

VICTORIA
UNIVERSITY OF
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*Te Whare Wananga
o te Upoko o te Ika a Maui*



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Maori language and culture have value not only to those of Maori descent but also to other New Zealanders. They are an element of key importance in our identity as a nation. We cannot establish our distinctiveness on the world scene without calling on the Maori input. Presented in its full richness and depth, that input develops our knowledge of our land and its history, our knowledge of and pride in ourselves...¹

I. INTRODUCTION

Maori language² (*te reo Maori*) is an integral part of New Zealand's national identity. Perhaps in recognition, 1995 has been designated 'Maori Language Year'. Or, instead of New Zealand celebrating a "distinctive feature of its heritage",³ such a designation may simply reflect that Maori language desperately needs national support.

As its uses have dwindled, so has the language itself. Those wishing to preserve Maori language face an arduous task. There is a sense of urgency, as Maori⁴ who can speak the language fluently are becoming older.⁵ There is a need to exploit this aging resource before it is too late.⁶

This article examines efforts to revitalize Maori language through broadcasting's power. Broadcasting may seem to be the perfect answer to halt the decline. Radio and television are

¹ Dame J Metge, cited in *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wai 26 and Wai 150) 34.

² Various dialects of Maori language exist. This may raise ancillary problems for broadcasting 'Maori language' on a national level, but as the Waitangi Tribunal has noted, this is a problem capable of solution: *Report of the Waitangi Tribunal on the Te Reo Maori Claim* (Wai 11) 1986, 48. Throughout this article, 'Maori language' is used in a general, indicative sense.

³ J Waite *Aotearoa Speaking for Ourselves: A Discussion on the Development of a New Zealand Languages Policy* (Ministry of Education, Wellington, 1992) 18.

⁴ The definition of 'Maori' has led to uncertainty in the past. It is now well established that if a person can lay claim to any Maori ancestry, then he or she may consider themselves 'Maori'. "A Maori is one who has Maori ancestry and who feels himself to be Maori": above n 2, 14. For the remainder of this paper, it is intended that 'Maori' denote those who are fighting for, and have taken steps for the salvation of the Maori language. It is not intended to imply that all Maori share the view of those actively involved with this task.

⁵ It is expected that in the next 20 years, the number of elderly Maori will increase rapidly. It is here that fluency in the language and knowledge of Maori culture is concentrated. See I Pool *Te Iwi Maori: a New Zealand Population, Past, Present and Projected* (Auckland University Press, Auckland, 1991) 227.

⁶ Pool believes these older generations should be well suited to transmitting their knowledge of Maori language and culture. The challenge is to make use of this knowledge in an appropriate manner: above n 5, 227.

part of nearly all New Zealanders' lives. At present, broadcasting forms the core of mass communication. The potential seems limitless - what better way to spread the knowledge of a few amongst the wider population of New Zealand?

However, Maori language, with its strength confined to older generations, will struggle against the demand for 'modern culture'. In an environment dictated by the free play of market forces,⁷ and by the limits of the Public Broadcasting Fee, an entity with little commercial power will struggle for 'air time'.

In the *New Zealand Maori Council v Attorney-General*⁸ ('NZMC') case, Maori sought to overcome these obstacles by demanding the Crown's assistance. The Crown was compelled to acknowledge a Treaty⁹ duty to seek ways of promoting Maori language in broadcasting. The prolonged proceedings which followed highlight the clash between this duty, and government policy favouring market competitiveness.

After discussing the legal issues in the NZMC case, this article further examines whether broadcasting is ultimately suited to assist Maori language. A survey of various social issues neglected in the case suggests that at present, the answer must be no. Despite considerable efforts, as Maori language now stands, it is too difficult to manipulate the broadcasting environment to meet Maori language needs.

II MAORI LANGUAGE

A Towards Extinction?

Numerous attempts to succinctly describe the state of Maori language have recently been put forth. They are united in outlining a precarious existence.

In 1986, the Waitangi Tribunal stated the matter thus:¹⁰

⁷ "Broadcasters lure audiences with programmes and sell the audiences to advertisers, who in turn show advertisements to the audiences. Audiences do not pay directly for the broadcast programmes." See M L Spitzer "Justifying Minority Preferences in Broadcasting" (1991) 64 South Calif Rev 293, 305.

⁸ [1994] 1 NZLR 513 (PC).

⁹ All references to the Treaty of Waitangi will be "the Treaty".

¹⁰ Above n 2, 10. In delivering the advice of the Privy Council in NZMC above n 8, 514, Lord Woolf simply said it was "in a state of serious decline."

It is clear that Maori language in New Zealand is not in a healthy state at the present time and that urgent action must be taken if it is to survive.

Maori language will not become extinct. The danger is that only a few elite will be fluent speakers, and consequently, "as a living language it will be no more".¹¹ This decay would have negative consequences for all things Maori, as language lies at the very heart of Maori culture. The position is forcefully stated in the following proverb:¹²

Ka ngaro te reo, ka ngaro taua, peri i te ngaro o te Moa
(If the language be lost, man will be lost, as dead as the Moa).

The early New Zealand Education system must bear much of the blame for the present situation.¹³ Often it was forbidden, and heavily punished to speak Maori at school. It was thereby learnt that Maori language was no longer acceptable in New Zealand society:¹⁴

There are many reasons why people decided... to abandon the use of Maori in their homes. One major and ever-present factor in such decisions however has been the obvious lack of support for the language in the New Zealand community as a whole... It was very obvious that the only language that really counted in New Zealand was English.

McGechan J observed that "the present situation is 'serious', but not yet 'hopeless'".¹⁵ While there is hope, action can be taken to preserve Maori language.

B Future Prospects for Maori Language

Inevitably, if Maori language is not used in a social context, it serves a limited purpose, and natural fluency will decline. Maori are concerned with finding ways to alleviate this acute

¹¹ McGechan J, in *New Zealand Maori Council v Attorney-General* Unreported, 3 May 1991, High Court Wellington Registry CP 942/88, 59.

¹² Above n 2, 7.

¹³ In 1913, 90% of Maori spoke the language fluently, compared to 26% by 1953: above n 2, 11. It is now estimated that 1.5% of the total population is fluent in Maori (12% of the Maori population): above n 3, 15.

¹⁴ Above n 2, 11.

¹⁵ Above n 11, 58. The social science experts agree with him - there are still enough fluent speakers to encourage hope. See the discussion below in Part V.

loss of fluent speakers. The most comprehensive discussion of language policy in New Zealand suggests that "revitalization of a people's language involves increasing the number of native speakers of the language, [and] increasing the number of domains in which the language is used..."¹⁶ However, the revival of Maori language should be not confined to simple numerical issues.¹⁷

A fundamental objective overall for Maori is a sense of self worth as Maori. This cannot be achieved without a sense that to be Maori, to be enriched by one's culture is of high value. In this context the effective recognition of the Maori language is of crucial importance.

The primary focus for Maori is to increase the number of fluent speakers. However, greater recognition of Maori language is beneficial in itself, as it will strengthen a source of pride for all Maori.

