 ISBN 0-9583363-0-X

The Principle of 'Partnership' and the Treaty of Waitangi

Implications for the public conservation estate

A review of the validity of a principle of 'partnership' under the Treaty of Waitangi, and its application to the ownership and control of New Zealand's public conservation and recreation estate

Bruce Mason
Researcher, Public Access New Zealand
December 1993—Revised January 1995

Introduction

The Treaty of Waitangi is widely regarded as the founding document for New Zealand. Many also regard it as a 'sacred compact', whose words and interpretation are not as important as the spirit that rises therefrom. Others view the Treaty as a 'historical artifact'—a 'modest little document' that has been adorned with sentiment and well-intentioned rhetoric.

Today it is hard to escape from talk of the Treaty, and related grievances and claims over land and other resources. Until comparatively recent times, the Treaty has had little or no relevance to most New Zealanders. However as a result of dramatically increased land and fishery claims this state of affairs is rapidly changing. During 1993 Government placed private lands beyond the power of the Waitangi Tribunal to recommend return of ownership to claimants. This has greatly increased pressure on government assets, and public lands such as national parks and other protected areas.

> There are at least 48 claims that affect the public conservation estate. Claimants generally seek the return of land. Some also seek shared management responsibility with the Crown.

Unless attributed, the views expressed are not necessarily those of Public Access New Zealand Inc. (PANZ).

Additional to claim settlements through the processes of the Waitangi Tribunal, there are broader changes underway in the ownership and control of natural and recreational areas. This is a subject that has not received much, if any, public notice as policy and allocation decisions are taking place behind closed doors. The Crown, as represented by executive Government, has taken upon itself the role of sole arbitrator as to its liabilities under the Treaty and the assets it may use in fulfilment of its perceived obligations. Many of those assets, unlike government commercial enterprises, include *lands held in trust for the benefit of present and future generations*. Under the mantle of the Treaty and 'Treaty principles', Government considers it is empowered to do as it alone sees fit with the public conservation estate.

For decades the Treaty was dismissed as 'a simple nullity' as it had no standing under our legal system. That situation changed in 1975 when the Crown accepted liability for breaches of the Treaty. The Treaty of Waitangi Act 1975 established the Waitangi Tribunal for the hearing of grievances by Maori against the Crown. Subsequently the jurisdiction of the Waitangi Tribunal was widened and other statutes have incorporated references to the Treaty. The general practice however has been to incorporate references to the 'principles' of the Treaty into law rather than references to the Treaty itself. Of direct relevance to the management of natural areas are references to the 'principles' of the Treaty in the Environment Act 1986 (Long Title), Conservation Act 1987 (s 4), Crown Forest Assets Act 1989 (Long Title), Resource Management Act 1991 (ss 5(e), 6), and the Crown Minerals Act 1991 (s 4). None of these statutes define what these principles are. That task has been left to the Waitangi Tribunal, the Courts, Government, and a variety of interest groups.

Since incorporation of the Treaty, or alternatively Treaty 'principles', into our domestic law a quiet revolution has been going on within government. It is only now, when faced by burgeoning claims by Maori for ownership and control over much of the public estate, that many New Zealanders are beginning to catch up on the statutory, structural, and attitudinal changes that are now affecting the ownership and control of the recreational 'commons'.

> A growing realisation is that New Zealand is on the brink of profound changes to the nature of 'public' lands, how they are managed, and for whose benefit.

The Waitangi Tribunal was established to determine the validity of claims against the Crown *and* to make recommendations as to the settlement of *proven* grievances. The Tribunal has made a fair effort at hearing and scrutinising the validity of claims. What is alarming some public interest groups however are secret hearings and settlements affecting the

public estate. Government and claimants are increasingly by-passing the Tribunal by direct negotiation of *unproven* claims and in at least one case (aspects of the Ngai Tahu land claim), in contradiction to findings of fact by the Tribunal. A more prevalent trend however is for the Department of Conservation (DOC) to instigate the vesting of ownership or control over public lands to Maori interests, independently of formal claims before the Waitangi Tribunal, or by 'mediation' processes. This is occurring under a justification of the duty "to give effect to the principles of the Treaty of Waitangi" (s 4 Cons. Act 1987).

Public concerns over secret deals involving public lands are not allowed to stand in the way of the Government— "premature disclosure of incomplete issues and proposals would...materially affect the orderly process of negotiation and would be likely to prejudice the Crown's ability to reach agreement". This "would not be in the public interest", in the view of the Minister of Conservation (letter dated 17 May 1993).

This paper examines the validity of the concept of 'partnership' which has gained currency as the central principle deemed to be derived from the Treaty. As a consequence of the notion that a 'partnership' exists between people of Maori descent and the Crown, fundamental changes to the founding 'preservation-with-use' and public ownership philosophy of the public conservation estate may be in store.

> It appears that most claimants do not subscribe to the concept of preservation of intrinsic natural values for their own inherent worth, rather preferring *utilisation* of conserved natural resources. Tribal authority over access to and use of natural areas contrasts markedly with existing rights of access, conveyed equally on everyone.

'Partnership' is commonly interpreted as meaning that a 50:50 entitlement exists between the Crown and Maori to ownership and control of all natural resources. As a consequence, a growing sector of the community fears that major inequalities will be created, in the ownership, control and benefits derived from natural resources, between successful claimants and the rest of society.

> Government has given impetus to high, but ill-founded, expectations by stating that *Maori are an equal partner with the Crown* and by implication entitled to half of every Crown-owned resource.

The prevalence of well-meaning rhetoric on the subject, mixed with a residue of guilt, means that it is politically dangerous and 'incorrect' to question the current orthodoxy. For instance the Hon. Denis Marshall, Minister of Conservation, in relation to Ngai Tahu land claims (Press Release, 8 September 1992):

> Some normally sensible and progressive conservationists seem in danger of losing their perspective over this issue and they have departed from their normal highly analytical and constructive approach to launch public attacks which distance them even further from Maori claimants.
>
> A considered and thoughtful approach to this issue has escaped them, and they apparently have a fundamental fear that you can't trust your treaty partner when it comes to conservation.
>
> What I would make a plea for is a greater sense of cultural understanding on the part of both Pakeha and Maori, to appreciate *as equal treaty partners* what motivates each other, and work out ways of accommodating their mutual concerns, Mr. Marshall concluded.

> The Treaty has become the main means of effecting asset redistribution, or at least attempting to do so. The implications for the public estate of unquestioning application of currently popular political perceptions are too grave to leave unexamined and undebated.

The Treaty

In 1840 the Crown and the majority of Maori chiefs signed a compact that created reciprocal rights and obligations for both parties. The Treaty consists of a preamble, three articles, and an epilogue. In broad terms, on the ceding of the right of complete sovereignty *or* government (Article I) and the granting of exclusive pre-emptive (purchase) rights of land to the Crown (Article II), Maori would retain *either* exclusive and undisturbed possession of their lands and estates forests fisheries and other properties so long as it is their wish to retain the same in their possession *or* the unqualified exercise of chieftainship over all their lands, villages and all other treasures (Article II), and be given the same rights and duties of citizenship as the people of England (Article III).

Although a relatively simple agreement it is complicated by the fact that it was executed in two versions, one in English, the other in Maori. This explains the italicised 'either' and 'or' above. Neither version is a direct translation of the other. Parliament has decided that the Waitangi Tribunal must have regard to both versions when determining if breaches of the 'principles' of the Treaty have occurred. Where the texts cannot be reconciled by reference to each other the Tribunal is of the view that the Maori version should be treated as the primary reference.

Te Tiriti o Waitangi—

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 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.

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 being 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 dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[*Here follow signatures, dates, etc.*]

The Text in Maori

Source: The Treaty of Waitangi Amendment Act 1985: being amended First Schedule to 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-kai 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 aianei, 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.

Ko te Tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapuki 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.

Translation of Maori Text

(by I H Kawharu in, 'Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi' (1989) —a reconstruction of a literal translation)

Victoria, the Queen of England, in her concern to protect the chiefs and subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order considers it just to appoint an administrator one who will negotiate with the people of

New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands and also because there are many of her subjects already living on this land and others yet to come.

