Book Review

THE TREATY OF WAITANGI IN NEW ZEALAND'S LAW AND CONSTITUTION, by Matthew Palmer (Author), Victoria University Press, 2008, 477 pp, recommended retail price NZ$50 (paperback).

The Treaty of Waitangi occupies an unsettled place in New Zealand's constitution, law and life. Although there is almost universal agreement that it is a foundation document, this is not reflected in the legal status of the Treaty, or necessarily in its treatment by government. The Treaty engenders strong emotions on both sides of the political divide. Many New Zealanders are ambivalent about it. For some, it is a private issue; for others, it is very public, and very political. Both the legal and constitutional status of the Treaty is uncertain and unsettled, and so is the question of who exercises public power in relation to it. Harris has described the Treaty as one ingredient of a 'cauldron of quietly simmering constitutional issues'.[1] In this well-researched book, Matthew Palmer confronts these issues head on, and argues his vision for settling the legal and constitutional position of the Treaty.

As co-author with Sir Geoffrey Palmer of *Bridled Power*, and author of several articles on the Treaty of Waitangi and related matters, Matthew Palmer is well-known and highly regarded. Palmer was awarded the New Zealand Law Foundation International Research Fellowship Award to write this book, which was published at the end of 2008. The book is the recipient of the Legal Research Foundation's J F Northey Book Award for the best legal book published in 2008.

The book cover is attractively laid out in earthy colours with the name of the book and the author clearly visible in large font. The cover picture of a pathway through a bush, as the author explains in the preface, is significant because it evokes New Zealand's constitutional landscape and the place of the Treaty of Waitangi in it. As Palmer observes, 'the Treaty is foundational, partly obscured, but salient'.[2] It is also perhaps symbolic of the journey the reflecting reader may make from general knowledge of the Treaty to an understanding of the legal and constitutional complexities of the Treaty, and ultimately perhaps, for support of the author's view of the Treaty's place in New Zealand generally, and the law and constitution particularly.

The content of the book is well-presented. The typesetting, text layout and font size aid in making the text easy to read. Chapters are numbered, but sections and paragraphs are not numbered. I suspect that this was done to improve the flow of the book, and to make it more accessible to the general reader. Although this is not necessarily a shortcoming, it could potentially be a minor annoyance, particularly for the more academic reader; it makes it a bit more challenging to get a holistic sense of the book. The use of endnotes, rather than footnotes, also simplifies reading, but again, for the more academic reader, constantly turning to the back of the book to access the endnotes may become cumbersome. The index uses page references because of the absence of paragraph numbering.

The book is conveniently divided into 3 main parts: past, present, & future. Each part has its own chapters. The division is simple, but not simplistic. It creates in the mind of the reader a reali-

1 BV Harris, 'The Treaty of Waitangi and the Constitutional Future of New Zealand' (2005) *NZ Law Review* 189.

2 Palmer 5.

sation and understanding of the importance of the past and present status and place of the Treaty as a pointer for the Treaty's future, and explains three distinct yet complementary developmental stages. There is also a preface, introduction and summary, which provide a useful abridgement of Palmer's views and recommendations.

Part 1: Past deals with the place of the Treaty of Waitangi in the law and the constitution in 1840. Palmer explores the Treaty's role in founding and legitimizing the New Zealand state. He provides a comprehensive overview of the historical events that led to the signing of the Treaty and then proceeds to discuss what he believes relevant parties understood the Treaty to mean at the time. He concludes that the Treaty resulted in public power being shared between the British Crown and Māori, although the terms of the power sharing were unspecified both in the Treaty and in reality.

Unsurprisingly, the greatest part of the book is devoted to **Part II: Present**. The author attempts to answer the following questions: what has the treaty been reinterpreted to mean in New Zealand today? What is its current legal status and force? What is its current place in New Zealand's constitution? The author provides a description and analysis of the status quo, which should be of great assistance to anybody needing an accessible, convenient and accurate exposition of Treaty of Waitangi law as it currently stands. His assessment of the present is damning, but accurate. There is a contradiction between the law and the constitution in how the Treaty is interpreted and enforced. The constitutional importance of the Treaty is not reflected in its current legal status, but more damning still, there is uncertainty not only about the meaning of the Treaty in relation to certain specific issues, but also about whose role it is to address these uncertainties. Palmer rightly describes the Treaty as being half in and half out of the law; one of the most unsatisfactory aspects of the current system is the inconsistency with which the Treaty has been incorporated into New Zealand legislation.

Palmer favours a relational approach to Treaty matters; relationships therefore lie at the heart of the Treaty, in particular, the relationship between the troika of Crown, Māori and other New Zealanders. The emphasis is on process, but without losing sight of the substance of rights and expectations. He concludes that the uncertainty about content and inconsistency in application is harming the Treaty and the nature and quality of relations between this troika.