C The Role of Broadcasting in the Revival

Broadcasting sparks many issues. Without doubt, it is considered to be highly influential - on the young in particular. Current law readily assumes societal values are affected by printed and visual matter.¹⁸ Broadcasting is presumed to have an enormous effect in developing and influencing the make-up of modern society.¹⁹

The importance of broadcasting has been seized upon by Maori. It is not imagined to be a lone saviour for the language. However, when associated with education and increased home use, broadcasting is considered to be "an essential component of institutional support for the maintenance and revitalization"²⁰ of Maori language.

¹⁶ Above n 3, 30.

¹⁷ D Henare, M Thompson and L Comer *Ka Awatea* (Ministerial Planning Group, Wellington, 1991) 83.

¹⁸ For example, the Films, Videos and Publications Classification Act 1993 creates a comprehensive scheme for regulating content of various publications. The Broadcasting Act 1989 itself sets standards for programme content.

¹⁹ In the United States context, it has been argued that "to pretend (as we all do from time to time) that film or television...is a neutral vessel, or contentless, mindless, or unpersuasive, is sheer denial. It is for better and frequently for worse, one of the major forces in the shaping of our national vision..." See P J Williams "Metro Broadcasting, Inc v FCC: Regrouping in Singular Times" (1991) 104 HLR 525, 535.

²⁰ Above n 11, 60.

Broadcasting in New Zealand is characterized by the perpetuation of English language to the exclusion of its Maori counterpart. This has contributed to a social environment where Maori language is smothered by English dominance. It follows that the perceived role of broadcasting is to raise the exposure, and indeed acceptance of Maori language in society. Respect for Maori language within the community is crucial to its development and survival.²¹

Today the electronic media dominates the way in which individuals, families, communities and a nation see themselves. Clearly Maoridom has been, and continues to be, misrepresented and negatively portrayed by this medium. Maori have been unable to hear effectively, or speak for, themselves and in this age of technological sophistication this is no longer acceptable.

This view has been endorsed by the Waitangi Tribunal,²² and is a theme in discussion of language policy in New Zealand.²³

The major hindrance is that broadcasting, whether by television or radio, is a highly specialized business. More importantly, the costs involved are enormous, and commercial competitiveness is crucial for survival within the industry. Creating a safe market for a language which is "being suffocated by the enveloping effect of the English language and contemporary culture"²⁴ is a difficult task.

Maori need assistance, and lots of it, to get Maori language firmly implanted into the broadcasting structure. The only source of this assistance is their Treaty partner - the Crown. However, to those concerned with saving Maori language, the Crown has not acted

²¹ D Chapman for the Tuwharetoa Maori Trust Board and Te Reo Iirangi o Tuwharetoa, in *Four Hui on the Theme Broadcasting, Te Reo, and the Future* (Ministry of Commerce, Wellington, 1991) 4.

²² In hearing a claim regarding the allocation of radio frequencies, the Waitangi Tribunal stated:

"We are convinced that the broadcasting media, radio, and television, plays a key role in the maintenance or loss, development or stagnation of language and culture, not only by what they do, but by what they do not do. The virtual absence of Maori language from radio and television has been a potent factor in the decline in the number of fluent speakers of Maori over the last forty years, to the point where its survival is problematic. This must be rectified."

See above n 1, 36.

²³ It was asserted that "[b]roadcasting is also important for the maintenance and development of group identity. At a national level, radio and television contribute to the development of a national identity. At a community level, they can be influential channels for the maintenance of community identity and cohesion."

See above n 3, 15.

²⁴ Above n 8, 518.

vigorously enough to protect Maori language. An opportunity to litigate this claim materialized upon restructuring of the broadcasting environment.

III THE TREATY OF WAITANGI AND BROADCASTING

A Restructuring the Broadcasting Environment

1 Legislative Measures

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A maze of legislative provisions enacted the new broadcasting structure. Section 5 of the State-Owned Enterprises Amendment Act (No 2) 1988 dissolved the Broadcasting Corporation of New Zealand, and its assets were vested in the Crown. Radio New Zealand and Television New Zealand were then added to the list of State-Owned Enterprises.²⁵

These entities would now compete in a commercial environment with other privately owned broadcasting stations.²⁶ Ideally, Crown interference with management and operational activities would be minimal, to achieve maximum efficiency and competitiveness.

The remaining step required to consummate broadcasting independence was the transfer of broadcasting assets from the Crown to the new enterprises.²⁷

2 A lack of protection?

It was recognized that minority interests could not be left unprotected within the new competitive environment. A grants scheme was developed to encourage representation of

²⁵ Section 2 of the State-Owned Enterprises Amendment Act (No 4) 1988. The list is contained in the First Sch to the State-Owned Enterprises Act 1986.
²⁶ The Radiocommunications Act 1989 set up a comprehensive scheme for the allocation of broadcasting frequencies on a commercially viable basis.
²⁷ Section 7 of the Broadcasting Amendment Act (No 2) 1988 allowed the Minister of Finance and State-Owned Enterprises to identify assets (and liabilities) which should be transferred to TVNZ and RNZ by the appropriate Order in Council. Section 9 of that Act provided that the transfer was to be treated as though carried out under s 23(1) of the State-Owned Enterprises Act 1986.

these interests. The Broadcasting Commission would charge a public broadcasting fee,²⁸ to be used for various broadcasting objectives.²⁹ This was not enough to meet the demands of Maori. They claimed Maori language and culture are *taonga*, and that the Treaty imposes an active obligation upon the Crown to protect all such *taonga*. The proposed scheme offered little prospect of this duty being fulfilled, making the transfer of assets inconsistent with Treaty principles.³⁰ The courts were required to assess the validity of this claim.

B *Litigation in the Courts*

The affirmative action debate in some respects resembles a college basketball game. Sides are chosen - or perhaps dictated by fate - before the contest. Both sets of fans spend an enormous amount of energy shouting at each other across the court and over the heads of the real players, but neither side convinces the other of much except the degree of passion for its own team. When the game is over it remains unclear exactly what, if anything, the winning fans have won and the losing fans have lost.³¹

1 *Applying the Treaty to broadcasting*

Before the restructuring process, the Waitangi Tribunal advised the Crown that Maori language was *taonga*, and thereby within the Treaty's protection. This means the Crown guaranteed undisturbed possession of the language to Maori, and undertook to protect it.³²

²⁸ Section 47 of the Broadcasting Act 1989.

²⁹ Section 36 of the Broadcasting Act 1989 provides:

"The functions of the Commission are -

(a) To reflect and develop New Zealand identity and culture by -

...

(ii) Promoting Maori language and Maori culture..."

³⁰ Above n 11, 2.

³¹ D P Judges "Light Beams and Particle Dreams: Rethinking the Individual vs. Group Rights Paradigm in Affirmative Action" (1991) 44 Ark L Rev 1005, 1007.

³² Above n 2, 20. This approach was subsequently adopted in the preamble of the Maori Language Act 1987:

"WHEREAS in the Treaty of Waitangi the Crown confirmed and guaranteed to the Maori people, among other things, all their *taonga*: And whereas the Maori Language is one such *taonga*".

