

WAIKATO LAW REVIEW

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EDITOR'S INTRODUCTION

I am pleased to present the thirteenth edition of the *Waikato Law Review*. The *Review* has a fresh look to take it forward from its origins under its first editor, Professor Peter Spiller.

A feature of this issue is a group of articles arising from papers presented at the annual conference of the Australasian Law Teachers' Association. Waikato hosted the four-day conference in July this year. Its theme was 'One Law for All?' which proved to be the starting-point for many valuable presentations and discussions. Among the articles on this theme are the contributions of keynote speakers – the Chief Justice, Dame Sian Elias, Sir Kenneth Keith (now a member of the International Court of Justice), Justice E T Durie, and John von Doussa QC, President of Australia's Human Rights and Equal Opportunities Commission. Another paper from the conference is that of Jane Diplock, Chair of the Securities Commission.

A regular feature of the *Review* is the Harkness Henry Lecture. This year's lecturer, Justice Blanchard, presents a thorough analysis of long-overdue proposals to reform insolvency legislation by making proper provision for business rehabilitation. The School is grateful for Justice Blanchard's contribution and for the continuing support of Harkness Henry & Co. Other papers in the *Review* present the research of seasoned and new scholars in different fields of inquiry. It is hoped that the review of Contemporary Issues in Maori Law and Society, provided by Linda Te Aho, will become a regular feature of the *Review*.

I thank the authors who submitted articles for the *Review*, the referees to whom articles were sent, and the staff of the School of Law of the University of Waikato who have assisted in its production. In particular I thank Janine Pickering for all her work on files and on liaison with contributors and printers; and Durgeshree Naicker for her careful work on references and document details.

Professor Barry Barton
Editor



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EQUALITY UNDER LAW

BY RT HON DAME SIAN ELIAS*

It is fifty years since the United States Supreme Court decided that ‘separate but equal’ state schools violated the ‘equal protection of the laws’ guaranteed by the Fourteenth Amendment of the Constitution.¹ At the same time, the Court held that segregation of public schools in the District of Columbia (to which the Fourteenth Amendment did not apply) was unconstitutional as a breach of the due process clause of the Fifth Amendment.² *Brown v Board of Education* has been described as ‘the centerpiece of justice in America’.³ It was an inspiration for those working for human rights around the world. In the United States it paved the way for the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act 1965 which eventually undermined the long-standing segregation of the black minority. Anthony Lester has described the background.⁴ The United States faced escalating embarrassment in its post-war foreign relations because of the discrimination against black Americans. The Truman administration had ended racial segregation in the armed forces and other institutions over which it had direct control. The Attorney-General filed an *amicus* brief in support of the claimants in *Brown*, attaching a letter from Dean Acheson, then Secretary of State, explaining the damage to the foreign relations of the United States in the continuation of such discrimination. The Court had the comfort of knowing the Executive branch of government was convinced of the need for change.

Richard Posner has argued that the Supreme Court’s reversal of *Plessy v Ferguson*⁵ did not arise from re-examination of the text of the Fourteenth Amendment, but from the changed social conditions in which *Brown* came to be determined:⁶

It was not the ‘pull of the text’ that compelled re-examination of *Plessy* but the vagueness of the text that *permitted* re-examination of the decision in light of half a century of social and political change. It was not brooding over the words ‘equal protection of the laws’ but a change in the nation’s ethical and political climate that resulted in the decision in *Brown*.

As Posner suggests, the Supreme Court rejected *Plessy* for grounds based on ‘political history, common sense and common knowledge, and ethical insight’.⁷ Formal equality of opportunity was no longer good enough in a world recoiling from the terrible events of World War II. The Universal Declaration of Human Rights and the Covenants it gave rise to affirmed human dignity and diversity of human aspiration under equal protection of law. These standards and aspirations,

* The Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand. An address given to the Australasian Law Teachers’ Association Conference, University of Waikato, 6 July 2005.

1 *Brown v Board of Education* 347 US 483 (1954).

2 *Bolling v Sharpe* 347 US 497 (1954).

3 P Finkelman, ‘Civil Rights in Historical Context: In Defence of *Brown*’ (2005) 118 Harv L Rev 973.

4 A Lester, ‘Brown v Board of Education Overseas’ American Philosophical Society, Philadelphia, 23 April 2004. 163 US 537; 16 S Ct 1138; 41 L Ed 256; (1896).

6 R A Posner, *The Problems of Jurisprudence* (1990), 307.

7 *Ibid*, 309.

necessarily expressed in general propositions that have to be assessed in social context, have had a profound impact upon the ethical content of law and on the way in which law is taught.

In New Zealand, there is no reference to 'equality before and under the law' in the New Zealand Bill of Rights Act 1990, such as is contained in section 15 of the Canadian Charter of Rights.⁸ The White Paper which preceded the Bill of Rights Act considered that the term was 'elusive and its significance difficult to discern'.⁹ It took the view that 'the general notion' of equality before the law was implicit in reference in the proposed bill (which would have bound the legislature) to 'New Zealand being founded on the rule of law'. Although the proposed preamble was not enacted in the modified Act, the Supreme Court Act 2003 contains a similar reference to 'New Zealand's continuing commitment to the rule of law'.¹⁰ The extent to which the concept of the rule of law contains the notion of 'equality before the law', as suggested by the White Paper, remains conjectural. So too does the content of equality under the law and its relationship with the express statutory rights to be free of the forms of discrimination prohibited by section 19 of the New Zealand Bill of Rights Act and section 21 of the Human Rights Act.

The liberal concept of freedom as the right to be free of legal disability cannot deliver equality under law. This is what Stephen Sedley has described as the 'snake in the legal grass'¹¹ – the unequal effects of equal laws. It was to redress that effect that the Supreme Court of the United States expanded the concept of discrimination to include what Chief Justice Burger, writing for the Court, referred to as 'practices that are fair in form, but discriminatory in operation'.¹² As he explained, alluding to Aesop's fable:

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. It has ... provided that the vessel in which the milk is proffered be one all seekers can use.¹³

It is to address the unequal effect of apparently equal laws that indirect discrimination is proscribed in a number of jurisdictions. In New Zealand section 65 of the Human Rights Act 1993 forbids 'any conduct, practice, requirement or condition not apparently in contravention of the Human Rights Act but which has the effect of treating a person or group of persons differently' on one of the prohibited grounds. Indirectly discriminatory policies or practices may apply equally to all persons but operate to disadvantage a minority group. So, in *Australian Iron and Steel Pty Ltd v Banovic*¹⁴ the High Court held that a 'last on, first off' retrenchment of employment indirectly discriminates against women employees whose entry into employment had been delayed because of historic discrimination. In the United States, weight and height requirements for employment have been held to discriminate indirectly against women.¹⁵ Such grounds of discrimination recognise real effect, despite the result being unintended.

8 Canadian Charter of Rights, s 15(1), which provides 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

9 *A Bill of Rights for New Zealand: A White Paper* (1985) para 10.81.

10 Supreme Court Act s 3(2).

11 S Sedley, *Freedom, Law and Justice* (1999) at 41.

12 *Griggs v Duke Power Co* 401 US 424 (1971).

13 *Ibid.*

14 [1989] HCA 56, (1989) 168 CLR 165 (5 December 1989).

15 *Dothard v Rawlinson* 433 US 321 (1977).

But freedom from discriminatory policies is not sufficient to remove disabilities, particularly when they arise from systemic historic discrimination. In many jurisdictions special legislative savings exempt affirmative action programmes. Where redress is sought from the courts without legislative backing, our tradition is cautious, generally treating equality before and under the law as a formal concept inherent in the nature of law, as the White Paper suggested.

Is this good enough? Stephen Sedley points to centuries of positive discrimination in favour of incompetent or mediocre white men which has resulted in typecasting of minority groups. Remedial steps, he suggests, are required to liberate the individuals comprising such groups.¹⁶ Anthony Lester has written of the inequalities in their environments which are the significant impediments to allowing people to fulfill their real potential:¹⁷

Anti-discrimination legislation cannot provide a remedy to those who are denied work because their lack of qualifications or seniority make them the first candidates for unemployment and technological redundancy or because of the absence of adequate training programmes ... Anti-discrimination legislation cannot by itself ensure that schools in poor neighbourhoods have good teachers and modern amenities ... Only if such general sources of inequality are removed can legislation be really effective in dealing with a specific inequality of racial discrimination. Similar considerations apply to some other forms of inequality, notably against women, where positive measures are needed to alleviate the double burden of child rearing and bread winning, especially for single parents.

The solutions to social inequalities are not principally to be found in law or legal process. They raise political and ethical questions, generally requiring political answers, usually delivered through enacted laws. Lord Bingham has identified three ways in which such laws regulate the position of all in a society.¹⁸ First, is the proscription of adverse discrimination in the manner I have been discussing. But the law can be used in two other ways. It can be used to entrench the power and influence of the dominant groupings. We have a number of examples in our history of such use of law. Finally, law can be used to recognise the existence of a minority and provide it with some autonomy and validity. Lord Bingham cites legislative measures taken in Finland and Belgium to empower minority languages. He refers to separate electoral rolls and seats in a number of countries, including New Zealand, to ensure that minorities have a distinct political presence. He points to the relative autonomy enjoyed by Scotland since the Act of Union and contrasts it with the position of Northern Ireland.

The empowerment of minority groupings through law takes many forms. At their least ambitious they may entail exemptions from legal prescription to meet particular cultural, linguistic or religious interests. At the other extreme, they may entail devolution of political authority, as in the assemblies of Scotland and Wales, which reflect a principle of subsidiarity, which shares common roots with federalism. Between are such structural accommodations as separate parliamentary seats, as in India, Fiji, and New Zealand, and special measures for language protection, preservation of culture, and custom, including separate systems of property ownership, all of which we have in New Zealand. All of these measures require community commitment. They entail the allocation of resources. It would be wrong to see such responses when adopted as divisive or in breach of principles of equality. Their aim is to integrate minority groups into the wider society without requiring loss of identity. Thus, Roy Jenkins looked to the

¹⁶ Above n 11 at 43.

¹⁷ A Lester, 'Equality and United Kingdom Law: Past, Present and Future' (2001) PL 77, 83.

¹⁸ T Bingham, 'Law in a Pluralist Society' in *The Business of Judging: Selected Essays and Speeches* (2000) 101-115.

integration of minority immigrant groups on the basis of 'equal opportunity, accompanied by cultural diversity, in an atmosphere of mutual tolerance'.¹⁹ Such aspirations may be disappointed. My point is that there is nothing wrong in principle with such solutions.

The truth is, as Sedley says, 'all laws discriminate':²⁰

They discriminate between the virtuous and the wicked, between the permitted and the prohibited, between the taxable and the duty-free. They discriminate, too, on grounds which from era to era are taken to be so obvious that they do not even require justification. It was obvious that the right of all Athenian citizens to vote did not include women or slaves. Among the American founding fathers who proclaimed the self-evident truth that all men are born equal were several slave owners. In this country until well into the 20th century the unsuitability of women to vote, sit on juries or join the professions was regarded – at least by men – as too obvious for argument.

We live in an increasingly diverse society. A comparison of the last three census results demonstrates how much the ethnic mix of our population is increasing and how rapidly it has happened. Alienation of minority groups threatens social stability and squanders human talent. Proper conduct can be promoted on a consistent and regular basis only by the mainstream processes of socialisation. Those mainstream processes of socialisations turn on a shared ethical sense and the practical and cultural networks in a community which reinforce expectation and interdependence. Cultural groupings which are not recognised, which have no sense of mutual expectation with others in the community and which feel isolated or denigrated, are not positive forces within our community. The validity our society gives to its cultural minorities is therefore very much in the wider community interest.

After the last election, the briefing papers of the Ministry of Women Affairs to the incoming Minister, published in July 2002, demonstrate both gender and cultural deficits. The statistics there recorded show both the continuing gap in earnings between women and men and the disparity in economic independence between the genders. The position of women who were members of some racial minorities lagged still further behind.

There are some serious challenges as to the law's ability to protect, recognise and affirm the right to difference of the ethnic and cultural minorities for whom New Zealand is home.

No recognition of cultural values is absolute. Tolerance of cultural diversity is bounded by notions of reasonableness and public policy, as the courts have recognised in a number of cases. New Zealand has legislated against cultural practices which run contrary to deeply held social and legal traditions. For example, female genital mutilation and bigamy are made criminal offences under the Crimes Act 1961. On the other hand, in the United Kingdom the Road Traffic Act 1988 exempts Sikhs from having to wear safety helmets on motor bikes because of the interference with their religious freedom. This statutory modification, it should be noted, followed a court decision in which the Court of Appeal was divided on the question whether the offence under the old legislation permitted religious belief to be accepted within the defence of necessity provided for.

In the United Kingdom multi-culturalism has been recognised as a fundamental objective of the government. It was defined in the United Kingdom government's submission to the United Nations Committee on the Elimination of all Forms of Racial Discrimination in 1995 in the following terms:

19 Speech to the National Committee for Commonwealth Immigrants, 23 May 1968, cited in A Lester, above n 17, 81.

20 S Sedley, above n 11, 40.

It is the fundamental objective of the UK government to enable members of the ethnic minorities to participate freely and fully in the economic, social and public life of the nation, with all the benefits and responsibilities which then entails, while still being able to maintain their own culture, traditions, language and values. Put more simply, this view of a multi-cultural society is one which protects the cultures represented in it by promoting their retention.

It is misconceived to suggest that the recognition of distinct cultural values detracts from the general principle that laws must apply equally to all. In New Zealand, we forget some of our own legal history when we claim that it is a fundamental tenet of English and New Zealand law that there is no room for distinctions in law to recognise minority interests. In the early years of the colony, for example, quite different penal provisions attached to Maori and non-Maori. In part that was in recognition of profound Maori abhorrence of imprisonment as a form of punishment and different notions of property which made dishonesty offences difficult to apply to Maori. The Maori Welfare Act 1962 contained provision, only recently repealed, for marae courts in minor matters, although it was never used. Until the new Constitution Act was enacted in 1986 the New Zealand Constitution Act 1852 continued provision for the gazetting of Maori districts in which Maori could administer their own laws provided they were not repugnant to the laws of humanity. Repugnancy to the laws of England or the general laws of New Zealand did not matter. This is an early response to the aspiration for a degree of autonomy which remains with us today and which is consistent with the contemporary aspirations of a number of European communities.

Pluralism in law through preservation of custom was common in colonial law.²¹ The common law, which we inherited from England, was in origin the custom of England. Wherever it was imposed in the British Empire, it picked up local customs, some of application only to distinct cultural or ethnic groupings within society. In an early case, the Privy Council recognised that English notions of property law were inadequate to deal with the religious practices of India. The court recognised and gave effect in law to the personality of an idol which was a family god. This approach was confirmed in its application to New Zealand by the Secretary of State for the Colonies, Lord Stanley in 1844. With the exception of customs 'in conflict with the universal laws of morality', Stanley could see no reason:²²

why the native New Zealanders might not be permitted to live among themselves according to their national laws or usages, as is the case with the aboriginal races in other British colonies.

In 1841, when the *Tyne* slipped into Auckland harbour bringing William Martin and William Shortland to set up the new legal order, the realities of life in New Zealand presented substantial challenges for the establishment of the 'settled form of government' and the protection of custom and law promised by the Treaty of Waitangi. In 1840 there were approximately 100,000 Maori in

21 P McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991) 85-86: 'The plurality of legal systems within British territory was hardly a novel possibility in 1840 as New Zealand was poised to become the Crown's newest colony. The legal monoculture today – "one law for everyone" – is a relatively recent attitude, one which should not be applied retrospectively to British imperial history. This history is one in which legal pluralism was the norm rather than the exception. ... British sovereignty of *itself* did not supplant the Maori customary law with English law. If the guarantee in the Maori version of the Treaty of Waitangi of te tino rangatiratanga was no more than an assurance that the Chiefs' cession of sovereignty would not displace their customary law, then this was a promise which to a great extent English imperial constitutional (colonial) law was able to keep'.

22 Great Britain Parliamentary Papers NZ 2 1844 (556) XXIII Appendix 19, 475 cited in E Fletcher, *A Rational Experiment: the Bringing of English Law to New Zealand* (unpublished Master of Arts thesis, Auckland University, 1998), 223.

New Zealand, and 2,000 settlers. By 1842 the settler population had grown to 11,000, most of whom were in New Zealand Company settlements at Wellington, Nelson, Wanganui, and New Plymouth, well to the south of the capital in Auckland.²³ Both Maori and non-Maori had expectations of law in the Crown Colony that were going to be very difficult to fulfil.

In vast tracts of the country, Maori were undisturbed in their traditional social organisation. Plunder to avenge injury was the usual vindication of right. Warfare, at least in parts of the country where Christian teaching was not accepted, continued. Collective responsibility for the depredations of individuals was accepted. Land was held collectively. Interests in land could be elaborate and could cross hapu territories. They could include usufructory rights, often seasonal, to particular resources; possessory rights to occupy habitations, cultivations and fisheries; and tribal rights under the *mana rangatira*.²⁴ The complexities of Maori systems of social organisation and in particular their relationships with land were only dimly perceived. Land purchases undertaken before 1840 remained to be investigated. The Crown's exclusive right under Article 2 of the Treaty of Waitangi to acquire Maori land (and sell it to settlers) required the establishment of a system. More settlers were on the way, with more pressures upon Maori land. Protection of those Maori customs not inconsistent with principles of humanity, suppression of those that were (cannibalism and warfare, but not initially slavery because of its role in Maori social organisation), and protection of the law raised questions of boundaries requiring negotiation and persuasion. The crucial piece in the plan to obtain Maori acceptance of law gradually was the Native Exemption Ordinance 1844. It aimed to attain 'gradual' and 'willing' acceptance by Maori of 'the laws and customs of England'. In the meantime, special laws more in accordance with Maori custom were proposed.

Thus the Ordinance provided for the participation in charging and arrest of Maori of two of the principal chiefs of the tribe to which the offender belonged. Because of Maori horror of imprisonment, bail was provided for as of right on provision of security in all cases except murder or rape. In the case of theft, no sentence was to be passed upon conviction if payment of four times the value of the goods stolen was made into Court before sentence. The value of the goods was to be paid to the victim, with the balance going to the Treasurer. No Maori was to be imprisoned for judgment debts in any civil proceedings. A further Fines for Assaults Ordinance enabled up to one-half of any fines imposed to be paid to victims, in explicit recognition of native preference for *utu*.

In introducing this measure to the Chiefs at a great gathering in Remuera, Governor Fitzroy explained that he did not wish to interfere with native custom. Rather he hoped to persuade by reason the abandonment of those customs in time. Key in this strategy, as Fletcher has argued,²⁵ was an emphasis on the benefits of individual responsibility, the dispassionate administration of justice (to achieve equality before the law) and the collective security to be obtained eventually from a common legal system. In the meantime, the legal system was to be separate in its provisions for Maori and non-Maori.

