Preliminary Paper No 9

THE TREATY OF WAITANGI
AND
MAORI FISHERIES

MATAITAI: NGA TIKANGA MAORI ME TE
TIRITI O WAITANGI

A Background Paper

Any comments, queries or requests should be made to

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Kaore i hangaia te kupenga hei hopu ika anake, engari i hangaia kia oioi i roto i te nekeneka o te tai.

(The net is not made up just to catch fish, but also to be flexible so that it may flow with the tide.)

Time present and time past
Are both perhaps present in time future
And time future contained in time past.

T S Eliot, Burnt Norton
# CONTENTS

<table>
<thead>
<tr>
<th>Preface</th>
<th>Page</th>
</tr>
</thead>
</table>

## PART I

| 1 Introduction                             | 1    |
| 2 Essence of the Paper                     | 5    |
| 3 Classification of Fisheries and Rights   | 13   |
| 4 The Present Sea Fisheries Regime         | 16   |

## PART II

| 5 The Historical Setting                   | 21   |
| 6 The Nature of Traditional Fisheries      | 26   |
| The Operative Date                         | 26   |
| Fisheries as Exclusive Property            | 27   |
| Offshore Fishing                           | 30   |
| The Economic Function of Fisheries         | 32   |
| 7 The Meaning of the Treaty                | 36   |
| The Heart of the Matter                    | 39   |
| The Nature of the Treaty                   | 40   |
| The English Version                        | 41   |
| The Maori Version                          | 44   |
| Conflict of Understandings                 | 49   |
| The Relationship of the Articles           | 50   |
| Conclusion                                 | 52   |
| 8 The State of the Law                     | 54   |
| The Traditional View                       | 54   |
| The Alternative View                       | 56   |
| 9 The Treaty as Public Policy              | 60   |
| 10 Foreshore and Sea Fisheries             | 68   |
| Ownership of the Foreshore                 | 69   |
| Fishing Rights                             | 70   |
| Regional Fisheries Officer v Williams      | 72   |
| The Effect of Recent Legislation           | 73   |
| 11 River and Lake Fisheries                | 74   |
| Rivers                                     | 75   |
| Lakes                                      | 76   |
| 12 The Impact of Other Legislation         | 80   |
| 13 Special Privileges and Equality         | 89   |
| 14 The Way Ahead                            | 92   |
PART III

15  The Historical Development of the Law
    Preliminary Issues Defined
    Misconceptions
    Aboriginal Title Overseas
    The Legal Status of Customary Land
    Pre-emption
    Land Claims Ordinance 1841
    The Issue of Waste Lands
    Subsequent Maori Land Legislation
    Normanby's Instructions
    R v Symonds (1847)
    The Kaitorete judgment
    The Kauaeranga judgment
    Re Lundon and Whitaker Claims Act 1871
    Wi Parata: The Act of State Doctrine
    The Act of State Doctrine Outside New Zealand
    The Later Course of Events in New Zealand
    The Triumph of Crown Rights
    Conclusion

16  Maori Custom and the Law
    Diverse Attitudes to Maori Custom
    The Effect of Annexation
    Maori Custom and the Common Law
    Custom and Common Law in Hawaii
    Conclusion

17  Government Policies and Maori Grievances
    The Early Years
    Maori Protests 1870-1890
    The Thames Goldfield Legislation
    The Riverton Dispute
    Crown Powers to Grant Land
    The Harbours Act 1878
    Rivers
    Lakes
    The State of Settled Policy in 1920
    New Zealand Policy in Island Polynesia
    The Continuation of Protest
    Whanganui a Rotu (Napier Harbour)
    Awapuni Lagoon
    The Period Since 1945
    Conclusion
APPENDICES

A  The English text of the Treaty of Waitangi
B  The Maori text of the Treaty of Waitangi
C  The Maori text translated directly into English by Prof I H Kawharu
D  Copies of claims in Muriwhenua and Ngai Tahu cases
E  Reports of Maori Fisheries Committee - Crown and Maori representatives
F  Judgments in:
   (1)  The Queen v Symonds
   (2)  Wi Parata v Bishop of Wellington
   (3)  Nireaha Tamaki v Baker (Court of Appeal and Privy Council)
   (4)  Waipapakura v Hempton
   (5)  Te Weehi v Regional Fisheries Officer
   (6)  Ngai Tahu Maori Trust Board v Attorney-General

List of Cases

Bibliography

A  Books, Reports and Theses
B  Articles, Essays and Papers
PREFACE

In May 1986 the Minister of Justice asked the Law Commission to consider and report on the law affecting Maori fisheries. In the Minister's words, the purpose of the reference was "to ensure that the law gives such recognition to the interests of the Maori in their traditional fisheries as is proper, in the light of the obligations assumed by the Crown in the Treaty of Waitangi." The full text of the reference appears in the introductory section.

The Commission decided as a first step to prepare a preliminary background paper on legal and historical aspects of the subject-matter of the reference. The expectation was that this would be published, possibly together with an issues paper, and comments generally solicited. This would have led in the ordinary course to extensive consultation and discussion with all those interested, and in particular with the many important interest groups.

However, the progress of events - judicial, political and legislative - described in the introductory section has made it doubtful whether further involvement by the Law Commission would serve a useful purpose. It likewise delayed the paper's completion and posed the problem of the most helpful time to issue it. No moment is or will be ideal, but the Commission believes that the value of the paper would be diminished by further postponing its publication.

Underlying these specific events is a deeper theme - a rapid and even perhaps dramatic change of perceptions of the Treaty of Waitangi's place in New Zealand law and the relationship between many aspects of the law and the Treaty. The true significance of this, its dimensions and its larger implications, are not yet apparent. It is thus not possible to do more than view the issues of our reference in a particular time-frame - the beginning of 1989. The study should be read with this in mind.

The paper's nature - a background and research document - has determined the nature of the consultations that have taken place in its preparation. It is not and was not envisaged as a report of any sort, with findings and recommendations about future action. Nor is it even a discussion paper in the sense of containing proposals or options. Accordingly, while a number of interest groups were contacted and the Commission's task explained to their representatives, there was no attempt to elicit or discuss their detailed views at that stage. On the other hand there was wide discussion with persons having special interest or expertise in the field - historians, practising lawyers, academics, representatives of government agencies, and others. An earlier draft of the paper was sent to various experts and their responses obtained. The help they have
freely given is gratefully appreciated. They are, of course, not responsible in any way for statements or opinions contained in the paper.

Among the materials and information that have been considered, the reports of the Waitangi Tribunal are in a class apart. Without the Tribunal's thorough and painstaking analysis of issues, history and law, and the unique body of evidence it has received from the tangata whenua, the preparation of a document such as this would at best have required extraordinary and prolonged labours.

The purpose of the paper is to make the work done available to those who may be interested and to inform public discussion of the extremely important and complex issues implicit in Maori fishing claims. The Law Commission's hope is that it will help in the clarification and understanding of the issues and their history, the state of the law and how it has developed, and the reasons for current Maori grievances and claims. The present is difficult to understand except in the light of the past. And the past in turn may have valuable lessons for the future.
PART I
INTRODUCTION

1.1 In May 1986 the Minister of Justice gave the Law Commission the following reference under section 7(2) of the Law Commission Act 1985 -

Purpose of reference

To ensure that the law gives such recognition to the interests of the Maori in their traditional fisheries as is proper, in the light of the obligations assumed by the Crown in Te Tiriti o Waitangi (the Treaty of Waitangi).

Reference

With this purpose in mind you are asked to consider and report on -

(1) The recognition of Maori fisheries (including lake and river fisheries) in the law, and whether any, and if so what, changes ought to be made to the law in that regard;

(2) What protection Maori fisheries should have in respect of acts or omissions by the Crown, public bodies and other corporations, and individuals;

(3) What measures and procedures are necessary or desirable to ensure that legislative proposals in any way affecting Maori fisheries take adequate account of Maori interests;

(4) What criteria should be applied in resolving conflicts between Maori interests in respect of fisheries and other public interests.

1.2 On receiving this reference the Commission undertook extensive research (mainly of a historical and legal nature) into the issues which the reference raised. There was also some consultation of a preliminary nature. The intention was to prepare a paper that would be a prelude to and assist in the essential process of consultation and discussion, which in turn would lead to recommendations on what ought to be done.

1.3 Subsequent events, however, have left it in serious doubt whether the Commission still has a part to play. A great deal of the ground has been covered at a local and most detailed level by the hearings of the Waitangi Tribunal.
of the Muriwhenua and Ngai Tahu claims. Various aspects (although by no means all) have been litigated before the Courts. In December 1987 the Government and the New Zealand Maori Council set up a Joint Working Group to report by 30 June 1988 on "how Maori fisheries may be given effect, conservation and management of fisheries in the interim, and a timetable for the transition process". The Joint Working Group could not reach complete agreement and on 22 September 1988 the Government introduced a Maori Fisheries Bill containing a detailed scheme for the recognition of Maori interests in sea fisheries. This Bill is still (February 1989) before a Select Committee. It is unclear what the legislation will finally provide. Negotiations between the Crown and Maori representatives are continuing.

1.4 The answer to one principal issue referred to the Law Commission is thus to be determined by negotiation and in the political arena.

1.5 There have been other significant events. Paragraph 2 of the reference asks what protection Maori fisheries should have in respect of acts or omissions by the Crown, public bodies and other corporations, and individuals. This goes beyond the recognition of Maori interests under the fisheries legislation. A large body of other statutes, and indeed common law, impinge on and may affect fishing grounds. Not only off-shore fishing is in question but also foreshore, river and lake fisheries. Much land below the high water mark has long been vested in harbour boards and other public bodies. It is not covered by the provisions to protect Maori interests in the Treaty of Waitangi (State Enterprises) Act 1988.

1.6 In June 1986 Cabinet directed that all future legislation coming before it at policy approval stage should draw attention to any implications for the recognition of the principles of the Treaty of Waitangi, and that departments should consult with appropriate Maori people on significant matters affecting its application. This has been reinforced by Cabinet's adoption of the proposals of the Legislation Advisory Committee in its report: Legislative Change, Guidelines on Process and Content (August 1987).

1.7 As a solution this depends on the continued will of the Executive for the time being to maintain the directive,

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1 Muriwhenua Report Wai-22, June 1988. The Ngai Tahu claim is proceeding. The formal claims in these cases are set out in Appendix D.

2 Appendix E reproduces the reports of the Crown and the Maori members of the Joint Working Group.
and on the judgment by Government and Parliament of how far particular proposals are consistent with the Treaty's principles, and if they may not be, how far they should prevail nonetheless.

1.8 Paragraph 4 of the reference raised a related issue. What criteria should be applied in resolving conflicts between Maori and other interests in matters pertaining to fisheries? What degree of paramountcy should these Maori interests have? This is ultimately a political question in the wider sense, but desirably there should be some coherent and consistent approach. That has hitherto been lacking. Some recent legislation, notably the Conservation Act 1987, goes a long way towards giving the principles of the Treaty an overriding force. In contrast the Environment Act 1986 lists these principles as one among several purposes of the Act without stipulating any sort of balancing test. The Town and Country Planning Act 1977 does not expressly mention the Treaty of Waitangi or its principles. Some other legislation directly or indirectly affecting fisheries is silent on the question of Maori interests.

1.9 However, in March 1988 the Minister for the Environment announced a programme for resource management law reform embracing a number of planning resource statutes. They comprise the

- Town and Country Planning Act 1977
- Water and Soil Conservation Act 1967
- Soil Conservation and Rivers Control Act 1941
- Mining Act 1971
- Coal Mines Act 1979
- Geothermal Energy Act 1953
- Petroleum Act 1937
- Quarries and Tunnels Act 1982
- Noise Control Act 1982
- Clean Air Act 1972
- Environmental protection and enhancement procedures and the relevant sections in the
- Continental Shelf Act 1964
- Iron and Steel Industry Act 1959
- Atomic Energy Act 1945

together with, where appropriate, issues and resource management laws related to the matters under review.

1.10 The review was to proceed with the following guidelines:

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"the primary goal for government involvement in resource allocation and management is to produce an enhanced quality of life both for individuals and the community as a whole through the allocation and management of natural and physical resources;

resource management legislation should have regard to the following, sometimes conflicting objectives: to distribute rights to resources in a just manner taking into account the rights of existing right holders and the obligations of the Crown. The legislation should also give practical effect to the principles of the Treaty of Waitangi."

In September 1988 a coastal law reform programme, relating principally to the Harbours Act 1950, was merged with the national resources law review. A discussion paper on the review was released in January 1989.

In consequence of what has happened, the scope of the paper is circumscribed and its purpose modest. Essentially it is a historically oriented survey of laws and policies affecting Maori fisheries. The aim of presenting it now is to explain the facts and the law and to provide perspective.
2 ESSENCE OF THE PAPER

2.1 This paper is a commentary upon a series of questions raised by the Commission's reference.

i What is the field of inquiry - what is meant by traditional Maori fisheries?

ii What were the terms of the Treaty of Waitangi in this context - what obligations did the Crown assume?

iii How far did (and does) the law give effect to these obligations?

iv How far have the actions and policies of governments in relation to Maori fisheries been consistent with the obligations the Crown assumed in the Treaty?

v What is the present state of the law affecting Maori fisheries?

vi Would a greater legal recognition of Maori fisheries in terms of the Treaty give Maori people unjustified privileges or be inconsistent with the principle of equality before the law?

2.2 The paper is divided into 3 parts. The first contains introductory material - an analysis of the different geographical situations where fishing rights can come into question and of the various possible legal rights in relation to fishing, and a description of the existing legal regime under the Fisheries Act 1983, particularly in relation to sea fisheries: section 4.

2.3 The second part begins with a very broad overview of the historical and legal background: section 5. It then addresses in sections 6 to 12 the questions: what were "Maori fisheries" at the time of the Treaty of Waitangi, how the Treaty itself dealt with them, and how the law enacted by Parliament or decided by the courts relates to the obligations of the Crown under the Treaty. This requires separate treatment of the legal regime governing sea and coastal fisheries (section 10), and river and lake fisheries (section 11). Moreover the law of fisheries itself is by no means the whole story. A large mass of other legislation - devolutionary (as in the Harbours Acts), resource, regulatory and planning - has or could have an effect on fisheries (section 12). And lying beneath much of the current argument about the adequacy or inadequacy of the
law governing Maori fisheries and fishing claims are fears of "special laws" or "special privileges" for one group, and a belief that this is contrary to the rule of law. This has to be addressed if the issue is to be dispassionately and constructively approached. Section 13 attempts to set this question in perspective.

2.4 The third part contains a fuller account of the historical development of the law in New Zealand, with reference to what has happened in analogous situations overseas, notably in the United States and Canada: section 15. Section 16 examines, also in the context of fisheries, the legal status of Maori custom. And finally section 17 considers the course of government policies, the legislation that they have generated, and Maori responses to them.

2.5 In all this, the Treaty of Waitangi is central: what it meant and was understood to mean at different times, what its implications were in terms of the imported English law, and how legislation and government policies and actions have dealt with it.

2.6 The reference relates to fisheries, but this cannot be isolated from other and more general topics, notably judicial decisions, policies and legislation concerning Maori land. The land cases often throw light on fishing rights by implication and analogy. Few judicial decisions have been directly on fisheries, and hardly any during the crucial nineteenth century period. The way in which the Courts have approached Maori claims, and the Treaty itself, can thus be properly appreciated only by looking in some detail at land cases.

2.7 Conversely, conclusions about the Treaty's application to fisheries have a larger context and significance.

2.8 The settlement of New Zealand and the status of Maori property and customs needs to be set in the wider context of the expansion of Europe after 1500 and the debates that occurred over aboriginal rights. These issues were reflected in arguments over waste lands (and are germane also to fisheries). They have a bearing on an understanding of the Treaty of Waitangi.

2.9 What are the Maori fisheries that the reference has to do with? Any answer in terms of inland or littoral fisheries only would be inadequate given the nature, extent and importance of sea fisheries to the Maori. There is evidence that historically Maori tribes and hapu fished well off shore, and that their fishing had a dimension beyond mere subsistence and ceremony. Some of this evidence
appears in the report of the Waitangi Tribunal on the Muriwhenua claim but section 6 mentions other sources also.

2.10 To determine what obligations were assumed by the Crown requires a careful examination of the Treaty of Waitangi and of the views of those who have expounded it, both Maori and Pakeha. Early understandings are of great importance, and special weight must now be placed on the Court of Appeal's decision in New Zealand Maori Council and Latimer v Attorney General and Others.

2.11 The principles of the Treaty, said the Court, required the Crown to respect, guarantee and actively protect Maori rights. The Maori Council case was itself concerned with land rights, but the Court did not distinguish these rights from others, including fishing rights, specified in the Treaty's English version. The Maori version used a word (rangatiratanga) which imported more than possession and indicated elements of management and control.

2.12 A choice of approaches, however, exists, and is fundamental. What is the proper starting point of a consideration of Maori fishing claims? Hitherto, this has been taken as Crown sovereignty over the sea and the seabed. The alternative is Maori "rangatiratanga" over fishing resources. The gist of the Waitangi Tribunal's report on the Muriwhenua claim is that the true question is what the Crown may reasonably seek from the Maori rather than how much it should concede to them. An acceptance of this would call for a reorientation in the basic assumptions of many Pakeha.

2.13 The key question is the relationship between Article 1 of the Treaty, which recognised the sovereignty of the Crown over New Zealand, and Article 2, which guaranteed the Maori tribes in the English version possession of their fisheries and in the Maori version authority (rangatiratanga) over their taonga, which the Waitangi Tribunal has held include fisheries. This question cannot be answered simply by looking at the Treaty itself, necessary though that is.

2.14 The second essential point is that, as the Court of Appeal has said, the Treaty is to be applied in accordance with its spirit and intent, and in the circumstances of 1989, not of 1840. It is thus "always speaking"; it is an organic instrument. But at the same time the circumstances

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of 1989 are themselves in part the product of the way in which the Treaty has been applied to fisheries in the past.

2.15 Against this background, the paper examines in detail the development of the law by the Courts and Parliament, and the policies of the Executive.

2.16 Until recently national sovereignty stopped at the traditional limit of 3 nautical miles. The Territorial Sea and Fishing Zone Act 1965 created a 9 nautical mile fishing zone beyond this limit. The territorial sea was itself extended for New Zealand to 12 nautical miles by the Territorial Sea and Exclusive Economic Zone Act 1977. The unquestioned doctrine of English law was that the sea was open to all to navigate and fish. Because the right to fish was a general right (subject to various legislative restrictions going back in New Zealand to 1866) private persons had no remedy for actions that indirectly destroyed or impaired fishing. This doctrine conflicted with traditional Maori customs and interests in respect of reefs, shoals and other offshore fishing grounds.

2.17 The situation of foreshore - coastal and harbour - fisheries was less clear even in terms of conventional understandings of the law.

2.18 In New Zealand the concept of the title of indigenous people to their land was accepted as a moral right, was inferentially recognised by legislation in 1841 and had apparently been upheld by the courts in 1847 and 1872 as a legal right even apart from legislation. Later cases, especially Wi Parata v Bishop of Wellington, are usually taken to have rejected it, although not as unequivocally as is sometimes supposed. What these cases did insist was that in the absence of statute no Maori claims to land were cognisable in the courts, and that assertions by the Crown that Maori title had been extinguished were conclusive. The Crown's acquisition of Maori land was explicitly held to be an act of State not reviewable by the courts. If this were not so, said the Judges, all private property rights to land might be endangered.

2.19 Nonetheless there existed from 1862 a series of statutory schemes whereby the Native Land Court investigated customary land titles and converted them into English-style titles, that is titles held from the Crown. Thus as a
general proposition (confiscations after the New Zealand Wars being to some degree an exception) Maori lands were dealt with by a judicial process. From the beginning then they did receive a degree of legal recognition.

2.20 The Crown, however, took a restrictive view of where 'land' for this purpose stopped. It asserted a complete and unqualified ownership of all land below high tide-mark. The matter first seems to have assumed importance in the late 1860s. There was an insistence on the public right to fish anywhere in tidal waters as well as offshore; a Maori had no more right than any other individual to fish there. The Court upheld this in 1914 in the key decision of *Waipapakura v Hempton.*10 And under Parliamentary sanction the Government disposed of large parts of the foreshore and harbours to Harbour Boards and other local bodies. This has generally been regarded as freeing this land from any Maori claims. Even if there were residual Maori rights in respect of the foreshore they were (on this view) destroyed once the customary title to adjoining land was converted into Crown-derived title. Yet because of a provision in successive Harbours Acts from 1878 the Maori Land Court had no power to issue titles in respect of land below high water mark. That land could never become Maori freehold land.

2.21 The state of affairs described in the previous paragraph was inconsistent with Maori perceptions of their customary rights, as frequent complaints and petitions indicate. The Court of Appeal in *Re The Ninety Mile Beach*11 concluded that originally the Native Land Court did have jurisdiction to investigate Maori title over foreshore lands. T A Gresson J remarked that otherwise the Maori would have been deprived of their customary rights by a sideward and the spirit of the Treaty seriously infringed.

2.22 Maori complaints and claims for redress in respect of fisheries and fishing grounds were frequent, forceful and often futile.

2.23 Pressures by European settlers and those who represented them were also evident in relation to lakes and rivers. In 1903, the Coal Mines Amendment Act declared the beds of navigable rivers to belong to the Crown. Soon afterwards, the Executive made strenuous efforts to persuade the Courts that the Crown owned lakebeds as well as the seabed beneath tidal waters. The Courts did not accept (though they have never definitively rejected) this claim.

10 (1914) 33 NZLR 1065.
The result was a series of compromises between the Crown and Maori claimants, sanctioned by legislation.

2.24 The progressive enlargement of the Crown's contentions should be noted. In the first years of British settlement there seems to have been no clear policy as to the ownership of the foreshore. By the 1870s the Crown was vigorously asserting complete proprietorship over all land below high tide mark, but often with the concession that the Maori might have fishing rights. Perhaps in the 1880s, and certainly by the beginning of the twentieth century, these too were inferentially rejected, a rejection that Stout C J upheld in Waipapakura. By 1910 the Crown was claiming that it had absolute ownership also of beds of lakes.

2.25 When sea fisheries were first made the subject of statutory regulation in 1877, Maori rights under the Treaty of Waitangi were preserved.12 This provision was omitted in 1894 and reinstated in 1903 in a vaguer form.13 It is now section 88(2) of the Fisheries Act 1983. The High Court's decision in Te Weehi v Regional Fisheries Officer14 has given it a substantial but as yet uncertain content. It may mean no more than that the regulations and restrictions imposed by fisheries legislation do not in certain circumstances apply to Maori. All fisheries legislation assumes and is built on the basic common law under which, as hitherto interpreted in New Zealand, the foreshore and the sea beyond it "belong to the Crown" without any qualification.

2.26 The present Fisheries Act and its predecessors have specific provisions enabling particular areas to be reserved for Maori use.15 These provisions are narrow, and their exercise was and is purely a matter of Executive discretion. Nor can there be any certainty that such areas, or any other Maori fishing grounds, will continue to yield fish. Other uses, and the effects of pollution, have often made them worthless for that purpose. The Manukau Harbour is a precisely documented instance.16 Legislation apart from the Fisheries Act must be taken into account in any consideration of the present situation of Maori fisheries.

2.27 The scheme of controls over commercial fishing created by the Fisheries Amendment Act 1986 has introduced a wholly new element. This is the Quota Management System, discussed in section 4. It puts limits on the total

12 Fish Protection Act 1877, s 8.
13 By s 14 of the Sea Fisheries Amendment Act 1903. See para 8.7.
15 Fisheries Act 1983, s 89(3)(b).
allowable catch (TAC) for each quota management area of each fish species included in the system and divides that quantity among those entitled to individual transferable quotas (ITQ). Allocations of quotas were made only to holders of existing fishing permits or persons who had held one within the previous 12 months. ITQs may be transferred or may be leased for a specified period or a specified tonnage of fish. Substantial annual "resource rentals" prescribed by the Act are payable in respect of each quota.

2.28 Established both for conservation reasons and for motives of economic efficiency the scheme has created a new form of property right and what is technically called a limited monopoly.

2.29 The legal effect of section 88(2) has consequently become a matter of much greater importance, since on the face of it the statutory scheme is subject to that subsection. The answer is at present uncertain. The issue may be determined by the Courts. Or the matter might be dealt with by negotiation ratified by legislation or by legislative settlement as the Maori Fisheries Bill, introduced on 22 September 1988, envisaged.

2.30 But considered historically and conceptually, what the 1986 legislation signifies is this. For more than a century the Crown consistently declined to recognise any exclusive right of the Maori in their sea fisheries. The ground was that the common right of everyone to fish below high water mark was a matter of basic legal doctrine and public policy, albeit subject to licensing and other regulatory regimes. On the Crown's initiative Parliament has now "fenced the watery common", established exclusive commercial fishing rights and given them to those operators who in the immediately preceding years had caught substantial quantities of fish.

2.31 This paper suggests that the law applicable to Maori fisheries is unsatisfactory. As understood until quite recently it has given little recognition to Maori interests in their sea fisheries. And the very changes and developments that are occurring (through case law and statute) leave the state of the law uncertain. Moreover the mass of other legislation that bears directly or indirectly on fisheries is inconsistent and often fails to give any express weight to Maori interests.

2.32 This result was not a necessary application of the common law. The law did not have to develop in New Zealand in the way it did. The cases after Wi Parata (appearing to deny Maori property rights unless they were expressly conferred by legislation) are out of phase with some earlier decisions, and with at least one current of Privy Council
cases. On the same common law base, the Canadian and especially the United States courts have given quite different answers. Even if the Treaty of Waitangi could not itself create rights directly recognisable by the Courts, many of the New Zealand decisions could have gone the other way, if, for instance, the Courts had been consistently willing to regard the Treaty as a source of public policy. The most recent cases illustrate this clearly.

2.33 These decisions, including Greig J's interim judgment in The Ngai Tahu Maori Trust Board v Attorney-General and Another and other cases, have taken a much more favourable approach to Maori claims than previously. But they have been based on special statutory provisions in the Fisheries Act 1983 and the State Owned Enterprises Act 1986. Legislation itself may not be sufficient, but will doubtless be needed to give effect to solutions reached by a political process and to produce clarity, certainty and perceived fairness.

3.1 The general reference to fisheries covers a variety of places, a variety of possible interests, and a variety of bodies in which these interests may be vested.

3.2 At one extreme are the high seas, over which no national control is claimed by the State beyond 200 nautical miles. There is in New Zealand law, since 1977, the Exclusive Economic Zone (EEZ), which extends from the outer boundary of the territorial sea to a distance of 200 nautical miles from a baseline measured from low-water mark generally, but as a straight line across indentations whose headlands are not more than 24 nautical miles apart. The territorial sea extends for 12 nautical miles from that baseline. (Again this is a modern enlargement of the traditional 3-mile limit of national sovereignty.) Between the territorial sea and the shore are the internal waters, comprising harbours, bays, and the foreshore generally below the mean high tide level. Inland, and subject in part to a different legal regime, are rivers (navigable and non-navigable), lakes and even swamps insofar as they may be a source of fish.

3.3 The Territorial Sea and Exclusive Economic Zone Act 1977 declares the seabed and subsoil between low-water mark and the outer limits of the territorial sea to be and to have always been vested in the Crown, subject to the grant of any estate or interest therein. This last would seem to refer to grants by the Crown to public bodies or private individuals. By implication it appears to exclude any possibility of Maori customary title in respect of these areas, since customary title does not derive from Crown grant. Whether it would now be held to have this effect is not clear.

3.4 Ownership of the foreshore between high and low water-mark is sometimes in the Crown, sometimes vested in harbour boards and other public authorities, and in a few cases in private persons (setting aside any question of continuing Maori fishing rights). The bed of any navigable river (a term that is itself not without uncertainty: see paras 11.8 - 11.10) is vested by statute in the Crown. The beds of non-navigable streams normally belong to the owners of the land on their banks. The basic legal status of lakes is not beyond doubt. In the orthodox view lakebeds, like riverbeds, prima facie belong to the owners of the adjoining land. The ownership of many lakes is, however, governed by special legislation, often the result of settlements between the Crown and the Maori interest concerned.
3.5 The nature of possible interests in relation to these various areas likewise varies. There is sovereignty or dominion, the ultimate authority of the national State expressed in the power to make general laws and to take property for public purposes. The right to control is a subordinate form. It is likely itself to import a certain power to make laws. The powers of local authorities, such as county councils and harbour boards, are of this kind. Overlapping but distinguishable from this is a right to manage. None of these forms of authority are "property" in terms of English law, and they are subordinate to the powers of the sovereign state. They are distinct from ownership, which is itself a parcel of rights - the right to exclude others, the right to use and exploit, and the right to alienate. But the exercise of a right to make laws by the body having sovereignty or a power of control may and often does limit the rights of ownership.

3.6 The "owners" of property may hold it for themselves or for others (the concept of trusteeship). And finally ownership may be absolute (of goods and in practice of freehold land), or it may be limited either in time, as in a life interest, or in extent. So one person might own a stream, but another might have a right to navigate it, or to take water or fish from it. Or, as with a lease, ownership and the right to possess and occupy might be divorced for a short or long period.

3.7 Some things are not the subject of ownership under our legal system. Thus there is no property in the fish in seas, rivers and lakes until they are caught. No-one can own sea water. The right to take or use other natural water (but not its ownership as such) is vested in the Crown with certain exceptions by the Water and Soil Conservation Act 1967 (section 21).