It is a fact that the Treaty affects the lives of all in New Zealand. Its content, constitutional place and legal standing are contested political issues that tend to polarise. Palmer takes the view correctly that certainty of the Treaty's place and standing would benefit all, and would improve the health of the troika's inter-relationships.

Palmer also deals with the standing of the Treaty in international law. He concludes that the Treaty is a valid and binding treaty at international law. He predicts how the Supreme Court could potentially rule on this, suggesting that the Court would likely find that the Treaty will not be enforceable as part of New Zealand law unless it is expressly incorporated into the law. However, he additionally opines that the Court is likely to hold that even though it is not enforceable in law, the Treaty is binding on the honour of the Crown.

Another interesting discussion centres around the issue of administrative decision-making, particularly regarding the doctrine of legitimate expectations. Palmer contends that there is a good argument to be made in favour of a legitimate expectation existing on the part of Māori that the Treaty will be a factor in administrative decision making by the Crown. In particular, he muses about whether the Supreme Court would develop a general legal obligation on the part of the Crown, based on a legitimate expectation to act consistently with the Treaty. Palmer's views on

the role of the courts in the interpretation and enforcement of the Treaty, and its principles make interesting reading. He reflects not only on the past and present treatment of the Treaty by the courts, but also muses on how the Supreme Court is likely to deal with it in the future. His musings are speculative at best but exhibit insight into how Palmer views the role of courts generally in society, particularly in relation to the balance of authority between the courts and Parliament. He seems to consider that the courts have not been as proactive as they could have been in making the Treaty more effectively binding on the executive branch, and points to a judicial reticence that is based on a perception on the judiciary's part that New Zealand's constitutional culture does not view them as the appropriate exercisers of public power in this regard. He refers to the 'deep and enduring tension' between the Treaty and New Zealand's majoritarian constitutional culture, which has Parliament as the primary driver of law and constitutional reform.[3] He opines that '[w]hether the courts will give force to the Treaty independent of Parliament ... will depend on whether the judges of the Supreme Court wish to do so. This will be influenced by those judges' perception of the justice of the dispute before them, their expectation of the likelihood that injustices will be remedied by the executive or by Parliament, and the extent to which the courts consider they enjoy public legitimacy in their exercise of judicial power.'[4] I think that he somewhat overestimates the ability of the courts in giving general effect to the Treaty. Perhaps Parliament is better suited to address these issues, rather than the courts; although, having said that, I think that the courts have a vital role to play in constitutional dialogue, particularly with regard to the Treaty of Waitangi. The pertinent question is the extent to which the courts can and should take the initiative in engaging the executive and legislature in such dialogue. In his discussion on the theory of constitutional dialogue, Palmer observes that new Supreme Court, composed of New Zealanders based in New Zealand, is 'likely to find its own distinctive New Zealand accent in constitutional dialogue with Parliament'.[5] The Supreme Court Act 2003 places emphasis on the Treaty of Waitangi,[6] and coupled with the statements made by the Chief Justice at the first sitting of the Supreme Court, it would appear that the court is conscious of its important role in this regard:

> What we should celebrate is the aspiration for the delivery of justice which has prompted the creation of the Court. Those aspirations have been with us from the very beginning. In February 1840 at Waitangi much of the debate was about law and its administration. I doubt whether any country was founded with such expectations of law as ours. The creation of a final Court of Appeal in New Zealand furthers those aspirations for justice.[7]

Part III: Future requires the author to don his soothsayer's garb to determine what the future holds for the Treaty. This is not an easy task. At the one end of the scale is the continuation of the status quo; this would clearly be an unacceptable option. At the other end of the scale lies the incorporation of the Treaty into the common law of New Zealand. Palmer's solution appears to lie somewhere in the middle.

Palmer's tone is conciliatory rather than alienating. His vision shifts the focus away from the technical aspects of the Treaty and its present treatment, to the benefits of stability and certainty about Treaty matters. He reiterates his thesis that relationships are at the heart of the Treaty, and

3 Palmer 26.

4 Palmer 232-233.

5 Palmer 242.

6 S 3(1)(a)(ii).

7 Dame Sian Elias, Speech on the occasion of the first sitting of the Supreme Court, Wellington, 1 July 2004 available at <http://www.courtsofnz.govt.nz/from/speeches-and-papers/#speechpaper-list-first-sitting> at 12 October 2009.

that the basis for success in Treaty matters is building and maintaining good relationships between the troika of Crown, Māori and other New Zealanders.

