

CHAPTER FIVE

Implications of the Treaty of Waitangi

INTRODUCTION

The Maori people are the longest established of all the ethnic and cultural communities that exist in New Zealand. They have a unique attachment to the land because of their long history of settlement and the nature of their spiritual beliefs. They are the tangata whenua. In 1840 they were the owners of New Zealand. In his judgement on the State Owned Enterprises case Mr Justice Cooke has summed up the essence of the Treaty that was signed in February of that year as follows: 'In brief the basic terms of the bargain were that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated.' The English and Maori language texts of the Treaty are set out in an appendix at the end of this chapter. These texts are widely accepted as authoritative by virtue of their inclusion in the Treaty of Waitangi Act 1975. Also attached is a translation of the Maori text into English as undertaken by Professor Kawharu of Auckland and used by the Court of Appeal in the State Owned Enterprises case when the Maori Council moved to prevent the transfer of Crown Land to the State Owned Enterprises, earlier this year.

The Treaty has attracted very considerable public interest in recent years. It has been given legal status in various statutes, especially the State Owned Enterprises, Conservation and Environment Acts and the Treaty of Waitangi Act which

established the Waitangi Tribunal. These measures indicate a readiness to accept the Treaty as a document of great importance to both Maori and non-Maori communities, and to resolve issues arising from alleged breaches on the part of successive governments. The Government has thereby recognised that the Treaty involves the honour of the Crown, that recognition of its spirit is important to social peace and that resentment based on past wrongs can be a major impediment to the success of programmes based on co-operation.

In assessing the implications of the Treaty we are conscious that we have no specialist expertise in such areas as history, law and Maori culture. At the same time, we do have a useful vantage point in assessing policies from our central position in the machinery of government and the transfer of government to the Crown is an essential element of the Treaty. Our task is to advise the Minister of Finance on matters important to economic and financial management. Clearly the Treaty falls within that category. Some of the subjects we discuss have already been addressed or touched on by the Waitangi Tribunal. In other areas we are venturing into uncharted waters. The argument for doing so is that Treaty issues cannot be shelved until, one by one, they are addressed by the Tribunal or the Courts. Also, where recommendations are made by the Tribunal, the Government retains the discretion to endorse them or not. Where we discuss matters that have yet to be dealt with by the Government, we generally refrain from stating a definitive view. However, we do probe the strength of several possible arguments with a view to sifting out those considerations that, whatever may be our final opinion, cannot lightly be dismissed. Before this exercise can be attempted, we must consider what general guidance is available from findings of the Waitangi Tribunal and the judgement of the Court of Appeal on the State Owned Enterprises case. (All references to the Court of Appeal and individual Judges of that Court in the rest of this chapter relate to the SOE case).

Possible Approaches to the Treaty

In hearing claims arising from legislation, policies, acts or omissions of the Crown alleged to be inconsistent with the principles of the Treaty, the Waitangi Tribunal has exclusive authority, for the purposes of its enabling Act, to determine the meaning and effect of the Treaty as embodied in the two texts referred to previously. This implies that both texts have equal status and they should be read in such a way as to help each other. The Tribunal has supplemented this basic approach by also having regard to other principles for the interpretation of treaties that have been applied overseas. For example they have stated that surrounding circumstances and any declared or apparent objects may be relevant to understanding the Treaty. They have also noted that it is relevant to consider what the

Maori signatories would have understood to be the meaning of the Treaty. On this basis, the Tribunal has suggested that 'taonga' ('other properties' in the English text) should be read to include cultural as well as physical 'treasures'. This interpretation is considered further in the section on social policy. At the same time the Tribunal has also clearly acknowledged the importance of what Captain Hobson and the British Government would have understood by the use of the term 'sovereignty' which is not adequately referred to in the Maori text. Another principle, perhaps the most important of all, is that the Treaty involves the honour of the signatories. This implies that there should be no suggestion of sharp practice or evasion of obligations by either the Crown or the Maori community. Mr Justice Cooke put this obligation to act honourably in even more positive terms when he stated that 'The Treaty signified a partnership . . . (and) the utmost good faith . . . is the characteristic obligation of partnership . . .'

In accordance with the Treaty of Waitangi Act, the Tribunal has to have regard to 'all the circumstances' of a case before it makes recommendations to the Crown. This means that, not only does it have to decide whether a breach of the Treaty may have occurred, but it also has to determine the extent to which it is appropriate to redress that grievance today. For example the Tribunal has stated that 'it is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party while creating another for another.' The reference to the principles of the Treaty in the State-Owned Enterprises Act contains no limiting reference. Nevertheless, Mr Justice Cooke has noted that the Crown is obliged to act in a reasonable way in honouring its commitments under the Treaty and has stated that 'the test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way.' In other words, the Court decision seems to reinforce the focus of the Waitangi Tribunal on finding solutions that are practicable and take existing realities into account.

The desirability of such an approach is strengthened when the actual texts of the Treaty are considered. Putting to one side the differences between them, their brevity and general nature are so striking that Mr Justice Cooke concluded that 'The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas.' This seems to be consistent with what we understand to be the Maori approach to interpretation, under which the wairua or spirit of what is said is more important than the actual words. Accordingly, the rights conferred by the Treaty cannot be fixed to the historical circumstances of 1840. These rights need continual re-application as new circumstances arise. The complexities and sophistication of the modern state were not even remotely envisaged in 1840. Future changes may be equally profound. The Treaty also needs continual reinterpretation in the light of changing attitudes and the development of ideas. For example, the concept of welfare and the appropriate role of the State has

evolved enormously over the past 60 years. Mental flexibility is as important to understanding and applying the Treaty as is a readiness to respect alternative cultural approaches.

Status of the Treaty

This chapter frequently refers to rights based on the Treaty. This is a convenient expression but in a legal sense the Treaty has usually been regarded as conferring enforceable rights only where it is enshrined in statute. The Government has made specific reference to the Treaty in several statutes, as stated above. However, there have been recent indications that the Courts may, in certain circumstances, give recognition to the Treaty even although it may not be enshrined in statute. It is a basic principle that statutes are construed by the Courts in the setting in which they are made. If the Treaty is seen as part of the wider social or constitutional background, the Courts may interpret statutes in the light of the Treaty, especially in respect of laws which relate to the general public interest. There is also the possibility that, regardless of the Treaty, Maori customary title and rights may be able to be recognised in common law. The Court of Appeal has yet to give a ruling on these possibilities but they indicate the extent to which orthodox approaches to the legal relevance of the Treaty and Maori customary rights are coming under question. Also, Mr Justice Somers has pointed out that legal non-recognition of the Treaty over most of the past 150 years should not be taken as meaning that the Courts did not consider that there was a moral onus on the Crown to honour its obligations.

The Government may give greater statutory recognition to the Treaty in one of two ways. First, the Government may continue to make references to the principles of the Treaty as new statutes are introduced and existing ones are amended. Second, the Government may wish to give general legal recognition to the Treaty as a matter of overriding constitutional law. Inclusion of the Treaty in a Bill of Rights or some other constitutional document may have that effect. Depending on how the reference is worded, this could mean that statutes inconsistent with the Treaty could be struck down by the Courts. Before deciding on the appropriate degree of statutory recognition of the Treaty, the Government and the community should be aware of what the implications of the Treaty might be. As stated above, the rest of this chapter explores these possible implications without coming to definitive viewpoints (not least because our own views on the Treaty have evolved significantly over the past few years and there is no reason to believe that further evolutions will not occur). After an initial section on the scope and meaning of partnership, we look at land claims, and then in turn consider

fisheries, controls on the use of land and water, mineral rights, economic development, consultation and decision-making, social policy, language and the rule of law.