3.8 Whether fishing rights divorced from the ownership of the underlying bed may exist in New Zealand law in respect of rivers and lakes is not completely certain. Note, however, that section 73 of the Fisheries Act 1983 prohibits anyone from selling or leasing the right to fish in any waters, the substance of the section going back to 1902. Whether separate fishing rights can exist in respect of the foreshore between high and low tide is clouded with uncertainty. Almost certainly there can be none for non-Maori. Until Te Weehi's case, the weight of judicial authority was for practical purposes against their existence for Maori also. The interpretation of section 88(2) of the Fisheries Act is one key to the answer. The degree of recognition of aboriginal title by the common law is another.

3.9 But a caution is necessary. This sort of analysis is useful only up to a point. New concepts and classifications may be called for to deal with new circumstances. Moreover, the concepts are themselves a product of Western legal thought and relate to Western systems and institutions. This is an area where the Pakeha unlearned in Maoritanga must tread with the greatest diffidence and circumspection. It seems that these concepts do not wholly correspond with Maori thinking and Maori concepts. To take only 2 examples, one cannot easily if at all subsume the fundamental ideas of mana and wairua under any of the heads mentioned above. And the word "rangatiratanga" used in Article 2 of the Treaty of Waitangi in relation to Maori rights is by no means co-extensive with "ownership".

3.10 Since Maori ways of thought have been a largely closed book to the vast majority of Pakeha, and Pakeha lawyers, the temptation exists to see Maori claims in terms of one or other of these categories. However, the Law Commission has a statutory obligation to take account of te ao Maori (the Maori dimension). And the law has often proved flexible and adaptable enough to cope with unfamiliar institutions and concepts.

3.11 Meanwhile, answers must perhaps be looked for in specific arrangements rather than simply in terms of general legislation built on a structure of English or European jurisprudential concepts.

19 See, for example, Pramatha Nath Mullick v Pradyunna Qumar Mullick (1925) LR 52 Ind App 245, where a Hindu idol was held to have legal personality. The case was discussed by P W Duff in (1929) 3 Camb LJ 42.
4.1 The geographical limits of the fisheries over which New Zealand has some jurisdiction are determined by the Territorial Sea and Exclusive Economic Zone Act 1977. It declares that the seabed and subsoil between low water mark and the outer limits of the territorial sea (12 nautical miles from the baseline) is deemed to be, and always to have been, vested in the Crown. Beyond the territorial sea is the Exclusive Economic Zone, whose outer limits are 200 nautical miles from the baseline of the territorial sea: see para 3.2. The Zone is part of New Zealand's fishery waters, and the Act controls foreign fishing in the Zone.

4.2 There was little pressure on New Zealand's offshore fishery resources until the 1960s, apart from a few localised fisheries such as oysters. Legislation in 1945 had licensed fishing vessels and required them to land their catches only at their port of registration. Following the report of a Parliamentary Select Committee, restrictive licensing was abolished in 1964 and a Fishing Industry Board set up to promote the industry. The emphasis was on the expansion of production and economic efficiency.

4.3 During the 1960s and 1970s the New Zealand fishing industry grew dramatically. The catch of many inshore species rose towards and past the level that their numbers would sustain. Objectives switched from maximum yields to maximum sustainable yields. The first serious attempt to deal with this was the "controlled fisheries" scheme enacted in the Fisheries Amendment Act 1977. It was to be applied to particular species by regulation. The first to be included were scallops and crayfish (rock lobsters); finfish in the Hauraki Gulf were added in 1981. As no total catch could be prescribed, the scheme was not very effective. It is overlapped by later schemes, and we were told that the intention is to revoke its applications as these schemes take effect.

4.4 In 1982 a policy designed to control total deepwater catches, bring greater efficiency to deepwater fishing and enhance New Zealand participation in that fishing was established under powers in the Fisheries Act 1908. Many of its characteristics looked forward to the later Quota Management System. A limitation of the total catch was of its essence. Provision for royalties was later made by the Fish Royalties Act 1985.

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21 Fisheries Amendment Act 1963; Fishing Industry Board Act 1963.
4.5 The Fisheries Act 1983, an Act "to consolidate and reform the law relating to the management and conservation of fisheries and fishery resources within New Zealand and New Zealand fisheries waters", established regimes for all waters, including inland waters. The scheme of the Act in relation to commercial sea fisheries is to divide fisheries waters into 6 Fisheries Management Areas, to require a Management Plan for each Area incorporating matters that the Act prescribes and having the force of regulations, and to control fishing through the licensing of commercial operators and their vessels. The purpose of management plans was to conserve, enhance, protect, allocate, and manage the fishery resources within New Zealand fisheries waters. Under this Act limits could be imposed on total catches.

4.6 The expectation that fishery management plans could be brought quickly into force proved too optimistic. By February 1989 no Management Plan had yet been adopted and only two had reached the stage of release for public comment.

4.7 Another aspect of the 1983 Act demands mention. Only licensed "commercial fishermen" could take fish for sale. This term was defined to comprise those who could satisfy the Director-General of Agriculture that they relied wholly or substantially for their income on fishing activities or (for companies) that they had made or intended to make an "appreciable investment" in the industry. The objects were to create a business-like fishing industry and to separate recreational and commercial fishing. The Director-General adopted the criteria of gross earnings of $10,000 a year or 80 per cent of total income.

4.8 The result was to approximately halve the number of commercial operators, something like 1500 to 1800 going out of business. In Northland it excluded something like 300 out of 600 fishermen. It reduced the catch by the order of only 5 per cent. A report prepared by Dr George Habib for the Maori Economic Development Commission and the Department of Maori Affairs dated December 1985, suggested that a large number of those excluded from both vessel and shore fishing were Maori. The legislation affected numerous operators living in small coastal communities, where in some cases, such as Te Kao, all catching for sale had to cease.

4.9 The Quota Management System (QMS) introduced by the Fisheries Amendment Act 1986 supplements and completes the 1983 regime. It has effected a fundamental and far-reaching

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22 § 4.
23 Korekore Piri Ki Tangaroa, Maori Involvement in the Fishing Industry.
change, the essence of which is a shift from the previous effort-oriented controls (closed seasons, size of nets etc) to what was seen as a much more efficient and effective extraction-oriented control. Its basic principle is to place a limit on the total commercial catch for each species to which it is applied by setting a total allowable catch (TAC). Many commercially significant species - 27 finfish species and paua - have been brought under it. However, as at February 1989 there were still a number of important exceptions, including rock lobster (crayfish), all types of tuna, scallops and oysters. A proportion of the total for each species is allocated to each operator as an Individual Transferable Quota (ITQ). Only those who held permits when the 1986 Act came into force or at some time during the preceding 12 months were entitled to receive a quota.

4.10 TACs are set for each species for each Quota Management Area, the boundaries of which are based on, but are not identical to, those of Fishery Management Areas. Under section 28C they are to be determined "after making allowance for Maori, traditional, recreational and other non-commercial fishing". (The use of the comma between "Maori" and "traditional" is confusing. It appears to distinguish Maori and traditional fisheries. But the clear implication is that the Maori fishing that must be allowed for is non-commercial.) In practice, we were informed, no specific allowance was made except for snapper, up to a third of which was allocated for recreational fishing. It was assumed that the Maori and recreational catch of other species was taken care of by a conservative setting of each TAC.

4.11 The Act enables TACs to be increased or reduced. Compensation is payable to quota holders whose ITQs are correspondingly reduced.

4.12 The original ITQ holders did not pay for their right. Indeed, an integral aspect of the scheme was financial assistance for those initially wishing to leave the industry. The Crown bought quotas back from those who saw their ITQ as being uneconomic or who for some other reason did not wish to accept it. About $55 million has been paid for this purpose. Fishing operators were also permitted to tender for the surrender of their quota. The policy has been successful in that almost all the excess of aggregated individual quotas over the TAC has been eliminated, and little pro rata reduction has been necessary.

4.13 ITQs are transferable. A holder may transfer it permanently or may lease the rights under it for a specified term or a specified tonnage of fish. A good deal of trading in ITQs has occurred, to the extent that a Fish Quota Exchange has come into existence. Anti-aggregation
provisions are designed to prevent any operator from having more than 20 per cent of the TAC by area for inshore species, or 35 per cent of the TAC for deepsea species. These provisions apply, however, only to legal ownership and could thus be circumvented.

4.14 Although original holders received their ITQs without payment, the 1986 Act provides for substantial annual resource rentals, varying with the species. They are prescribed on a per tonne basis in Schedule 1B of the Act, but may be varied by Order in Council: section 107G. The Minister recommending a variation must have regard to the value of ITQs for the species and the net returns and likely net returns to commercial fishermen.

4.15 The total resource rentals billed by the Ministry of Agriculture and Fisheries for the 1987/88 fishing year (1 October 1987 - 30 September 1988) were approximately $22.5 million, up from approximately $21.7 million the previous year.

4.16 The rentals set for the fishing year beginning in October 1988 vary from $6 per tonne (red cod taken in South-East Coast area) to $252 (orange roughy and paua) where the holder has the use of a foreign owned New Zealand fishing boat, and $3 and $126 respectively where the holder does not. Other typical rentals per tonne are (in round figures):

<table>
<thead>
<tr>
<th>Species</th>
<th>Rental per tonne</th>
</tr>
</thead>
<tbody>
<tr>
<td>snapper</td>
<td>$98/$49</td>
</tr>
<tr>
<td>hake</td>
<td>$65/$32</td>
</tr>
<tr>
<td>blue cod</td>
<td>$31/$16</td>
</tr>
<tr>
<td>hapuku (groper and bass)</td>
<td>$43/$22</td>
</tr>
<tr>
<td>tarakihi</td>
<td>$24/$12</td>
</tr>
</tbody>
</table>

4.17 In fact these rentals have little relationship to the prices at which quotas have been traded, and we were told that the industry resisted proposals that they should. In any event such prices have varied enormously between, as well as within, different fishing areas. Thus for the period June to November 1987 the average price per tonne of snapper quota varied from $14,763 in area 1 to $3337 in area 7. In that area the lowest price was a purely nominal $28 per tonne of snapper. Of the transactions in orange roughy quotas, $6600 per tonne was paid in one area, $2000 in another. It should be remembered that transactions may be sales of quotas or leases for a specified period or tonnage. No useful conclusions can be drawn from these sorts of figures without further analysis.
4.18 The New Zealand fishing industry has in the last twenty years become large and economically important, bringing substantial revenue to the Government as well as being a significant export earner. The value of the domestically consumed catch is much more modest. Concentration of ownership has resulted in about 18 companies catching over 75 per cent of the total. The share of foreign vessels is much smaller proportionately than formerly. Thus in 1988 the total allocation to Korea and Japan, the two main foreign operators in New Zealand waters, was only 17,000 tonnes for all finfish and squid.

4.19 Detailed information about Maori participation in this industry either before or after the 1983 legislation is not readily available. Dr Habib's study (see para 4.8) yields the following exemplary table for 1985.

<table>
<thead>
<tr>
<th>Total vessel permits</th>
<th>Maori holders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northland</td>
<td>318</td>
</tr>
<tr>
<td>Auckland/ Hamilton</td>
<td>78</td>
</tr>
</tbody>
</table>

4.20 In economic terms the ITQ scheme has created a new limited monopoly akin to those arising from other restrictive licensing schemes, such as liquor licences and taxi licences. In legal terms it has converted a public right to fish commercially (subject, of course, to regulation) into a series of private rights. It has created a new property right in the nature of a profit a prendre - broadly an ongoing right to take something tangible that is present on another person's land - and allocated that right to those who held, or had recently held, commercial fishing licences at the time of its commencement. The small, essentially part-time, operators whom the 1983 Act excluded from commercial fishing did not receive any share. Nor did they receive compensation. On the other hand the Crown bought out those 1986 participants in the industry who for one reason or other did not wish to take up their ITQ.
PART II
5.1 Throughout the history of humankind the emigration and re-settlement of peoples has been a recurrent theme. One such movement was the great folk-migration from Europe that began as a trickle at the end of the fifteenth century. From about the middle of the eighteenth century it gathered volume, and during the nineteenth and early twentieth century became a flood which filled the temperate lands discovered by European explorers and largely displaced their existing inhabitants.

5.2 The causes of this migration were diverse and operated at different levels. To discuss them is far beyond the scope of this survey, but one may note the conjunction of a dramatic growth in population after about 1750, a general condition of poverty but an optimism that it might be ameliorated, a spirit of confidence and adventure that accompanied the industrial revolution, and greatly improved means of mass transport. At the same time technological superiority, especially in arms, enabled white settlers to impose themselves on indigenous peoples to a large degree.

5.3 In these circumstances the large scale settlement by Europeans of New Zealand, a temperate land with a favourable climate and soil, had almost an air of historical inevitability. And the power and mana of Great Britain on the seas after the Napoleonic wars meant that this settlement was likely to be essentially British. The European colonisation of New Zealand is as much a fact of history as the Anglo-Saxon and Danish settlements of England, the Bantu migration into southern Africa, and the initial discovery and settlement of Polynesia itself. It is a fact that has to be accepted at the threshold of any honest inquiry. To disparage it is beside the point.

5.4 The formation and expansion of Polynesian culture brought their colonists to uninhabited islands, and about 1000 years ago to an Aotearoa that was likewise empty of people. European voyagers and colonists were in that respect less fortunate. The lands they saw themselves as discovering were already occupied by societies of various natures - nomadic, agricultural and urban. Except in a few unimportant cases they did not arrive as tangata whenua.

5.5 This expansion of Europe produced moral tensions that are not recorded as being associated with earlier folk-migrations. These tensions were not simply a product of the nineteenth century evangelical and humanitarian movement in England. The issues were first argued in sixteenth century Spain, soon after colonisation of the
newly discovered Americas began. They were predicated in medieval and renaissance natural law thinking, and by Christian teaching. The question was one of justice. In what circumstances and on what conditions were Christian powers justified in assuming rule over the Indians and (a separate question) in acquiring their land and other property? The answer that was given to the second question in official Spain, in the writings of most of the founders of modern international law such as Grotius (1583-1645), and in the usual practice of Britain and at least some other colonial powers, was that Indian property rights were to be recognised by the law and that their land and other possessssions could not be appropriated without sufficient cause. The desires and convenience of the colonists were not a sufficient cause. Already we have the concept of aboriginal title.

Moreover, treaties and agreements made with chiefs and other indigenous rulers were as binding as those made with other European powers. In both cases the moral and legal principle of pacta sunt servanda (promises must be kept) was accepted. In neither case did the practice always live up to the theory.

However, as the desire of European settlers and would-be settlers for land grew, a major qualification surfaced. It was founded on a natural law doctrine that the right to property is not absolute (a starving person who takes food is not morally guilty of theft) and that the ownership of property beyond reasonable needs may properly be limited. It was therefore proper, so the argument ran, that the rights of a few native people to range over a large area should yield to others who could use it more effectively so as to benefit many rather than a few. The practical distinction was commonly between nomads and pastoralists, who were readily assumed to be more primitive, and agriculturalists. The rights of indigenous people were thus confined to land they actually cultivated or which was actually necessary for their support. This notion goes back at least to Locke (1632-1704), who held that land was capable of ownership only when "the sweat of labour had been mixed with it", in his own phrase. One of its most influential exponents was the Swiss jurist Vattel (1714-1767), whose statements were often quoted in relation to New Zealand affairs.

As well as being arguable in terms of natural rights, such a philosophy fitted in well with utilitarian concepts ("the greatest happiness of the greatest number"). Naturally it was congenial to settlers and the promoters of settlement. It gave a moral sanction to those who wished to occupy sparsely populated countries. The degree to which this philosophy was applied varied. In
Australia, and in parts of Canada, the aborigines were regarded as having no rights against the British settlers. On the other hand, normal policy and practice in the United States dictated that all tribal lands should be purchased and certain rights preserved. Fishing and hunting rights were among them.

5.9 One early and far-reaching consequence of the Treaty of Waitangi for New Zealand was to settle the issue as to the extent of land whose Maori proprietorship was recognised. Its supporters and opponents soon realised that as long as it stood even its English version committed the Crown to the widest recognition of Maori land rights over the whole of New Zealand. All or almost all land in New Zealand was claimed by some Maori group. As the British Resident, James Busby, perceived as early as 1835, "as far as has been ascertained every acre of land in this country is appropriated among the tribes". There was no true waste land in New Zealand. All land had to be obtained by willing purchase.

5.10 Why then was the Treaty expressed in these wide terms? Partly because of a sense of justice that had long antecedents in British colonial policy but also owed a good deal to the evangelical and humanitarian movement. Partly because of the reality of Maori power in 1840. Britain sought to gain Maori consent as the basis for acquiring sovereignty over New Zealand. There is no reason to think that the British government would have contemplated for a moment a war of conquest in 1840. The only terms on which the Maori would possibly give their consent included an assurance of protection for all their land and property.

5.11 But what was accepted for land was not applied to fishing grounds below the high tide mark, nor in the long run to fishing rights that might be independent of ownership of the underlying soil. These fell foul of the common law rules that land below high tide mark was the property of the Crown, unless it had been granted to others, and that there was a public and general right to fish in both tidal and offshore waters. These rules were taken by courts and governments to prevail over any Treaty promises or principle of aboriginal title. To many Pakeha New Zealanders this did and does seem part of the natural order of things. However, to many Maori it was novel and alien. It lies at the heart of many Maori grievances over fishing rights.

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24 See eg report of 1844 House of Commons Committee - paras 9.5 - 9.9 below.
5.12 British sovereignty over New Zealand was followed (as the British government expected) by substantial immigration from Europe, almost wholly from the British Isles directly or through Australia. After 1858 European settlers and their children outnumbered an apparently declining Maori population. The disparity was made almost overwhelming by the influx following the South Island gold rushes of the 1860s and the Vogel immigration policy of the 1870s. The 1881 census recorded a population of 46,000 Maori and 490,000 non-Maori. Thus a century ago Maori already comprised less than a tenth of the population of New Zealand. Indeed like other indigenous people affected by European settlement, the Maori seemed for a time to be withering away.

5.13 Land acquisition followed this tide. By 1891 all but about 11 million acres (4.5 million hectares, one sixth of the total land of New Zealand) had gone out of Maori ownership. And this process continued until at least 1921. The countryside in much of New Zealand was colonial British in appearance and character.

5.14 With British settlers inevitably came English law and English institutions. In the circumstances of the time it was natural also that these should be applied to Pakeha and Maori alike. These systems reflected their British origins and the values and assumptions that lay behind them. The legal and institutional alterations that were made were in terms of arguments and principles familiar in Britain and Western Europe. Thus the social democracy that New Zealand aspired to, and achieved earlier and more fully than did Britain, was a Western concept.

5.15 For the majority of New Zealanders these things belonged and continue to belong. And they belong in geographical place as well as through inheritance. The issues and problems created by the presence in New Zealand of two principal cultural streams cannot usefully be approached by denigrating the legitimacy or value of one of them. To deny the Pakeha roots in New Zealand is itself an unwillingness to face reality.

5.16 The advent of responsible government - for most purposes in 1856 but more tardily for Maori affairs - created a dilemma and a conflict that even in 1989 have not been resolved. The Treaty of Waitangi was made between the Maori and the Queen of Great Britain. As long as the British Government and Governors acknowledged some responsibility as the Crown's agents for the welfare of the Maori, the Crown could attempt to hold the ring between settlers and Maori. The system produced serious tensions but it did provide an independent authority to which the Maori could look for protection of their interests.
Crown

Maori                      Settlers

5.17 In a nineteenth century colony of substantial British settlement, however, early self-government was inevitable. That necessarily meant that the Crown was identified with New Zealand Ministers answerable to a New Zealand Parliament whose lower House was elected almost wholly by settlers. The basic rule of democratic, and especially British-derived, systems is that the numerical majority determines laws and policies. This was, and is, exacerbated by the absence from mainstream New Zealand thinking of any doctrine of fundamental minority rights.

5.18 The Government was thus, constitutionally and in practice, the agent of the (settler) majority. Wherever the interests or wishes of settler and Maori conflicted, the only safeguard for the Maori (apart from resort to arms) was the Government's sense of fairness and restraint pursued even at the expense of its electors' self-interest. New Zealand governments were therefore put into the position of being judges in their own cause. It would hardly be surprising if justice was not always done.
6.1 The explicitly stated purpose of the reference to the Law Commission is to ensure that the law gives such recognition to the interests of the Maori in their traditional fisheries as is proper. So there is need to consider what these "traditional fisheries" may be, their economic and cultural nature and significance, and their geographical extent.

6.2 In the past, Maori interests in fisheries have been seen as essentially personal and social, pertaining to subsistence and to hospitality. This has been the assumption of governmental and administrative policies and regulatory measures. Special reserves and exemptions from general regimes have been directed at allowing use for personal consumption or at hakari, hui and tangi. These uses are important. But the implication that there was no wider or more general Maori interest in fishing is inconsistent with a great deal of evidence, both from early history and more recently.

6.3 It may be doubted whether "traditional fisheries" can mean other than Maori fisheries as they were. Maori claims to fisheries and to land seem always to be based on historic and in that sense traditional rights. On that assumption, there are several principal issues -

i  The date before which Maori fisheries should be regarded as "traditional".

ii Whether sea fisheries were regarded as the exclusive property of a group.

iii The extent of offshore fishing.

iv Whether Maori fisheries were purely for the subsistence of particular whanau or hapu or had a commercial element.

6.4 The range of primary and secondary material on each of these issues is very large. This paper mentions only a fragment of what is available.

The Operative Date

6.5 All dates are to some degree arbitrary because they ignore the process of change and development that characterises Maori (and other) societies and economies. But for practical purposes some dividing line is needed, and precedent, convenience and fitness suggest the choice of 6 February 1840, when the Treaty of Waitangi was first
signed. Customs, practices and activities that do or may reasonably be inferred to antedate 1840 are thus traditional in this context.

6.6 That does not seem to imply that to enjoy the Treaty's protection the technologies and methods of Maori fishing are to be frozen in their 1840 form. Freedom to take advantage of the dramatic changes that have occurred in technology seems as valid in the context of Maori fisheries as for Pakeha fisheries. (On the testimony of European explorers and voyagers from Cook and du Fresne, Maori fishing equipment and methods in the early nineteenth century were in many respects superior to those of Europe.) In Canada the Supreme Court has held that a 1752 treaty that preserved "free liberty of hunting and fishing as usual" did not confine the right to hunt to methods usual in the eighteenth century. And no one ever seems to have supposed that the Treaty guarantee of Maori land covered only its use by the methods then in vogue, or to produce only those crops then cultivated.

6.7 Numerous writings testify to the special place of fisheries in Maori economy and culture in pre-European times and throughout the nineteenth century and even later. So too for the pre-contact period does archeological evidence. While fishing may have been less important economically in modern times, its significance to Maoritanga at a cultural level continues. And as a potential economic base and resource (which they undoubtedly were in 1840) the value of fisheries to Maori people may be very great.

Fisheries as Exclusive Property

6.8 The Maori did not see fisheries as something general and available to all, any more than they saw land in this way. Particular fishing grounds, wherever situated, were exclusive to a group (normally a hapu). Others could, and sometimes did, use them only by permission. Thus, some inland hapu had by custom a right to visit particular areas of the foreshore at particular times to fish there. The following may be cited among the many references covering various parts of New Zealand:

i J L Nicholas, Narrative of Voyage to New Zealand, vol 1. Entry for 29 December 1814.

"These people [of the Bay of Islands] are very industrious in attending to their fisheries, which
are here numerous and well supplied; the coves in particular have a great abundance, and the right of fishing in certain places is recognized among them, and the limits marked out by stakes driven into the water. We observed several rows of these stakes belonging to the different tribes, each having respectively their prescribed boundaries, beyond which they durst not venture to trespass, without incurring the resentment of all the others, who would instantly punish them for any violation of the general compact. Their nets are much larger than any that are made use of in Europe: they make them of the flax in its undressed state, and one of them very often gives employment to a whole village. The coves and harbours abound in fish, which they are very careful in laying up for their winter store, by cutting it open from the head to the tail, taking out the back-bone, and exposing it in the sun to dry."

Evidence of James Mackay Jnr, Civil Commissioner, Waihou, to the Select Committee on The Thames Sea Beach Bill 1869.28

"The Natives occasionally exercise certain privileges or rights over tidal lands. They are not considered as the common property of all Natives in the Colony; but certain hapus or tribes have the right to fish over one mud flat and other Natives over another. Sometimes even this goes so far as to give certain rights out at sea. For instance, at Katikati Harbour, one tribe of Natives have a right to fish within the line of tide-rip; another tribe of Natives have the right to fish outside the tide-rip. The lands contained in the schedule of the Bill are probably the most famous patiki (flat fish) ground in New Zealand, and have been the subject of fighting between various hapus of the Thames Natives."

In the Kauwaeranga decision of the Native Land Court (1870), also relating to the Thames foreshore, Chief Judge Fenton said:29

"That the use to which the Maoris appropriated this land was to them to the highest value no one acquainted with their customs and manner of living can doubt. It is very apparent that a place which

28 (1869) AJHR F-7 p 7.
afforded at all times, and with little labour and preparation, a large and constant supply of almost the only animal food which they could obtain, was of the greatest possible value to them; indeed of very much greater value and importance to their existence than any equal portion of land on terra firma."

iv Sir Peter Buck (Te Rangi Hiroa) 1920. Maori Food-supplies of Lake Rotorua. 30

"The old-time Maori, a careful and observant student of nature and all matters connected with food-supplies, soon ascertained the parts of the lake where the various foods were most plentiful and most easily procured. These spots became the fishing-grounds, carefully marked and jealously guarded by the various subtribes and families. They were given names, and the most famous were alluded to in song and story. ..."

"... the tumu in the lake were used like surveyors' pegs in modern times: they marked off the parts of the lake that belonged to the various families and subtribes. Undoubtedly more of the lake was pegged off than the part in the immediate neighbourhood of the shore, which proves how valuable it was considered as a source of food-supply. It was far more valuable to the old-time Maori than any equal area of land."

v Elsdon Best. The Maori As He Was (1924). 31

"Each clan had its own fishing grounds, and any trespass thereon led to trouble. They were assigned special names, and when folk went out afishing they located the taonga ika or fishing ground, by lining objects on land, hill peaks, promontories trees etc. Two of such lines were utilised, the intersection of which marked the location of the ground."

vi R McDonald (1929), Te Hekenga, an account of old Horowhenua. 32

"No one writing of the food supply of the Maori can afford to overlook the important part played

31 Reprint 1974, p 270.
by the tuna, or eel, in his dietary. The existence of a swamp or lake which provided a constant source of supply of what to him was one of his chief delicacies, constituted in a large measure his standard of the desirability of a locality. It was without doubt this fact which in a large measure determined Te Whatanui's selection of ... his place of abode. In fixing the boundaries of the Muaupoko territory ... he was careful to exclude the whole of the Hokio stream from their jurisdiction, thus assuring to himself the absolute control of the eels of the lake."

6.9 General reference may also be made to the conclusions of Dr P Hohepa in a paper presented at a seminar for Maori leaders in 1976 and to the submissions of Isla Nottingham of the University of Waikato and Dr George Habib, fisheries consultant to the Waitangi Tribunal, in March and April 1987 in relation to the Muriwhenua claim.

Offshore Fishing

6.10 Again there is ample material showing that Maori fishing was not limited to harbours, tidal waters and other inshore grounds, and extended well out to sea. For example R T Kohere33 writes that his tupuna Mokena Kohere of Ngati Porou, who was born about 1812, claimed hapuku grounds at Hapurapoi as well as crayfish grounds off Whakori Bluff as belonging to his hapu. Mention is also made of the hapuku grounds nearer to his area and also used by his tribe. The ground favoured by Mokena was over 8 miles north of East Cape.

6.11 In his booklet, When All the Moa Ovens Grew Cold, Atholl Anderson states:34

"Fishing was another important subsistence activity, especially about Otago Peninsula. It was at one time thought that fishing during the early Maori era was everywhere of minor significance compared with moa hunting and sealing but two recently excavated sites, at Purakanui and Long Beach, have disclosed specialised camps occupied AD/c. 1300-1500. Furthermore, recent radiocarbon dates for some of the large Catlins sites now show that fishing was beginning to replace moa hunting and sealing as early as AD 1350.

33 The Story of a Maori Chief (1949) 30, 45.
The main species caught by the early Maori were barracouta, red cod, ling, blue cod and the spotty. Barracouta was by far the most important of these."

6.12 Colenso, describing Maori fishing at about 1840, commented that -

"The seas around their coasts swarmed with excellent fish and crayfish .... In seeking all of these they knew the proper seasons when, as well as the best manner how, to take them ... Sometimes they would go in large canoes to the deep sea fishing, to some well known shoal or rock, 5 to 10 miles from the shore, and return with a quantity of large cod, snapper and other prime fish."35

6.13 The Rev J Buller, in Forty Years in New Zealand (1878), said -36

"Their fishing expeditions were great occasions, and attended with religious ceremonies. They used not only hooks, but nets and seines, made of the fibres of the flax leaf. In olden time their hooks were made of bone - often of human bone. They would go out into the deep sea, with their large canoes, for ten or more miles from the shore. Cod, snapper, and other large fish, in great quantities, rewarded their toil. In their nets, they take numbers of mullet, dog-fish, mackerel, and other kinds that are found in shoals. "

6.14 Coming to the present, oral evidence given to the Waitangi Tribunal at the hearing of the Muriwhenua claim on behalf of Ngati Kahu and other tribes identified many fishing grounds and the landmarks by which they are located. In its report of June 1988 on the Muriwhenua claim, the Tribunal found (inter alia) that:

- An intensive all year fishing use was made of the seas to about three miles off-shore.

