



1 September 1994

Mr Bruce Mason
Trustee
Public Access New Zealand Inc
P O Box 5805
DUNEDIN

Dear Mr Mason

Partnership Plan

1. I refer to your letter dated 28 February 1994 seeking certain information on partnership relationships between the Department and iwi Maori. The way in which you have phrased the questions seems to indicate that you have in mind a particular policy initiative or statement by the Department. Since this is not identified I propose to answer your question in general terms by reference to the principles of the Treaty of Waitangi. I assume that your specific use of the term partnership is sourced from interpretations of these principles. In particular you have sought the statutory, case law and constitutional basis for certain "*determinations*" in respect of partnership and the Department's functions. While I question the appropriateness of the term "*determinations*", your questions are addressed under the following headings.

Statutory Authority

2. What is the statutory authority for a reference to "*partnership*"? As noted above the concept of partnership derives from the principles of the Treaty. As you are aware the Conservation Act 1987 ("*the Act*") contains the requirement that the Act "*be interpreted and administered as to give effect to the principles of the Treaty of Waitangi*" (s4). This provision appears on its face to be stronger than the corresponding provision in the Resource Management Act 1991 which requires a decision-maker to

"take into account the principles of the Treaty" (s8), yet weaker than the directive in the State-Owned Enterprises Act 1986 that nothing in that Act permits the Crown to act in a manner that is "inconsistent with the principles of the Treaty of Waitangi". Thus the Department is to administer the legislation in a way which gives effect to any relevant principles and importantly the legislation is to be interpreted in the same way. "To give effect to" may be defined as "to fulfil" or "to make operative". This imposes a legal requirement on the decision-makers exercising powers under the Act and the Department in terms of administration of the legislation. The meaning of "principles of the Treaty" will depend on the context in each case.

3. A question arises as to whether the same requirement is imposed in respect of the Reserves Act 1977, the National Parks Act 1980 or any of the other pieces of legislation referred to in the First Schedule to the Act. Section 6 of the Act specifies that the Department is to administer the legislation listed in the Schedule. It may be argued that s4 only applies to the Act since there is no specific wording extending the application of this section to the Acts listed in the First Schedule. This argument is strengthened by the fact that some pieces of legislation listed in the First Schedule have specific clauses which refer to the principles of the Treaty (eg the Foreshore and Seabed Endowment Revesting Act 1991). The alternative argument is that as a result of the directive in s4 of the Act s6 should be interpreted as to give effect to the principles of the Treaty, thus the administration of the Acts specified in the First Schedule must give effect to the principles, including the overarching principle identified by the Court of Appeal using the term "partnership" (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 - "the Lands" case). The Department of Conservation considers the better view is that s4 does apply to the Acts in the First Schedule unless there is some provision in the scheduled Act which is inconsistent with this interpretation.
4. The issue may be clarified when the judgement of the High Court in *Ngai Tahu Maori Trust Board and ors v Director-General of Conservation and ors* (CP No 841/92) is delivered. In any event if the Acts listed in the First Schedule are not subject to s4 of the Act it must be remembered that the Waitangi Tribunal has jurisdiction to consider whether any legislation is consistent with the principles of the Treaty. In certain cases it may be appropriate in administrative law terms for decision-makers to address principles of the Treaty as a relevant consideration when exercising powers under legislation which does not make direct reference to those principles.

Case Law

5. Identification of principles of the Treaty by the Courts has occurred in a number of high profile cases with which I understand you are familiar. In respect of the so-called partnership principle, I refer to the **Lands** case. A reference to the concept of partnership or to the partnership principle is a short-hand for the observations of their Honours that the Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith (per Cooke P at p 664, 1 1; Richardson J at p 673, 1 50; Somers J at p 693, 1 5; Casey J at p 702, 1 32 - p 703, 1 6; Bisson J at p 715, 1 27). Reasonableness and good faith are characteristics of this partnership which are identified in the judgements - as opposed to any direct analogy with elements of partnership law for example (p 664, 1 23ff; p 673, 1 35). Certain specific duties on the parties or principles of the Treaty are referred to in the judgements and developed in subsequent cases.
6. The concept of partnership is referred to again in *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 ("*The Forests*" case), the court stating at p 152, 1 30 that the obligation of good faith might require consultation in certain circumstances and that with respect to claims to resources did not automatically require equal shares between the parties. The latter point was reiterated in *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 at p 527, 1 36 ("*The Coal*" case). At p 5 of the Privy Council decision in the *Broadcasting Assets* case (*New Zealand Maori Council and ors v Attorney-General and ors*) their Lordships provide their opinion on the nature of the principles of the Treaty categorising them as "*underlying mutual obligations and responsibilities*". The relationship between Maori and the Crown is emphasised - "*This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust*". This relationship is that which in earlier cases has been categorised as "partnership".
7. The foregoing brief review of some of the relevant case law shows that the concept of partnership can be categorised as an overarching principle. The various principles of the Treaty identified by the courts to a greater or lesser extent derive from this relationship. What appropriate behaviour to one's partner might be in any particular situation is dependant on the facts of the case and the governing legislation as is apparent from the court's approach in the **Forests** case. Thus, to answer your second questions, the nature of the relationship conceptualised as partnership cannot be precisely defined but, as their Lordships expressed, it should be founded on reasonableness, mutual cooperation and trust. In order to ensure that the relationship is maintained in the modern apparatus of the State it is necessary to develop policies

which address the principles of the Treaty in a practical way.

Constitutional Underpinnings

8. The foregoing answers the questions you have posed without further reference to constitutional matters. However, I note that whether or not the principles of the Treaty have been recognised in legislation there may be occasions in which there is a moral although generally not a legal duty to ensure adherence to the spirit of the Treaty by acting in accordance with its principles. It is interesting in this context to note the Court of Appeal's approach in *Tavita v Minister of Immigration* [1984] 2 NZLR 257. The court notes that the law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution. Though it was not necessary to decide this case on the basis of this issue, these observations are perhaps an indication of the potential for judicial activism in other areas of law, in particular the approach to the application of Treaty principles.

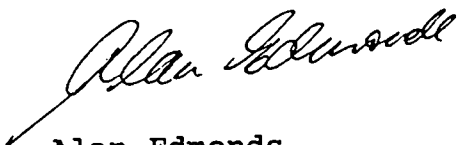
Departmental powers in respect of the conservation estate

9. Finally, the Minister of Conservation, the Department and the officers of the Department have the powers and functions conferred on them (directly or indirectly by way of delegation) by the Act, the legislation listed in the First Schedule to the Act, any other legislation where specific powers are conferred or delegated legislation. The Act establishes the Department under the control of the Minister of Conservation (s5) and s6 sets out the functions of the Department.
10. The Minister of Justice has recently announced new Crown policy being developed in respect of the use of lands administered by the Department in Treaty settlements.

Mission

11. The Department's "mission" is found in the various Acts which it administers and which confer functions upon it.

Yours faithfully



Alan Edmonds
Deputy Director-General
for Director-General