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THE TREATY OF WAITANGI: A NEW LEGISLATIVE STATUS?

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INTRODUCTION

The Treaty of Waitangi was signed on the sixth of February 1840 between the Chiefs of the 'Confederation of the United Tribes of New Zealand' and Lieutenant Governor Hobson on behalf of Her Majesty, Queen Victoria. The Treaty of Waitangi was effectively the tool by which the peaceful colonisation of New Zealand became possible.[1]

Since that date the Treaty has raised two major questions. The first, as to its status in law, and the second, as to the nature of the obligations it imposes on the Crown in respect of the Maori people.

By the First Article of the English text of the Treaty, the Chiefs ceded all powers of 'Sovereignty' to Her Majesty, Queen of England. In the Maori text, sovereignty was referred to as 'Kawanatanga' which meant 'governance'. In Article II, the Crown confirmed and guaranteed to the Maori signatories 'the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties.' This guarantee translated as one of '...te tino Rangatiratanga' (chieftainship) over 'ratou whenua' (the land), 'ratou kainga' (the estates) and 'ratou taonga katoa' (all things highly prized). Lastly, in the Third Article, the Maori people were promised the Queen's 'Royal protection' and 'all the Rights and Privileges of British Subjects.'[2]

Over the past twenty years there has been much controversy and commentary concerning the laws affecting the Maori people and their rights under the Treaty. This debate has fueled

the call for urgent change in terms of recognition of the Treaty, particularly so in the area of legislation.

The importance of the Treaty of Waitangi to the Maori people is realised in the resolutions of the National Hui on the Treaty of Waitangi in 1984 which stated[3]

> The Treaty of Waitangi is a document which articulates the status of Maori as tangata whenua of Aotearoa. The Treaty shall be the basis of claims in respect to the land, forests, water, fisheries and Human rights of the Maori people.

This paper is directed at both the existing and proposed legislative provision for the Treaty of Waitangi, and will look at the markedly abrupt rise in statutory favour that the Treaty has recently found. The traditional concept of the Treaty in New Zealand law, and the Treaty of Waitangi Act 1975 which began this sudden turn around in status, will be reviewed briefly. Subsequent provisions for the Treaty of Waitangi in the proposed Bill of Rights and in other legislation, together with recent judicial interpretations, will be examined with a view to the relative place of the Treaty and these provisions in New Zealand law.

THE TRADITIONAL VIEW

The traditional conception by both the judiciary and the Crown was that the Maori rights to land and other matters stemming from the Treaty of Waitangi were non-existent in New Zealand law.

That view was propounded by the case Wi Parata v. Bishop of Wellington[4] where it was held that the Treaty of Waitangi had no effect in domestic law and conferred no legal rights

against the Crown.

It is this traditional view that has existed over the greater part of the last 140 years since the signing of the Treaty. It has been reflected by both judicial decision and legislation throughout that period.[5]

Despite this lack of legal force, the Treaty of Waitangi has still maintained its presence, and is now finally gaining the recognition it warrants.

THE TREATY OF WAITANGI ACT 1975

The establishment of the Waitangi Tribunal under the Treaty of Waitangi Act 1975 was a formal acknowledgement by the Crown of the growing recognition of the Treaty.

This rise in recognition, leading to the statutory formation of the Waitangi Tribunal, largely stemmed from an increased public awareness and concern about the Treaty and its unfulfilled obligations. This concern was expressed to a great extent through a high level of active protest against the Treaty in the early 1970s, including the Maori land marches and the occupation of claimed ancestral land such as Bastion Point. Another significant factor relates to the longstanding and close affinity between the Maori people and the Labour Party, dating back to the 1930s and the alliance between the Ratana movement and Labour.[6] This close relationship was relevant therefore in the passing of the Treaty of Waitangi Act 1975 during the single term in office of the 1972 Labour Government. Furthermore, the only amendment to that Act was passed in 1985 by the fourth and present Labour Government,

after three successive terms in opposition.

The enactment of the Treaty of Waitangi Act 1975 gave the Treaty a new status. in what sense?

The Waitangi Tribunal is required to consider any Act, regulation, policy, practice or act, done or omitted, by or on behalf of the Crown, that is claimed to be 'inconsistent with the principles of the Treaty.'[7]

Such claims can be brought by any Maori who alleges that they, or any group of Maoris of which they are a member, would be likely to be prejudicially affected by the above stated Crown acts.[8]

The Tribunal also has jurisdiction to examine any proposed legislation referred to it, by resolution of the House in the case of a Bill, or by any Minister of the Crown in the case of any regulations or Order in Council.[9]

However, the Tribunal has a mere recommendatory power, and may make such recommendations '...if it thinks fit having regard to all the circumstances of the case.'[10]

The thrust of the Act is explained in the Long Title,

> ...to provide for the observance and confirmation of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.

The legislative intent is clear. Given that the Treaty has not previously been part of the domestic law, the Tribunal is to consider what steps might be taken to ensure that laws

and policies adequately reflect its general principles, or what might be done to remedy or compensate for existing breaches.

