

LAW, LAND, AND MAORI ISSUES

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The purpose of this article is to assess and comment upon past legislative provisions and more recent enactments and case decisions affecting the Maori people, especially in relation to the promises made in the context of the Treaty of Waitangi 1840. Considering the potential enormity of the task involved, the article will deal only superficially with the earlier legislative provisions, and will merely endeavour to identify the trends and consequences of recent developments.

I. THE COLONIAL PERIOD 1840-1960 — SEPARATE BUT EQUAL?

In relation to Maori land, much has been written about the purpose of the early Native Lands Act, 1862-1909, and the declared or implicit legislative policies, that the Acts were intended to facilitate the dealing with Maori land either between Maori people, or more probably by alienation to the European settlers.¹ In partial justification of the later Acts, the alienations to persons other than the Crown were subject to approval by the Native Land Courts or Boards, which were intended to ensure that an adequate consideration was paid and no Maori would be left "landless".² The fairness or unfairness of sales, approved by a majority of owners or shareholders, is a matter which will continue to be the subject of enquiries, especially in relation to sales to the Crown which were not subject to Court confirmation. The justice of the land confiscations and the Crown acquisitions, are all areas now within the jurisdiction of the Waitangi Tribunal, with the potential for reparation.³

In other areas of law, especially the control of Maori settlements and criminal justice, it is noteworthy that a benign "separate but equal" approach prevailed during the colonial period. For example, under the Maori Council Act 1900, the preamble to the Act refers to the expressed desire to control Maori settlements and then states "whereas it would conduce to the higher civilisation

¹ I.H. Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (Clarendon, 1977); D.V. Williams, *The Use of Law in the Process of Colonisation*. Ph.D. thesis, U. Dar-es-Salaam, 1983, 263-324 (Native Land Courts); P.G. McHugh, *The Fragmentation of Maori Land* (L.R.F., 1980); P.G. McHugh, "Aboriginal Title in New Zealand Courts" (1984) 2 *Canta. LR* 233; F. Hackshaw, *The Recognition of Native Customary Rights at Common Law*, thesis, U. of Ak. 1984; G. Asher & D. Naulls, *Maori Land* (N.Z. Planning Council, 1987), at 29-38.

² Native Lands Act 1909, ss 372, 373 (private sales at Government valuation and Court protection from 'landless' status). cf The Native Lands Act 1862, declaration in preamble of Crown obligations under the Treaty of Waitangi to regulate land dealing; s.2 recognises Native customary title, but the Act contemplates private sales where a certificate of title has been issued. The Native Lands Act 1865 establishes the Native Land Court. The Native Rights Act 1865, s.3 declares Court jurisdiction over the Maori people and title to land held under ancient Maori custom and usage is to be recognised. See also Native Land Act 1873, 1880; Native Land Court Act 1886, 1894, cf N. Smith, *Maori Land Law* (Reed 1960), 710, one purpose "to facilitate dealings with Maori lands and the peaceful settlement of the country" — "grave abuses resulted". . .

³ Treaty of Waitangi Act 1975, s.6 (as amended 1985). For critical accounts, see Smith, *supra* n.2 at 9, Kawharu, *supra*, n.1, at 15 (Court a veritable engine of destruction); Williams, *supra*, n.1, 263-324 (systematic acquisition of Maori land by colonial manipulation).

and contentment of the Maoris themselves if they were authorised and encouraged in such laudable desires". Consequently Maori Councils were established with power to make local bylaws to control building standards, disorderly behaviour, proceedings of tohungas, fisheries, and other matters, including "the sales within the kaingas of goods by Indian, Assyrian, and other hawkers".⁴

Concerning the identification of the Maori, in the Juries Act 1908 the definition of "Maori" refers to persons of the "aboriginal race of New Zealand", extends the definition to the "Polynesian, Melanesian, or Australasian races", and incorporates persons designated "half-castes", provided that person is living "as a member of some Maori tribe or community".⁵ The significance of this categorisation, is to allow for an all Maori jury in a criminal case involving Maori offending against another Maori, with like provision for civil cases. Where a civil case involves one Maori against a non-Maori, a mixed jury of races may be allowed, but no equivalent provision applied to criminal charges involving non-Maori people. The provisions for a Maori jury were not repealed until 1962.⁶

In a study of reification of language, the terminology "aboriginal race", "native" and "half-castes", raises different images according to time and place.⁷ Clearly today, some of the terms have a pejorative or demeaning inference, yet it is of note that two of the terms found in the Education Act 1914, establishing "native schools" for the attendance of Maori children, still survive in the Education Act 1964. Namely, the definition of "Maori" continues to refer to a person belonging to "the aboriginal race of New Zealand: and includes a half-caste and a person intermediate in blood between half-castes and a person of pure descent from that race".⁸ This definition appears to have been over-looked in the general repeal or replacement of similar wording instituted in 1974. The provision for separate Maori schools remains under the Education Act, the justification now presumably having been translated from the original purposes to that of affirmative action for the Maori people.⁹

Concerning housing, the Native Housing Act 1935 (Native amended to read Maori in 1947), conferred on the Maori Land Board a basic objective to provide funding of housing for the Maori people. The 1935 definition of a Native (Maori), heralded the broader view of a Maori identity, namely "a

⁴ Maori Councils Act 1900, s.16 — the bylaw empowering section can be assumed to accurately reflect the most urgent social needs seen by Parliament at the time. Cf M.King, *Maori* (Heinemann, 1983), 73-158 for an illustrated account of rural Maori settlements.

⁵ Juries Act 1908, s.2.

⁶ *Ibid*, ss 144-149. Repealed by the Juries Amendment Act 1962, (*infra*, n.19).

⁷ For reification concepts, see B.J.Brown, *Shibboleths of Law: Reification, Plain-English and Popular Legal Symbolism*, (L.R.F., 1987).

⁸ Education Act 1964, s.2. Cf Ranginui Walker, *Nga Tau Tohotohe: Years of Anger*, (Penguin, 1987), 26 "The Pakeha tends to think of a halfcaste as less than . . . halfbreed".(quotation) Cf. Repeal of the half-caste provisions in the Maori Purposes Act 1974, s7; Maori Affairs Amendment Act 1974, s.2 (Labour Government, Hon Matiu Rata, Minister of Maori Affairs), and in the major Electoral Amendment Act 1975, replacing the "European roll" with the General roll, and introducing the roll option for persons with a degree of Maori ancestry (*infra*, n.32).

⁹ *Ibid*, ss.101, 102 scholarships may be awarded to a Maori child or student of "any degree of descent", with preference to those "who by blood or culture can be most closely identified as Maori or Polynesian". Compulsory education for non-Maori children commences in the Education Act 1877, s.10, but any Maori was 'at liberty' to send his children to a public school. The Education Act 1914 extended compulsory school enrolment to all children aged 7-13 years.

person belonging to the aboriginal race of New Zealand, and includes a person descended from a Native (Maori)".¹⁰

The Maori Social and Economic Advancement Act 1945 continued and formalised the District Maori Committee structure, and the provision for Maori wardens, to have jurisdiction in relation to petty offending by Maori people.¹¹

In relation to public works, the Public Works Act 1928, provided in ss 102-103, that "notwithstanding anything in any law in force to the contrary", Maori land could be taken by Order in Council, without provision for any statutory notice or objection rights which were accorded to the owners of non-Maori land. This discrimination as to rights, clearly aggrieved the Maori people.¹²

Under the Town and Country Planning Act 1953, no acknowledgement is made of the Maori people, the intent being to treat all land owners or occupiers alike, but the Crown was not bound by that Act. Hence, public works could continue, especially motorway development, without the necessity to use the requirement, map designation, objection and appeal procedures, which might otherwise give to the occupiers a right to contest the proposals.¹³

Considering general influences upon the legislature in New Zealand after the Second World War, the Universal Declaration of Human Rights 1948, promulgated by the United Nations, and endorsed by New Zealand, provides a framework for amendments and reforms to the legislation of the next period. Article 1 states: "All human beings are born free and equal in dignity and rights . . .". Article 2 states: "Everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status . . .".¹⁴ Without any doubt, the United Nations Declaration has had a profound impact on thinking on human rights matters throughout the world, and has influenced the interpretation of the United States Constitution, leading to the rejection in 1954 of the "separate but equal" doctrine, by the U S Supreme Court in *Brown v Board of Education*.¹⁵ Henceforth, separate provision, still in vogue in South Africa, could not in

¹⁰ The ownership of a housing lot under freehold title is not generally regarded by the Maori people as an acceptable basis or substitute for turangawaewae. Only communal ownership in tribal lands will provide an acceptable traditional standing place for the feet: Asher and Naulls (op.cit., n.1), referring to the *Royal Commission on the Maori Land Courts* (1980), at 24-25 (McCarthy). The Maori Housing Act 1935, s.2A was inserted in 1969 to extend the provisions to include a Polynesian living in New Zealand. Cf Walker, supra, n.8 at 213, defining Maoriness.

¹¹ Maori Social and Economic Advancement Act 1945, s11 (Maori wardens appointed by Minister). The local regulation of Maori social and village conditions dates back to the Maori Councils Act 1900. The 1945 Act was repealed by the Maori Welfare Act 1962 (retitled in 1970, the Maori Community Development Act 1962). Cf R. Walker, supra n.8, at 201.

¹² The Crown acquisition form the basis of many referrals to the Waitangi Tribunal, and are referred to by the Court of Appeal in the landmark case *NZ Maori Council v Attorney-General* (1987) 6 N.Z.A.R. 353 (infra).

¹³ See *Wellington City Corporation v Victoria University of Wellington* [1975] 2 NZLR 301 as to Crown prerogative.

¹⁴ The 1948 U.N. Declaration is set out in J.B.Elkind & A.Shaw, *A Standard for Justice*, (O.U.P., 1986) at 191 (Appendix 1). For background discussion, ibid, at 206. This declaration has been superseded by the U.N. International Covenant on Civil and Political Rights (ratified by N.Z. in 1978), set out, ibid, at 197 (Appendix 2).

¹⁵ *Brown v Board of Education*, 347 U.S. 483 (1954); *Bolling v Sharpe*, 347 US 497 (1954) (applied to D.C.); reversing the separate but equal doctrine upheld in *Plessey v Ferguson*, 163 U.S. 537 (1896).

general terms be approved within domestic legislation, unless providing for affirmative action.

