

Report of the Waitangi Tribunal on the Orakei Claim

11 The Status and Scope of The Treaty of Waitangi

11.1 Introduction

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11.1.1 It is helpful at this point to recapitulate certain earlier findings made by this Tribunal on the status and scope of the Treaty before proceeding to deal in detail with the claims before us. We now have the great advantage of the considered views of the Court of Appeal in *New Zealand Maori Council v Attorney-General* (1987) 6 NZAR 353 on the principles of the Treaty which they saw as being relevant to the case before them. We will, of course, be guided by the judgments in that case. We would emphasise that we are not attempting to lay down a set of definitive or exclusive criteria by which future claims should be assessed; they are intended to be guidelines and a base for our consideration of the present claims. No doubt they will be amplified, developed and refined in the light of subsequent claims which come before us. We proceed now to indicate our approach to the interpretation of the Treaty.

Waitangi Tribunal, Department of Justice, Wellington.

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11.2 Status

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11.2.1 We do not find it necessary or helpful to review in any detail the precise legal status of the Treaty of Waitangi whether under international or municipal law. It should however be noted that the Colonial Secretary's instructions of 14 August 1839 to Captain Hobson

- acknowledged (be it with qualifications) the Maori sovereignty of New Zealand as an independent state;
- disclaimed any pretension to seize the Islands of New Zealand or to govern them without the free and intelligent consent of the Natives first obtained;
- authorised Captain Hobson as Consul to treat with the aborigines of New Zealand for the recognition of the Queen's sovereign authority over the whole or any part of those Islands which they may be willing to place under Her Majesty's Dominion. In doing so he advised that he was "not unaware of the difficulty by which such a Treaty may be encountered."

11.2.2 The English text of the Treaty is consistent with the form of treaties of International law and is concerned with matters such as the cession of sovereignty (or Kawanatanga) in exchange for the grant of British citizenship which properly fall within the scope of an international Treaty. Despite subsequent doubt expressed by some colonists and others the Colonial Secretary Lord Stanley in a dispatch dated 13 June 1845 to the newly appointed Governor Grey expressly

repudiated the notion that the treaties which we have entered into with these people are to be considered as a mere blind to amuse and deceive ignorant savages. In the name of the Queen I utterly deny that any Treaty entered into and ratified by her Majesty's Command was, or could have been made in a spirit thus disingenuous or for a purpose thus unworthy. You will honourably and scrupulously fulfil the conditions of the Treaty of Waitangi.

11.2.3 It is surely reasonable, given the intention of the British Government to treat with the Maori people as a sovereign independent nation, to apply to the interpretation of the Treaty the general principles of Treaty interpretation as applicable under municipal law.

Whatever its strictly legal standing, good faith and the honour of the Crown call for such an approach.

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11.3 Principles of Treaty Interpretation

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11.3.1 We have discussed this topic in earlier decisions (see for instance Te Atiawa Report (1983: 10.1) and Manukau Report (1985:8.2). We are required by s.5(2) of the Treaty of Waitangi Act 1975 to have regard to both the Maori and English language versions of the Treaty and "to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them."

11.3.2 Lord McNair in his authoritative work on *The Law of Treaties* discusses "interpretation" which he says is often loosely used as if it included "application". Strictly speaking, when the meaning of a treaty is clear, it is applied, not interpreted. Interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the treaty, or where they are susceptible of different meanings (McNair, 1961:365). Given that the Treaty of Waitangi is bilingual, different meanings are inevitable. McNair states the primary duty of a tribunal charged with applying or interpreting a treaty as being to give "effect to the expressed intention of the parties, that is, their intention AS EXPRESSED IN WORDS IN THE LIGHT OF THE SURROUNDING CIRCUMSTANCES." (McNair's emphasis, 1961:365). He warns against over reliance on what he calls the plain terms of a treaty (366). McNair also stresses the need to bear in mind what may be called the overall aim and purpose of the treaty (380). In relation to bilingual treaties McNair says that neither text is superior to the other and that it is permissible to interpret one by reference to another (1961:432-3). In the case of the Treaty of Waitangi it is important to note that with very few exceptions, the Maori version of the Treaty was signed by the Maori chiefs. We believe that where there is a difference between the two versions considerable weight should be given the Maori text since this is the version assented to by virtually all the Maori signatories. Moreover, this is consistent with the *contra proferentem* rule that, in the event of ambiguity, a provision should be construed against the party which drafted or proposed that provision (1961:464). McNair stresses that the performance of treaties is subject to "an over-riding obligation of mutual good faith" and that obligation also applies to the interpretation of treaties (1961:465).

11.3.3 The United States experience in the interpretation of treaties with the Indian people is instructive (McNair, 1961:470). As we indicated in the Manukau Report (1985:8.2) the United States Supreme Court has laid down an indulgent rule which requires such treaties to be construed "in the sense which they would naturally be understood by Indians" - see *Jones v Meehan* (1899) 175 US 1. The reasons given for this rule of construction appear in the following passage at pp 10-11 of the Opinion of the United States Supreme Court delivered by Mr Justice Gray.

In construing any Treaty between the United States and an Indian tribe, it must always (as was pointed out by Counsel for the appellees) be borne in mind that the negotiations for the Treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the Treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the Treaty is framed is that imported to them by the interpreter employed by the United States; and that the Treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

11.3.4 We recall that the Treaty of Waitangi was prepared on instructions from Governor Hobson who, in turn, was acting on instructions from Lord Normanby, the Colonial Secretary. The Rev. Henry Williams was responsible for the Maori text (Ross, 1972:133). Few, if any, of the Maori signatories could read English nor could all of them read Maori. But the Maori version was for them the only relevant text. It seems clear that it was written and subsequently explained by Williams in terms that were most likely to be acceptable to the Maori chiefs (Ross, *supra*). The circumstances related in the foregoing extract from *Jones v Meehan* although not in all respects similar to those surrounding the signing of the Treaty of Waitangi by the Maori signatories, are sufficiently similar as to warrant considerable weight being given to the Maori version where ambiguity or doubt exists.

11.3.5 We must also have regard to the principle that treaties should be interpreted in the spirit in which they were drawn taking into account the surrounding circumstances and any declared or apparent objects and purposes. See *Fothergill v Monarch Airlines Limited* [1980] 2 ALL ER 696 (HL) and *Minister of Home Affairs v Fisher* [1980] AC 319. In the latter case, which concerned the interpretation of a provision in the constitution of Bermuda, Lord Wilberforce in delivering the judgment of the Privy Council considered the proper approach to the interpretation of a constitutional instrument. He drew attention to certain special characteristics of Chapter 1 of the Constitution pointing out that it was drafted in a broad and ample style which laid down principles of width and generality. He drew attention to the influence on the drafting of Chapter 1 of the European Convention for the Protection of Human Rights and the earlier United Nations Universal Declaration of Human Rights. In a much quoted and memorable passage he said

These antecedents, and the form of Chapter 1 call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism'.

We believe it is equally essential, in interpreting the Treaty of Waitangi, to avoid 'the austerity of tabulated legalism'.

11.3.6 A recent Canadian case which, like the US case of *Jones v Meehan*, concerned the Chippewa Indian nation, also affords useful guidance to the interpretation of treaties. In *R v Taylor and Williams* (1981) 62 CCC (2d) 227 the Ontario Court of Appeal laid down an important principle that in the interpretation of treaties (as distinct from contracts at domestic law) surrounding circumstances may be considered though on its face the treaty is not lacking for certainty. Land had been ceded in that case, without reservation of Indian hunting rights. Though the treaty was unambiguous in that respect, the Ontario Court of Appeal read into the arrangement an understanding that hunting rights would not be extinguished having regard to the importance of hunting for tribal survival, Indian customary practices and things said at the time. The Court added

Cases on Indian and Aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the Treaty, relied on by both parties, in determining the Treaty's effect ... (p 232)

Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible ... (pp 235-236)

Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the Treaty, then such understanding and practice is of assistance in giving content to the term or terms (p 236).

A similar approach, that the history and oral traditions of a tribe are relevant in construing a treaty was taken in *Choctaw Nation v United States* (1886) 119 US I, 25 Ct 75.

11.3.7 As to the relevance of surrounding circumstances in interpreting the Treaty see now the New Zealand Maori Council case per Richardson J at 377 and Casey J at 410. See also Bisson J at 422.

In considering what the parties to the Treaty laid down as that foundation [for the future relationship between the Crown and the Maori race] in the documents they signed it would be appropriate to adopt from another context the words of Lord Wilberforce in *James Buchanan & Co Limited v Babco Forwarding and Shipping (UK) Ltd* (1977) 3ALL ER 1048 and determine the principles of the Treaty, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance.

As evidence of the Maori concept of the Treaty Bisson J then quotes the reported words of Tamati Waka Nene, Chief of Ngatihao when Captain Hobson presented the Treaty to the Chiefs at Waitangi for signature and the words of Eruera Maeha Patuone the elder brother of Waka Nene.

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11.4 Broad Implications of the Treaty

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11.4.1 Elsewhere (Te Atiawa Report, 1983:10.3) we have stressed that the Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. It made us one country, but acknowledged that we were two people. We would re-affirm this statement as an important and basic proposition. It is fundamental to an understanding of the Treaty of Waitangi.

11.4.2 In his instructions to Captain Hobson of 14 August 1839 Lord Normanby the Colonial Secretary acknowledged that "the Maori title to the soil and to the Sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government". While he instructed Hobson to obtain "by fair and equal contracts with the Natives the cession to the Crown of such waste lands as may be progressively required for the occupation of Settlers resorting to New Zealand" this was subject to the important caveat that he was not to purchase "any Territory the retention of which by them would be essential or highly conducive, to their own comfort, safety or subsistence".

11.4.3 Although the Colonial Secretary refers to "waste lands" it should not be inferred that these were not owned by the Maori people. Hobson was authorised to purchase waste lands which the Maoris did not need or wish to retain; it necessarily follows from this the Colonial Secretary acknowledged that the Maori owned all such land.