The Native Exemption Ordinance, which Governor Fitzroy acknowledged had been 'framed on no precedent', came to be considered in London in a new climate. War had broken out in the North of New Zealand. Fitzroy was recalled and Governor Grey, an ambitious trouble-shooter,

23 McLintock, *Crown Colony Government in New Zealand* (1958), 134.

24 Waitangi Tribunal (of New Zealand) *The Mohaka River Report*, (1992, Wai 119), 16.

25 E Fletcher, above n 22, 234.

was sent out to New Zealand in 1845. Stephen was sympathetic to the Ordinance, but thought it would provoke settler hostility too far. Lord Stanley considered that the 'zeal' of the reformers had 'rather outrun discretion'. Although the Ordinance was not formally disallowed, the new Governor was instructed to revise it.

The themes of cultural plurality and the response of law still exercise us. They include recognition of Maori custom within our law and questions as to the inevitability of a unitary legal system. How we have dealt – or not dealt – with such themes is part of the story of the New Zealand legal system.

Our laws for many years recognised informal Maori marriage and adoptions. For all our history we have maintained a separate system for the ownership and alienation of Maori land. Maori land is explicitly exempted from the provisions of the Matrimonial Property Act 1976. Statutes such as the Resource Management Act 1991 and its predecessors the town and country planning legislation, have given explicit recognition to Maori cultural values. The Maori Community Development Act 1962 provides for Maori Wardens to exercise control over other Maori and perform minor policing roles. Under the Evidence Act, exceptions to the rule against hearsay are made for evidence of Maori custom.

Leaving aside the place of Maori in New Zealand society, other legislation permits the recognition of minority cultural values. That is particularly the case in family law where the courts have invoked Article 30 of the United Nations Convention of the Rights of the Child in being guided by the principles that a child should be able to know and enjoy his or her own culture and language. The Children Young Persons and Their Families Act 1989 specifically recognises cultural issues. It is based on the assumption that children are best raised within their own cultural context and with their own people. It permits tribal elders to take leadership roles in family group discussions. Under the Mental Health (Compulsory Assessment and Treatment) Act 1992, courts and tribunals exercising powers under the Act are required to do so 'with proper respect for the patient's cultural and ethnic identity, language and religious or ethical beliefs' and the significance to the patient of his or her ties with family, hapu, iwi and others. Cultural evidence can be called on sentencing. Apart from sentencing, in criminal law, we have not maintained recognition through law of diversity. In family law, property law, and public law, we have continued to accept that the law can respond to the distinct values of distinct racial and cultural communities. On the topic of cultural maintenance, we may have been more ambivalent. Language is a case in point.

Matthew Arnold once described the Welsh language as 'the curse of Wales'.²⁶ Today in the United Kingdom and in Europe minority native languages are not regarded so miserably. It has come to be recognised that such diversity is a source of richness and strength in a society. It has come to be seen that validation of cultural minorities through recognition of their languages is critical to human dignity. Joseph Raz has argued more widely that freedom of expression validates an individual's identification with his or her way of life and sense of self-worth.²⁷ If individuals believe their way of life or culture to be valid that 'facilitates rather than hinders their integration into society'.²⁸ Such validation also makes the way of life 'a real option' for others. A perception that a language is dead, dying or irrelevant may be shattered. Public validation is essential to a sense of 'cultural transmission, preservation and renewal'. We have lost much time with many

26 J Morris, *Wales* (1982), 66.

27 J Raz, 'Free Expression and Personal Identification' (1991) 11 OJLS 303 at 311.

28 *Ibid*, 312.

minority languages. Modern communications which have done so much to kill them off now present a unique opportunity to deliver the scarce resource of the native speaker to a wide audience.

The Welsh Language Act which is the prototype for our Maori Language Act, was passed by the Westminster Parliament in 1967. There are Welsh language radio and television stations and statute requires the curriculum of schools to contain Welsh language instruction. There is wider support for such initiatives in Europe. And they are not confined to native languages. A European Community directive requires member states:²⁹

to take appropriate measures to promote, in co-ordination with normal education, teaching of the mother tongue and culture of the country of origin for the children of other community nationals.

‘Pluralistic equality’ aims to give members of minorities the same advantages as members of the majority. ‘Affirmative equality’ goes further and may involve a corresponding interference with the freedom of the majority, for example by making the education system bilingual or requiring all civil servants to be bilingual. These are steps that have been taken in Wales, Belgium, and Canada. We have not been prepared to go as far to date.

So far, I have talked about substantive equality under law. Equality before the law is also an aspect of the rule of law, as the New Zealand White Paper recognised. It strikes a universal chord because of a shared moral sensibility that the delivery of justice by impartial tribunals matters. Such equality was part of Aristotle’s notion of corrective justice. Essential to it is the requirement of impartiality in the application of law by which no weight is given to the character or social status of the parties. Posner, in arguing against the view³⁰ that Aristotle’s notion of corrective justice is more than a formal concept, comments that ‘Aristotle seems to be saying little more than that there should be an impartial government machinery for redressing redressable wrongs’.³¹

Well, it may seem little in saying, but the delivery of a level playing field is more easily said than done. The difficulties lie both in the provision of impartial judges and in their application of equal laws to people who are manifestly unequal. The disparities do not simply arise in ease of access to the courts because of lack of means, although that is a significant barrier to equality before the law. Eligibility for legal aid and commercial value explain why criminal cases and freedom of speech cases are the most common to invoke human rights and why the privacy interests of wealthy individuals are often before the courts. The principled development of law is the loser if the discourse enabled by litigation about equality is blocked or skewed. Court fees, lawyers’ fees and the exposure to costs greatly inhibit public interest litigation today.

It has to be acknowledged that the techniques and legitimacy of judicial function are fragile. That can be illustrated by the difficulties experienced by Courts in expressing ethical and legal standards which will allow principled determination of issues of life and death and the allocation of medical resources.³² More widely, the scope for judicial correction of inequalities is circumscribed by legislation and also by the reality that the courts lack legitimacy in making substantial changes to long-standing assumptions, often reflected in older legislation. That is

29 European Economic Council Directive 77/486/EEC of 25 July 1977 on the Education of the Children of Migrant Workers [Official Journal L 199 of 06.08.1977].

30 Expressed for example by Bingham, above n 18, 310-311 and S Sedley, above n 11, 50-51.

31 Posner, above n 6, 316.

32 *Roe v Wade* 410 US 113 (1973); *Airedale NHS Trust v Bland* [1993] 1 All ER 821; *Patient A v Health Board X*, High Court BLE CIV-2003-406-000014, 15 March 2005, Baragwanath J.

illustrated in New Zealand by *Attorney-General v Quilter*³³ in which gay couples who applied for marriage licences were unsuccessful in a claim that they were being discriminated against. Instead, this form of disadvantage has since been directly addressed by the legislature, which is clearly better placed to reflect contemporary values and provide appropriate solutions. What I think should not be underestimated is the didactic role that the litigation may have played. As it has in other major litigation about equality which has been formally unsuccessful.³⁴

Other disparities in equality before the law arise in the application of the criminal law to those of unequal responsibility. For those who are sane and not provoked to kill, the law is in general implacable. Sedley says of sentencing that most of the individuals before the court are irreparably damaged by their formative experiences. This is the ‘majestic even-handedness of the law’, described by Anatole France, ‘which forbids rich and poor alike to sleep under bridges, to beg in the streets and to steal bread’.³⁵ The courts in sentencing such people are instruments of society in maintaining civil order and public confidence in the system. The scope for contextualised judging to ensure equal justice is small.

That is not necessarily a bad thing. In cases involving equality, cultural values and gender and class assumptions may distort impartiality unconsciously. This is the risk of the ‘unexpressed major premise’ described by Oliver Wendell Holmes.³⁶ Such premise is often based on values and attitudes which have been absorbed by the judge through his or her own experiences in life. Felix Frankfurter identified a critical quality of a judge as the ‘power to discover and to suppress his prejudices.’³⁷ It is easier said than done, particularly if judges come from narrow sections of society. Lord Devlin pointed to the English judges who, in looking for the philosophy behind an Act, found ‘a Victorian Bill of Rights’:³⁸

favouring (subject to the observance of the accepted standards of morality) the liberty of the individual, the freedom of contract, and the sacredness of property, and which was highly suspicious of taxation. If the Act interfered with these notions, the judges tended either to assume that it could not mean what it said or to minimize the interference by giving the intrusive words the narrowest possible construction, even to the point of pedantry.

Within my time in legal practice in New Zealand, I can point to similar hostility by the then exclusively male judiciary to the policies of early matrimonial property legislation. These were judges who prided in their mastery of legalism. They would have been horrified to think that they were pushing any sort of ideological barrow. I suspect the same is true of the English judges who were hostile to tax and other legislation impacting on property rights. They simply did not see that their construction of the legislation was heavily influenced by their own personal values and they did not appreciate the extent to which those values were out of touch with the values of the times.

There are limits to the insights to be expected of a judge who thinks that all the world thinks as he does and therefore that a factor goes without saying. That is why diversity in appointments

33 [1998] 1 NZLR 523.

34 *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 (CA); [1994] 1 NZLR 513 (PC); [1996] 3 NZLR 140 (CA).

35 *Le Lys Rouge* (1894), ch 7.

36 O W Holmes, *The Common Law* (1881).

37 F Frankfurter, ‘The Appointment of a Justice’ in P B Kurland, (ed) *Felix Frankfurter on the Supreme Court: Extrajudicial Essays on the Court and the Constitution* (1970), 216-217.

38 P Devlin, ‘The Judge as Lawmaker’ in *The Judge* (2nd ed, 1981) at 15.

matters. Had there been women on the bench, it is most unlikely that the unconscious hostility to the matrimonial property legislation would have continued unchallenged for so long. Or that I could have received a judgment in defended separation case where the judge said ‘You only have to look at the photographs of the home to see that the respondent is a good husband and provider.’ Again, however, there are limits to what can realistically be achieved with greater diversity on the bench, especially when we move beyond gender. Whatever their origins, most judges are appointed from well-educated, middle-class, economically comfortable backgrounds. Perhaps honesty in identification and expression of the major premises in judicial reasoning is the best policy.

It can however be controversial, as is illustrated by a 1997 decision of the Canadian Supreme Court, *R v RDS*.³⁹ A black youth was acquitted by a black judge, who declined to accept the evidence of a police officer. What she said was:⁴⁰

The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the court this morning. I am not saying *that the constable has misled the court, although police officers have been known to do that in the past*. I am not saying that the officer overreacted, *but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable*. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [RDS] that he was told to shut up or he would be under arrest. *It seems to be in keeping with the prevalent attitude of the day*.

At any rate, based on my comments and based on all the evidence before the court I have no choice but to acquit.

The Supreme Court of Canada was deeply divided on the acceptability of what L’Heureux-Dubé and McLachlin JJ described as ‘contextualised judging.’⁴¹ Four judges expressed the view that ‘judicial neutrality’ is to be contrasted with ‘judicial impartiality’. The first is impossible to achieve. On this view judges should draw on knowledge of their communities. Relevantly, they would understand the racial dynamics of the community ‘including the existence ... of a history of widespread and systematic discrimination against black and aboriginal people, and high profile clashes between police and the visible minority over policing issues.’⁴² L’Heureux-Dubé and McLachlin JJ found the judges’ remarks:⁴³

reflected an entirely appropriate recognition of the facts in evidence in this case and of context within which this case arose – a context known to the judge and to any well-informed member of the community.

Cory and Iacobucci JJ, while concurring in the result to uphold the verdict, emphasised the dangers of reasoning from generalisations. They stressed that the life experience of a trial judge is no substitute for evidence. They thought the reasons given were sufficient, however, without the offending words. The dissenting judges (Lamer CJ, Sopinka and Major JJ) took the view that the reasoning was based on stereotyping and was impermissible propensity reasoning, not based on evidence relating to the particular officer.

39 [1997] 3 SCR 484.

40 Ibid at 494 (emphasis added in judgment).

41 Ibid, para 59.

42 Ibid, para 47.

43 Ibid, para 30.

Cases such as this illustrate why it is easier to treat equality before the law as a claim for formal equality through provision of an impartial adjudicator who is a check against the exercise of arbitrary power. As such, it is a central plank of the common law notion of the rule of law. That leaves questions of substantive equality to be addressed largely in the political arena. But not always.

I started with *Brown v Board of Education* as an example of an exceptional case which came before the court at a time when there was significant political will for change, perhaps majoritarian will. That is not to diminish its impact. It was a case where the court did not evade the snake in the legal grass. It determined that the unequal impact of apparently equal laws was contrary to the requirement of equality under law, an attribute of the rule of law. It stands to remind us that equality under law is not a formal concept only. It never has been.

‘ONE LAW FOR ALL’

BY HON JOHN VON DOUSSA QC*

In the second century AD, Marcus Aurelius, a Roman emperor and Stoic philosopher, thanked one of his brothers for teaching him to value ‘the conception of the state with one law for all, based upon individual equality and freedom of speech, and of a sovereignty which prizes above all things the liberty of the subject’.¹

In the modern world, ‘One law for all’ is a much more troubled and ambiguous ideal. From a political perspective it is an appeal to national unity, and so, to social, cultural and ethnic unity. From a legal perspective, it is an appeal to equality before the law. Equality before the law is, itself, a multifaceted and ambiguous concept. Equality can refer to equal or uniform treatment under the law, or it may import notions of substantial equality that attract Aristotle’s maxim that like cases should be treated alike, and other cases according to their degree of difference. Equal treatment under the law implies a formal model of equality under which everyone is assessed and treated without regard to their particular circumstances. Equal treatment in this sense pays no regard to individual disadvantage. Substantive equality requires that individual circumstances and disadvantages are compensated for so that the law has equal outcomes for everyone.

Assertions of equality usually imply positive connotations, but may disguise hidden vices. Differences of race, ethnicity, religion, sex and economic and cultural circumstances can mean that ‘one law for all’ protects the values and interests of a majority of citizens at the expense of minorities. It does so by privileging unity and formal equality over cultural diversity and substantive equality.

Since World War II, lawmakers, especially at the international level, have recognised the extent to which this threatens the very existence of minorities. They have directed attention to the regulation of social, economic and cultural affairs in order to achieve substantive equality of opportunity and outcomes for all peoples. The response has been to confer specific, enhanced rights on vulnerable groups, ranging from cultural diversity and anti-discrimination laws to rights of political, legal and cultural self-determination. At times this has led to tension between, on the one hand, national majorities who seek to invoke formal equality as their touch stone, and use slogans like ‘one law for all’ and ‘unity’ to consolidate their grasp on power, and, on the other hand, minority groups who appeal to principles of social and economic justice, multiculturalism and biculturalism in order to gain for themselves a just outcome.

I propose to approach the topic from a human rights perspective. For this reason I first discuss three types of rights recognised in international law that lie along the spectrum of this tension: (a) universal individual human rights; (b) minority rights which reflect universal rights but which also seek to protect and promote substantive equality within disadvantaged groups; and (c) Indigenous

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1 Robert Royal, ‘Who Put the West in Western Civilization?’ (Spring 1988) *The Intercollegiate Rev* 3, 8 (quoting M Aurelius).

rights, including the contentious concept of self determination which, according to some, abandons 'one law for all' in favour of outright legal pluralism.² I will then consider how these types of rights have been recognised in the domestic law of Australia. In doing so, I will identify failures to achieve substantive equality before the law, particularly among indigenous Australians, and note the minimal extent to which domestic law has moved towards legal pluralism which echoes developments in international law.

I. INTERNATIONAL HUMAN RIGHTS LAW: EQUALITY, MINORITIES AND INDIGENOUS RIGHTS

International developments recognise a stratification of rights, and hence 'different laws for all,' and shed light on the way international law seeks to resolve the tensions between equal treatment on the one hand, and diversity on the other.

The bedrock of international human rights law is, undoubtedly, equality. This is reflected in Articles 1 and 2 of the Universal Declaration of Human Rights, which enshrine, respectively, equal dignity and anti-discrimination. Yet, this principle has not prevented international law from drawing distinctions between classes of persons, and extending to minorities and Indigenous peoples a variety of distinct rights, *in addition* to the general rights enshrined in the Universal Declaration.

Whilst international law recognises that every human being is unconditionally, and without exception, entitled to the fundamental rights enshrined in the Universal Declaration, and in the derivative human rights conventions, it allows for 'special measures' that make provision for those suffering discrimination³ either on account of some personal characteristic, or because of membership of a minority group. The focus in taking those measures is on equality of outcome, rather than equality of form. These measures are additional to the general rights — individual members of minorities are entitled to rely on both.

Minority rights are recognised in Article 27 of the International Covenant on Civil and Political Rights ('ICCPR'), which states that:

persons belonging to [ethnic, religious or linguistic minorities] shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or use their own language.

The Human Rights Committee has commented that Article 27 is 'directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.'⁴

2 International human rights law recognises a distinction between individual indigenous rights and the rights of 'peoples.' Self-determination is a collective or 'peoples' right. In Australian and New Zealand, these rights only apply to the indigenous population. For the distinction between the categories of international human rights law, see: A Eide, 'Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples' UN Doc E/CN.4/Sub.2/2000/10 (19 July 2000).

3 Discrimination contemplates 'any distinction, exclusion, restriction or preference, which is based on any ground ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms'. Human Rights Committee, General Comment 18, para 7 of the 37th Session of the Human Rights Committee, 1989. *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (1989).

In 1992, the protection offered by Article 27 was reinforced by a resolution of the General Assembly, in which it approved the Declaration of the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (the 'Minority Declaration').⁵ The Minority Declaration obliges States to protect minorities, as well as promote their participation in public life, but subject to the corresponding right of others to enjoy the fundamental rights enshrined in the Universal Declaration. It expressly empowers States to 'take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.' International law endorses the principle of equality of outcome over equality of form; and to this end sanctions separate laws for separate persons, in order to ultimately ensure substantive equality before the law. Pertinent to both Australia and New Zealand, international law accords to indigenous peoples rights that are both separate and additional to the general human rights enshrined in the Universal Declaration and the minority rights preserved in Article 27 of the ICCPR.

Significant legal recognition of indigenous rights occurred through the 1970s and 1980s.⁶ Whilst the first Convention (ILO Convention 107) dealing exclusively with indigenous issues was created between 1953 and 1957 by the International Labour Organisation,⁷ there was little, if any, indigenous participation in its negotiation. The Convention sought to integrate indigenous peoples into mainstream national economies without coercion or abuse, but it was condemned by indigenous groups for advocating assimilationist policies.⁸ The Convention was revised in 1989.⁹ Australia has signed neither Convention.¹⁰

A more extensive statement of indigenous rights is contemplated in the draft Declaration on the Rights of Indigenous Peoples. The draft is still before a special Working Group of the UN Human Rights Commission. Several more years are likely to pass before the draft is finalised. So far only two provisions have been adopted. They relate to the right to equality and the right to nationality. Little progress has been made on others. Rights of self-determination, collective ownership of land and intellectual property are still the subject of significant disagreement.

