THE IMPACT OF THE TREATY OF WAITANGI ON GOVERNMENT AGENCIES

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FOREWORD

By the Hon Jim Sutton, Minister of Agriculture

The Treaty of Waitangi, over the last few years, has been accorded increased importance in public policy issues and in government decision making.

There have been a number of major developments on Treaty issues and in the Government's approach to Maori policy. These developments have already had and will continue to have substantial implications for government agencies and the way in which they carry out their work.

This review outlines recent activities on Treaty issues and the consequences of these for government agencies. The review was initially prepared to assist the Ministry of Agriculture and Fisheries to assess the implications of the new focus on the principles of the Treaty for the Ministry's operations and responsibilities.

I am pleased that Brooker & Friend Ltd and the Ministry have come together to publish the review so that it will be available to a wider audience. It is a useful reference source for people whose interests and work call for a good understanding of Treaty issues.

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INTRODUCTION

This report presents an overview of the impacts and potential impacts on government agencies of recent developments relating to the Treaty of Waitangi.

The report has been prepared by the Bridgeport Group on contract to MAFTech of the Ministry of Agriculture and Fisheries.

The report:

- outlines the main influences which have led to the increased importance now accorded by the Government to the principles of the Treaty in public policy development and government decision making;

- outlines recent and current issues in which the recognition of the principles of the Treaty is a central factor;

- identifies the main implications for government agencies arising from the new focus on the Treaty.

The report is based on information gathered and views expressed in Bridgeport's consultations with a number of people, mainly, but not exclusively, from government agencies which are substantially involved with Treaty matters. The report generally takes account of activities relating to the Treaty up to March 1990.

THE NEW ENVIRONMENT IN A NUTSHELL

Overview

Over the last decade or more, and in particular over the last five years, there has been a marked change—in fact, a quiet revolution—in the Government's approach to Maori policy and in the importance accorded to the principles of the Treaty of Waitangi in government activity.

Concepts which go to the roots of Maori traditions and social structures, but are quite new to the processes and culture of government in New Zealand as these have developed since 1840, have been, or are in the course of being, introduced into policy development and everyday decision making and administration by public agencies.

This review is not able to traverse the history of the attitudes of Maori and the Crown towards the Treaty and on the place of the Treaty in New Zealand's law and the practice of government. Reference, here, to the Treaty's history, is confined to a selection of comments made by people who have been substantially involved in Treaty issues. These comments help to set the scene for the review and to catch the spirit of today's concerns about the Treaty.

For Maori, the Treaty of Waitangi has always been regarded as of paramount importance in setting the terms of their partnership with the Crown. In the words of Chief Judge Durie of the Waitangi Tribunal:

> "A stock take of the Maori position gives cause for alarm. The memory of old land losses is not forgotten and is compounded by the survival of policies, continuing unabated to modem times, to ensure that the pattern of land loss, cultural loss and loss of control has continued. It is the continuation of the sense of grievance over what is now ten generations, and the sort of alienating effect that that has, that concerns. I have heard some people talk of Maori activism about the Treaty as though the activists had only recently unearthed it to suit their own ends. It needs to be understood that if the Treaty was assigned to the garbage can by lawyers and politicians, it was never accorded that treatment in Maoridom. It has dominated Maori political debate from the 1840s to the present day. Throughout history large gatherings of Maori people have been called to discuss that one topic. It has been the subject of countless petitions to Parliament and the Courts. Modern Maori debate on the Treaty is certainly nothing new".

The history of the attitudes of the Crown towards the Treaty tells quite a different story.

The Royal Commission on Social Policy, which reported in 1988, was required, by its terms of reference, to describe the standards of fairness and the foundations of New Zealand's society and economy. In doing so, the

Royal Commission produced a discussion booklet on the principles of the Treaty of Waitangi. In this the following comment was made:

> "To understand the history of our country and the current patterns of social relationships between people we need to know about the Treaty and the attitudes of the two principal parties at the time of the signing and subsequently. Not all issues stemming from the Treaty can be dealt with in this publication, nor should this be seen as a definitive statement about the status of the Treaty or the responsibilities of successive generations to honour its intent. But some fundamental aspects do require examination and discussion if the objectives of justice, fairness and efficiency are to be pursued.
>
> "In essence the Treaty was a partnership between the Maori inhabitants of New Zealand and the British Government. While it had potential for a fair and even arrangement, inequalities between the partners quickly developed. Control, power and decision making passed from one partner to the other and even by 1852, with the passing of the Constitution Act, the effective administration of New Zealand had become the province of the European settlers. The Anglo-Saxon traditions of individual effort and industry and the promise of full citizenship to male settlers, left little room for those whose traditions and values had other origins.
>
> "By 1860 the European population at 79,000 had surpassed the declining Maori numbers and, with no regard for the concept of partnership declared only 20 years earlier, the Maori had become a political minority in their own country.
>
> "Grievances from the past linger on: land, language, authority, self-determination. Even in the 1980s they underpin much of the tension within the relations between Maori and Tauiwi (later settlers), although the situation has been considerably complicated by problems of unemployment, inflation, disparities in standards of living. Inequalities, in fact, occur in all major economic and social areas of New Zealand society and dissatisfaction has led to calls for a re-examination of the basic values on which our social policies are based. A Maori cultural and political revival has reiterated the need for cultural perspectives to be part of that examination.
>
> "That there are problems which Maori and Tauiwi must work out together, is apparent. Confrontation and conflict exist. Ways must be found to continue constructive discussion and a sharing of ideas. At the centre of any major consideration for the improvement of race relations is the Treaty of Waitangi. It marked the beginning of nationhood and lies at the heart of many Maori grievances and claims of injustice."

The President of the Court of Appeal, Sir Robin Cooke, in the Court's judgment on the case in 1987 arising from the State-Owned Enterprises Act 1986, made the following comment:

> "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. In 1967 in the debates on the Maori Affairs Amendment Bill, a measure facilitating the alienation of Maori land, the responsible Minister, the Hon J R Hanan, saw it as 'the most far-reaching and progressive reform of the Maori land laws this century . . . based upon the proposition that the Maori is the equal of the European . . . The Bill removes many of the barriers dividing our two people'. Another supporter of the Bill expressed the hope that 'it will mark the beginning of the end of what still remains of apartheid in New Zealand'. Such ideas are no longer in the ascendant, but there is no reason to doubt that in their day the European Treaty partner, and indeed many Maoris, entertained them in good faith as the true path to progress for both races. Now the emphasis is much more on the need to preserve Maoritanga, Maori land and communal life, a distinctive Maori identity".

Taking a wider view of Maori/Pakeha relations, the late Professor R Q Quentin-Baxter wrote, in 1984:

> ". . . If New Zealand has a destiny as a separate nation, rather than as a detached part of Australia, it will be principally because these islands were a meeting-place of two great races, and because—even in the worst times—their dealings with each other never lacked a certain grandeur. It is of course a flawed record; but the world has no better record and can ill afford to lose this one. In return, the theory and practice of the modern international law of human rights can reinforce our resolution to do whatever may be needed to reduce, and finally to eliminate margins of disadvantage suffered by the Maori . . . people in health, in education and in professional and other attainments. In richness of culture they will have the advantage; but it will be a shared advantage for Maori cultural tradition has never been exclusive . . . When the first European settlers came to New Zealand, they brought with them everything except the stratified class society of England and Europe. The characteristic New Zealand demand, now taken up by the Maori, was always for fairness and equality of opportunity—an affirmation of the intrinsic worth of every human being, found also in the Universal Declaration of Human Rights". (New Zealand Law Journal, 207, 1984, quoted in Te Reo Maori report of the Waitangi Tribunal).

A new focus

Since 1975, a number of influences have interacted, and continue to interact, to generate changing perspectives on the Treaty and its importance to today's society. Among these are:

- the actions of Maori
- new approaches to Maori policy by the Government

- the work of the Waitangi Tribunal
- judgments of the Courts
- the restructuring of the public sector, including the impacts of the disposal of Crown lands to state-owned enterprises
- the disestablishment of the Department of Maori Affairs and the new roles of the Ministry of Maori Affairs, the Iwi Transition Agency and of iwi authorities
- other major public policy reforms, including the reorganisation of local and regional government, the reform of resource management law, the progressive devolution to iwi authorities of responsibility for Maori development programmes, and the Maori Fisheries Act
- efforts to improve cultural sensitivity in agencies in the state sector
- the continuing public and political debate about the Treaty and its relevance to today's society.

The actions of Maori

Over the last two decades, there has been a strong resurgence of Maori spirit and of Maori determination to assert their interests on the basis of the Treaty of Waitangi.

This resurgence is expressed in a number of directions. There is greater determination and assertiveness among Maori (and a more positive response to this from the Government and the Courts) to secure redress for past and current breaches of the Treaty.

There is a similar determination to overcome Maori social and economic disadvantage and enhance their position in New Zealand society today. Maori are acting to invoke the guarantee, under Article Two of the Treaty, of the right of Maori to the control and enjoyment of those resources and taonga, both material and cultural, which it is their wish to retain.

Many Maori, as well as the Government, look to the traditional iwi structure and the restoration of iwi self-management as the means by which Maori can achieve greater social and economic self-reliance and independence.

What has become clearly apparent in recent years is the strength of the Maori commitment, where they see their rights and interests at stake, to win a greater say in shaping their own destiny and, in partnership with the Crown, in shaping New Zealand's destiny.

The Government's approach to Maori policy

The Government, in a number of major policy decisions over the last five years, has acted more directly and substantially than governments have commonly done in the past in recognition of the principles of the Treaty.

To this end, the Government has set in place a number of measures and reforms which are aimed at bringing about a greater responsiveness among government agencies to Maori aspirations.

The Waitangi Tribunal was set up in 1975 to investigate claims made by Maori under the Treaty's provisions. In 1985, the Tribunal's jurisdiction was extended to enable it to consider claims going back to the time of the Treaty's signature in 1840.

The Tribunal, in a series of major reports, has since drawn attention to the case for redress of a range of Maori claims on land, fishing, Maori language, as well as on other issues.

The Government has set in place and is in the process of implementing major initiatives in Maori policy focusing, in particular, on the recognition and restoration of iwi authority and a key role for the Ministry of Maori Affairs in ensuring that Maori perspectives are brought to bear in all areas of public policy.

The Government has also made provision in a number of major statutes for the recognition of the principles of the Treaty.

Increasingly, the Treaty is coming to be regarded as an important touchstone for all areas of government activity.

Judgments of the Courts

The Courts have also played a substantial role over the last few years in helping to influence political and community thinking on the Treaty.

In a number of landmark judgments on cases taken to the Court by Maori plaintiffs, new directions and new benchmarks have been set on the relevance of the principles of the Treaty to planning and decision making on public policy issues. The two judgments which stand out in this respect are those of the Court of Appeal on cases brought by the New Zealand Maori Council in 1986 and by the Tainui Maori Trust Board in 1989.

The first of these cases was described by the Court of Appeal itself, and subsequently by the Prime Minister, as perhaps as important for the future of the country as any case that has come before a New Zealand Court.

A feature of the recent series of judgments made by the Courts on Treaty issues has been the consistency with which the Maori case has been upheld.

The two cases referred to above, as well as others on issues concerned with land, highlight the strong connection between the Government's decisions to dispose of Crown land and forests to the newly created state-owned enterprises and the emphatic assertion by Maori of their stake in these assets under the provisions of the Treaty.

Similarly, Maori have displayed the same determination to press their claim under the Treaty to rights to fishing and to ensure that these rights are respected in the Government's introduction of a new fisheries management regime.