So the Queen desires to establish a government so that no evil will come to Maori and European living in a state of lawlessness.

So the Queen has appointed me, William Hobson a captain in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents to the chiefs of the Confederation chiefs of the subtribes and other chiefs these laws set out here.

The first

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

The second

The Queen of England agrees to protect the chiefs, the subtribes 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 give them the same rights and duties of citizenship as the people of England.

(Signed) W. Hobson
Consul and Lieutenant-Governor

So we, the Chiefs of the Confederation and of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and our marks thus.

Was done at Waitangi on the sixth of February in the year of our Lord 1840.

Interpretation of Treaty principles

The 'principles' of the Treaty now have greater status under statute than the text of the Treaty itself. Under existing law, the Treaty principles are defined and re-defined by the Court of Appeal where the principles are noted in a statute the Court is called on to interpret. This process began with the 1987 *New Zealand Maori Council SOE lands case*. Mr. 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. Mr. Justice Somers noted that Court decisions are binding on the Tribunal.

Definitions of the principles of the Treaty have been expressed by the Waitangi Tribunal, the Court of Appeal, and the 1988 Royal Commission on Social Policy. *Principles for Crown Action on the Treaty of Waitangi*, a 1989 statement by the Prime Minister set out policy guidelines on how Government Departments and agencies are to approach Treaty issues.

Origins of the 'partnership' principle

The notion that a 'partnership' exists, variously between the Crown and Maori or Pakeha and Maori, has arisen during the last decade as race relations in New Zealand have been put under the microscope.

In 1984 the Anglican Church established a Bicultural Commission to consider, *inter alia*, whether any principles of 'partnership and bicultural development' are implied in the Treaty. In 1986 the Commission concluded that the Treaty does imply such principles. The Commission took *a theological or biblical approach* to the concept of partnership, and while offering a meaning of the term failed to define it. While resorting to dictionary definitions for other terms in its report, the Commission confined its meaning of 'partnership' to what it believes it to 'involve':

> Partnership *involves* co-operation and interdependence between distinct cultural or ethnic groups within one nation.

The Commission had prevailing social concerns— "the Commission is convinced that partnership and bicultural development offer the way forward for a society ready to be enriched by its duel heritage". The Commission went as far as to say in an appendix to its report that the Treaty of Waitangi 'promised' bicultural development but without providing any basis for this assertion. *The Report of the Bicultural Commission of the Anglican Church on the Treaty of Waitangi*. 1986.

The Right Rev. Manuhuia Bennett, a member of the Commission and of the Waitangi Tribunal, regards partnership as "fundamental to any bicultural programme", *in the context of the work of the Tribunal.* It appears that his and the Commission's conclusions as to the existence and nature of a 'partnership' have been applied to the business of the Tribunal. *Te Roopu Whakamana I Te Tiriti O Waitangi. A Guide to the Waitangi Tribunal.* 1992. Waitangi Tribunal Division, Department of Justice.

The Court of Appeal

The major development in the concept of 'partnership' under the Treaty has been at the Court of Appeal. The *New Zealand Maori Council (SOE lands case),* [1987] 1 NZLR 641, provides the starting point for legal significance being attached to the concept of 'partnership' under the Treaty.

In the 1987 'lands' case the Court held that (my emphasis):

> *The Treaty signified a partnership between Pakeha and Maori* requiring each to act towards the other reasonably and with the utmost good faith. The relationship between the Treaty *partners* creates responsibilities analogous to fiduciary duties. 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. That duty is no light one and 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 (p 642 line 47).

The decision was cited to be based on—

Cooke P: "The principles of the Treaty are to be applied, not the literal words. As is well known, the English and Maori texts in the first schedule to the Treaty of Waitangi Act 1975 are not translations the one of the other and do not necessarily convey precisely the same meaning"(p 662 line 28).

Richardson J: "It is not necessary for the purposes of this case to attempt to write a general treatise on the subject. This is because, as in all cases, it is a matter of determining what are the relevant principles having regard to the context in which their identification arises. There is however one overarching principle—to which I shall return—which in its application here is sufficient to answer the present case. It is that considered in the context of the State-Owned Enterprises 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. That basis for the compact requires each *party* to act reasonably and in good faith towards the other" (p 673 line 40).

Somers J: "A breach of a Treaty provision must in my view be a breach of the principles of the Treaty. ...The obligation of the *parties* to the Treaty to comply with its terms is implicit, just as the obligation of the *parties* to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle, and was in my view intended by Parliament to be embraced by the terms it use in s 9. *As in the law in 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" (p 693 line 8).

Casey J: "I see such a principle [the rights and privileges of British subjects] as very relevant to this case, *inherent in the concept of an on-going partnership founded on the Treaty*. Implicit in that relationship is the expectation of good faith by each side in their dealings with the other, and in the way that the Crown exercises the rights of government ceded to it. To say this is to do no more than assert the maintenance of the 'honour of the Crown' underlying all its Treaty relationships" (p 703 line 1).

Bisson J: "This Court is not concerned with a strict or literal interpretation of the Treaty of Waitangi, nor to the application of such an interpretation to a given set of facts. This Court is called upon to consider what are the principles of the Treaty. The principles of the Treaty of Waitangi were the foundation for the future relationship between the Crown and the Maori race. In considering what the *parties* to the Treaty laid down as that foundation in the documents they signed it would be appropriate to adopt from another context the words of Lord Wilberforce in *James Buchanan & Co. Ltd. v Babco Forwarding & Shipping (UK) Ltd.* [1977] 3 All ER 1048, 1052, and determine the principles of the Treaty "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation" (p 714 line 5).

Commentary on judges' decision

There is difficulty understanding from the Judges' recorded deliberations how they determined from the terms of the Treaty that a 'partnership' exists between the Crown and Maori. The only direct reference above to the matter of partnership is from Mr. Justice Casey who saw "an on-going partnership founded on the Treaty". This observation was within the context of the principle that the rights and privileges of British subjects were granted to Maori. Central to those rights was the granting of equality *for each individual* before the law. It is inherent of such a principle that there are no greater or lesser rights for one individual in relation to others. The concept of a 'partnership' between certain *classes of citizen* and the Crown implies greater standing before the Crown and the law relative to others. In contradistinction to the notion of 'partnership' between a special class of citizen and the Crown, the Court reinforced the equality principle by citing Professor Kawharu's literal translation of the Maori text of the third article: "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 give them *the same rights and duties of citizenship* as the people of England" ([1987] 1 NZLR 663 line 14).

The body of the Court of Appeal's decision contains no definition of what is meant by 'partnership'. Repeated interchangability of terms with different meanings creates confusion and does not assist with deducing what the Court meant by 'partnership'. In relation to the Treaty the terms 'party/parties' are interchanged with 'partner/partners'. As a consequence, 'parties' to the Treaty have become 'partners' which in turn may have created a 'partnership' in the minds of the members of the Court.

Some definitions

Parties: persons who voluntarily take part in anything, in person or by attorney; as the parties to a deed. *N Z Law Dictionary* 3rd edition.

Partner: sharer (with person, in or of thing); person associated with others in business of which he shares risks and profits. *The Concise Oxford Dictionary* 7th Edition.

Other relevant extracts from each Judge's decision—

Justice Cooke: "The Treaty *signified a partnership between races,* and it is in this context that the answer to the present case has to be found (p 664 line 1).

"In this context the issue becomes what steps should be taken by the Crown, as *partner* acting towards the Maori *partner* with the utmost good faith which is the characteristic *obligation of partnership*...(p 664 line 23).

"What has largely been said amounts to acceptance of the submission for the applicants that the relationship between *the Treaty partners* creates responsibilities analogous to fiduciary duties (p 664 line 38).

"It will be seen that approaching the case independently we have all reached two major conclusions. First that the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act. Second that those principles require *the Pakeha and Maori Treaty partners* to act towards each other reasonably and with the utmost good faith (p 667 line 6).