- Throughout the balance of the continental shelf, to about 12 miles from the shore, fishing was intensive and regular but mainly seasonal.

35 "On the Maori Races of New Zealand", Transactions of the New Zealand Institute, Vol 1, p 9.
36 P 231.
Expeditions coincided with the off-shore migrations of such species as hapuku, bass and snapper. Also fished were species more typical of off-shore areas such as tuna, pelagic sharks, tarakihi, piper, mackerel and squid.

- Where the continental shelf enlarges, or where underwater mountains rise closer to the surface, fishing occurred at distances up to 25 miles from the shore, as is evidenced by certain more isolated fishing grounds.

- There is no evidence of expeditions to catch such deep water fish as orange roughy, hoki and orego, though Maori names show that some deep water species were known.37

6.15 It does not follow that offshore fishing occurred extensively everywhere in Aotearoa. Where offshore reefs and shoals were few, or where seas were unusually wild, or littoral sources of valued fish species ample, the Maori possibly did not venture far from land. More detailed evidence is needed. But certainly fishing well out to sea was customary in many places.

The Economic Function of Fisheries

6.16 Finally there is the question of the economic nature of the use made of fish resources. The Maori economy in pre- and early-European times seems not to have been fully examined, but there is some evidence that the use made of fish resources went beyond mere personal and family consumption, and the provision of food at hui, and included a species of trading in the form of gift-exchange. In Economics of the New Zealand Maori38 Raymond Firth discussed the purpose, scope and mechanics of gift-exchange, which undoubtedly served the function of transferring a surplus of both natural and crafted products from their place of origin to other parts of the country.

So basic and varied a resource as fish was naturally an important subject of gift-exchange, especially between coastal and inland groups.

"Foodstuffs were the chief commodity which changed hands. Thus the people on the sea coast exchanged fish with the inland people, who responded with preserved birds, rats and various kinds of forest products. Cakes made from the meal of the hinau berry, the feathers and skins of birds for

ornament, and kokowai, red ochre, also went down to the coast, while shellfish, shark oil, karengo, paua shells, and the berries of the karaka were utilised as subsidiary articles of export by the sea-coast tribes." (p 403)

6.17 Firth mentioned various sources for this conclusion, and there are others that he did not quote.

6.18 The case of Hone Te Anga v Kawa Drainage Board related to the effect of draining the swamp on eel supplies. Cooper J mentioned in his judgment that "large numbers of eels were caught by the Maoris from time immemorial by means of eel pas and weirs". He observed:

"Sometimes the catches were exceptionally heavy and the surplus eels were sent as presents to other tribes, sometimes to Natives residing at Rotorua, sometimes to those at the Thames, and presents in return of other kinds of fish were received from these Natives." (p 1145)

6.19 A practice of barter among different coastal tribes is inferred by James W Stack in an article in 1877. Stack describes the activities of Moko, a "robber chieftain" in about the middle of the sixteenth century. He set up a stronghold at Waipara:

"... the choice of the spot being determined by the existence of a cave in close proximity to the highway, along which a regular trade was carried on up and down the coast; the preserved mutton-birds, dried fish, and kauru from the south being exchanged for preserved forest-birds, mats, etc., from the north." (p 62)

6.20 Edward Shortland in Traditions and Superstitions of the New Zealanders (1856) noted:

"The inhabitants of the villages on the upper parts of the river Wanganui are celebrated parrot catchers ... Every evening, the birds taken during the day are roasted over fires, and then potted in calabashes in their grease ... Thus preserved, parrots and other birds are considered a delicacy, and are sent as presents to parts of the country, where they are scarce: and in due time a return present of dried fish, or something

39 (1914) 33 NZLR 1139.
40 Transactions of the NZ Institute, Vol 10, p 57.
else not to be obtained easily in an inland country, is received.

This was the sort of barter formerly most in vogue in New Zealand."

6.21 In his essay On the Maori Races of New Zealand
William Colenso comments:42

"Buying and selling for a price, as practised by us, was unknown to them ... They had, however, a kind of barter or exchange; or, more properly, a giving to be afterwards repaid by a gift. Dried sea-fish, or dried edible sea-weed, or shark oil, or karaka berries, would be given by natives living on the sea-coast to friendly tribes dwelling inland; who would afterwards repay with potted birds, or eels, or hinau cakes, or mats ..."

6.22 The report of the Royal Commission on Wairarapa Lake stated that:43

"Eels were a favourite food with the Maoris and a good eel-fishery ... is of as much value to them as the banks of Newfoundland are to those who deal in codfish. ... Eels in olden times not only formed a large article of diet for the Natives but they used to dry them in quantities and send them as presents to neighbouring hapus, receiving in return other kinds of food..."

6.23 Traditional fisheries therefore provided not only food for the owners of the fishing grounds, but access to other things that they lacked. Moreover many sources show that a trading economy readily developed alongside the primarily subsistence pattern of life after European contact. A large trading dimension of Maori fishing continued for a number of years after 1840: see the references at para 17.29.

6.24 There is little profit in entering into semantic arguments about the connotations of "commercial": whether or not for instance commerce includes barter, or the notion of reciprocal gift that was integral to Maoritanga as to many societies. The point is precisely that these matters are not susceptible of answer in purely Western terms. What is reasonably certain is that before and after the eighteenth century European contacts Maori communities

43 (1891) AJHR 6-4 p 5.
often did not consume all the goods they produced but exchanged them for other goods, and that this process of exchange included fish.

6.25 The unreality of trying to separate subsistence, hospitality and commercial fishing in the comparable society of British Columbia is well expressed in the following passage from the Final Report of the Commission on Pacific Fisheries Policy:

"Today many Indians still depend heavily on fish for food ... Some continue to fish with traditional equipment, the technical and economic efficiency of which often compares favourably with that of the modern industrial fishery. Traditional methods of processing and preserving fish ... are also practised and ... its use in feasts and ceremonies has been increasing. The traditional Indian fishery is thus a blend of a search for food, production for trade, a social activity and a cultural expression. The distinction customarily drawn by non-Indians between commercial and recreational fishing is inappropriate in this context. Indian fishing has elements of both, and more."

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"Those who study the Treaty will find whatever they seek. Those who look for the difficulties and obstacles which surround the Treaty will find difficulties and obstacles. But those who approach it in a positive frame of mind and prepared to regard it as an obligation of honour will find the Treaty is well capable of implementation."

7.1 The expressed purpose of the reference is to ensure the proper recognition of Maori fisheries by the law in the light of the obligations that the Crown assumed in the Treaty of Waitangi.

7.2 It is therefore convenient at this point to set out here (as well as in Appendices A and B) the English and Maori texts of the preamble and the three articles of the Treaty as authoritatively reproduced in the First Schedule of the Treaty of Waitangi Act 1975, as amended in 1985. Also appended (Appendix C) is a literal English translation of the Maori text by Professor H Kawharu.

English Version

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

45 Sir Henare Ngata, quoted by Blank A and others in He Korero mo Waitangi (1985) p 144.

native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the First

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

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.

Maori Version

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

Na ko te Kuini e hihia 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 aiane, amua atu ki te Kuini e mea atu ana ia 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, kihai i uru ki taa 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 Hapu, ki nga tangata katoa o Nu Tirani, te tino rangatiratanga o o ratou weneue 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 unu 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 wakaetanga 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 ke ana mea ki nga tangata o Ingarani.

7.3 It is not necessary to consider whether at international law or constitutional law the Treaty is the source of British sovereignty over New Zealand. This is a complex and much debated issue. Even those who have
maintained that New Zealand was acquired by simple annexation disagree on what the operative date was. The Commission’s starting point must be the Treaty itself; the reference assumes its constitutional status, and the continuing significance of the obligations under it.

The Heart of the Matter

7.4 Te Tiriti o Waitangi, the Treaty of Waitangi, is a covenant between the chiefs and tribes of Aotearoa and the Crown of Great Britain and Ireland, whose successor is the Government of New Zealand. While the reference to the Law Commission requires a careful examination of its texts and their history, a holistic view of the Treaty appears essential to its proper understanding and application. On that approach, none of its articles are subordinate to others. Neither the English nor the Maori text needs to be secondary. This is not to challenge the statement of the Waitangi Tribunal in its Orakei Report.47

"We believe that when there is a difference between the two versions considerable weight should be given to the Maori text since this is the version assented to by virtually all the Maori signatories. Moreover this is consistent with the contra proferentem rule that, in the event of ambiguity, a provision should be construed against the party which drafted or proposed that provision."

7.5 Fundamental too is the Treaty's character as a living document. The past cannot neatly be divided from the present and the future.

7.6 What is necessary, and not simply from the aspect of fishing rights, is this -

- to understand the promises and undertakings contained in the Treaty
- to determine the relationship of Articles 1, 2 and 3
- to reconcile the promises of the Treaty with the legal order
- to apply it to the realities of the present

7.7 The question, what did the Treaty of Waitangi say about fishing rights, calls initially for an examination and comparison of the various texts and their history. The

47 Wai-9, November 1987, p 128.
fullest treatments of this are by R M Ross in her article *Te Tiriti o Waitangi: Texts & Translations,*\(^48\) and by Dr Claudia Orange in *The Treaty of Waitangi.*\(^49\) McKenzie's *Oral Culture, Literacy & Print in Early New Zealand: the Treaty of Waitangi*\(^50\) is also of interest, particularly as to the importance of what was said rather than written, although his views of Maori illiteracy have been challenged. Further valuable discussions of the text of the Treaty are contained in the Report of the Royal Commission on Social Policy.\(^51\) And one must also take into account the manner in which the Treaty should be interpreted. As to this, statements of the Waitangi Tribunal in the *Manukau* case\(^52\) are of great weight.

7.8 In addition to discrepancies between English and Maori versions of the Treaty, the English text itself left major loose threads. For instance, the meaning of the right of pre-emption was ambiguous; and moreover was stipulated for lands only. This does nothing to elucidate what those on the British side thought they were doing in relation to fishing rights. Nor do we know what documents and precedents Busby and Hobson had access to, other than the Instructions of 14 August 1839 sent to Hobson by Lord Normanby, the Secretary of State for the Colonies.

The Nature of the Treaty

7.9 At the threshold it is appropriate to note an essential distinction between the Treaty of Waitangi and many treaties negotiated with the indigenous people of Canada and the United States. These were agreements for the acquisition of property; governments did not regard the Indian tribes as having any sort of sovereignty over their lands, although in the United States they had a species of autonomy expressed in the phrase "domestic dependent nations". The Treaty of Waitangi did not purport to transfer any property. Apart from the cession of sovereignty (however that may have been understood by Maori) its provisions confirmed Maori property rights and laid down the ground rules for their subsequent disposition, and declared Maori to have all the rights and privileges of British subjects. A closer New Zealand analogy with the nineteenth century Indian treaties was the land purchases subsequently made by the Crown.

\(^{48}\) *NZ Journal of History* (1972) 6, 130.

\(^{49}\) Allen and Unwin (1987).

\(^{50}\) *Victoria University Press* (1985).

\(^{51}\) *Vol 2*, p 28 et seq.

\(^{52}\) *Wai-8*, July 1985, pp 88, 95.
7.10 But in one aspect the Treaty of Waitangi is nonetheless analogous to many of the Indian treaties negotiated by the United States government. These did not exchange fishing rights for land; the United States had no power to confer fishing rights because it did not possess them: see eg United States v Winans.\(^53\) Nor did the Treaty of Waitangi purport to grant possession of fisheries or land in exchange for sovereignty. They already belonged to the Maori. If the concept of common law title is valid in New Zealand, they continued to belong to the Maori legally as well as morally. Insofar as cases such as Te Heuheu Tukino v Aotea District Maori Land Board\(^54\) held that the Treaty was not the origin of these rights they need not be criticised. Rather the Treaty undertook in the English preamble to "protect the just rights and property" of the Maori, and in Article 2 "confirmed and guaranteed" possession of their fisheries and their properties. The United States treaties used similar language - they "reserved and secured" fishing rights.

7.11 The next general point to be observed is that the Treaty was not made with "the Maori" collectively or anyone on behalf of the Maori as a whole. Nor could it have been, given the nature of the 1840 Maori polity. Unlike Hawaii and Tahiti at this period,\(^55\) no chief or alliance of chiefs had acquired paramountcy over Aotearoa. So the guarantee of protection for (inter alia) "their fisheries" refers to the particular fisheries of each iwi or hapu. This is not unimportant; it gives a concrete and specific rather than abstract character to the Crown's promise.

**The English Version**

7.12 The preamble to the English version of the Treaty is worth attention. It provides a succinct and authoritative summary of the acknowledged reasons for acquiring sovereignty and the perceived implications. It is obviously influenced by the terms of the Instructions of 14 August 1839 which Hobson received from Lord Normanby.

The Queen of England is anxious -

\[
(a) \quad \text{to protect the just rights and property of the chiefs and tribes, and}
\]

\[
(b) \quad \text{to secure to them the enjoyment of peace and good order.}
\]

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53 (1905) 198 US 371, 381.
54 [1941] NZLR 590; [1941] AC 308.
7.13 The state of affairs justifying British intervention is "the great number of Her Majesty's subjects already settled in New Zealand and the rapid extension of emigration from Europe and Australia still in progress". This has produced the need to avert the "evil consequences which must result from the absence of necessary laws and institutions alike to the native population and to British subjects", a need that it is predicated can be satisfied only by the cession of sovereignty.

7.14 The dominant intention expressed is to secure law and order both for Maori and Pakeha, and the relevance of this would have been apparent to those living in northern and coastal New Zealand at the time, as well as to anyone today acquainted with pre-1840 history.

7.15 The secondary purpose, manifested in the instructions given by Lord Normanby both to Hobson and to Sir George Gipps, Governor of New South Wales, is to secure to the Crown the promise of an exclusive right of pre-emption over "such lands as the proprietors may be disposed to alienate." And by pre-emption the British party meant more than what we call "first refusal"; the Maori were taken as promising not to sell land at all except to the Crown: R v Symonds.

7.16 Briefly the English version of Article 2 of the Treaty reads, as far as relevant:

"Her Majesty ... confirms and guarantees to the Chiefs and Tribes of New Zealand .... the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess ...."

7.17 This assurance, "confirms and guarantees", is strong and unequivocal. It appears to embrace the notion of active protection. This indeed has now been categorically stated by Cooke P in the Maori Council case.

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

56 [1840-1932] NZPCC 387.
7.18 The Treaty in its English version guaranteed the chiefs and tribes of New Zealand and the respective families and individuals thereof "full exclusive and undisturbed possession" of their fisheries. Did that mean that no-one except Maori could catch fish in New Zealand or off its coast? Differing views have been expressed about this. But Maori complaints and assertions in the nineteenth century and later disclaimed any desire to exclude the Pakeha altogether. Nor is there anything in the findings of the Waitangi Tribunal to support such a claim.

7.19 Was the term fisheries, as has occasionally been suggested, intended to apply only to inland lake and especially river fisheries? While it is impossible to say what may have been in the minds of the English draftsmen, there seems no justification for reading down the wide meaning of the word. In the only relevant judicial decision, Baldick v Jackson, Stout C J assumed the widest meaning and applied the Treaty's guarantee to whaling.

7.20 How the words fisheries and forests got there at all is one of the minor mysteries of the Treaty. Interestingly, no specific reference to the protection of fisheries (or forests) occurs in earlier African treaties that are otherwise remarkably similar in language to the Treaty of Waitangi. There is, for example, a treaty that Britain concluded in 1825 with Banka, King of Sherbro, as part of the British acquisition of Sierra Leone. It stipulates that in return for a cession of sovereignty the African parties were to retain the full, free and undisturbed possession and enjoyment of the lands they now hold and occupy and to receive the rights and privileges of British subjects.

7.21 Nor was there any reference to fisheries in one draft of the Treaty of Waitangi that later found its way to England.

7.22 One must remember that the "audience" addressed by the Treaty was the Maori chiefs. Hobson had been instructed to deal fully and frankly with them. Although the chiefs doubtless did not appreciate some of the concepts and words used (notably sovereignty), the Treaty in its English form reads very much as a 'plain language'

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58 (1910) 30 NZLR 343.
60 Ross p 134, Orange p 40.
document by the standards of the time. The phrase "lands and estates, forests, fisheries and other properties" does not look like a technical legal description. In terms of strict 1840 English property law "lands and estates" could only cause confusion. "Forests" has no particular legal significance. The article guarantees "possession", as some analogous treaties do, but in the context of pre-emption (itself, as has been noted, ambiguous) refers to "proprietorship" and "proprietors" (not "possessors"). It seems most unlikely that the authors meant to use technical legal language.

7.23 More plausible, but still mere speculation, is to look at the enumeration in terms of major Maori economic resources: lands (dwellings and cultivations) fisheries (which is self-defining) and forests (hunting and timber). These are precisely the things that sympathetic officials might have supposed that the Maori would principally want to be protected. In Northland, of all parts of New Zealand, the association of fisheries with sea as well as river or lake fisheries was close. It would have been extraordinary if Busby, who played a large part in drafting the final English version,61 was unaware of this.

The Maori Version

7.24 The Maori version is what almost all the Maori parties signed. Only 39 chiefs at Waikato Heads are known to have signed the English version. Over 500 signed the Maori version at Waitangi and elsewhere. It is not a close translation of the final English text, and does not explicitly refer to fisheries. It uses the phrase "o ratou wenua o ratou kainga me o ratou taonga katoa". W(h)enua signifies lands and kainga habitations; and the last 3 words can be literally translated as "all things valued" or "all things treasured": see the Te Atiawa, Manukau and Te Reo Maori cases.62

7.25 Why did this version not mention fisheries, and what is the significance of that? Here again we are in the realm of supposition. However, both Ross ("almost certainly") and Orange ("probably") suggest that Williams, who was the author of the Maori translation, was working from an earlier English draft.63

7.26 Ross says that when Bishop Selwyn asked Williams in 1847 how he had explained the Treaty to the Maori, Williams re-translated the Maori text into English as

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61 Busby's "Remarks" (1861) AJHR E-2, 67.
62 Wai-6, March 1983; Wai-8, July 1985; Wai-11, April 1986.
63 Ross p 142, Orange p 40.
"their lands and all their other property of every kind and degree". But this would be wide enough to embrace fisheries, and the suggestion that Williams did not envisage "taonga" as including fishing rights seems unsupported. The further view that the Maori did not see the Treaty as the guardian of their fishing rights until the present century is untenable. It must certainly have been in their minds at least after the Kohimarama Conference in 1860.

7.27 The Waitangi Tribunal in its Motunui decision has expressly found that "taonga" did include fisheries.

7.28 The Maori text also has a weaker verb: "agrees to protect" in Professor Kawharu's translation in place of "confirms and guarantees". But significantly, it talks not of "possession" but of "te tino rangatiratanga" (usually rendered as full chieftainship). Professor Kawharu translates this as "the unqualified exercise of their chieftainship". This seems a much wider notion and does not replicate any concept in any extant English draft. The reasons why it was chosen are obscure. Undoubtedly, however, it sowed the seeds of later misunderstandings.

7.29 For some early writers the implication of the term seems to have been almost a commonplace. In his Pamphlet on the Taranaki Question Sir William Martin had this to say -

"The Treaty of Waitangi carefully reserved to the Natives all then existing rights of property. ... It assured to them "full, exclusive and undisturbed possession of their lands and other properties which they may collectively or individually possess, so long as it is their pleasure to retain the same." This Tribal right is clearly a right of property and it is expressly recognised and protected by the Treaty of Waitangi. ...

The rights which the Natives recognised as belonging thenceforward to the Crown were such rights as were necessary for the Government of the Country, and for the establishment of the new system. We called them "Sovereignty"; the Natives called them "kawanatanga" "Governorship".

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64 Ross p 142.
65 See Appendix C.
66 Orange, pp 41-42.
67 Reprinted in (1861) AJHR, E-2, p 2.
This unknown thing, the "Governorship", was in some degree defined by a reference to its object. The object was expressed to be "to avert the evil consequences which must result from the absence of Law". To the new and unknown Office they conceded such powers, to them unknown, as might be necessary for its due exercise. To themselves they retained what they understood full well, the "tino Rangatiratanga", "full Chiefship", in respect of all their lands."

7.30 Gorst remarked in 1864 - 68

"According to the Maori version of this Treaty — which differs from the English text of which it purports to be a translation — the Queen of England guaranteed to the Maoris the full chiefship over their lands and other property. They also gave up to the Queen the whole governorship over their lands, and the Queen promised them the full rights of British subjects."

7.31 In 1865 the House of Representatives debated and carried a motion to table a copy of the "original" Treaty of Waitangi, a copy of the received translation into Maori, and a literal translation of this into English. Fitzgerald reminded the House that if the document was signed in its Maori version the English version was irrelevant as to its binding effect. Carleton added: "in the Maori copy chiefs were guaranteed chieftainship over their land ... The Governor was under a misapprehension in thinking this had been yielded."

7.32 A consistent theme among Maori who spoke publicly of the Treaty in the nineteenth century was that the Treaty purported to preserve and guarantee their mana.

7.33 Thus Patara, the editor of the King movement's paper Te Hokioi, wrote in 1861 - 70

"Successive governments have declared to us that the Queen by the Treaty of Waitangi promised us the full chiefship of such of our lands rivers fisheries etc as we might wish to retain. Now Waikato is one of the rivers which we wish to retain under our own chiefship. How is it then that we are told a steamer is to be sent into this river, though we have not given our consent. Is

68 The Maori King, p 25.
70 Gorst, p 217.
this the way in which the Treaty of Waitangi is observed by your side. Pakeha friends, why do you trample under your feet the words of your Queen."

7.34 A recurrent theme at the "Orakei Parliament" in 1879 was the degree to which the mana assured by the Treaty had been protected. The conference resolved that:

"The Chiefs and people would remain loyal to the Queen ... would adhere to the Treaty of Waitangi and the principles of the conference of Kohimarama; would retain the mana over their lands, fisheries..."

7.35 And almost 20 years later in 1898 Te Heuheu of Tuwharetoa, using the Maori text of the Treaty, told the Select Committee on the Native Lands Settlement and Administration Bill "72

" ... what we understand, and what we have always understood, is this: that section 2 of the Treaty of Waitangi assures to the Natives all their rights title and the management of their own affairs."

7.36 What the then Governor (Gore-Browne) wished the Maori to understand from the Treaty appears from his address at the opening of the Kohimarama Conference in 1860. This was a gathering of some 200 chiefs from all parts of New Zealand except Taranaki and Waikato. Gore-Browne read and expanded on the Treaty's provisions. This was read to the assembly in Maori, possibly by Donald McLean, the Native Secretary. Both translation and address specifically referred to both forests and fisheries. "Ko o ratou oneone, me o ratou whenua, me o ratou ngaherehere, me o ratou wai mahinga ika, (all fishing places) me o ratou taonga ake."73

7.37 The word "rangatiratanga" was not used in the Maori explanation. Indeed no word corresponding either to authority or possession appeared. On the other hand, the explanation of Article 1 did retain the term kawanatanga ("mana Kawanatanga katoa i a ratou katoa").74

7.38 A similar sidestep occurred in 1869, when a new translation from the English text was tabled in the Legislative Council.75 "Rangatiratanga" disappears both

71 (1879) AJHR 6-8.
72 (1898) AJHR I-3A p 7.
73 Te Karere Maori, Nos 13-18, p 6.
74 Ibid.
75 (1869) AJLC 67-71.
from the preamble and Article 2. But in a complete reversal of the original Maori it was used in Article 1 to replace "kawanatanga" - the phrase was "ma tikanga me nga mana katoa o te Rangatiratanga". Orange observes that this was an altogether different treaty from the one that had been signed. 76

7.39 As the Royal Commission on the Electoral System noted in its Report77 the content of the term "rangatiratanga" has not yet been settled. "Rangatiratanga" was the word used in the 1835 Declaration of Independence in reference to the independence of Aotearoa that Britain acknowledged. Williams' Dictionary The Maori Language simply defines it as "evidence of breeding and greatness", which does not take us far in the Treaty context. The usual modern translation is "chieftainship". The English preamble to the Maori Affairs Bill now before Parliament uses the Maori word without any translation. The New Zealand Maori Council's kaupapa of 1983 on which that Bill is based stated its meaning in pragmatic terms as "the wise administration of assets possessed by a group for that group's benefit: in a word, trusteeship".

7.40 In the Maori preamble "rangatiratanga" also appears in the phrase "ratou rangatiratanga, me to ratou wenua". Here it is used side by side with the word for land (w(h)enua) and corresponds to the English "just rights".

7.41 In its Orakei report, the Waitangi Tribunal discussed this problem at some length. Inter alia it said:78

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

7.42 Whichever English word is used - chieftainship, trusteeship, authority - the Maori version of Article 2 would seem to convey more than a right to occupy or possess, and carry connotations of control and regulation: see para 3.5. One Maori view of its implication for fisheries (which may or may not be typical) was given on behalf of the Tainui Maori Trust Board to the Waitangi

76 Op cit p 183.
78 PP 131-133.
Tribunal in the course of its Muriwhenua hearings in March 1987 -

"Tainui believes this right covers all fisheries around their tribal territory out to the three mile limit. It encompasses all inshore and shoreline fisheries, shellfish beds, other inshore and seashore resources such as seaweed; all inland waterways, rivers and lakes which fall within their tribal boundaries ... Tino rangatiratanga is not perceived as ownership in Paakehaa terms. Its meaning is that the overall kaitiaki or guardianship lies with the local tribe or hapuu. The final management of both the commercial and non-commercial use of fishing resources is encompassed by this role. It does not imply that only certain areas are of traditional importance. Moreover, it does not imply that, by reserving the use of these areas to the local tribe or hapuu, the Ministry of Agriculture and Fisheries has the right to look after, or arrange, for the commercial exploitation of all the rest." [emphasis added.]

7.43 The Muriwhenua claim itself dealt with the area from Whangape Harbour around from the north (including the Three Kings) to the Mangonui River. The claimants asserted that among the taonga recognised by the Treaty were:

"exclusive title to and possession and use of the harbours, sea coasts, on-shore and off-shore fisheries, and the customary title and other rights (including those of management and control) in respect of sea harbours, coastal waters, coastline, fisheries (on and off-shore) and including shellfish in respect of the whole of this area."

Conflict of Understandings

7.44 One vital question is probably impossible to answer now. Were rights over the sea (to use as neutral a term as possible) seen by the signatories as pertaining to kawanatanga and thus passing to the Crown or to rangatiratanga and retained by the tangata whenua? The Waitangi Tribunal has interpreted "kawanatanga" as including the right to make laws. But this in turn would seem to imply a right to control and regulate, and thus

overlap rangatiratanga. The lawmaking power would on this basis belong both to the Crown and the Maori.

7.45 The English version opposes sovereignty and rights of possession. There can be little doubt that in the minds of Hobson and his officials the cession of sovereignty gave it power and authority over the sea below low water mark, leaving aside the question of tidal waters. This is not necessarily the same as an exclusive right to exploit the resources of the sea. A loosely analogous modern distinction exists in the concept of the Exclusive Economic Zone, which is not part of the national territory but is marked by an exclusive right to control and exploit the resources of the sea and the seabed.80

7.46 A lead to British views at the time is provided by an opinion given by Lord Russell to Governor Gipps on 27 November 1840.81 Gipps had inquired what effect the annexation of New Zealand had on the position of American citizens inter alia as whale fishermen. The reply stated:

"I believe the law of nations to be that no Alien has the right to fish in land-locked waters, ... but that all mankind have a right to fish in the open Sea and even close in shore on any Territory unless the State to which that Territory belongs can establish as a matter of fact from time immemorial, it has enjoyed an exclusive right of fishing on such shores. Hence I infer that the right of aliens to fish in the open Harbours, Bays, Roadsteads and Shores of New Zealand is indisputable. Moreover, I believe that it would be very bad policy to dispute it. The Whalers will be among the very best customers of the Colonists."

7.47 The essential difficulty is that there are really three concepts - dominion, control and management, and ownership: see para 3.5. Each version of the Treaty uses only 2 of them, but not the same 2.

The Relationship of the Articles

7.48 How to relate Articles 1 and 2 is both a crucial and an intractable question. The words of the Treaty provide no direct answer. The context in which it was drawn up and accepted suggests that the minds of the

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80 Territorial Sea and Exclusive Economic Zone Act 1977.
81 Recorded at CO 209/6 p 204 (National Archives reference microreel 353).
British authorities and the Maori did not altogether meet. Dr Orange suggests that the Maori envisaged something like a British protectorate over New Zealand, akin to the one that France established over Tahiti in 1843. That would leave the Maori with greater autonomy than annexation and Crown colony status did. On the other hand it would have been unsuited to extensive British settlement. By the time of the Treaty this was explicitly contemplated by the British government, and indeed was going on.

7.49 There would seem to be a reciprocity between the two articles. If Article 2 in a sense limits the sovereignty conferred by Article 1, the converse is also true. Article 1 limits the authority recognised in Article 2.