The only major limitation to the bringing of claims under the Act was that no claim could be made in respect of something that occurred before October 10, 1975. This was a major reservation, because it was difficult to understand how the Tribunal 'can purport to satisfy Treaty rights when it is not permitted to investigate those (past) actions.'[11]

This position, however, altered with the enactment of the Treaty of Waitangi Amendment Act 1985, which as well as increasing the constitution of the Tribunal,[12] altered the existing legislation so that claims could be made in respect of any Crown act done on or after February 6, 1840.[13]

THE PROPOSED BILL OF RIGHTS

In April 1985 the Government published a White Paper containing a draft Bill of Rights intended to guarantee to all New Zealanders certain fundamental human rights and freedoms.[14]

Clearly the adoption of a Bill of Rights will constitute an important change in the Constitution of New Zealand. The proposed Bill takes the form of a superior body of law which will bind Parliament and the Executive, and will give the Courts the power to invalidate legislation and other Government action which contravenes the rights conferred in the Bill.[15]

The paramount provision relating to the Treaty of Waitangi in the proposed Bill of Rights is Article 4. Article 4 provides[16]

> (1) The rights of the Maori people under the Treaty of Waitangi are hereby recognised and affirmed.
> (2) The Treaty of Waitangi shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent.
> (3) The Treaty of Waitangi means the Treaty as set out in English and Maori in the Schedule to this Bill of Rights.

The importance of the Treaty of Waitangi in the Bill of Rights can be seen from the fact that to recognise and affirm the Treaty is one of the twin objectives set out in the Long Title. The Preamble also emphasises the fact that the Maori and the Crown entered into a solemn agreement- the Treaty of Waitangi- and that this Treaty ought to be recognised and affirmed as part of the supreme law of New Zealand.

This reference to supreme law is carried to effect in Article 1 of the Bill, which provides that 'any law (including existing law) inconsistent with this Bill shall, to the extent of the

inconsistency, be of no effect.'[17]

There has been much debate and differences on the topic of the ratification of the Treaty by way of inclusion in the Bill of Rights. An understanding of the diversity of opinions, and the reasoning behind them, may be obtained by looking at both the general, and the more specific, implications of the provisions in the Bill of Rights relating to the Treaty.

Article 4 substantially alters the traditional view that, after annexation by the English, Maori rights to land and other matters were non-existent, as already illustrated by the case Wi Parata v. Bishop of Wellington.[18] Article 4, however, expressly recognizes and affirms the rights under the Treaty. It should be noted that it is not the Treaty of Waitangi itself which is recognised and affirmed, but rights under the Treaty. It has been suggested that an additional paragraph be added to Article 4[19]

> to incorporate the Treaty itself and not merely 'rights under' the Treaty, since it is the status of the Treaty which is of concern, particularly to the Maori people.

The necessity of this proposal to include the Treaty itself must be questioned. It is the rights under the Treaty which are essential to any question or claim that legislation or Government action is inconsistent with the Treaty. Emphasis must be placed on the principles underlying the Treaty and should not be restricted by the strict terms and provisions of the Treaty itself being specifically included in the Bill of Rights.

Although it does not specify what these 'rights under the Treaty' are, this lack of specificity maintains the idea of

the Treaty as living and organic. The White Paper cites the words of the Waitangi Tribunal[20]

> The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilize a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.

Thus, the Bill of Rights is in keeping with the spirit and the true intent of the Treaty and the idea that the Treaty is to be regarded as always speaking. The Government, the Courts and Parliament will no longer be able to claim that the rights conferred under the Treaty are only moral rights and have no substance in law.

The provisions of the Bill also allow for a liberal interpretation of the Treaty by way of paragraph (c) of Article 4 which relates to the Treaty consisting of both an English and a Maori text. In view of the clear differences between the two versions[21] the Courts will have to consider both and attempt to give effect to their true intent and spirit. Perhaps provision should be made here for reference to the findings of the Waitangi Tribunal who has shown itself highly capable of applying the techniques of bilingual treaty interpretation[22]

> ...we are bound by the provisions of section 5(2) of the Act (ie Treaty of Waitangi Act 1975) to have regard to both the Maori and English texts of the Treaty. ...
>
> With regard to bilingual treaties McNair in The Law of Treaties states that neither text is superior to the other. The two texts should help one another so that it is permissible to interpret one text by reference to the other.
>
> This approach helps in interpreting the Treaty of Waitangi and reconciling differences between the two texts, but we must also have regard to other principles. In the United States, which has had considerable experience in the interpretation of treaties with the Indian people, the Supreme Court has laid down an indulgent rule which requires treaties to be construed 'in the sense which they would naturally be understood by Indians'... Relevant in this context is the predominant role the Maori text played in securing the signatures of the various chiefs.

Nonetheless, the point of interpretation by the Courts is one which brings up a major point of concern with the Bill of Rights. By way of Article 1 the Treaty of Waitangi is accorded the status of supreme law and consequently Courts will be faced with the task of the judicial review of legislation that is in conflict with the Treaty. There are differing attitudes towards this new role which the Courts would be required to perform in interpreting and applying the Bill of Rights. There is the argument that the enactment of the Treaty in the Bill will place on our Courts the task of judicial review of legislation in which they are not trained. However, another more optimistic approach is put forward by Chief Judge Durie of the Maori Land Court and Chairman of the Waitangi Tribunal [23]

> I do not think it beyond the wit of any Court to interpret, on evidence, a document in another language or to apply recognised principles of law to the interpretation of bilingual treaties.

The Canadian Courts have shown such judicial ability to isolate the essential attributes of Indian 'society' [24] and there is no theoretical reason why the New Zealand Courts, operating under a Bill of Rights, could not perform a similar exercise with Maori rights. The only hard, practical fact is that we do not have the vast economic resources available in both Canada and the United States [25] and the Bill of Rights will impose large increases in terms of litigation and judicial time.

