ENVIRONMENTAL MANAGEMENT AND THE PRINCIPLES OF THE TREATY OF WAITANGI

Report on Crown Response to the Recommendations of the Waitangi Tribunal 1983-1988

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PREFACE

This report has attempted to assess the performance by the Crown in taking into account the principles of the Treaty of Waitangi in its environmental planning and management. A measure of past performance as perceived by tribal authorities is reflected by the number of claims made to the Waitangi Tribunal. A measure of present performance is the response made by the Crown to the Tribunal recommendations.

The Crown itself established the system of the Waitangi Tribunal which enables measurement of its own performance. This initiative and others in more recent years have seen significant progress being made whereby Pakeha New Zealanders are being made aware of the rights and concerns of the *tangata whenua*. These are home country rights and are not to be confused with the rights of a minority culture.

The Maori people have their own principles of environmental management. Principles and policies established by statute in New Zealand have been for separate resources such as air, water, land forests or fish. Ecological principles of the interdependence of nature and the need for integrated management are only now being addressed in resource management law. There is a unique opportunity for Maori and Pakeha principles of environmental management to be considered together for the management of natural and physical resources.

Before this can happen there has to be a better understanding by the people of New Zealand of Maori culture and the responsibilities imposed by the Treaty of Waitangi. That the Treaty is a living reality needs to be recognised by all. The Treaty will continue to influence management of natural and physical resources. Celebrations in 1990 of the Treaty signing would be enhanced by adoption of a common environmental policy that prevented and resolved the grievances that would otherwise be presented to the Waitangi Tribunal on matters of natural and physical resource management.

A message conveyed to me by the Maori people for the management of natural and physical resources has been "Respect and protect what is there; restore what is lost". My report details the Crown's response to requests from the Waitangi Tribunal to protect and restore resources. Although recommendations are made that would assist the Crown process of response to Tribunal recommendations, the greatest hope for the future lies in the development of a mutually acceptable environmental policy and a common goal for all.

Helen R. Hughes

Helen R Hughes
Parliamentary Commissioner for the Environment

"Rapua te huarahi whanui
Hei ara whakapiri i nga iwi e rua
I runga i te whakaaro kotahi"

(seek the broad highway that will
unite the two peoples toward a
common goal)

Whakatauki

"It is out of keeping with the
spirit of the Treaty . . . that the
resolution of one injustice should
be seen to create another"

Waitangi Tribunal
Muriwhenua Fishing Report
(1988; p. xxi)

"The way ahead calls for
careful research, for rational positive
dialogue and above all, for a
generosity of spirit"

Justice Richardson
in NZ Court of Appeal
NZ Maori Council decision
(1987; p. 14)

"The ethos of the Treaty is
the real raw material that makes
up the vision of a society all New
Zealanders can adhere to : partnership,
co-operation, respect, mutual benefit,
negotiation, compromise and good
faith. Those are the principles
we must adopt"

Rt. Hon. David Lange
Prime Minister
(speech, Auckland,
21 October 1988)

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EXECUTIVE SUMMARY

Under the Long Title of the Environment Act 1986, the Parliamentary Commissioner for the Environment has the obligation to take full and balanced account of the principles of the Treaty of Waitangi in monitoring and advising on environmental management by public authorities. The recommendations of the Waitangi Tribunal contain practical advice on how the environment may be managed in harmony with the principles of the Treaty. The Crown's response to these recommendations is one indication of whether it is giving the Treaty principles full and balanced account in its management of the environment.

Of the 59 recommendations given by the Tribunal to date, 21 have been fully or partially implemented. The Crown is not obliged to implement the Tribunal's recommendations, but the Court of Appeal has indicated that the Crown is obliged as partner to the Treaty to provide redress where breaches of Treaty principles have been identified. However, the Commissioner has found that where the Crown has not acted on Tribunal recommendations, it has also not provided alternative redress. Where the breach has involved environmental degradation, the degradation has continued.

The Commissioner commends the Crown for establishing the Waitangi Tribunal (1975), for extending its powers of review back to the signing of the Treaty (1985), and for providing increased staffing and resources (1988). The Crown is also commended for beginning to include the principles of the Treaty in statute (Treaty of Waitangi Act 1975, Environment Act 1986, Conservation Act 1987, State-Owned Enterprises Act 1987). These changes were badly needed: however, they are only a beginning.

The Commissioner agrees with other observers that the pace of change, although necessary, has left the public behind. A public education programme is urgently needed to counteract past deficient teaching of New Zealand history in schools. The Crown has neglected to fully inform the public about its response to Tribunal recommendations, and this too needs to change.

In order for environmental management to take account of the principles of the Treaty, the Commissioner has found that it must address the three main themes of **partnership, tribal *rangatiratanga,*** and **active protection.** The principal change implied for the existing environmental management system is a greater share of decision-making power between Crown/Pakeha and Maori partners to the Treaty and greater cognisance of Maori cultural values in the protection of resources and other *taonga.* The holistic approach of traditional Maori environmental management has much to offer, and is receiving belated recognition of its essential similarity to the ecological approach.

The Crown has in recent years made bold beginnings to incorporate the principles of the Treaty into the management of the environment shared by all citizens of New Zealand. These changes are overdue, and the momentum of change should not be lost.

The Commissioner makes recommendations to assist the Crown to continue, reasonably and in good faith, to fulfil its obligations as partner to the Treaty of Waitangi.

RECOMMENDATIONS

Crown response to Waitangi Tribunal recommendations

The Crown has been remiss in the past in not acknowledging the essential validity (or otherwise) of the grievances investigated by the Tribunal, in not fully informing the public of why some form of redress is required, and in not explaining what approach to redress it has taken and why.

RECOMMENDATION 1:

TO THE PRIME MINISTER, THE MINISTER OF JUSTICE AND THE MINISTER OF MAORI AFFAIRS:

that following the release of Tribunal findings the Crown should advise the public, in prompt and succinct form:

(a) **the nature of the claim and the findings of the Tribunal;**

(b) **whether the Crown agrees with the Tribunal's assessment of past Crown breaches of Treaty principles;**

(c) **the recommendations for redress conveyed by the Tribunal;**

(d) **the form of redress to be granted by the Crown;**

(e) **if this redress differs from that recommended by the Tribunal, why the Crown has chosen this path;**

(f) **the timetable for implementation of redress.**

(*Note:* information on (d) through (f) will likely be available later and constitute a separate press release. If so, a summary of the information in (a) through (c) should be re-issued at that time).

For Tribunal reports already received (Motunui, Kaituna, Manukau, Te Reo Maori, Waiheke, Orakei, Muriwhenua fishing) where Tribunal recommendations have not been fully implemented, the Crown should follow this same formula where it has not already done so.

(Section 3. 1)

Coordination of Crown response

Most management decisions relating to the principles of the Treaty and many Tribunal recommendations extend over the responsibility of more than one department. Lack of coordination of Crown response is in the process of being remedied by the Treaty Issues Unit in the Department of Maori Affairs, which was established in 1987. This coordination function is essential and should be continued.

RECOMMENDATION 2:

TO THE PRIME MINISTER, THE MINISTER OF JUSTICE AND THE MINISTER OF MAORI AFFAIRS:

that the Treaty Issues Unit in the Department of Maori Affairs (or equivalent) should be retained and given adequate resources and status to coordinate prompt interdepartmental response to Tribunal findings and recommendations.

(Section 3. 2)

Public education on Treaty issues

As a result of inadequate information provided in schools and by the Crown generally, both officials and the general public are largely unaware of the history, text, and modern day implications of the Treaty of Waitangi. In recent years, Crown actions have moved ahead of the understanding of the general public on these matters, and a widespread public education programme is essential.

RECOMMENDATION 3:

TO THE PRIME MINISTER AND THE MINISTERS OF JUSTICE, MAORI AFFAIRS, EDUCATION, AND IMMIGRATION:

that the Crown should as a matter of urgency financially support and expand education efforts to present to the public a balanced history of the Treaty, including information on the Treaty texts, principles defined to date, and practical modern implications; and that this education campaign should be aimed at all adults, school children, and immigrant citizens.

(Section 3. 3)

Policy and management implications of Treaty principles

The principles of the Treaty identified to date by the Waitangi Tribunal, Court of Appeal and others can be grouped into the major themes of partnership, tribal *rangatiratanga,* and active protection. Changes to the existing decision-making and resource management system are required to implement these principles.

RECOMMENDATION 4:

TO THE PRIME MINISTER, AND MINISTERS OF ENVIRONMENT, LOCAL GOVERNMENT, JUSTICE AND MAORI AFFAIRS:

that the Crown recognise generally, and particularly in the context of the current Resource Management and Local Government Law Reform programmes, that:

(a) the implementation of the Treaty principles of partnership and tribal *rangatiratanga* requires a change in the existing power equation between the Treaty partners, giving *tangata whenua* an increased share in actual decision-making power at both central and regional levels; and

(b) the implementation of the Treaty principle of active protection requires proactive initiatives for environmental management in both statute and

policy to:

i) **protect Maori *taonga* according to Maori cultural preferences;**
ii) **provide rehabilitation or compensation for mismanagement of natural resources where valid Maori grievances under the Treaty have been established.**

(Sections 2 and 3. 4)

Changes in Crown administration for the management of natural and physical resources

Departments are presently monocultural in outlook and in decision-making structure. In order to implement the principles of the Treaty the Crown needs to ensure that it not only improves understanding of Treaty issues amongst officials (together with the general public as per recommendation 3) but also obtains in-house and external advice from Maori people and pursues bicultural decision-making structures. Section 56 of the State Sector Act 1988 requires Chief Executives to consider the "aims and aspirations" of the Maori people in relation to being "a good employer". This provision is insufficient to ensure that Chief Executives have full regard to the principles of the Treaty in all aspects of their duties.

RECOMMENDATION 5:

TO THE PRIME MINISTER AND THE MINISTERS OF STATE SERVICES, ENVIRONMENT, AND MAORI AFFAIRS:

that the Crown

(a) **encourage departmental initiatives to expand officials' understanding of Treaty issues and Maori values and to design bicultural decision-making structures;**

(b) **amend the State Sector Act 1988 to require Chief Executives to conduct all Crown business so as to act in a manner that is consistent with the principles of the Treaty of Waitangi; and**

(c) **amend resource management legislation so as to ensure that natural and physical resources are managed in a way that is consistent with the principles of the Treaty of Waitangi.**

(Section 3. 5)

Independent overview of Crown action on Treaty issues

The existing statutory provisions are insufficient to guarantee an ongoing independent overview of the Crown's fulfilment of its duties as Treaty partner. The Waitangi Tribunal investigates cases of potential breach of the Treaty and section 8I of the Treaty of Waitangi Act 1975 now provides for the Minister of Maori Affairs to report to Parliament on the Crown response to Tribunal recommendations. However, this is limited in scope and tied to Ministerial control. A number of options for independent overview exist, including the Treaty of Waitangi Commission recommended by the Royal Commission on Social Policy.

RECOMMENDATION 6:

TO THE PRIME MINISTER, AND THE MINISTERS OF JUSTICE AND MAORI AFFAIRS:

that an independent body with the statutorily defined role of monitoring the Crown performance on Treaty issues be

(a) identified with the assistance of a bicultural advisory group set up for this purpose,

(b) established, and

(c) adequately resourced.

(Section 3. 6)

Incorporation of Tribunal recommendations into current law reform

Over the years the Tribunal has made recommendations to the Crown on the legislative changes needed to implement the principles of the Treaty (Motunui 1983, Kaituna 1984, Manukau 1985). To date they have not been implemented. Each of these recommendations should be fully addressed now in the current Local Government and Resource Management Law Reform.

RECOMMENDATION 7:

TO THE MINISTERS OF LOCAL GOVERNMENT AND ENVIRONMENT:

that in the current Local Government and Resource Management Law Reforms, the Tribunal recommendations concerning legislative amendment be fully addressed; and if the form recommended by the Tribunal is not accepted, that public explanation be given. The Tribunal's recommendations (Motunui 3, Kaituna 2(c), Manukau 1, 7, 8 and 13) are:

(a) General:

i) to bind the Crown in the same way as the private citizen;

ii) to provide for combined hearings for multiple consents and uniformity between statutes;

iii) to provide for assessment of the cumulative effects of development on the environment;

iv) to enable the conduct of the parties to be considered by statutory consent authorities and Tribunals in orders for disclosure, discussion or research;

v) to provide for the review of existing use rights in light of current standards;

vi) to provide for reservation and control of Maori fishing grounds;

vii) to restore the Crown's fiduciary responsibilities to *tangata whenua*

under the Treaty in relation to rivers, harbours, coastal, and foreshore areas;

viii) to provide for compulsory acquisition and reservation of *wahi tapu.*

(b) Town and Country Planning Act 1977:

i) apply sections 3 and 102A to areas where a Maritime Plan does not exist;

ii) Maritime , Regional, and District Schemes to have regard to Maori values and their relationship with natural resources;

iii) bring consents under the Mining Act 1971 and Petroleum Act 1937 into general planning procedures;

iv) that development levies be apportioned where *marae* and *papa-kainga* are affected by developments and an additional levy be provided where Maori fisheries or Maori cultural interests are particularly affected.

(c) Water and Soil Conservation Act 1967:

i) enable Boards and Tribunals to take Maori spiritual and cultural values and Maori fishing areas into account;

ii) empower Boards to control methods of waste disposal and instigate variation of existing water rights;

iii) provide for review of existing water right discharges that do not meet current standards.

(Section 3. 7)

Form of Waitangi Tribunal reports

The way in which the Tribunal has chosen to present its findings and recommendations to the Crown in the past has at times contributed to the lack of visible Crown response, particularly with regard to imprecise wording of recommendations. In addition, the previous lack of a concise summary of findings has made necessary information inaccessable to both officials and the general public.

RECOMMENDATION 8:

TO THE WAITANGI TRIBUNAL:

that

(a) in formulating its recommendations to the Crown it aims for as much precision and clarity as possible;

(b) the recent practice of including a summary of findings in its reports should be continued; and,

(c) it consider preparing 'popular summaries' for the benefit of the media and the Crown's Treaty issues education programme.

(Section 3. 8)

INTRODUCTION

The Parliamentary Commissioner for the Environment was established under the Environment Act 1986 to ensure that public authorities and others are held accountable for their planning and management as it affects the environment. The Long Title of the Act spells out matters which should be given full and balanced account in the management of natural and physical resources. These are:

(a) the intrinsic values of ecosystems;

(b) all values which are placed by individuals and groups on the quality of the environment;

(c) the principles of the Treaty of Waitangi;

(d) the sustainability of natural and physical resources; and

(e) the needs of future generations.

The Parliamentary Commissioner for the Environment initiated this investigation into the Crown response to the recommendations of the Waitangi Tribunal as a part of her responsibilities under the Environment Act. The objective was to assess whether the Crown was giving full and balanced account to the principles of the Treaty in its management of natural and physical resources.

The Waitangi Tribunal has statutory responsibility to interpret 'the principles of the Treaty' under the Treaty of Waitangi Act 1975. Matters which have come before the Tribunal relate directly to the management of natural and physical resources or (in the case of the claim on Te Reo Maori) relate to matters falling under the broad definition of 'environment' used in the Environment Act. Although the aims of the Tribunal are different from those of the Parliamentary Commissioner, the Tribunal's findings contain advice on environmental management, which relates to the statutory concerns of the Parliamentary Commissioner.

In contrast with the Tribunal, the Commissioner's primary focus is on the environmental degradation which is connected with each claim, and the way in which the Crown has chosen to address that degradation. If the Crown has not followed the advice of the Tribunal (i. e. , the recommendation has not been implemented) has the degradation been reduced in another way which also takes full and balanced account of the principles of the Treaty?

The Treaty of Waitangi granted to the Crown the right to make laws in order to govern (Article I), but in exchange it gave the Crown the obligation to actively protect certain rights of the Maori people (Articles II and III).

The Crown is not obliged by law to follow the recommendations of the Waitangi Tribunal. The Parliamentary Commissioner recognises that the Crown may find that some recommendations are not reasonable, affordable, or appropriate, and may choose to redress breaches of the Treaty in other ways. As Justice Cooke observed in the NZ Maori Council case before the Court of Appeal, if the Tribunal finds merit in a claim and recommends redress it would only be in very special circumstances that the Crown, as a reasonable Treaty partner, could justify withholding some form of redress. [1]

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1 NZ Court of Appeal, 1987, Cooke P, pp. 37-38

If a claim is found by the Tribunal to be a valid grievance, it can be taken as evidence that the Crown's past environmental management has not taken the principles of the Treaty into full and balanced account. A measure of whether present environmental management is giving full and balanced account to the principles of the Treaty can be found in the way the Crown provides redress for those grievances.

The Parliamentary Commissioner for the Environment is charged with giving remedial advice as appropriate. This investigation has documented certain shortcomings in the Crown's regard for the principles of the Treaty, and accordingly recommendations have been made.

Methodology

In December 1987, letters were sent to the 21 Ministers to whom recommendations had been directed by the Waitangi Tribunal, asking what action had been taken by the Crown. By May 1988, all responses had been received and by June 1988 a summary of responses checked with Ministers for accuracy. As a check on the accuracy of the Ministerial replies and on whether the environmental degradation associated with the claims was being resolved, claimants were approached for comment in June 1988.

In early August 1988, Ministers were again approached for an update on any further progress which may have occurred. These replies were all finally received by 15 October 1988.

During this same period, the broader issues relating to Treaty principles and environmental management by the Crown were monitored, investigated, and discussed with selected advisors.

Outline of report

Section 1 of the report summarises and appraises the Crown response to the recommendations of the Tribunal. Background material can be found in Appendices A to H.

Section 2 of the report discusses the principles of the Treaty in relation to environmental management and explores ways that the Crown can improve its response to Tribunal recommendations. Supplementary information can be found in Appendices I to M.

Section 3 of the report discusses ways that environmental management by the Crown can better take full and balanced account of the principles of the Treaty, and offers recommendations. These recommendations are summarised in the Executive Summary.

1 THE CROWN RESPONSE TO RECOMMENDATIONS OF THE WAITANGI TRIBUNAL

1. 1 Overview

The Crown set up the Waitangi Tribunal in 1975 and in 1985 extended its powers of review back to 1840. With the establishment of the Tribunal, a forum finally existed to explore Maori grievances under the Treaty which could operate in a Maori context and therefore fully explore the Maori view as well as the Crown view. The Tribunal is a measure for the Crown of its own performance as a Treaty partner.

The Tribunal has the power of investigating Crown policies or practices that may be contrary to the principles of the Treaty of Waitangi and of recommending to the Crown how grievances should be resolved. It is entirely the choice of the Crown what response is given to this advice and the Tribunal has no powers of enforcement.

Of the 59 recommendations delivered to the Crown by the Waitangi Tribunal to date,[1] eight have been partially implemented by the Crown and 13 have been fully implemented. A further 32 have been or are being addressed, but no tangible results have yet been seen. The remaining 6 have either been rejected (5) or information from Ministers has been insufficient for an evaluation to be made (1). This information is summarised in Table 1 and the background information can be found in Appendices A to G.

As noted in the Introduction, the Court of Appeal has stated that to be a reasonable Treaty partner the Crown should grant some form of redress for breaches of the Treaty.[2] If the Crown prefers alternative forms of redress from those recommended by the Tribunal, the Commissioner believes that the Crown must show that the alternative will be as likely to attain improved environmental quality, take full and balanced account of the principles of the Treaty, and address the other matters in the Long Title of the Environment Act ('all values'; sustainability; needs of future generations). The Tribunal to date has shown sensitivity to all of these matters in making its recommendations, but the Crown in not acting on Tribunal advice has so far failed to demonstrate that its chosen alternatives will provide an equivalent or improved result.

1. 2 Appraisal of Crown Response

This section comments on Crown response to date as compared against the recommendations tendered by the Tribunal. Each section is preceded by a very brief summary of Tribunal findings and recommendations. Fuller details on Tribunal findings and Crown response can be found in Appendices A to G.

1. 2. 1 Motunui claim

The Tribunal found that the traditional fishing grounds of Te Atiawa had been polluted and would likely be polluted further, prejudicially affecting their fishing rights guaranteed under the Treaty. The Tribunal recommended that the planned Motunui outfall

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1 Recommendations physically numbered by the Tribunal total 39. See note under Table 1 and Tables in Appendices A to G for clarification of counting method use for this report.

2 NZ Court of Appeal, 1987, Cooke P, pp. 37-38

Table 1: Summary of Crown Response to Tribunal Recommendations (see Appendices A to G for detail)

CLAIM (date recommendations received by Crown)	**STATUS OF IMPLEMENTATION**					
	? ?	R	Start	Part	Full	Total
MOTUNUI (17/3/83)			4		3	7+
KAITUNA (30/11/84)			1	2	3	6+
MANUKAU (9/7/85)		*	20	2	2	24+
TE REO MAORI (29/4/86)		2		2	1	5
WAIHEKE (2/6/87)	1		1		1	3
ORAKEI (4/11/87)		1	6		3	10+
MURIWHENUA (Interim reports 8/12/86 to 31/5/88)		2		2		4
Totals	1	5	32	8	13	59

Key:

? ?	=	insufficient information
R	=	rejected by Minister
Start	=	being addressed, but tangible results not yet evident
Part	=	partially implemented
Full	=	fully implemented

Notes:

\+ Total number of recommendations appears higher than those numbered by the Tribunal because sub-headings of recommendations and referrals and comments in the recommendations text have also been counted to assist in monitoring the Crown response.

* Manukau recommendation 4 was formally rejected by Cabinet but has since been reconsidered.

The evaluations refer to implementation of recommendations as worded by the Tribunal. Implementation of the spirit of the recommendations might be judged differently.

should not be built, the existing Waitara outfall should be upgraded, and that legislation should be amended to protect Maori fishing rights.

Five and a half years after the Crown received the Tribunal's recommendations, the Motunui outfall was not built, the Waitara reefs continue to be polluted, and the legislation, policy and practices at fault have not been remedied.

After the Tribunal recommendations were made, the Crown convened a Task Force of officials who carried out a number of investigations. The final recommendation to the Crown was to construct a new long outfall at Waitara with the intention that treatment of effluent would follow at a later stage and be the responsibility of the companies and local authorities involved. The Crown did not explain how the problems identified by this claim would be solved by its chosen approach.

The delays that have occurred in the past in finding a solution to the Waitara pollution are an indictment of the Crown's lack of commitment to solving this problem. The Parliamentary Commissioner for the Environment reported to Parliament in July 1988 that:

> *"My inquiries have not established all causes for the delays in the parties reaching agreement. However, I believe the decision by the Ministry of Energy to negotiate the Heads of Agreement through its trading arm . . . contributed to protracted negotiations.*
>
> *To achieve satisfactory effluent discharge standards through the Waitara outfall requires far greater commitment and persistence by the Ministry of Energy and the North Taranaki District Council than has been shown so far."*[3]

The Ombudsmen reported to Parliament in 1988 that:

> *". . . the sum total of the delays which have occurred and which continue to occur in achieving a result, render all arguments rationalising them untenable."*[4]

Initiatives by the Crown, local authorities, and local industry in 1988 may resolve this longstanding problem, and achieve not only an improved outfall but improved treatment of wastes as the Tribunal recommended. The Commissioner supports these initiatives in full.

1. 2. 2 Kaituna claim

The Tribunal found that plans to re-route Rotorua sewage by pipeline to the Kaituna River would prejudicially affect Ngati Pikiao by polluting their traditional fishing grounds. The Tribunal recommended that the 'nutrient pipeline' plans should be abandoned and alternatives found; and that deficient legislation be changed.

Those recommendations specific to the Kaituna pipeline (numbers 1, 2(a), 2(b) and 3) have been implemented or are in the process of being implemented. Crown funding, although approved, has not yet been discharged.

Recommendations relating to legislation (numbers 2(c) and 4) have not been implemented; of these, recommendation 2(c) is now covered by the Resource Management Law Reform.

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3 Parliamentary Commissioner for the Environment, 1988, p. 14

4 Ombudsmen 1988, p. 15

1. 2. 3 Manukau claim

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

While the Crown has in some way addressed (at least in part) most of the Manukau recommendations, three years after those recommendations were issued none of them have been sufficiently implemented to show any real change 'at the flaxroots level'. Understandably, the claimants feel frustration and cynicism, and have made their concerns known in the national media and in international forums. When not acting on Tribunal recommendations, the Crown has neglected to explain how the problems identified by the Tribunal would be solved by its chosen approach.

It must also be noted that the claimants were not satisfied with some of the Tribunal recommendations, particularly relating to Waiuku and Maioro (numbers 9 and 12) and the *kaitiaki* status of *tangata whenua* (number 5). This has not assisted negotiations between the Crown and the *tangata whenua* to seek resolution of those problems.

Some of the recommendations involve significant changes to current environmental management, particularly number 3 concerning the restoration of the Manukau Harbour. While a Manukau Harbour Strategy has now been completed as recommended, implementation will take many years and the cooperation of some 20 agencies, and it will take years before the restorative effects of present changes can be seen. The Crown has chosen to monitor the implementation of this Strategy by local authorities, rather than taking a more proactive role. It could be questioned whether the Crown is fulfilling its responsibility for 'active protection' under the Treaty.

Recommendations 2 and 6 (exclusive fisheries) would have provided interim relief to claimants until the health of the harbour's ecosystem had been restored. They would have required relatively little administrative effort to implement, but appear to have been impeded by departmental reticence to resolve the problems identified by the Tribunal.

Recommendations requiring legislative change (numbers 1, 7, 8 and 13) remain outstanding, but these may be covered in current reviews of resource management and local authority legislation.