In the High Court, McGechan J further accepted that broadcasting was vital to Maori language revitalization. It was "one of a trio of major influences, comprising home use, education and broadcasting".³³ Broadcasting gave potential to have the language heard by a mass audience, and could increase its status and credibility amongst youth.³⁴

During the restructuring process, there had been Treaty failings over reasonable inquiry.³⁵ As a consequence, the Crown had not adequately informed itself as to the importance of broadcasting for Maori language protection.³⁶ If the restructuring process had proceeded in a proper manner, the Crown would have been aware that the Treaty requires positive action³⁷ to secure a place for Maori language in broadcasting. In the absence of adequate protective steps, Treaty principles would be violated.³⁸

This conclusion was adhered to by the Court of Appeal and the Privy Council.

The imposition of this duty was unopposed by the Crown. The contentious aspect was to ascertain the precise nature and extent of the obligation. In the Te Reo Maori hearing, the Waitangi Tribunal was understandably reluctant to make any concrete recommendations, as the Broadcasting Tribunal, and a Royal Commission on Broadcasting were looking into the area.³⁹ As the case unfolded in the courts, final decision on this point was not required, but there were some judicial observations of significance.

When considering the extent to which the Crown should implement policy to fulfil its obligations, the Privy Council's advice must now be taken into consideration.⁴⁰

³³ Above n 11, 62.

³⁴ Above n 11, 61. Comfort was also derived from the Radio Frequencies Report (above n 1, 26), where the Waitangi Tribunal was supportive of increased Maori language exposure in broadcasting. See above n 11, 62.

³⁵ This duty arises from the fundamental Treaty principles of reasonableness and good faith to be observed by both parties. See Richardson J in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 673.

³⁶ Above n 11, 70. Much discussion between the Crown and Maori did take place, but this was after the broadcasting structure was established by legislation.

³⁷ The Crown's obligation is not limited to passive protection, but may also require active steps. See above n 35, 673.

³⁸ Above n 11, 71.

³⁹ Above n 2, 41.

⁴⁰ Above n 8, 517.

Foremost among those 'principles' are the obligations which the Crown undertook of protecting and preserving ... the Maori language as part of taonga... The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown... 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 cooperation and trust.

The governing principle is that the Crown should not be required "to go beyond taking such action as is reasonable in the prevailing circumstances".⁴¹ Furthermore, "the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time".⁴²

Without denying the profound importance of preserving Maori language, a conservative approach in the broadcasting area is justified. The potential quantity of expenditure involved is vast, and the prospect of achieving positive results remains uncertain.⁴³

2 Section 9 of the State Owned Enterprises Act 1986

Treaty obligations are not enforceable by legal action unless incorporated into law by statute.⁴⁴ However, section 9 of the State-Owned Enterprises Act 1986 ('the Act') provides the following:

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.

Although Treaty duties are not enforceable, the validity of Crown conduct under the Act can be assessed in relation to Treaty principles. The Maori case hinged on the application of this section, as it was the mechanism which allowed litigation of their claims.

⁴¹ Above n 8, 517.

⁴² Above n 8, 517. For example - "in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure": above n 8, 517. If a *taonga* is in a vulnerable state (as is Maori language), this "may well require the Crown to take especially vigorous action for its protection": above n 8, 517).

⁴³ This aspect will be further developed below in Part V.

⁴⁴ *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590; [1941] AC 308.

Section 23 of the Act governed the proposed transfer of assets.⁴⁵ Section 9 is to be treated as a "paramount provision"⁴⁶, and will not permit the transfer if Treaty principles would be breached.⁴⁷ Therefore, it "becomes the duty of the courts to check when called on to do so in any case that arises, whether that restriction has been observed and, if not, to grant a remedy."⁴⁸

The *NZMC* case provided a novel situation in which to apply section 9. In past cases, assets which the Crown wished to transfer were subject to potential Maori ownership claims.⁴⁹ If those Treaty claims were prejudiced by a transfer, then Treaty principles would be breached. This was not the situation here. Maori had no interest in the assets themselves. The importance of the assets was their (alleged) ability to influence the Crown's fulfilment of its Treaty duty. This extended application of section 9 required a renewed appraisal of its terms by the courts.

Considering the title to the assets was unencumbered, how should it be decided whether the impending transfer was inconsistent with Treaty principles? The answer is that section 9 only prevents action which diminishes the Crown's capacity to fulfil its Treaty obligations. Using it to force the Crown to take positive steps towards fulfilment of its duties would be wrong.⁵⁰

⁴⁵ Above n 27.

⁴⁶ Somers J in above n 35, 696.

⁴⁷ Above n 35, 660.

⁴⁸ Cooke P in above n 35, 660.

⁴⁹ For example, in *New Zealand Maori Council v Attorney-General* above n 35, Maori were concerned that the transfer of land to various State enterprises would frustrate future recommendations of the Waitangi Tribunal relating to the ownership of that land. Similarly, in *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 it was the proposed transfer of coal-mining rights which caused concern.

⁵⁰ McGechan J put the matter this way:

"I consider action will be 'inconsistent' with Treaty principles, within the meaning of s 9, if such action reduces unnecessarily Crown capacity to meet Treaty obligations to protect the language, or excludes related Treaty compliance steps (if any) which in the circumstances and constraints then prevailing the Crown reasonably could and should then take."

Above n 11, 24.

There was argument in the Court of Appeal as to exactly what he meant by the last sentence, but eventually the case was approached by both sides on the footing that an impairment of capacity must be shown. This was also the approach used by the Privy Council:

"The answer depends on whether the transfer of the assets could now or in the foreseeable future impair, to a material extent, the Crown's ability to take the reasonable actions which it is under an obligation to undertake in order to comply with the principles of the Treaty."

This restrictive interpretation of section 9 did not find favour with Cooke P in the Court of Appeal. Throughout the long history of the proceedings, he was the sole judge to find the proposed transfer unlawful.⁵¹

His starting point was that the Treaty is to be given a wide and liberal interpretation.⁵² Therefore, Cooke P thought "a distinction for the purpose of Treaty principles between preserving capacity and using it is the very kind of legal subtlety which should be foreign to the approach to a pact with an indigenous people."⁵³ Section 9 should be "approached in the same spirit as the pact itself".⁵⁴ So, the question should simply be whether the action "will produce or contribute to producing a result inconsistent with that guarantee."⁵⁵

The difference in this approach may be more illusory than real. A causal link between the transfer of assets and the situation which is inconsistent with Treaty principles is essential. It is difficult to see what this link may be other than a reduction in the Crown's ability to meet its obligations. In reality, the restructuring 'produced' or 'contributed to producing' the repugnant situation, not the transfer of assets. The President's later conclusion that there was a reduction in the Crown's capacity to fulfil its duty reflects this.⁵⁶

Section 9 is concerned only with qualifying powers conferred elsewhere in the Act. This qualification demands that the provision is not "to provide a lever which can be used to compel the Crown to take positive action to fulfil its obligations under the Treaty".⁵⁷ A requirement that the proposed transfer must impair the Crown's capacity to meet Treaty obligations is a logical way of giving effect to this intent.

