Section 3(1)(g) of the Town and Country Planning Act 1977

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Given that control of land is a major concern of the Maori, the importance of the role of planning legislation in meeting Maori needs is undeniable. The Town and Country Planning Act 1953 failed to make express provision for Maori interests in this area. Although evidence of the special interests of a particular group was relevant in assessing the planning needs of that group,[1] no guidelines existed as to their status relative to other planning considerations.[2]

Submissions by the New Zealand Maori Council on the Town and Country Planning Bill 1977 pleaded for a "clear statutory provision to govern practice and provide for the protection of the Maori people". The resultant section 3(1)(g) fell far short of the Council's wishes and its effectiveness has been a matter of debate ever since.[3] Nevertheless, it was a step forward in that it identified the special relationship between the Maori people and land as an important consideration in the planning decision-making process.

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1 Palmer, *Planning and Developmental Law in New Zealand* (1977) 53-54.

2 *Morris v Hawke's Bay County Council* (1977) 6 NZTPA 219. See also *Nga Hau E Wha Trustees v Pukekohe Borough Council* Appeal 476/75.

3 Walker, "Korero", *New Zealand Listener*, 18 February 1984; Tamihere, "The Treaty of Waitangi and the Bill of Rights: A plea for recognition" [1987] NZLJ 151.

Background

The broad aim of planning legislation is to provide a framework for patterns of land use and ownership and policy guidance on how they may be best organized in the public interest. To this end, sections 3 and 4 of the Town and Country Planning Act 1977 (and the accompanying Schedules) contain a range of purposes or objectives for decision-makers to consider. Section 3(1)(g) is one of seven matters declared to be of national importance which must be recognised and provided for in the preparation, implementation and administration of regional, district and maritime planning schemes. It refers to "the relationship of Maori people and their culture and traditions with their ancestral land"

The acknowledgement of Maori interests in a general statute is noteworthy.[4] Although by 1987 a number of statutes had built on this development, either by recognition of specific Maori needs[5] or by including reference to the principles of the Treaty of Waitangi, as recently as 1985 Shonagh Kenderdine in two important articles was obliged to argue for the validity of "statutory separateness".[6] Her thesis was that:[7]

> in drafting what may be broadly termed its environmental and planning legislation, the New Zealand legislature since 1840 has largely ignored Maaori perceptions of Articles I and II [of the Treaty of Waitangi]. The misperception and ignorance of Maaori rights has resulted in legal monoculturism with clear implications of statutory separateness in the New Zealand planning process, the implications of which are currently being wrestled with by Government and tested in a variety of New Zealand courts.

While the application of section 3(1)(g) involves an adjustment to new legislative considerations, it is submitted that the approach adopted by the Tribunal is best understood by reference to broader trends in judicial decision-making in New Zealand. It is possible to isolate at least three different ways in which recognition of Maori interests has been limited in the legal arena.

Firstly, the New Zealand courts have been reluctant to give weight or recognition to Maori culture or values as a basis for adjudication. The law in this area has been profoundly influenced by the words of Prendergast CJ in *Wi Parata v Bishop of Wellington*[8] in which the existence of Maori customary rights independent of statute was denied and the Treaty of Waitangi referred to as a "simple nullity".[9] The decision of the Court of Appeal in *In Re Ninety-*

4 Walker, "Korero", *New Zealand Listener*, 13 July 1985 and 18 February 1984.
5 Downey, "Return of the tohunga" [1987] NZLJ 37.
6 Kenderdine, "Statutory Separateness (1): Maori Issues in the planning process and the social responsibility of industry" [1985] NZLJ 249; and "Statutory Separateness (2): The Treaty of Waitangi Act 1975 and the planning process" [1985] NZLJ 300.
7 Ibid, 249-50.
8 (1878) 3 NZ Jur (NS) SC 72, 78.
9 Asher, "Planning for Maori Land and Traditional Maori Uses" (1982) 65 TPQ 28, 29; Tamihere, "Te Take Maori: Maori Perspective of Legislation and its Interpretation with an Emphasis on Planning Law" (1985) 5 AULR 137, 138.

Mile Beach[10] remains good authority in confirming the view of the learned Chief Justice that in 1877:

> it was for the supreme executive Government to equip itself as best it may, of its obligation to respect Native proprietary rights, and of necessity it must be sole arbiter of its own justice.

