Legal implications of Treaty jurisprudence

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The Treaty of Waitangi has generated a great deal of legal thought and activity in recent years. This address provides an extensive survey and analysis of the literature, legislation, and case law in this area as at July 1989.

I OUTLINE

It is very clear that Treaty issues and Treaty jurisprudence are going to form a basis for some of the most significant legal developments in 20th Century New Zealand. Everything that has happened in the last 3 years has confirmed this view - from the principles of the Treaty being incorporated into various commercially based and resource use statutes to the dicta emerging from the courts in cases such as *New Zealand Maori Council* v *Attorney-General*;[1] *EDS* v *Mangonui County Council*;[2] *Huakina Development Trust* v *Waikato Valley Authority*[3] on the importance of the Treaty; to *In the Matter of an Application by Margaret Mutu Grigg to set aside Karikau 2 Residue*;[4] *In re an Application by City Resources (NZ) Ltd*[5] on the relationship of Maori to and use of their lands.

There is a sense of a tide running at full flood as the Treaty is affirmed as a "domestic constitutional document, in the context of the Treaty of Waitangi Act 1975 and the State Owned Enterprises Act"[6] and as a document relating to fundamental rights.[7]

Some Maori Tribes regard the Treaty as having been based in contract (not compact)[8] and seek damages for breach whilst the Law Commission argues for law

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1 [1987] 1 NZLR 641.
2 Unreported, 27 February 1989, Court of Appeal, CA 56/88.
3 [1987] 2 NZLR 188.
4 K1 15/360 3, Maori Land Court.
5 [1988] D No A26/88.
6 Above n 1, 682.
7 Above n 1, 656.
8 *In the Matters of claims by Henare Rakihia Tau and the Ngai Tahu Trust Board* (WAI 27) Department of Justice, Wellington.

reform to restore and affirm Maori fishing rights.[9] The Court of Appeal judges in the NZ Maori Council case generally see the need for maintenance of "honour of the Crown" as underlying its Treaty relationships and dealings with Maori.[10]

I have therefore been asked to outline some of the future legal issues which may arise surrounding the Treaty of Waitangi and to look also at the rights that the Treaty protects - sovereign, Maori and the rights of New Zealanders.

Before, however, going any further it is useful to look at statistics on what lands (apart from fisheries) are held currently by Maori and to put in perspective what little remains. Estimates in 1986 set the figure of 1.18 million acres of "reserved, vested and other categories of land" which did not account for general land in Maori ownership.[11] There are 66,235,209 acres of land in New Zealand. It is also useful to look at the statistics of raupatu (confiscated) lands to see what passed out of Maori hands under various expropriating statutes of the 19th century.[12]

LOCALITY	AREA* ORIGINALLY CONFISCATED	AREA* PURCHASED OR RETURNED	AREA* FINALLY CONFISCATED	TRIBES AFFECTED
TARANAKI	1,275,000	813,000	462,000	Te Atiawa Taranaki Ngati Ruanui Ngarauru
WAIKATO	1,202,172	314,364	887,808	Ngati Paoa Ngati Haua Waikato
TAURANGA	290,000	240,250	49,750	Ngai Te Rangi
BAY OF PLENTY	448,000	236,940	211,060	Ngati Awa Tuahoe Whakatohea
HAWKES BAY			50,000	Ngati Kahungunu

* Areas in acres[13]

The President of the Court of Appeal also made the point that under the State-Owned Enterprises Act 1986:[14]

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9 Preliminary Paper No 9 (1989).

10 Per Casey J at 703.

11 *NZ Maori Council* v *A - G* per Cooke P at 653 op cit.

12 NZ Settlements Act 1863; NZ Settlements Amendment Act 1864; NZ Settlements Amendment and Continuance Act 1865; NZ Settlements Acts Amendment Act 1866.

13 Litchfield "Confiscation of Maori Law" (1985) 15 VUWLR 335, 355.

14 Above n 1, 653.

> Over three million hectares were intended to be transferred to Landcorp: including farm land, land under lease and licence, and unallocated Crown land. Forestcorp planned to acquire by transfer 880,000 hectares, comprising exotic and indigenous forests, roads, etc. Government Property Services was to acquire some 280 properties, mainly mid-town sites for State office accommodation. The three new Post Office corporations were to acquire a range of city, suburban and rural retail sites, and in the case of Telecom, sites for transmission equipment, depots and other facilities.

Since the statement was made, some of the land the President refers to has been on-sold to third parties as the Crown divests itself of Crown-owned assets, whilst plans are being made for further sales of State Enterprises which contain much of the country's forestry and mineral resources. Both of these categories of land are subject to Maori claims as is much of the remainder of Crown land in the South Island.

Whilst the nation's assets remained with the Crown, some Maori claimants seemed content that many remain there. But the effect of the transfer of those assets - be they in the form of ITQ under the Fisheries Act 1983 - or lands which contain mineral and petroleum resources or forests and to which they may have strong cultural and spiritual links, has had immediate impact. Many of these lands were lost through confiscations after the New Zealand Wars or through Crown land policies which did not protect Treaty rights under Article the Second. The Tribes are aggrieved that having lost their assets either to develop, or to borrow from in the past, they are now precluded from access to them either as shareholders or as a form of compensation.[15]

Many lawyers are now involved in what I shall call "Treaty Jurisprudence" - those who act for commercial firms or SOE's - those who deal with natural resource and planning activities - the conveyancers; some will be litigating in the courts whilst acting at the same time for tribal claimants, interveners, or the Crown before the Waitangi Tribunal and grappling with the concepts of 'tapu', 'rangatiratanga' and 'manamoana' to which many non-legal definitions apply, and most of which will be unfamiliar: some, acting on planning applications, may in fact in future attract a tribal boundary dispute on what is ancestral land[16] which has to be resolved in the Maori Appellate Court.

This has all resulted from one Act which incorporates the Treaty in a Schedule (the Treaty of Waitangi Act 1975), three statutes which incorporate the phrase the "principles of the Treaty of Waitangi": The Environment Act 1986 (the Long Title), the State-Owned Enterprises Act 1986 (section 9), the Conservation Act 1987 (section 4); and which one excludes Maori traditional fishing rights - the Fisheries Act 1983 (section 88(2)). Various other resource use statutes such as the Water and Soil Conservation Act 1967, the Town and Country Planning Act 1977

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15 *Love* v *A-G*, Unreported, CP 135/88, Ellis J at p 5.

16 See above n 2.

and the Mining Act 1971 attract the importance of Maori ancestral and spiritual values either through direct legislative protection or judicial interpretation.

The outline therefore I wish to present covers the following:

II Maori Title and Treaty Rights

- A Land
- B Fisheries

III Natural and Spiritual Resources

- A Water
- B Geothermal Water
- C Gold and Silver
- D Ancestral Land

IV The Principles of the Treaty of Waitangi

V The State-Owned Enterprises Act 1986 and the Significance of the Transfer of State Assets

VI The Public Works Act 1986

VII Use of the Waitangi Tribunal as Injunctive Relief.

In preparing this paper I have tried not to duplicate in any way the extensive work undertaken by legal writers such as Dr Paul McHugh (of Sussex College Cambridge University) on aboriginal title,[17] Professor F M Brookfield (on the NZ Constitution),[18] Rev Dr David J Williams (Treaty - Derived rights)[19], and Associate Professor Kenneth Palmer's "Law, Land and Maori Issues".[20] However I would ask that if you wish to understand the complicated issues of the Treaty jurisprudence you read those works together with the Waitangi Tribunal Reports and also The *Treaty of Waitangi* by Dr Claudia Orange,[21] *Fatal Necessity British Intervention New Zealand 1830-1847* by Peter Adams,[22] *The Shadow of the Land* by Professor Ian Wards,[23] and finally the latest book to be published: *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* edited by Professor I H

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17 His works are variously listed throughout this opinion.

18 'The Constitution. The search for legitimacy' in Kawharu, below n 24, 1.

19 'Te Tiriti O Waitangi - Unique Relationship between Crown and Tangata Whenua', Kawharu, below n 24, 64.

20 (1988) 3 Canta LR 322.

21 Allen & Unwin, Auckland, 1987.

22 Auckland University Press, 1977.

23 *The Shadow of the Land; a study of British policy and Racial Conflict in New Zealand 1832-1852* (Historical Publications Branch, Dept of Internal Affairs, 1968).

Kawharu.[24] The Law Commission has also just released its preliminary Report on the Treaty of Waitangi and Maori Fisheries; it is very comprehensive and persuasively argued.[25]

II MAORI TITLE AND TREATY RIGHTS

The Treaty of Waitangi 1840 did not alter the nature of Maori rights to lands, forests, fisheries. These were protected by the doctrine of aboriginal title.[26] The Treaty confirmed the doctrine and Article the Second provides a guarantee of the continuance of the rights[27] until they are extinguished in a manner conforming with the Treaty as by a freely conducted sale of all those rights or by a statutory taking which does not offend against the principles of the Treaty. Practitioners should be careful however about adopting North American concepts and case law on aboriginal title into test cases here without careful analysis. The underlying philosophies on the doctrine are the same, but in Canada and America it is given legislative protection which is not available here.[28]

It is suggested that Maori Treaty rights which flow from the doctrine of aboriginal title should be viewed as one part of the basic principles of New Zealand's common law that underpins the constitutional links between Crown and Maori; it should regulate the interplay between the New Zealand system of law and government (based on English law) and Maori resource rights, customary laws and political institutions which were protected by the Treaty.[29]

The Law Commission in its latest publication on Maori fisheries argues that the courts, legislature and executive should see the Treaty as the source of public policy. It found that the courts themselves might:[30]

(i) interpret legislation where possible so that it is not inconsistent with the Treaty;

(ii) give specificity to general or neutral words in legislation in the light of the Treaty;

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24 Kawharu ed *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland University Press, Auckland, 1989).