To conclude this part, the Maori Purposes Act 1950, provided a firmer organisational base for the various Maori Trust Boards administering tribal land and property, the provisions being updated in the Maori Trust Boards Act 1955.¹⁶

II. THE MIDDLE AGES 1960-1975 — ASSIMILATION OBJECTIVES?

The varying roles of the political parties is evident during this period, it commencing with the demise of the Labour Government late in 1960, followed by nine years of the National Government under Sir Keith Holyoake, with the restoration of the Labour Government at the end of 1972.

The first relevant enactment is the Waitangi Day Act 1960, which in s 2 stated that 6 February in every year “shall be observed throughout New Zealand as a national day of thanksgiving in commemoration of the signing of the Treaty of Waitangi”. The preamble refers almost apologetically to the Treaty, but as an innovation, sets out the English version in a schedule to the Act. The final section 3, provided for the Treaty to be observed as a public holiday by local Proclamation, and it was so observed in the Northland province.¹⁷

In 1963, Hon.J R Hanan, Minister of Justice, introduced into Parliament a New Zealand Bill of Rights, modelled upon a similar Canadian enactment. The preamble declared “The New Zealand nation is founded upon the principle that all its citizens of whatever race are one people . . . ” The Bill proclaimed the basic right to equality before the law, and freedoms of religion and assembly, and provided a code for police conduct with suspects. Commentators upon the Bill viewed it with suspicion, considering it unnecessary, and likely to cause legal confusion.¹⁸ The Bill did not proceed further, and appears to have had little visible legislative influence.

In the meantime, the Maori Education Foundation Act 1961 had been passed to encourage the funding of Maori students, and the Juries Amendment Act 1962 abolished the Maori and mixed race jury provision. Henceforth all persons, whether Maori or not, would be eligible to serve upon a jury.¹⁹

¹⁶ An earlier land ownership option was through Maori incorporations commenced between 1894 and 1909 G.Asher and D. Naulls, *supra*, nl, at 39. Trust Boards may own and administer land, but have wider health and educational functions, *ibid*, at 76.

¹⁷ The Bill was introduced by the Rt Hon.W. Nash, P.M. and Minister of Maori Affairs, who stated concerning the merits of European and Maori people “There are no inherently superior people anywhere”: (1960) N.Z.P.D. Vol.323, 1814; vol.325, 2949-2951.

¹⁸ (1965) A.J.H.R., 1-14. For extracts see W.C.Hodge. “A Bill of Rights for New Zealand” Mark II”, [1985] NZ Recent Law 716. The Bill required other legislation to be interpreted consistently with the fundamental human rights and freedoms, but subject to s.2 (2) which recognised “that every person has duties to others” as found in law “protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of New Zealand”. This qualification preserved most laws intact.

¹⁹ See (1962) N.Z.P.D. v332 for debate over the bill. Hon.J.R. Hanan described the separate jury system “to be discrimination of the most detestable kind in the light of our modern social conditions. We might expect something like that in South Africa, or in Alabama or Mississippi, but not in New Zealand” (at 2008). However, the Maori members, in particular Hon.Sir Eruera Tirikatene, were not in favour of abolishing the Maori jury for a Maori offender-victim crime. The Maori opinion had been influenced by a recent murder case where a European jury had convicted the Maori offender, but on a retrial before a Maori jury, the accused was acquitted on the ground of insanity. The abolition Bill was passed. For a history of the jury legislation, see Hanan at 2748-2768.

The same year the Maori Welfare Act 1962 provided an upgraded structure for the District Maori Committees, and the powers of the Maori wardens, but more significantly it established the New Zealand Maori Council and the separate district Maori Councils. A consideration of the objectives of the New Zealand Maori Council under s 18, indicates a recognition of the struggle of the Maori people in the social, educational and public health areas. The advantages of a co-ordinated national body to act on behalf of the Maori people is self-evident, and complements and provides a possibly wider perspective on Maori affairs than is forthcoming through the four standing Maori seats in the House of Representatives. The Maori Welfare Act was retitled the Maori Community Development Act by amendment in 1979.²⁰ The New Zealand Maori Arts and Craft Institute Act 1963, provides a formal structure for the Institute at Whakarewarewa in Rotorua, and provides a broad encouragement for the cultural arts and crafts of the Maori people.²¹

Concerning the area of criminal justice, the Justice Department publication "Crime and the Community" (1964) indicates the potential for the need to provide special policies for Maori offenders, to carry out research upon Maori offending, and to employ more Maori prison officers and field workers to assist.²² Outside the jurisdiction of the Maori wardens, and district committees to discipline minor disorderly and drunken offences by Maori offenders, no specific recognition of Maori needs and protocol is found in the Criminal Justice legislation of the time.²³

With reference to land subdivision, the Maori Land Courts under the Maori Affairs Act 1953 retained exclusive jurisdiction to authorise partitions of land within country areas, but subdivisions within an urban area were subject to borough or city council approval.²⁴ However, under the Maori Affairs Amendment Act 1967, the partition of Maori land in counties was made subject to county council approval. The consequence was, that in addition to the need to comply with the zoning prescribed by district planning schemes, the county council could require a 10% reserve contribution, and a further 20 metre esplanade reserve where the land adjoined a lake, river, or sea

²⁰ The N.Z. Maori Council members are appointed by the District Maori Councils (3 each). These bodies and the Maori wardens are independent from the Department of Maori Affairs and their community officers. The Maori Women's Welfare League is a non-statutory group.

²¹ The Institute council of seven persons includes representation from the Tourist and Publicity Department, the Rotorua City Council, as well as Maori representatives (s.5). The functions are primarily encouragement of Maori culture, and arts and crafts (s.14).

²² Department of Justice, *Crime and the Community: A Survey of Penal Policy in New Zealand*, (Government Printer, 1984), at 13, 43, 84, 99 (the Hon J.R. Hanan, Minister of Justice).

²³ The Criminal Justice Act 1985 introduces the community care sentence (s.53), which provides programmes specifically for Maori offenders, referring to *maatua whangai* placement or placement with the *iwi* (tribe), *hapu* (sub-tribe), *whanau* (extended family) or a *kaumatua* (elder). The Children and Young Persons Bill 1987 recognises more broadly the importance of the family structure (*whanau*, *hapu*, *iwi*) as a basis for personal assessment (*infra*). For a comment on the Maori warden role, R. Walker, *supra* n.8 at 201.

²⁴ See Land Subdivision in Counties Act 1946, s.3 (not applicable Native Land dwelling sites). Maori Affairs Act 1953, ss173(4)(5) (counties planning scheme a guide only), 432 (boroughs, cities). The Maori Land Court jurisdiction dates back to the Native Lands Act 1865, contemplating the issue of titles to ten or less persons upon a partition, with sales to persons other than the Crown declared void unless a title was issued. For problems with titles and European settler ambitions, see Williams, *supra*, n.1.

frontage.²⁵ The reserve contribution obligation, again, appeared to some Maori owners to prejudice land rights and to amount to an unfair acquisition of land for public use, contrary to the Treaty of Waitangi promises.²⁶

One of the final enactments of the National Government of the day was the passing of the Race Relations Act 1971, being based upon earlier legislation of the U.K. Parliament. This Act in general terms prohibited discrimination in relation to access to public places and facilities, accommodation, and employment, by reason of "colour, race, or ethnic or national origins" unless for the purposes of promoting equality.²⁷

In 1973, the new Labour Government moved to improve the objection rights under the Public Works Act, and by the Public Works Amendment Act 1973 transferred the right of objection away from the acquiring body ("the Crown or a local authority") to the independent Planning Appeal Board. The following year the Maori Purposes Act 1974 repealed the now obnoxious provisions of the Public Works Act, which denied to the Maori people any objection in respect of the taking of Maori land.²⁸ It was however necessary for the Maori owners to utilise the objection procedures, as in *Dannevirke Borough Council v Governor-General* in 1981²⁹ the Chief Justice ruled that there was no residual discretion under the Public Works Act to refuse to issue a proclamation taking land (Maori land to be used for a refuse tip), upon the broader political view by Cabinet that it would be undesirable to take such land. It was also advisable for the Maori people to take advantage of the Planning Act provisions for designation objections in the first instance.

Concerning the status of the Treaty of Waitangi and its observance, the New Zealand Day Act 1973 repealed the Waitangi Day Act 1960, and represented a belief advanced by the Rt Hon Norman Kirk, the Prime Minister, that a public holiday should be declared for the benefit of all New Zealanders as a commemoration of the signing of the Treaty on 6 February 1840 at Waitangi. This Act again set out a copy of the Treaty in a schedule, but only the English version. The dropping of the "Waitangi Day" appellation did not receive universal approval from the Maori people, underlying the important symbolism and ethos of "Waitangi" within the Maori and non-Maori cultures and history.³⁰

In 1974, in accordance with Government policy expressed in a White paper, the enactments administered by the Maori Affairs Department were amended to adopt a uniform definition of a Maori. The former limitation to a person

²⁵ Maori Affairs Amendment Act 1967, s.20(2) inserting s.432A, repealing s.173(4). For current reserve obligations upon subdivision (or development), see Local Government Act 1974, ss. 284-292, 293, 294.

²⁶ Cf G.Asher & P.Kingi, *Maori Planning Kit* (1981); G.Asher, "Planning for Maori Land and Traditional Maori Uses" (1982) 65 TPQ 28; P.Crawford, "Marae, Papakainga and Kainga" (1982) 65 TPQ 45; Ree Anderson, *Planning for Maori Needs*, (M.W.D., 1983). Also R. Walker, supra n.8 at 57, 58 (proposed Lake Taupo foreshore reserves designation substantially affecting Maori land) — infra, n.12.

²⁷ The first two Race Relations Conciliators, Mr Harry Dansey and Mr Hiwi Tauroa were Maori. In 1986, Mr Walter Hirsh, a Jewish non-Maori was appointed, causing some controversy and opposition among the Maori people. Cf R. Walker, supra n.8, at 225-227.

²⁸ Public Works Act 1928, ss.102-103, repealed by Maori Purposes Act 1974, s.12.

²⁹ [1981] 1 NZLR 129. Davison C.J. Cf K.A.Palmer, "Acquisition of Maori Land for Public Works" (1981) 65 T.P.Q. 35. Also *Maori Land Trust v M.O.W.D.* (1980) 7 N.Z.T.P.A. 108 (inadequate consideration of Maori leasing issue for Ohaaki power station site).