The full potential impacts of these Court judgments are still unfolding but, umistakeably, they already have critical implications for the planning and management of a wide range of natural resource issues. Just as clearly, these judgments have an important bearing on other areas of public policy. They have also cast new light on the continuing relevance of the Treaty to today's society.

The Government's five principles

A consequence of the judgments of the Court of Appeal and of the findings of the Waitangi Tribunal was the release by the Prime Minister, in July 1989, of the Principles for Crown Action on the Treaty. These identify five principles by which the Government will act when dealing with issues that arise from the Treaty (see **"Principles for Crown Action"** on p29).

Public sector and Maori Affairs restructuring

The impact of the restructuring of the former Department of Maori Affairs and the Government's policy on the restoration of iwi authority, has far-reaching immediate and longer term implications for the future relationships between Maori and the Crown.

In November 1988, following extensive consultation with Maori, the Government announced its principal objectives in Maori policy in the statement Partnership Response (Te Urupare Rangapu). The main features of this statement, in terms of the structures of government were the provisions It made to:

- restore and strengthen the operational base of iwi and to this end, to
- establish the Iwi Transition Agency to prepare, over a five year period, for the progressive devolution to iwi of responsibility for making their own decisions on their affairs and to contract with government agencies for the delivery of Maori programmes;
- establish a Ministry of Maori Affairs to provide, among other responsibilities, a Maori perspective on all aspects of public policy;

- enhance the responsiveness of government agencies to principles of the Treaty and the Government's objectives in Maori policy.

The Iwi Transition Agency and the Ministry of Maori Affairs are now established. The Runanga Iwi Bill was introduced to Parliament in December 1989 for the incorporation and registration of runanga (or council) of iwi. This will enhance the legal status of iwi.

The Runanga Iwi Bill, for the first time since the signing of the Treaty of Waitangi, provides for Government's formal recognition of the iwi structure. The purpose of the Bill is, essentially, to enable Maori to use more traditional structures to deliver services to their people.

The major features of the Government's policies on these issues are outlined on pp 40–49.

These policy moves, as they come to full fruition, will transform the historical and existing relationships between Maori and the Crown and individual government agencies.

Local government and resource management law reform

The actions the Government has taken over the last two years to reorganise local and regional government and to reform the resource management laws also have direct implications for the partnership between Maori and the Crown.

It is the Government's intention that both these reforms should make provision for mandatory consultations between territorial and regional authorities and iwi on all issues where Maori interests are involved.

The Government is proposing that requirements for consultations of this kind will be incorporated into legislation. These proposals are outlined on pp 35–37.

Continuing debate

This summary covers only the major areas of public policy where action has been taken to make provision for the recognition of the principles of the Treaty.

It is difficult to overestimate the longer term implications of the changes made for the processes and culture of government in New Zealand.

Both Maori and the Crown have set their directions for a partnership vastly different from that which has been practised in the past. The impacts are now being felt by all government agencies and especially by those which are involved with the management and use of natural resources.

The changes made are taking place amidst continuing community and political

debate about the role of the Treaty in today's society and the future directions of Maori/Pakeha relations. There are strong and conflicting points of view about differing courses which might be followed.

The likelihood is that the public and political debate will continue and perhaps intensify in the environment of the 1990 anniversary and of this year's General Election.

This review now examines in greater detail the major areas of government activity, referred to briefly above, where changing attitudes to the relevance and recognition of the Treaty are most apparent.

THE WAITANGI TRIBUNAL

General

The Waitangi Tribunal has, in its 15 years of existence, brought to bear substantial influence on political and public attitudes to historic Maori grievances under the Treaty, the case for redress and to the intent and spirit of the Treaty itself.

The Chairman of the Waitangi Tribunal, Chief Judge Durie, referring to what he called *"the Waitangi experiment"*, has said that he had not been able to find anywhere else in the world a body quite like the Tribunal. Judge Durie said that:

> ". . . it seems unique that a Tribunal of semi-legal character, and which enjoys a substantial input from lawyers, has been called in aid, not only to report on native grievances, but to recommend as well national policies for a new order. We may need the open mind of the experimentalist if we are to develop that role."

The Tribunal 1975–1985

The Waitangi Tribunal was established by the Treaty of Waitangi Act 1975.

This Act gave the Tribunal authority to hear claims by Maori who believed they were prejudicially affected by legislation, policy or practices of the Crown that were inconsistent with the principles of the Treaty. If the Tribunal found a claim to be substantiated it could then recommend action that could be taken by the Crown to provide a remedy or redress.

The Tribunal was, under the Act, effectively given authority to determine the meaning and effect of the Treaty.

The Act excluded the Tribunal's jurisdiction over anything done (or not done) before the Act's commencement—that is, 1975.

Initially, the Tribunal comprised three people: the Chief Judge of the Maori Land Court as chairman; one Maori, on the recommendation of the Minister of Maori Affairs; and one other person on the recommendation of the Minister of Justice. The Act accorded the Tribunal the status of a permanent Commission of Inquiry.

The Tribunal is bicultural in several respects. Its representation comprises Maori and Pakeha in about equal numbers. Claims are heard both in the Maori and English languages and are weighed against the Maori and English versions of the Treaty that were signed in 1840.

Claims by Maori are usually heard on the marae of the tribe of the claimants concerned and conducted in accordance with Maori protocol.

Pakeha and Crown submissions on claims are normally held in public buildings in towns closest to where a claim is in dispute. Pakeha procedures and protocols apply in these instances.

Initially, placement of claims before the Tribunal was slow. The first claim, heard in May 1977, was by Mr J P Hawke and others of Ngati Whatua who, after being discharged without conviction on a charge of taking shellfish, claimed he had been prejudicially affected because he had a right under the Treaty to take the shellfish. In March 1978, the Tribunal reported to the effect that the claim was unsubstantiated and made no recommendation on it.

The second claim before the Tribunal was lodged by Mr T E Kirkwood and by the Manukau Harbour Action Association whose concern was that a proposed thermal power station to be built near Waiau Pa on the Manukau Harbour would adversely affect Maori fishing grounds. The Tribunal agreed that the proposed power station would interfere with traditional Maori fishing grounds. It made no recommendation as the then New Zealand Electricity Department had decided not to proceed with the project.

Following a period when there appeared to be diminished interest in the Tribunal, another claim was heard in 1982. This claim, by the Te Atiawa tribe of Taranaki, was that effluent from the Motunui synthetic fuels plant would pollute traditional fishing grounds. Te Atiawa were supported in their claim by environmental interests and some economists opposed to the development. In its report, which attracted a good deal of public interest, the Tribunal found in favour of the applicants and recommended to the Crown that the proposed ocean outfall for the Motunui plant be discontinued.

The initial Government reaction to the recommendation was cool but public interest in the issue did not wane. In 1983, in response to another of the Tribunal's recommendations on Motunui, an interdepartmental task force was established to examine the broad issue of medium-term plans for development in the region and how the necessary services and infrastructures could best be provided. The task force concluded that this planning should be the role of the Taranaki United Council. The task force was then asked to address the narrower issue of waste disposal in north Taranaki.

In October 1986, the Government announced it would provide $11.7 million of the estimated total of $13 million to help fund a new regional outfall at Motunui to dispose of waste after land-based treatment. In June 1987, Te Atiawa complained about lack of progress to the Ombudsman. Eventually, in November of that year, an agreement between the Crown and the North Taranaki District Council was reached. By June 1988, a Management Committee was established to build a new outfall. Almost seven years after the Tribunal's report was submitted to the Government, decisions are about to be made on the type of land-based treatment that will be adopted.

Following release of its Motunui report, there was renewed interest in the

Tribunal. Between 1983 and 1985 it considered or began consideration of four claims. An outline follows of the main features of these claims, the findings of the Tribunal and the subsequent action taken by the Government. (The Parliamentary Commissioner for the Environment, in her report "Environmental Management and the Principles of the Treaty of Waitangi", published in November 1988, examines in detail the Crown's response to the Tribunal's recommendations.)

Kaituna River claim

This claim was made against a proposal to discharge Rotorua's sewage into the Kaituna River. The Tribunal found in favour of the claimants and recommended that Crown financial support for the disposal pipeline be withdrawn and diverted to assist funding for an acceptable land disposal system.

The recommendation was accepted by the Government and a land disposal system is currently being installed and should be in operation in 1990.

Manukau claim

In the words of the Tribunal, the Manukau claim was about

> "the despoliation of the Manukau Harbour and the loss of certain surrounding lands of the Manukau tribes. More potently underlying this claim is an enormous sense of grievance, injustice and outrage that continues to haunt the Manukau Maori and bedevil the prospect of harmony in greater Auckland.
>
> "This sense of grievance, begins with the land confiscations of the 1860s. By confiscation the Manukau tribes lost most of their lands including their villages and sacred places. They live with this loss today.
>
> "We knew of the confiscations of 1863 but we were to learn also of the view, illustrated by many examples, that the confiscations never stopped in 1863. It is said they have continued, in one form or another, from then to the present day. In their view the pattern of unjust treatment continues still, and unless arrested, will yet continue until nothing is left but a deeply embittered people and the shreds of a worthless Treaty."

The Manukau claim was lodged in May 1983. The Tribunal found that the tribes of the Manukau Harbour had been severely prejudiced in their enjoyment of traditional lands and fisheries through compulsory acquisitions, land and industrial developments, reclamations, waste discharges, zonings, commercial fishing, and the denial of traditional harbour access, contrary to the guarantees under the Treaty. The Tribunal recommended changes to legislation and Crown policy, an action plan to clean up the harbour and restore its mana with participation of tangata whenua, and the return of certain lands and fisheries.

In 1986 the Government moved to implement recommendation 13 which sought statutory protection for waahi tapu by compulsory acquisition.

Not all of the Tribunal's recommendations have been acted on although some progress has been made. A Manukau Harbour Strategy has now been completed as recommended. Its implementation will require the long-term co-operation between a number of local, regional and central government agencies. Legislative change embodied in the Resource Management Bill and the proposed Maori Advisory Committee Bill should also help to meet some of the recommendations.

Other of the Tribunal's recommendations on the Manukau are still under review by the Government.

The claimants have expressed frustration and cynicism over what they see as an unsatisfactory response by the Government and its agencies to the Tribunal's findings.

Recognition of the Maori language claim

A claim for official recognition of the Maori language was lodged with the Tribunal in May 1984. The Tribunal reported in April 1986.

The Tribunal found that the Maori language is a taonga guaranteed protection under the Treaty, and that in failing to actively protect the language the Crown has acted contrary to the Treaty. The Tribunal recommended changes to education, broadcasting and state services policy, the establishment of a Maori Language Commission, and legalising the use of Maori in official proceedings.

The Crown partially implemented recommendations 1 and 2 through passage of the Maori Language Act 1987. This legislation was introduced in anticipation of (rather than in response to) the Tribunal's findings. Although the Act established Te Taura Whiri i Te Reo Maori (the Maori Language Commission) it did not fully implement the Tribunal's recommendation concerning the use of Maori in official business. The recommendations relating to education and bilingualism in the state services (numbers 3 and 5) have not been implemented.

The recommendation relating to broadcasting policy has, in a general sense, been acted on.

The Waiheke claim

The Waiheke claim which was lodged in January 1984 was reported on by the Tribunal in June 1987.

The Tribunal found that in disposing of the Waiheke lands without inquiring into the position of Ngati Paoa, who by that stage had become landless, the Crown through the Board of Maori Affairs had acted contrary to the Treaty.