Coordination efforts by the Treaty Issues Unit of the Department of Maori Affairs (initiated in November 1988 when the Unit was set up, nearly three years after the recommendations were issued) has been encouraging effective action by departments on the Manukau recommendations, and papers are expected to go to Ministers on the outstanding recommendations by the end of 1988.

1. 2. 4 Te Reo Maori claim

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

The Crown partially implemented recommendations 1 and 2 through passage of the Maori Language Act 1987. This legislation was introduced in anticipation of (rather than in response to) the Tribunal's findings. Although it set up Te Taura Whiri i Te Reo Maori (the Maori Language Commission) it did not fully implement recommendation 1 concerning the use of Maori in official business.

The recommendations relating to education and bilingualism in the state services (numbers 3 and 5) have not been implemented, and in the absence of other evidence it has been assumed that these recommendations have been rejected by the Crown. The Crown has not explained how its alternative approaches may achieve the same or better result in actively protecting the Maori language.

Recommendation 4 relating to broadcasting policy was not worded strongly ('regard be had to'). Although broadcasting policy changes to date are not sufficient to actively protect the Maori language, they have followed the wording of the recommendation.

1. 2. 5 Waiheke claim

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

Sixteen months after the Crown received the Tribunal's recommendations, there has been no visible result or decision on the principal recommendation to return the Waiheke lands (number 1). For 11 months of this period the Treaty Issues Unit was in full operation.

The $5,000 to cover costs of an abandoned hearing (number 3), which should have been an automatic reimbursement by the Justice Department, was finally paid 15 months after the recommendation was made.

The recommendation relating to tribal land endowments generally (number 2), was so mildly worded by the Tribunal that a measurable Crown response is unlikely to emerge.

1. 2. 6 Orakei claim

The Tribunal found that the Crown, through acts and omissions contrary to the Treaty, caused Ngati Whatua to be virtually landless. The Tribunal recommended that certain lands be returned and a tribal endowment be granted to assist in tribal rehabilitation. The Tribunal also referred to the Attorney-General a consideration of pardons and remissions of fines for the protestors who sought to bring these injustices to the attention of the Crown.

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

The tribal endowment has been paid, and the required legislative amendments required to implement the majority of the recommendations are being drafted and are expected to be introduced by the end of 1988.

During the 10 months that transpired between the lodging of the recommendations with Ministers and payment of the endowment to Ngati Whatua, the Treaty Issues Unit was actively pursuing resolution of the recommendations as a priority issue.

1. 2. 7 Muriwhenua claim (interim reports on SOEs and fishing)

(*Note:* the Tribunal has not yet reported on the land issues associated with the Muriwhenua claim, except concerning transfer of Crown lands to SOEs).

The Tribunal found that the Treaty guaranteed the ownership of fisheries to Maori in the same way as land, and the Crown assumption of control over the fisheries without prior negotiation with Maori was contrary to the Treaty. The Tribunal recommended that current negotiations between Crown and Maori on fisheries be continued in good faith, and the costs of Maori negotiators be met by the Crown. In relation to land, the Tribunal recommended that transfers of Crown land to SOEs not be made until Maori interests in the land could be protected.

The Crown response to the interim report on transfer of Crown land to SOEs was prompt, and resulted in the landmark Maori Council case before the Court of Appeal. The Crown response to the two subsequent memoranda on the ITQ fishing system was nil, until forced by restraining orders from High Court. Negotiations took place between Crown and Maori, but did not reach agreement. The Maori Fisheries Bill introduced in September 1988 contained some matters agreed upon between parties, but also went much further in introducing matters not under negotiation (i. e. freshwater fisheries), proposing a restrictive allocation of quota, and, most significantly, proposing that Maori rights of access to Courts and the Waitangi Tribunal in regard to fisheries be repealed. A recent proposal by the Crown suggested that Maori rights of access to Courts and Tribunal would be retained, but the total Maori quota share would be reduced from 50 per cent to 10 percent. At the time of writing the issue continues to be debated and the response of the House to the Bill remains to be seen.

1. 3 Environmental effects of Crown response:comparison of three claims concerning water pollution

The Motunui, Kaituna and Manukau claims are briefly compared in this section as an example of environmental affects from Crown action or inaction in response to Tribunal recommendations.

These three claims had in common the following:

(a) degradation of water quality and ecosystem health and depletion of harvestable species, according to both Pakeha science and Maori observation;

(b) degradation of purity and *mana* of water and fisheries resources by discharge of wastes to water, according to Maori spiritual concepts; and

(c) as a combination of (a) and (b) prejudicial effect on tribal fishing rights guaranteed under Article II of the Treaty.

In each case, the Tribunal recommended solutions that would address all three problems noted above. These proposed solutions were arrived at by taking full and balanced account of the principles of the Treaty, the degree of prejudice suffered or expected to be suffered by the tribe, and the practical obstacles to redress. Details on environmental degradation and Tribunal findings and recommendations for these three claims can be found in Appendices A, B and C.

The Crown response has been varied:

Motunui

The recommendations relating to the Motunui outfall have been implemented, preventing pollution of those reefs, but the recommendations concerning the Waitara outfall, designed to reduce existing pollution, have languished in bureaucratic procedure for over five years. The Waitara reefs have continued to be polluted over the intervening years.

Kaituna

The recommendations of the Kaituna claim relating to alternative methods of disposal for the sewage from the Rotorua district are being implemented. Had the nutrient pipeline been proceeded, with Ngati Pikiao would have been prejudicially affected and the pollution merely exported from one body of water to another. With Crown support for the alternative of land application of sewage, the nutrients will be absorbed instead in Whakarewarewa Forest, ultimately removing nutrients from Lake Rotorua, preventing culturally offensive pollution, and enhancing a harvestable resource.

Manukau

The enormity of the Manukau itself and the complexity of contributing sources of pollution indicates that remedies will take some time to take effect, and this has encouraged a cautious approach by the public authorities to whom the Crown has delegated responsibility. However, the Tribunal's recommendations also offered more easily addressed interim relief for the tribes for the prejudicial effects on their fisheries resources, which the Crown could implement quickly: cessation of commercial fishing in certain areas and allocation of exclusive fishing zones. Over three years after these recommendations were given, however, neither these remedies nor effective alternatives have been implemented, while slow progress has been made on the Action Plan to clean up the harbour.

2 THE PRINCIPLES OF THE TREATY OF WAITANGI

2.1 Overview

(*Note:* for more information see Appendices J to M)

> *"The essence of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretation out of place."*
> *(Waitangi Tribunal, 1987)* [1]

> *"... much of the contemporary focus is on the spirit rather than the letter of the Treaty, and on adherence to the principles rather than the terms of the Treaty. Regrettably, but reflecting the limited dialogue there has been on the Treaty, it cannot yet be said that there is broad general agreement as to what those principles are."* *(Justice Richardson, 1987)* [2]

Both the Tribunal and the Courts have agreed that the Treaty is a living document and it should be interpreted as such, with evolving, not fixed principles. However, it is a fundamental constitutional rule that the law should be both clear and accessible: people should be able to understand their rights and duties under the law and therefore it is important that there are clearly identifiable principles or guidelines by which all can know the Treaty.

A Cabinet decision of 23 June 1986 [3] directed that all future legislation referred to Cabinet at the policy approval stage should draw attention to any implications for recognition of the principles of the Treaty, that departments should consult with appropriate Maori people on matters affecting application of the Treaty, and the financial and resource implications of recognising the Treaty should be assessed whenever possible in future reports.

The Environment Act 1986, Conservation Act 1987, and State-Owned Enterprises Act 1987 refer to the 'principles of the Treaty of the Waitangi'. The Long Title of the Treaty of Waitangi Act 1975 also refers to the 'principles' of the Treaty, and in fulfilling its functions, the Waitangi Tribunal is to 'have regard to' the two texts of the Treaty in the First Schedule to the Act.

The principles of the Treaty have greater status under statute than the text of the Treaty itself. Under existing law, the Treaty principles will ultimately be defined by the Court of Appeal where the principles are noted in a statute the Court is called on to interpret. This process has begun with the New Zealand Maori Council case. Justice Cooke noted that although much weight should be given to the opinions of the Waitangi Tribunal, those opinions were not binding on the Courts. [4] Justice Somers noted that Court decisions were binding on the Waitangi Tribunal. [5]

The Waitangi Tribunal has the existing expertise and experience to define principles, but under present law neither the Courts nor the Crown are obliged to agree with or follow the recommendations of the Tribunal. While the Tribunal's membership reflects both Treaty partners, the Courts as yet do not.

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1 *ORAKEI,* p. 149

2 NZ Court of Appeal, 1987, Richardson J, pp. 13-14

3 Cabinet Office Circular, CO(86)10

4 NZ Court of Appeal, 1987, Cooke P, pp. 29-30

5 NZ Court of Appeal, 1987, Somers J, pp. 12-13

Definitions of the principles of the Treaty have been expressed by the Waitangi Tribunal, the Court of Appeal in the 1987 New Zealand Maori Council case, the New Zealand Maori Council and the Crown in that same case, and the Royal Commission on Social Policy. The conclusions of the Tribunal and the Court of Appeal are summarised in Table 2, and these together with the other definitions are discussed in greater detail in Appendices J to M.

Until such time as the Treaty principles are more clearly defined, the Parliamentary Commissioner for the Environment will apply those principles listed in Table 2 in fulfilling her functions under the Environment Act.

2. 2 *Partnership and Tribal Rangatiratanga*

The one principle of the Treaty that comes through most clearly is 'partnership', yet the practical meaning of this partnership has yet to be fully explored. Some may view this as a 50:50 partnership, others as a 80:20 partnership, still others as increased consultation but no change in who makes decisions or reaps the benefits.

How environmental management decisions are made and by whom affects the type of decision made and ultimately the way in which humans act within ecosystems. Regardless of the form envisioned, implementation of partnership under the Treaty implies some greater share by Maori people in decision-making.

In the existing situation, one Treaty partner (the Crown) holds all the decision-making power. The other Treaty partner (the Maori people) may make representations to the Crown directly, or indirectly through the Waitangi Tribunal or Parliament, and the Crown may choose whether and how it will respond. The Crown reserves the right to govern, as guaranteed by Article I of the Treaty. However, this must be balanced by the tribal *rangatiratanga* guaranteed by Article II.

'Te tino rangatiratanga' guaranteed in Article II of the Maori text of the Treaty implies tribal control of tribal resources. At present the Crown seeks to control these resources. Two Treaty principles defined by the Tribunal are particularly relevant here:

(a) *'Tino rangatiratanga'* includes management of resources and other *taonga* according to Maori cultural preferences; and

(b) The courtesy of early Crown consultation with Maori people and the need for the Crown to assist in establishing a legally recognisable form of *rangatiratanga.*

The current Local Government and Resource Management Law Reform programmes present a crucial opportunity for affirmative action to be taken to redress imbalances in decision-making relating to environmental management. The August 1988 discussion document on Resource Management Law Reform noted that guarantees of *'te tino rangatiratanga'* in Article II of the Treaty implied a role for Maori tribal bodies in the management of natural resources:

> *"Whatever level of government is involved, decision-makers must be accountable and responsive to the needs of those affected by decisions. The structure of government (who is represented and how) is especially important if Maori issues and perspectives are to be recognised. It has been suggested that iwi (tribal) authorities should have decision-making powers. Maoridom have stressed there must be adequate tribal representation on decision-making bodies."* [7]

7 Ministry for the Environment, August 1988, pp. 15, 22

Table 2: Summary of Principles of the Treaty of Waitangi defined by the Waitangi Tribunal and the Court of Appeal

Waitangi Tribunal (see Appendix J)	**Court of Appeal** (see Appendix K)
THE ESSENTIAL BARGAIN The exchange of the right to make laws for the obligation to protect Maori interests. (1)	The acquisition of sovereignty in exchange for the protection of *rangatiratanga.* (1)
PARTNERSHIP The Treaty implies a partnership, exercised with utmost good faith. (2) The Treaty is an agreement that can be adapted to meet new circumstances. (3) The needs of both Maori and the wider community must be met, which will require compromises on both sides. (4) The courtesy of early consultation. (9) The principle of choice: Maori, Pakeha, and bicultural options. (12)	The Treaty requires a partnership and the duty to act reasonably and in good faith (the responsibilities of the parties being analogous to fiduciary duties). (2) The freedom of the Crown to govern for the whole community without unreasonable restriction. (3) Maori duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable cooperation. (7)
ACTIVE PROTECTION The Maori interest should be actively protected by the Crown. (5) The granting of the right of pre-emption to the Crown implies a reciprocal duty for the Crown to ensure that the *tangata whenua* retain sufficient endowment for their foreseen needs. (6) The Crown cannot evade its obligations under the Treaty by conferring its authority on some other body. (7) The *'taonga'* to be protected includes all valued resources and intangible cultural assets. (11)	The duty of the Crown is not merely passive but extends to active protection of the Maori people in the use of their lands, and other guaranteed *taonga* to the fullest extent practicable. (4) The obligation to grant at least some form of redress for grievances where these are established. (5)
TRIBAL *RANGATIRATANGA* The Crown obligation to legally recognise tribal *rangatiratanga.* (8) *Tino rangatiratanga'* includes management of resources and other *taonga* according to Maori cultural preferences. (10)	Maori to retain chieftanship *(rangatiratanga)* over their resources and *taonga* and to have all the rights and privileges of citizenship. (6)

Note: This wording is a summary from original sources. Numbering refers to text in Appendices J and K. For principles defined by NZ Maori Council and the Crown in the case before the Court of Appeal, and the Royal Commission on Social Policy, see Appendices L and M.

The Royal Commission on the Electoral System noted that although Maori social and economic objectives may be the same as or similar to those of the majority culture, the ways in which they would choose to pursue them could very well differ. They concluded that an equitable balance of socio-economic ends and cultural means

> *"... cannot be satisfactorily achieved unless the special rights and interests of the Maori people are effectively represented in the determination of public policy by representatives who are also members of the Maori community."* [8]

However, token representation will not be enough. Although it may provide an educative function in the short term, it will not resolve the imbalance unless **both** sides are willing to compromise. As noted by the Waitangi Tribunal in the Manukau report:

> *"All too easily will such bodies merely assert a 'democratic' right for the majority to outvote the minority which will perpetuate grievances and bring no better results in the future than those that have been produced in the past."* [9]

The Crown's current policy relating to Maori participation in decision-making is to

> *"promote decision-making in the machinery of government, in areas of importance to Maori communities, which provide opportunities for Maori people to actively participate, on jointly agreed terms, in such policy formulation and service delivery, and [to] encourage Maori participation in the political process."* [10]

How this might be done is still being explored, but several practical models are emerging: joint *iwi* authority and local authority management committees for specific resources,[11] local authority inclusion of *iwi* development plans in the regional planning process,[12] and eventual delegation of some service delivery programmes to *iwi* authorities.[13]

The Crown will need to recognise tribal authorities in law in order for tribal authorities to influence the management of natural and physical resources. In the past, the Crown failed to legally recognise existing *iwi* authorities, and in fact in earlier years introduced policies to put an end to tribal powers.[14] In later years, the Crown designed and imposed its own *iwi* authority structures for its own purposes.[15]

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8 Royal Commission on the Electoral System 1986, p. 87

9 *MANUKAU,* pp. 108-109

10 Minister of Maori Affairs, April 1988, p. 6, (f) and (g)

11 Being developed for Orakei reserves (John Paki, pers. comm. , October 1988)

12 Proposal for reform in Town and Country Planning Act: paper in progress, Maruwhenua, Ministry for the Environment (Shane Jones, pers. comm. , October 1988)

13 Minister of Maori Affairs, April and November 1988

14 *ORAKEI,* pp. 151-155; *MANGONUI,* pp. 47-48

15 For example, Maori Trust Boards (Maori Trust Boards Act 1955) and the New Zealand Maori Council and District Maori Councils (Maori Community Development Act 1962)

The Tribunal has noted that:

> *"The Crown, in our view, has much work to do to complete its Treaty undertakings. It must provide a legally recongisable form of tribal rangatiratanga or management, a rangatiratanga that the Treaty promised to uphold."* [16]

In recent policy initiatives the Crown is beginning to recognise the importance of *iwi* authorities as chosen by the *iwi* themselves for the representation of Maori interests. *Te Urupare Rangapu* states:

> *"The Government emphasises that iwi should define their own structures . . . . If these structues meet the criteria agreed upon by iwi and the Government, then the Government will recognise them as iwi authorities."* [17]

It is important to acknowledge that the Crown, although purporting to serve all people, is comprised predominately of Pakeha decision-makers, who for the most part are monocultural and tend to view the world within a Pakeha framework. Pakeha people dominate resource management by the Crown, as well as by local authorities and catchment boards.

Decisions affecting the environment are made for the most part by decision-makers who do not themselves fully represent the composition of the wider community. Maori people are under-represented in decision-making in terms of their numbers in the population. The mandate of the Long Title of the Environment Act, for regard to be had to 'all values' and the principles of the Treaty, cannot be adequately met until there is better representation of the whole community. No matter how well-intentioned, a Pakeha cannot adequately represent Maori interests.

It is a maxim that power will not be readily given up by those who hold it. However, benefits can be anticipated in preventing matters going to Tribunals through improved environmental management, improved environmental quality, equality for all citizens, and replacing inter-cultural tensions with understanding. A decision-maker with generosity of spirit would be expected to share decision-making power, and better reflect the principles of partnership and tribal *rangatiratanga* implicit in the Treaty of Waitangi.

2. 3 Active protection

Another clear principle to emerge is the Crown obligation to actively protect Maori interests under the Treaty. This principle will hold regardless of whether it is resource management law or policy that is under scrutiny.

Current Crown policy concerning "active protection" under the Treaty is to

> *"honour the principles of the Treaty of Waitangi through exercising its power of government reasonably, and in good faith, so as to actively protect the Maori interests specified in the Treaty."* [18]

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16 *MANGONUI*, p. 5

17 Minister of Maori Affairs, November 1988, p. 11

18 Minister of Maori Affairs, April 1988, p. 6

The matters requiring active protection under the principles of the Treaty, and therefore explicit provisions in statute and policy, include all Maori *taonga* and sufficient resource endowments to meet tribal needs, managed according to Maori cultural preferences, and protection of Maori rights and privileges of full citizenship. For example, *kaimoana* and freshwater food resources are *taonga,* and their pollution by human wastes is culturally offensive: environmental managers would need to accommodate this concern if operating under Treaty principles.

The consideration of equity (in this case allocation of tribal endowments) has in Pakeha tradition not been considered part of environmental management *per se.* It relates directly to the allocation of natural and physical resources, however, and therefore falls under the Environment Act. In the current Resource Management Law Reform, it encompasses the question of 'ownership'. Environmental managers will be required to adjust to whatever ownership/stewardship regime is resolved, but as noted in the previous section, it is crucial to consider who the environmental managers will be.

2. 4 *Implications for environmental management*

> *"The desire to 'balance' the Treaty with other competing sets of priorities may, in part, reflect a misunderstanding of its purpose and provisions. The Treaty is undoubtedly a bill of rights for the Maori people. It is also a charter of power for the government. In its essential provisions it is not unbalanced. "* [19]

'Environmental management' can be considered as the management of human activity within ecosystems. This of necessity involves management of human use of natural and physical resources in such a way that the values and needs of people and the integrity of ecosystems are considered in a holistic sense.

The Long Title of the Environment Act 1986 instructs that 'full and balanced account' be given to ecosystems integrity, human values, Treaty principles, sustainability of resources, and needs of future generations. The operational definition of 'full and balanced' the Commissioner has adopted requires that management decisions must be, insofar as possible, in harmony with each of these five categories.

The Long Title of the Environment Act reflects internationally recognised principles of good environmental management. Long-term survival and quality of life for people depends on the integrity and health of ecosystems, and the use of resources so as to maximise long-term availability. These basic principles have been fully documented most recently by the 'Brundtland Report'. [20]

A basic requirement for good environmental management is full information, so that informed choices can be made. Another essential requirement for good environmental management is a holistic view of the environment, that recognises the interconnectedness and interdependency between people and natural and physical resources over time. Serious errors of judgement in environmental management have been committed when decisions have been made on a resource-by-resource basis and wider or long-term impacts have not been considered. This has been partly due to lack of adequate information, but also in large part due to a mindset that separates humans from the ecosystem that sustains them and believes, for example, that resources are endlessly exploitable or that wastes can always be sent 'away'.

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19 Officials Working Group 1988, p. 12

20 World Commission on Environment and Development, 1987

The traditional Maori view of the environment is holistic. [21] While it is recognised that not all Maori people hold to traditional Maori views, and that some Pakeha hold strongly to holistic views that in many ways are similar to traditional Maori views, the predominant approaches of the two different cultures have been markedly different.

The Pakeha exploitative and scientific approach, which views and manages the environment in a piecemeal fashion, has brought great technological innovation, but it has also brought ecological disasters such as grossly polluted waterways, acid rain, nuclear wastes, the 'greenhouse effect', and widespread extinction of species. A holistic approach offers promise to reverse these trends.

A common theme in the Commissioner's discussions with Maori people about environmental management is 'respect and protect what is there, restore what is lost'. There is considerable common ground here on which Maori and Pakeha can together develop a mutually satisfying environmental management strategy.

Finding common ground will require compromises from both sides, not just one-way. Historically, Maori people have been forced to express their concerns entirely within the Crown/Pakeha framework, which often meant their concerns were not adequately addressed, or only addressed when they fit in with the 'established' (i. e. Crown/Pakeha) way of doing things.

The Crown/Pakeha side needs to respect the depth, difference, and validity of Maori values. For their part, Maori people have observed for decades the advantages and disadvantages of the 'established' Crown/Pakeha way of doing things. Few Pakeha decision-makers, however, have been able to consider the Maori way of doing things. Expression of alternative approaches, which address all of the matters in the Long Title of the Environment Act, is needed.

There is currently deep distrust among Maori people about the way natural and physical resources have been managed by the Crown for the last 148 years. It will be deeds, not mere talk, which demonstrate whether the Crown/Pakeha side should now be trusted and respected.

Regardless of culture, Maori and Pakeha people share the same environment, and their futures are therefore linked. The Tribunal has amply demonstrated examples of Crown actions which have denied Maori people access to sufficient natural and physical resources for their needs and contributed to the pollution or destruction of natural resources. Environmental management with a common future in mind requires Pakeha and Maori to listen and learn from each other, a more equitable share in resources and decisions over resources, and careful attention to the health and sustainability of the ecosystems that all people depend on for survival and quality of life.

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21 Douglas 1984, Royal 1988

3 CHANGES NEEDED TO IMPROVE CROWN REGARD FOR THE PRINCIPLES OF THE TREATY

3. 1 Crown response to Waitangi Tribunal recommendations

In order to understand the practical implications of environmental management that fully acknowledges principles of the Treaty, the advice of the Waitangi Tribunal in connection with environmental management needs to be given full attention. To fulfil its obligations of partnership and active protection under the Treaty, the Crown should respond to Tribunal reports reasonably and in good faith, and ensure that there is some form of redress where valid grievances under the Treaty have been shown.

The first question to answer is whether a breach of the Treaty has occurred, and therefore whether the Crown is obliged to provide some form of redress. The second question is whether the redress recommended by the Tribunal is deemed appropriate or affordable.

The general public should not be expected to digest lengthy Tribunal reports, nor should the media be expected to undertake Crown responsibilities. What the public has heard, out of context, is that certain recommendations have been made, and, again out of context and at some later date, that some recommendations are to be enacted, or that some claimants are angry because recommendations haven't been addressed. Full information and advice from the Crown is necessary for the public to make informed evaluations of the justice of Tribunal findings and the proposed remedial measures. To date the Crown has been remiss in its educative responsibilities.

The Crown has also been remiss in not keeping the public informed of the reasons for choosing alternative redress from that recommended by the Tribunal. Rather than publicly stating that the recommendation is as yet under study or unacceptable, it has remained silent, and not only provided no explanation, but in effect no redress. If a claim of grievance is accepted, some form of redress should be found and implemented and the reasons for varying from the Tribunal recommendations fully and promptly explained.

The Crown in 1988 stated that one of its policy objectives in relation to the Maori affairs area was to

> *"deal fairly, justly and expeditiously with breaches of the Treaty of Waitangi and the grievances between the Crown and Maori people which arise out of them."* [1]

As well as react to Tribunal recommendations, the Crown must also inform the public of the history and reasoning behind the findings of the Tribunal.

The Parliamentary Commissioner for the Environment recommends to the Prime Minister, the Minister of Justice and the Minister of Maori Affairs that following the release of Tribunal findings the Crown should advise the public, in prompt and succinct form:

(a) the nature of the claim and the findings of the Tribunal;

(b) whether the Crown agrees with the Tribunal's assessment of past Crown breaches of Treaty principles;

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1 Minister of Maori Affairs, April 1988, p. 6

(c) the recommendations for redress conveyed by the Tribunal;

(d) the form of redress to be granted by the Crown;

(e) if this redress differs from that recommended by the Tribunal, why the Crown has chosen this path;

(f) the timetable for implementation of redress.

(*Note:* information on (d) through (f) will likely be available later and constitute a separate press release. If so, a summary of the information in (a) through (c) should be re-issued at that time).

For Tribunal reports already received (Motunui, Kaituna, Manukau, Te Reo Maori, Waiheke, Orakei, Muriwhenua) where Tribunal recommendations have not been fully implemented, the Crown should follow this same formula where it has not already done so.