7.50 The concept of partnership is valid and fruitful but insufficient. How was and is authority to be shared? What things in New Zealand of the year 1989 belong to "sovereignty" and what to "rangatiratanga"? What does it mean in terms both of access to and control over fisheries? And how does it affect the equal rights promised by Article 3? No predetermined answer is possible. The government of a modern State must have the effective power to govern and to make laws. There are such things as overriding national interests. Numerous overseas examples, past and present, prove that this is not incompatible with a considerable degree of autonomy for particular groups. But the dividing line has to be worked out for a particular society at a particular time. It is important to avoid this being done in terms of the values and priorities only of the section holding effective power - in democratic societies like New Zealand, the numerical majority.

7.51 The interaction of Articles 2 and 3 presents a less formidable but nonetheless real problem. The Royal Commission on Social Policy dealt with it in this way -

"Article 3 ... is sometimes seen as limiting the authority of Article 2 and its emphasis on rights accruing from tribal membership. There is no real incompatibility. Clearly the acceptance of 'the rights and privileges of British subjects' (English version) does not require an extinction of those rights which the members of any tribe have inherited. Indeed the whole thrust of the Treaty was to confer new aspects of citizenship
and at the same time ensure the continuation of existing Maori social and economic systems".83

7.52 The rights specified in Articles 2 and 3 may be seen as separate and cumulative. Otherwise, Article 2 is simply merged in Article 3. This would amount to submerging in a purely Western political and social order what was to the Maori of 1840 — and perhaps many Maori today — essential and vital. But nonetheless there is room for conflict and argument.

Conclusion

7.53 An overriding lesson is that we should be wary of too minute an analysis or pedantic an interpretation of the Treaty of Waitangi. The nature of the document and the circumstances in which it was drawn up will simply not support it. Rather it is the essence and spirit of the Treaty that should be looked at in considering the Crown's obligations. The continual emphasis of the Waitangi Tribunal, and of the Court of Appeal in the Maori Council case, has been on this spirit and on the living character of the document. To adopt the words of section 5(d) of the Acts Interpretation Act 1924, the Treaty of Waitangi might rightly be regarded as always speaking, to be applied to circumstances as they arise so as to give effect to its spirit, true intent and meaning.

7.54 This approach is reflected in the language of the Treaty of Waitangi Act 1975, which set up the Waitangi Tribunal. The basis of a claim is that the claimant (or a Maori group of which he or she is a member) is likely to be prejudicially affected by any legislation, policy, practice, act or omission which was or is inconsistent with "the principles of the Treaty of Waitangi."84 Two recent statutes, the Conservation Act 1987, and the State Owned Enterprises Act 1987, use the same phrase.

7.55 So the Treaty must now be applied to the circumstances of 1989. The Waitangi Tribunal has consistently stressed this and it lies behind and is acknowledged in the phrase "principles of the Treaty". Almost 150 years of history and of profound change cannot be set aside. Nonetheless it is the Treaty that must be so applied; not some new and fictitious document. The Treaty gave the Crown what it sought; sovereignty and governance over New Zealand. This is a continuing authority and

84 S 6(1) as substituted by the Treaty of Waitangi Amendment Act 1985.
power. What the Maori received in return is likewise ongoing - the continued protection of the rights that the Treaty acknowledged as theirs. Among these rights were the fisheries of Maori tribes.
8.1 The prevailing understanding of the law applicable to Maori fisheries for most of the twentieth century and until recently is simple.

8.2 The moral obligation resting on the Crown by virtue of the Treaty promises was seldom publicly denied. But the generally accepted opinion from the 1870s was that its legal effect was nil, and the very acquisition of British sovereignty prevented the courts from taking account of any so-called Maori rights.

8.3 The Treaty of Waitangi was not a treaty at international law, principally because the Maori, because of their lack of political organisation and law, were not capable of entering into international relationships. Under the familiar dichotomy New Zealand was acquired by annexation and was thus a settled and not a ceded colony. On the acquisition of sovereignty the common law automatically extended to New Zealand, this being confirmed by the English Laws Act 1858. In particular the title to all land vested in the Crown. Title to land could be acquired only from and through the Crown. And the common law right of all persons to fish in tidal rivers, estuaries and the sea precluded any sort of Maori ownership or control of fishing grounds there, or exclusive rights to fish: Waipapakura v Hempton.

8.4 Even if the Treaty were a valid cession it could not be a source of rights under municipal law: Te Heuheu Tukino v Aotea District Maori Land Board. The Treaty of Waitangi thus had no direct effect on the law of New Zealand, and did not give rise to rights that could be recognised in a court of justice.

8.5 Starting from the propositions that the title to all land in a British possession vested in the Crown, and that a subject could hold land (including fishing rights) only by or through a grant from the Crown, it seemed to follow that the only source of Maori property rights over land in the absence of a specific grant was legislation. From the beginning (Land Claims Ordinance 1841) Maori land rights did receive statutory recognition. There was no comparable legislation in respect of fishing rights.

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85 Veale v Brown (1868) 1 NZCA 152.
86 (1914) 33 NZLR 1065.
87 [1941] NZLR 590; [1941] AC 308.
except as a consequence of title to the underlying soil
(important in respect of lakes) Maori tribes and hapu had
no fishing rights that any Court could recognise. They had
no title to the beds of navigable rivers, this being in the
Crown.88 And they had no title to the soil below high
water mark, which was vested in the Crown at common law.

8.6 There existed one indirect and uncertain
exception. The first general legislation providing for the
control of fisheries, the Fish Protection Act 1877,
provided in section 8:

"Nothing in this Act contained shall be deemed to
repeal, alter, or affect any of the provisions of
the Treaty of Waitangi, or to take away, annul, or
abridge any of the rights of the aboriginal
natives to any fishery secured to them thereunder."

8.7 This Act was "incorporated" in the Fisheries
Conservation Act 1884 and repealed in its application to
sea fisheries by the Sea Fisheries Act 1894, which
contained no similar provision, nor any provision
purporting to protect Maori fishing rights. In 1903, a
clause was added to the Sea Fisheries Amendment Bill and
became section 14 of that Act:

"Nothing in this Act shall affect any existing
Maori fishing rights."

8.8 Section 14 was carried into the consolidating Act,
the Fisheries Act 1908, as section 77(2), and (omitting the
word "existing") is now section 88(2) of the Fisheries Act
1983.

8.9 That provision, however, could be no more than a
qualification of the scheme of restrictions and regulations
created by the Act. Stout C J said in Waipapakura89 that
it was merely a savings provision for rights that existed
apart from the Act. These could not be treaty rights
because the Treaty could not confer legal rights. It had
no effect on other legislation that otherwise diminished or
destroyed access by Maori to their traditional fishing
grounds; nor did it confer any sort of property in respect
of those grounds, or alter the common law except insofar as
the scheme of the Act itself qualified it.

8.10 This was "taught law" in New Zealand at least as
recently as the 1950s. It was propounded without question

88 S 14. Coal Mines Amendment Act 1903, confirming the decision in Mueller v The
Taupiri Coal Mines Ltd (1902) 20 NZLR 89.
89 (1914) 33 NZLR 1065, at 1070.
in both editions of Robson, *New Zealand - The Development of its Laws and Constitution* (1953 and 1967), and in McLintock's *Crown Colony Government in New Zealand* (1958). It underlay the decisions of the Courts in the Wanganui River and Ninety Mile Beach cases. Support for many of the propositions appears in articles written by Haughey in 1966 and Molloy in 1971. No subsequent reported case rejected or questioned it, until the decision of Williamson J in *Te Weehi v Regional Fisheries Officer*.  

The Alternative View

8.11 Nonetheless, this view overlooked a mass of early history, practice and judicial decision both in New Zealand and other British colonised territories. This has been brought to light in many articles and commentaries during the last 25 years. Strong arguments can be mounted in favour of the following propositions:

- That the Treaty of Waitangi was a valid treaty of cession in terms of a common understanding of international law both then and now.

- That regardless of its status at international law the Treaty was a valid act of cession in British constitutional law and therefore capable of making New Zealand a ceded rather than a settled colony (though in terms of the reception of English law the practical consequences were the same).

- That the common law itself, in its application to British territories, however acquired, recognised the land and related rights of native peoples as a legal qualification, the precise nature of which is unsettled, of the paramount title of the Crown. The Treaty was no more than declaratory in this respect, and Maori property rights did not and need not derive from the Treaty. This is the concept of aboriginal title. In respect of land where Maori customary title has been ascertained and extinguished the common law has

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90 [1962] *NZLR* 600.  
admittedly been superseded by statute. But in other cases it remains applicable except that, because of sections 153-157 of the Maori Affairs Act 1953, it cannot be invoked against the Crown in respect of land. In other words Maori property rights continued to exist unless and until legislation took them away.

8.12 If the last of these propositions is valid, the law already recognises to an uncertain degree Maori rights in respect of traditional fisheries. It cannot yet be affirmed that the New Zealand courts have adopted it. However, some very recent decisions have gone some way towards accepting the concept that indigenous people had property rights at common law.

8.13 Te Weehi is authority for the view that traditional Maori fishing rights exist and are not subject to the regulatory regime of the Fisheries Act. Waipapakura had held that customary rights could not receive legal recognition without legislative sanction. In Te Weehi Williamson J preferred the view that such rights continued unless extinguished in one way or another. He found support for this view in Inspector of Fisheries v Ihaia Weepu\(^5\) and Keepa v Inspector of Fisheries\(^6\) as well as in the Canadian cases. Those New Zealand decisions had nonetheless been adverse to the Maori defendants. He distinguished them (and Waipapakura) on the grounds that in the case before him the claim did not rest on any assertion of proprietorship of the soil and was not a claim to an exclusive right. Williamson J referred to, but did not place any weight on, the omission from the 1983 section of the word "existing", which was in the corresponding provision of the 1908 Act. (The Select Committee on the 1983 Bill omitted the word on the ground that it was redundant and added nothing.)

8.14 The facts in Te Weehi and Waipapakura bear a considerable similarity. In both cases an individual was fishing in a manner prohibited by the Fisheries Act. In Waipapakura the breach was using nets unlawfully; in Te Weehi it was taking undersized paua. The plea in both cases was that the action was in exercise of Maori fishing rights and was within the exception in the Fisheries Act in favour of such rights. Nor is there any suggestion in Waipapakura that the plaintiff based her claim on either an exclusive right or Maori ownership of the soil.

\(^5\) [1956] NZLR 920.
\(^6\) [1965] NZLR 322.
8.15 The reasoning in Te Weehi by which Waipapakura was distinguished therefore presents some difficulties and if strictly applied could give that decision a limited effect. Nonetheless there is at least an implicit recognition of a common law aboriginal title, and the approach and tone are quite different from most of the New Zealand cases since Wi Parata.

8.16 The Court of Appeal's decision in the Maori Council case is not of direct application to aboriginal title or to fishing rights. That case arose from a provision in the State Owned Enterprises Act 1986 (section 9) whereby nothing in the Act was "to permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi". The Court had to determine the relationship between that section and the much more detailed provisions of section 27, which dealt with the transfer of land from the Crown to the new enterprises, and to consider the meaning of "the principles of the Treaty of Waitangi". A unanimous decision of 5 judges gave section 9 an overriding effect, and in doing so recognised the Treaty as having a fundamental constitutional character. But as Cooke P remarked, the way for the decision was opened only by the legislation. He expressly refrained from any comment on "other issues, however important or interesting they are in themselves ... For example, whether the Treaty had a status in international law; what are the principles for interpreting international treaties; whether apart from the Treaty Maori customary title has protection at common law. These are big questions."

8.17 But the Court accepted Te Heuheu Tukino as a binding decision that in the absence of legislation no treaty could create or affect legal rights. And one Judge (Somers J) referred without any sign of reservation to earlier cases holding the Crown's obligations to be non-justiciable.

8.18 The Te Weehi decision has now been reinforced by Greig J's judgment in a series of actions brought by Maori interests seeking an injunction against the government from extending the quota management system created by the Fisheries Amendment Act 1986 to certain additional species: Ngai Tahu Maori Trust Board v Attorney-General &

98 For example, Cooke P at 655.
Another.99 It is necessary to appreciate, as the Judge stressed, that this decision was an interim one only. The judgment is nonetheless significant. The thrust is that Maori fishing rights having a commercial element existed in 1840, that they had not been taken away by statute, that it would be surprising if they had been taken away by the operation of the common law, but that in any event in the context of fisheries law, section 88(2) and its predecessors had expressly preserved them. Greig J considered section 88(2) to mean that nothing is to be done under the Fisheries Act that would affect, restrict, limit or extinguish those fishing rights.

8.19 To the extent that the law is uncertain it is deficient. This uncertainty is an unsound basis for a practical solution.

8.20 Moreover the law is unlikely to be able to accommodate Maori claims for control and management of fisheries resources. The legal validity of these claims is not readily found in a common law doctrine of aboriginal title as generally understood.100 It must rest constitutionally on the covenant between the Crown and nga iwi Maori in the Treaty of Waitangi. So if these claims are to be accepted in any degree Parliament must positively intervene to determine the issue specifically.

8.21 The state of the law, and in particular its historical development and the law in other comparable countries of settlement, are discussed in greater detail in sections 15 and 16, in Part III of this paper.

100 See, however, B Slattery, "Understanding Aboriginal Rights" (1987) 66 Canadian BR 727.
The doctrine that the Treaty of Waitangi conferred no legal rights does not mean that it could not affect the law indirectly. As a formal agreement between the Crown and the Maori chiefs providing for the acquisition of British sovereignty and the assurance of protection for Maori rights and the recognition of their status as British subjects it had and has a moral status. The Courts, the Legislature and the Executive might see it as a source of policy. This could affect the legislation that was or was not enacted, and the policies of the Executive government.

The Courts themselves could, for instance:

i interpret legislation where possible so that it is not inconsistent with the Treaty;

ii give specificity to general or neutral words in legislation in the light of the treaty;

iii regard the Treaty as declaratory of the existing common law;

iv possibly, in an extreme case, consider the Treaty as a basic limit on legislative power.

The existence of the Treaty undoubtedly coloured early land legislation. It had a considerable, possibly a decisive, effect on the waste lands issue in the 1840s (see paras 15.36-15.44). It was explicitly recognised in the Fisheries Protection Act 1877. However, the acceptance of the Treaty as part of public policy was infrequent, inconsistent and haphazard.

In 1844 the Port Nicholson landowners were complaining about Fitzroy’s waiver of pre-emption. Their memorial to the British Government was presented and doubtless prepared by George Evans, an English barrister who acted as legal adviser to the New Zealand Company in Wellington. He asserted...

"... the impossibility of the natives conveying that which they have not in contemplation of law - an estate of freehold in the soil. In order to do this we need only refer to those numerous citations of what may be termed the common law of the colonies ..."

This view ... is not in any sense repugnant to the Treaty of Waitangi, which we acknowledge as a fundamental law in this colony. This treaty simply and absolutely confirmed and assured to them all their territorial rights ... the question of what these rights are being unaffected by the Treaty."

9.5 There were, however, certainly voices both in New Zealand and in England that regarded the Treaty as an unfortunate act having most undesirable consequences. One such voice was heard in the majority report of the House of Commons Select Committee on New Zealand.102

"The evidence laid before Your Committee has led them to the conclusion that the step thus taken, though a natural consequence of previous errors of policy, was a wrong one. It would have been much better if no formal treaty whatever had been made, since it is clear that the natives were incapable of comprehending the real force and meaning of such a transaction; and it therefore amounted to little more than a legal fiction, though it has already in practice proved to be a very inconvenient one, and is likely to be still more so hereafter."

9.6 The Committee was particularly upset that - 103

"... these stipulations, and the subsequent proceedings of the Governor founded upon them, have firmly established in the minds of the natives notions, which they had then but very recently been taught to entertain, of their having a proprietory title of great value to land not actually occupied; and there is every reason to believe that, if a decided course had at that time been adopted, it would not have been difficult to have made the natives understand that, ... all the unoccupied territory of the islands was to vest in the Crown by virtue of the sovereignty that had been assumed."

9.7 The Committee, however, admitted that "erroneous as they believe the policy hitherto pursued to have been, they are sensible of the great difficulty which may now be experienced in changing it".

103 Ibid.
9.8 The majority report was not accepted by the Crown. Noteworthy is Lord Stanley's affirmation in reply to the contemptuous dismissal of the Treaty by Joseph Somes of the New Zealand Company as "a praiseworthy device to amuse and pacify savages".104

"Lord Stanley entertains a different view of the respect due to obligations contracted by the Crown ... he will not admit that any person or any government, acting in the name of Her Majesty, can contract a legal or moral or honorary obligation to despoil others of their lawful and equitable rights."

9.9 He later instructed Grey:105

"In the name of the Queen I utterly deny that any Treaty entered into and ratified by Her Majesty's command, was or could have been made in a spirit thus disingenuous or for a purpose thus unworthy. You will honourably and scrupulously fulfill the conditions of the Treaty of Waitangi."

9.10 The Courts in New Zealand have also explicitly acknowledged the relevance of the Treaty. Four twentieth century judicial statements will serve as examples -

Mueller v The Taupiri Coal Mines Ltd per Edwards J;106

"it appears to me to be impossible to infer any dedication by the Crown so long as the soil in the river remained Native land .... To do so would be to assume that the sovereign power has not respected, but has improperly invaded, the Native proprietary rights."

Baldick v Jackson per Stout C J;107

"though the right to whales is expressly claimed in the statute of 17 Ed. II, c. 2, as part of the Royal prerogative, it is one not only that has never been claimed, but one that it would have been impossible to claim

106 (1902) 20 NZLR 89 at 123.
107 (1910) 30 NZLR 343 at 344.
without claiming it against the Maoris, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with - they were to be left in undisturbed possession of their lands, estates, forests, fisheries, &c. I am therefore of opinion that so far as this ground of appeal is concerned it has no validity."

Tamihana Korokai v Solicitor-General per Stout C J;\textsuperscript{108}

"It is not necessary to point out that if the Crown in New Zealand had not conserved the native rights and carried out the Treaty a gross wrong would have been perpetrated."

Re The Bed of the Wanganui River per Turner J;\textsuperscript{109}

"Upon the signing of the Treaty of Waitangi the title to all land in New Zealand passed by agreement of the Maoris to the Crown; but there remained an obligation upon the Crown to recognise and guarantee the full exclusive and undisturbed possession of all customary lands to those entitled by Maori custom."

9.11 Whether these and similar statements can always be reconciled with actual decisions of courts, and the policies and actions of governments, in respect of fisheries is quite another matter. In Mueller and Baldick they are undoubtedly part of the grounds of the decision. But if legislation had always been interpreted wherever possible so as to be consistent with the principles of the Treaty, a number of the cases adverse to Maori fishing rights could well have been decided otherwise.

9.12 The public statements of politicians did not always match what they said on more confidential occasions, nor their actions. For example, in 1930 the Minister of Marine wrote to (Sir) Apirana Ngata. A call had been made for a fishing reserve in the Kawhia Harbour for exclusive Maori use. There was no power, he said, to grant such rights. Even if there were it would not be reasonable to do so.\textsuperscript{110}

"It is recognised that under the Treaty of Waitangi the Chiefs and Tribes were to have the

\textsuperscript{108} (1913) 32 NZLR 321 at 343.
\textsuperscript{109} [1962] NZLR 600 at 623.
\textsuperscript{110} Marine Department files M1 2/12/429.
full exclusive and undisturbed possession of their fisheries.

The fact is however that there never could have been any exclusive right to fisheries, and in any case the land which the Natives want set aside is mostly tidal land. These tidal flats are, as you are aware, Crown property in its common law right."

9.13 Doubtless politicians and officials thought that they were acting in accordance with the Treaty of Waitangi. Often, however, and perhaps above all in relation to fisheries, they interpreted the English version of Article 2 narrowly, and Article 1 largely and liberally. The Maori version was almost totally ignored.

9.14 One may detect the true beginning of a new spirit in the enactment of the Treaty of Waitangi Act 1975. The Act created the Waitangi Tribunal with jurisdiction to inquire into any claim by a Maori that any existing Act, regulation, Order in Council or Crown policy or practice was inconsistent with the principles of the Treaty of Waitangi and that the claimant was or was likely to be prejudicially affected thereby. Where the Tribunal considered the claim well founded it could recommend action by the Crown to compensate for or remove the prejudice or to prevent others being prejudiced. The long title of the statute was - "An Act to provide for the observance, and confirmation, of the Treaty of Waitangi by establishing a Tribunal ... to determine whether certain matters are inconsistent with the principles of the Treaty."

9.15 The 1975 Act was the stirring of a breeze that has become a powerful wind. Its force and implications were not realised for some time. Even in 1984 counsel for the Ministry of Agriculture and Fisheries admitted to the Waitangi Tribunal that the Ministry had considered neither the Treaty of Waitangi nor the Treaty of Waitangi Act 1975 in the preparation of the Bill that became the Fisheries Act 1983. In fact, that Bill as introduced would have radically diminished the potential protection for Maori rights in section 77(2) of the Fisheries Act 1908. The words "nothing in this Act shall affect any existing Maori fishing rights" were qualified by adding the phrase "under any enactment". That phrase was omitted by the Select Committee after vigorous protests.

9.16 A recent shift in official attitudes has occurred. In 1985 an Interdepartmental Committee on Maori Fishing Rights said this in its unanimous report - 112

"We accept that a proper understanding of the Treaty is likely to call for changes in the received official sense of priorities. The tendency in the past has been to see the provisions of the Treaty as subordinate to other policies. The opposite approach is the more appropriate. While (again in the words of the Waitangi Tribunal) the treaty does not fossilise a status quo, its principles should not be watered down to conform with more limited objectives and policies.

The first basic question that requires the government's decision is whether the law is to recognise as a principle Maori fishing rights as we have defined them. The implications of this would be considerable both in themselves and as a precedent. It would place constraints on a number of public policies and public activities both at the national and local level. But we are compelled to think that history and justice support it, and the fundamental premises of a bicultural society reinforce it."

9.17 That report was presented in November 1985. Although the Ministry of Agriculture and Fisheries was represented on the committee, there must be doubt whether those who prepared the Bill that was introduced in December 1985, and was to establish the ITQ scheme, seriously considered the relationship of the scheme either with the Treaty of Waitangi or with section 88(2) of the Fisheries Act 1983. The Minister's introduction speech made no mention of the Treaty, of section 88, or of Maori issues. Nor did the Bill itself contain any reference to Maori fisheries or rights. Later, a clause was added by the Select Committee, after hearing submissions, providing for the total allowable catch to be set after taking account of "Maori traditional recreational and other non-commercial interests in the fishery". This, the chairman said, would keep the way open for proper consideration of traditional and customary fisheries.

9.18 But in 1986 Cabinet issued a directive to departments as follows:

"Cabinet on 23 June 1986—

1. agreed that all future legislation referred to Cabinet at the policy approval stage

113 468 NZPD 8958.
114 472 NZPD 2883.
should draw attention to any implications for recognition of the principles of the Treaty of Waitangi;

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

This has subsequently been affirmed by Cabinet's adoption of the proposals contained in the report of the Legislative Advisory Committee: Legislative Changes - Guidelines on Process and Content (August 1987).

9.19 The force of the Treaty of Waitangi as a source of public policy to be applied by the Courts has now been established by recent decisions. They include Huakina Development Trust v Waikato Valley Authority & Bowater.115 Here Chilwell J, interpreting a statute which made no express reference to the Treaty or to Maori interests, spoke of the Treaty as "part of the fabric of our society".

9.20 The judgments of the Court of Appeal in the Maori Council case116 are notable. The basis of this decision on the facts was that the Government had taken no steps to give effect to section 9 of the State Owned Enterprises Act 1986. Its legal essence was that section 9 of the Act prevailed over the more detailed and specific section 27 of the same Act. The Maori Council challenged the Crown's intention to transfer large areas of Crown land to the new corporations created by the State Owned Enterprises Act 1986. Before the Court it argued that section 27 was a code which "covered the field" of land, leaving section 9 to apply only to other assets. The Court rejected this. Cooke P suggested as a more tenable proposition that section 27 was intended as an exclusive application of the principle of section 9 in relation to land. But he continued:117

"But the difficulty remains that on that interpretation s 9 adds little or nothing to the protection that s 27 would give in any event. It is true that a difficulty of this kind is not necessarily fatal. From time to time overlapping or surplus provisions are found in complicated legislation. Nevertheless in matters of such

115 [1987] 2 NZLR 188.
transcendent importance for the Maori people as land and the Treaty of Waitangi a court would reach that conclusion with great reluctance."

9.21 Of still wider significance is the following:118

"The submissions were rather that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation."

9.22 Apart from the State Owned Enterprises Act, the Treaty of Waitangi has received statutory recognition in 2 significant pieces of legislation. The long title of the Environment Act 1986 states one of the purposes of the Act as being to ensure that in the management of natural and physical resources, full and balanced account is taken (inter alia) of the principles of the Treaty of Waitangi. The Conservation Act 1987 goes further, section 4 requiring that Act to be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

9.23 Nonetheless, the Royal Commission on Social Policy has concluded 119 that "... in New Zealand today there remains a lack of consensus as to the authority [the Treaty] commands or the importance which should attach to it." The Royal Commission itself saw the Treaty as a document of fundamental importance both to the history of New Zealand and to the future development of our country and all its people.

9.24 Section 17 of this paper develops in detail the history of Executive policies and actions in respect of Maori fishery claims.

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118 Ibid, 655-6.
10.1 Maori land rights were recognised arguably by the common law but in any event accepted by statute. But the question arises of what was meant by "land". After some uncertainty and hesitation the Executive took, and steadfastly maintained, the view that land for that purpose stopped at high-water mark. Maori ownership of and rights in respect of the foreshore were denied. In Waipapakura the Courts upheld the Crown's argument that the plaintiff (a Maori woman fishing in tidal waters) had no individual or communal right to do so. The Crown further asserted that the Maori had no claim to the ownership of lakebeds, but it did not succeed in the Courts on this issue.

10.2 The concept of the foreshore, and sea, lake and river beds, as part of the public domain is a respectable one and there is much to be said in favour of it. Freedom of access to the sea for fishing as well as for all manner of other recreational purposes was and continues to be a highly valued "taonga" of New Zealanders. Any government that was seen to be taking it away would have been in trouble with its electors. The notion of fishing rights as private property was objectionable to a wide public opinion. Prevailing attitudes are epitomised in the succinct words of section 5 of the Fisheries Conservation Act Amendment Act 1902: "it shall not be lawful for any person to sell or let the right to fish in any waters".

10.3 What can be said, however, is that governments were dismissive of the Maori viewpoint and did little to accommodate it in overall laws and policies.

10.4 Under Maori custom, tidal and sea fisheries were not usually regarded as common to all, but rather the jealously guarded property of a hapu. See para 6.8. But in official and orthodox legal eyes the foreshore below high tide mark and a fortiori offshore reefs and shoals was Crown land in a special sense. The Harbours Act 1878 and its successors embodied that concept.

10.5 The Crown's argument in the Kauwaeranga case sums up its attitude accurately. By the law of England the foreshore belongs to the Crown and can only be held by a subject by grant from the Crown either actual or presumed. The Maori cannot own the foreshore according to their customs and usages, as such ownership would be in derogation of the prerogative of the Crown. This was

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120 See now s 73, Fisheries Act 1983.
essentially the view that prevailed in subsequent decisions. It requires analysis.

10.6 Two distinct issues have to be disentangled - the ownership of estuaries, foreshores and seabed on the one hand, and the freedom of the public to fish on the other.

Ownership of the Foreshore

10.7 The New Zealand courts have mostly treated the Crown's rights in respect of the foreshore with great deference and virtually as a necessary attribute of sovereignty. Among politicians, the Crown's legal advisers and the judges alike the proposition "the Crown owns the foreshore" became unquestioned.

10.8 The development and ultimate triumph of this view is traced in section 15. In the absolute form in which it prevailed in New Zealand, judicial authority does not support it. Thus in 8 Halsbury (4 ed) 1418 it is said that

"by prerogative right the Crown is prima facie the owner of all land covered by the narrow seas adjoining the coast, and also of the foreshore. There is a presumption of ownership in favour of the Crown. This presumption arises from the fundamental principle that all the land in the realm belonged originally to the sovereign."

[emphasis added]

10.9 The paragraph adds that the presumption is now of less weight than formerly.

10.10 That is the current view. It is consistent with the earlier cases. Thus in Le Strange v Rowe Erle C J said that "in a great number of cases the Crown has parted with the foreshore ... I take it that in the great majority of cases the right to the foreshore between high and low water is in the Lord of the Manor." As the Maori Appellate Court asserted in the Ngakororo Mudflats case, it is a matter of facts and evidence. Statute apart, there is no difference between the Crown's title over the foreshore as ultimate proprietor and its ultimate title over the dry land. It can make grants of one as much as of the other. In the earlier days of European settlement, a number of grants of land below high tide were in fact made to private citizens. So the fact that the Crown holds the

122 (1866) 4 F & F 1048.
123 (1941) Auckland Appellate Court Minute Book 12, 137.
124 See the return published in (1868) AJHR C-3, a list which is probably itself incomplete.
paramount title to the foreshore is not even prima facie incompatible with the legal recognition of indigenous property rights. Every word that has been said since 1839 about the Crown's title being subject to rightful and necessary occupation and use by the indigenous inhabitants can apply equally to the foreshore.