The Tribunal recommended that certain Waiheke lands be restored to Ngati Paoa.

The Government, in early 1989, restored the Waiheke Station to the Ngati Paoa as a going concern.

The Tribunal since 1985

In 1985 the Waitangi Tribunal Amendment Act became law. This had several important effects which have had significant impacts on subsequent actions of the Tribunal, the Crown, the Courts and Maori interests. Most importantly, the Amendment Act extended the jurisdiction of the Tribunal to events occurring since the signing of the Treaty on 6 February 1840. The Amendment Act also:

- allowed the Tribunal to commission research and to receive as evidence reports on research;
- expanded the membership of the Tribunal, in addition to the Chairman, to six, four of whom were to be Maori. This enabled the Tribunal to sit in divisions and to consider separate claims simultaneously;
- provided for deputy members to be appointed to the Tribunal;
- corrected errors in the Maori text of the Treaty which appeared in the 1975 Act.

The claims reported on since 1985 are now outlined.

Orakei claim

The first claim to be received and reported on under the new ground rules was the Orakei (or Bastion Point) claim which was lodged with the Tribunal in April 1986. The Tribunal reported to the Government in November 1987.

The Tribunal found that the Crown, through acts and omissions contrary to the Treaty, caused Ngati Whatua to be virtually landless. The Tribunal recommended that certain lands be returned and a tribal endowment be granted to assist in tribal rehabilitation.

The Tribunal also referred to the Attorney-General a consideration of pardons and remissions of fines for the protesters who sought to bring these injustices to the attention of the Crown.

The Crown accepted all of the Tribunal recommendations directed to the Ministers, but the Attorney-General disagreed with the Tribunal's assessment of matters referred to him.

The Muriwhenua claim

In June 1985, the Muriwhenua people of the far north lodged a wide-ranging claim that was concerned with what they perceived as Crown control over their fisheries and various tracts of land. This claim was the trigger to a chain of events that were to have far reaching impacts. These included:

- the ruling by the Court of Appeal in June 1987 leading to important changes to the Treaty of Waitangi Act and the State-Owned Enterprises Act.

- an application to the Court of Appeal ultimately resulting in key changes to the Crown Forest Assets Act.

- the granting of an injunction by the High Court resulting in an interim halt to the further issue of fishery quota and in major changes to the legislation on Maori fisheries.

The Tribunal, in May 1988, presented its substantive report on the Muriwhenua fisheries claim (land and other issues have yet to be dealt with). This report is extensive and, in some 370 pages, traces the legitimacy of the Muriwhenua claim. It makes no specific recommendation but establishes that the Muriwhenua people were, prior to the Treaty, extensively involved in fishing-commercially and otherwise. It also demonstrates how, progressively, by legislation enacted in the 1800s and as recently as 1986, Muriwhenua Maori have been denied rights to fisheries which were rightfully theirs by virtue of Article II of the Treaty.

Other claims

Since 1985 there have been a number of claims the Tribunal has reported on but, for a variety of reasons, made no recommendation. They are:

- The Motiti Island claim where local Maori objected to the island's inclusion in Tauranga County. The Tribunal concluded that the claim should be decided by the Local Government Commission.

- A claim that Maori were being accorded special privileges and that this was at odds with the terms of the Treaty. The Tribunal reported that it could not, in terms of its Act, hear this claim as it was lodged by a non-Maori.

- A claim requesting the Tribunal's intervention in respect of the law concerning the taking of freshwater whitebait in Lake Taupo. The Tribunal investigated the claim and found that anyone could take indigenous whitebait in the lake.

- A claim seeking Maori representation by way of, two seats on the Auckland Regional Authority. While the Tribunal considered whether

it had jurisdiction in the affairs of a local authority, the ARA meantime created two Maori seats and the claim was withdrawn.

- A claim by a person after he had been prosecuted for illegally taking seafood. The person was convicted in the District Court but the conviction was overturned by a subsequent appeal to the High Court. The claim was subsequently withdrawn.

The Tribunal's future timetable

Looking ahead the Tribunal has a substantial workload in front of it over the next several years.

As at 6 November 1989, 102 claims had been registered by the Tribunal.

The claims can be grouped as follows:

- Claims concluded and reported to the Minister of Maori Affairs: 16
- Claims heard and awaiting preparation of reports to the Minister: 10
- Claims in the process of hearing or mediation: 3
- Claims being researched or otherwise prepared for programming: 21
- Claims awaiting initial appraisal action: 52

Of the 52 claims awaiting appraisal, it is likely that a number of these will be joined for hearing purposes.

Some of the claims already examined and some currently being examined and others still to be considered are complex and substantial. Their consideration has been and will continue to be very time-consuming.

For example, the Ngai Tahu claim hearings commenced in August 1987 and ended in October 1989. Judge McHugh, the Tribunal Chairman for this claim, reported in his summing up comments at the end of the hearings, that over 900 submissions and exhibits had been received-some containing as many as 700 pages. This amounted to documentation 8.5 metres high. The Judge noted that while the Ngai Tahu claim was said by counsel for the claimants to comprise nine claims (over the eight Crown Purchase Deeds and mahinga kai-areas of traditional food resources) there were, in fact, 73 separate grievances to be considered within these claims.

Further reference to the Ngai Tahu claim is made on pp 33–34.

There are six major land confiscation claims before the Tribunal. These concern Waikato, Taranaki, Whakatane, Tauranga, the East Coast and the Bay of Plenty.

Notwithstanding the magnitude and complexity of some claims, those awaiting hearing should in future, be reported on at a faster rate than has been the case up until now.

Speeding up the hearing of claims will be achieved in several ways. With the Tribunal's expanded membership and resources it is now possible for it to sit in separate divisions allowing the concurrent hearing of several claims. It should also be possible for claims with a common root or concern to be grouped together and heard collectively. Another approach the Tribunal is likely to adopt in future is to encourage direct negotiation between claimants and the Crown, possibly with Tribunal members or officers acting as mediators and facilitators. This should become increasingly possible as further claims are reported on, precedents set, and practices and principles established.

Another important point is that the Tribunal is increasingly adopting the practice of encouraging negotiation between the affected parties rather than recommending remedies.

It is said that all or most of the claims could be disposed of in four to five years, though some say the turn of the century is a more realistic estimate.

There is concern among Maori interests, some of it vigorously expressed, about what they see as the inadequate action taken by the Government in response to the Tribunal's recommendations. The Parliamentary Commissioner for the Environment, in her report of November 1988, noted that, of the 59 recommendations made to the Crown by the Tribunal up to that time, eight had been partially implemented by the Crown and 13 had been fully implemented. A further 32 were being addressed but there were no tangible outcomes. The majority of the remaining six had been declined by the Government.

The Prime Minister, in December 1989, took up the concerns held about the extent of the Tribunal's current and future workload and about the Government's response to recommendations already made by the Tribunal.

The Prime Minister noted that there were as many as 16 government departments involved on claims before the Tribunal. This had created the potential for overlap and duplication with each agency having to come to grips with new issues and processes.

To streamline the work involved, the Government has now established a new Crown Task Force on Waitangi issues. The Task Force comprises a special Standing Committee of Cabinet convened by the Minister of Justice, together with a core group of officials and strengthened Treaty units in the Department of Justice and the Ministry of Maori Affairs.

The Ministerial members of the Standing Committee, in addition to the Minister of Justice, are the Minister of Finance, the Minister for State Owned Enterprises, Minister of Maori Affairs and the Attorney-General.

The Crown Task Force is serviced by a core group of officials convened by the Department of the Prime Minister and Cabinet. The Task Force will be

responsible for developing the Crown's position in respect of Waitangi Tribunal hearings, direct negotiations and Court proceedings.

It will also be responsible for ensuring that negotiated agreements, Court judgments and Waitangi Tribunal recommendations which the Government has accepted are implemented promptly. The Task Force will set up a "negotiations register" so that each claim can be given a priority and handled in an orderly sequence, related, where relevant, to the Waitangi Tribunal's programme. The Prime Minister, in announcing these changes, said that the Waitangi Tribunal would remain an essential element in settling Maori grievances. He also said that what was needed was

> "a more robust system for exploring the potential to settle claims before they get to the Tribunal and to settle them after the Tribunal had made its recommendations. In many cases it may be possible to achieve a negotiated settlement without having to go to the Tribunal at all".

The Government, the Prime Minister said, was not obliged to accept the recommendations of the Tribunal. It would, however, continue to act in good faith by examining these recommendations carefully in accordance with the Principles for Crown Action on the Treaty (see p29) and in negotiating with the iwi concerned.

The Minister of Justice has commented further on the role of the Crown Task Force on the Waitangi Tribunal. Mr Jeffries said that the basis of the Government's policy was to give recognition to the historical fact that some past events had resulted in grave injustices and that these could be partly offset by the application of specific resources for the development of Maori people.

Mr Jeffries said the role of the Waitangi Tribunal is seen by the Government to be central to this policy. The Tribunal is the cornerstone of the process for assessing claims. It conducts comprehensive hearings, it enables the history of claims to be aired and examined, it determines whether a claim has been proved, it makes findings, its reports are published and up to the present it has made recommendations to the Government as a result. The Minister also said:

> "Claimants go to the Waitangi Tribunal as of right. This will continue to be the case. In some cases it may be feasible, with the consent of all parties and with the consent of the Crown, to enter into negotiations on the settlement of a claim without a full hearing before the Tribunal itself. The route through the Tribunal is expected to remain the usual channel. The Waitangi Tribunal has won international acclaim as a suitable instrument for dealing with Treaty claims."

THE TREATY: THE MAJOR ISSUES

This section outlines a number of the major issues which have arisen since 1986 and have called for the resolution of matters concerned with the principles of the Treaty.

The State-Owned Enterprises Act and the Court of Appeal's 1987 decision

The passage through Parliament and the subsequent Court of Appeal judgments on the State-Owned Enterprises Act 1986 were a watershed in the development of new approaches to and new definitions of the nature of the partnership between the Crown and Maori under the Treaty.

The 1987 judgment of the Court of Appeal on the provisions of this legislation relating to the Treaty was of substantial significance in two respects.

The judgment, in terms of the specific issues before it, set new directions for the determination of Maori interests, under the provisions of the Treaty, in Crown land and other resources.

Generally, the judgment through its interpretation of the principles of the Treaty, laid down new guidance on these principles and their application and relevance today to issues of public policy. The principles of the Treaty, as defined by the Court of Appeal, are outlined in greater detail on pp 41–43.

Because of the importance these issues have since assumed, it is useful to tell the story of the Court's judgment on this legislation in some detail.

A major purpose of the state-owned enterprises legislation was to enable the Crown to transfer Crown assets to state-owned enterprises (SOEs). When the Bill was introduced into Parliament in late 1986 it contained no provisions relating to recognition of the principles of the Treaty.

As a result of an eleventh hour intervention by the Waitangi Tribunal, which was concerned about the possible implications of the SOE legislation for the Muriwhenua claims with which it was then involved, the Government introduced amendments to the Bill to cover Treaty issues. These amendments appeared as sections 9 and 27 of the Act as adopted by Parliament in December 1986.

Section 9 contains the strong provision that nothing in the Act would permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi. Section 27 details mechanisms for protecting claims already lodged with the Waitangi Tribunal at the time the Act became law.

The New Zealand Maori Council subsequently became concerned about the limitations imposed by section 27. These could have the effect of excluding the possibility of any part of the several million hectares of land to be transferred to SOEs from being subsequently returned to Maori should a

later finding by the Waitangi Tribunal on claims not yet lodged so recommend.

