addresses broad themes. It left much to be worked out in the future. As the

Waitangi Tribunal commented in its Ngai Tahu Report (1991, Vol. 2, pp 222-223): "the broad and general nature of [the Treaty's] language indicates it was not intended as a finite contract but rather as a blueprint for the future."

5. The Treaty was expressed in both English and Maori, and there are important differences (and contradictions) between the two texts which further increase the difficulties in interpreting and applying the Treaty. The overwhelming majority of the Maori chiefs signed the Maori language version of the Treaty and Maori typically emphasise its provisions when claiming redress under the Treaty. It is not surprising, therefore, that the principles of the Treaty which have developed are equally open-textured, difficult to interpret and apply and are subject to modification and development as new circumstances arise.

6. The development of the Treaty principles involves all of the following key institutions in our constitutional system:

(a) The Executive Government;

(b) Parliament;

(c) The Waitangi Tribunal; and

(d) The Courts.

7. Obviously these bodies can (and frequently do) differ on just what the Treaty means, and what Treaty principles are relevant, in any particular case. To date, the pronouncements of the Waitangi Tribunal and the Courts on the modern day implications of the Treaty have tended to attract the greatest attention. But their activities in this area have been made possible only because Parliament has enacted legislation which specifically refers to the principles of the Treaty.

8. The Executive has also developed its own set of guidelines, notably the "Principles for Crown Action on the Treaty of Waitangi" which were published by the Department of Justice in 1989. Furthermore, Maori iwi (tribes) and pan-tribal organisations (such as the New Zealand Maori Council and the National Maori Congress) are increasingly dealing with Government directly over Treaty claims and, in the process, are endeavouring to persuade Government to accept Maori perceptions of the Treaty principles Maori regard as relevant to any particular claim.

9. Whose interpretation of the Treaty is the deciding one depends crucially upon the context in which the Treaty is addressed. In fact, it is fair to say that no one institution is in complete control of all Treaty issues. In particular, it cannot be said that the opinions of the Courts are, in all circumstances, binding on the other branches of government. This flows from the constitutional position of the Treaty of Waitangi in the New Zealand system of government and from the complex interplay of the institutions which make up that system.

II. WHAT IS THE TREATY OF WAITANGI?

10. The Treaty of Waitangi is an international treaty of cession. By the first Article of the Treaty, the chiefs and sub-tribes of New Zealand ceded their sovereignty (or "kawanatanga" - "complete government" - by the Maori text) over the country to the British Crown. Maori also gave the Crown the exclusive right to purchase tribal land (Article 2).

11. In return, Maori received "the rights and privileges of British subjects" (Article 3) and express guarantees from the Crown (in Article 2) that they would retain the "full exclusive and undisturbed possession" of their "lands and estates forests fisheries and other properties" for so long as they wished to retain those resources. In the Maori text of Article 2, the Crown agreed to protect Maori in the "unqualified exercise of their chieftainship" ("te tino rangatiratanga") over their lands, villages and all their "treasures" ("taonga"). As has been noted, contemporary Maori claims to the return of land and other resources typically emphasise the provisions of the Maori text of Article 2 of the Treaty; particularly the promise to protect tribal tino rangatiratanga over "taonga" (a flexible concept which has been interpreted to include non-physical assets of Maori, such as the Maori language). A copy of the English and Maori versions of the Treaty, along with a translation of the Maori text, is attached to this memorandum for your reference.

12. Although the Treaty is often regarded today with a degree of cynicism, that was not the attitude of the British Government in 1840 when the Treaty was signed. The British had, on a number of occasions prior to that date, expressly recognised the independent status of New Zealand and regarded Maori consent as an essential pre-requisite to the assumption of British rule over the country. In his instructions to Captain Hobson of 14 August 1839, the Secretary of State for the Colonies, Lord Normanby, advised:

> "The Queen, in common with Her Majesty's immediate predecessors, disclaims for herself and for her subjects every pretension to seize the islands of New Zealand, or to govern them as part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained. Believing, however, that their own welfare would, under the circumstances I have mentioned, be best promoted by the surrender to Her Majesty of a right now so precarious, and little more than nominal, and persuaded that the benefits of British protection, by laws administered by British Judges, would far more than compensate for the sacrifice by the natives of a national independence which they are no longer able to maintain, Her Majesty's Government have resolved to authorise you to treat with the aborigines of New Zealand for the recognition of Her Majesty's sovereign authority on the whole, or any part of those islands, which they may be willing to place under Her Majesty's dominions.
>
> ALL dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of Her Majesty's sovereignty in the islands."

13. Although the Treaty clearly anticipated (and, in a real sense, approved of) the growth of non-Maori settlement in New Zealand, non-Maori settlers as such did not gain any particular rights under the Treaty nor do the Treaty guarantees of protection extend to non-Maori. The rights of all New Zealand citizens are, in effect, determined by the extent of the Crown's (now Parliament's) Article 1 sovereignty/kawanatanga to make laws for all citizens, as well as the Government's ability to administer those laws.

14. Maori strongly argue that the Article 2 guarantees fetter the Crown's/Parliament's sovereignty and that, in effect, neither the Crown nor Parliament can take any action which would be contrary to the explicit guarantees of protection of the Maori interests referred to in Article 2. At present, the conventional view is that Parliament is sovereign and that its law-making abilities are not so restricted by the Treaty's terms. However, that view is no longer uncritically accepted and it is possible that in an extreme situation in the future the Courts may actually refuse to uphold a statute which is seriously in breach of the Treaty.

15. It is also important to realise that Maori claims under the Treaty are made against the Crown, as the other Treaty party. Although Maori claims may adversely affect private third parties (in some cases, quite seriously), Maori must look to the Crown for redress of Treaty grievances. Maori cannot directly bring claims under the Treaty against private individuals. For its part, the Government has been careful to observe this distinction and has declared that it will not (and, indeed, it cannot without legislation) compulsorily acquire private land or other privately-owned property to settle claims. The Treaty of Waitangi Act was amended in 1993 to expressly preclude the Waitangi Tribunal from recommending the return to Maori of any private land or the acquisition of any private land by the Crown.

16. Although the Government's approach accords with the fundamental two party (Crown and Maori) structure of the Treaty, strict adherence to this policy has caused difficulties in practice. Private individuals who are affected by Treaty claims, or even the public in general (when nationally important assets are at stake), can find themselves "locked out" of the claims settlement process. Further, because private land is generally not available to meet Treaty claims, publicly-owned assets (including, as you know, the Conservation Estate) have come under greater pressure to be included in Treaty settlements. As at this date it is not possible to predict how those issues will be resolved.

III. POSITION OF THE TREATY IN NEW ZEALAND'S CONSTITUTION TODAY

17. Today, the Treaty is far from being the "simple nullity" Chief Justice Prendergast said it was in Wi Parata v The Bishop of Wellington and the Attorney-General (1877) 3 NZ Jur (NS) SC 72. Indeed, in the *Broadcasting Assets case*, the Privy Council observed (at page 3) that the "Treaty records an agreement executed by the Crown and Maori, which over 150 years later is of the greatest constitutional importance to New Zealand."

The Statutory Incorporation Rule

18. The starting point, in understanding the Treaty's modern constitutional role, is what is known as the "statutory incorporation rule". That rule states that unless the Treaty is incorporated in a statute, it will not normally have any binding legal effect. In the leading case on the rule, Hoani Te Heu Heu Tukino v Aotea District Maori Land Board [1941] NZLR 590, which was also decided by the Privy Council, the Lord Chancellor, Viscount Simon, said:

> "It is well settled that any rights purporting to be conferred by [the Treaty of Waitangi] cannot be enforced in the Courts, except insofar as they have been incorporated in the municipal law . . . So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the

Treaty of Waitangi, and that he must refer the Court to some statutory recognition of the right claimed by him."

19. The rule was reaffirmed by the Court of Appeal when that Court heard the broadcasting assets case in 1992 (The New Zealand Maori Council v The Attorney-General [1992] 2 NZLR 576, 603 per McKay J) and the rule was not disputed by the Maori Council on its subsequent (unsuccessful) appeal in that case to the Privy Council. The broadcasting assets case concerned a Maori challenge to the transfer, under the State-Owned Enterprises Act 1986, of the Crown's broadcasting assets to Radio New Zealand Limited and Television New Zealand Limited. Maori argued that the transfer should not take place until satisfactory safeguards had been put in place to ensure that the Maori language was accorded an appropriate priority in public broadcasting.

20. As a result of the statutory incorporation rule, the Treaty has tended to operate (if at all) on a political level. To a large extent, that is still the case today. However, notwithstanding the rule, the Treaty's legal importance has increased markedly in recent times. This is mainly as a result of its increasing recognition in statute law (discussed next), but also because of a wider acceptance by the Courts of Maori Treaty claims and a deeper appreciation by the Courts (and, indeed, the Government) of the importance of the Treaty to Maori. It cannot now be said that the Treaty will have no effect in a context where there is no applicable statute.

Parliament

21. Since the mid-1970s, Parliament has increasingly incorporated references to the principles of the Treaty of Waitangi in statutes. A list of the current statutes which fall within this category is annexed as Appendix 2. Perhaps the most important statutory references are those found in the Treaty of Waitangi Act 1975 (which established the Waitangi Tribunal - discussed below) and section 9 of the State-Owned Enterprises Act 1986 which provides that "Nothing in this Act shall permit the Crown to act in a manner which is inconsistent with the principles of the Treaty of Waitangi". Section 9, in particular, led to a significant round of litigation by Maori against the Crown which resulted in Maori achieving notable legal victories and provided the Court of Appeal with important opportunities to formulate the Treaty principles which the Court considered were relevant to the interpretation of section 9. The practical benefits to Maori from those cases has been less easy to identify, however.

The Courts

22. Where the principles of the Treaty of Waitangi have been incorporated in a statute, then it falls to the Courts, as a matter of statutory interpretation, to say what those principles are in the particular context of the litigation. Court decisions are binding on the parties to the proceeding and may also have some value in subsequent cases as either a binding, or a persuasive, legal precedent.

23. In some cases, the Courts have "read in" Treaty principles into statutes which do not expressly refer to the Treaty and have also required Government ministers and other decision-makers to take account of those principles when exercising statutory powers of decision. For example, in the important 1987 decision of the High Court in Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188, Justice Chilwell held that certain provisions in the

(now repealed) Water and Soil Conservation Act 1967 were ambiguous and that the Treaty could be used in interpreting those provisions. His Honour said ([1987] 2 NZLR 188, 210):

> "...the authorities show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute of the obligations of the Crown to the Maori people... There can be no doubt that the Treaty is part of the fabric of New Zealand society."

24. In the Airwaves case (Attorney-General v New Zealand Maori Council [1991] 2 NZLR 129, C.A.) the Court of Appeal, by a majority, upheld an injunction which prevented the Minister of Communications from proceeding to dispose of AM and FM radio frequencies by tender. The Court considered that the Minister should wait for the Waitangi Tribunal to hear and report on a Treaty claim that Maori were in need of a greater share of FM frequencies and television prime-time to ensure survival of the Maori language. The majority judges were of the view that "no reasonable Minister, if he accepted the Crown is bound to have regard to Waitangi Tribunal recommendations on Maori broadcasting, could do other than allow the Tribunal a reasonable time for carrying out its inquiries" (page 139).

25. Through these processes, the Courts have, over time, developed a range of somewhat rudimentary and open-textured, but also far-reaching, Treaty principles. In the 1980s the Courts were particularly active in this area. In 1987, the Government's entire corporatisation programme was brought to a halt by Maori-initiated Court action under section 9 of the SOE Act (the key decision of the Court of Appeal is reported as: New Zealand Maori Council v The Attorney-General [1987] 1 NZLR 641, C.A. - referred to below as the "New Zealand Maori Council case"). The Government was forced to reach a settlement with Maori (which was enacted in legislation, the Treaty of Waitangi (State Enterprises) Act 1988) before the programme could proceed.

26. There were those who thought the Courts in these cases had begun to overstep their constitutional role of interpreting statutes, and were instead making policy that was properly the province of the Executive and Parliament. In the 1990s, the Courts have tended to display more restraint and to more carefully identify their role. An early indication of this approach was given by Justice Richardson, who was in the minority in the Airwaves case, when he stated (page 141):

> "Policy decisions are for Ministers entrusted with the exercise of statutory power. They are not for the Courts. The legitimate role of the Court is to satisfy itself that the process of decision-making accords with the administrative law standards. It is not to review or question a substantive policy decision. The overall policy concern here was how best to utilise the radio frequency spectrum in the national interest. A highly relevant policy consideration was the promotion of Maori language and culture through broadcasting policy. It was for the Minister to determine the manner and extent to which this important national resource should be utilised to further that objective."

27. While other factors, such as the wider public interest and economic concerns, have been identified by the Courts in cases involving the Treaty in the

past, there appears to be an increasing acknowledgement by the judiciary of such factors. This has been particularly evident in the broadcasting assets line of cases. For example, Justice McGechan in the High Court (New Zealand Maori Council v. Attorney-General, unreported, HC-Wgtn, CP 942/88, 3 May 1991) noted (at page 64) that:

> "Public funds are scarce, and with no sign of early relief. It would be a brave soul who predicted Government could immediately, even as a matter of priority, find sufficient sums for capital purchases for Maori broadcasting, at a time when all social welfare needs (including those of Maori) are pressing. A Court should take note of the obvious economic circumstances and political realities in assessing likely human conduct. They are as much a fact as the weather."

28. The Court of Appeal, which by a 3:1 majority dismissed the Maori appeal from the High Court, emphasised the Court's constitutional function. Justice McKay, one of the majority judges, said (page 598):

> "It is not the Court's role to make policy decisions or to decide on the concrete steps which would have to be taken as a minimum in order to comply with Treaty principles. Nor do I think the Court is required to pass judgment on the whole of the Crown policy in this area."

29. However, the Privy Council in the same case cautioned that the Courts should not go too far. The Privy Council was of the view (page 15) that the majority of the Court of Appeal:

> "... were mistaken in suggesting that as the question of the manner in which the Crown chooses to fulfil its obligations under the Treaty is a matter of policy the court has no power to intervene unless the court is satisfied that the policy is unreasonable ... The question is a matter on which the court must form its own judgment on the evidence before the court."

30. Notwithstanding the Privy Council's comments, as the Courts have begun to acknowledge economic and public interests (including the Government's right to make policy in the interests of all New Zealanders), the principles of the Treaty appear to have been modified and tempered to some degree. We have not yet reached the stage where the Treaty is directly enforceable in the Courts against the Government. It is possible that developments will go that far, but they have not done so yet.

The Executive

31. Decisions regarding the allocation of resources in settlement of claims negotiated between the Crown and Maori are the responsibility, in the first instance, of the Cabinet. However, Parliamentary approval is required for the expenditure of any public funds, and legislation may also be required to implement Treaty settlements (particularly where the transfer of non-monetary public assets is concerned, or to ensure the settlement "sticks", i.e. is "final" and binding on Maori). Parliamentary input on matters affecting Maori Treaty claims may be greater under MMP. Under the present FPP system, Cabinet's decisions as to the Budget and allocation of resources tend to be final. They are not changed by Parliament. The accountability of Government to both Parliament and the

electorate is likely to be enhanced under MMP causing perhaps heightened scrutiny of Treaty settlements.

32. The Government has some room to manoeuvre in its approach to the application of Treaty principles, particularly as the principles themselves are flexible. Where Government acts pursuant to statutory authority, it must comply with the requirements of the statute and can be reviewed in the Courts if it fails to do so. The Government will frequently be required to have regard to the wider public interest, either because the statute directs the Government to do so, or because the public interest is a relevant consideration which must be taken into account when Ministers seek to exercise statutory powers of decision. Increasingly, the Government is also having to observe New Zealand's international obligations. However, in matters of high policy (including, particularly, the allocation of national resources to settle Treaty claims) judicial review is unlikely, by itself, to be a significant restraint on the Crown. Furthermore, the Courts have tended to leave the final settlement of disputes in the hands of the parties themselves. Indeed, in its 1989 decision Tainui Maori Trust Board v Attorney-General [1989] 2 NZLR 513, the President of the Court of Appeal, Sir Robin Cooke, considered (at page 529) that the principles of the Treaty required Maori and the Crown to make a "genuine effort" to work out their own agreement to settle the claims in that case.

33. Although the 1989 "Principles for Crown Action on the Treaty of Waitangi" have not been revoked as government policy, the Government's approach towards the Treaty is not always easy to discern. Advice to the Government on Treaty issues has varied significantly between the different Departments who have an interest in this area. On the whole, the Government has moved with caution and, when faced with litigation or Tribunal proceedings, has tended to emphasise the Crown's sovereign rights to govern under Article 1 and the principle that the Crown is entitled to reasonable co-operation from Maori.

34. Some believe the Government has failed to take the initiative in the Treaty debate. Current government policy is to settle all major claims by the turn of the century, and for settlements to not exceed a so-called "fiscal envelope". News reports have suggested that the envelope may be as large as $2 billion, although Government has yet to decide on the figure. There is concern that the settlement process is not sufficiently transparent for Government to be held properly accountable. With the prospect of a by-election and perhaps further political instability after that, it is possible progress in reaching and announcing actual settlements will not be rapid.