10.11 There is some recognition of the logic of this in North J's judgment in Re The Ninety Mile Beach (see paras 2.21, 15.111). He was not prepared to accept the Solicitor-General's "attractively simple" contention that the Crown's right to the foreshore was such that the Maori Land Court never had jurisdiction to investigate title to land below high water mark. The same view was expressed by T A Gresson J. But in terms of the judgment as a whole this jurisdiction could only flow from legislation, and legislation in the form of the Harbours Act 1878 had put an end to it.

10.12 That the Crown owns the foreshore by virtue of paramount title (unless it has granted it to others) is not in doubt. What is in question is the nature of that title and whether there may be a legal burden on it. The New Zealand approach typifies the tendency that the Privy Council deprecated in Amodu Tijani v Secretary, Southern Nigeria125 to apply technical concepts and rules of English law to an irrelevant situation.

Fishing Rights

10.13 Paradoxically, it is in relation to fishing rights as distinct from ownership of the soil that the received view of the common law is less favourable to Maori claims.

10.14 With the major exception of the fisheries legislation, the public right to fish in all waters below high tide mark was well established as a fundamental policy of the law of New Zealand up to 1986. A private right of fishery, effective to exclude the public right, could, it is said, only be created by an act of the Crown.126 At least since Magna Charta it could not be the subject of a Crown grant because of chapter 16 of that statute,127 with the result that private fisheries can now be created only by legislation. Any Crown grant of foreshore land is necessarily subject to public rights of fishery and of

125 [1921] 2 AC 399.
126 18 Halsbury 4th ed, paras 601-615.
127 "No banks shall be defended from henceforth but such as were in defence in the time of King Henry ... by the same places and the same bounds as they were wont to be in his time."
navigation. It can exist only by prescription or (in England) by a presumed grant prior to Magna Charta, one instance being the fishery that was the subject matter of Goodman & Blake v Borough of Saltash: see para 16.20.

10.15 The concept of a presumed grant, however, cannot apply outside Britain because in the nature of things there could have been no such grant. A leading case is the judgment of the Privy Council in Attorney-General for British Columbia v Attorney-General for Canada.128 The issue of indigenous property or fishing rights did not arise in this case, and the judgment cannot be regarded as decisive on that question. But as a general statement it is unequivocal.

10.16 The question was whether the British Columbia legislature (as distinct from the Canadian Parliament) had power to regulate the rights of fishery in tidal and non-tidal waters of the Fraser and other rivers. The Privy Council held that the province did not. In doing so it discussed the nature of fishing rights and the circumstances in which private fisheries over tidal waters could exist.

Their Lordships affirmed the proposition that -

"the subjects of the Crown are entitled as of right to fish in the high seas and tidal waters alike. The legal character of that right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial and in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean." (p 169)

To this right there were, however, exceptions exemplified by English decisions where separate and exclusive rights of fishing in tidal waters had been recognised. In all such cases proof of the existence of the right had of necessity gone further back than the date of Magna Charta. (This is too strong - the English cases are based on a presumed grant.) "... No such case could exist in any part of British Columbia, inasmuch as no rights there existing could possibly date from before Magna Charta." (p 171)

"Since the decision of the House of Lords in Malcolmson v O'Dea, it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters,  

and that no public right of fishing in such waters, then existing, can be taken away without competent legislation. This is now part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia." (p 170)

10.17 The objection may be made that the phrase "then existing" makes nonsense of the conclusion. To suppose that in 1297 or thereabouts there was any public right of fishery in British Columbia (or New Zealand) is as untenable as the notion, which the decision dismisses, of a Crown grant before that date. But the substance of the decision has not been doubted.

10.18 These lines of reasoning, however, overlook the argument that in acquiring new territory the Crown must take indigenous property rights as it finds them. The use of an obscurely worded provision of Magna Charta (which the Imperial Laws Application Act 1988 does not list as part of the law of New Zealand and which was repealed in Britain: Statute Law Reform Act 1969) to deprive the Maori of valued and supposedly guaranteed rights may be thought to infringe a more fundamental public policy than the unrestricted right of the public to fish. That right has in any event been restricted and regulated directly and indirectly for more than a century by a series of statutes. Such an argument seems consistent with the Court of Appeal's approach in Re The Ninety Mile Beach and with Te Weehi.

Regional Fisheries Officer v Williams

10.19 The decision of O'Regan J in Regional Fisheries Officer v Williams in 1978 shows a new and more liberal judicial philosophy towards foreshore fishing rights. Although very much a judgment on the special facts and legislation, it can be seen as a harbinger of cases like Te Weehi. Williams too arose from the prosecution of a Maori for breaching the Fisheries Act - in this instance taking whitebait out of season at the mouth of the Hokio stream, near Levin. Special statutory provisions, going back to the Horowhenua Block Act 1896, governed Maori fishing rights in this stream, and the decision turned on the interpretation and application of these provisions and laid down no general principles. But the Judge emphasised that the legislation (in particular section 18(5) of the Reserves and Other Lands Disposal Act 1956) was expressed to preserve existing rights and not to grant new ones. It preserved to the Maori owners of certain parts of the

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Horowhenua Block "free and unrestricted use of their fishing rights over the Hokio stream". This right, he held, extended over the foreshore at the stream's mouth and overrode the more general provisions of the Harbours Act vesting foreshores in the Crown.

"... [Counsel] submitted that the appellant, fishing as he was on the foreshore, was on Crown land to which his fishing rights do not extend. I do not accept that submission. The rights of piscary which he and the other members of the Muaupoko who own Horowhenua XI block are ... unique rights. They are also ... old rights. .... They might well have existed prior to the coming of the Pakeha. They were asserted in necessarily general terms throughout the years over which the settlement was made and in the end they were given statutory recognition. That statute [sic] ... declared the bed of the Hokio stream 'to be and to have always been owned [emphasis in original] by the Maori owners'. The declaration ... is statutory recognition that such ownership preceded the advent of the Pakeha and the introduction of his artifices for the making of laws and for creating and recording property rights .... I think therefore [emphasis added] that the right of the Crown to the foreshore at the outlet of the Hokio stream is subject to the rights of piscary of the Maori owners in that part of the stream."

The Effect of Recent Legislation

10.20 The enactment of the State Owned Enterprises Act 1986 opens the way to the Crown's transfer of such part of the foreshore as it still owns to the new enterprises. That, however, would face the hurdle of section 9 as interpreted by the Court of Appeal in the Maori Council case, which precludes the Crown from acting in a manner inconsistent with the principles of the Treaty of Waitangi. The present policy is that foreshores and the seabed beyond them are to remain Crown property. We are informed that commercial port areas (now mostly defined) are to be administered by the Ministry of Transport and other parts of harbours and foreshores are the joint responsibility of that department and the Department of Conservation. How far the rules for the administration of the Conservation Act, which inter alia is required to give effect to the principles of the Treaty, now govern these areas is unclear.
RIVER AND LAKE FISHERIES

11.1 Fishing rights in New Zealand non-tidal rivers and lakes have usually been taken to flow from the ownership of the underlying soil. There are conflicting statements, but in Re The Bed of the Wanganui River the Court of Appeal did not question a finding of the Maori Appellate Court that Maori fishing rights in the river were an incident of title to the bed, and could not be separated from that title. In other words, no title to the bed, no fishing rights.

11.2 A similar approach seems implicit in a statement by Cooper J in Tua Hotene v Morrinsville Town Board.131

"The plaintiffs, in conjunction with other Native proprietors of Maungatapu D and Te-au-o-Waikato, have had fishing-rights in the Piako River and such other rights as the river afforded, the same being a non-navigable river at the place where it flows through the lands of the plaintiffs. It is, in my opinion, clear that the bed of the river where it flows through the lands owned by the plaintiffs in common with the other Native proprietors was vested ad medium filum in the Natives who owned the land on each side of the river. Therefore the Proclamation purports to take from these Native owners the bed of the river and to destroy their fishing-rights."

(The proclamation had said nothing about fishing rights; this was taken to be a consequence of vesting the bed.)

11.3 The concept of common law aboriginal title might, however, involve the recognition of a fishery right in relation to lakes and rivers, as well as over the foreshore, separate from the ownership of the bed. Though based on the savings provision of section 88(2) of the Fisheries Act, the Te Weehi decision provides some support for that notion. The point may well still be open.

11.4 Nonetheless, the accepted view of the common law operated in a way more favourable to Maori claims to lake and river than to littoral fisheries. There was no presumption of Crown ownership of lakes or river beds.

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131 [1917] NZLR 936, 945.
Rivers

11.5 At common law the owner of land along a river bank presumptively owns the bed of the river and therefore fishery rights over it to the middle line of the river. However, the bed of navigable rivers is vested in the Crown by statute. Section 14 of the Coal Mines Amendment Act 1903 declared that:

"Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown."

11.6 The provision was a sequel to the decision in Mueller v The Taupiri Coal Mines Ltd. This held that grants of land along the Waikato River did not carry title to the bed to the middle line, because circumstances extrinsic to the grant rebutted this presumption—namely the Crown's obvious wish to retain the use of the river as a public highway.

11.7 The Crown was asserting through legislation an exclusive title to river beds of navigable rivers analogous with its title over the foreshore and the title it unsuccessfully claimed over lakebeds, implicitly to the exclusion of any Maori customary rights.

11.8 What is a navigable river? The Coal Mines Act 1979 defines it in section 261 (repeating earlier definitions) as:

"a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts or rafts."

11.9 This seems a very wide definition, and it might be wondered if changes in technology such as the jet boat can affect the scope of "navigable rivers". In The King v Morison the Crown accepted that the definition only applied to those parts of a river which are in fact navigable and not to its whole length, but the Court itself came to no firm decision on this. This leaves open the possibility that the Act applies to stretches of river along which boats cannot in fact pass.

11.10 The provision received a very restricted interpretation from Savage J in Tait-Jamieson v I C Smith

134 (1902) 20 NZLR 89, (see the comment of counsel in The King v Morison [1950] NZLR 247 at 250).
Preferring the view of Adams J among inconsistent dicta in Attorney-General ex rel Hutt River Board v Leighton,137 he held that section 261 did not affect the presumption that a Crown grant of land bordering a river conveyed the bed to the middle line. In other words the grant had to expressly exclude the riverbed if section 261 was to apply. Morison was not cited. If Tait-Jamieson is correct there would be little to which the section could apply, and its purpose becomes difficult to understand. And it would mean that the beds of navigable rivers have mostly passed out of Crown hands, so that the Crown would be powerless to return them to Maori ownership. On the other hand it would advantage Maori owning freehold land on the banks. One cannot assume that Tait-Jamieson is by any means the last word. In any event, since the great majority of streams in New Zealand are by any test non-navigable, fishing rights in respect of them belonged to Maori riparian owners, whether by Maori custom or under the freehold titles issued by the Native Land Court.

Lakes

11.11 The law concerning the ownership of lake beds is not settled beyond all doubt. Where a person's land completely surrounds a lake, it is clear that ownership of the lake bed is incorporated in it. With other lakes the view accepted in New Zealand is that, as is certainly the case in England, each riparian proprietor owns (and thus has exclusive fishing rights over) a corresponding section of the lake.

11.12 While this is reasonably satisfactory for small lakes, its application to the largest lakes could be regarded in the words of the English Laws Act 1908138 as "not applicable to the circumstances" of New Zealand. Some modern support for this is to be found in Southern Centre of Theosophy Incorporated v The State of South Australia139 where the court suggested that this ad medium presumption, while applicable to regions with a long history of European settlement, did not necessarily apply to Australian states where the Crown was "the ultimate proprietor of waste lands". See para 16.29. This is in accord with comments made in Mueller that the Crown is "trustee" of "waste lands" in New Zealand. The view, however, would have seriously adverse consequences to Maori

136 [1984] 2 NZLR 513.
137 [1955] NZLR 750.
138 Repealed, but effect continued by s 5 of the Imperial Laws Application Act 1988.
139 (1979) 21 SASR 399.
claims to mana over their lakes and the fisheries belonging to them. It was in fact strenuously but unsuccessfully contended for by the Crown in Tamihana Korokai v Solicitor-General,\textsuperscript{140} where the title to the bed of Lake Rotorua was at issue.

11.13 Generally, disputes between the Crown and Maori concerning lakes have been dealt with on an ad hoc basis. The orthodox view of ownership put the Maori in a strong negotiating position. The result was that while the agreements were not necessarily as fair as they might have been, the working out of a concept of partnership can be discerned.

11.14 The settlements fall into two classes, those where Maori ownership of the lake bed is retained, and those where it is not. Apart from this distinction, there are varying degrees of Maori control over the use of the resource, but in all cases traditional fishing rights are retained, albeit in some cases in modified form.

11.15 Lake Horowhenua is an example of the first class. There was conflict initially among several Maori parties claiming sole or beneficial ownership of the lake. A Royal Commission in 1896 resolved these claims in favour of the local Maori tribe (Muaupoko) who customarily used the lake for fishing purposes, with trustees holding the fee simple title for them. Public use of the lake was, however, desired, and after negotiation the lake was declared a public recreation reserve in the control of a Domain Board in 1905.\textsuperscript{141} The Maori owners retained some control over the lake through membership of this Board and a statutory preservation of their fishing rights. These rights were not, however, to interfere with the public use of the lake for recreation purposes.

11.16 This arrangement was modified in 1956 because of doubts which had arisen as to the precise legal ownership of the lake bed in the light of the 1905 Act. They were brought to a head by drainage operations which exposed land on the lake perimeter. The trustee arrangement was confirmed by legislation and those members of the Muaupoko tribe living near the lake were declared beneficial owners of the lake bed, with their fishing rights again preserved. A new Domain Board was appointed with the statutory requirement of half Maori-recommended appointees.\textsuperscript{142} This arrangement continues in force today. The fishing rights of the Muaupoko are supported,

\textsuperscript{140} (1912) 32 NZLR 321.
\textsuperscript{141} Horowhenua Lake Act 1905.
\textsuperscript{142} S 18, Reserves and Other Lands Disposal Act 1956.
at least as far as eel fisheries are concerned, by the Fisheries Regulations 1986.\textsuperscript{143}

11.17 The Lake Waikaremoana Act 1971 is another instance. A Maori Appellate Court judgment in 1944, upholding an earlier determination of the Maori Land Court, confirmed that the bed of this lake was in Maori ownership. The Crown chose not to challenge this decision and entered into lengthy negotiations with the owners. A Crown proposal to buy the lake was rejected. The bed was left in Maori ownership, but a 50 year lease over it was given to the Urewera National Park Board. The Maori lessors retain the right of access to the lake, but day to day control is with the Park Board. An annual rental is paid to 2 Maori trust boards, who administer this money for the benefit of the lake owners.

11.18 In the case of Lake Rotoaira near Lake Taupo, a very high degree of Maori control has been retained over traditional land and fishing rights. The Maori owners of the lake complained that the introduction of trout had all but destroyed the traditional koura fishery. The Crown here simply gave the owners the right to take any fish in the lake without the need for licences normally issued for trout fishing. This settlement was the subject of some controversy when it was proposed to charge outsiders for the right of access to the lake - in effect the sale of a fishery right contrary to what is now section 73 of the Fisheries Act 1983. This proposal was effected by Part I of the Maori Purposes Act 1959, but not before strong protests had been entered against such a precedent.\textsuperscript{144} It was widely viewed as an unfortunate if necessary exception to the general rule that no private fishing rights should exist in New Zealand.

11.19 Taupo and Rotorua moana illustrate the second type of settlement where the beds passed out of Maori ownership, but substantial fishing rights were provided for. The Crown's failed attempt to override Maori claims in the Court in the case of Rotorua has already been noted. Agreement was reached with the Arawa claimants to the lake bed before the issue could be finally determined in the Land Court (the proceedings of which were interrupted by the death of one of the judges hearing the case). This agreement, partially enacted in section 27 of the Native Land Amendment and Native Land Claims Adjustment Act 1922, declared the beds of some 14 lakes (including Rotorua) and the right to use their waters to be, "the property of the

\textsuperscript{143} SR 1986/223.
\textsuperscript{144} Marine Department File M1 1/7/132.
Crown, freed and discharged from the Native customary title, if any ...".

11.20 The Lake Taupo settlement\(^{145}\) makes identical provision for Taupo, in that Maori retain the right to fish for indigenous species in the lake, and are to be given licences on favourable terms to fish for imported fish. This last provision was made partly because of the damage that imported trout had done to the populations of indigenous fish species - as happened with Rotoaira.

11.21 Both settlements provided for the creation of a local Maori Trust Board, which receives annual payments from the Crown and administers these for the benefit of Maori people living around the lakes. In the Taupo case the Crown hoped to have the cost of these payments to the trust board offset by the fees paid by the general public for licences to fish for trout in the lakes\(^{146}\) - in effect a payment of part of a "resource rental" to the local Maori. With both lakes the Governor-General may reserve portions of either lake bed for Maori use.

11.22 As with river fisheries, rights claimed by Maori in lakes are subject to statutory provisions which have the potential to limit them considerably. For example almost identical provisions in the Coal Mines Act 1979\(^{147}\) and the Petroleum Act 1937\(^{148}\) authorise the Minister of Energy (or the "appropriate Minister") in each case to grant rights of exploitation over:

"All land that is the bed of a lake if it is held by or on behalf of the Crown or if, in the opinion of the Minister, it is not clearly established who is the owner of the land." [emphasis added]

11.23 What these provisions seem to say is this. A Minister can give someone authority to drill or mine on land that does not belong to the Crown as long as the Minister is doubtful who the land does belong to. Although such a grant would presumably be subject to judicial review, the ordinary law would require the Crown to go initially to the Courts to determine such questions of ownership.

\(^{145}\) Native Land Amendment and Native Land Claims Adjustment Act 1926, s 14.
\(^{146}\) Native Land Amendment and Native Land Claims Adjustment Act 1924, s 29(3).
\(^{147}\) S 21(1)(k).
\(^{148}\) S 29(1)(p).
THE IMPACT OF OTHER LEGISLATION

12.1 The status of Maori fishing rights whether under common law or as a result of legislation cannot be seen in isolation. There exists and has long existed a large amount of empowering, regulatory and planning legislation that affects both inland and marine fishing grounds and the ability to harvest kaimoana from them. Private law rights can be lawfully exercised to the detriment of fisheries.

12.2 This mass of statutes can be classified in a variety of ways. They may for example be divided into:

i. Those that authorise the taking of private land for public purposes.

12.3 The principal Act is the Public Works Act 1981, which authorises central and local authorities (the latter with the approval of the Governor-General) to purchase land compulsorily for public works. Local authorities include regional and local councils, hospital and harbour boards and "any other person or body, however designated, having authority, under any Act, to undertake the construction or execution of any public work". The power was restricted between 1981 and 1987 to "essential works", but this restriction has been removed by the Public Works Amendment Act (No 2) 1987.

12.4 Many different Acts empower local authorities and the Crown to carry out public works, and these Acts often adopt the compulsory acquisition powers and procedures in the Public Works Act. Such works may often affect fishing rights, for example swamp drainage, supplying electricity and natural gas, and harbour works.

ii. Those that authorise public bodies to carry out activities that might otherwise be unlawful as affecting private rights.

12.5 Along with the power to take land for public works is the power to carry out these works. Various Acts empower public authorities to carry out activities on public land or other land that might otherwise be unlawful as affecting private rights.

12.6 The Harbours Act 1950 contains many illustrations. Powers granted in the Act include constructing harbour works, laying pipes and building
railways and tunnels. Harbour Boards may also have powers under bylaws to control many aspects of the use of harbours.

12.7 Other significant examples are works connected with land drainage under the Land Drainage Act 1908, and water control under the River Boards Act 1908 and the Soil Conservation and Rivers Control Act 1941. These last 2 Acts contain very wide powers including the power to alter the course of rivers and divert water from them; to construct and maintain watercourses and to take water from watercourses. Each Act empowers the relevant authority to enter onto private land to carry out its functions.

iii. Those that license private persons to use public land or property.

12.8 Many statutes license private persons and public authorities to carry out activities that they would not, under the common law, be entitled to perform.

12.9 The Harbours Act contains important licensing powers which include granting licences to take stone and sand from foreshores, harbours, lakes and rivers and the seabed; and licences to use the foreshore for various purposes. Licencees in the latter case have the power to carry out reclamations despite the later provisions of the Act regarding reclamations.

12.10 Licensing regimes are common in minerals statutes. The Petroleum Act 1937 is an example. The Act vests petroleum in its natural state in the Crown, then provides a licensing procedure for individuals who wish to prospect and mine for it.

iv. Those that in the public interest restrict the use of property or rights by land owners or the public either absolutely or conditionally.

12.11 A number of statutes control and restrict the use that land owners can make of their land, in order to conserve resources or to prevent others being adversely affected.

12.12 The best known example is the Town and Country Planning Act 1977. It provides for the creation of 3 types of scheme, Regional, District and Maritime Planning Schemes, which are binding on public authorities, land owners and the public generally. District and maritime schemes set out certain activities which are permitted as of right; any other activity requires a consent from the Council or Maritime Planning Authority.
12.13 Maritime schemes directly affect fishing by controlling the activities that may be carried out within areas of water. District schemes are land use plans. They do not in the usual case deal specifically with issues of water quality and water rights—these being the province of the Water and Soil Conservation Act—but they determine the siting of industries and other land uses which may have significant effects on water quality.

12.14 The Water and Soil Conservation Act 1967 controls the use a landowner may make of his or her land, by vesting all rights to natural water (with limited exceptions) in the Crown. A person wishing to use water must apply to the local Catchment Board for a water right. (The Geothermal Energy Act 1953 institutes a similar regime, under which a licence to use geothermal energy must be obtained from the Minister of Works.) The issue of water rights is governed by the objects of the Act generally but also by any classification of water and any water conservation orders made under the Act.

12.15 A different sort of statute restricts public access to Crown land, in the interests of conserving or enhancing some natural feature of the land. Under the Conservation Act 1987 and the Reserves Act 1977 public use of areas of Crown land is restricted in accordance with the objectives of the conservation area or reserve. The Marine Reserves Act 1971 is another example.

12.16 This body of statute law has 3 notable characteristics.

12.17 First, each Act tends to deal with its own subject in isolation, and may overlap or even be inconsistent with the terms or the policy of other statutes. The relationship between statutes that deal with the same subject matter is often not spelt out. One example is the relationship between reserves under the Reserves Act and conservation areas under the Conservation Act on the one hand, and zoning and other planning requirements under the Town and Country Planning Act on the other. Do pipelines authorised under the Petroleum Act need consents under the Water and Soil Conservation Act? It is now clear that mining operations authorised under the Mining Act 1971 do not require planning consent, but this was the subject of long debate.

12.18 There have been some attempts to achieve consistency. Thus section 4 of the Town and Country Planning Act requires local, regional and maritime planning authorities to have regard to the principles and objectives of the Water and Soil Conservation Act 1967 and the Soil Conservation and Rivers Control Act 1941 in preparing and
administering their schemes. There is also provision for joint hearings of planning and water right applications where a project requires both consents.

12.19 Generally, however, until fairly recently there has been little consistent policy, other than "development". This meant settling immigrants or their descendants on the land and maximising the production of exportable goods. In the case of mining statutes it meant providing mechanisms for exploitation of the particular resource.

12.20 In recent years the policy of conservation and environment protection has been incorporated to a greater or lesser degree in various statutes, such as the Reserves Act, Town and Country Planning Act and Marine Reserves Act. It is expressed in the long title of the Water and Soil Conservation Act. In this Act, as in the Town and Country Planning Act, the policy of conservation is balanced against the policy of making productive use of the resource, policies which may sometimes conflict. Under the Conservation Act 1987, however, the administration of a number of other statutes, such as the Reserves Act 1977 and the National Parks Act 1980 becomes subject to the principles of conservation.

12.21 One of the implicit aims of the resource management law review that commenced in 1988 is to propose consistent policies for all resource management legislation.

12.22 Second, there is an absence of any uniform or principled approach to rights and grounds of objection. Contrast, for instance, 2 of the most important statutes, the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967. Under the former, standing to object to land use planning applications and planning schemes is restricted to persons either "affected" or "representing some relevant aspect of the public interest". Where maritime planning is concerned, however, the right to object is greatly extended, to "any body or person". Under the latter Act the grounds of objection are fairly wide. A person may object on the grounds that the grant of the application would prejudice his or her interests or the interests of the public generally. This provision has recently been applied by Chilwell J in Huakina Development Trust v Waikato Valley Authority to a Maori group's interests in the spiritual, cultural and traditional relationships with natural water.

12.23 Under the Petroleum Act 1937, there is no right of objection to the grant of a prospecting or mining licence,

[1987] 2 NZLR 188.
or a pipeline authorisation. Similarly the Harbours Act 1950 provides no right to object to the grant of licences, for example, for the use of foreshores. The Iron and Steel Industry Act 1959 gives no right of objection to the exercise of the Minister's power to authorise any person to prospect and mine ironsands. The Soil Conservation and Rivers Control Act 1941 gives a right of objection to works to certain public bodies only.

12.24 Despite these inconsistencies a trend can be discerned towards decision by independent authority (rather than, for example a Minister, as used to be common) and towards greater and more detailed rights of objection. For example the Public Works Act now gives the final power of decision in compulsory purchase cases to the Planning Tribunal, rather than the Minister.

12.25 Third, until very recently, the legislation failed to give any protection to Maori interests except in terms of ownership of land or insofar as they could be subsumed under the head of "public interest". One quite recent instance where the law was held to exclude any requirement to consider Maori interests was Dannevirke Borough Council v Governor-General. The Council wished to acquire Maori land by compulsion for a rubbish tip. The Governor-General, whose consent was necessary, refused it on the ground that the compulsory acquisition of Maori land was contrary to government policy. The High Court (Davison C J) held that the Governor-General had no power to exercise his discretion on that basis and that the refusal was therefore invalid. The judgment is notable in that no mention whatever was made of the Treaty of Waitangi and its possible implications for construing a statute.

12.26 The scheme of planning legislation tended to follow overseas derived concepts and values. This is seen clearly in the effect of the Town and Country Planning Act 1953 on marae housing. Its 1977 successor does acknowledge Maori interests in several respects. In preparing and administering both district and maritime schemes the local or maritime planning authority is subject to sections 3 and 4, which set out matters of national importance, and the objectives of planning respectively. Matters of national importance include "the relationship of the Maori people and their culture and traditions with their ancestral land." Also of relevance in this context is the preservation of the coastal environment and the protection of the physical environment generally. These are among matters which are to be "recognised and provided for" in all plans.

12.27 The effectiveness of these provisions to protect Maori interests generally has been limited in 2 ways. First they are only some of a number of matters which must be provided for; they may conflict, for example, with the requirement in section 4 to promote the economic welfare of the people of an area. Maori interests have not been accorded any paramountcy. Second, until recently "ancestral land" received a narrow interpretation which excluded land that had passed out of Maori ownership, even where that land was in Crown ownership. However, this has now been rejected.152

12.28 Under the Town and Country Planning Act the local or maritime authority is also required to make provision for such of the matters set out in schedules to the Act as it considers necessary. This is somewhat circular, and appears to leave authorities with a wide discretion. The schedules list potentially conflicting matters to be "dealt with". In the case of district schemes these include a specific reference to Maori interests in the following: "Provision for marae and ancillary uses, urupa reserves, pa, and other traditional and cultural Maori uses".

12.29 Schedule 3 which concerns maritime schemes contains a provision, recently inserted, to take account of Maori traditional and cultural uses, including fishing grounds, but again this is only one of several matters.

12.30 Nonetheless there is a growing judicial willingness to recognise Maori values in planning. Abbott v Lower Hutt City Council153 exemplifies this. Land designated for a cemetery drained into a river used by Maori for eeling, whitebaiting and shellfish. The Tribunal accepted that sub-surface discharge would render the stream unusable for these purposes and would offend Maori cultural and spiritual values. Under the head of "social and environmental effects" these effects were taken into account and the designation revoked.

12.31 The Public Works Act contains a procedure for notifying the owners of land and those with an interest in land, and those persons have a right to object before the Planning Tribunal to the acquisition. Special provision is made for identifying owners of Maori land, but there is no further recognition or protection of Maori interests. A person who wished to object on the grounds that the acquisition would affect a fishing right would be unable to

152 Royal Forest and Bird Protection Society v W A Habgood Ltd (1987) 12 NZPA 76.
do so unless the right was attached to an interest in land. Nor does the Water and Soil Conservation Act 1967 provide any explicit protection for Maori values.

12.32 Under the Petroleum Act a person holding a mining or prospecting licence is authorised to enter onto the land that is the subject of the licence. In the case of certain lands such as conservation areas, national parks, the foreshore (outside port areas), and the beds of navigable rivers, the consent of the Minister of Conservation must be obtained before the licensee can enter the land. The Minister may refuse consent with or without conditions. As the Conservation Act must be administered in accordance with the principles of the Treaty, this requirement for consent could now protect Maori interests. There are similar provisions in the Coal Mines Act 1979 and the Mining Act 1971.

12.33 Some Acts contain a protection for Maori interests that is expressly secondary, for example the Swamp Drainage Act 1915. Section 7 provides that land used exclusively for Maori settlement shall not be compulsorily acquired "unless this is necessary for the successful conduct of the drainage operations."

12.34 Even where Maori interests are mentioned they are not made paramount, but are among matters to which regard must be had.

12.35 A new and important exception is the Conservation Act 1987, which upholds the principles of the Treaty as paramount public policy. Section 4 has been noted previously: see para 9.22. It requires the Act to be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi. Section 6 obliges the Department of Conservation to administer a number of other Acts in the first Schedule subject to the Conservation Act. There is a nice question concerning the Harbours Act 1950, which is not enumerated in the first Schedule, but is amended by the second Schedule so as to divide the administration between the Ministry of Transport (for port areas) and the Department of Conservation for others.