Partnership

The recent judgement of the Court of Appeal on the SOE case was not an attempt to list and analyse all the principles of the Treaty of Waitangi. Instead, it only focused on those principles relevant to the particular case. However, there was general agreement that the concept of partnership is central to an understanding of the Treaty and that, arising from this concept, is an obligation on both parties to act in good faith. This interpretation is of particular interest as, at first sight, it is not obvious that partnership is the primary theme of the Treaty. For example, the preamble to the English version is very parental in several areas: the Queen regards the chiefs and tribes ‘with Her Royal Favour’ and is described as ‘anxious to protect their just Rights and Property...’ Likewise, the language employed by Tamati Waka Nene was not obviously the language of partnership when he appealed to Captain Hobson: ‘Do not thou go away from us; remain for us-a father, a judge, a peacemaker.’ In several parts of this paper, especially where we consider the heritage of the past and the case for land claims, we look to this element of parental responsibility. However it is also true that both parties to the Treaty have changed enormously since 1840. Accordingly, when we consider current and future policy directions we lay much more stress on the equality that is normally associated with partnership.

The nature and scope of the partnership between the Crown and the Maori people requires consideration. We have identified at least three different forms of partnership that might arise from the Treaty. The first form involves working together to minimise conflicts where each party exercises its respective rights. In order to achieve this objective it seems essential that where rights are in conflict, mutual respect, good faith and reasonable conduct should prevail. For example, in terms of the Treaty, the right to govern passed to the Crown. Accordingly, Mr Justice Bisson stated that ‘it is in accordance with the principles of the Treaty that the Crown should provide laws and make related decisions for the community as a whole having regard to the economic and other needs of the day’. However, in exercising that right to govern, the Crown should not unreasonably infringe on the property rights of the Maori people that were guaranteed by the Treaty. On the other hand, the Court of Appeal also considered that the Maori people should not unreasonably hold up the process of government through an insistence on an inappropriate degree of consultation. At this point, Mr Justice Richardson concluded that ‘the notion of an absolute open-ended and formless duty to consult is

incapable of practical fulfillment and cannot be regarded as implicit in the Treaty.’

The second form of partnership would arise in situations where there is a fundamental legal conflict between the largely unqualified nature of Treaty assurances to the Maori people and different assumptions of what property rights may be held privately and which are reserved to the Crown. In theory, careful management and forethought might avoid or minimise potential for conflict of the type outlined in the paragraph immediately previous, but conflict is unavoidable where, for example, the Treaty assigns ownership rights over fisheries to various tribes but, even in 1840, there was a common law assumption of Crown ownership of harbours and foreshores. Other conflicts of this nature have developed since 1840 through various legislative enactments reserving river beds, inland waters such as Lake Taupo and minerals such as petroleum, ironsands and geothermal energy to the exclusive ownership of the Crown. In these cases a reasonable interpretation of partnership might include shared access to the resource or the shared receipt of income derived from use of the resource. This is discussed more fully in subsequent sections on fishing and mineral rights. The Court of Appeal has yet to consider this kind of partnership.

A third form of partnership exists in the area of general revenue-sharing. This is taken to mean the allocation of tax-payer funds to tribal and other Maori groups to enable them to pursue particular programmes of special interest to their people. Examples of such programmes include MANA Enterprises (which extends loan finance to support relatively small-scale Maori business ventures) and Maatua Whangai (whereby children ‘at risk’ are located within extended family groups instead of Department of Social Welfare institutions). The Treaty does not explicitly address the financing of government but, as government was transferred to the Crown, and as the right to tax is an integral aspect of government, it may reasonably be assumed that, in terms of the Treaty, taxation revenue is a resource belonging solely to the Government. This implies that the other Treaty partner does not have a right to use such funds on a ‘no strings attached’ basis without accounting for such use. Accordingly, we strongly doubt whether demands for a share of tax revenue to be spent without accounting for use would be consistent with the principles of the Treaty.

However, this does not mean that there is not a good case, in terms of the Treaty, for the Government making funds available to tribal and other groups for particular programmes provided adequate accountability mechanisms that recognise the purpose and origin of the funds are put into place. The chieftainship over property and other possessions that is pledged in the Maori text can be read to include the continued right to uphold certain social customs and ways of life that may differ from those of the non-Maori majority. The maintenance of these rights is a major objective of many Maori groups as they feel that their people are

better cared for in a specifically Maori context. This objective may coincide with certain objectives of the Crown in exercising its Treaty-given right to govern and care for its subjects. Accordingly, in this form of partnership there may be shared objectives between the Crown and the Maori people based on a common commitment to care, encourage and protect that neither can relinquish. Where objectives may be shared there should be close consultation and the pooling of insights to ensure that the desired results are achieved.

Partnership is often taken to mean power-sharing. This is often a reasonable implication, especially of the second and third forms of partnership outlined above. For example if partnership in respect of fisheries is confined purely and simply to receipt of a prescribed share of rentals, that would seem to be a one-sided and uneven arrangement, a very pale reflection of the 'rangatiratanga', or chieftainship over resources that is pledged in the Maori text. In this situation, some ability to influence decision-making would be appropriate. However, we would be very doubtful whether special claims to partnership in the sense of power-sharing could be advanced in areas where the Treaty has little, if anything to say. In such areas, the provisions of Article III would seem to apply, that is, the Maori people should have as much right to influence outcomes as all other persons who may be subjects of the Crown, but no special rights. The Treaty does not imply any general right to a special voice in government, or any particular form of representation. Though rangatiratanga implies an important role in the management of issues affecting the tribe, the ceding of general government is one of the clearest points in the Treaty, and no specific or general role in national issues is reserved for the chiefs and tribes.

The State-Owned Enterprises Act can be taken as a case in point. According to section 7, 'Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.' As was noted in the Court of Appeal decision, the only actions of the Crown contemplated by the Act are the transfer of property and the directions that may be given by the shareholding Ministers to the boards of any of the enterprises in respect of their annual statements of corporate intent. Both of these authorised actions of the Crown have, or may have, major implications for Maoridom. The first set of actions may have a detrimental effect on the ability of the Crown to satisfy successful land claimants, a point that has been accepted by the Court of Appeal. However the second set of actions may also affect many Maori persons as decisions taken by the enterprises pursuant to their annual statements of intent may have a significant impact on incomes and employment in certain areas.

If the partnership principle were to be universally extended we would expect section 7 to be of considerable importance for both of these sets of actions. However, several of the Court of Appeal judges indicated that, if section 7 were not to apply to land claims, then, as stated by Mr Justice Casey 'very little else in

the Act would impinge on the Treaty principles.’ The lack of identification of other possible implications of the Treaty, in the context of the Act, is interesting. We consider this aspect in much more detail in the section on economic development. The point we wish to make here is that, in our view the principle of partnership can indeed be deduced from the Treaty, but its application cannot be divorced from the particular provisions of the Treaty and declared to be binding on a universal basis. The Crown is perfectly free to extend the concept of a special and unique partnership with the Maori people into areas not covered by the Treaty if it wishes but we do not consider that it is legally or morally bound to do so in terms of the Treaty.

Mr Justice Cooke stated at one point that ‘The Treaty signified a partnership between races.’ From one viewpoint this is true if the Crown, in 1840, is seen as the embodiment of the British people. However, his other references, and those of the other judges, to the Treaty partners being the Crown and the Maori people seem to be more precise in a legal sense. The distinction is not pedantic since, if the partnership were truly between peoples, there could be objections to the Crown using tax-payer funds (contributed by Maori as well as by non-Maori persons) to compensate for breaches of the Treaty. There would also be the practical difficulty of who would speak for the Pakeha partner. This could open up very basic questions of what would be the most appropriate constitutional arrangements to reflect a partnership between races. In this paper we see the Treaty as a partnership between its signatories (the Crown and certain Maori chiefs) qualified by the long-standing convention that the rights and duties accepted by those chiefs apply to Maoridom in general. This convention means for example, that the tribes of the South Island can look to the Treaty for protection even although the Treaty was only signed by chiefs of the North Island, and only some of those before Captain Hobson proclaimed British sovereignty over New Zealand.