³⁰ See (1973) N.Z.P.D., Vol.382, 793-796; Vol.385, 2886-2901.

of the aboriginal race of New Zealand, including a half-caste, but not below that blood level, was removed. Henceforth, a "Maori" was defined to mean a person of the Maori race and included any descendant of a Maori. This change enabled a person with any Maori blood to claim Maori status, and to enjoy inheritance rights in respect of tribal Maori land.³¹

III. THE MAORI RIGHTS RENAISSANCE 1975-1987

In its last year in office, the outgoing Labour Government enacted two statutes of considerable constitutional importance to the Maori people. The first enactment was the Electoral Amendment Act 1975, which reformed the Maori roll. The former restriction of full to half blood Maoris to the Maori roll, with "half-caste" Maoris having a choice as to the European (non-Maori roll) or Maori roll, was replaced by the uniform definition of a Maori as including any descendant of a Maori. The Maori person so defined then had a choice of either the Maori roll or the General roll.³²

The second enactment was the Treaty of Waitangi Act 1975. The Act constituted the Waitangi Tribunal, with the jurisdiction to investigate a claim by a Maori that he or she (or the tribal group) "is likely to be prejudicially affected by an existing Act or regulation or practice by or on behalf of the Crown" which "was or is inconsistent with the principles of the Treaty . . ." The Act included both Maori and English versions of the Treaty, conferring power on the Tribunal to determine differences in meaning.³³

By foreshadowed amendment in 1985, the jurisdiction of the Waitangi Tribunal was made retrospective to the 6th day of January 1840, to cover Acts, regulations, orders and proclamations, notices, and policy or practice by or on behalf of the Crown.³⁴ In constitutional terms, the jurisdiction covers

³¹ Maori Purposes Act 1974, s.7; Maori Affairs Amendment Act 1974, s.2. The amendments, introduced by Hon Matui Rata, represented Labour Government policy, submissions from Maori tribal groups, and the proposals in a White Paper E20 (1973) to provide uniform recognition by choice of any degree of Maori ancestry. For debates on the Bills, see (1984) N.Z.P.D., vol.391, 2688-2695; vol.394, 4775-4786.

³² Electoral Amendment Act 1975, s.2 (Maori redefined); s.6 (replacement of 'European' roll label with 'General' roll); s.8 (provision for 4 Maori seats to be increased by ratio of Maori population to non-Maori population and seats); s.41 (Maori option as to Maori or General roll). Section 8 was repealed by the new National government by the Electoral Amendment Act 1976, and the limit on 4 Maori seats reimposed regardless of elector numbers. The Electoral Amendment Act 1980 updated the Maori option to be exercised only after each quinquennial census. The Electoral Regulations 1981, Amendment No.6 (S.R. 1987/10), introduce the 'Tangata Whenua' special vote procedure for persons on a Maori roll as a general roll polling place. See *Report of the Royal Commission on the Electoral System* (Govt Printer, 1986, — Mr Justice Wallace chairman), ch.3 Maori Representation; Appendix A, "The Electoral Law of New Zealand: A Brief History", Appendix B "A History of Maori Representation in Parliament", Prof.M.P.K. Sorrenson; Annex, "Voting in the Maori Political Sub-System, 1935-1984", Prof.Robt Chapman.

³³ For legislative history, see (1984) N.Z.P.D Vol. 395, 5725-5728; vol.401, 4342-4346. After hearing submissions seeking retrospective effect, the Government left that question for future reconsideration. See also A.D.Sutton, "The Treaty of Waitangi Today", (1981) 11 V.U.W.L.R. 17.

³⁴ Treaty of Waitangi Act 1975, s.6(1) (as amended). For comment on the earlier jurisdictional limits see Waitangi Tribunal Finding on the *Manakau Harbour* (WA18/1985), at 95-99 (present accountability for past defaults).

virtually all New Zealand legislative history and practice, including local authority and public body actions.³⁵

The new National Government desired to restore Waitangi Day, and passed the Waitangi Day Act 1976, including for the first time the Maori language version of the Treaty as well as the existing English version. Although the restoration of the name was accepted by some of the Maori people as desirable, many other groups found it to be a focal point for land grievances and general disenchantment with the promises of the Treaty, labelling it to be a “fraud” until such time as its objectives were honoured. The “celebration” of the day was seen as an affront, giving rise to significant disruption of the traditional colonial type ceremonies with naval involvement. The nature of the commemoration ceremonies continue today to give rise to disagreement and dissatisfaction.³⁶

In 1977 the Reserves Act was passed, replacing an earlier statute. This Act does not refer to Maori land reservations, or cultural objectives, presumably as Maori reservations at the time were dealt with under the Maori Affairs Act 1953, and continue to be so dealt with by the Maori Land Court. But compulsory acquisition of Maori land for public reserves required consent of the Minister of Maori Affairs.³⁷

By contrast, the Town and Country Planning Act 1977 did introduce a major legislative recognition of the special place of the Maori people in planning scheme adoption and implementation. Following submissions by the N Z Maori Council, the matters in s 3 “declared to be of national importance [which] shall in particular be recognised and provided for” were extended to include section 3(1) (g) “the relationship of the Maori people and their culture and traditions with their ancestral land”. In addition, in the first schedule dealing with regional schemes, clause 9 (d) provided for the regional scheme to indicate the needs for “marae and ancillary uses, urupa reserves, pa, and other traditional and cultural Maori uses”. The second schedule dealing with district scheme content, referred in clause 1 to the need to plan for the “interests of minority groups”, and under clause 3 “provision for marae and ancillary uses, urupa reserves, pa, and other traditional and cultural Maori uses”.³⁸

³⁵ The Waitangi Tribunal Report concerning the “construction of a proposed *Auckland Thermal Power Station at Waiiau Pa*, on the south Manukau Harbour” (WA12/1978) (Chief Judge Gillanders-Scott; Southwick, Latimer), had upheld the claim that the work (cooling towers) could seriously affect customary Maori fishing rights, that these were not extinguished by the vesting of the harbour bed in the Crown, but that as the Crown had decided not to proceed further, no specific recommendations were made as to remedial legislation. The later general inquiry into pollution and mismanagement of the *Manakau Harbour* and environs (including acquisition of Maori land for public and private purposes), *supra*, n.34, holds the Crown responsible by act or omission for the failings of the Harbour Board and other local authorities or public bodies, under the principles of delegation of power: “The Crown cannot divest itself of its Treaty obligations or confer an inconsistent jurisdiction on others. It is not any act or omission of the Board that is justiciable but any omission of the Crown to provide a proper assurance of its Treaty promises when vesting any responsibility in the Board.” (p.99)

³⁶ See Chief Judge Durie, in *A Bill of Rights for New Zealand* (LRF 1985) at 190. Also Walker, *supra*, n.8, at 72-76, 91-93.

³⁷ Reserves Act 1977, s.12 (1). Maori land may be used for mining and prospecting, with consent of the owners: Mining Act 1971, s.30, but legally could be declared open by Order in Council in the national interest upon a refusal: s.7.

³⁸ G.Asher, “Planning for Maori Land and Traditional Maori Uses” (1981) 65T.P.Q.28, at 30-34. Also John Tamihere, “Te Take Maori: A Maori Perspective of Legislation and its Interpretation with an Emphasis on Planning Law”, (1985) 5 A.U.L.R.137.

In a 1977 case before the Appeal Board, *Morris v Hawkes Bay County Council*,³⁹ the Board recognised the cultural needs of the Maori people to possibly live on a marae, as being relevant to a planning decision. In 1978, in *Knuckey v Taranaki County Council*,⁴⁰ section 3 (1) (g) was applied to prevent the acquisition of remaining Maori ancestral land for a public esplanade. Other cases interpreted the statement to be not applicable where the land had passed from Maori ownership, limiting “ancestral land” to land still in the Maori title.⁴¹ Likewise, the Planning Tribunal declined to apply the provision to give the Maori people any undue advantage or freedom from planning controls, where seeking to achieve some commercial advantage, not available to other persons in the district.⁴²

A matter of local, but of some general legislative influence and significance, was the occupation of the Bastion Point land by the Maori people in 1977-1978. The settlement of that dispute led to the Orakei Block (Vesting and Use) Act 1978. The significance of the Act is to vest in the Ngati Whatua of Orakei Maori Trust Board the ownership of part of the Orakei Block to be held in perpetuity without any power of sale, and to redefine under the context of the Orakei Hapu of Ngati Whatua, the beneficiaries of the administration of the land by the Board. This solution accepts in 1978 a land tenure concept held by the Maori people in 1840.⁴³

Concerning protection of the historic heritage, the Historic Places Act 1980 continued the existing protection for archaeological sites established in 1954, applying to places or vessels involving significant human activity more than 100 years ago. In relation to recognised archaeological sites, the right to investigate, where concerning the Maori settlement, may require consultation with the District Maori Council, although the Minister (formerly Internal Affairs, now Conservation) may over-ride the decision of the Trust or the Maori Council.⁴⁴

In relation to historic buildings and historic areas generally, the Act recognises the desirability of considering protection through district planning scheme listing

³⁹ (1977) 6 N.Z.T.P.A. 219.

⁴⁰ (1978) 6 N.Z.T.P.A. 609.

⁴¹ *Re Appl by NZ Synthetic Fuels Corp Ltd* (1981) 8 N.Z.T.P.A. 138, at 157 (following *Quilter v Mangonui County Council* (1978), unreported). The narrow interpretation was criticised by a number of commentators: Palmer, supra n.29 at 35; Tamihere, supra n.38; G.Asher and D.Nauls, supra n.1, at 82.

⁴² *Goddard v Wellington City Council* (1984) 10 NZTPA 251 (commercial zoning of urban Maori land subject to amenity objectives), *Royal Forest and Bird Protection Soc v Clutha County Council* (1985) 10 N.Z.T.P.A. 449 (need to protect native bush on Maori land upheld). cf *Pouto 2F Trust v Hobson County Council* (1985) 10 N.Z.T.P.A. 462 (rural zoning to allow exotic forestry as of right on Maori land approved taking into account cultural and economic needs.)

⁴³ The preamble of the Orakei Block (Vesting and Use) Act 1978 recites the settlement background, and the intent to create for the Orakei hapu “a permanent estate and turangawaewae for them forever . . .” Section 4 constitutes the Trust Board. Section 7 establishes the duty to hold the vested land “as a perpetual estate and turangawaewae for its beneficiaries” with no powers to sell, and leases are restricted to beneficiaries, or widows or widowers thereof. Section 12 vesting the whare nui for the use and benefit of Maoris generally, and s.16 requiring an equalisation payment of \$200,000 remain in dispute, and are the subject of a referral to the Waitangi Tribunal (report pending 1987). See Walker, supra n.8 at 51-56, for a description of the Maori protest occupation of Bastion Point in 1976-1977 (506 days).