11.4.4 It is indeed well established that in 1840 the Maori claimed ownership of the whole of the islands of New Zealand (Adams, 1977:176-7). In support of this claim Adams cites:

It may firmly be stated that, in the European days, there was no area of land that was not claimed by some tribe. (Elsdon Best, *The Maori*, 1924).

There is not an inch of land in the islands which is not claimed, nor a hill, nor valley, stream or forest, which has not a name (AJHR 1890, G-I, White's evidence).

The Maoris claim and exercise ownership over the whole surface of the country; and there is no part of it, however lonely, of which they do not know the owners. Forests in the wildest part of the country have their claimants. Land, apparently waste, is highly valued by them. Forests are preserved for birds; swamps and streams for eel-weirs and fisheries. Trees, rocks and stones are used to define the well-known boundaries (W Swainson, *New Zealand and its Colonization*, 1859).

The value of its land, therefore, not only for its produce, but also for dignity and rank that was attached to its ownership, was very great, and its possession

was coveted beyond all other things . . . (AJHR 1890, G-I F E Maning's evidence).

It is well to recall that the Maori people by no means relied only on their cultivated land for their food. For them the distinction between 'cultivated' and 'waste' land in the European sense did not exist. This was, in part, because the Maori followed a practice of 'shifting agriculture' but more importantly, because they resorted to the produce that lived and grew naturally upon it, or in the streams, lakes and swamps. From it they took flax, timber, and fern root, rats, birds, eels and fish (Adams, 1977:177).

Land so essential could not in the Maori mind be considered 'waste'. The Maori laid claim to remote interiors by naming features of the landscape for parts of the body of tribal forebears and leaders and by lighting fires at strategic points in appropriate seasons. Hunting and fishing areas were apportioned to various hapu.

11.4.5 While the Colonial Government may not have been fully aware of the effect and nature of Maori occupation of the land the Colonial Secretary's instructions, as we have seen, recognised Maori ownership of the land. This was known to and acknowledged by the first two Governors of New Zealand, by Shortland who acted as Governor after Hobson's death pending FitzRoy's arrival, and by George Clarke the Chief Protector of Aborigines (Adams, 1977:178)

Whatever Hobson's views on the content of a Treaty before he arrived in New Zealand, he must have been immediately informed by Bushy and the missionaries that a guarantee of their lands would be absolutely necessary if the Maori were to be induced to cede their sovereignty. The speeches of many of the chiefs at the Waitangi and Hokianga ceremonies showed how correct this view was and how clearly the Maoris saw the protection of their lands as the crux of the matter. They had no doubts that all their lands, cultivated or otherwise, were confirmed to them by the Treaty. Neither had Hobson, who acted on that basis during the brief course of his administration till his death in September 1842. (Adams, 1977:179).

11.4.6 And see now Cooke P in the New Zealand Maori Council case at p 358

The view generally accepted by historians and lawyers at the present day is that expressed as long ago as 1846 by Sir William Martin, the first Chief Justice. As he put it, before the Treaty of Waitangi the whole of New Zealand "or as much of it as is of any value to man" was divided among the Maori tribes and subtribes. Communal ownership was not confined to areas in actual occupation.

11.4.7 The Colonial Office, albeit reluctantly, accepted in the first five years of the Colony that the Treaty recognised the Maori ownership of the whole of New Zealand. But constant pressure by the New Zealand Company for the adoption of a narrower view and persistent misgivings among some British politicians led Earl Grey in his despatch of 23 December 1846 to Governor Grey to adopt a more aggressive approach to the acquisition of Maori land. He held that Maori owned only occupied and cultivated land and that all

unoccupied land was waste land and the property of the Crown. Governor Grey however, with support from Bishop Selwyn and Chief Justice Martin, refused to accept this narrow view and continued to recognise Maori ownership of the whole of the country (Adams 1977:187). Grey nonetheless proceeded to buy up extensive areas in both islands.

Waitangi Tribunal, Department of Justice, Wellington.

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11.5 The Two Versions of the Treaty

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11.5.1 There are important differences between the Maori and English versions of the Treaty. Under s 5 of the Treaty of Waitangi Act 1975 it is our function to determine the meaning and effect of the Treaty as embodied in the two texts and to settle issues raised by the differences between them. On earlier occasions we have given careful consideration to submissions and evidence on the significance of the cession in the Maori text of Article 1 of 'Kawanatanga' to the Queen while the English version speaks of "all rights and powers of Sovereignty". A further important question arises as to whether the grant or recognition of "te tino rangatiratanga" of their lands, homes and all things prized in the Maori text was wider in scope than the "full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties" guaranteed in Article 2 of the English text. (The words "so long as they wished to retain the same" do not appear in the Maori version.)

11.5.2 The meaning of 'tino rangatiratanga' has caused us much trouble. There is no precise English equivalent and it is used in the Treaty in an 'un-Maori' manner. To give it the meaning both parties appear to have understood, we would render it as 'full authority'. The opening to Article the second would then be interpreted as

The Queen of England assures to the chiefs, the sub-tribes and [Maori] people of New Zealand and agrees [to their having] full authority over their lands, homes etc.

11.5.3 Literally it may mean full chieftainship. The missionary Henry Williams, author of the Maori text, rendered it as "their full rights as chiefs" while Sir William Martin, New Zealand's first Chief Justice used "full chiefship" (refer Te Atiawa Report 1983:10.2). Modern Maori scholars accept 'chieftainship' in literal translations. Professor I H Kawharu gives this

The Queen of England agrees to protect the chiefs, the sub-tribes and the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures (Kawharu, evidence to Court of Appeal in New Zealand Maori Council case, supra, 1987)

11.5.4 In Professor Hirini Mead's view 'tino rangatiratanga' means not 'full chieftainship' but 'hereditary chieftainship' for chieftainship he considers was hereditary (submissions to Waitangi Tribunal, 1983, Te Reo Maori claim). Kawharu, on the other hand, saw descent as only one criterion for chiefly leadership, 'proven ability' being the other (Kawharu, submissions to Waitangi Tribunal, 1984, Kaituna Claim). That view is supported by Cleave (1983:52) who describes 'rangatiratanga' as simply 'leadership', with the

rangatira embodying the prestigious and spiritual powers of his ancestors (p 55).

He adds

A rangatira must fight the claims of others to seniority as well as assert his own. This is true also of other principles of seniority. For example, there is what would best be described as an ascribed distinction between chief, rangatira, and commoner, tutua. But few people would admit to being of a tutua category. Everyone can trace his descent back to a rangatira of note and, within specific social contexts, it is up to the individual to prove his rangatiratanga (p56).

11.5.5 The differences are important, as will be seen later, but for now the problem appears to be that Maori used 'rangatiratanga' to describe chiefly leadership, while Williams used it in the Treaty to describe 'authority'. Williams Dictionary (1985:323) however cites no other meaning for 'rangatiratanga' than "evidence of breeding and greatness" the example relied upon being an extract from Grey's collation *Nga Mahi a Nga Tupuna* (1854).

11.5.6 The Maori word for 'authority' is 'mana'. 'Rangatiratanga' and 'mana' we have said are "inextricably related words" (Te Atiawa Report, 1983: 10.2).] In the Manukau Report (1985:8.3) we related that 'mana' had been used in the earlier Declaration of the Independence of New Zealand to describe "all sovereign power and authority" but Williams was careful to avoid using 'mana' for 'sovereignty' in the Treaty, for due to its spiritual and highly personal connotations, no person of mana could cede it. Thus he used 'kawanatanga' for 'sovereignty' and 'rangatiratanga' for the Maori authority though to Maori, 'mana' would have described both, *Kuini Mana* for one (as was colloquially used), *Mana Maori* for the other, and *Mana Motuhake* to describe the autonomous character of the latter.

11.5.7 But the continued use of 'rangatiratanga' to describe the authority of the Maori in respect of their lands and other interests may perpetuate a Victorian view that Maori society was hierarchical. That opinion was extended to a belief, shared by Chief Judge Fenton, that only the chiefs mattered in Maori society and that the rest "should be allowed to labour for a living" (Ward 1974:). It had the horrendous result that only chiefs were sometimes put upon titles, often only one but in the case of Orakei thirteen, as absolute owners and to the exclusion of all others of the tribe.

11.5.8 It is patently obvious Orakei Maori did not see things that way. The problem was that colonial opinion effectively grafted onto Maori chieftainship, feudal notions of inheritance that restrict land rights to a privileged minority.

11.5.9 The 'missionary Maori' that predominates the Maori text helps to perpetuate the Victorian view, the missionaries using 'rangatiratanga' to describe, for example, 'the Kingdom of God' (see Te Atiawa Report

1983:10.2). Western secular and religious cultures combine to depict authority as imposed from 'the top' as from God, Kings and Princes. But there is evidence that in Maori society, authority belongs to the people, with chiefs as leaders, not rulers.

11.5.10 The nature of Maori chieftainship (rangatiratanga) was considered in about 1849 by Te Rangikaheke of Ngati Rangiwewehi in Te Tikanga o tenei Mea o te Rangatiratanga o te Tangata Maori as recorded in Grey's New Zealand Maori Manuscript 85, pp 91-97. A translation is given in Mead (1984:286).

11.5.11 Te Rangikaheke however defines the qualities of traditional leadership rather than the nature of tribal authority. After reviewing the attributes of chieftainship, the chief's ability to conduct discussions, lead in battle, supply food, entertain guests and the like, he says, according to the translation.

That is why it is proclaimed to the land, "So-and-so is a rangatira".