12.36 A proposal to add a new paragraph to the long title of the Environment Act 1987, while not referring to the Treaty as such, would enhance the regard to be paid to Maori values under that Act. The paragraph reads:

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154 Law Reform (Miscellaneous Provision) Bill 1989 cl 72.
"(d) Kia poua kia uu nga kaupapa Maori e hangai ana ki nga taonga a Ranginui raua ko Papatuanuku (establish and confirm a philosophy for the recognition of the treasures of the sky father and the earth mother)"

12.37 Past failure to acknowledge Maori interests in legislation has been mirrored in the payment of compensation for land compulsorily acquired, which has been assessed in European terms. Payment is normally confined to direct property damage and not indirect injury. Under the Public Works Act, which provides the method of assessment for compulsory acquisition in most cases, compensation is only payable to land owners.

12.38 Much of this legislation is relevant to Maori fisheries. Historically, the effect on eel and other inland fisheries of legislation providing for land drainage and the prevention of flooding was profound. The story of Lake Wairarapa is mentioned elsewhere in this paper: see paras 17.87-17.90. Another situation that must have been common was the subject of the decision in Hone Te Anga v Kawa Drainage Board: see para 6.18.

12.39 The pollution of lakes, rivers, harbours and coastal waters as a result of the exercise of statutory powers has likewise had serious effects on fish resources. It is unnecessary to go further than the reports of the Waitangi Tribunal in the Kaituna, Manukau Harbour and Orakei cases for detailed examples.

12.40 The vast majority of statutes that do or may adversely affect Maori fisheries in a significant way contain no express provision either to safeguard Maori interests or to permit objections based on them. There could well be others in addition to the following -

Coal Mines Act 1979
Electric Power Boards Act 1925
Electricity Act 1968
Geothermal Energy Act 1953
Harbours Act 1950
Iron and Steel Industry Act 1959
Land Drainage Act 1908
Local Government Act 1974
Marine Farming Act 1971
Marine Pollution Act 1974
Mining Act 1971
New Zealand Ports Authority Act 1968
Petroleum Act 1937
River Boards Act 1908
Soil Conservation and Rivers Control Act 1941
Submarine Cables and Pipelines Protection Act 1966
12.41 There is also the question of the exercise of private (common law) rights. The ordinary law of nuisance has had little application to the sea, which in terms of orthodox law was not subject to private ownership or rights analogous to ownership. Fishing resources along the coast and over offshore reefs and shoals could be and were depleted, impaired and even destroyed. If any sort of legal right in traditional fisheries had been acknowledged, the freedom to affect them adversely without specific legislative sanction might have been circumscribed.
13 SPECIAL PRIVILEGES AND EQUALITY

13.1 Any balanced view of Maori fishing rights must take account of an objection that is often raised. Why should any group enjoy special rules or privileges that are withheld from others? The goal should surely be equality of every person before the law. Furthermore, to regard an agreement made almost 150 years ago in utterly different circumstances as binding today is to make the dead hand of the past rule the present.

13.2 These views are widely and sincerely held. They are understandable and attractive. Equality before the law is an aspect of the rule of law and is indeed a fundamental tenet of a just society. It is reflected in Article 3 of the Treaty of Waitangi itself. In modern times it has been powerfully reinforced by international covenants. Racial discrimination is proscribed by the UN Convention on the Elimination of All Forms of Racial Discrimination. New Zealand has acceded to this Convention, and the Race Relations Act 1971 ensures that our laws gives effect to the obligations of that Convention.

13.3 To dismiss or denigrate the principle of equality as belonging to English or Western value systems is unconvincing. Likewise, rigid adherence to irrelevant or outmoded rules is unlikely to promote real justice or to produce sensible and practical answers.

13.4 However, a phrase such as equality before the law must itself be properly understood. It means and can only mean that those in like circumstances should be treated alike. Our law abounds in instances of powers, rights and obligations that exist for some but not all. Many appointed and elective bodies have powers that the ordinary citizen does not. The people of one borough or county may have rights and obligations under local bylaws and ordinances that the people of other boroughs and counties do not. Universities have always possessed considerable legal autonomy, in respect both of persons (faculty, graduates and students) and places (on campus). Many professions and organisations have powers of self-government, with tribunals to regulate their affairs and impose sanctions on members who act in breach of rules and standards. Landowners have an exclusive right to use, manage and exploit their land. Thus they may exclude the public from riverbanks and beaches above high tide (and in a few cases down to low tide).

13.5 Moreover, the rule of law in the full sense has to do with the content of the law as well as its equal application. A law that applies equally to all may be
unfair to all or to some. The law does not exist in a vacuum. It arises out of the circumstances and reflects the experience, perspectives and values of those who make it. The common law was "the custom of the people of England". It was fashioned by the history and the environment of the people of England and in modern times the English people who settled the various overseas communities. (The law of even Scotland is different in many respects.) What does justice to one set of people in one sort of community in one place may be inadequate or oppressive in another.

13.6 We should be wary of too simplistic a concept of democracy. Respect for minority rights is arguably as much a pillar of a just society as the principle of majority rule.

13.7 So there is nothing strange or inconsistent in the idea that the law in New Zealand should take account of Maori institutions, values and customs. These should not be ordered in ways that may have been appropriate for those of British descent but that were (and to some extent may still be) alien to the Maori. To subject them to all the rules of English derived law, many of which are of the greatest technicality, is to deny rather than promote real equality.

13.8 Three responses of a more specific nature may be made.

13.9 First of all, the past often does govern the present, whether we like it or not. To deny this is to reject history. Old covenants and old statutes may be a source of rights and duties today that few would query. The Treaty of Waitangi is no more part of an irrelevant past than the Ten Commandments, the Hippocratic Oath or Magna Charta. In the Treaty of Waitangi the Crown made certain promises as a condition of acquiring and continuing to hold sovereignty over New Zealand. These promises are as valid on an enduring basis as the power of sovereignty.

13.10 Second, the value and importance of the Treaty is not limited to the Maori people. The Treaty, it has been pointed out, marks the beginning of constitutional government in New Zealand. It was the means by which British authority and government came to New Zealand peaceably and with the consent of those this country belonged to. By the Treaty the Maori gave to the British

Crown the right to make laws and govern in return for the promise to recognise and protect those things that the Maori valued. And by implication the Treaty acknowledged the right of settlers to come to New Zealand, live here and bring up their children as New Zealanders. Both these rights and this promise are of their nature ongoing. The power to make laws and to govern, and for the Pakeha to have their home in this land, is a lasting one. It is accepted today by the overwhelming majority of Maori people. Because of the Treaty the Pakeha lives here not as a conqueror or an interloper but as a New Zealander.

13.11 The same point can be put another way. No-one wants to inherit a stolen country. No-one doubts that New Zealand formerly belonged to the Maori. The Pakeha New Zealander rightly denies that he is a thief or a receiver of this country. But this can only be so if his forebears' possession was acquired by consent. The evidence of that consent for New Zealand as a whole is the Treaty of Waitangi.

13.12 Third, it is not "the Maori" who are claiming rights in relation to fisheries, any more than in Western terms it is "the people" who own land. Rather, it is the particular iwi or hapu whose historic possession and mana found the claim to legal recognition. They regarded their fisheries as property - as much property as land itself and of comparable economic importance. To look at these claims simply in racial terms is a misapprehension. The case for the recognition of Maori fisheries rests in large degree on respect for property rights. Few people in our society see the ordinary rights of ownership and control as conferring improper privileges or as contrary to equality before the law.

13.13 Expressed more positively, the argument for the recognition of Maori fisheries is this. These fisheries were historically vested in the iwi and hapu of Aotearoa (and were a major economic resource). A condition of the consent of the chiefs to British sovereignty was that possession of these fisheries should be guaranteed "as long as it is their wish and desire to retain" them. Fishing rights are to be respected and protected not as a privilege for Maori, but because these rights belonged to the various communities which formed the people of Aotearoa before the European came to its shores and have never been sold or given away.

13.14 This seems consistent with equality before the law and the rejection of racial discrimination.
14.1 An examination of the history and law of Maori fisheries since 1840 leads to the conclusion that the law as generally understood in the past did not give full effect to the Crown's obligations assumed in the Treaty of Waitangi. Actions and policies of the Crown over several generations have likewise often failed to honour these obligations. This failure has been at two levels - to protect tribal fisheries as a property right and to preserve tribal mana over their fisheries in the sense of participation in their control and management. Indeed the very existence of the second obligation was not generally perceived until recently. The understandings and expectations of the Pakeha public have reflected and built upon the behaviour of governments.

14.2 However, the law itself, and perceptions of it, are not static. The courts have been prepared to revisit and rethink the approaches to these issues that previously prevailed. The Te Weehi decision, the judgments of Chilwell J in Huakina Development Trust and Greig J in Ngai Tahu Maori Trust Board, and above all the thrust and tenor of the Court of Appeal's judgments in the Maori Council case are examples. Recent government responses have been positive and constructive: the introduction of the Treaty of Waitangi (State Enterprises) Bill and the agreement to set up a Joint Working Group with the Maori Council to report on how Maori fisheries may be recognised were landmarks.

14.3 Acceptable reform must start not merely with existing law but with the existing state of affairs that in this case has developed over a century or more. Opinions about past wrongs do not answer the question what ought to be done now to achieve practical justice. As the Waitangi Tribunal has said, injustices are not to be rectified by creating new and different injustices. Over a very long period of time public authorities have acted and have made decisions and dispositions on the footing that tidal land and the sea bed were free of any qualifying Maori rights. Amateur and commercial fishermen have made use of fishing grounds for generations, and the law has encouraged them (special legislative restrictions apart) to regard these as open to all. There is no reason to query their good faith. As the Waitangi Tribunal said in the Motunui case -156

"The Treaty was also more than an affirmation of existing rights. It was not intended to merely
fossilise a status quo, but to provide a direction for future growth and development ... We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles.

We do not therefore consider that both the Maori and the Crown should be so bound that both sides must regard all Maori fishing grounds as inviolate."

14.4 Extracts from this part of the Tribunal's report were quoted with approval by Bisson J in the Maori Council case. And in the same case Casey J regarded as "a valuable insight" the Tribunal's concept of the Treaty as "the foundation of a developing social contract". 157

14.5 More than that, long-standing habits of thought are involved. Past arrangements and perspectives are so engrained among Pakeha that they have become part of the assumed order of things. Account must be taken of this if change is to be sound and lasting.

14.6 Nonetheless, there is wide agreement among those who have considered the matter that the law pertaining to Maori fisheries needs review. Recent legal developments have left it uncertain. Without Parliamentary intervention it can be clarified only by a possibly long process of litigation. Reconciliation between the promises of the Treaty of Waitangi and the legal order is necessary and inevitable. Perhaps of particular difficulty is the relationship between the sovereignty (kawanatanga) that the Maori agreed to yield to the Crown and the rights (tino rangatiratanga) the retention of which they were promised. This is already a real issue in the fisheries context. A similar problem of the relationship between the United States and Indian nations has been accommodated in that country (however imperfectly and contentiously), but its solution will be hard in a society like New Zealand with its strong emphasis on equality and uniformity and consequent strong belief in a unitary legal system.

14.7 How can a satisfactory solution best be brought about? Without some legal imperative underlying them, administrative policies, arrangements and undertakings are unlikely to be enough. What the Danks Committee on Official Information said in a different context is in point: 158

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"... we have concluded that in New Zealand circumstances injunctions to officials would not work without a firm commitment by government to back them. And we doubt whether any commitment that did not have the force of law would either be acceptable to the community as an earnest of government intentions or give officials a sufficient base towards taking further steps".

14.8 The decision in the Maori Council case was made possible only by the enactment of section 9 of the State Owned Enterprises Act. There are other difficulties in the way of relying altogether on the development of a body of law in this field by judicial decision. Not the least is the prospect of a prolonged period during which the law remains uncertain. So legislation will be needed, if only to ratify and give effect to agreements and decisions independently arrived at. Past disputes between the Crown and the tangata whenua over lake fisheries were often settled case by case through a compromise reached after negotiation and ratified by legislation.

14.9 New Zealand may have something to learn from events in the States of Oregon and Washington following a period of intense confrontation in the courts. During the nineteenth century many Indian tribes made treaties with the United States ceding large parts of their lands subject to the reservation of certain land and other property, including fishing rights. These treaties bound the States, but the Federal Courts acknowledged the States' power to restrict tribal fishing in the interests of conservation. Diminishing numbers of salmon in the Columbia River in the 1960s led to restrictive regulations. In Sohappy v Smith,159 the Oregon District Court held that tribes were entitled to a "fair share" of the harvestable salmon and put treaty fishing rights on an equality with the conservation of fish for other uses. Fishing could be regulated to the extent that it was reasonable and necessary for conservation of resources, did not (either in terms or in effect) discriminate against the Indians, and conformed to standards prescribed by the Court. Further litigation led the parties to see the need for co-operation and a tribal role in the management process. With the Court's prompting a 5-year Fisheries Management Plan was adopted in 1977. It proved defective in important respects, but following yet further litigation a more comprehensive plan is now being negotiated. This embraces production management as well as allocation, and provides for a much more adequate tribal participation in management.

In his 1986 Jurisprudential Lecture at the University of Washington,160 William C Canby reminded his audience that "negotiations are greatly affected by the legal armament that each side brings to the negotiating table". In New Zealand the legal armament that Canby spoke of has come into being with the Court of Appeal’s decision in the Maori Council case and its veto on the transfer of Crown land to the new corporations pending settlement, and the interim decision in the Ngai Tahu case. In the Maori Council case, the Court directed the Crown to prepare a scheme of safeguards giving assurance against the transfer of lands or waters that would prejudice claims, that were or might foreseeably be submitted to the Waitangi Tribunal. One can observe in this an interaction between Parliament, the Courts, the Tribunal and the Executive, with representatives of the Maori people participating in the search for a solution.

There is also in respect of sea and inland fisheries the extra dimension of other impacting practices and laws. The establishment, for instance, of a right to take shellfish from a harbour is of little worth if pollution of the harbour has destroyed the shellfish or made them a danger to health. The American courts have recognised this sort of reality161 and have recently pushed its implications further.162 A clearer foundation of legal right for Maori interests in fisheries might serve both as a base to build management schemes and structures and to develop policies and remedies where outside actions affect fishing grounds.

If change went beyond ad hoc treatments of specific problems, the application of existing legal concepts and doctrines might not be enough. Some fundamental and imaginative thinking may be required. Thus, while the concept of trusts may be relevant (and the Explanatory Note to the Maori Affairs Bill 1987 observes that the idea of the trust is congenial to Maori thinking), doctrines of equitable estates and interests have their own rigidities and artificialities. The implications of the partnership analogy that the Maori Council decision accepted may need to be explored. New approaches to ownership, and new kinds of property rights and varieties of legal personality could fall to be considered. The kind

161 United States v Winans (1905) 198 US 371.
of analysis set out in section 3 above may not be enough to accommodate what is required. These are fascinating questions, but they have a practical dimension also.

14.13 The old net must be cast aside - but what is the new net that will go fishing?
PART III
15.1 Section 8 summarised the view of the law governing Maori property claims (including fishing claims) that came to be accepted as settled in New Zealand during the present century, and the revisionist view based on a common law doctrine of aboriginal title that has re-emerged during the last 20 years or so. There is support for this second view in very recent cases here and overseas. It is, however, not yet established for New Zealand.

15.2 The purpose of this and the next section is to examine more fully these views, their development and the basis on which they rest.

Preliminary Issues Defined

15.3 At the beginning, it is essential to distinguish the numerous issues surrounding the legal status of the Treaty of Waitangi and of Maori property claims, of which fisheries claims were part. This has not always been done and confused thinking is the frequent result. At least 10 separate and distinct issues can be identified.

i The Treaty of Waitangi as an international instrument and the source of British sovereignty under international law.

ii The Treaty as evidence and exemplar of the position under customary international law.

iii The Treaty as an act of British government policy, and the effect of a formal annexation as an act of State.

iv The Treaty as a source of rights under the ordinary law.

v The legal classification of New Zealand as a settled or a ceded colony.

vi The initial law of New Zealand as a British colony.

vii The status of Maori customary law after British sovereignty.

viii The proprietary rights of the Maori as the indigenous inhabitants.

ix The Treaty as a declaration of the existing municipal (common) law as it applies to
overseas possessions acquired by the British Crown.

The Treaty as a source of public policy, affecting the construction and interpretation of legislation and executive acts and policies.

15.4 For example, more than one court decision has proceeded on the assumption that because the Treaty could not be a source of rights recognised by the ordinary law (an answer to iv) the Maori had no property rights without the intervention of legislation (an answer to viii and ix). The question whether the common law recognised Maori property rights (viii) was confused with the issue of whether that law superseded Maori custom (vii).

15.5 And New Zealand might be a ceded colony (v) and yet be subject to the application of the common law immediately upon coming under British sovereignty (vi). The tests are not the same. Comments in the various opinions and cases are usually obiter, often ambiguous and sometimes inconsistent. Perhaps the common sense resolution of the matter is that suggested by Roberts-Wray:

"The rule that settlers take English law with them is often referred to as a birthright of British subjects. But ... that does not adequately explain the rule or its difference from the law governing ceded or conquered territories. The truth is that there is no practical alternative. In the kind of territory where a Colony could be established by settlement, there was only indigenous law which was quite irrelevant to the needs of the settlers. The situation was very different in the places acquired by cession or conquest when the rules were laid down. ... This distinction has practical importance if it is permissible to look beyond the rules and extend them to other circumstances where the rationes are equally valid. Apparently it is. The idea behind Lord Mansfield's suggestion in Campbell v Hall that Jamaica, though acquired by conquest or cession, should be treated as a settlement because (as he thought) the Spaniards had disappeared when British colonists arrived, is to be welcomed ... In Yeap Cheah Neo v Ong Cheng Neo the Judicial Committee expressed the view that English law

applied to an uninhabited colony (Penang) acquired by cession... It is only one step further to extend the rule regarding settlement to a case of cession or conquest of a country which, being inhabited by people with laws unsuitable for the settlers, could have been colonised by settlement."

15.6 Given that English law applied to New Zealand from the date of its acquisition by Britain (although the operative date of 14 January 1840 established by statute is wrong historically), what was the legal status of Maori property and customs? This is of central importance to the issue of fishing rights, and the degree to which subsequent law has upheld or rejected these.

Misconceptions

15.7 No complete view of the common law concerning indigenous property rights is possible without going beyond the New Zealand cases. Curiously (given the propensity of New Zealand judges to range widely over common law jurisdictions) a number of important persuasive authorities, even Privy Council dicta, have been little regarded after the early colonial period. One reason may be an assumption that the Treaty of Waitangi was the only possible source of Maori rights apart from legislation. Another may be the popular view that the Treaty of Waitangi was a unique act of enlightenment and generosity by the British government.

15.8 Issues debated in New Zealand in terms of the Treaty of Waitangi or of aboriginal title are not novel. Arguments about the existence and nature of "native title", what land was subject to it, and the policy and meaning of pre-emption in newly acquired territories were rehearsed in British North America long before 1840. The concept of aboriginal title has an even longer pedigree. Similar situations usually produced similar answers. Many early New Zealand judges and officials were well aware of this. It was only in later years that it was ignored or forgotten.

15.9 The eighteenth and nineteenth centuries saw many agreements between Britain and other European powers and local chiefs and rulers in Africa, Asia and the Pacific. C H Alexandrowicz mentions numerous treaties with African rulers. For instance:164

"in the treaty between Great Britain and Bey Sherbro, Ruler of Kafir Bulloms (1827), the British Governor of Sierra Leone accepted for

Great Britain the stipulated cession of territory and separately "guarantees to the Kafir family and the inhabitants ... the continued and unmolested enjoyment of such lands and other property as they now possess."

15.10 Elsewhere he instances many dealings with Indian and South East Asian rulers throughout the seventeenth and eighteenth centuries on a manifest footing of equality.165

15.11 The 1825 treaty between Britain and Banda in Sierra Leone has already been mentioned: see para 7.20.

15.12 Proper understanding has been further clouded by the concept of tenure, which is fundamental to English and English-derived land law but has no necessary relevance to aboriginal property concepts. It was tempting to conclude that because all English tenure derived from the Crown, land rights not deriving from the Crown could have no legal existence apart from statute.

15.13 This point was made in the Privy Council's judgment in Amodu Tijani v Secretary, Southern Nigeria.166

"in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, ...."

15.14 In Guerin v The Queen Dickson C J remarked:167

165 An Introduction to the History of the Law of Nations In the East Indies (1967).
166 [1921] 2 AC 399 at 402.
"[I]n describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law ...

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right ... The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered."

Note too the statement of Justice Holmes delivering the judgment of the Supreme Court in Damon v Hawaii,168 a case that related to fishing rights over lagoons and over the open sea up to 1 mile from the beach -

"The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use, or alternatively, to put a taboo on all fishing within limits for certain months and to receive from all fishermen one-third of the fish taken upon the fishing grounds. A right of this sort is somewhat different from those familiar to the common law but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or profit a prendre as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit." (p 158)

15.15 Confusion arose also from a failure to appreciate the distinction between the politico-legal concept of sovereignty (Vattel's haute domaine) and the concept of title to land, domaine utile in Vattel's terms. This is pointed out by Roberts-Wray, with specific relation to New Zealand.169 The acquisition of sovereignty does not automatically extinguish lawfully existing property rights, although the new sovereign can of course put an end to them if it wishes. Furthermore, sovereignty does not necessarily imply title, even paramount title, to land.

168 (1903) 194 US 154.
The concept of the sovereign as owner of all land is a feudal one that lies at the heart of our property law but is far from universal. One should reflect on the fact that many other legal systems have allodial (that is, absolute) ownership of land.

Aboriginal Title Overseas

15.16 The doctrine of aboriginal title is neither novel nor modern. It precedes the beginning of English colonisation. It is not limited to the common law system. On the contrary it was part of what may be called the ius gentium of European colonial powers, going back to Las Casas (1474-1566) and Vitoria (1483-1546) in sixteenth century Spain. In 1524 Vitoria published his book De Indis, arguing that the Indians of America were entitled to be treated as owners of their land and other property and not to be disturbed in their possession. This view prevailed in Spanish law and policy (though not always in colonial practice).

15.17 This was likewise a guiding principle in the British colonisation of North America, as evidenced by the Proclamation of 1763 following the conquest of Quebec from the French. No doubt many transactions were grossly unfair, but the principle was accepted and the policy followed that the Indians had a title which had to be purchased before any land belonged wholly to the Crown or, in the United States, its successor.

15.18 Its classic formulation is in the judgments of Marshall C J in Johnson v McIntosh and Worcester v Georgia.

"[Title by discovery] regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial..."
of the possessor to sell. [The original inhabitants] were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, according to their own discretion."

*(Johnson v McIntosh 574)*

15.19 This principle has often been reiterated. For example in *United States v Santa Fe Railroad Co.* 175 Justice Douglas said at page 345 -

"Occupancy necessary to established aboriginal possession is a question of fact .... If it were established that the lands in question ... constituted territory occupied exclusively by the Walapais ... then the Walapais had "Indian title" which unless extinguished, survived the national grant of 1866 .... Nor is it true that a tribal claim to any particular lands must be based upon a treaty, statute or other formal government action."

15.20 And in *Lipan Apache Tribe v United States* -176

"Indian title based on aboriginal possession does not depend on sovereign recognition or affirmative acceptance for its survival. Once established in fact it endures until extinguished or abandoned." (per Judge Davis)

15.21 Recently, in *County of Oneida v Oneida Indian Nation* 177 the Supreme Court unanimously reaffirmed the right of the Oneidas to bring an action for unlawful possession of tribal land. (The claim arose out of a transaction in 1795, and the Court held 5-4 that the action was not barred on the ground of undue delay.) In a part of the majority judgment that was not subject to dissent the Court said this:

"By the time of the Revolutionary War, several well-defined principles had been established governing the nature of a tribe's interest in its property and how those interests could be conveyed. It was accepted that Indian nations held "aboriginal title" to lands they had inhabited from time immemorial. The "doctrine of discovery" provided, however, that discovering nations held fee title to these lands, subject to

175 (1941) 314 US 339.
176 (1967) 180 US Court of Claims 487.
the Indians' right of occupancy and use. As a consequence, no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign. ... From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands. The Court spoke of the "unquestioned right" of the Indians to the exclusive possession of their lands, and stated that the Indians' right of occupancy is "as sacred as the fee simple of the whites". This principle has been reaffirmed consistently." (page 178)

15.22 The existence of aboriginal title is now recognised by the law of Canada: Calder v Attorney-General of British Columbia;178 Guerin et al v The Queen;179 R v Sparrow, a decision of the Court of Appeal of British Columbia.180 In Calder the Supreme Court of Canada divided equally on whether certain general legislation in British Columbia had extinguished Indian title, but both groups of judges agreed that it did exist, and that it was not dependent on treaty, executive order or legislative enactment. Sparrow is of particular interest here because it concerned fishing rights. A member of an Indian band had been convicted for fishing with a drift net larger than permitted. The Court had no hesitation in holding that there was a legally recognised aboriginal fishing right, that its existence did not depend on any positive treaty, statute or agreement, and that it had not been extinguished by positive legislation. The real issue was the extent to which it could lawfully be regulated. The decision on this issue rested on specific Canadian legislation and legislative history; the Court held that the power of regulation existed to the extent that its exercise could be reasonably justified as necessary for the proper management and control of the resource or in the public interest.

15.23 On the other hand, in Australia, Blackburn J of the Northern Territory Supreme Court rejected aboriginal title as a source of any legal property rights in Milirrpum v Nabalco Pty Ltd181 after a lengthy examination of cases decided in various Commonwealth countries, including New Zealand.

15.24 At this point, one possible technicality needs to be mentioned. Many of the territories in respect of which the courts have upheld indigenous property rights were colonies or former colonies that Britain acquired or was said to have acquired by conquest or cession. New Zealand on the other hand was (arguably) a settled colony—that is, one acquired by mere occupation and annexation. It has been contended that the rule protecting existing property rights does not apply to such territories. And some cases have, implicitly or explicitly, indicated a distinction between the 2. They include Wi Parata.182

15.25 This is dubious on the facts; it is clearly opposed to principles of justice and fairness; moreover it is very difficult to find authoritative support for it. Rather there are dicta (eg, in Te Heuheu Tukino) suggesting that in any case, irrespective of the mode of acquisition, "the inhabitants can make good in the courts only such rights as the sovereign has recognised". This in turn might seem at first sight unfavourable to any doctrine of native title, which would be inconsistent with other decisions in England and elsewhere. The dictum was cited with approval by Lord Denning in Ovekan v Adele,183 which concerned land in Lagos (Nigeria) a territory that Britain acquired by treaty of cession in 1869. But Lord Denning added in a very significant passage:

"In inquiring, however, what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law." (p 788)

15.26 In other words, there is a presumption in favour of existing property rights which will be displaced only by the positive conduct of the Crown.184 Inaction amounts to recognition. The Courts will enforce these rights, applying the rules not of English real property law but of native law and custom.

182 (1877) 3 NZ Jur (NS) at 78.
183 [1957] 2 All ER 785.
The Legal Status of Customary Land

15.27 What may be called the orthodox twentieth century school in New Zealand maintained that on annexation the Crown automatically acquired title to all land in New Zealand, and any legal rights of the Maori to their land in the absence of a Crown grant could only exist insofar as they had a legislative source and foundation. It further asserted that in respect of land (but not fishing rights) such legislation was enacted, beginning with the Land Claims Ordinance 1841.

15.28 But if legislation was not a pre-requisite of legal recognition of Maori title to land, it was not necessary for fishing rights either. Whether or not fishing rights are severable from ownership of the soil beneath, they are part of the rights of full ownership. It is thus relevant to examine in some detail both legislation and judicial decisions pertaining to land.

15.29 There is throughout the key constitutional documents and the early New Zealand cases a constant theme that Maori property rights were to be respected. It is not always clear whether moral rights or rights known to the law were meant. One reason for the obscurity is the very early intervention of legislation dealing with land, beginning with the Land Claims Ordinance 1841. A great deal of what argument there was initially related to the interpretation of "pre-emption". This is what the Land Claims Ordinance 1841 dealt with; it was the central issue in Symonds' case; and it was the dominant and almost exclusive theme of the dispute in 1840 between Gipps, the Governor of New South Wales, and Wentworth, a prominent settler who laid claim to vast areas of New Zealand by alleged purchase from Maori. Two other burning issues, on which a great deal was written, concerned what lands were subject to native title (was it only land in actual occupation, as various authorities contended from Vattel on, and a good deal of opinion as well as interest maintained?) and subsequently who owned and who could alienate Maori land (what was the position of chiefs?). This was the subject of intense controversy at the time of the Waitara Purchase. 

185 [1840-1932] NZPCC 387.
186 See the dispute between Sir William Martin and C W Richmond, and the collection of papers, in (1861) AJHR E-2.
Pre-emption

15.30 The quarrel between Wentworth and Gipps concerned the ability of British subjects to acquire a good title to land they had purported to purchase whether before or after Britain had acquired sovereignty. The transactions of Wentworth and his fellow speculators had preceded the establishment of sovereignty and their rapacious character was itself a compelling reason for the Government to intervene. As the Privy Council much later remarked in Re Southern Rhodesia - 187

"private concessions of large extent and of ambitious character when obtained by white financiers from untutored aborigines, are generally and justly the objects of close scrutiny ..."