35. The position of the Executive government, particularly Cabinet, is critical in any settlement proposal. The Executive carries the negotiations. The Executive must make the Budgetary allocations. The Executive must muster the political will to drive the process. While the Executive's proposals may not find favour in a Parliament where the Government has a slender majority, or in an MMP parliament, in practical effect no settlements will be reached which the Executive opposes. Executive proposal of settlement is therefore a necessary condition of Treaty settlement but not a sufficient one. Parliament is an increasingly important factor.

The Waitangi Tribunal

36. The last, but by no means least, key institution in understanding the role of Treaty principles is the Waitangi Tribunal. The Tribunal was established in 1975 by the Treaty of Waitangi Act of that year. At the beginning, little was heard from the Tribunal. Then in the late 1970s Chief Judge Durie was appointed its head and, under his leadership, the Tribunal began to produce comprehensive and startling reports which generally upheld major Maori Treaty claims. In 1985 the Tribunal's jurisdiction to hear claims was extended back to 6 February 1840 and the Tribunal began to report on Maori claims based on alleged historical breaches of the Treaty by the Crown, often dating from last century. The confidence which Maori have in the Tribunal is reflected in the fact that the Tribunal now faces a big backlog of claims waiting to be heard.

37. Should Maori feel that the interpretation of the Treaty adopted by Parliament or the Executive at any time since 6 February 1840 is contrary to the Treaty they can lodge a claim to this effect with to the Waitangi Tribunal which may report on the matter (Treaty of Waitangi Act 1975, section 6). The Tribunal is restricted, in most cases, to making non-binding recommendations to government "relating to the practical application of the Treaty". Under its Act, the Tribunal is directed to assess Crown actions or legislation against the principles of the Treaty. The Treaty principles must in turn reflect both the English and the Maori Treaty texts. As a result, the Tribunal has itself developed a wide variety of Treaty principles, many of which have also been adopted by the Courts. The Courts have recognised that the Tribunal is a specialist body, in relation to interpreting and applying the Treaty, and have in the past treated the Tribunal's reports with a considerable degree of respect. The Courts are not, however, a rubber stamp for principles of the Treaty enunciated by the Tribunal. In more recent times, the Courts have demonstrated that they are prepared to reject Tribunal findings or reasoning with which they do not agree.

IV. THE PRINCIPLES OF THE TREATY

38. The preliminary observations above are essential to an understanding of the principles of the Treaty, since much depends on who is deciding what the principles are and in what context they should be applied. The principles of the Treaty of Waitangi are continually being developed and fine-tuned by the Courts and the Waitangi Tribunal. Indeed, they are in a constant state of evolution.

39. The big shift in approach taken by the Courts occurred in 1987. This new approach has had several results. First, development of several of the principles has continued. Second, there is now an acknowledgement that other important considerations, such as economic and social concerns, need to be weighed in judging outcomes. Although the principles have yet to be applied to a range of situations, the case-law and Tribunal reports do provide some parameters within which Treaty disputes can be addressed.

40. The 1987 New Zealand Maori Council case was the first major decision of the Court of Appeal which dealt with the interpretation of the principles of the Treaty of Waitangi. The principles outlined by the Court then have provided the benchmark for subsequent decisions and continue to enjoy a degree of acceptance in the Courts, the Tribunal and Government and amongst Maori.

41. In seeking to define the 'principles' of the Treaty, the Court of Appeal looked to reports of the Waitangi Tribunal, lists of Treaty principles submitted by the parties to the case, the Maori Affairs Bill then before Parliament (now enacted as Te Ture Whenua Maori/the Maori Land Act 1993), as well as affidavit evidence given by leading Maori figures and other materials submitted to the Court.

42. In the decision, Justice Somers observed that (page 692):

> "The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed are the circumstances to which those principles are to apply. At its making all lay in the future. Now much, claimed to be in breach of the principles and of the Treaty itself, lies in the past. Those signing the Treaty must have expected its terms would be honoured. It did not provide for what was to happen if, as has occurred, its terms were broken."

And that (page 693):

> "A breach of a Treaty provision must in my view be a breach of the principles of the Treaty."

43. Justice Casey stated (page 702) that in creating legislation that referred to 'principles' rather than 'terms or provisions' of the Treaty, Parliament provided for the Treaty's terms to be:

> "... understood in the light of the fundamental concepts underlying them. [This] calls for an assessment of the relationship the parties hoped to create by and reflect in that document, and an enquiry into the benefits and obligations involved in applying its language in today's changed conditions and expectations in the light of that relationship."

The Key Treaty Principles

44. The main Treaty principles, as developed by the Tribunal and the Courts, are summarised as follows. The principles are listed in no particular order of importance.

PRINCIPLE 1: THE "ESSENTIAL BARGAIN"

45. The Treaty represents a bargain between the Crown and Maori. Its purpose was to secure the acquisition of sovereignty by the Crown in exchange for the protection of Maori tribal rangatiratanga over land and other taonga.

46. On this principle, the President of the Court of Appeal in the 1987 New Zealand Maori Council case, explained that the basic terms of the Treaty bargain were (page 663):

> "... that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated. These aims are partly conflicted. The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas."

47. In the same case, Justice Richardson considered that (page 673):

> "There is ... one overarching principle ... that considered in the context of the [SOE] Act, the Treaty of Waitangi must be viewed as a solemn compact between two identified parties, the Crown and the Maori, through which the colonisation of New Zealand was to become possible. For its part the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return it gave certain guarantees."

The Government's right to govern

48. An important aspect of this principle is that the Government is entitled to govern and that each party is entitled to expect reasonable co-operation from the other. Thus the President of the Court of Appeal noted in the New Zealand Maori Council case that (pages 665-666):

> "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."

49. In addition, Justice Bisson stated that (page 716):

> "... it is in accordance with the principles of the Treaty that the Crown should provide laws and make related decisions for the community as a whole having regard to the economic and other needs of the day ..."

50. In a subsequent decision of the Court of Appeal in 1989, also under the SOE Act, (Tainui Maori Trust Board v Attorney-General [1989] 2 NZLR 513), the President noted that (page 530):

> "On the Maori side it has to be understood that the Treaty gave the Queen government, Kawanatanga, and foresaw continuing immigration. The development of New Zealand as a nation has been largely due to that immigration. Maori must recognise that it flowed from the Treaty and that both the history and the economy of the nation rule out extravagant claims in a democracy now shared. Both partners should know that a narrow focus on the past is useless. The principles of the Treaty have to be applied to give their results in today's world."

51. On the duty of Maori to co-operate with government, in the New Zealand Maori Council case President Cooke noted that (page 529):

> "... the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation."

PRINCIPLE 2: PARTNERSHIP

52. A central (and often controversial) principle is the notion that the Treaty signifies a "partnership" between Maori and the Crown which imposes on the

parties a duty to act reasonably and in the utmost good faith towards each other. The responsibilities of the parties under the Treaty have been compared to "fiduciary duties", or duties of trust and confidence.

53. The "partnership" concept gained its greatest impetus from the Court of Appeal's decision in the New Zealand Maori Council case. Justice Casey explained the reasons behind the partnership in these terms (page 702):

> "From the attitude of the Colonial Office and the transactions between its representatives and the Maori chiefs, and from the terms of the Treaty itself, it is not difficult to infer from the start in 1840 of something in the nature of a partnership between the Crown and the Maori people. The latter ceded rights of government in exchange for guarantees of possession and control of their lands and precious possessions [taonga] for so long as they wanted to retain them. In its context Captain Hobson's famous announcement "Now we are one people" points to this concept rather than the notion that with a stroke of the pen both races had become assimilated".

54. The partnership concept is not identical to a legal partnership under the Partnership Act 1908. For example, it does not necessarily imply that Maori are entitled to an equal share in, or say in the management of, natural resources. In the forests case (New Zealand Maori Council v Attorney-General [1989] 2 NZLR 142, C.A.) President Cooke explained (page 152):

> "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 national assets or resources as regards which, even if Maori have some fair claim, other initiatives have still made the greater contribution. For example - and it is only an example - that might well be true of some pine forests."

55. Similar sentiments were expressed by the President in the Tainui case (at page 529):

> "The demand for coal and the establishment of the New Zealand coal industry have come largely from European or Western civilisation. Even so coal can be classified as a form of taonga, there was apparently some limited Maori use of it before the Treaty, and there has been the Maori contribution to the industry. A negotiated settlement which recognised as regards coal that Tainui are entitled to the equivalent of a substantial proportion but still considerably less than half of this particular resource could be suggested as falling within the spirit of the Treaty of Waitangi."

56. On the other hand, partnership is not an entirely empty concept either. The Courts will enforce the Crown's Treaty obligations, including dealing fairly with Maori as a Treaty partner, at least where statute requires this. As Sir Robin Cooke said towards the end of His Honour's judgment in New Zealand Maori Council (at page 667):

> "... [the] principles [of the Treaty] require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured."

PRINCIPLE 3: ACTIVE PROTECTION

57. The duties of the Crown under the Treaty are not merely passive but extend to active protection of Maori in the use of their lands, waters and other guaranteed taonga, to the fullest extent practicable. This principle is based on the terms of Article 2. It does not allow the Crown to benignly ignore Maori interests, but rather calls on the Crown to take active steps to protect those interests. The Crown's duty is continuous and the Crown's obligations under this principle may be increased by:

(a) the nature of the interest which is at risk (for example, the Crown may be under a greater duty to protect highly valued Maori taonga, such as urupa (burial grounds) or the Maori language);

(b) the extent to which the Maori interest is at risk (again, the fact that only a small number of fluent Maori speakers remain, such that the continued survival of the language is at risk, may place a greater burden on the Crown to take steps to protect and enhance the Maori language); and

(c) whether the above factors (a) and (b) are the direct or indirect result of past Crown breaches of the Treaty (including, possibly, breaches that are due to legislative action): Privy Council, broadcasting assets, page 5.

58. Lord Woolf, who delivered the judgment of the Privy Council in the broadcasting assets case, expressed the principle in this way (page 5):

> "Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation."

59. The Crown's obligations of active protection are not absolute. Lord Woolf went on to strongly make this point:

> "It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual co-operation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant."

60. And in the High Court's decision in the same case, Justice McGechan said (page 22):

> "Under the acknowledgement of kawanatanga or "sovereignty" (both words appear inadequate) the Crown is to govern. A country incorporating two peoples is to develop. In that exercise, kawanatanga resting uneasily as it does with tribal tino rangatiratanga, there will be occasions when damage to taonga inevitably will occur. Lands necessarily will be taken for public purposes. However there remains a duty, following on from Treaty principles requiring good faith and fair and reasonable conduct, to do no more damage than necessary in the exercise of that governmental function."

PRINCIPLE 4: REDRESS

61. The Court of Appeal has suggested that "where grievances are established, the State for its part is required to take active steps in reparation (Justice Richardson in New Zealand Maori Council at 674). Justice Somers in that case used the analogy with the law of partnership:

> "The obligation of the parties to the Treaty to comply with its terms is implicit, just as is the obligation of parties to a contract to keep their premises. So is the right of redress for breach which may fairly be described as a principle, and was in my view intended by Parliament to be embraced by the terms it used in section 9. As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other - a fair and reasonable recognition of, and recompense for, the wrong that has occurred. That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal."

62. This principle need not necessitate payment by the Crown of ruinous damages to Maori for past Treaty breaches. The Waitangi Tribunal considers that in many cases it will be sufficient for the Crown to "ask what can be done now and in the future to rebuild the tribes and furnish those needing it with the land endowments necessary for their own tribal programmes" (Waiheke Island Report, 1987, 86).

63. As we have noted earlier (at paragraph 26), the Courts have recognised that the Government's resources are not bottomless and the Courts should not expect the Crown to find significant resources to meet Maori Treaty claims, particularly in terms of economic hardship. That view may change, however, if New Zealand's economy continues to improve.

PRINCIPLE 5: TRIBAL RANGATIRATANGA

64. Maori are to retain "unqualified chieftainship" ("tino rangatiratanga") over their resources and taonga as well as to have all the rights and privileges of citizenship.

65. This principle is implied from Articles 2 and 3, and is generally addressed in the principle of essential bargain above. As it was specifically noted by Justice Bisson in the New Zealand Maori Council case (page 715):

> "The Maori Chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of the utmost good faith in the matter of which their existing rights would be guaranteed and in particular guaranteed down to each individual Maori the full exclusive and undisturbed possession of their lands which is the basic and most important principle of the Treaty in the context of the case before this Court ... [also] ... Her Majesty extended to the natives of New Zealand. ... all the rights and privileges of British subjects."

66. The Waitangi Tribunal has explained the concept of tino rangatiratanga in a variety of its reports. In the Orakei report is said:

> "The meaning of tino rangatiratanga has caused us much trouble. There is no precise English equivalent, and it is used in the Treaty in an "un-Maori" manner. To give it the meaning both parties would have understood, we render it as full authority..." (emphasis added).

67. In other reports the Tribunal has defined tino rangatiratanga as denoting "absolute control" over resources "according to Maori custom" and as reflecting the mana of Maori iwi (tribes) or hapu (sub-tribes) - as property rights were traditionally communal in nature - not only to possess resources but also to control and manage those resources in accordance with their own cultural preferences and practices. This would necessarily include the right to exclude others from the resources. With the possible exception of the term "mana" (which was not used in the Treaty), tino rangatiratanga is effectively the traditional Maori concept which comes closest to European notions of ownership.

PRINCIPLE 6: CONSULTATION

68. The Treaty principle of consultation is less well established than some of the other principles. In the New Zealand Maori Council case, the Court of Appeal rejected, as "unworkable", a general Treaty duty that the Crown must consult with Maori. Sir Robin Cooke explained the difficulties (page 665):

> "Exactly who should be consulted before any particular legislative or administrative step which might affect some Maoris, it would be difficult or impossible to lay down. Moreover, wide-ranging consultations could hold up the processes of Government in a way contrary to the principles of the Treaty."

69. However, in the subsequent forests case, the Court of Appeal invoked the partnership principle and said (page 152):

> "We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clear beyond argument."

70. In practice, consultation has tended to occur either in the context of actual or threatened litigation by Maori or where expressly required by statute (e.g., the Resource Management Act 1991).

PRINCIPLE 7: HONOUR OF THE CROWN

71. This principle also flows from the partnership idea, but also from the old common law notion that the Crown is, in some sense, the protector of the indigenous inhabitants of the lands it colonises and should not engage in any sharp practices against those peoples. Justice McGechan in the broadcasting assets case reflected these considerations when his Honour said (page 15):

> "The parties are to continue to act in, and are entitled to expect, good faith. The Crown is expected to act in relation to Maori in accordance with the concept of honour of the Crown."

PRINCIPLE 8: THE PRINCIPLE OF "OPTIONS"

72. The Waitangi Tribunal has considered the relationship between the three articles of the Treaty. In so doing, the Tribunal has identified a principle which it has termed "the principle of options". In its Muriwhenua Fishing Report (1988) at page 195 the Tribunal said of this principle:

> "(a) The Treaty envisaged the protection of tribal authority, culture and customs. It also conferred on individual Maori the same rights and privileges as British subjects.
>
> (b) Neither text prevents individual Maori from pursuing a direction of personal choice. The Treaty provided an effective option to Maori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds. That same option is open to all people, is currently much in vogue and may represent the ultimate in partnership. But these are options, that is to say, it was not intended that the partner's choices could be forced.
>
> (c) The historical record suggests Maori have consistently sought to uphold tribal ways against policies directed to amalgamation... but there is no certainty that that preference would be maintained if the forces of amalgamation were removed.
>
> (d) But the tribal right is also upheld. The individual, as a British subject, has the same rights (and duties) as anyone else in pursuing individual employment or gain. This may reduce the tribal need but does not necessarily replace it."

73. To put it another way, Maori rights under Article 3 are in addition to the specific guarantees of protection of traditional Maori interests contained in Article 2. The Article 3 "rights and privileges of British subjects" cannot be used to "read down" the rights recognised in the second article. - In this sense the Tribunal has found that Maori can "have their cake and eat it too".

The Crown's Treaty Principles

74. As we have noted, in 1989 the Crown published its own set of principles for Crown action on the Treaty. They are not necessarily the same as the principles laid down by the Tribunal and the Courts. They are:

74.1 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.

74.2 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 toanga 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.

74.3 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.

74.4 The Principle of Co-operation

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 co-operation which is an obligation placed on both parties to the Treaty.

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

74.5 The Principles of Redress

The Crown accepts a responsibility to provide a process for the resolution of grievance 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.

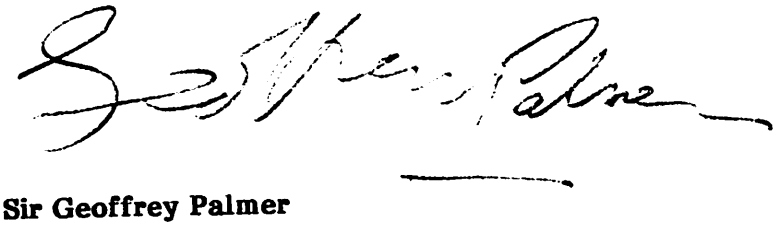
75. It can be seen from comparing these two sets of principles, developed by the Crown on the one hand and the Courts on the other, that perspectives may differ when it comes down to a practical evaluation on a set of actual facts as to what the Treaty may require. Despite the fact that what the courts say on these issues are not necessarily applicable to all occasions when the meaning of the Treaty has to be arrived at, it is helpful to go through the salient aspects of all of the judgments as has been done above.