The people of the land will enquire, "What does the rangatiratanga of that man consist of?" Then the people who have seen will perhaps enumerate all the traits noted. The listener will say, "There indeed is a true rangatira. Who were his parents? Who was his ancestor?" The people who heard this would then reply, "According to what I heard So-and-so was the ancestor". Who then were the parents? So-and-so was the father and the mother was the daughter of So-and-so. Then the people will say, "No wonder! It is because of his chiefly birth! Such chieftainship will not lie dormant. That which was begun before must continue on down; that [line] is of So-and-so. His name is being heard. Never shall be found wanting the chiefly heritage, the capacity for courage, the ability at battle speeches, the capacity to produce food, industry, feasts or celebrations, the urging against departure of travelling parties, council speeches, welcoming of guests and the kindness and also the liberality to travelling parties, large or small".

None of these qualities repose in the belly of the common man. They are possible only from the noble heritage.

11.5.12 On this view, chiefly status belongs to those who exhibit the chiefly traits of their noble forbears. But Te Rangikaheke appears to say that chiefly traits are hereditary, not the right to rule. It is not an affirmation of the western view that 'ascent to the throne' follows one line but an opinion that leadership in Maori terms requires both status proven by descent and a strong display of certain personal attributes. Most significantly it is for the people to recognise those qualities and so identify the rangatira in the course of time.

11.5.13 So at Orakei, it was the nephew Tuhaere who led after Te Kawau, and there was no hurry to acknowledge a 'successor' to the equally prestigious Uruamo.

Kawharu and Cleave would therefore hold common ground with Rangikaheke, that leadership depended on recognition of both descent and ability. The judges however are the people of the tribal community. The leaders they are bound to follow are none other than those they recognise as worthy or who prove their prowess. The rangatira "is a trustee for his people, an entrepreneur in all their enterprises" (Kawharu, 1984:5) and always answerable to them, it being succinctly stated that "a chief who persistently flouted majority opinion committed political suicide" (Kawharu 1977:56).

11.5.14 Recognition by the people was, according to John Rangihau of Tuhoe, a very important element in the identification of a rangatira. In a recent discussion with two of our members, just ten days before he departed to his final resting place, Te Rangihau took the view that there was no such thing as a chief in Maori terms, insofar as the concept of "chief" was an English concept, suggesting the rangatira above and the people below.

11.5.15 Rather, the position was that certain people assumed leadership or took on the mantle of rangatira by virtue of a number of factors, one of the most important being recognition by the people. Te Rangihau was firm in the view that given the attributes of noble descent and strong leadership ability, taking the role of rangatira was dependent upon confirmation of such by the people - in his words, "rangatira was people bestowed".

11.5.16 Te Rangihau went further in his analysis. In his opinion that which distinguished the true rangatira was the quality of commonality. In other words the rangatira has the ability to bring himself to the same level as those who recognise him as their leader. So it is not uncommon to hear the rangatira address his people "e aku rangatira", thereby acknowledging that all his people are rangatira.

11.5.17 The quality of commonality is the component that binds the leader as one with his people, for in fact in Te Rangihau's opinion, every person is a rangatira, in that every person is regarded as being his/her own person, and allowed his/her own space. Thus in greeting a person by saying "tena koe", one is not merely saying "hello". In fact one is saying exactly what the words mean - "there you are". Embodied in that statement are the following sentiments as expressed by Te Rangihau, "I acknowledge you as the person you are, for the aura that you have".

11.5.18 It is this element of commonality and the part it plays in recognizing that every person is a rangatira that highlights the importance of the people component in the concept of rangatiratanga, confirming the view that the authority embodied in that concept is also the authority of the people.

11.5.19 'Rangatiratanga' by Williams Dictionary means "evidence of breeding and greatness" but it makes little sense to say the Queen assured to the chiefs and tribes the evidence of breeding and greatness of their lands. Williams clearly meant 'the authority' (mana) of their lands, but at least the Maori were not confused, for they naturally substituted 'mana' to make the text sound right and to give it sense. From the well recorded manuscript of the

conference of 200 chiefs at Kohimarama in 1860, where the Treaty was discussed at length, 'mana' consistently replaces 'rangatiratanga' in the recorded Maori discussion, as we explained in the Manukau Report (1985:8.3).

The Queen stipulated in the Treaty that we should retain the mana of our lands ...

The words of the Queen were that the mana of the chiefs would be left in their possession, that they were to retain the mana of their lands ...

The Queen in the Treaty of Waitangi promised that the Maoris would retain their mana ...

And so on, not one speaker using 'rangatiratanga' for each spoke his native tongue as he knew how. Used that way, mana meant 'authority'. Indeed, Hori Tauroa was the exception.

He said simply

We ought to have the authority over our lands ...

Therefore, to maintain the Maori syntax, avoid confusion on whether chiefs were hereditary in the western way and ruled or simply arose out of the people as leaders, and to give effect to the apparent understandings of both Williams and the Maori, we render 'rangatiratanga' as 'authority', 'tino rangatiratanga' as 'full authority' and to give it a Maori form we use 'mana'.

11.5.20 We also considered 'taonga' in the Te Atiawa and Manukau reports. William's Dictionary renders it as 'property, anything highly prized'. (1985:381) We emphasise here, as described in our earlier reports, that 'taonga' is not limited to property and possessions. Ancient sayings include the haka (posture dance) as a 'taonga' presented to visitors. 'Taonga' may even include thoughts. We have found it includes fisheries (Te Atiawa Report 1983) and language (Te Reo Maori Report 1986).

11.5.21 The Maori text thus conveyed an intention that the Maori would retain full authority over their lands, homes and things important to them, or in a phrase, that they would retain their mana Maori. That of course is wider than the English text which guaranteed "the full, exclusive and undisturbed possession of lands, estates, forests, fisheries and other properties" so long as the Maori wished to retain them. The Maori text gave that and more.

11.5.22 To the Crown was given 'Kawanatanga' in the Maori text, not 'mana' for as we noted in the Manukau Report (1985:8.3) the missionaries knew well enough no Maori would cede that. 'Kawanatanga' was another missionary ary coined word and for reasons given in the above report, likely meant to the Maori, the right to make laws for peace and good order and to protect the mana Maori. That, on its face, is less than the supreme sovereignty of the English text and does not carry the English cultural assumptions that go with it, the unfettered authority of Parliament or the principles of common law administered by the Queen's Judges in the Queen's name. But nor does the

Maori text invalidate the proclamation of sovereignty that followed the Treaty. Contemporary statements show well enough Maori accepted the Crown's higher authority and saw themselves as subjects be it with the substantial rights reserved to them under the Treaty.

11.5.23 It is the concept of partnership and the special relationship between the Maori and the Crown, as described by the Court of Appeal in the New Zealand Maori Council case that over reaches the two texts. For now, we need look only to the application of both texts to particular cases and concerns.

11.5.24 The present case is concerned with land. It is plain that land, which is expressly referred to in both texts, is covered by the Treaty. The real question is the nature and extent of the interest in the land secured to the Maori. In the Te Atiawa Report (1983) we stressed that 'rangatiratanga' and 'mana' are inextricably related and that rangatiratanga denotes the mana not only to possess what one owns but, and we emphasise this, to manage and control it in accordance with the preferences of the owner. We thought the Maori text would have conveyed to Maori people that, amongst other things, they were to be protected not only in the possession of their fishing grounds (the subject matter of the Te Atiawa claim) but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences. Clearly the same understanding would have been held in relation to land. We continue to believe that this is the proper interpretation to be given to the Treaty, because the Maori text is clearly persuasive in advancing this view, and because the English text, referring to a "full exclusive and undisturbed possession" also permits it.

11.5.25 Article 2 of the English text speaks of the lands and other properties which the chiefs, tribes, families, and individuals might collectively or individually possess. It acknowledges that collective ownership may exist. Colonial administrators had earlier experience of tribal land ownership from the settlement of other colonies, notably in North America and Africa. The second article envisaged the retention of Maori lands by Maori people for as long as they wished to retain them and then in accordance with their customary lore and tenure. If anything other than that were intended it would need to have been expressly said.

11.5.26 Rev. Maori Marsden submitted to us that the third article in the Maori text shows the Maori was assured the use of his own rites and customs (tikanga) in the same way as the settlers were to be assured of theirs. In the Te Reo Maori claim Mr Manuka Henare of the Catholic Commission for Evangelisation, justice and Development referred to a question raised before the signing of the Treaty, at Waitangi, concerning the right to practice one's own religion and faith. After an adjournment to consider the point the Governor announced that all faiths and customs were to be respected. As we have seen, a Court may consider such surrounding circumstances but in this case there is no need to do so. It is the view of most writers and commentators that Maori customary rights were protected. Thus

The Maori knew nothing of a title held in severalty. On the contrary his rights of occupancy were vested in him subject to the paramount rights of the tribe to whom all lands occupied by its members belong. Lands occupied by Maoris were held by them tribally and communally, subject to the customs and usages which prevailed amongst them before the advent of the Pakeha.

The communal right so existing was recognised by the Crown in the Treaty of Waitangi. . . " (Smith, later a Judge of the Maori Land Court,

Both P G McHugh and F Hackshaw have also argued that the native right to retain native lands until voluntarily ceded included the right to retain those lands in accordance with customary tenures and laws. It remains to be added that the Maori text puts the matter beyond doubt.

11.5.27 The acknowledgement in the Maori text, of the "tino rangatiratanga" of the Maori over their lands necessarily carries with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy. These, as we have already indicated in 3.4 include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion. A consequence of this was that only the group with the consent of its chiefs could alienate land.

11.5.28 In recognising the "tino rangatiratanga " over their lands the Queen was acknowledging the right of the Maori people for as long as they wished, to hold their lands in accordance with longstanding custom on a tribal and communal basis.

Waitangi Tribunal, Department of Justice, Wellington.

11 The Status and Scope of The Treaty of Waitangi

11.6 The Nature of the Guarantee

11.6 The Nature of the Guarantee

11.6.1 Under Article 2 of the English text of the Treaty, the Queen "confirms and guarantees" to the Maori people "the full exclusive and undisturbed possession of their lands ... " for as long as they wish to retain them. In our Te Reo Maori Report (1986) we referred to submissions made by the International Commission of Jurists on the meaning of the word "guarantee" in Article 2. After referring to the Shorter Oxford Dictionary (3rd ed. 1964) together with various law dictionaries and a Dictionary of International Law and Diplomacy, the point was made that the word denotes an active executive sense rather than a passive permissive sense, or in a phrase, "affirmative action" (Te Reo Maori Report 1986:4.2.7).