In more detailed regard to the implication of Article 1 and 'supreme law' the Treaty of Waitangi will enjoy superior status to municipal law, and legal recognition of rights will be held valid over any inconsistent legislation, both existing and in the future. The effect of this on existing legislation is quite dramatic, as is evidenced by a report submitted by

the New Zealand Maori Council to the Government in 1971.[26] In this report, Sir Henare Ngata outlined the numerous contraventions of the Treaty. For instance, a 1967 amendment to the Maori Trustee Act 1953 has aprovision which diverts all individual rents of fifty cents or less into the hands of the Maori Trustee. In the first three years of that legislation a total of $70,000 was withheld from the individuals concerned. Rents are income from land, and the non-payment of under fifty cent rents is a contravention of the Treaty. There are many more claimed contraventions including the Rating Act 1967, the Petroleum Act 1937, and numerous provisions of the Maori Affairs Act 1953 and its amendments. The possible inconsistencies are formidable in number, and yet the report does not even go to the extent of outlining contraventions in terms of Maori human rights. One must, however, doubt as to whether it would be desired, even by the Maori people themselves, that some provisions of the Treaty should prevail over legislation dealing with the protection and conservation of wildlife.[27]

On their individual interpretation both Article 4 and Article 1 seem to give wide ranging rights and powers of invalidation, but these broad statements of rights are not intended to be read literally. Article 3, which adopts section 1 of the Canadian Charter of Rights and Freedom 1982,[28] provides that[29]

> The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Thus,[30]

> This general limitation provision indicates that the guaranteed rights are not absolute: they are subject to such limits as can be justified by reference to the characteristics of a free and democratic society.

But, the questions must be asked as to[31]

> ...what are the essential characteristics of 'a free and democratic society' and what limitations on guaranteed rights can be justified in terms of these characteristics?

The Commentary contained in the White Paper on the Bill of Rights seems to envisage the Courts balancing the guaranteed rights against other important competing interests.[32] In terms of Article 4, which confers constitutional status on the guarantees given by the Treaty, the Commentary states at paragraph 10.42 that the exact application of these rights[33]

> must be considered in the light of the whole ambience - social, economic and so on - at the time the question arises.

The point has also been raised that, in terms of United States experience, what is 'rational' to the judiciary is not necessarily 'rational' for women,[34] and perhaps the same argument can be extended to the Maori.

It has been suggested that Article 3 be drafted so as to exclude the Treaty of Waitangi from its operation.[35] This view is supported by Elkind and Shaw who state that Article 3[36]

> ...opens up the whole question (and real likelihood) of de facto amendments to the Treaty in the guise of limitations which are held to be 'reasonable' and 'demonstrably justified in a free and democratic society'.

The exact implications and width of scope of the limitation provision contained in Article 3 are very uncertain and seemingly unstable elements in the Bill of Rights as it now stands.

Another problem area may surface if a right guaranteed under Article 4 pertaining to the Treaty is in conflict with another right, such as the right to freedom from discrimination under

Article 12. Elkind and Shaw suggest in their Alternative Draft Bill of Rights that provision be added to ensure that laws specifically aimed at implementing the Treaty shall not be subject to challenge on the ground that they are inconsistent with 'equality rights.'[37] This would allow for reverse discrimination, or special measures, in favour of Maoris, if it is for the purpose of securing previously breached rights under the Treaty of Waitangi. However, the limitation provision in Article 3 may allow such measures to be justified without specifically providing for them. Such a provision would be necessary though, if Elkind and Shaw's other suggestion to exclude the Treaty from the operation of Article 3 is implemented.

Article 28, relating to the entrenchment of the Bill of Rights, naturally also has great relevance to the Treaty. Under Article 28 the rights guaranteed under the Treaty of Waitangi, along with the rest of the Bill, is completely entrenched as a part of New Zealand's Constitutional Law.[38] Provision is therefore made, that the Articles relating to the Treaty in the Bill of Rights may only be altered or repealed by a 75% majority in the House of Representatives or by a majority in a referendum of electors. This prevents the opportunity for repeal or amendment by a simple majority, and thus, dramatically reduces any uncertainty about the future of the Treaty as Constitutional Law.

This special provision may not be a sufficient safeguard for the Treaty because no proper provision is made for Maori views to be given due weight. Two other alternatives or variations on Article 28 have been voiced. Firstly, that 'any repeal or amendment of rights flowing from the Treaty of Waitangi

should be subject to a special Maori referendum;'[39] and secondly, that Article 28 specifically provide that rights under the Treaty cannot be amended or repealed at all.[40]

The other major provision relating to the Treaty of Waitangi is Article 26, which sets out the position of the Waitangi Tribunal in respect of the Bill of Rights. Article 26 'allows' for special reference to the Waitangi Tribunal when, in any proceedings, any question arises as to the consistency of some enactment or policy with the Treaty. Following on from the Tribunal's earlier reports[41] and from the effect of Article 4, the Treaty is to be regarded as 'always speaking' and shall be applied so that effect may be given to its 'spirit and true intent.' The question can be raised, however, as to why the Courts are not bound to refer matters of the Treaty to the Waitangi Tribunal. Article 26 uses the word 'may.' In section 12 of the Indecent Publications Act 1983 a similar provision relating to questions of indecency arising in Court provides that the Court 'shall' refer the question to the Indecent Publications Tribunal. Is there any logical reason for the distinction? In my opinion, even if they are not compelled to refer such questions to the Tribunal, if the Court does so then Article 26 should bind the Court to accept the Tribunal's advice, except where that is contrary to the provisions of the Bill of Rights. Even if the Court chooses not to refer to the Tribunal, that decision not to refer should be appealable.