Land Claims

In considering the implications of the Treaty, most interest has focused on the land claims submitted to the Waitangi Tribunal in view of their questioning of the moral basis of existing property rights over large areas of both the North and South Islands. As at the end of March 1787, there were 88 claims lodged with the Tribunal involving a large number of tribal groups. Most of these claims involve land. The claims are based on a variety of grievances including unfair confiscation for alleged rebellion; failure to honour in full contracts for the purchase of land; and failure to return land that may have been confiscated for a particular purpose once that purpose no longer applied.

A survey of historical research suggests that the most substantial breaches of the Treaty arising from unjustified confiscations may have occurred in parts of Taranaki, Waikato and perhaps the Tauranga/Bay of Plenty areas in the aftermath of the Land Wars of the 1860s. We have examined the report of the 1728 Royal Commission which described as 'unjust and unholy' the war arising from the Waitara Purchase in Taranaki. We are also aware that historical research has challenged the assumption that the Tainui were in a state of rebellion when Sir George Grey ordered the invasion of the Waikato. In the light of this evidence, it could be debated whether the Tauranga/Bay of Plenty confiscations were fully justified as there seems to have been a spill-over effect between the Waikato/Taranaki wars and the outbreak of fighting at Tauranga, Whakatane and elsewhere. These claims were examined by the 1728 Royal Commission referred to above and eventually a settlement was reached in 1748, with the establishment of the Tainui and Taranaki Maori Trust Boards. Much later, an agreement was reached on the Tauranga confiscations. In terms of acceptability to the claimants these settlements have not stood the test of time. Inflation has severely eroded the real value of annual payments to these two Trust Boards (\$15,000) and, as stated above, historical research has questioned assumptions of tribal culpability. The extension of the jurisdiction of the Waitangi Tribunal to cover alleged breaches of the Treaty since 1840 has effectively provided the opportunity to reopen the findings of the 1728 Royal Commission, as well as to consider claims that have not previously had a hearing including the Ngai Tahu claim to large tracts of the South Island.

The number of these claims, and the extremely large scale of some of them, makes it essential that there is as widespread a consensus as possible that the objectives of the exercise are valid and that any adverse reactions are minimised. Such reactions, whether based on disappointment or a feeling that the Government may have gone too far, could have serious consequences for social and political stability. We understand that the basic objective is to review grievances with the intention of acknowledging breaches where it is found that these occurred and making appropriate redress. This sounds simple and straightforward. However, there are several pathways that could be followed in pursuing this objective. The recent finding of the Waitangi Tribunal on the Waiheke claim, released in June this year, has illustrated the basic choices that are available. It is very desirable that decisions are made in respect of these choices in the near future so that a consistent policy is followed with the least possible risk of a major change of direction at a later stage in the process.

The first possible approach is to deal with land claims in a relatively strict legal way, focusing on the actual words of the Treaty and calculating compensation as if the Treaty were an enforceable contract like any other. This would suggest that valid claims would only arise where it could be demonstrated that the alienation

of land was not on a voluntary basis. If land were sold for what in retrospect might seem a pittance, no valid claim would arise provided the sale had been unpressured and with the consent of the rightful owners. If a claim were successful, a calculation would be made of the value of the land at the time of alienation. Although the 1728 Royal Commission stated that it would be 'difficult, if not impossible', to calculate land values at the time of the 1860s confiscations, we understand that estimates, however rough, can be arrived at as voluntary transactions in land were continually occurring after 1840. The amount of the loss could then be updated by any of several indices, such as movements in land values or interest rates applying to long-term Government stock. There are overseas precedents for this kind of calculation that can be drawn on. The result would be a sum of compensation that the Government might or might not accept. The sums arrived at by such methods can be very considerable due to the effect of compounding interest or inflation in land values over periods of over 100 years even when very modest estimates of original land value are made.

There are several criticisms that might be made of the outcomes likely to be produced by such an approach. First, it assumes that voluntary sales by owners legally recognised as such did not involve breaches of the principles of the Treaty. This could be seen as ignoring the fact that the colonial government, in the 1860s, unilaterally changed the ground rules on which the ownership of Maori land had been based in 1840. There seems to be evidence that these changes were intended to undermine tribal unity which, in the late 1850s, had often been expressed in opposition to further alienations, and to facilitate unrestricted land sales. The nature of these changes (the partitioning of land, the individualisation of title and the disinheritance of many non-resident tribal members) and their effects are outlined in some detail in the finding on the Waiheke claim. In brief, they seem to have created a totally new class of legal owners which had not existed in 1840 when the Crown had guaranteed '*to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exercise of their property rights.* Demoralisation resulting from the Land Wars, the destruction of tribal unity in the ownership of property, and the fact that effective legal structures to utilise land where ownership was fragmented were only developed many years later in the 1720s and 1730s all seem to have contributed to a steady stream of sales.

Second, it may be argued that the chiefs assembled at Waitangi only agreed to sign the Treaty on the understanding that the Crown had an intention to prevent a situation in which the tribes would lose those lands essential for their maintenance and well-being. There seems to be historical evidence that the Imperial Government in London was aware that unrestricted private sales would rapidly reduce the tribes to a landless state. It was for this reason amongst others that the Crown insisted on the right of 'pre-emption' under Article II of the Treaty under

which it could control the amount and pace of land sales while still preserving substantial reserves for the Maori population. Assurances given by Captain Hobson that the legality of previous private sales would be reviewed and that the Maori people could rely on the good faith of Her Majesty's Government seem to have been crucial in swinging the debate at Waitangi. As late as 1858, the Imperial Government rejected a proposal to abolish pre-emption on the grounds that such action would be a breach of the Treaty. However, the abolition of pre-emption was one of the first acts of the colonial government after it assumed responsibility for Maori affairs in 1862.

Closely related to the question of the wider intentions of the Crown is that of whether 'bad bargains' as such could be considered to involve breaches of the Treaty. For example, the finding on the Waiheke claim notes that in 1842 the Crown purchased a large area of land for the new capital at Auckland for \$200, and, less than a year later, resold this land to settlers for 8,000 times the purchase price. The question is whether such dealings were consistent with the honour of the Crown and the 'most fervent' assurances given by Captain Hobson of Waitangi that the chiefs 'might rely implicitly-on the good faith of Her Majesty's Government in the transaction'. There does not seem to be a simple answer and the finding on the Waiheke claim suggests that several factors would need to be taken into account, including the financial pressures on an Imperial Government that had world-wide responsibilities. This implies that it may have been reasonable for the Crown to help fund the expenses of its new colony through profits on land sales. Also, it seems to have been part of the original colonising strategy that the new settlers would set about improving the property they acquired and thereby improve the value of those holdings that would be reserved for the maintenance, comfort and well-being of the Maori population. The implication of the above is that 'bad bargains' may be accepted as honourable if seen as part of a wider strategy to prevent the tribes becoming landless as well as to promote European settlement. The failure of the colonial government to implement that wider strategy in full may therefore be alleged to call into question the propriety of some of the land dealings of the Crown.