In the context of section 3(1)(g) of the Planning Act, the Planning Tribunal was confronted in *Auckland District Maori Council v Manukau Harbour Maritime Planning Authority*[11] with arguments based on "the common thread of humanity between Maori and Pakeha" and an appeal "not to reason, for that has been tried many times, but to aroha (compassion), that noble sentiment of which only human beings who have not had it blunted by civilisation are capable".[12] The Tribunal reacted by showing its awkwardness in dealing with such concepts and referred to:[13]

> the difficulty which can sometimes arise in presenting intangible values in a way in which they can, by judicial process, be identified, evaluated and weighed against conflicting values.

Later it held:

> Regarding counsel's appeal to aroha (compassion) rather than to reason, it is our duty to reach a judicial decision; and although that does not necessarily exclude compassion nor exclude recognition of the diminished value of fisheries from other causes, we are obliged to make our decision on the evidence called before us concerning the likely effect which the construction and use of the proposed wharf terminal would have on fisheries.

With respect, it is submitted that Tribunals and other Courts, and in particular those in the planning area, are called upon to consider many "intangible values", although most will be more culturally identifiable to European decision-makers. The Maori Planning Kit[14] comments:

> the general system of land regulation also fails to comprehend or place value on aspects which assume a fundamental and important role in Maori society and culture, and which are continually displaced in favour of more material pursuits such as economic goals.

It will be seen that reference to economic or productive land uses is a recurring theme in Tribunal decision-making.

Secondly, the attitude of the legislature and judicial decision-makers towards Maori interests, especially Maori land interests, has been unquestionably paternal.[15] The law was often a tool for "protection of the natives"[16] and failed to recognise Maori as tangata whenua or as partners to the Treaty of

10 [1963] NZLR 461, 475.
11 (1983) 9 NZTPA 167.
12 Ibid, 168.
13 Ibid, 172.
14 Asher and Kingi, *Maori Planning Kit*, Department of Maori Affairs, 1981.
15 O'Keefe, "A Maori Cultural and Traditional Dimension in Land Planning Law" (1985) 77 PQ 19, 22.
16 *Aotea Maori Land Board v State Advances Superintendent* [1928] NZLR 2; *R v Symonds* (1847) NZPCC 387, 391.

Waitangi. The judgment in *Alexander v Maori Appellate Court*[17] pointed towards the need for a new standard when Mahon J observed:

> I should think it no longer safe to rely upon the historical view that members of the Maori race are incapable of managing their own affairs without supervision . . . I should think it unsatisfactory to place too much reliance today upon those judicial opinions expressed many years ago, which stressed the parental role of the Maori Land Courts . . .

Nevertheless, a number of recent judicial decisions giving recognition to Maori values and interests are tempered by outcomes contrary to Maori wishes in a way which highlights a lingering paternalism.[18]

Thirdly, it may be contended that legislative and judicial policy has often favoured the accommodation of Maori interests into wider headings, in a manner which exemplifies Hobson's monocultural ideal that "we are one people". The contrary view is that Maori culture and interests must be recognised and catered for separately. This view is expressed by John Tamihere[19] in the following terms:

> . . . policy makers and planners have consciously and unconsciously strived for cultural uniformity in this country and in doing so have relegated things Maori into non-issues. Perhaps this has been carried out under the false presumption that equality means 'sameness'.

He refers to the statement of the then Governor-General, Sir David Beattie, in 1981:[20]

> I am of the opinion that we are not one people, despite Hobson's oft quoted words, nor should we try to be. We do not need to be.

Thus recognition in section 3(1)(g) that Maori values and culture are a matter of national importance is, in theory, of special significance in the wider legislative and judicial framework. What must be emphasised, however, is that section 3(1)(g) refers to a particular and unique relationship to land which does not sit well alongside the English concept of land law adopted in this country.

The relationship of the Maori people with the land is a complex one, and one which will not be dealt with in detail in this article. However, it is instructive to understand that it is based on Maori mythology[21] which provides a holistic view integrating the individual in spiritual and physical terms with the environment.[22] In addition, the relationship of the Maori with the land gives them a cherished link with their tipuna (ancestors) rendering the past a vital part of the present which may be summed up in the concept of turangawae-

17 [1979] 2 NZLR 44, 53.