⁴⁴ Historic Places Act 1980, ss2, 41-44, 46. A commercial building by Bexley Developments in 1986 at the foot of Mt Eden, Auckland, on land regarded as ancestral, was allowed to proceed by decision of the Minister at the time (Hon.Mr.Tapsell).

under section 49 in respect of historic areas. More specifically, under section 50, a traditional site, defined to mean a place that is “important by reason of its historical significance or spiritual or emotional association with the Maori people . . .”, once so declared by the Trust as worthy of recognition, may be referred to the Minister for further action. Where the land remains under Maori ownership, the possibility of referring the matter to the Maori Land Court for the establishment of a Maori reservation may arise. Otherwise, the District Maori Council may consider other action, whether or not the land remains in Maori ownership and the territorial authority is to take into account the desirability of protecting the traditional site under the district planning scheme.⁴⁵

Returning to the arena of public works, the Public Works Act 1981 did not recognise specifically the possibility that the acquisition of Maori land compulsorily could raise extra considerations. However, the Act reduced the compulsory acquisition power to certain listed “essential works”, and improved both the initial planning scheme designation and subsequent acquisition objection rights to include mandatory assessment as to “the extent to which adequate consideration has been given to alternative sites, routes, or other methods of achieving the objectives of the Minister or local authority”. Under these criteria, the relationship of the Maori people with their land would be a relevant factor.⁴⁶ More significantly, the Act introduced an obligation under section 40, concerning disposal of land no longer required for a public work, to offer the land back to the original owners unless clearly impracticable, unreasonable, or unfair to do so. The 1981 version, obliged the land to be offered back at current market value, an offer likely to be unacceptable to many former owners, especially Maori owners, where the land had been taken many years earlier. Fortunately, the 1982 amendment introduced a discretion whereby the Commissioner or local authority, if considering it reasonable to do so, could offer the land back at a lesser price. Although not a decision under section 40, the completion of the return of the old Raglan Golf Course land in 1987, without requiring payment, sets a possible precedent for future Crown action in relation to former Maori holdings.⁴⁷

Towards the end of 1982, the hearings by the Waitangi Tribunal, now presided over by Chief Judge Durie of the Maori Land Court, heralded the beginning of a landmark recommendation made on 17 March 1983. The referral by Mr Aila Taylor, on behalf of the Te Atiawa tribe, concerned damage and pollution from a proposed pipeline and discharge of effluent from the New Zealand Synthetic Fuel Corporation plant at Motonui. The Tribunal, in a

⁴⁵ *Ibid.*, s.50. For Maori reservations, Maori Affairs Act 1953, ss.439, 439A.

⁴⁶ Public Works Act 1981, s.2 (essential works “list”), s.16 (taking limitation). The essential works restriction was repealed 1987. For guidelines as to taking objections: s.24(7). See *Abbott v Lower Hutt City* (1985) 11 N.Z.T.P.A. 65 (designation of private land for cemetery purposes refused where Maori fishing likely to be detrimentally affected, and alternative sites investigation inadequate). For procedures generally, Palmer, *supra*, n.29. The Maori Land Court supervises negotiations for acquisition: *ibid.*, s.17.

⁴⁷ *Ibid.*, s.40. For an account of the struggle by Mrs Eva Rickard for the return of the ancestral Raglan land taken in 1941 for airfield defence purposes, then leased to the local golf club, see Walker, *supra* n.8, at 117. The initial settlement in 1981 imposed an equalisation payment upon the Tainui Awhiro tribe, which was not paid, and finally remitted in 1987 by the Minister of Lands. For the case declaring the validity of the Crown lease (preceding the settlement), see *Raglan Golf Club v Raglan County Council and others* [1980] N.Z. Recent Law 334, Bisson J.

well reasoned report concerning the interpretation of the Treaty of Waitangi, referred to the guarantee of undisturbed possession of fisheries, and the encompassing of this objective in the Maori language version, being a taonga (treasure). In a formidable conclusion, the Tribunal effectively challenged the Government to discontinue the outfall, and to arrange an alternative land based treatment facility which would be acceptable to the Maori people of the area. Further, the Tribunal noted that in certain rulings of the Planning Tribunal arising out of the *Minhinnick* decisions, that Tribunal has declined to recognise Maori spiritual values as relevant, being “purely metaphysical concerns” but the narrow view was not acceptable to the Maori people. The Tribunal referred to the statement by the Governor-General, Sir David Beattie, at Waitangi Day, 1981, namely, “I am of the view that we are not one people, despite Hobson’s oft-quoted words, nor should we try to be. We do not need to be”.⁴⁸

As is well recorded, the Government reaction was initially to reject the recommendations by the Tribunal, but faced with mounting public pressure, and some technical advice as to the alternatives, and a co-existing need to improve the Waitara sewerage distribution outfall, the Government agreed to vary the final water-right grant by legislation, and establish an alternative, but still controversial, system further south at Waitara township.⁴⁹

The broader impact of the Waitangi Tribunal recommendation was to inject new confidence and faith in the Maori people in the utility of referring issues and grievances to the Waitangi Tribunal as a realistic constitutional way of resolving issues. The subsequent reports relating to the Kaituna River, the Manukau Harbour, and the Maori language have all received affirmation from the Maori people, and have produced advantageous political and practical responses.⁵⁰

At the same time, the efforts of the Maori people toward self-betterment through the Department of Maori Affairs were bearing fruit. The Maatua Whangai organisation to assist the rehabilitation of offenders commenced in 1981, together with the Kokiri centres to develop Maori traditional work skill. The Te Kohanga Reo Trust was incorporated in 1983 to foster the pre-school Maori language nests, leading to bilingual provision in certain primary schools with a predominant Maori enrolment, being a general objective in the community, outside the narrower Maori schools provision.⁵¹

⁴⁸ *Finding concerning the Fishing Grounds in the Waitara District* (WAI 6/1983). See D.V. Williams, “Te Taha Maori Recognised: A Comment on the Waitangi Tribunal Report” [1983] NZ Recent Law 378. The strict legal validity of the grant of the Motonui water right for waste discharges had been upheld by the Court of Appeal in *North Taranaki Environment Protection Assn Inc v Governor-General* [1982] 1 N.Z.L.R. 312.

⁴⁹ Synthetic Fuels Plant (Effluent Disposal) Empowering Act 1983. For comment on the initial Government reaction to the Waitangi Tribunal report, see Walker, *supra* n.8 at 83.

⁵⁰ *Finding concerning Kaituna River* (WAI 4/1984) — proposed Rotorua sewerage plant nutrient pipeline discharge offending Maori spiritual and cultural values; *Finding concerning the Manukau Harbour* (WAI 8/1985); *Report concerning Te Reo Maori (Language)* (WAI 11/1986) — recommendations as to use of Maori language in Courts, public bodies, school classes, broadcasting and bilingualism for certain positions. The earlier *Report on the Proposed Thermal Power Station at Waiu Pa* (WAI 2/1978), upholds the Maori claims that the development would be contrary to the Treaty (*supra* n.35).

⁵¹ New Zealand Official Yearbook 1985, at 100 (education). 103-106 (Tu Tangata community programmes). The Criminal Justice Act 1985 recognised the Maori cultural dimension expressly in the new “community care” sentence (*supra* n.23).

Likewise, academic research and writing was to the forefront, with works by F. Hackshaw (1984), P. G. McHugh (1984), D.V. Williams (1983), and F.M. Brookfield (1985), all forcefully concluding that the Maori occupancy of New Zealand prior to 1840 had produced systems of ownership, land occupancy, and fisheries which ought to be recognised as legal rights still subsisting after execution of the Treaty of Waitangi 1840, and amounting to rights protected thereunder unless specifically negated. This strong academic support, and criticism of intervening decisions of the Supreme Court up to the Privy Council, was soon to prove persuasive.⁵²

In addition to the Motonui outfall issue in 1983, also before Parliament was the Fisheries Bill. This provided that nothing in the Bill should affect "any existing Maori fishing rights". Following submissions to the Parliamentary committee that the legal status and relationship of Maori fishing recognised under the Treaty of Waitangi, should be left open, the Bill was reported back in amended form to deliberately proffer the possibility that Maori fishing rights, which were not existing declared rights under the earlier Act, might still remain legally extant. The Fisheries Act 1983, s 88 (2) read "nothing in this Act shall affect any Maori fishing rights".⁵³

1. *Bill of Rights 1985 (proposed)*

In 1985, a potentially far-reaching constitutional proposal was published by the Government, namely the proposed New Zealand Bill of Rights, a much more comprehensive provision than the modest 1963 proposal, but again based on the more recent Canadian Charter of Rights and Freedoms.⁵⁴

Concerning the status of the Treaty of Waitangi, para 4 of the proposed Bill stated that the rights of the Maori people under the Treaty are "hereby recognised and affirmed", and the Treaty "shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent".⁵⁵ The potential impact of the Treaty immediately gave rise to controversy. On the one side, concern was expressed as to the scope of the statements in the Treaty, and uncertainty as to the interpretation of the Maori language version as against the English language version. On the other side, there was concern expressed by the Maori people and others, that under article 3, relating to "justified limitations", the promises could be reduced by interpretations as to the "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Furthermore, the Maori people in particular were concerned that under the

⁵² P.G. McHugh, *supra* n.1; F Hackshaw, *supra*, n.1; D.V.Williams, *supra* n.1; F.M.Brookfield, "The Constitution in 1985: The Search for Legitimacy", (U of Auckland, 1985).

⁵³ See N.Z. Parliamentary Debates 1983, at 1372-90; 1445-6; 2258-9; 2265-66. The debate included reference to the first Fish Protection Act 1877, s.8 which stated "Nothing in this Act contained shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder". The continuing legal existence of customary Maori fishing rights was advanced in the Waitangi Tribunal inquiry concerning *Waiau Pa* (1978) *supra* n.50. See also n.14, *infra*.

⁵⁴ *A Bill of Rights for New Zealand*. A White Paper. (Government Printer, 1985), presented by the Minister of Justice, Hon. Geoffrey Palmer.