The above arguments have been greatly telescoped for the sake of brevity. They imply that the Tribunal may consider that even apparently voluntary sales may have involved breaches of the principles of the Treaty and been inconsistent with the honour of the Crown as a partner obliged to act in good faith. They also suggest that a broader approach less focused on land values and calculations of interest rates may be more equitable and perhaps more affordable. The main recommendation arising from the finding on the Waiheke claim (which involved the Ngati Paoa, a small, scattered and landless tribe is 'that Government consider (and we put the matter no stronger than that) the release of funds to the board of Maori Affairs for the establishment of tribal land endowments having regard to

the opinions expressed in this chapter'. Within the main body of the finding the chairman is more explicit and we quote the following paragraph:

The prospect that reparation may come to depend upon various degrees of wrong must also cause concern. Some tribes it seems may expect to recover handsomely through events that may rank as atrocities. Others perhaps 'loyal' to the Crown in the wars, may expect little if anything at all. Yet, in the same historic process, tribes in both categories have somehow lost a reasonable land base. It is difficult to see that a tortious approach serves best to provide equity amongst them, or that it can ever deal adequately with those consequences of social dislocation that call for an assessment of the particular needs of each. There is an alternative approach. To compensate a tort is only one way of dealing with a current problem. Another is to move beyond guilt and ask what can be done now and in the future to rebuild the tribes and furnish those needing it with the land endowments necessary for their own tribal programmes. That approach seems more in keeping with the spirit of the Treaty and with those founding tenets that did not see the loss of tribal identity as a necessary consequence of European settlement. It releases the Treaty to a modern world, where it begs to be reaffirmed, and unshackles it from the ghosts of an uncertain past. The Governments of both the United States of America and Australia have instituted tribal development and 'buy-back' policies to much the same end. Their examples merit study. I would commend to Government therefore that it also promotes policies to secure to the tribes, over a period of time, a reasonable land base in tribal ownership. In this way, the Treaty may yet be given new life and the honour of the Crown restored, not upon the assessment of past wrong, but upon the Crown's own concern to promote the survival of the tribes in the years ahead.

We have sought to clarify the main elements of the chairman's proposal and the extent to which it involves a significant departure from what we understand to be current policy or assumptions in respect of land claims. In some areas this involves a degree of interpretation so the following statements should be regarded as somewhat tentative unless they are supported by explicit references in the finding on the Waiheke claim:

- there would be no change in the nature of the beneficiaries, being tribal groups rather individuals. (This aspect is discussed more fully following);
- there would continue to be a link between current Government policy and the existence of verified grievances. However, as the imposed individualisation of title from the 1860s on may be seen as a breach of the principles of the Treaty, it is possible that virtually all tribes might be able to point to at least some verifiable grievances, and not just those that were the victims of 'obvious' injustices;
- accordingly, virtually all tribes might be able to construct some form of claim for compensation;

- this compensation might be a long time in coming given the backlog that currently exists, but many of the tribes, especially those which are landless, have pressing current needs;
- the Government does not necessarily need to wait until the Tribunal makes recommendations before it introduces a policy to meet some of those needs. Such action, in advance of particular findings, might have a positive impact on relations between the Crown and tribal claimants;
- the scale of compensation payments through the Tribunal mechanism would be less than would otherwise be the case if a general 'buy-back' policy could be pointed to, and there might be more reasonable expectations of what could be delivered by the total process, bearing in mind what the taxpayer and the economy can afford.

The immediate suggestion from the Tribunal is that the Government study the concept, including a look at overseas schemes which are said to be similar in nature. If the Government were to prefer to await the outcome of particular findings before proceeding to any payments or asset transfers, it would seem that some of the chairman's concerns might be met if the process of redress were to be speeded up. This would enable payments to be made sooner rather than later to successful claimants and these could be used for, or take the form of, the buy-back of assets if such action is desired by the tribes concerned. (This aspect is discussed more fully later.) The net effect of such a policy may not be markedly different from that suggested by the chairman if it is recognised that such general policy action as the forced individualisation of title could be seen as a breach of guarantees extended to tribes. In any event, we consider that the Government would always need to bear in mind what the economy could afford in deciding on levels of compensation. Such payments could of course 'be spread over several years so as to even out some of the possible fiscal 'hump'.

Whatever pathway is followed the question arises whether particular compensation payments, perhaps supplemented by general buy-back programmes will achieve a final settlement of land claims, or whether residual grievances are likely to remain and be the subject of further claims by subsequent generations. As a general principle it may be assumed that the greater the generosity of the Government, the greater the likelihood of claims being settled once and for all. On the other hand, the greater the generosity the greater the fiscal cost or the income foregone from the use of assets. It would be surprising if any settlement that might realistically be expected would extinguish all sense of grievance. What may be hoped for is that the level of settlements be a sufficient indicator of the sincerity and good intentions of the Government to satisfy most Maori and non—Maori opinion that justice had been done in a reasonable way. Furthermore, if appropriate policies that recognise the need to accommodate a Maori dimension in many spheres of activity are put in place, there may be a steady reduction in

any sense of alienation or exclusion from the wider flow of national life. Such sentiments have helped to focus attention on historic grievances, although many other factors have also played a part. However, there can be no guarantee that apparently 'settled' claims will not resurface at some future time.

In the rest of this section on land claims, we consider the form of compensation that might be appropriate if a claim were upheld. First, such payments tend to be made on a tribal basis. This reflects the basic nature of the property rights that were lost when the alleged breaches of the Treaty took place. As has been previously stated, the guarantees extended by the Treaty recognised the tribal basis of Maori land ownership. Accordingly, tribes can claim, in terms of the Treaty, to be the holders of certain rights. In some cases payment to the tribe as a whole may also reflect the fact that it is often impossible to determine, after the passing of so many years, which particular whanau (families) or hapu (sub-tribes) may have been the main losers when confiscations of tribal land occurred. The precise recipient of payment in each case (iwi or hapu) will depend on the issue and evidence, and the Tribunal can be expected to offer guidance on a case by case basis.

Second, the form of any compensation is likely to be influenced by the economic objectives that seem to be held, at least in part, by many of the claimants. The Land Wars destroyed the independent military base of the tribes. The confiscations that followed went a long way to destroy the independent economic base of some tribes and subsequent land sales continued the process on a national basis. As a result, most tribes exist today as social support networks. They retain an important spiritual dimension but few are significant economic units. Accordingly, the objectives of many claimants seem to be two-fold: to redress the injury done to tribal mana when an injustice occurred and to help re-establish a tribal economic base. Such a base, if achieved, might be a focus for tribal identification and self-esteem even for those tribal members who would remain employed outside of the tribal economic frame-work.

In addition, claimants may have specific objectives that relate to particular assets or features of the natural landscape that are of major cultural or spiritual importance to particular tribes. In these instances, monetary compensation would probably be inappropriate unless as part of some procedure for transferring ownership or arranging an appropriate degree of control. Places of this nature could include the traditional landing places of the Great Canoes, certain burial grounds and topographical features such as Mount Hikurangi in the East Cape region.

The possibility of the Crown using compulsory powers of acquisition in respect of sacred sites that may have been unfairly alienated and are now in private hands, should be seriously considered, as has already been suggested by the Waitangi Tribunal and approved in principle by the Government. Any such

should always be borne by the central government. For example, there may be situations -as where sewerage schemes may require modification to incorporate Maori values-where at least some proportion of the cost should fall on local authorities. Such situations would need to be looked at on a case-by-case basis.

In any event, it would generally be desirable to minimise the impact of compensation arrangements on third parties unless this is unavoidable as it involves disturbance and a further layer of complication. Many of the claimants seem to recognise this desirability, and hence the strength of their interest in the assets of the Crown.

Fishery Claims

Similar issues arise in respect of claims to particular stretches of water. Historically the Maori people have claimed communal ownership rights over water comparable to those over land. The right to fish those waters was allocated between hapu and whanau. Fishing was carried out for personal consumption, hospitality and trade before 1840. The Treaty is explicit in **recognising** Maori ownership of their fisheries and attaches no limitation to the exercise of fishing rights. Accordingly, the accommodation of Maori perspectives on fishing involves several basic issues such as the definition and extent of traditional fisheries, the degree of ownership and allowable utilisation associated with them, and the implications of an 'area based' approach to fishing rights for the recently introduced system of Individual Transferable Quotas.