V. CONCLUSION

76. It must be evident from the foregoing analysis that it is imprudent to be dogmatic about the precise meaning and application of the principles of the Treaty of Waitangi. There can be little doubt that the Treaty has been of increasing weight recently. So far as settlements of claims are concerned, however, the key decision makers will be the Executive and to a lesser, but enhanced extent, the Parliament.

77. The principles which have been developed by the Waitangi Tribunal and the Courts are important in shaping the context in which settlement issues are addressed. Yet the larger the settlement and the greater the resource required to satisfy it, the more appropriate it is for the issue to be within the province of the Executive and the Parliament.

78. These may be circumstances in which the views of the Courts become important on an application for judicial review of a settlement. Yet it is likely that these influences will be peripheral, and the essential policy drivers of the settlement process will be within the Executive, with the requirement that Parliament approve.



Sir Geoffrey Palmer
Consultant

Appendix 1

The Texts of the Treaty of Waitangi

(1) The Treaty of Waitangi
Official Version[1]

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article The First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation and Independent Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

Article The Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and

[1] First Schedule to the Treaty of Waitangi Act 1975 (1975 N.Z. Stat. 114).

undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article The Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W. HOBSON Lieutenant Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One Thousand eight hundred and forty.

[*Here follow signatures, dates, etc.*]

(2) Te Tiriti o Waitangi
Official Version[2]

KO WIKITORIA, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko Te Tuatahi

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.

Ko Te Tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua.o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko Te Tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga

[2] *Id.*, as amended by s. 4, Treaty of Waitangi Amendment Act 1985 (1985 N.Z. Stat. 148).

tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) WILLIAM HOBSON,
Consul and Lieutenant Governor.

Na ko matou ko nga Rangatira o te Wakaminenga a nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.

(3) Te Tiriti o Waitangi

Literal Translation by Prof. I. H. Kawharu[3]

Victoria, the Queen of England, in her concern to protect the chiefs and subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order considers it just to appoint an administrator one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands and also because there are many of her subjects already living on this land and others yet to come.

So the Queen desires to establish a government so that no evil will come to Maori and European living in a state of lawlessness.

So the Queen has appointed me, William Hobson a captain in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

The First

The Chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.

The Second

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person buying it (the latter being) appointed by the Queen as her purchase agent.

The Third

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them

[3] As accepted by the parties to *The New Zealand Maori Council v. The Attorney-General* [1987] 1 N.Z.L.R. 641 (C.A.) at 662-663 per Cooke P.

the same rights and duties of citizenship as the people of England.

Signed WILLIAM HOBSON
Consul and Lieutenant Governor

So we, the Chiefs of the Confederation and of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and marks thus

Was done at Waitangi on the sixth of February in the year of our Lord 1840

The Chiefs of the Confederation

APPENDIX 2

Important Statutory Incorporations of the Treaty of Waitangi

Resolution of claims under Treaty of Waitangi
Treaty of Waitangi Act 1975
Treaty of Waitangi (State Enterprises) Act 1988
Crown Forest Assets Act 1989
Treaty of Waitangi (Fisheries Claims) Settlement Act 1992

Legislation to secure rights protected by the Treaty of Waitangi
Fisheries Act 1983
Maori Language Act 1987
Maori Fisheries Act 1989

Provisions requiring that regard be had to the principles of the Treaty of Waitangi
Environment Act 1986
State-Owned Enterprises Act 1986*
Conservation Act 1987*
Crown Minerals Act 1991
Foreshore and Seabed Endowment Revesting Act 1991
Harbour Boards Dry Land Endowment Revesting Act 1991
Resource Management Act 1991
Crown Research Institutes Act 1992

(* denotes legislation which accords priority to the principles of the Treaty of Waitangi).

Provisions requiring that regard be had to Maori interests or the Maori perspective
Law Commission Act 1985
Education Act 1989
Broadcasting Act 1989

Equal opportunity provisions
Access Training Scheme Act 1988
State Sector Act 2988 (and many other provisions regulating the appointment of staff to statutory bodies, such as the Law Practitioners Act 1982 and the Broadcasting Act 1989)

General provisions allowing for cultural differences
Criminal Justice Act 1985
Coroners Act 1988
Children, Young Persons and their Families Act 1989
School Trustees Act 1989

THE PRINCIPLES OF THE TREATY: SOMETHING LESS THAN SYCOPHANCY

1. Safety warning: tolerance-free zone
2. A political question; doubts are morally and intellectually defensible
3. Why do we applaud lawyers?
4. The status of the Treaty in international and domestic law
5. What does it say? The terms
6. The disappearance of the parties
7. Increasing references to principles
8. Judicial activism and undemocratic tendencies
9. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641
10. The principles – a political exercise. Implications?
11. "Partnership"
12. "special relationship"
13. "taonga"
14. The obligation to respect the Waitangi Tribunal
15. What help platitudes?
16. Other statutes: the Resource Management Act 1991
    the Conservation Act 1987
    Ngai Tahu Trust Board v Director-General of Conservation [1995] 3 NZLR 553
17. Final questions:

    Will the process ever end?
    Do lawyers do any good?
    Who rules – us or the dead? The people, or judges?
    Where are we going?

THE TREATY OF WAITANGI

(THE TEXT IN ENGLISH)

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

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In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W. HOBSON Lieutenant Governor.

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Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[*Here follow signatures, dates, etc.*]

The Environment Act 1986

An Act to—

(a) Provide for the establishment of the office of Parliamentary Commissioner for the Environment:

(b) Provide for the establishment of the Ministry for the Environment:

(c) Ensure that, in the management of natural and physical resources, full and balanced account is taken of—

(i) The intrinsic values of ecosystems; and

(ii) All values which are placed by individuals and groups on the quality of the environment; and

(iii) The principles of the Treaty of Waitangi; and

(iv) The sustainability of natural and physical resources; and

(v) The needs of future generations

The Conservation Act 1987

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

The Crown Minerals Act 1991

4. Treaty of Waitangi—All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

The Resource Management Act 1991

"Iwi authority" means the authority which represents an iwi and which is recognised by that iwi as having authority to do so:

"Kaitiakitanga" means the exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself:

"Maataitai" means food resources from the sea and "mahinga maataitai" means the areas from which these resources are gathered:

"Mana whenua" means customary authority exercised by an iwi or hapu in an identified area:

"Tangata whenua", in relation to a particular area, means the iwi, or hapu, that holds mana whenua over that area:

"Taonga raranga" means plants which produce material highly prized for use in weaving:

"Tauranga waka" means canoe landing sites:

"Tikanga Maori" means Maori customary values and practices:

"Treaty of Waitangi (Te Tiriti o Waitangi)" has the same meaning as the word "Treaty" as defined in section 2 of the Treaty of Waitangi Act 1975:

PART II

PURPOSE AND PRINCIPLES

5. Purpose—(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

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

(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

7. Other matters—In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) Kaitiakitanga: (aa) the ethic of stewardship

(b) The efficient use and development of natural and physical resources:

(c) The maintenance and enhancement of amenity values:

(d) Intrinsic values of ecosystems:

(e) Recognition and protection of the heritage values of sites, buildings, places, or areas:

(f) Maintenance and enhancement of the quality of the environment:

(g) Any finite characteristics of natural and physical resources:

(h) The protection of the habitat of trout and salmon.

8. Treaty of Waitangi—In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

The State-Owned Enterprises Act 1986

4. Principal objective to be successful business—(1) The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be—

(a) As profitable and efficient as comparable businesses that are not owned by the Crown; and

(b) A good employer; and

(c) An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.

(2) For the purposes of this section, a "good employer" is an employer who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring—

(a) Good and safe working conditions; and

(b) An equal opportunities employment programme; and

(c) The impartial selection of suitably qualified persons for appointment; and

(d) Opportunities for the enhancement of the abilities of individual employees.

9. 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.

27. Maori land claims—(1) Where land is transferred to a State enterprise pursuant to this Act and, before the day on which this Act receives the Governor-General's assent, a claim has been submitted in respect of that land under section 6 of the Treaty of Waitangi Act 1975, the following provisions shall apply:

(a) The land shall continue to be subject to that claim:

(b) Subject to subsection (2) of this section, the State enterprise shall not transfer that land or any interest therein to any person other than the Crown:

(c) Subject to subsection (2) of this section, no District Land Registrar shall register the State enterprise as proprietor of the land or issue a certificate of title in respect of the land.

(2) Where findings have been made pursuant to section 6 of the Treaty of Waitangi Act 1975 in respect of land which is held by a State enterprise pursuant to a transfer made under this Act (whether or not subsection (1) of this section applies to that land), the Governor-General may, by Order in Council,—

(a) Declare that all or any part of the land shall be resumed by the Crown on a date specified in the Order in Council; or

(b) In the case of land to which subsection (1) of this section applies, waive the application of paragraphs (b) and (c) of that subsection to all or any part of the land.

(3) Where any land is to be resumed pursuant to subsection (2) (a) of this section—

(a) The State enterprise shall transfer the land to the Crown on the date specified in the Order in Council; and

(b) The Crown shall pay to the State enterprise an amount equal to the value of the interest of the State enterprise in the land (including any improvements thereon). The amount of any such value shall be that agreed between the State enterprise and its shareholding Ministers or, failing agreement, that determined by a person approved for this purpose by the State enterprise and its shareholding Ministers.

THE NEW ZEALAND MAORI COUNCIL AND LATIMER v ATTORNEY-GENERAL AND OTHERS

Court of Appeal (CA 54/87)
4-8 May; 29 June 1987
Cooke P, Richardson, Somers, Casey and Bisson JJ

Application for judicial review — Declaration as to unlawfulness of certain projected dealings with Crown land — Proper interpretation of State-Owned Enterprises Act 1986 — "Principles of the Treaty of Waitangi" — Status of Maori land claims under Waitangi Tribunal Act 1975 — State-Owned Enterprises Act 1986, ss 9, 23, 27 — Waitangi Tribunal Act 1975, s 6.

This application, which was moved into the Court of Appeal, was for judicial review of the proposed exercise by Ministers of the power given to them by s 23 of the State-Owned Enterprises ("SOE") Act 1986 to transfer land on behalf of the Crown to State enterprises.

Following the introduction of the SOE Bill the Waitangi Tribunal recommended that the powers to transfer Crown land should not be exercisable in respect of lands subject to claims before the Tribunal. This intervention led to the addition of what are now ss 9 and 27 of the SOE Act. The central issue in this case was the meaning, status and ambit of s 9, which reads as follows:

> 9. 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.

Section 27 deals with land subject to a claim under the Waitangi Tribunal Act 1975, and includes provisions that land which was on 18 December 1986 (the date the SOE Act came into force) subject to a claim made to the Waitangi Tribunal shall remain subject to that claim in the hands of the Crown. A large number of claims were received by the Tribunal after that date — many pursuant to the 1986 amendment which permitted claims dating back to the Treaty. The applicants in the present proceedings feared that lands the subject of claims made to the Tribunal after 18 December 1986 would be transferred by Ministers under s 23 of the SOE Act; and that this would make it both harder for the Crown to satisfy any such claims which were recommended by the Tribunal, and virtually impossible for the Crown to do so if the land concerned had by that time been transferred on by

the State enterprises to private ownership. The applicants were concerned also that land transferred under s 23 not only might include land the subject of a claim or prospective claim under the Waitangi Tribunal Act 1975, but also would diminish the stock of Crown land available for transfer in compensation for land successfully claimed but now for one reason or another out of reach. (The comment of Casey J on this second point, near the end of his judgment, is worth noting).

The Crown opposed the application basically on two grounds: (a) that s 27 of the SOE Act was a self-contained code regulating dealings with land that was subject to claims under the Treaty at the date the Act came into force, and thus should not be read down under the general words of s 9. The proposed transfers would not in any case be inconsistent with the principles of the Treaty: and (b) that the restraint sought by the applicants would impose serious delays and administrative difficulties on the Crown in proceeding with the planned transfer of assets that was a central feature of the SOE Act. If necessary, the Crown said, s 9 must be read as if subject to the implied qualification "except in relation to land".

The overall conclusion of the Court is summarised by the President at p 373 of his judgment in these words:

> At the outset I mentioned that each member of the Court was writing a separate judgment. It will be seen that approaching the case independently we have all reached two major conclusions. First, that the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act. Second, that those principles require the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith.

Held (1) Both the wording of s 9 of the SOE Act and its position in the Act (in Part I, "Principles",) showed that it was intended to govern the whole Act, including s 27. It was "a paramount provision" (per Somers J at 404). Given that "land is a primary concern to Maoris under the Treaty of Waitangi, and the utilisation and disposition of Crown land is a primary concern under the SOE Act," there was no justification for excluding land from the ambit of s 9 (per Richardson J at 387). "In its ordinary and natural sense the section has the impact of a constitutional guarantee within the field covered by the SOE Act" (per Cooke P at 364).

(2) However, the operation of s 27 of the SOE Act was not confined to rectifying mistakes, or to catching cases where transfers of land had been made in breach of s 9. The existence of a claim to specified land under the Waitangi Tribunal Act did not of itself prevent a transfer of that land under s 23 of the SOE Act. This was the combined effect of s 27(1) and (2). "These provisions are in effect a direct statement that a transfer of land against which a claim has been made is not contrary to s 9. That is the only way the two sections can sensibly be read together" (per Somers J at 403).

(3) There were well-known textual problems with the Treaty of Waitangi, but in the total scene these were not important. "What matters is the spirit" (per Cooke P at 369). The way ahead called "above all for a generosity of spirit" (per Richardson J at 380).

(4) The requirement that the Treaty partners act towards each other reasonably and with the utmost good faith is reciprocal, and is "the kind of duty which in civil law partners owe to each other" (per Somers J at 400).

(5) The Crown's duty "extends to active protection of Maori people" (per Cooke P at 370); and "the principles of the Treaty include an obligation to redress

past breaches of the Treaty" (per Somers J at 404).

(6) "The Crown must be satisfied that any disposition to a State enterprise would not preclude or unreasonably impede giving effect to any recommendation of the Waitangi Tribunal for the return of Crown land or for land in lieu where land has already gone out of Crown hands" (per Richardson J at 392).

(7) The "Principles of the Treaty" did not extend to a general requirement that the Crown must always consult with Maori interests (as suggested by counsel for the applicants). The Maori people were entitled to rely in general on the old concept of "the honour of the Crown", discussed by Richardson J at 389 and by Casey J at 410).

(8) In interpreting the Treaty "it would be appropriate to adopt from another context the words of Lord Wilberforce in *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] 3 All ER 1048, 1052, and determine the principles of the Treaty — "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation"" (per Bisson J at 422).

(9) There would be a declaration that it would be unlawful to transfer assets to State enterprises without establishing a system for considering, in relation to particular assets or categories of assets, whether their transfer would be inconsistent with the principles of the Treaty of Waitangi.

(10) Directions would be given for the speedy preparation and final approval by the Court of "a system of safeguards giving reasonable assurance that land or waters will not be transferred to State enterprises in such a way as to prejudice Maori claims that have been submitted to the Waitangi Tribunal on or after 18 December 1986 or may foreseeably be submitted to the Tribunal" (per Cooke P at 372).

Application

This was an application for judicial review of the proposed exercise by Ministers of the power to transfer Crown land to State enterprises. The application was removed into the Court of Appeal.

W D Baragwanath QC, Sian Elias and *J M Dawson* for the appellants

D P Neazor QC, D A R Williams QC, R B Squire and *Kristy McDonald* for the respondents

M F Quigg and *Rachel Dewar* for the Coal Corporation of New Zealand Ltd.

Cur adv vult

COOKE P. This case is perhaps as important for the future of our country as any that has come before a New Zealand Court. Accordingly, although we have reached a unanimous decision, each member of the Court is delivering a separate judgment setting out his reasons for joining in the decision. What the decision means is stated shortly in the last part of this judgment.

Table 2: Summary of Principles of the Treaty of Waitangi defined by the Waitangi Tribunal and the Court of Appeal

Waitangi Tribunal (see Appendix J)	Court of Appeal (see Appendix K)
THE ESSENTIAL BARGAIN The exchange of the right to make laws for the obligation to protect Maori interests. (1)	The acquisition of sovereignty in exchange for the protection of *rangatiratanga*. (1)
PARTNERSHIP The Treaty implies a partnership, exercised with utmost good faith. (2) The Treaty is an agreement that can be adapted to meet new circumstances. (3) The needs of both Maori and the wider community must be met, which will require compromises on both sides. (4) The courtesy of early consultation. (9) The principle of choice: Maori, Pakeha, and bicultural options. (12)	The Treaty requires a partnership and the duty to act reasonably and in good faith (the responsibilities of the parties being analogous to fiduciary duties). (2) The freedom of the Crown to govern for the whole community without unreasonable restriction. (3) Maori duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable cooperation. (7)
ACTIVE PROTECTION The Maori interest should be actively protected by the Crown. (5) The granting of the right of pre-emption to the Crown implies a reciprocal duty for the Crown to ensure that the *tangata whenua* retain sufficient endowment for their foreseen needs. (6) The Crown cannot evade its obligations under the Treaty by conferring its authority on some other body. (7) The *'taonga'* to be protected includes all valued resources and intangible cultural assets. (11)	The duty of the Crown is not merely passive but extends to active protection of the Maori people in the use of their lands, and other guaranteed *taonga* to the fullest extent practicable. (4) The obligation to grant at least some form of redress for grievances where these are established. (5)
TRIBAL *RANGATIRATANGA* The Crown obligation to legally recognise tribal *rangatiratanga*. (8) *Tino rangatiratanga'* includes management of resources and other *taonga* according to Maori cultural preferences. (10)	Maori to retain chieftanship *(rangatiratanga)* over their resources and *taonga* and to have all the rights and privileges of citizenship. (6)

Note: This wording is a summary from original sources. Numbering refers to text in Appendices J and K. For principles defined by NZ Maori Council and the Crown in the case before the Court of Appeal, and the Royal Commission on Social Policy, see Appendices L and M.