18 See for example: *Auckland District Maori Council v Manukau Harbour Maritime Planning Authority* supra at note 11; *Royal Forest and Bird Protection Society v Habgood* (1987) 12 NZTPA 76.

19 Tamihere, supra at note 9, at 138.

20 *New Zealand Herald*, 7 February 1981, at 12.

21 Tamihere, supra at note 9.

22 Asher, supra at note 9, at 30.

wae (a place to stand).[23]

The question to be answered in the planning law context is whether section 3(1)(g) provides an effective vehicle for the recognition of these values as it clearly purports to do, or whether decision-makers can continue to downgrade these matters as merely "intangible"[24] or as "purely metaphysical"[25] when balancing them with other relevant matters.

A Balancing of Land Interests

The weight given to interests associated with industrial and commercial development compared with section 3(1)(g) considerations may be seen in a number of cases. *Re An Application by N.Z. Synthetic Fuels Corporation Limited*[26] involved an application to the Tribunal under the National Development Act 1979 as part of the development of the Motunui Synthetic Fuels Plant. Set against claims that the project was one of national importance were Maori claims that the proposed site was of great historical importance. There was concern about the possible disturbance of relics, archaeological sites including urupa (burial grounds), pa sites, and of human remains. In addition, a proposed outfall was sited on a shoreline used extensively by the Te Atiawa tribe for shellfish gathering.[27] Having concluded that the land in question was not ancestral land because it was no longer in Maori ownership, the Tribunal held:[28]

> . . . we do not consider the landowner's opportunities for development and use of the site . . . should be restricted because of the likely, but unverified, presence of relics or remains in unidentified locations on the site.

Although the Tribunal did examine alternative sites it found that the proposed site was the only one suitable for the project within the terms of the Act. The national interest in the ongoing development prevailed and the Tribunal directed that the outfall be further off-shore in either of the locations proposed by the applicant corporation. Although the Tribunal also noted that the Historical Places Trust appeared "to have devoted much time to the consultation with the tribes and hapu", it felt that it was sufficient to inform the Maori people of any human remains found during site excavations and to make provision for an archaeologist from the Trust to be present.

23 Anderson, *Planning for Maori Needs*, Ministry of Works and Development, 1983, at 6.

24 *Auckland District Maori Council v Manukau Harbour Maritime Planning Authority* supra at note 11, at 172.

25 *Minhinnick v Auckland Regional Water Board* Decision A116/81.

26 (1981) 8 NZTPA 138; See also *Application by Winstone Concrete Ltd* (1987) 12 NZTPA 257; *Auckland District Maori Council v Manukau City Council* Decision A99/82.

27 Later the subject of a Waitangi Tribunal inquiry in the *Report Findings and Recommendations of the Waitangi Tribunal by Alia Taylor and on behalf of Te Atiawa Tribe in Relation to Fishing Grounds in the Waitara District* (WAI 6/1984).

28 Supra at note 26, at 156.

In *Burkhardt v Mangonui County Council*[29] the appellants' objections to a scheme change to facilitate a major tourist development on the Karikari peninsula included those of Maori people based on section 3(1)(g). According to the District Planning Scheme the relationship of the Maori people and their culture and traditions with their ancestral land was "particularly relevant to the Mangonui County". The Tribunal held that the Council was free to agree in principle that there should be a major new tourist resort in the area and to decide on the guidelines to be followed by those interested in promoting such a development. However, it was also held that until studies had been completed, the location of the resort should be left open under the District Scheme.

In *Re An Application by Amoco Minerals NZ Limited*[30] the applicant sought an exploration licence over forest land being developed by Maori owners who objected that the licence would authorise activity which could disturb both the development of the forest and wahi tapu (sacred sites). The Tribunal, in granting the licence, noted that for purposes of the management of the forest, graves and sacred places had been identified and documented and forestry plans had been changed in order to safeguard them. The Tribunal therefore recommended a condition requiring the licensee to consult with the land owner to identify known burial sites or sacred places, and to protect such sites to the best of its ability. The Tribunal did not address the question of Maori willingness to disclose such information to outside developers.[31] There is a sad irony attached to the Tribunal's willingness to impose conditions obliging Maori owners to consult with developers, when a grievance frequently expressed in Tribunal hearings is the failure of developers to consult Maori people affected by their proposals.[32]