25 Above n 9.

26 See generally PG McHugh "Aboriginal Title in New Zealand Courts" (1984) 2 Canta LR 235 "The Legal Status of Maori Fishing Rights in Tidal Waters" (1984) 14 VUWLR 247 "The Legal Basis for Maori Claims Against the Crown" (1988) 1 VUWLR 1.

27 *Wallis* v *Solicitor-General* (1903) NZPCC 23, 34: the Privy Council stated that in 1848 the "rights of the Natives depended solely on the Treaty of Waitangi".

28 In the United States, Indian treaties are given specific protection under the constitution and in Canada the issue is determined by the Royal Proclamation of 1763 and the Constitution Act of 1982.

29 I have adopted this view from Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727, 732.

30 Above n 9, 60, 9.2.

(iii) regard the Treaty as declaratory of the existing common law;

(iv) possibly, in an extreme case, consider the Treaty as a basic limit on legislative power.

Outside the courts, often acknowledgement of rights will involve nothing more than recognition of the tribe as tangata whenua or consultation with it about a proposed activity. Sometimes with the rights once identified, any resolution of difficulties may need negotiation and agreement and, only as a last resort, litigation.

It is also suggested that in making such recognition in this way instead of denying the existence of Treaty rights, lawyers might begin to take account of them as a matter of course - in the way they do common law rules relating to property rights at English law and help affirm the Treaty's significance in New Zealand society. Dr Paul McHugh, the New Zealand pioneer of the doctrine of aboriginal title in this country, sees the concept in this way:[31]

> Since sovereignty is conceded in English law as a combination of imperium (the right to govern) and dominium (the Crown's paramount ownership of all land) aboriginal title in its classic formulation is seen as a burden upon the Crown's dominium in its newly acquired territory.

Practitioners should be aware however that the incidents of Treaty rights which flow from title will differ from tribe to tribe and that they should be careful of assuming common rootstocks, although this may be different in respect of fisheries. As it has been said:[32]

> Claims to aboriginal title are woven with history, legend, politics and more obligations. If the claim of any band in respect of any particular land is to be decided as a judicial issue and not a political issue it should be considered on the facts pertinent to each tribe and its land, and not on any global basis.

A Land Rights

One legal writer[33] points out that whether in North America, Africa, New Zealand or the Pacific Islands the property institution of tribal societies generally have the following features:

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31 P G McHugh "Maori Fishing Rights and the North American Indian" (1985) 6 Otago LR 62, 64.

32 *Kruger and Manuel* v *R* [1987] 1 SCR 104, 109 (Supreme Court of Canada). See also *Amodu Tijani* v *Secretary Southern Nigeria* [1921] AC 399, 403-404.

33 J C Smith "The Concept of Native Title" (1974) 24 Toronto LJ 7.

1 The property relation is that of physical possession, and is expressed in terms of possessive pronouns such as 'ours' or 'yours'.

2 Title is based on long uninterrupted possession and use.

3 The property relation in regard to land is viewed in terms of groups rather than of individuals.

4 These groups are conceived of as including the dead, and the yet to be born, as well as the living.

5 The property relation reflects and parallels the patriarchal or matriarchal social ordering of the society.

... Within all institutions of property except the western legal systems of the dominant societies, title to land is possessory, that is, based on long-term use and occupation.

Norman Smith discusses[34] how customary Maori title to land is held. Whilst little customary land as such now remains,[35] his is a useful analysis for any practitioners dealing with Maori land claims where there are boundary disputes or Crown lands to which Treaty rights may enure.

(a) Those who show complete and continuous occupation, ie, occupation commenced before 1840, and extending up to the time of investigation of title. Where the occupation is by virtue of ancestry it is usual to require that constructive possession was held for at least three generations. Where the occupation is claimed to be under a gift, unbroken occupation by the various generations from the time of the gift should be shown.

(b) Those who have never personally occupied but whose near antecedents had undisputed occupation or whose rights have been kept in existence by relatives.

(c) Those who have occupied at some former period but are not in present occupation.

(d) Those who are in occupation by right of ancestry but whose permanent occupation is recent in its origin.

It must not be necessarily assumed, however, that the application of one rule will exclude persons to whom the other might apply. On the contrary all four rules should, where applicable, be utilised.

Article the Second guarantees the rights of Maori to their possessions so long as it is the 'wish and desire of the Tribes to retain them'! However the whole basis

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34 *Maori Land Law* (AH & AW Reed, 1960) 91, 92.

35 Section 155 of the Maori Affairs Act 1953 declares that customary land claims are not available or enforceable as against the Crown. Such a provision is a clear breach of Article the Second of the Treaty.

of Maori customary title to land is based on the doctrine of Ahi Ka (keeping the fire alight) or "dominium" in Roman Law terms. Smith defines it thus:[36]

> As has been indicated above, every right to land, whether it rested upon ancestry, conquest or gift was required to be kept alive by occupation or the exercise of some act indicative of ownership and user. As previously stated, a Maori was required, according to Native custom, *to keep his fires burning on the land.* If a Native left his tribe and went to live in another district either through marriage or otherwise, and he and his descendants remained away for three generations, they would forfeit all rights to the land so abandoned; their claims would become *ahi-mataotao.* The meaning of this term is *cold* or *extinguished* fire and, as applied to the instance just given, would signify that the rights of the claimants had become cold and their claims extinguished. [emphasis added]

He goes on:

> *Ahi-mataotao* applies to cases where the descendants of the territorial ancestor voluntarily abandon the land and none of the progeny return to keep their rights alive for a period of three generations. Absence for one generation would not materially affect the rights of the absent parties.

There is no reason why such principles outlined by Judge Smith should not apply to tribal fisheries although, as the Muriwhenua Interim Findings on Fisheries[37] makes clear, often the Crown land policies were responsible for forcing Maori away from some traditional grounds.

Meanwhile there are several ways in which Maori title or rights are extinguished:

(a) By sale by Maori to the Crown without reservation of any continuing territorial or non-territorial interest.

(b) By sale by Maori to a party other than the Crown, being a transaction without reservation and to which the doctrine of pre-emption applied. Those which took place before 1840 were subjected to exhaustive scrutiny by the Land Claims Commissioners from 1841 on. Where a sale was held to be invalid because of inadequate payment (for example) the lands became part of surplus Crown lands and were subjected to scrutiny by the Surplus Land Claims Commission 1946. The land was not returned and some compensation was paid.

Treaty rights in some form may still enure if these lands are still in Crown ownership. It will be a question of proof and will probably arise before the Waitangi Tribunal.

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36 Norman Smith *Native Custom and Law Affecting Land* (Maori Purposes Fund Board, Wellington, 1942) 57-58.

37 A Report of the Waitangi Tribunal at 207.

(c) By the taking of land by or pursuant to a statute. McHugh[38] argues that such legislation must be express. Legislation, such as game and laws, which are simply regulatory cannot be treated as impliedly extinguishing Maori title. In support of this he cites *Kruger and Manuel* v *The Queen*;[39] and *R* v *Sparrow*.[40]

He comments that:[41]

> Transactions purporting to extinguish the aboriginal title as well as statutes likely to have similar effect are to be interpreted in a manner consistent with the honour of the Crown and its unique duties towards its aboriginal subjects. Such interferences with the title to the land may remove the tribe's claim to titular (territorial or customary) ownership whilst leaving non-territorial aboriginal rights.

The interesting point about the principle of 'non-territorial rights' is that it may well fill the vacuum caused by the disjunction between the English common law systems and Maori customary law. It may accommodate Treaty rights notwithstanding Crown title by placing a burden on that title. I refer particularly to Maori rights to shellfisheries in tidal waters.

An example of an express taking would be the Coal Mines Act 1979, which vests the beds of navigable rivers in the Crown. Section 261 deems the beds always to be vested in the Crown. So also would be section 3(1) of the Petroleum Act 1937 which declares all petroleum in its natural state to be the property of the Crown whether alienated or not.

(d) By sale subject to express conditions. Many of the tribes sought specific protection of their rights in the deeds of sale, eg the Waitangi Tribunal Report on the Ngati Kahu Mangonui Sewerage claim makes mention of deeds which allow continued Maori use of cultivations and dwelling and landing places on lands sold. Under Kemp's (Canterbury) Deed in the South Island, 'mahinga kai' rights to cultivate, fish and bird were preserved. One legal commentator explains that these rights[42]

> are best understood as residual portions of the bundle of rights that constitutes aboriginal title. They are thus sui generis property rights, similar but not identical to the profit a prendre known to English Law.