Thus, in the context of that case, it was submitted that the word "guarantee" meant more than merely leaving the Maori people unhindered in their enjoyment of language and culture. It required active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture.

11.6.2 In the Manukau Report (1985:8.4) we put the matter this way

The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them. The possessory guarantees of the Second Article must be read in conjunction with the Preamble (where the Crown is "anxious to protect" the Tribes against the envisioned exigencies of emigration) and the Third Article where a "royal protection" is conferred. It follows that the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights. It is the omission of the Crown to provide that protection that has been the main cause of complaint in this Claim.

And see now Cooke P in the New Zealand Maori Council case at p 370

Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded.

See also Richardson J at 381 and Casey J at 410.

11.6.3 It is clear that the Crown incurred an obligation actively to ensure that its Treaty undertakings given in reciprocity for concessions by the Maori chiefs, are adhered to. We reiterate our view that an omission to provide the protection guaranteed under Article 2 is as much a breach of the Treaty as a

positive act that removes those rights. This view is reinforced by the express reference in s.6(1) of the Treaty of Waitangi Act 1975 (as amended in 1985) to any act done or omitted at any time on or after the 6th day of February 1840 or proposed to be done or omitted, by or on behalf of the Crown.

Waitangi Tribunal, Department of Justice, Wellington.

11 The Status and Scope of The Treaty of Waitangi

11.7 The Delegation of Responsibility

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11.7.1 We have had occasion in this Report to examine and comment upon several decisions of Judges in the Native Land Court in the exercise or purported exercise of their jurisdiction under Native Lands Acts. The question arises as to whether such decisions might constitute an "act done or omitted ... by or on behalf of the Crown" in terms of s 6(l)(d) of the Treaty of Waitangi Act 1975. If not, it would seem they would fall outside the jurisdiction of this Tribunal.

11.7.2 "Crown" for the purposes of the Treaty of Waitangi Act has the same meaning as that given in the Crown Proceedings Act 1950, that is, "Her Majesty in right of Her Government in New Zealand". Currie (1953:11) states

Where particularisation is not required it is convenient to use the compendious term "the Crown" to include the Sovereign and also the Governor-General, Ministers and other servants of the Crown through whom and through which the executive functions assumed by the State are exercised.

It is well recognised that the Courts are not part of the Executive arm of Government and indeed are required to function independently of it. They are not the Crown nor are they agents of the Crown.

11.7.3 We had occasion to consider an analogous point in our Manukau Report (1985:8.4) in which certain actions of the Auckland Harbour Board fell for consideration. It was contended for the Board that it was not an agent of the Crown. In that case we did not find it necessary to question particular acts of the Board except insofar as they related to the nature of its statutory jurisdiction. We found the question to be whether the statutory parameters prescribed for others in defining the responsibility of the Crown under the Treaty were adequate having regard to the principles of the Treaty. It follows that the Crown cannot divest itself of its Treaty obligations by conferring an inconsistent jurisdiction on others.

11.7.4 Accordingly, it is not any act or omission of the Native Land Court that is justiciable, but any omission of the Crown to provide a proper assurance of its Treaty promises when vesting any responsibility in the Court.

11 The Status and Scope of The Treaty of Waitangi

11.8 Provisions and Principles

11.8 Provisions and Principles

11.8.1 We are mindful of the fact that we are required to determine whether any matter of which complaint can be made under s.6 of the Treaty of Waitangi Act "was or is inconsistent with the principles of the Treaty", rather than with its provisions as such. We are not confined to the strict legalities. We believe that the essence of the Treaty of Waitangi transcends the sum total of its component written words and puts narrow or literal interpretation out of place. This appears to be recognised by the Treaty of Waitangi Act 1975 which, had it contemplated a strict interpretation reflecting 'the austerity of tabulated legalism' would not have directed us to have regard to the principles of the Treaty. A consideration of the provisions of the Treaty in a vacuum is a barren exercise and not calculated to assist in the formulation of the principles of the Treaty.

11.8.2 As we indicated in our Te Atiawa Report (1983:10.3) the Treaty was more than an affirmation of existing rights. It was not intended merely to fossilise the status quo but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract. It follows that there is room for movement and scope for agreement between the Crown and the Maori people which involves a measure of compromise and change.

11.8.3 High authority for the validity of the foregoing approach is now to be found in the judgment of Casey J in the New Zealand Maori Council case in the following passage at 410

I think the deliberate choice of expression "inconsistent with the principles of the Treaty" in preference to one such as "inconsistent with its terms or provisions" points to an adoption in the legislation of the Treaty's actual terms understood in the light of the fundamental concepts underlying them. It calls for an assessment of the relationship the parties hoped to create and reflect in that document, and an enquiry into the benefits and obligations involved in applying its language in today's changed conditions and expectations in the light of that relationship.

Waitangi Tribunal, Department of Justice, Wellington.

11 The Status and Scope of The Treaty of Waitangi

11.9 Pre-Emption and Reciprocal Duties

11.9 Pre-Emption and Reciprocal Duties

11.9.1 Under Article 2 of the Treaty the Crown obtained the valuable monopoly right to purchase land from the Maori to the exclusion of all others. The question arises as to whether the granting of this right imposed any reciprocal obligation or duty on the Crown. In the Tribunal's Waiheke Report (1987) Chief Judge Durie found that this right of preemption imposed on the Crown a corresponding duty to ensure that each tribe maintained a sufficient endowment for its foreseen needs. Another member of the Tribunal in that case, Mr M J Q Poole, differed from the Chief Judge and found no such duty or obligation to arise under the Treaty provisions. He found it unnecessary to look beyond the strict terms of Article 2 in reaching this conclusion. We bear in mind McNair's warning against over-reliance on the 'plain terms' of the Treaty and recall the need to have regard to the overall aim and purpose of the Treaty (11.3.2). We have earlier (11.3.3) adopted the rule laid down by the United States Supreme Court that treaties with an indigenous people should be construed in the sense in which they would naturally be understood by them. We have also (11.3.5) adopted the principle that treaties should be interpreted in the spirit in which they were drawn taking into account surrounding circumstances and any declared or apparent object or purpose. In our view it is entirely proper that, in determining the scope and meaning of the provisions in Article 2 of the Treaty, we should have regard to all these considerations.

11.9.2 Captain Hobson came to New Zealand with Instructions from Lord Normanby, the Colonial Secretary to enter into a pact with the Maori chiefs. Soon after his arrival in the Bay of Islands Hobson had drafted a Treaty to give effect to these Instructions. Considerable light can be shed on the terms of the Treaty as finally settled by Hobson by reference to the Instructions under which he was acting. Lord Normanby's Instructions were dated 14 August 1839. Immediately on receiving them Captain Hobson wrote to the Under Secretary of the Colonial Department seeking elucidation of some aspects. Lord Normanby responded to Hobson's enquiries the following day, 15 August 1839. Given their central importance it is desirable to reproduce here the relevant extracts from the Instructions of 14 August 1839.

Sir,

1. Your appointment to the office of Her Majesty's Consul at New Zealand having been signified to you by Viscount Palmerston, and his Lordship having conveyed to you the usual instructions for your guidance in that character, it remains for me to address you on the subject of the duties which you will be called to discharge, in a separate capacity, and under my own official superintendence.

2. The acquaintance which your service in Her Majesty's Navy has enabled you to obtain with the state of society in New Zealand, relieves me from the necessity of entering on any explanations on that subject. It is sufficient that I should generally notice the fact, that a very considerable body of Her Majesty's subjects have already established their residence and effected settlements there, and that many persons in this kingdom have formed themselves into a society, having for its object the acquisition of land, and the removal of emigrants to those islands.

3. Her Majesty's Government have watched these proceedings with attention and solicitude. We have not been insensible to the importance of New Zealand to the interests of Great Britain in Australia, nor unaware of the great natural resources by which that Country is distinguished, or that its geographical position must in seasons, either of peace or of war, enable it, in the hands of Civilized men to exercise a paramount influence in that quarter of the globe. There is probably no part of the earth in which Colonization could be effected with a greater or surer prospect of national advantage.

4. On the other hand, the Ministers of the Crown have been restrained by still higher motives from engaging in such an enterprise. They have deferred to the advice of the Committee appointed by the House of Commons in the year 1836, to inquire into the state of the Aborigines residing in the vicinity of our Colonial Settlements; and have concurred with that Committee in thinking that the increase of national wealth and power promised by the acquisition of New Zealand, would be a most inadequate compensation for the injury which must be inflicted on this Kingdom itself, by embarking in a measure essentially unjust, and but too certainly fraught with calamity to a numerous and inoffensive people, whose title to the soil and to the Sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government. We retain these opinions in unimpaired force; and though circumstances entirely beyond our control have at length compelled us to alter our course, I do not scruple to avow that we depart from it with extreme reluctance.

5. The necessity for the interposition of the Government has however become too evident to admit of any further inaction. The reports which have reached this Office within the last few months establish the facts that, about the commencement of the year 1838, a Body of not less than two thousand British Subjects had become permanent inhabitants of New Zealand, that amongst them were many persons of bad or doubtful character - convicts who had fled from our penal Settlements, or Seamen who had deserted their Ships; and that these people, unrestrained by any Law, and amenable to no tribunals, were alternately the authors and the victims of every species of Crime and outrage. It further appears that extensive cessions of Land have been obtained from the Natives, and that several hundred persons have recently sailed from this Country to occupy and cultivate those Lands. The spirit of adventure having been thus effectually roused, it can no longer be doubted that an extensive Settlement of British Subjects will be rapidly established in New Zealand; and that, unless protected and restrained by necessary Laws and Institutions, they will repeat, unchecked, in that corner of the Globe, the same process of War and spoliation, under which uncivilized Tribes have almost invariably disappeared as often as they have been brought into the immediate vicinity of Emigrants from the Nations of Christendom. To mitigate,

and, if possible, to avert these disasters, and to rescue the Emigrants themselves from the evils of a lawless state of Society, it has been resolved to adopt the most effective measures for establishing amongst them a settled form of Civil Government.