Modern technology has revolutionised fishing in harbours, estuaries, river mouths and coastal waters where Maori have been actively fishing for centuries. It has also made possible the fishing of deep-water areas that Maori navigators may have occasionally visited or traversed but which would not have been significantly exploited, if at all, before 1840. It may be acknowledged that if colonisation had not occurred, the exploitation of deep water areas would have taken place as a natural extension of Maori fishing activities. However, it remains a debatable proposition to suggest that, in terms of the Treaty, the Maori people have a claim to share in royalties received from fishing in areas far from traditional waters. Changes in international law and exclusive economic zone legislation have pushed back the 'economic frontiers' of New Zealand into areas where no rights of this nature existed before. There is a strong case for the benefits of these changes accruing to the nation as a whole.

Another line of approach is that certain inshore waters should be regarded as traditional fisheries within which tribal members, exercising Treaty-based rights, should not be confined to fishing for personal consumption. Maori persons

regarded ownership of water in much the same way as ownership of land. To restrict Treaty-based rights in respect of fisheries to fishing for personal consumption would seem as bizarre to Maori opinion as restricting the use that could be made of Maori land to subsistence purposes and prohibiting any commercial activity. In many respects this approach is more persuasive, as the owners of property rights should generally be able to benefit from and respond to changing technologies and market opportunities within the area where those rights apply. Nevertheless there needs to be a considerable degree of bi-cultural accommodation in respect of fishing as the exclusive Maori ownership of extensive traditional fisheries would be unlikely to be widely accepted even if the case for such ownership may be strong if Article II of the Treaty, with its reference to 'full, exclusive and undisturbed' possession, is taken by itself. The principle of partnership is of crucial importance in understanding and implementing the Treaty and a modification of claims to exclusive fishing rights would seem necessary to ensure that both Maori and non-Maori communities have fair access to the bounty of the sea. The Waitangi Tribunal has already stressed the need for compromise and to minimise potential for conflict between Maori and other fishing interests.

The Treaty is couched in general terms and can be adapted to changing circumstances. The approach recently adopted by the Government has been to emphasise the control and management of stocks of species rather than areas of water as such with a view to avoiding over-fishing and maximising long-term economic benefits. This has involved the introduction of the Individual Transferable Quota (ITQ) system based on estimates of the size of the stock of certain species. If there is sufficient agreement, it should be possible to negotiate Maori fishing rights within this newer framework with the tribes concerned receiving a share of quotas or of net royalties. If quotas are allocated, they would presumably be communal rather than individual. These matters would of course be determined in consultation with the tribes. Any royalties would need to be net of a reasonable share of the costs of administering and enforcing the quota policy, including the cost of scientific research. In general terms, an outcome along these lines would seem a fair recognition of equity concerns within a framework that was as efficient as possible. A 'two-system' approach could involve very major inefficiencies. There would still need to be consideration given to fisheries that remain outside the ITQ system such as shell fish.

The Waitangi Tribunal has commented on fishing in some detail in its findings on the Te Atiawa and Manukau claims. Recommendations for the recognition and protection of Treaty-based rights have been referred to the Law Commission. The Commission is taking into account overseas settlements in respect of indigenous peoples and intends to embark on a process of consultation. A final report is not expected before the end of next year. In the meantime, it would seem

appropriate to have regard to the spirit of the findings of the Tribunal in implementing policy.

Controls on the Use of Land and Water

In looking at land and fishery claims, we have looked at questions of ownership. Controls on the use of land and water involve a different set of questions. Most land in New Zealand is subject to zoning restrictions promulgated under various regional, district and maritime planning schemes. The English language version of the Treaty promises to Maori owners the 'full, exclusive and undisturbed' possession of their lands, forests and fisheries. Full application of the 'undisturbed' principle could make impossible the compulsory acquisition of Maori land. Other legislation restricting the use of that land might also become unenforceable. In such a situation 'islands' of territory might exist within which the Maori owners would be free of zoning restrictions while neighbouring non-Maori owners would be bound by district and other schemes. Such situations may sound extreme but they do exist in parts of the US in respect of Indian reservations.

It must be stressed that the possible implications of the Treaty for controls on the use of land (and also for mineral rights which are discussed in the following section) do not arise in respect of all land owned by Maori. Rather they only arise in respect of that land, generally owned on a communal basis, that was never alienated. Mr Justice Cooke has noted that land of this type comprises about 1.18 million hectares or about 4.5 percent of the total area of New Zealand. The largest blocks of such land are in the East Cape and around Lake Taupo and the centre of the North Island. This stock of land will be increased if successful claims lead to the return of land that may have been unfairly acquired. However, the Treaty would not be applicable to general land owned by Maori people. (For some purposes the definition of ancestral land can include land no longer in Maori ownership but this question is not considered here.)

Bearing in mind the need for partnership and not to infringe unreasonably on the rights of others, we suggest that there would be at least two circumstances in which the acceptability of such a policy-if applied in full-would be questionable:

- i first, where the absence of controls had an unfavourable effect on the ability of non-Maori persons to enjoy their property rights. An extreme example might involve restrictions on programmes involving the public good, such as the right of entry of local and government officials engaged in the control and eradication of animal and exotic plant diseases;

- ii second, where lack of restrictions on Maori land conferred an unfair economic advantage. This might arise where a commercial enterprise could be sited on Maori land but competing enterprises could not operate from nearby non-Maori land. In certain areas there may be a good case for a general relaxation of restrictions in order to encourage economic development and promote employment, but relaxation on an ethnically discriminate basis would probably have an unfavourable impact on social harmony.

However, there would seem to be other important areas where planning restrictions can weigh heavily, and unfairly, on the Maori community in a manner contrary to the spirit of the Treaty and also to a reasonable sense of justice. In many areas of New Zealand there are traditional areas of Maori settlement, often focused on marae or near other centres of communal life. Changes in the wider community around and about the marae have lead in the past to whole areas, including the traditional settlement, being zoned non-residential. In these circumstances existing dwellings pre-dating the rezoning might be accepted but approval for their substantive repair or replacement has sometimes been difficult to obtain. It seems reasonable to accept that proper account be taken in all schemes of the traditional settlement preferences of the Maori people. This would mean a basic right to live on or near a traditional settlement regardless of changing patterns of land-use in the neighbourhood unless relocation becomes totally unavoidable. Also, where compulsory purchases do occur, it might be reasonable to recognise a residual Maori interest in the land concerned. For example, it might satisfy the inrerests of the Crown to enter into long-term leases of land required for public purposes in a way that still recognised ultimate Maori ownership.

The full application of the 'undisturbed' principle could also have major implications for water rights. For example, it might mean that neither the Crown nor any other person would be able to obtain a water right if the Maori people claiming ownership of, or fishery rights over, a particular stretch of inland water objected. In such a situation the Maori owners might effectively veto a scheme, such as an irrigation work where a continuous corridor might be required, although the rest of the community might desire it. However, it is easy to portray an unreasonable situation and use it as an excuse for continuation of the status quo. Historically, the status quo in respect of water rights has been unreasonable in making no legislative provision for Maori values to be included in the criteria to be taken into account. This situation is likely to be corrected in the near future based on wording recommended by the Waitangi Tribunal. A recent High Court decision has also opened the way for the principles of the Treaty to be taken into account in relation to water rights even without specific references in statute.