Some of these resource use rights have been accommodated by the Crown by grants of land to enable access to fisheries. Others appear to have been inadequately understood or overlooked.

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38 McHugh "The Legal Basis for Maori Claims against the Crown" (1988) VUWLR 1, 10.

39 [1987] 1 SCR 104.

40 (1986) 36 DLR (4th) 247.

41 McHugh, above n 38, 19-20

42 Slattery, above n 29, 744.

However, where Maori land was Crown granted, it is a question of law as to whether Maori rights to their possessions still exist. Any answer to this question will depend on the legal significance of Crown granted title which extinguished aboriginal title, the wording of the Deeds of Sale, and the express words of the statutes which may govern some of the transactions.

(e) By abandonment. This would equate with ahi-mataotao discussed above. It is thus necessary that there be a continuing and enduring relationship with the lands in question. If use or occupation of rights has allowed to lapse the land in question may be set free of Maori title. Failure to exercise or use rights does not immediately bring about the cessation of aboriginal title; a certain period of time is necessary and the reason for that failure will be relevant.[43] There must be sufficient time passed to evidence that Maori have irrevocably cut links with the lands over which the rights existed. How long this takes depends on the circumstances.

(f) By gift. Many Anglican Church lands were gifted on the condition that they remained in Church hands. Those that have been on-sold to third parties are the subject of contention (as would be many tribal gifts of land to the Crown if tampered with).

(g) By expropriation. The Waste Land Acts, the New Zealand Settlements Act 1863, New Zealand Settlements Amendment Act 1864, New Zealand Settlements Acts Amendment Act 1866, Public Works Lands Act 1864 and East Coast Lands Titles Investigation Act 1866 are expropriating statutes. The land was often taken without compensation.[44] These are "raupatu" lands and contain much of the country's mineral resources. There can be no residual Maori title under these Statutes (for example to coal in the Waikato) as the wording of the 1863 Act is very specific.[45]

> ... such land shall be deemed to be Crown land freed and discharged from all Title Interest or claim of any person whatsoever.

The Public Works Act 1971 has to be viewed somewhat differently. It accorded to Maori in some instances the rights or privileges of British subjects under Article the Third of the Treaty but there are clear cases of "creeping" expropriation and the early legislation had no notice provisions.

(h) Where Maori title has survived sale or a taking by the Crown of the land it will be extinguished by the granting of a title (to someone other than the

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43 Interestingly see *EDS* v *Mangonui County Council*, above n 2 (per McMullin J at 36 dissenting).

44 "The fact that aboriginal title is an interest in land means that it benefits from the common law presumption favouring the payment of just compensation upon a compulsory taking": above n 29, 751.

45 NZ Settlements Act 1863 (section IV).

Crown) under the Land Transfer Act 1952. The plain intention of the Land Transfer Act is that title held under it is free of all unregistered interests apart from the limited exceptions in section 62 and from interests created or acknowledged by the registered proprietor. The exceptions in section 62 relate to omitted easements against which the title of the registered proprietor is not indefeasible.[46] I have come across some instances of Maori traversing farming lands to their traditional fisheries - mostly with the acquiescence of the farmers. If, however, there was any contention, the easements might be more formalised under section 62.

B Fisheries Rights

On 18 June 1880 Chief Judge Fenton of the Maori Land Court was requested to come before the Native Affairs Committee of the House of Representatives on the question of fishing rights (3 years after Chief Judge Prendergast delivered the *Wi Parata* judgment saying the Treaty was a nullity). As the Chairman of the Native Affairs Committee, Colonel Trimble, explained:[47]

> Every session petitions come before the House and before this Committee complaining of interference with fisheries and pipi beds. The Natives seem to think very frequently that they have been aggrieved and they pray for redress for their grievances. The petition now before the Committee asks that an Act may be passed ....

Fenton was asked to address two questions:

1 What is the practice of the Court with regard to these fisheries and pipi beds?

2 If there is a grievance could it be remedied through the action of the Legislature?

I have included the whole text of Fenton's address because it is illuminating on the question of Maori title to fisheries for those searching to establish its sources.

Fenton:

> The rule of law is simply this. When I say rule of law I mean Maori common law - that where a native family or tribe have established as a matter of fact the exclusive exercise of rights of fishing in any locality and have maintained it against others in the old days, that is before British Law was established in the Islands, then we have given them a title to those rights as an easement. We have never recognised any rights below the surface, but simply an easement, and the easement in this case I suppose would be the right to use the surface of the soil and all above it, but nothing below it, excluding others from interfering with these rights. I may add that I gave a judgment

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46 McHugh "Aboriginal Servitudes and the Land Transfer Act 1952" (1986) 16 VUWLR 313, 332.

47 LE 1/18880/6 - 21/80 National Archives.

in which I thought the question a very important one and it first came before me alone I think at the Thames, where the natives established rights of fishing for flounders (patiki). They proved that others had recognised those rights long before we came into the country, that each family and I think in some cases individual natives had built walls below the high water mark, and by placing a net or some apparatus of that sort over the only entrance at high water, when the tide went away the fish were left, and they had fisheries which they maintained by force if necessary against others.

But what was the essential question in establishing the right? The real essence of the facts that we require to be proved, after that the decision would be a question for a Jury and not for the Judge, that is whether they had done these things, not only whether they had fished there, but whether they had prevented others from doing so.

I do not remember that I have ever had a case below high water mark, although I think it is quite possible that such exist. I remember there is a rock on the north of Waiheke which is a great fishing ground for hapuka, and I am aware that the Ngati Paoa defended that ground against attacks from the north. I cannot say that the court has decided that case, or that it has decided any such ....

Sir William Fox questioned:

Would you apply that doctrine to the sea beach as well as to a tidal river or mud-flat?

I do not think I would, but I should not like to say decidedly.

Have you ever done so?

No I have not. There is a valuable shell fishery on the West Coast between Hokianga and Kaipara called Toheroa where the natives obtain a large clam. That fishery is of great value to them, but whether they have ever exercised rights of property to the exclusion of others I do not know, but that is the essence of their title according to my judgment. They must prove exclusive use.

Thus the Chief Judge disclosed in relation to his work on the Native Land Court that he considered:

(a) Maori 'common law' as he put it, as a rule of law.

(b) The right of a tribe or family to exercise exclusive fishing rights and to maintain it against others.

(c) The right could be protected by a Crown granted title so these rights may be utilised, ie an easement (which was in the form of a grant of land) so the tribes could have rights of access to the fishery. (McHugh states the right is more anagalous to a profit a prendre than an easement).

(d) The tribe had to prove it fished that particular ground and whether it had prevented others from doing so.

(e) That no rights existed below the ground. (This view he appears to have imported from English law).

His analysis is not greatly different from that adopted in the Native Land Court in relation to Maori customary land. Any analysis of a Maori fishing right therefore might include the following questions:

1 What do the early deeds of sale say?[48]

2 Was Maori exclusive title to fisheries extinguished as exclusive user when the lands adjoining the fisheries were sold?

3 What was the implications for fisheries if the lands adjoining were sold under duress? (Examination by the Waitangi Tribunal would need to establish this).

4 What are the implications of a "non-territorial right" ie permission to use: *Tom Te Weehi* v *Regional Fisheries Officer*.[49]

In the *Muriwhenua Interim Findings on Fisheries* the Waitangi Tribunal asked the question whether land sales may imply waiver of exclusive fishing rights. They discounted those sales before 1840 and after 1865 but stated that it seemed overly pretentious to the Tribunal that a tribe should retain exclusive rights to the whole of its fisheries after land sales. "Manamoana"[50] had depended on the exclusive possession of the adjoining land. The Tribunal made the following tentative observations:[51]

(i) Whatever the customary expectation, we have also to ask what Maori would have expected of the Treaty. The Treaty introduced a new regime since land sales were unheard of in custom.

(ii) Whether the guarantee in respect of fisheries was the same as that for land or not the Treaty provided a separate protection for each, the implication being that each would require an agreement before rights might be passed.

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48 Not many practitioners realise that these are contained in Alexander McKay *A Compendium of Official Documents Relative to Native Affairs in the South Island* (1872) and Turton (ed) *Maori Deeds of Land Purchases in the North Islands* vols 1 and 2 (Wellington, 1877).

49 [1986] 1 NZLR 680. At common law fishing rights can exist independently of the ownership of the soil: *Attorney-General* v *Emerson* [1891] AC 649, 654.

50 "Manamoana" connotes power, authority, control, influence and prestige as well as psychic forces.

51 *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* WAI 22 (Waitangi Tribunal, Dept of Justice, Wellington, 1988) 207-208.

(iii) Nonetheless some fisheries are patently connected to the land such as fisheries associated with swamps, streams, ponds and foreshores.

(iv) There is also evidence of a general nature that Maori expected to retain access to their inland fisheries after land sales. Particularly following the sale of vast areas. Exclusive rights were still claimed in some cases, especially with regard to eeling. It appears unlikely that non-Maori would have been seen as excluded from the right to fish for domestic purposes from the ceded lands.

(v) A land sale between 1840 and 1865 may carry an implication that a tribe no longer sought exclusive rights to the whole of the fisheries connected to the land sold.