"We left it to the Treaty *partners*...(p 719 line 13).

"The Court hopes that this momentous agreement will be a good augury for the future of the *partnership*. Ka pai" (p 719 line 26).

Justice Richardson: "There is however one overarching principle—to which I shall return—which in its application here is sufficient to answer the present case. It is that considered in the context of the State-Owned Enterprises 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 (p 673 line 43).

"Common to both perspectives was the recognition that the [second] article provided for *Maoris to be accorded equal status with other British subjects* (p674 line 24).

"...the Treaty *partners* (p 674 line 27).

"There is, however, one paramount principle which I have suggested emerges from consideration of the Treaty in its historical setting: that the compact between the Crown and the Maori through which the peaceful settlement of New Zealand was contemplated called for the protection by the Crown of both Maori interests and British interests and rested on the premise that each *party* would act reasonably and in good faith towards the other within their respective spheres. That is I think reflected both in the nature of the Treaty and in its terms (p 680 line 52).

"It was a compact through which the Crown sought from the indigenous people legitimacy for its acquisition of government over New Zealand. Inevitably there would be some conflicts of interest. There would be circumstances when 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 (p 681 line 3).

"In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the State-Owned Enterprises Act, there is every reason for attributing to both *partners* that obligation to deal with each other and with their Treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions. No less than under the settled *principles of equity as under our partnership laws*, the obligation of good faith is necessary inherent in such a basic compact as the Treaty of Waitangi. In the same way too honesty of purposes calls for an honest effort to ascertain the facts and to reach an honest conclusion (p 682 line 42).

"...treaty partner/partners" (p 683 lines 1 and 17; p 683 lines 18 and 42; p 685 line 12).

Justice Somers: "Each *party* in my view owed to the other a duty of good faith. It is *the kind of duty which in civil law partners owe to each other* (p 693 line 5).

"The obligation of the *parties* to the Treaty to comply with its terms is implicit, just as is the obligation of *parties to a contract* to keep their promises (p 693 line 16).

"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 rises to a right of redress by the other..." (p 693 line 20).

Justice Casey: "...The relationship the *parties* hoped to create... (p 702 line 26).

"From the attitude of the Colonial Office and the transactions between its representatives and the Maori chiefs, and from the terms of the Treaty itself, it is not difficult in infer the start in 1840 of *something in the nature of a partnership between the Crown and the Maori people* (p 702 line 30).

"...this concept of *an on-going partnership*... (p 702 line 41).

"I see such a principle as very relevant to this case, inherent in the concept of *an on-going partnership* founded on the Treaty. Implicit in that relationship is the expectation of good faith by each side in their dealings with the other, and in the way that the Government exercises the rights of government ceded to it" (p 703 line 1).

"Before concluding, there are some general observations I would like to make:

(i) I have spoken of what I perceive to be *a relationship akin to partnership between the Crown and Maori people*, and of its obligation on each side to act in good faith" (p 704 line 15).

Justice Bisson: No quotations on parties, partners, or partnership.

Discussion of Case

From the Court's decision some elements it attributes to a 'partnership' can be identified—

- acting with utmost good faith; the kind of duty which in civil law partners owe to each other;
- acting reasonably;
- the settled principles of equity as under our partnership laws;
- as in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress.

It appears that the above elements are applicable to a variety of contractual relationships other than those of partnerships.

Mr. Justice Casey gets closest to defining the Treaty 'partnership' between the Crown and Maori by describing it as *something in the nature of* a partnership and as *a relationship akin to* partnership. In the writer's view this does not establish that a partnership exists.

> It is clear from the terms of the Treaty that a distinct relationship was established. It is problematic whether that relationship comfortably fits within the label of 'partnership'.

In a post-case and non-judicial commentary, Sir Robin Cooke, President of the Court of Appeal, stated that the Court found:

> *the analogy of partnership* was helpful in discovering the principles of the Treaty, because of the connotation of a continuing relationship between *parties* working together and owing each other duties of reasonable conduct and good faith. The analogy was of course not suggested to be perfect, but it is a natural one. It had been used often enough by historians and others in the past. It has since then been used by Parliament in a 1988 Amendment to the Treaty of Waitangi Act 1975 whereby, in considering the suitability of persons for appointment to the Waitangi Tribunal, the Minister of Maori Affairs is directed to have regard to "the partnership between the two parties to the Treaty". The judges did understand that the *parties* to the Treaty were not in fact embarking on a business in common with a view to profit. They also understood that shares in partnership vary. After all, much legal practice in New Zealand is carried on in partnerships in which the shares are not equal (14 (1990) NZULR 5).

> The business connotations of partnerships that Sir Robin said the Court considered do not sit well with the 'social' partnerships the Anglican Church, Parliament and some other commentators visualise.

The Court's vision of a Treaty partnership also does not fit with the 'law of partnership' in New Zealand (see box). These factors, and notions of 'sharing' and 'equality' that would inevitably arise, make the Court's use of an analogy of 'partnership' surprising. Given the central importance attributed to the concept of 'partnership', so too was the Court's lack of clear definition of what it meant by the term.

Mr. Justice Cooke later judicially elaborated on the meaning of a Treaty 'partnership' in a 1989 Court of Appeal decision on the *Tainui Maori Trust Board case* ([1989] 2 NZLR 513). He indicated that the concept of partnership does not mean "that every asset or resource in which Maori have some justifiable claim to share should be divided equally". The emphasis given by Mr. Justice Cooke that partnership does not mean a fifty per cent share of every resource in which there is some legitimate claim was earlier emphasised by the Court in the 1989 *state forests case* ([1989] 2 NZLR 142).

Royal Commission on Social Policy

This was another source of development of the 'partnership' model. The Commission's work led to structural changes within government and an increasing adoption of 'Treaty principles' as matters for administrative action.

The Commission reported in 1988 and produced a discussion booklet on the principles of the Treaty of Waitangi. In part it commented that:

> In essence the Treaty was a partnership between the Maori inhabitants of New Zealand and the British Government. While it had the potential for a fair and even arrangement, inequalities between the partners quickly developed. ...By 1860 the European population at 79,000 had surpassed the declining Maori numbers and, *with no regard to the concept of partnership declared only 20 years earlier*, the Maori had become a political minority in their own country.

In its report, the Commission, while not seeking to compile a definite list of Treaty principles, focused on three principles, which it saw *as crucial to an understanding of social policy and upon which the Treaty impacts*—partnership, protection, and participation.

The Commission was influenced by the submissions of the Anglican Church Bicultural Commission which was "studying ways and means of working in partnership, Maori and Pakeha". The Royal Commission noted that *partnership was more readily applied to Articles 1 and 3 of the Treaty but that it should not be used to diminish the guarantees of 'full, exclusive and undisturbed possession' promised in Article 2 (The April Report*, Vol. II. Report of the Royal Commission on Social Policy. April 1988).

The Law of Partnership in New Zealand

There are three essential elements, without which a partnership cannot exist—

- there must be a business;
- it must be carried on with a view to profit;
- it must be carried on by or on behalf of the alleged partners.

Principles of the Law of Partnership. Fifth edition. Webb and Webb 1992. Butterworths, Wellington.

'Partnership' is also defined in the Partnership Act 1908 (s 4) as "the relation which subsists between persons carrying on a business in common with a view to profit". These definitions hardly fit the nature of the Treaty of Waitangi.

Section 5 of the Partnership Act provide rules for determining the existence of partnerships. If applied to the Treaty of Waitangi none of these could construe 'partner' status to either the Crown or Maori or the existence of a partnership.

It appears that the Royal Commission's social imperatives influenced its view and interpretation of the Treaty rather than a detailed analysis of the words of the Treaty itself. The Treaty was viewed as a means of advancing the social goal of partnership—the Commission was not impressed with alternatives to partnership "and is strongly of the opinion that fairness, equality and justice will be best addressed when partnership is vigorously pursued at all levels..."