It will usually be the case that several considerations have to be weighed against each other. This involves an analysis of the costs and benefits of particular

proposals. This approach has been taken in respect of several well-publicised proposals to dispose of sewage by pipeline into the sea or a river. The Waitangi Tribunal has noted that such proposals are potentially offensive to Maori cultural and spiritual values. However, the Tribunal is also conscious of the economic cost of accommodating such perspectives as is evidenced by its discussions on sewage disposal at Rotorua (the Kaituna claim) and the discharge of water from the Waikato River into the Manukau harbour (the Manukau claim). It is clear that an enhanced environmental awareness on the part of many non-Maori persons has made it considerably easier for Maori perspectives to be accommodated. Nevertheless, the net economic costs of alternative sewage disposal schemes have to be considered together with any overall increase in community well-being that might result from bicultural accommodation.

Mineral Rights

Maori culture was neolithic before European contact (although not in 1840). Greenstone was a taonga (treasure) of national importance and the tribes of the Volcanic Plateau would have attached great value to the geothermal pools of the region. Quarries of ochre were useful for colouring. Apart from these resources, such minerals as gold, silver, coal and oil were unknown or unutilised. This raises interesting questions in respect of the ownership of mineral wealth discovered and developed since 1840 since the Maori signatories would not have had such resources in mind when they agreed to a Treaty that guaranteed their property rights. This set of questions has yet to be considered by the Waitangi Tribunal. However, in order to devise some basis for analysing several of the arguments that have been put forward, we have drawn heavily on analogies based on the earlier section on fishing.

The appropriateness of these analogies may be questioned on the grounds that fishing rights would have been of concern to the Maori signatories whereas mineral rights would not. This brings to a head the question of how open-ended are the rights assigned by the Treaty. Whatever may be the most appropriate answer to this question, we consider that there should be a reasonable consistency in interpreting all rights assigned by the Treaty, including those transferred to the Crown as well as those remaining with the Maori people. We consider it reasonable that the right of government, transferred to the Crown, should encompass situations that would never have been envisaged by Lord Normanby, Secretary of State for the Colonies in 1840, and his Cabinet colleagues. However, in order to achieve a fair consistency of approach, this implies that opportunities of land use should not be confined to those that the chiefs at Waitangi would have had in mind.

It was earlier suggested that it would be contrary to the spirit of the Treaty to confine Maori use of traditional fisheries to methods employed in 1840. This would mean that within those fisheries that had not been freely alienated the tribes concerned would have a negotiable claim to take advantage of modern fishing technology. Within the limits of the claim, this new technology could reasonably be used to exploit more effectively resources already known in 1840, or to exploit new resources not known or unused at that time. However, where the Maori owners had freely alienated a fishery, it may reasonably be assumed that the new owners would be the ones who could benefit from new technology. Applying this analogy to minerals would imply that Treaty-based rights could only be argued in respect of resources on land that had never been alienated or that had been unfairly alienated contrary to the Treaty. This would cast doubt on claims that all mineral wealth, unless expressly alienated, remained in Maori ownership even if the land as such had been freely transferred. The discussion is theoretical as we do not know the extent, if any, to which fisheries were actually traded. It is possible that no trades occurred. However, the line of reasoning is not necessarily invalid and does indicate a possible approach to mineral rights.

Another analogy might be possible in respect of trees, which were taonga of great importance in traditional Maori culture. Trees provided weapons, construction materials, tools, household items, a source of firewood and means of transportation on water. When land was sold, it may reasonably be assumed that the vegetation cover went with it, unless special clauses were inserted to protect a residual right of the previous owners. Adopting a similar approach to what lay beneath the soil would imply that, without specific clauses, no special claims could be made where land had been freely alienated.

This would leave the subset of land that is currently owned by the Maori people, and to which any special regime of Treaty-based rights might apply (that is, the 1.18m hectares referred to previously). This probably contains relatively few mineral resources of any commercial significance. However, land that was or may have been unfairly acquired, (through unjustified confiscation or contract of sale that may not have been fully honoured by the purchaser[s]) contains some of the most important mineral wealth in New Zealand. Accordingly, any special regime could have major implications even if it is not extended to areas where land had been freely alienated. Very careful consideration of the issues is therefore required. In the case of both fisheries and minerals the basic problem, as indicated in the earlier section on partnership, is to reconcile the largely unqualified nature of Treaty assurances with different assumptions of what property rights may be held privately and which are reserved to the Crown.

The recognition of rights based on the Treaty has implications not only for the ownership but also for the utilisation of resources. This has been demonstrated by discussion on the mining of natural resources in areas where local tribal opinion

may consider various forms of economic activity to be inappropriate—for example, where burial sites might be disturbed. Different attitudes towards utilisation may also result from different concepts of responsibility. For example, the concept of stewardship for future generations may imply a greater emphasis on the conservation of a resource relative to its immediate exploitation. As stated in the section on water rights, the evolution of environmental/conservation awareness in the non-Maori community ‘has greatly increased the scope for inter-cultural understanding in areas such as these. Also, positive examples of bicultural cooperation can be pointed to, as in the case of some mining agreements. However, differences of outlook and emphasis may remain in particular cases and will require careful resolution.

Economic Development

While claims to lands, forests and fisheries have obvious economic implications, the Treaty does not directly address such economic questions as employment, incomes and regional development that are currently of very major concern to Maoridom. The preamble to the Treaty which provides an indication of the intentions of the signatories refers to peace and order but not to prosperity as objectives of the Crown in acquiring law-making powers. From this viewpoint there is nothing in the Treaty to imply that the Crown is committed to maintaining any particular level of prosperity or of gainful employment for Maori persons. It is true that many Maori communities have received a severe economic jolt in recent years. The closure of Whakatu Freezing Works and the transition to the Forestry Corporation are two examples. However, these adverse effects are only being felt to such an extent as the economic base of Maoridom has several major weaknesses that are being exposed by restructuring. These include the underdevelopment of communal assets, a largely unskilled workforce and concentration of employment in certain industries that hitherto have lacked a strictly commercial focus.

Nevertheless, there are several implications of the Treaty relevant to economic policy. They are less direct than the references to peace and order but they do exist. As has been stated earlier a case can be made that in terms of the Treaty, the Crown is pledged to respect the right of Maori persons to be culturally different if they wish to retain their special identity as Maori. Affinity with a particular tribal district is seen by many Maori as inextricably bound up with identity as Maori. As a result of these special affinities the process of adjustment to corporatisation and wider economic and social trends may be more complex in the case of particular Maori tribal groups than for non-Maori communities.

There has of course been a massive migration of Maori persons from rural to urban areas since the Second World War, this being a response to greater employment and other opportunities outside traditional tribal districts. In other words, Maoridom has certainly demonstrated very considerable mobility in the past. However, there is currently a much greater awareness of the need to preserve Maori identity and of the cultural and other losses that have been partly associated with urbanisation. This has even taken the form, reinforced by the emergence of urban unemployment, of reverse migration back to rural areas. Substantial further reductions in employment opportunities in certain areas are posing a very serious dilemma for the Maori groups concerned.

It would not seem possible, on the basis of current economic trends and relatively high Maori population growth, for certain of the traditional tribal districts to be able to support more than a relatively modest proportion of total tribal membership in economically sustainable employment. Accordingly, a pattern of wholesale reverse migration is thought unlikely given the opportunities still existing in urban areas. In some areas, the most that could probably be hoped for is the economic anchoring of a sufficient tribal presence in areas of cultural importance for the tribal membership as a whole, both urban and rural, to have greater collective confidence in adjusting to a rapidly changing environment. In some cases this may mean accepting a trade-off between material standards of living and the preservation of cultural and spiritual values. This process could be encouraged by an award system that had local or regional variations. This might enable people to have a choice between accepting a marginally lower wage and staying within their preferred geographical area, or moving elsewhere in search of higher levels of remuneration. The absence of such an award system discourages the development of industry in certain areas and so denies people the opportunity to choose. In any event, it should be recognised that the Government cannot guarantee the existence of commercially viable opportunities in any particular area.