APPENDIX L - PRINCIPLES OF THE TREATY OF WAITANGI AS PROPOSED BY APPLICANTS AND PLAINTIFFS IN THE NEW ZEALAND MAORI COUNCIL COURT OF APPEAL CASE (1987)

Proposed by the New Zealand Maori Council

- The Crown duty to actively protect to the fullest extent practicable.
- The jurisdiction of the Waitangi Tribunal to investigate omissions.
- A relationship analogous to a fiduciary duty.
- The duty to consult.
- The honour of the Crown.
- The duty to make good past breaches.
- The duty to return land for land.
- That the Maori way of life would be protected.
- That the parties would be of equal status.
- Where the Maori interest in their *taonga* is adversely affected, that priority would be given to Maori values.

Proposed by the Crown

- That a settled form of civil government was desirable and that the British Crown should exercise the power of Government.
- That the power of the British Crown to govern included the power to legislate for all matters relating to 'peace and good order'.
- That Maori chieftainship over their lands, forests, fisheries and other treasures was not extinguished and would be protected and guaranteed.
- That the protection of the Crown should be extended to the Maori both by way of making them British subjects and by prohibition of sale of land to persons other than the Crown.
- That the Crown should have the pre-emptive right to acquire land from the Maori at agreed prices, should they wish to dispose of it.

(*Source:* NZ Court of Appeal, Cooke P, pp. 13-14)

APPENDIX M -
Principles of the Treaty as Defined by the Royal Commission on Social Policy (1988)

"It is the covenant of the Treaty which establishes three fundamentals; partnership, equality of peoples, and guarantee. Many Maori believe that these fundamentals must guide the interpretation of the Treaty of Waitangi. This understanding may be controversial to many Pakeha. It emerges clearly however, from Maori interpretations of the Treaty texts, and their historical and contemporary perspectives.

The **FUNDAMENTAL OF PARTNERSHIP** referred initially to the relationship between Maori people and the British Queen and Crown. Later, the relationship changed to that between Maori and the Crown based in New Zealand (and thence all immigrants and settlers). It was to be a relationship of mutual respect between equal peoples.

The rangatira sought a partnership for several reasons. Although numerically and militarily the stronger, the Maori wanted a system of law and order to govern the relationship between Maori and Pakeha. Many rangatira were also worried about the continuing conflicts between some iwi. Further they wanted continued access to internal and overseas trade and new technology, and independence from other colonial powers.

The **FUNDAMENTAL OF EQUALITY OF PEOPLES** refers to the understanding that Maori and Pakeha would have equality and live in such a way that mutual respect and integrity were maintained.

The **FUNDAMENTAL GUARANTEE** refers to the promise that the Queen would ensure that Maori were treated and protected as British subjects. At the same time the retention of Maori fishing grounds, forests, lands and other properties including culture would be guaranteed."

(*Source:* Royal Commission on Social Policy, 'The April Report', Volume III, part 1, p. 103)

JUSTICE DEPARTMENT, WELLINGTON 199

PRINCIPLES FOR CROWN ACTION ON THE TREATY OF WAITANGI

PRINCIPLE 1

The Principle of Government *The Kawanatanga Principle*

The Government has the right to govern and to make laws.

PRINCIPLE 2

The Principle of Self-Management *The Rangatiratanga Principle*

The iwi have the right to organise as iwi, and, under the law, to control their resources as their own.

PRINCIPLE 3

The Principle of Equality

All New Zealanders are equal before the law.

PRINCIPLE 4

The Principle of Reasonable Cooperation

Both the Government and the iwi are obliged to accord each other resonable cooperation on major issues of common concern.

PRINCIPLE 5

The Principle of Redress

The Government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur.

The five Principles are detailed in the following pages together with a commentary.

What are the "Principles" of the Treaty of Waitangi?

There is (and continues to be) a wide variety of organizations and individuals claiming to have discovered, or have simply stated, the "Principles" of the Treaty. They are all different. Here are just a few:

	Number of Principles "discovered" or stated
• Justice Department (1990) "Principles for Crown Action on the Treaty of Waitangi"	5 principles
• Royal commission on Social Policy (1988)	3 principles
• New Zealand Law Commission (1999)	13 principles
• New Zealand Court of Appeal (Crown v Maori Council) (1987)	8 principles
• NZ Maori Council to Court of Appeal (1987)	10 principles
• Crown to Court of Appeal (1987)	5 principles
• Principles defined by Waitangi Tribunal (1983 to 1988)	12 principles
• Office of Treaty Settlements (1999)	4 principles
• Sir Douglas Graham (in Trick or Treaty?)	11 principles
• Centre for Maori Studies, Lincoln University (1994)	4 principles
• Hiwi Tauroa, formerly Race Relations Conciliator (1989)	2 principles
• NZ Attorney General (2000)	6 principles
• Minister of Health/Privy Council	3 principles

Summary

- 13 Agencies or Individuals
- Range from 2 to 13 "Principles"
- No one list is identified as the true or correct list
- Without exception, no list can claim to be authoritative and none are defined in or by legislation
- All of the principles claimed by the various entities or individuals are general statements of intent, which have existed in civilized societies for millennia. They are not unique to or exclusively the domain or property of the Treaty of Waitangi.

FOR: DAVID ROUND

OCTOBER 12, 2001 THE NATIONAL BUSINESS REVIEW

Myth of partnership in Treaty of Waitangi creates racist law

JOCK ANDERSON at Law Conference 2001

A populist concept of the Treaty of Waitangi being a so-called "partnership" between Maori and the Crown has taken a hammering from Act New Zealand MP and lawyer Stephen Franks.

Championing individual property rights, Mr Franks told the triennial law conference in Christchurch the treaty was not a partnership agreement.

He said there was nothing in the text or in the context that suggested the Crown, or Maori, contemplated what was now understood to be "partnership."

"For a start, it could only have been multiple partnerships, each between the Crown and a signatory iwi or tribe," he said.

The treaty, he added, did not assume only collective rights, or government by or for Maori generally.

"Nor does it create or recognise any collective government mechanisms or privileges. It gave security of property to identifiable iwi and to Maori individuals."

Mr Franks said the Crown party had all but lost the nature needed to be in a domestic political partnership.

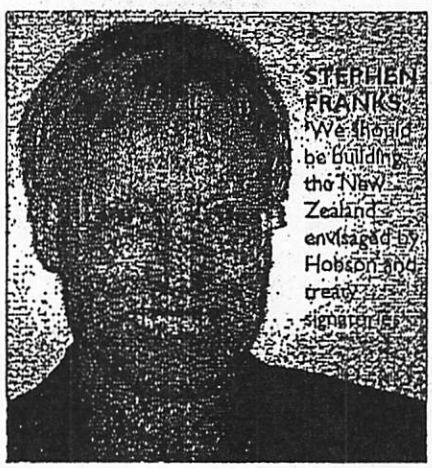
"To New Zealanders there is now no 'Crown' in the sense of an embodied treaty counterparty. In a democracy we are all participants in 'sovereignty.'

"It is hard to see how some of us are in partnership with all of us, including themselves, who collectively determine what the Crown can or must do," he said.

He said the concept of being "one people" could not be twisted into any notion of constitutional partnership.

Partnership rhetoric could help focus on the positive side of the expectations that motivated the signing of the treaty, more than the fears that also propelled it.

"But the metaphor becomes sinister when the partnership analogy is used to extract so-called 'principles' that justify racism. That is, privileges and special powers conferred by political brownness, rather than by ordinary principles of property succession," Mr Franks said.



STEPHEN FRANKS: "We should be building the New Zealand envisaged by Hobson and treaty signatories."

"Without its new separatist, and racist, interpretation the treaty should be no more threatening than law guaranteeing property rights to once unpopular minorities such as Catholics, Jehovah Witnesses or Chinese immigrants."

The treaty legitimised the rule of law in New Zealand and the government did not now need the treaty as the foundation for legitimacy, he said.

"The fact that disgraceful breaches occurred soon after and almost continuously since shows the lack of actual constitutional power in the document. These limitations are not reasons to discard it or invent fantasies about it. It has political power, as a rallying symbol, and an inspiration.

"More importantly it can now have real force as a guarantee of property rights."

Mr Franks said the "mysterious mutation" of taonga from meaning goods or possessions or treasures to include intangibles had perverted the treaty.

He said it was "inconceivable the British or Maori would have tried to grant exclusive possession to things like language or custom." The law the treaty brought to New Zealand resisted strongly the creation of rights not susceptible to enforcement.

"These are precepts our legislators have forgotten in the last two decades, with the purported creation of rights without remedies and imperfect forms of property such as a 'right' to a job," he said.

"Some of our worst law gives remedies without ascertaining the rights they should flow from. The Resource Management Act and the Employment Relations Act exemplify this kind of legal solecism.

"Even now treating information as property -- giving exclusive possession -- is contentious. The sensible evolution of our insider trading law has been hampered by lawyer resistance to a simple property/conversion analysis.

"We even hear of the same people who support mystical expansions of treaty rights and 'indigenous rights' to control use of indigenous flora and fauna, fulminating against conventional intellectual property in genetic knowledge.

"We should be building the New Zealand envisaged by Hobson and treaty signatories. In such a New Zealand the government and the law are colour blind, we are all equal under a law that upholds our property rights.

"With genuine respect for freedom, and a rule of law that restrains the government we can protect our freedom to express various beliefs and cultures.

"We would all benefit if Maori were supported by pakeha – and vice versa -- in moving property owners' rights back towards the classical model our forebears had in mind when the treaty was signed.

"If the treaty was restored treaty tensions would reduce substantially and it would become a constitutional taonga for us all."

THE NEW ZEALAND LAW JOURNAL
PUBLISHED BY BUTTERWORTHS APRIL 2000

UNDERMINING THE CONSTITUTION

Just over two centuries ago a remarkable group of men got together to draft what was to become the Constitution of the United States: men of achievement, who had carved a living from virgin countryside, had battled the elements, had been soldiers, had risked their own money, time and even lives. There were no career politicians, no academics, and of those from the service sector, most had some wealth-creating role as well. Many, including some of the most prominent, had been home schooled: neither George Washington nor George Mason, for example, ever went to school. They assembled in response to crisis: the independent colonies' assemblies were undermining the rule of law and were embarked on beggar-my-neighbour policies of tariffs and protectionism. They took as their starting point the self-evident truth that all people had inherent rights to life, liberty and the pursuit of happiness.

The contrast with the group assembling in Wellington as this *Journal* comes out for a conference on "Building the Constitution" could not be more marked. There is no crisis, but the recent lesson of Canada is that discussing the constitution out of the blue is an effective way of creating one.

There are no entrepreneurs and precious few "doers". The business "perspective" is represented by Hugh Fletcher, the manager of a big business known for his corporatist views and Dr Roderick Deane a man of undoubted ability as an economist and the leader of a large organisation, but who was an employee nearly all his life.

Most of the rest are people who have watched, criticised, offered services or obstructed from the sidelines while others have got on with the business of generating wealth. Few have ever been responsible for employing anyone, or put their own capital or even time at risk. Many, like Judges and academics, have led lives deliberately designed (for good reason) to shelter them from reality. They are mostly the product of, and many are current participants in, New Zealand's state monopoly university system.

The papers give major cause for concern. It is left to economists Alex Sundakov and Dr Deane not only to try to inject a note of reality but also to raise values such as the rule of law with which lawyers have become bored.

Sir Geoffrey Palmer and Philip Joseph seem to have been tasked to produce descriptive reviews which refer to the idea of limited government, but not to explain why it is important. Hardly mentioned alsewhere, it is treated as one idea amongst many equally valid points of view. But at a constitutional conference it is not one idea amongst many.

If the object of government is to achieve an election target, or some grand vision such as "equity" or even the fatuous economic growth targets that most parties bandy about in complete disconnection from their policies, then at some point even the separation of powers, let alone more detailed processes, will get in the way.

A government can only achieve goals in the real world by having untrammelled power to introduce the right policy (assuming it can know what it is) at the right moment, without consultation or warning and often after telling lies about its intentions.

The only purpose of a constitution is to limit government to following certain processes which in turn limits the outcomes it can even pursue, let alone achieve. Consciousness of this is largely absent from the papers published in advance. There is even Sir Ross Jansen's familiar paper about a power of general competence for local government. Isn't the point of a constitution to prevent central government from having a power of general competence?

Although the letter sent out said that the conference sought to represent all points of view, the only paper in the entire collection that even begins to defend limited government, individual freedom and property rights is Dr Deane's.

Instead we are treated to Professor Jane Kelsey with such gems as "free market policies that have increased inequality within and between countries, and in the case of poorer countries condemned millions to entrenched, life threatening poverty". One only has to compare the last 50 years of socialist, centrally planned African states and India with Asian countries such as Taiwan, Japan and South Korea which in living memory had similar standards of living, to see that this is arrant twaddle.

Professor Kelsey cannot distinguish between an outcome which is the product of the decisions of millions of free people and an outcome planned by a government. The processes we call globalisation are simply what happens when people are left free to contract with whom they will, unobstructed by discriminatory taxation and regulation.

It is revealing of the organisers' mindset that they consider this sort of thing worth listening to. Evidently any view is entitled to be heard if it is shouted loudly and frequently enough, except of course, a defence of the traditional values of constitutionalism and the legal system.

We descend to the depths with Moana Jackson with his "all societies developed their own unique (and equally valid) institutions to govern themselves" a description which presumably embraces Pol Pot, Hitler, Stalin and Vlad the Impaler. One of the most dangerous aspects of this conference is the open argument for, and idle assumption by others of, Maori separatism. If this conference causes as little eventual damage as the recent Canadian constitutional controversies, we shall have got away lightly. ❑

FAR: DAVID ROUND

THE RISE OF THE FU MOVEMENT

The global left-wing elite has found the ideal method of ignoring tiresome things like elections, says ***Mark Steyn***

New Hampshire

CONSERVATISM is doomed. True, in the Eastern bloc, in its conclusive demolition of the Berlin Wall, it won the battle of ideas. But in its own Western bloc, it's lost the battle of process, and that's likely to prove decisive. In the United States, George W. Bush is opposed to same-sex marriage. So is John McCain. But whichever one of them becomes president will have little say over whether or not, in Vermont and elsewhere, justices of the peace (and, indeed, clergy) find themselves uttering the words, 'I now pronounce you man and husband.' On almost any issue you care to name — from partial-birth abortion to education reform to racial quotas to human cloning to drug legalisation — the real action's in the courts, not the legislatures. Aside from tinkering with the tax code and coming up with an entitlement here and there, America's 'lawmakers', as newspapers still quaintly refer to elected representatives, no longer, in any meaningful sense, make laws — not the ones which govern our lives.

Instead, what they mainly do is protest their impotence to do anything very much at all, other than try to come up with something that brings them into compliance with the whims of the judiciary. You can find new examples every week across the Western world, but, to pluck one close to home, here in New Hampshire my own legislature is struggling to come up with a new education-funding system and a new tax structure for the state. Not because there's anything wrong with the tax structure or the education system, or any public clamour to change either — both are a huge success, if only by the pitiful standards prevailing elsewhere in the Union — but because the New Hampshire Supreme Court took it upon itself to declare our practice of town-level education funding 'unconstitutional'. It's been pretty much the same for 200 years, but suddenly it's 'unconstitutional' and has to go. And all our elected 'lawmakers' can say is: don't blame us, there's nothing we can do.