A right of self-determination by an indigenous minority, exercisable in possible conflict with the mainstream structure of state government, has always been contentious, notwithstanding

4 Human Rights Committee, General Comment 23 on the rights of minorities (Article 27), in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/Rev.3 (1997).

5 The Declaration was adopted by General Assembly Resolution 47/135 on 18 December 1992.

6 W Jonas, *Aboriginal and Torres Strait Islander Social Justice Report*, Human Rights and Equal Opportunity Commission, (2002) 181. This recognition grew out of landmark events, such as the Report of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1971 ('the Cobo Report'); the 1977 international NGO conference in Geneva, which resulted in the Declaration of the Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere; and the 1987 World Conference to Combat Racism and Racial Discrimination.

7 ILO, Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries 1957, (No. 107).

8 Jonas, above n 6, 181-182.

9 The Convention carries the same title but is listed as Convention No. 169 in the ILO Convention series.

10 Australia has, however, signed and ratified the Convention on the Rights of the Child [1991] ATS 4, which specifically protects certain rights for indigenous children.

Chapter IX of the Charter of the United Nations, and the first Articles of the International Covenant on Civil & Political Rights ('ICCPR') and the International Covenant on Economic Social and Cultural Rights ('ICESCR') which recognise that 'all peoples have the right of self-determination'. The Charter and the Conventions do not define what is meant by 'peoples', nor do they lay down rules as to how this right is to be exercised. States and indigenous minorities alike have taken advantage of this ambiguity to assert a position which the other denies.

II. AUSTRALIA'S DOMESTIC SITUATION

To a greater or lesser degree, the categories of international law rights I have mentioned are found in Australia. It will come as no surprise that Australia's domestic record is relatively sound in relation to the categories of universal and minority rights but falls short of the international standard when it comes to indigenous rights.

A. *Australia's Multicultural Composition*

At the outset, let me indicating the extent of cultural diversity in Australia.¹¹ Some 43 per cent of the population was born overseas, or has a parent who was born overseas. This reflects the highest level of immigration in the western world.¹² One quarter of immigrants comes from the United Kingdom, 8.7 per cent from New Zealand and 5.4 per cent from Italy. These countries have featured heavily on the cultural landscape of Australia for many decades. In recent times, however, the numbers of migrants from other regions have increased markedly. As a result, there are over 200 languages spoken in Australian homes and all the major religions are represented. According to the most recent census compiled in 2001, there are 410,003 indigenous Australians. 366,429 identified themselves as Aboriginal, 26,046 as Torres Strait Islander and the remainder claim to be both. This roughly corresponds to 2.2 per cent of the population.

B. *Australian Legal Landscape: Federal Level*

Australia has no national Bill of Rights. The Commonwealth Constitution does not enshrine, expressly or by implication, the notion of universal equality. And there is little prospect that a national Bill of Rights will be enacted, let alone constitutionally entrenched, in the foreseeable future. At the Constitutional Conventions held in the 1890s, the framers of the Constitution rejected the idea of incorporating an American-style Charter. They preferred, as Dawson J noted in the High Court case *Kruger v The Commonwealth*, 'to place their faith in the democratic process for the protection of individual rights and saw constitutional guarantees as restricting that process'.¹³

In 1992, the High Court considered whether there was an implied right to equality in the Constitution in *Leeth v The Commonwealth*.¹⁴ The appellant had been convicted of several crimes under the Customs Act 1901 (Cth), including the offence of conspiring to import commercial

11 Statistics are available from the forthcoming edition of *Face the Facts: Teaching Resources for use in Australian Classrooms*. For the current edition, see: <www.humanrights.gov.au/>.

12 New Zealand is next (18.7%), followed by Canada (18.4%) and the United States (11.4%).

13 [1997] 146 ALR 126, 154.

14 [1992] 172 CLR 455.

quantities of cannabis resin. As a federal prisoner, he was sentenced under the Commonwealth Prisoners Act 1967 (Cth), which permitted the sentencing judge to fix a minimum non-parole period which reflected the non-parole period of a State or territory prisoner, convicted of a crime attracting an equivalent sentence, in the State or territory in which the crime took place. The plaintiff challenged the constitutional validity of the Act, submitting that it infringed an implied constitutional right of equality, since federal prisoners would receive different non-parole periods depending upon the State or territory in which the trial took place. By a majority of 4 to 3, the Court rejected this submission, holding that the law was valid as there was no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth.¹⁵ Each Judge alludes to the need to ensure that like cases are treated alike,¹⁶ this being an inherent feature of judicial power,¹⁷ but the majority considered the relevant factor was equal treatment between federal prisoners within each State and territory.

The majority view in *Leeth* was followed five years later in *Kruger v The Commonwealth*. Dawson J in that case observed:

While the rule of law requires the law to be applied to all without reference to rank or status, the plain matter of the fact is that the common law has never required as a necessary outcome the equal, or non-discriminatory, operation of laws. It is not possible, in my view, to dismiss the discriminatory treatment of women at common law or such matters as the attainder of felons as 'past anomalies'. To do so is to treat the doctrines of the common law with selectivity.¹⁸

The absence of a constitutional guarantee of universal equality, however, does not mean that Australia has forsaken its international law obligations.

Federal and state anti-discrimination laws, together, provide fairly comprehensive protection against discrimination. The federal anti-discrimination laws make unlawful discrimination on many grounds, including:

- Race, colour, descent or national or ethnic origin;
- Sex;
- Marital status;
- Pregnancy or potential pregnancy;
- Family responsibilities;
- Disability; and
- Age.

Although cast in universal terms, these laws provide the principal source of minority rights in Australia.

The Human Rights and Equal Opportunity Act 1986 (Cth) and Regulations thereunder protect additional labour rights, giving effect to Australia's obligations under the International Labour Organization Convention (No 111) concerning Discrimination in respect of Employment and Occupation.¹⁹ They include the right not to be discriminated on the grounds of:

¹⁵ Per Mason, Dawson and McHugh JJ at para 24.

¹⁶ Per Mason CJ, Dawson and McHugh at para 32; Brennan J at paras 7 and 13; Deane and Toohey JJ at para 13; Gaudron J at para 21.

¹⁷ See, for example, Gaudron J at para 21.

¹⁸ *Kruger v The Commonwealth* [1997] 146 ALR 126 per Dawson J, 157-8.

¹⁹ The Convention was opened for signature on 25 June 1958 and entered into force on 15 June 1960. It was entered into force in Australian law on 15 June 1974.

- Religion;
- Political opinion;
- Criminal record;
- Nationality;
- Sexual preference; and
- Trade union activity.

State and Territory anti-discrimination and equal opportunity legislation augments the coverage of the Federal Acts by adding homosexuality, transexuality and religion to the list of prohibited grounds of discriminatory behaviour.²⁰

Like international law, domestic anti-discrimination law allows 'special measures'²¹ to be taken in order to remedy persistent, or structural, inequalities. In Australian law, the focus of special measures provisions is on the achievement of substantive equality or equality of outcomes, rather than formal equality or equality of opportunity. The provisions contemplate that the achievement of substantive equality requires more than the simple termination of discriminatory practices. It requires measures or programmes to correct or compensate for past or present discrimination, or to prevent discrimination from recurring in the future. In a recent decision of the Federal Court, the special measures provision in the Sex Discrimination Act was interpreted as accommodating the taking of 'hard' measures so long as the particular measure was proportionate to the goal sought to be achieved. The measure upheld as a 'special measure' in this case was an inflexible quota system reserving a number of elected positions on the branch executive of a union exclusively for women.²²

C. *State and Territory Laws*

I have already briefly discussed state and territory anti-discrimination laws. At the State and Territory level of government, again no constitutional Bill of Rights or principle of equality is legally entrenched. However, the Australian Capital Territory enacted a legislative Bill of Rights in 2004, which provides in section 8(2) that 'everyone has the right to enjoy his or her human rights without distinction of any kind.' It also protects minority rights under section 27 but deliberately excludes indigenous rights from its purview.²³ In form it is not unlike the New Zealand Bill of Rights Act 1990.

The ACT Act is the first of its kind in Australia. The process of pre-enactment negotiation was fraught with difficulty as disparate groups either claimed it was a dangerous precedent to set or, alternatively, that it was a toothless tiger. It is too early to determine whether the Act has succeeded in improving respect for human rights. Although it has been in force for one year, its provisions have not yet been invoked in the courts. Importantly, there are limits to its potential impact as it does not cover economic, social and cultural rights. Nor does it provide remedies.

20 See Anti-Discrimination Act 1977 (NSW); Equal Opportunity Act 1995 (Vic); Anti-Discrimination Act 1991 (Qld); Equal Opportunity Act 1984 (SA); Equal Opportunity Act 1984 (WA); Anti-Discrimination Act 1998 (Tas); Anti-Discrimination Act 1992 (NT).

21 For example, Race Discrimination Act 1975, s 8(1).

22 *Jacomb v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250.

23 Bill of Rights ACT Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee*, (May 2003) 100-105.

Consequently, a person has little chance of vindicating his or her right to equal treatment on *any grounds* (except, of course, through pre-existing anti-discrimination legislation).

The Victorian Government is also considering adopting a Charter. The Government has indicated that it would prefer a model similar to the ACT law, in which universal political and civil rights are included but economic, social, cultural, minority and Indigenous rights are excluded. It has also indicated that it wishes no right of action to be created.²⁴

D. Multicultural Policies

Australia has also developed policies that are intended to further the enjoyment of individual and minority group rights. Australia formally repealed the White Australia immigration policy in the early 1970s, although it had ceased to operate in any meaningful sense in the 1960s. Since that time, the federal Government has embraced a policy of multiculturalism. The Government's current policy was updated in 2003 in a policy statement called 'Multicultural Australia: United in Diversity.'²⁵ There are four pillars:

- Responsibilities of all – in which Australians have a civic duty to support the basic structures and principles of Australian society, including parliamentary democracy, the Constitution, freedom of speech and religion, English as the official language, the rule of law, acceptance, and equality.
- Respect for each person – which entails the right to express your own culture and beliefs free from interference, within the limits of the law. Those laws include the federal anti-discrimination and anti-vilification laws.
- Fairness for each person – which, again, is a reference to equality and anti-discrimination; and
- Benefits for all – which is the theory that the country as a whole will benefit from the productive diversity of multicultural influences.

Australia has also adopted a Public Service Charter of Cultural Diversity that espouses a similar policy. Given that the Commonwealth is the largest employer in Australia, this is significant.

These policies are considered to be very effective by international standards. Multiculturalism aims to promote diversity and tolerance, but at the same time the Australian policy protects the absolute integrity of the state. These policies are not flexible enough to incorporate some of the more contentious rights claimed by indigenous Australians.

III. EQUALITY OF OUTCOME FOR INDIVIDUALS AND MINORITIES

Does this legislative and administrative appearance of equality achieve equality of outcome for minorities? At least for Indigenous people as a minority group, the simple answer is 'no' or 'not sufficiently.' The legacy of racial discrimination, social inequalities and extreme poverty continue to affect the majority of Aboriginal Australians,²⁶ although in recent years, as the Committee on the Elimination of Racial Discrimination (CERD) noted in its periodic report this year,

²⁴ An electronic version of the Statement of Intent is available at <www.justice.vic.gov.au>

²⁵ 'Multicultural Australia: United in Diversity - Updating the 1999 New Agenda for Multicultural Australia: Strategic directions for 2003-2006' available at <www.immi.gov.au>

²⁶ Report of the Special Rapporteur on Racism and Racial Discrimination at the 58th Session of the Commission on Human Rights, Geneva. UN Doc. E/CN.4/2002/24 (26 April 2002) para 9.

'significant progress has been achieved in the enjoyment of economic, social and cultural rights by the indigenous peoples'.²⁷

The Racial Discrimination Act 1975 was intended to entrench racial equality in the Federal legal system, but this result remains elusive. The existence of systematic racism and stereotypical assumptions about people from non-English speaking backgrounds and Aboriginal Australians has been routinely acknowledged by the courts, but there has been a reluctance to use this acknowledgement as a basis for drawing an inference of racial discrimination.²⁸ In *Sharma v Legal Aid Queensland*²⁹ the applicant sought to draw an inference of racial discrimination from evidence that there were very few people from non-English speaking backgrounds in the employ of the respondent, especially at the higher levels of the administration. This evidence did not persuade the trial Judge. The effect of her judgment is that courts should be wary of presuming racism, in the absence of clear direct evidence. The Full Federal Court affirmed this view on appeal.³⁰ CERD noted the difficulty of proving that discrimination is racially based in its March 2005 report, recommending that the government consider changing the burden of proof.³¹

The ineffectiveness of the Racial Discrimination Act in achieving racial equality also rests on another fundamental issue that undermines any notion that the ideal of 'one law for all' is a reality. That is the practical issue of access to justice. If a person is unable to gain the benefit of a legal right, it has no practical value. As in all fields of human right discourse a human right is meaningful only if it can be enjoyed. Indigenous Australians, because of their social, economic and educational disadvantages find it very difficult to understand the intricacies of the law, to gain the necessary advice, and to withstand the stresses of going through the legal process. Access to justice and all the practical dimensions of this topic are topics in themselves. I do not intend to expand on them here, but their importance is obvious. Access to justice may be denied if a right is created but no remedy exists. This is the obvious shortcoming in the ACT Human Rights Act.

CERD also noted in its report concern for the increasing prejudice against Arabs and Muslims that occurred in Australia in the wake of September 11 and the Bali bombings. In 2003, the Commission inquired into prejudice against Arabs and Muslims. The project was called 'Isma,' which means 'listen' in Arabic.³² The purpose was, quite literally, to listen to the concerns of the Arab and Muslim community to better understand the nature of the prejudice they were experiencing, and to come up with recommendations for strategies to counter it. The project included national consultations with over 1,400 Arab and Muslim Australians and empirical and qualitative research. This process identified the already well recognised deficiency in the Federal anti-discrimination law which does not adequately cover discrimination on the ground of religion and does not provide an effective remedy. More pertinent, however, was evidence that those suffering the prejudice were either not aware of avenues open to them under the law to seek protection, or were too apprehensive to pursue them either out of a fear of officialdom or a belief

27 CERD, 'Concluding observations of the Committee on the Elimination of Racial Discrimination,' UN Doc. CERD/C/AUS/CO/14 (March 2005).

28 Human Rights and Equal Opportunity Commission, 'Submission to the Committee on the Elimination of Racial Discrimination' (7 January 2005) part 2.

29 [2001] FCA 1699.

30 [2002] FCAFC 196.

31 Above n 27, para 15.

32 The report is available at: <www.humanrights.gov.au/>.

that it would be pointless to do so. Again the inequality in enjoyment of their human rights was not so much a failure of the law itself, but a combination of practical access considerations that had a much greater impact on equality outcomes.

IV. INDIGENOUS RIGHTS

Notwithstanding the acknowledged disadvantages suffered by indigenous Australians, few laws give special recognition to Aboriginal and Torres Strait Islanders in Australia.

There has been no federal constitutional recognition of the status of indigenous people as custodians and first owners of the land. The Constitution Act of Victoria was recently amended to include section 1A, to recognise that the colonisation of the State happened without proper consultation with local Aborigines and that Victoria's Aboriginal people, as the original custodians of the land, have a unique status as the descendants of Australia's first people; and have a special relationship with their traditional lands and waters. The Victorian Constitution is careful, however, to specify that this symbolic recognition does not create any new legal rights.³³

There is no equivalent in Australia to section 45 of the New Zealand Electoral Act 1993, which creates Maori electoral districts, thereby ensuring their representation in the national Parliament.

Native title is one of the few areas in which distinct Indigenous rights have been recognised, first by the courts in 1992 in *Mabo v Queensland [No 2]*,³⁴ and then by the Native Title Act 1993 (Cth). Native title rights have proved elusive and of limited cultural or economic value. This is partly due to the fact that at best they are merely a bundle of fragile rights that are extinguished by inconsistent legislative or executive action, and partly because of the difficulties claimants confront in discharging the evidentiary burden of establishing their continuous connection with the land.³⁵

Attempts by indigenous tribes to establish legal rights by invoking the concept of Aboriginal sovereignty based on them being a nation have comprehensively failed. The courts have consistently held that Aboriginal people are subject to the laws of the Commonwealth and of the States and Territories in which they respectively reside.³⁶ In *Walker v State of New South Wales* Mason CJ observed that to hold otherwise would offend the basic principle that all people should stand equal before the law.³⁷

It will be apparent from what I have said that the aspirations of the Aboriginal peoples of Australia have, at least for the most part, not been formally recognised to this point in time, and Australia has not kept pace with the developments at the international level. However, the future may not be entirely bleak. In a recent speech on reconciliation, Prime Minister Howard seemed to acknowledge, for the first time since assuming power in 1996, that indigenous rights in Australia might involve recognition of civil and political rights.³⁸ He said: 'Reconciliation is about rights as well as responsibilities. It is about symbols as well as practical achievement'. Indigenous leaders

33 Section 1A(3)(a).

34 [1992] 175 CLR 1.

35 *Members of the Yorta Yorta Community v Victoria* [2002] 214 CLR 422.

36 *Walker v State of New South Wales* [1994] 126 ALR 321; *Coe v The Commonwealth* [1979] 24 ALR 118, 129; and *Coe v The Commonwealth* [1993] 118 ALR 193, 200.

37 *Walker*, *ibid*, at 323.

38 J Howard, 'Address at the National Reconciliation Planning Workshop' (30 May 2005). <www.pm.gov.au/>.

admitted to being 'astounded' by Mr Howard's comments, and suggested that they marked a 'tectonic shift in the Federal Government's approach to indigenous policy'.³⁹ A great number of Australians hope that is the case. What ever the virtues or vices of the catch-cry 'one law for all', it is beyond the time when indigenous Australians should enjoy all the benefits, privileges and happiness enjoyed by the rest of the Australian community. If ever there was a case for special measures, and special laws for the benefit of a small section of the community, this must be it.

I think the conclusion from my discussion is simply that the proposition 'one law for all' is too ambiguous to be meaningful. If a further example of this is necessary what is the result of applying it to, say, a Migration Act? The Act would be one law that applies to everyone, yet within its provisions people are divided into different categories according to whether they are citizens, non-citizens arriving lawfully in the country with a visa, or are unlawful arrivals. The outcome for each group will be very different. The proposition is a loaded one, often called in aid to support a majority position, but it is not a useful tool for legal analysis. Nor is it useful in discussion about human rights. Rather, the focus should be on equal treatment under the relevant legal system. I will end by noting that, as a human rights practitioner, this means more educational work is required by me and all my counterparts so as to encourage broader discussion and community acceptance of a notion of equality that goes beyond mere formal equality.