3. 2 Coordination of Crown response

Most environmental management decisions relating to the principles of the Treaty and many recommendations of the Waitangi Tribunal extend over the responsibility of more than one department. Therefore, effective coordination of departmental action is essential in planning and exercising environmental management which takes full regard of the principles of the Treaty.

Until the establishment of the Treaty Issues Unit in the Department of Maori Affairs and its coordination of departmental responses beginning in 1987, there was no clear responsibility for ensuring prompt and coordinated responses to Treaty issues or Tribunal recommendations, either in the form of advice to Ministers, or in the implementation of Ministerial decisions. Prior to 1987, coordination efforts were *ad hoc.*

The Treaty Issues Unit suffered initial delays in obtaining staff and resources. The Unit also had problems in overcoming an apparent reluctance by officials to accept responsibility for assisting a prompt response to Tribunal recommendations. As noted in the Department's 1987/88 Annual Report, the Treaty Issues and Maori Land Liaison Section:

> *". . . faced problems with other Government Departments, both in attempting to ensure that they consider Waitangi Tribunal recommendations and that they consult the Department when formulating policy."* [2]

The Treaty Issues Unit has now set up a mechanism that has the capability, given adequate resources and departmental status, of achieving prompt, coordinated and full departmental response. It is highly desirable that the Unit be given the necessary resources and status and be carried over when the Department of Maori Affairs is restructured into a Ministry.

In relating the principles of the Treaty to environmental management decisions generally (whether or not addressed by the Tribunal), the Maruwhenua unit in the Ministry for the Environment has a policy advice role to play. To date, there has been coordination and cooperation on specific issues between Maruwhenua and the Treaty Issues Unit.

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2 Report of the Department of Maori Affairs and the Board of Maori Affairs and the Maori Trustee for the year ended 31 March 1988, p. 12

At the time of writing, a Treaty Issues Advisory Unit is also being set up in the Department of Justice. In contrast to the Treaty Issues Unit in the Department of Maori Affairs, it appears that the Justice Department unit is to have a greater focus on coordinating broad policy issues and on the Crown case before the Waitangi Tribunal and the Courts. Insufficient information is available at this time to ascertain whether this and the Treaty Issues Unit will be given equivalent resources and status, and what degree of cooperation, duplication or conflict may exist between them.

The Parliamentary Commissioner for the Environment recommends to the Prime Minister, the Minister of Justice and the Minister of Maori Affairs that the Treaty Issues Unit in the Department of Maori Affairs (or equivalent) should be retained and given adequate resources and status to coordinate prompt interdepartmental response to Tribunal findings and recommendations.

3. 3 Public education on Treaty issues

Ultimately the priority given to finding proper redress for breaches of the Treaty is a matter of political choice. A lack of progress on addressing recommendations points to Ministers of the Crown considering other matters to be higher priority, and directing their departments accordingly, and also to departmental advice not convincing Ministers to alter these priorities. It reflects a lack of political will and a lack of concern or understanding among departmental advisors. Ultimately it also reflects priorities held by the mainstream electorate which the politicians respond to.

Departmental advisors generally have not had the same sense of urgency for redress of Treaty breaches as claimants or others who fully understand the issues. Departmental staff, like the wider community, have tended to be insulated from such issues and unaware of Maori concerns and Crown obligations under the Treaty. In recent years, however, bicultural and cross-cultural understanding workshops have begun to increase knowledge of these issues among public servants, and the public at large, slowly contributing to more informed debate and a reordering of priorities.

In preparing this report, the principal theme that emerged was the need for wider public education on Treaty issues. As an artifact of New Zealand's history and the curriculum of the school system, the great majority of New Zealanders are unaware of their history, the Treaty texts, modern-day implications, and Crown-Maori interactions over the years.

The establishment of the Waitangi Tribunal has allowed scholarly and bicultural investigation of specific claims and helped to bring information on Treaty issues into the public view, and the activities of various pressure groups have helped to keep the issue in the media. However, the general public remains largely unaware of the essential basic information. The detail of Tribunal reports is inaccessable to the majority of the public, and Crown press releases have been unhelpful in explaining the historical background.

In the last three years the Crown has taken significant steps toward resolving breaches of the Treaty: expansion of the Tribunal's purview to 1840, insertion of 'the principles of the Treaty' into some new statutes, and most recently prompt reaction to the Orakei and Muriwhenua fishing reports from the Tribunal. However, as a member of the Opposition stated during the debate in the House on the Muriwhenua fisheries claim, the Crown needs to do a better job of educating the public:

> *"What must the Government do? Above all, it must realise that it has come so far so fast that it is way out in front of the people at large. They do not understand. Those members should go back to the electorate, they should talk to the people*

in the street. They have no idea about the matter. Many people in the House would have no idea, because for most of us our education ignored New Zealand history.

The Government cannot ignore the people who disagree. They are citizens. They have views. The Government has to convince them". [3]

The need for public education on Treaty issues has been noted by many others, including the Royal Commission on Social Policy,[4] the Court of Appeal,[5] members and staff of the Waitangi Tribunal, [6] the past president of Federated Farmers,[7] and the Crown negotiators in the Joint Working Group on Maori fisheries. [8]

Providing a balanced picture to the wider public will be a major undertaking and will not just happen without extensive (and expensive) public education. Most of the responsibility rests with the Crown, which has the resources and has the obligation to redress past breaches of the Treaty. It is the Crown's responsibility to initiate action.

The Parliamentary Commissioner for the Environment recommends to the Prime Minister and the Ministers of Justice, Maori Affairs, Education, and Immigration that the Crown should as a matter of urgency financially support and expand education efforts to present to the public a balanced history of the Treaty, including information on the Treaty texts, principles defined to date, and practical modern implications; and that this education campaign should be aimed at all adults, school children, and immigrant citizens.

3. 4 Policy and management implications of Treaty principles

An analysis of principles defined to date by the Waitangi Tribunal, Court of Appeal and others suggests that the central principles of the Treaty are 'partnership', 'active protection', and 'tribal *rangatiratanga*' (see Section 2 for more detail).

Management of the environment cannot be separated from the system of control; how the decisions are made, by whom, and on what criteria. The dynamics of how decisions are made affects the type of decision that is made, which directly affects the natural and physical resources around us; these changes, in turn, affect how we inter-relate with one another in the social environment.

Participation of both Maori and Pakeha in decision-making that affects both parties is an essential part of the partnership and tribal *rangatiratanga* implied by the Treaty. The principle of active protection requires that particular attention be given, in both laws and policy, to Maori rights as guaranteed by the Treaty.

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3 Simon Upton MP, Hansard, First session 42nd Parliament, 15 June 1988, p. 4397

4 Royal Commission on Social Policy, April 1988, vol. II pp 76-80 and June 1988, p. 17

5 NZ Court of Appeal, Richardson J, p. 12

6 Judge McHugh, Christchurch Press, 1 December 1987, Gisborne Herald, 2 August 1988; W. Gardiner, pers. comm. October 1988; also Evening Post, 9 August 1988

7 Planning Council, 1988, p. 13, Sir Peter Elworthy, keynote address to "Pakeha Perspectives on the Treaty"

8 Ministerial Sub-committee on Maori Fisheries, 1988, p. 10

The Parliamentary Commissioner for the Environment recommends to the Prime Minister, and Ministers of Environment, Local Government, Justice and Maori Affairs that the Crown recognise generally, and particularly in the context of the current Resource Management and Local Government Law Reform programmes, that:

(a) the implementation of the Treaty principles of partnership and tribal *rangatiratanga* requires a change in the existing power equation between the Treaty partners, giving *tangata whenua* an increased share in actual decision-making power at both central and regional levels; and

(b) the implementation of the Treaty principle of active protection requires proactive initiatives for environmental management in both statute and policy to:

  i) protect Maori *taonga* according to Maori cultural preferences; and

  ii) provide rehabilitation or compensation for mismanagement of natural resources where valid Maori grievances under the Treaty have been established.

3. 5 Changes in Crown administration for the management of natural and physical resources

As addressed in Section 3. 3, the knowledge of public servants on Treaty issues parallels that of the larger community, and the same holds true for officials' understanding of Maori values on environmental management. It will take time to reverse the effect of decades of education which omitted information on the Treaty and the Maori point of view, and a public education programme is needed urgently.

Education of existing public servants is essential, but it is only one component. Agents of the Crown must also be held accountable for ensuring that the principles of the Treaty of Waitangi are upheld in all Crown activities, and the composition of the public service must become more representative of the Maori people.

In the discussion document *He Tirohanga Rangapu,* the Crown stated:

> *"The Government recognises that mainstream departments and agencies are not responsive enough to the needs of Maori people and communities. The main reason for this is that these organisations are predominantly monocultural in outlook and personnel. This must be changed . . . The keys to change lie in commitment and leadership."* [9]

In the subsequent policy document *Te Urupare Rangapu,* the Crown stated:

> *"The Government believes that all its agencies must accept full and proper responsibility for Maori people and communities, and for Maori values and issues . . . .*
>
> *The Government acknowledges that its agencies must rouse themselves and respond in a definite and positive way to the needs, concerns, and aspirations of Maori people. It accepts that if there is no genuine and obvious change, Maori people and communities will continue to be disadvantaged by the system."* [10]

This policy document presented 20 strategies for improving the responsiveness of Crown agents to Maori concerns. [11] The principles of the Treaty were explicitly addressed in five of these 20 strategies:

> " - *The ministry [of Maori Affairs] will develop a set of criteria to help government agencies take into account the principles of the Treaty of Waitangi when they develop policy proposals.*
>
> - *The ministry will review all policy proposals from government agencies, and will make sure these proposals are consistent with the principles of the Treaty of Waitangi and the Government's objectives in the Maori Affairs area.*
>
> - *The Cabinet Office will be responsible for ensuring that no new policy is considered by Ministers unless the criteria developed by the Ministry of Maori Affairs have been applied.*

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9 Minister of Maori Affairs, April 1988, p. 14

10 Minister of Maori Affairs, November 1988, p. 19

11 Ibid. , pp. 19-22

- *The success of all government policies will be determined by the extent to which they reflect the principles of the Treaty of Waitangi, and specifically meet the Government's objectives in the Maori Affairs area.*

- *Government agencies will be required to work the principles of the Treaty of Waitangi into their corporate plans."* [12]

These policy initiatives may not have as great a priority in corporate planning and resource allocation as would statutory requirements to act in accordance with the principles of the Treaty. Statutory amendment could ensure that Crown agents could be held accountable in this regard.

In the existing departmental structure, there are several Maori advisory units. The most visible of these are the Treaty Issues Unit in the Department of Maori Affairs, the Treaty Issues Advisory Unit in the Department of Justice (soon to be established), Maruwhenua in the Ministry for the Environment, and Te Ohu Whakatupu in the Ministry of Women's Affairs. There are also Maori or cultural advisory units in the Departments of Education, Social Welfare, and Labour, and a Maori Advisor in the Departments of Conservation (proposed) and Health. [13]

All of the above-mentioned units and bodies are without decision-making power, and advisory only. This is in keeping with the principal implication of Article I of the Treaty (the power of the Crown to govern), but not in keeping with those principles implied by the Treaty as a whole (partnership, active protection and tribal *rangatiratanga*). Decisions on departmental management are made by the Senior Executive Service under the State Sector Act 1988. Policies to ensure a balance in representation of both Treaty partners in the Senior Executive Service would be in keeping with the principles of the Treaty.

The proposed policies in *Te Urupare Rangapu* would assist in encouraging Chief Executives to heed the advice of in-house groups and involve Maori advisors in policy development from the outset. Inclusion of the principles of the Treaty in relevant legislation would give a statutory force to these policies.

In order to pursue in good faith the partnership implied by the Treaty, some departments, including the Ministry for the Environment and the Department of Conservation, have begun looking at their structures and devising ways to move toward bicultural decision-making. The assistance of in-house 'ginger groups' and outside consultative groups has helped management and staff address institutional racism and the implications of the principles of the Treaty. These initiatives are extremely valuable, and should be encouraged to continue throughout government. They are not explicitly addressed in *Te Urupare Rangapu,* and require the support of Chief Executives to succeed.

The Parliamentary Commissioner for the Environment recommends to the Prime Minister and the Ministers of State Services, Environment, and Maori Affairs that the Crown

(a) encourage departmental initiatives to expand officials' understanding of Treaty issues and Maori values and to design bicultural decision-making structures;

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12 Ibid. , p. 20

13 Parliamentary Order paper, 22 June 1988, pp. 1761-1762

(b) **amend the State Sector Act 1988 to require Chief Executives to conduct all Crown business so as to act in a manner that is consistent with the principles of the Treaty of Waitangi; and**

(c) **amend resource management legislation so as to ensure that natural and physical resources are managed in a way that is consistent with the principles of the Treaty of Waitangi.**

3. 6 Independent overview of Crown action on Treaty issues

Until passage of the Treaty of Waitangi (State Enterprises) Act 1988 the collation of information on the Crown response to Waitangi Tribunal advice and reporting to Parliament were not the statutory responsibility of any department or agency of the Crown. Over 13 years of Tribunal activity and five years of Tribunal recommendations, there was no clear monitoring and reporting function. The Tribunal reports to the Minister of Maori Affairs, but he was not until this year required to report to Parliament or the public on these matters.

In the absence of organised monitoring to give results on a regular basis, it is impossible to understand fully which breaches of the Treaty have been redressed and which remain unresolved. Likewise it is not possible to clearly ascertain whether environmental management advice in harmony with Treaty principles, as given by the Tribunal, is being implemented. Public understanding of Treaty issues suffers, promoting uninformed, polarised, or inappropriate public debate. For example, some people have claimed the Crown has done nothing, and others have claimed the Crown has gone too far: both of these views could be shown to be in error with the benefit of the data now collected in this report.

With the new section 8I in the Treaty of Waitangi Act 1975, although improved information will likely be available on a regular basis, it must be noted that there is an advantage in a monitoring function resting with an independent agency, as well as with the Minister responsible for the Crown response. The principle behind the establishment of the Controller and Auditor-General, the Ombudsmen, and the Parliamentary Commissioner for the Environment should apply to the overview of Crown adherence to the principles of the Treaty of Waitangi. As the law stands now, none of these existing Parliamentary officers has a clear mandate to overview Crown performance in this area. The closest would be the Parliamentary Commissioner for the Environment, but with a restricted budget and a very broad mandate, scrutinising Crown adherence to the principles of the Treaty in environmental management must compete with many other priorities.

The Royal Commission on Social Policy, after extensive consultation and research, resolved that ultimately the necessary safeguard relating to honouring of the Treaty was its entrenchment as a constitutional document. As an interim measure, they recommended a **Treaty of Waitangi Commission** which could:

> *"... audit existing and proposed legislation and the policies and practices of state agencies. It should be set up to recognise the roles of federating Maori organisations, tribal authorities and the principle of partnership."* [14]

In making this recommendation, the Royal Commission considered that existing independent review bodies would not, "given their current structures and priorities", be able to "give consistent attention to the implications of the Treaty to the full range of social and economic policies". [15]

14 Royal Commission on Social Policy, June 1988, p. 17

15 Royal Commission on Social Policy, April 1988, Vol. II pp 62-63

A number of models were discussed in the preparation of this report. In summary they include:

1 RECOMMENDATORY POWERS ONLY

(a) A **TREATY OF WAITANGI COMMISSION,** as noted above, or a Treaty of Waitangi Commissioner with adequate support staff.

(b) A **MAORI OMBUDSMAN,** reporting to Parliament attached to the Office of the Ombudsmen, serving not only to investigate Maori grievances against the actions of Crown departments, statutory boards, and local government, but also to monitor the Crown's performance in dealing with recommendations of the Waitangi Tribunal.

(c) Continued monitoring by the **PARLIAMENTARY COMMISSIONER FOR THE ENVIRONMENT,** with the addition of another Parliamentary appointment and/or staff with that particular mandate to enable continual monitoring.

(d) A **MAORI CABINET/RUNANGA** to ensure executive decisions reflect the principles of the Treaty. [16]

(e) A **STANDING COMMITTEE OF PARLIAMENT** to oversee Treaty issues. [17]

2 LEGALLY ENFORCEABLE STATUS

(a) Powers of a court given to the **WAITANGI TRIBUNAL.**

(b) **ENTRENCHMENT OF THE TREATY AS A CONSTITUTIONAL DOCUMENT** as recommended by the Royal Commission on Social Policy.

(c) A **SECOND HOUSE OF PARLIAMENT,** to provide equal representation of the two Treaty partners. [18]

A combination of more than one of these could give greater assurance that the terms and the principles of the Treaty are adhered to by the Crown.

Regardless of the options chosen, the following general principles would be important to follow:

1 independent of department or Ministerial control;

2 reporting directly to Parliament and to the public, and charged with giving remedial advice;

3 functions clearly defined, and adequately resourced to to the job.

It is important that both Treaty partners are involved in making the decision on what sort of monitoring body is most appropriate and therefore a bicultural group should be set up to advise Ministers on independent monitoring options.

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16 Te Runanga Whakawhanaunga I Nga Hahi, 1988; Minister of Maori Affairs, July 1988, App G.II

17 Hon Matiu Rata; see section G. 4 in the Appendices

18 Henare and Douglas 1988, pp. 177-190

The Parliamentary Commissioner for the Environment recommends to the Prime Minister, and the Ministers of Justice and Maori Affairs that an independent body with the statutorily defined role of monitoring the Crown performance on Treaty issues be:

(a) identified with the assistance of a bicultural advisory group set up for this purpose;

(b) established; and,

(c) adequately resourced.

3. 7 Incorporation of Tribunal recommendations into current law reform

Of particular importance to the current Resource Management and Local Government Law Reform programmes are the Tribunal's recommendations for changes to the statutes under review. It is imperative that each of these recommendations be fully addressed at this time.

The Parliamentary Commissioner for the Environment recommends to the Ministers of Local Government and Environment that in the current Resource Management and Local Government Law Reform programmes, the Tribunal recommendations concerning legislative amendment be fully addressed; and if the form recommended by the Tribunal is not accepted, that public explanation be given. The Tribunal's recommendations (Motunui 3, Kaituna 2(c), Manukau 1, 7, 8 and 13) are:

(a) General:

i to bind the Crown in the same way as the private citizen;

ii to provide for combined hearings for multiple consents and uniformity between statutes;

iii to provide for assessment of the cumulative effects of development on the environment;

iv to enable the conduct of the parties to be considered by statutory consent authorities and Tribunals in orders for disclosure, discussion or research;

v to provide for the review of existing use rights in light of current standards;

vi to provide for reservation and control of Maori fishing grounds;

vii to restore the Crown's fiduciary responsibilities to *tangata whenua* under the Treaty in relation to rivers, harbours, coastal, and foreshore areas;

viii to provide for compulsory aquisition and reservation of *wahi tapu.*

(b) Town and Country Planning Act 1977:

i apply sections 3 and 102A to areas where a Maritime Plan does not exist;

ii Maritime, Regional, and District Schemes to have regard to Maori values and their relationship with natural resources;

iii bring consents under the Mining Act 1971 and Petroleum Act 1937 into general planning procedures;

iv that development levies be apportioned where *marae* and *papa-kainga* are affected by developments and an additional levy be provided where Maori fisheries or Maori cultural interests are particularly affected.

(c) Water and Soil Conservation Act 1967:

i enable Boards and Tribunals to take Maori spiritual and cultural values and Maori fishing areas into account;

ii empower Boards to control methods of waste disposal and instigate variation of existing water rights;

iii provide for review of existing water right discharges that do not meet current standards.

3. 8 Form of Waitangi Tribunal Reports

One theme which emerged in our discussions with departmental representatives, claimants, and other advisers was that the lack of a clear Crown response to the Tribunal's recommendations was in part related to the way the Tribunal had worded or presented those recommendations in the first place.

The first aspect has to do with imprecise recommendations. Recommendations that are generally or broadly worded may be difficult to implement, or easy to evade. However, the Tribunal has been making the recommendations more explicit in recent reports (compare, for example, recommendations in the Motunui and Orakei reports), and this trend should be continued.

Secondly, in the past the Tribunal's failure to provide a concise summary made the rationale behind their recommendations less accessible. The careful scholarship of the Tribunal which results in its valuable findings also results in very densely written and lengthy reports. The recent initiative of the Tribunal in producing summaries of their findings (e. g. ,in the Orakei, Muriwhenua and Mangonui reports) is commendable and should be continued. This current format will assist the Crown in providing accessible information to the public, as recommended in Section 3. 3, but the additional preparation by the Tribunal of 'popular summaries' would be even more effective.

The Parliamentary Commissioner for the Environment recommends to the Waitangi Tribunal that:

a) **in formulating its recommendations to the Crown it aims for as much precision and clarity as possible;**

(b) **the recent practice of including a summary of findings in its reports should be continued; and,**

(c) **it consider preparing 'popular summaries' for the benefit of the media and the Crown's Treaty Issues education programme.**

DEFINITIONS

CROWN - "Her Majesty in right of Her Government in New Zealand" (Crown Proceedings Act 1950, s. 2). Technically the Crown is a part of Parliament: Parliament is defined as the Sovereign in Right of New Zealand plus the House of Representatives (Constitution Act 1986, s. 14). The Crown does not include the Courts.

> "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". [1]

FIDUCIARY - of, or held or given in, trust: trustee.

HAPU - section of a large tribe.

HOLISTIC - whole, entire, interconnected: viewing the environment as a completely interconnected whole rather than a series of discrete parts that can be separated out.

HUI - meeting, assembly of people.

IWI - nation, people: used to refer to Maori tribal groupings, as in iwi authorities.

KAIMOANA - seafood: includes all edible species from salt water ecosystems.

KAITIAKI - guardian: protector; caretaker; one who watches out for or looks after. With regard to environmental management, it embodies the concept of 'stewardship' as opposed to ownership.

KAUMATUA - old man or woman, elders.

MANA - authority, control, influence, prestige, power, psychic force.

MANA WHENUA - authority or control over land, prestige from tribal control over ancestral land.

MARAE - courtyard, village common: the enclosed space in front of a *wharenui.* Also used to include the entire meeting area in a Maori community: *wharenui*, courtyard, and *wharekai* (dining hall).

PAKEHA - person of predominately European descent: applies equally to original settlers, their descendants, and subsequent immigrants of this racial extraction.

PAPAKAINGA - Maori village.

RANGATIRATANGA **(also *te tino rangatiratanga*)** - chieftainship: tribal control of tribal resources. Includes the holding of resources on a communal rather than individual basis. [2]

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1 Currie, 1953, p. 11

2 For a full discussion of the implications of *rangatiratanga*, see ORAKEI, pp. 131-135

TANGATA WHENUA - people belonging to the land: the people indigenous to a particular place. For New Zealand generally this means the Maori people, and for locations within New Zealand it means the Maori *hapu* or tribe which has traditionally inhabited there.

TANGI - to mourn: a gathering to mourn a person's death.

TAONGA - treasure or property: anything highly prized.

TAUIWI - foreign race: includes all non-Maori residents in New Zealand; Pakeha, Polynesian, Asian, Indian, and other immigrant groups.

TUPUNA - ancestor, grandparent.

WAHI TAPU - sacred place.

WHARENUI - meeting house.

ABBREVIATIONS

DOC	Department of Conservation
DOSLI	Department of Survey and Land Information
ITQ	Individual Transferable Quota (system of allocating fisheries resource)
MAF	Ministry of Agriculture and Fisheries
MFE	Ministry for the Environment
SOE	State-Owned Enterprise

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APPENDIX A - Motunui Claim

A. 1 Environmental degradation

This claim was concerned primarily with damage through pollution to Te Atiawa's traditional fishing grounds in North Taranaki in breach of Article II of the Treaty. The claim focussed on the proposed outfall to be constructed for the synthetic fuels plant at Motunui which would have resulted in further pollution of fishing reefs already damaged by effluent, particularly from the Waitara outfall.

The Tribunal noted that the greater part of the reefs used by Te Atiawa to gather *kaimoana* had been rendered unusable by pollution from a combination of various man-made outfalls along the coast and the various natural rivers and streams running into the coastal waters, with a particular impact from the Waitara Borough outfall. [1]

In commenting on the effluent from the Waitara outfall, the Tribunal noted:

> *". . . the position was graphically illustrated for us by evidence of bathers contracting boils and other skin diseases after swimming in the area, of divers emerging from the water with toilet paper and other wastes on their bodies, and of the closing of the surf riding club.*
>
> *. . . shellfish are now rarely, if ever, taken from the reefs at the mouth of the Waitara river. The elders referred to 'sick mussels' on the reefs. On the Orapa reef, once 'reserved' to service the Manukorihi marae, the mussel shells are said to be fragile, disintegrating underfoot and even crumbling in the hand.*
>
> *. . . There is a fear that the continued discharge of effluent from the Borough and Borthwicks will extend to pollute further reefs, and deny a source of seafood not only to the Maori people but to the rest of the population."* [2]

The Commission for the Environment in its submission to the Tribunal commented on the risks of bacterial and viral contamination, particularly from antibiotic-resistant bacteria, and noted:

> *". . . The filter-feeding shellfish tend to concentrate coliform bacteria and since such shellfish are often eaten raw or after minimal cooking, there is a potential public health hazard."* [3]

The Commission in its submissions commented on solutions to the problems at Waitara which could accommodate cultural concerns, and proposed separation of waste streams, land treatment, and a coordinated waste treatment and disposal policy formulated by local and regional interests. This advice was reflected in the Tribunal's recommendations.