⁵⁵ *Ibid.*, at 36, 74-77 (comment).

provisions for entrenchment and amendment (article 28), it would be possible to amend or wholly cancel the Treaty of Waitangi as drafted.⁵⁶

Elkind and Shaw (1986) assess the criticisms, and advance an alternative Bill of Rights to provide for greater security for the Treaty, and to clarify the problem of conflicts between treaties expressed in more than one language, giving to the Waitangi Tribunal the power to make final and binding determination on interpretation.⁵⁷ This would elevate the Tribunal above the Court of Appeal, and would necessarily be acceptable to Parliament or the judiciary. The Bill of Rights has no present prospects of adoption (1987), but has been a focal point for identifying the central place of the Treaty of Waitangi in the constitutional history. F.M. Brookfield has argued (1985), that reconciliation of the Treaty within a formalised constitutional structure ought to be a principal objective of constitutional reform.⁵⁸

In light of the proposed New Zealand Bill of Rights, published in 1985, it is however of note that the new Constitution Act 1986 which replaces the New Zealand Constitution Act 1852 (UK), does not in the preamble, nor in the text, refer anywhere to the Treaty of Waitangi. The only reference to the Treaty occurs in the first schedule in a minor consequential amendment to the Treaty of Waitangi Act 1975 to ensure that the right of petition to the House of Representatives will not be affected by the right given to a Maori person to approach the Waitangi Tribunal. Otherwise, the report of the Tribunal is to be laid before the House of Representatives and not Parliament as previously directed. On hindsight, a reference to the Treaty of Waitangi in the preamble would have given proper recognition to the status and historic importance of the Treaty, without necessarily giving rise to debate over the meaning of certain key words in the Maori version, in particular *rangatiratanga*, and *kawanatanga* (the nature of chieftainship, governance or sovereignty).⁵⁹

2. High Court activism 1986-87 — *Te Weehi, Habgood, and Huakina Trust*

(a) *Maori Customary Fishing Rights*

Three decisions of the High Court have been delivered in 1986 and 1987, which profoundly advance the recognition of Maori rights, as promised in the Treaty of Waitangi 1840.

The first case, *Te Weehi v Regional Fisheries Officer* (1986)⁶⁰ concerns the interpretation of section 88 (2) of the Fisheries Act 1983, as referred to previously. In brief, the legal issue was whether or not Mr Te Weehi could be prosecuted for breach of fisheries regulations, relating to the taking of

⁵⁶ See generally *A Bill of Rights for New Zealand* (LRF seminar, 1985), in particular papers by Chief Judge Durie on Part II and clause 26 (171-193), Ms Ripeka Evans (195-205), and Shane Jones (207-217). Also Elkind and Shaw, *infra*, n57, at 42 concerning fundamental entrenchment.

⁵⁷ Dr J.B. Elkind and A.Shaw, *A Standard for Justice* (O.U.P., 1986), at 36-46, 167-175, 187 (alternative draft).

⁵⁸ F.M.Brookfield, *supra* n.52.

⁵⁹ See Parliamentary debates, (1986) N.Z.P.D., Vol.470, 1344-1360; 5850-5861 (no Maori speakers). Submissions were made to the Parliamentary Committee on the Constitution Bill that it should give recognition to the Treaty of Waitangi. The Committee unanimously rejected this view: (1986) N.Z.P.D., at 5853 (Hon. J.K.McLay). For discussion of the meaning of *rangatiratanga*, *taonga*, and other key Maori words, see Tribunal reports, *supra*, n.48, n.50 (control and management by the Maori people, essence).

⁶⁰ (1986) 6 N.Z.A.R. 114.

under-sized shell fish from a protected sea shore area held under Crown title. Nothing in the Act was to affect “any Maori fishing rights”, and the question of whether or not those fishery rights could be legally considered, and could be established by Mr Te Weehi. Earlier decisions had indicated the rights were tied to land ownership, but Williamson J., influenced by the academic writing of P.G. McHugh, distinguished the contrary decisions, to hold that customary Maori fishing rights could indeed be recognised by the Courts, and were not dependant upon title ownership. On the evidence, it was established that Mr Te Weehi was acting within the terms of the customary rights held by the local tribe, he having consent to gather shellfish in their customary fishing area, and the regulation could have no application to his particular activities. In a comment on the decision, Professor Brookfield acknowledges that the decision is limited to the Fisheries Act substantially, but it leaves open the possibility of other unsucceeded Maori customary rights remaining in existence regardless of land title or tenure.⁶¹

More generally, the regulation of fishing by the Maori people in a manner consistent with the Treaty of Waitangi now requires resolution, and instead of bringing in amending legislation to over-rule the decision (other than in respect of marine farming),⁶² the Crown is holding consultations with the Maori Council and tribal groups, to reach a working accord.⁶³

(b) *Planning & ancestral land*

As noted, the initial interpretation under the Town and Country Planning Act 1977, of the matter of national importance declared in section 3(1)(g), involved a restriction of “the relationship of the Maori people and their culture and traditions with their ancestral land” to land remaining in Maori ownership.⁶⁴ In the 1983 decisions of the Planning Tribunal concerning the installation of an LPG depot within the Manukau Harbour, the Planning Tribunal accepted that the harbour, no longer being vested in the former Maori occupiers, could not be regarded as ancestral land, but it was accepted that the observance of the Treaty of Waitangi by the Crown was a matter of public interest, and in particular a matter of interest to the Maori people, as a group forming part of the wider public interest.⁶⁵

Under that approach, the significance of the Treaty was taken into account in reaching a considered decision to approve the depot, as not interfering with traditional Maori uses of the harbour. In 1984, the author (Palmer),

⁶¹ F.M. Brookfield, “Maori Fishing Rights and The Fisheries Act 1983: Te Weehi’s Case” [1987] N.Z. Recent Law 63.

⁶² The Marine Farming Amendment Act 1987, s.3 (substituting s.49) protects the fish stock and marine vegetation of the authorised lessee. The recognition of Maori fishing rights under the Treaty was acknowledged in the Fish Protection Act 1877, s.8 (supra n.53). For a discussion by the Waitangi Tribunal of the unsuccessful attempts by the Te Atiawa people to obtain formal recognition of Maori fishing grounds in coastal waters, see *Finding* supra n.48, para. 4.7, 4.8 (Maori fishing reserves in 6 Lakes, but refusal to promulgate reserves in sea and seashore areas not in tribal ownership).

⁶³ Existing regulations under the Fisheries Act 1983 make special provision for Maori gatherings : e.g. Fisheries (Amateur Fishing) Regulations 1986, reg. 27 “Fish taken for hui or tangi” — excess quantities may be taken for hui or tangi with prior notice to a Fishery Officer and in accordance with any conservation conditions imposed. The *Te Weehi* ruling bypasses this regulation which gives precedence to the public interest in conservation.

⁶⁴ Supra n.41.

⁶⁵ *Auckland District Maori Council v Manukau Harbour M.P.A.* (1983) 9 N.Z.T.P.A. 165 (Judge Sheppard, chairman).

stated that “the words [ancestral land] are also wide enough to refer to land no longer in Maori ownership but formerly possessing the status of ancestral land. In these cases, the freehold rights of the current owners may be paramount”. The wider view of the matter of national importance, was not accepted by the Planning Tribunal at the time.⁶⁶

In *McKenzie v Taupo County Council* (1987),⁶⁷ the Planning Tribunal was faced with another claim that ancestral land was being prejudicially affected by the proposed planning consent to establish a marina at the Waikato River outlet of Lake Taupo. Again, following precedent, the Tribunal declined to accept the submissions under section 3(1)(g), but then concluded that, on the broader issue of effect on the existing and foreseeable future amenities, and general welfare of the people of the district (section 72), serious consideration must be given to the deep spiritual beliefs of the Maori people, and in particular the Tuwharetoa tribe, as to the Waikato River in being a pathway for the spirits of the departed, and for other spirits. The Tribunal accepted that the tribe were “the very tangata whenua of the Lake Taupo district. Their association with their mountains and with the lake has deep spiritual character which is represented in the beliefs and practices by which their distinctive identity is expressed. That association reflects an essentially indigenous quality because it is related to the physical features of the tribal area, so that its expression in beliefs and practices becomes taonga of the tangata whenua”. As a result these beliefs had “a special place of honour, and land use planning should be carried out in such a way that those beliefs and practices can be preserved and continued”.⁶⁸

Nevertheless, after considering the solemn nature and significance of the spiritual beliefs, it was found on the evidence that the particular marina would not obstruct the natural flow patterns of the lake or river, and the marina was allowed to proceed, subject to certain conditions. This decision, on its facts assessment, is entirely consistent with the ruling of Holland J. in the High Court 21 days later in the *Habgood* case.

In *Royal Forest and Bird Protection Society (Inc) v W A Habgood Ltd* (1987),⁶⁹ the High Court was concerned with a question of law relating to a mining application under the Mining Act 1971. By virtue of the Mining Amendment Act 1981, the matters of national importance in section 3 of the Town and Country Planning Act, were by cross-reference made relevant to assessment of an exploration, prospecting, or mining licence application, where objection was made to the Planning Tribunal. The Tribunal, following precedent, had declined to accept as directly relevant section 3(1)(g), where the land concerned for sand mining was Crown land. Considering the purpose and nature of the reference to “Maori ancestral land” in section 3(1)(g), Holland J. concluded that the Planning Tribunal had erred in the previous decisions in reading in a limitation of “ancestral land” to land remaining in Maori tenure or ownership. There was no justifiable reason for this restriction, and the preceding Planning Tribunal decisions on the point were to be regarded as over-ruled. Having come to that conclusion, his Honour was able to find

⁶⁶ K.A. Palmer, *Planning and Development Law in New Zealand* (L.B.C., 1984), 208. A view previously stated by Palmer, (1981) 65 T.P.Q.35. Also J.Tamihere, supra n.38, at 141.

⁶⁷ (1987) 12 N.Z.T.P.A. 83 (Judge Sheppard presiding).

⁶⁸ *Ibid.*, at 90 (paras. 67, 68).

⁶⁹ (1987) 12 N.Z.T.P.A. 76 (Holland J.).

on the assessment of the evidence from the objectors based upon Maori association and settlement of the land, that the matter of national importance was not compromised, and the existing limited decision of the Tribunal could remain in effect.