III NATURAL AND SPIRITUAL RESOURCES

A Water

Chief Judge Fenton, of the Native Land Court in the 1860's awarded "easements" throughout the country to protect access to various tribal fisheries. In the South Island he also stipulated that water flows be maintained to protect the fisheries. This is the only example I have come across where there has been such a requirement in respect of water flows specially to protect Maori resources.

There is no record of a condition on the flows being carried through on to the Crown grant of these easements and subsequently the fisheries suffered from diminution of the water resource as it was deployed elsewhere or polluted.

One legal commentator[52] writes that the two outstanding features of the Water and Soil Conservation Act 1967 are the apparent elimination of the common law rights to the use of water and the establishment of a complex regulatory structure to give effect to the administration and control of the water resource. He notes that the precise manner in which the specific common law water rights have been transformed by the Act are still somewhat uncertain and cites *Stanley* v *South Canterbury Catchment Board*[53] as supporting the view.

I am not sure in the sphere of Maori Treaty rights that this is a correct view. Clearly this whole issue of Maori water rights has to be examined more carefully in the light of the emerging body of law which surrounds it.

The sole right to take natural water is vested in the Crown *subject to the provisions of the Act.*[54] The Act says nothing about ownership of water and section 21 contains a caveat:

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52 DAR Williams "The Water Resources: Some Current Problems of Law and Administration" (1980) NZLJ 499 at 500.

53 [1971] 4 NZTPA, 63.

54 Section 21(1).

> Provided also that it shall be lawful for any person to take or use any natural water that is reasonably required for his domestic needs and the needs of animals for which he has any responsibility and for or in connection with fire-fighting purposes.

One can only speculate what might have happened if tribes had sought protection of water flows under the Act to maintain their eel and shell fisheries which were (and still are in many instances) part of their domestic consumption. They would have had to prove reasonableness as against other users. Meanwhile the caveat remains until this day.

The Water and Soil legislation also says nothing about the Maori spiritual relationship with water. It was not until 1987 that Chilwell J[55] in the High Court was able to conclude, on the granting of rights to discharge water into the Waikato, under section 21(3A), that Maori cultural values cannot be excluded from the Water and Soil Conservation Act if the evidence establishes the existence of spiritual, cultural and traditional relationships with the natural water held by a particular and significant group of Maori people.

His Honour's approach was innovative. He held that a statute could be interpreted by invoking another of similar intent - namely the Town and Country Planning Act 1977 (section 3(1)(g) - the Maori relationship with ancestral lands); and he used as aids in interpretation the Treaty of Waitangi Act 1975, the Waitangi Tribunal Reports on water issues, and the Treaty of Waitangi as an international instrument in the interpretation of municipal legislation.[56]

Meanwhile it is interesting to observe that in the United States under the Winters Doctrine,[57] a case turning on an Indian agreement with the Government of May 1888 creating the Fort Belknop Reservation, the reservation of water rights was implied with the making of the reservation.

The defendants argued that it was implicit in the agreement that there was priority in water rights in the act of reservation, because the land was small in area and arid. They argued the Government wished to make them self-sufficient and industrious, and mentioned that without irrigation cultivation was non-feasible and that the transition to a pastoral and civilized people would not occur.

The court held that when the Federal Government created Indian reservations it impliedly reserved water rights needed for fulfilling the purposes of the reservation.

The doctrine applies to Indian reservations whether created by treaty, agreement, executive order or Congressional Act and since most Indian reservations were

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55 *Huakina Development Trust* v *Waikato Valley Authority* [1987] 2 NZLR 188.

56 Under the SOE Act 1986, section 9 expressly incorporates the principles of the Treaty and therefore its terms.

57 *Winters* v *The United States* 207 US 564 (1908) Supreme Court.

established at very early dates the Indians have priority over most non-Indian water claims. Moreover, Indian priority may even be earlier than the date of the creation of the reservation since in some cases the creation of the reservation merely continued pre-existing original water rights.

United States and Klamath Indian Tribe v *Adair*[58] in the US Supreme Court, was another case which examined water rights. The principal purpose of the Treaty was to provide an area for the exclusive occupation of Indians so that they could continue to be self-sufficient:

1 It ensured that the Indians could continue traditional way of life, eg hunting, fishing, trapping and food gathering.

2 It encouraged Indians to adopt agriculture.

The Treaty granted the Indians an implied right to as much water on the Reservation as was necessary to fulfil these purposes. The termination of the Reservation as a legal entity did not abrogate the Indians' water rights.[59] The Indians are still entitled to as much water on the Reservation lands as they need to protect their rights.

The Winters Doctrine protects Indian water rights from diversions of both surface and subsurface water whether the diversion occurs on or after the reservations.[60] Thus Maori under this doctrine could arguably have a non-territorial right to water which could extend to geothermal water.

B Geothermal Water

Given the circumstances of Article the Second of the Treaty, geothermal water is clearly a taonga for the tribes on whose land it arises (just as pounamu (greenstone) is for Ngai Tahu in the South).

The Geothermal Energy Act 1953 vests the right to use and control of the resource in the Crown rather than its ownership. Applying Dr McHugh's thesis on aboriginal title and the Crown's present policy on Treaty rights it may be possible to demonstrate that the common law rights of the landowner in the groundwater still remain in existence and would enure as Maori title to the resource unless title has been extinguished under the Public Works Act 1981. As against this, however, the Crown has all the attributes of owner as the legislation gives the Crown the absolute right to control the extraction of the resource or prohibit it entirely.

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58 (1938) 304 US 119.
59 Klamath Termination Act 14, 24, USC 565M.
60 *Cappaert* v *United States* 426 US 128 (1976).

R P Boast, Senior Lecturer in Law at Victoria University, has presented an excellent paper "Geothermal Energy Maori and Related Issues"[61] for the Resource Management Law Reform team. He points out that specific thermal areas such as Ohinemutu, Whakarewarewa and Ketehi are a treasured possession for the Ngati Tahu Tribe and argues that a case based on traditional lore and history might be made for the whole geothermal field. Ngati Tahu have lodged a provisional claim to the Waitangi Tribunal[62] against the Geothermal Energy Act 1953, which, in vesting complete control of the geothermal resource in the Crown, "effectively expropriates it from tribal control".

Mr Boast also argues for lands taken under the Public Works Act 1981 for energy development to be returned to the tribes and/or for the tribes to receive some benefit such as royalties, shares and joint venture partnerships in these resources.

Mr Boast makes mention of *Jicarilla Apache Tribe* v *Supron Energy Corporation*[63] in which the Federal Tenth Circuit Court of Appeal concluded that the Federal Government has fiduciary obligations to the tribes in the management of mineral and oil and gas resources.

In view of the New Zealand Government's commitment to devolution of power and authority to iwi, some thought might be given to creating commercial mechanisms which would involve the tribes in utilising their traditional resources even if control remains with the Crown.

On the West Coast of the South Island, Poutini Ngai Tahu, a hapu of that South Island tribe, have entered into commercial agreements with New Zealand Lime and Marble Company over the extraction of gold in the Arahura River which is vested in the Tribe. In return for agreement to mine the company will pay royalties to the Tribe, which will enable it to repurchase some of its ancestral land in the area. The company will also pass over to the Tribe all pounamu recovered in the course of its operations. Commercial lawyers may give some thought to using this kind of mechanism elsewhere to protect Treaty rights or at least recognise them.[64]

C Gold and Silver

As indicated above, the Treaty ensures that Maori rights survive passage of sovereignty subject to meeting certain tests. One of the tests is that of compatibility with the prerogative powers of the Crown exercised under Article the First.

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61 Working Paper No 26.

62 WAI PC 46.

63 782 F 2d 855 (1986).

64 There is precedent elsewhere. In Canada British Petroleum (International) won a tribe's permission to extract oil from tribal lands by paying royalties; another oil company had pressured the government to take the land under appropriating status.

Section 6 of the Mining Act 1971 states:

> ... notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of lease, or other instrument of title all gold and silver existing in its natural condition or under the surface of land within the territorial limits of New Zealand, whether or not the land has been alienated from the Crown, shall be the property of the Crown.

This section represents a codification of the common law which has existed since the decision of the *Case of Mines*[65] which is authority for the proposition that natural deposits of gold and silver, and their ores belong to the Crown irrespective of the ownership of the surrounding soil. This case was the first formal recognition of the existence of a Crown prerogative right to 'royal metals' which prevails in all Commonwealth countries in the absence of any local laws to the contrary.

The same Act divides Maori land into two categories for mining purposes: Crown land, and Private and Maori Land.

Maori Reserved Land is deemed (by virtue of section 7 of the Maori Reserved Land Act 1955) to be Maori freehold land and thus is "Maori Land" for the purposes of the Mining Act. Maori customary land also comes within that definition and both categories come within the ambit of section 6 whose intended application is to all lands within the territorial limits of New Zealand.

One of the relevant prerogatives is the sole right of the Crown to take or authorise the taking of royal metals. It is a prerogative which applies in the colonies.[66] One view of the matter is therefore that unless the Crown agreed in a legally binding document with Maori to fetter the prerogative, their title to gold and silver ceased in 1840. When the tribes came to sell to the Crown the royal metals did not form part of the sale as the Crown already possessed the exclusive right to them. As early as 1858 section 43 of the Gold Fields Act[67] ensured that

> nothing in the Act contained shall be deemed to abridge or control the prerogative rights and powers of Her Majesty the Queen in respect of the gold mines and gold fields of the Colony.