Furthermore, the capacity qualification is entirely consistent with previous cases, where success was founded on Treaty claims being prejudiced by proposed transfers.⁵⁸ The Treaty claim here was the active protection of Maori language via broadcasting. It is difficult to see how this duty could be prejudiced if the transfer of assets does not alter the prevailing situation.

Above n 8, 519.

⁵¹ *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 577, 584.

⁵² As decided in above n 35.

⁵³ Above n 51, 583.

⁵⁴ Above n 51, 584.

⁵⁵ Above n 51, 579.

⁵⁶ Above n 51, 585.

⁵⁷ Above n 8, 520.

⁵⁸ Above n 49.

The original issue was whether the Crown's protective steps were sufficient to meet its Treaty duty. This became distorted by the use of section 9, where attention is necessarily focussed on the act of transfer itself. The protective steps already taken remained relevant to the overall inquiry, but were no longer under direct scrutiny.

3 The application of section 9

A broad and profound constitutional claim was thus reduced to a normative legal issue. Would the Crown's ability to meet Treaty obligations be impaired by the transfer of assets? A consideration of the circumstances surrounding the transfer was required.

After studying the new broadcasting environment, McKay J was not persuaded that the transfer of assets would alter the present situation.⁵⁹

This is the present situation. It does not seem to me that the transfer of assets will materially change it. The concerns expressed on behalf of the appellants apply as much to the present situation as to the situation that will exist after the assets have been transferred. The only difference would seem to be that once the assets are transferred the Crown will be less able to reconsider the present structures and revert to a more direct control over either one or all of the channels.

There was a lack of compliance with the Treaty in the restructuring process. It is clearly in doubt whether the Crown can comply with its obligations under the new structure. Despite this, McKay J concluded such factors were beyond reproach from the Court.⁶⁰

Whether the Crown is able to comply with its Treaty obligations within the new structures is clearly arguable, *but those structures are already in place.* They have been achieved by legislation, and are not able to be challenged in these proceedings. *It is only the proposed transfer of ownership of the assets which can be challenged.*

This was a tidy solution to a perplexing problem. The Court affirmed an obligation to actively protect Maori language in broadcasting. However, the new broadcasting

⁵⁹ Above n 51, 602. McKay J delivered the leading judgement of the majority in the Court of Appeal.

⁶⁰ Above n 51, 602 (emphasis added).

environment originates from valid legislation. Therefore, the structure must remain as Parliament intended. Within this structure, the Crown's capacity to comply with its Treaty duty was unaffected by the transfer of assets. Accordingly, section 9 was not breached.

Cooke P took issue with this decision. The President was persuaded that the Crown's capacity to comply with its obligations would be impaired by a transfer of assets. This was because the Crown "would lose the lever provided by the control of the assets."⁶¹ In other words, the assets represented the last remnant of Crown control over broadcasting.

4 Resolution by the Privy Council

The Privy Council affirmed the decision of the Court of Appeal. However, some aspects of the reasoning vary from McKay J's judgement. The Judicial Committee agreed that section 9 only prevents action which would restrict the Crown's ability to comply with Treaty obligations.⁶² To decide whether section 9 was breached, the wider effects of the Act were analysed. The conclusion was as follows:⁶³

⁶¹ Above n 5, 510.

⁶² Above n 5, 520.

⁶³ Note that it does not deal with the question of Cooke P as above n 51, 584 that if "a future Parliament wished to change the policy, others by comparison unlikely to be a realistic world have to be expected" - the other members of the Court of Appeal - McKay J suggested

⁶¹ Above n 51, 585. Presumably the lever indicated is s 23 of the State-Owned Enterprises Act 1986, which allows the Crown to transfer assets to State enterprises "for such consideration, and on such terms and conditions, as the shareholding Ministers may agree with the State enterprise."

⁶² Above n 50.

⁶³ Above n 8, 520 (emphasis added).

The combined effect of the statutory provisions to which reference has been made demonstrates that *after transfer the Crown can exercise a substantial degree of indirect control* over the manner in which the assets are employed. If the Crown in order to fulfil its obligations under the Treaty wishes to promote more Maori language television and is prepared to accept the cost implications of what it wishes to achieve then in reality it will be able to bring this about even after the transfer of the assets... . The transfer of the assets *will not therefore substantially undermine the ability of the Crown to fulfil its obligations under the Treaty.*

This was because a state enterprise "remains very much the Crown's creature."⁶⁴ A state enterprise would be unlikely to frustrate the Crown's wishes. Even if the Crown found its influence to be inadequate, it could seek the necessary legislative powers to achieve its objective.⁶⁵

This conclusion was sufficient to allow the Judicial Committee to reach the same result as the Court of Appeal.⁶⁶ However, their Lordships deemed it necessary to further explain the opinions delivered in the Court below.

It was stated that the difference in opinion between the President and McKay J was due to the significance they attached to the changes made by the restructuring legislation.⁶⁷ While no doubt true, this is slightly misleading. The significance attached to the assets themselves was the critical factor. Cooke P was confident the assets gave the Crown ability to influence programme content. The majority was not.

This greater optimism caused Cooke P to place greater significance on the changes already made by legislation. The policy in place became the very reason to prevent the transfer, as it provided very weak, if any, protection for the language. The control of assets represented the last fragment of Crown influence over the broadcasting structure.

This can be compared to the majority, who found the restructuring legislation to be significant in a different way. As the policies enshrined in the legislation "are accomplished

⁶⁴ Above n 8, 520.

⁶⁵ Above n 8, 520.

⁶⁶ Note that it does not deal with the assertion of Cooke P in above n 51, 584 that if "a future Parliament wished to change the policy, claims for compensation unlikely to be affordable would have to be expected." This important factor was not lost on the other members of the Court of Appeal - McKay J suggested "[m]inisterial directions could be given to Television New Zealand Ltd, but given present policies of accountability, this would seem most unlikely while these policies are maintained": above n 51, 602. It seems that entering into the arena of speculation as to governmental action must ultimately be just that - speculation.

⁶⁷ Above n 8, 524

facts upon which the Court is not entitled to pass a value judgement",⁶⁸ they must be given full effect. The legislation effectively gave the Crown limited power to control programme content even before the transfer of assets. Further examination suggested a shift in ownership could have no further prejudicial effect on the Crown's Treaty obligations.

Their Lordships gave their own indications as to the proper relevance of existing statutory frameworks when applying section 9. The Maori Council strongly supported the reasoning of Cooke P, who argued that excluding legislative schemes from consideration would amount to reading down section 9.⁶⁹

It would amount to rewriting the section as if it said "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi, except in so far as any Crown action gives effect to the policy of any enactment other than this section that is inconsistent with those principles."

Their Lordships advised that policy reflected in legislation is relevant for consideration as part of the surrounding circumstances.⁷⁰ Therefore, if the legislative framework contributes to the transfer being inconsistent with Treaty principles, there is no excuse to deny the claim. Unfortunately, the legislative policy may be frustrated.⁷¹ However, policy reflected in legislation is within the Legislature's entitlement, and should not be frustrated unless the act in question actually causes the breach of Treaty principles.⁷² This is entirely consistent with the approach of the majority in the Court of Appeal, who were well aware that the "judgement called for by s[ection] 9 must be made within the framework that now exists."⁷³

⁶⁸ Hardie Boys J in above n 51, 588.