The New Zealand Maori Council took action against the Crown, the essence of their case being that the protection given by section 9 of the Act was not universally upheld by the exclusive nature of section 27.

The Court of Appeal, in June 1987, unanimously ruled that section 9 had an overriding effect. The Court said that future claims against those lands not presently covered by section 27 should not be excluded, by their transfer to SOEs, from the possibility of being later returned to Maori as a consequence of a Tribunal recommendation to that effect.

The Court directed that the question of transfer of land to SOEs should be resolved by direct negotiation between the New Zealand Maori Council and the Crown. The consequence of these negotiations was the passing of the Treaty of Waitangi (State Enterprises) Act in 1988. This protected the position of existing and future land claimants before the Tribunal by amending the principal Treaty of Waitangi Act and the principal State-Owned Enterprises Act.

The effect of these amendments was that, under the State-Owned Enterprises Act, any land transferred to SOEs by the Crown would be subject to a memorial on its certificate of title stating that the land or any interest in land must be returned to the Crown and ultimately to Maori on the recommendation of the Waitangi Tribunal.

There is no formal provision for appeal against a final recommendation by the Tribunal. However, the Act provides that the Tribunal, in these instances, should first prepare an interim recommendation. A period of 90 days is then allowed for it to receive further submissions before the Tribunal makes a final recommendation on which the Government would act.

The Treaty of Waitangi Act was amended to widen the jurisdiction of the Waitangi Tribunal to enable it to give effect to this requirement. These amendments allow SOEs, or any other owner of land or any interest in land affected by a memorial on its title, to apply for a ruling by the Waitangi Tribunal that land, not already subject to a Maori claim, be no longer liable to return to Maori. In the event of a successful application of this kind the certificates of title for the affected land would then carry a notation to this effect.

These changes give responsibility to the Tribunal as the ultimate decision maker over the ownership of large tracts of land eligible for transfer by the Crown to SOEs. They have fundamental implications for the operation of SOEs and the possible later privatisation of their assets.

Apart from a perceived lessening in value of land bearing a memorial on its title, some also see a prospect that the passing of substantial areas of land

back to Maori could jeopardise the functioning of an SOE (even though it would receive compensation from the Crown).

Landcorp, an SOE with over three million hectares comprising both farm development blocks and commercial and residential developments, would seem to be among the most exposed if land now held by it was the subject of successful claims. Government Property Services, Coalcorp, New Zealand Post, Telecom and Electricorp and the Airways Corporation, even though their landholdings may not be as great by comparison, may also be affected for the same reason.

The Treaty of Waitangi (State Enterprises) Act 1988 does not disallow the prospect of direct privatisation of Crown owned land which has not been transferred to an SOE. However, the recent declaration of the Court of Appeal on an application by Tainui Maori directed that the Crown should take no action, either directly or by its agents, to dispose of Crown lands until such time as a protective scheme had been worked out for the Tainui claimants. That direction would seem to rule out the prospect of direct sale by the Crown to third parties of those lands of concern to the Tainui claimants. Whether it precludes direct sale in other parts of the country is not so clear.

The Waitangi Tribunal has clearly stated its view on this matter. In his summing up of the Tribunal's hearing of submissions on the Ngai Tahu claim, Judge McHugh drew attention to the finding of the Court of Appeal on the Tainui case. On this basis, he urged the Government not to take action to dispose of surplus South Island Crown land pending the completion of the Ngai Tahu report and the Tribunal's recommendations.

The Crown Forest Assets Act 1989

In November 1989, the Crown Forest Assets Act became law.

This legislation, and the Court judgment which preceded its adoption, reinforced the need for the Government and its agencies to pay close heed to the principles of the Treaty in determining public policy.

The Crown Forest Assets Act is primarily concerned with the implementation of the Government's policy for the disposal of the management and cutting rights to state-owned exotic forests but not the land on which these forests grow. In retaining this land in Crown ownership, the Act removes any possibility of the privatisation of state forest land. This provision excludes the pre-emption of possible claims to that land that may be (at present or in the future) dealt with by the Waitangi Tribunal.

The Act also gives the Tribunal a role in respect of Crown forest land comparable to that it has in respect of Crown land transferred to state-owned enterprises. If the Waitangi Tribunal recommends a return of Crown forest land to Maori ownership, the Act provides that the Crown must:

return that land to Maori ownership subject to any cutting licence that may have been granted under the Act;

pay compensation to Maori for the encumbrance imposed by the licence on the land in accordance with a formula set out in the Act.

The Act also provides that any Minister of the Crown or any holder of a management andcutting right (called a forestry licence) can apply to the Tribunal for it to declare that the Crown land subject to such a licence would not be liable for subsequent return to Maori. The title of this land would then be endorsed accordingly.

The resolution of the Treaty issues arising in this legislation was achieved following a judgment on these issues by the Court of Appeal.

The Bill, as initially proposed was based on the recommendations of a government forestry working group of officials (it included no Maori) which were subsequently approved by Cabinet in November 1988.

At that stage the proposition was that:

- the Crown would offer for sale management and cutting rights of Crown forest for a specified number of years (50–70 years was suggested);
- the Forestry Corporation would act as agent for the sale of those rights;
- ownership of the land would be retained by the Crown;
- discussions were to be held with Maori to take account of their needs and to protect the position of Maori claimants before the Waitangi Tribunal.

The nature of the proposed legislation was conveyed to Maori interests just prior to a national hui convened at the invitation of the Minister of State Owned Enterprises. There had, up to that point, been no detailed consultation with Maori. In its initial form, the Bill sought to avoid perceived problems in disposing of Crown forest assets (trees) if the land on which they were growing was subject to a memorial on its title. It was proposed that the rights to the trees would be disposed of by direct sale by the Crown, using the Forestry Corporation (an SOE) only as its agent.

The New Zealand Maori Council rejected this approach. The Council argued that Government had changed the ground rules by providing that, instead of transfernng the ownership of Crown forests and land to an SOE (the Forestry Corporation), it had elected instead to sell off. the forests and keep the land in Crown ownership. The Maon Council believed that this move would put the question of existing and future claims over State forest land to the Waitangi Tribunal outside the obligations imposed by the Waitangi

Tribunal (State Enterprises) Act 1988. This would exclude a later possibility of any part of some 600,000 hectares of land being returned to Maori on the recommendation of the Waitangi Tribunal.

The Council conveyed its concern to Government and resorted as well to legal remedy.

In December 1987, in a review of the performance of the Government and the Maori Council in respect of its June 1987 decision on the State-Owned Enterprises Act, the Court of Appeal noted that the agreed framework of what was to become the Treaty of Waitangi (State Enterprises) Act 1988 broadly met the Court's directions. The Court also said *"purely as a proviso, in case anything unforeseen should arise, leave to apply is reserved"*.

This proviso was seen by the New Zealand Maori Council as a means whereby the mechanisms of the proposed Crown forest sale legislation could be challenged. In February 1989, the Council filed in the Court of Appeal a notice of motion to the effect that the proposed method of Crown forest assets disposal was inconsistent with the Court's June 1987 judgment and was therefore unlawful.

This move prompted an assurance by the Government, in March 1989, that no forest asset sales would take place until full consultations with Maori had taken place.

This was accepted by the Council and, in turn, the Court recognised that there was no need to rule on the motion for interim relief.

However, that matter aside, the Court did deal with the question of whether the Council had a legitimate right to appeal, given the terms of the Court's December 1987 minute. The Court found that the Council's application for leave to appeal was valid and that, if the Crown had identified its intention of using an SOE (the Forestry Corporation) as a sales agent for selling Crown forest assets directly to third parties, the outcome of its June and December 1987 rulings *"could well have been worded differently"*.

In its March ruling on all these matters the Court noted that the national hui in January 1988 amounted to Maori being presented with a fait accompli. This, the Court said, did not represent the spirit of partnership which it said was at the heart of the principles of the Treaty of Waitangi referred to in section 9 of the State-Owned Enterprises Act.

The Crown Forest Assets Act, in its final form, is largely based on the outcome of consultations between Maori and Government in the light of the Court's judgment.

Maori issues aside, there were other concerns expressed about the Crown forest llegislation. Environmental interests, including the Parliamentary Commissioner for the Envrronment, had voiced concerns over the lack of obligation on the part of licence holders to replant trees in areas where land

instability is a problem. The main areas where this is likely are the East Cape area and some sand dune areas on the west coast of the North Island.

Other concerns included the need to protect waahi tapu and archaeological sites, conservation areas and public access.

The Act now provides that licences will be subject, where necessary, to certain covenants to ensure the protection of these values. There is still some uncertainty as to who should be responsible for monitoring the performance of licensees in meeting these obligations.

The Maori Fisheries Act

The Maori Fisheries Act, adopted in December 1989, had a tortuous history in its formulation and passage through Parliament.

The central factor in the difficulties the Government encountered with this legislation has been the concern of Maori to safeguard their fishing rights under the Treaty.

The genesis of Maori concern was the Quota Management System (QMS) which became law with the passing of the Fisheries Amendment Act in late 1986.

The system is one which allows for a Total Allowable Catch (TAC) to be identified for each commercial fish species within pre-defined management areas of New Zealand's territorial sea to the limit of the Exclusive Economic Zone. Individual Transferable Quota (ITQ) for each of the species is then available for issue by the Ministry of Agriculture and Fisheries but not to the extent that it exceeds the TAC for a particular management area. ITQ is, with some exceptions, issued in perpetuity. It can also be traded or leased.

Critics of the system argue that its effect has been to privatise the fishery resource which was, in terms of the Treaty of Waitangi, never the property of the Crown in the first place.

Early concern over introduction of the QMS was expressed by the Waitangi Tribunal in its hearing of the Muriwhenua fisheries claim. The Tribunal considered that the issue of ITQ, as now provided for in the Act, would prejudice the outcome of that claim. In December 1986 the Tribunal wrote to the then Director-General of MAF urging that no ITQ be issued until the Tribunal had reported to Ministers on the claim.

In reply, the Director-General turned down that request on the basis that:

- key actions had already been taken;
- business decisions had already been taken in an expectation that ITQ would be notified as soon as practicable;

- he (the Director-General) was under a statutory obligation to issue ITQ.

The Director-General gave the Tribunal the assurance that this action should not be seen as derogating from the Ministry's acceptance of and its commitment to applying the principles of the Treaty of Waitangi as these relate to fisheries.

The Waitangi Tribunal did not agree with this view. In the conclusion of its 1988 Muriwhenua report, the Tribunal noted

> "the Quota Management System, as currently applied, is in fundamental conflict with the Treaty's principles and terms, apportioning to non-Maori the full, exclusive and undisturbed possession of the property in fishing that to Maori was guaranteed; but the Quota Management System need not be in conflict with the Treaty and may be beneficial to both parties if an agreement or arrangement can be reached".

By September 1987, TACs for some 29 species of fish had been identified and ITQs for those species had also been issued.

In October 1987, the Minister of Fisheries intended to advertise in the *Gazette* the TAC for squid and jack mackerel. This began a chain of events that led to applications to the High Court which were subsequently heard before Mr Justice Greig. The first was by the New Zealand Maon Council and Runanga o Muriwhenua seeking to restrain publication of the notice.

The substance of the application was based on a finding of the Waitangi Tribunal that the Muriwhenua people had established proprietary rights to the fishery in Muriwhenua waters.

The Court accepted, as evidence, the findings of the Tribunal in respect of proprietary rights. The Court linked this with section 88(2) of the Fisheries Act which states *"Nothing in this Act shall affect Maori fishing rights"*.