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1 *MOTUNUI*, p. 36

2 Ibid., pp. 28-29

3 Statement of Helen Hannah Rigg Hughes (Assistant Commissioner for the Environment) on the Motunui claim to the Waitangi Tribunal, October 1982, pp. 2-3

A. 2 *Summary of Tribunal findings* [4]

The Tribunal found in the Motunui claim that:

1 The river and reefs referred to in the claim constitute significant and traditional fishing grounds of the *hapu* concerned. The river, reefs, and associated marine life suffer from various degrees of pollution, and those near the mouth of the Waitara River are in particular badly polluted and stand to be polluted further, and as a result the local Maori people are prejudicially affected.

2 The Motunui outfall that the Crown intends to construct will result in the physical destruction of a part of a further reef, and that there can be no guarantee that further pollution will not follow. The local *hapu* would be particularly prejudiced as this is their last remaining reef not seriously affected by pollution.

3 The *hapu* are prejudicially affected by:

(a) legislation currently in force that gives insufficient recognition and protection for Maori fishing grounds and the Maori interest therein;

(b) policies or practices adopted by statutory bodies in that priority is not given or not able to be given by them to the Maori interest in fishing grounds over and above the general interest;

(c) by the practice of the Crown in omitting to make appropriate laws for the protection of Maori fishing grounds from pollution, and for the control of Maori fishing grounds by Maori people;

(d) by the Crown seeking to construct the Motunui outfall without first ensuring that Maori fishing grounds would not be affected.

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4 *MOTUNUI*, pp. 62-65

A.3 SUMMARY OF CROWN RESPONSE: MOTUNUI CLAIM

WAITANGI TRIBUNAL RECOMMENDATIONS	CROWN RESPONSE	STATUS SUMMARY
Received by the Crown 17 March 1983 Claim lodged with the Tribunal 4 June 1981	*General note:* the wording of the recommendations follows that of pp. 67-73 of the Motunui report, but the numbering follows that in the summary on p.6.	
To the Minister of Energy **1.** That the proposal for an ocean outfall at Motunui be discontinued;	The Motunui right was cancelled by s. 4 of the Synthetic Fuels Plant (Effluent Disposal) Empowering Act 1983. (*Note:* s. 4 was subsequently repealed by the National Development Act Repeal Act 1986, which removed the original authorisation for issuing the right to discharge at Motunui).	fully implemented
2. That the Crown seek an interim arrangement with the Waitara Borough Council for the discharge of the Syngas effluent through the Council's outfall.	A right to discharge off the Waitara coast (specific map reference) and requirement for Waitara Borough Council to provide use of facilities was formalised by s. 3 of the Synthetic Fuels Plant (Effluent Disposal) Empowering Act 1983.	fully implemented
3. The establishment of a Regional Planning and Coordinating Task Force under the aegis of the ***Ministers of Energy and Works and Development*** with the broad function of proposing medium-term plans for development in the region and making recommendations for the provision of infra-structures and ancilliary services commensurate with projected growth, and with the particular function of addressing and making recommendations on the matters we have raised in 1 - 8 above (para 12.3 of the report). (*Note:* Items 1 - 8 discussed the need for a new outfall at Waitara; the need for land-based sec-	An interdepartmental task force was set up in 1983 under the Prime Minister's Department to report to Cabinet on how to respond to this recommendation. It concluded that medium- term plans for development and the coordination of services should be the role of the Taranaki United Council, and that no new body was necessary. The Task Force was then given the more limited brief of recommending measures for waste disposal, in consultation with the people of North Taranaki. The following decisions were announced by the Crown on 22 October 1986: - The Crown to fund $11.7 million of the anticipated $13 million to build a new regional outfall at Waitara. - Noted the recommendation of the Interdepartmental Committee that waste dischargers should have land-based treatment of waste,	being addressed, but tangible results not yet evident

WAITANGI TRIBUNAL RECOMMENDATIONS	CROWN RESPONSE	STATUS SUMMARY
ondary or tertiary treatment; the need for coordination of planning and siting; Crown assistance in planning, construction and funding; the need to define Maori fishing grounds and not to place discharges near shellfish beds or into the Waitara River).	and pump the treated water out to sea. (The press release stated "We acknowledge that the scheme is a compromise for the Te Atiawa people, in that it is just not possible to dispose of all treated wastes on the land because of physical and technical reasons".) - New outfall to accommodate all of the regional wastes and provide for some future growth. The outfall pipe may need to be be longer than the present one. Implementation of the preferred solution was to be the responsibility of the Ministry of Energy. Lack of progress in implementing the new outfall prompted Te Atiawa to lodge a complaint with the Ombudsman in June 1987. The Ombudsmen's report to the House for the year ended 31 March 1988 stated that there had been "unsatisfactory progress to date in implementing a recommendation of the Waitangi Tribunal which had been recognised by two successive Governments as being worthy of implementation". The basis of a Heads of Agreement between the Crown and other users (represented by the North Taranaki District Council) was finalised on 5 November 1987, signed by the Minister of Energy on 21 April 1988, and a Management Committee set up to build and operate the new outfall.The Taranaki District Council applied for the required water right on 27 June 1988 and a project Manager was appointed on 2 August 1988. Studies commissioned by the Management Committee have concluded that the existing outfall if repaired could have a life of 25 years.This would allow the savings to be used to build secondary treatment plant if the terms of reference for the Crown grant are broadened accordingly. On 19 October 1988 the Ministers of Envi	

	ronment and Energy announced approval for this change of emphasis. The Secretary for the Environment is monitoring progress.	
4. The establishment of an interdepartmental committee under the direction of the ***Minister of Maori Affairs*** comprised of representatives from the Department of Maori Affairs, the Ministry of Agriculture and Fisheries, the Ministry of Works and Development, the Department of Health and the Department of Lands and Survey, to draft amending legislation to provide for the reservation and control of significant Maori fishing grounds, for the recognition of Maori fishing grounds in general regulatory and planning legislation, to improve existing provisions for the assessment and control of particular work projects, and to effect certain miscellaneous amendments, in accordance with our proposals as given above [in para 12.4 of the report: see below].	Cabinet set up an interdepartmental committee chaired by the Justice Department on 5 November 1984. Their report was released in November 1985 and concluded: - That the law pertaining to Maori fishing grounds does not give proper recognition to Maori interests in the light of the principles of the Treaty of Waitangi. - That more exact knowledge of the nature and extent of all Maori fishing grounds should be obtaind. - That the need for this should not be allowed to delay other action. - That sections 155 to 158 of the Maori Affairs Act (which deal with Crown rights over Maori customary land) should be reviewed urgently. The following terms of reference were then referred to the Law Commission in May 1986: (1) The recognition of Maori fisheries (including lake and river fisheries) in the law, and whether any, and if so what, changes ought to be made to the law in that regard; (2) What protection Maori fisheries should have in respect of acts of omissions by the Crown, public bodies and other corporations, and individuals; (3) What measures and procedures are necessary or desirable to ensure that legislative proposals in any way affecting Maori fisheries take adequate account of Maori interests; (4) What criteria should be applied in resolving conflicts between Maori interests in respect of fisheries and other public interests. The Law Commission report was expected out in 1988. The Crown reaction to interim findings on the fishing aspects of the Muriwhenua claim also apply. (see Appendix G)	being addressed, but tangible results not yet evident

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
Other matters detailed in para 12.4 were: i Application of s. 3 and s. 102A of the Town and Country Planning Act to any area in respect of which a maritime Plan does not exist, and extending s. 3(1)(g) to include Maori fishing-grounds. ii Empower Regional Water Boards to a) impose conditions or adopt practices ena bling them to control the method of waste disposal, and; b) instigate variation procedures to existing water rights in recognition of changing circumstances.	Items i and ii may be addressed in the Resource Management Law Reform (commenced in 1988 and expected to result in legislation in 1989).	being addressed, but tangible results not yet evident
iii Amend fisheries regulations to enable the taking of paua under 125 mm for Te Atiawa, and generally the taking of shellfish for tangi subject to approval from tribal authorities.	Re: paua: this was to have been addressed in the context of the regional fishery management plans, but such plans are in abeyance pending resolution of the broader Maori fisheries issues and a general review of fisheries legislation. Re: shellfish for *tangi*: MAF developed a system allowing partial tribal control of shellfish harvest for *tangi* and *hui* in the South Island and has since begun negotiations with tribes in the south half of the North Island.The Minister of Fisheries reports that Taranaki Te Atiawa have not agreed to this system, because not enough authority would be vested in the tribe.	being addressed, but tangible results not yet evident.
iv Correct errors in the Maori text of the Treaty in theTreaty of Waitangi Act 1975.	Errors in the Maori text of the Treaty in the Act were corrected by the Treaty of Waitangi Amendment Act 1985.	

A. 4 Claimant comments

Mr Aila Taylor

At the time of writing, negotiations with all interested parties (including *tangata whenua*) are proceeding in apparent good faith and good will on all sides, in contrast to the previous five years. Mr Taylor was pleased with recent progress and emphasised positive aspects of this development.

However, he also made it clear that there has been a heavy cost to his people from many years of delay and inaction by the Crown and the Crown's agents. He recognises that changes in attitudes and approaches takes time, and sees that significant changes have eventually taken place, but in the interim the people of Te Atiawa have suffered.

The main theme he wished to emphasise was **partnership.** He commented that "it is not sovereignty for either side that is important, but that we all work together". Three points he made in this context were:

1 Respect and support for values on both sides.

2 Option for Maori people to have input throughout.

3 Maori representation in final decision-making.

It is important that people recognise and respect each others' values. In particular, Pakehas need to acknowledge *rangatiratanga* and a *kaitiaki* role for tangata whenua.

It is also important that the Pakeha recognise the importance of *mana* to Maori people, which cannot be correlated with particular sums of money. For example, the ability to provide *kaimoana* generously to guests is far more important than the market value of those fish and shellfish. It is not money but a healthy reef ecosystem that is relevant. His people have had their *kaimoana* sources taken away from them by pollution, and therefore their *mana* has been diminished.

He felt that one of the factors which contributed to previous lack of progress on the Waitara outfall was the lack of a requirement in statutes to address Maori concerns. The resource management law reform will now address this, but it also must address the concerns of the wider community. He noted that the desire for a cleaner and healthier environment is not just a Maori concern, and the benefits will be for the entire community.

He also emphasised a **holistic** approach to local planning and pollution control. The current piecemeal approach, where a decision-making body looks at only one resource (or a single aspect of that resource) out of context, leads to unwise decisions which damage the environment.

He noted that Te Atiawa *"were never against progress; they just didn't want to be its victims".* There has been an uneven distribution of impacts, which needs to be avoided in future.

He wants to see full employment for local people, and therefore recognises that some compromises are necessary. The question is, how far do they have to go in compromising, and are compromises being made on both sides?

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1 Summary of discussions in June, August and October 1988

APPENDIX B - Kaituna Claim

B. 1 Environmental degradation

The pollution of Lake Rotorua from an excess of nutrients (eutrophication), signalled by excess weed growths, surface scum from algal colonies, sedimentation, and loss of water clarity, has been a matter of concern for over 20 years. The lake and its environs are an important national asset for recreational purposes, particularly trout fishing, and helps to support a substantial local tourist industry.

The most obvious and measurable source of nutrient pollution is effluent from the Rotorua sewage works, and the Ministry of Works and Development proposed that a Crown subsidy should be given for catchment control measures and piping of the nutrients out of the lake catchment and directly into the Kaituna River. Ngati Pikiao objected to the pipeline, claiming this would pollute their fishing grounds in the Kaituna River and Maketu Estuary, contrary to the guarantees in Article II of the Treaty.

The lake does not exist in isolation from the surrounding land and sewage effluent is not the only source of pollution to the lake. The Tribunal noted that nutrients from fertilisers and animal droppings together with the associated silts entered the lake after heavy rain. [1] The focus of the claim and suggested remedies, however, were on the treatment of sewage.

The Commission for the Environment in its submissions to the Tribunal noted that the nutrient pipeline would merely be transferring a problem from one body of water to another, in the process impairing Maori cultural values and precluding options for the restoration of the Maketu Estuary, and concluded that alternative treatments should be seriously addressed. The Commission further noted that a change in attitude on sewage disposal was necessary:

> *"We need to question whether disposing waste into inland water is compatible with using the water resource in a sustainable manner. Every waterway has a finite assimilative capacity for waste. [In addition] use of water for waste disposal does not always recognise cultural, spiritual and recreational values and so does not meet the needs of our culturally diversified society. "* [2]

The concept of a nutrient pipeline, as devised by the Ministry of Works and Development, was considered by the Tribunal to be inappropriate and outdated, and the method of its promotion deemed at fault. The Tribunal stated that the other options should be considered and the final scheme "geared to the best possible protection for Lake Rotorua as a national asset".[3]

B. 2 Summary of Tribunal findings [4]

The Tribunal found in the Kaituna claim that:

1 The discharge of sewage into the Kaituna River through a nutrient pipeline as proposed by the Crown would prejudicially affect the claimants by:

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1 *KAITUNA*, p. 27

2 Submission of Helen Hannah Rigg Hughes (Assistant Commissioner for the Environment), on the Kaituna claim to the Waitangi Tribunal, September 1984, p. 4

3 *KAITUNA*, pp. 7, 30-31

4 *Ibid.*, pp. 39-41

(a) contravening their spiritual and cultural values;

(b) reducing the quality or quantity of their fisheries;

(c) rendering the catch of these fisheries unacceptable on spiritual and cultural grounds; and

(d) rendering plant and other resources in and about the river less suitable for traditional purposes.

2 Practicable alternatives to the Kaituna pipeline existed (considered in the light of Maori values as well as sound engineering practice).

3 The Water and Soil Conservation Act 1967 prejudicially affects the claimants in that it fails to implement and recognise the provisions of the Treaty of Waitangi.

B.3 SUMMARY OF CROWN RESPONSE: KAITUNA CLAIM

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
Received by Departments 30 November 1984 Claim lodged with the Tribunal 31 January 1978		
1. To the Minister of Maori Affairs That notice be taken of the finding of this Tribunal that the policy of the Crown by which a pipeline is to be constructed to discharge effluent from the Rotorua District Waste Water Treatment Plant into the Kaituna River is contrary to the principles of the Treaty of Waitangi.	Notice was taken.	fully implemented
2. To the Minister of Works and Development a) That the policy of the Crown by which a pipeline is to be constructed to discharge effluent from the Rotorua District Waste Water Treatment Plant be abandoned as being contrary to the principles of the Treaty of Waitangi.	The Crown abandoned all financial support for the construction of a pipeline to divert Rotorua's effluent to the Kaituna River.	fully implemented
b) That research be undertaken into the possibility of disposing of such effluent by discharging the same on to land in a suitable and practical manner instead of discharging the same into Lake Rotorua.	Studies were carried out and the Crown announced support for a combined treatment plant and land disposal option for the disposal of effluent. An Environmental Impact Assessment for the project was produced in July 1988, an irrigation system is being developed for Whakarewarewa Forest, and the scheme is expected to be operational in 1990.	fully implemented

c) That the Water and Soil Conservation Act 1967 and related legislation be amended to enable Regional Water Boards and the Planning Tribunal properly to take into account Maori spiritual and cultural values when considering applications for granting of water rights, the renewal thereof or objections to such applications.	A draft Water and Soil Bill contained provisions to comply with this recommendation, but this Bill was caught up with the wider review of resource management statutes commenced in 1987/88 and expected to result in draft legislation in 1989. (*Note:* The High Court has subsequently ruled in Huakina Development Trust v Waikato Valley Authority and Bowater (Chilwell J., 2 June 1987) that Maori cultural values can be taken into account when considering consents such as water rights under the Water and Soil Conservation Act 1967.)	being addressed, but tangible results not yet evident
3. To the Ministers of Works and Development and Health That the present subsidy granted for the Kaituna River Major Scheme be altered to enable the Rotorua District Council to treat the effluent from its Waste Water Treatment Plant by a suitable biological stripping process without loss of that subsidy so that phosphorus and nitrogen can be removed from that effluent up to the standard required by the water right now granted permitting the District Council to discharge such effluent into Lake Rotorua.	The Crown announced that it will give a 75 percent subsidy for a combined treatment plant and land disposal scheme for Rotorua's sewage effluent disposal (the same percentage as that offered for the proposed Kaituna pipeline) up to a maximum grant of $21M. However, release of the funds has been a problem. Although the scheme approval was lodged with the Ministry of Works and Development in November 1987, Crown approval of the funding was not announced until 9 August 1988, and as of 13 October 1988 the Rotorua District Council still had not received reimbursement for contracts let on the project. (*Note:* as this subsidy is no longer related to the sewage disposal scheme, which was terminated in May 1986, the Department of Health considers it is not now involved. Abolition of the Ministry of Works and Development contributed to the delay in funding approval.)	partially implemented

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
4. To the Minister In Charge of the Parliamentary Counsel's Office That the attention of the Chief Parliamentary Counsel and other appropriate officers be drawn to the Finding of the Tribunal with particular reference to the consequences of legislation being enacted that is in conflict with the principles of the Treaty of Waitangi.	A copy of the Cabinet Minute recording Cabinet's 15 June 1987 acceptance of all the Kaituna Decision recommendations was forwarded to the Chief Parliamentary Counsel. A Cabinet decision of 23 June 1986 required all proposed legislation to have attached a memorandum addressing whether the proposal is consistent with the principles of the Treaty. 1987 Department of Justice guidelines to departments on legislative change indicate that when drawing up new legislation compliance with the principles of the Treaty of Waitangi must be considered. None of these actions specifically relate to the Tribunal's reference to 'consequences' of legislation in conflict with the principles of the Treaty.	partially implemented

B. 4 Claimant comments

Mr Stanley Newton, JP QSM

Mr Newton chose to prepare comments in writing. The text is reproduced in full below:

> "The Ngati Pikiao Kaituna claim was neat, it was tidy and it was very well presented. We stuck to all the essentials of traditional Maori protocol. We chose the environs of our *tupuna marae* and the beckoning of our *tupuna wharenui* Te Takinga. Our claim was of Maori origin of Maori traditional, spiritual and cultural values; our history, our *mana* and our *wairua* Maori was at stake. We believed, that the hull of our canoe could never be hidden.
>
> We extended every hospitality and courtesy to all that came to the *marae,* whether for or against the claim. The eldership of Ngati Pikiao extended to all the heartiest of felicitations, together with the comfort and warmth of the *marae* and the *wharenui.* There were prayers before and after each session of the enquiry. Having thus achieved this, so far, all was well. Visitors were now of the *tangata whenua* peaceful, happy and comfortable. The focus was now directed to the issues on hand. The Pikiao claim had started.
>
> We treasure the memories of that *hui* and admire, always, the stature, the esteem and the dignity of the members of that Tribunal. The depth of the enquiry was terrific. If the Kaituna River is said to be one of the food bowls of the people from Lake Rotoiti and out to the estuary at Maketu on the coastline, then, are there any examples of this.
>
> Yes! There were laid out on the floor of the *wharenui* one monster eel, some *kakahi* or fresh water mussel, succulent *pipis* and *tuangis,* some placid *paua,* some grizzly *kina* and a few mournful mussels, all *kaimoana* food, which would suffer from pollution if the Kaituna pipeline became a reality.
>
> I believe the summary of the Waitangi Tribunal's recommendations of the Kaituna claim, which is concise and to the point, has come about by careful consideration and enquiry by that Tribunal. Our eldership, including myself, expressed our gravest concern that wastewater disposal to the River was a complete desecration of the spiritual, the cultural, the traditional and the historical values we had for this very sacred river of Ngati Pikiao. We spoke in Maori; we spoke in *karakia;* we spoke in chants; and we spoke in *waiata* and *oriori.* The charm and the spiritual presence of our *tupuna* (ancestors) prevailed overall. Our mother tongue was truly our enlightenment.
>
> Suffice for the Claim. What of the follow up of those recommendations of the Waitangi Tribunal. At one stage the Rotorua District Council was going to do a short cut job. They were going to refine the sewage at the treatment plant to maximum purity as defined by their water right and continue to dump that effluent in Lake Rotorua. Ngati Pikiao did a *haka,* before the Council, and that dampened all of their aspirations.
>
> We loaded them on mini-vans and took them, engineers and all, to Whangamata, to see how that enterprising little town disposes of its wastewater into nearby state forest. Levin was our next target to show them how wastewater could be spray-irrigated onto coastal sand dunes amongst a very young pine forest. A similar scheme in the Bay of Islands for land disposal was also pointed out.

And now, we are happy to find that our city- fathers are going to dispose of the Rotorua city wastewater into the Whakarewarewa forest by spray-irrigation. They reckon the cost is enormous and it could be a burden to all Rotorua ratepayers for years to come. True, my rates have already increased 40 percent. I believe the Government's 21 million dollar subsidy is being very well spent and our environmental heritage of lake and land will be protected from human pollution for many decades." [1]

1 Letter of 18 August 1988

APPENDIX C - Manukau Claim

C. 1 Environmental Degradation

The Manukau was for hundreds of years a rich source of food. From 1847 however, the concentration of inadequately controlled agricultural and industrial development in the harbour's catchment led to widespread pollution and alteration of the estuarine ecosystem. The Tribunal summarised the experience of tribal witnesses who recalled abundant finfish and shellfish resources which allowed *marae* to provide generously for guests. Now, however, fish must be purchased for the major tribal gatherings. [1]

The Manukau Harbour is very large and relatively shallow, with a long shoreline and great expanses of intertidal areas. The harbour's ecology is thus particularly sensitive to the influx of sediments and pollutants from modern land use. In summarising the history of pollution in the Harbour, the Tribunal noted:

> *"By the first World War land surrounding the upper Mangere inlet was firmly established as the noxious industry centre for Auckland [and] by 1950 pollution was an obvious problem. Some 18 trade waste sewers discharged untreated wastes to the harbour along the northern coast alone, together with untreated urban effluent at several points and additional effluent from process operations. Discharges to the Mangere inlet resulted in severe ecological damage from which the harbour has not yet fully recovered. There was evidence that the water was recycled with each tidal change rather than fully flushed so that contamination was not confined to the main channels but spread throughout the harbour. The inlet was described as 'an evil smelling estuary having a bottom covered with black, sulphide smelling ooze' with rotting organic matter 'several feet thick'. Fumes from the mudflats were reported to have blackened the paint of houses [and] a Commission of Inquiry was appointed in 1955 to consider the 'Noxious Fumes' problem . . . .*
>
> *. . . Several witnesses affirmed the view that pastoral farming in the catchment is a major contributor to the bacterial loading in the harbour and is probably the main cause of the 'creeping black mud' referred to, and extensive deposits of silt that have accumulated over the years. "* [2]

The Tribunal noted that although the Mangere Sewage Purification Works (constructed in the 1960s) had led to improved water quality, it was still insufficient to maintain a healthy estuarine ecosystem. [3] The Tribunal questioned the way that the public authorities sought to balance development and preservation rather than improve water quality, noting that:

> *". . . there ought to be more positive policies providing an incentive to developers to shape their projects to secure an environmental advantage or to contribute to the cost of environmental repair. "* [4]

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1 *MANUKAU,* pp. 55-56

2 *Ibid.* , pp. 60-62

3 *Ibid.,* p. 101

4 *Ibid.* , p. 67

The Commissioner for the Environment reiterated concerns to the Tribunal (also expressed in the Motunui and Kaituna hearings) about the cumulative impacts of pollution on Maori fishery resources [5] and further noted:

> *". . . the administrative agencies concerned with water in New Zealand need as a matter of urgency to undergo professional training to improve their capacity to communicate when confronted with a Maori viewpoint and to develop their sensitivity, not only to Maori values in relation to water, but towards the conservation ethic in general. The fact that water is managed in a monocultural framework and with a bias towards consumption rather than conservation is in my view part of the problem and it creates the difficulties which this Tribunal is called upon to address from time to time as is the Commission for the Environment."* [6]

The Tribunal included among its environmental management recommendations the amendment of resource management statutes, the formulation of a comprehensive action plan to clean up the Harbour, and the creation of a bicultural guardianship authority to oversee Harbour management.

C. 2 Summary of Tribunal findings [7]

The Tribunal in the Manukau claim found generally that in the Manukau the tribal enjoyment of the lands and fisheries has been and continues to be severely prejudiced by compulsory acquisitions, land development, industrial developments, reclamations, waste discharges, zonings, commercial fishing and the denial of traditional harbour access and that the omission of the Crown to provide a protection against these things is contrary to the principles of the Treaty of Waitangi.

The Tribunal made specific findings on:

(a) the need for urgent action on regional and maritime schemes and the creation of a 'clean up' action plan, with particular attention to sewage discharges and continuing illegal waste discharges and reclamations.

(b) the need to restore *mana* Maori through Crown resumption of Harbour ownership and granting of Maori influence over use of the Harbour, and the need for a bicultural guardians group to protect Maori and environmental interests in the decision-making process. (The Tribunal did not endorse full Maori ownership, full Maori control, or a complete moratorium on new water rights.)

(c) changes needed to current legislation which is contrary to the principles of the Treaty, in particular the Town and Country Planning Act 1977, the Water and Soil Conservation Act 1967, fisheries legislation, and the Historic Places and Antiquities Acts.

(d) the need for attitudinal changes as well as legislative changes and the importance of early consultation, avoiding token representation, and providing re search assistance to Maori groups.

(e) particular Crown actions contrary to the principles of the Treaty affecting the people of Makaurau, Whatapaka, Pukaki, Maioro, Awhitu and Rangariri.