15.31 In his speech to the New South Wales Legislative Council Gipps, quoting Kent and Storey, admitted the Natives to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it and to use it according to their own discretion. Their rights (he asserted) fell short of ownership in that they lacked any power to dispose of it to third parties.

15.32 One therefore cannot use this episode, as Foden seems to do, 188 in aid of a denial of indigenous land rights. The essence of the matter was a public policy interest overriding any property rights in land claimants.

Land Claims Ordinance 1841

15.33 If the view is correct that Maori land rights existed only because legislation conferred or provided for them, one might have expected some positive provision that did this. And that provision should strictly be retrospective, dating back to whatever was regarded as the operative time of the acquisition of sovereignty. The first Land Claims Ordinance calls to be examined in that light.

15.34 The relevant part of the ordinance provided:

"All unappropriated lands, subject to rightful and necessary occupation and use by the aboriginal inhabitants, are and remain Crown or domain lands."

The term "unappropriated" appears to be unique to this Ordinance in New Zealand legislation. However, it does appear in the Instructions accompanying the Royal Charter

187 [1919] AC 211 at 236.
of 8 November 1840. When land had been surveyed registers were to be kept showing lands "hereafter to be appropriated" and, as far as possible, land already appropriated. They were also to show surveyed land not appropriated. A person who paid for land was entitled to have appropriated to him or her "such unappropriated land" as the person selected. The sensible interpretation of the Ordinance is therefore that it excludes land that has been the subject of a Crown grant. But nothing of importance seems to attach to it.

15.35 As a legislative foundation of Maori title (as distinct from an acceptance of it), this enactment looks rather thin. It reads rather as an aside, casually acknowledging an existing legal situation. The thrust of the Ordinance was very different. Its purpose, recited in its long title, was to replace the New South Wales Land Claims Act 1840, which governed New Zealand land claims, and accordingly to deny validity to land purchases made in New Zealand before or after the acquisition of sovereignty, to provide for claims to be examined by a Commissioner, and to maintain the Crown's exclusive right to acquire land from the Natives. In passing, this last would hardly have been necessary if the Crown was indeed considered to have an unqualified title. The Maori would have had nothing to dispose of. And if respect for Maori interests was a matter simply of government policy, again legislation would not be required.

And there is a little more to it than that. At the end of the Land Claims Ordinance is a proviso that nothing in it "shall be deemed in any way to affect any right or prerogative of Her Majesty ...". If the Crown could at common law disregard Maori land rights, this proviso would have been in open conflict with the phrase about Crown land being subject to rightful and necessary occupation and use. To give the latter any force would have been difficult. On this approach the Ordinance could not have been the source of any Maori rights.

The Issue of Waste Lands

15.36 The Land Claims Ordinance 1841 looks back to the Royal Charter of 1840. One provision of that Charter empowered the Governor to make grants of waste land belonging to the Crown, with a proviso that nothing in the Charter was to affect the rights of any aboriginal Natives to the actual occupation or enjoyment of any lands in the

189 Paras 47 and 48.
190 Para 49.
colony which they actually occupied or enjoyed.\textsuperscript{191} This again implied that these rights did exist, and that the prerogative legislation of the Charter was not to be construed as affecting them. The Charter, however, on the face of it took a narrow view of the extent of native land — only that land which the Maori actually occupied and enjoyed. As Sir William Martin said in 1846:\textsuperscript{192}

"So far as yet appears, the whole surface of these islands, or as much of it as is of any value to man, has been appropriated by the Natives, and, with the exception of the part which they have sold, is held by them as property".

15.37 This in turn merely amplifies what Busby had already said 5 years before the Treaty: "As far as has been ascertained every acre of land in this country is appropriated among the tribes".\textsuperscript{193}

15.38 The 1840 Charter represented a line of thinking in England (shared by many settlers in New Zealand), based on the theories of Locke and Vattel, that Native peoples had rights only in land that had been improved by labour. Vattel, for example, wrote:\textsuperscript{194}

"It is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers can not populate the whole country. ... Their uncertain occupation of these vast regions can not be held as a real and lawful taking of possession ...

... when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them ... ."

(He said nothing about sea or other fisheries.)

15.39 This doctrine was strongly expressed in the majority report of the Select Committee of the House of Commons on New Zealand affairs in 1844: see paras 9.5–9.9. Its apogee for New Zealand was Earl Grey's Instructions of 1846, which, with a new Royal Charter, were

\textsuperscript{191} Domett, \textit{Ordinances of NZ 1841-1849} p 6.
\textsuperscript{192} 1846 Pamphlet reproduced in (1890) \textit{AJHR} G-1.
\textsuperscript{193} See Orange p 38.
\textsuperscript{194} The Law of Nations (1758) Rep Carnegie Institute 1916, p 85.
designed to introduce representative government in this country. Paragraph 9 of Chapter XI provided -

"No claim shall be admitted ... on behalf of the Aboriginal inhabitants of New Zealand to any Lands situate within the said Islands, unless it shall be established ... that the claimants or their progenitors, or those from whom they derived title, have actually had the occupation of the Lands so claimed, and have been accustomed to use and enjoy the same, either as places of abode, or for tillage, or for the growth of crops, or for the depasturing of cattle, or otherwise for the convenience and sustentation of life, by means of labour expended thereon."

15.40 This was resisted by the authorities in New Zealand partly on the ground that it could be effected only by military force. There was also opposition in principle and because of its manifest breach of solemn promises - a clear and early instance of the effect of the Treaty of Waitangi on policy. The missionaries who had told the Maori in 1840 that their properties would be fully protected were outraged. The Instructions were never brought into effect and the British authorities acquiesced.

15.41 Nor did this narrow notion of indigenous property rights prevail in the United States. Mitchel v United States concerned a claim to land in Florida. Baldwin J, delivering the judgment of the Supreme Court, restated the orthodox doctrine of Indian title, and added -

"Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its conclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals." (p 559)

15.42 What constituted possession was defined in Indian terms. Neither practice nor doctrine placed limitations on the territory of the Indian nations that had to be lawfully acquired by treaty.

195 Domett, Ordinances of New Zealand 1841-49 (1850) p 61.
197 (1835) 9 Peters 539.
15.43 The New Zealand Constitution Act 1852 (UK) accepted the wider view. Section 52, empowering the General Assembly to make laws regulating the sale of waste lands, defined waste lands essentially as "lands wherein the title of Natives shall be extinguished as hereinafter mentioned", referring to section 53 which embodied the rule of Crown pre-emption. This prevailed over the Vattelian doctrine that title was limited to land under active occupation and use.

15.44 Although this controversy was carried on in relation to land it is germane to the question of fisheries also. The words of the Treaty were accepted as bearing a Maori understanding of what "their lands" were. There is no basis for rejecting the same approach to fisheries. The Maori were promised protection for "their fisheries" ie, fisheries as they understood them. Things, however, did not turn out that way.

Subsequent Maori Land Legislation

15.45 The Land Claims Ordinance was followed by various special pieces of legislation confirming or regularising grants to Europeans, or awarding them compensation. None of these contained any express recognition of Native title. The Land Claims Ordinance remained until formally repealed in 1878 by the Repeals Act as among those measures that were "spent or ceased to be in force otherwise than by express and specific repeal, or have ... become unnecessary".

15.46 Later general legislation dealt with Native title in the same oblique fashion. It was descriptive and not constitutive. For example the Native Districts Regulation Act 1858 referred to "districts over which the native title shall not for the time being have been extinguished". The Native Rights Act 1865 was to the same effect, section 3 reading:

"The Supreme Court and all other Courts ... ought to have and have the same jurisdiction in all cases touching ... the titles to land held under Maori customs and usage as they have under any law ... touching the persons and property of natural born subjects of Her Majesty."

15.47 And under the Lands Act 1877 "demesne lands of the Crown" were defined as "all lands vested in Her Majesty wherein the title of the aboriginal natives has been extinguished". "Crown lands" were in turn defined as a species of demesne lands. It follows logically that land still held by the Maori under their customs was not Crown.
land, although in accord with received doctrine Her Majesty held paramount title.

15.48 From 1862 successive Native Land Court Acts provided the machinery by which the acknowledged object of separating the Maori from their lands could be legally effected. They assumed the existence of Maori title. Thus the Native Land Court Act 1862 after reciting Article 2 of the Treaty of Waitangi, and the desirability of assimilating the ownership of such lands "as nearly as possible to the ownership of land according to British law," provided that "all lands over which Native title shall not have been extinguished" were to be dealt with and disposed of under the Act. Its 1865 successor recited that it was "expedient to amend the laws relating to lands ... which are still subject to Maori proprietary customs, and to encourage the extinction of such proprietary customs and provide for the conversion of such modes of ownership into titles derived from the Crown". "Native land" was defined as "lands which are owned by Natives under their customs and usages", as distinct from "hereditaments" - land subject to tenure or held under a title deriving from the Crown. Clearly therefore the Act posited that all title to land was not derived from the Crown. The East Coast Act 1868 uses the phrase "land owned according to Native custom". And as late as 1888 the Native Land Act (essentially a measure for promoting free trade in Maori land) was applied to "all land held by Natives under any title except under their customs and usages" - again an implication that custom and usage was a source of legal title.

15.49 Lord Haldane, delivering the judgment of the Privy Council in Manu Kapua v Para Haimona on appeal from the Native Appellate Court, put the state of affairs thus:

"Prior to the grant ... the land in question had been held by the Natives under their customs and usages ... As the land had never been granted by the Crown, the radical title was ... vested in the Crown subject to the burden of the Native customary title to occupancy" (p 416)

15.50 The particular interest of this statement in the present context is that it cited no authority. There was no attempt to show that the law thus expounded derived from the long repealed Land Claims Ordinance or any other statutory source. The passage simply echoes in different language what the Privy Council had said 25 years previously in the St Catherine’s Milling and Lumber Co v

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The Queen on appeal from Canada. Apparently the proposition was too basic to need support.

15.51 On the positive side there are a number of references to Maori ownership as a right of a legal character.

Normanby’s Instructions

15.52 The Instructions of Lord Normanby to Hobson dated 14 August 1839, refer to -

"A numerous and inoffensive people whose title to the soil .... is indisputable and has been solemnly recognised by the British Government."

15.53 This might at first sight be argued to refer to moral rights only. But a thorough examination of the Instructions makes it almost impossible to doubt that in the eyes of Normanby and his advisers the Maori had a property in the land that was not at the whim of the Crown, would not be automatically destroyed or impaired by annexation, and needed no legislation for its preservation. There was no discussion of aboriginal title. It was simply taken for granted. Later, Hope's letter of 10 January 1843 (on behalf of Lord Stanley) to Somes, the Chairman of the New Zealand Company; is unequivocal -

"... Her Majesty distinctly recognised the proprietorship of the soil in the natives and disclaimed alike all territorial rights and all claims of sovereignty which should not be founded on a free cession."

15.54 More pointedly he continued -

"Lord Stanley cannot now permit it to be maintained, ... that the natives had no proprietary right in the face of the Company's declaration that they had purchased those very rights ..."

199 (1888) 14 App Cas 46.
R v Symonds (1847)

15.55 R v Symonds\textsuperscript{202} was a test case brought to
determine the validity of Fitzroy's waiver of the Crown's
exclusive right to purchase native land and to determine
the nature of "pre-emption". It was that issue that the
case decided, but it is of particular importance for wider
reasons.

15.56 The principal judgment was that of Chapman J. He
held that the Crown was the exclusive source of private
title and had the exclusive right of extinguishing the
title of aboriginals. But, he suggested, a private
purchase might be good against the Native sellers.
Conversely in the United States the courts would not
hesitate to impeach a grant in a suit by Native Indian
owners on the basis that Native title was not
extinguished. (Here he was referring in particular to the
Supreme Court's decision in Cherokee Nation v State of
Georgia.)\textsuperscript{203} Chapman J continued:

"Whatever may be the opinion of jurists as to the
strength and weakness of the Native title, ... it
cannot be too solemnly asserted that it is
entitled to be respected and that it cannot be
extinguished otherwise than by the free consent of
the Native occupiers". ... It follows ... that in
solemly guaranteeing the Native title ... the
Treaty of Waitangi does not assert either in
doctrine or practice anything new and unsettled."
(p 390)

15.57 Later he said at page 391:

"It is not at all necessary to decide what estate
the Queen has in the land previous to the
extinguishment of the Native title ... the full
recognition of the modified title of Natives ... is not theoretically inconsistent with the Queen's
seisin in fee as against her European
subjects."\textsuperscript{204}

15.58 Martin C J was equally clear that settlers could
acquire no title except from the Crown. He quoted Kent:

\textsuperscript{202} [1840-1932] NZPCC 387.
\textsuperscript{203} 30 US (5 Peters 1) (1831).
\textsuperscript{204} Cf. Marshall C J in Fletcher v Peck (1810) 10 US (6 Cranch) at 142: "The
nature of the Indian title, which is certainly to be respected by all courts,
until it be legitimately extinguished, is not such as to be absolutely
repugnant to Seisin in fee on the part of the State".
"The European nations which respectively established Colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy. The Natives were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it ..." (p 393)

15.59 There is nothing whatever in the judgments in Symonds to suggest that Maori property rights were not justiciable, or that they were justiciable only because of the Land Claims Ordinance 1841.

The Kaitorete Judgment (1868)

15.60 The 1841 Ordinance was examined in the Native Land Court judgment of Chief Judge Fenton in Kaitorete (1868). The subject matter was the spit of land between Lake Ellesmere and the sea. The issue was the validity of a sale by the Ngai Tahu to Wakefield as agent for the New Zealand Company, the date of which does not appear from the judgment but certainly refers to the Kemp purchase of 1844. In essence it was held, consistently with Symonds, that under the common law a fair sale by Natives to a private person extinguished the Native title but gave no title to the purchasers but rather to the Crown. Fenton obviously had difficulty with the term "unappropriated" in the Ordinance but considered that the common law would not be interfered with by this statute "which is in fact simply an affirmance of the common law".

15.61 In other words, the situation would have been the same even if the reference to Maori occupation and use had never appeared.

15.62 Note that Fenton saw no problem in resolving the dispute by granting the Maori claimants a fishing easement over the land comprising the spit, while leaving ownership in the Crown.

The Kauwaeranga Judgment (1870)

15.63 This decision of Chief Judge Fenton is of particular interest in the present context because it is the only fully reasoned nineteenth century judgment concerning fishing rights, because it related to rights over the foreshore between high and low water marks, and

205 The judgment is reprinted in Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879 (1879).
because of the Judge's last minute retreat from the logic of his reasoning (and the substance of his earlier decision in the Whakaharatau case) to deny on unabashed policy grounds an absolute property right as distinct from a right to fish. Fenton while Chief Judge of the Native Land Court was for a time a member of the Legislative Council, and was present at and took part in the debate on the Bill that became the Shortland Beach Act 1869. He would thus have had a close acquaintance with the political implications.

15.64 His decision gave the Maori claimants full and exclusive fishing rights in respect of an area of the foreshore, a mudflat between high and low water. It therefore rejected by implication the contention of the Crown that:

"by the law of England ... the foreshore belongs to the Crown, and can only be held by a subject by grant from the Crown, either existing or presumed by prescription. This seisin of the Crown is an incident of sovereignty. ... The Native Lands Acts do not affect the Crown; and Maoris cannot own the foreshore according to their customs and usages, as such ownership would be in derogation of the prerogative of the Crown, ..."

15.65 More was heard of this contention later, and a more receptive audience found. But Kauwaeranga was applied by the Native Land Court in the Porirua Foreshore case in 1883 where Chief Judge Macdonald held that the applicants were entitled on the facts to a right of fishery over certain tidal land in Porirua Harbour. But he felt doubtful whether the court could issue a title and he did not do so, Cf Richmond J in Ex parte Piripi Te Maari (see para 17.87), although that case concerned title to a lake. Kauwaeranga was accepted (and reproduced in full) in Judge Harvey's report in 1948 on the Ahuriri Lagoon petition.

15.66 In the Ngakororo Mudflats case (1941) the Native Land Court gave title to Maori claimants of certain Hokianga land that may have been tidal in 1840 on the ground (inter alia) that it was customary land. The Native
Appellate Court reversed this. But in doing so it said - 210

"The Native Land Court's decision as to whether these mudflats are papatupu (customary) land must rest upon findings of fact .... In England the fee simple to land below high-water mark has, in certain instances, become vested in the proprietor of the foreshore. If, under the circumstances of the English people, title to the sea-bed can be established in this way, we see no reason why title should not just as well be established by the Maori people of New Zealand.

As before mentioned, this must necessarily be a question of fact, and this is referred to in Judge Fenton's Kauwaeranga judgment of 1870."

15.67 The Court found as a fact that the lands were below water in 1840 but were not customary lands. It set a high evidential standard because "satisfactory proof might entitle the claimants to an award of these mudflats as papatupu land ..." 211

Re Lundon and Whitaker Claims Act 1871

15.68 The strongest judicial recognition of Maori title irrespective of either the Treaty of Waitangi or subsequent legislation is that of the Court of Appeal of 5 judges in Re Lundon & Whitaker Claims Act 1871. 212

"The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it." [emphasis added]

15.69 The Court also pointed out (and this statement is important to an accurate understanding of many of the decisions) that all title to land by English tenure had to be derived from the Crown. For example, it throws light on Gillies J's judgment in Mangakahia v New Zealand Timber Co Ltd, 213 which has been said to be adverse to the concept of legal recognition of Maori rights.

15.70 In Mangakahia the plaintiffs sought a remedy against an alleged trespass based not on actual possession but on title to possession. This was seen by the Court as

210 Maori Appellate Court Auckland Minute Book 12, 137.
211 Ibid, at 141.
212 (1871) 2 NZCA 41, 49.
213 (1884) 2 NZLR 345.
an incident of English tenure. Gillies J held that ownership of land according to native custom did not carry the incidents of ownership under a Crown derived title. Ownership according to Native custom did not confer any title known to English law; it was not ownership in "fee simple". That seems unexceptionable, and the decision implies a form of legal ownership in the Maori. In passing Gillies J explicitly denied that the Treaty of Waitangi was a "simple nullity" as Prendergast had said in Wi Parata.

15.71 What the case did demonstrate was the absence of any adequate remedy for infringements of that ownership.

"The remedy according to native custom was much more simple speedy and conclusive, but our law does not recognise these modes .... nor does it confer upon native title the incidents of title held under the Crown." (p 350)

15.72 What then, were the incidents of Native title, and how should the Court set about protecting legally recognised property? No-one addressed these issues. The law was applied in what now seems a rather wooden fashion. Compare the United States law referred to in the Oneida case:

"Numerous decisions of this Court prior to Oneida I recognized at least implicitly that Indians have a federal common-law right to sue to enforce their aboriginal land rights. In Johnson v McIntosh, supra, the Court declared invalid two private purchases of Indian land that occurred in 1773 and 1775 without the Crown's consent. Subsequently in March v Brooks it was held: "That an action of ejectment could be maintained on an Indian right to occupancy and use is not open to question. This is the result of the decision in Johnson v McIntosh". More recently, the Court held that Indians have a common-law right of action for an accounting of "all rents, issues and profits" against trespassers on their land. Finally, the Court's opinion in Oneida I implicitly assumed that the Oneidas could bring a common law action to vindicate their aboriginal rights. We noted that the Indians' right of occupancy need not be based on treaty, statute or other formal Government action. We stated that "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.""

Wi Parata: The Act of State Doctrine

15.73 From the 1870s nonetheless there was a shift of judicial attitudes towards the legal status of Maori rights. Wi Parata v Bishop of Wellington (1877)\textsuperscript{215} is rightly regarded as the turning point.

15.74 In the report of this case an interesting passage occurs. Counsel for the plaintiff was arguing that all the land in the country was vested in the Crown in trust for its subjects, and the Crown still held a great portion in trust for the Natives.

15.75 Richmond J interposed:\textsuperscript{216}

"subject to a principle of common law applicable to newly settled countries in which there was an aboriginal race. The Crown takes all their land, subject to a rightful and necessary occupation by the aborigines." [emphasis added]

15.76 This last phrase simply repeated the words of the 1841 Ordinance. But Richmond's comment did not find any expression in Prendergast C J's judgment, the only one given. And the decision itself is certainly antithetical to any notion of legally enforceable native property rights. It makes derogatory comments about existing legislation referring to rights and native customs. There are several pieces of circular reasoning, an incomplete reading of Blackstone, and a confusion between the importation of the body of common law and the recognition of property rights.

15.77 The Wi Parata judgment in a now notorious passage referred to the Treaty of Waitangi as a nullity. The restricted context must be appreciated - it was a nullity in so far as it purported to cede sovereignty. Prendergast C J, however, continued: "so far as the proprietary rights of the natives are concerned the Treaty merely confirms the rights and obligations which iure gentium vested in and devolved upon the Crown" (p 78). There is no reference to possible common law native rights and a distinction was drawn (p 78) between respect for property rights on the cession of civilised territory and the case of "primitive barbarians".

15.78 The essence of Wi Parata, however, is that the Crown's dealings with the Maori for the acquisition of their lands were acts of State not cognisable in the

\textsuperscript{215} (1877) 3 NZ Jur (NS) 72.
\textsuperscript{216} At p 76.
Courts. The real fear is manifest. If the Crown was indeed obliged to extinguish Native title in accordance with law and was answerable to the courts accordingly, the derivative title of settlers might be in jeopardy. This was a legitimate concern, but there were of course possible answers to that problem.

15.79 Again one should appreciate the relevance of all this to fishing claims. Some of these dealings related, or could be argued to relate, to fishing rights. Whether and how far these rights had been extinguished seems clearly to come within the proposition laid down in *Wi Parata* and its successors: it was for the Crown to decide.

15.80 The decision in *Wi Parata* was foreshadowed in an opinion given by the then Attorney-General Whitaker in 1863. The question was whether the Crown had a legal right to use land not purchased from the Maori for making roads and for defence. His predecessor Sewell had opined that it had, invoking the concept of eminent domain. Whitaker took a broader view.217

"I am not aware of any instance in which either the Crown or legislature ... has recognised a title in the Aborigines cognisable in a court of law ... Assuming then that the land over which the Native title has not been extinguished to be Crown lands, ... it follows that the Crown has a right in law, so long as there is no interference with the rightful and necessary occupation and use thereof by the aborigines, to use the land".

15.81 Even here there is a qualification. The Crown had this legal right provided it did not affect the Native right of occupation and use. But if it did, what then? Whitaker avoided this issue. *Wi Parata* and later cases did not concede even as much.

15.82 *Wi Parata's* view of the juridical status of Maori rights was confirmed by the Court of Appeal in *Nireaha Tamaki v Baker*.218 In that case the Court treated all dealings with Maori for the purchase of land as acts of State beyond the law. Richmond J delivering the brief judgment of the Court, anticipated Salmond's argument in *Tamihana Korokai*.

"There can be no known rule of law by which the validity of dealings ... of the Sovereign with the

218 (1894) 12 NZLR 483.
Native tribes ... for the extinction of their territorial rights can be tested".

".... The Crown is under a solemn obligation to observe strict justice ... but of necessity it must be left to the conscience of the Crown to determine what is justice." (p 488)

15.83 The Court approved the decision in Wi Parata as authority for the proposition that "the mere assertion of the claims of the Crown is in itself sufficient to oust the jurisdiction of this or any other court." No other authority is given to support the proposition or the decision, which itself is a simple assertion. One has the uncomfortable sensation of Bodin revisited - sovereignty as "maiestas legibus solutis" (the sovereign is above the law). The concept of an unreviewable act of State, orthodox in the sphere of foreign relations, was applied to an ordinary piece of Crown acquisition of property. The common contemporary use of the term "cession" to cover the transfer both of sovereignty and land may have muddied the judicial waters. But again the policy foundation was explicit enough: "the security of all titles in the country depends on the maintenance of this principle." 219

The Act of State Doctrine Outside New Zealand

15.84 A very different stance was taken at this period by the English Law Officers in relation to Fiji. Article 4 of the Deed of Cession of 10 October 1874 provided - 220

"That the absolute proprietorship of all lands not shown to be now alienated so as to have become bona fide the property of Europeans or other foreigners or not now in the actual use or occupation of some Chief or tribe or not actually required for the probable future support and maintenance of some chief or tribe shall be and is hereby declared to be vested in Her said Majesty her heirs and successors."

15.85 The essential distinction between this article and the policy embodied in documents such as the Royal Charter of 1840 and the 1846 Instructions was the recognition of bona fide land acquisitions by settlers before the cession. Otherwise there are clear similarities. But the Colonial Office at first took rather a cavalier view of the article and instructed the Governor that its application was entirely a matter for Crown discretion. The Governor

219 Ibid, at 488.
220 Legge, Britain in Fiji (1958), Appendix, p II.
was to determine what land was in native occupation or required for future use. Such land would be held in trust, leaving it for the time being in Native occupation. And (echoing the Land Claims Ordinance 1841) Europeans were to give satisfactory evidence of the fairness of their transactions and would receive such Crown grants as the Governor thought fit.

15.86 This was challenged by the European settlers. The Deed of Cession, they claimed, was a treaty which recognised the existence of previously acquired rights to land. The Executive therefore could not dispose of them, or indeed grant them to the holders. Nor could it finally decide on the validity of claims.

15.87 The Law Officers essentially upheld these contentions. They reported that settlers could not be required to take Crown grants as the basis of their title. The Crown could of course investigate land claims but could not place any interpretation on the Deed of Cession that it did not bear in the judgment of a court. By the same token Native rights were valid against the Crown, and the final decision on what lands were occupied or required by Natives would be for the court. It depended on the facts.

15.88 The subsequent course of events is outside the theme of this paper, but in the upshot all land not sold before the cession became (without the need for court intervention) the virtually inalienable property of the indigenous inhabitants. 221

15.89 Coming close to the present day, contrast also Lord Reid's remark in Attorney-General v Nissan: 222

"... I am of the opinion that a British subject ... can never be deprived of his legal right to redress by any assertion by the Crown or decision of the court that the acts of which he complains were acts of state."

Although other judges in that case were not prepared to go quite as far, Lord Pearson was categorical that:

"There is an error in and in so far as it is implied that an act of State could be committed against a subject within the realm." (p 239)

221 Legge, Britain in Fiji (1958) pp 170-201.
15.90 The statement in Halsbury that the notion of act of State has no application to a citizen within the realm accords with this.

15.91 Not long after the judgment in Nireaha the case of Attorney-General for Canada v Attorney-General for Ontario came before the Privy Council on appeal from the Supreme Court of Canada. This related to an 1850 treaty of cession of their land by the Ojibeway Indians in return for, among other things, a perpetual annuity. Like many Canadian appeals it was really a dispute between federal and provincial governments. But there was no suggestion in the judgment of Lord Watson that the treaty did not create legally binding obligations on the Crown. He said:

"The effect of these treaties was, that, whilst the title to the lands ceded continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds, passed to the Government of the Province, which also became liable to fulfil the promises and agreements made on its behalf, by making due payment to the Indians of the stipulated annuities, whether original or increased... the Indian annuities payable under the treaties of 1850 were debts or liabilities of the old province, either present, future or contingent." (p 205)

15.92 Following this, the Supreme Court of Alberta in R v Wesley accepted the analogy of contract. In Canada, the Indian treaties appeared to have been treated judicially as "mere promises and agreements", but the obligation on the government was still binding. A recent writer has been able to state categorically that these obligations are enforceable by law.

15.93 The modern case of Pawis v The Queen is also in point.

The Later Course of Events in New Zealand

15.94 Some 7 years after the Court of Appeal's judgment in Nireaha it was reversed by the Privy Council. Their

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223 Vol 18, (4th ed), 1418.
224 [1897] AC 199.
225 [1932] 4 DLR 774 (ASCAD).
Lordships seemed to find no difficulty with the notion that a court could enquire and decide whether Native title had been extinguished according to law, or that the terms in many relevant New Zealand statutes "Native title", "owners" and so forth had a legal content. The Privy Council's decision given on 11 May 1901 was followed by a number of Maori challenges mounted in the courts and, in 1902, by the Land Titles Protection Act. This ousted the courts' jurisdiction to examine the validity of any Native Land Court Order, Crown grant or other instrument of title subsisting before 3 October 1892 without the leave of the Governor in Council.

15.95 One of these challenges is reported in Hohepa Wi Neera v Bishop of Wellington, an attempt at a re-run of Wi Parata. The Court of Appeal would have none of it, and affirmed the earlier case, notwithstanding the Privy Council's decision in Nireaha Tamaki, which the Court indeed said had held Wi Parata to be rightly decided. Stout C J nonetheless had some caustic words for what their Lordships said in that case. Among other failings, they had not realised that the Native Rights Act 1865 could not bind the Crown. This was clear from section 5(8) of the Interpretation Act 1888, which provided that no Act in any manner affects the rights and privileges of the Crown unless it "expressly" states that the Crown is bound. Other New Zealand cases have taken the view that this provision and its successors cannot mean what they say and that the Crown may be bound by "necessary intendment". They include the judgment of Chapman J in Tamihana Korokai.