A differing view propounded by Elkind and Shaw involves complete jurisdiction being given to the Waitangi Tribunal to make final and binding decisions on the implementation of the Treaty under the Bill of Rights. Thus, in Elkind and Shaw's Alternative

Draft Bill of Rights,[42]

> ...the Waitangi Tribunal assumes the status of an Appellate Court, not in the sense that it is a Court of Appeal, but in the sense that it is the sole body authorized to enforce Article 4 and the Treaty of Waitangi.

This view is allegedly based on the 'long and regrettable history of New Zealand court decisions' denigrating the Treaty and its underlying principles.'[43] However, such a view may no longer be so justified following the recent High Court case Te Weehi v. Regional Fisheries Officer[44] which recognises customary Maori fishing rights under the common law doctrine of aboriginal title. This doctrine operates even in the absence of the Treaty, but Article 4 recognises and affirms not the Treaty itself, but the rights under the Treaty. Thus it is 'undoubtedly intended to give recognition to the idea that the Treaty of Waitangi was declarative of pre-existing rights.'[45] This is further supported by P G McHugh in an article consequent the Te Weehi decision in which he states that the Treaty is only declaratory of rules which applied anyway.[46]

Another reason to avoid conferring exclusive jurisdiction on the Waitangi Tribunal is the unavoidable overloading of the Tribunal that would occur. Already, since the extension of the Tribunal's jurisdiction to include historic claims, its workload has increased significantly.[47] It was recently estimated that the fifty-two claims presently before the Tribunal should alone keep it going for ten years.[48]

With this envisaged increase in the importance of the Tribunal 'it is important that the legal community see this body as more than just a creature of Parliament's social conscience.'[49] Perhaps, if a second Waitangi Tribunal was established it would relieve the backlog of claims and enable a more effective response to a possible new role under the Bill of Rights.

Finally, under Article 26, application to the Tribunal from the Court must be by 'any party to the proceeding.' This appears to exclude anyone who may be affected, for example, by living near to a proposed effluent discharge, if they are not a party to the hearing. Therefore they cannot make an application to the Tribunal that the proposal is inconsistent with rights under the Treaty. This could easily be rectified by altering Article 26 so that the application can be made by anyone with a specific interest, that is, an interest greater than the general 'public interest.'

The Commentary to the White Paper also impresses the reality that the proposed Bill of Rights will need to be supplemented by other affirmative measures to promote the rights of the Maori as tangata whenua. Further legislative and administrative action will be required in the future.[50]

EXISTING LEGISLATIVE PROVISIONS FOR THE TREATY

The final emphasis in the preceding section concerning the proposed Bill of Rights was the need for legislative recognition of rights under the Treaty of Waitangi to supplement the Bill of Rights.

This section will look at the existing provisions for the Treaty of Waitangi in statutory law, with an examination of recent judicial interpretation of such provisions.

Naturally, these provisions usually arise in environmental legislation, as the rights supposedly guaranteed under Article II of the Treaty of Waitangi relate to the land, estates, forests, fisheries and other properties of the Maori people.

The Treaty of Waitangi Act 1975

This Act has already been examined earlier in this paper.[51] The Treaty of Waitangi Act 1975 was essentially the fundamental force that has resulted in the increased statutory provision for the Treaty. To recapitulate, the Treaty of Waitangi Act 1975 provided for the establishment of the Waitangi Tribunal and effectively gave the Treaty a new status at the time of enactment.

Environment Act 1986

The Environment Act 1986 affords a much greater recognition to the Treaty of Waitangi than any previous environmental legislation.

Specifically, its long title states it is, among other purposes,

an Act to

> ensure that, in the management of natural and physical resources, full and balanced account is taken of ... the principles of the Treaty of Waitangi.

The Act provides for the establishment of the Office of Parliamentary Commissioner and for the establishment of a Ministry for the Environment.

In respect of the functions of the Commissioner, section 17(c) states that regard must be given to

> any land, water sites, fishing grounds or physical or cultural resources, or interests associated with such areas which are part of the heritage of the tangata whenua and which contributes to their wellbeing.

This is in addition to the paramount purpose of taking account of the principles of the Treaty as stated in the Long Title.

The functions of the Ministry for the Environment are also governed by the provisions of section 17(c) and the purposes expressed in the Long Title. The Ministry sees recognition of Maori values and rights under the Treaty as a primary aspect of their functioning.[52] Specifically, they have made provision for the establishment of a four person Maori Secretariat within the Ministry to consult widely with representatives of tribal authorities and ensure that Maori concerns are articulated at all levels of Government.

Thus, the Ministry for the Environment will be a 'key actor' in the future recognition of Maori rights and values under the Treaty.

Conservation Act 1986

The Conservation Act 1986 established the Department of Conservation, charged with the task of promoting conservation in the management of New Zealand's resources and historic places and applying conservation values to the management of other resources entrusted to its care.