39 S Peatling, 'Pearson applauds reconciliation as PM's finest' *Sydney Morning Herald*, 6 June 2005.

PROTECTING HUMAN RIGHTS IN A TIME OF TERROR: THE ROLE OF NATIONAL AND INTERNATIONAL LAW

BY RT HON K J KEITH*

What is the role of law and legal principle in the face of terrorist attacks and threats? Are human rights expendable if national security is to be protected? I will consider those broad questions by reference to relevant facts and national and international legal requirements, with some attention to the particular rights of personal liberty, freedom of association and protection against torture. The article will discuss the role of international and national processes, legislatures, executives and courts and conclude with some general reflections about the role of law and lawyers. But first a little history.

I begin 2500 years ago in the aftermath of the War of the Seven against Thebes. Antigone, the daughter of Oedipus, learns that her two brothers, forced onto the two sides of the battle, have killed each other. She defies the order of Creon, King of Thebes, forbidding burial of her ‘treacherous’ brother, Polyneices.

According to a marvellous new translation by Seamus Heaney,¹ King Creon decrees as follows:

Eteocles, who fell in our defence,
Eteocles will be buried with full honours
As a hero of his country.

But his brother
Polyneices, an exile who came back
To visit us with fire and sword, a traitor

...

He is forbidden
Any ceremonial whatsoever.
No keening, no interment, no observance
Of any of the rites. Hereby he is adjudged
A carcass for the dogs and birds to feed on.
And nobody, let it be understood,

* Rt Hon Sir Kenneth Keith, Judge of the International Court of Justice. Formerly Judge of the Supreme Court of New Zealand, membre de l’Institut de Droit International. An address given to the Australasian Law Teachers’ Association Conference, University of Waikato, 6 July 2005. Tim Smith, my clerk (2003-2004), provided great assistance in the preparation of predecessors to this paper, which draws on papers given to the Commonwealth Law Conference in Melbourne in April 2003, the Australian Judges Conference in Auckland in January 2004 and the Interights Fiji Human Rights Judicial Colloquium in Suva in August 2004. With a few amendments this paper is also published in V Crnic-Grotic and M Matulovic, eds, *International Law and the Use of Force at the Turn of Centuries: Essays in Honour of V D Degan* (Rijeka, 2005), and its publication in the Review is with the kind permission of the editors of that book.

1 *The Burial at Thebes: A Version of Sophocles’ Antigone* (2004) 17.

Nobody is to treat him otherwise
 Than as the obscenity he was and is.
 This is where I stand when it comes to Thebes:
 Never to grant traitors and subversives
 Equal footing with loyal citizens,
 But to honour patriots in life and death.

This discrimination, degradation and breach of humanitarian principle the King justified by reference to patriotic duty and solidarity:

For the patriot,
 Personal loyalty always must give way
 To patriotic duty.
Solidarity, friends,
 Is what we need. The whole crew must close ranks.
 The safety of our state depends upon it.
 Our trust. Our friendships. Our security.
 Good order in the city. And our greatness.²

I. SOME FACTS

Figures are not all. There must also be qualitative judgment. The attacks of September 2001, December 2001, October 2002, May 2003 and many others going back over centuries were evil and criminal. Because of their random character and their motivation, such attacks may challenge the very essence of democratic societies. But quantitative measures are also significant. International Red Cross figures show that from the end of the Cold War, throughout the next ten years, on average over 4,000 people were killed in armed conflict week by deadly week, three quarters of them in Africa.³ United States State Department figures show that through the same decade the average number of deaths from international terrorism was under ten a week.⁴ To make another comparison, deaths from malaria averaged over 20,000 a week – almost all in sub-Saharan Africa.

Apart from the qualitative element there are also the possible threats, especially those presented by non-state armed groups. The International Institute of Strategic Studies in its *Military Balance 2003-2004* lists 165 non-state armed groups. They are to be found in 54 countries from Tunisia to Namibia in Africa, Colombia to Peru in the Americas, Japan to Afghanistan in Asia and the United Kingdom to Turkey in Europe, and they range in size from 20,000 to 30,000 members (in the Sudan) to just ten (in Spain). Almost all operate only locally but some, of course, as the world knows to its cost, do have wider agendas and targets, notably al-Qaeda and Jemaah Islamiah. Some have been in existence for several decades, reminding us that terrorism is nothing new, with many writings taking its beginnings back to Jewish struggles to throw off the Roman yoke in first century Palestine.

The IISS provides comment as well as facts. While in 2003 there were positive developments in longstanding conflicts involving terrorism in Sri Lanka and Nepal, in others there was little or no progress. They provide this sober assessment of al-Qaeda:

2 Heaney, above n 1, 16.

3 International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2001* (2001) Table 15.

4 Eg Cronin 'Rethinking Sovereignty: American Strategy v the Age of Terror' (2002) 44(2) *Survival* 119, 128.

As of June 2003, US assertions made in the wake of the Iraq war that al-Qaeda was ‘on the run’ and that the global counter-terrorism coalition had ‘turned the corner’ in the ‘War on Terror’ appeared over-confident. To the contrary, attacks linked to al-Qaeda – whose targets included US residents and corporations in Riyadh, Saudi Arabia, on 12 May, and Europeans and Jews in Casablanca, Morocco, on 16 May – suggested that it is still a potent and formidable terrorist organisation. They further indicated that US aggression in Iraq might have impelled the group to refocus its efforts on the Persian Gulf and the larger Arab World. That said, the post-11 September incarnation of al-Qaeda is qualitatively different from the entity that existed pre-11 September.

...

On the plus side, war in Iraq has denied al-Qaeda a potential supplier of weapons of mass destruction (WMD) and discouraged state sponsors of terrorism (eg Iran and Syria) from continuing to support it. In opening the way to demonstrating the merits of political pluralism and participation in a reconstructed Iraq, the war may also have improved the West’s ability to address the root causes of Islamic terrorism through democratisation – although any such gains are as yet unrealised and by no means assured. On the minus side, war in Iraq has probably inflamed radical passions among Muslims and thus increased al-Qaeda’s recruiting power and morale and, at least marginally, its operational capability. Any conclusive failure to find WMD in Iraq could only exacerbate these effects. On the balance, therefore, the immediate effect of the war may have been to isolate further al-Qaeda from any potential state supporters while also swelling its ranks and galvanising its will.⁵

II. THE RULE OF LAW AND ITS ESSENTIAL STABILITY

Those facts and threats – notably the outrages of 11 September 2001 – have led to major changes in international and national law. Before considering some of those changes, I identify the competing principles. On the one side is the famous statement by Cicero, *inter arma silent leges*. After 11 September there were contentions to similar effect by American officials and commentators: the existing law regulating the use of force had to be altered in a basic way.

But compare Aharon Barak, the President of the Supreme Court of Israel. In a judgment ruling that a military commander had distributed gas masks unequally on the West Bank during the 1991 Gulf War when Iraq fired missiles at Israel, he said

even when the cannons speak, the military commander must uphold the law. The power of society to stand up against its enemies is based on the recognition that it is fighting for values that deserve protection. The rule of law is one of these values.⁶

We are warned against succumbing to the expediency or the politics of the moment. Our history, our tradition, our profession have established principles to which as citizens and as lawyers we must strive to adhere, while meeting the challenges presented by terrorist acts.

Jacob Kellenberger, the President of the International Committee of the Red Cross, made the point in the context of international humanitarian law in 2002:

Another question that has been raised is whether international law in general, and international humanitarian law specifically, are adequate tools for dealing with the post-September 11th reality. My answer to this is that international law, if correctly applied, is one of the strongest tools that the community of nations has at its disposal in the effort to reestablish international order and stability.⁷

⁵ International Institute of Strategic Studies, *Military Balance 2003-2004*, 54, 356-357.

⁶ *Marcus v Minister of Defense* 45 PD(1) 467, 470-471. See also his splendid ‘The [US] Supreme Court 2001 Term: Foreword: A Judge on Judging: the Role of a Supreme Court in a Democracy’ (2002) 116 Harv L Rev 16, especially 148-160.

Even if international obligations are not perfect, it is not for any State to unilaterally abrogate them where they find them inconvenient. The President continued:

Our belief in the continued validity of existing law should not be taken to mean that international humanitarian law is perfect, for no body of law can lay claim to perfection. What we are suggesting is that any attempt to reevaluate its appropriateness can only take place after it has been determined that it is the law that is lacking, and not the political will to apply it. *Pacta sunt servanda* is an age-old and basic tenet of international law which means that existing international obligations must be fulfilled in good faith. This principle requires that attempts to resolve ongoing challenges within an existing legal framework be made before calls for change are issued. Any other course of action would risk depriving the law of its very *raison d'être* – which is to facilitate the predictable and orderly conduct of international relations. Care should especially be taken not to amend rules designed to protect individuals in times of crises, because individuals have no other protection from arbitrariness and abuse except implementation of the law.

It is very significant and encouraging that the 28th International Conference of the Red Cross and Red Crescent in December 2003 and consisting of representatives of the 192 States Parties to the Conventions and 181 National Societies unanimously stated its conviction that ‘the existing provisions of international humanitarian law form an adequate basis to meet challenges raised by modern armed conflicts’.⁸ That declaration followed an extensive array of meetings and seminars held throughout 2002 and 2003 on the adequacy of the law. That adequacy was in the end not questioned in any essential way. What was vital was better compliance.

III. RIGHTS AND PERMISSIBLE LIMITS ON THEM

Notwithstanding those general declarations, campaigns against terrorism may and in fact do put in question fundamental rights, including the rights to personal liberty, the right not to be tortured, freedom of association and the right to due process – to mention just the rights considered in this paper.

It is commonly said that no rights are absolute. It would appear to follow that limits on each and every one of them might be justified by the public interest in forestalling terrorism. To take the rights listed, administrative detention has been justified as a response to terrorism in many parts of the world and over much of recorded history;⁹ a distinguished American academic lawyer has recently argued that torture should be available under judicial warrant in extreme situations, such as the ticking bomb scenario, to obtain information which would save many lives;¹⁰ membership of proscribed organisations may be made an offence as may the provision of funds or other support to them; and rights of access to legal advice, to the courts, to habeas corpus and to the protection of due process generally might be denied or limited.

In addition to broad rule of law arguments and tests elaborated by professional bodies for assessing such denials or limitations on fundamental rights¹¹ we have a set of international treaty obligations against which such actions are to be tested. They appear in particular in the

7 Dr Jakob Kellenberger Statement to the 58th Annual Session of the United Nations Commission on Human Rights, available < www.icrc.org >.

8 For further reflections on the continuity of international law after 11 September, see Campbell McLachlan ‘After Baghdad: Conflict or Coherence in International Law?’ (2003) 1 NZJPIL 25.

9 See eg Lord Bingham ‘Personal Freedom and the Dilemma of Democracies’ (2003) 52 ICLQ 841.

10 Alan M Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (2002).

International Covenant on Civil and Political Rights, where relevant, the 1949 Geneva Conventions and their 1977 Protocols and regional human rights treaties. The world community has over a lengthy period reached very broad agreement on the permissibility of limits on or denials of particular human rights and civil liberties. Almost all the States of the world are parties to those treaties¹² which may now be seen as largely declaratory of customary international law.

Those treaties provide for limits on rights in three different contexts – in the general case, when a state of emergency has been declared, and when war rages.

In the first, the general case, the statement of the particular right may articulate limits on the right, in two different ways. The right may incorporate a limit in itself. Thus the right to the liberty of the person, under article 9(1) of the Covenant, includes the right not to be subjected to *arbitrary* arrest or detentions. Next, the statement of the right may recognise that limits *may* (not *must*) be imposed. Thus, under article 22, the right to freedom of association may be subject to restrictions which are prescribed by law and which are necessary in the interests of national security or of public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedom of others. The assessment of what is arbitrary and what may be required to protect national security may well take account of the character of the terrorist activity if the justification for the particular detention regime or restraint on association is being justified on that ground.

Those two types of limits tend to support the proposition that no rights are absolute and that all are subject to limits even in peacetime, when there is no emergency. But the Covenant and, to anticipate, the Geneva Conventions and Protocols show that some rights are not subject to limits of either kinds. For instance, the prohibition on torture and cruel, inhuman or degrading treatment or punishment as stated in article 7 of the Covenant, has neither an inherent limit nor a permitted limit. That is also the case with the prohibition on slavery and on retrospective criminal liability (articles 8 and 15).

The limits just discussed are not tied to a specific situation such as terrorism. They are generally available to a State if it can satisfy their terms. The Covenant does however particularly address limits which may be imposed in public emergencies, which would include armed conflicts and may include terrorist situations. This is the second context. Public emergencies are the subject of article 4 of the Covenant which permits derogations from obligations in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed. The measures may derogate only to the extent strictly required by the exigencies of the situation. The measures are not to be inconsistent with other obligations under international law and are not to involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Those preconditions are stated in strict terms. On their face they can be and are in fact the subject of judicial examination by international courts as well as national ones. This is however an area where courts may well defer to executive judgment, as appears later.

Article 4 of the Covenant also makes it clear that, even if an emergency is declared, some of the rights are not derogable and cannot be limited. Those rights include the right to life (article 6), the right not to be subject to torture (article 7), the right not to be held in slavery or in servitude (article 8(1) and (2)) and the right not to be subject to retrospective criminal liability (article 15).

11 Eg International Commission of Jurists, Frederico Andreu Guzmán, *Terrorism and Human Rights* (April 2002) and International Bar Association Task Force Report, *Global Principles on Suppressing Terrorism within International Law Framework* (October 2003).

12 154 parties to the ICCPR, 192 to the Geneva Conventions and 163 and 159 to the 1977 Protocols.

The rights under three of those articles (articles 7, 8 and 15) have the further feature noticed earlier; they are stated absolutely and contemplate no inherent or permissible limits in the general case.

I move to armed conflict – the third situation in which human rights may be limited. The Geneva Conventions state rights vital for the protection of humanity. They begin with this absolute statement: The High Contracting Parties undertake to respect and to ensure respect for this Convention *in all circumstances*. The Geneva Conventions distinguish between international and non-international conflicts. In both victims of conflict have fundamental rights. One notable provision is common article 3 of the 1949 Conventions, applicable in internal armed conflict. It provides in part as follows:

The following acts are and shall remain prohibited at any time and in any place whatsoever with respect to persons taking no active part in the hostilities:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The first additional Protocol of 1977 on international armed conflicts states fundamental guarantees of persons who are in the power of a Party to the conflict. Those rights too are formulated in absolute terms, for instance, in article 75(2) which lists substantive rights similar to those in article 3 and which is considered to be declaratory of customary international law. Paragraph (3) of the article elaborates para (d) of article 3. Similar guarantees are stated in the additional Protocol relating to the protection of non-international armed conflicts (articles 4-6). Also important are the substantive and process protections included in the third and fourth Conventions of 1949.

The absolute character of the rights in this third category is emphasised by the prohibition on the renunciation of rights in each of the Conventions, the general prohibition on reprisals and the bar in the general law of treaties on setting aside humanitarian treaties by reason of breach.¹³

Standard sets of due process protections also appear in the antiterrorism conventions. So, the terrorist financing convention guarantees to those against whom proceedings are brought fair treatment, including rights under national law and applicable provisions of international law, including international human rights law.

It is striking that in 1977 as in 1949 the world community was willing to provide for greater protection for human rights in armed conflicts than it was in the 1950s and 1960s when it prepared general human rights instruments and allowed for possible derogations from those rights (notably due process rights) during public emergencies. Article 4(1) of course does prohibit derogations were they to breach *other* obligations under international law, which would include the Geneva Conventions.¹⁴

The protection and implementation of these rights presents a range of challenging and vital issues. The fact that I consider only some of the means of implementation and only some of the

13 Article 60(5) of the Vienna Convention on the Law of Treaties 1969.

14 See e.g. para 9 of the Human Rights Committee's general comment of 2001 on article 4, CCPR/C/21/Rev. 1/Add 11.

rights does not mean that I consider the other means and rights to be unimportant. Current shocking breaches in all regions of the world are compelling evidence to the contrary.

IV. THE ROLE OF THE EXECUTIVE AND THE LEGISLATURE IN PROTECTING LIBERTIES WHEN PREPARING ANTI-TERRORISM LEGISLATION AND INTERNATIONAL MONITORING

Executives and legislators increasingly recognise their responsibilities in preparing and administering legislation to test actions against human rights obligations. The testing may occur under national processes (such as a Bill of Rights), and international ones.

The international processes will generally include an obligation to report periodically to a monitoring committee, in the case of the ICCPR, the Human Rights Committee. Those processes, first, require the government authorities to prepare a report which among other things may provide justification for derogations from human rights effected in emergencies, second, may permit non-governmental organisations to prepare parallel reports for the monitoring committee and, third, provide for exchanges between the government and the committee and for the committee to make suggestions and recommendations to the government for changes in the law, suggestions and recommendations which will be the subject of the next round of reporting and exchanges. The increasing significance of this international monitoring process for national policy making and law reform is not always appreciated. In the case of international labour law such a monitoring process has existed for more than eighty years. The process may also be created *ad hoc* as with the Counter Terrorism Committee set up under Security Council resolution 1373 in September 2001.

National vetting may be provided for in legislation, as in Canada, New Zealand, the United Kingdom and the Australian Capital Territory. The original Canadian Bill of Rights 1959, the New Zealand Bill of Rights Act 1990, the United Kingdom Human Rights Act 1998 and the ACT Human Rights Act 2004 all require an appropriate Minister to advise Parliament about the consistency of proposed legislation with the national Bill. Underlying that public process are internal government processes which may be emphasised, as in New Zealand, by requirements laid down in the *Cabinet Manual*.

The parliamentary committee process may also include the examination of a government's instrument of derogation when an emergency situation is relied on to justify derogations from human rights. That happened for instance in the United Kingdom in November 2001 and later.

Such national processes may be complemented by international ones. For instance, in August 2002 the Commissioner for Human Rights of the Council of Europe issued an opinion critical of the justification for the British derogation and the arrangements for its review and renewal.¹⁵ While recognising that states have an essential obligation to protect their institutions and their citizens against terrorist attack, he emphasised that the threat of terror be combated with due respect for the rule of law. And, while states had been afforded a large measure of discretion in their assessment of the existence of a public emergency, the Commissioner's opinion was that the general increased risk of terrorist activity post 11 September 2001 could not, on its own, justify derogation from the Convention. A number of European states long faced with recurring terrorist activity had not found it necessary to derogate from the Convention. And, even assuming the

15 Opinion 1/2002, Comm DH (2002) 7.

existence of a public emergency, it was questionable whether the British measures were strictly required. Other measures might have been equally effective without requiring derogation. As well,

The proportionality of the derogating measures is further brought into question by the definition of international terrorist organisations provided by section 21(3) of the Act. The section would appear to permit the indefinite detention of an individual suspected of having links with an international terrorist organisation irrespective of its presenting a direct threat to public security in the United Kingdom and perhaps, therefore, of no relation to the emergency originally requiring the legislation under which his Convention rights may be prejudiced.