The importance of the *Habgood* ruling is to ensure for the future that in all areas of town and country planning, including maritime areas relating to harbour water, and in mining licence cases, that objections based upon the relationship of the Maori people with their ancestral land will be admissible regardless of land tenure. However, as stated by Holland J. it will not be sufficient to claim that the whole of New Zealand is ancestral land, but it will be necessary for there to be "some factor or nexus between their culture and traditions of the Maori people to the land".⁷⁰ The decision must surely be welcomed as affording proper respect to Maori culture and traditions, again a commitment made under the Treaty of Waitangi.⁷¹

(c) *Water rights and Maori spiritual values*

The last case of the trio concerns the interpretation of the Water and Soil Conservation Act 1967, which within its own terms does not refer to the Maori people, let alone their culture, traditions, and spiritual beliefs when considering application for a water right. The relevance of Maori spiritual values was first raised in a 1982 case concerning Mrs Minhinnick, who objected to a water-right discharge from the Glenbrook steel mill into the Manukau Harbour, being pollution which would be offensive to the continued use of the harbour as a traditional Maori shell fish reserve. The Tribunal rejected the relevance of Maori spiritual concerns, being purely "metaphysical" and of no greater relevance than the spiritual values held by other persons in the community at large.⁷²

The ruling highlighted in part the discrepancy between the Planning Act, which contained section 3(1)(g), and other references to Maori activities in the regional and district scheme schedules, and in section 4(3) required the district planning authority to take into account the principles and objectives of the Water Act. The issue arose again in the Motonui petroleum plan discharge cases, involving the approval by the Court of Appeal of the Planning Tribunal decision in granting the water right, with the subsequent repudiation of the decision in Maori eyes, by the Waitangi Tribunal upon its Te Atiawa report.⁷³ As related, the discharge point was then altered by subsequent government legislation.⁷⁴ Again, the author, Palmer had stated (1984), that "Maori spiritual values as to water mixing and use of traditional fishing grounds, should be accorded due recognition", but this view point was not adopted by the Planning Tribunal.⁷⁵

Ultimately, upon appeal to the High Court, in *Huakina Development Trust*

⁷⁰ *Ibid.*, at 81, 82. The term 'land' should include seabed and the water above.

⁷¹ The Waitangi Tribunal in Findings, WAI 6 and WAI 8, *supra* n.48, 50, noted the limited Planning Tribunal interpretation without any endorsement of the narrow view.

⁷² *Minhinnick v Auckland Regional Water Board* [1982] N.Z.Recent Law 190.

⁷³ *Re Application by N Z Synthetic Fuels Corp. Ltd* (1981) 8 N.Z.T.P.A. 138 (Planning Tribunal site approval and water right); *North Taranaki Environment Protection Assn Inc v Governor-General* [1982] 1 N.Z.L.R. 312 (CA), upholding P.T. decision. Waitangi Tribunal Report, *supra* n.48.

⁷⁴ *Supra* n.49.

⁷⁵ *Ibid.* n.66, at 872 (Vol II).

v *Waikato Valley Authority*⁷⁶, Chilwell J. on 2 June 1987 delivered a ruling that the *Minhinnick* decisions were incorrect and Maori spiritual values were relevant in assessing a water right application. In reaching this conclusion, his Honour reassessed the legal significance of the Treaty of Waitangi and concluded, following established authority, that the Treaty standing alone did not confer any enforceable legal rights in a municipal court. However, the Treaty was not without legal significance, having been recognised by Parliament under the Treaty of Waitangi Act 1975, the Waitangi Day Act 1976, and the rulings of the Waitangi Tribunal, as the specialist tribunal constituted to interpret the provisions, were to be given considerable weight by the High Court. That judicial recognition of the relevance of the findings and recommendation of the Waitangi Tribunal is a landmark in the context of precedent, and statutory interpretation.⁷⁷ Furthermore, the Court was willing to accept a number of statements made in the report on the Manukau Harbour as expressing the significance of Maori spiritual values regarding water use, and pollution by industry and other activities. In the context of objection rights under the Water Act, on the grounds of public interest and in relation to the generally expressed objectives for assessing applications, it was relevant to take into account both Maori cultural and spiritual values of a type clearly recognised by the Tribunal or otherwise accepted as customary upon the evidence.

The acceptance of Maori spiritual values under the Water Act inevitably reinforces the acceptance and relevance of Maori spiritual values under the Town and Country Planning Act, and Mining Act provisions. It also has wider impact, in affirming spiritual values as part of the taonga protected by the principles in the Treaty of Waitangi.⁷⁸

3. *State-Owned Enterprises Act 1986*

As mentioned, the Constitution Act 1986 does not refer to the Treaty of Waitangi, or to the Maori people in the text. Likewise, in the restructuring of the Departments of State by the Labour Government in 1986, the State-Owned Enterprises Bill initially did not make any reference to the Treaty. However, at a later stage after the first reading of the Bill, the Waitangi Tribunal made an urgent submission to Government arising out of an enquiry into the Muriwhenua claims in Northland, involving Crown land, that a safeguard should be written into the Bill to prevent further alienations of land claimed by the Maori people as still held by the Crown on trust or being former public work land, or otherwise subject to dispute and possible investigation by the Waitangi Tribunal.⁷⁹

⁷⁶ (1987) 12 N.Z.T.P.A. 129.

⁷⁷ *Ibid.*, 155. The recognition of the pronouncements of the Waitangi Tribunal is confirmed by the Court of Appeal judgments given 27 days later in the *N Z Maori Council* case, *infra* n.80.

⁷⁸ Maori spiritual values were accepted as relevant in the earlier *McKenzie* decision on 10 March 1987, *supra* n.67, concerning opposition to a conditional use application to establish a marina on Lake Taupo. The Waitangi Tribunal strongly supported Maori spiritual values as protected by the Treaty in the *Manukau Report*, *supra* n.50, and commented upon the Water and Soil Conservation Act 1967 as "monocultural legislation" (p.117).

⁷⁹ See (1986) N.Z.P.D. 6192-3, 6197. Also judgments *infra* n.80, Cooke J. in particular noting legislative debates. A State-Owned Enterprise is not intended to retain the Crown prerogatives or Government public work powers: State-Owned Enterprises Act 1986, ss23(9)(9A), 32(2)(5) (as amended 1987, No.117).

As a consequence, section 9 was inserted into the Act stating “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”. Furthermore, to provide a mechanism for the return of land already the subject of existing submissions to the Waitangi Tribunal, section 27 allowed for the transfer back to the Crown but upon a price to be agreed between the Crown and the State enterprise as transferor. These safeguards did not allay the fears of the New Zealand Maori Council, and proceedings were filed to obtain an interim order preventing vesting of land in the corporations. The substantive case was referred directly to the Court of Appeal.

In the decision, *N Z Maori Council & Latimer v Her Majesty's Attorney General, & others*⁸⁰ delivered on 29 June 1987, by a full Court comprising Cooke P., Richardson, Somers, Casey, & Bisson JJ, the claim by the Maori Council that a wholesale transfer of Crown land to the State enterprises would breach section 9, despite section 27, was upheld. Although legally predictable, the decision is a constitutional landmark in recognising for the first time the substance of the “principles of the Treaty of Waitangi”, and in accepting again (as did Chilwell J. earlier) the importance of the Treaty of Waitangi Act 1975 in the legislative recognition of the wording of the Treaty, with the appointment of the Waitangi Tribunal as a specialist body to advise and report as to interpretation of both the Maori language and English language versions. Although not conclusive, the Tribunal reports would clearly be considered authoritative, unless otherwise found to be inaccurate. Furthermore, interpreting the impact of section 9, the Court lays down a more general ruling, namely that the principles of the Treaty “require the Pakeha and Maori treaty partners to act towards each other reasonably and with the utmost good faith”.⁸¹ The limited but strong judicial affirmation of the obligation, under the State-Owned Enterprises’ powers to act reasonably and with the utmost good faith, (but without imposing any specified duty to consult), will do much to restore the credibility of the Treaty in the eyes of the Maori people. In dicta Cooke P. acknowledges that there have been breaches of the Treaty in the past. As to the duty to work out an agreed solution to the transfer of Crown land, Cooke P. states “That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured.”⁸²

In the separate judgments, Richardson J., in considering “the honour of the Crown”, emphasises the legal analogy “No less than under settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi”.⁸³

Somers J. expresses the similar view that the duty of good faith derives from the instruction on 14 August 1839 by the Marquis of Normanby to Governor Hobson, which stated: “All dealings with the aboriginies for their

⁸⁰ (1987) 6 N.Z.A.R. 353. Court of Appeal. The second respondents were the Ministers of Finance, Energy, Lands and Forests.

⁸¹ *Ibid.*, in particular judgment of Cooke P., at 370.

⁸² *Ibid.*, at 373. The N.Z. Herald, 30 June 1987, reports reactions from Sir Graham Latimer (second applicant) “we can have faith in the judicial system in this country”; Dr Rangi Walker “It’s a vindication of the position most of us have held for some time”; Professor Whatarangi Winiata emphasized the partnership obligations of the Crown with the Maori people as “a major implication” (p.20, section 1).

⁸³ *Supra* n.80, Richardson J. at 390.

lands must be conducted on the same principles of sincerity, justice and good faith as must govern your transactions with them for the recognition of Her Majesty's sovereignty in the islands". These instructions supported the conclusion that "Each party . . . owed to the other a duty of good faith." The bulk of Maori grievances related to land, and his Honours would hold "the principles of the Treaty include an obligation to redress past breaches of the Treaty . . ." ⁸⁴

Concerning the ongoing partnership envisaged under the Treaty in 1840, Casey J. observes "In its context Captain Hobson's famous announcement "Now we are one people" points to this concept rather than to the notion that with a stroke of the pen both races had been assimilated" ⁸⁵

Having regard to the central references of the Treaty in the Treaty of Waitangi Act and the State-Owned Enterprises Act, Bisson J. states "With the advent of legislation invoking recognition of the principles of the Treaty no longer is it to be regarded as a "simple nullity" (as in *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur R (NS) SC 72) and the application of its principles does not involve the enforcement of the Treaty itself as if totally incorporated in municipal law (cf *Hoani Te Heu Heu v Aotea District Maori Land Board* [1941] AC 308, at p 324)." ⁸⁶

The judges reaffirm the accepted legal opinion that the Treaty does not in general confer rights in personam directly enforceable under municipal law, and in the words of Somers J. "Neither the provisions of the Treaty of Waitangi, nor its principles are, as a matter of law, a restraint on the legislative supremacy of Parliament." ⁸⁷

However, the affirmation of the legal consequences of incorporation of "the principles of the Treaty of Waitangi" within legislation is a landmark, as stated, and the judgments are profoundly relevant to the interpretation of such references in other recent legislation. Both Casey J. and Bisson J. briefly allude to the several 1986 and 1987 Acts and Bills, now to be considered. ⁸⁸

4. Further Statutory Recognition 1986-1987

Four statutes deserve assessment in relation to specific recognition of the Treaty or implied objectives thereunder to accommodate a Maori dimension, or a bi-cultural approach.