Waitangi Tribunal
Principles of the Treaty of Waitangi defined 1983-1988

The Parliamentary Commissioner listed the following principles that she identified from the decisions of the Waitangi Tribunal up to 1988:

"1. The exchange of the right to make laws for the obligation to protect Maori interests.

"2. *The Treaty implies a partnership, exercised with utmost good faith.*

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

> The interests recognised by the Treaty give rise to a partnership, the precise terms of which have yet to be worked out (p 95).

Subsequent to the Court of Appeal case, the Orakei and Muriwhenua reports reiterated and supported the judgment of the Court that *the leading principles of the Treaty are (a) that it signifies a partnership between the races,* and (b) that it obliges both *partners* to act towards each other in utmost good faith (*Orakei report* pp 147-148, *Muriwhenua report* pp 190-192).

"3. The Treaty is an agreement that can be adapted to meet new circumstances.

"4. The needs of both Maori and the wider community must be met, which will require compromises on both sides.

"5.The Maori interest should be actively protected by the Crown.

"6.The granting of the right of preemption to the Crown implies a reciprocal duty for the Crown to ensure that the tangata whenua retain sufficient endowment for their foreseen needs.

"7.The Crown cannot evade its obligations under the Treaty by conferring authority on some other body.

"8.The Crown obligation to legally recognise tribal rangatiratanga.

"9.The courtesy of early consultation.

"10. Tino rangatiratanga includes management of resources and other taonga according to Maori cultural preferences.

"11. 'Taonga' includes all valued resources and intangible cultural assets.

"12. The principle of choice: Maori, Pakeha and bicultural options".

Ngai Tahu Land Claim Report 1991

References to 'partners' and 'partnership' (my emphasis):

"The tribunal has recognised that in reconciling the concepts of sovereignty and rangatiratanga some compromises will need to be made by *both Treaty partners*. In the *Muriwhenua report* (1988), p195, the tribunal commented: neither *partner* in our view can demand their own benefits if there is not also an adherence to reasonable stated objectives of common benefit. It ought not to be forgotten that there were pledges on both sides (4.7.7 at p 237).

"*The Treaty signifies a partnership* and requires the Crown and Maori partners to act toward each other reasonably and with the utmost good faith. *This proposition was independently agreed on by all five members of the Court of Appeal* in the New Zealand Maori Council case*. Several of the judges emphasised the importance of the 'honour of the Crown'. Mr. Justice Casey saw the concept as underlying all the Crown's Treaty relationships. Sir Ivor Richardson referred to the Treaty as a 'compact'.

"This tribunal adopts the following statement by the Muriwhenua tribunal as to the basis for *the concept of a partnership:—*

> It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for *the concept of a partnership.*

"The obligation of the *parties* to the Treaty to comply with its terms is implicit, just as is the obligation of *parties* to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle, and was in my view intended by Parliament to be embraced by the terms it used in s 9. *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 (4.7.17).

"Sir Robin Cooke also accepted that if the Waitangi Tribunal found merit in a claim and recommended redress the Crown should grant at

---

* See 'Court of Appeal' pp 4-7 for actual, and differing, judical understandings on 'partnership'.

least some form of redress, unless grounds existed justifying a reasonable *partner* in withholding it—which he thought 'would be only in very special circumstances, if ever'. It would appear to follow from this ruling that failure by the Crown, without reasonable justification, to implement the substance of a tribunal recommendation may in itself constitute a further breach of the Treaty. It could well be inconsistent with the honour of the Crown.

"The tribunal accepts the view that the present arrangement [Titi Islands] reflects the principle of *partnership*. It also indicates the possibilities in an exercise of rangatiratanga guaranteed and protected by the Crown. The fact that regulations were drawn up by beneficiaries in the land is a point not to be overlooked in the application of *the principles of partnership in resource management* (17.2.12 at p 859)".

Principles for Crown Action on the Treaty of Waitangi

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

The intent behind the release was to dispel doubt and removing confusion about issues that had arisen from the Treaty.

Deputy PM Geoffrey Palmer stated that the objective was to provide some certainty as to the Crown's approach and to give Government agencies a "clean set of policy guidelines about how to approach Treaty issues". Prime Minister David Lange stated that the principles are consistent with the Treaty of Waitangi, and with observations made by the Courts and the Waitangi Tribunal.

In relation to the *Principles for Crown Action* Mr. Palmer separately reinforced that:

> In considering appropriate measures of redress, the Government must consider factors such as economic and administrative feasibility, the need to spread the cost and benefits, and the requirement in any democracy, that a measure be acceptable to or at least tolerated by, a reasonably broad range of opinion. In assessing those factors the Government is doing no more than applying the Waitangi Tribunal's warning that:
>
> > It is out of keeping with the spirit of the Treaty ... that the resolution of one injustice should be seen to create another (*Waiheke Report*, 1987, p 99; also *Muriwhenua Report*, 1988, p xxi).
>
> Palmer, Hon. Geoffrey. *The Treaty of Waitangi—principles for Crown action*(1989) 19 VUWLR 335.

The principles are accompanied by a commentary that cites the sources and authorities on which each principle is based. The Government statement of the five principles, without accompanying commentary, is set out below:

"Principle 1
The Principle of Government: The Kawanatanga Principle

The Government has the right to govern and to make laws.

"Principle 2
The Principle of Self-Management: The Rangatiratanga Principle

The iwi have the right to organise as iwi, and, under the law, to control their resources as their own.

"Principle 3
The Principle of Equality

All New Zealanders are equal before the law.

"Principle 4
The Principle of Reasonable Cooperation

Both the Government and the iwi are obliged to accord each other reasonable cooperation on major issues of common concern.

Treaty 'partnership' as a matter of law

There is one statute in which the legislature saw fit to establish, as a matter of law, that a 'partnership' exists under the Treaty. This was in an 1988 amendment to the Treaty of Waitangi Act that imposes a duty on the Minister of Maori Affairs, when considering the suitability of persons for appointment to the Waitangi Tribunal, to have regard to "the partnership between the 2 parties to the Treaty" (s. 2A Treaty of Waitangi Act 1975).

Nowhere under statute, other than under the Partnership Act 1908 (s. 4), is 'partnership' defined.

During the passage of the Treaty of Waitangi Act amendment only three MPs referred to a 'partnership.' Two Government members made statements as to its existence, but offered no explanation as what they meant by the term. An opposition member saw fit to raise questions as to its nature and the consequences of a 'partnership'—"The tribunal has spoken of a partnership between the parties, but which partnership between which parties? The original partnership was between the British Crown and Maori chiefs. Neither of those parties exists now, yet the word 'partnership' is still used. Does that mean that everything is to be shared fifty-fifty? That expression is vague, meaningless, pious, and likely to confuse and lead to bad decisions..." (Warren Kyd, *Hansard* 1988 p 7930).

(...continues next column...)

"Principle 5
The Principle of Redress
The Government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur".

Discussion

Elaboration of Principles 1, 2, and 5 is not included in this paper as these are not directly relevant to the question of 'partnership'. It is noteworthy that the Government statement, after review of the Treaty and decisions from the Courts, and the reports of the Waitangi Tribunal, does not embrace 'partnership' as a principle. Instead the document concludes that, *"the outcome of reasonable cooperation will be partnership"*. In the commentary on Principle 4, elements other than 'reasonable cooperation' ..."referred to in pronouncements of the Courts and the Waitangi Tribunal—of good faith, consultation, and partnership—all flow from the central element of cooperation". It is only within the context of 'cooperation' that the concept of 'partnership' arises in the document. Elsewhere in the document the signatories to the Treaty are referred to as 'interests' or 'parties' and not as 'partners'.

> The principle of equality is the other area of significance. The dichotomy between a 'partnership' rather than 'equal citizenship' view of the Treaty underlies the conflict that has emerged over the Department of Conservation's interpretations of their duty to "give effect to the principles of the Treaty of Waitangi" by way of a 'partnership' with Maori.

The equality principle is reproduced in full as follows:

> The third Article of the Treaty constitutes a guarantee of legal equality between Maori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality although human rights accepted under international law are incorporated also.
>
> The third article also has important social significance in the implicit assurance that social rights would be enjoyed equally by Maori with all New Zealand citizens of whatever origin. Special measures to attain that equal enjoyment of social benefits are allowed by international law.