These prerogative rights included the rights to gold and silver. This provision predated many of the deeds of sale seen in Mackay and Turton.

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65 (1568) 1 Plowd 310; 75 ER 472 (KB).
66 *Woolley* v *Attorney-General* (1877) 2 AC 163 (PC).
67 21 & 22 Victoria (UK).

J C Parcell[68] notes that whilst it is always open to the Crown to alienate gold or silver through statute, this was not done in New Zealand and the full force of the prerogative continued as confirmed by its recent codification.

He is prepared to admit[69] however the possibility that the right to gold and silver may remain with Maori in land which has not been dealt with by the Maori Land Court and is held by the Crown on behalf of Maori under the customs and usages of the Maori people.

Another view of the tribes' position is that the common law doctrine of Maori title modified the application to New Zealand of the Royal Prerogative and poses the question of the existence of Maori property rights, which survived the declaration of sovereignty over New Zealand.

If this is the current view, it is quite close to Parcell's modification. The doctrine in its application to some of the customary lands remaining would have the effect of confirming the ownership of gold and silver by the original Maori owners of all land which had not in any way passed through the hands of the Crown (whether by sale, Crown grant, reserve, decision of the Native Land Court, or otherwise).

The practical limitation upon the present day impact of the doctrine is that very little land is still held according to a customary title, and has never been so 'touched' by the Crown and its servants. Moreover, since 1971, section 6 appears to have applied to all land including Maori customary land.

D Ancestral Land

The Court of Appeal in *EDS* v *Mangonui County Council*[70] elevates matters of "national importance" under section 3 of the Town and Country Planning Act 1977 beyond a mere balanced assessment previously required by the Planning Judges and directs that the matters be given special weight by requiring other sections of the Act (namely sections 4, 36 and 72) to be subject to the section.

The action brought by the EDS sought to preserve a beautiful part of the Karikari Peninsula in Northland from development. The Tai Tokerau tribes had long regarded this part of the Peninsula as very special to their manawhenua. It was the landing place of the first canoe of Ngati Kahu. For the purposes of this paper its significance lies in the weighting the Court of Appeal gave section 3(1)(g) - the relationship of Maori with his ancestral land.

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68 A Thesis on the Prerogative Right of the Crown to Royal Metals (Government Printer, Wellington,1960).

69 Above n 68, pp 46-7.

70 Above n 2.

The court held by a majority of 3-2 that the section imports a presumption of importance and that nationally important criteria (though the subsections may compete among themselves) under the section are held to be more important than district ones.

The effect of the development on ancestral land was seen to be important and so the way in which a resource was used (namely Maori ancestral land) would come under scrutiny in such a situation. The President of the Court held that:[71]

> the scale of the development would overshadow the Ngati Kahu presence on the Peninsula: that they could not relate to or feel at home with a development of this kind and magnitude.

There are interesting dicta which will cause resource development and planning lawyers to go on inquiry. I merely detail as examples:

1 The circumstances of the severance may be important (for example if the land was expropriated or if there was duress in the initial sale).[72]

2 If there was a voluntary disposition by Maori to European then section 3(1)(g) may be considerably diminished in impact.[73]

3 The extent of the necessary relationship of Maori to their land and culture and traditions will obviously vary and with that variation, the weight accorded to it and the degree of protection necessary to preserve it.[74]

4 The Act's essential concern is people and the quality of their lives.[75]

5 Most of New Zealand would qualify as ancestral land but section 3(1)(g) is only concerned with ancestral land with which Maori people and their culture and traditions have a relationship.[76] Such a relationship would need to be proved to the civil standard where it is in issue.

Meanwhile Judge Treadwell has held *In the Matter of Application No 33.431 by Norman William Stacey*[77] that an exploration licence should be granted despite strong objections by the tangata whenua because they had "no idea where their sacred sites were, and no intention of divulging that information even if they were possessed". His Honour identified a "spirit of reciprocity" because information gained from the exploration licensing system was of benefit to the nation as a

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71 Per Cooke P above n 2 at 12.
72 Above 2, 36.
73 Above n 2, 36.
74 Per Somers J at 7.
75 Per Casey J at 11.
76 Per Bisson J at 10.
77 Decision No W3/89, 19 January 89.

whole. He imposed a condition that the applicant consult with the tangata whenua. He applied the balancing test to the criteria under section 129 of the Mining Act 1971 which imports section 3(1)(g), and found it wanting in this instance.

IV THE PRINCIPLES OF THE TREATY

The phrase "the principles of the Treaty of Waitangi" is not nearly as incomprehensible as it might first sound. The purpose of this section of the paper is to distil the principles from the *NZ Maori Council* case and also the *Muriwhenua Fisheries* findings. The Parliamentary Commissioner's Office has provided an excellent synthesis in "Environmental Management: The Principles of the Treaty of Waitangi" from those and other Waitangi Tribunal Reports and I do not propose to unnecessarily duplicate them here.

"Principles" are applied because of the difficulties with the literal words of the texts of the Treaty.[78] Somers J in the *NZ Maori Council* case sees them as the same today as they were in 1840: "Only the circumstances have changed".[79] And Cooke P sees the need "for their broad unquibbling and practical interpretation".[80] Casey J in that case cited with approval the definition given to the word 'principle' in the Shorter Oxford Dictionary as "fundamental motive or reason of action".[81]

In relation to section 9 of the State-Owned Enterprises Act (SOE Act) which contains the very powerful statutory provision, "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi." Casey J went on to make a significant statement. He thought that the deliberate choice of the expression[82]

> '... Inconsistent with the principles of the Treaty' in preference to one such as 'inconsistent with its terms or conditions' *points to an adoption in the legislation of the Treaty's actual terms understood in the light of the fundamental concepts underlying them.* It calls for an assessment of the relationship the parties hoped to create by and reflect in that document, and an inquiry into the benefits and obligations involved in applying its language in today's changed conditions and expectations in the light of that relationship. [emphasis added]

Thus section 9 of the SOE Act imports the Treaty's actual terms into the legislation and forces the parties to re-examine the fundamental concepts underlying them.

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78 *NZ Maori Council* case per Bisson J at 714. On the text itself see Bruce Biggs "Humpty Dumpty, the Treaty of Waitangi" in Kawharu, above n 24.

79 Above n 1, at 692.

80 Above n 1, at 655.

81 Above n 1, at 702.

82 Above n 1, at 702.

Earlier Casey J said that the thrust of the Article was not only the protection of Maori land but the "uses and privileges" associated with it.[83] Thus there is direct relevance of this dicta to forestry leases, mineral interests and geothermal water on Maori land or expropriated Maori land the subject of the claims.

The President of the Court affirmed senior counsel's approach in the *NZ Maori Council* case to interpreting the principles. He advocated the phrase:[84]

> should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty. But the State Owned Enterprises Act itself virtually says as much in its own field. The questions in this case are basically about the practical application of the approach in the administration of this Act.

Thus any interpretation has to be broad and effective in order to give effect to the principles and there is justification for taking into account the developments in respect of indigenous peoples' rights in international forums.[85] The President gives the fiat to a broad interpretation not only in the context of the SOE Act but also when analysing ambiguous legislation or working out an express reference to the Treaty.

In legislation elsewhere, namely section 4 of the Conservation Act 1987 which states: "This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi" and the Long Title to the Environment Act 1986 which includes (inter alia) the phrase: "An Act to provide for the principles of the Treaty of Waitangi" the phrase will have much less force than section 9 of the SOE Act. However the Conservation Act will attract direct challenge to the use of statutory power should section 4 be contravened, whilst the Long Title to the Environment Act will doubtless be subjected to the inventive scrutiny of lawyers as they attempt to read into it the various issues relating to Maori concerns which are not covered satisfactorily within its main provisions.

Meanwhile the implications of the phrase "the principles of the Treaty of Waitangi" are undoubtedly beginning to be felt in the fields of state enterprises, resource development and resource protection as its application proves an effective threshold test for Crown endeavour and local authorities as Crown agents in the administration of much of the Crown legislation and control of local works. In this way, the principles themselves should begin to have the effect of constitutional guarantees and these guarantees will eventually impact on other areas

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83 Above n 1, at 700.

84 Above n 1 at 656.

85 See Benedict Kingsbury, "The Treaty of Waitangi: some international law aspects" in Kawharu, above n 24,12.

within our society. Gradually the constitutional framework will be coloured in by "Treaty Principles".

1 The Principle of Partnership[86]

> The Treaty signified a partnership between races, and it is in this concept that the answer to the present case has to be found. For more than a century and a quarter after the Treaty, integration, amalgamation of the races, the assimilation of the Maori to the Pakeha, was the goal which in the main successive Governments tended to pursue. Now the emphasis is much more on the need to preserve Maori taonga, Maori land and communal life, a distinct Maori identity.
>
> In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State Owned Enterprises Act are not used inconsistently with the principles of the Treaty.