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5 Submissions of Kenneth William Piddington (Commissioner for the Environment) to the Waitangi Tribunal, November 1984, pp. 4-5

6 Ibid. , p. 3

7 *MANUKAU,* pp. 100-128

C.3 SUMMARY OF CROWN RESPONSE: MANUKAU CLAIM

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
Received by Departments 9 July 1985 Claim lodged with the Tribunal 16 May 1983	(*General note:* (a) All recommendations with the exception of number 4 were supported in principle by Cabinet on 30 September 1986 (SE (86) M26 Part 5 refers). (b) On 22 March 1988 and on 21 June 1988, Maori Affairs convened meetings of relevant departments to expedite action on the Manukau recommendations.	
1. ***To the Ministers of Transport*** (re Harbours Act), ***Local Government*** (re controlling authorities), ***Energy*** (re Coal Mines Act and rivers), ***Fisheries*** (re seabeds) ***and Works and Development*** (re planning laws) That in view of Maori sensibilities to the ownership of river, coastal and foreshore areas and the need to reconcile those sensibilities with public ownership, and in view of the diversity and occasional anomalies in the laws and practices governing grants of control of various parts of those areas, and the need to integrate those controls with sound planning principles in both environmental and commercial management; that the laws relating to the ownership and control of rivers, harbours, coastal and foreshore areas be reviewed, together with the particular enactments in force for particular harbour, coastal and foreshore areas with a view to restoring the ownership of the Crown and expressing therein the Crown's fiduciary responsi-	In September 1986 the Cabinet Social Equity Committee directed the Minister of Maori Affairs to prepare a document concerning these matters, in consultation with relevant departments. This document did not emerge. The Crown now considers that these matters have in large part been over- taken by the review of resource management and local government statutes commenced in early 1988 and expected to result in draft legislation in 1989. (See Recommendation 7 for related Crown response.) As at 1 April 1987, the Ministry of Transport remained the lead agency administering the Harbours Act for areas that are encompassed by a 'port boundary' (after 1 June 1988 this included the Onehunga Wharf in the Manukau Harbour) while Department of Conservation gained lead responsibility for the administration of remaining foreshores and the inshore seabed. DOC was directed to undertake a review of laws controlling coastal and marine resources, and in October 1988 this was combined with the Resource	being addressed, but tangible results not yet evident

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
bilities to the local tribes in terms of Treaty of Waitangi, and with a view to rationalising existing control anomalies and providing integration with other planning statues. (Refer paras 6.1, 6.4, 6.5, 8.3, 9.2.3, and 9.2.4 of the report.)	Management Law Reform under the Ministry for the Environment.	
2. To the Minister of Civil Aviation and Meteorological Services		
That in view of the tribal interests in the fishing grounds of Pukaki Creek and the Karore and Oriori banks, now affected by the Auckland International Airport, the Civil Aviation Division of the Ministry of Transport be directed:	The Minister of Transport was to have reported on this matter by 31 October 1986.	
(a) to investigate and report to you on the practicality of restricted fishing and/or passage rights to licensed individuals of the Pukaki tribes within the areas of current restriction, and	Initial departmental discussion focussed on a concern that fishing would cause birdstrike hazard to aircraft through fish offal attracting birds (despite Maori tradition that prohibits gutting of fish at sea). Discussions with claimaints were begun at the end of 1987. At the time of writing a paper had been approved by the Ministers of Fisheries and Transport for submission to Cabinet which proposed conditions "under which disciplined fishing can occur without creating a hazard to aircraft".	being addressed, but tangible results not yet evident
(b) to include in its current review of the Pukaki causeway and bridge, a report to you on the possibility of changes to improve water flows and maintain sea access in order that the fishing rights guaranteed to the Pukaki people in the Treaty of Waitangi might be partly restored. (Refer paras 5.5, 5.8 and 9.3.3 of the report.)	A report on the effects of the causeway and bridge was prepared and also made available to local tribes. The report confirmed water quality deterioration but did not reach conclusions on whether the causeway contributed to increased siltation by restricting tidal flow. The Crown considers a rescue fire bridge is still needed and the Pukaki causeway must remain until an alternative can be made available. However, it is now Auckland International Airport Ltd which has jurisdiction over this area.	being addressed, but tangible results not yet evident

	(*Note:* the bridge was included in the assets transfer to the Airways Corporation but with a rider postponing final vesting of ownership until the Crown decides on this recommendation. In October 1988 the Minister of Transport noted that ownership of the bridge could now be vested in the Corporation.)	
3. To the Ministers for the Environment and Works and Development		
(a) That following the release of the Manukau Harbour Maritime Planning Scheme the Commissioner for the Environment be asked to advise on the formulation of a Manukau Harbour Action Plan with definite commitments to take positive measures for the restoration of the harbour having regard to our finding that the deterioration of the harbour seriously prejudices the enjoyment of fisheries protected by the Treaty of Waitangi, and that positive action is needed more than policies of containment to remove that prejudice.	The Manukau Harbour Strategy was released by the Minister for the Environment on 10 July 1987. It involves three stages: - immediate action to clean up and restore the harbour; - a review of management systems, legislation and administration affecting the harbour; - establishing a coordinated management system for the future. The Strategy specifically spells out actions to be taken by local, regional and central agencies with responsibility for the harbour (some 20 agencies have been identified) and the need for a coordinated and 'whole ecosystem' approach. The Crown sees implementation of the strategy as a regional responsibility. Progress in implementing some elements of the Strategy has been overtaken by the release of the Auckland Regional Authority's separate Manukau Harbour Action Plan in mid 1987 and a proposed Manukau Harbour Maritime Planning Scheme. The region has been asked to follow up the other elements of the Strategy Plan. The Ministry for the Environment is continuing with its watching brief.	fully implemented
(b) That the advice should consider ways in which the plan might be implemented and subsidy assistance settled. (Refer paras 6.5 and 9.2.6 of the report.)	In 1987/88 $500,000 was available to the ARA for water and soil resource management including the Manukau Harbour project and a similar sum is contained in the 1988/89 estimates.	partially implemented

WAITANGI TRIBUNAL RECOMMENDATIONS	CROWN RESPONSE	STATUS SUMMARY
4. To the Minister of Transport That pending the formulation of an Action Plan as in 3 above, further reclamations in the Manukau be prohibited. (Refer para 9.2.6 of the report.)	This is the only recommendation in the Manukau Decision which Cabinet would not support in principle in September 1986. The reasoning for this included: - rights of public objection to reclamation proposals already existed, and were available to *tangata whenua* ; - possible interference with essential works of Auckland International Airport and the Auckland Harbour Board; and - possible interference with plans to deal with existing illegal reclamations through directing proper completion or granting retroactive validation. However, the Manukau Harbour Strategy released in June 1987 by the Minister for the Environment proposed that no further harbour reclamations be approved, consistent with the draft Maritime Planning Scheme. Current Crown policy is that reclamations should not be authorised unless deemed urgent or in the public interest, until a draft Maritime Planning Scheme is notified (SE (87) M1/1: CM 87/13/5), and the Minister of Conservation has not authorised any reclamations since February 1987.	being addressed, but tangible results not yet evident
5. To the Ministers of Maori Affairs and Environment That Manukau Guardians be appointed to provide a Maori and environmental overview of the harbour and a Maori overview of the environs, and to restore the *mana* Maori in both, in the manner recommended at para 9.2.6 of the report.	The Ministry for the Environment's Manukau Harbour Strategy identifies the distinction between the Maori concept of *kaitiaki* and the Pakeha concept of Guardians, and the possible difficulty in reconciling the two in one structure. Negotiations between the Department of Maori Affairs, the Ministry for the Environment (MFE) and the Department of Conservation have begun. Over 1987-88, MFE officials were unable to find a model to accommodate the concerns of claimants, and in October 1988 officials proposed letting a contract to claimants for them to set out their preferred option. However, the	being addressed, but tangible results not yet evident

	Minister of Conservation advises that ultimately the issue cannot be resolved until Crown-Maori negotiations on harbour ownership are concluded in some other forum.	
6. To the Minister of Fisheries **(a)** That in view of Treaty of Waitangi guarantees for Maori fisheries and the current lack of recognition given them, contrary to the Treaty, and in view of our findings that there is need for greater research on how Maori fisheries might be more adequately provided for in legislation, policy and management planning, and in view of our finding that there is potential for conflict between Maori, public and commercial fishing interests and that the potential for conflict should be eliminated, and in view of the fact that the options adopted in other countries with indigenous minorities have not been fully examined or made known locally, and in view of our finding that Maori representatives on bodies under the aegis of the Ministry ought to have appropriate support and access to research opinion, that comprehensive studies be undertaken now to identify areas of major Maori habitation and fishing activity throughout the country, the nature of the fishing activity, the location of particular tribal fishing grounds and the *marae* and *hapu* associated with each, and the options available for the recognition, protection or compensation of Maori fishing interests, and that the information be made available for public consideration;	A National Fisheries Hui was held in 1985 to enable all tribal groups to air grievances and share information. It became clear during the hui and subsequent discussions that many tribal groups were unwilling to release fishing information to a government department, prompting proposals for tribal repositories of information, compiled with Crown support but not published. The Crown did not allocate funds for the proposed comprehensive work: limited work has been undertaken by MAF, but departmental action now awaits resolution of general Maori fisheries issues.	being addressed, but tangible results not yet evident

WAITANGI TRIBUNAL RECOMMENDATIONS	CROWN RESPONSE	STATUS SUMMARY
(b) That in the interim, the lower creek and mouth of Whatapaka or Clarkes Creek, and the Pukaki-Oruarangi creeks and tributaries, be reserved now for the exclusive use of the *hapu* of Whatapaka and Pukaki *marae* respectively;	*Whatapaka Creek* Crown directives required the balancing of Maori interests with general commercial and recreational interests, and common ground was not reached in discussions with local groups. A paper describing options, originally due 30 November 1986, was submitted to Cabinet on 30 June 1987, but decision was delayed awaiting a Crown law opinion. A new paper was expected to go to Cabinet in early 1988 to cover all three creeks, and as of October 1988 a final draft was being discussed by Ministers. *Pukaki Creek* (Also see note under recommendation 2a). This creek is not used commercially as is Whatapaka Creek, but resolution of the Pukaki exclusive fishery issue has been linked to that of Whatapaka. *Oruarangi Creek* MAF considers that the Tribunal may have mistaken this creek for Waokauri Creek, as Oruarangi Creek now has no fishery to speak of. The Auckland sewage ponds now block the stream off from the estuary and restoration of the stream is required before any significant fishery would be present. Possible restoration is currently being investigated by the Auckland Regional Authority.	being addressed, but tangible results not yet evident
(c) That a comprehensive study be undertaken on the effects of commercial fishing in the Manukau Harbour and lower Waikato River; and,	The Cabinet Social Equity Committee set a reporting date Start of 30 May 1989 for this study, and field aspects of the study were completed by May 1988 as scheduled. The scientific report is being reviewed and the document will be circulated to 'interested parties' once cleared by the Minister of Fisheries.	being addressed, but tangible results not yet evident
(d) in the event that conclusions on that study cannot be finalised within 3 years, following	The Crown chose to mark the three years from when decisions were made by Cabinet (May 1986), not when Tribunal recommendations were given to the Crown (July 1985). Therefore the Crown considers	being addressed, but tangible results not yet evident

consultation with affected interests and public consideration, commercial fishing in the Manukau Harbour and Port Waikato River mouth areas be prohibited until such time as a marked improvement in the fish stocks is clearly apparent. (Refer paras 6.1, 6.2, 6.3.1, 6.3.2, 6.6, 8.3, 9.2.7, 9.2.8 and 9.2.9 of the report.)	that the deadline to meet is May 1989 not July 1988.	
7. To the Minister of Works and Development		
(a) That consideration be given, in the long term, to modernising and integrating a range of planning statues with provisions - to bind the Crown in the same way as the private citizen (paras 6.5 and 9.2.11 of the report) - to codify the principles to be applied, as appropriate, to all affected statutes (para 7.2.11 of the report). - to provide for combined hearings to enable projects requiring several consents to be dealt with at one hearing (para 9.3.5 of the report) - to provide for the assessment and consideration of the cumulative effect of developments and the main- tenance of appropriate environmental qualities (para 9.2.6 of the report) - to enable the conduct of the parties to be considered and any direction for further disclosure, discussion or research to be made (para 9.3.5 of the report) and - to provide for the review of existing use rights (para 9.3.4 of the report).	In September 1986, Cabinet directed Ministers to give 'urgent consideration' to these matters. A review of resource management legislation commenced in early 1988 is expected to result in draft legislation in 1989. This review will consider the Town and Country Planning Act, water and soil legislation, coastal legislation, minerals legislation, Geothermal Energy Act, Petroleum Act, Clean Air Act and Noise Control Act and environment assessment procedures. The Minister for the Environment advises that the review will consider the Treaty of Waitangi and its application to natural resource management, and will address the reports and recommendations of the Waitangi Tribunal on the Te Atiawa, Kaituna and Manukau claims. (*Note:* with the transfer of planning statutes administration to the Ministry for the Environment on 1 April 1988, this recommendation became the responsibility of the Minister for the Environment.)	being addressed, but tangible results not yet evident

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
Applicable principles should include consideration of the relationship of the Maori people their values, culture and traditions to any lands, waters or resources, and the protection of Maori lands and fishing grounds.		
(b) That existing legislation be amended forthwith i) to enable Regional Water Boards to take into account Maori spiritual and cultural values when considering water rights applications ii) to provide specific reference to Maori fishing areas and the values pertaining thereto in the laws affecting water rights. iii) to provide for the review and reformulation of existing water right discharges that have not been approved by Regional Water Boards (the Manukau Sewage Purification works for example) to bring them into line with current standards. iv) to require that Maritime Planning Schemes and Regional and District Planning Schemes shall have regard to the relationship of the Maori people, their values culture and traditions to any land, waters or resources. v) to remove any exemptions for the Crown from the requirements of the general planning laws and to apply the planning procedures to all mining under the Mining Act 1971 and gas pipeline authorisations under the Petroleum Act 1937 or provide other sanctions for the protection of Maori interests affected by	Comment above refers. Re b(i) and (ii); concluding paragraph in the Crown response to Kaituna Recommendation 2(c) also refers.	being addressed, but tangible results not yet evident

those Acts (refer paras 6.5 and 9.2.11 of the report).		
8. To the Ministers of Maori Affairs, National Development and Local Government That consideration be given to affirmative action to fund and assist tribal authorities to establish an economic base for their people, that development levies be apportioned where *marae* and *papakainga* are affected by developments and that an additional levy be provided where traditional fisheries are affected or where Maori people have a significant cultural interest in affected resources (refer para 9.2.12 of the report).	(*Note:* there is no longer a Minister for National Development. The Minister of Fisheries is also involved.) In 1987 the Town and Country Planning Act 1977 was amended to require a representative of the *tangata whenua* of the region on regional planning committees. The Crown considers that this allows greater involvement of the Maori community in decisions on allocation of development levies. The Minister of Local Government advises that this recommendation will be considered during the Local Government Law Reform commenced in early 1988 and expected to result in legislation in 1989. The Minister of Fisheries has noted that in order to seek an additional levy where traditional fisheries are affected, information is required on the nature and extent of these fisheries (see comment under Recommendation 6a). The Muriwhenua report has subsequently indicated that all fisheries are traditional Maori fisheries unless the Crown can demonstrate it negotiated otherwise.	being addressed, but tangible results not yet evident
9. To the Ministers of Lands, Forests, Energy, and Works and Development That negotiations be continued with all affected parties for a settlement of the claims in respect of the compulsory acquisition of lands in the Waiuku State Forest, if practicable without further recourse to this Tribunal (refer paras 5.4 and 9.3.1 of the report).	(Recommendation 12 also refers) The Waiuku State Forest, excluding 289 hectares of *wahi tapu* (Te Papawhero, Waiaraponia, Te Kuo and Tangitanginga) is scheduled for sale to the Forestry Corporation. In the interim, the land is held by the Department of Lands and under a management contract with the Forest Corporation. The Minister of State-Owned Enterprises notes that if the Tribunal recommends resumption, the land will be returned	being addressed, but tangible results not yet evident

WAITANGI TRIBUNAL RECOMMENDATIONS	CROWN RESPONSE	STATUS SUMMARY
(*Note:* this recommendation was given to encourage Forest Service initiatives in 1985 to negotiate the return of the land. The Tribunal granted leave to the claimants to file a fresh application if the negotiations failed).	to the Crown. The area is now the subject of new claims before the Tribunal. The Minister of State-Owned Enterprises has given an assurance of "government's best endeavours to settle a claim by Tainui outside the Waitangi Tribunal".	
10. To the Minister of Internal Affairs **(a)** That the Antiquities Act 1975 and any policies for the administration of that Act be reviewed in the light of the concerns expressed in para 7.4 upon the ground that while the principle of protecting Maori *taonga* is consistent with the promises of the Treaty of Waitangi, the Treaty promises were intended to confer a benefit on the *hapu* owning or entitled to those *taonga* and that the claimants in this case have not received a benefit since the passing of that Act.	The Department of Internal Affairs is overseeing a major review of the Antiquities Act 1975 and has sought comment on the Act from the Maori community since 1986. A Maori working party is now considering the matter of compliance with the Treaty of Waitangi and a Protection of Movable Cultural Property Bill is expected to be introduced into the House by mid 1989.	being addressed, but tangible results not yet evident
(b) That in view of the apparent lack of knowledge of this Act among those who appeared before us, the Department make known widely in the community both the provision of the Act and Departmental policies under it. (Refer para 7.4 and 9.3.7 of the report).	The Department of Internal Affairs has initiated a 'major advertising programme', including brochures, a school resource kit, and a television advertisement, with distribution to Maori authorities and schools.	fully implemented
11. To the Ministers of Maori Affairs, Lands, Forests, Environment, Science and Technology and Fisheries That their Departments be authorised, at their discretion to assist Maori groups with the prepa-	The Department of Maori Affairs in 1988 initiated the employment of a town planner and the formation of a Maori Land Information Office	partially implemented

ration and formulation of submissions and the presentation of available evidence to those bodies, boards and tribunals involved in planning processes in order that their concerns might be better known and where practicable verified from available information or opinion (refer paras 6.5 and 9.2.11 of the report).

in conjunction with the Department of Survey and Land Information which provides information on request concerning *wahi tapu* reservation and land claims.

The Department of Lands "is prepared to assist within the limits of its capabilities, where appropriate".

The Ministry of Forestry's Policy Division would be able to provide assistance "as appropriate, if requested".

The Department of Science and Industrial Research will provide advice "subject to the charging policies laid down by Government". Cost recovery may not be sought where wider environmental implications are present (e.g. comment on timber treatment plant for Huakina Development Trust in April 1988).

The Ministry of Agriculture and Fisheries is constrained by the limitations of its resources but can offer
(a) legal advice where Maori concerns coincide with those of the Ministry, and
(b) advice or formal evidence from fisheries scientists when requested. The Ministry reports that although most Maori groups have been notified of this service, it is seldom utilised.

The Department of Conservation (Northern Regional Office) has requested the Huakina Development Trust to report on assistance it expects from the Department.

The Treaty of Waitangi (State Enterprises) Act 1988 contains an amendment to the Legal Aid Act 1969 which will provide legal aid for proceedings before the Waitangi Tribunal and will make legal aid available to Maori groups. These provisions are to be retained and expanded in the proposed Legal Services Bill due for introduction in late 1988.

WAITANGI TRIBUNAL RECOMMENDATIONS	CROWN RESPONSE	STATUS SUMMARY
	The Ministry for the Environment has made some funding available to Maori groups to assist in the preparation of their submissions to the Resource Management Law Reform.	
12. To the Ministers of Lands, Forests and Energy **(a)** That the consents and licences whereby NZ Steel Ltd is authorised to undertake mining operations at Waikato North Head be reviewed and renegotiated, or new undertakings sought, to protect sacred sites and adjoining Maori lands, as referred to at para 9.3.6 (but not so as to presume that all former Maori freehold lands are sacred sites), with provision for the re-interment of discovered remains, and with provision for the re-interment of the remains within larger *wahi tapu* where burials are dispersed, with the concurrence of elders of Ngati Te Ata. **(b)** That if agreed to by Ngati Te Ata, assistance be given for the survey of agreed sacred sites, and their establishment as Maori Reservations with trustees appointed for their control. (Refer paras 7.3 and 9.3.6 of the report.) (*Note:* the claimants asked that all mining cease until the identification of *wahi tapu* has been completed. The Tribunal declined this on the grounds that new terms would be negotiated, and *wahi tapu* identification could proceed ahead of mining).	(Recommendation 9 also refers, including new claims before Tribunal) New Zealand Steel submitted proposals to the Minister of Maori Affairs for handling *wahi tapu* sites on 28 May 1987. They required Ngati Te Ata to define *wahi tapu* sites and agree to re-burial proposals. Ngati Te Ata did not formally respond to this proposal (having already stated that they believe the entire area to be a *wahi tapu*). The Department of Maori Affairs is coordinating officials in the preparation of advice to Ministers.	being addressed, but tangible results not yet evident

13. To the Ministers of Maori Affairs and Works and Development That in view of our finding that Maori *wahi tapu* are not adequately protected and that ownership or control of *wahi tapu* are not adequately secured to the tribes, and that these things are contrary to the Treaty, statutory provision be made for the compulsory acquisition of significant sacred sites for settlement as Maori Reservations in appropriate cases (refer paras 5.5, and 9.3.2 in the report), and:	The Historic Places Act 1980 is under review by the Department of Conservation and a discussion document is expected to be ready by the end of 1988. The Minister of Conservation advises that "protection of sites of particular Maori interest is likely to be addressed in the paper". In the interim, the Treaty of Waitangi (State Enterprises) Act 1988 assists in resumption and reservation of *wahi tapu* sites that are on Crown land transferred to an SOE.	being addressed, but tangible results not yet evident
14. To the Ministers of Maori Affairs and Internal Affairs That research be undertaken into the desirable options for the identification of Maori sacred sites on Crown or General land having regard to the recent Australian experience pertaining to Aboriginal sacred sites (refer paras 7.3 and 9.3.2 of the report).	With departmental restructuring, this recommendation belongs to DOC. Some DOC regional offices have begun assisting with tribally controlled surveys of *wahi tapu.* DOSLI would be "prepared to assist with research into options". Overseas legislation will be taken into account in the review of the Historic Places Act 1980 (see no. 13 above).	being addressed, but tangiblr results not yet evident
15. To the Minister of Lands That the Crown negotiate with the current owners and lessee for the acquisition of the Pukaki *marae* site, *urupa* (with access thereto) and lagoon, and if those areas or any of them can be acquired then without charge to the Maori *hapu* the Crown should gazette those areas as Maori reservations for Ngati Te Akitai and Waiohua,	Research uncovered evidence that some of the Pukaki lands were returned to Maori individuals, then subsequently sold by them. DOSLI has gathered full ownership, lease and valuation data to assist the Department of Maori Affairs in coordinating officials in the preparation of advice to Ministers.	being addressed, but tangible results not yet evident

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
upon the grounds that they are existing *wahi tapu* of those tribes, that such action is necessary to secure and protect them, that there are currently insufficient laws to protect and secure such areas to the prejudice of the affected tribes, and that the omission to provide such laws is contrary to the principles of the Treaty (refer paras 5.8 and 9.3.2 of the report).		
Additional 'recommendations' The claimants believe that there are two more recommendations in the concluding text of the Tribunal's report (even though they are not numbered as are the others). These would be:		
- Compensation for confiscations should be made payable not to individuals but to the Makaurau, Pukaki and Te Puea *marae* s. These people have suffered enormous losses and although compensation was not sought it provides the only practical alternative to restoring what was lost.	A paper was submitted for consideration of Ministers on 29 August 1988, and officials are looking into further details.	being addressed, but tangible results not yet evident
- Ngati Te Ata ought to be fully informed on why they had to vacate the Moeatua *marae,* on whether or not they still have an interest in the Awhitu Lakes, and whether access or user rights can still be secured to them. The Rangariri people ought to be told of the position concerning their *papakainga* and should be assisted to re-establish their *mana whenua* at Awhitu.	DOSLI is conducting investigations on these matters (initiated in 1988).	being addressed, but tangible results not yet evident

C. 4 Claimant comments

Mrs Nganeko Minhinnick [1]

The Manukau claimants have experienced a great deal of frustration over the Crown's lack of progress in implementing the Manukau recommendations. The Crown officially accepted all but one of the recommendations in 1986, but tangible 'flaxroots level' results are still largely non-existent. They have experienced a long series of different Crown representatives, all having to be told the same thing all over again. They would like to see one key contact and coordination between different divisions and agencies of the Crown.

They have also seen a long series of written reports to no apparent effect. Government reports seem to be 'just lots of words'. They are 'sick of reports', and have no patience now with representatives who cannot show practical results. While they await action, the pollution continues daily, and new sources of pollution continue to be approved. The claimants are led to believe that those in power 'don't give a damn'.

She feels that the Crown needs to **trust,** to **ask,** and to **listen.** Maori people must be given a say, and the Maori way of managing resources must be accommodated.

They do not want money or revenge. They want a **return of *mana* and adequate resources to be self-sufficient.** Mrs Minhinnick drew attention to the recommendations of the 1988 UN Report by Professor Daes in this regard.

> *. . . "it is . . . my most important recommendation that the Maori people be given formal and substantive self-government over their local and internal affairs . . . the minimum goal should be powers sufficient for the protection of the groups' collective right to existence and for the preservation of their identities . . . to this end, a secure financial basis must be created, preferably through the establishment of rights to land and resources, taxation powers and, when and if these are insufficient, the granting of lump sums for the free use of the self-governing entity."* [2]

Mrs Minhinnick strongly criticised the 'piecemeal' approach to environmental management shown by the Pakeha system, and emphasised the need for a **holistic** approach. All resources must be viewed as an interconnected whole, and all impacts considered by decision-making bodies. The failure to take a holistic approach has produced the severe damage that the Manukau has suffered.