Soon after the release of *Principles for Crown Action*, criticism arose that the Crown's five principles do not fairly describe or reflect the Maori text of the Treaty. In particular, Professor Mead and Maanu Paul of Ngati Awa rejected the principle of self-management, instead preferring 'absolute authority'. The principle of equality, "as described", was also objected to. The central criticism was the elevation of the idea of cooperation above the concept of partnership (Te Runanga O Ngati Awa to Waitangi Tribunal 18 July 1989).

In defence of *Principles for Crown Action*, one of the contributors to the advice on which it is based was moved to publish an explanation (Alex Frame, *A State Servant Looks at the Treaty* (1990) 14 NZULR 82). As the fullest treatment so far of the subject of partnership and the Treaty, this is extensively drawn on below.

Mr. Frame observed that the criticism suggested that it was open to any body *except* the Crown to declare its policy in relation to the Treaty or even to declare what the Treaty meant. He pointed out that the document is a *policy* for Crown action, not a rewrite of the Treaty.

> In regard to 'partnership' he wrote:
> One criticism...has been that the...'Principle of Cooperation', is in some way a retreat from the notion of 'partnership'. This latter term had achieved currency following its adoption by the Court of Appeal. ...Indeed, it can be confessed that the group of officials charged with preparing the *Principles for Crown Action* for ministerial consideration first attempted to formulate a 'Principle of Partnership'. A number of problems quickly became apparent. First the Court of Appeal had employed the expressions 'reasonable cooperation' and 'partnership' somewhat interchangeably. Secondly, the aura of legal precision surrounding the term 'partnership' proved to be deceptive. In fact, neither the statutory definition of 'partnership' ("the relation which subsists between persons carrying on a business in common with a view to profit") nor more elaborate explanations of learned commentators provided any guidance as to the allocation of power between 'partners'. Indeed, this subsequently came to be explicitly recognised by the Court of Appeal when their Honours warned against a mechanical 50/50 model of partnership (*Mahuta* v *Attorney-General*, unreported, Court of Appeal, 3 October 1989, CA 126/189).
>
> Indeed, the more one looked at the Court of Appeal's use of the concept of 'partnership' in the *New Zealand Maori Council* case in 1987, the more it became apparent that the principle assistance it provided as an analogical device related to a duty to consult and to disclose "in the utmost good faith". This special nature of the 'partnership' was simply but effectively expressed by Lord Eldon in *Const* v *Harris* in 1824:
>
> > In all partnerships whether it be expressed in the deed or not, the partners are bound to be true and faithful to each other.
>
> The 'good faith' implication of the 'partnership' concept is nevertheless to be weighted against the potentially misleading implications of '50/50 ownership' and 'one race one vote' which are also inherent in the 'partnership' metaphor. The matter is, with respect, well expressed in Mr. Paul Temm QC's recent publication (Temm 1990, *The Waitangi Tribunal*), where the author states:
>
> > So it must be said at once that the fact that the Treaty created a partnership between the Crown and the Maori New Zealander does not mean that there is an equal partnership between them. It does not

mean that Maori New Zealanders are entitled to fifty percent of all the seats in Parliament, nor fifty percent of all tax revenue, nor fifty percent of all the positions in the public service, nor fifty percent of all broadcasting time on national radio and television. And it certainly does not mean that Maori New Zealand is entitled under the Treaty to half of all Crown property in the country.

Claims of these kinds have been asserted from time to time but they are all based on the false foundation that a partnership necessarily means an equality between the partners.

"The second problem relates to whether 'partnership' can provide *a guide to action* for state officials. Is there not a likelihood that officials will see 'partnership' as something purely abstract, unrelated to day-to-day operations of government agencies? A more practical concept seemed to be called for—one pointing to activity rather than abstraction. The idea of cooperation (literally 'working together') appeared to offer that more practical concept with administrative relevance.

"The concept of cooperation has the advantage that most people know, at everyday level, what cooperation is and can recognise its presence or absence with considerable accuracy. It should be stressed at the outset that the word 'cooperation' will here be used in its formal sense without the connotations of a particular political or industrial philosophy and, certainly, it is not used in that colloquial, figurative, ironic sense which implies coercion. The term will be used in its standard dictionary sense of 'working together to the same end' (Concise Oxford Dictionary). Cooperation is a behavioural strategy for achieving ends difficult or impossible to achieve otherwise".

Mr. Frame went on to define seven characteristics of 'cooperation'. In summary these are—*two (or more) parties, acting as free agents, engaged together in purposeful activity, that is based on a shared understanding and commitment, both coordinating their respective actions to a common goal.*

"The concept of 'cooperation' is thus shown to be more fundamental, more specific in its implications, and therefore more demanding of the parties, than of 'partnership'. Cooperation is the actual activity without which 'partnership' is a mere abstraction. The way in which this conclusion is expressed in the *Principles for Crown Action* is that, 'the outcome of reasonable cooperation will be partnership' ".

Application of Treaty principles within DOC

The involvement of iwi in conservation land management has rapidly increased since the Department of Conservation was created in 1987. There is a requirement under section 4 of the Conservation Act to "give effect to the principles of the Treaty of Waitangi".

The department's vision of where it is going in relation to Treaty matters was established early in its history. In 1988 the Waitangi Tribunal recorded what Ken Piddington, the first Director-General, saw as the departmental vision for the future of the public estate:

Mr. Piddington indicated that, in thinking about the way in which the principles of the Treaty of Waitangi affect the department in its operational work and how it might best achieve the form of partnership articulated by the Court of Appeal in the New Zealand Maori Council case, he proposed to develop a set of guidelines. Later he said:

"In considering our responsibilities for the public estate the central issue comes back to whether or not the question of title is actually relevant to our management role. Since the claimants have raised several issues in respect of title I believe the conclusion we have reached is highly significant. As already indicated the stewardship of a public resource does not require the steward to obtain evidence of ownership. It is, however, necessary for that agent to receive unequivocal instructions from a source of higher authority. This authority in my submission equates precisely with the concept of 'Rangatiratanga' in Article the Second. It follows that by seeking appropriate guidance from a tribal trust or other authority the department can align its protective role with the wording of the Maori version of the Treaty".

In short Mr. Piddington envisaged the development of a partnership between the department and the tanga whenua, working for the common good (*Ngai Tahu Report* 1991 p 1048).

> DOC sees continued ownership of public lands and waters as incidental to its role as a 'steward', and the tangata whenua and its interests as indivisible. 'Higher authority' for management will come from iwi rather than from the purposes set out in administering statutes. Consequently the public will not be able to call to account either the department or Minister.

The department has relied on its own interpretations of the Treaty and case law to formulate a 'partnership' model. All these aspects are highly challengeable in terms of interpretation and matters of record, as well as under the statutory purposes for protected areas. However this departmental position, conceived without consultation and debate with the wider community, has set the scene from then on.

For instance, Janet Owen, DOC's Director of Protected Species, writing in March 1992, prejudged the validity of all future claims by stating that "...the Crown has defaulted on its responsibilities as a Treaty partner". She continued "...the Treaty of Waitangi confers a special position on Maori" and "in line with the princi-

ples of the Treaty *DOC is seeking to achieve joint decision-making on any allocation of the resource, with the partners assuming shared and singular responsibilities in the process"* (*Traditional Harvest of Protected Natives. Terra Nova*, March 1992, p 50).

It appears that the department has taken no notice of subsequent developments to the 'partnership' model at the Court of Appeal, or to the *Principles for Crown Action*, but has chosen to pursue its own vision, latterly reinforced by ill-founded utterances from the Minister of Conservation.

Since coming to power in 1990, the National government has primarily concerned itself with reviewing the administrative structures for resolution of Treaty grievances, rather than reassess the principles of the Treaty or its own basis for action. There is equivocalness as to current government policy on the *Principles for Crown Action:*

> Although there has been some discussion within Government on the five Principles outlined in the booklet, the Government has yet to endorse these Principles...there has not been any decision at the present time to change the current Government policy...it should not be assumed that the five Principles are current Government policy (Department of Justice to B. Mason 10/8/93).