The United Kingdom also gave notice to the Secretary-General of the UN of derogation from article 9 (personal liberty), under article 4 of the Covenant. The Human Rights Committee, in a general comment on article 4, adopted on 24 July 2001, recalled that it had expressed its concern over States parties that appeared to have derogated from rights in situations not covered by article 4 and said this:

Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers.¹⁶

That emphasis on the processes of national decision-making and explanation was prominent in an early case when in 1981 the Committee upheld challenges by Uruguayan citizens to their being banned for 15 years from engaging in any activity of a political nature including the right to vote. The State party could not, the Committee said, evade its obligations under the Covenant by merely invoking the existence of exceptional circumstances. The State party was duty bound to give a sufficiently detailed account of the relevant facts to enable the Human Right Committee to fulfil its function of ensuring that the State party lived up to its commitments under the Covenant:

If the respondent Government does not furnish the required Justification itself, as it is required to do under article 4 (2) of the Optional Protocol and article 4 (3) of the Covenant, the Human Rights Committee cannot conclude that valid reasons exist to legitimize a departure from the normal legal regime prescribed by the Covenant.¹⁷

Even on the assumption that there existed a situation of emergency in Uruguay, the Human Rights Committee expressed doubt that any ground could be adduced to support the measures enacted. The Government of Uruguay had failed to show that the measure was required in order to deal with the alleged emergency situation and pave the way back to political freedom.

16 General Comment No. 29, CCPR/C/21/Rev. 1/ Add 11. Those propositions, along with the opinion of the Council of Europe Commissioner, were cited in a recent decision of the United Kingdom House of Lords, considered later in this article.

17 *Jorge Landinelli Silva v Uruguay*, Communication No. R8/34 (30 May 1978) UN Doc Supp No. 40 (A/36/40) 130 (1981).

V. THE ROLE OF COURTS IN PROTECTING HUMAN RIGHTS IN THE CONTEXT OF MEASURES TAKEN FOR REASONS OF NATIONAL SECURITY AGAINST TERRORISM

That determination provides a link to the role of national and international courts in this area. Relevant to that role for national courts is the place of international law in national legal systems. Customary international law, it is generally said, forms part of the law of common law countries. But treaties, concluded by the executive in exercise of its prerogative, are generally seen in the Commonwealth as not becoming part of the law of the land. While the State is bound in international law by virtue of the various executive actions of signature, ratification or other acceptance, if a change in rights and duties under the law is required, then there must be appropriate legislative action.¹⁸

It does not follow, however, that national courts in these countries cannot have regard to treaties which are not incorporated into law. They may in particular see the treaty as relevant to the interpretation of a statute or as a contribution or to the clarification and development of the common law.¹⁹ The likelihood of such actions has been promoted by a decade of meetings of judges, mainly from the Commonwealth, organised by Interights and the Commonwealth Secretariat. In 1988, at the first Colloquium held at Bangalore, they adopted a statement on the role of international human rights law in national law including these statement. It read in part:

2. ... international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
4. In most countries whose legal systems are based upon common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.
- ...
6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
- ...
7. ... where national law is clear and inconsistent with the international obligations of the State concerned in common law countries the national court is obliged to give effect to national law. In such cases the courts should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of international legal obligation, which is undertaken by a country.

Justice Michael Kirby of Australia, commenting on the 10 years following the formulation of the Bangalore Principles, notes that some Australian lawyers (and not a few judges) were at first inclined to view the Bangalore Principles as completely heretical. His Honour observes, however, that in the following 10 years ‘something of a sea change has come over the approach of courts in

18 See, for example, *The Parlement Belge* (1878-79) 4 PD 129; *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA).

19 See eg New Zealand Law Commission *A New Zealand Guide to International Law and its Sources* (R34, 1996) 23 which lists ways in which treaties may be relevant.

England, Australia, New Zealand and other countries of the common law.²⁰ That sea change is reflected in judgments, both in references to the Bangalore Principles and more widely in increased resort to international human rights instruments, and also in the striking alteration in the language of the Principles in their 1998 re-statement at the 8th Colloquium, again in Bangalore. The Principles now state that:

2. The universality of human rights derives from the moral principle of each individual's personal and equal autonomy and human dignity. That principle transcends national political systems and is in the keeping of the judiciary.
3. It is the vital duty of an independent, impartial and well-qualified judiciary, assisted by an independent, well-trained legal profession, to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.
4. Fundamental human rights form part of the public law of every nation, protecting individuals and minorities against the misuse of power by every public authority and any person discharging public functions. It is the special province of judges to see to it that the law's undertakings are realised in the daily life of the people.²¹

The 1998 re-statement in particular removes the need for ambiguity (expressed as uncertainty or incompleteness in the 1988 principles) in the law before such norms become relevant.²² It is still the case however that important limits remain. This is particularly so in the absence of a supreme constitution, as in New Zealand and the United Kingdom, or in the absence of an entrenched Bill of Rights, or in situations where the legislature has without doubt overridden the internationally required right.

In practice, three different situations involving interpretation by reference to international obligations can be distinguished:

1. the legislation in question aligns exactly or in substance with the relevant treaty provisions;
2. the legislation is intended in a general way to give effect to the treaty, but departs from its wording;
3. the legislation is not concerned in its main provisions and purposes with the treaty (which might indeed have been accepted by the government after the legislation was enacted) but the treaty is nevertheless claimed to be relevant to its operation.

One rationale for using international materials, in all those situations but especially the first, is the presence of a binding obligation on the State in international law. This is so whether the matter is put as one of Parliamentary purpose, that is that Parliament is assumed to have acted consistently with the State's international obligations, or as a broader presumption or approach to interpretation, that is the courts will attempt to read legislation so as not to place the State in breach of its international obligations. This necessarily requires a court to consider what those

20 Michael Kirby 'The First Ten Years of the *Bangalore Principles* on the Domestic Application of International Human Rights Norms' (address to the Conference on the 10th Anniversary of the Bangalore Principles, 28 December 1998). For an account by the organiser of the series, Anthony Lester, see 'The Challenge of Bangalore: Making Human Rights a Practical Reality' [1999] EHRLR 273.

21 *Developing Human Rights Jurisprudence*, Vol 8: Eighth Judicial Colloquium on The Domestic Application of International Human Rights Norms (2001).

22 But see for a restatement of this traditional view, Lord Hoffmann in *Boyce v R* [2005] 1 AC 400 (PC), para 25. Compare *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 WLR 1, paras 36-38, 46-47 and 98-103 (HL) and *Attorney-General v Zaoui* (2005) 7 HRNZ 860 (SCNZ).

obligations actually are. This process has long been recognised. For instance in the 1820s Chancellor James Kent began his lectures to the law students at Columbia College with the law of nations, on the basis that the law of the United States or of New York would not be properly appreciated without that background.²³

State responses to heightened security concerns are almost invariably carried out through legislation. In States with the shared common law heritage, this may in part be traced back to the common law's traditional antipathy towards executive action justified by national security, as in the great case of *Entick v Carrington*,²⁴ condemning search and seizure of documents without a statutory mandate. Powers of detention too must be justified by reference to statutory authority. In many Commonwealth countries, the definition of criminal offences is also statutory. In the aftermath of 11 September 2001, many states have passed legislation to deal with the 'new' threat posed by multinational terrorist organisations as required in part at least by Security Council resolution 1373. They include New Zealand, Australia the United Kingdom and other Pacific states.²⁵ Some of that legislation implements the anti-terrorism conventions mentioned earlier. How are courts likely to interpret such legislation?

I earlier suggested that courts may defer to executive judgment in areas of national security. The New Zealand Law Commission provided this summary of national court responses in 1991:

Challenges to the legality of declarations of states of emergency have, in general failed. The Malaysian Constitution empowered the Head of State to proclaim a state of emergency if 'satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened' (Constitution of Malaysia Article 150). As a consequence of difficulties arising from the dismissal of the Chief Minister of Sarawak, the Head of State made such a Proclamation. The Privy Council rejected the challenge to its validity. It was not, the Judicial Committee said, for it to criticise or comment on the wisdom or expediency of the steps taken by the Government to deal with the constitutional situation. The questions of gravity of the emergency and the existence of a threat to the security of Sarawak 'were essentially matters to be determined according to the judgment of the responsible Ministers in the light of their knowledge and experience.' (*Ningkan v Government of Malaysia* [1970] AC 379, 391) The Privy Council left open the question (on which the Court below had divided) whether the validity of the Proclamation was even justiciable: in its view, that question of far-reaching importance remained 'unsettled and debatable' on the present state of the authorities (391-392).

Challenges to the validity of Proclamations or declarations of emergency made in New Zealand, India and Australia have also failed, with similar comments being made about the very broad, or even absolute, discretion of the Government. See, for example, *Hewett v Fielder* [1951] NZLR 755, 760 (Ft Ct); *Bhagat Singh v King Emperor* (1931) LR 581A 169 (JC) (the Governor-General 'alone' could decide whether there was an emergency and had 'absolute power' in making Ordinances); *King-Emperor v Benoari Lal Sarma* [1945] AC 14, 22 (JC); and *Dean v Attorney-General of Queensland* [1971] Qd R 391 (SC).²⁶

In one of its earliest decisions, the European Court of Human Rights held that Ireland was justified in 1957 in declaring a public emergency in terms of article 15 of the European Convention and that the imposition of administrative detention was 'strictly required by the

23 *Commentaries on American Law* (1826) Part I: Of the Law of Nations.

24 (1765) 19 Howell's State Trials 1029; 95 ER 807.

25 Terrorism Suppression Act 2002 (New Zealand); Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Australia); Terrorism Act 2000 (UK) and Anti-Terrorism, Crime and Security Act 2001, and the Prevention and Suppression of Terrorism Act 2002 (Samoa).

26 Law Commission, *Final Report on Emergencies* (1991 NZLC R22) 364-365.

exigencies of the situation'.²⁷ The Court in this context has developed 'the margin of appreciation'.

It may be that that assessment is dated and that courts now may be more willing to review executive decisions taken in emergency situations. A mass of more recent material is now available, some of it indicating a less deferential attitude.²⁸

The House of Lords in December 2004 ruled that a derogation by the United Kingdom under the European Convention on Human Rights to allow long-term or indefinite executive detention of foreign nationals suspected of terrorist activities was not lawfully made.²⁹ The first matter that their Lordships had to consider was whether a public emergency threatening the life of the nation existed. On this question their Lordships divided. A majority were prepared to accept that deference to the executive on this question was appropriate. Lord Bingham, delivering the principal speech, put the matter in terms of the institutional capacities of the courts:

The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore will be the potential role of the court. ... Conversely, the greater the legal content of any issue, the greater the potential role of the court ...³⁰

The determination of whether a public emergency existed was a pre-eminently political judgment.

A consideration of the second question, whether the measures were 'strictly required by the exigencies of the situation', was not however precluded by any doctrine of deference. In this the Lords rejected the argument of the Attorney-General that it was not for un-elected judges to review the decisions of the legislature on questions of national security:

the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.³¹

Questions concerning limitations on fundamental rights were of a legal character suited to judicial scrutiny – even close scrutiny.³² This was particularly so in the case of fair trial rights and detention; courts were specialists in the protection of liberty.³³ By a majority of seven to one, their Lordships held that the measures adopted by Parliament were not strictly required; that was demonstrated by the fact that suspected UK-national terrorists, who were admitted to pose the same risk as non-national suspects, were not subject to the same detention provisions.

One Law Lord was prepared to go further and hold that no public emergency existed. Suggesting that a national court might more closely scrutinise a derogation than an international court,³⁴ Lord Hoffmann declared that the United Kingdom was not so fragile or fissiparous as to

27 *Lawless v Ireland* (No 3) (1961) 1 EHRR 15.

28 For one notable commentary see Johan Steyn 'Guantanamo Bay: The Legal Black Hole' (2004) 53 ICLQ 1. See also the furious responses it generated in *The International Herald Tribune*, from Professor Ruth Wedgwood who has served as an adviser to the Pentagon on implementing rules for war crimes trials in military commissions and from the United States Ambassador to the United Nations in Geneva (2 and 16 December 2003).

29 *A v Secretary of State for the Home Department* [2005] 2 AC 68 (HL).

30 *Ibid.*, para 26 Lord Bingham.

31 *Ibid.*, para 42 Lord Bingham.

32 *Ibid.*, para 116 Lord Hope.

33 *RJR-MacDonald Inc v Attorney-General of Canada* [1995] 3 SCR 199, para 68 La Forest J.

be unable to withstand a serious act of violence. While not underestimating the ability of fanatical groups of terrorists to kill and destroy, they did not threaten the life of the nation.

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.³⁵

A. *Personal Liberty: Detention*

The House of Lords was not there concerned with applications by the plaintiffs for direct relief in respect of their detention. By contrast in three recent American cases the courts were. The plaintiffs were detained in military facilities as part of the ongoing campaign against terror. I also mention a New Zealand case from the Second World War.

In the first American case, *Rasul v Bush*, the Supreme Court held in June 2004 that the Federal Courts had jurisdiction in habeas corpus proceedings brought on behalf of Australian and Kuwaiti citizens detained at Guantanamo naval base in Cuba.³⁶ While the reasons for the majority do not depend on the position of prisoners of war under international law, strong echoes of the concerns raised by many commentators can be seen in the grounds given by the Court for distinguishing an earlier decision³⁷ which had held that Federal Courts lacked jurisdiction to issue a writ of habeas corpus to 21 German citizens who had been captured during World War II in China, convicted by a military commission and incarcerated in occupied Germany:

Petitioners in these cases differ from [those] detainees in important respects: They are not nationals of countries at war with the United States, and they deny they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

The reasons given by the Court suggest a real unwillingness to allow detainees to disappear into a legal black hole, and a sense of discomfort with the continuing denial of access to a tribunal to determine the status of the detainees as required by the (third) Geneva Convention for the protection of prisoners of war. The American approach had been to declare Taliban and Al Qaeda captured personnel to be illegal or 'enemy' combatants and not prisoners of war under the third Geneva Convention.³⁸ However, under the third Convention if there is doubt whether persons who have committed a belligerent act and have fallen into the hands of the enemy are POWs within the protected categories, they are to enjoy the protection of the Convention until their status has been defined by a competent tribunal. The United States authorities are now taking action on that matter.

34 A view shared by Lord Hope: *A v Secretary of State for the Home Department* [2005] 2 AC 68 (HL), para 131.

35 *Ibid*, para 97. Compare the position he had taken just three years earlier in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, para 50. Generally see Lord Steyn 'Deference: a Tangled Story' [2005] Public Law 346.

36 *Rasul v Bush* 542 US 466 (2004). For contemporary discussions of the treatment of detainees see International Institute of Strategic Studies, *Strategic Survey 2004/05* (2005) 63-68 and Philippe Sands *Lawless World: America and the Making and Breaking of Global Rules* (2005) chs 7 and 9.

37 *Johnson v Eisentrager* 339 US 763 (1950).

38 Ari Fleischer, 'Special White House Announcement Re: Application of Geneva Conventions in Afghanistan' (7 February 2002) available < www.whitehouse.gov >.

Earlier, in October 2002, a very experienced United States international lawyer had called attention to the apparent American avoidance of that provision. On the substance he said this:

I believe that it would be much easier and more convincing for the United States to conclude that the members of the armed forces of the effective government of most of Afghanistan should, upon capture, be treated as POWs. This is what we did in Vietnam, where we found it desirable to give virtually all enemy prisoners POW status.³⁹

He continued,

When I prepared the first draft of these comments, I assumed that the rejection of POW status for Taliban soldiers must have resulted from some unexplained central purpose, probably one related to the intention ultimately to prosecute some of them. The longer I ponder the reasons that might have inspired this decision by the President, the more I am inclined to suspect that there may well have been no such unexplained purpose. Might it not be the case that the present administration in Washington believes precisely what the White House press secretary said, that is, that the failure of the Taliban soldiers to wear uniforms of the sort worn by the members of modern armies and the support by the Taliban government of the unlawful terrorist objectives of Al Qaeda suffice to justify, or even require, denial of POW status to all members of the Taliban armed forces? While such a determination seems baseless, one can imagine its being urged by those who, in the Reagan administration, grotesquely described the Geneva Protocol I as law in the services of terrorism.⁴⁰

In a second decision, *Hamdi v Rumsfeld*,⁴¹ delivered on the same day as its judgment in *Rasul*, the Supreme Court considered an application for habeas corpus filed on behalf of an American citizen captured in Afghanistan and detained as an 'enemy combatant' in a naval brig in South Carolina. The Court of Appeals had concluded that Hamdi's detention could be justified by reference to the Joint Resolution of Congress passed soon after 11 September authorizing the President to 'use all necessary and appropriate force against those nations, organisations, or persons he determines planned, authorized, committed or aided the terrorist attacks' or 'harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons' (the AUMF). While a plurality of the Supreme Court agreed on this point with the Court of Appeals, its opinion signals some role for traditional parts of the law of armed conflict, with the judges referring to the Hague and Geneva Conventions and their limit of detention to the time of active hostilities. The judges noted, however, that 'the national security underpinnings of the "war on terror", although crucially important, are broad and malleable.' Were the Administration's full position to be adopted, Hamdi's detention could last for the rest of his life. They continued as follows:

Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. See, e.g., Constable, *U. S. Launches New Operation in Afghanistan*, Washington Post, Mar. 14, 2004, p. A22 (reporting that 13,500 United States troops remain in Afghanistan, including several

39 George H Aldrich 'The Taliban, Al Queda and the Declaration of Illegal Combatants' (2002) 96 AJIL 891, 896.

40 Aldrich, *ibid.*, 896.

41 542 US 507 (2004).

thousand new arrivals); J. Abizaid, Dept. of Defense, Gen. Abizaid Central *Command Operations Update Briefing*, Apr. 30, 2004, <http://www.defenselink.mil/transcripts/2004/tr20040430-1402.html> (as visited June 8, 2004, and available in the Clerk of Court's case file) (media briefing describing ongoing operations in Afghanistan involving 20,000 United States troops). The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.' If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF.

That passage does not recognise that the armed conflict may have moved from an international one to a national one, and that any justification for the detention under the Geneva Convention had arguably ended.

The third American decision was given by Judge James Robertson on 8 November 2004 in the District of Columbia District Court against the background of the June decisions.⁴² The petitioner was in part successful in his habeas corpus application, because he had not been determined by a competent tribunal to be an offender triable under the law of war and because the procedures established for the Military Commission set up by the President were contrary to or inconsistent with those applicable to courts martial. The petitioner had been captured in Afghanistan in late 2001 during hostilities after the 11 September attacks, he asserted his entitlement to POW status under the Third Geneva Convention and the Government had not convened a competent tribunal to determine whether he was entitled to that status. The Court's ruling on the 'competent tribunal' issue is based on a direct application of the relevant provisions of the Third Convention, as part of the law of the United States. The finding that the Military Commission's procedures were flawed was mainly based on United States law, but the Judge also found support in international humanitarian and human rights law for the right to be present at one's trial. The direct invoking of international law is most encouraging and is in the tradition of American courts from the earliest days of the Republic.⁴³

The World War II New Zealand judgment concerning personal liberty was not reported until after the end of the war, well over a year after it was delivered.⁴⁴ In this case, the Court of Appeal, consisting of five judges, was persuaded by Mr G G G Watson that the members of the returning furlough draft, who had refused to parade at Trentham Military Camp in January 1944 for embarkation to return to the Middle East, had not committed the offence of military desertion.