To accomplish this design is the principal object of your Mission.

6. I have already stated that we acknowledge New Zealand as a Sovereign and independent State, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty Tribes, who possess few political relations to each other, and are incompetent to act, or even deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate Predecessor, disclaims for herself and for her Subjects, every pretention to seize on the Islands of New Zealand, or to govern them as a part of the Dominion of Great Britain, unless the free and intelligent consent of the Natives, expressed according to their established usages, shall be first obtained. Believing however that their own welfare would, under the circumstances I have mentioned, be best promoted by the surrender to Her Majesty of a right now so precarious and little more than nominal and persuaded that the benefits of British protection, and of Laws administered by British Judges would far more than compensate for the sacrifice by the Natives of a national independence which they are no longer able to maintain, Her Majesty's Government have resolved to authorize you to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any parts of those Islands which they may be willing to place under Her Majesty's Dominion. I am not unaware of the difficulty by which such a Treaty may be encountered. The motives by which it is recommended are of course open to suspicion. The natives may, probably, regard with distrust a proposal which may carry on the face of it the appearance of humiliation on their side, and of a formidable encroachment on ours; and their ignorance even of the technical terms in which that proposal must be conveyed, may enhance their aversion to an arrangement of which they may be unable to comprehend the exact meaning, or the probable results. These, however, are impediments to be gradually overcome by the exercise, on your part, of mildness, justice, and perfect sincerity in your intercourse with them. You will, I trust, find powerful auxiliaries amongst the missionaries, who have won and deserved their confidence, and amongst the older British residents who have studied their character, and acquired their language.

7. It is almost superfluous to say that in selecting you for the discharge of this duty, I have been guided by a firm reliance on your uprightness and plain dealing. You will, therefore frankly and unreservedly explain to the natives, or their chiefs, the reasons which should urge them to acquiesce in the proposals you will make to them. Especially you will point out to them the dangers to which they may be exposed by the residence amongst them of settlers amenable to no laws or tribunals of their own; and the impossibility of Her Majesty's extending to them any effectual protection unless the Queen be acknowledged as the sovereign of their country, or at least of those districts within, or adjacent to which, Her Majesty's subjects may acquire lands or habitations. If it should be necessary to propitiate their consent by presents or other pecuniary arrangements, you will be authorized to advance at once, to a certain extent, in meeting such demands, and

beyond those limits you will reserve and refer them for the decision of Her Majesty's Government.

8. It is not however to the mere recognition of the sovereign authority of the Queen that your endeavours are to be confined, or your negotiations directed. It is further necessary that the Chiefs should be induced, if possible, to contract with you, as representing Her Majesty, that henceforward no Lands shall be ceded either gratuitously or otherwise, except to the Crown of Great Britain. Contemplating the future growth and extension of a British Colony in New Zealand, it is an object of the first importance that the alienation of the unsettled lands within its limits should be conducted, from its commencement, upon that system of Sale, of which experience has proved the wisdom, and the disregard of which has been so fatal to the prosperity of other British Settlements... You will, therefore, immediately on your arrival announce by a Proclamation addressed to all the Queen's Subjects in New Zealand, that Her Majesty will not acknowledge as valid any title to Land in that Country which is not either derived from, or confirmed by, a Grant to be made in Her Majesty's name, and on her behalf. You will however at the same time take care to dispel any apprehensions which may be created in the minds of the Settlers that it is intended to dispossess the owners of any property which has been acquired on equitable conditions, & which is not upon a scale which must be prejudicial to the latent interest of the community...

9. I shall in the sequel explain the relation in which the proposed Colony will stand to the Government of New South Wales. From that relation I propose to derive the resource necessary for encountering the difficulty I have mentioned. The Governor of that Colony will, with the advice of the Legislative Council, be instructed to appoint a legislative Commission, to investigate and ascertain, what are the Lands in New Zealand held by British Subjects under Grants from the Natives, how far such grants were lawfully acquired, and ought to be respected, - and what may have been the price or other valuable considerations given for them. The Commissioners will make their Report to the Governor, and it will then be decided by him, how far the Claimants or any of them may be entitled to confirmatory Grants from the Crown; and on what conditions such confirmations ought to be made....

10. Having by these methods obviated the dangers of the acquisition of large tracts of Country by mere Landjobbers, it will be your duty to obtain, by fair and equal contracts with the Natives, the Cession to the Crown of such Waste Lands as may be progressively required for the occupation of Settlers resorting to New Zealand. All such contracts should be made by yourself, through the intervention of an Officer expressly appointed to watch over the interests of the Aborigines as their Protector. The resales of the first purchases that may be made, will provide the Funds necessary for future acquisitions; and, beyond the original investment of a comparatively small sum of money, no other resource will be necessary for this purpose. I thus assume that the price to be paid to the Natives by the local Government will bear an exceedingly small proportion to the price for which the same Lands will be resold by the Government to the Settlers. Nor is there any real injustice in this inequality. To the Natives or their Chiefs much of the Land of the Country is of no actual use, and in their hands, it possesses scarcely any exchangeable value. Much of it must long remain useless, even in the hands of the

British

Government also, but its value in exchange will be first created, and then progressively increased, by the introduction of Capital and of Settlers from this Country.

In the benefits of that increase the Natives themselves will gradually participate.

11. All dealings with the Aborigines for their Lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all. They must not be permitted to enter into any Contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any Territory the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of Land by the Crown for the future Settlement of British Subjects must be confined to such Districts as the Natives can alienate without distress or serious inconvenience to themselves. To secure the observance of this rule will be one of the first duties of their official protector....

(NB: Paragraph numbers have been added to facilitate reference.)

11.9.3 The first four paragraphs of Lord Normanby's Instructions portray succinctly and graphically the "extreme reluctance" of the British Government actively to intervene in New Zealand. For some years during the 1830s the Church Missionary Society had strongly opposed the colonisation of New Zealand. The 1837 Report of the Aborigines Committee urged that the sovereignty of indigenous peoples should be recognised but in the case of New Zealand colonisation should be opposed at least until Parliament had considered the question. Its Report has been characterised by McLintock (1958 : Ch 2, Idealism Rampant) as being "the most remarkable expression of liberal opinion in the treatment of aborigines put forward by any parliamentary inquiry in the 19th century". It was, says McLintock, "deeply tinged with

Christian idealism" and "it expressed in noble and moving prose Burke's concept of trusteeship". See also Adams (1958:146) who refers to the Church Missionary Society's role as a guardian of humanitarian attitudes towards the Maoris. "Through its insistence on the sovereignty, independence and rights of the Maoris" says Adams, the Society contributed to the humanitarian ethos of the late 1830s and its persistent advocacy of Maori rights "helped to ensure that the protection of those rights was a major aim of British policy."

Accordingly, the Colonial Office in the years between 1837 and 1839 resisted the efforts of Wakefield and the then New Zealand Association to obtain official recognition and support for its colonisation plans for New Zealand. Finally, the New Zealand Company determined in 1839 to proceed without official sanction.

11.9.4 Meanwhile, as is indicated in paragraph five of the Instructions, there were by 1838 an estimated two thousand or so British subjects including 'many persons of bad or doubtful character'. Moreover, it appeared that extensive cessions of land had been obtained from the Maoris and, further, that several hundred colonists had recently left Britain to settle in New Zealand. Lord Normanby expresses his fear that unless "necessary laws and

institutions" are imposed the indigenous Maori people will be endangered by war and spoliation and may disappear as has often happened in other countries brought into contact with "emigrants from the Nations of Christendom". Accordingly, the British Government felt reluctantly compelled to intervene in order to protect the New Zealand tribes and also to rescue the emigrants from a lawless state of society. Historians have differed as to the principle motivation for British intervention at this time. McLintock (1958:45) sees British intervention as being more for the benefit of the natives than for the protection of the British subjects. Adams (1977:59) considers the British intervention was intended to protect both British subjects and the Maori. "The humanitarian motive was only half the story" but, says Adams, "it was the half which Captain Hobson was instructed to emphasise and explain most carefully to the Maoris when he negotiated the cession of sovereignty in 1840."

11.9.5 Lord Normanby, in paragraph 4 of his Instructions, acknowledged the Maori title to the soil and to the sovereignty of New Zealand as being 'indisputable'. Later, in paragraph 6, he in a sense qualifies his acknowledgement of Maori sovereignty but nevertheless disowns any pretention on the part of his Government to annex New Zealand without the "free and intelligent consent of the natives" being first obtained. Being of the opinion that the benefits of British protection would be greatly to their advantage he authorises Captain Hobson to treat with the Maori for the recognition of the Queen's sovereign authority over the whole or parts of New Zealand. In his discussions with the Maori, Hobson is urged by Lord Normanby to be frank in explaining why they should cede sovereignty to the Queen. "Especially" Lord Normanby directs, "you will point out to them the dangers to which they may be exposed by residence amongst them of settlers amenable to no laws or tribunals of their own, and the impossibility of Her Majesty's extending to them any effectual protection unless the Queen be acknowledged as the sovereign of their country." Clearly Hobson had all this in mind when he caused to be inserted early in the preamble to the Treaty the reference to the Queen being anxious to protect the just rights and property of the Chiefs and Tribes and to secure to them peace and good order.