(a) *Town and Country Planning Act 1977*

Under the Town and Country Planning Amendment Act 1987, the constitution of a regional planning committee is simplified in relation to Maori representation.

Formerly, a representative of the Maori people of the region could be nominated by the District Maori Council where in the opinion of the united or regional council it was first accepted that there were "significant Maori

⁸⁴ *Ibid.*, Somers J. at 400, 404.

⁸⁵ *Ibid.*, Casey J. at 410.

⁸⁶ *Ibid.*, Bisson J. at 424.

⁸⁷ *Ibid.*, Somers J. at 399. Cf Cooke P. at 371 "The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try to shackle the Government unreasonably would itself be inconsistent with those principles".

⁸⁸ *Ibid.*, Casey J. at 409; Bisson J. at 418 — references to the Environment Act 1986 and Conservation Act 1987. *Infra* n.99.

land holdings” within the region and it was therefore appropriate to include a representative of the Maori people. This discretion gave rise to uncertainty as to whether significant Maori land holdings referred to presently owned holdings, or earlier ancestral occupation, and there was general dissatisfaction amongst the Maori people concerning the lack of guaranteed representation.⁸⁹ The 1987 amendment includes as of right on the regional planning committee “a representative of the tangata whenua of the region”. There is no definition of the “tangata whenua” and these words probably represent their first use within general legislation. Although likely to be interpreted as the “aboriginal people of the area”, it may well be appropriate to assume that where Maori words are used their interpretation should be approached from a Maori perspective. On this assumption there is probably no doubt as to who would be regarded as the “tangata whenua”, and a suitable representative of these people.⁹⁰

Other 1987 amendments to the Planning Act include a minor addition to the second schedule matters to be dealt with in a district planning scheme, namely provision for recognition of Maori reservations already set apart. In relation to maritime planning schemes, the third schedule obligations contained no reference to Maori objectives in the 1977 version, and this is remedied by the addition of a new clause directing for consideration as appropriate “provision for Maori traditional and cultural uses, including fishing grounds”. It is reasonable to assume that this clause has been inserted as a direct result of criticism made by the Waitangi Tribunal in its report concerning the Manukau harbour (WAI 8).⁹¹

(b) *Environment Act 1986*

The Environment Act 1986 provides another example of recognition of the relative significance of the Treaty of Waitangi. The Bill as introduced into the House of Representatives in 1986 included a reference to the Treaty in the long title, and further specific references in relation to the matters to be taken into consideration by the Parliamentary Commissioner in carrying out the environmental supervisory functions, and by the new Ministry for the Environment in carrying out its functions. In the former role, the Commissioner was to have regard to “the principles of the Treaty of Waitangi”. In the latter role, the Ministry was to advise on policies in relation to the management of natural and physical resources, with a view to improving the quality of the environment and “of giving recognition and practical effect to the principles of the Treaty of Waitangi”. When the Bill was reported back to the House

⁸⁹ Town and Country Planning Act 1977, s.6(2)(e),(3) — the Maori representative, if applicable, was nominated by an appropriate District Maori Council. Cf Palmer, *supra* n.66, at 43 - significance not restricted to existing Maori land holdings, but includes significance in an historical sense.

⁹⁰ *Ibid.*, s.6(2)(e) (as substituted 1987). The regional authority would appear to be vested with the power of appointment, or the acceptance of a nominee, but in the Parliamentary debates, Mr Ken Shirley, MP, reporting the Bill back after the amendment, assumed “the representatives would be appointed by tangata whenua”: (1986) N.Z.P.D., vol 475, at 5502. The Parliamentary opposition spoke against the removal of the District Maori Council as the nominating body.

⁹¹ *Ibid.*, Second Schedule, clause 3 reference to Maori reservations; Third Schedule, new clause 2A. See Waitangi Tribunal report (WAI 8), *supra* n.50, at 60-69, 118. For Parliamentary debates (1986) N.Z.P.D., Vol.475, 5502, (1987) 7398-7410, 8073, 8167-8173 — planning for Maori fishing grounds was not questioned or debated.

for enactment, both references to the Treaty of Waitangi were deleted. One may speculate that a possible reason for their omission was to avoid overlap or conflict with the role of the Waitangi Tribunal in interpreting the Treaty.⁹²

However, the Bill as passed, includes a redrawn long title, which clearly states inter alia, that it is “an Act to . . . ensure that, in the management of natural and physical resources, full and balanced account is taken of . . . (iii) The principles of the Treaty of Waitangi . . . ”.⁹³ The long title of an act may be used as an aid to its interpretation. It is accordingly reasonable to assume that in carrying out the broad functions to investigate any developments which may affect the environment, the Commissioner will be required to take into account the principles of the Treaty of Waitangi in that regard. Likewise, the Ministry in advising the Minister on environmental matters, should also have regard to the principles of the Treaty as far as relevant. As both the Commissioner and the Ministry have supervisory and recommendation functions in relation to some 41 statutes set out in the schedule, by clear implication, the principles of the Treaty are now relevant to the administration of each of the listed statutes.⁹⁴

(c) *Conservation Act 1987*

In the Conservation Act 1987, Parliament may be seen to have taken a further step, in going beyond the obligation to take into account the Treaty of Waitangi, to require affirmative action towards its fulfilment. The Act creates a new Department of Conservation under the control of the Minister of Conservation, and states in section 4: **Act to give effect to Treaty of Waitangi.** “This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.”⁹⁵

It is submitted, that the initial obligation under section 4 to interpret the Conservation Act so as “to give effect . . . to the principles of the Treaty of Waitangi” has a legal effect similar to section 9 in the State-Owned Enterprises Act 1986, and cannot be construed to increase the scope of the statutory powers already stated in the Conservation Act. By implication, the principles of the

⁹² Environment Bill 1986, section 16 (d) [struck out], section 28(a)(i) [reference to the Ministry function concerning the Treaty deleted.] The Parliamentary Debates do not disclose the reason for the deletions of the Treaty references in the text, although the question was asked by Mr McLean M.P. (and not answered) : (1986) N.Z.P.D. at 6165. For other debates, *ibid.*, Vol.472, 2980-3000, Vol.475, 5402-5401, 6162-6171.

⁹³ The long title was redrafted to ensure that in the management of natural and physical resources, a “full and balanced account” is taken of five specific criteria, the initial draft title having been described as having an “excessive anthropocentric bias” : (1986) N.Z.P.D. Vol.475, 5402 per Mr Ken Shirley M.P. (Chairman of the P. and D. Committee). The first criteria is “the intrinsic value of ecosystems”.

⁹⁴ Environment Act 1986, s.2 — the definition of “consent” refers to an “authorisation, permission, a licence, a permit, a right, and any other approval of any type whatsoever” capable of being granted under the 41 Acts, or regulations, notices, or bylaws thereunder, or under planning schemes, and the Parliamentary Commissioner has the right to take part in any proceedings to obtain any such “consent” (s.21). If there are no proceedings arising, the Commissioner’s powers to intervene are limited to investigation and advice to the bodies or parties concerned (s.16(1)(c)). The Ministry function as to the Acts is to provide “the Government, its agencies, and other public authorities with advice on — (i) The application, operation, and effectiveness of the [41] Acts . . . in relation to the achievement of the objectives of this Act.”The preamble encapsulates the relevant basic objectives, which include the principles of the Treaty. See also, references, *infra* n.99, 1, 2.

⁹⁵ For Parliamentary debates, (1986) N.Z.P.D. 6138-6152, (1987) N.Z.P.D. 7881-7891 (250 submissions), 7975-8002, 8008-8019.

Treaty must be determined where a relevant issue arises, and taking the words of Cooke P., “the Pakeha and Maori Treaty partners [should] act towards each other reasonably and with the utmost good faith”.⁹⁶ In essence, no interpretation should be reached under the Conservation Act which might be inconsistent with the principles of the Treaty. The additional directive that the “act shall so . . . administered as to give effect to the principles of the Treaty” can be construed as imposing a duty upon the Department to take an active role in promoting through administration the principles, where a neglect to take action could result in prejudice or compromise of the promises or commitments in the Treaty.⁹⁷ The scope of this statutory obligation goes beyond the narrow functions of the Department, as the Department under section 7 is granted the administration of 18 statutes under the first schedule and has various consultation obligations in relation to other statutes set out in the second schedule. One of the functions in section 7 (b) is “to advocate the conservation of natural and historic resources generally”. Combining this function with the responsibilities under the first and second schedules, and the directive in section 4, it may be properly concluded that affirmative action is now required from the Department in all administrative areas to give “effect to the principles of the Treaty of Waitangi”.⁹⁸

Concerning identification of the principles, in the *NZ Maori Council* decision, Bisson J. notes the references to the Treaty in the Environment Act 1986 and the Conservation Act 1987, and states:⁹⁹

“Although Parliament has referred to “the principles of the Treaty of Waitangi” and placed great weight on them it has not in any of the Acts mentioned spelt out what those principles are. It has been left to the Waitangi Tribunal to make its own determination of those principles and their practical application on claims which came before it. Although the Crown has not the right to make a claim to the Waitangi Tribunal it can look to findings of the Tribunal for guidance as to the principles . . . ”

In the same decision, Casey J. notes the references to the Treaty in the above Acts, and after postulating the nature of a principle as “a fundamental motive or reason for action”, refers to the Waitangi Tribunal report on the Manukau Harbour, and states “it drew a number of conclusions, the first being that the Treaty obliges the Crown not only to recognise the Maori interests specified in it, but actively to protect them. I concur in thinking that this is a principle to be rightly drawn from a consideration of the Treaty provisions in the light of the surrounding circumstances”.¹⁰⁰

The legal duty is not limited to prospective events or action, but as Somers

⁹⁶ Supra n.81. The ordinary principles of statutory interpretation apply, including s.5(j) of the Acts Interpretation Act 1924 as to the fair, large, and liberal approach.