The judgment ruled that the action of the soldiers who, to quote the charge sheet, 'after having been warned to proceed for overseas with intent to avoid so proceeding collectively failed to parade for embarkation with the returning furlough draft when ordered to do so thereby avoiding proceeding on service overseas', did not amount to an act of desertion. In a sense, the finding is a straightforward one of interpreting the word 'desertion'. That offence is constituted by persons absenting themselves physically from the control of duly constituted military authority with the

42 *Hamdan v Rumsfeld* 344 F. Supp. 2d 152 (2004).

43 Eg *The Charming Betsy* 6 US (2 Cranch) 64. After the delivery of the address on which this article is based the Court of Appeals for the District of Columbia (the panel including now Chief Justice Roberts) reversed the District Court decision, holding among other things that Hamdan could not directly invoke the Convention in court; *Hamdan v Rumsfeld* 15 July 2005 No 14-3593. 415 F. 3d 33 (2005). The Supreme Court has granted certiorari and the appeal is due to be heard in March 2006; 126 S Ct 622 (2005).

44 *Close v Maxwell* [1945] NZLR 688. The Law Reports have a footnote reading 'the report of this case was delayed owing to the operation of the Censorship and Publicity Emergency Regulations 1939'.

intention either of not returning or of avoiding some important service or duty. The soldiers' actions did not constitute desertion in those terms.

But, while that might be thought to be a straightforward, even literal, finding based on the ordinary meaning of the words, it is possible to think of purposive arguments that might well have led a court, in time of great peril to the nation, to say that the actions were in effect desertion and fell plainly within the purpose of the legislation. Moreover, the decision of the court-martial to convict the soldiers was protected by a strong privative clause. Might not the Court have said that, even if the ruling by the court-martial that the actions did constitute desertion was inaccurate as a matter of law, it was nevertheless a ruling that fell within the court-martial's jurisdiction? An associated argument was that the offence of desertion plainly fell within the jurisdiction of the court-martial and the detail of the charge is something of lesser significance. The Crown also argued very strongly that the common law had never interfered with the army *flagrante bello*. Great caution must be observed not to interfere with military discipline. And there must be a flagrant abuse of military authority before the civil courts should interfere.

The court was not willing to go down any of those paths. It unanimously overturned the convictions.

B. Freedom of Association

The right to freedom of association is often limited in times of emergency including terrorism and war. That is to be seen in resolution 1373 and associated national legislation. The placing of limits on it raises very difficult issues as appears from two decisions from two further jurisdictions.

In 1969 the House of Lords (by three judges to two) on appeal from the Court of Appeal of Northern Ireland upheld the appellant's conviction for being a member of a republican club in breach of regulations prohibiting such membership or membership of 'any like organisation howsoever described'.⁴⁵ Michael Francis Forde was a member of a 'republican club' and accordingly came within the terms of the offence created by the regulation. No evidence was given that he or the club were at any time a threat to peace, law and order, and so far as the police were aware there was nothing seditious in its pursuits or those of its members. The relevant Minister had power to make regulations 'for making further provision for the preservation of the peace and the maintenance of order'. The majority judges read that phrase very broadly, referring to war time and emergency cases. They asked whether the regulation was 'capable of being related to the prescribed purpose' and said if there was no question of bad faith the courts will be slow to interfere with the exercise of wide powers to make regulations. But the dissenters thought that the duty of surveillance entrusted to the courts for the protection of the citizen goes deeper than that. Further, the regulation was too vague and ambiguous. 'A man must not be put in peril on an ambiguity under the criminal law.'⁴⁶

The Nuremberg Tribunal was also faced with offences involving the membership of proscribed organisations. Article 10 of the Nuremberg Charter made it an offence to be a member of an organisation declared criminal by the Tribunal. 'In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.' The Tribunal said this:

45 *McEldowney v Forde* [1971] AC 632.

46 For another membership case under the apparently very broad terms of s 11 of the United Kingdom Terrorism Act 2000 see *AG's Reference (No 4 of 2002)* [2003] EWCA Crim 762.

In effect, therefore, a member of an organisation which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.

The Tribunal however had a judicial discretion whether it would declare any organisation criminal, a discretion to be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. Accordingly since the declaration with respect to the organisations and groups would fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by the Charter as members of the organisation.⁴⁷ To repeat, criminal liability was to be based on individual responsibility and individual fault. Collective punishments could not be tolerated.⁴⁸

C. Torture

My final area is torture. The prohibitions in the International Covenant, regional conventions, the Convention against Torture and the Geneva Conventions and Protocols are all in absolute terms and probably have the force of *ius cogens*.⁴⁹ The prohibition, uniquely among human rights instruments, brings with it a prohibition on the admissibility of a confession obtained by torture. And yet there is the Dershowitz position and the undoubted practices of many states over many ages.

I take just one case, the judgment of the Supreme Court of Israel given on 6 September 1999,⁵⁰ in which all nine judges agreed with the judgment prepared by President Barak holding unlawful certain methods of interrogation of suspected terrorists. The justification for such methods was that they were deemed immediately necessary for saving human lives.

Shortly before the end of the judgment the President said this:

This decision opens with a description of the difficult reality in which Israel finds herself security wise. We shall conclude this judgment by re-addressing that harsh reality. We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties. This having been said, there are those who argue that Israel's security problems are too numerous thereby requiring the authorization to use physical means. If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an issue that must be decided by

47 The International Military Tribunal, Nuremberg, Judgment of 30 September 1946.

48 The issue of collective punishments was a live one in the preparation of the Charter, eg Telford Taylor *The Anatomy of the Nuremberg Trials* (1993) ch 2 and the triumph of the Stimson position over Morgenthau's within the United States administration.

49 See eg *Attorney-General v Zaoui* (2005) 7 HRNZ 860 (SCNZ) para 51 and n 42 and the authorities mentioned there.

50 *Public Committee against Torture in Israel and others v The State of Israel and others* HC 5100/94, judgment of 6 September 1995.

the legislative branch which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The pointed debate must occur there. It is there that the required legislation may be passed, provided, of course, that a law infringing upon a suspect's liberty 'befitting the values of the State of Israel', is enacted for a proper purpose, and to an extent no greater than is required. (Article 8 to the Basic Law: Human Dignity and Liberty.)

Deciding these applications weighed heavy on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. Our apprehension is that this decision will hamper the ability to properly deal with terrorists and terrorism, disturbs us. We are, however, judges. Our brethren require us to act according to the law. This is equally the standard that we set for ourselves. When we sit to judge, we are being judged. Therefore, we must act according to our purest conscience when we decide the law.

Against that security background, the Court concluded that certain methods of interrogation used by the GSS were unlawful because they were not a reasonable form of investigation. For that purpose the Court drew on Israel's international obligations and absolute character:

First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever. There is a prohibition on the use of 'brutal or inhuman means' in the course of an investigation. F.H. 3081/91 *Kozli v. The State of Israel*, at 446. Human dignity also includes the dignity of the suspect being interrogated. Compare HCJ 355/59 *Catlan v. Prison Security Services*, at 298 and C.A.4463/94 *Golan v. Prison Security Services*. This conclusion is in accord with international treaties, to which Israel is a signatory, which prohibit the use of torture, 'cruel, inhuman treatment' and 'degrading treatment.' See M. Evans & R. Morgan, *Preventing Torture* 61 (1998); N.S. Rodley, *The Treatment of Prisoners under International Law* 63 (1987). These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can lead to the investigator being held criminally liable. See, e.g., the Penal Law: § 277. Cr. A. 64/86 *Ashash v. The State of Israel* (unreported decision).

VI. CONCLUDING COMMENTS

I conclude with three broader thoughts.

The first is to be careful in our use of words. All can understand the rhetorical force of the use of the word 'war' in expressions such as the 'war against poverty' or the 'war against drugs'. But 'war against terror' can move us too quickly to thoughts of the lawful use of armed force in self defence in the context of that 'war', particularly with the controversial restatement by the United States of the right of preemptive self defence in its September 2002 Security Policy. Francis Bacon in his essay *Of Judicature* had something wise to say about all this four centuries ago:

Above all things integrity is their position and proper virtue. Cursed (saith the law) is he that removeth the landmark.

I return to *Antigone*. Creon is brought down by his recklessness and his pride. 'The blow,' he says, 'came quick'. The Chorus concludes the play in this way:

Wise conduct is the key to happiness.
 Always rule by the gods and reverence them.
 Those who overbear will be brought to grief.
 Fate will flail them on its winnowing floor.
 And in due season teach them to be wise.⁵¹

The second broader matter is about the danger of specialisation in the law. The issues of law raised by campaigns against terrorism concern matters traditionally considered by criminal lawyers, constitutional lawyers, human rights lawyers, military lawyers and international lawyers among others. The legal issues run into an array of issues engaging the knowledge and skills of experts in many other areas – foreign policy, strategy, defence, police, internal security, science, medicine, history, theology It is very important that lawyers in considering this complex of issues have regard to their full range. They will serve their clients and the public much better if, while keeping the detail clearly in mind, they lift their eyes and, like Matthew Arnold, see things steadily and see them whole.

My final point extends that visual metaphor in the final paragraphs of *War and Peace* (1869), Leo Tolstoy compares the understanding of the physical sciences after the Copernican revolution with the understanding of history:

As with astronomy the difficulty of recognizing the motion of the earth lay in abandoning the immediate sensation of the earth's fixity and of the motion of the planets, so in history the difficulty of recognizing the subjection of personality to the laws of space, time, and cause, lies in renouncing the direct feeling of the independence of one's own personality. But as in astronomy the new view said: 'It is true that we do not feel the movement of the earth, but by admitting its immobility we arrive at absurdity, while by admitting its motion (which we do not feel) we arrive at laws,' so also in history the new view says: 'It is true that we are not conscious of our dependence, but by admitting our freewill we arrive at absurdity, while admitting our dependence on the external world, on time, and on cause, we arrive at laws.'

In the first case it was necessary to renounce the consciousness of an unreal immobility in space and to recognize a motion we did not feel; in the present case it is similarly necessary to renounce a freedom that does not exist, and to recognize a dependence of which we are not conscious.

The 'laws' to which Tolstoy refers take us back to the rule of law and to President Barak. By admitting our dependence on one another and on the external world, we recognise essential limits on our freewill. While our independence is recognised and sustained by the law so too it is limited by the law. The same is true of each of the States making up the world community and indeed of the world community itself, as it increasingly organises itself through the law. This is a critical time for the *international* rule of law.

51 Dato' Param Cumuraswamy at the Melbourne Conference in April 2003 found it shocking how shallow a commitment some Governments had to the basic principles that underlie their societies and how willingly they deny basic protections to others. A former senior US Justice Department official has recently written at length about the danger of using the 'war against terrorism' as a metaphor: Phillip B Heymann *Terrorism, Freedom and Security* (2003) reviewed by Lee and Schwartz (2005) 103 Mich L Rev 1446.

THE RULE OF LAW, BICULTURALISM AND MULTICULTURALISM

BY HON JUSTICE E T DURIE*

I do not regard the policies for bicultural or multicultural development as mutually exclusive. I think they address different things. Biculturalism is about the relationship between the state's founding cultures, where there is more than one. Multiculturalism is about the acceptance of cultural difference generally. Both policies may be seen to point to the need for a new legal framework to define the relationship between the state and its constituent peoples. I suggest that the framework is already under construction although the design is not yet clear. For thoughts about the design I think one could do no better than to read Will Kymlicka but at some risk I will mix in perspectives of my own.¹ Mostly I seek a perspective that considers the development of the rule of law in light of social changes since Dicey's lectures were published in 1885.

As a phrase, the rule of law captures some of our most treasured visions of democracy, equality and liberty. Government must not be capricious but must act according to law. All are equal before the law and the law is the protector of individual liberties. However in Dicey's world, where these thoughts grew, there were only two actors to be concerned about, the individual and the state. The social order was so homogenous that there was no need to consider particular cultural groups. The sociological concept of nation, as a people of common history and tradition, and the political concept of the state, as the government of a large, defined territory, were either fused in fact, or were fused as an ideal. That was probably not the case for most of the world at that time. It is certainly not the case for many states today. Bosnia and Rwanda, for example, have shown that peace requires that groups too should be accommodated within the state.

Moreover, the recognition of only the state and the individual was rarely possible in the New World, where invariably, more than one culture was involved in the formation of the state. From the 1830s the Native Americans were provided for in the United States as domestic, dependent nations. The description of them as nations was undoubtedly correct, sociologically, although the term is now politically inconvenient because of the confusing conception of the nation state. On the other hand, Canada developed concepts of inherent rights of autonomy coupled with fiduciary obligations. Australia turned to the doctrine of aboriginal rights. New Zealand grafted on a concept of partnership through the development of a treaty jurisprudence. In the New World the founding cultures of the modern state were not necessarily limited to two, like the indigenous and

* Justice of the High Court; Commissioner of the Law Commission.

1 W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995). I have also considered A Bartley, and P Spoonley, 'Constructing a Workable Multiculturalism in a Bicultural Society' in M Belgrave, M Kawharu, and D V Williams, (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2005); S Elias, 'Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round' (2003) 14 Public Law Review 148 and S C Idleman, 'Multiculturalism and the Future of Tribal Sovereignty' (2004) 35 Colum Human Rights Law Rev 589.

the British. For example, the French Canadian and Métis were founding cultures in Canada, as also were the Afrikaners in South Africa.

However, that which most distinguishes Dicey's world from the world of today is the predominance of multicultural states as a result of globalisation. Moreover, where multiculturalism, along with affirmative action, was once tolerated as temporary and awaiting incorporation, it is now celebrated. It is here to stay. Indeed, it has the backing of international human rights law. I refer to the right of persons who belong to an ethnic, religious, or linguistic minority, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or to use the language of that minority.²

What we need to note, however, is that the rights claimed for each category of cultural group are not the same. We might start with the founding cultures beginning with that of say, the British in New Zealand. The first concern is for the maintenance of cultural identity. This may not be openly addressed in a sober way but can erupt in crude comments as in references to the number of Asians on Queen Street. The second concern may be to maintain the inherited system of government to which all citizens are expected to subscribe. That too is a particular form of cultural manifestation. So far, the New Zealand system of government is not constitutionally entrenched.

The prospect of identity loss is likely to be more pressing for such founding minorities as the French Canadians. However, their concerns have now been recognised, and having been recognised they can now be provided for in ways that will hopefully provide some relief.

The indigenous have a bundle of distinctive claims that may be seen as the natural consequences of their indigenous status. Indeed for most legal purposes their rights derive not from their culture but from their existence as political entities before the state's establishment. Accordingly they claim rights of self-government within the state. They seek respect and support for their customs and culture, not merely state indifference or tolerance. In the multi-cultural environment of today they are further unique in that they have no safe, cultural base, no mother country where their culture is perpetuated as the norm.

Australia and New Zealand are also hosts to unique cultural groupings from the Pacific Islands. It is likely that the culture of some of these groups will survive only on our soil, especially with global warming. Their culture is like an endangered species although unfortunately, multiculturalism is not always appreciated in the same way as biological diversity. These island groups could present another claim again that capitalises on our claims that we are all part of one Pacific polity. If that is our perception, then arguably, these are our indigenous people too.

Accordingly the concerns of these groups that make up the founding peoples of the state are not only different from each other, but as a group they are different again from the concerns and claims of the more recent cultural immigrants. Generally, the recent immigrants may claim the right to practice their culture but do not contend that the culture must be maintained by the state. The issues that arise from the practice of the culture are not easy nonetheless. Even a matter as straightforward as dress, can cause serious complications. May the hijab or Islamic scarf be worn in secular schools? Can the burka be worn in a New Zealand court?

I suggest that it is useful to distinguish the legal and the political management of diversity. For legal purposes, biculturalism and multiculturalism are uncertain tools.

2 International Covenant of Civil and Political Rights, Article 27 and New Zealand Bill of Rights Act 1990, s 20.

Biculturalism in New Zealand can be defined by its objectives. One is to acknowledge and respect those things that are distinctly Maori owned and operated, like Maori language, custom and lands, Maori schools (kohanga reo, kura kaupapa and wananga) and Maori governance institutions (runanga and urban authorities). Another is to make state-operated facilities more culturally amenable to Maori as with the recognition of Maori preferences and practices in schools, hospitals and prisons. A third is to foster Pakeha engagement with Maori culture as with the teaching of Maori language and culture amongst predominantly Pakeha students. A fourth is to provide especially for Maori in national institutions, like the Maori Parliamentary seats.

Yet another is to promote the settlement of land claims. And in addition, another goal is to combine elements of both cultures to forge a common national identity. The present Coat of Arms is a classic symbolic example, especially when compared with its predecessors. An example of a focused plan of action from the private sector is the programme to develop a bicultural jurisprudence undertaken at The University of Waikato.

These are laudable objectives but the law is more fundamentally concerned with the rights of Maori as an indigenous people. Accordingly, of the bicultural objectives I have mentioned, the law is probably concerned mainly with the recognition of Maori governance institutions, land rights, and custom law.

Multiculturalism has two aspects in New Zealand. One aspect concerns the toleration of cultural difference. The other concerns the celebration of cultural difference. The latter overlaps with bicultural policy development and can lead to competition for government support but more often I should think, the two policies are mutually supportive. However, the law is concerned only with the first aspect, the toleration of cultural difference. In New Zealand, this is normally in the context of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

However, for the more complete and effective management of diversity I suggest it is more helpful to fall back on the tried and trusty concept of the rule of law. I have suggested that the rule of law is fundamentally about the relationship that exists between the state and its subjects. The only problem is that the subjects of Dicey's state were one people. The state of the global age is more likely to have to deal with peoples. Accordingly, where Dicey spoke of individual liberties or civil rights, we have now to talk as well of group rights. I suggest that the predominant issue now, for world and national peace and good order, is the appropriate accommodation of different interest groups within the life of the state.

You will note then that the courts have been grasping the nettle for some long time. Just as Dicey thought should be the case the courts have not waited for constitutional direction or direction from the assembly of states in international instruments. They have been making constitutional provisions for years. It is important to observe that in each of the countries of the New World with which we are most familiar, United States, Canada, Australia, and New Zealand, the accommodation of indigenous peoples within the state has resulted directly from judicial prompting.