Implied in the judgment is the recognition of a distinctive and separate Maori culture. The duty of the need to preserve taonga, land, community life and the separate Maori identity is no light one and if there is a breach in the context of State Owned Enterprises "the Court will insist it be honoured".[87] It is a strong dictum.

2 The Principle of Reciprocal Obligations

This flows on from the concept of partnership. Richardson J saw this as the core concept of the Treaty. Basically the principle is the guarantee of protection in return for the cession of sovereignty.[88] It also stems from the gift of pre-emption of Maori lands; the guarantee to protect what remained of Maori taonga after sale is part of the reciprocal Crown duty. From this flows the importance of acting fairly and reasonably towards Maori in considering the exercise of powers governed by an Act which includes the principles of the Treaty. The obligation of good faith is necessarily inherent in such a basic compact as the Treaty.[89]

3 The Principle of Active Protection

> The duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practical. ... I take it as implied in the proposition that as usual, practicable means reasonably practicable.[90]

"Active protection" must of necessity put the Crown on the alert - and enquiry - which might inevitably lead to consultation.

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86 Above n 1, 664. See also Casey J at 703 and 704.
87 Above n 1, 667.
88 Above n 1, 682.
89 Above n 1, 684.
90 Above n 1, 664. See also Casey J at 702.

4 The Principle of Honest Effort to Ascertain the Facts

This flows from honesty of purpose as between the parties. The onus is on the Crown when acting within its sphere of conduct to make an informed decision and it must be sufficiently informed as to the relevant facts and the law - which might not inevitably involve it in consultation. In some cases extensive consultation and co-operation will be necessary.

5 The Principle of the Right of Redress for Breach

This is outlined by Somers J[91] and is a very important one for the Crown. The principle is analysed through the law of partnership:

> ... a breach by one party of his duty to the other gives rise to a right of redress by the other - *a fair and reasonable recognition of, and recompense for* the wrong that has occurred. [emphasis added]

Thus His Honour sees the recompense as not justiciable in the ordinary courts but before the Waitangi Tribunal. Casey J also addresses the question of redress for past breaches and sees it as an obligation on the Crown, whilst the President of the Court says that it would only be "special circumstances" that would justify the Crown withholding redress.[92]

> A duty to remedy past breaches was spoken of. I would accept that suggestion, in the sense that if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it - which would be only in very special circumstances, if ever. As mentioned earlier, I prefer to keep open the question whether the Crown ought ordinarily to grant any precise form of redress that may be indicated by the Tribunal.

6 The Principle of Mutual Benefit

The Tribunal identifies that both parties expected to gain from the Treaty, but in its view neither partner can demand its own benefit without an adherence to reasonable objectives of mutual benefit.[93]

7 The Principle of Options

The general purpose or object of Article the Second is that nothing would impair the tribal interest, as from time to time apparent, in maintaining from the sea, sustenance, livelihoods, communities, a way of life and full economic

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91 Above n 1, 693.
92 Above n 1, 664.
93 *Muriwhenua Fishing Report*, Above n 51.

opportunities. There was a duty on the Crown to ensure that Maori retained sufficient resources for their subsistence and economic wellbeing.[94]

The Treaty envisages:[95]

(a) protection of tribal authority, culture and customs with a corresponding conferral on individual Maori of the same rights and privileges as British subjects;

(b) that Maori could develop along customary lines or assimilate into a new way. There was also a third alternative - to walk in two worlds, this option being open to all people;

(c) that there may be a reduction of tribal need but it is not necessarily displaced.

In my view this allows Maori to interchange his rights and privileges under Article the Second and Article the Third.

8 The Principle of Consent

In exchange for this cession of sovereignty and the acceptance of European settlement, Maori would not be relieved of their important properties, which included their interest in fishing, without their full consent.[96]

9 The Principle of the Maori Right to Exercise Rangatiratanga (tribal self-regulation)

The Court of Appeal continued to develop the concept that is implicit in Article the Second - that there are tribal authorities headed by Rangatira well capable of managing their own resources. Peace, law and order was what they sought from the Crown.[97]

The current Crown policies on future devolution to the iwi authorities appear to recognise this principle.

10 The Principle of the Right to Govern Without Undue Shackles

Sir Robin Cooke in the *NZ Maori Council* case realised the dangers of fettering unreasonably the right of a democratic government to govern.[98]

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94 Above n 87, 213-235.
95 Above n 87, 195.
96 Above n 87, 239.
97 Above n 1, 715.
98 Above n 1, 665.

> 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 and shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other co-operation.

11 The Principle of the Crown Guarantee to Individual Maori of Full Exclusive and Undisturbed Possession of their Lands

This emerges from the dicta of Bisson J and in his view is the most important principle within the context of the SOE Act. However, earlier he recognised "other properties" translated in the English text of Article the Second, extends to Maori customs and culture.[99]

12 The Principle of Negotiation for Interference with Rights

Following on from that in terms of the Treaty, the Crown has to negotiate for a right of public entry into tribal possessions.[100]

> In terms of the Treaty, it is not that the Crown had a right to licence the traditional user. In protecting the Maori interest, its duty was rather to acquire or negotiate for any public user that might impinge upon it. In the circumstances of Muriwhenua, where the whole sea was used, and having regard to its solemn undertakings, the Crown ought not to have permitted a public commercial user at all, without negotiating for some greater right of public entry. It was not therefore that the Crown had merely to consult, in case of Muriwhenua, the Crown had rather to negotiate for the right.

V THE STATE-OWNED ENTERPRISES ACT 1986 AND THE SIGNIFICANCE OF THE TRANSFER OF STATE ASSETS

A The Significance of Section 9

Apart from the powers which allow Ministers to convert Crown into State assets the significance of the State-Owned Enterprises Act 1986 lies in the fact that:[101]

> Municipal Law, that is to say Section 9 of the State-Owned Enterprises Act 1986, recognises the Treaty of Waitangi by expressly limiting the Crown's power to act under the 1986 Act by reference to the Treaty principles.

Section 9 therefore influences all decisions the Crown is likely to make under the Act. It has the effect of a "constitutional guarantee" within the field covered

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99 Above n 1, 715.

100 *Muriwhenua Report*, above n 93, 307.

101 Above n 1, 692.

by the Act. Thus Treaty obligations are carried into municipal law making Maori rights enforceable by the courts directly.[102]

The court was able to find in the *NZ Maori Council* case that steps had to be taken by the Crown to provide protection for actual and prospective Maori claims to the Waitangi Tribunal in the business of transferring lands and assets to the SOE's. To act prejudicially to those claims was to act in a manner inconsistent with the principles of the Treaty.[103]

This places the onus on the Crown not to transfer assets until it is plain that the claim is not well-founded or satisfactory safeguards are provided.

The Judges were clear that for the Crown to act otherwise would not only preclude reparation from the land to satisfy any recommendations of the Tribunal but also impede making reparation from other land which might be available.[104]

> If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Maori claims do not require retention of certain land, no principle of the Treaty will prevent transfer.[105]

But further on in his judgment the President stipulated that in relation to land now held by the Crown:[106]

> The effect of our present decision, built on the Treaty of Waitangi Act and the State Owned Enterprises Act is that in relation to land now held by the Crown, it should never again be possible to put aside a Maori grievance in that way. [emphasis added]

Whilst any SOE's remain under the State-Owned Enterprises Act the Crown relationship with the tribe creates a responsibility "analogous to a fiduciary duty".[107] It is trite law that a fiduciary must act with loyalty, honesty and good faith and exercise his or her powers for their intended purpose. That is the basic tenet of the fiduciary duty. Lord Herschell in *Bray* v *Ford*[108] provides the classic statement of fiduciaries:

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in the position where his interest and duty conflict. It does not appear to me that this rule is, as has been said before, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is,

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102 See also Greig J's observation in *Ngai Tahu Maori Trust Board* v *Attorney-General* (interim decision) (CP 559/87, 614/87: 12 December 1987) in respect of fisheries.
103 Above n 1, 660 & 668 and 670.
104 Above n 1, 723.
105 Above n 1, 664.
106 Above n 1.
107 Above n 1, per Cooke P at 664.
108 [1896] AC 44, 51-52.

> there is danger in such circumstances, of the person holding a fiduciary position being swayed by interest, rather than by duty, and thus prejudicing those whom he was bound to protect.

This statement cannot be literally applied to a Sovereign but the implications for the Crown in any asset sale are obvious, particularly because of the emphasis on duty and interest. The President of the Court made it clear:[109]

> that it becomes the duty of the Court to check, when called on to do so in any case that arises, whether the restriction (of Section 9) has been observed and if not to grant a remedy.

At the time of writing, the Court of Appeal had exercised its guardianship sale in respect of forests: *The New Zealand Maori Council* v *A-G and Minister of Forests* (CA 54/87) per Cooke P at 20 (Interim Finding).

B What is Meant by "Land" and "An Interest in Land"?

The Waitangi Tribunal has, under section 8A(2)(a) of the Treaty of Waitangi Act 1975 power to recommend the return to Maori ownership, land, or an interest in land transferred to a State enterprise under section 23 of the State-Owned Enterprises Act 1986.