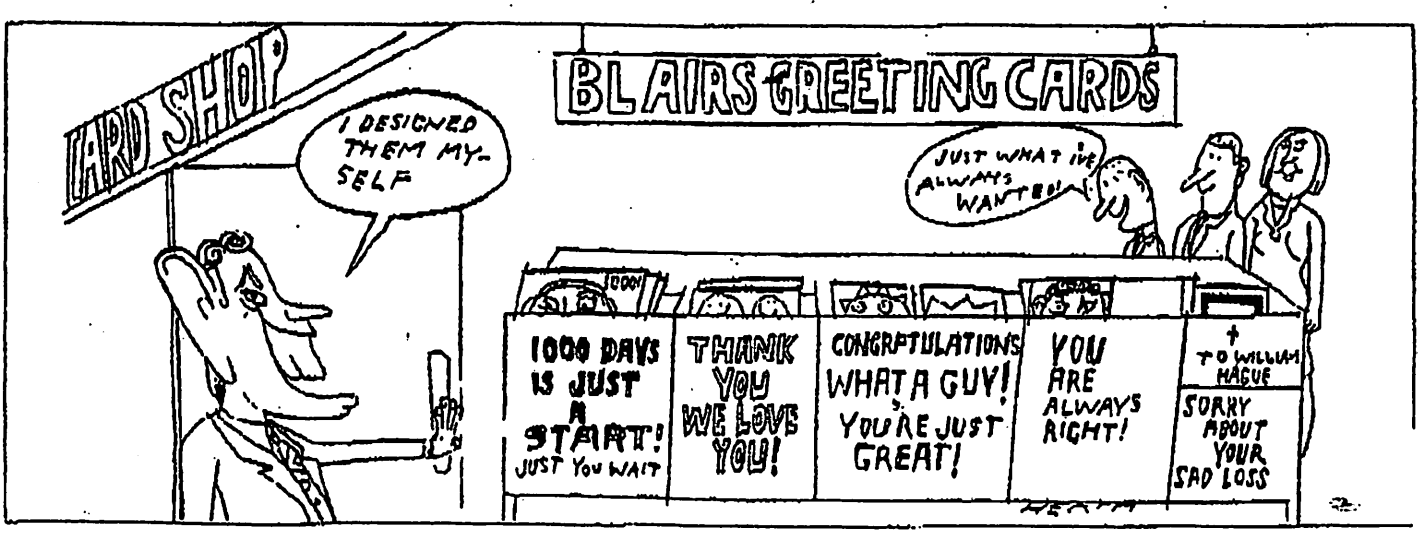
Judicial activism is, of course, a famously American perversion. In other countries within the English Common Law tradition, judges have tended to be fusty types disinclined to creative interpretation of statutes whose meaning seemed plain to one and all. It would never have occurred to these men (and they were all men) that it was their job to usurp the role of Parliament in, say, achieving social justice for the transgendered. But not any more. When was the last time you heard a bewigged magistrate go into his 'What are these "Beatles" to which the witness refers?' routine and flaunt his ignorance of the fancies of the day? The judges have got with the beat.

In London at least, as we learnt during the Pinochet case, a judge can still be rapped on the knuckles if he fails to spot any potential conflict of interest between the case he's presiding over and his various extra-curricular enthusiasms. But most other British-derived countries have moved closer to the American model of an interventionist Supreme Court and have discarded, with astonishing rapidity, such tiresome concepts as the time-honoured principle of judicial impartiality. My current favourite is Canadian Supreme Court Justice Claire L'Heureux-Dube. Some 20 years ago, the Judicial Council was still willing to reprimand judges for speaking out on 'a matter of serious political concern and division when that controversy was at its height'. But now Mme L'Heureux-Dube gaily cartwheels across the political issues of the day with apparent impunity. After her ruling striking down Ontario's definition of a spouse as a member of the opposite sex, Her Ladyship flew on to London and told an international gay rights conference that she would continue to fight against 'a general failure in the political process to recognise the rights of lesbians and gays'. Not for Mme L'Heureux-Dube a tetchy 'What are these "Pet Shop Boys" to which the witness refers?' Instead, she told her London audience, 'There is much work to be done.'

Undoubtedly. But hitherto in democratic societies, if you wanted to make law on subjects about which you felt passionately, you offered yourself to the people for election to the legislature. Mme L'Heureux-Dube clearly understands that that's a waste of time. 'We have lots of discretion,' she told her London audience. 'I am not afraid to strike down laws.' Sitting next to her was

THE BLAIRS

Michael Heath



FOR: DAVID ROUND

Justice Michael Kirby of the Australian High Court, a recently uncloseted gay who's become the Peter Tatchell of the international legal set. Having listed his partner, former newsagent Johan van Vloten, in *Who's Who*, the judge is now campaigning for same-sex couple benefits and giving speeches to Aussie school students on gay rights. An employer resisting the idea that he was obliged to offer partner benefits to gays might wonder if he'd get a fair hearing before such judges. 'You can call it partiality,' Mme L'Heureux-Dubc said. 'I call it human.' The gay crowd broke into what was described as 'thunderous applause'.

That's why we conservative types oppose 'affirmative action'. Her Ladyship is on the Supreme Court of a G7 nation because Western governments noted (reasonably enough) that there were insufficient women on the bench but thought the problem could be solved simply by accelerating through the ranks any ambitious jurist who happened to be of a non-male persuasion. The result is that Canada's senior courts and human rights commissions (an innovation the European Union will soon import) are staffed by judges of a left-wing orthodoxy that most electable liberal parties would balk at. In Alberta, for example, private religious schools which regard homosexuality as an abomination cannot refuse to hire screamingly camp gays. Confronted with this ruling, the Conservative government of the Province did what all legislators do these days: they shrugged. Needless to say, the 'tolerance' required of religious employers is not required of all groups, if, for example, a devout Catholic were to get a job at a gay bathhouse and wander round the cubicles saying Hail Marys, he'd get short shrift from the courts.

The caricature of Western legal systems is usually that they're insufficiently progressive: 'white man's justice', etc. But, in fact, even if either man had the stomach for it, it would be all but impossible for Bush or McCain to find enough judges from the available pool with even a nominally conservative approach to these issues. The judiciary now fulfils the same role as the military in banana republics: you may be able to elect your politicians, but the real, entrenched power in the land will see to it that the legislature will only ever be a figleaf.

Does that sound a bit alarmist? Well, look at it this way: the principles that have worked so well in the USA — of bypassing such tiresome notions as popular will and using the courts to advance causes for which there is no social consensus — are now being applied internationally, where there's even less opportunity for legislative oversight. Different jurisdictions, generally, reflect the will of their people: in Massachusetts, Louise Woodward was convicted of manslaughter; in Texas, they'd have fried her. But 'international law' declines to recognise the right of sovereign jurisdictions: in Chile, some folks are passionately pro-Pinochet, some are passionately anti, and others feel (in the formulation of Clinton defenders) that it's time to move on. But, as far as the House of Lords and other European courts are concerned, Chile's settlement of its own affairs counts for naught.

'International law' is the new colonialism, the imposition on the world's peoples of the moral certainties of a remote, unaccountable Western elite. Indeed, the old imperialists were far more tolerant of local customs and culture than the monolithically leftist body of activist law. In 1998, the British government forced its reluctant Caribbean colonies to abandon their prohibitions on homosexuality to bring their laws into compliance with the European Convention. But what chance do those Muslim and Third World countries who regard abortion as an abomination have of foisting their views on Europe or North America? 'International law' represents not a global consensus, but left-wing orthodoxy on an unlimited budget: pro-gay, pro-abortion, anti-Pinochet.

If you're a fiscal conservative, you're probably saying, 'So what? Who cares as long as taxes stay low?' But in North America the judiciary's promotion of various interest groups usually comes with certain benefits attached. And, even in other cases, there's usually a price tag. New Hampshire is the only jurisdiction on the American continent with no sales tax, no income tax and a political culture in which no candidate of either party can be elected governor without taking the state's famous 'No Tax' pledge. If a court can nullify a state's entire philosophy at a stroke, don't bet that your tax rate is safe. More to the point, the existence of an activist judiciary is a great advantage for weasel candidates of the Left. It allows Al Gore to stay electable by running to the right of the courts, secure in the knowledge that he can leave it to them to chalk up the great irreversible victories of American progressivism. Meanwhile Al can profess that, although he 'personally' is not in favour of same-sex marriage, he must bow to the will of the court.

'I cannot tell a lie, father, I cut down the cherry tree . . . and I'm gay.'

If this passivity sounds familiar, it should: the way North America's elected representatives talk about court decisions is the way the British talk about European decisions. Awfully sorry, old boy, but resistance is useless. The European Union is, of course, more than a court, but it's essentially engaged in the same business — advancing a particular agenda while insulating it from such tedious concepts as the will of the people. Thus the EU is currently putting the squeeze on Austria over the participation of Jörg Haider's Freedom party in the new coalition. The members of the government were all popularly elected and have a majority in parliament. By comparison, the European Commission of appointed apparatchiks has no democratic oversight and is simply the result of backroom deals. Nonetheless, they've decided to try to nullify the results of the Austrian election — or at least to negate the 29 per cent of votes they find so disagreeable. Reading the interview with Herr Haider in the *Weekly Telegraph* (the paper's overseas edition), I was startled by Dominic Lawson's second question: 'What is your view of the action taken by the FU states to cut off all bilateral political talks with Austria?'

'The FU states? I assumed at first it must be a printing error but, thinking about it, I'm not so sure Lawson isn't right. The West is in thrall to a great FU movement that's been growing for 30 years. You're one of the 90 per cent of the American people who opposed court-mandated 'busing'? FU! You're a New Hampshire voter and you're happy with your tax structure the way it is? FU! You're a white Canadian who likes to hunt and you don't see why natives alone should have been given (as a court recently decreed) the right to kill as many moose and deer as they want? FU! You're an Austrian and you'd like the right to choose your elected representatives? FU!

In the hysterical reaction to Jörg Haider and in the hijacking of Pinochet, you get a glimpse of the limits that the new global elite is prepared to tolerate: you can vote left or centre-left but anything else is a waste of time. Conservatives won great victories in the late Seventies against the dead hand of statism, socialism, big labour and Keynesian economics. Their opponents in the new century are more vital, more elusive and much better organised. Abortion and statewide education-funding and unlimited fishing rights for natives may have their merits, but they should be argued and settled by the people's representatives. When the Left tried dispensing with democracy in the Soviet Union and the Warsaw Pact, it led eventually to counter-revolution and the regimes' collapse. In the US courts, in Canada's human rights commissions and in Europe's bureaucracy, the Left may finally have found a form of democratic subversion that works.

Separating church and state

Rodney Hide and Tariana Turia challenge the state's right to impose religious observance upon the citizen

Chris Trotter

Anne Askew enjoys the dubious distinction of having been the only woman tortured in the Tower of London.

Racked by no less a personage than Sir Thomas Wriothesley, Lord Chancellor of England, this unfortunate woman's only crime was a firm conviction that her religious beliefs were no business of Henry VIII's ministers.

The full separation of church and state has yet to be accomplished in England, where the legacy of Henry VIII's sixteenth-century quarrel with Rome persists to this day.

In England's former colonies, however, secularism has struck deep roots. In the United States the prohibition against establishing a state religion is enshrined in the Constitution – much to the chagrin of the Christian Right, whose theocratic aspirations are well known.

Lacking a written constitution, New Zealand must make do with symbolic legislative enactments – such as the Education Act of 1877, which stipulated that schooling in the colony was to be free, disapprove of homosexuality. But this does not give them the right to outlaw its practice – although it was not so long ago that the law discriminated against gays in this fashion.

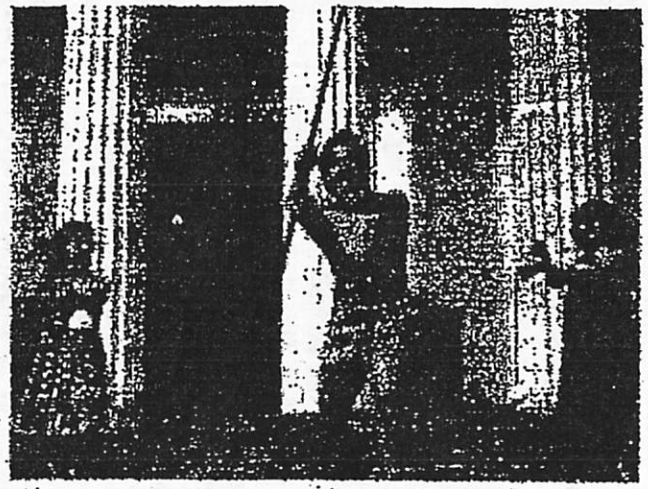
The appropriate balance between religious rights and other rights would appear to be where the expression of the former in no way impedes the enjoyment of the latter.

What then should we make of ACT MP Rodney Hide's accusation that the Ministry of Foreign Affairs and Trade acted improperly in spending $8,196 of taxpayers' money on a Maori hikitapu – or spiritual cleansing ceremony – at New Zealand's new embassy in Bangkok?

"One person's religion is another person's hocus-pocus and they shouldn't be forced to pay for it," said Hide.

In the circumstances described – four Maori elders being flown to Thailand at the ministry's expense for the express purpose of exorcising unwanted spiritual entities from the government's new premises – Hide's complaint raises a number of interesting points.

Spending public funds on such a project does imply an official recognition of Maori religiosity. Certainly, the MFAT spokesperson who debated the issue with Hide and National Radio's Kim Hill on 13 July gave every impression that



If MFAT is unwilling to associate New Zealand with the Middle Ages, why is it happy to include rituals from the Stone Age in its opening ceremonies?

Rodney Hide: One person's religion is another person's hocus-pocus and they shouldn't be forced to pay for it

'biculturalism' is in official New Zealand circles."

Smug self-congratulation may feature among the ministry's motives though it is an insufficient explanation.

Hide's intuition that there is a connection between the Bangkok hikitapu and the constitutional issue of church/state relations is sound because there are signs that Maoritanga is becoming a kind of official state religion.

Increasingly, Maori ritual is being incorporated into all forms of official and quasi-official events. What state function could now proceed

In other words, as a result of colonisation, Maori were forced to endure the imposition of Pakeha religious beliefs. Their right to respond to the world in ways which seem best to them was not respected.

Leaving aside the fact that some Maori practices – cannibalism and slavery, for example – could not be condoned by the colonisers without doing violence to their own deeply held religious and ethical beliefs,

Turia's condemnation of cultural imperialism springs from exactly the same constitutional impulse as Hide's. She, too, is calling for a secularisation of the state, even if, in her case, it is in the name of recognising the health care practices of a pre-modern culture.

But if, as Turia insists, Maori find offensive and oppressive the colonisers' attempts at "individualising Maori with the introduction of numerous assimilationist policies and laws to alienate Maori from their social structures," then equally offensive and oppressive must be the growing insistence that Pakeha show due respect and reverence for cultural paradigms requiring them to deny not only the political and ethical achievements of the European Enlightenment, but also the scientific world view.

Anne Askew is remembered as a martyr precisely because she resisted to the end the King's requirement that she conform with his beliefs. She died at the stake for the proposition that no-one is a better keeper of one's conscience than one's self.

The State's role is to hold the ring in the never-ending contest of ideas. When it starts pulling on the gloves itself, we all have cause to worry. ■

Chris Trotter is the editor of NZ Political Review

well known.

Lacking a written constitution, New Zealand must make do with symbolic legislative enactments – such as the Education Act of 1877, which stipulated that schooling in the colony was to be free, compulsory and secular.

The Bill of Rights Act of 19 90 similarly protects the individual's religious beliefs from State control, stipulating that: "Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and hold opinions without interference." The Act also acknowledges that: "Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private."

At this point the right of the individual to manifest his or her religious beliefs and the duty of the state to prevent the imposition of religious ideas and practices on others, intersect. Here that the real political dilemmas arise.

Hindus, for example, revere the cow as a sacred animal. But this does not entitle them to break into abattoirs and rescue cattle waiting to be slaughtered. The property rights of the farmers and meat processors cannot be extinguished by the religious rights of the Hindus.

Similarly, many Christians

Men and women, who would not deign to set foot in a church from one year to the next, will bow their heads for minutes on end beneath a stream of mellifluous Maori blessings

Spending public funds on such a project does imply an official recognition of Maori religiosity. Certainly, the MFAT spokesperson who debated the issue with Hide and National Radio's Kim Hill on 13 July gave every impression that Maori animistic rituals were part-and-parcel of contemporary diplomatic protocol.

It is, however, difficult to imagine the Ministry of Foreign Affairs and Trade arranging for four Catholic priests to conduct an exorcism ceremony in the Bangkok offices of Tradenz at public expense.

They would, quite rightly, anticipate an extremely negative reaction to New Zealand being associated with such medieval superstitions as demonic possession. But, if MFAT is unwilling to associate New Zealand with the Middle Ages, why is it happy to include rituals from the Stone Age in its opening ceremonies?

One explanation is that the hikitapu ritual is simply included as an example of New Zealand's indigenous culture – as a bit of local "colour." This would represent a supremely arrogant and insensitive exploitation of Maori religious practice. It is tantamount to saying: "See how enlightened we New Zealanders are. See how we allow these poor benighted natives to have their little moment in the spotlight. See how deeply imbedded

[illegible] because there are signs that Macritanga is becoming a kind of official state religion.

Increasingly, Maori ritual is being incorporated into all forms of official and quasi-official events. What state function could now proceed without the formal Maori powhiri with its prayers and hymns? Men and women, who would not deign to set foot in a church from one year to the next, will bow their heads for minutes on end beneath a stream of mellifluous Maori blessings.

At what point does the official expression of cultural-religious practices appropriate to the marae constitute an infringement of the citizen's right not to have the state impose religious observances upon him?

Rodney Hide finds an ally on this issue in Associate Maori Affairs Minister, Tariana Turia. Speaking to the New Zealand Association of Counsellors national conference on 7 July, Turia noted that: At early colonial contact a Judaeo-Christian culture was introduced, "which saw itself as superior and indigenous people as inferior. Indigenous beliefs were seen as pagan and what resulted was the imposition of another culture. While tangata whenua appeared to adopt the 'new ways,' many secretly clung to the pre-colonial beliefs of the culture. Many of those exist to this day."