She noted that the Tribunal approach and recommendations has changed over time. However, claimants whose case was heard when the Tribunal could only look back to 1975 have to rejoin the claims queue for a re-evaluation to seek stronger recommendations.

Mrs Minhinnick's comments specific to individual Manukau recommendations are detailed below:

Rec 1: Review of statutes

The existing piecemeal approach must be replaced with a holistic approach. All statutes dealing with air need to be included: not only pollution, but control of air traffic. She is

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1 Summary of discussions in June and September 1988

2 DAES, 1988, p. 12

concerned that the majority of the $5 million being spent on the resource management statutes review is being spent on lawyers rather than gathering wider input.

Rec 2: Pukaki fishing access and airport causeway

'Ongoing consultation', as claimed by the Crown, is not correct: only one specific meeting to date. The fishing access issue must also now take Muriwhenua findings into account.

The report on the effect of the causeway excluded expert advice from *tangata whenua,* and is not a definitive statement on the issue. The Minister of Transport has told them that the causeway can be removed if the Eastern Accessway goes ahead, but they are concerned that this may involve further compromises on their part.

Rec 3: Action Plan Implementation

She complained that there are too many committees, and too much delay for unnecessary studies instead of acting on clean-up. The emphasis is 'technical' rather than 'natural' and nothing concrete is happening. At the very least **studies must include *tangata whenua* knowledge.** In the interim they also want to see a practical moratorium on new discharges.

Rec 4: Moratorium on reclamations

They want this moratorium to be enacted. It is not an 'overly blunt' method as some have claimed. Drastic moves are needed.

She noted however, that the regaining of land naturally eroded away near Whatapaka marae (some of which was *wahi tapu*), should not be thwarted as part of a moratorium on reclamations. The people have determined that no significant damage would be done to fish breeding grounds. She emphasised the wisdom of a holistic approach.

Rec 5: *Kaitiaki* /guardians

Nganeko stated that the Maori people desire their status as *kaitiaki* to be fully recognised, and that this is **not the same as ownership.** She repeatedly emphasised that the Pakeha people needed to trust that the Maori people would act as effective guardians.

They will not support the Lake Guardians model (only advisory) or only a percentage of guardianship. They want *tangata whenua*'s existing *kaitiaki* status to be acknowledged 100% as a starting point; in that way they can negotiate a 50:50 partnership from a position of *mana.* They believe it is against the spirit of the Treaty for the Crown to demand a compromise of *mana* from the outset.

Rec 6: Reserved fisheries

They feel that the Crown approach over this has been very insensitive. The Crown has been completely wrong about the bird strike hazard: traditional fishing methods do not allow gutting at sea, and birds would not therefore have been attracted near the aircraft by making the area an exclusive Maori fishing zone.

She reminded that the Lower Waikato fisheries report was due out 31 May 1988. The Tribunal recommended that if the matter is not resolved within three years, the commercial fishing should be prohibited (the three year time limit after the findings were issued expired on 9 July 1988).

Rec 7(b): Amendment of legislation re: water rights

She reminded that the Tribunal recommended the legislation should be 'amended forthwith'. This has not occurred.

She also noted that: (a) water rights should not be issued without concerning the needs of the water body itself (to maintain a healthy ecosystem); (b) the 'grandfather clause' in the Water and Soil Conservation Act allowing existing discharges to continue without control must be deleted; and (c) catchment boards must respect tribal boundaries when selecting Maori representatives.

Rec 8: Development levies, especially re: fisheries

Under the present $50 million cut-off for development levies, they believe that big developments are just split up into smaller parts to avoid paying.

With regard to Maori representatives on regional planning committees, boundaries need to be clarified. Pakeha jurisdictions and Maori tribal boundaries don't match.

With regard to traditional fisheries: they believe the burden of proof rests with the Crown to prove that a fishery is not traditional, not for *tangata whenua* to prove that it is.

She also noted that Professor Daes' UN report has supported affirmative action (see quote earlier).

Recs 9 and 12: Maioro and Waiuku: *wahi tapu,* ironsand mining and forestry

Mining of the remains of their ancestors is the 'insult of all insults'. They will not agree to mining or removal of remains. Forestry operations are also unacceptable (they are digging up ground, not just cutting trees). They want the whole area returned without conditions.

This issue has been taken by Nganeko to the UN through Professor Daes of the Working Group on Indigenous Populations. They will continue to pursue international remedy if domestic law does not protect them.

The claimants believe that the wording of recommendation 9 resulted from the Tribunal being misled that the Forest Service was seeking genuine negotiation with *tangata whenua.* The proposal they had, however, meant continued desecration of *wahi tapu,* and the *kaumatua* refused to accept it.

Recs 13 and 14: Protection of *wahi tapu*

They believe the Historic Places Trust should be replaced by Maori *kaitiaki* in relation to *wahi tapu.* The existing situation does not provide adequate protection.

Rec 15: Return of Pukaki marae and urupa

They have never denied that the lands were returned and then sold: what must be considered is that the move from communal to private ownership, and the sale of land to pay for rates, were compelled in breach of the Treaty. When the current owners (Turners and Growers) purchased, Maori Affairs omitted gazetting the reserves as instructed: the fault is the Crown's.

'Additional recommendations'[8]

Ngati Te Ata believe that there are two more recommendations in the concluding text of the Tribunal's report (even though they are not numbered as are the others). These would be:

> 16. Compensation for confiscations should be made payable not to individuals but to the Makaurau, Pukaki and Te Puea *maraes*. These people have suffered enormous losses and although compensation was not sought it provides the only practical alternative to restoring what was lost.
>
> 17. Ngati Te Ata ought to be fully informed about why they had to vacate the Moeatua marae, about whether or not they still have an interest in the Awhitu Lakes, and whether access or user rights can still be secured to them. The Rangariri people ought to be told of the position concerning their *papakainga* and should be assisted to re-establish their *mana whenua* at Awhitu.

8 Note: these 'recommendations' were brought to the attention of the Treaty Issues Unit in June 1988, and they began investigations.

APPENDIX D - Te Reo Maori Claim

D. 1 Environmental degradation

Environmental management is the management of human activity within ecosystems. The way that human beings behave is a reflection of their cultural background, and their culture is transmitted to them via their language. A threat to the Maori language is a threat to the integrity of a unique indigenous part of the New Zealand environment. Where the environment may be or has been adversely affected the Parliamentary Commissioner for the Environment may investigate under section 16(1)(c) of the Environment Act. Section 17(c) of the Act directs particular attention to cultural resources which contribute to the wellbeing of the *tangata whenua.*

D. 2 Summary of Tribunal findings [1]

1 The Treaty guarantees protection of the Maori language as a *taonga* under Article II. The protection guaranteed to *taonga* under the Treaty requires active (not merely passive) protection.

2 Laws and policies prohibiting the use of Maori in the Courts are inconsistent with the principles of the Treaty.

3 The education and broadcasting systems in over-emphasing English fail to protect the Maori language. (However, the Tribunal noted that it did not feel qualified to deal with many of the recommendations sought by the claimants in relation to education and broadcasting except in a general way.)

4 The Maori language should be officially recognised forthwith in the Courts and in dealing with any department or local authority. However, enforced bilingualism in all official documents is inappropriate as resources could be better spent on a Maori Language Commission to encourage the use of Maori.

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1 *TE REO MAORI,* pp. 27-33, 38-58, 65-67

D.3 SUMMARY OF CROWN RESPONSE: TE REO MAORI CLAIM

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
Received by Departments 29 April 1986 Claim lodged with the Tribunal 2 May 1984		
1. To the Minister of Maori Affairs and the Prime Minister That legislation be introduced enabling any person who wishes to do so to use the Maori language in all Courts of law and in any dealings with Government Departments, local authorities and other public bodies (refer para 8.2.8 of the report).	The Maori Language Act 1987 declared the Maori language to be an official language of New Zealand and conferred the right to speak Maori in any legal proceedings. The right to speak Maori in dealings with other public authorities has not been granted nor has the right to submit court documents in Maori.	partially implemented
2. To the Ministers of Maori Affairs and Internal Affairs That a supervising body be established by statute to supervise and foster the use of the Maori language (refer para 8.2.12 of the report).	The Maori Language Act 1987 established Te Taura Whiri i te Reo Maori (the Maori Language Commission) to actively promote Maori as a living language and to advise and assist the Crown in the implementation of Maori as an official language of New Zealand.	fully implemented
3. To the Ministers of Maori Affairs and Education That an inquiry be instituted forthwith into the way Maori children are educated including particular reference to the changes in current departmental policies which may be necessary to ensure that all children who wish to learn Maori should be able to do so from an early stage in the educational process in circumstances most	The Minister of Education advises that "the Department of Education has initiated new programmes and continued to strengthen existing provisions to increase the availability of teachers and resources to teach Maori". The recommended inquiry was not instituted.	rejected by Ministers

beneficial to them and with financial support from the State (refer para 6.3.7 of the report).		
4. To the Ministers of Maori Affairs and Broadcasting That in the formulation of broadcasting policy regard be had to this Finding, that the Treaty of Waitangi obliges the Crown to recognise and protect the Maori language, and that the Broadcasting Act 1976 (sec 20) enables this to be done so far as broadcasting is concerned (refer para 7.1.9 of the report).	The Minister of Broadcasting advises that the Crown "is committed to ... the provision of programmes designed to enhance Maori language and culture". There has been some increase in the use of Maori in general radio and television programming, the number of Maori language programmes, and appropriate staff training and support initiatives. The BCNZ has established a Maori Radio Board and has applied to the Broadcasting Tribunal for warrants to operate a Maori Radio Network. On 3 October 1988, the Minister of Broadcasting announced reform of policy relating to Maori broadcasting. Key points relating to this recommendation were: (a) a minimum of six per cent of the Public Broadcasting fee allocated for Maori broadcasting purposes (Maori language broadcasting is included in this amount but not specifically provided for); (b) requirement over a three year transitional period for TV 3 to build up programming directed at a Maori audience and 'include a Maori dimension in its presentation' (no specific requirement for broad-casting in the Maori language); (c) autonomy and financial support for Aotearoa Maori Radio (no specific requirement for broadcasting on the Maori language).	partially implemented
5. To the Minister of Maori Affairs and the Minister In Charge of State Services That amendments be made to the State Services Act 1962 and the State Services Conditions of Employment Act 1977 to make provision for	The State Services Commission recommended against these proposed legislative changes. The SSC considered that they were already able to promote bilingualism, and had "already promulgated	rejected by ministers

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
bilingualism in Maori and in English to be a prerequisite for appointment to such positions as the State Services Commission deems necessary or desirable (refer para 9.1.4 of the report).	a policy change to departments requiring them to consider the need for proficiency in Maori language and culture as an essential, highly desirable or desirable specification for appropriate jobs". With the passage of the State Sector Act 1988, the general responsibility rests with Chief Executives of government departments. S. 56(2) requires that they be "good employers", which includes recognition of the aims, aspirations and employment requirements of the Maori people. S. 58 requires an "equal employment opportunities programme". S. 60 requires the Chief Executive to give preference to the person best suited to the position. None of these sections specifically mentions the Maori language.	

General notes:

(1) Crown policy on Maori language was announced in April 1988 in He Tirohanga Rangapu ("Partnership Perspectives") (p. 6) as:

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

(2) The Crown response to the Tribunal's Te Reo Maori recommendation was deemed by the claimants as insufficient to actively protect the Maori language, and they have filed a further claim (WAI 26, June 1986).

D. 4 Claimant comments

Mr Huirangi Waikerepuru and Mr Piripi Walker [1]

The claimants believe that the Crown purposefully pre-empted the findings of the Tribunal in the Te Reo Maori claim by introducing the Maori Language Bill before the Tribunal findings were made public. The changes instituted by the Crown were lesser than those recommended by the Tribunal and, the claimants believe, insufficient to actively protect the Maori language.

They would like to see the Maori Language Act or other appropriate statutes strengthened to reflect fully the first Te Reo Maori recommendation. Maori people should be able to conduct their business in the Maori language with all of government, not just the courts.

The claimants are now concentrating on self-help initiatives such as establishing tribally-based Maori language radio stations themselves. Without adequate assistance from the Crown to cover costs, however, they must rely on extensive volunteer labour. The Tribunal has stated that it is the Crown's duty to actively protect the *taonga* of *te reo* Maori, and therefore the claimants believe the Crown should be more generous.

The Waitangi Tribunal apparently indicated to claimants that after the Royal Commission on Broadcasting finished their deliberations, the issue of ownership of the airwaves under the Treaty could be considered. However, as their claim has been heard by the Tribunal once before, their second claim must now wait in the queue.

Mr Walker questioned whether the Tribunal itself is actually a fraud, if its recommendations can be ignored by the Crown, and it is not adequately resourced for the task it has been given. They feel that purely advisory bodies will serve no useful purpose until the power equation in government reflects a Crown-Maori partnership.

They also said that representation of the Maori partner in decision-making must be tribally based.

Mr Walker noted that central government needs reform in order to recognise the Treaty and the need for partnership, especially with regard to the 'operative environment' (schools, broadcasting, etc.).

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1 Summary of discussions in June/July and September/October 1988

APPENDIX E - Waiheke Claim

E. 1 Environmental degradation

The Waiheke claim dealt with the allocation of the natural and physical resource of land, and access for *tangata whenua* to physical and spiritual sustenance from that land. Loss of the Waiheke land meant loss of natural, physical and cultural resources that were their heritage and necessary for the physical and cultural wellbeing of the tribe, which are matters of concern to the Parliamentary Commissioner for the Environment under section 17(c) of the Environment Act. Section 16(1)(a) of the Act allows investigation into matters of resource allocation.

E. 2 Summary of Tribunal findings [1]

The Crown acted contrary to the principles of the Treaty in enabling the disposal of the Waiheke scheme through the Board of Maori Affairs without providing for an inquiry into the Ngati Paoa position, and the prospect of furnishing relief.

(*Note:* Two of the three Tribunal members also found that the granting of the right of pre-emption to the Crown under the Treaty implies a reciprocal duty for the Crown to ensure that the *tangata whenua* retain sufficient endowment for their foreseen needs. This opinion was later endorsed by the Tribunal sitting on the Orakei claim.)

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1 *WAIHEKE* pp. 74-84, 99-100

E.3 SUMMARY OF CROWN RESPONSE: WAIHEKE CLAIM

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
Received by Departments on 2 June 1987 Claim lodged with the Tribunal 19 January 1984		
To the Minister of Maori Affairs **1.** That the Crown negotiate with the Board of Maori Affairs, Mr H M Evans for the Waiheke Station Evans Family Partnership and the Ngati Paoa Development Trust (Inc), through a negotiator appointed by it,with a view to releasing the Waiheke Station to a Ngati Paoa tribal trust and establishing a viable operation on it, or failing agreement, that the Crown seeks for Ngati Paoa some other endowment that involves a land base within its ancestral territory.	The Minister of Maori Affairs sought a legal opinion from the Solicitor General in September 1987, and received the reply on 15 April 1988. He advised in August 1988 that there is an impediment connected with the prior lease of the station, but that this may be resolved by October 1988.	being addressed, but tangible results not yet evident
2. That Government consider (and we put the matter no stronger than that) the release of funds to the Board of Maori Affairs for the establishment of tribal land endowments having regard to the opinions expressed in the overview and recommendations of the Tribunal.	No information has been provided by Ministers.	insufficient information
3. That Government pay $5,000 to the Ngati Paoa Marae Committee towards costs of the abandoned hearing.	The Department of Maori Affairs asked the Departmentof Justice on 15 February 1988 to expedite this payment. The payment was made to the Ngati Paoa Development Trust Board on 6 September 1988.	fully implemented

E. 4 Claimant comments

Mrs Hariata Gordon [1]

The Waiheke claimants to date have not had a positive or a substantive response from the Crown. They see that both the primary cause of the problem which led to their claim, and the party responsible for coordinating the Crown response to the Tribunal's recommendations, are under the jurisdiction of the same Minister of the Crown (Board of Maori Affairs and Treaty Issues Unit, both under the Minister of Maori Affairs). This situation seems not to have encouraged a speedy resolution.

Although their ancestors were compelled to sell the Waiheke land (under circumstances induced by Crown actions in breach of the Treaty), the tribe believes they should still have the right to be consulted about transactions in their tribal territory. They believe that recommendation 1 should have been worded more forcibly. They also believe that it is an insult for Maori Affairs to propose alternative lands to Waiheke. If an alternative was appropriate, Ngati Paoa would have said so: only they can say which lands are *taonga* to them. [2]

They believe that the third recommendation should not have to have been stated at all, if the departments of the Crown had been doing their job.

Mrs Gordon noted that although the Waitangi Tribunal can only issue recommendations, it is all they have to place their faith in.

Contacts with departments of the Crown are frustrating: the contact person keeps changing, and information has to be repeated as it does not seem to get passed on to others who need to know. Better coordination of communication is needed.

Partnership must involve shared decision-making at all levels. At the moment it appears to be only one-way consultation (Pakehas make the decisions, and consult if they want specialist Maori information). 'Considering' Maori values is not strong enough.

Rangatiratanga requires that Maori people be given back enough resources to be self-sufficient and not dependent on handouts. Devolution must include adequate resources in control of the *iwi* authorities.

She also feels that talking about 'white backlash' only encourages it to happen. Politicians should instead concentrate on public education: particularly explaining the background of the claims.

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1 Summary of discussions in June and September 1988

2 *Note:* the Director of the Treaty Issues Unit believes that they have not been proposing alternatives (J. Paki, pers. comm. , 18 October 1988).

APPENDIX F - Orakei Report

F. 1 Environmental degradation

The Orakei claim is similar to the Waiheke claim in that it dealt with the allocation of the natural and physical resource of land, and access for *tangata whenua* to the physical and spiritual sustenance from that land (see comments under E.1).

F. 2 Summary of Tribunal findings [1]

1 The Crown at various times and in various ways failed to meet its obligations under the Treaty to the Ngati Whatua people of Orakei, and in so doing has prejudicially affected them to the extent that they are "virtually landless and without standing in their own homeland". As a consequence of the many breaches of the Treaty of Waitangi recorded, and the serious loss and deprivation which Ngati Whatua at Orakei have incurred as a result, appropriate relief should be granted to them. This relief should be granted to the tribe as a whole through the Ngati Whatua of Orakei Trust Board.

2 The Crown has an obligation under the Treaty to ensure retention by tribes of sufficient resources for their maintenance, support and livelihood. As a result of Crown action, Ngati Whatua has insufficient resources to sustain itself, including lack of sufficient financial resources to utilise any lands that may be returned to them. Therefore, in addition to return of certain lands, the Crown should grant a sufficient financial endowment.

3 There was nothing inconsistent with the Treaty that the claimants, and others, should demonstrate to protest the failure of the Crown to redress Ngati Whatua losses at Orakei or to provide some forum for the issues to be fully researched, debated and determined. It was inconsistent with the Treaty however that the protest in this case was made unlawful through acts of trespass. However the matter of pardons is for the Attorney-General to decide.

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1 *ORAKEI*, pp. 137-147, 180-195

F.3 SUMMARY OF CROWN RESPONSE: ORAKEI CLAIM

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
Received by Departments on 4 November 1987 Claim lodged with the Tribunal 7 April 1986		
	General note: The Treaty Issues Unit of the Department of Maori Affairs coordinated an interdepartmental working party on the Orakei recommendations and negotiations with the Auckland City Council. The Crown announced on 1 July 1988 that the Tribunal's recommendations to Ministers would be implemented. New legislation is required to implement many of the recommendations, and the Minister of Maori Affairs expects this will be introduced by the end of 1988.	
To the Ministers of Maori Affairs, Housing, Lands, Local Government, Health and Finance **1.** *Okahu Park and the Bastion Point Headland Reserves* a) That Okahu Park and the Bastion Point headland reserves (excluding the MJ Savage Memorial) and being the areas marked 19,20,21,22,23,28,29 and 30 on appendix III of the report, cease to be Crown land and be vested in the Ngati Whatua of Orakei Maori Trust Board as Maori land holding historical and spiritual significance for the Ngati Whatua of Orakei and available as a park for the benefit of the Ngati Whatua and the citizens of Auckland.	Legislation is being drafted.	being addressed, but tangible results not yet evident

b) That administration of the lands be vested in a statutory Board called the Ngati Whatua of Orakei Reserves Board (or other such name as may be sought by Ngati Whatua of Orakei Maori Trust Board).

c) That the board comprise six members, or other such even number as may be agreed to, half to be appointed by the Auckland City Council, the Chairman to be elected by the Board members from among their number.

d) That the Reserves Board control and manage the reserves for the purpose of their classification under the Reserves Act 1977 in accordance with the appropriate provisions of that Act, at the cost of the Auckland City Council.

e) That notwithstanding the representation of the Trust Board on the Reserves Board, the Reserves Board may lease or give licences for parts of the reserve for Ngati Whatua farming or for tribal community or cultural functions to be held at suitable times and places.

f) That the Crown pay fees to the Trust Board appointees in accordance with the Fees and Travelling Allowances Act.

g) That the Reserves Board be exempt from the payment of rates.

h) That the reserves be renamed as Ngati

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
Whatua Park or some other such name as the Trust Board may approve. (Refer paras 14.3.1, 14.3.3, 14.3.4, 14.4.1, 14.4.2 of the report.)		
2. *Orakei Marae, Church and Urupa* That the Orakei Marae, Church and Urupa, marked 105, 106, 107, 102, 114 and the access strip marked 112 on appendix III of the report be vested in the Ngati Whatua of Orakei Maori Trust Board freed from the payment of rates. (Refer paras 12.19, 14.3.9, 14.4.2 of the report.)	Legislation is being drafted.	being addressed, but tangible results not yet evident
3. *Kitemoana Street housing - Mortgage* a) That the liability of the Ngati Whatua of Orakei Maori Trust Board to pay $200,000 to the Crown be abrogated by the repeal of s. 16 of the Orakei Block (Vesting and Use) Act 1978.	Legislation is being drafted.	being addressed, but tangible results not yet evident
b) That the Crown settle with the Maori Trustee the principal sum on the Board's mortgage to the Maori Trustee with interest paid by the Board to the date of settlement; and that the Maori Trustee make appropriate refunds to the Board (refer paras 14.3.10, 14.4.3 of the report.)	$126,518.56 was paid to the Board on 22 August 1988.	fully implemented
4. *Youthline Trust site, Community site, Housing Corporation Land* a) That the Crown vest in the Ngati Whatua of	Legislation is being drafted.	being addressed, but tangible results not yet evident

Orakei Maori Trust Board, without conditions as to user i) the land (No 110 appendix III) comprising 4303m2 at the northern end of Kupe Street, Orakei and set aside as a local purpose (community health) reserve by s. 14 of the Orakei Block (Vesting and Use) Act 1978, the control and management of which was vested by the Act in the Youthline Trust (Incorporated). ii) the land (No 31 appendix III) comprising 7798m2 at the northern end of Kupe Street, Orakei being all the land described in the second and tenth schedules to the 1978 Act, and which was vested in the Auckland City Council as a local purpose (site for community facilities) reserve by s 13 of that Act. iii) the land (No 111 appendix III) comprising 1.7986 ha situated by the Bastion Point (Kohimarama) headland being the land described in the eleventh schedule to the 1978 Act and which was vested in the Housing Corporation of New Zealand by s. 14 of that Act.		
b) That the Board may be exempted from any reserve or reserve fund contribution requirements on any sub-division of the above lands and that they be held rate free for so long as they remain undeveloped.		
c) That the Crown refund to the Youthline Trust (Inc) and the Auckland City Council, any sums	The Trust and the Council have declined to ask for reimbursement.	fully implemented

WAITANGI TRIBUNAL RECOMMENDATIONS	CROWN RESPONSE	STATUS SUMMARY
expended by them in respect of the lands described (refer paras 14.3.6, 14.3.7, 14.3.8, 14.4.3, 14.4.5 of the report).		
5. Endowment Contribution a) That the Crown pay to the Ngati Whatua of Orakei Maori Trust Board the sum of $3,000,000 and b) that such sum be paid in cash, or made inflation proof if paid over time; c) that the Crown meet the cost of an independent advisor and consultant on a four year contract to assist the Board (refer paras 14.2, 14.4.4, 14.4.5, 14.4.7, 14.4.12 of the report).	The $3 million was paid to the Trust Board on 25 August 1988. This adviser is to be paid for from the $3,000,000 endowment.	fully implemented
6. Recognition of Tribal Authority That the purposes and powers of the Ngati Whatua of Orakei Maori Trust Board be extended in the manner contemplated at paras 12.23 and 14.4.9 of the report.	Legislation is being prepared.	being addressed, but tangible results not yet evident
7. Legislation That the appropriate legislation to implement these recommendations be drafted in full consultation with the Ngati Whatua of Orakei Maori Trust Board and with such amendments or additions as the Board may agree to.	Conditions with the Board are 'ongoing'.	being addressed, but tangible results not yet evident

8. State Housing That Housing Corporation be directed to provide a preferential policy for Ngati Whatua persons in the allocation of State homes in the Orakei block.	Maori Affairs staff have advised the Corporation, and new policy is 'being considered'.	being addressed, but tangible results not yet evident
REFERRED TO THE ATTORNEY GENERAL (not numbered along with other recommendations) The claim to pardons and a remission of outstanding fines, the background outlined in Part 1 of the report, and the findings and comments at para 12.24 of the report.	The Attorney General noted: on 22 August 1988 that: "The Tribunal found that the claimants held sincerely to the view that what they did was necessary and right. In my view that may explain the protest action, but cannot lawfully excuse it. The Tribunal itself seems to have acknowledged this point when it fell short of recommending pardons ... I do not see that the interests of justice would be served by invoking the power of pardon or to cease further attempts to enforce payment of outstanding fines."	rejected

F. 4 Claimant comments

Mr Joe Hawke and Mr Danny Tumahai [1]

Ngati Whatua believe that their physical as well as emotional/ spiritual environment was destroyed by actions of the Crown. Loss of land was connected to loss of fishing and farming resources, and loss of *mana.*

At the time comments were invited from the claimants, the Crown had not yet made its announcement that the Orakei recommendations were accepted. Claimants were aware that delays had occurred with arguments over the $3 million, and asked why action couldn't be taken on the other recommendations in the meantime. They noted it was a matter of **justice**, not precise compensation: the $3 million recognised past wrongs but could not approach compensation for them.