In March 1993 the Director-General of Conservation advised that all regional conservators have access to three primary government publications to provide direction how they are "to give effect to the principles of the Treaty" (D-G Conservation to B. Mason 12/3/93). These are:

1. Principles for Crown Action. Department of Justice, July 1989. This is reviewed earlier.

2. Towards Responsiveness. State Services Commission, July 1989. This identifies some Treaty principles and "their operational dimensions". The principle of 'partnership' is identified as "perhaps the most central of all the principles to emerge from the SOE case". In this concept "is to be found the ultimate objective of the Government's Maori policy, and it is this which presents us with the obligation to consider what practical steps should be taken by the Crown in fulfilment of its role as partner to the Treaty of Waitangi". This and other identified principles, however, *"underscore, or are subsumed within, the five principles recently adopted by Government as guidelines for Crown Action"*. In other the words the *Principles for Crown Action* are supposed to have primacy.

3. The Direct Negotiation of Maori Claims. Department of Justice 1990. This confines itself to structures and process for dealing with Maori claims, but restates Government's commitment to the *Principles for Crown Action* which "sets out the position of the Government in dealing with the negotiation of claims under the Treaty of Waitangi".

In addition the Department has produced three policies (approved 22 February 1993), headed by the Minister of Conservation's earlier quoted statement that Pakeha and Maori are "equal treaty partners". 'Partnership' policies are pursued. None of the policies includes principles from the *Principles for Crown Action.*

> There appears to be a singular determination within DOC to promote the vesting of control and the administration of public reserves and conservation areas in private Maori Trusts. This is based on an assumed 'partnership' conferring equal or greater-than-equal status on any one of Maori descent.

For instance vesting of Stephens Island (Takapourewa) in Ngati Koata, "would express a special partnership relationship between the Minister and the Trust which gives effect to the principles of the Treaty of Waitangi" (DOC papers titled *Vesting a Public Reserve* 1993). In the words of the mediator appointed to negotiate settlement of the *unproven* claim over Stephens Island—"in essence a claim for an arrangement whereby Ngati Koata ownership of Stephens Island is acknowledged by the Crown and that management of all those lands be one which reflects the partnership principle" (*Revesting of Conservation Land or Reserves.* DOC, for New Zealand Conservation Authority. 2 February 1993).

> The 'partnership' model is now well installed in the department, and receiving uncritical, mechanical application through all policy and operational areas.

Atawhai Ruamano Conservation 2000 is cited as the departmental vision for the year 2000 where "places special to Maori...[are] protected and managed according to Maori tikanga in partnership with iwi", with 'people changes' to achieve "conservation management with iwi Maori".
'Conservation Results' include—

- "Protect, *or allow sustainable use* of, plants, animals and places special to Maori".
  (This is a clear expression of intended changes to the purposes of supposedly 'protected areas' such as national parks which are to be "*preserved in perpetuity as far as possible in their natural state for their intrinsic worth and for the benefit, use, and enjoyment of the public"*, s. 4 National Parks Act 1980).
- "Help achieve the settlement of key claims under the Treaty of Waitangi as the context for enhancing partnership between Pakeha and iwi".
- "Manage places special to iwi according to Maori tikanga and acknowledge the kaitiaki role that iwi have".

'People Changes' include—

- " Building a partnership with iwi".
- "Conservation partnership with iwi Maori", with an explanation:

  > The extent to which conservation progress can be made in the short to medium term will depend in part on the ability to develop working partnerships with iwi Maori. Partnership is about working together. Giving effect to the Treaty of

> Waitangi requires that iwi and the department understand each other's perspectives about conservation and are involved in an active consultation process". "These goals and actions would be set out in a Partnership Plan".

Atawhai Ruamano Conservation 2000. Discussion Document. May 1993. Department of Conservation.

Conclusion

The 'partnership' myth

The concept of a 'Treaty partnership' arises from a perceived need for the sharing and re-distribution of power and resources with Maori, rather than from the words of the Treaty itself.

The proponents of a 'partnership' view assume the concept to be the most appropriate strategy to achieve biculturalism in New Zealand.

> In common parlance, 'Treaty partnership' is ill-defined, confused, and misleading—dangerously so in regard to the Crown's obligations to all citizens and the potential for detriment to the majority of New Zealanders. There is an inherent and inescapable connotation of equality between the 'partners' that make the use of the term inappropriate in the full context of the Treaty.

As a metaphor, 'partnership' raises impossible, and unfair, expectations. In relation to the Treaty, 'partnership' between races, or between the Crown and Maori, is no less than a myth—more so is the notion of 'equal partnership'.

However, somewhat perplexedly, as one of very few proponents who have dared to admit—"Myths are useful", even 'vital'..."the mythmaking surrounding the Treaty of Waitangi should be a cause of celebration...". As Paul McHugh in *Constitutional Myths and the Treaty of Waitangi* (NZLJ September 1991, p 316) continues to comment:

> No one pretends that the language of 'partnership' and 'fiduciary obligation' was exchanged on the seaside promontory at Waitangi in 1840. The Courts have stressed their construction of what amounts to a contemporary mythology of the Treaty.

So why the pretence?

As the Ministry for the Environment observed in 1988—

> Continuing statutory preference for the 'principles of the Treaty' as opposed to its plain words, have provided room for the Courts to rewrite and moderate the actual terms of the Treaty. The Court of Appeal has created a concept of partnership as the framework within which Treaty disputes are to be worked out. Partnership has little or no intrinsic meaning and so can be made to mean whatever it is wished to mean. It is an empty box to be filled by whoever wields power on the day. The concept cannot be found in the words of the Treaty (Ministry for the Environment. Resource Management Law Reform. *A Treaty Based Model — The principle of active protection.* Working Paper No. 27. 1988).

As means of just reconciliation, the 'partnership' model further fails when it is asked—in what shares do the 'partners' participate? This is a practical reality recognised by Government's 1989 *Principles for Crown Action*, which concluded that 'partnership', in the context of correctly reflecting the Treaty, is an abstract idea that can serve little useful purpose.

The notion of a 'partnership' involving the sharing fifty:fifty or in other portions of wealth and power, that is not the 'exclusive' preserve of the Maori 'partner', goes against all statutory and dictionary definitions of the term as well as the Court of Appeal's more recent development of the concept.

> The Court of Appeal has spelt out on three occasions at least that there is no equality in the 'partnership'. However the driving engines of 'partnership' within and outside Government either haven't heard or don't care to know.

There has been a tendency in recent years to 'read down' the first and third Articles of the Treaty, and elevate the second. All Articles, in both versions, must be read in relation to each other and the Treaty purposes as expressed in the preamble if a fuller understanding is to be obtained. Downgrading of particular elements leads to a tendency to automatically impute bad faith on one party—always the Crown!

> At an individual citizen level there is an irreconcilable conflict between 'partnership' and 'equal citizenship' views of the Treaty. The former has no basis in the Treaty—it is a creature of social engineers, the judiciary, and a bureaucracy captured by a 'politically correct' Treaty orthodoxy. The latter has direct expression in the usually preferentially quoted Maori version of the Treaty—*all New Zealanders have the same rights and duties of citizenship.*

The 'partnership' model is now well established within many institutions of Government. Because the Court of Appeal introduced the model into the common law it now tends to be uncritically accepted and advanced as the only valid approach towards Treaty principles.

However if applied as a means of divesting or sharing control, management, or ownership of the public conservation estate, 'partnership' between DOC and particular classes of citizens, as represented by iwi, hapu, or individuals of Maori descent, will create *inequalities of opportunity and benefit between individual citizens.* This raises the possibility of legal challenges of decisions thought to be

contrary to Article Three, in the context of "giving effect to the principles of the Treaty of Waitangi" as required by section 4 of the Conservation Act.