⁶⁹ Above n 51, 585.

⁷⁰ Above n 8, 524.

⁷¹ Above n 8, 524.

⁷² Above n 8, 524.

⁷³ Above n 51, 588.

C Comment on the Proceedings

All members of the judiciary involved with this “ungrateful”⁷⁴ matter followed the same legal approach. As dictated by the Privy Council, the fundamental question when applying section 9 is whether the Crown’s capacity to comply with Treaty obligations is reduced or impaired by the proposed action. While simple in its formulation, this interpretation proved to be tricky in application.

This is amply illustrated by Cooke P rationally reasoning himself to the opposite conclusion of the majority. This divergence illustrates uncertainty in a matter involving an instrument which “is of the greatest constitutional importance to New Zealand.”⁷⁵ This should be a source of concern. How was Cooke P able to achieve such a feat? He proceeded down the same path as the majority, but arrived at a different destination.

This should not be a source of surprise. In early judicial consideration of section 9, it was recognized that ultimately, in any particular situation, the determination must be a question of fact.⁷⁶ However, it “does not follow in each instance the question will admit of only one answer.”⁷⁷ More significantly, “a value judgement is inevitably involved in determining whether Ministerial conduct is or would be inconsistent with Treaty principles.”⁷⁸

The answer to the predicament must be that Cooke P travelled further down the path than others were willing to follow. His decision attempted to rectify a legislative structure already in place. This must have been far beyond the Legislature’s contemplation when section 9 was enacted. Section 9 is “a fetter on Executive action, not on legislative power.”⁷⁹ It clearly does not give courts the power to assess the validity of legislation in relation to Treaty principles.

So, which “side”⁸⁰ won? As predicted, it is not entirely clear. To begin with, the highest judicial authority has affirmed a Treaty duty to promote Maori language in broadcasting.

⁷⁴ Above n 51, 586.

⁷⁵ Above n 8, 516.

⁷⁶ Above n 35, 664.

⁷⁷ Cooke P in above n 35, 664.

⁷⁸ Casey J in above n 35, 704.

⁷⁹ Above n 51, 588.

⁸⁰ Above n 31.

The value of this affirmation should not be trivialized, as the Crown does not treat its Treaty obligations lightly. There is now a foundation from which to negotiate, discuss and consult in the true spirit of Treaty partners.

On the other hand, significant factors point in the opposite direction. Despite the good faith of the Crown, increased exposure for Maori language in broadcasting involves compromises in Crown policy. Some of these compromises may be simply too large for the Crown to make. Here the outcome of the proceedings weigh in the Crown's favour. This is because the opportunity for Maori to litigate their claims has been and gone, and any other judicial protection is limited.

D *Is Adequate Protection Possible?*

The feeling from the case is that the proposed broadcasting structure did not offer adequate protection for Maori language. While not subjected to final decision, on its face, the structure did not measure up to the Treaty's protective guarantee. What would have happened if Cooke P's decision was upheld? Presumably the transfer would be further delayed until adequate protection for Maori language was guaranteed. However, as past cases have shown, this does not mean the courts can force the Crown into specific action. The approach in the past has been to require the Treaty partners to negotiate a suitable scheme to ensure action is consistent with Treaty principles. Reasonable safeguards are required.⁸¹ The task of finding a suitable protective scheme here is daunting given the environment the restructuring legislation assembled.

The Broadcasting Act 1976⁸² required the Broadcasting Corporation to have regard to Government policy in relation to broadcasting, and to comply with directions given by the Crown pursuant to such policy. In comparison with a grants scheme, this illustrates a more direct way of enabling greater Maori language representation in broadcasting. This is still a

⁸¹ Above n 35. Although the usual position is that courts are powerless to compel the Crown into decisions of policy, the effect of s 9 could be to be compel the Government to enact policy to comply with the section. For example, following the successful action in *New Zealand Maori Council v Attorney General* above n 35, ss 27 to 27D of the State-Owned Enterprise Act 1986 were enacted to enable the Crown to resume land which was the subject of successful claims to the Waitangi Tribunal.

⁸² Section 20.

far from perfect resolution to the current dilemma. The government's goodwill is imperative for success. As history shows, such a provision did not prove to be effective in the past. Although true that the Crown is now more adequately informed as to the relevance of broadcasting to preservation of Maori language, conservatism in an area with large fiscal implications would be warranted. In short, such a provision does not provide a guarantee, it merely protects Crown discretion.

An illustration of such directives could be the imposition of quotas. Statutory quotas would no doubt please those fighting for the language, and have been used overseas.⁸³ However, quotas are gravely inconsistent with the state-owned enterprise philosophy to operate as a successful business, and to be as profitable and efficient as comparable private businesses.⁸⁴ Further difficulties arise in deciding what form quotas should take. Most quotas would be unreasonable within the current scheme.⁸⁵ Hence, Treaty principles would not require Maori language quotas to be implemented, as they would substantially undermine the Crown's right to govern effectively.⁸⁶

Despite a duty to facilitate the increased exposure of Maori language in broadcasting, there is no other reasonable alternative to the grants scheme originally proposed. Unless the broadcasting structure is dramatically altered, the protection for Maori language will continue to be weak.

⁸³ Welsh medium broadcasting began with quotas. In the late 1970's, it was anticipated that a new channel (SC 4) would be devoted exclusively to Welsh language. In the end, there was a political fight to achieve the initial quota of 22 hours per week. Therefore, McGechan J was right in noting that the Welsh situation may be of limited assistance for Maori: above n 10, 62 - there was no detailed analysis of how broadcasting may best serve the language, but simply concessions to political pressure.

⁸⁴ Section 4(1) of the State-Owned Enterprise Act 1986.

⁸⁵ Maori language is not the only area where extra funding is needed. Three Government interests have been identified - providing access to broadcasts for small or remote communities, local content programmes, and minority interest programmes. Resources to achieve all three are limited. Therefore the grants scheme is used to enable proper targeting and flexibility - it may "require trade offs to be made" See *Report on Implementation of Broadcasting Policy Reform* (Officials Co-ordinating Committee on Broadcasting, 1988) 21. The imposition of a quota for Maori programming would only serve to complicate an already difficult area.

⁸⁶ In this regard, note the assertion of Cooke P in above n 35, 665:

"The principles of the Treaty do not authorize 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."

IV THE CURRENT SITUATION

The Public Broadcasting Fee, coupled with appropriations from Parliament, as feared, have been inadequate to help promote more than scarce Maori language representation in broadcasting.

Radio is the only medium approaching something close to that envisaged by Maori.⁸⁷ Mainstreaming in television is non-existent,⁸⁸ and the total number of hours dedicated to Maori language is sparse.⁸⁹ There is nothing to provide greater encouragement than was evident before the proceedings begun in the late 1980's.

One question remains to be answered - is the effort really worth it?