They noted that their claim was already a compromise, as they only chose lands with no third parties involved, in order to be 'reasonable'. It was now time for the other Treaty partner to be reasonable.

Mr Hawke was the first to lodge a claim with the Waitangi Tribunal, in 1976, where he raised general Maori land issues in connection with a fisheries claim. Twelve years and three hearings later, they finally had a Crown undertaking, but as yet no tangible result.

They are concerned that the Crown seems to read the recommendations of the Tribunal only, and not the full text that explains the magnitude of injustice and the speed with which it should be righted. They also felt that Tribunal recommendations from some other claims were not explicit enough, enabling the Crown to not act.

He also noted the difference between the Pakeha piecemeal approach to resource management, and the Maori **holistic** approach.

Mr Hawke emphasised the need for 50:50 partnership; his people originally offered this to the Crown, but the trust and the Treaty were broken. It is time to try again.

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1 Summary of discussions in June and September 1988

APPENDIX G - Muriwhenua Claim (Interim reports on SOEs and fisheries)

G. 1 Environmental degradation

The fisheries portion of the Muriwhenua claim was principally concerned with the contention that full Crown control of fisheries was contrary to the Treaty, in that the Maori people had not surrendered the fisheries guaranteed to them under Article II. The remainder of the claim is concerned with land and the Tribunal has not reported its findings in that regard apart from the interim report of 8 December 1986 relating to the transfer of Crown lands to SOEs.

The Tribunal noted that the Northland fishery had not suffered the same impacts from pollution as in other areas:

> *"The Far North's slow economic development also meant that fish habitats were spared the pollution and reclamations that affected more prosperous places."* [1]

However, the majority of comment in the Muriwhenua report concerning impacts on natural and physical resources relates to **resource depletion** through overfishing.

The Long Title and s. 17(e) of the Environment Act refers to sustainability of natural and physical resources and s. 17(e) of the Act refers to depletion of these resources.

The first example of resource depletion documented by the Tribunal was that of the grey mullet fishery; booming in the 1870s and 1880s, it was by 1895 in decline. [2] Significant depletion of fish stocks then occurred nationwide with the advent of steam trawlers in 1916 and subsequent sophistication of, and lack of control over, trawl/seine operations.

In 1963, the Crown initiated policy actively encouraging exploitation of the inshore fisheries.

> *"Under increasing pressure, both small and large operators worked their way up the coast, ranging from trawlers at sea to small trailer borne boats on land. Muriwhenua was not exempted, despite its remote position . . . . Their coastlines are now dominated by trawlers and fishermen based in the south . . . . It was further apparent that by the 1980s, the viability of small fishing ventures was very much in question and that only the bigger species - the larger trawlers - with the facility to explore further afield, might survive in the competition . . .*
>
> *. . . The catch of some fish stocks had dropped dramatically. National commercial landings of snapper for example, plummeted from 17,600 tonnes in 1978 to 8729 tonnes in 1983. Not only were financial returns down but the survival of some species appeared in jeopardy. In brief there were too many fishermen chasing too few fish."* [3]

The Crown response to this situation was to reduce the number of people fishing commercially by excluding part-timers. This had a disproportionate impact on the claimants, and

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1 *MURIWHENUA*, p. 113

2 Ibid. , p. 94

3 Ibid. , p. 117

contributed to the lodging of the Muriwhenua claim with the Tribunal. Imposition of the ITQ (Individual Transferable Quota) system added further insult to this injury. [4]

The Tribunal advocated bicultural negotiations to resolve the matters of resource allocation. As these negotiations transpired, in addition to *rangatiratanga* and resource allocation, conservation of the fisheries resource was a theme of particular importance to the Maori negotiators. [5]

G. 2 Summary of Tribunal findings [6]

8 December 1986 report

1 The State Owned Enterprises Bill as drafted was prejudicial to the Muriwhenua claim and some 40 claims before the Tribunal and was contrary to the principles of the Treaty.

10 December 1986 report

2 The allocation of Individual Transferable Quotas (ITQs) could prejudice the Muriwhenua claim, and considerable disruption and need for compensation may ensue if ITQs were issued.

30 September 1987 memorandum

3 The main finding was that the fisheries were owned by Maori in the same way as land, and that the Crown therefore was required under the Treaty to negotiate for a right of commercial use.

June 1988 report

4 The Treaty guaranteed to Maori full protection for their fishing activities, including unrestricted rights to develop them along either or both customary or modern lines. Without prior agreement (which was not obtained) general fishing could neither delimit nor restrict this Maori fishing interest: to the extent that general fishing might do so, the Crown is bound to intervene.

5 The fishing activities of the Muriwhenua people involved the whole of the adjacent continental shelf. Those activities in fact had been developed on commercial lines, and would have been developed as a commercial industry, had the Treaty guarantee been maintained by the Crown.

6 The Crown is obliged to support Maori economic initiatives in fishing, or otherwise to seek arrangements whereby Maori and non-Maori fishing could proceed to the mutual advantage of both sides. It is consistent with the Treaty and in the interests of both sides that new agreements or arrangements on fishing should now be sought. In Muriwhenua, the Crown must bargain for any public right to the commercial exploitation

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4 Ibid. , p. 188

5 Report of the Maori Members of the Joint Working Group on Fisheries, pp. 1, 7, 8, 12, 14 (in Ministerial Sub-Committee on Maori Fisheries, July 1988). Also see Preamble to the Maori Fisheries Bill, k(v)

6 *MURIWHENUA,* pp. 239-240, 296-297

of the inshore fishery. In terms of the Treaty the Crown's only interest in that fishery at present is the full protection and promotion of tribal fishing activities.

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

8 The damage to the Muriwhenua tribes had included the loss of a viable industry. Very substantial relief to the claimants is required in respect of past breaches and to restore their fishing economy to what it might have been. A long-term programme of rehabilitation is required and special account must be taken of their reliance on fishing due to the small land area available to them, the lack of alternative industries in the district and the need to rebuild their communities.

G.3 SUMMARY OF CROWN RESPONSE: MURIWHENUA CLAIM (INTERIM REPORTS ON SOEs AND FISHERIES)

WAITANGI TRIBUNAL RECOMMENDATIONS	*CROWN RESPONSE*	*STATUS SUMMARY*
Claim lodged with Tribunal 11 June 1985		
1. Report dated 8 December 1986 ***To the Minister of Lands*** That the Minister of Lands, or any other Minister involved, decline to transfer to any State-Owned Corporation envisaged by the Bill the Crown Lands within the traditional territories of the Ngati Kuri, Te Aupouri, Te Rarawa, Ngai Takato, and Ngati Kahu Tribes during the currency of the claim before us.	The State-Owned Enterprises Bill was amended, and consequently the State-Owned Enterprises Act 1986 contains sections 9 (Treaty of Waitangi) and 27 (Maori land claims). It was section 9 that allowed the New Zealand Maori Council case to proceed before the Court of Appeal in 1987. The Court's decision required a negotiated agreement between the plaintiff and the Crown, which resulted in the passage of the Treaty of Waitangi (State Enterprises) Act on 30 June 1988. This did not prevent lands being transferred to SOEs or other bodies (in Muriwhenua or elsewhere) but provided a mechanism to protect tribal interests in land transferred to SOEs until the Tribunal could review their claims.	partially implemented
2. Memorandum dated 10 December 1986 ***To the Minister of Agriculture and Fisheries*** We have concluded that no Quotas should be allocated until the Tribunal has reported to the Ministers and that Report has been considered.	The Director-General of Agriculture and Fisheries in his reply of 23 December 1986 stated that the Crown had already made key policy decisions and created expectations of prompt issuance of ITQs, and would proceed to issue ITQs. He further stated that "this action should not be seen in any way derogating from the Ministry's acceptance of and commitment to applying the principles of the Treaty of Waitangi as they related to fisheries".	rejected by Ministers

3. Memorandum dated 30 September 1987 ***To the Minister of Maori Affairs*** The Tribunal draws your attention particularly to the opinion that Government should not take any further steps in implementation of the ITQ policy in the fisheries. (*Note:* the report observed that, as the Muriwhenua people (and likely the other tribes) exercised a traditional control over fisheries which they did not willingly give to the Crown, the Crown should negotiate with them for right of commercial use, and that the ITQ policy is contrary to the principles of the Treaty.)	The Crown did not act on this advice. The Muriwhenua claimants, and subsequently the Ngai Tahu claimants and six other Maori authorities (from Tainui, Raukawa, Taranaki, Waiariki, and Tai Tokerau, and the NZ Maori Council) applied to the High Court for restraining orders on the further implementation of the Quota Management System. Temporary orders were issued on 30 September 1987 (for the Muriwhenua territory only) and 2 November 1987 (for the whole fishery), until Maori fishing rights could be "fully and finally resolved". On 22 December 1987, the Crown announced the formation of a working group to report to the Crown and Maori tribes on Maori fishing rights by 30 June 1988.	rejected by Ministers
4. Interim report dated 31 May 1988 (published June 1988) We make this report on the first stage in our proceedings in the hope that it will assist in negotiations already well underway. We have been asked to defer the consideration of recommendations until a later stage, should it be necessary to consider them at all. There is one recommendation that we nonetheless make. The unequal bargaining power of Maori has been reflected in past transactions with the Crown. These negotiations are historic, in our view, and ought not to be seen in later years as having suffered from the same impediment. We recommend, that unless it has already made provision the Crown undertakes to meet the Maori party's reasonable costs, including	The negotiation team reported on 30 June 1988 that they were unable to reach agreement. Negotiations resumed on 29 August 1988 and the High Court granted orders sought by the Crown allowing the fishing season to begin on 1 October unhindered by the discussions. Ministers have not provided information re: covering the costs of Maori negotiators. The Maori Fisheries Bill was introduced in September 1988, containing some of the matters that could be agreed upon, but also going much further: (a) two items were listed as agreed upon in the Preface that do not appear to have been actually agreed to by the Maori negotiators (k (iii) and k (vi), re-allocation of quota and tribal gathering for *hui* and *tangi*);	partially implemented

WAITANGI TRIBUNAL RECOMMENDATIONS	CROWN RESPONSE	STATUS SUMMARY
that necessary to obtain such legal and technical assistance as may be required.	(b) denied Maori access to the Courts or the Waitangi Tribunal in relation to fisheries issues, including claims relating to loss of fisheries through pollution; (c) covered freshwater fisheries, which were not covered in negotiations; (d) required Maori to 'substantially fish' each 2.5 per cent before being allocated the next 2.5 per cent (up to allowable total 50 per cent) and left the definition of 'substantially' wholly open to Ministerial interpretation without statutory criteria; (e) provided for the establishment of local non- commercial fisheries zones with local management committees, but did not specify criteria for selecting committee members nor guarantee traditional fishing access. In protest to the form of the Bill, the NZ Maori Council filed proceedings with the High Court on 27 September 1988 claiming negligence by the Crown in failing to protect Maori fisheries as guaranteed by the Treaty and as protected by section 88(2) of the Fisheries Act (which the Bill would repeal). A Crown proposal reported in the media on 29 October 1988 suggested that Maori rights of access to Courts and Tribunal could be retained if the total quota allocated to Maori were reduced to 10 per cent from 50 per cent. Submissions on the Bill closed on 28 October 1988. The response of the House is yet to be seen.	

G. 4 Claimant comments

Hon Matiu Rata [1]

Mr Rata stressed that only part of the Muriwhenua claim related to fisheries, and that the remaining portion dealing with land had yet to be reported on by the Tribunal. He did not want to see the attention given to the fisheries issues compromising in any way their opportunity for redress for land claims.

He also noted that the use of the Muriwhenua findings on fishing to set precedent for Maori fishing policy nationwide suggests that the hearing costs should not be borne solely by Muriwhenua claimants but should be shared more equitably.

Mr Rata commented that it was unrealistic to expect Maori-Crown negotiations to resolve in six months a problem that had evolved over 148 years. The Ministers' decision to introduce the Maori Fisheries Bill was a 'very bold step' to force resolution of these issues. He would like the Crown to not be looking for 'a way out' of difficult Treaty issues, but 'a way in' to a positive solution.

He has a great deal of confidence in the ability of this country to solve Treaty issues, and sees slow but positive progress. Mr Rata would like to see a **bipartisan approach** to the Maori fishery issue and to Treaty issues generally, and believes that with informed debate and goodwill enduring solutions could be reached within a decade.

He recognises that one generation cannot afford to remedy 148 years of breaches under the Treaty in one go and that there are no simplistic answers. **Seeking a 'full and final settlement' is unrealistic and inequitable: one generation cannot have sufficient foresight or financially afford it. What is needed is a base settlement and a legislative formula that requires adherence to the principles of the Treaty.** Each generation can contribute in relation to the benefits acquired, and the principles can be applied as appropriate to changing conditions.

He believes that Maori people are generous when it comes to material issues, and are not interested in 'splitting straws' like the Pakeha seem prone to do.

He is concerned that "the niceties of law not be used to deny justice". Litigating for years in the courts is no solution. He is also concerned that "the rule of law not stifle the legitimacy of claims". If redress is considered too expensive this should be a comment on this generation's ability to pay, not a comment against the validity of the grievance itself.

Mr Rata indicated that the Tribunal had received "undue pressure" from the Crown to get the Muriwhenua fisheries report out quickly, and he was concerned at this development.

With regard to future review of the implementation of Tribunal recommendations: he noted that the Minister of Maori Affairs is now required to report annually, but that there may be a 'conflict of interest' as Maori Affairs itself has been involved in claims as part of the Crown. He would like to see a standing committee of Parliament oversee Treaty issues.

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1. Summary of discussions in June, October, and November 1988

APPENDIX H
WAITANGI TRIBUNAL REPORTS NOT CONTAINING RECOMMENDATIONS [1]

H. 1 Fisheries regulations

Mr Joe Hawke of Ngati Whatua and others lodged a claim in October 1976 that prosecutions under the Fisheries Regulations were contrary to Maori fisheries rights guaranteed under the Treaty. Mr Hawke also gave a lengthy submission on the issue of customary Maori land.

The Tribunal considered that the claim was not well founded, and accordingly made no recommendations. The Tribunal did not address the matter of Maori land, as it was not part of the original claim, and dismissed the fisheries claim largely because the regulations allowed for special permits for specific tangi or hui gathering but the claimants had not sought a permit.

H. 2 Waiau Pa Power Station

This claim, lodged in February 1977, concerned a Crown proposal to site the Thermal No. 1 Power Station near Waiau Pa, and the consequent impacts this would have on the estuary ecosystem and thus *kaimoana* resources.

The proposed power station was to be fired by natural gas from the Maui field, and would have required either cooling ponds, taking 560 ha of intertidal land, or mechanical draught cooling towers, which could produce effluent containing chemical pollutants.

The Crown advised the Tribunal that it had abandoned the cooling pond alternative, and then that it had abandoned the power station proposal in total. The Tribunal did not therefore make any final recommendations. It did however comment on Maori views of pollution and the likely environmental impacts, as the quotes below summarise:

> *"The Tribunal was particularly impressed by the witnesses who spoke of the interdependence of communities of life within the waters . . . That there has been already a deterioration due to pollution from fresh stream flooding, agricultural use of the inland areas and from other man inspired activities, is beyond doubt.*
>
> *. . . The Tribunal is satisfied that it was demonstrated beyond doubt that shallow sheltered inlets like Manukau harbour are important marine ecosystems . . . and that there is an extensive measure of interdependence between the whole of the sheltered nursery areas of the Manukau harbour and the ocean fisheries.*
>
> *The Tribunal has reached the conclusion that the proposals of the New Zealand Electricity Department, be the proposal in the form of a 'pond' or of 'cooling towers', will cause damage to the waters of the Manukau harbour. The Tribunal believes that there must be recognition of the fact that a valuable source of food, which given a fair chance is capable of providing protein for generations to come, should not be endangered to such an extent that its future is put in jeopardy . . . . "* [2]

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1 For full references of these reports, see the References section

2 *WAIAU PA POWER STATION,* pp. 10-12

The power station was not proceeded with, largely based on economic grounds. However, the Tribunal clearly indicated the incompatibility of thermal/chemical effluent with the protection of ecological integrity and *kaimoana* resources in estuarine environments.

H. 3 Motiti Island

This matter was brought to the Tribunal in May 1984 by the Patuwai Tribal Committee, who objected to the inclusion of Motiti Island within Tauranga County for local government purposes and sought the Tribunal's assistance in persuading the Local Government Commission to set aside its scheme.

The Tribunal advised the claimants that it could only investigate Crown policies or practices that may be contrary to the principles of the Treaty of Waitangi and invited the Committee to submit a claim prepared appropriately. The Committee did not respond. The Tribunal judged with the information at hand that the Committee had had the right of hearing before the Local Government Commission, and to investigate the matter further would require a claim stated in different terms.

H. 4 'Special Privileges'

Mr D McMaster of Auckland filed a claim in February 1985 alleging amongst other things that a number of special privileges were accorded to Maori people at variance with the Treaty. Mr McMaster was advised that s. 6 of the Treaty of Waitangi Act 1975 allowed only Maori people to bring a claim to the Tribunal, and as he is not Maori he withdrew his claim.

H. 5 Taupo fishing rights

Mr H T Karaitiana of Ngati Tuwharetoa lodged this claim in December 1984 requesting the Tribunal's intervention with regard to the law affecting the taking of *inanga* (freshwater whitebait) in Lake Taupo.

The Tribunal researched the relevant fishing regulations and found that Ngati Tuwharetoa had exclusive rights to *koura* and other fish indigenous to the lake, but anyone could take whitebait, lamprey or eel. They advised Mr Karaitiana and requested clarification on his claim, but received no response. After two years the claim was considered to have lapsed.

H. 6 Auckland Regional Authority

The Auckland District Maori Council lodged this claim in March 1986, claiming that the Auckland Regional Authority was in breach of Article II of the Treaty in not granting two seats on the Authority to Maori people and in rejecting the District Maori Council's nomination to fill a vacant seat on a body that had 29 Pakeha and no Maori members.

The Tribunal advised the claimants that there would be a delay before the claim could be heard and to consider in the interim whether under the terms of the Treaty of Waitangi Act the actions of a local authority could be claimed against.

The District Maori Council advised in November 1986 that the ARA had subsequently created two Maori seats, and that in view of the growing list of cases before the Tribunal, they would withdraw their claim.

H. 7 Ngai Tahu fishing rights

In September 1984, Tom Te Weehi and Reremoana Hauraki of Ngai Tahu claimed to the Tribunal that certain provisions of the Fisheries Act and Regulations were contrary to the Treaty.

Mr Te Weehi had been prosecuted for the taking of seafood contrary to the Fisheries Regulations. Criminal prosecutions were adjourned by the District Court to enable the Tribunal to hear the claim, but the Tribunal decided in June 1985 that they would not hear the claim until the Court proceedings had been completed.

Mr Te Weehi was convicted in the District Court but successfully appealed against that conviction in the High Court. The High Court decision was that he was exercising his customary fishing rights and did not commit an offence. [3]

Mr Te Weehi subsequently withdrew his claim from before the Tribunal.

H. 8 Mangonui Sewerage

The Mangonui Sewerage Report dealt with the portion of the Ngati Kahu claim (lodged March 1987) concerning a sewerage scheme proposed on their ancestral lands. The portion of the claim dealing with their land generally has yet to be reported on by the Tribunal.

The Tribunal declined to make recommendations in their report. However, the report did have comment to make in relation to the environmental and cultural impacts of sewage treatment and disposal, and bicultural resolution of conflicts in that regard.

The Tribunal did not challenge the previous findings of the Planning Tribunal and Board of Health that some form of sewerage scheme was needed in the region. They noted that in the area from Mangonui to Cable Bay the heavy clay soils prevented the effective functioning of septic tanks, resulting in direct discharge to streams and the sea, and that porous soils in the Taipa catchment meant that septic tank leachate had some contact with the shallow water supply aquifer. [4]

The Tribunal noted the importance of kaimoana resources in the region, particularly in Ryders Creek and the Taipa River [5], and that sewage discharges to kaimoana areas is "anathema to many Maori for whom waste can never be discharged to waters that support food". [6] They noted that in response to concerns about the Taipa River catchment, the proposed scheme was to divert the effluent into the Parapara Stream catchment instead, where its quality was to be 'polished' by a marsh system. [7] However, they were also of the view that insufficient assurance had been given by the Catchment Board that there would not be seepage from the holding ponds into the Taipa aquifer and estuary. [8]

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3 Williamson J in Te Weehi v Regional Fisheries Officer High Court, Christchurch, M 662/85, 19 August 1986

4 *MANGONUI SEWERAGE*, pp. 30-31

5 Ibid. , pp. 26-27

6 Ibid. , p. 38

7 Ibid. , pp. 26-30

8 Ibid. , p. 5

The Tribunal noted that during the time that decisions on the scheme were being made, planning and water rights laws did not sufficiently allow for the Maori point of view to be taken into account. [9] However, after the Tribunal commissioned a study of alternative sites, and considered their practicality in light of physical constraints, Maori concerns, and costs to the local ratepayers, they concluded that they could recommend no clear alternative to the proposed sewerage scheme.

The Tribunal noted that:

> *"The Treaty . . . requires a balancing of interests in some cases, and a priority for Maori interests in others. This is one occasion where a balancing is needed and some compromises must be made . . . . The scheme, we note, has been arranged and changed to reduce the cultural impacts, and the continued possession and enjoyment of tribal land and fisheries is not in the circumstances unduly encroached upon."* [10]

And found that:

> *"Having regard to the customary opinion that wastes defile that which is esteemed, Maori planning would require the works to be elsewhere . . . [however] the ponds should be resited . . . only if there are reasonably practical alternatives . . . Of the alternatives proposed, none is sufficiently free of other problems to warrant Parliamentary intervention to require the ponds' relocation. "* [11]

An important finding of the Tribunal was that the Crown had acted contrary to the provisions of Article II of the Treaty in failing over the years to legally recognise tribal *rangatiratanga,* which in the Mangonui case had contributed to inadequate consultation with Ngati Kahu by the local authority. [12]

The Tribunal also noted that planning should have regard to the retention of lands in Maori ownership, and that the assessment of the relationship of Maori people to the land ought not to depend on the ownership of the land. [13]

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9 Ibid. , pp. 4-6

10 Ibid. , p. 7

11 Ibid, p. 61

12 Ibid. , pp. 47-48, p. 60

13 Ibid. , p. 61

APPENDIX I - TEXTS OF THE TREATY OF WAITANGI

(*Note:* Italics have been added to aid in comparing major differences between the English and Maori texts. It is the Maori version that approximately 500 Maori chiefs signed.)

The Text in English

(*Source:* Treaty of Waitangi Act 1975, First Schedule)

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation ***all the rights and powers of Sovereignty*** which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

The Text in Maori

(*Source:* Schedule to the Treaty of Waitangi Amendment Act 1985. *Note:* this Act corrected errors in the Maori text in First Schedule of the 1975 Act).

KO WIKITORIA, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua alanei, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

KO TE TUATAHI

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu ***te Kawanatanga katoa o o ratou wenua.***

English Translation of the Text in Maori

(*Source:* adapted from; Royal Commission on Social Policy 1988, 'June Report', Vol III part 1, pp. 211-212)

Victoria the Queen of England in her gracious recollection of the chiefs and tribes of New Zealand and her desire that they and their chieftainship be secured to them, and a peaceful state also, has deemed it a just act to send here a chief to be the person to arrange for the native people of New Zealand to agree to the governorship by the Queen of all places of that land and of the islands. Already many of her people have settled in this land or are coming there. Now the Queen desires that the governorship may be settled to stem the evils that would come upon the native people and the British who dwell there in lawlessness. Now therefore it is good that the Queen has sent me, William Hobson, a captain in the Royal Navy as governor for all areas of New Zealand that are given over to the Queen now or later. She gives to the chiefs of the Confederation of Tribes of New Zealand, and to the other chiefs as well, these laws which will be spoken about now.

THE FIRST

The chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England forever ***the complete government over their land.***

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof ***the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession;*** but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W HOBSON Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty. [Here follows signatures, dates, etc]

KO TE TUARUA

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirani ***te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.*** Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

KO TE TUATORU

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) WILLIAM HOBSON
Consul and Lieutenant-Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.

THE SECOND

The Queen of England agrees to protect the Chiefs, the sub-tribes and all the people of New Zealand in ***the unqualified exercise of their chieftainship over their lands, villages and all their treasures.*** But on the other hand, the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being appointed by the Queen as her purchase agent).

THE THIRD

For this agreed arrangement therefore, concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will given them the same rights and duties of citizenship as the people of England.