He considers various options to achieve this end, including the maintenance of the status quo. Although he concedes that the analysis in his book is consistent with reform that would afford the Treaty the status of superior law – which would give the judiciary the ability to essentially overrule the legislature and executive branches – he does not regard this option as feasible presently. In his words, 'I just cannot see that the current state of New Zealand's collective constitutional culture would tolerate it'.[8] His preferred option, which he terms the 'realistic option' is to make the Treaty of Waitangi a binding part of New Zealand law, with a Treaty of Waitangi Court having the responsibility to interpret and apply it. The Court would be composed of selected High Court judges and Waitangi Tribunal members, who are given warrants to sit in this Court in panels of two. An appeal will lie to the Court of Appeal and Supreme Court from this Court. The benefit of Palmer's solution is that it will provide certainty at least about who will exercise the power of interpretation, and will hopefully bring more clarity and certainty to the interpretation of the Treaty and its application. Such a court would also be likely to be less reticent in substantively enforcing the Treaty, and the principles which underlie it. He sees a new role for the Waitangi Tribunal, that of advisor to Parliament on the meaning of the Treaty in legislation, whilst continuing to report on historical claims.

The reasoning underlying the call for a separate court has merit. Palmer correctly records concern about the legitimacy of the courts of general jurisdiction to deal with Treaty matters in the eyes of Māori. To my mind, this can to some extent be addressed by increasing the number of Māori judges, or judges with knowledge of tikanga Māori and kaupapa Māori, on the superior courts' bench, but this would require a firm commitment from the executive to increase judicial diversity. Perhaps a similar outcome to that proposed by Palmer could be achieved by creating a Treaty of Waitangi chamber within the High Court which would be staffed by judges of the High Court with knowledge and understanding of Treaty matters. Rather than creating a separate court, a chamber that is part of the courts of general jurisdiction could go a long way to mainstreaming the Treaty and its interpretation. But for this to work, judicial legitimacy issues need to be addressed first.

Palmer's plea for the inclusion of the Treaty as a binding part of New Zealand for general purposes has substantial merit. Presently, it is generally only in instances where legislation stipulates that regard should be had to the Treaty that the courts use it as an aid to interpretation. The Waitangi Tribunal can interpret and apply the Treaty but without general binding effect. Palmer's suggestion would allow the Treaty to be used as a general aid to interpretation. This would call for Parliament to enact a statute that would give the general meaning of the Treaty of Waitangi the force of law in the same way as any other piece of legislation.

The fear with a book of this length is that it runs the risk that the text may become tedious, especially as it is sole authored. Although there is a measure of repetition, Palmer holds the attention of the reader with interesting content and an unpretentious, forthright writing style. The key is that the author adopts a practical approach to these complex issues without discarding their theoretical underpinnings. Palmer is a proponent of constitutional realism, and tells it like it is. There can be no doubt on which side of the fence Palmer sits. He pulls no punches and states his opinion, but he does so in an honest and reasonable way that affirms his bona fides and is unlikely to alienate

8 Palmer 339.

readers who do not share his views. His pragmatic approach is refreshing and one of the distinguishing attributes of the book. His vision is ambitious, yet realistic. He acknowledges though that not everyone would agree with him, but the benefit of Palmer's thesis is that it provides a basis for discussion.

The inclusion of material taken from the cabinet files on the Treaty of Waitangi adds substantial value to the book, and provides interesting insight into the way that successive governments have viewed the Treaty and its place in New Zealand's legal and constitutional landscape. Appendix B to the book contains selected extracts from these files.

The present unsettled place of the Treaty is wholly untenable and needs to be resolved. The appropriate path needs to be carefully chosen after debate and reflection as it will no doubt impact on our relations with one another, and with the way we see and regard ourselves as individuals and a nation. The discussion around the place of the Treaty is a vital component of any dialogue on New Zealand's constitutional arrangements. Palmer touches upon the significance of a culture of 'pragmatic evolution' regarding the constitutional arrangements, which is tied in with an 'instinct for ad hocery'.[9] Is this still the way to go, or there is a need for a greater sense of purpose and direction with regard to the complex issues that relate to the Treaty? Whatever the chosen path, it should be one that binds rather than divides; the whole community should have confidence in the outcome of the dialogue. The discussion may be a long and difficult one, but it is one that is vital to the interests of all communities in New Zealand. As put by Harris, '[u]ltimately that place [in New Zealand's future constitutional structure] is likely to be determined by a compromise between the values underpinning the Treaty and justifying particular recognition in the law of Māori interests, and the liberal ideal of all citizens and their interests being treated in largely the same way.'[10] Finding this balance is the challenge. Palmer expresses the hope that the book 'will provoke new, constructive conversations about where we are and where we want to be going in relation to the Treaty of Waitangi.' The book is a good start to such a conversation, and to addressing this challenge.

Overall, the book is a tour de force that makes an invaluable contribution to learning in the area. I have no doubt that it will become the *locus classicus* on the subject. It should appeal to a broad range of readers. Although the primary readers are likely to be academics, politicians and others who deal with the Treaty in a professional capacity, the ordinary reader should also benefit from this book. It is always challenging to strike an appropriate balance between academic scholarship and popular non-fiction, but I think that the book succeeds on this score. The publicity pamphlet is indeed right in calling the book both 'academically robust and accessible'. It should be essential reading for anyone involved in law, and would be a welcome addition to any other serious reader's bookshelf.

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9 Palmer 17.

10 Harris, above n 1, 215-216.

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