Approximately 13 percent of the population is of Maori descent and potential beneficiaries of transferred ownership or control over a substantial public estate. If a 'partnership' model is applied by way of preferential allocations to bodies or persons with unproven or invalid claims under the Treaty, where does this leave the other 87 percent who have lost rights of publicly accountable control, and possibly use, over a shared heritage?

Inequalities that are likely to arise will not just be between Pakeha and Maori. There will result major disparities *between* Maori claimants as shown by recent disagreement over allocation of sea fisheries. There is also the question—why are Crown agencies seeking to forge 'partnerships' only with iwi? The Crown's obligations arising from the Treaty and constitutional law extend to *every citizen*, of Maori as well as non-Maori descent.

The Department of Conservation, as the central custodian of the public estate, is limited by statute to *preserving natural resources for their own intrinsic worth and allowing public uses consistent with that objective.* Fundamental changes to this founding 'preservation-with-use' philosophy and to public rights of access and enjoyment are at issue.

There is a major gulf between the existing legislative purposes for Crown protected areas and the variously expressed 'conservation-for-utilisation' preferences of many iwi. This conflict of objectives should be fully debated before any consideration is given to handing ownership or control of public lands to private interests.

The 'partnership' course is to change the essential character of public lands and who the intended beneficiaries are, by a confused and undemocratic application of the Treaty.

Appendix 1

Statutes and case law concerning Treaty and Maori interests

Statutes with reference to the Treaty of Waitangi

Fish Protection Act 1877, s 8.
Fisheries Act 1983, s 54A; reference to Article II in new Part IIIA, as inserted by s 74, Maori Fisheries Act 1989.
Maori Fisheries Act 1989, RS 27, Long Title.
Maori Language Act 1987, Preamble.

Statutes with reference to the 'Principles of the Treaty of Waitangi'

Conservation Act 1987, s 4.
Crown Forest Assets Act 1989, Long Title.
Crown Minerals Act 1991, s 4.
Education Act 1989, s 181(b).
Environment Act 1986, Long Title.
New Zealand Maori Council v Attorney-General. [1987] 1 NZLR 641-719. CA.
Resource Management Act 1991, ss 5(e), 6.
Runanga Iwi Act 1990, s 4.
State-Owned Enterprises Act 1986, s 9.
Treaty of Waitangi Act 1975, ss 5, 8A-8H.

Statutes with reference to a 'partnership' under the Treaty

Treaty of Waitangi Act 1975 s.2A, as amended by 1988 No. 233.

Statutes creating direct, rather than recommendatory, powers for the Waitangi Tribunal

New Zealand Railways Corporation Restructuring Act 1990 (Part IV).
Treaty of Waitangi (State Enterprises) Act 1988 (Part II).

Other Statutes

Fisheries Act 1908, s 77(2).
Fisheries Act 1983, s 88(2).
Lake Waikaremoana Act 1971.
Land Titles Protection Act 1902, s 2.
Maori Affairs Act 1953, s 155.
Maori Reserved Land Act 1955 RS 8.
Maori Vested Lands Administration Act 1954 RS 8.
Native Land Act 1909, s 84.
Rununga Iwi Repeal Act 1991 No 34.
Sea-fisheries Act 1894, s 72.
Sea-fisheries Amend. Act 1903, s 14.
Shortland Beach Act 1869.
State Sector Act 1989.
Te Rununga O Ngati Awa Act 1988 No 227.
Te Rununga O Ngati Porou Act 1987 No 182.
Te Rununga O Ngati Whatua Act 1988 No 231.
Treaty of Waitangi (State Enterprises) Act 1988.
Treaty of Waitangi Amendment Act 1985.
Treaty of Waitangi Amendment Act 1993.

Case Law

Attorney-General v New Zealand Maori Council (CA 247/99) (radio spectrum).
M R R Love v Attorney-General unreported judgement, 1988 (Petrocorp).
New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641-719. CA (SOE lands).
New Zealand Maori Council v Attorney-General [1989] 2 NZLR 142 (forestry).
New Zealand Maori Council v Attorney-General [1992] 2 NZLR 576 (broadcasting assets).
Royal Forest and Bird Protection Society (Inc.) v W A Habgood Ltd. (1987) 12 NZTPA (HC) 76.
Tainui Maori Trust Board v Attorney-General [1989] 2 NZLR 513 (Coal Corporation).
Te Heuheu Tukino v. Aotea District Maori Land Court [1939] NZLR 107 (SC).
Te Heuheu Tukino v. Aotea District Maori Land Court [1941] NZLR 590 (PC).
Te Runanga O Muriwhenua Inc. v Attorney-General (CA 110/90) (fisheries).
Te Weehi v. Regional Fisheries Officer [1986] 1 NZLR 680 (HC).

Appendix 2

Bibliography

Adam, Peter. 1977. Fatal Necessity: British Intervention in NZ 1830-1847. Auckland University Press.
Anglican Church. 1986. The Report of the Bi-cultural Commission of the Anglican Church on the Treaty of Waitangi.
Batchelor, Michael. 1990. Consider the Treaty, *Lawlink* 5 (2) June 1990.
Boast, R P. 1989. The Treaty of Waitangi. A framework for Resource Management Law. NZ Planning Council and VUWLR (1989) 19 VUWLR Monograph 1.