On this basis the Court ruled that, for the area of the Muriwhenua fisheries claim, the publication of the notice could be contrary to those rights.

What followed was a series of applications to the Court on behalf of tribal interests around most of the New Zealand coast (Hawke's Bay, Wairarapa, Taranaki and Wanganui were the exceptions). All these actions claimed similar relief to that given to Muriwhenua.

Specifically, they sought to:

> "restrain the Minister of Agriculture and Fisheries and his officers from taking any action or further action in carrying out the QMS in respect of squid and jack mackerel and any other species of fish or fishery in particular rock lobster, paua and eel".

This application was also heard before Mr Justice Greig, who in November 1987, ruled in favour of the applicants to the effect that the issue of new ITQ and creation of further TACs should stop in the interim. This ruling was based largely on the Court's recognition that "Maori fishing rights" referred to in Fisheries Act were more than rights of a recreational or ceremonial nature and could be extended to include commercial fisheries. The ruling stated that:

> "In face of what has now appeared before the (Waitangi) Tribunal and before this Court I have come to the conclusion that what has taken place and what is to take place should stop. It cannot be just or right that what is arguably wrong and in breach of the Act should continue. It is, in my opinion, reasonably necessary in the interim to stop the process for the purpose of preventing any further inroads into those apparent rights of fishery until they are fully and finally resolved."

In an attempt to resolve the question of how Maori fishing claims could be met, while continuing to manage and conserve the fisheries, a Joint Working Group comprising four Maori and four officials of the Government was established. Differences soon emerged. When the group reported to Government in June 1988, two reports with divergent views on key issues were presented.

Another round of negotiation followed, this time between Ministers and Maori. The end result was that in September 1988 the Maori Fisheries Bill was introduced to Parliament.

A number of its provisions drew a swift reaction from Maori.

While the Bill provided for the progressive allocation of up to 50 percent of TAC to Maori it also:

- repealed section 88(2) in the present Fisheries Act which gave protection to Maori fishing rights;
- cancelled the order made by Mr Justice Greig that prevented the further issue of ITQ;
- denied Maori access to the Waitangi Tribunal in respect of fisheries issues.

Maori reaction took the form of proceedings filed in the High Court in September 1988 claiming negligence by the Crown in that the Bill failed to protect Maori fisheries as guaranteed by the Treaty.

For other reasons, the fishing industry was opposed to provisions in the Bill and relief was sought by the New Zealand Fishing Industry Association which also filed proceedings against the Crown.

The Court ruled that the applications by Maori and the Fishing Industry Association should be heard together. The initial hearing date was 1 August 1989 but this was later adjourned to March 1990.

Meantime, the Maori Fisheries Bill was referred to the Select Committee for the hearing of submissions. In an interim report to the House in late September 1989, the Chairman of the Select Committee on Planning and Development indicated substantial changes to the Bill's original form were being considered. The key changes proposed were:

- deletion of the provisions which proposed the repeal of section 88(2) of the Fisheries Act.

- deletion of the provisions cancelling litigation before the High Court and claims before the Waitangi Tribunal.

- reduction in the TAC to be transferred to Maori from 50 percent (as initially proposed) to 10 percent.

The Maori Fisheries Act was adopted in December 1989. It established a Maori Fisheries Commission having the role of holding ITQ in trust for Maori and managing it in a way that would be to the social and economic benefit of Maori. To maintain flexibility and to allow diversity of Maori activity in fishing, the Act introduced the concept of "quota equivalents" whereby the 10 percent could be made up by cash or other considerations, as an alternative to ITQ, in proportions to be determined by the Commission.

Membership of the Commission comprises four members appointed by the Governor-General on the advice of the Minister of Fisheries and three on the advice of the Minister of Maori Affairs.

The Act also established Aotearoa Fisheries Limited, a company whose sole shareholder is the Commission. Aotearoa Fisheries Limited is in effect, the trading arm of the Commission managing the ITQ and quota equivalent.

Another important provision in the Act is that it recognises the importance of local fisheries, or taiapure to Maori. It provides that, on application to the Minister of Fisheries, any littoral or estuarine waters around the New Zealand coast may, by Order in Council, be declared a taiapure.

Taiapure will each be managed by a committee of management that would be appointed by the Minister after consultation with the Minister of Maori Affairs. The committee will have the power to make regulations to ensure the conservation of fish, aquatic life and seaweed within the limit of the taiapure. Regulations made for each taiapure will override any other fisheries regulation that may be made under the legislation. The objective in establishing taiapure is to ensure that an area of sea that has customarily been of special significance to local Maori (either as a source of food or for spiritual or cultural reasons) is protected and managed for that purpose.

The legislation provides that no one can be refused access to, or use of, a taiapure on the grounds of ethnic origin.

Procedures set out for the establishment of taiapure contain extensive public notice and appeal procedures with provisions for hearings before a tribunal comprising a Judge of the Maori Land Court, together with one or more assessors appointed by the Chief Judge of the Court. The tnbunal, after hearing objections and carrying out anynecessary investigations, would then make its recommendation to the Minister of Fisheries.

The Act, largely contains the key provisions that were proposed in the Select Committee's interim report to Parliament in September 1989. The most significant change is that, during the four year transition penod when, each year, 2.5 percent of fishing quota is transferred to the Maon Fisheries Commission, the Commission must, itself, transfer a minimum of half of that quota to Maori.

The objective is that, at the end of the transition period, a minimum of five percent of quota or quota equivalent will have been transferred to Maori. The remaining five percent progressively acqurred by Aotearoa Fisheries Limited will, depending on the fortunes of the company, be available for use, disposal or transfer according to the wishes of the Commission.

The essence of this arrangement is that the management or disposal of the Maon ftsheries assets allocated by the Crown, and the returns from these, are controlled by Maori.

The ultimate outcome of the Maori ftshing issue is still unknown. Since the adoption of the Maori Fisheries Act, Maori have expressed concern that it does not specifically require the Maori Fisheries Commission to consult tribes with historic sea fisheries interests before it makes decisions concerning the allocation of quota. The Prime Minister, in February 1990, after discussions with Maori, gave an undertaking that the Government would place before Parliament, at the earliest possible date, an amendment to the Act to make that consultation a specific function of the Commission.

The effect of this has been that the earlier applications filed by Maori in the High Court claiming negligence by the Crown, have now been withdrawn by Muriwhenua and, in the case of Ngai Tahu adjourned sine die. This is in accord with the comment made by the Prime Minister in February 1990 as follows:

> "We have therefore agreed we might pause and step back from the Court case at this time. I have given the Maori principals my assurances as Prime Minister that, if at any time in the future Maori wish to proceed with litigation concerning the nature and extent of Maori fishing rights, they will have the right to do so".

Principles for Crown action

The Government, in July 1989, released the statement known as the *"Principles for Crown Action on the Treaty of Waitangi"*.

The Government's moves to dispose of Crown land and forests to stateowned enterprises, the consequent judgments by the Court of Appeal on cases brought to the Court by the New Zealand Maori Council as well as a comparable succession of events on the Government's proposed fisheries legislation, generated considerable uncertainty and confusion about issues relating to the Treaty.

The intent behind the release of the Principles for Crown Action was to dispel this uncertainty. The Government, in the then Deputy Prime Minister's words, *"has had to find, in relation to the Treaty, a place to stand"*. The objective, he said, was to provide some certainty to the Crown's approach and to give Government agencies a *"clean set of policy guidelines about how to approach Treaty issues"*.

The principles are accompanied by a commentary which cites the sources and authorities on which each principle is based.

The Government's statement of the five principles, without the accompanying commentary, is set out below.

1. *The kawanatanga principle—the principle of government*

In summary, this principle states that the Government has the right to govern and to make laws.

The first Article of the Treaty gives expression to the right of the Crown to make laws and its obligation to govern in accordance with constitutional process. This sovereignty is qualified by the promise to accord the Maori interests specified in the second Article an appropriate priority.

2. *The rangatiratanga principle—the principle of self-management*

In summary, this principle states that the iwi have the right to organise as iwi, and, under the law, to control their resources as their own.

The second Article of the Treaty guarantees to iwi Maori the control and enjoyment of those resources and taonga which it is their wish to retain. The preservation of a resource base, restoration of iwi self-management, and the active protection of taonga, both material and cultural, are necessary elements of the Crown's policy of recognising rangatiratanga.

3. *The principle of equality*

In summary, this principle states that all New Zealanders are equal before the law.

The third Article of the Treaty constitutes a guarantee of legal equality between Maori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality although human rights accepted under international law are incorporated also.

The third Article also has an important social significance in the implicit assurance that social rights would be enjoyed equally by Maori with all New Zealand citizens of whatever origin. Special measures to attain that equal enjoyment of social benefits are allowed by international law.

4. *The principle of co-operation*

In summary, this principle states that both the Government and the iwi are obliged to accord each other reasonable co-operation on major issues of common concern.

The Treaty is regarded by the Crown as establishing a fair basis for two peoples in one country. Duality and unity are both significant. Duality implies distinctive cultural development and unity implies common purpose and community. The relationship between community and distinctive development is governed by the requirement of co-operation which is an obligation placed on both parties to the Treaty.

Reasonable co-operation can only take place if there is consultation on major issues of common concern, and if good faith, balance, and common sense are shown on all sides. The outcome of reasonable co-operation will be partnership.

5. *The principle of redress*

In summary, this principle states that the Government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur.

The Crown accepts a responsibility to provide for the resolution of grievances arising from Treaty. This process may involve the Courts, the Waitangi Tribunal, or direct negotiation. The provision of redress, where entitlement is established, must take account of its practical impact and of the need to avoid the creation of fresh injustice. If the Crown demonstrates commitment to this process of redress then it will expect reconciliation to result.

The Government's statement on the five principles, as set out above, has, to date, generated little public debate. There has, however, been critical comment from some Maori interests.

Some of the general points raised in this criticism have been that:

- the principles are biased in the Crown's favour;

- they represent a retreat from earlier statements on the Treaty made by the Government, although this retreat is said to be less apparent in the long version of the principles released by the Government than it is in the shorter version;

- the principles are weighted towards the English version of the Treaty and take too little account of the differences between that and the Maori version;

- they reflect the British systems of government and law which are adversarial.

The Tainui claim

In October 1989, the Court of Appeal issued a judgment on a case brought by the Tainui Maori Trust Board and others concerning Crown land in the Waikato. This judgment was important in two respects. First, it provided a further statement of the Court's interpretation of the principles of the Treaty. The judgment, for the Government, also raised constitutional issues about the. relationship and balance of powers between Parliament, the Executive and the Courts. Reference is made to these constitutional issues on pp 48–49.

The Tainui case had two components both of which were connected with land that was subject of an agreement between the Crown and the state-owned enterprise Coal Corporation of New Zealand Limited (Coalcorp).

The Government's intention was that the Crown transfer to Coalcorp parcels of Crown land in the Waikato, together with coal-mining licences over that land that were effectively created at the time of the agreement. It was also intended, in the agreement, that some other Crown land declared to be surplus would be sold off directly to third parties with Coalcorp acting as the Crown's agent.

The land involved in both the above instances is land that is the subject of a claim by Tainui at present before the Waitangi Tribunal. That claim has not yet been heard.

The first claim sought by Tainui before the Court of Appeal was that the coal-mining licences created in the Crown/Coalcorp agreement were an interest in the land subject to the licences.

Resolution of this question was seen by Tainui as important because land, or any interest in land, transferred to an SOE by the Crown under the State-Owned Enterprises Act, carries with it a memorial on its certificate of title that the land is bound to be returned to Maori on the recommendation of the Waitangi Tribunal.