It therefore becomes critical to identify what is "land" and an "interest in land". A definition of land is contained in the Land Transfer Act 1972 section 2:

> "Land" includes messuages, tenements, and hereditaments, corporeal and incorporeal, of every kind and description, and every estate or interest therein, together with all paths, passages, ways, waters, water-courses, liberties, easements, and privileges thereunto appertaining, plantations, gardens, mines, minerals, and quarries, and all trees and timber thereon or thereunder lying or being, unless specially excepted.

There are thus immediate effects for all State corporations controlling natural resources such as Electricorp, the Coal Corporation and the Forestry Corporation. The resources they control are not excepted from the Act. (I note in passing that the President of the Court of Appeal in the *NZ Maori Council* case states that the State-Owned Enterprises Act affects waters.[110])

If what is being transferred is an "interest in the land" then that interest needs to be closely defined.

(a) The Coal Corporation is a State-Owned Enterprise designated in the Second Schedule to the SOE Act. Whilst coal is deemed to be vest in the Crown by virtue of Section 5 of the Coal Mines Act 1979, it is a matter of law whether a coal mining licence is an "interest in land". Section 84 of the Act states that:

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109 Above n 1, 660.
110 Above n 1, 661.

> every coal mining right shall be deemed to be a chattel interest and subject to this Act may be sold or otherwise disposed of as fully as a chattel interest in land.

Similar wording was interpreted in *Crown Silver Mines Ltd (NPR)* v *The Crown in Right of British Columbia.*[111] In that case "chattel" interest was prima facie taken to mean personalty rather than real property. However, I doubt that this is correct as the whole exclusive nature of the interest and the procedures surrounding its transferability, recording, and payment of fees portray a property right. It is sui generis. In *Mason* v *McConnochie*[112] a mining case under section 139 of the Mining Act 1898 the term "chattel interest in land" was considered by the Supreme Court of New Zealand and held to be an interest in land. This seems a more correct view.

Currently, the Waikato is under claim by the Tainui Tribe and that area encompasses all the coal mining operations carried out by the Coal Corporation at the Huntly, Rotowaro and Maramarua and Weaver's Coal Field. The Ngai Tahu claim in the South Island encompasses some of the Corporation's West Coast coal mines.

Whilst the coal mining licences are designated to be statute granted under section 101B of the Coal Mines Act 1979 (as inserted by section 32 of the Fifth Schedule to the State-Owned Enterprises Act 1986) it has to be established whether statute granted licences constitute an interest in land. If the Corporation's assets are transferred under section 23 of the SOE Act then the compulsory re-acquisition provisions in respect of "any land or interest in the land" will apply (Treaty of Waitangi (State Enterprises) Amendment Act 1988 (section 8A)).

Meanwhile section 70F the Finance (No 2) Act 1988 demonstrates that the Crown intends removing the Corporation from the First Schedule to the SOE Act 1986. Whilst the status of the Corporation would thus become like that of Petrocorp, its removal does not affect the compulsory re-acquisition provision under section 8A of the Treaty of Waitangi Act.

Should the Minister of State-Owned Enterprises decide to sell shares only however, it is doubtful whether it involves the exercise of a statutory power to attract review proceedings under the Judicature Amendment Act 1972.[113]

It may be argued that under the NZ Settlements Act 1863 (section IV) all titles and interests of Maori relating to the coal bearing lands in the Waikato are

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111 [1986] 6 WWR 328 BCSC.

112 [1901] 19 NZLR 638. This view has recently been upheld by the Court of Appeal in *Mahuta & The Tainui Trust Board* v *A-G & Others,* unreported, 3 October 1989 (CA 126/89).

113 See *Love,* above n 15.

clearly extinguished under the expropriating statutes. However the dicta of Richardson J has some relevance here:[114]

> If the original Crown title is seen to be flawed or tainted when viewed in terms of the Treaty, then certain dealings by the Crown with that land may themselves be in breach of the Treaty.

On the West Coast the Arahura Deed specifies that Ngai Tahu sold the minerals with the land. In that case the deed itself would have to attract the charges of bad faith, undue influence and duress to bring any of the principles of the Treaty to bear on breach under the Treaty of Waitangi Act 1975.

(b) Petroleum and gas leases convey an interest in land. The empowering provisions of the Petroleum Act 1937 suggest an intention to grant real property interests in petroleum and natural gas even though it is the property of the Crown. However one would need to thoroughly examine the lease documents which in form, language and manner of execution will or will not confirm this.[115]

(c) In respect of forests and proposed transfer of assets, a Crown "flawed title" to the land would again doubtless draw the attention of the Court of Appeal. A full bundle of property rights such as those protected by Article the Second would include:

(i) the right to dispose of property by commercial transfer;
(ii) the right to use and manage property;
(iii) the right to make a profit from that property,

thus making cutting rights to forests a very attractive proposition.

The development right inherent in Article the Second might thus give protection in respect of non-indigenous forests which have been grown this century; this would accord with the Court of Appeal's recognition that the principles of the Treaty preclude it from being fossilised as at 1840. The acquisition of State forests as a remedy for breach of Article the Second would also seem to accord with the court's view that if ancestral lands are not available for return then other Crown assets might be.

In respect of forestry agreements with the tribes themselves then the Crown would most probably attract a trustee-like function and assume the duty of a fiduciary in its dealings with the forests.[116]

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114 Above n 1, 680.

115 See generally D E Fisher"Law and Policy for accelerating Petroleum Exploration and Development in New Zealand" (1986) 16 VUWLR 11.

116 *Guerin* v *The Queen* (1984) 13 DLR (4th) 591, SCC.

VI THE PUBLIC WORKS ACT 1981

The Public Works Act 1981 (with certain reservations) requires the Chief Executive of the Department of Lands to offer back to Maori their land for public works - land acquired under that Act or any other Act.

I do not intend to examine the Act exhaustively - only the sections that have direct relevance to the return of Maori land. The potential for litigation in this area in a climate of asset sales is awesome and the Chief Executive of the Department of Lands bears great responsibility. There are also concerns that many local authorities will not know what they are dealing with and some land will not be offered back.

Section 40 reads:

(1) Where any land held under this or any other Act or in any other manner for any public work -
(a) Is no longer required for that public work; and
(b) Is not required for any other public work; and
(c) Is not required for any exchange under section 105 of this Act -
the Chief Executive of the Department of Lands ... shall endeavour to sell the land in accordance with subsection (2) of this section, if that subsection is applicable to that land.
(2) Except as provided in subsection (4) of this section, the Chief Executive of the Department of Lands... unless -
(a) He or it considers that it would be impracticable, unreasonable, or unfair to do so; or
(b) There has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held -
shall offer to sell the land by private contract to the person from whom it was acquired or to the successor of that person -
(c) At the current market value of the land as determined by a valuation carried out by a registered valuer; or
(d) If the Chief Executive of the Department of Lands ... considers it reasonable to do so, at any lesser price.

The definition of public work is that given by the Public Works Amendment Act 1987 (section 2(5)).

'Public work' and 'work' mean -

(a) Every Government work or local work that the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain, and every use of land for any Government work or local work which the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain by or under this or any other Act; and include anything required directly or indirectly for any such Government work or, local work or use:

(b) Every Government work or local work constructed, undertaken, established, managed, operated or maintained by any Education Authority within the meaning of the Education Act 1964 and every use of land for any Government work or local work which such Education Authority constructs, undertakes, establishes, manages, operates, or maintains, and include anything required directly or indirectly for any such Government work or local work or use:

(c) Any Government work or local work that is, or is required, for any university within the meaning of the Universities Act 1961.

'Railways' is also given an extended definition under section 3(b) and includes wharves and jetties.

"Government work" is defined to mean:

A work or an intended work that is to be constructed, undertaken, established, managed, operated, or maintained by or under the control of the Crown or any Minister of the Crown for any public purpose.

Thus works that are intended for public purposes but presumably abandoned, are also caught by the legislation.

The section also catches "local works":

A work constructed or intended to be constructed by or under the control of a local authority or for the time being under the control of local authority.

Sections 40, 41 and 42 do not apply on the transfer of land to a State enterprise but to continued application thereafter.

Many of the lands acquired for public works such as airport land, for defence purposes, for roads, railways, schools, hospitals and scenic reserves were acquired from tribes out of land either reserved from sale because they were traditional ancestral lands or reserved for them by agreement with the Crown. Both categories were eventually Crown granted. A great many would attract the "special relationship" provisions of Maori to his land that is detailed in the *EDS* v *Mangonui County Council* case.

Section 41 of the Act therefore makes express provision for the return of land which before acquisition was:

(a) Maori freehold land or general land owned by Maoris (as those terms are defined in section 2 of the Maori Affairs Act 1953); and

(b) beneficially owned by more than 4 persons; and

(c) not vested in any trustee or trustees or local authority.

However there are four caveats in the way of offering and back to Maori:

1 The price (current market value - and even a lesser price) would generally be prohibitive for any but the wealthiest trusts. The only recourse for Maori would be to make out a case to the Chief Executive on grounds encompassed by the principles of the Treaty of Waitangi which might persuade him that the price might be lowered or *even paid later.* But the principles of the Treaty have not been incorporated directly into the legislation and the matter remains open for argument. It may be noted that under early legislation no notice provisions were given in respect of land taken from Maori. Some of the later requisitions, however, should attract the protection of Article the Third of the Treaty as they pertain to the rights available to all British subjects and brought many advantages to Maori.