The Conservation Act 1986 has specific provision for the Treaty of Waitangi along similar lines to the Environment Act 1986

Section 4 of the Conservation Act states

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

In effect, this requires that the Department ensures that account is taken of those values embodied in the principles of the Treaty, in its administration and operation. In this respect, a decision has been made that the Department will have a Maori Advisory Group to direct the Department in this area. 53

Thus, section 4 will be an all-important section of the Conservation Act 1986.

State-Owned Enterprises Act 1986

The State-Owned Enterprises Act 1986 is an Act designed to establish state enterprises which will be as profitable and efficient as comparable enterprises not owned by the Crown. 54

Section 9 of the State-Owned Enterprises Act provides that

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

It was this provision that was at the heart of the case heralded as a 'landmark in New Zealand legal history'[55] New Zealand Maori Council and Latimer v. Attorney-General and others.[56]

This case brought by the New Zealand Maori Council and its Chairman against the Attorney-General, the Ministers of Finance, Energy, Lands and Forests and the Governor-General, sought judicial review of the projected transfers of huge areas of Crown land to State enterprises.

The central issue concerned the meaning and ambit of section 9, and its relationship with section 27, which specifically provides for Maori Land Claims.

Section 27 provides that if a claim has been submitted to the Waitangi Tribunal before the date of the Governor-General's assent, that is December 18 1986, any land transferred to a State enterprise continues to be subject to the claim. The State enterprise cannot transfer any interest in the land to any third party and is not registered as proprietor unless and until there is a waiver by the Governor-General in Council after the Tribunal's findings have been made. The Maori Council claimed that section 27 was subject to section 9, and that it is inconsistent with the principles of the Treaty of Waitangi not to provide protection for claims made to the Waitangi Tribunal after December 18 1986. Any claims subsequent to that date, it was said, could be defeated by the transfer of the land by State enterprises to private ownership. The Crown claimed that section 27 constituted an

exhaustive code in respect of Maori Land claims, and that section 9 had no effect in that respect.

All five Judges in the Court of Appeal held that section 9 was paramount and that all proposed dispositions of Crown land by way of section 23 were subject to it. Thus, section 9 clearly restricted the Crown to acting under the Act in accordance with the principles of the Treaty, and it 'becomes the duty of the Court to check... whether that restriction has been observed.'[57] Based on that view a major part of all five judgements involved an attempt to elicit those principles of the Treaty that bind the Crown in respect of former Maori land and waters affected by the State-Owned Enterprises Act.

In the end the unanimous decision was encapsulated by Cooke P in these words,[58]

> 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. Second, that those principles require the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith.

This concept of partnership is appropriate in emphasising the underlying principles of the relationship between the Maori and the Pakeha stemming from the Treaty. It recognises the fact that the Treaty imposed rights and obligations on both parties and that the Crown can no longer proceed unilaterally in their dealings with the affairs and resources of the Maori people. Intrinsic in this overriding principle of partnership are the obligations and other principles entailed in the provisions of the Treaty. Casey J found that the Treaty obliged the Crown not only to recognise the Maori interests specified in it, but to actively protect them, and he stated[59]

> I see such a principle as very relevant to this case, inherent in the concept of on-going partnership founded on the Treaty. Implicit in that relationship is the expectation of good faith by each side in their dealings with each other, and in the way that the Crown exercises the rights of government ceded to it.

The corollary to the partnership concept, of acting reasonably and in good faith, recognises the Treaty as ongoing and changing in the obligations it imposes. The decision of the Court is consistent with the findings of the Waitangi Tribunal that the Treaty is 'the foundation of a developing social contract.'[60] As Cooke P stated 'The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas.'[61]

There are also several other subsidiary points of importance concerning the Treaty of Waitangi made in the course of the judgements.

Firstly, there is the overall effect of the judgement in terms of interpreting other existing and future statutes that provide for the principles of the Treaty of Waitangi. The Court of Appeal noted that the same expression dealing with the 'principles of the Treaty' is found in section 4 of the Conservation Act 1987 and in the Long Title to the Environment Act 1985.[62] This will have particular influence on the Conservation Act, as the Department of Conservation presently administers 6.5 million hectares of Crown land, and must do so under section 4 'to give effect to the principles of the Treaty of Waitangi.' Much of this land may also be subject to claims before the Waitangi Tribunal, and therefore similar measures of protection to those expressed in the Maori Council case may be required.

A second point of note is that the decision will be binding and[63]

> to the extent that it is material in any case should be followed by the Waitangi Tribunal as a declaration of the highest judicial tribunal in New Zealand.

It must be noted, however, that the Maori Council case only identified those principles relevant in the context of the State-Owned Enterprises Act,[64] and therefore the Waitangi Tribunal is not limited in its findings concerning the Treaty principles in every case. There may well be, and in fact have been,[65] claims before the Tribunal, especially those concerning Maori fishing grounds and spiritual and cultural values implicit in the Treaty, that enable the Tribunal to extend its interpretation of the principles of the Treaty of Waitangi.

The Court of Appeal also found that while the opinions of the Tribunal, expressed in reports under the Treaty of Waitangi Act 1975, are not binding on Courts in proceedings dealing with other Acts, they are of great persuasive value.[66] The findings of the Tribunal were referred to in all the five judgements, particularly so in that of Bisson J.[67] This may well provide a welcome and useful precedent for future Courts.