The second claim before the Court was that the Crown should take no further action on the direct disposal of surplus land, whether by the actions

of Coalcorp as agent or otherwise, until a scheme for protection of Tainui's rights in respect of the land had been agreed.

The implications for the interest in land question were of great importance to both the Crown and Tainui. This was because, if it could be established that the coal-mining licences were 'an interest in land' a valuable resource would be liable for return to Maori if the Waitangi Tribunal so recommended.

The Court in its judgment noted, by way of example, that the 2000 hectares comprising the Rotowaro mine alone, which is within the land claimed by Tainui, had a value of between $100–$130 million if mining rights were included.

In a unanimous decision the Court upheld the Tainui claim. The President of the Court of Appeal, in his judgment said:

> "Coalcorp's mining rights have been transferred to it by the Crown and are subject to the protection for Maori claims enacted by the Treaty of Waitangi (State Enterprises) Act 1988".

The second aspect of the claim relating to the disposal of "surplus" land was in respect of land confiscated by the Crown in the 1860s. This land is called Raupatu (conquest or confiscation).

Again, the Court ruled in Tainui's favour to the effect that the Crown should take no further action in disposing of raupatu lands until a scheme is agreed between Tainui and the Crown.

In his conclusions on both claims the President observed:

> ". . . what is clear in my opinion is that the attempt to shut out in advauce any Tainui claim to be awarded some interest in coal and surplus land in issue in this case is not consistent with the Treaty. Unchallenged violations of the principles of the Treaty cannot be ignored. Available means of redress cannot be foreclosed without agreement".

The Court encouraged the Crown and Tainui to negotiate an agreement in respect of the latter's claims and said that resolution of them before the Courts should only be a last resort.

In the words of the Court of Appeal:

> "In the end no doubt only the Courts can finally rule on whether or not a particular solution accords with the Treaty principles. But in this kind of issue judicial resolution should be very much a last resort. In the New Zealand Maori Council case and the forests case the Treaty partners have achieved solutions. The leave to apply which this Court will reserve in the present case will give a like opportunity; though with the background of the 1927 Royal Commission report, and realism on both sides, some agreement more specific than in those cases should be definitely within

their capability. It is a test of the good faith and responsibility of both sides".

The Government, in its reaction to the Court's judgment, initially considered the possibility of taking the matter on appeal to the Privy Council. It has since decided not to do so, and instead, proposes to resolve the matter in direct negotiations between Tainui and the Government. These negotiations have now started.

The Ngai Tahu claim

The Ngai Tahu claim at present before the Waitangi Tribunal relates to extensive tracts of land across all of the South Island except for that portion in the Nelson–Marlborough area that comprised what is known as the Wairoa Purchase.

The Chairman of the Ngai Tahu Trust Board, Tipene O'Regan, has said that the Ngai Tahu claim differs in several important respects from the majority of claims brought or intended by the North Island tribes.

The first difference is the range of issues involved. *"In large measure"*, Tipene O'Regan says, *"this derives from the uniting into one single claim of nine major claims, each of which on its own might have constituted a respectable challenge to the Tribunal. A further contribution to the scale of the claim is the vast geographical area of the Ngai Tahu rohe (region), the diversity of the environment and its resources, and the time span over which the Ngai Tahu grievances have endured."*

The nub of the claim is that the Crown and its agents have not honoured obligations that were said to be agreed and understood at the time land was purchased from Ngai Tahu in the nineteenth century. These obligations were set out in Crown policy that the agents of the Crown *"were not to purchase from the Maori any land the retention of which would be essential or highly conducive to their own comfort, safety or subsistence"*.

The claim also relates to other concerns over some of the original land purchase agreements. These involve disputes over large tracts of land in Fiordland, Otago and the central South Island.

Ngai Tahu are seeking remedy largely in the return of land and fisheries.

The Tribunalhas yet to report on the claim. However, the Chairman, Judge McHugh, in his summing up comments at the conclusion of the hearing of submissions in October 1989, gave a clear indication of the Tribunal's thinking and the likely direction of its report which is due in late 1990. Judge McHugh commented as follows:

". . . it is clear indeed that underlying the whole of the Crown dealings with Ngai Tahu in the South Island there was a failure of the Crown to

> provide adequate reserves for the present and future needs of the Ngai Tahu people when the various purchases took place.
>
> "This failure of the Crown to ensure Ngai Tahu were left with a sufficient endowment for their own present and future needs has impacted detrimentally on the economic circumstances of Ngai Tahu. It also has resulted in the denial of access to traditional food resources.
>
> "The Tribunal will deal fully with this breach of Treaty principles in its report but the evidence presented to this Tribunal throughout this enquiry and acknowledged by the Crown is so cogent and clear that the Tribunal would be remiss in its duty if it failed to comment on it at this point."

In a reference to the declaration by the Court of Appeal in the recent Tainui case directing that no action be taken by the Crown or its agent to dispose of Crown land until a scheme had been worked out for Tainui claimants Judge McHugh said:

> ". . . the Tribunal urges Government to follow the clear principle stated in the Tainui case and take no action to dispose of surplus South Island Crown land pending the completion of the Ngai Tahu report and the Tribunal's recommendations. Following the unequivocal view of the Court of Appeal, that any attempt to shut out in advance any claim to surplus land is not consistent with the Treaty, this Tribunal would expect Government and its agents to abide this declaration and hold back from land disposal."

Judge McHugh also said:

> ". . . that Ngai Tahu were inadequately endowed with land at the time of the Crown purchases must surely indicate that Crown land or SOE land may be resorted to as compensation".

It would seem that the Tribunal, when it reports, will be expecting Ngai Tahu and the Crown to negotiate and agree on the nature of land settlements.

Where the claims involve SOE land or Crown forestry land, a failure on the part of the Crown and Ngai Tahu to reach agreement could leave it open to the Tribunal to recommend certain transfers of land to Maori, be made. In this event, such a recommendation would be binding.

It would not seem that the Tribunal's findings could have any impact on privately-held land. It is possible that a negotiated settlement could involve the transfer of some land under pastoral lease from the Crown to Ngai Tahu.

Resource management law

The Resource Management Bill, introduced to Parliament on 8 December 1989 revises and consolidates into a single statute, 54 statutes controlling New Zealand's land, air and water resources.

The Bill proposes a number of sweeping changes to existing legislation. A greater focus is now placed on resource management becoming the responsibility of regional and local government.

The Bill provides for the consideration of the Treaty of Waitangi and the concerns of Maori generally in all resource management matters. The Bill:

- requires consultation with iwi for the development of policy statements and plans;
- allows for the recognition of iwi management plans;
- provides that existing Maori rights regarding the use of geothermal energy and protections relating to access to Maori land for mining purposes will continue;
- provides for the Maori Land Court to continue to have responsibility for the division of Maori land.

Specific provisions in the Bill to achieve these ends include the following:

- Heritage features of importance to Maori will be able to be protected through management plans, or by a heritage protection order made through an iwi authority to the Minister of Maori Affairs;
- A requirement relating to water conservation orders is that iwi be notified of all applications for these orders in areas incorporating Maori land or reserves;
- A National Policy Statement can be developed to provide the necessary guidance for broader issues of concern to Maori nationwide. National Policy Statements would be binding on all local government policies and plans;
- In the area of pollution management, there is, under the Bill no absolute right to pollute. This regulation reflects, in part, traditional Maori values in relation to discharges into the environment, particularly sewage disposal.

There is provision for the recognition of iwi management plans. While these plans are not compulsory, if an iwi decides to prepare a plan for the management of its resources, territorial and regional government must have regard to the plan. The provisions in the Bill allowing for the preparation of management plans to guide any resource issue also mean a territorial or

regional council could prepare a plan to better manage the resources of significant concern to iwi.

Iwi may also be delegated some resource management functions by a local authority. While they will not be delegated full decision making powers, this provision would allow iwi to have more say in managing the resources of the area in a manner that recognises their values and input.

The partitioning of Maori land would be the preserve of the Maori Land Court. In those cases where Maori land is divided, the reserves provisions will apply only where the land is partitioned for the purpose of sale.

The ethic of kaitiakitanga (often referred to as guardianship or stewardship) is seen as an important consideration which will be an integral part of sustainable management. The Bill allows the integration of certam customary Maori concepts to produce a more responsive resource management system. This builds on the submissions which many iwi groups have made about their role as kai tiaki of taonga.

Certain existing Maori entitlements relating to the use of geothermal energy would be protected by the Bill. It is widely accepted by Maon that geothermal resources are taonga. They have a variety of uses, some domestic, some therapeutic, and other uses as well. The Bill would enable various groups, such as marae committees, to contmue using geothermal energy for communal purposes.

The landowner's right of consent for mining on Maori. landwill be retained. In addition to this minimum impact prospecting activities on Maon land have been provided for. Prospectors on Maori land must have special regard to waahi tapu and they must make reasonable attempts to consult with the owners of the land.

In the development of National Coastal Policy statements, the interests of Maori in the coastal environment have been recognised. The protection of waahi tapu, shellfish collecting and those areas where weaving materials are gathered may be provided for in the policy.

Regional policy statements will be of critical importancein the overall system of resource management. The Bill would enable regional government to gam good information on the position and needs of iwi in their area. This should be of benefit to iwi as it provides an opportumty for the Joint development of policies.

The reference in the Bill to the relationship of Maori and their culture and traditions with their ancestral lands includes waters, sites and other taonga. This will enable Maori to advocate the recognition and protection of environmental features other than just the land. This should mean that consent agencies, working with iwi, will consider environmental effects on a wide range of taonga.

A special Parliamentary Select Committee has been formed to hear and consider submissions on the Resource Management Bill. It is the Government's intention that the legislation should be adopted in 1990.

Reorganisation of local government

Proposals by the Government on new procedures for mandatory consultations between territorial and regional councils and Maori advisory committees have been subject of a public discussion paper.

The Government, after taking account of submissions on the discussion paper, intends to introduce legislation on this matter in 1990.

The Minister of Local Government has, in the discussion paper, released a draft Bill designed to make provision for:

- appropriate recognition of the Treaty of Waitangi in local Government;
- appropriate consultative mechanisms, including Committee structures, to ensure adequate Maori input into local government decision making.

The Government favours formal arrangements for the establishment of mandatory consultative mechanisms applicable to all territorial and regional councils. The Government has also indicated that it believes the consultative mechanisms should provide for:

- a Maori advisory committee for each regional and territorial authority;
- membership of the committee to be representative of iwi which are tangata whenua of the region;
- consultations by the regional or territorial authority on matters concerning Maori, with the advisory committee having power to make recommendations to the authority and the latter making the final decision.

Implications for private land

There is some concern, especially among Pakeha in the rural community, that existing and future claims to land by Maori might, in some cases, place at risk the lawful title to freehold land.

The Government has repeatedly given assurances that Maori claims to land could not result in the dispossession of holders of privately-owned land. Similar assurances have been given by the Waitangi Tribunal as well as by Maori claimants.

In view of these assurances, concern expressed that freehold land may be at

risk are speculative and do not appear to have substance. There are a number of aspects of Maori claims and the procedures relating to recommendations by the Waitangi Tribunal and Government action on these which currently give rise to misunderstanding and concern about possible implications of Maori land claims for privately-owned land.

In addition to the assurances given by the Government the Waitangi Tribunal has also stressed that it does not seek solutions to well-founded claims which would be disruptive to society.