2 Another is where the Chief Executive:[117]

> ... believes on reasonable grounds that, because of the size, shape or situation of the land he ... could not expect to sell the land to any person who did not own land adjacent to the land to be sold, the land may be sold to an owner of adjacent land at a price negotiated between the parties.

Whilst the discretion is essentially the Chief Executive's, he is circumscribed by the grounds of reasonableness and would be able to be challenged under the *Wednesbury* administrative law principles if he acted otherwise. However alternatively the Chief Executive may wish to consider the dicta of Richardson J in the *NZ Maori Council* case:[118] "possession of land and the rights to land are not measured simply in terms of economic utility and immediately realisable commercial values".

3 The third caveat again lies within the discretion of the Chief Executive - when he considers it "impractical, unreasonable or unfair" he may choose not to offer it back. All such qualifications might attract review proceedings if exercised inadequately. In my view, however, it is within the inherent jurisdiction of the Chief Executive to make the decision under the authority of *CREEDNZ Inc* v *Governor-General.*[119]

4 The fourth hurdle lies in just what constitutes "significant changes"? Presumably opencast coal mines, land in central business districts and so on. But maybe it befits a reasonable Treaty partner to consult with Maori on what is significant. As these asset sales are continuing around the country it is doubtful whether many of the Maori tribes have notice to make intervention unless there are substantive administrative procedures to make tribal members aware of sale. The existing notice provisions may not be sufficient.

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117 Section 40(4).
118 Above n 1, 674.
119 [1981] 1 NZLR, 172.

VII THE USE OF THE WAITANGI TRIBUNAL AS A FORM OF INJUNCTIVE RELIEF

Within the past few years the Tribunal has to my knowledge been used five times[120] in various ways by claimants seeking relief from events being persued in legal and political forums which were perceived to be harmful to their interests.

1 The Kaituna River (Nutrient Pipeline)

This claim was lodged on 30 January 1978 by Sir Charles Bennett of Maketu and others asking that a proposal for a nutrient pipeline to the Kaituna River not be proceeded with. It was adjourned twice to ascertain the outcome of certain planning applications including water rights. Following the decision of the Planning Tribunal in 1983 allowing 3 appeals, the claimants sought a hearing. As a result of the Tribunal's recommendation the Crown abandoned all financial support for the construction of the pipeline to divert Rotorua's effluent to the river, and instead announced it would give a 75% subsidy for a combined treatment plant and land disposal scheme.

2 Te Atiawa (Motonui Outfall)

This claim focused on the proposed outfall to be constructed for the synthetic fuels plant at Motonui which would have resulted in further pollution of Te Atiawa's fishing reefs. Water rights had already been approved under the National Development Act 1979. The Tribunal's findings caused a complete re-assessment on the sewage outfall and considerable delays. The new project is not yet finalised.

3 The Muriwhenua Fisheries Claim

This began as a land/fisheries claim in 1985. The Tribunal made an interim report on 8 December 1986 on the State Owned Enterprises Bill as being prejudicial to the principles of the Treaty of Waitangi. This resulted in the Bill being amended to include section 9 (the Treaty principles section).

Two days later another interim report was issued about the allocation of ITQ under the Fisheries Act 1986 being prejudicial to the Muriwhenua claim. The Tribunal warned of the need for compensation if the allocation of ITQ went ahead. The Minister declined to act. Finally a memorandum in September 1987 prompted the Crown to negotiate when the Tribunal made a finding that the Crown must bargain for any public right to commercial exploitation of the fisheries. Since a further report in 1988, the Crown is negotiating, seeking interim settlement and is the subject of court proceedings.

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120 This Section does not include all the claims lodged as a result of the implementation of the State Owned Enterprises Act 1986.

4 Ngati-Kahu (Mangonui Sewage Claim)

Here the Planning Tribunal and local councils had given final approvals for a sewage proposal in Northland on what was ancestral land of the Ngati Kahu tribe. Pipe laying had begun and the Tribe itself appeared to have apparently approved the final scheme. The elders had objected to the scheme both through a local pakeha family and personally when the discharge was to be close to their traditional fisheries. The evidence disclosed that the younger people had objected after the local body officials had left the final meeting with the Tribe. The Tribunal declined to recommend in the Tribe's favour as the alternatives proposed were not sufficiently free of other problems.

Meanwhile the project has been stalled. There is an appeal lodged under the Public Works Act 1981 to prevent the land from being taken for this scheme. In the interim the Court of Appeal has ruled in *EDS* v *Mangonui County Council* on the importance of ancestral land and the use to which it is put.

5 The Nukuhau Marina (Lake Taupo)

Here the statutory consents required for the project were a town planning application in respect of access to the site, town planning application in respect of the marina itself, water rights in respect of storm water discharge and excavation, and consents under the Harbours Act for reclamations and associated harbour works.

The town planning consent was obtained from the Planning Tribunal in the face of strong Maori objection, whereupon a claim was lodged with the Waitangi Tribunal. The Maori claimants are making a strong case to "tapu" of the lake waters. The proponent sought to have the claim struck out of the Tribunal and was not successful. Meanwhile the consent of the Minister of Conservation has become the subject of review proceedings before the High Court.

What is interesting about this development is that the lake is administered by two authorities, one of which, the Ministry of Transport, does not attract the principles of the Treaty of Waitangi within its own empowering legislation and the other, the Department of Conservation, which does administer the lake under the principles of the Treaty. The Minister of Conservation has yet to give consent.

All of these findings and recommendations should give us pause. As lawyers advising commercial clients, the indicators are that there has been something fundamentally flawed in our approaches to Maori issues in this country.

There is hope on the one hand that the Natural Resources Law Reform Working Party will resolve some of the difficulties we all perceive. On the other hand, the Local Government Reform Bill, which might provide enlightenment to local authorities on some of these issues, is in itself hampered by the lack of reference to them.

VIII SUMMARY

1 Treaty rights flow from the doctrine of aboriginal title. These rights are as alive today as they were in 1840:

The Tribal right is clearly a right of property and it is expressly recognised and protected by the Treaty of Waitangi. That Treaty neither enlarged nor restricted the then existing rights of property. It simply left them as they were.

Some rights exist at law; others exist in common (customary) law; some exist as a burden on Crown title; some exist as non- territorial rights; some exist in deeds of sale or as rights to compensation for property unlawfully taken.

2 There is a serious need for law reform to protect Treaty rights to give certainty to all parties. Government is addressing the need through the Natural Resource Law Reform Working Party and the Law Commission has indicated the urgent need for fisheries law reform. Despite some excellent dicta emerging from the courts, litigation is not going to resolve many of the issues as they currently stand.

3 Many of the Maori claims are non-justiciable in the courts because they involve social, economic and political problems and solutions should be resolved in forums other than the courts. For Maori there have been some missed opportunities in the past few years viz: acknowledgement of Treaty rights in a Bill of Rights; acceptance of the Fisheries Working Party's interim solutions. These opportunities may not come again.

4 On the sale of State-owned assets, the Court of Appeal is guardian of the rights enshrined in the Treaty and protected under that specific legislation. The court urges resolution of the difficulties through negotiation.

5 The use of commercial mechanisms for Crown and commercial developers in conjunction with Maori interests is a means of providing access to resources and re-establishing mana. These remain viable solutions to the current impasse on State-Owned Enterprises. In this context the principle of partnership in any joint venture with the Crown does not necessarily mean a half share in the resource. There are other percentage solutions.

I leave you with a reflection of Richardson J made in the context of the *NZ Maori Council* case. He observed that there is much force in the observation Sir Henare Ngata made in his evidence that:[121]

> ... a contentious matter such as the Treaty will yield to those who study it whatever they seek. If they look for difficulties and obstacles, they will find them. If they are

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121 Above n 1. at 673

prepared to regard it as an obligation of honour, they will find that the Treaty is well capable of implementation.

KENSINGTON SWAN SETS UP TREATY ISSUES UNIT

Kensington Swan has set up a specialist Treaty of Waitangi unit to advise organisations and individuals affected by the Treaty issues. The unit, Te Ohu Whakakaupapa I Te Tiriti, comprises two qualified teams in the firm's Auckland and Wellington offices.

The managing partner, Warren Allen, said the Treaty would have an increasingly pervasive effect on the New Zealand legal environment. Knowledge of its provisions and expertise in the legal issues it raises were now becoming essential, especially for the larger firms.

"It is important for New Zealand that all parties, Maori and Pakeha, receive fully informed advice on Treaty issues, with a view, where possible, to resolving disputes before they start," he said.

"Much of the cost and effort involved in dealing with Treaty issues in the planning process, for example, can be avoided by ensuring tangata whenua concerns are addressed sensitively early on."

In Auckland, the Treaty Unit team comprises Joe Williams who has extensive experience in this area and Wayne Attrill who has recently completed his LLM on the Treaty at Harvard. Matt Casey is the supervising partner.

The Wellington team comprises Richard Cathie, who is experienced in Maori land law, assisted by Rahira Walsh, a staff solicitor.