(Signed) WILLIAM HOBSON
Consul and Lieutenant-Governor

We, the chiefs of the Confederation of the Tribes of New Zealand who are gathered here at Waitangi, and we also the Chiefs of New Zealand, understand the meaning of these words which we have accepted and totally agree. Thereby we have marked our names and our marks.

This has been done at Waitangi on the sixth day of February, in the year of our Lord 1840.

APPENDIX J - PRINCIPLES OF THE TREATY OF WAITANGI AS DEFINED BY THE WAITANGI TRIBUNAL (1983-1988)

Principles that can be identified from the decisions of the Waitangi Tribunal are discussed below:

1 THE EXCHANGE OF THE RIGHT TO MAKE LAWS FOR THE OBLIGATION TO PROTECT MAORI INTERESTS

This concept was expressed in the Manukau report as follows:

> *"[kawanatanga] means the authority to make laws for the good order and security of the country but subject to an undertaking to protect particular Maori interests."* [1]

In the Motunui report, the Tribunal said:

> *"[The Treaty of Waitangi represents] an exchange of gifts .... The gift of the right to make laws, and the promise to do so so as to accord the Maori interest an appropriate priority."*

and (as also later confirmed in the Orakei report):

> *"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. It established the regime not for uni- culturalism but for bi-culturalism."* [2]

The Muriwhenua report stated that:

> *"The principle that emerges is the protection of Maori interests to the extent consistent with the cession of sovereignty. "* [3]

2 THE TREATY IMPLIES A PARTNERSHIP, EXERCISED WITH UTMOST GOOD FAITH

The principle of partnership was first stated by the Tribunal in the Manukau report:

> *"The interests recognised by the Treaty give rise to a partnership, the precise terms of which have yet to be worked out."* [4]

Subsequent to the Court of Appeal case, the Orakei and Muriwhenua reports reiterated and supported the judgement of the Court that the leading principles of the Treaty are (a) that it

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1 *MANUKAU,* p. 90

2 *MOTUNUI,* p. 61, *ORAKEI,* p. 130

3 *MURIWHENUA,* p. 191

4 *MANUKAU,* p. 95

signifies a partnership between the races, and (b) that it obliges both partners to act towards each other in utmost good faith. [5]

Further treatment of this theme can be found in Appendix K.

3 THE TREATY IS AN AGREEMENT THAT CAN BE ADAPTED TO MEET NEW CIRCUMSTANCES

Tribunal decisions make it clear the Treaty must move with the times and adapt to remain relevant. The Motunui report states:

> *"The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates it was not intended as a finite social contract but as the foundation for a developing social contract . . . .*
>
> *We consider that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and adherence to its broad principles."* [6]

Chief Judge Durie in the Waiheke report stated:

> *"The preamble to our governing Act directs, in my view, that the Treaty is to be always speaking - it is to be made relevant to our times."* [7]

4 THE NEEDS OF BOTH MAORI AND THE WIDER COMMUNITY MUST BE MET, WHICH WILL REQUIRE COMPROMISES ON BOTH SIDES

On the matter of compromise, the Motunui report states:

> *"It is not inconsistent with the Treaty of Waitangi that the Crown and Maori people should agree upon a measure of compromise and change. In particular, it is not inconsistent with the Treaty that the Te Atiawa hapu should accept a degree of pollution in respect of certain of their fishing grounds, on the basis that other grounds will not be spoilt."* [8]

This principle was reiterated in the Orakei report. [9] In the Te Reo Maori report, the Tribunal stated:

> *"The Treaty was directed to ensuring a place for two peoples in this country. We question whether the principles and broad objectives of the Treaty can ever be achieved if there is not a recognised place for the language of one of the partners to the Treaty. In the Maori perspective the place of the language in the life of the nation is indicative of the place of the people."* [10]

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5 *ORAKEI*, pp. 147-148, *MURIWHENUA* , pp. 190-192

6 *MOTUNUI*, p. 61

7 *WAIHEKE*, p. 82

8 *MOTUNUI*, p. 62

9 *ORAKEI*, p. 137

10 *TE REO MAORI*, p. 29

The Tribunal commented as follows in the Muriwhenua report:

> *". . . neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit. It ought not to be forgotten that there were pledges on both sides."* [11]

In the Mangonui report, the Tribunal discussed this principle further:

> *"It was a condition of the Treaty that the Maori possession of lands and fisheries would be guaranteed. The guarantee requires a high priority for Maori interests when works impact on Maori lands or particular fisheries for their guarantee was a very small price to pay for the rights of sovereignty and settlement that Maori conferred. In other cases however, it is a careful balancing of interests that is required. It was inherent in the Treaty's terms that Maori customary values would be properly respected, but it was also an objective of the Treaty to secure a British settlement and a place where two people could fully belong. To achieve that end the needs of both cultures must be provided for, and where necessary, reconciled."* [12]

The principle relating to the question of balance was stated succinctly in the Waiheke report, and reinforced in the Muriwhenua report as follows:

> *"It is out of keeping with the spirit of the Treaty . . . that the resolution of one injustice should be seen to create another."* [13]

The Motunui decision commented on the concept of an 'exclusive user', stating that:

> *"the mana of the Maori people to be able to control their own fishing grounds ought to be upheld. This includes the power to regulate and restrict both the use and the class of persons who may use. It does not follow however, that there must in all cases be an exclusive user but rather that that is a matter to be determined in consultation and negotiation with the hapu concerned. We noted that . . . [the claimants] do not seek an exclusive user . . . this approach is consistent with Maori customs and values."* [14]

In the Manukau report, the Tribunal discussed the concept as follows:

> *". . . we do not think the Maori interest in the seas is the 'full exclusive and undisturbed possession' of the English text. European New Zealanders need this Treaty too because by it the Maori people agreed to and accepted the existing and projected settlements and emigration referred to in the preamble and thereby agreed that the Europeans too would 'belong'. Both parties stood to gain by this Treaty as partners in a new enterprise. The new partner necessarily needed access. The European's interest in the harbour and foreshore areas cannot be denied either.*

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11 *MURIWHENUA,* p 195

12 *MANGONUI,* p. 60

13 *WAIHEKE,* p. 99, *MURIWHENUA,* p. xxi

14 *MOTUNUI,* p. 63

We suspect that the original Maori signatories would have appreciated this and that the subsequent claims to exclusive ownership reflect the total denial of the Maori mana in the laws of the seas and fisheries. Those who appeared before us claiming that the Manukau belonged to them spoke of the Maori willingness to share the Manukau. They spoke also of the belittlement they felt when their 'first nation' status was relegated to that of 'an ethnic minority'.

We conclude that the Treaty did promise the tribes an interest in the harbour. That interest is certainly something more than that of a minority section of the general public, more than just a particular interest in particular fishing grounds, but less than that of exclusive ownership. It is in the nature of an interest in partnership the precise terms of which have yet to be worked out. In the meantime any legal owner should hold only as trustee for the partnership and acknowledge particular fiduciary responsibilities to the local tribes, and the general public, as distinct entities." [15]

5 THE MAORI INTEREST SHOULD BE ACTIVELY PROTECTED BY THE CROWN

As noted in no. 1 above, *'kawanatanga'* means the authority to make laws for the good order and security of the country, but subject to an undertaking to protect particular Maori interests. The Tribunal has stated the possessory guarantees of the second article must be read in conjunction with the preamble, where the Crown 'is anxious to protect' the natives against the outcomes of emigration and with the 'royal protection' conferred in the third article, and said in the Manukau report:

"The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them . . . . 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." [16]

This point was made again in the report on Te Reo Maori, and reiterated in the Orakei report as follows:

"[In Te Reo Maori] . . . 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." [17]

In the Muriwhenua report, the Tribunal noted that the guarantees in the Treaty assured that:

". . . despite settlement Maori would survive and because of it they would also progress . . . to achieve that . . . the Crown had not merely to protect those natural resources Maori might wish to retain, but to assure the retention of a sufficient share from which they could survive and profit, and the facility to fully exploit them." [18]

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15 *MANUKAU,* p. 94

16 *MANUKAU,* p. 95

17 *TE REO MAORI,* p. 29, *ORAKEI* p. 135

18 *MURIWHENUA,* p. 194

6 *THE GRANTING OF THE RIGHT OF PRE-EMPTION TO THE CROWN IMPLIES A RECIPROCAL DUTY FOR THE CROWN TO ENSURE THAT THE TANGATA WHENUA RETAIN SUFFICIENT ENDOWMENT FOR THEIR FORESEEN NEEDS*

Judge Durie in the Waiheke claim found that this was a principle of the Treaty, but the Tribunal was not unanimous on that point through the dissenting opinion on that claim of member Mr J Q Poole. [19]

In the Orakei report, however, considerable research was undertaken into the historical context of the Treaty, and the opinion of Judge Durie in the Waiheke claim was supported. As summarised in the Orakei report:

> *"It is abundantly evident . . . 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 . . . .*
>
> *. . . 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 . . . that each tribe maintained a sufficient endowment for its foreseen needs."* [20]

7 *THE CROWN CANNOT EVADE ITS OBLIGATIONS UNDER THE TREATY BY CONFERRING AUTHORITY ON SOME OTHER BODY*

This was first stated in the findings on the Motunui claim, and confirmed in subsequent reports. [21]

As stated in the Manukau report:

> *". . . we do not find it necessary to question [the Auckland Harbour Board's] particular acts except insofar as they relate to the nature of its statutory jurisdiction . . . . The first question is whether the Crown has a responsibility in terms of the Treaty. The question is then whether the statutory parameters prescribed for others in defining that responsibility are adequate having regard to the principles of the Treaty. It follows that the Crown cannot divest itself of its Treaty obligations or confer an inconsistent jurisdiction on others. It is not any act or omission of the [Auckland Harbour] Board that is justiciable but any omission of the Crown to provide a proper assurance of its Treaty promises when vesting any responsibility in the Board."* [22]

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19 *WAIHEKE,* pp. 74-84

20 *ORAKEI,* pp. 144, 147

21 *MOTUNUI,* pp. 65, *WAIHEKE,* p. 74, *MANUKAU,* p. 99, *ORAKEI,* p. 136

22 *MANUKAU,* p. 99

The Tribunal found in the Orakei report that this principle extended to the vesting of responsibility in the Native Land Court, and in the Mangonui report found that it extended to the laying down of rules for local authorities and the Planning Tribunal. [23]

8 THE CROWN OBLIGATION TO LEGALLY RECOGNISE TRIBAL RANGATIRATANGA

In the Mangonui report, the Tribunal first addressed this point in detail in the context of whether Ngati Kahu had been prejudiced in their ability to present their veiws and have them accepted in the planning process. The Tribunal noted that a major impediment to tribal participation was the Crown's failure to legally recongise tribal authorities, a duty required under Article II of the Treaty.

> *"It ought not to be forgotten that the Treaty was with tribes, being signed at different places and times by persons on their behalf . . . . It was also clear in the Maori text and in the statements made at the time, that traditional mechanisms for tribal controls would continue to be respected and maintained.*
>
> *The main difficulty is that they were not. On the contrary, as the Orakei Report makes clear, policies were introduced over a century ago to put an end to tribal powers.*
>
> *Criticism that a tribe has failed to object is largely to blame the victim of the historic process for its current condition. The nub of the problem is in the omission of the Crown to recognise the tribal position and to provide the legal foundation and resources for tribes to contribute more fully to local affairs and to take all necessary steps for the protection of tribal interests."* [24]

9 THE COURTESY OF EARLY CONSULTATION

In the Manukau report, the Tribunal noted that:

> *"Consultation can cure a number of problems. A failure to consult may be seen as an affront to the standing of the indigenous tribes and lead to a confrontational stance. Admittedly some values and traditions are not negotiable but the areas for compromise remain wide . . . .*
>
> *To achieve a reasonable compromise it is preferable that there be consultation with the tribe rather than have the tribe resort to objection processes, or even protests and demonstrations. It would help if the conduct of the parties were related to planning procedures so that the Tribunal could adjourn proceedings and require discussion and a search for a settlement. "* [25]

In the Mangonui report, the Tribunal stated that:

> *"Even at the outset there is a Maori complaint that the opportunity to be involved is merely by an objection procedure which operates after the local authority's plans have been drawn and publicised. The procedure is available to the public*

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23 *ORAKEI,* p. 136, *MANGONUI,* p. 4

24 *MANGONUI,* p. 47

25 *MANUKAU,* pp. 119, 125

as a whole. The tribes were given a special status by the Treaty however, and the objection procedures are often inconsistent with their ways, compelling a confrontational stance.

The complaint is valid in our view but not because there is a duty to consult in all cases. It is the prior opportunity to discuss that is most especially wanting. Early discussions build better understandings in an area of cultural contact where the potential for conflict is high. Agreements may not be reached but new insights may be obtained and the subsequent debate may at least be better informed.

Nevertheless it is as wrong to blame the Council if Ngati Kahu were consulted too late as it is to discredit Ngati Kahu if their objections were not made sooner. There is a decided lack of structure by which to determine the proper tribal members to deal with, or by which an authoritative tribal position can be obtained. The Crown, in our view, has much work to do to complete its Treaty undertakings. It must provide a legally recognisable form of tribal rangatiratanga or management, a rangatiratanga that the Treaty promised to uphold." [26]

10 *TINO RANGATIRATANGA INCLUDES MANAGEMENT OF RESOURCES AND OTHER TAONGA ACCORDING TO MAORI CULTURAL PREFERENCES*

The Motunui decision first sums this up as the full import of *te tino rangatiratanga.* [27] The Kaituna decision notes this same premise when it determines that traditional rights of ownership are part of the *'taonga* Maori' guaranteed in the Treaty and carry with them the free and uninterrupted right to fish and gather in their traditional areas without impositions on their cultural and spiritual values from pollution. In the Manukau report the Tribunal stated that *'te tino rangatiratanga'* in the Treaty means 'full authority status and prestige with regard to their possessions and interests', and that:

"The protection of fisheries must accord with the Maori perception of those fisheries. It must be recognised that those disruption of fisheries that offend cultural or spiritual values, as for example the discharge of animal wastes to the waters of the fishery is as offensive as a physical disruption that reduces the quantity or quality of the catch . . . there must be regard for the cultural values of the possessor." [28]

The Orakei report reiterates this point and notes that:

"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." [29]

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26 *MANGONUI,* pp. 4-5

27 *MOTUNUI,* pp. 60, 63

28 *MANUKAU,* p. 95

29 *ORAKEI,* pp. 134-135

11 'TAONGA' INCLUDES ALL VALUED RESOURCES AND INTANGIBLE CULTURAL ASSETS

The Tribunal has noted in the majority of its reports that *taonga* means 'all things highly prized' by Maori and this includes tangibles such as fishing grounds, harbours and foreshores, and intangibles such as the Maori language and the *mauri* or 'life-force' of a river. [30]

12 THE PRINCIPLE OF CHOICE: MAORI, PAKEHA AND BICULTURAL OPTIONS

In the Muriwhenua report, the Tribunal considered the rights guaranteed to Maori in both a tribal context (Article II) and a personal context (Article III):

> *"The Treaty provided an effective option to Maori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds. That same option is open to all people, is currently much in vogue and may represent the ultimate in partnership. But these are options, that is to say, it was not intended that the partner's choices could be forced.*
>
> *The historical record suggests Maori have consistently sought to uphold tribal ways against policies directed to amalgamation . . . but there is not certainty that that preference would be maintained if the forces of amalgamation were removed.*
>
> *But the tribal right is also upheld. The individual, as a British subject, has the same rights (and duties) as anyone else in pursuing individual employment or gain. This may reduce the tribal need but does not necessarily displace it. "* [31]

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30 *MOTUNUI*, p. 59, *KAITUNA*, p. 17, *MANUKAU*, pp. 93-95, *TE REO MAORI*, pp. 28-29, *ORAKEI*, p. 134

31 *MURIWHENUA*, p. 195

APPENDIX K - PRINCIPLES OF THE TREATY OF WAITANGI AS DEFINED BY THE COURT OF APPEAL (1987)

The Court of Appeal in seeking to define the 'principles' of the Treaty included in its source documents reports of the Waitangi Tribunal, the lists of Treaty principles submitted by the parties to the case (see Appendix L), the Maori Affairs Bill then before Parliament, and affidavits and other materials submitted to the Court.

Justice Somers observed that:

> *"The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed are the circumstances to which those principles are to apply. At its making all lay in the future. Now much, claimed to be in breach of the principles and of the Treaty itself, lies in the past. Those signing the Treaty must have expected its terms would be honoured. It did not provide for what was to happen if, as has occurred, its terms were broken."* [1]

And that:

> *"A breach of a Treaty provision must in my view be a breach of the principles of the Treaty."* [2]

Justice Casey stated that in creating legislation that referred to 'principles' rather than 'terms or provisions' of the Treaty, Parliament provided for the Treaty's terms to be:

> *". . . understood in the light of the fundamental concepts underlying them. [This] calls for an assessment of the relationship the parties hoped to create by 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 light of that relationship."* [3]

1 THE ACQUISITION OF SOVEREIGNTY IN EXCHANGE FOR THE PROTECTION OF RANGATIRATANGA

Justice Cooke observed that the 'spirit' rather than the strict text of the Treaty should be considered, and that the basic terms of the Treaty bargain were:

> *". . . that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated. These aims are partly conflicting."* [4]

All citations from New Zealand Court of Appeal, *The Treaty of Waitangi in the Court of Appeal* (New Zealand Maori Council and Latimer v Attorney General and others, 6 NZAR 353), Government Print, June 1987.

1 Somers J, p. 20

2 Somers J, p. 21

3 Casey J, p. 16

4 Cooke P, pp. 34-35

Justice Richardson considered that:

> *"There is . . . one overarching principle . . . that considered in the context of the SOE Act, the Treaty of Waitangi must be viewed as a solemn compact between two identified parties, the Crown and the Maori, through which the colonisation of New Zealand was to become possible. For its part the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return it gave certain guarantees."* [5]

2 THE TREATY REQUIRES A PARTNERSHIP AND THE DUTY TO ACT REASONABLY AND IN GOOD FAITH

Justice Cooke noted that:

> *"The Treaty signified a partnership between races . . . ."*

and that:

> *"utmost good faith . . . is the characteristic obligation of partnership."* [6]

Justice Richardson noted that the 'compact' entered into by the signing of the Treaty:

> *". . . 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 toward the other within their respective spheres . . . .*
>
> *There would be circumstances where satisfying the concerns and aspirations of one party could injure the other. If the Treaty was to be taken seriously by both parties each would have to act in good faith and reasonably towards the other . . . under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi."* [7]

Justice Casey noted that to assert that partnership and the exercise of good faith was implicit in the relationship established by the Treaty was:

> *"to do no more than assert the maintenance of the 'honour of the Crown' underlying all its treaty relationships."* [8]

In summing up the findings of the Court of Appeal, Justice Cooke noted that, approaching the case independently, they had all agreed that:

> ***". . . the principles [of the Treaty] require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith.***

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5 Richardson J, p. 15

6 Cooke P, pp. 35-36

7 Richardson J, pp. 34, 39

8 Casey J, p. 17

That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured." [9]

3 THE FREEDOM OF THE CROWN TO GOVERN

Justice Cooke noted that:

> *"The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try and shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other co-operation."* [10]

In addition, Justice Bisson stated that:

> *". . . it is in accordance with the principles of the Treaty that the Crown should provide laws and make related decisions for the community as a whole having regard to the economic and other needs of the day . . . ."* [11]

4 THE CROWN DUTY OF ACTIVE PROTECTION

Justice Cooke accepted that the relationship between the Treaty partners created responsibilities analagous to fiduciary (trusteeship or protectorate) duties, and 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."* [12]

5 CROWN DUTY TO REMEDY PAST BREACHES

Justice Cooke commented on a proposed 'duty to remedy past breaches', saying that:

> *". . . if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it - which would be only in very special circumstances if ever."* [13]

However, he did not wish to comment on whether the Crown should grant precisely the form of redress recommended by the Tribunal.

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9 Cooke P, p. 44

10 Cooke P, p. 40

11 Bisson J, p. 25

12 Cooke P, p. 37

13 Cooke P, pp. 37-38

Justice Richardson noted that:

> *". . . the protection accorded to land rights is a positive 'guarantee' on the part of the Crown. This means that, where grievances are established, the State for its part is required to take positive steps in reparation."* [14]

Justice Somers observed that:

> *". . . the right of redress for breach . . . may fairly be described as a principle . . . As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other - a fair and reasonable recognition of, and recompense for, the wrong that has occurred. That right is not justiciable in the courts but the claim to it can be submitted to the Waitangi Tribunal."* [15]

The Court ruled that the Crown must devise a mechanism to ensure that in the transfer of lands from Crown control to State-Owned Enterprises the Maori partner's right of redress was not prejudiced.

6 *MAORI TO RETAIN CHIEFTAINSHIP (RANGATIRATANGA) OVER THEIR RESOURCES AND TAONGA AND TO HAVE ALL THE RIGHTS AND PRIVILEGES OF CITIZENSHIP*

This is implied from Articles II and III, and generally addressed in principle no. 1 above. As it was specifically noted by Justice Bisson:

> *"The Maori Chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of the utmost good faith in the matter in which their existing rights would be guaranteed and in particular guaranteed down to each individual Maori the full exclusive and undisturbed possession of their lands which is the basic and most important principle of the Treaty in the context of the case before this Court . . . . [also] . . . Her Majesty extended to the natives of New Zealand . . . all the rights and privileges of British subjects. "* [16]

7 *THE MAORI DUTY OF 'REASONABLE CO-OPERATION'*

Justice Cooke noted 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 co-operation. "* [17]

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14 Richardson J, p. 17

15 Somers J, p. 22

16 Bisson J, pp. 22-23

17 Cooke P, p. 37

8 ON WHETHER THE TREATY CREATES A DUTY TO CONSULT

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

> *"although . . . clearly entitled to decide on such a policy, as a reasonable Treaty partner it should take the Maori race into its confidence regarding the manner of implementation of the policy."* [18]

Justice Richardson noted that:

> *". . . honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion."* [19]

But that:

> *". . . the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty . . . [however] . . . the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on . . . the Crown, when acting within its sphere to make an informed decision . . . to be able to say it has had proper regard to the impact of the principles of the Treaty."* [20]

He went on to note that to gather the necessary information on Treaty implications, 'some' or 'extensive' consultations may be needed, but in other circumstances the Crown may already have the necessary information at hand.

Justice Somers observed that:

> *". . . while each side is entitled to the fullest good faith by the other, I would not go so far as to hold that each must consult with the other. Good faith does not require consultation although it is an obvious way of demonstrating its existence."* [21]

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18 Cooke P, p. 38

19 Richardson J, p. 39

20 Richardson J, p. 40

21 Somers J. p. 23

APPENDIX L - PRINCIPLES OF THE TREATY OF WAITANGI AS PROPOSED BY APPLICANTS AND PLAINTIFFS IN THE NEW ZEALAND MAORI COUNCIL COURT OF APPEAL CASE (1987)

Proposed by the New Zealand Maori Council

- The Crown duty to actively protect to the fullest extent practicable.
- The jurisdiction of the Waitangi Tribunal to investigate omissions.
- A relationship analogous to a fiduciary duty.
- The duty to consult.
- The honour of the Crown.
- The duty to make good past breaches.
- The duty to return land for land.
- That the Maori way of life would be protected.
- That the parties would be of equal status.
- Where the Maori interest in their *taonga* is adversely affected, that priority would be given to Maori values.

Proposed by the Crown

- That a settled form of civil government was desirable and that the British Crown should exercise the power of Government.
- That the power of the British Crown to govern included the power to legislate for all matters relating to 'peace and good order'.
- That Maori chieftainship over their lands, forests, fisheries and other treasures was not extinguished and would be protected and guaranteed.
- That the protection of the Crown should be extended to the Maori both by way of making them British subjects and by prohibition of sale of land to persons other than the Crown.
- That the Crown should have the pre-emptive right to acquire land from the Maori at agreed prices, should they wish to dispose of it.

(*Source:* NZ Court of Appeal, Cooke P, pp. 13-14)

APPENDIX M -
Principles of the Treaty as Defined by the Royal Commission on Social Policy (1988)

"It is the covenant of the Treaty which establishes three fundamentals; partnership, equality of peoples, and guarantee. Many Maori believe that these fundamentals must guide the interpretation of the Treaty of Waitangi. This understanding may be controversial to many Pakeha. It emerges clearly however, from Maori interpretations of the Treaty texts, and their historical and contemporary perspectives.

The **FUNDAMENTAL OF PARTNERSHIP** referred initially to the relationship between Maori people and the British Queen and Crown. Later, the relationship changed to that between Maori and the Crown based in New Zealand (and thence all immigrants and settlers). It was to be a relationship of mutual respect between equal peoples.

The rangatira sought a partnership for several reasons. Although numerically and militarily the stronger, the Maori wanted a system of law and order to govern the relationship between Maori and Pakeha. Many rangatira were also worried about the continuing conflicts between some iwi. Further they wanted continued access to internal and overseas trade and new technology, and independence from other colonial powers.

The **FUNDAMENTAL OF EQUALITY OF PEOPLES** refers to the understanding that Maori and Pakeha would have equality and live in such a way that mutual respect and integrity were maintained.

The **FUNDAMENTAL GUARANTEE** refers to the promise that the Queen would ensure that Maori were treated and protected as British subjects. At the same time the retention of Maori fishing grounds, forests, lands and other properties including culture would be guaranteed."

(*Source:* Royal Commission on Social Policy, 'The April Report', Volume III, part 1, p. 103)