Clearly, one purpose of section 3(1)(g) is to further development of ancestral land which is compatible with the best interests of Maori culture and tradition. The Waitangi Tribunal has also recognised that the ancient Maori was a developer and exploiter of natural resources. However, the Maori concept of development is quite different from that which is currently prevalent. In its *Manukau* Report,[33] the Tribunal examined the ongoing industrialisation and pollution of the Manukau harbour, and characterised western society as predominantly secular and individualistic while:[34]

29 (1979) 6 NZTPA 614; The Tourist development at Karikari is an ongoing issue. Significantly the proposal involves leasehold lands now administered by the Department of Conservation. See *EDS v Mangonui District Council* Decision No A3/86; *EDS v Mangonui District Council* (1987) 12 NZTPA 349 (HC).

30 Decisions A76/83.

31 See discussion of *Application by Winstone Concrete Ltd* infra at note 60 and accompanying text.

32 See for example *Re An Application by NZ Synthetics Fuels Corporation Ltd* supra at note 26; *Adamson Taipa Ltd v Mangonui County* (1982) 8 NZTPA 379.

33 *Finding of the Waitangi Tribunal on the Manukau Claim* (WAI 8/1985).

34 Ibid, 9.3.5.

> Maori society on the other hand is predominantly spiritual and communal. The Maori world view emphasises the primacy of nature and the need for man to tread carefully when interfering with natural laws and processes.

Planning schemes should allow the Maori people to positively identify with, occupy and use their ancestral land.[35] This means that Maori people may not use their land as they choose merely in order to obtain maximum economic advantage. In *Goddard v Wellington City Council*[36] Maori beneficial owners of ancestral land applied for consent to use land for commercial development in the centre of Wellington. The Planning Tribunal rejected their argument that section 3(1)(g) allowed them to exploit fully the commercial potential of the land. It was held that the operation of section 3(1)(g) operated in two sets of circumstances:[37]

> Section 3(1)(g) is in the opinion of the Tribunal directed, firstly, at protective measures to ensure that the ancestral land is not used for uses incompatible with culture and traditions as a result of procedures or zonings under the provisions of the Town and Country Planning Act 1977. The section can secondly be used in a positive planning manner if the Maori people wish to utilise such land in a manner befitting their culture and traditions.

This approach to section 3(1)(g) again highlights tensions created by paternalistic attitudes where planning decisions are taken contrary to Maori wishes, though purportedly for the best interests of Maori people.

The approach in *Goddard* was expressly followed in *Royal Forest and Bird Protection Society v Clutha County Council*[38] where the Tribunal rejected the use of section 3(1)(g) to justify the continuation of logging of ancestral land. However, section 3(1)(g) has also facilitated positive uses in development of ancestral land. In *Pouto 2F Trust v Hobson County Council*,[39] the Tribunal considered a proposal by the Council to rezone ancestral land of the Ngatiwhatua tribe making production forestry a conditional use. The applicants argued that forestry development was desirable over and above traditional farming uses, not only for its financial benefits but also for social, cultural and employment reasons. The Tribunal considered provisions in the Northland Regional Scheme on "Maori Values", including the express objective "to acknowledge the need to widen the economy of rural settlements to enable the Maori people to return to live and work on their land". It concluded that:[40]

> The Maori have cultural and spiritual needs for association with their own ancestral land: forestry can provide much greater opportunities for employment on the land, and for a career structure associated with it, than traditional farming can.

The council was directed not to rezone the land.

35 *Quilter v Mangonui County Council* Appeals 296/77 and 38/78; *Re an Application by NZ Synthetic Fuels Corporation Ltd* supra at note 26.
36 (1984) 10 NZTPA 251.
37 Ibid, 254.
38 Supra at note 18.
39 (1985) 10 NZTPA 462.
40 Ibid, 465.

Apart from other matters expressly provided for in the Town and Country Planning Act, a number of policies have been frequently adopted which conflict with the special relationship identified in section 3(1)(g). One is the idea that the land must be *utilised*, or that it must be valued according to economic criteria. In *McCready v Marlborough County Council*[41] the Tribunal, on an application for consent to re-establish a Maori settlement on ancestral land, rejected an argument based on section 3(1)(g) in part because: "[t]here is now no activity associated with Maori culture or tradition carried on in the area at all."