The Chairman of the Waitangi Tribunal, Chief Judge Edward Durie, has said that Maori who were claimants before the Tribunal had not wished to destroy society or to prejudice race relations in New Zealand. Claimants, he said, even where they were concerned with the most gross instances of proven wrong, had modified their claims so as not to upset the holders of private property who might otherwise be affected.

> "The overwhelming impression I have, is that Maori are mainly concerned to secure a place for being Maori in New Zealand, with resources needed to sustain the Maori way and the opportunity to participate as well in genuine national endeavours."

The Waitangi Tribunal, in its finding on the W aiheke Island claim, said that Pakeha had acquired leaseholding and freeholding rights for value and in good faith. The Tribunal did not recommend action which would prejudice the position of such landholders. The Tribunal has said, in both its Waiheke and Muriwhenua reports, that it would be out of keeping with the spirit of the Treaty that the resolution of one injustice should be seen to create another.

The Chairman of the Ngai Tahu Trust Board, Tipene O'Regan, has said of the Ngai Tahu land claim that Ngai Tahu

> "was concerned to create the minimum of social and economic disruption in society at large, and so emphasised that the intended remedies would be from the Crown-held estate and would not be laid against private land".

The only legislative provision under which privately owned land might be returned to Maori is that contained in the State-Owned Enterprises Act and the Crown Forest Assets Act 1989 (see pp19 and 21).

This provision concerns land that was previously Crown land which had been transferred to an SOE and then on-sold to private parties. The certificates of title for land in this category have a memorial that the land would be returned to Maori if the Waitangi Tribunal should so recommend. In such cases the dispossessed owners would be paid compensation by the Crown.

So far the Tribunal has made no such recommendation but it has the authority to do so.

There appears to be an anomaly in the provisions which apply to privately owned land that has been compulsorily acquired by the Crown for a particular purpose. In the event that the land is not used for this purpose and, as a result, the Crown then wishes to dispose of it, the Crown must, under sections 40, 41 and 42 of the Public Works Act 1981, offer the land back to the original owner. The State-Owned Enterprises Act similarly provides that if an SOE wishes to dispose of land it had acquired from the Crown that had, initially, been compulsorily acquired, it too must offer the land back to the original owner.

A problem that arises is that the land's certificate of title would then carry the memorial referred to earlier. Arguably, the land involved would have a lesser market value than it would without the memorial.

There could be other possible implications for privately owned land arising from Maori claims or, more generally, from the application to some situations of the principles of the Treaty of Waitangi.

The current fracas between a landowner and Maori claimants over a disputed 45 ha block of land at Maunganui Bluff, Northland, and the intervention of the Government in this, offers such an example. Maori claim that this land is waahi tapu and that it was not part of the original sale of surrounding land to the Crown. On this basis, Maori demand the return of the land. The landowner does not accept this and wishes to subdivide the land for sale. The Government has offered to buy the disputed block at fair market price for subsequent return to Maori but the owner is asking for substantially more than the Government has offered. Negotiations are continuing. Some see that the outcome could set something of a precedent for the resolution of similar disputes over land elsewhere in the country.

The principles of the Treaty and the manner in which these are incorporated in the resource management legislation when this becomes law, will make provision for the relationship of Maori with their ancestral lands, waters, waahi tapu sites and other taonga. These provisions have the potential to influence the use to which land may be put.

THE CROWN AND MAORI: NEW APPROACHES

Over the last two years the Government, in consultation with Maori, has developed new policy aimed at relating the principles of the Treaty of Waitangi to today's society.

The new policies are outlined in detail in the Government's key statement on Maori policy, Partnership Response (Te Urupare Rangapu,) released in November 1988.

Three major legislative moves have since been made to implement these policies. These are:

- the establishment of the new Ministry of Maori Affairs;
- the abolition of the old Department and Board of Maori Affairs and the establishment, in its place of the Iwi Transition Agency;
- the introduction to Parliament, on 8 December 1989, of the Runanga Iwi Bill providing for the incorporation and registration of runanga (or councils) of the iwi.

The background to and the main features of the changes made by this legislation are outlined below.

The Government's objectives

In April 1988, the Government released the paper Partnership Perspectives (He Tirohanga Rangapu) proposing ways of improving the delivery of Government programmes and services to Maori communities.

The Government stated that its principal objectives are to:

- honour the principles of the Treaty of Waitangi through exercising its powers of government reasonably, and in good faith, so as to actively protect Maori interests specified in the Treaty;
- eliminate the gaps which exist between the educational, personal, social, economic and cultural well-being of Maori people and that of the general population, that disadvantage Maori people; and that do not result from individual or cultural preferences;
- provide opportunities for Maori people to develop economic activities as a sound base for realising their aspirations, and in order to promote self-sufficiency and eliminate attitudes of dependency;
- deal fairly, justly and expeditiously with breaches of the Treaty of Waitangi and the grievances between the Crown and Maori people which arise out of them;

- provide for the Maori language and culture to receive an equitable allocation of resources and a fair opportunity to develop, having regard to the contribution being made by Maori language and culture toward the development of a unique New Zealand identity;

- promote decision making in the machinery of government, in areas of tmportance to Maori communities, which provide opportunities for Maori people to actively participate, on jointly agreed terms, in such policy formulation and service delivery;

- encourage Maori participation in the political process.

These objectives form the basis of the new approaches the Government has made to the partnership of the Crown and Maori.

The principles of the Treaty

This review has already outlined major issues of Government policy and administration where the Treaty of Waitangi has, in recent years been a principal focus of attention. ‘

A number of agencies—mainly Government, the Waitangi Tribunal, the Courts and Maori interests—have been interacting in endeavours to reach a resolution on these issues which is both consistent with the Treaty and acceptable to all parties and to the community generally.

A consequence of this interaction has been the identification and refinement of a set of principles which can be seen as reflecting the general intentions and spirit of the Treaty as it applies to today’s society. The use of the expression *the principles of the Treaty of Waitangi*, rarely heard before the mid 1980s, has over the last several years become commonplace in legislation, in every day government decision making and in the media reporting.

The Waitangi Tribunal, in its role of determining the meaning and effect of the Treaty, has played a substantial role in interpreting, defining and applying the principles of the Treaty. So, too, have the Courts in a number of judgments to which reference has already been made. The Government for its part, both in response to the findings of the Tribunal and the Courts’ and in developing its policy on Maori issues, has also made its contribution to the process. The Goverment, in the Prime Minister’s statement of July 1989, has defined the principles by which the Crown will act when dealing with issues that arise from the Treaty (seep 29).

There are some differencesof interpretation of *the principles of the Treaty* among the authorities and Maon interests involved but what emerges also is a broad oneness of mind as to the continuing importance of the Treaty.

The following is a summary of the principles of the Treaty as defined by the Court of Appeal. This is based largely on an outline of these principles, as well as of the pnnciples defined by the Waitangi Tribunal and others, in the

report of the Parliamentary Commissioner for the Environment on *Environmental Management and the Principles of the Treaty of Waitangi*, November 1988.

1. The Treaty provides for the acquisition of sovereignty in exchange for the protection of rangatiratanga.

Mr Justice Cooke in the Court of Appeal stated that the basic terms of the Treaty bargain were:

> "... that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated. These aims are partly conflicting. The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas".

This quotation as well as those referred to later in this section, are from the judgment of Mr Justice Cooke in the New Zealand Court of Appeal on the *New Zealand Maori Council and Graham Stanley Latimer v the Attorney General and others*, dated June 1987.

2. The Treaty requires a partnership and the duty to act reasonably and in good faith.

Mr Justice Cooke stated that:

> "... those principles (of the Treaty) require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith."

3. The Treaty provides for the freedom of the Crown to govern.

Mr Justice Cooke said:

> "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."

4. The Treaty bestows on the Crown a duty of active protection of Maori people in the use of their lands and waters to the fullest extent practicable.

5. The Crown has a duty to remedy past breaches of the Treaty.

6. The Treaty provides for Maori to retain chieftainship (rangatiratanga) over their resources and taonga and to have all the rights and privileges of citizenship.

7. The Treaty bestows on Maori a duty of reasonable co-operation.

Mr Justice Cooke said:

". . . the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation."

8. A duty to consult.

Mr Justice Cooke said it was unworkable to lay down a duty to consult in an unqualified sense, but that for a change of such magnitude as the transfer of Crown lands to SOEs, the Crown:

"although . . . clearly entitled to decide on such a policy, as a reasonable Treaty partner it should take the Maori race into its confidence regarding the manner of implementation of the policy."

Responsiveness of state sector agencies

The State Services Commission has in recent years acted to enhance the responsiveness of agencies in the state sector to Maori people and communities.

To assist agencies in this way the State Services Commission has produced a series of booklets providing guidance on Treaty issues and Maori issues generally. These are:

"Towards Responsiveness—Objective Setting and Evaluation"
("Me Penapena—Nga Whainga atu me nga hua e Kitea ana")

"Partnership Dialogue—A Maori Consultation Process"
("He Korero Rangapu")

"Personnel Response—A Practical Approach"
("Me Penapena Au Kaimahi Maori—Hei Whakatinana")

"Contacts for Consultation—A Directory of Maori Organisations"
("Nga Ropu Kai Korero A Iwi—He Whakamohio")

Directive on new legislation

The Government, in June 1986, made a directive to departments about the need for new legislation to comply with the principles of the Treaty of Waitangi.

The directive said that Cabinet had:

- agreed that all future legislation referred to Cabinet at the policy approval stage should draw attention to any implications for recognition of the principles of the Treaty of Waitangi;

- agreed that departments should consult with appropriate Maori people on all significant matters affecting the application of the Treaty, the Minister of Maori Affairs to provide assistance in identifying such people if necessary;

- noted that the financial and resource implications of recognising the Treaty could be considerable and should be assessed wherever possible in future reports.

The implications of this directive for those involved in preparing legislation have been spelled out in *"Legislative Change: Guidelines on Process and Content"*, a report by the Legislation Advisory Committee published in 1987.

The report states that the directive emphasised the central importance of consultation in the legislative process in the particular context of Maori and Treaty issues. Priority must be given by those involved in preparing legislation to ensure that Maori interests are identified promptly, consultation with the relevant community or communities is undertaken at an early stage, the consultation is carried out in a manner and context with which Maori people are comfortable, the consultation is seen to have clear results, and there is feedback to the Maori community.

The report states the content of legislation may reflect the Treaty in a variety of ways. The Treaty might be mentioned specifically or the reference might be more general (as in references to the resources of the tangata whenua). The reference might be to the principles or to the Treaty itself. The Treaty (or its principles) might be given a certain priority or it might be a matter to be considered along with others.

The Ministry of Maori Affairs

The new Ministry of Maori Affairs (Manatu Maori) was established on 1 July 1989. Its responsibilities are quite different from those of the former Department of Maori Affairs.

The Ministry's role reflects the need the Government sees to develop policy, more effectively than has been done in the past, to strengthen the position of Maori people in today's society. The creation of the Ministry is also consistent with the Government's general approach to the restructuring of the state sector with its emphasis on the separation, in different agencies, of responsibilities for policy advice on the one hand and operations and service delivery on the other.

A key function of the Ministry is that it is required to review and comment on all Government activity where a Maori perspective is considered to be essential. In this area, the role and status of the Ministry is similar to that of Treasury in relation to financial matters and that of the State Services Commission in relation to public service administration.

The Ministry's functions are to:

—provide policy advice to the Government on:

- Treaty issues;
- existing policies (and their associated delivery systems) which are relevant to Maori people;
- new policy initiatives;
- legal issues relevant to Maori people.