This is classic judge-made constitutional development. The concepts of domestic dependent nations, aboriginal autonomy, aboriginal rights and treaty partnership are all from the bench over a period of about 170 years. They turn give effect to principles tracing back to the fifteenth century. To my mind, these decisions on the status of indigenous people involved the quintessential application of the rule of law. The issues concerned the accommodation of peoples within the state in ways that most protected their liberty and the necessary constraint upon the state having regard to long established principles of colonial common law.

The Courts have also managed, in multi-cultural context, the remaining principle that Dicey raised, that all are equal before the law. As many have made clear, Justice Mary Gaudron especially, multiculturalism reminds us that equality is relative and depends upon the recognition of difference.³

The international community has struggled with the recognition of group rights. This may be due to the long focus on individual rights since that was all that was required in the homogeneous Old World. I suggest that today, it may be pretentious not to recognise that group rights exist. For example, the right in section 20 of the New Zealand Bill of Rights Act to enjoy one's culture, in community with other members of the group, is generally seen as an individual right. However, its effective exercise may depend on the recognition that is given to the group.

However, there are some concerns about group rights that do need to be confronted. One is that the group's own laws may conflict with certain fundamental standards accepted by the state. Does the group provide fairly for women or adequately protect the rights of the child or in other respects will members be unjustly treated or excluded? Another is whether the recognition of cultural difference will impair the development of national unity. A third is whether the rights of peoples are political matters that are not justiciable.

Each is a particularly large topic that cannot be addressed in a few sentences but I suggest for now that each concern is exaggerated. First, a significant reason for recognising a right is sometimes that it is immediately constrained as a result. I refer to formal constraints like that in the New Zealand Constitution Act 1852 and the New Zealand Bill of Rights Act 1990. The former provided for the recognition of Maori customs and usages 'so far as they are not repugnant to the general principles of humanity'.⁴ The latter effectively provides that rights may be limited where the limitation can be demonstrably justified in a free and democratic society.⁵ In addition I refer to the Hohfeldian constraint that leads us to consider the duty that corresponds with the right conferred. And finally, it is invariably the case that rights are not so fundamental in fact that they are incapable of falling foul of others. It is then not beyond the wit of the courts to seek an appropriate balance, or to consider how the two may be harmonised.

Secondly, does recognition cause division? I suggest that national tension is more likely to arise not from efforts to accommodate ethnic groups under the umbrella of the state but from the refusal to accommodate them.

Thirdly, are these matters entirely political? I think 'entirely' overstates the position. I suggest that the New Zealand Wars of the 1860s to 1880s could have been avoided if, instead of leaving matters to the discretion of the Governor, there had been a law to provide for the recognition of appropriate representatives for Maori tribal groups prior to the alienation of Maori land. In other words, some things are political because we choose to let them be so, and fail to see the rule of law issues that are involved. Of course other aspects of group rights are political, like the political structure by which national policy is decided. The concern here is with that which is necessary to secure liberty for individuals as members of a particular interest group.

3 See the collection of articles honouring Justice Mary Gaudron in (2004) 15 Public Law Rev 261.

4 Section 71.

5 Section 5.

In conclusion, I suggest that a framework of individual rights is inadequate to deal with the legal issues behind the management of cultural difference. The Diceyan principles remain as important as they ever were, but the issues for today should be addressed within a group rights framework.

HARKNESS HENRY LECTURE

APPROACHES TO BUSINESS REHABILITATION

BY RT HON PETER BLANCHARD*

It is now 11 years since the coming into force of the Companies Act 1993. Whilst a few problem areas have been identified – notably the voidable transaction provisions for which reform is proposed in draft insolvency legislation – and, with comparatively little litigation in key areas like directors' duties, many provisions have yet to be fully tested, the Act is generally regarded as a great success for the Law Commission in modernising corporate law. So is its companion, the Receiverships Act 1993, despite drafting deficiencies, in particular something of a muddle over preferential claims.

But the companies package lacks an important component in relation to insolvent companies. It reformed and carried forward provisions concerned with the enforcement of corporate securities by means of the appointment of a receiver. It has a greatly simplified regime enabling the liquidation and dissolution of companies which are regarded as being beyond redemption. And it contains mechanisms for compromises with creditors and schemes of arrangement. But one looks in vain for a really flexible and efficient way of rehabilitating or reconstructing companies which have suffered financial problems and may be insolvent, yet have businesses which are capable of being stabilised and nursed back to financial health, whether in the same corporate shell or using a new vehicle.

What one is looking for, I suggest, is a regime which encourages directors who have recognised their company's financial problems to make an early decision either to attempt rehabilitation or to put the company into liquidation. The earlier action is taken, the better the chance of a successful outcome or at least, if the company cannot be saved, of a greater return from a liquidation. Such an outcome is much to be preferred than one in which a business which is not viable is permitted to struggle on with an ever-mounting deficiency for all concerned, especially perhaps for its directors if they ultimately face claims for losses caused because of insolvent trading.

At a seminar in February 1994, before the companies package came into force, I advocated the introduction of the missing element by the adoption of the Australian voluntary administration scheme. Here is what I said:

There is a need, in my view, for a system which can either enable an independent administrator to nurse a sick company back to health or can let the creditors quickly decide that it is in their best interests that the patient be given a speedy death.

* DCNZM, Judge of the Supreme Court of New Zealand. I wish to acknowledge the assistance of my law clerk, Katharine Sanders, in the preparation of this article. This lecture was given on 10th October 2005. Since then, an Insolvency Law Reform Bill has been put before Parliament. Readers should note that it uses slightly different section numbering and includes some substantive changes.

Directors who know that their company is sick but not necessarily dying are placed in a very difficult position by the present law (essentially repeated in the 1993 Act) which imposes personal liability upon them if they allow the company to continue to incur debts while it is insolvent. Sometimes it is hard to tell whether the company is insolvent. Sometimes it is obviously insolvent but that may be a temporary problem, depending upon how future events work themselves out. Under a system of administration the directors can publicly acknowledge the position and hand over control of the company to an independent accountant. There is an immediate moratorium (although a chargeholder empowered to appoint a receiver is able to do so if it acts within a short period). The administrator must summon a creditor's meeting within a period of a very few weeks and put a proposal before it.¹

What it seemed to me was needed, and what I saw in voluntary administration, was a system which:

- Maximises the value of the company's assets,
- Is conducted by an independent insolvency expert,
- Enables swift decision making by the creditors on rehabilitation or liquidation,
- Is without need for approval by a Judge (whose experience in this field might be limited and who might be reluctant to give approval to commercial decisions),
- Has sufficient flexibility to meet new developments or to accommodate compromise, and
- Keeps costs (often the final straw for the struggling company) to a minimum, in particular, by avoiding unnecessary court involvement.

Ideally, there would be built-in incentives which would encourage early use of the rehabilitation scheme.

There was nothing very radical about the suggestion I made in 1994 that we should follow the Australian example, and I recall I was not alone in making it, but it seemed to fall on deaf ears. However, last year in April, a proposal for voluntary administration finally emerged into the light of day in draft legislation circulated for comment by the Ministry of Economic Development.² The Ministry's proposal does closely follow the provisions first introduced in Australia in 1993 in the Corporations Law and now found in Part 5.3 of the Corporations Act 2001 (Cth).

I will shortly describe and comment on two very different corporate rehabilitation models which New Zealand could have chosen to follow in an adaptation for local conditions. Then, I will set out the proposed administration scheme in greater detail and mention something of how it has worked in practice in just over a decade of experience across the Tasman. I do not propose to mention statutory management under the Corporations (Investigation and Management) Act 1989 which has not been much used in recent years and may, with the advent of administration, prove to be surplus to requirements.

Lest they be overlooked, before examining the overseas models, I should mention that there are already in the Companies Act the under-utilised provisions of Part 14 which enable compromises to be proposed without reference to the court. A compromise can be proposed by the board of directors, a receiver or liquidator or (with the leave of the court) by a creditor or shareholder.³ The proposer must call a meeting and provide detailed information.⁴ There is no

1 'Corporate Insolvency under the Receiverships Act 1993 and the Companies Act 1993 – What's Old, What's New and What's Likely to Follow?' The Company Law Conference 1994 materials, 119 cited in P Heath, 'Voluntary Administration – Proposals for New Zealand' in C Rickett (ed) *Essays on Corporate Restructuring and Insolvency* (1996) 103.

2 The Draft Insolvency Law Reform Bill and Discussion Document are available on the Ministry of Economic Development web site; <www.med.govt.nz> (last accessed 26 September 2005).

moratorium unless an order to that effect is obtained from the court.⁵ Separate meetings are necessary of any class of creditors. The compromise becomes binding only if approved at each meeting by 75 per cent in value of the class of the voting creditors.⁶

It may be that this avenue for a failing company has been unpopular because of the lack of an automatic moratorium coupled with the special majority requirements and lack of flexibility in relation to the proposal, i.e. an inability for creditors to negotiate changes during the process, at or before the creditors' meetings. Possibly also, companies are discouraged by the tax effect of any compromise under which debt is written off. That is a problem which may afflict any of the models if adopted in New Zealand.

I. CHAPTER 11 – UNITED STATES

The first overseas model is the Chapter 11 regime in the United States. It approaches the question of company insolvency very much from the perspective of the company itself and the shareholders. It is debtor orientated. United States insolvency legislation is set out in the Bankruptcy Code 1978,⁷ which gives two options to an insolvent company: liquidation under Chapter 9 or reorganisation under Chapter 11.

The process of securing Chapter 11 protection begins with the directors filing proceedings in the Bankruptcy Court.⁸ The court must be satisfied that the applicant is acting in good faith but there is no requirement to demonstrate that the company is insolvent or likely to become so.⁹ A successful application results in an order of the Bankruptcy Court which immediately freezes the rights of all creditors, whether secured or unsecured.¹⁰ A creditor may apply to the court to lift the automatic stay but will need to demonstrate that its interest is inadequately protected under the moratorium.¹¹

After the freeze has been put in place, the incumbent management and directors of the company have 120 days in which to file a reorganisation plan.¹² It is a distinctive feature of the Chapter 11 scheme that the board remains in control of the company, subject to the continuing scrutiny of the Bankruptcy Court, which must give final approval to any plan.¹³ A creditors' committee is also likely to play a significant role in investigating the company's affairs and negotiating with the board of directors. The committee may employ professional advisers at the company's expense, and is entitled to file a reorganisation plan if the company itself fails to do so within the prescribed time-frame.¹⁴

3 Companies Act 1993, s 228.

4 Ibid, s 229.

5 Ibid, s 232.

6 Ibid, sch 5, cl 5.

7 11 U.S.C.

8 Bankruptcy Code 1978, s 301.

9 See M Trebilcock, and J Katz, 'The Law and Economics of Corporate Insolvency: A North American Perspective' in C Rickett, (ed) *Essays on Corporate Restructuring and Insolvency* (1996) 12.

10 Bankruptcy Code 1978, s 362(a).

11 Ibid, s 362(d)(1).

12 Ibid, s 1121(b).

13 Ibid, s 1129.

14 Ibid, s 1121(c).

Before filing a reorganisation plan, the directors must seek the approval of each 'impaired class of creditors' whose rights would be affected if the proposed plan were implemented.¹⁵ Two-thirds in amount and more than one half by number of each class of creditor is required to consent to the plan.¹⁶ If a class of impaired creditors objects, the company may apply to the court to 'cram-down' their opposition, which the court may do if it is satisfied that the proposal is generally 'fair and equitable' to the objecting class, and at least one impaired class has consented.¹⁷ Once approved, the plan binds all parties.

The involvement of the Bankruptcy Court does not end when the reorganisation plan is filed. The power of the court to replace the board with a trustee in cases of fraud or gross mismanagement remains. Court approval is necessary before a debtor company may act outside the ordinary course of its business and, whilst debt incurred after the company goes into Chapter 11 always takes priority over unsecured pre-commencement debts, the court may also authorise new financing secured over unencumbered assets,¹⁸ or give a lender priority over existing secured creditors in some cases. Where the priority of secured creditors is to be disturbed, the court must be satisfied that the interests of those creditors are 'adequately protected'.¹⁹ The court may also grant the company the right to use any difference between the value of the security and the amount secured as a 'cushion of collateral' for other borrowing. This power may significantly increase the funds obtainable for the rescue of the company.

A debtor company or a creditors' committee may recover payments under voidable antecedent transactions²⁰ and may, provided the contract is generally capable of assignment, assign or terminate executory contracts regardless of their terms.²¹

Developments in American insolvency practice outside the formal Chapter 11 procedure should also be noted. As the Chapter 11 procedure has become more widely understood, debtors and creditors have increasingly negotiated reorganisation plans outside the formal court process. This informal negotiation, known as a 'pre-pack', allows debtor companies to avoid some of the costs associated with seeking Chapter 11 protection, and is usually implemented by the filing of a reorganisation plan.²² Arguably, the automatic stay on creditors' rights after a Chapter 11 order, together with the possibility of cram-down, encourage creditors to pre-empt the court process, taking the opportunity to attach favourable conditions to any future financing.

The Chapter 11 regime has both supporters and detractors. Those in favour of allowing management to stay in control of the debtor company argue that the approach in the United States

15 Section 1124(1) of the Bankruptcy Code states that a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest.

16 Bankruptcy Code 1978, s 1126(c).

17 *Ibid*, s 1129(b). For discussion of the rights of creditors affected by 'cram-down' see R Broude, 'How Rescue Culture Came to the United States' in (April/June 2003) *Australian Insolvency Journal* 4, 10. Also, M Trebilcock, and J Katz, above n 9, 19, where it is argued that high levels of acquiescence by creditors to plans which do not respect their priority of claims reflect a desire to avoid cram-downs.

18 Bankruptcy Code 1978, s 364(c).

19 *Ibid*, s 364(d).

20 *Ibid*, s 547(b).

21 *Ibid*, s 365.

22 See discussion of 'pre-pack' arrangements in CAMAC, *Rehabilitating Large and Complex Enterprises in Financial Difficulties*, Report of the Australian Corporations and Markets Advisory Committee (2004) 130.

encourages struggling boards to take early remedial action. The company also has the opportunity to retain the expertise of existing management. In practice, it does not seem to ‘leave the lunatics in charge of the asylum’, for empirical evidence suggests that incompetent managers get fired. One commentator has put it this way ‘The debtor in possession is the company, not the individual. Companies survive; managers most often do not, and at least not in their jobs’.²³

The independent supervisory role of the Bankruptcy Court is not without its drawbacks: it seems to increase administration costs significantly and the process could never be described as speedy.²⁴ It is an element which might not be welcomed in New Zealand because of judicial reluctance to become involved in decision making which requires specialised commercial skills and knowledge. Criticism is also levelled at Chapter 11 that it can create unfairness for solvent competitors who, unlike the bankrupt corporation, have to continue to meet their interest bills and pay their other obligations.

II. THE ENGLISH REHABILITATION PROCESS

In contrast to Chapter 11, the rehabilitation process under reforms introduced by the Enterprise Act 2002, and in force in the United Kingdom from 15 September 2003,²⁵ is orientated more to the interests of the ordinary creditors. The procedures are complex and I can attempt only a sketch of some of the main provisions. The rights of charge holders are curtailed. In other than cases of mortgages or charges over land and some exceptional circumstances, the appointment of a receiver by a secured creditor is not permitted where the security was created after the coming into force of the reforms. (However, grandfathering allows them under existing debentures, so that what the English call administrative receiverships will occur for some years ahead.²⁶)

I digress slightly to show the extent of the bias of the Enterprise Act against general charge holders and in favour of ordinary creditors. The distinction between fixed and floating charges, sensibly abolished in this country under the Personal Property Securities Act 1999, continues in the United Kingdom and currently is said to bedevil their banking law now that the House of Lords in *Spectrum Plus*²⁷ has followed New Zealand²⁸ and Privy Council²⁹ decisions in determining that ordinarily a general charge over future book debts must be regarded as floating. By requiring such a floating charge holder to concede priority to preferential claims that decision

23 R Broude, above n 17, 8. See also L M LoPucki, ‘Correspondence. Strange Visions in a Strange World: A Reply to Professors Bradley and Rosenzweig’ (1992) 91 Mich L Rev 79, where he defends Chapter 11 arguing that the assertion that Chapter 11 shields managers from creditors while they expropriate wealth for themselves is neither supported by the empirical evidence, nor true.

24 For discussion of empirical evidence about the cost of the Chapter 11 bargaining procedure see M Trebilcock, and J Katz, above n 9, 19.

25 Section 250 of the Enterprise Act 2002 inserts a new Chapter IV in Part III of the Insolvency Act 1986 (UK). The Act applies to England, Wales, Northern Ireland and Scotland except as otherwise stated in s 280. For a general introduction to the Enterprise Act 2002 see ‘Administration and Company Voluntary Arrangements’ in R Goode, *Principles of Corporate Insolvency Law* (3rd ed, 2005), Chapter 10. Also, <www.insolvency.gov.uk> (last accessed 6 October 2005).

26 Insolvency Act 1986, s 72A(4)(a).

27 *In re Spectrum Plus Ltd (in liquidation)* [2005] 3 WLR 58 (HL).

28 *Supercool Refrigeration and Air Conditioning (in Receivership and Liquidation) v Hoverd Industries Ltd* [1994] 3 NZLR 300.

29 *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 (PC); [2002] 1 NZLR 30 (PC).

may have considerable influence under the Enterprise Act because, although the Act removes the preferential priority of Crown claims³⁰ – employee preferential status is unaffected³¹ – it more than offsets this gain to the floating charge holder by providing for ring-fencing of a prescribed percentage of the company's net property – those assets which would otherwise have been available to the floating charge holder. Except where the net property is less than a prescribed sum (currently £10,000) and subject to a dispensation from the High Court if the cost of making the distribution would be disproportionate to the benefits, 50 per cent of the first £10,000 of net property and 20 per cent of any further amount (up to a ceiling of £600,000) may be applied in payment of the administrator's remuneration, obligations and expenses and subject thereto must be applied in payment of the ordinary creditors (including the Crown) in priority to the holder of the floating charge.³²

To return to my theme, the English insolvency legislation prior to the Enterprise Act provided for a form of company administration under an appointment made by the High Court.³³ Because of its complexity, delay and expense, as compared with administrative receivership, it was much less used. It was, for example, a necessary preliminary that a person petitioning for an administration order should submit to the court in support of the petition a detailed report on the affairs of the company by an independent person, who was often the intended administrator. That meant that a really quick rescue of the company might be impracticable.

The Enterprise Act continues to allow for an appointment by the court. But, importantly, it authorises two additional means of installing an administrator without first going to the court. The holder of a floating charge over the whole or substantially the whole of the company's property can do so,³⁴ in much the same way as a receiver could be appointed, giving notice to the court only after the event.³⁵ The company or its directors can also appoint an administrator³⁶ unless a winding up petition or an application for the appointment of an administrator by the court is extant or there is already a (grandfathered) administrative receivership.³⁷ However, the company and the directors are obliged to give 5 days' written notice to any general charge holder before they can make such an appointment.³⁸ Thus the general charge holder may be able to pre-empt the situation by making its own appointment of an administrator. However, no matter who does the appointing,

30 Enterprise Act 2002, s 251.

31 *Ibid*, s 251(3).