If the economy is to respond to new challenges and opportunities it must be expected that patterns of employment will need to change over time. The decades of European contact before 1840 had brought new commercial opportunities that benefited some areas more than others, especially those able to supply food and timber to visiting vessels and the emerging settlement at Russell. The Treaty made no attempt to set this pattern of commercial advantage in stone. Indeed, the pattern has undergone many changes over the past 150 years and has required many social adjustments for Maori and non-Maori alike. However, even where an attachment to a particular area is regarded as an essential part of cultural identity, we would strongly doubt whether a Treaty partner, acting reasonably and in good faith, would be obliged to guarantee the existence of subsidised employment. In

our view, such an approach would run the risk of moving Crown-Maori relations away from a partnership towards a master-servant relationship.

On the other hand, it is appropriate for the Government to recognise that economic development in New Zealand tends to occur in an environment that may be perceived as mono-cultural, making it correspondingly more difficult for Maori economic initiatives to succeed. There is a perception that Maori projects involving communally-owned assets are 'too difficult' as they may require a different approach to land ownership and utilisation and working with different and unfamiliar kinds of decision making structures. This is often reinforced by an assessment, sometimes based on experience, that such projects are too likely to fail due to lack of business expertise and sound management skills. These perceptions help to explain why substantial Maori assets are relatively under-developed and producing low rates of return notwithstanding widespread acceptance of the call for a much greater degree of Maori economic independence.

Some would argue that the Government would have an obligation, in terms of the Treaty of Waitangi, to do something to improve this situation. In view of our earlier comments on economic development and the Treaty, we are doubtful of the extent to which such an obligation would exist. However, the Government is not limited to only doing what it may be obliged to do in terms of the Treaty. If the Government considers, in any particular situation, that the benefits of a certain type of intervention would outweigh any costs associated with it, then there is a case for that policy being implemented as part of the Government's basic interest in increasing national and community welfare whether or not a Treaty obligation can be pointed to. There are many reasons why the relative under-development of Maori resources, including people as well as land, is of concern to the Government. For example, there have been several attempts to quantify the fiscal cost of Maori over-dependence on the state. Measurements may vary but the cost is likely to be very considerable once account is taken of welfare benefits and the costs of institutional care or custody. Other costs may be immeasurable, such as group and individual demoralisation, resentment, anger and fear, but their impact on the quality of life is perhaps the most profound of all.

The Government would have a variety of possible responses. Looking at the economic development sphere, one response would be to help demonstrate that Maori economic initiatives can succeed on their own merits and that there are good commercial opportunities for financial institutions willing to expand into this hitherto under-developed market. A crucial part of this response would involve building up Maori expertise in the packaging and managing of projects while ensuring full exposure to the disciplines of market interest rates. The Maori Development Corporation could play a spear-heading role in this process. It is definitely not suggested that Maori economic units should endeavour to maximise

profits in a way that may not suit their needs or preferences. Achieving a satisfactory lifestyle is far more important for individual and group fulfilment than pursuing any particular set of material goals. However, there does seem to be significant scope for improving the rate of return on Maori enterprises if a greater degree of economic independence were regarded as a desirable element of a satisfactory lifestyle.

If some trust boards receive significant transfers of assets or cash payments as a result of successful land claims or a more general policy of building up tribal assets it will become even more important that they possess or have access to suitable business skills and expertise in order to take the best advantage of the increase in communal wealth. It is also critical that there be a general improvement in the level of skills available to the Maori workforce, especially that large proportion that is young and prone to unemployment. It is expected that Maori Access will play a large part in achieving this goal by extending assistance to tribal, regional and other identifiably Maori providers of approved training programmes.

Consultation

This subject has already been touched on in the section on partnership. As has been indicated earlier, it is appropriate for partners to help each other in the preservation of their respective rights, and to ensure that the exercise of one set of rights does not unreasonably infringe on another. This implies a strong, though not unqualified, need for consultation. The appointment of Manukau Guardians, as recommended by the Waitangi Tribunal to provide a Maori overview of the harbour and its environments, is a good example of how consultation can be built into decision making processes. There is always a basic difficulty in making arrangements for minority representation in decision making processes: how to ensure that the minority are not continually over-ruled by majority opinion. The terms of reference of relevant boards and committees could outline an agreed process of consultation on issues of importance to Maori communities and also provide, where appropriate, that the boards and committees must have regard to the viewpoints expressed. This is the approach proposed for the administration of Whanganui National Park. It seems to fall mid-way between a requirement merely to consult and an obligation to automatically endorse the results of consultation. There might be procedures for reviewing decisions where it is felt that due regard had not been shown to the Maori viewpoint.

Consultation is not necessarily an easy process. In many areas it will be clear with whom consultation should occur. On local issues it will often be the local

tribe or some smaller kinship group. In others, it may not be obvious. Consultation can be a very lengthy and time-consuming process. On many issues, especially where services are to be delivered on a tribal basis, there is no substitute for a full round of consultation. However, on other issues of national importance a more rapid response may be essential for the expeditious government of the country. For example, in respect of the SOE case, the Court of Appeal indicated that wide-ranging consultation would be inappropriate and that the New Zealand Maori Council should be the body involved in discussions with the Government and the Court over the transfer of assets.

In considering consultation it must be remembered that Maoridom encompasses a very broad range of opinion and urbanisation, especially in Auckland and to a lesser extent in Wellington, has strained the effective operation of traditional tribal networks. For practical reasons, regional groupings have emerged in these areas to exercise some of the functions that elsewhere in New Zealand are carried out by tribally-based structures, such as the administration of several programmes introduced by the Government. At the same time, these regional authorities would probably have no ambition to replace the tribe as the basic focus of identification for those many Maori persons who retain strong tribal attachments.

The Government should not endeavour to impose its own preferred organisational structures on Maoridom. Rather it should be willing to work with whatever organisations might be preferred by any significant group of Maori persons provided certain basic requirements of trust and mutual respect exist. This means a renunciation of any reluctance of New Zealand Governments to consult with, and involve in decision making, tribal authorities. It also means that the Government should retain flexibility in endeavouring to meet the needs of those Maori persons who may be unwilling to work within, or be inadequately served by, traditional tribal structures.

Social Policy

The Treaty also has considerable implications for social policy. These do not only depend on interpreting "taonga" in its universal sense to embrace all things highly treasured, including cultural assets and social customs, although a case can be made in these terms. Of more obvious relevance—at least in the English version—is the provision of Article III whereby the Queen of England extended to the Maori people all the rights and privileges of British subjects. These rights and privileges have changed enormously over the past 150 years. For example, most British subjects did not have the right to vote in 1840. Nor, looking at the social sphere, did they have those rights to free education, public health treatment

and the receipt of welfare benefits to which we have become accustomed today. Accordingly, Article III does not give rights and privileges to the Maori people that are not enjoyed by other New Zealand citizens (or subjects of the Crown). What it does do, in our opinion, is give a positive assurance that Maori people should not, in effect, be denied or restricted in the enjoyment of these rights and privileges because the nature of service delivery does not suit their cultural preferences.

This subject is extremely important but we will only give two brief examples in this section as the need to accommodate cultural diversity has already been discussed in Chapter 3. Quite a few Maori persons in country areas live on communally owned land. Such persons have often had considerable difficulty in raising loans for house construction or repair as lenders have usually insisted on security based on individual title. The Housing Corporation and the Department of Maori Affairs are now exploring and introducing on a pilot basis the use of alternative securities that do not require the partitioning of communal land. Also, policies regarding the care of children 'at risk' have usually focused on the ability or willingness of the parents to cope with particular situations. If parents could or would not cope, the alternative was often institutional care. The Maatua Whangai programme of the Department of Social Welfare offers a third choice, that of placing children 'at risk' within extended family networks. This recognises the Maori view that ultimate responsibility for bringing up children rests with a wider circle of kin than the immediate parents.