Despite the applicant having described in detail the history of her family's interest in the land over one hundred years, and despite her desire, and that of her mother that she should live on that land, the Tribunal took the view that the applicant could provide a home for her family in a nearby town instead. It is submitted that this decision gives effect to a narrow "economic value" or "productive utilisation" test, and flies in the face of the broader historical relationship of the Maori people to land. The general policy of the Council, which provided that such settlement would involve an uneconomic extension of amenities, prevailed.

Equally, section 3(1)(g) considerations may be seen to conflict with the policy of making land available for public recreation. An early example was the now repealed Maori Affairs Amendment Act 1967 which gave power to councils to require a 10 percent reserve contribution and a further 20 metre esplanade reserve where partitioned Maori land adjoined a lake, river or sea frontage. Similarly in *Lewis v Ministry of Works and Development*[42] designation of Maori coastal land was based upon:

> the principal object ... to ensure that in due course there is adequate coastal land which may be used and enjoyed by the 'public at large'.

Nevertheless, it is possible for section 3(1)(g) considerations to override this type of policy as is demonstrated by *Knuckey v Taranaki County Council.*[43] In this case the council proposed to designate a section of ancestral land as a "Proposed Esplanade Reserve". The land in question was the only land still vested in Puketapu people, after large areas of their land had been acquired progressively for public works. The proposed walkway was supplementary to an existing one and was therefore one of "convenience" only. In a strongly worded decision, the Tribunal uplifted the designation on the basis of section 3(1)(g) considerations and held that:[44]

> ... it would be difficult to find a parcel more appropriately deserving of recognition under the Town and Country Planning Act 1977 ...

41 Appeal 1073/77.
42 Decision 339/76.
43 (1978) 6 NZTPA 609.
44 Ibid, 612.

Ancestral Land

The weight given to section 3(1)(g) considerations will depend upon the nature and intensity of the relationship with ancestral land. Hence the restricted meaning given to "ancestral land" has been a source of contention. It was the decision in *Knuckey v Taranaki County Council*[45] which set the standard:

> ... ancestral land in this particular case is land which, regardless of legal tenure, belongs to or is vested in or reserved to the Puketapu people and by operation of law and/or custom is owned by or regarded as owned by or is capable of being owned by the present members of that tribe and their descendants as one entity and is associated historically with the burial of ancestors.

Despite attempts to limit the dictum to the facts of the particular case this restrictive approach has been followed on a number of occasions[46] so that the special relationship of Maori people with their ancestral land has not been allowed by the Tribunal to override "ownership rights". This view is clearly expressed in *Quilter v Mangonui County Council*:[47]

> Counsel for the respondent did submit that ancestral land remains "their ancestral land", i.e. ancestral land of the Maori people, even though it may have passed into the ownership and occupation of people who are not Maoris. This is a somewhat startling proposition. We can readily see that a purpose of section 3(1)(g) is to require planning to allow Maori people positively to identify with, occupy and use their ancestral land. But the effect of counsel's submission is to say that the provision can and should be used negatively; that it can be used to prevent non-Maoris from using their land in a manner which would offend Maori sensibility. We have always proceeded on the basis that it must be demonstrated that the limitations which planning places upon the development of land are for the general benefit of the community as a whole.

Similarly, in *Auckland District Maori Council v Manukau Harbour Maritime Planning Authority*[48] the Council's arguments were not based on an objection to the exercise of ownership rights in the construction of a wharf on the harbour, but on wider concepts describing the relationship of Maori people to the harbour. Sheppard J effectively dismissed this viewpoint in stating:[49]

> ... although the [Planning] Act requires cultural values to be taken into consideration, it does not provide that they must necessarily prevail over other considerations.

The objection and frustration of Maori applicants in each case is understandable; the Planning Act gives important recognition to Maori culture and traditions in relationship to land, yet from the outset these very things are denied by their direct conflict with the concept of title to land. Tamihere ar-

45 Ibid.

46 *Re an Application by NZ Synthetic Fuels Corporation Ltd* supra at note 26, at 157; *Otago Harbour Board v Silverpeaks County Council* supra at note 45, at 346; *Auckland District Maori Council v Manukau Harbour Maritime Planning Authority* supra at note 18, at 171.

47 Supra at note 35.

48 Supra at note 18.

49 Ibid, 172.

gues:[50]

> The relationship of the Maori to the land transcends tenure on title boundaries as recognised by case law and statutory interpretation.