The Court, in addition, realised the Tribunal's need for increased resources 'to carry out its statutory responsibility and deal with claims expeditiously.'[68] This is an area of overall concern in the operation of the Tribunal, who presently have 88 claims lodged before them, 32 of which were lodged after December 18 1986, and many of which will concern Crown land subject to the State-Owned Enterprises Act and the Maori Council case findings.

Perhaps the most under emphasised, and yet probably the most significant point made by the Court of Appeal, is the suggestion that 'it might be inconsistent with the principles of the Treaty for the Crown to act inconsistently with the recommendation'[69] of the Tribunal that land be returned to Maori ownership. Cooke P states that,[70]

> The Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it - which would be only in very special circumstance if ever.

Thus, in effect, the Tribunal's findings in the future may be viewed as more than merely recommendatory.

The full significance of these statements, with the Tribunal having at least 88 claims to determine, is yet to be realised.

However, despite the important social and legal significance of the Maori Council case, it in fact does nothing to change the status of the Treaty of Waitangi in its own right. As was held in the case Hoani Te Heuheu Tukino v. Aotea District Maori Land Board,[71] which was cited in the Court of Appeal decision, rights conferred by the Treaty cannot be enforced in the courts except insofar as a statutory recognition of those rights can be found. As Cooke P states,[72]

> If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.

The Town and Country Planning Act 1977

The Town and Country Planning Act 1977 does not directly refer to the Treaty of Waitangi but it does make provision for the

recognition of Maori values.

Section 3(1)(g) provides that in the preparation, implementation and administration of regional, district and maritime schemes, the relationship of the Maori people and their culture and traditions with their ancestral land must in particular be recognised and provided for as a matter of national importance. The First and Second Schedules to the Act also provide that 'marae and ancillary uses, urupa reserves, pa and other traditional and cultural Maori uses' are matters to be dealt with in regional and district planning schemes.[73] The Third Schedule also provides that 'Maori traditional and cultural uses, including fishing grounds' are to be dealt with in maritime planning schemes.[74]

In effect, however, planning legislation appears to give no greater primacy to Maori matters than to other landuse considerations. This is an observation that was supported by the Waitangi Tribunal in the Motonui Report when they noted '...the provision is accorded no priority over other possibly competing 'public interest' provisions.'[75]

This observation has to the greater part been borne out in practice. Although some authorities have made provision within their planning schemes,[76] there still seems to be an overall hesitancy or unwillingness to come to terms with Maori values in the planning process.

Indeed, the Ministry of Works and Development[77] stated to the Waitangi Tribunal; 'Planning Statutes apply to all - Maori and pakeha - as has been said 'we are all one people'.'[78]

The Waitangi Tribunal consequently commented, 'Perhaps it is that presumption that is the cause of a substantial problem.'[79]

Water and Soil Conservation Act 1967

The Water and Soil Conservation Act 1967 is an Act to promote a national policy in respect of natural water and to provide for its conservation, allocation, use and quality.[80] There are, however, no special provisions for Maori fishing grounds, and any Maori interest is merely an aspect of the general public interest.

Thus, in its review of environmental considerations in the context of the Water and Soil Conservation Act in the case Minhinnick v. Auckland Regional Water Board and Waikato Valley Authority,[81] the Planning Tribunal felt unable to take into account Maori cultural and spiritual values that transcend the mere physical environment. This failure to recognise Maori interests was a major concern to the Waitangi Tribunal in both the Manukau and Te Atiawa Claims. In the Manukau case the concern related to the proposal by the New Zealand Steel Mill Works at Glenbrook to draw water from the Waikato River for use in their slurry pipeline and then to discharge the water into the Manukau Harbour. The Maori claimants first two grounds of complaint were based on the effect on fishing and the deterioration of water quality in the Manukau. However their third ground was a metaphysical concern. Fresh water (wai maori) and salt water (wai mataitai) are seen as conceptually separate. Each water stream carries its own mauri (lifeforce) and has its own mana (status). Of course the waters do mix. The mauri of the Waikato River flows into the mauri of the sea, but on its landward side the mauri of the

Waikato is a separate entity. The Maori objection was to the mixing of the waters by unnatural means. However, although upholding the Maori view, the Tribunal said their values have no effect in law.[82]

Nonetheless, this concern may to a great extent be eased following the recent High Court decision in Huakina Development Trust v. Waikato Valley Authority and Bowater.[83] This case concerned a water right granted to discharge effluent into the tributary of a stream which ran into the Waikato River. The Huakina Development Trust objected, and being unsuccessful before the Planning Tribunal, appealed to the High Court. The appellants objection was based on section 24(4) of the Water and Soil Conservation Act which provides that any person may lodge an objection

> ...on the ground that the grant of the application would prejudice its or his interests or the interests of the public generally.

They presented submissions that 'the pollution would detrimentally affect a very valuable tribal resource, which provides both physical and spiritual sustenance.'[84] These submissions were based on the findings of the Waitangi Tribunal on matters of Maori spiritual values, and on the Treaty of Waitangi itself.

The Court found in favour of the respondent on certain evidentiary and procedural grounds.[85] Despite this the Huakina case is highly significant because a major part of Chilwell J's judgement concerned the extent to which, in the absence of any reference in the Act to Maori cultural concerns, extrinsic evidence could be called in aid of an application of this kind.