V THE ROLE OF BROADCASTING IN PERSPECTIVE

A *Broadcasting Maori Language - Can There be Success?*

The duty to promote Maori language in broadcasting was imposed with no opposition. The evidence before the High Court demanded the acceptance of such a duty.⁹⁰ There was no discussion of evidence against the duty under consideration, which casts doubt on McGechan J's assertion that in determining the importance of broadcasting, "there is room for commonsense and inferences as to probability."⁹¹

⁸⁷ There are 22 radio stations promoting Maori language and culture across New Zealand on a regional basis. See "Maori Radio Thrives on Dance Music" *The Dominion*, 8 May 1995, 9. Aotearoa Radio operates on a national spectrum. However, as far as 'mainstream' radio is concerned, Maori content ('Te Reo o Aotearoa' and 'Mana Maori Media') accounted for approximately 400 hours of National Radio broadcasts in 1994. See *Radio New Zealand Annual Report 1993-1994*, 35.

⁸⁸ Throughout 1994, none of the available television stations had Maori language content programmes scheduled for primetime (5:30 pm - 10:30 pm). See N Martin (ed) *Television: The New Zealand Television Broadcasters' 1994 Yearbook* (Television Broadcasting Group, Wellington, 1995) 41.

⁸⁹ 'Maori programmes' funded by New Zealand on Air (Broadcasting Commission) for the year ended 30 June 1994 totalled 116 hours across all three national networks. See above n 88, 46.

⁹⁰ In the High Court, McGechan J was greatly influenced by the Chairman of the Maori Language Commission, Rev Kingi Ihaka, who strongly supported the use of broadcasting. Above n 11, 60.

⁹¹ Above n 11, 60.

Broadcasting was envisaged as a major component in the cause to 'revitalize' the language. However, it must be understood that Maori language is in the grip of an ongoing trend. This trend is a decline in the use of the language since colonization by the British. This decline must be stopped, and then reversed for Maori language to survive. Put this way, we should not talk of revitalizing or promoting the language, but rather of 'reversing language shift'.⁹²

The position Maori language finds itself in is nothing new in an international sense. Various linguistic minorities in an array of countries have fought the same battle that Maori are now fighting.⁹³ The problem of reversing language shift has thus developed into a complex social science. Researchers have spent lifetimes examining the causes of language shift, and have developed theories for reversing this phenomenon.

The parties to the *NZMC* proceedings were well aware that broadcasting was not a resolution to the problem in itself, but was one important factor in addressing the crisis facing Maori language. There was a feeling that the Crown had not adequately put its mind to ascertaining how broadcasting could be used to encourage Maori language. The Treaty required them to do this.

For the social science experts, this is an understandable approach, but could prove to be a destructive influence when trying to save Maori language. Indeed, perhaps the most eminent of all the experts has been critical of salvation efforts which focus on broadcasting to a large degree. Joshua Fishman⁹⁴ regards broadcasting as serving little positive purpose, and the "pursuit of these stages at this time may represent little more than the pursuit of a will-o'-the-wisp."⁹⁵ His concluding warning as to the New Zealand position is ominous:⁹⁶

The biological clock is ticking for Maori. Who can serve as models for native-like Maori language-in-culture... when the grandparents are all gone? Will this clock be heard, or will the noise of an artificial life-support system (consisting of media, hype and kindergartens plus a few schools operating in a vacuum) succeed in drowning out the ticking?

⁹² This is the label given to situations where "native languages are threatened because their intergenerational continuity is proceeding negatively with fewer and fewer users...or uses every generation" See J Fishman *Reversing Language Shift: Theoretical and Empirical Foundations of Assistance to Threatened Languages* (Clevedon, Philadelphia, 1991) 1.

⁹³ Examples include Irish in Ireland, Basque and Catalanian in Spain, and even Yiddish in the United States.

⁹⁴ Above n 92, 244. The observations were made at the time when the *NZMC* court proceedings were just beginning. No doubt Fishman would be critical of the time and effort spent on the resulting litigation.

⁹⁵ Above n 92, 244.

⁹⁶ Above n 92, 246.

This criticism stems from his theory for 'reversing language shift'. The key to prosperity is dedication to the "authoritative allocation of scarce resources, such as intelligence, funds, time, effort and implementational power, to the solution of language status problems".⁹⁷ Initial efforts should concentrate on where the language is used the most - at home and in the community. There, intergenerational erosion can be halted in the most effective way, by building a strong foundational support for future, more advanced efforts.⁹⁸ The beginnings of this foundational support exist, with *kohanga reo*⁹⁹ being the most prominent establishment, but it is not complete. As has been frequently lamented, there is virtually nothing to build upon the outstanding work done by the *kohanga reo* movement once children reach school.

Fishman can understand why Maori have tried so hard to get the broadcasting industry to respond to their needs. Broadcasting now represents a foundational institution of society. Therefore, successfully establishing Maori language within it would imply that Maori language is an important, material part of modern society. To him, this is the danger. What appears to be success, could simply be an illusion.

Bold and exciting manoeuvres to achieve compulsory compliance with Maori demands may provide gratification if successful, but may only lead to "hollow victories and must ultimately crumble unless they rest upon the strong base of the informal, intimate spoken language in daily family, neighbourly and community interaction".¹⁰⁰ The primary concern must be to secure comprehension and use of Maori language amongst young people. Broadcasting is not well suited to do this. It does shape attitudes, it conveys images. However, for actually transmitting knowledge and fluency from the old to the young, it is deficient. The creation of a positive attitude towards Maori language and culture will not help if time runs out, and people have ignored the crucial aspect of conveying the language from those who know it to those who do not.

This is the fear for the experts. Apparent success in broadcasting, and in other public areas through symbolic and tokenistic representation, can create an aura of accomplishment.

⁹⁷ Above n 92, 81.

⁹⁸ The requirement is to "undertake to repair lower, foundational stages before moving ahead to more advanced ones." Above n 92, 109.

⁹⁹ These are programmes where children of pre-school age are taught in complete Maori language environments.

¹⁰⁰ Above n 92, 110.

Amongst the euphoria of recognition, and perceptions of resurrection of Maori language, people are inadvertently lulled into a false sense of security. The dreaded consequence is that the first-hand teaching of the language to the young is overlooked.

Furthermore, huge amounts of effort are required to become established in broadcasting. The chances of attaining worthwhile results are limited. Fluent speakers enter the industry with enthusiasm, and are eager to help with the endeavour to communicate Maori language. How long does this optimism last in an environment where success is difficult to measure, and constant financial burdens prevail? Fishman would suggest this enthusiasm and energy is vital, and should not be wasted on building "castles in the sky".¹⁰¹ Its greatest value is in the community. However hard it may seem,¹⁰² the small steps must be taken first - the establishment of communities where the young are free to immerse themselves in Maori, away from the influence of the language which has drowned Maori for so long.

B Broadcasting Maori Culture and Interests

Language and culture are difficult concepts to isolate in practice - language is part of culture, and culture is part of language.¹⁰³ It is therefore not surprising that the NZMC proceedings were based on a Crown obligation to protect both language and culture.

Intuition suggests the home and community are best equipped for enabling individuals to become aware of their heritage and culture. Not only does immediate contact provide the optimal environment for language transmission, but must also be the primary method for spreading the wealth of Maori culture.

The question is whether broadcasting can act as a surrogate for community based programmes. The argument of Maori is that it can - and may even go further in disseminating Maori language and culture. Raising the profile and status of all things Maori

¹⁰¹ Above n 92, 110.