15.96 In 1891 a Royal Commission on Maori Lands was set up. Its members were James Carroll, William Lee Rees and James Mackay. Mackay died during the preparation of what would have been a partially dissenting report. His incomplete opinion contained this passage:

"The assumption of the sovereignty of the islands under the Treaty of Waitangi extinguished the separate nationalities that existed prior to its promulgation, while at the same time it saved all their proprietary rights, and, subject to Her Majesty's right of pre-emption, confirmed to the Native landowners the power of alienation which they had already begun to exercise."

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229 (1902) 21 NZLR 655.
230 (1913) 32 NZLR 321 at 355.
231 (1891) AJHR G-1A, p 4.
15.97 This made no reference to *Wi Parata* but the majority report did. It took what now seems to be a surprising view of the law.232

"*Wi Parata* ... decided ... that all Maori lands were waste lands of the Crown, subject to the rights of the Natives. That judgment (*Wi Parata*) is clear but the facts and the law warrant even a broader utterance. By the law of nations, English occupation vested the ultimate title to all lands in the Crown. The Maoris at the moment of occupation became tenants ... The Maori title is that of occupation, but occupation by an indefeasible right." [emphasis added]

15.98 This is a clear affirmation of the doctrine of aboriginal title but it is certainly not what later generations have taken from the decision. Nonetheless no case had directly denied Maori title to their land; none derived that title solely or principally from legislation. Edwards J in *Mueller v The Taupiri Coal Mines Ltd* had explained the famous "nullity" passage in *Wi Parata*.233

"This passage simply denies any operation to the Treaty of Waitangi as a cession of the sovereignty: it does not deny that it declared the existence of the proprietary rights of the Natives, although it puts those rights on a higher footing than if they had stood on the Treaty alone."

15.99 What the cases did insist was that these proprietary "rights" were wholly at the mercy of the Executive; if the Government said it had extinguished them then they were extinguished. The nature of a "right" of this kind, and the notion of a right at common law which nonetheless cannot be enforced by the courts, pose some problems.

15.100 Yet as late as 1912 Chapman J was wrestling in *Tamihana Korokai*234 with the relationship between Crown title and Maori right. He began by observing that the Natives could properly commence a proceeding in the Native Land Court to have their claim of title investigated. "They therefore have some right, and the first thing to be considered is what that minimum right is". He assumed "as has generally been assumed" that Native lands were vested in the Crown by virtue of the sovereignty and remained so

232 (1891) AJHR 6-1, p 10.
233 (1902) 20 NZLR 89 at 123.
234 (1913) 32 NZLR 321.
vested until individual titles were ascertained. Statute law (he said) supported that view "but that does not dispose of the matter". In fact Chapman J went on to review numerous Acts, both Imperial and New Zealand, which used language implying the confined existence of a Native title.

15.101 "The due recognition of this right or title by some means was imposed on the colony as a solemn duty" - a duty that the Legislature had endeavoured to perform in a long series of enactments. What Chapman J seems not to have considered is that perhaps legislative recognition was not necessary. He ignores for instance R v Symonds and the words of the Lundon & Whitaker decision. Yet, he continued, "the creation of [the Native Land] Court shows that Native titles have always been regarded as having an actual existence... The lands may be Crown lands but they are not vacant Crown lands".

"In the Native Land Act 1909 ... "customary land", ... is used to describe land which, being vested in the Crown, is held by Natives or the descendants of Natives under the customs and usages of the Maori people. "Held" here does not mean wrongfully retained, but held and retained under the same customs that were declared to be valid if existent by the Imperial statute of 1846 already referred to, and the later enactments, Imperial and colonial. That this is not inconsistent with such lands being Crown lands is shown by section 88, which specially declares that they shall be regarded as Crown lands while recognising that this is for the protection of the interests of Natives. To say that these customs are not cognizable by the Supreme Court, and that the Supreme Court does not know the nature of the customs and the resulting tenure, does not dispose of the legally ascertained fact that the tenure exists. (p 357)

15.102 But, he pointed out, the right could be met and defeated by the Crown exercising its power under section 85 of the Native Land Act 1909 to declare Native title extinguished.

15.103 Chapman in his judgment seems almost to have accepted, a year before Manu Kapua, the concept of a radical Crown title legally burdened, even in the absence of positive legislation, with a Native right of occupation and use.
The Triumph of Crown Rights

15.104 The monumental restatement of Native land law prepared by Salmond with the assistance of Carroll and Ngata put the New Zealand position beyond doubt. Sections 84-87 of the Native Land Act 1909 provided that customary title was not available or enforceable against the Crown, that a proclamation that any Crown land was free from Native customary title was conclusive (a similar provision had been in earlier Native land legislation), and that no grant or other disposition of land by the Crown could be questioned on the ground that Native title had not been extinguished. Moreover, customary title was automatically extinguished in respect of land which for 10 years before 31 March 1910 had been continuously in possession of the Crown, whether through its tenants or otherwise. The Governor in Council was authorised, at any time and for any reason, to prohibit the court from ascertaining the title to any land.

15.105 This last remarkable privative clause was repealed in 1913, and a savings provision was introduced to give Maori the right to have their claims to customary land investigated and adjudicated by the court. Herries, moving the committal of the Native Land Amendment Bill, pictured this as a great concession but he referred to "those obnoxious sections" and implied their inconsistency with the Treaty of Waitangi. There does seem to have been a sense that the 1909 provisions went altogether too far.

15.106 With these qualifications the law now contained in sections 153-157 of the Maori Affairs Act 1953 has remained the same. The Maori Affairs Bill now before Parliament proposes to drop them.

15.107 In Waipapakura in 1914 the conventional New Zealand view had crystallised. A Maori was net fishing in the tidal waters of the Waitotara river. A fishery officer seized her nets on the ground that they were being used in breach of regulations under the Fisheries Act. She claimed that her use was in accord with a Maori fishing right, and sued unsuccessfully for conversion. The case came before the Supreme Court on appeal from the Magistrates' Court. It was heard by a Full Court, with Stout C J delivering the sole judgment. He began by rejecting the proposition that only the Native Land Court could inquire into Maori custom. That Court had no special jurisdiction to deal with "fishing rights", only with "land". The proposition that fishing rights derive from

235 S 84.
236 S 100.
237 167 NZPD 389.
238 (1914) 33 NZLR 1065.
ownership of the underlying soil and are simply one of the
bundle of rights that make up ownership was apparently not
raised. But substantively Stout C J applied Wi Parata and
the Court of Appeal's version of Nireaha Tamaki. The
Treaty of Waitangi could create no legal rights. Even if
it had the effect of a statute it would be difficult to
read it as conferring any recognition of fishing rights in
tidal waters. No New Zealand statute gave any communal or
individual rights of fishery in the sea or tidal waters
(begging the question of what the Fisheries Act proviso did
mean). In the absence of a statute there could be no
rights.

"So far as sea fisheries are concerned ... there
must, in our opinion, be some legislative
provision made before the Court can recognise the
private rights, if any, of Maoris to fish in the
sea or in tidal waters." (p 1072)

15.108 The overall themes and policy of the decision were
the public right to fish in the sea and tidal waters,
elevated virtually to a constitutional principle, and the
concept that there should be no special privileges for
Maori in that regard.

Conclusion

15.109 The recognition by New Zealand courts of
aboriginal title in the form of fishing rights might
require the overruling of Waipapakura. That case was
followed in Kepea v Inspector of Fisheries. Here also
the appellant had raised section 77(2) of the Fisheries Act
1908 as a defence to a charge of taking undersized
toheroa. Hardie Boys J upheld the conviction because

- a grant of freehold title over land bordering
the foreshore extinguished any customary
fishing rights attached to the land; and

- the claim to a fishing right would exclude
the rights of others to fish in the area and
was thus invalid.

15.110 The status of these decisions has now been
rendered uncertain by the judgment in Te Weehi
(see paras 8.13-8.15), which has opened the way for a more
far-reaching reappraisal of the law, but was based on a
positive (if ambiguous) statutory provision.
15.111 The Court of Appeal's decision in Re the Ninety Mile Beach also stands in the way of judicial acceptance of a common law aboriginal title. The dispute in this case concerned the beach below high tide. The thrust of the judgments was firmly based on the "no statute, no rights" doctrine. Claiming to apply Chapman J's judgment in Symonds, North J thought that:

"it necessarily follows that on the assumption of British sovereignty - apart from the Treaty of Waitangi - the rights of the Maoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand, whether above high-water mark or below high-water mark ... But as we all know, the Crown did not act in a harsh way ..." (p 468)

15.112 In the Maori Council case the Court of Appeal expressly left open the question whether the law protected Maori customary title. But in any case the questions would remain whether there is room to apply the doctrine in the face of much specific and exclusive legislation, and how it might be applied to sea fisheries.

16 MAORI CUSTOM AND THE LAW

16.1 In no respect is the divergence between British and Maori expectations earlier or more clearly seen than in respect of the status of Maori customs. Two statements in 1840 epitomise it. In his speech at Waitangi on 5 February during the debate that preceded the Treaty's signing Tamati Waka Nene was translated as saying - 241

What did we do before the Pakeha came? We fought, we fought continually. But now we can plant our grounds, and the Pakeha will bring plenty of trade to our shores. Then let us keep him here. Let us all be friends together. ... O Governor, remain. ... Do not go away from us; remain for us a father, a judge, a peacemaker. You must not allow us to become slaves. You must preserve our customs, and never permit our lands to be wrested from us. ... . Stay thou here, dwell in our midst. Remain, do not go away.

16.2 At the end of the same year Lord Russell directed-242

"you will look rather to the permanent welfare of the tribes ... than to their supposed claim to the maintenance of their own laws and customs."

Diverse Attitudes to Maori Custom

16.3 The cultural and religious climate of nineteenth century England was unfavourable towards accepting other ways of life. The missionary spirit and its idealism was itself inimical to respect for Maori custom, except at most as something to be tolerated pending the conversion of the Natives to Christian and therefore English ways. There was nothing hypocritical about this approach. The equal value of every human being in no way implied equality of religion, custom or culture. The Maori deserved better than their savage customs. They deserved to become brown Victorian English people.

16.4 A cruder hostility existed among some settlers after 1840. They were unlikely to show much tolerance of

Maori ways and values, the less so if these stood in the way of their acquisition and use of the land they had emigrated to obtain. The Maori were an inherently inferior people whose natural destiny was to be dispossessed. Darwinism was in the New Zealand air well before The Origin of Species was published.

16.5 A middle ground between these attitudes, which would probably be common among Pakeha even today, is exemplified in a speech on the Maori Councils Amendment Bill by Herries, the Member for Bay of Plenty, and subsequently Native Minister, in 1903:

"Why should there be two laws - one for the Europeans and one for Maoris? ... a great deal of this separation between the races was due to the land laws...the Government brought down legislation to keep the two races apart, and made different laws for the Pakeha and the Maori... Bills of this kind, which made one law for the European and another for the Maori, only intensified the evil. Instead of trying to join the two together they were only driving in the wedge harder that separated the two races... Why not try to weld them together? ... to make them live like Europeans, to give them the same laws and not separate laws, to get them to intermarry and become one New Zealand race... I would like to see legislation brought in to put an end to the kainga and to the pa, to make Maoris live the same as Europeans, and have the same aspirations and views as the Europeans..."

The Effect Of Annexation

16.6 When British intervention in New Zealand was being considered in the 1830s, one option was to set up European enclaves, on the model of the "factories" in India, where English laws and institutions would prevail. Hobson suggested following a visit in 1837 that these might be established at the Bay of Islands and elsewhere and that treaties should be concluded with the chiefs for the recognition of factories and the protection of British subjects and their property. Subsequently Busby proposed a protectorate with special laws for British subjects. As late as June 1839 the British government still contemplated the cession of only parts of New Zealand. But by August of that year a more ambitious course had been decided upon and expressed in Normanby's instructions to Hobson:
"The spirit of adventure having thus effectually been roused, ... an extensive settlement of British subjects will be rapidly established in New Zealand; and that, unless protected and restrained by necessary laws and institutions, they will repeat ... the same process of war and spoilation ... to advert these disasters, and to rescue the emigrants themselves from the evils of a lawless state of society, it has been resolved to adopt the most effective measures for establishing amongst them a settled form of civil government.

Believing, however, that their own welfare would ... be best promoted by the surrender to Her Majesty of a right now so precarious, and little more than nominal, and persuaded that the benefits of British protection, and of laws administered by British judges, would far more than compensate ....

It is further necessary that the chiefs should be induced, if possible, to contract ... that henceforward no lands shall be ceded ... except to the Crown of Great Britain."244

16.7 The British government's clear view at the time was that the acquisition of sovereignty over New Zealand, albeit by cession, would carry the automatic application of the law of England. Russell's despatch of 9 December 1840 forwarding the Royal Charter constituting New Zealand a separate colony is explicit on this point. It referred to "the well established principle of law, that Her Majesty's subjects, settled in a country acquired as New Zealand has been acquired, carry with them as their birthright so much of the law of England as is applicable to their altered circumstances".245

16.8 Discussing the various categories of Native custom, the despatch continued:

"finally there are customs which ... may be borne with until they shall voluntarily be laid aside by a more enlightened generation. It is important to advert distinctly to this topic because, without some positive declaratory law ... the law of England would prevail over them, and subject the natives to much distress and many unprofitable hardships." [emphasis added]
16.9 Meanwhile, the Treaty of Waitangi had been concluded. Three things bear on the likely expectations of those who signed it.

- the speech of Waka Nene, which, it is generally accepted, was influential if not decisive in persuading those who were present. It contains the quotation at the beginning of this section.

- The text of the Treaty itself in its Maori version. The signatories yielded kawanatanga but retained rangatiratanga, which carried something much more than the idea of material property. And the Crown guaranteed to preserve not merely whenua and kainga but "ratou taonga katoa" - all prized or treasured things.

- The "Pompallier episode". The fullest account is that of Colenso, an eyewitness. Bishop Pompallier had asked for the Maori to be assured that there would be full liberty for the Catholic religion. Hobson assented, but referred also to the protection of Maori customs and beliefs. This was all put in writing. Colenso states: I got Mr Williams (though with some hesitation on his part) to insert "me te ritenga Maori hoki" as a correlative to that of Rome. The English read, "The Governor says that the several faiths of England, of the Wesleyans, of Rome, and also the Maori custom, shall alike be protected by him."246

16.10 Dr Orange in The Treaty of Waitangi 247 depreciates the significance of this last. It is quite true that the addition of the words was a tactical move on the part of the Protestant missionaries affronted by the prospect of the recognition of the Catholic religion. But the phrase was nonetheless recorded.

16.11 A detailed account of legislative and judicial treatment of Maori custom in the general sense is out of place in this survey. Despite the promptings of the British government, and the later provision in section 71 of the Constitution Act 1852 (UK), little was done then or at any time to recognise local Maori custom.

247 p 53.
Section 71 read:

"And whereas it may be expedient that the Laws, Customs, Usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general Principles of Humanity, should for the present be maintained for the Government of themselves, in all their relations to and dealings with each other, and that particular Districts should be set apart within which such Laws, Customs, or Usages should be observed:

It shall be lawful for her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from Time to Time to make Provision for the Purposes aforesaid, and any Repugnancy of any such native Laws, Customs, or Usages to the Law of England, or to any Law Statute, or Usage in force in New Zealand, or in any part thereof, in anywise notwithstanding."

The power given by this provision was never used. It was repealed along with other surviving sections of the Constitution Act 1852 by the Constitution Act 1986.

16.12 The Native Districts Regulation Act 1858 and the Native Circuit Courts Act 1858 permitted a limited recognition of Maori custom in predominantly Maori districts, along with self-government through runanga or district councils. They were a response to the threat perceived from the King movement. The advent of the New Zealand wars and the persistent hostility of many settlers and politicians caused the system to be abandoned in the late 1860s. The comment of Alan is that -

"the opportunity for Maori leaders to exercise a wide range of legislative and judicial powers [was] virtually closed. Nor could the Resident Magistrates any longer be mediators in the sense of helping the Maori to evolve and administer a pattern of bylaws compounded of English elements and local customs, to suit local requirements. Essentially they could now only be mediators of English law to the Maori.

The 2 Acts were repealed in 1891.

The Maori Councils Act 1900 subsequently provided for a limited degree of self-government for Maori communities, but little came of it in the longer term.249

16.13 The one significant and lasting exception was in relation to land titles, including succession. Even here, the provisions of the various Native Land Acts requiring the Court to ascertain ownership according to Native custom were apparently not always applied in reality. In the very instructive case of Willoughby v Panapa Waihopi250 Chapman J remarked:

"Its Judges have acted on the assumption that they might invoke Native custom to determine the succession to the freehold lands of Maoris. That is to say, that Court has applied the same rules of succession to the lands of Maoris which happened to be held under title derived from the Crown as it habitually applied to lands not so held ... . A body of custom has been recognized and created in that Court which represents the sense of justice of its Judges in dealing with a people in the course of transition from a state of tribal communism to a state in which property may be owned in severalty, or in the shape approaching severalty represented by tenancy in common. Many of the customs set up by that Court must have been founded with but slight regard for the ideas which prevailed in savage times." (p 1149)

16.14 Nor, however, was English law applied in its entirety, as the judgments of Chapman J and other judges in Willoughby also demonstrate. Examples are the exclusion of spouses and the recognition of customary marriages and adoptions for succession purposes. It seems rather a case of the application and development of custom by analogy; an attempt to apply customary rules to the novel species of Maori freehold land. That policy is not to be condemned. Indeed, if it had been applied at a more fundamental level it could have avoided many problems, such as those that arose in Mangakahia: see paras 15.69-15.71.

16.15 Adams in Fatal Necessity251 refers to a perceptive analysis by George Clarke, the Protector of Aborigines, in 1845. He opined that many of the existing difficulties might have been prevented by legalising Maori customs not repugnant to fundamental morality and investing

249 See the summary in The Maori and New Zealand Politics (ed JOA Pocock) (1965) by R J Martin, 53.
250 (1910) 29 NZLR 1123.
the chiefs with magisterial authority. Instead the
Government had been so apprehensive lest any portion of the
Executive power should pass into other hands that
certainty in its ultimate intentions had been shaken.

16.16 A minute by Sir James Stephen at the Colonial
Office shows the issue in an even clearer light. The
New Zealand Attorney-General, William Swainson, had
expressed the view that British sovereignty over
New Zealand extended only over those parts whose chiefs had
signed the Treaty of Waitangi. Stephen commented:

"The difficulty which presses Mr Swainson
manifestly is, that he assumes the impossibility
of separating the sovereignty of the Crown over
the aborigines from their subjection to the same
code of laws by which their European fellow
subjects are governed; but this consequence,
absurd as I admit it to be, does not really
follow. I know of no theoretical or practical
difficulty in the maintenance, under the same
sovereign, of various codes of law, for the
government of different races of men. In British
India, in Ceylon, at the Cape of Good Hope, and in
Canada, the aboriginal and the European
inhabitants live together on these terms.

Native laws and native customs, when not abhorrent
from the universal and permanent laws of God, are
respected by English legislatures and by English
courts; and although problems of much difficulty
will occasionally arise out of this state of
things, they have never been such as to refuse all
solution, or as to drive the local authorities on
the far more embarrassing difficulty of extending
the law of England to persons wholly ignorant of
our language, manners and religion".

16.17 But this was not a view that ever commanded much
support in New Zealand. The attitude of Grey was firm:

"The general line of policy I have endeavoured to
adopt in reference to the subject of legislation
for the mixed races inhabiting this country has
been to convince the natives that their
traditional customs had, in reference to their own
present state, and that of the country generally,
become obsolete and useless, and that it would be
to their own advantage to adopt our laws, and to

resort to our tribunals. With this view, I felt that it would, perhaps, be better not to require our Courts in any way to recognise the barbarous customs of the native race ... ".

16.18 The picture is different in the United States, and this is why American experience and American court decisions are of indirect application only. From the beginning United States law recognised the Indian tribes or "nations" as "domestic dependent nations," not sovereign in the international sense, but legal and political entities. They possessed and still possess a measure of legal autonomy and their own courts, which have a considerable jurisdiction.

Maori Custom and the Common Law

16.19 Could fishing rights as part of Maori custom nonetheless have entered through the common law? In one case Maori custom did find a niche in New Zealand law. In Public Trustee v Loasby, Cooper J held that tangi expenses properly incurred were a charge on a Maori deceased's estate, recognising as law a well settled custom. He laid down 3 requisites for the legal recognition of such a custom -

i The custom exists as a general custom of a class eg, the Maori;

ii It is not contrary to statute law;

iii It is reasonable in all the circumstances.

16.20 Note, however, the very narrow scope of the decision. It threatened no Pakeha interest. It is also said that a profit, (roughly, a right to take from time to time something from someone else's land) unlike an easement, cannot arise by custom. A right to fish on another's land is clearly a profit. The principal authority is Gateward's Case, which has been subsequently applied, for example in Race v Ward. But the English courts have likewise been prepared to find a way round this distinction with its somewhat specious reasoning. Thus the House of Lords in Goodman and Blake v

254 (1908) 27 NZLR 801.
255 12 Halsbury (4th ed) 431.
256 (1607) Co Rep 59b, 77 ER 344.
257 (1855) 4 E & B 702, 119 ER 259.
Borough of Saltash invoked the notion of a presumed trust to uphold a claim to dredge for oysters in a navigable tidal river. (The right to the fishery itself was a prescriptive one vested in the borough corporation). A lawful origin for the usage ought to be presumed if reasonably possible. And Gateward's case itself accepted that copyholders could claim profits by custom because they were precluded from claiming them by prescription.

16.21 There is also a cryptic statement in the Privy Council's judgment in Attorney-General of British Columbia v Attorney-General of Canada that the severance of a fishing right from the ownership of the underlying soil cannot be brought about by custom, "for the origin of such a custom would be an unlawful act. This is plainly obiter, and is difficult to follow. It should, however, be noted.

16.22 In Malcomson v O'Dea on which the Privy Council relied, the House of Lords upheld a claim to a private fishery of very old but uncertain origins in the tidal part of the Shannon River in Ireland. And at least one English decision has upheld fishing rights extending to the seabed beyond low water mark. This is Gann v The Free Fishers of Whitstable. The respondents owned a private oyster fishery that extended about 2 miles into the sea below the low water mark. The case concerned the right to charge anchorage dues from vessels anchoring within the boundaries of the fishery. The House of Lords found that such an interference in the public right of navigation in the sea would require evidence of some express grant from the Crown. The fishery right, however, was upheld, subject to the public right of navigation. There was evidence of immemorial usage (a deed of conveyance in 1792 stated the fishery had existed "for many hundred years now long past"), and a grant by the Crown prior to Magna Charta was presumed.

16.23 The Mayor of Colchester v Brooke provides another example of a fishing right beyond low water mark (the right itself was not questioned). It concerned a private oyster fishery in a navigable tidal river. Even at the lowest tides, much of the fishery remained submerged.

16.24 Another line of argument could also be used to support common law recognition of customary Maori fishing
rights. The orthodox view is that, on the extension of British sovereignty to a "settled" and in some circumstances a "ceded" colony, (see para 8.3) the common law of England extends to that colony as far as it is appropriate to its circumstances. This doctrine goes back to Blackstone and further, but its classic statement is that of the Privy Council in Cooper v Stuart.264

"The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class ... the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute."

16.25 In New Zealand this rule was enacted in the English Laws Act 1908. This Act has been repealed by the Imperial Laws Application Act 1988, but section 5 of that Act provides that the common law of England, so far as it was part of the laws of New Zealand at the commencement of the Act, is to continue to be part of the laws of New Zealand. The exact effect of this somewhat unsatisfactory provision remains to be seen.

16.26 The 1908 Act repeated the English Laws Act 1858. The origin of that Act was a decision of Stephen ACJ that the Wills Act 1837 was not in force in New Zealand because the country was already under British sovereignty (and therefore British statutes did not in the ordinary case extend to New Zealand). This odd notion conflicted with the conventional view that the initial date of receiving English law was 14 January 1840. The 1858 Act adopted the latter. But it likewise adopted the standard formula "so far as it is applicable to the circumstances of the colony."

16.27 There are many cases on the meaning and application of that phrase - Cooper v Stuart itself,

264 (1889) 15 App Cas 286 at 291.
Attorney General v Stewart, 265 Whicker v Hume, 266 Jex v McKinney, 267 Ruddick v Weathered, 268 and so on. Nearly all approach it from the aspect of the settlers, British or other. But it seems equally legitimate to take into account the circumstances of a large indigenous population hitherto governed by their own laws and customs. As Lord Russell said, the application to such people of the whole of the common law would cause "much distress and many unprofitable hardships". 269

16.28 The Cooper v Stuart dichotomy is moreover inadequate. New Zealand was not a territory "practically unoccupied, or without settled inhabitants". The facts and the whole course of British dealings with New Zealand negate the notion. Indeed until the 1860s European settlers were in a minority in the North Island.

16.29 While the vast majority of the cases, both in New Zealand and overseas, have dealt with the applicability of Imperial statutes in various British possessions, there are decisions where a common law rule was in question. Cooper v Stuart is again an instance. The Privy Council had no difficulty in deciding that the rule against perpetuities was part of New South Wales law, but went on to hold that the rule did not apply to a Crown grant in New South Wales, irrespective of whether it had been extended to the Crown in England. No statute was involved. Again, quite recently in Southern Centre of Theosophy Incorporated v South Australia, 270 a case on accretion, a full court of the Supreme Court of South Australia opined that, whatever the position in Britain, ownership of lake beds in Australia vested in the Crown under the common law. This was not dealt with by the Privy Council when it reversed the judgment. 271

16.30 On that footing indigenous custom could have been given a wider application than legally recognised custom in England. It could, for example, qualify in societies such as New Zealand the traditional rules about the Crown's title over the foreshore and the nature of the public's right to fish. 272

265 (1817) 2 Mer 143; 1 ER 881.
266 (1858) 7 HL Cas 124; 1843-60 All ER Rep 450.
267 (1889) 14 App Cas 77.
268 (1889) 7 NZLR 491.
270 (1979) 21 SASR 199.
271 38 ALR 586.
16.31 However, the point seems never to have been taken judicially. In Baldick v Jackson Stout C J held that the statute of 17 Edw II c 2 (right to whales part of the Royal prerogative) was not in force in New Zealand, as being inapplicable to the circumstances of the colony. The grounds were first, that throughout the long history of New Zealand whaling the right had never been claimed and second, that it would have had to be claimed against the Maori, which would have been contrary to the Treaty of Waitangi. The logical implications of this decision were far reaching but no later decision has taken it up. And Baldick v Jackson was concerned with the applicability of an English statute. The Chief Justice took a very different view where it was a question of the common law. In Waipapakura v Hempton, 4 years later, he said:

"Now in English law – and the law of fishery is the same in New Zealand as in England, for we brought the common law of England with us except insofar as it has not (sic) in respect of sea fisheries been altered by statute – there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast." 274

Custom and Common Law in Hawaii

16.32 The wider worlds of Polynesia and the common law intersect not only in New Zealand but also in the American State of Hawaii, where indigenous custom has a much higher status. From its European discovery in 1778 Hawaii was recognised by Western powers as an independent and sovereign State. In the nineteenth century it acquired a missionary-influenced code of laws. There was substantial white (and Asian) immigration to the extent that Westerners achieved economic and political dominance. Hawaii became a territory of the United States in 1898, when native Hawaiians comprised 35 per cent of the population. By 1976 this proportion had decreased to 20 per cent. The territory was admitted as a State in 1959. Legally, Hawaii is a common law jurisdiction; the common law of England, as ascertained by English and American decisions, is declared to be the common law of the State.

16.33 Nonetheless, rights under customary law are recognised, and an interaction has occurred between the 2 systems.

16.34 Article 12, section 7 of the Hawaii constitution (as amended in 1978) provided –

273 (1910) 27 NZLR 801.
274 (1914) 33 NZLR 1065, 1071.
"The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."

The principle embodied in Article 12.7 is not new. It is said that:

"A number of Hawaiian rights predating the Republic of Hawaii have been preserved by the deference that Hawaii has long given to customary law. Continuation of the practice after annexation and statehood indicates the viability of some traditional Native Hawaiian law. Absent statute, traditional Hawaiian usage is not only admissible in the courts of Hawaii, but also controls inconsistent common law. ... Statutory law controls inconsistent customary law, but custom can be used to clarify ambiguous statutes."\(^{275}\)

The contrast with New Zealand is stark.

Conclusion

16.35 Realistically the application of Maori custom and usage to a substantial body of British settlers was out of the question. The general extension of the common law to New Zealand was inevitable; so also was its broad application to all the people in theory – and, as settlement continued and spread, in practice. What was not faced up to then or later outside the sphere of land law, and succession in relation to Maori land, was the possible integration of indigenous custom into the law so that it reflected the real circumstances of the time and place.

16.36 Nonetheless, the common law did very possibly have the capacity to acknowledge and integrate Maori custom in relation to rights in the nature of property. The concepts of aboriginal title and of the validity of lawful customs could thus have come together. The starting point would have been Re the Lundon and Whitaker Claims Act. The essence of that decision, which is consistent with all the cases, is that all property rights by English tenure must derive from the Crown. But the decision is also authority for the proposition that "the Crown was bound to a full

recognition of native proprietary right, and whatever the extent of that right by established native custom might be, the Crown was bound to respect it". [emphasis added]

16.37 As the law stands it appears that the courts could read customary rights by implication into statutes whose wording does not clearly preclude it. This would be in line with the general promises of the Treaty and with its higher legal status following recent legislation and litigation.