11.9.6 Adams considers that there was a difference between what Hobson was instructed to tell the Maori and what the Colonial Office actually meant. Yet these Instructions were drafted by the Colonial Office

Hobson was told to explain to the chiefs that Britain was intervening "especially" on their behalf because there was no other way to protect them. The Colonial Office meant that Britain was intervening partly to protect the Maoris, but also to protect the British settlers in New Zealand and the interests they had created. Hobson was not directed to emphasize this, nor to explain the Government's new willingness to promote the systematic colonisation of New Zealand. The Maoris were to be told only half the story. (1977:166)

11.9.7 What then were the Maori told when their signatures to the Treaty were being sought? In answering this question it is necessary to have regard not merely to what was said at the signing at Waitangi on 6 February 1840 but

in other parts of the country where copies of the Treaty were taken by emissaries of Governor Hobson (who for a time was ill and unable to travel). A quite detailed account of various signings is given by Buick (1936) and Colenso's eye-witness account (1890) of the signing at Waitangi is frequently cited. In his opening speech the Governor, so Colenso tells us (1890:17), emphasised that the Treaty was for their own good and for their protection. Before general discussion among the Chiefs commenced Mr Bushy (hitherto the British Resident) informed the Chiefs that the Governor had not come to take away their land but rather to secure them in the possession of what they had not sold. The reaction of the early speakers was one of hostility to the Governor's proposal and was interspersed by frequent reference to land already lost and concern for the protection of their land. At one stage this prompted the Governor to interpose that "all lands unjustly held would be returned; and that all claims to lands, however purchased, after the date of the proclamation would not be held to be lawful". As the discussion continued a few chiefs spoke in favour of signing the Treaty. But the turning point occurred following a reportedly eloquent intervention by Tamati Waka Nene who, after addressing his fellow chiefs, turned to the Governor saying

O Governor, remain. I, Tamati Waaka, say to thee, remain. Do not go away from us; remain for us a father, a judge, a peacemaker. You must not allow us to become slaves. You must preserve our customs, and never permit our lands to be wrested from us. Yes it is good, it is straight. Stay then here, dwell in our midst. Remain, do not go away.... Stay then, our friend, our father, our Governor. (Buick, 1936:143)

In the event, some 45 chiefs signed the Treaty the following day, 6 February 1840.

11.9.8 At Hokianga, Buick tells us, (1936 : Ch.5) there was initially strong opposition to the Treaty from various chiefs. Hobson emphasised that their only hope of protection against unscrupulous Europeans was to become a party to the Treaty. Otherwise, he said, they would be stripped of their lands by a worthless class of British subjects who would trample on their rights. He sought authority from the chiefs to control such people. Mohi Tawhai, among others, responded saying "Well, let him come, let him stop all the lands falling into the hands of the Pakehas." Taonui was another chief who requested the Governor to protect his children and take care of his land which he did not wish to sell. It was at Kaitaia where Lt Shortland, the newly appointed New Zealand Colonial Secretary presided, that the chief Nopera Panakareao made his celebrated remark that "the shadow of the land goes to the Queen, but the substance remains with us". Nopera's speech was made after Lt Shortland had assured all the assembled chiefs that Governor Hobson would strictly honour all the obligations which the Treaty imposed on him in the Queen's name. Buick (1936:341-2) refers to a letter written to Lord Stanley in 1845 by Lt Shortland in which Shortland emphasised that "without a reciprocal guarantee by the Crown to them of the perfect enjoyment of their territorial rights" the Maori would never have agreed to cede sovereignty to the Crown. He further stressed the Maori feeling of great anxiety and mistrust in regard to the security of their lands citing, by way of example, a statement to the missionaries that "Your Queen will serve us as she has done the black fellows

of New South Wales; our lands will be taken from us, and we shall become slaves." It appears that at Manukau and other places visited by Captain Symonds on behalf of Hobson considerable opposition was met. Accordingly, Governor Hobson issued in the Maori language a circular letter the text of which is cited by Buick (1936 : 191). In this letter Hobson referred to the activities of an ill-disposed Pakeha who was circulating false statements that the Maori's land would be wrested from them and their customs abolished. To these allegations the Governor issued a categorical denial and he repeated the assurances which he had given at Waitangi and Hokianga namely, that he would "ever strive to assure unto you the customs and all the possessions belonging to the Maori".

11.9.9 Adams, who considers that Lord Normanby's Instructions were consciously oriented towards persuading the Maori that their protection was the main object of intervention says

Hobson carried out his instructions faithfully. James Bushy noted that 'the alleged grounds' of the cession proposal were the impossibility of preventing or controlling the great influx of British subjects into New Zealand and of protecting law abiding members of both races from violent men. Willoughby Shortland believed that the preservation and civilisation of the Maoris and the protection of their rights and privileges were the principles on which New Zealand was annexed. George Clarke believed that the Maoris would never have signed the Treaty of Waitangi had not Hobson assured them that Britain's object in seeking the cession was 'solely' to protect the Maoris and punish criminal Europeans and that the happiness and prosperity of all would probably be promoted thereby. (1977:167)

11.9.10 It is apparent then, that categorical assurances were given to the Maori Chiefs by Hobson and his representatives whereby, in return for ceding sovereignty to the Queen, they would be protected by the Queen in respect of both their property and their rights. The preamble to the Treaty expressly says so. But Lord Normanby's Instructions to Captain Hobson did not stop there. Immediately after giving his directions to obtain cession of sovereignty Lord Normanby, in paragraph 8, requires Hobson to induce the chiefs, if possible, to agree that they will not cede any lands except to the Crown. This was seen to be essential given the contemplated future growth and extension of a British Colony in New Zealand. In furtherance of this aim Captain Hobson was directed, immediately on his arrival in this country, to issue a Proclamation announcing that the Crown would not acknowledge as valid any title to land which was not either derived from or confirmed by a Crown grant. Proclamations were duly issued first by Governor Gipps in Sydney on 19 January and then by Hobson in New Zealand on 30 January 1840 simply declaring all future land purchases from the Maori null and void. (Adams 1977:194)

11.9.11 Lord Normanby next advised Captain Hobson that the Governor of New South Wales (of which New Zealand at the time formed a part) would be instructed to appoint a Commission to investigate how far land acquired from the Maori had been lawfully acquired and whether they should be confirmed as Crown Grants. Such a Commission was duly appointed by the

Governor of New South Wales on 30 September 1840 and was superseded by Commissioners appointed by the Governor of New Zealand under Clause 3 of the 1841 Land Claims Ordinance No 1. Clause 2 of the same Ordinance vested in the Crown the sole and absolute right of preemption of land from the Maori. It appears from paragraph 10 of his Instructions that Lord Normanby hoped by the foregoing methods to obviate "the dangers of the acquisition of large tracts of country by mere landjobbers." Captain Hobson in the same paragraph, was then directed "to obtain, by fair and equal contracts with the Natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to New Zealand". All contracts for the purchase by the Crown of Maori land were to be made through the intervention of "an officer expressly appointed to watch over the interests of the Aborigines as their Protector."

11.9.12 Lord Normanby went on in paragraph 10 of his Instructions to say that only a comparatively small sum would be required to commence land purchases from the Maori. This was because the price to be paid to the Maori "will bear an exceedingly small proportion to the price for which the same lands would be resold to the settlers". In short, the Maori by accepting little more than a nominal price, would enable the Government, by means of extremely profitable re-sales, to build up a fund not only to acquire further land but to meet development expenses and to finance the cost of bringing more British emigrants to the new Colony. This is made clear in the following extract from Lord Normanby's Instructions not previously reproduced

The system at present established in New South Wales regarding land, will be applied to all waste lands which may be acquired by the Crown in New Zealand. Separate accounts must be kept of the Land Revenue. ' Subject to the necessary deductions for the expense of surveys and management, and for the improvement by roads and otherwise, of the unsold Territory, and subject to any deductions which may be required to meet the exigencies of the local Government, the surplus of the revenue will be applicable, as in New South Wales, to the charge of removing emigrants from this Kingdom to the new Colony ...

Few, if any, of these proposals were communicated by Captain Hobson or his representatives, when explaining the "pre-emptive" clause in Article 2 of the Treaty to the chiefs. Had this been done the likelihood of the chiefs agreeing to such a proposal would have been remote. Given the constant reiteration by Captain Hobson and his agents of the Crown's commitment to the protection of their lands and their rights the chiefs understandably failed to appreciate the risk they ran in agreeing to this provision. It is difficult not to agree with Adams when he says the Maori were to be told only half the story (1977:166). It would, however, not be right to accuse Lord Normanby of bad faith. For in paragraph 10 of his Instructions he justifies his proposal for a minimal payment only to the Maori on two main grounds.

First, he considers that much Maori land is of no actual use to them and in their hands possesses scarcely any exchangeable value. These are, in themselves, questionable assumptions.

Secondly, he says, the land value will be created and progressively enhanced by the introduction of capital and settlers from Britain. "In the benefits of that increase the Natives themselves will gradually participate." This is an important statement for it assumes that the Maori people will be left in possession of sufficient land for them to benefit from the predicted increase in land values resulting from progressive colonisation. If the Maori were not to be left with an adequate endowment then the anticipated benefit occurring to them would be illusory.

11.9.13 That it was not Lord Normanby's intention that the Maori should not benefit from the exercise of the Crown's rights of pre-emption is made apparent in the succeeding paragraph 11 of his Instructions. In this paragraph he set the parameters and imposed the limitations within which the Crown was to exercise its pre-emptive right to purchase Maori land.

- All dealings with the Maori were to be conducted on the basis of sincerity, justice and good faith just as were negotiations for the recognition of the Queen's Sovereignty over New Zealand.

- They must be prevented from entering into contracts which would be injurious to their interests. By way of example Lord Normanby stipulates that the agents of the Crown are not to purchase from the Maori any land "the retention of which by them would be essential, or highly conducive to their own comfort, safety or subsistence".

- Lord Normanby further emphasised this point when he next stipulated that the acquisition of land by the Crown for the future settlement of British emigrants must be confined to such districts as the Maori can alienate "without distress or serious inconvenience to themselves".

- Lastly, an Official Protector was to be appointed to ensure that this stipulation is complied with.