¹⁰² "These stages are labor-intensive rather than cost-intensive, and, as such, they depend squarely on the dedication, ability and simple sweat and tears that can be mobilized..." Above n 92, 111.

¹⁰³ The relationship between the two concepts is difficult to ascertain and define, and is said to be exceedingly complex. See J Edwards *Linguistic Minorities, Policies and Pluralism* (Academic Press, London, 1984) 291.

can encourage a greater desire to learn and use the language in the community.¹⁰⁴ Exposure in broadcasting will create an incentive to learn the language.¹⁰⁵

The objective of mainstreaming as seen by the appellants is not merely to reach the Maori audiences at a time when they are able and likely to watch television, but to present the language to the total audience in a way which will attract viewers and affirm the importance of the language in the eyes of both Maori and non-Maori. This concept does not appear to have been grasped by the Crown's officials.

Care is needed here. Throughout the judgements delivered in the case's long history, terms such as Maori "culture" and "interest" were used in relation to "Maori programming". It may be a simplistic point to make, but 'Maori' is not a concrete definition.¹⁰⁶ Broadcasting shapes mass perception, and therefore subtleties in these concepts should not be overlooked - especially if Maori are concerned with establishing respect and understanding amongst non-Maori. This delicacy of this task should not be underestimated.

The broadcasting industry of the United States provides ample thought-provoking material on this aspect. With its massive and competitive 'free' markets, difficulties in providing adequate minority representation arise. The Federal Communications Commission has developed policies to encourage diversity of minority views in the media. The main thrust is to facilitate minority ownership of radio and television networks.¹⁰⁷ The policies make it cheaper, and sometimes easier for a minority member to be granted an available broadcasting licence. These policies were challenged on the basis that they were unconstitutional.¹⁰⁸

¹⁰⁴ In Wales it has been noted that television is more successful in shaping young peoples attitudes to culture than language. Attitudes to language only changed once someone became more involved in that culture. See C Baker *Aspects of Bilingualism in Wales* (Multilingual Matters Ltd, Avon, 1985) 137.

¹⁰⁵ Above n 51, 601.

¹⁰⁶ See above n 2, 14 for discussion on the perils in determining exactly what 'Maori' does and does not include.

¹⁰⁷ In New Zealand, *Iwi* sponsorship is required for radio frequencies allocated to community based Maori radio stations. The idea being that *iwi* would then be responsible for ensuring broadcasters complied with conditions of licensing - namely, the promotion of Maori language and culture. See *He Ara Hou mo Te Reo Iriurangi - A New Path for Broadcasting* (Ministry of Broadcasting, 1990).

¹⁰⁸ The policies relating to broadcasting form a part of the wider "affirmative action" debate. These policies were usually challenged under the Fifth Amendment, which guarantees equal protection under the law. See generally A J Anastos "The Fallacy of a Single Minority Broadcast Voice: The Legacy of *Metro Broadcasting, Inc v Federal Communications Commission*" (1993) 15 Com Law 3.

A narrow majority of the Supreme Court in *Metro Broadcasting, Inc v FCC*¹⁰⁹ upheld the policies. They noted similar points to the courts in New Zealand - the world that broadcasting offered to minorities was very "white" dominated. The Supreme Court was not concerned with remedying past wrongs. Rather, it was in the public interest (and therefore government interest) to have continued viewpoint diversity in broadcasting.

The decision was based solely on the idea that minority ownership leads to minority representation in programming.¹¹⁰ One argument put forward in opposition of such policy is that this nexus is very difficult to substantiate.¹¹¹ After a careful study Spitzer concludes that minority and majority station owners will behave in the same way.¹¹² This is because both will want to maximise the market's profit potential.

Those involved with 'Maori Broadcasting' are less motivated by materialism,¹¹³ but the viability of the broadcasting station will still depend on a degree of commercial success. Maori stations will have difficulty promoting solely Maori culture and language - they must respond to the audience. Invariably, this leads to programme content that is similar to that found in mainstream stations.¹¹⁴ The fear must be that the Maori element will become subordinate to the dominant viewpoint demanded by the audience. Although the Maori content is present - is it really being listened to in the way it should?

¹⁰⁹ 110 S.Ct. 2997 (1990).

¹¹⁰ In this respect, the following statement is of interest:

"Maori control is also an important feature of Maori broadcasting. No longer is it appropriate, if it ever was, to rely on Pakeha benevolence for inclusion of a Maori dimension in public broadcasting. Maori broadcasting must mean nothing less than broadcasting for Maori by Maori."

Sir Kingi Ihaka for the Maori Language Commission in above n 21, 15.

At present, the main mechanism for broadcasting of Maori language is the regime of separate "iwi radio" stations. There was a bid to have a separate Maori television station when the licence was offered in the 1980's - see R Benton *The Role of Television in the Survival of Maori Language* (Te Wahanga Maori Occasional Paper No 18, 1985).

¹¹¹ M L Spitzer above n 7; A J Anastos above n 108. This nexus was essential to upholding the policies. The FCC's policies had been challenged as unconstitutional in that they had the effect of creating inequality before the law. It was therefore necessary to establish a State interest in allowing the policies - increased diversity was this interest.

¹¹² Above n 7, 360.

¹¹³ It will be a condition of the broadcaster's licence that he or she be committed to the development of Maori language and culture.

¹¹⁴ For example, MAI FM88 (Auckland) became the third most popular station through its concentration on dance music. This is one of the 22 stations set up nationwide to promote Maori language and culture. The station was successful because it was "audience driven". See "Maori Radio Thrives on Dance Music" above n 87.

Other simmering conflicts arise in relation to policies such as those implemented in the United States. One issue to surface is the assumption of a "singular minority voice which, when placed inside the broadcast studio, better represents minorities than does a well-informed nonminority."¹¹⁵ Maori are more acutely aware of the negative impacts of broadcasting than others. They have unique insights as to the effect it has had. The dominant culture is simply not fully aware of what has been going on.¹¹⁶ There could, however, be impediments to the progress of Maori language and culture if the theme "broadcasting for Maori by Maori"¹¹⁷ is taken too far. It has been commented in relation to the United States that:¹¹⁸

[O]ne of the new hallmarks of racism is the notion of one black voice, one black experience, one black political community, one black ideology - of a black community without an authentic inner political life wracked by dissension and ideological struggle.

Clearly, views such as this must not be encouraged. The question is whether it would be going too far to suggest that separatism in broadcasting policy could contribute to such notions.

The idea of a single Maori interest and Maori voice will offend many. On one level, there is a diversity of culture across the *iwi* making up the Maori population. Each is proud of its own history and heritage. This should not be subjected to a process whereby the media presents a singular representation of Maori 'interests' and 'culture' to the wider population. Maori have a right to individual autonomy also, and broadcasting policy suggesting otherwise is undesirable.¹¹⁹ However well meaning the intention, it is detrimental to use labels such as 'Maori interest programmes' and the like.¹²⁰

¹¹⁵ Above n 108, 15.