The imperative nature of this view is apparent. Similarly, the Maori Planning Kit suggests:[51]

> The problem, in our opinion, . . . is not one of definition but one of understanding what constitutes the complexities involved in the consideration of ancestral land.
>
> Framing the term within restrictive legal partitions or frameworks . . . is tantamount to negating (or ignoring) the importance of these terms in a Maori cultural context.

In 1987, when these issues came before the High Court in *Royal Forest and Bird Society v Habgood*,[52] these observations were largely accepted and, accordingly, section 3(1)(g) was given a much broader interpretation. The case concentrated on the meaning of the term "ancestral land" and involved objections to an application for a mining licence under the Mining Act 1971 for a site at Kaitorete spit near Lake Ellesmere. The land had been mined previously but Maori objectors claimed the land was ancestral and contained sites of significance to Maori people, as well as being of historical and archaeological importance. However, the Tribunal decided the land was not ancestral. In the High Court Holland J considered the consistent line of authority built up by the Tribunal. He noted:[53]

> There may be a danger in interpreting what a European would describe as his or her ancestral land. What is required to be determined is the relationship of the Maori people and their culture and traditions with *their* ancestral land.

Having emphasised this viewpoint, his Honour went on to attempt to clarify the interpretation of section 3(1)(g). In particular, he expressed the view discussed above that the Tribunal's definition tended to negate the overall effect of the section. It is worth citing the judgment at length as it is intended to be a clear statement of principle:[54]

> With respect to the Tribunal, I consider that it has erred in endeavouring to apply an appropriate interpretation to a part of the whole ["ancestral land"] with a view to assisting it in interpreting the whole rather than first considering what is meant by the whole.
>
> . . . Clearly continuous ownership of the land by Maoris would often be a relevant factor in that relationship. Likewise it may be an important factor to consider the extent to which a special relationship by Maoris has been claimed or recognised by them throughout the generations. More importantly the effect of the proposed use of the land on that relationship will have to be considered in each case. These instances are clearly not intended to be exhaustive. I can see no logical or legal reason why s 3(1)(g) of the Act should be of no application solely because the land in question is no longer owned by Maoris. Previous decisions

50 Tamihere, supra at note 9, at 142.
51 Supra at note 14.
52 Supra at note 18.
53 Ibid, 80.
54 Ibid, 80-81.

of the Tribunal to this effect should be regarded as overruled.

The general purpose of the legislature in including para (g) in s 3(1) was to require the Tribunal and others affected with town planning principles to have regard as a matter of national importance, and in relation to town planning in particular to recognise and provide for, the relationship of the Maori people and their culture and traditions with the land which was once theirs. Parliament put no limitations on the extent or nature of this relationship to the land and there is no justification for a judicial limitation being imposed.

His Honour went on to dismiss the appeal on the grounds that despite the error of law made by the Tribunal, it had in fact considered all relevant matters to section 3(1)(g) under other headings – again an uncomfortable juxtaposition of a recognition of Maori values and interests and an outcome contrary to Maori wishes. Nonetheless, it is submitted that the judgment of Holland J goes a long way towards clarifying the meaning of section 3(1)(g) by looking to its meaning and effect as a whole first, and then to the meaning of "ancestral land". This effectively reverses the *Knuckey* approach, and creates a new category of ancestral land being land which was historically ancestral but which has passed from the ownership of the Maori people. This must entail a whole new status underlying ownership of land by non-Maoris, and new responsibilities too.[55]

Recent Trends

It is possible to identify a new legislative and judicial climate in which special recognition of Maori needs and values is prominent. The work of the Waitangi Tribunal has been of great significance in making Maori concepts and values judicially accessible. This was clearly evidenced in the recent Court of Appeal decision on the transfer of land to State-Owned Enterprises which re-assessed the "principles of the Treaty of Waitangi" and consequential obligations on Treaty partners.[56]

In the planning law sphere the recent decision in *Huakina Development Trust v Waikato Valley Authority*[57] has dealt a further blow to Planning Tribunal unwillingness to consider Maori values – this time in relation to the Water and Soil Conservation Act 1967. Overturning a long line of Tribunal decisions, Chilwell J held that Maori spiritual values in relation to natural waters were relevant considerations in the granting of water rights. This in effect goes a step further than the *Habgood* decision because no express recognition of Maori interests equivalent to section 3(1)(g) is included in the 1967 Act. His Honour also recognised that the Treaty of Waitangi "is part of the fabric of New Zealand society". The case has provided a further boost to Maori claimants in the planning law area.