11.9.14 It is abundantly evident from the foregoing that Lord Normanby, in instructing Captain Hobson to obtain for the Crown the right of the pre-emption of Maori land, and in stipulating how such right was to be exercised, made

it clear that no land was to be so purchased which was needed to provide for the comfort and subsistence of the Maori people. In short, they were to be left with a sufficient endowment for their own needs. An official protector was to ensure this. The right of pre-emption was to be a limited right. It was not to extend to land needed by the Maori.

11.9.15 It should be added that the philosophy of assuring sufficient areas to native peoples was nothing new in British colonial practice. It was a well established policy to be found as early as 1755 and 1756 in the instructions to the Governors of New York and Virginia, which described in detail the boundaries of lands to be reserved for the Indians and instructed the Governors to use their "utmost endeavours to prevent any settlements being made within the same" (Labaree Royal Instructions to British Colonial Governors

vol 1 pp 468-469). Lord Normanby's instructions lacked the same precision in requiring reserves, the obligation on the Crown to approach its purchasing rights with proper sensibility being directed to the same end. Early maps in New Zealand delineated areas as intended native reserves and lands were in fact reserved, or promised as reserves in several subsequent New Zealand transactions. As we have seen at 4.5, 'native districts' were expressly contemplated in s.73 of the New Zealand Constitution Act 1852. Districts were not created but native reserves were recognised and provided for in the Native Reserves Act 1856. Section 22 of the Native Reserves Act 1882 added an important criterion, that reserves could not be alienated unless

a final reservation has been made, or is about to be made, amply sufficient for the future wants and the maintenance of the tribe, hapu or persons to whom the reserve wholly or in part belongs.

The preamble to the Native Land Act 1873 reiterated the objective of reserving areas for the purpose

...of assuring to the natives without any doubt whatever a sufficiency of their land for their support and maintenance, as also for the purpose of establishing endowments for their permanent general benefit from out of such land.

11.9.16 The emphasis had already shifted however from assuring tribal requirements to assessing individual needs. The bulk of Maori land was not in Reserves and the Native Land Act 1873, which applied to non reserve land, quantified the need by requiring 50 acres to be set aside for every man, woman and child resident in the relevant district.

11.9.17 The Native Land Act 1909 introduced another test - that no sale of an interest was to be confirmed to make the seller 'landless', that is, without sufficient other land for the seller's maintenance, but added a proviso, unless the native selling had other means.

(By 1953 the test was simply that sales were not to be approved if contrary to equity, good conscience or the interests of the native seller. It was not until the Maori Affairs Amendment Act 1967 that such provisions for the retention of Maori land disappeared altogether from the statute books.)

11.9.18 What explanations, if any, were given to the Maori chiefs by Captain Hobson and his representatives of the pre-emptive provisions in Article 2 of the Treaty? At the outset it should be said that it is by no means certain that the chiefs understood that Article 2 of the Treaty was intended to give the Crown the sole and exclusive right to purchase Maori land rather than simply the right of first refusal of the land (Adams, 1977:198). In this respect, there is a significant difference between the English and Maori texts - see Waiheke Report, 1987:Ch.8. There is surprisingly little on record as to what explanation was given to the Maori by way of justification for the pre-emptive provision in Article 2. Adams points out (1977:199) that there is no surviving account of the signing at Waitangi which mentions whether the Maori were told why pre-emption was necessary. Yet it is scarcely conceivable that some

explanation was not given for such an important constraint on the right to alienate their land. Adams proceeds to relate explanations given by Major Bunbury (an emissary for Captain Hobson) in terms similar to those given by Buick (1936:216-220). At Coromandel Bunbury, through a missionary interpreter, told the chiefs that pre-emption was 'intended to check their imprudently selling their lands without sufficiently benefiting themselves or obtaining a fair equivalent'. At Tauranga the Major said that pre-emption was 'intended equally for their benefit and to encourage industrious white men to settle amongst them' rather than allowing the appropriation of large areas of land by absentee speculators; the Queen would buy their land at a just valuation (Adams 1977:199). Adams considers it reasonable to conclude that if Bunbury, acting directly under Hobson's instructions, explained the need for pre-emption on the grounds of preventing land speculation and protecting the Maori, then this was the explanation which the Government gave generally (1977:199). Adams considers it most unlikely that Hobson and his delegates would have explained that it was intended to use the profits from resale at a much higher price for furthering emigration of British settlers. Yet this, Adams contends, 'was precisely the reason for pre-emption'. He invokes Normanby's Instructions in support (1977:199). We believe Adams' contention is an over-simplification of Lord Normanby's instructions. In particular, it overlooks the critically important fact that Lord Normanby coupled his instructions about pre-emption with his clear and unambiguous direction that the Crown should not exercise the right of pre-emption in respect of land needed by the Maori for their support and livelihood. It was to be exercised in such a way that the Maori, equally with the new settlers, would gain from the progressive appreciation in land values resulting from systematic colonisation. Obviously this would occur only if the Maori were left with sufficient land. Hence Lord Normanby's directive restricting and qualifying the exercise of the Crown's right of pre-emption.

11.9.19 It is instructive to note again the observations of Chapman J in *R v Symonds* (1847) [1840-1932] NZPCC 387. Referring to the legal doctrine of the Crown's right of pre-emption Chapman J in the Supreme Court says (391)

... This necessarily arises out of our peculiar relations with the native race, and out of our obvious duty of protecting them, to as great an extent as possible from the evil consequences of the intercourse to which we have introduced them, or have imposed upon them. To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the Natives in a very short time.

Chapman J found that 'the existing rule contemplates the Native race under a species of guardianship' and he went on to hold that, practically,

it secures to them all the enjoyments from the land which they had before our intercourse, and as much more as the opportunity of selling portions, USELESS TO THEMSELVES, affords. (Emphasis added)

It is also relevant to note certain observations in the same case made by Chief Justice Martin. The learned Chief Justice quotes from the first part of Clause

8 of Lord Normanby's instructions (the direction to secure to the Crown the rights of pre-emption) and then says (p 397)

Now, these directions appear to have been in no way confined to the Governor to whom they were personally addressed. They were clearly indicative of a policy to be steadily pursued by successive Governors whilst the colonisation of the country should be proceeding. These instructions were carried out, first, by the Treaty of Waitangi and, afterwards by the Land Claims Ordinances ...

11.9.20 It needs to be added, for the sake of completeness, that the rule of pre-emption did not entirely rest on the humanitarian concern to protect native interests. The origin of the rule, as exemplified in North America, lay in the feudal theory that all freehold titles must emanate from the Crown, with the corollary that only the Crown can extinguish native titles, and the political policy that British citizens may not establish colonies without the Crown's licence. Chief Justice Martin explained the rationale this way, in *R v Symonds* (supra, p 395)

If a subject of the Crown could by his own act unauthorised by the Crown acquire against the Crown a right to any portion of the lands of a new country, it is plain that he might, acting upon that right, proceed to form a colony there. Now the law of England denies to any subject the right of forming a colony without the licence of the Crown.

On the settlement of New Zealand however, there were grafted to the rule the humanitarian concerns upper-most in the minds of Colonial Office officials at the time. Doubtless those concerns received pre-eminence in discussions on the Treaty. We suspect, neither the legal intricacies of feudal tenure, nor the political expedient of preventing private citizens from establishing colonies, nor the fiscal device of funding colonisation from resale profits, ranked significantly in comparison.

11.9.21 As is well known Governor FitzRoy, for a short time in 1844-45 waived, or purported to waive, the Crown's right of pre-emption. In doing so he was clearly conscious of the need to ensure that sufficient land was retained by Maori vendors. In this connection Chief Judge Durie in the Waiheke Report (1987:76) quotes from Commissioner Mackay in his 1891 report to the General Assembly on native claims in the South Island, who, with regard to South Island landless natives, said (G7 and G7A)

...Governor FitzRoy was fully alive to the importance of making such reserves, and in both of his proclamations, dated respectively the 26th March 1844 and October 1844, waiving the Crown's right of pre-emption, it was stipulated that one tenth of the land, of fair average value as to position and quality, was to be conveyed by the purchaser to Her Majesty for public purposes, especially the future benefit of the Natives; and in a memorandum on the sale of land in New Zealand by the aboriginals, about the same date, the importance of setting apart reserves for the Natives is alluded to as follows:

'With respect to the interest of their descendants they are indifferent, and require the provision of at least a tenth of all lands sold, besides extensive reserves in addition' . . .

11.9.22 Sir George Grey reinstated the Crown's right of pre-emption shortly after taking up office as Governor. It will be recalled that he was directed by Lord Stanley in his Instructions dated 13 June 1845 to "honourably and scrupulously fulfil the conditions of the Treaty of Waitangi". The Crown's right of pre-emption was subsequently provided for in s.73 of the New Zealand Constitution Act 1852. Significantly the British Government in 1859 disallowed the Native Territorial Rights Bill in which the New Zealand General Assembly proposed to dispense with the Crown's right of pre-emption and to allow Maori land to be freely sold on the open market. It did so on the ground that the Bill was an infringement of the Treaty. It was not until 1862, after the control of Maori Affairs passed from the British to the New Zealand Government, that the Crown's pre-emptive right was finally abolished.

11.9.23 We return now, belatedly it may be thought, to the question posed in 11.9.1 which has given rise to the foregoing discussion, the question being whether the valuable monopoly right conferred on the Crown by the Maori chiefs in the Treaty of Waitangi which enabled the Crown, to the exclusion of all others, to purchase Maori land, imposed any reciprocal duty on the Crown. And if so, what was the nature of any such reciprocal duty?

11.9.24 It will be recalled that Lord Normanby, in paragraph 8 of his Instructions to Captain Hobson, directed Hobson to secure from the Maori a right of pre-emption in favour of the Crown. Later in his Instructions (paragraph 11), he significantly narrowed the ambit of the exercise of the right of pre-emption so as to exclude all land needed by the Maori for their "comfort, safety or subsistence". No land was to be so acquired which would cause "distress or serious inconvenience" to the Maori. When Captain Hobson came to implement these Instructions in the Treaty he did so in reverse order. Thus in Article 2 reference to the right of pre-emption follows, rather than precedes, the guarantee by the Crown to the Maori people of "the full exclusive and undisturbed possession of their lands ... so long as it is their wish and desire to retain the same in their possession." Only after making this re-assuring provision did Hobson insert the exclusive right of pre-emption in favour of the Crown over such lands as the owners may be disposed to alienate. We recall that this provision follows the earlier expression of anxiety on the part of the Crown to protect the just rights and property of the Maori people.