When superstition rules, foggy thoughts flourish

Straight Thinking

OWEN MCSHANE

As we extend a welcome hand to the refugees from Afghanistan we should be aware that Teleban means "students" or "seminarians." This insanely brutal regime is run by enthusiastic "students of religion."

For over a decade New Zealand governments have been encouraging the imposition of religious beliefs on to our hard-won secular society.

I have a whole bundle of recent government publications which all state, as a matter of fact, that New Zealanders must understand and learn to relate to a body of religious beliefs that are antithetical to any open and free society.

For example *Weaving Resilience into our Working Lands*, published by the Parliamentary Commissioner for the Environment, tells us:

For tangata whenua ... all living things are originally descended from Ranginui and Papatuanuku, the sky and the earth; their son Tane is the atua responsible for forests ... The relationships between people and the other descendants of Tane are especially close; as the junior member of this kin group, humans have particular obligations to the older members, the trees, plants, birds and other forest creatures.

So that's why we can't log the forests.

In the *Newsletter of The New Zealand Climate Change Programme*, Charlotte Severne declares:

The concept of mauri [life force] makes it possible for everything to live and is responsible for the maintenance and survival of life. Everything has a mauri – lands, rivers, seas and the atmosphere.

Dr Severne is presumably not from some newly discovered Amazonian tribe; she appears to be a product of our education system.

These government authors might respond that they are just passing on "the Maori world view." That may be so, but where are the multitudinous Maori who actually believe this stuff? The huge majority of Maori who claim religious affiliation on census night describe themselves as Christian of one kind or another.

These beliefs are most commonly dished out by young white university graduates of our planning schools telling applicants for resource consents that they cannot do this or that, because they will destroy the mauri of the water, air, soil or ... (tick the relevant box).

Mauri is a potent tool in these young planners' hands because applicants have no means of measurably mitigating any degradation of this mysterious plasma. No wonder two young planners in two different parts of the country had reported that mauri is the "quintessence of resource management in New Zealand."

Who teaches them this stuff?

This new religious movement is not limited to young planning graduates. The bishop, the retired chief justice and the two doctors who served on the Royal Commission on Genetic Modification declared that:

Mauri is the life energy or soul and is shared by all living things. Even inanimate objects like cliffs, stones and especially water have their own mauri.

So now we know. These commissioners then passed on a Maori submission that:

The water piped through a family home has a mauri that mixes with the mauri of the drainpipes and eventually the mauri of the water glass.

Act MP Stephen Franks has responded:

Any pakeha who publicly espoused these views would be regarded as mad ... Best of all, the royal commission tells us "breaches of protocol can be hara, whether deliberate or inadvertent, and cause misfortune or death (atua) or injury or sickness (mate Maori)." This must be the first royal commission in modern times to endorse witchcraft, and witchcraft aimed at maintaining a stultifying power structure at that.

Our politicians are equally enthusiastic. In her June 2001, "State of the Nation's Environment" address, Environment Minister Marian Hobbs let us know that:

Each time we do something that damages our environment, or moves the clean and green reality a little bit further from our perception, a little bit of what makes New Zealand unique dies also.

We expect this kind of guff from our politicians, but the minister then said:

Maori have known this for over a 1000 years. In Maori it is called mauri which is translated to mean "life force." Mauri animates and illuminates all things, and if mauri is present in a locality, then that locality can be said to be in good health. Conversely, death, in the Maori view, is characterised by the absence of mauri.

Ms Hobbs was a school teacher and presumably gifted these insights to hundreds of children passing through her care on their path to enlightenment.

Funny that. When I went to school we learned that one of the great triumphs of western civilisation was the long path to the discovery that there is no "life force." (We're still working on the soul.)

We should all be alarmed that government publications routinely declare that all New Zealanders, of whatever belief, have to acknowledge and "take into account" this Maori view of the world.

The Environment Ministry's "preliminary wording" of the Draft National Policy Statement on Biodiversity tells us:

Understanding and applying the views of tangata whenua to the management of indigenous biodiversity is key to its maintenance and enhancement.

What does all this mean?

One example tells us that it can mean a great deal. The *Coast to Coast Courier* of August 22 reports that Kaipara Excavators has agreed to pay the Ngati Wai a "cultural liaison" fee of $1 million so this iwi won't object to their application to suck up sand from the seabed.

It seems sometime during the 1800s the Ngati Wai fought a sea battle within the 480sq km dredging area and remains from the battle are still on the ocean floor and should not be disturbed.

Beats working.

Taking Maori view cuts funny farm risk

Marian Hobbs tells us that Maori have known about mauri for a thousand years. We should not be surprised. Virtually every preindustrial society believes the whole world is occupied by spirits who determine what makes the world tick.

Tribal leaders remind the hapless victims of floods, droughts, volcanic eruptions, disease and other routine events of primitive life that only the priests – and tributes – can protect their people from the playfulness of the gods.

Western history describes these beliefs as pre-Socratic, because philosophers began to move away from these repressive ideas about 2500 years ago.

The debate about the existence of soul, life force and the human condition started and has been a lively one ever since. But by the time Wohler had synthesised organic urea from inorganic chemicals, western civilisation had long abandoned the idea that spirits inhabited all things and should determine how we live, work and play.

However, New Zealand politicians of all hues seem determined to claim another world first by abandoning 2500 years of systematic thought in favour of primitive superstition. What drives this return to pre-Socratic animism?

Some few Maori on the make may be benefiting from this rebirth of the old time religion – but I don't believe they drive it.

These documents all come from our environmental agencies and are almost certainly authored by Dark Green fundamental animists. They insist we have no right to log the trees or mine the minerals, that any resource-use rapes the Earth Mother and is a dark and deadly sin.

They don't want to say such things outright and risk being sent to the funny farm. So they co-opt the "Maori world view" as a politically correct testament to their own religious cause.

It took only about 200 years for Christianity to move from being a religion of slaves to being a prerequisite to holding a decent job within the Roman Empire.

Things move faster these days, so it may not be long before Green Robed Ones walk among us determining how and where we live – and die.

While some of us paddle about in the shallows, trying to catch the knowledge wave, a tidal wave of green superstition is engulfing us all.

RECESSION

ld outlook creates na despite rate cut

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	Building consents – dwellings
	Balance of payments – current account
	Overseas merchandise trade – imports
	National Bank business confidence survey
	Real GDP by production

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review the official cash rate for another two weeks – caught the markets by surprise not only for its timing but its size.

"This suggests the Reserve Bank takes very seriously the downside risks to world and domestic economic growth from recent events in the US," Standard & Poor's director of economic research Stephen Kirchner said.

"The easing also reflects the Reserve Bank's rather modest schedule of easings to date, with a nominal official cash rate that even now ranks second only to Norway as the highest in the world."

There is still some pessimism about the global economy, and this has been exacerbated by last week's terrorist attacks. All the world's main economic regions – the [illegible] and Asia – are now [illegible] that added risk to

However, New Zealand – and main trading partner Australia – were in a comparatively enviable position at the moment, he said.

"You would want to be where we are in our respective business cycles – competitive exchange rates, good employment, and the revenue, rainfall and commodity prices are all good news stories at the moment.

"But what is weighing heavily, to a magnitude I've never seen, is the global economic slowdown."

As well as leadership on the monetary policy side from the Reserve Bank, some leadership was also necessary from the government on its spending.

The government would not cut spending if the country went into recession, Finance Minister Michael Cullen said this week.

Economists have cautiously endorsed this approach but emphasised the government would have to make other moves to help put a floor under business confidence.

"It's probably quite sensible not cutting spending," Mr Orr said. "But some of the government's more marginal investments should be looked at again."

Straight Thinking

OWEN MCSHANE

Taniwha wakes up for judge

Lawyer Philip Milne is acting for the Department of Corrections in its case before the Environment Court seeking RMA consent for the proposed prison at Ngawha, near Kaikohe in Northland.

Mr Milne must have wondered where his career in law had taken him as he told Judge Sheppard that he would be calling evidence to show that the area's taniwha, known to local Maori as Takauere, would not be offended by the development work.

No doubt the opposing counsel will call evidence that the taniwha will indeed be most upset.

What can a poor judge do? I suppose he can dismiss both sets of evidence as hearsay – it seems unlikely the taniwha will make an appearance in the court.

How much longer will the judiciary put up with such non-judiciable nonsense?

Any non-Maori who wasted the court's time talking about the adverse effects on hobgoblins or on the dragon of St George would get short shift and lumbered with costs – we hope.

However, Judge Sheppard has a nice sense of humour and with luck has some suitable Celtic ancestry. Maybe he is the one to tell the court at the next sitting that: "I have heard arguments that the taniwha will be offended, on the one hand, and that it will not be offended, on the other. So I went home and consulted my ancestral leprechaun. He tells me that the taniwha has swum to Ireland, is soaking in Guinness, and couldn't give a tuppeny-stuff."

The legal fraternity would call this "a strong signal from the court."

The ugly tyrants of green pastures

Back in the 1980s, the *Daily Telegraph's* "Peter Simple" bewailed the fact that with political correctness going mad, loony councils and pillocking pollies, he was finding it more and more difficult to come up with a satirical column that didn't turn into reality, with bells on, within a few weeks. The satirist was becoming prescient.

I know the feeling.

After the Americans agreed to the world demands to remove the tariffs on our lamb I posted the following comment on the nz.politics newsgroup:

This is what came up – in truly timeless prose:

"The ongoing 'foot and mouth' massacre of British livestock fits all too conveniently the aims of the WTO and right-wing global-corporate-linked bodies, drastically reducing the degree of self-sufficiency in production available within the country. In this instance it is developed country reduction to extreme dependency (and thereby ceptibility to blackmail)

...oker taping practices

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14) is completely misleading and inaccurate. The briefing papers that were released to a number of media agencies under the Official Information Act indicated there was a concern the television activities of TVNZ may run at a loss in future years.

I would have thought a supposedly business-focused paper such as *The National Business Review* would understand that these are only one part of the

PricewaterhouseCoopers recognises and respects the restrictions contained in the Law Practitioners Act as buttressed by the rules of the New Zealand Law Society. Contrary to the suggestion that we are skirting the rules, we will be operating explicitly within them and on the basis of extensive advice received on the subject from a Queen's counsel. We will not be

Health and Disability Bill

weighted in favour of Maori

In a democracy the criterion for deciding priorities for a limited health dollar has to be that of need, writes DAVID ROUND, who teaches law at the University of Canterbury and is the author of *Truth or Treaty*? The Government's proposed treaty clause in the Public Health and Disability Bill introduces racism into the health system.

IT IS the future: as always, more people need operations than the health service can provide.

Two people are competing for one kidney transplant. One is a little European girl with every prospect of a healthy useful life before her. The other is an old Maori man already suffering from several other medical conditions. It is always a sad choice to make. But would not the little girl benefit more? Or suppose two remote parts of the country need hospitals. The population of one area, in the North Island, is largely Maori; the other's, perhaps in the South, largely European. Only one hospital can be built, but if the money were not spent on one hospital it could nevertheless provide much health care for both areas. What should be done?

If the New Zealand Public Health and Disability Bill is made law in its present form, health administrators may not have much choice. Clause 3 declares that one of the Bill's purposes is, "consistently with the [other] purposes, to recognise and respect the principles of the Treaty of Waitangi". Clause 4 requires the Bill "to be interpreted in a manner . . . consistent with the principles of the treaty . . .".

Clause 18 lists the functions of district health boards. Four of the 10 functions refer specifically to Maori, and them alone. Two of those four give special status to Maori with "mana whenua" — traditional tribal associations with that area. Besides the elected member of boards (who can be Maori, and who are elected by all electors including Maori) there are to be four appointed members, of whom at least two must be Maori, and more if that is necessary to keep Maori numbers on the board proportional to Maori in that area's population.

Now it is certainly true that Maori suffer more ill health in certain ways than non-Maori. It is perfectly reasonable, then, for health policies and actions aiming to prevent and cure ill health to concentrate on Maori in many cases. Few would complain of that. That can be done, however, without special mention of the treaty or even of Maori. All that is needed is a general commitment to health care for all who need it. If more is required, then a clause such as the Bill actually contains, requiring health boards "to reduce other health disparities between population groups" is enough. Special mention of Maori will certainly be used to justify preferential treatment for Maori on the grounds of race alone.

The argument has been put forward already. Mr Rau Williams, a Northland Maori man, was denied kidney treatment solely on clinical grounds. The number of treatments was limited, and Mr Williams would not benefit as much as other possible candidates. The New Zealand Maori Council, among others, vehemently objected. It claimed, that, as an old man, Mr Williams was a "taonga" guaranteed to Maori by the treaty, and that his health care was therefore guaranteed. It is unlikely that the Maori council would say that any Maori people of whatever age were not taongas. Accept that, and a legal obligation would arise under this Bill to give some degree of preference to Maori in health decisions solely because of their race.

The possibility is not absurd. After all, the general words of the Bill require suitable and effective health care for all as a general principle. Any mention of Maori must be for something over and above that. What else could it mean? Cabinet papers about this Bill say that the Crown's health obligations to Maori will not end when health disparities have been addressed. The recently-signed free trade agreement with Singapore sets out our Government's right to accord "more favourable treatment to Maori" to fulfil its treaty "obligations".

The Bill does not spell out what treaty "principles" are. The courts ciples" the courts have already found are vague platitudes from which any court could pluck any principle it liked to come to any decision desired.

The treaty said, in fact, that Maori were thenceforward the Queen's subjects like everyone else. But the courts' recent ill-advised discovery of a principle of a relationship "akin to partnership" is constantly used to support claims that Maori and the Crown have equal rights to share in decision-making and asset dividing.

Moreover, as well as the Bill's serious references to treaty principles, each elected health board will also have specially appointed Maori members. They will obviously be in a position to influence health policy and direction towards the treaty.

Even within Maoridom the Bill creates divisions, as it requires boards to establish special "partnership relationships" with Maori with "mana whenua" — Maori of the 1840 tribe of that area. What does this mean? Again, who knows? But already Murihenua leader Shane Jones has said that it will provide a new stage for Maori sovereignty advocates.

Like the Bill's treaty references, it will certainly create plenty of lucrative work for lawyers keen for their share of the health dollar.

The cabinet papers' constant refer-

Maori and the Crown never mention one thing: the money the "Crown" spends on health comes not from some secret board of ancient gold and jewels, but from our taxes. For funding purposes, the people are the "Crown". Yet the Bill's actual words, and cabinet documentation, are based on the premise of a "special relationship" between Maori and the Crown, so that, over and above their claims as citizens, Maori have some extra claim on publicly funded resources. Non-Maori, without such a "relationship", are in an inferior position.

The rest of the Bill may be good or bad. But in a democracy the criterion for deciding priorities for a limited health dollar has to be that of need. If the health service is not colour-blind, it is racist. It is as simple as that.

This Bill is a step towards turning the treaty into a *de facto* constitution. If health boards must have specially appointed Maori members, why not every other public body? If "treaty principles" must apply in laws about health, why not in laws about employment, education, everything? Cabinet papers recognise that this well may "set a trend". The Government has absolutely no mandate to introduce a

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Time to reassess Closing the Gaps

Good intentions can all too often founder on the rocks of practical difficulties. Such is the case with the pro-Maori health policies proposed as part of the Government's Closing the Gaps initiative. Nobody can doubt that social cohesion will be endangered if steps are not taken to bridge the divide between Maori and other New Zealanders in health, life expectancy, education and income. But, as the Race Relations Conciliator has pointed out, affirmative-action health policies targeting Maori, such as hepatitis B and smoking cessation programmes, invite racial division, resentment and anger.

Dr Rajen Prasad provides good examples of how such sentiment is being stirred. People, he says, are being turned away from hepatitis B testing caravans because they are not Maori. And he has received a complaint from a Pakeha forced to travel 30 or 40km for treatment while a Maori neighbour received the same service from a mobile clinic down the street. Such incidents promote only discord, the very opposite of the cohesive urge at the heart of Closing the Gaps.

Health should not be administered in a discriminatory fashion. International conventions to which New Zealand is a signatory say as much. Dr Prasad recommends that the Government should act in the first instance by dropping the clauses in proposed legislation that say health treatment should be interpreted in light of the Treaty of Waitangi.

The Government, for its part, says no preferential treatment is intended. According to the Prime Minister, the intent of the treaty clause was "to signal that Maori must be involved in the planning and providing of services, which seems perfectly reasonable."

Yesterday, Helen Clark reiterated that Maori would not get favourable health treatment. Whatever the intention, this, of course, overlooked the stark examples of preference outlined by Dr Prasad the previous day. Instead, the Prime Minister accused Dr Prasad of failing to take account of Government utterances since the Health and Disability Bill was first proposed. There would be changes to the legislation, she said, without being specific.

In fact, the Government has been given good reason to reassess its Closing the Gaps policy.

Dr Prasad's criticism goes to the heart of the planned programme, which envisages responsibility for delivering social services to Maori devolved through iwi and other Maori structures. Assistance for Maori would be delivered by Maori in a Maori way. Such a process is always open to claims of discrimination if other races are excluded. Only if such services treat all people fairly and equally will they ensure that they avoid such criticism.