Brooker and Friend Ltd. 1990. The Impact of the Treaty of Waitangi on Government Agencies. Brooker and Friend Ltd. for MAF.
Buick, Lindsay. 1936. (1976). The Treaty of Waitangi. How NZ became a British colony. 3rd edition. Capper Press, Christchurch.
Chapman, Guy. 1991. The Treaty of Waitangi — fertile ground for judicial (and academic) myth-making. NZLJ July 1991, 228.
Crengle, Dianne. 1993. Taking Into Account the Principles of the Treaty of Waitangi. Ideas for the Implementation of Section 8 Resource Management Act 1991. Ministry for the Environment.
Department of Justice. 1989. Principles for Crown Action on the Treaty of Waitangi.
Department of Justice. 1990. The Direct Negotiation of Maori Claims. The Treaty of Waitangi Policy Unit for the Crown Task Force on Treaty of Waitangi Issues.
Department of Justice. 1992. Te Roopu Whakamana I Te Tiriti O Waitangi. A guide to the Waitangi Tribunal. Waitangi Tribunal Division, Department of Justice.
Durie, E T. and Orr, G S. 1990. The role of the Waitangi Tribunal and the development of bicultural jurisprudence. 14 NZULR 62.
Frame, Alex. 1990. A State Servant Looks at the Treaty. [1990] 14 NZULR, 82.
Gerritsen, Nick. 1991. The Treaty of Waitangi: "Do I dare, Disturb the universe?". NZLJ April 1991, pp 138-140.
Haughey, E J. 1966. Maori claims to the lakes, river beds and the foreshore. NZULR 2 (1966) pp 29-42.
Jamieson, Nigel. 1992. The Maori Magna Carta: A Review. NZLJ March, 101.
Kawharu, Hugh. 1989. Maori and Pakeha Perspectives of the Treaty of Waitangi. Oxford University Press, Auckland.
Keith, Sir Kenneth. 1990. The Treaty of Waitangi in the Courts. 14 NZULR 37.
Kelsey, E J. 1990. The Principles of the Treaty of Waitangi. Unpublished Report for Ministry for the Environment, Centre for Resource Management, Lincoln University.
Kelsey, Jane. 1990. A Question of Honour: Labour and the Treaty 1984-1989. Allen and Unwin, Wellington.
Kenderdine, S E. 1989. Legal Implications of Treaty Jurisprudence. 19 VUWLR 347, 369-372.
Kenderdine, Shonagh. 1989. Legal implications of Treaty jurisprudence. 19 VUWLR 347.
Legat, Nicola. 1990. Claudia Orange and the treaty of waitangi industry. *Metro* June 1990.
Marshall, Denis. Minister of Conservation. Address to Wanganui Branch of Royal Forest & Bird Protection Society. 8 September 1992.
Marshall, Denis. Minister of Conservation. Press release 8 September 1992.
McHugh, Paul. 1984. The legal status of Maori fishing rights in tidal waters. 14 VUWLR 247.
McHugh, Paul. 1987. Aboriginal title returns to the New Zealand Courts. NZLJ. February 1987: 39-41.
McHugh, Paul. 1988. The Legal Basis for Maori Claims Against the Crown. 18 VUWLR 11.
McHugh, Paul. 1991. Constitutional myths and the Treaty of Waitangi. NZLJ September 1991, 316.
McHugh, Paul. 1991. The Maori Magna Carta. NZ law and the Treaty of Waitangi. Oxford University Press, Auckland.
McHugh, Paul. 1992. Sealords and sharks: The Maori Fisheries Agreement (1992). NZLJ October 1992, 354.
McHugh, Paul. 1993. A new role for the Maori Courts in the resolution of Waitangi claims? NZLJ June 1993 229.
McNair, Lord. 1961. The law of treaties. Oxford University Press, Oxford.
Minister of Maori Affairs. 1988. Partnership Perspectives (He Tirohanga Rangapu): A Discussion Paper on Proposals for a New Partnership.
Minister of Maori Affairs. 1988. Partnership Response (He Tirohanga Rangapu): A Discussion Paper on Proposals for a New Partnership.
Ministry for the Environment. 1988. Resource Management Law Reform. The Treaty of Waitangi and its significance to the reform of resource management laws. Working Paper No. 8.
Ministry for the Environment. 1988. Resource Management Law Reform. A Treaty Based Model — The principle of active protection. Working Paper No. 27.
Ministry for the Environment. 1991. Consultation with Tangata Whenua. A guide to assist local authorities in meeting the consultation requirements of the Resource Management Act 1991.
Ministry for the Environment. 1992. The Resource Management Act. Kia Matiratira. A Guide for Maori.
Ministry of Maori Development. 1993. Mauriora Ki Te Ao—An Introduction to Environmental and Resource Management Planning.
Mulgan, Richard. 1989. Maori, Pakeha and Democracy. Oxford University Press.
New Zealand Conservation Authority. 1992. Hui Whakatopu, Conservation Board Maori Members' Hui. 1992. Summary Report prepared for Minister of Conservation.
New Zealand Government. 1991. Report on Current and Suggested Government Approach and Structures for the Resolution of Treaty of Waitangi Grievances. Cabinet Committee memo CAB (91) M19/17.
New Zealand Government. 1991. Structures for the resolution of Treaty of Waitangi grievances. Cabinet paper.
New Zealand Law Society. 1989. Treaty of Waitangi: Papers from New Zealand Law Society Seminar.
O'Reilly, L M. 1992. Application of the principles of the Treaty of Waitangi within the Department of Conservation. Seminar paper: Legal Conference May 1992.
Orange, Claudia. 1988. The Treaty of Waitangi. Allen and Unwin.
Palmer, Hon. Geoffrey. 1989. The Treaty of Waitangi — principles for Crown action 19 VUWLR 335.
Parliamentary Commissioner for the Environment. 1988. Environmental Management and the Principles of the Treaty of Waitangi: Report on the Crown Response to the Recommendations of the Waitangi Tribunal 1983-1988.
Parsonson, Gordon. Nursery of dispute: not a 'security for peace'. Waitangi seen against its circumstances. *Otago Daily Times* 8 July 1988.
Rikys, Pita. 1991. Trick or Treaty. NZLJ October 1991, 370.
Royal Commission on Social Policy. 1987. The Treaty of Waitangi and Social Policy: Discussion Booklet No 1 July 1987.
Royal Commission on Social Policy. 1988. The April Report, Volume II Future Directions. Report of the Royal Commission on Social Policy.
Slattery, B. 1987. Understanding aboriginal titles. Canadian Bar Review 66: 727-783.
State Services Commission. 1989. Partnership Dialogue—A Maori Consultation Process. SSC Responsiveness Unit.

State Services Commission. 1989. Towards Responsiveness — Objective Setting and Evaluation (Me Penapena — Nga Whainga atu me nga hua e Kitea ana).
Tau, M T et al. 1990. Te Whakatau Kaupapa — Ngai Tahu Resource Management Strategy for the Canterbury Region. Aoraki Press, Wellington.
Temm, Paul. 1990. The Waitangi Tribunal: The Conscience of the Nation. Random Century, Auckland.
Wellington District Law Society. 1986. Papers from a Seminar on the Treaty of Waitangi.
Wheen, Nicola. (1992). The Treaty of Waitangi and its Impact on New Zealand's Legislation. Faculty of Law, University of Otago.
Williams, David. 1990. The constitutional status of the Treaty of Waitangi: an historical perspective. 14 NZULR 9.
Williams, Joe. 1991. Chapman is wrong. NZLJ October 1991, 373.
Yensen, Helen. 1989. Honouring the Treaty. An introduction for pakeha of the Treaty of Waitangi. Penguin, Auckland.

Appendix 3

Definitions

bicultural: having or combining two cultures. *The Concise Oxford Dictionary* 7th Edition.
charter: written grant of rights by sovereign or legislature, esp. creation of borough, company, university etc. *The Concise Oxford Dictionary* 7th Edition.
compact: agreement or contract between two or more. *The Concise Oxford Dictionary* 7th Edition.
covenant: a clause of agreement contained in a deed whereby a party stipulates for the truth of certain facts, or binds himself to give something to another, or to do or not do any act. *NZ Law Dictionary* 3rd Edition.
duty: moral or legal obligation, what one is bound or ought to do; binding force of what is right. *The Concise Oxford Dictionary* 7th Edition.
fiducial: adj. showing confidence or reliance: of the nature of trust: serving as a standard of reference. *Chambers Everyday Dictionary.* 1975.
hapu: sub-tribe.
iwi: tribe.
joint: held or done by, belonging to 2 or more persons in conjunction; sharing (possession). *The Concise Oxford Dictionary* 7th Edition.
kaitiakitanga: exercise of guardianship.
mana: authority, control, influence, prestige, power, psychic force.
parties: persons who voluntarily take part in anything, in person or by attorney; as the parties to a deed. *N Z Law Dictionary* 3rd edition.
party: body of persons united in a cause, opinion etc.; each of two or more persons making the two sides in legal action, contract, marriage etc. *The Concise Oxford Dictionary* 7th Edition.
partner: a sharer: one engaged with another, an associate in business: one who plays on the same side with, and along with, another in a game. *Chambers Everyday Dictionary.* 1975.
partnership is the relation which subsists between persons carrying on a business in common with a view to profit. (s 4 Partnership Act 1908).
partnership: joint business; sharer with (person); shares risks and profits; one who engages jointly. *The Concise Oxford Dictionary* 7th Edition.
rangatiratanga (also *te tino rangatiratanga*): chieftainship: tribal control of tribal resources. Includes the holding of resources on a communal rather than individual basis. *Environmental Management and the Principles of the Treaty of Waitangi*, Parliamentary Commissioner for the Environment, 1988.
runanga: assembly, debate.
tangata whenua: iwi or hapu that holds mana whenua over an area (s 2 Resource Management Act 1991); or, people of the land.
taonga: treasures as the sacred possessions of the tangata whenua.
tikanga Maori: Maori tradition and custom.
title: Legal right to the possession of property (esp. real property); the evidence of such right; title-deeds. An assertion of right; a claim. *Shorter Oxford Dictionary.* 3rd Edition.
title: That which justifies or substantiates a claim; a ground of right; hence an alleged or recognised right.
treaty: a formal agreement between states. *Chambers Everyday Dictionary.* 1975
treaty: a negotiation; a compact between nations. *The Concise Oxford Dictionary* 7th Edition.

Appendix 4

Abbreviations

All ER	All England Law Reports
CA	Court of Appeal
HC	High Court
NZLJ	N Z Law Journal
NZLR	N Z Law Reports
NZTPA	N Z Town Planning Appeals
NZULR	N Z Universities Law Review
PC	Privy Council
SC	Supreme (now High) Court
VUWLR	Victoria University of Wellington Law Review