11.9.25 It is axiomatic in construing the provisions of a Treaty such as the Treaty of Waitangi between the head of a powerful highly civilised nation and representatives of a relatively unsophisticated and powerless native people that the utmost good faith must be imputed to the British Crown. It is necessary to have regard to the sense in which the provisions of the Treaty would be understood by the Maori signatories. It is also necessary that regard should be had to all relevant surrounding circumstances and any declared or apparent objects and purposes. A generous interpretation avoiding "the austerity of tabulated legalism" is clearly called for. In seeking an answer to

the question posed we should have regard to the various matters discussed in the preceding paragraphs of this section and in particular

- The humanitarian impulses which played an extremely important part in the decision of the British Government to intervene in New Zealand with a view to protecting the Maori people from the adverse consequences of colonisation and the emphasis given to these considerations by Captain Hobson and his representatives in seeking to persuade the Maori chiefs to adhere to the Treaty.
- The emphatic direction from Lord Normanby to Captain Hobson that any right of pre-emption in favour of the Crown obtained from the Maori chiefs was to be restricted to land not required by the Maori people for their own livelihood.
- Lord Normanby's assurance to Captain Hobson that the Maoris would benefit from the predicted increase in land values resulting from progressive colonisation (this being possible only if the Maori were left with an adequate endowment of land to reflect the anticipated increase in value).
- The many expressions of concern by the chiefs that they might be dispossessed of their land if they signed the Treaty and the repeated assurances by Governor Hobson and his various representatives at the times the chiefs were being urged to sign the Treaty, that their lands would be protected.
- The specific assurance in the preamble to the Treaty that the Crown was anxious to protect the just rights and property of the Maori people.
- The explanation given to the Maori chiefs of the need for pre-emption on the grounds of preventing land speculation and protecting the Maori and the apparent absence of any reference to the purpose to which the Government would put resulting profits.
- The well-established fact that, had the Maori chiefs not been assured that their possession of their lands would be protected, they would not have become parties to the Treaty.

11.9.26 In our view the two parts of Article 2 of the Treaty must be read together and construed in the light of the foregoing considerations. If this is done, we find that Article 2, read as a whole, imposed on the Crown certain duties and responsibilities, the first to ensure that the Maori people in fact wished to sell; the second to ensure that they were left with sufficient land for their maintenance and support or livelihood or, as Chief Judge Durie puts it in the Waiheke Report (1987:77), that each tribe maintained a sufficient endowment for its foreseen needs

11 The Status and Scope of The Treaty of Waitangi

11.10 The Duties of the Treaty Partners

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11.10.1 Finally, and perhaps most importantly, we state a leading principle of the Treaty articulated by the Court of Appeal in the New Zealand Maori Council case. There are two essential elements. The first is the recognition in the words of Cooke P at 369 that "the Treaty signified a partnership between the races". The second is the obligation which arises from, indeed is inherent in, this relationship for each partner to act towards the other as Cooke P puts it at 370, "with the utmost good faith which is the characteristic obligation of partnership." Later, the learned President says

It should be added, and again this appears to be consistent with the Tribunal's thinking, that 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 cooperation.

Richardson J puts the matter in this way at 388

There is, however one paramount principle which I have suggested emerges from consideration of the Treaty in its historical setting: that the compact between the Crown and the Maori through which the peaceful settlement of New Zealand was contemplated called for the protection by the Crown of both Maori interests and British interests and rested on the premise that each party would act reasonably and in good faith towards the other within their respective spheres. That is I think reflected both in the nature of the Treaty and in its terms.

Somers J expressed his view succinctly at 400

Each party in my view owed to the other a duty of good faith. It is the kind of duty which in civil law partners owe to each other.

Finally, Casey J puts it in this way at 410

I see such a principle as very relevant in this case, inherent in the concept of an on-going partnership founded on the Treaty. Implicit in that relationship is the expectation of good faith by each side in their dealings with each other, and in the way that the Crown exercises the rights of Government ceded to it. To say this is to do no more than assert the maintenance of the "honour of the Crown" underlying all its treaty relationships.

We would state the principle which emerges in this way. The Treaty signifies a partnership between the Crown and the Maori people and the compact

between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other.

Waitangi Tribunal, Department of Justice, Wellington.

11 The Status and Scope of The Treaty of Waitangi

11.11 Summary

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11.11.1 At the risk of over-simplifying our discussion of the status and scope of the Treaty of Waitangi it is convenient here to summarise the main elements. In doing so we reiterate our earlier disclaimer that we are not attempting to lay down a definitive and exclusive set of criteria by which claims should be assessed. We believe however that the following criteria are relevant to a consideration of the present claim.

11.11.2 It is reasonable to apply to the interpretation of the Treaty of Waitangi the general principles of treaty interpretation as applicable to municipal law.

Relevant principles are:

- (a) The primary duty of a tribunal charged with interpreting a treaty is to give effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of surrounding circumstances.
- (b) It is necessary to bear in mind the overall aim and purpose of the treaty.
- (c) In relation to bilingual treaties neither text is superior;
- (d) Given that almost all Maori signatories signed the Maori text, considerable weight should be given to that version;
- (e) The contra proferentem rule that in the event of ambiguity such a provision should be construed against the party which drafted or proposed that provision (in this case the Crown) applies;
- (f) The United States Supreme Court "indulgent rule" that treaties with indigenous people (American Indians) should be construed "in the sense which they would naturally be understood by Indians" supports the principle (d) above;
- (g) Treaties should be interpreted in the spirit in which they were drawn taking into account the surrounding circumstances and any declared or apparent objects and purposes.

11.11.3 Broad Implications of the Treaty

- (a) The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence should remain and be respected.

(b) While the Colonial Secretary's instructions to Captain Hobson required him to obtain "by fair and equal contracts with the Natives the cession to the Crown of such 'waste lands' as may be progressively required for the occupation of settlers resorting to New Zealand" this was subject to the qualification that he was not to purchase "any territory the retention of which by them would be essential or highly conducive to their own comfort, safety or subsistence."

(c) The Treaty recognised the Maori ownership of the whole of New Zealand and the Maori signed the Treaty on the basis that all their lands, cultivated or otherwise, were confirmed to them by the Treaty.

11.11.4 The Two Versions of the Treaty

(a) In the Maori text the chiefs ceded to the Queen 'kawanatanga'. This is less than the sovereignty ceded in the English text, and means the authority to make laws for the good order and security of the country but subject to the protection of Maori interests. The cession of sovereignty however is implicit from surrounding circumstances.

(b) The Maori text conveys an intention that the Maori would retain full authority over their lands, homes and things prized. This is more than the "full exclusive and undisturbed possession" guaranteed in the English text.

(c) In Maori thinking "rangatiratanga" and "mana" are inseparable. One cannot have one without the other. The Maori text of the Treaty conveyed to the Maori people that, amongst other things, they were to be protected not only in the possession of their lands but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences.

(d) The lands owned by the Maori were held by them tribally and communally. The communal right so existing was recognised by the Crown in the Treaty. The conferral in the Maori text of "te tino rangatiratanga" of their lands on the Maori people carries with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy. These include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion.

(e) In recognising the "tino rangatiratanga" of their lands the Crown acknowledged the right of the Maori people for as long as they wished, to hold their land in accordance with long standing custom on a tribal and communal basis.

11.11.5 The Nature of the Guarantee

In agreeing to confirm and guarantee to the Maori people the rights conferred on them in Article 2 of the Treaty in respect of their lands the Crown incurred

an obligation actively to ensure that its Treaty undertakings were adhered to. It follows that an omission to provide protection is as much a breach of the Treaty as a positive act that removes or abrogates those rights.

11.11.6 The Delegation of Responsibility

(a) Decisions of the Native Land Court in the exercise or purported exercise of their jurisdiction under Native Lands Acts or other statutes are not "acts done or omitted ... by or on behalf of the Crown" in terms of s 6(l)(d) of the Treaty of Waitangi Act 1975, but

(b) the Crown cannot divest itself of its Treaty obligations by conferring an inconsistent jurisdiction on the Native Land Court or other judicial or non-judicial bodies.

(c) Accordingly, it is not any act or omission of the Native Land Court that is justiciable but any omission of the Crown to provide a proper assurance of its Treaty promises when vesting any responsibility in the Court or, indeed, any other body.

11.11.7 Provisions and Principles

(a) The Tribunal is required to determine whether any matter of which a complaint can be made under s 6 of the Treaty of Waitangi Act 1975 "was or is inconsistent with the principles of the Treaty" rather than with its provisions as such.

(b) The essence of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretation out of place.

(c) The Treaty was more than an affirmation of existing rights. It was not intended merely to fossilise the status quo but to provide a direction for future growth and development. It is not intended as a finite contract but is the foundation for a developing social contract.

11.11.8 Pre-emption and Reciprocal Duties

The two parts of Article 2 of the Treaty must be read together and construed in the light of the surrounding circumstances and other considerations referred to in 11.9.1 to 11.9.20. So read and construed, Article 2 imposed on the Crown certain duties and responsibilities, the first to ensure that the Maori people in fact wished to sell; the second to ensure that they were left with sufficient land for their maintenance and support or livelihood or, as Chief Judge Durie puts it in the Waiheke Report (1987:77), that each tribe maintained a sufficient endowment for its needs.

11.11.9 The Duties of the Treaty Partners

The Treaty signifies a partnership between the Crown and the Maori people and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other.

Waitangi Tribunal, Department of Justice, Wellington.