The responsibilities of the Government under Article III can be seen as extending beyond ensuring that its own services are made available in a culturally appropriate manner. An example is legislation to prohibit racial and other forms of discrimination wherever these might occur. An area of particular difficulty in this regard is discrimination in the rental housing market which has been the subject of recent study. This has illustrated the extent to which discrimination can take increasingly subtle forms to escape detection while still achieving its basic objective. The basic conclusion is that the complete elimination of discrimination will depend on a further evolution of societal attitudes as there are limits to what can be achieved by legislative fiat. Nevertheless, it very much behoves the Government to continue to set a good example and improve its own performance in meeting cultural needs while encouraging other organisations and individuals to follow suit.

Language

Language is frequently described as the basis of culture. The Waitangi Tribunal has stated that language is one of the most important of the 'taonga' or ancestral treasures guaranteed by the Crown. As part of this guarantee, the Tribunal suggests that all Maori persons wishing to learn the language should have the opportunity to do so, in a culturally appropriate manner, at all levels in the educational system. This guarantee is not directly relevant to the non-Maori community. After all, the principle of compulsion is alien to the Treaty, whether this involves the unjustified confiscation of Maori lands or an insistence that persons unwilling to do so should learn and use the Maori language. However, there may be a national financial and economic cost in a greater degree of official bilingualism and this could affect the general tax-payer. These costs could be considerable if such steps were taken as requiring the language to be used in all public documents. As discussed in the section on water rights and the utilisation of mineral resources it would be a matter of weighing the economic cost against the social benefits. These benefits can be considerable where there is widespread demand for bilingualism on the part of a substantial minority.

Much depends on the strength and extent of this demand which is likely to change over time. In the light of such changes, rights to use the language that may seem a reasonable maximum at one point in time, may turn out to be half-way houses towards more extensive practical recognition. In brief, provisions that may seem modest from a Maori perspective at the present time, should not be seen as fixed and foreclosing greater recognition in response to future trends. As the same time the desirability of non-compulsion in learning and use cannot be stressed too strongly. The purposes of language and cultural instruction is to broaden understanding and promote social harmony. If the process is forced, this purpose may be defeated.

The Rule of Law

The Treaty involved the surrender of practices that had played a major role in traditional Maori culture but which were inconsistent with the transfer of sovereign law-making powers and the extension to all the Maori people of the rights and privileges of British subjects. For example, the right to make war and enslave opponents was abandoned as was the seeking of revenge or *utu*. If any intention is explicit in the preamble to the Treaty it is the intention of the Crown to enforce law and order and avoid 'the evil consequences which must result from the absence of the necessary Laws and Institutions.' There seems no reason to doubt

that the Maori signatories understood this basic intention. It is also beyond doubt that the ending of tribal wars that had been particularly destructive in the 1820s (although the 1830s was a quieter period) brought very major benefits. However, not all the results of the enforcement of British law seem to have been beneficial to the Maori people.

A basic premise of many European approaches to law is that there should be one law for everyone. However, difficulties arise in deciding whose law should be the one law and who should make the laws. An example of the former difficulty that has often been referred to is the imposed individualisation of Maori land so that one system of land ownership might prevail. Historians have suggested that this policy has usually been intended either to hasten the sale of Maori land to European colonisers or to force an 'entrepreneurial' attitude upon Maori owners and so promote 'positive' cultural evolution along European lines. The results of this policy are alleged to include the impoverishment of many of the tribes, the creation of obstacles to the effective utilisation of what Maori land remains and the erosion of the cultural base of Maoridom. An example of the second difficulty has already been referred to. A reading of the 1975 report of the Commission of Inquiry into Maori Reserved Lands suggests that in deciding the statutory framework that should apply to such lands, successive parliaments, in extending perpetual rights of renewal, acted more in the interests of European settlers than of the Maori beneficial owners.

Opposition to a bicultural legal system is often based on a legitimate concern that double standards not result in flagrant abuses of justice. For example, in Medieval Europe, church courts tended to be more lenient than civil courts in many areas of justice and anyone who could demonstrate why he or she should be tried by the church could expect a more favourable outcome. However, provided there is comparability in the perceived severity of punishment it may be expected that the greater involvement of the Maori people in the judicial process will increase the extent to which justice is done and is seen to be done by all sectors of the community. The remoteness of the judicial process from the Maori people has been seen as an important factor in the alienation of Maori youth and their frequent disregard of the law.

In brief, there is no question that, in terms of the Treaty, the function of justice and responsibility for the maintenance of law and order rest with the Crown. However, this does not mean that the Crown has a Treaty-given right to impose a system of law that is consistently alien to Maori practices and beliefs. Discrimination is needed to distinguish between those areas of the law where one system should prevail, and those (as in the ownership of land) where dual systems might provide a fairer response to different cultural needs. Likewise, a greater degree of biculturalism in the administration of the law could bring justice closer to the

Maori community and increase the chances of offenders accepting the outcome of the judicial process.

Conclusion

The main points made in the course of this paper are:

- the Treaty involves a special and unique partnership but only in respect of areas actually covered by the Treaty. Where the Treaty is silent, as in respect of employment, incomes and economic development, there would be no special claim to partnership or power-sharing other than as provided under Article III (which is concerned with the rights and privileges of all British subjects);
- the Government should not be confined to powers and responsibilities of government that existed in 1840 but should be free to respond to changing economic and social needs. This also implies that rights to land and water guaranteed by the Treaty to the tribes should not be confined to the forms of usage that existed in 1840. Accordingly the Treaty has a role in respect of modern-day developments in fishing and mining;
the partnership in the Treaty is between the Crown and the Maori people, not between the Pakeha and the Maori peoples. If the later approach is followed there could be major constitutional implications and it would be difficult to justify the use of general taxpayer funds to redress grievances;
- the Treaty assigned government to the Crown. The right to tax is an integral aspect of government. Accordingly, in terms of the Treaty, taxation revenue is a resource wholly owned by the Crown and the other partner has no rights to use such funds without accounting for any such use;
- in respect of every Treaty issue there must be regard to what is reasonable and what would be consistent with good faith. In determining what is reasonable account would need to be taken of the state of the national economy, where appropriate, and the reasonable rights of other persons. Good faith is required of both parties in carrying out their obligations;
- racial and/or cultural discrimination would be a breach of the Treaty. The Government must ensure that its services are provided in a culturally appropriate manner and should encourage the rest of the community to follow suit.

The Treaty has the potential to affect many areas of life in New Zealand. Some implications are clear and are likely to have continuing force regardless of changing social and intellectual climates. Many others are less certain and the extent to which they may be acknowledged will depend on the evolution of perceptions and the acceptability of ideas at particular times. What seems to be required is for each generation to reinterpret its meaning and apply its spirit to the ever changing circumstances of individual and national life. This paper is put forward as a contribution to the on-going process of discussion and evaluation. At the same time, it also addresses several matters that will require early consideration by the Government, especially the general direction of policy in respect to land claims and whether consideration should be given to a possible policy to strengthen the land base of the various tribes as recommended by the Waitangi Tribunal.

APPENDIX I

Treaty of Waitangi: English Version

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

Article The First

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

Article The Second

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

Article The Third

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

William Hobson Lieutenant Governor

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

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

{Here follow signatures, dates, etc.)

APPENDIX II

Treaty of Waitangi: Maori Version

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

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

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

Ko te Tuatahi

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

Ko te Tuarua

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

Ko te Tuatoru

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

(Signed) William Hobson

Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i

te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

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

Ko nga Rangatira o te wakaminenga.

APPENDIX III

Treaty of Waitangi: Translation of the Maori Text into English (by Professor Kawharu)

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

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

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

The First

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

The Second

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

The Third

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

Signed William Hobson
Consul and Lieutenant Governor

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

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

The Chiefs of the Confederation