⁹⁷ The mandatory nature of “shall” compared to a permissive “may” is a well recognised legal distinction. Cf Jim Evans, “Mandatory and directory rules” (1981) 1 *Legal Studies*, 227.

⁹⁸ The relevance of the Treaty of Waitangi was not debated in Parliament. There were no Maori speakers to the Bill (supra n.95). However, the Select Committee amended the Bill to allow a specific exception to the prohibition against taking a plant from a conservation area, namely where the Director-General authorises the taking of “any plant to be used for traditional Maori purposes” (s.30(2)).

⁹⁹ Supra n.80, Bisson J. at 418.

¹⁰⁰ *Ibid.*, Casey J. at 410.

J. would hold, the principles “include an obligation to redress past breaches of the Treaty”.¹⁰¹

(d) *Maori Language Act 1987*

The Maori Language Act 1987 (*Te Reo Maori*), provides landmark recognition of the Maori language as an official language, and by the presentation of a Maori language version first, followed by the English version. In the preamble referring to the Treaty of Waitangi and the guarantees of the Crown, it acknowledges that the Maori language is to be one such “taonga” under the Treaty.¹⁰² A right to speak Maori is guaranteed in the context of legal proceedings, which are defined to include not only proceedings of Courts and certain Tribunals, but other quasi-judicial bodies, where reporting on matters of particular interest to the Maori people, and this may extend to local authority planning committees where Maori issues are raised.¹⁰³ The right to speak Maori requires the forum to admit the statements, and to provide an interpreter if necessary. The recognition of the Maori language does not entitle the speaker to be necessarily addressed or answered in Maori.¹⁰⁴

5. *Statutory Bills 1987*

The visible trend towards official recognition of the Treaty of Waitangi, and the increasing use of the Maori language in general statutes, is further exemplified in two Bills remaining before the House of Representatives in 1987.

(a) *Children and Young Persons*

In the Children and Young Persons Bill 1987, section 3 tabulates the objects of the Act to promote the well-being of children and young persons. Significant reference is made to “assisting families, whanau, hapu, and iwi in the discharge of their responsibilities to children and young persons”, and more generally to recognise the desirability of a child to live in the association of a “hapu” or family group, and to take into account the psychological and spiritual impact of removing a young person from the hapu or family group. The Bill endeavours to take cognisance of and to accommodate the bicultural family structures within the community.¹⁰⁵

¹⁰¹ *Ibid.*, Somers J. at 404.

¹⁰² Maori Language Act 1987. The Bill was first read in the House of Representatives in 1986, shortly before the Finding of the Waitangi Tribunal relating to *Te Reo Maori* (WAI 11), was issued on 29 April 1986. The Finding holds in para. 4.3.9 that the Maori language is a ‘taonga’ under the Treaty, which should be protected under article II, contrary to the Court of Appeal decision in *Mihaka v Police* [1980] 1 N.Z.L.R. 453.

¹⁰³ *Ibid.*, ss.2, 4, first schedule. The Tribunal Finding (*supra* n.3) recommends the official recognition of the Maori language in the Courts, but also recommends recognition in dealings with Government Departments, local authorities, and public bodies (para. 8.2.8). The later recommendation is not implemented in the Act.

¹⁰⁴ *Ibid.*, s.5. The Tribunal Finding (*supra* n.3) further recommends an enquiry into educational practices to encourage the learning and use of Maori in schools, the promotion of the language in broadcasting, and that bilingualism be a prerequisite for certain State services positions.

¹⁰⁵ The Bill introduces new advisory bodies with multicultural representation. It replicates the existing Children and Young Persons Act 1974 in dealing with two major problem areas, namely parental neglect and child offending. These problems may overlap in particular cases. In the mental health sphere, there is a distinct lack of statutory or official recognition of Maori cultural and spiritual factors in treatment programmes: Rev Eru Potaka-Dewes “Maori Illness and Healing” in *Mental Health: A Case for Reform* (LRF, 1986), 103-119.

(b) *Maori Affairs*

The Maori Affairs Bill 1987, (to replace the 1953 Act), contains a bilingual preamble, giving precedence to the Maori language. It recites that “the Treaty of Waitangi symbolises the special relationship between the Maori people and the Crown: and . . . it is desirable that the spirit of the exchange of sovereignty for the protection of rangatiratanga embodied in the Treaty be reaffirmed . . .”.¹⁰⁶ Furthermore, in the interpretation of the Act generally, section 2 (2) states: that “it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates the retention, use, and control of Maori taonga by Maori people”. In the event of conflict between the Maori and English versions of the preamble, the Maori version shall prevail. Section 3 follows with an innovative listing of eight of the Maori words or phrases used in the Bill, with English interpretations. In general terms, the Bill endeavours to prevent the further alienation of land to persons other than “the preferred classes of alienees” who are primarily the children or members of the hapu of the owners.¹⁰⁷

In relation to land partition and subdivision, the existing legal obligation to obtain approval by the territorial authority under the Local Government Act 1974 is retained, which also brings in the application of district planning schemes.¹⁰⁸ However, in relation to reserves contributions and roads, a discretion is granted to the territorial authority to dispense with the normal requirements as to reserves provision or roading, as long as the allotments will remain under the control of the present owner or owners.¹⁰⁹ Furthermore, where the Maori Land Court certifies the land has “special historical significance or spiritual or emotional association with the Maori people”, a reserve requirement shall not be imposed but the land is to be set aside as a Maori reservation, so retaining Maori ownership.¹¹⁰ This provision complements the identification under the Historic Places Act 1980 “of traditional sites”, and in conjunction with the discretion to dispense with roading or reserves, will largely resolve the former grievances expressed where Maori land was taken for public reserve purposes or esplanade reserves where sited adjacent to water areas.¹¹¹

IV CONCLUSION

As stated initially, an attempt has been made to assess the significant legislative

¹⁰⁶ Rangatiratanga denotes authority to control and manage, to be coupled with the status and dignity of mana : Finding on the *Manukau Harbour Claim* (WAI 8/1985), at 90-91. Also Finding, WAI 6, supra n.48, at para. 10.2.

¹⁰⁷ Maori Affairs Bill 1987, ss.155 (2) — preferred classes of alienees, 158-161-alienation rights subject to Maori Land Court confirmation. Cf R.Walker, supra n.8, at 59 “Not one more acre” to be alienated to the pakeha.

¹⁰⁸ *Ibid.*, ss.366, 367. For former legislative position, see supra n.24. Concerning planning scheme compliance and ordinances to accommodate traditional Maori settlements, see Asher and Crawford, supra n.26.

¹⁰⁹ *Ibid.*, s.368(3). This provision will be apposite for a marae settlement, which is likely to remain with the original hapu or iwi.

¹¹⁰ *Ibid.*, s.368(1). Also s.367(8) in relation to reserves generally. In the decision *R v Nukutaurua 3C3B and 3C3A Blocks*; Maori Appellate Court, 32 Gisborne A.C.M.B. 217, 25 June 1987, the Court held that the creation of a Maori reservation under s.439, although a subdivision, was created by the Crown through a vesting notice, and was not therefore subject to the public reserve obligations under Pt XX of the Local Government Act 1974.

¹¹¹ Historic Places Act 1980, s.50, s.2 (definition). Cf R.Walker supra n.8, at 58-Lake Taupo esplanade reserves over Maori land opposed.

provisions since 1840, impacting upon the recognition and implementation of the Treaty of Waitangi. Much of the earlier legislation, grouped under the indicative colonial period heading, represents a respect for the Maori people (excluding the land confiscation enactments), but adopts an approach, common to the time, to provide for separate provisions for the Maori people within their own communities and problem areas. Otherwise the enactments reflect a monocultural legislative solution.

The Middle Ages period, identified as commencing in 1960, accords a recognition of the inherent discrimination which separate statutory provisions are likely to promote and evinces an indirect endeavour to assimilate the Maori people into the legislative process, by repealing discriminatory legislation, and removing the restrictions upon identification as a Maori person, where the proportion of Maori blood is less than half. In essence, the ethos prevails that we are all New Zealanders or Kiwis together, with no discrete heritage to be recognised outside the areas of Maori land dealing.

The Maori Rights renaissance, indicated as starting in 1975, has been a gradual process combining attitudinal change, political innovation, legislative recognition, and judicial activism. Throughout this period, the law has at times led the social changes in the community, and at other times, has reflected those changes.

It is also possible to speculate that the advance of Maori rights has occurred more rapidly under one government than under another, or by virtue of the influence of one Prime Minister or Minister of Maori Affairs, as against another.¹¹² From a legal point of view, it is more important to consider whether or not the principles of the Treaty have in fact been fulfilled in 1980, or whether further legislative reforms remain to be undertaken.¹¹³ One may firmly conclude, however, that since 1975, and more particularly since 1985, there has been a dramatic bicultural renaissance in New Zealand resulting in (a) the legal integration of the Treaty of Waitangi into key statutes, (b) the first significant official use of the Maori language in general statutes, and (c) the increasing acceptance of Maori cultural and spiritual values as relevant issues to be applied by the legislators, the Courts, Tribunals, and administrators.

¹¹² As a broad observation, the recognition of the Treaty of Waitangi partnership, and the Maori culture, has been promoted more positively by the more recent Labour Governments (1958-60; 1973-75, 1984-87), than by the National Government in the intervening years. For an analysis of respective Government policies in relation to the Maori people in the context of electoral representation, see *Report of the Royal Commission on the Electoral System*, (Govt Printer, 1986), in particular Appendix A, "The Electoral Law of New Zealand: A Brief History"; Appendix B "A History of Maori Representation in Parliament", Prof M.P.K.Sorrenson; Annex, "Voting in the Maori Political Sub-System, 1935-1984", Prof.Robt Chapman.

¹¹³ For example, the *Royal Commission on the Electoral System*, supra Ch.3, recommends a mixed member proportional voting system as the best means of providing effective Maori representation (rec. 3, 106); and more generally that Parliament and the Government should consult with the Maori people to establish and co-ordinate mechanisms and processes which adequately recognise the constitutional position of the Maori people under the Treaty of Waitangi (rec.7, 112). Likewise, in relation to Maori fishing rights acknowledged under the Fisheries Act 1983, s.88 (2), the interim decision of Greig J. in *Ngai Tahu Maori Trust Board v Attorney-General and another*, High Court, Wellington C.P. 559/87, judgment 2 November 1987, declaring fish quota regulations to be unenforceable as affecting the commercial rights of the Maori, raises major constitutional, legal, and compensatory issues for future Parliamentary resolution.