More fundamentally, however, the Government is being prodded to recognise that Maori deprivation has more to do with socio-economic factors than ethnicity. This was the conclusion of a report by the Labour Department's senior research analyst, Simon Chapple. Helen Clark might well have had that finding partly in mind when she referred to a lot of water having gone under the bridge since the Government first formulated legislation.

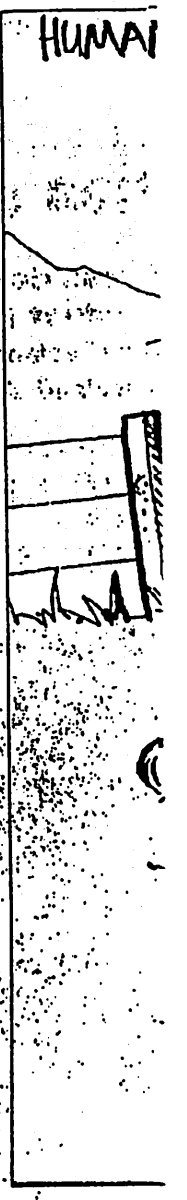
Mr Chapple said, in essence, that place of residence, age, education and skills had more to do with poverty than race. In areas such as South Auckland, Northland and the central North Island, there were poor Maori, but there were also poor Pakeha and poor Pacific Islanders.

Now, the Plunket Society has chimed in, saying it is aware of an increasing link between poor health and lower incomes, rather than ethnicity.

Recognising that this is a problem of poverty as well as ethnicity in fact provides the Government with the path out of its predicament. The way becomes open for the targeting of risk areas, rather than an at-risk race. If there is a prevalence of teenage pregnancy in, say, Northland, that district would be selected for a special programme of free contraceptive advice.

Maori, who are obviously over-represented as an at-risk group in many areas of health, are concentrated in such regions. Thus, they would automatically become one of the major recipients of such community assistance. However, other people, equally needy but of a different race, would not be denied such services.

If need, not ethnicity, is the basis of such programmes, issues of Maori health will still be tackled.



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David Round, Senior Lecturer, The University of Canterbury

provides a second view of the Ngai Tahu whale-watching case.

The decision of the Court of Appeal in *Ngai Tahu Trust Board v Director-General of Conservation* ([1995] 3 NZLR 553) is perplexing and unsatisfactory. It is difficult to know what to make of a case which itself announces that its "precedent value ... for other cases of different facts is likely to be very limited" (p 562). One would hope that certain surprising statements in the judgment should be ignored, and that the Court's cavalier approach to legal reasoning will not be repeated. It remains to be seen if simply expressing the opinion that precedent value is limited – in effect, a desire that a case be ignored – will suffice to avoid the doctrine of *stare decisis*. Already Mr J Guthrie, Chairman of the Conservation Authority, in a letter to the chairman of the Northland Conservation Board, has announced his opinion that the Court's attempt "to limit the affect [sic] of its decision by saying that the case was decided on its peculiar facts and will offer little in the way of precedent ... is wrong". The case's statements about the law could have considerable implications, and pro-Treaty enthusiasts, Mr Guthrie and many more, are not going to be deterred by a few cautious judicial reservations, as the Court of Appeal should surely know. If the Court's decision is to be ignored, a better basis for doing so might well be the ground that it was made *per incuriam*.

The case arises out of the intention of the Director-General of Conservation, publicly notified in 1992, to issue a further permit for whale-watching by boats off the Kaikoura coast. Four appellants, "who may conveniently be referred to collectively as Ngai Tahu" (p 555) challenged the Director-General's intention on Treaty of Waitangi and legitimate expectation grounds. These two grounds were held to be essentially the same (p 561).

The granting of a permit by the Director-General would be made under 1992 Regulations made under the Marine Mammals Protection Act 1978. The emphasis in both those regulations and earlier ones was "throughout ... on protection of the mammals ..."(557). In neither set of Regulations, however, was there anything to prevent Treaty considerations also being taken into account (557). The Director-General's evidence was that consideration had been given to Ngai Tahu's point of view.

"It is difficult to know what to make of a case which itself announces that its 'precedent value ... for other cases of different facts is likely to be very limited"

The Director-General of Conservation was acting under the Marine Mammals Protection Act. Nevertheless, and obviously, his own office and department are established by another statute, the Conservation Act 1987. The Conservation Act requires the Department to administer the Marine Mammals Protection Act and various other Acts in the First Schedule.

The Conservation Act also contains, in s 4, the direction that:

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

Section 4 says merely that the Conservation Act shall be so administered and interpreted. There is no indication anywhere in the Conservation Act that the various Acts listed in the First Schedule are also to be so interpreted and administered. It would have been perfectly easy for Parliament to have said so, but it did not. Yet the Court of Appeal has chosen, in this case, essentially to rewrite these other statutes by holding that s 4 applies to them also. On controversial matters – and Treaty claims are surely controversial – it might be more reasonable to expect a Court to take a conservative approach, and leave adventures to Parliament. Yet in this controversial case, the meaning of a statute – s 4 – is strained in a startling and politically controversial manner. This is surely ill-advised.

Moreover, the Crown in argument raised a good argument, besides the accepted canons of statutory interpretation, as to why s 4 should not apply to the Acts in the First Schedule (558). That argument was that certain Acts there listed, Acts made and added to the First Schedule after DOC was established, contained their own sections referring to the Treaty. Such sections would be superfluous if s 4 applied to these statutes. This is, surely, an argument worthy of serious consideration. Yet the Court of Appeal dismisses it in two sentences, not even considering it but merely saying that the "question of reconciling them [with s 4] will have to be determined if and when it arises" (558). It is alarming that the Court seems determined to choose the adventurous path, and refuses to consider a highly relevant argument. Admittedly, in the High Court the Director-General, in argument, accepted that s 4 applied to the Marine Mammals Protection Act. Yet the Court of Appeal judgment records, on p 558, different arguments, such as I have put forward here, being placed before it.

Equally surprising is the Court's treatment of the question of the connection of Ngai Tahu's claimed rights of control over whale-watching with title to land. "It is possible", the Court says, (p 559) "that title and control go together and have been extinguished together". Given that statement, one might justifiably expect some consideration of the question. That statement is, after all, an admission by the Court that any claimed Ngai Tahu rights may have been extinguished. But what are the judgment's next words? "Putting aside that possibility, however ...". The question of title to land is not mentioned again. A fundamental question is raised only to be ignored. We deserve better than this from our de facto highest Court.

On the same page the Court observes that commercial whale-watching "is a very recent enterprise, founded on the modern tourist trade and distinct from anything envisaged in or any rights exercised before the Treaty". The Court had been referred to no case in any jurisdiction dealing with claims to exclusive commercial whale-watching rights. Moreover, the Court added, even though "a right of development of indigenous rights is ... coming to be recognised in international jurisprudence", any such right that might exist would not necessarily be exclusive.

In the light of these statements – in particular the statement that Ngai Tahu's claim is "distinct from anything envisaged in or any rights exercised before the Treaty" – it is very difficult to see how it is possible to connect it with the Treaty. The Court tries to link it by saying that whale-watching "is so linked to *taonga* and fisheries that a reasonable Treaty partner would recognise that Treaty principles are relevant. Such issues are not to be approached narrowly" (560). While we would all, of course, applaud generosity of spirit, it can easily become a smokescreen for woolliness of thought. As we all learnt at school, when our multiplication tables were drummed into us, multiply something – any number – by nothing, and what you have is nothing. In the same way, if Ngai Tahu's claim is for something unknown under the Treaty, it is nothing under the Treaty, and nothing cannot be linked to anything. It matters not that Treaty principles "require active protection of Maori interests". By the Court's own admission, there is no interest to protect. "However liberally ... Treaty rights may be construed, tourism and whale-watching are remote from anything in fact contemplated by the original parties to the Treaty. Ngai Tahu's claim to a veto must be rejected."

The most the Court can say, in a later paragraph, is that viewing whales has "some similarity to fishing or shore whaling". Yet the Court also accepted that it was not clear whether Ngai Tahu actually hunted even small whales (559) – it is clear that they did not hunt the sperm whales now being watched – and that "off-shore whalers were able to take whales without interference from Ngai Tahu, and Ngai Tahu had little ability to control this fishery, even if they had the inclination". Land-based whaling was controlled by the tribe only because, and to the extent that, Ngai Tahu owned the land on which the whaling stations were based. As well as the feeble observation that viewing whales has "some similarity" to the whaling which Ngai Tahu themselves did not do, the Court also states that viewing whales is "analogous" (561) to such fishing or shore whaling. Are remedies to be granted now simply because a litigant's claim is to something "similar" or "analogous" to a right? Is this generous principle to extend to other areas of law?

The Court of Appeal's judgment also contains a disturbing uncertainty of fact. One of the three "special features" of this case is that "Ngai Tahu were the pioneers of whale-watching off Kaikoura". (The other two "special features" are the analogy with fishing or shore whaling – already discussed – and the fact that the whale-watching was organised on some sort of tribal basis. It is difficult to see how a right can be created out of nothing simply because tribal members act in concert.) One might have thought that the fact that "Ngai Tahu were the prioneers of whal-watching" irrelevant to the Treaty question, but leaving that aside, the Court itself several pages earlier was rather more diffident, saying there that Kaikoura whale-watching was "pioneered in 1988 by Ngai Tahu and two persons apparently commissioned by Ngai Tahu". Over the next eleven pages that diffidence, and the "apparently", disappears. It might seem strange even that these two persons were "apparently" commissioned by Ngai Tahu, given that the Court records in the next sentence that these two persons "obtained the first permit in the name of their own company", and that "they have since been bought out by Ngai Tahu". In fact there seems to be some considerable uncertainty as to the extent to which Ngai Tahu pioneered modern whale-watching.

"In the light of these statements – in particular the statement that Ngai Tahu's claim is 'distinct from anything envisaged in or any rights exercised before the Treaty' – it is very difficult to see how it is possible to connect it with the Treaty"

Perhaps the Court was not to know this, although the facts it mentions above should at least have made it wary. It is worth noting, anyway, that this one of the three special features of this case may well not be so.

The Court's decision is not without its good points. It is good to hear it reaffirmed that, whether one uses the English or Maori versions of the Treaty, its first article "must cover power in the Queen in Parliament to enact comprehensive legislation for the protection and conservation of the environment and natural resources. The rights and interests of everyone in New Zealand, Maori and Pakeha and all others alike, must be subject to that overriding authority" (558). It is good to hear the Court repeat, if only in passing, that the relationship between Crown and Maori is only "akin to" a partnership, rather that being a partnership (568). It is good that the Court makes plain that, as regards whale-watching, conservation considerations are "overriding" and "paramount" (560, 561). And it is most heartening that the Court at least pays lip-service to the proposition that the Treaty has no independent legal life of its own, but depends on statutory authority for its incorporation into the law. Yet so long as decisions are made which still substantially grant to Maori what they seek while having only a loose connection with accepted law and legal reasoning, such sensible principles may not be of much value.

What will the consequences of this decision be? For all the Court's protestations, there must be some. Mr Guthrie, in the letter referred to before, is certain that it has consequences. He considers it a "significant development" and purports to discover in it two new principles to add to the list of the Crown's Treaty obligations. Regardless of his view, it is at least clear that at one stroke, numerous statutes – including such nationally significant ones as the Wildlife Act, Wild Animal Control Act, National Parks Act and Reserves Act – have been rewritten, without explanation or justification, so that they must serve the Treaty. It is not even clear that other sections of the Conservation Act, such as the overriding duty to conservation, apply to these other statutes – but the Treaty section does. Quite possibly then, we may find in the future that Maori must, in this case's phrase, be given a "rea-

sonable degree of preference" in the allocation of opportunities to hunt and control deer and other animal pests, for example. Such hunting, after all, could surely be said to "similar" or "analogous" to the hunting of native birds done before 1840. Very possibly the Department of Conservation must employ Maori staff as rangers in National Parks – and indeed, everywhere – given that the guiding of visitors has now been held by the Court to be a natural function of the local Maori inhabitants. The possibilities are endless.

The effect of the decision is also out of step with the anti-monopolistic spirit evident in our competitive ethos and commercial law. Ngai Tahu already have all the existing licences for whale-watching by boat at Kaikoura. They seek the new licence not only to increase their business but also to preserve their monopoly. It would seem that any granting of the next licence to Ngai Tahu would not be anti-competitive conduct of the sort to which the Commerce Act applies. Neverthleless, the wording of s 5 of the Marine Mammals Protection Act seems wide enough to include consideration of competition matters, and it is unfortunate and surprising that a Court so sensitive to the question of monopolies did not consider the question here.

"Are remedies to be granted now simply because a litigant's claim is to something 'similar' or 'analogous to a right? Is this generous principle to extend to other areas of law?"

I am conscious that some of my comments in this note may smack of irreverence to the judiciary. I hope they may be considered merely in Lord Atkin's famous words, "the ... respectful, even [if] outspoken, comments of [an] ordinary man". If I be irreverent, I am so reluctantly. But if Judges choose to abandon their ancient position and instead become politicians, they must expect to be regarded and treated as such. Since 1987 kind-hearted and no doubt well-intentioned Judges – led on, perhaps, by some enticing *ignis fatuus* – have, in controversial cases concerning Maori and other issues, abandoned the wise path of legal caution and have chosen instead the political path. Certainly, Parliament has chosen to mention the principles of the Treaty in various statutes. It is regrettable that Parliament has abdicated its duty and left what is essentially a political matter to the Courts. Nevertheless, no statute obliges the Courts to be so adventurous in their application of statutes. This latest decision is a ragbag of slipshod reasoning and political meddling. The Judges may have done the country immense harm. They have certainly made decisions which should properly be made only by people with manifestos standing for election and later liable not only to be lobbied but also, if need be, to lose their seats. If Judges wish to be politicians they should stand for Parliament. ❑

Forget Maori and Crown claims — give islands back to wildlife

In negotiations between the Crown and Ngai Tahu over some small islands off Stewart Island the interests of conservation are being over-ridden, argues DAVID ROUND.

No reasonable New Zealander opposes remedying genuine injustices done to Maori. Unfortunately, in that process other important interests are being disregarded and consequently other injustices sometimes done.

In 1864 the Crown purchased Stewart Island (Rakiura) and its offlying islands. Some islands, the "Beneficial Titi Islands", were reserved for continued Maori muttonbirding. Others, less valued for food-gathering, became the Crown's absolute property. These included the "Crown Titi Islands", where some muttonbirding occurs with the Crown's consent, and Codfish Island (Whenua Hou).

These Crown-owned islands are immensely important to the conservation estate. Half the world's kakapo, and about 65 other bird species, live on Codfish. This precious sanctuary, of international significance, enjoys a very high level of legal protection. Short-tailed bats, saddlebacks and many other birds, undescribed lizards, and threatened invertebrates and plants inhabit various islands. The Department of Conservation agrees its knowledge of what the Titi Islands hold is incomplete. Islands — island arks — are important sanctuaries for vulnerable wildlife. Elsewhere, DOC is seeking islands to purchase or protect.

The Ngai Tahu claim against the Crown before the Waitangi Tribunal included claims for Codfish and the Crown Titi Islands. The tribunal found injustices in other Crown dealings with Ngai Tahu, but clearly ruled that Treaty principles were not breached in the Rakiura purchase. The tribunal even praised the present management arrangements for the Crown Titi Islands. The tribunal may lawfully make recommendations only when breaches have been established.

Nevertheless the tribunal "recommended" the Crown Titi Islands be given to Ngai Tahu and generous landing and control rights for Ngai Tahu be established over Codfish. These "recommendations" — the tribunal's word — were made entirely without jurisdiction. It is alarming to see any tribunal ignore its own constitution. Moreover, would any serious court recommend that a guiltless defendant still compensate an unsuccessful plaintiff?

Some members of the Southland Conservation Board, the supposed guardian of conservation interests and the public patrimony, embraced these invalid recommendations with uncritical enthusiasm. Two years of secret negotiations occurred. Finally, with little publicity, the public was "consulted". Public information provided clearly favoured the board's desired outcome, containing no genuine assessment of options. Nevertheless, public submissions overwhelmingly opposed the board's proposal. DOC employees, experts on the conservation issues involved, were not encouraged to make submissions.

The board finally decided, five to four, in favour of the tribunal's "recommendations". All four board members with Ngai Tahu affiliations (including at least one muttonbirder) supported the resolution. One opponent was absent.

Conditions were to be imposed. After freeholding, the Crown Titi Islands were to be managed as a nature reserve under a deed of agreement. Such arrangements, however, are profoundly unsatisfactory. Access and activities by Crown officers would depend on Ngai Tahu agreement, and inevitably be restricted. The public will have no say in management, and no way of discovering what is happening. The deed will allow a Ngai Tahu veto over any proposals to eliminate rats or other pests. There would be no Queen's chain.

There is abundant evidence that private freehold and sound conservation management are incompatible. Nearly all New Zealand's serious conservation problems, public and Maori and European freeholders alike, have obstructed vital conservation work. Freehold title abolishes the chief instrument of public regulation. Privatisation, like extinction, is forever. Promises, possibly well-intentioned, mean little. Ngati Porou promised public access to Mount Hikurangi when, without consultation or Waitangi Tribunal recommendation, that was taken from the conservation estate and given to them. That promise has been disregarded.