On these issues it was held that the spiritual values and cultural relationships of the Maori people to the waters of

the region, including the Waikato River and its tributaries, were proper matters to be considered on an application under section 21 and also therefore on an objection under section 24. Chilwell J stated that,[86]

> They cannot be excluded for the reason that the Water Act is so deficient in guidelines that the Court has to resort to extrinsic aids. In this case those aids include the Treaty of Waitangi, the Treaty of Waitangi Act, the Waitangi Tribunal interpretations of the Treaty and the Planning Act. Through all those agencies a common theme is found.

This reference to the Planning Act is an important aspect of the judgement. Chilwell J found that references to Maori cultural concerns in the Town and Country Planning Act 1977 can be imported into the Water and Soil Conservation Act, because there is justification for treating the two Acts as composing a 'comprehensive statutory scheme.'[87]

Thus, the Huakina decision may prove to be of even greater legal and social significance than the Maori Council case, in that it allows for the consideration of Maori interests, including those under the Treaty of Waitangi, in an Act in which the legislature has not expressly so provided.

CONCLUSION

A major argument put forward against the inclusion of the Treaty of Waitangi in the proposed Bill of Rights, is that the Treaty should stand alone without restrictions. Such arguments envisage the Treaty itself entrenched as Supreme Law 'without the baggage of a Bill of Rights.'[88]

However, with the recent affirmative measures taken by the legislature to recognise and provide for the rights under the Treaty of Waitangi, it may well gain a relatively similar status without its inclusion in a Bill of Rights. The Courts, as seen in the cases New Zealand Maori Council and Huakina Development Trust, are willing and capable of interpreting such legislative provisions giving effect to the principles of the Treaty of Waitangi and of using the Treaty as an aid to interpretation. The legislature must, however, continue to enact such provisions in its statutes, and it is hoped that it does after its present review of Mining, Planning and Water and Soil Conservation legislation.

Despite the fact that this effect given to the Treaty by ordinary legislation is important and necessary 'such legislation ...is vulnerable to repeal like any other legislation.'[89]

The Chief Judge of the Maori Land Court and Chairman of the Waitangi Tribunal stated,[90]

> Those who say we do not need a Bill of Rights can say so from the standpoint of a people whose rights have never been seriously threatened. That is not an experience that the Maori people have enjoyed.

Clearly, the Bill of Rights can, and must, operate supplemented by other affirmative legislative measures, in order to truly give effect to rights under the Treaty of Waitangi. The least that the draft Bill of Rights provides is for the Treaty of Waitangi as a part of the foundation of the Constitution of New Zealand; and as a consequence it provides a sound template for the development of a set of standards by which the Legislative, the Executive and the Judiciary can judge existing and future laws and policies against fundamental Maori rights and freedoms.

FOOTNOTES

1 There are many differing views concerning the method by which the Crown gained sovereignty over New Zealand, whether by cessation, conquest, or discovery and occupation. Richardson J in the Court of Appeal in the recent case N Z Maori Council and Latimer v. Attorney-General and others (1987) Unreported, Court of Appeal, C.A.54/87, stated on page 15 of his judgement that 'the Treaty of Waitangi must be viewed as a solemn compact... through which the colonisation of New Zealand was to become possible.'

2 Waitangi Tribunal Report No. 4, Kaituna Claim dated 30 November 1984; pp. 16-19.

3 He Korero Mo Waitangi (1984) p. 2.

place of publication ? authors? insufficiently identified.

4 (1877) 3 N Z Jur(NS) SC 72.

5 See, Hoani Te Heuheu Tukino v. Aotea District Maori Land Board (1941) AC 308

In Re The Bed of the Wanganui River (1962) N Z L R 600

which held that the Treaty itself obliges no rights enforceable in municipal law, except so far as they have been incorporated by statute.
Statutes that govern areas in which such rights should have effect, including Fisheries Act 1908, Maori Affairs Act 1953, Water and Soil Conservation Act 1967, have no such provision for the Treaty or rights claimed under it.

6 The Ratana Movement, formed by Tahupotiki Wiremu Ratana in 1918 as a religious mission, struck an informal alliance with the Labour Party for the 1931

general election. This was formalised with the Prime Minister, M J Savage, after Labour's victory in the 1935 election. The Ratana movement used the Treaty of Waitangi as a symbol for Pakeha breach of faith and called for its re-enactment. (The Oxford History of New Zealand, Oxford University Press, 1981 pp.292-4)

7 s. 6(1) Treaty of Waitangi Act 1975

8 'Maori' under s. 2 of Treaty of Waitangi Act 1975 means 'a person of the Maori race of N Z, and includes any descendant of such a person.'

9 s.8 Treaty of Waitangi Act 1975

10 s.6(3) Treaty of Waitangi Act 1975

11 Sutton, The Treaty of Waitangi Today (1981)11 VUWLR 17 However, the Waitangi Tribunal seemed to be able to circumvent this restriction with ease. For example, in the Manukau Report, there was a claim for ownership of the Manukau Harbour tidal lands by the Maori claimants. In the case of the Manukau Harbour, the tidal lands have been vested in the Auckland Harbour Board since the enactment of the Manukau Harbour Control Act in 1911, an act occurring many years before the jurisdictional limit date of October 10, 1975. Despite finding that ownership should not be re-vested in the Maori people, the Tribunal still inquired into this claim. (See Waitangi Tribunal Report No.8, Manukau Claim, report dated 29 April 1986, p.49 and pp.100-108)