¹¹⁶ "If we cannot conclude absolutely that the victims of racial oppression are always the best architects of its cure, we must nevertheless assume that the best insight and inspiration for its amelioration will come from those most immediately and negatively affected." See above n 19, 529.

¹¹⁷ Above n 21, 15.

¹¹⁸ E Genovese, cited in above n 108, 19.

¹¹⁹ To put this argument in another form, it would be very difficult to define 'Pakeha' culture. Individuals see themselves differently, have different viewpoints, and aspire to different goals. Maori are no different - it is not desirable to subject individuals to a perceived common interest by perpetuation of separate 'Maori interest' programmes.

¹²⁰ "This is the process which, in its grossest form, allows... the perpetuation of the statement, 'They all look alike'." Above n 108, 20.

Broadcasting is seen as a tool for presenting Maori language and culture to the total audience.¹²¹ The details of Maori language and culture remain a mystery to much of our population. Categorizing programmes as 'Maori interest' will not change this. An aura of 'theirs' and 'ours' programming arises, and the long dominant English language is not encouraged to accommodate Maori within its existence. This acceptance is vital. Maori language cannot hope to achieve the existence hoped for if the majority of those using English are oblivious to the problems it faces.

The decline of Maori language was due to the majority's unwillingness to accept its value. The situation now is one of apathy. Most are willing to accept the value inherent in Maori language and culture, but see it as a Maori problem. Separate institutions, and indeed concepts of separate Maori interests are not likely to change this attitude, but may simply serve to reinforce it.

VI CONSIDERATIONS FOR THE FUTURE

Maori have been adamant that broadcasting is vitally important to the salvation of Maori language. There can be no doubt that to occupy a substantive position in New Zealand society, Maori language needs to be adequately represented in the media. However, doubts must remain whether Maori language is as yet ready for this increased participation in broadcasting.

Creating diversity in broadcasting has been characterized as "an attempt to propagate special interest markets or to ghettoize audiences into 'mass appeal' on the one hand and minority markets on the other."¹²² This is what Maori hope to avoid, and was the motivation for bringing their action to court. However, enormous difficulties arise when trying to present Maori language in a way that takes it beyond the realm of a minority market. The difficulties with establishing Maori in existing stations - whether television or radio - have been discussed. Furthermore, the establishment of separate institutions leave doubt as to the effectiveness of presenting language and culture to the wider population.

¹²¹ Above n 51, 601.

¹²² Above n 19, 528.

Despite these difficulties, Maori were able to point (with some effectiveness) to the development of a separate Welsh medium channel (SC4) in Wales. However, more negative than positive aspects arise from the Welsh example. The channel's development was a direct result of overriding political pressure. It was virtually a national cause to obtain the new channel.¹²³ Only those academics concerned with the development and promotion of the Welsh language opposed the new channel.¹²⁴ After considerable political fighting, the channel was obtained. Issues remained to be resolved regarding programme content. These issues were amplified by the availability of only a small target audience.¹²⁵

The content needed to reflect Welsh culture - the minority's views and interests needed to be put forth if it was to be appealing, and not of harmful consequence.¹²⁶ But this creates more problems - what is this 'Welsh dimension', and how can it be defined? Care needed to be taken not to unduly extend the portrayal of language and its influence over the life of Wales.¹²⁷

To assess whether television is having an influence over the salvation of the Welsh language is difficult. All that can be ascertained is that Welsh is still facing difficulties in the same way that Maori is.

Endless difficulties arise when trying to successfully establish Maori-medium broadcasting. A small target audience leads to an uphill battle for survival. Costs continue to be an obstacle, and adequate funding is difficult to obtain.¹²⁸

¹²³ Much of the comment illustrates exactly what Maori language must avoid - there were those supporting the channel because it was viewed as recognition and provided status for the declining language. The majority of non-Welsh speakers saw the channel as a way of removing the existing 'annoying' Welsh content from the mainstream channels. This leaves serious questions as to the effectiveness of the channel for conveying the language to the mass audience. See C J Dodson and R G Jones "A Welsh Medium Television Channel for Wales" (1984) 48 *International Jnl of the Sociology of Language* 11, 14.

¹²⁴ This was because "[t]hey considered that merely maintaining Welsh amongst those who already speak it, and making it more difficult for learners to be exposed to the influence of Welsh-medium programs, would not be the best possible way to preserve the language, especially as the number of first-language speakers was steadily declining." See above n 123, 16.

¹²⁵ Interestingly, it was felt that the least enthusiastic support came from the "very audience that the new service would need to attract" - the minority Welsh speakers. "[T]heir reactions were still apathetic and even faintly hostile." See above n 123, 22.

¹²⁶ "[I]ndeed, one could conceive of a Welsh language service that would actually do active harm to the living culture by disseminating modes of thinking and patterns of behaviour that are positively inimical to it." See above n 123, 25.

¹²⁷ Above n 123, 26.

¹²⁸ "Auditor Queries Airwaves Funding" *The Dominion*, Wellington, New Zealand, 25 May 1995, 1.

Of greater significance is the human input. It would be a shame if this effort were not put to best effect. Other areas of development require work, particularly community based programmes involving Maori language immersion. Timing is the key, and in the present situation, it is perhaps best that further efforts in broadcasting be delayed until there is stronger support for Maori language. After all, broadcasting responds to the audience's demand - if those demands are strong enough.

VII CONCLUSION

Treaty principles are not often legally binding on the Crown, and in this situation, there could have been drastic consequences as a result. Many of those consequences may have negatively influenced the progress of Maori language. The problem of protecting Maori language is exceedingly important, and in the present situation, frustratingly difficult. The nature of the judicial process dictated that the judges involved in the litigation considered the matter on much narrower terms than desirable for policy makers in this area.¹²⁹

They were being asked to decide a legal issue. However, the legal issue had the ability to create an imbalance in a complex and critically important societal matter. As difficult as it is to accept, matters such as this should remain in the field of consultancy, discussion, and planning. However, it must be conceded that a high degree of restraint was needed to avoid legal action. This was an isolated opportunity to use the courts. The chances of future legal proceedings under the umbrella of the Treaty was negligible once the assets were transferred.

So the battle for increased Maori language representation in broadcasting was lost. The reality is far worse than this - Maori language is losing an ongoing war against the oppressiveness of English. The socio-linguistic experts would suggest Maori language faces a long campaign to prevent complete annihilation. It must first make use of what friendly territory remains - free from the majority language's corrupting influence - and go about rebuilding and replenishing itself. Dedication and maybe even hardship will be required.

¹²⁹ See above n 3 for an overview of issues involved with the development of comprehensive language planning.

The aim should be to increase the numbers willing to fight for its survival. Perhaps then, Maori language will command more respect, and may succeed in staking a claim to territory hitherto governed by the English language.

The effort put into the initial reinforcement stage will determine the fate of Maori language. Bold efforts to impose itself in the domain of the majority language will only serve to make it more vengeful in defence of what it considers its own. The paradox is that the Treaty's judicial interpretation requires immediate, positive action for Maori language in the very fields that could cause further harm. However, as the current broadcasting circumstances show, the Crown is resisting pressure for further Maori language representation. Continued resistance will force Maori to act on their own. This is the best way to continue the fight to save Maori language.

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