The public will have no say in management, and no way of discovering what is happening.

The Conservation Board proposes giving Rakiura Maori general landing rights to Codfish Island ("consistent with wildlife security"). Maoris now may apply to visit Codfish, but few if any apply. Why should one group be excepted from strict access laws? Privilege of access based on race will inevitably encourage resentment and disrespect for laws seemingly based on accident of birth rather than practical need.

The tribunal invalidly "recommended" Ngai Tahu involvement in Codfish's management. The conservation board proposes to establish a management committee — a quango — with a Ngai Tahu majority. Quangoes are generally condemned nowadays, yet are acceptable here. This committee — one of whose prime concerns, in a nature reserve, is the consideration of Maori protocol — is unnecessary. Any competent conservation board could administer Codfish.

Some Ngai Tahu consider these special access privileges as a step towards eventual freeholding. Some have long advocated that birding (not just for muttonbirds) resume on the island. Secret negotiations and proposed minority representation for conservation interests suggest the soothing assurances of politicians on this matter are worth no more than usual.

Two centuries ago Maori conservation attitudes may have been superior to European ones; although ideals and practice never perfectly coincide. But Maoris now have no monopoly on conservation knowledge and ethics. Muttonbirding is now a commercial industry, and it is not certain it is sustainably managed now. Ngai Tahu have opposed monitoring (and at times access) by DOC staff and independent scientists.

Muttonbirders have (on both Crown and Beneficial Islands) killed absolutely protected birds and bats. They have illegally released goats, cats and weka on various islands. Almost certainly they (inadvertently) allowed rats to reach Big South Cape Island and cause the extinction of two native birds.

Ngai Tahu have opposed shifting two endangered species from one Crown Island to another. They greatly restrict DOC's presence and research. Some Maoris have called for a fur-seal cull. How will freeholding stop this? Private ownership — Maori or European — is unthinkable. Public control — and better control — is the only answer.

Section 4 of the Conservation Act declares that the act shall be interpreted and administered as to give effect to treaty principles. But the statute's words and purpose — which clearly give priority to nature and conservation — come first. The treaty has no over-riding precedence. Nor should it have. Alarmingly, some in DOC fail to realise this. The conservation management strategy of DOC's Auckland conservancy has been accused of giving Maori cultural practices priority over conservation.

Our wild places, and the threatened remnants of our remarkable natural heritage, are important to us all. They are central to our perceptions of who we are. They cannot be given away. No principle of natural justice or treaty gives Maori concerns and needs precedence over others. Moreover, former boundaries between Maori and European culture and spirituality are disappearing.

As society becomes more racially, socially and culturally diverse, the principle of equality of entitlement to our public lands is becoming more, not less, important. Freeholding publicly-owned islands in the name of cultural primacy turns all non-Ngai Tahu New Zealanders into trespassers in the land of their birth.

It is unacceptable to use public conservation lands — often protected after great public struggles (often against the Crown!) — to settle treaty claims, even valid ones. It is appalling that the Crown has so little sense of obligation to its subjects that it may agree to give away their precious and hard-won property. The Cabinet has noted that the Crown Titi and Codfish arrangement could be done "at little cost to the Crown". What of other costs? Moreover, if conservation lands are disposed of, will any citizen ever again want to give or sell land to the Crown for conservation?

The Waitangi Tribunal's partisanship and excess of jurisdiction must cast doubt on many of its decisions. It is regrettable that Ngai Tahu should pursue an outcome unsupported by the tribunal's findings of fact and which so disadvantages other interests. Injustices to Ngai Tahu elsewhere in the South Island cannot be remedied by unnecessary and unjust gifts to Rakiura Maori.

DOC's underfunding, and continued reduction in funding, is a national disgrace. Its muddled priorities are also disgraceful. It spends money promoting Maori culture while allowing native bird species to slide unhindered into oblivion. It actually wants to give away precious and validly acquired islands — these islands and Stephens Island (Takapourewa, the Cook Strait home of tuatara), for example. DOC suggested to Maori that they might like to ask it for Stephens Island. Despite repeated advice from the Crown Law Office that no grievance exists, DOC persists in its desire to give it away. The director-general of conservation stated it was appropriate to privatise the Crown Titi Islands. In a deplorable conflict of interest, DOC's Maori Liaison Unit often supports Maori claimants.

Why does DOC have no national islands policy? No Titi Islands management strategy? How, without these things, and with incomplete knowledge of Crown Titi Islands' natural values, can DOC advocate giving them away?

The manner of public consultation has been grudging and disgraceful. Excluded from the long secret negotiations between Crown and Ngai Tahu, then fed biased "explanatory material", the public then had its submissions ignored. This can only engender reasonable suspicion of treaty matters. Biculturalism cannot be established so furtively. The public is more than an unfortunate impediment to treaty settlements.

The final decision rests with the director-general of conservation. Who should have these islands? Not Maori, not European. Not even, really, the Crown. Give them to the original inhabitants — the wildlife. It is time we had a treaty with them.

■ David Round is a lecturer in law at the University of Canterbury.

■ LETTERS TO THE EDITOR

OTAGO DAILY TIMES Thursday November 23 2000

Simple slogans not doing NZ history any favours

We are all being exposed to new politico-pop New Zealand history, writes KERRY HOWE, professor of history at Massey University's Albany Campus. History should be about acknowledging and trying to understanding the complexity of the human journey, rather than a moralising mission.

UNLIKE many comparable countries, New Zealand does not adequately feature the study of history, either its own or anybody else's, during compulsory schooling. Thus general public awareness and discussion of historical issues is not well developed.

It might be argued that there is no real harm in this. I'm sure that there are many who would consider this a right and proper condition. But I suggest that it has now created a rather unhealthy emotional breeding ground for those who would wish to inform us about our past using extremist perspectives, catch cries and slogans. There have always been extreme views about the past, but when they increasingly come from politicians and others who have the capacity to capture dramatic media headlines, I believe that there is cause for concern.

Debates about New Zealand history have generally been confined to academia. It has been far less common for historical interpretation to become an issue in day-to-day New Zealand politics.

This situation has slowly been changing in New Zealand since the 1980s with the growing political significance of the historical relationships between Maori and Pakeha, in the context of Waitangi issues. Now it seems that hardly a day goes by when there is not some sort of comment from Government members and others about the evils of New Zealand's past. We are being exposed to new politico-pop New Zealand history.

I'm not suggesting it is an organised conspiracy, but rather that it is cumulative assertion of a particular ideological/moralistic perspective, which meets little contradiction. Even the attorney-general promises/threatens a nationwide lecture tour to tell us all what we should know about our bad past.

This form of history has two particularly pernicious characteristics. Firstly, history is used as a whipping boy. Today's values and social policy ideals are imposed upon the past. The past is found wanting and thus condemned. There is no attempt made to understand the past in terms of its own values and perspectives. Somehow the notion of history as an evil in itself has come to prevail. Who has committed the greatest abuses? Who is the victim? Who will atone? History equals grievance.

Secondly, no effort is made to convey the incredible complexities of the past. Instead a simplistic binary world, now divided by "gaps", is constructed: Maori/Pakeha; urban/rural; rich/poor; possessed/dispossessed; holistic/materialistic; healthy/sick. "Colonialism" was bad; "post-colonialism" is good. Maori were destroyed; Pakeha flourished.

The complex processes of cultural interaction that these simplicities deny are further reduced to historical absurdity by various highly emotive terms and catch cries. Among the more recent notable ones are "fi/holocaust", "genocide", "post-colonial traumatic stress". The current debates tend to be about the contextual naughtiness or otherwise of using such terms. The real issue, in my view, should be less about their assumed relevance to New Zealand history, and more about the stupidity of encapsulating complex human events in a single word or phrase.

It might be helpful if some of those who currently speak with such simplistic passion became a little better informed both about the scholarly literature on New Zealand history, and aware of its research strengths and weaknesses, and also about how themes in New Zealand history fit into the broader perspectives of Pacific and world history.

For example, the arrival of "western diseases" in New Zealand was not some organised colonists' plot. It was the result of the transference of microbes all around the world that began from about 1500 onwards with the development of Eurasian expansion. Eurasia just happened to have the greatest range of domesticated animals from whence derived many of its human diseases. And it was not all one way. For example, syphilis from the Americas ravaged Europe. Global transference of microbes continues today.

No culture or nation has ever "owned" a disease. Moreover, the relationship between new diseases and environment, accurate population figures, cultural practice, the timing and epidemiology of introduced diseases, and natural and acquired immunology. Again there is a good academic literature on these matters, especially for the Pacific islands and elsewhere, though it is still under-researched in the case of New Zealand

Nor does any nation or culture have a monopoly over virtue or harmony. Painful though it may be to some, the wars of the 1860s were as much a civil war amongst some Maori as they were a conflict between the government and some Maori tribes. Probably most Maori remained either neutral or fought on the side of the colonial forces.

By far the greatest military devastation of Maori took place by Maori during the so-called musket wars of the 1820s and 1830s, before European colonisation began. To say these things is not to attempt to whitewash or denigrate any one side, merely to indicate that human affairs are not simple.

And as for the apparently newly-claimed Pakeha evil of Maori urbanisation, it should be remembered that in 1800 only 2% of the world's population was urbanised. Now it is more than 50% and growing exponentially. This is a broad consequence of the against acknowledging human suffering, or injustice, or the imbalances of power relationships of the past and present. But I am making a plea that history should be about acknowledging and trying to understanding the complexity of the human journey, rather than a moralising mission.

The two key themes in human history are human relationships with each other and with their environment. New Zealand was the last part of the habitable world to be settled by humans. In fewer than 700 years it has been the site of events that in most other parts of the world have been developing for tens of thousands, often hundreds of thousands of years. Let's not become too pompously myopic.

It is sometimes claimed that history is too important to leave to historians. As a historian I would claim in defence that it is positively dangerous to leave it to people who embrace uninformed and extreme views. Gordon McLauchlan expressed it brilliantly when he wrote: "Without sincerely, and as accurately as possible, respecting the past, we remain rootless in the present and flounder towards the future."

• *Professor Howe's latest book is* [illegible]

The Otago Daily Times
Founded 1861
New Zealand's First Daily Newspaper

10 FEB 2001

Day of dissension

WAITANGI DAY remains a disappointment. Anger, apathy and angst are more common than celebration and pride; flagellation, not fun and fanfare the order of the day for the latest such charade. How many New Zealanders now believe, as Ngai Tahu leader Edward Ellison said on this newspaper's opinion pages this week, that Waitangi Day is "still an important focus for the continual construction of our nation's identity"? We might well wish it so, but most New Zealanders, we suggest, are simply fed up now with the protests. They are becoming increasingly cynical about the overblown emphasis placed on an ancient, albeit historically significant, document.

It is little wonder that Helen Clark's decision to bypass commemorations at Waitangi itself is widely applauded. Why should our Prime Minister put up with more insults and dishonour? Why should a national day always turn sour? After years of spitting, scuffling and slights, enough was enough.

Last month, we wrote that ever since activists hijacked Waitangi Day and made it the focus of their innumerable and ceaseless grievances, most New Zealanders have treated this "founders" day with increasing diffidence. Waitangi Day became the scapegoat for the historical fact of European arrival and eventual domination. The unstoppable changes were already well under way long before the treaty was signed. And the document itself is a historical oddity wreathed in misunderstanding and given extraordinary latter-day prominence. Cobbled-together statements with questionable Colonial Office backing and a text of questionable translation can hardly be the "founding document of our nation". It has suited many Maori interests, supported by sectors of liberal Pakeha, to induct the treaty with an aura like that given by fundamentalists to tenets of religious scripture. A treaty signed 161 years ago should have little other than symbolic relevance and historical interest to a modern multi-cultural society. Realistically, however, the specific place given to the treaty by the Court of Appeal and successive governments cannot just be undone. For better, and often for worse, the treaty has taken on a life of its own. But it should not be used to enshrine racial distinctions and privileges or used to sustain the mirage of "partnership" where one partner is superior to all others. The time has come to ease back on the undue emphasis on all things treaty.

New Zealand has so much in which to rejoice. Despite weaknesses and problems, we share a democracy where human rights are largely protected. We live in a green and pleasant land that provides opportunities for most, if not all, of our citizens. We, of all races, cultures and creeds, live in one of the most privileged places on earth. Anybody returning from overseas marvels at our strengths, and not at our foibles and failings.

What a shame, therefore, that the closest we have to a national day is spoiled by deep dissension. While we might never party with the passion of Americans on Independence Day or the French marking the storming of the Bastille, calls are growing to dump the Waitangi Day and treaty emphasis as the basis of national identity and commemoration and look elsewhere to celebrate our nation's founding. Should we return to Norman Kirk's New Zealand Day concept and take a fresh approach to Waitangi Day? What about, as Wellington's *Dominion* newspaper has suggested, marking September 26 as a new national day? It was on that day in 1907 that New Zealand acquired dominion status. Should thought be given to a 1947 date to mark the adoption of the Statute of Westminster, when New Zealand's Parliament became fully sovereign and independent from Britain? It should be remembered that Waitangi Day itself has only been marked since 1960. Nowhere is it set in stone that New Zealand cannot celebrate both an independence day and a treaty day.

When we celebrate nationhood it is unhealthy to brood on a remote past which cannot be undone. Destructive bitterness will only be matched by retaliatory emotions; we all will suffer. Goodwill over Waitangi Day is exhausted, and an alternative is needed now.

ODT

11 JAN 2002

The art of patronage

THE GOVERNMENT set out soon after taking office to introduce three substantial changes to the way local bodies operate. First, the Local Electoral Act 2001, which sets out how councils are elected, has come into force, although its full effects will not be experienced until the next round of elections. Councils will be able to choose an alternative voting system, either the present first-past-the-post (FPP) system, or the single transferable vote (STV). Five percent of voters can also demand a poll to consider a change.

The second stage of the overhaul features measures to "modernise" the way rates are levied. The Government acknowledged that rates are coercive taxes, and councils are now required to achieve a balance between certainty of process and application on the one hand, and opportunities for individual input and redress on the other. Councils' revenue will still be provided mostly by general rates based on the value of properties, and they will still be able to set differential rates and uniform charges. Certain ambiguous definitions of ownership have been tidied up, and exemptions and classes of non-rateable land clarified.

All of this was laudable until the Government, in its rejection of assimilation and its determination to force "bi-culturalism" on the nation, had an attack of Maoriness and decided councils must now take into account the aspirations that "Maori owners" have for their land when councils are making rating decisions. A local authority, for example, "must adopt a policy on the remission and postponement of rates on Maori freehold land". This was a strong hint of what was to follow in the third and final part of the review that has now come to light.

Next month, the deadline will be reached for public submissions on the Local Government Bill, which gives local authorities more general powers devolved from central government. They may choose the activities they undertake and how they undertake them, subject to public consultation processes. It is intended this will give them the ability to act within laws enjoyed by individuals and corporates, subject to specific limitations. But the legislation is also one more mechanism by which the Government intends to give "Maori" special privileges, over and above the rights accorded other ratepayers.

This Government, it must be admitted, has made no secret of its intentions to give "Maori" special consideration, identifying as particular concerns "Maori participation and representation" in local government, and "the way local government operates". But the proposed law has some quite extraordinary provisions. For a start, councils will have to formally recognise the "principles" of the Treaty of Waitangi in all that they do. Precisely what these "principles" are or mean is, of course, a matter of continuing debate, but we do not doubt there will be implications for ratepayers' future costs.

The Bill also *requires* councils to endeavour to "provide appropriate opportunities for Maori to contribute to its decision-making processes". Councils must make public their plans for "representation arrangements, including the option of establishing Maori wards or constituencies", and "policies for liaising with and memoranda or agreements with Maori". Furthermore, "a local authority must, in making significant decisions related to land and bodies of water, take into account the relationships of Maori and their culture and traditions with their ancestral land, water, sites . . .valued flora and fauna, and other taonga". There is no specific mention that we can find in the legislation requiring councils to similarly take into account the relationships of other cultures' traditional relationships with the land and water.

These and similar measures will help sustain the construct of "Maori" as a separate people who, by some unknown means, are in 21st-century New Zealand incapable, or to date prevented, from enjoying the same rights and privileges as every other mixed-race New Zealander. Such powers, in circumstances easily imagined, could readily drive further a greater wedge than now exists between those who believe our true identity is that of one nation of many cultures, and those who maintain the fiction of a superior "Maori" race requiring exceptional measures to preserve both the "purity" of its identity and the superiority of its status. This is a recipe born of fear, confusion, and raw political cynicism, and it should be rejected, so long as unity continues to be our national goal in this democracy.

ODT, 20 MAY 2002

Privy council

MAORI COUNCIL chairman Sir Graham Lattimer and Maori Fisheries Commission chairman Shane Jones both stated that the proposed new supreme court would enhance Maori rights under the provisions of the Treaty of Waitangi (*ODT*, 17.4.02). Could they confirm that the proposed court would also enhance the responsibilities of Maori as New Zealand citizens, as provided for by Article Three of the Treaty?

Philip Temple
City Rise

[This letter was referred to Sir Graham Lattimer and Robin Hapi, chief executive officer, Treaty of Waitangi Fisheries Commission. They did not wish to respond.]