12 By way of s.2 of the Treaty of Waitangi Amendment Act 1985 the Tribunal consists of the Chief Judge of

the Maori Land Court as Chairman and six persons of whom at least 4 shall be Maori

13 s.3 Treaty of Waitangi Amendment Act 1985, which amended s.6(1) Treaty of Waitangi Act 1975

14 A Bill of Rights for N Z, A White Paper, 1985 (hereinafter referred to as White Paper.)

15 Article 1, see White Paper p.68 para 10.17 and 10.18

16 White Paper p.11

17 Ibid p.10

18 Above n.3

19 Elkind and Shaw, A Standard For Justice (1986) p.43

20 Waitangi Tribunal Report No.6 Te Atiawa Tribe's Waitara Fishing Claim, report dated 17 March 1983, p.61, cited in White Paper p.75 para 10.36

21 As stated Manukau Claim p.91

22 Ibid p.88

23 'A Bill of Rights for N Z' N Z Legal Research Foundation (1985) p.192

24 He Korero Mo Waitangi, 1984 p.125

25 P J Kaye, Bill of Rights Seminar Commentaries (1985) N Z L J 230

26 Report by Sir Henare Ngata as presented in He Korero Mo Waitangi, (1984) pp.134-144

27 eg The Wildlife Act 1953

28 White Paper p.125

29 Ibid p.11

30 J A Smillie, The Draft Bill of Rights (1985) N Z L J 277

31 Idem

32 White Paper p.60 para 8.10

33 Ibid p.76

34 'A Bill of Rights For N Z' Legal Research Foundation 1985 p.132

35 Nadja Tollemache, The Proposed Bill of Rights, paper prepared for Human Rights Commission, (1986) p.43

36 Elkind and Shaw, A Standard for Justice (1986) p.30

37 Ibid pp.43-44. The so-called 'equality rights' equate with Article 12 in the White Paper Bill of Rights, that is, the right to freedom from discrimination.

38 Following Elkind and Shaw's suggestion that an additional provision to Article 4, making the Treaty itself part of the Bill of Rights, the Treaty itself would be entrenched, not merely the rights under it.

39 Nadja Tollemache, Proposed Bill of Rights (1986) p.51

40 Elkind and Shaw, A Standard For Justice, (1986) p.5 p.44

41 eg Manukau Claim, Te Atiawa Claim

42 Elkind and Shaw, A Standard For Justice, (1986) pp.45-46

43 Ibid p.6

44 (1986) B C L 1396

45 Elkind and Shaw, A Standard for Justice (1986) p.43

46 P G McHugh, Aboriginal Title Returns to N Z Courts, (1987) N Z L J 39

47 Under Treaty of Waitangi Amendment Act 1985

48 The Evening Post Wellington, New Zealand, 28 March 1987

49 P G McHugh, The Constitutional Role of the Waitangi Tribunal, (1985) N Z L J p.224

50 White Paper p.39 para 5.26

51 Above pp.3-4

52 Ministry For The Environment, Draft Strategic Plan, 1986 pp.20-21

53 From speech notes of Hon. Russell Marshall at inauguration of Dept. of Conservation 1 April 1987

54 s.4(1)(a) State-Owned Enterprises Act 1986

55 The Evening Post, Wellington, New Zealand, 29 June 1987

56 (1987) Unreported, Court of Appeal, C A 54/87

57 Ibid, Cooke P's judgement p.28

58 Ibid, Cooke P's judgement p.44

59 Ibid, Casey J's judgement p.17

60 Te Atiawa Claim p.61

61 N Z Maori Council, Cooke P's judgement p.35

62 Ibid Casey J's judgement pp.14-15

63 Ibid Somers J's judgement p.13

64 Ibid Richardson J's judgement p.33

65 eg Manukau, Kaituna and Te Atiawa Claims.

66 N Z Maori Council, Cooke P's judgement p.30

67 Ibid, Bisson J's judgement pp.17-22

68 Ibid, Richardson J's judgement p.45

69 Ibid, Cooke P's judgement p.27

70 Ibid, p.38 of his judgement

71 (1941) A C 308

72 N Z Maori Council, Cooke P's judgement p.47

73 The First and Second Schedules of the Town and Country Planning Act are effected through s.11(2) and s.36 respectively.

74 This clause was inserted by s.33(1) of Town and Country Planning Amendment Act 1987, and is effected through s.104(2) of the 1977 Act.

75 Te Atiawa Claim p.39

76 eg Auckland Regional Authority in its Regional Scheme.

77 The Town and Country Planning Act 1977 is administered in the Ministry of Works and Development.

78 Te Atiawa Claim p.23

79 Idem

80 Long Title of the Water and Soil Conservation Act 1967

81 Planning Tribunal Decision No. A116/81, 16 December 1981

82 Manukau Claim pp.123-125

83 (1987) High Court M430/86
(since reported at (1987) 12 NZTPA 129)

84 Ibid p.4

85 Namely, that no detrimental effects to water quality were adduced by the appellant, and the respondent satisfied the conditions prescribed for the grant of a water right under s. 21 of the Act.

86 Huakina Development Trust p.80

87 Ibid p.54

88 Jones, A Bill of Rights For N Z, Legal Research Foundation, (1985) p.217

89 Nadja Tollemache, The Proposed Bill of Rights, (1986) p.32

90 Durie, Bill of Rights For N Z, Legal Research Foundation (1985) p.174