In this new climate changes in the Planning Tribunal's approach to Maori

55 Anderson, supra at note 23, at 8.
56 *NZ Maori Council v Attorney-General* [1987] 1 NZLR 641; (1987)6 NZAR 353.
57 [1987] 2 NZLR 188; (1987) 12 NZTPA 129.

claims may also be perceived. An important recent example is *McKenzie v Taupo County Council*[58] in which objections were raised by members of Ngati Tuwharetoa to the granting of a conditional use consent to establish a large marina on Lake Taupo near the Waikato river entrance. It was claimed that the development would destroy stocks of kakahi (a shellfish) and koura (a crayfish) and that disturbing the river flow would interfere with the passage of spirits or unhappy emotions, and also with spirits of the departed, which are held to be carried up the river toward Cape Reinga.

The Tribunal affirmed the consent, basing its decision on evidence that the waterflow would not be impeded in any way harmful to those spiritual beliefs and that fisheries would not be adversely affected. However, in a strongly worded statement which may be seen to prefigure the *Habgood* decision, the Tribunal headed by Judge Sheppard observed:[59]

> 67. It is to be expected of all New Zealanders that they will be tolerant and respectful of the spiritual beliefs and cultural practices of others. Freedom to continue such beliefs and practices is a fundamental liberty in this country and contributes to the richness of life here. However, to treat the spiritual beliefs and cultural practices of Tuwharetoa on that plane would fail to do justice to that people. They are themselves the very tangata whenua of the Lake Taupo district. Their associations with their mountains and with the lake has a 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 their tribal area, so that its expression in beliefs and practices becomes taonga of the tangata whenua.
>
> 68. For those reasons, they deserve more than the tolerant respect due to the beliefs and practices of New Zealanders in general. Rather, they should have 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.

This is a surprisingly broad statement of principle. Its importance lies not least in its recognition by the Tribunal of Maori as tangata whenua in a planning context. It is submitted that this, combined with the apparent willingness of the Tribunal to deal with concepts such as taonga (a treasure) as well as spiritual beliefs and practices demonstrates a step forward in Tribunal thinking. Again, the importance of the work of the Waitangi Tribunal in making these concepts judicially accessible cannot be underestimated.

However, the fact that there is still a long way to go not merely in recognising these values but also in giving effect to them in situations where they conflict with development interests is demonstrated in the recent decision in *Application by Winstone Concrete Limited.*[60] In that case the Huakina Development Trust[61] opposed, on behalf of the Ngati Te Ata people of the Awhitu area, an application for a prospecting licence. They had refused to supply in-

58 (1987) 12 NZTPA 83.
59 Ibid, 90.
60 (1987) 12 NZTPA 257.
61 The Trust was formed when Waikato representatives on the Auckland District Maori Council withdrew to form their own lobby group.

formation to the applicants on specific areas of concern or on the location of wahi tapu (sacred sites). They objected to giving such information as it was sought solely for commercial motives, and in a way that failed to recognise their status in relation to the land as tangata whenua. The Planning Tribunal, again under Judge Sheppard, dealt with the matter by considering the limited impact of prospecting in contrast to mining and by referring to the opportunities the objectors had had to be heard by the applicants and the Tribunal. The Tribunal referred to passages in the decision of the Court of Appeal in *New Zealand Maori Council v Attorney-General*[62] describing the need for reciprocity and co-operation as part of a duty of good faith owed by the partners to the Treaty of Waitangi to each other. As a result, the Tribunal decided neither the Treaty nor Maori values in relation to wahi tapu were sufficient grounds for refusing the licence.

It is submitted that the application to the case of the broad principle of reciprocity identified by the Court of Appeal is extremely tenuous. It identified the applicants with the Crown and confers benefits on them whilst simply denying the objectors any right to refuse co-operation. It is further submitted that the Tribunal failed to address the cultural issue adequately. The objectors were effectively forced to reveal information, on matters sacred to them, to persons wishing to commercially exploit their ancestral lands. Maori values were compelled to concur with dominant development values embodied in mining legislation. It is submitted that future recognition of Maori interests under section 3(1)(g) must involve a more careful working through of this conflict of values.

62 Supra at note 56.