—advocate policy initiatives and identify resource needs to:

- Cabinet committees;
- Government agencies;
- the private sector.

—monitor and advise the Government on the responsiveness of government agencies to Maori issues.

—facilitate, where appropriate, contact and discussion between Maori people and government agencies.

—conduct policy-related research.

The Ministry does not have operational responsibilities for the delivery of programmes and services. This is now the responsibility of the Iwi Transition Agency and, will, over the five year transition period, become the responsibility of the iwi authorities themselves.

The Ministry is located only in Wellington and it is expected to reach a total of 65 staff during 1990.

The role of the Iwi

The strengthening of the iwi (tribe) and helping to restore their independence is a cornerstone of the Government's new approach to Maori policy.

The iwi is a group descended from a common founding ancestor. An iwi is made up of hapus (sub-tribes). Each hapu consists of related whanau (family) groups. Iwi have an identifiable and historical base. The boundaries are known to the group and, on the whole, were identified by the Maori Land Court last century.

Today, Maori people who make up iwi form three general groups, namely:

- those who actively identify with their iwi and who live in their tribal territory;

- those who actively identify with their iwi but who live outside their tribal territory;

- those who because of residency, marriage, or other reasons have become adopted members of another iwi.

Every Maori person is born with one or a number of iwi affiliations.

The Government, in its discussion paper Partnership Perspectives (He Tirohanga Rangapu) of April 1988 stated the role of the iwi as follows:

> "Maori signatories to the Treaty of Waitangi represented a specific iwi or hapu. The strength of the traditional iwi structure is reflected in their continuing existence today. They are strong, enduring, sophisticated systems of co-operation and community effort and as such it has been advocated that they provide an appropriate means of delivering government programmes to Maori people."

The Government has set out in Partnership Response (Te Urupare Rangapu) its policy about the role of the iwi in its new approach to partnership.

This policy provides for iwi authorities, on behalf of their members, to contribute to the development of government-funded programmes in partnership with individual government agencies. When agreement has been reached on the nature of these programmes the iwi authorities will be responsible for their implementation. This will be achieved by way· of contracts with the involved government agencies for the delivery of services. The iwi authorities will be accountable for the resources allocated to them.

In the past the responsibility for government-funded Maori programmes was largely with the former Department of Maori Affairs. The effect of the new policy will be that, after an establishment period during which the Iwi Transition Agency will act in this capacity, iwi authorities will deal directly with government agencies in shaping development and social programmes to meet their particular needs and in contracting for the delivery of the services provided for under these programmes.

Iwi Transition Agency

The Iwi Transition Agency (ITA) came into being on 1 April 1989 as the successor to the former Department of Maori Affairs.

ITA is the agency through which decentralisation of responsibility to iwi authorities will be administered. ITA's immediate responsibility is to maintain existing programmes until iwi authorities are sufficiently resourced and have the skills to assume their new role. ITA's more important task is to work with the iwi authorities to help them become established on a sound basis.

The agency has a budget of $247 million spread over the five year transition period.

It has a staff of 500 and has offices in the same locations as the former Department, including seven regional offices and 28 sub-offices.

Runanga Iwi Bill

The introduction into Parliament in December 1989 of the Runanga: Iwi Bill is an important step in the process of devolution to iwi authorities.

The Bill gives iwi enhanced status in law.

The Bill, in its preamble, states that its purpose is to:

- acknowledge the enduring, traditional significance and importance of the iwi;
- identify the characteristics by which iwi are to be recognised for the purpose of this legislation;
- provide for the incorporation of runanga (or councils) to represent iwi in accordance with charters prepared by them;
- provide a process for the resolution of conflicts that may arise within an iwi or between incorporated runanga.

The Bill also makes provision for Maori living in urban areas or outside their own tribal boundaries. In this respect the Bill looks to the establishment of taura (a group established by the incorporated runanga of any iwi to represent the interests of those members of an iwi who are residing in the rohe (region) of another iwi).

Provision is made in the Bill for contracts between runanga and the Crown for the delivery of services by government agencies. The Bill also enables the Crown to contract with other Maori authorities of national significance and in urban centres.

The Bill provides that it is for Maori people within an iwi to decide who should represent them.

The Minister of Maori Affairs has described the Government's policy on the role of the iwi as *"the key to greater self-determination, responsibility and economic welfare for the Maori people"*. Others, too, see this policy as pivotal. Robert Mahuta has said *"the idea of devolution is like a genie now freed from the bottle in which history has entrapped it. It is out now. No one can stuff it back into the bottle again."*

Increasingly, iwi are being identified by public sector agencies as the point of contact and the structure through which Maori input to policy development

should be gathered and channelled. Government policies for devolution in other areas-education, local government, health and resource management-provide for negotiation and consultation to occur between central government agencies and iwi.

There are, however, conflicting views about the place now being accorded to iwi in the Government's Maori policy. Some see the present unevenness in the resources, skills and effectiveness of different iwi as carrying with it the possibility that those iwi already well established might disadvantage others which are much less developed and less able to fend for themselves and promote their interests. The point is also made that the outcome of claims before the Tribunal which, on current timetables, may not be resolved until after the five year transitional period for iwi establishment, could have bearing on the determination of some iwi boundaries and their resources.

There is political debate between the Government and the Opposition about the role which should be given to iwi.

The Mana Motuhake party has said that it favours, instead of devolution to iwi, the establishment of a national Maori Congress and about eight regional authorities elected every four years by those on the Maori electoral roll.

It seems that no-one doubts the magnitude of the task ahead in establishing and devolving responsibility to iwi authorities. There is, however substantial Government commitment to the policy and considerable drive behind it through the work of the Iwi Transition Agency.

The roles of Government and the Courts

Attention has been focused in recent months on the respective roles of the Government and the Courts on matters relating to the interpretation and application of the principles of the Treaty.

Reference to this has been made earlier in relation to the judgment of the Court of Appeal on the Tainui claim.

In this judgment, the President of the Court of Appeal made the comment that *". . . in the end no doubt only the Courts can finally rule on whether or not a particular solution accords with the Treaty principles"*. This comment led the Prime Minister, in December 1989, to state the Government's position on constitutional matters relating to the Treaty.

The Prime Minister said the Government accepted that the Court of Appeal, in the Tainui case, had correctly decided the actual points of law before it. However, he said, the President's comment quoted above raised important constitutional issues.

The Prime Minister, releasing a discussion paper on *"Constitutional Matters Raised by Treaty of Waitangi Issues"*, said that all three branches of Government—Parliament, the Courts and the Executive—had played in

recent years a significant role in addressing Maori grievances under the Treaty. He said it would be of concern if the comment of the President of the Court of Appeal quoted above *"were to indicate the readiness of that or any Court to move outside of what is seen as its traditional role of interpreting, explaining and thus developing the law"*.

The Prime Minister said that any such move would suggest that the Courts had the power to contradict Parliament. This would seriously destroy the constitutional balance of power between the three branches of government. The issues arising from the Treaty were, he said, a matter of major social policy with important economic and racial implications. Parliament's role as the ultimate arbiter of such issues could not be ousted.

The Prime Minister, in his statement, linked this matter with the debate in recent years over the proposed Bill of Rights and said that New Zealanders had made it clear that they did not want an unelected judiciary to have the power to constrain and overturn the decisions of elected politicians. Nor did Maori want the Courts to be final arbiter of Treaty issues.

The Prime Minister said that the Government will make the final decisions on these issues.

THE MAIN ISSUES ARISING

General

The impacts and potential impacts on government agencies of the new focus on the Treaty of Waitangi in government activity are immense.

The process of shaping and coming to terms with the new environment is very much a learning experience for both the Crown and Maori. Both are working in largely uncharted waters with few precedents to guide them. There are, as a result, bound to be misunderstandings as agencies and Maori respond and adjust to a changing environment where Treaty issues are involved.

It is therefore important that the management of these issues is given high priority by all government agencies.

The main impacts

The impacts for State agencies derive from the range of new requirements and developments relating to the Treaty. These have been outlined in this review. In summary, the most significant among these are:

- new obligations on public sector agencies arising from the policy document Partnership Response (Te Urupare Rangapu), the State Sector Act and the notice given by the Government that chief executives of departments will be held accountable for their responsiveness to Maori people and communities;

- the release by the Prime Minister of the Principles for Crown Action on the Treaty of Waitangi;

- the judgments by the Courts on the principles of the Treaty;

- the legislative provision in the Treaty of Waitangi (State-Owned Enterprises) and Crown Forest Assets Acts to safeguard Maori interests in the disposal of Crown assets.

- the specific responsibilities of the Ministry of Maori Affairs, and also of each state agency, to ensure that the Maori perspective is taken into account in policy development in all areas;

- the progressive devolution of responsibility for Maori development programmes to iwi authorities, initially through the Iwi Transition Agency;

- the prospect of continuing restructuring within state agencies of policy, operations and service delivery roles and the relevance of Treaty issues to this restructuring;

- the implications of the provisions for consultations with Maori in the Resource Management Bill now before Parliament;

- the need for public agencies to develop relationships with the new authorities for territorial and regional government and with their proposed Maori advisory committees.

The Treaty principles

Each state agency now has to come to grips with the new requirements to recognise and take account of the principles of the Treaty as these apply to the agency's responsibilities.

The Ministry of Maori Affairs has a monitoring role in advising the Government on the responsiveness of state agencies to Maori issues.

It is for each agency to develop, in consultation with Maori authorities and advisers, the action it should take to meet these new requirements.

This action will need to provide for:

- programmes aimed at ensuring management and staff at all levels acquire an awareness and understanding of the Treaty principles and of Maori values and aspirations;

- management and staff to develop the competence to participate in Maori decision making processes;

- the development of bicultural approaches to planning and decision making;

- the establishment of close working relations with the Ministry of Maori Affairs on the determination of issues where Treaty principles need to be taken into account, as well as on that Ministry's function to report to the Government on all policy issues where it believes a Maori perspective is important;

- similarly, the establishment of close working relations with the Iwi Transition Agency and, subsequently, with individual iwi as these are registered and become operational in terms of the legislation now before Parliament.

Clearly, the range of new requirements will involve substantial changes to long established procedures and processes in government.

If the words of Partnership Response (Te Urupare Rangapu) are to mean what they say, what is called for from agencies and officials is a cultural shift in the way they now go about their business.

People and structures

State agencies are approaching in different ways the action necessary to ensure they have the policies, people and structures in place to enable them to adapt to the new environment.

What each agency should do depends largely on its role and area of operations. What suits one would not necessarily suit others. It is important that agencies work closely with the Ministry of Maori Affairs, and other Maori advisers, including those who have already established advisory units in other agencies, about alternative courses which can be followed.

Departments generally are acting to meet the requirements under equal employment opportunities strategies to increase the number of Maori people at all levels of state agencies.

Policy development

The point is strongly made by both Maori and other agencies that equal employment opportunities and access to advice on Maori issues, although important in themselves, will not, on their own, bring about responsiveness to Maori concerns among state agencies.

The major requirement is for state agencies to involve Maori interests in policy issues and to secure and respond to Maori input on these issues in all areas where Maori interests are affected.

The performance of agencies in the recognition they give to the principles of the Treaty will be judged by Maori on the basis of:

- the adequacy and timeliness of the provisions made for Maori input to policy;
- the extent to which an agency can demonstrate that Maori perspectives and objectives have influenced its activities;
- the evidence of partnership and co-operation between the agency and Maori in the processes of planning, decision making and administration.

A critical factor will be the degree of corporate commitment given to meeting these requirements and the degree to which this commitment permeates management and staff and an agency's overall activities.

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