32 Enterprise Act 2002, s 252 inserts a new s 176A into the Insolvency Act 1986. A similar model was recommended by the Cork Committee in its report Department of Trade, *Insolvency Law and Practice: Report of the Review Committee* (1982), Chapter 36. For discussion of the ring-fenced fund see S Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67 *Mod L Rev* 247, 269-271; and M Simmons, 'Some Reflections on Administrations, Crown Preference and Ring-Fenced Sums in the Enterprise Act' (July 2004) *J of Bus L* 423, 431-435.

33 For discussion of the old administration régime, including the transitional provisions applying to existing administrations see W Kerr, and M Hunter, (eds) *Kerr and Hunter on Receivers and Administrators* (8th ed, 2005) 272-274.

34 Insolvency Act 1986 (UK), sch B1, para 14 inserted in the Insolvency Act 1986 (UK) by s 248 of the Enterprise Act 2002.

35 Insolvency Act 1986 (UK), sch B1, para 18.

36 *Ibid*, para 22.

37 Restrictions on appointment by the company or its directors are set out in the Insolvency Act 1986 (UK), sch B1, paras 23-25.

38 Insolvency Act 1986 (UK), sch B1, para 26(1)(a).

the administrator must act in the interests of the company's creditors as a whole.³⁹ He or she cannot look primarily to the interests of the chargeholder even if appointed by that person.

It is apparent that those who drafted the Enterprise Act believed that, if at all possible, a struggling company should be rescued from its insolvency. Here is the statutory statement of the purpose of administration:

The administrator of a company must perform his functions with the objective of –

- (a) rescuing the company as a going concern, or
- (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
- (c) Realising property in order to make a distribution to one or more secured or preferential creditors.⁴⁰

Later in the same provision it is stated that the administrator must perform his or her function with the objective of rescuing the company as a going concern unless he or she thinks object (b) would achieve a better result for the company's creditors as a whole;⁴¹ and it is further laid down that the administrator may perform his or her functions with object (c) – realising property to make a distribution to secured or preferential creditors – only if he or she thinks that it is not reasonably practicable to achieve either of the other objects *and* if he or she does not unnecessarily harm the interests of the creditors as a whole.⁴²

The administrator is therefore placed in something of a strait-jacket, as compared with a receiver or, as we shall see, as compared with an Australian-style administrator. It seems to be assumed that the typical case will be one in which the company can be restored to financial health and can continue to operate its business. But is not a more common outcome likely to be the sale of any rescued business as a going concern, that is, separation of a viable business from its former corporate shell, or the sale of individual assets, followed by a liquidation? In other words, it may be suggested that more often an administration will be a means of achieving object (b) or, failing that, object (c), to the advantage of the creditors as compared with a straight liquidation, or perhaps a receivership, rather than a means of achieving object (a), namely continuance of the company itself after restoration of its solvency.

As Sandra Frisby of the University of Nottingham has pointed out, the stipulations of statutory purpose may be asking rather a lot of an administrator. In order to formulate proposals for creditors which comply with these requirements of the Enterprise Act, a prospective administrator may need a great deal more information about the affairs of the company than is likely to be available at the outset.⁴³ Frisby suggests that an administrator may be unlikely to consent to act under an appointment by the company or its directors without a prior investigation with all the attendant delay and cost. It is at this point, she says, that legislative aspiration and commercial reality may well part company. Arguably, the new regime simply directs administrators towards a certain end without providing them with any new apparatus to achieve it.⁴⁴

39 Ibid, para 3(2).

40 Ibid, para 3.

41 Ibid, para 3(3).

42 Ibid, para 3(4). S Frisby, above n 32, 261 observes that para 3 'appears to place corporate rescue squarely at the top of the hierarchy of aims of the new "streamlined" administration procedure'.

43 S Frisby, above n 32, 261.

44 Ibid, 262.

The Enterprise Act directs the administrator to prepare, as soon as practicable, a statement of affairs⁴⁵ as well as proposals for achieving the purpose of the administration.⁴⁶ The proposals have to be laid before creditors for their consideration within 8 weeks of the appointment.⁴⁷ An initial creditors' meeting must be held within 10 weeks.⁴⁸ The proposals may include a compromise or arrangement with creditors or recommend conversion of the administration into a voluntary administration ordered by the court.⁴⁹ The rules made under the Act contain very detailed requirements in relation to proposals.⁵⁰ There is also a stipulation that the proposals may not include any action which affects the rights of a preferential creditor.⁵¹ If the proposals are approved by the requisite majority the administration may continue for the purpose of implementing them. If not, or if the scheme subsequently fails, a winding up will follow.⁵²

The appointment of an administrator is limited to a period of one year from the initial appointment with provision for brief extension by the creditors and by the court.⁵³ The administrator is given full power of management of the company,⁵⁴ acting as its agent,⁵⁵ and the directors of the company are correspondingly reduced in their powers, although they continue in office. The company's assets are protected during the administration by a general moratorium.⁵⁶ There is no ability for a general charge holder to override the wishes of the majority of the creditors.

III. VOLUNTARY ADMINISTRATION – THE AUSTRALIAN SCHEME AND NEW ZEALAND PROPOSALS

I preface my description of the voluntary administration regime by drawing attention to an important safeguard which does not yet exist in New Zealand and may be desirable once administrations begin in this country. It is that in Australia insolvency practitioners have to be registered.⁵⁷ There are qualification and good behaviour requirements designed to ensure that liquidators, receivers and administrators are proper persons to manage insolvent companies and are fully independent.⁵⁸ The need for independence is reinforced by a statement of general principle in the Code of the Insolvency Practitioners' Association of Australia that in every professional assignment a member undertakes he or she must be, and be seen to be, free of any interest which is incompatible with objectivity and independence.⁵⁹ The Australian Corporations

45 Insolvency Act 1986 (UK), sch B1, para 47(1).

46 *Ibid*, para 49.

47 *Ibid*, para 49(5)(b).

48 *Ibid*, para 51(2)(b).

49 *Ibid*, para 49(3).

50 See Insolvency (Amendment) Rules 2003, sch 1, r.2.33(2).

51 Insolvency Act 1986 (UK), sch B1, para 73.

52 *Ibid*, para 55.

53 *Ibid*, para 76.

54 *Ibid*, para 59(1).

55 *Ibid*, para 69.

56 *Ibid*, paras 42 and 43.

57 An application for registration may be made under s 1279 of the Corporations Act 2001.

58 Corporations Act 2001, s 1282.

Act, like the British Enterprise Act, contains a statement of purpose for administrators. But it is much less prescriptive. The purpose is:

[T]o provide for the business, property and affairs of an insolvent company to be administered in a way that:

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) if it is not possible for the company or its business to continue in existence – results in a better return for the company’s creditors and members than would result from an immediate winding up of the company.⁶⁰

The draft New Zealand Bill contains an almost identical provision.⁶¹

The Explanatory Memorandum which accompanied Part 5.3A during the Australian legislative process stated:

The new Part is ... intended to provide for speed, and ease of commencement, of administrations; minimisation of expensive and time-consuming court involvement and formal meeting procedures; flexibility of action at key stages in the administration process; and ease of transition to other insolvency solutions where an administration does not by itself offer all of the answers.⁶²

A. *Appointment of Administrator*

A voluntary administration begins when an administrator is appointed either by the court or, more usually, out of court. It can be begun by the company only after the directors have passed a resolution recording that the company is insolvent or is likely to become insolvent.⁶³ In practice, that should encompass most cases in which the directors are in some doubt about the company’s true position. An administrator can be appointed even if a liquidation is inevitable⁶⁴ but cannot be appointed except by the court (or as a replacement) if the company is already under administration.⁶⁵ However, as administration comes to an end once a deed of company arrangement (DOCA) is executed, the company, through its directors, is not prevented from appointing an administrator where it is operating under a DOCA.⁶⁶ If the company is already in liquidation, only the liquidator or the court can appoint an administrator.⁶⁷ Notice of appointment

59 IPAA *Code of Professional Conduct*, para 2, available <www.ipaa.com.au> (last accessed 26 September 2005). See also the statement of the Federal Court in *Lam Soon Australia Pty Ltd v Molit (No 55) Pty Ltd* (1996) 22 ACSR 169, 184.

60 Corporations Act 2001, s 435A.

61 Companies Act 1993, s 239A to be inserted by s 424 of the Draft Insolvency Law Reform Bill, above n 2, hereafter referred to as the draft NZ Bill.

62 Explanatory Memorandum to the Corporate Law Reform Bill 1992, para 449, available <www.takeovers.gov.au> (last accessed 26 September 2005).

63 Corporations Act 2001, s 436A; draft NZ Bill, s 239I. See also *Wagner v International Health Promotions Ltd* (1994) 15 ACSR 419.

64 *Dallinger v Halcha Holdings Pty Ltd* (1996) 14 ACLC 263.

65 Corporations Act 2001, s 436D; draft NZ Bill, s 239H(2). A court will not adjourn or stay an application for liquidation simply because the company has appointed an administrator before the application has been heard. A company bears the onus of showing that the interests of its creditors will be better served by an administration: *Deputy Commissioner of Taxation v First Netcom Pty Ltd* (2000) 35 ACSR 615.

66 *Beatty v Brashs Pty Ltd* [1998] 2 VR 201.

67 Corporations Act 2001, ss 436A(2), 436B(1) and 436C(2); draft NZ Bill, s 239H(1)(b)(c).

will under the New Zealand proposal have to be given to the Registrar of Companies, not to the court.⁶⁸

A person who is entitled to enforce a charge on the whole, or substantially the whole, of a company's property may appoint an administrator if the charge has become enforceable and the company is not already in liquidation.⁶⁹ I will refer to such a person as a general charge holder. There may be difficulties in determining what is a charge over substantially the whole of the company's property. One commentator has suggested that a creditor will be a substantial chargee if it has the capacity to take control of so much of the business, property and affairs of an insolvent company as is necessary to conduct an effective operation. The fact that some valuable assets of a company are excluded from the scope of the charge should be immaterial, on this view, unless they are an integral component of the company's business.⁷⁰

I pause to ask why a charge holder who wants to intervene would ever wish to appoint an administrator if it has the power to appoint a receiver. Why would a charge holder want to subject itself to a deed of arrangement if receivership is an option?

B. *Moratorium*

There is an immediate moratorium as soon as an administrator is appointed.⁷¹ This does not stop actions already begun to enforce a charge over the company's property.⁷² But legal proceedings against the company and enforcement of securities and other self-help actions by creditors may not be begun or continued without the consent of the administrator or the court,⁷³ which is not likely to be given if that will cause significant expense and/or distraction.⁷⁴ Proceedings to enforce guarantees of the company's liabilities cannot be enforced against a director or a director's relative or spouse.⁷⁵ There is an exception to the moratorium. During a 10 working day 'decision period' running from the date of notice to it, a general charge holder may take enforcement action by appointing a receiver or taking possession of property.⁷⁶ With this exception, persons whose property is occupied by or in the possession of the company cannot take steps to recover it (unless it is perishable property)⁷⁷ without the leave of the administrator or the court.⁷⁸ Leave may be granted if the moratorium will cause the owner of the property financial or other loss or detriment greater than any benefit or advantage that the creditors might derive from the statutory restraint.⁷⁹

68 Draft NZ Bill, s 239ADR. Under s 450A of the Corporations Act 2001, notice of appointment must be given to the Australian Securities and Investment Commission.

69 Corporations Act 2001, s 436C(1); draft NZ Bill, s 239K.

70 J O'Donovan, *Company Receivers and Administrators* (2001) 190.

71 Corporations Act 2001, ss 440B and 440C; draft NZ Bill, ss 239AY and 239AZ.

72 Corporations Act 2001, s 441B; draft NZ Bill, s 239ABI.

73 Corporations Act 2001, s 440D; draft NZ Bill, s 239ABA.

74 *Re Capital General Corp Ltd* (2000) 19 ACLC 848, 850-851.

75 Corporations Act 2001, s 440J; draft NZ Bill, s 239ABF.

76 Corporations Act 2001, s 441A; draft NZ Bill, s 239ABH. In Australia where there has been a practice of purporting to extend the decision period by agreement between the general charge holder and the administrator – a practice seemingly in conflict with the Act – it has been recommended by a government committee that this period be increased to 15 working days: CAMAC Report, Recommendation 24, above n 22, 64.

77 Corporations Act 2001, s 441C; draft NZ Bill, s 239ABJ.

78 Corporations Act 2001, s 440C; draft NZ Bill 1993, s 239AZ.

79 *Canberra International Airport Pty v Ansett Australia Ltd* (2002) 41 ACSR 309.

However, Australian courts have generally given creditors of the company the opportunity to consider proposals put forward by the administrator to enable the company to continue trading even for a short period and have therefore been prepared to refuse leave on an interim basis to enable that to occur.⁸⁰

C. Powers of Administrator

An administrator is given control of the company's business, property and affairs and has full power to carry on the business and manage the property. He or she may terminate or dispose of the business or property in whole or in part even without the consent of creditors⁸¹ and before any meeting has been held and can exercise the functions and powers normally exercisable by the directors.⁸² The administrator acts as the company's agent⁸³ and can appoint an agent to do anything the administrator is unable to do personally.⁸⁴ All these things can be done even when the company is in liquidation. Like a receiver under our 1993 Act, the administrator's agency for the company can exist notwithstanding that the appointment is made during a liquidation.

Any transaction or dealing by a company in administration is void unless done by or with the prior consent of the administrator or sanctioned by the court.⁸⁵ The directors continue in office but cannot act without the administrator's approval.⁸⁶ But a receiver and manager whose appointment by a charge holder is not blocked by the administration is unaffected.⁸⁷ Contracts of employment continue but, except where the administrator adopts such a contract, the draft New Zealand Bill does not provide for any personal obligation similar to that of receivers where they do not terminate employment within 14 days of their appointment.⁸⁸

D. Court's Power of Assistance

A particularly useful feature of the voluntary administration scheme is the broad power given to the court – without any guidelines or qualifications – to determine how it may operate in relation to a particular company.⁸⁹ It enables the court, for example, to overcome problems arising from departures from particular requirements of the legislation. This has proved very useful in larger or more complex insolvencies, such as the Ansett collapse.⁹⁰ The court's order is made prospectively but can deal with the consequences of something which has already occurred, including a failure

80 *Re Java 452 Pty Ltd* (1999) 32 ACSR 507.

81 *Re Eisa Ltd; Application of Love* (2000) 35 ACSR 394.

82 Corporations Act 2001, s 437A; draft NZ Bill, s 239U.

83 Corporations Act 2001, s 437B; draft NZ Bill, s 239W.

84 Corporations Act 2001, s 437C(1A); draft NZ Bill, s 239V(2)(c).

85 Corporations Act 2001, s 437D(2); draft NZ Bill, s 239Z(1).

86 Corporations Act 2001, s 437C; draft NZ Bill, s 239X.

87 Corporations Act 2001, s 442D; draft NZ Bill, s 239ABH(3).

88 Draft NZ Bill, s 239Y. There is no equivalent provision in the Corporations Act 2001. For discussion of the legal issues raised in Australia for employees where their employer is in voluntary administration see P Darvas, 'From the Outside Looking In: Employees and Voluntary Administration' (2001) 29 ABLR 409.

89 Corporations Act 2001, s 447A; draft NZ Bill, s 239ADK. For a general discussion of the court's power under s 447A see K R Moore, 'Is the Voluntary Administration Process in Australia Flexible Enough?' (2003) 19 Ins L & Prac 5, 171. Moore argues that the court's approach to the discretion has encouraged commercially viable outcomes.

90 *Re Ansett Australia Ltd and Mentha* (2001) 188 ALR 165.

to comply with the company's constitution. But the Australian courts have made it clear that the power should not be exercised in a way that will affect rights which have already accrued; orders therefore can have effect only from the time they are made, though made in respect of past events.⁹¹

E. Procedure

The administrator is required to proceed as follows. As soon as practicable there must be an investigation of the company's business, property, affairs and financial circumstances and the administrator must form an opinion on the best outcome for the administration. The directors must provide a statement about the company's business and the like within 5 working days.⁹² (For convenience, I am using the time periods in the New Zealand draft. The Australians are in the process of altering theirs and we are anticipating their changes.) Within 8 business days an initial creditors' meeting must be held.⁹³ At this meeting decisions must be taken on the appointment of a creditors' committee to have a consultative role and on whether to change the administrator. The administrator must table an interests statement disclosing any relationships (professional, business or personal) with the company or with any of its officers, shareholders or creditors.⁹⁴ This of course provides a check on any 'friendly' selection which may have been made by the directors.

F. The Watershed Meeting

A major meeting, known as a watershed meeting, must be convened within 20 working days⁹⁵ and held within 25 working days of the commencement of the administration.⁹⁶ That period can be extended by the court.⁹⁷ The watershed meeting decides upon the future of the company and, in particular, whether the company and the creditors (through the administrator) should execute a deed of company arrangement (DOCA). The directors are required to attend unless excused or having a valid reason. But they cannot be required to answer questions.⁹⁸

The administrator is required when giving notice of the watershed meeting to provide a report on the company's business, property, affairs, financial circumstances, and any other material matter. The administrator must also give the creditors his or her opinion, with reasons, on whether the company should execute a DOCA, or the administration should simply end ('as you were'), or the company should go straight into liquidation. If a DOCA is recommended, there must be a statement setting out details of the proposal.⁹⁹ The fact that the creditors can resolve that the company go into liquidation¹⁰⁰ provides a disincentive against directors putting the company into

91 *Australasian Memory Pty Ltd v Brien* (2002) 200 CLR 270. A useful summary by Austin J of the emerging jurisprudence on the court's power under s 447A is found in *Deputy Commissioner of Taxation v Portinex Pty Ltd* (2000) 34 ACSR 391, para 30.

92 Corporations Act 2001, s 438B(2); draft NZ Bill, s 239AD.

93 Corporations Act 2001, s 436E(2); draft NZ Bill, s 239AJ.

94 Draft NZ Bill, s 239AL. Cf. Corporations Act 2001, s 448C.

95 Draft NZ Bill, s 239AP(2). Cf. Corporations Act 2001, s 439A(5).

96 Corporations Act 2001, s 439A(2); draft NZ Bill, s 239AQ(2).

97 Corporations Act 2001, s 439A(6); draft NZ Bill, s 239AP(3).

98 Draft NZ Bill, s 239AS.

99 Corporations Act 2001, s 439A(4); draft NZ Bill, s 239AQ(3).

100 Corporations Act 2001, s 439(c); draft NZ Bill, s 239AW(c).

administration merely to gain the advantage of a moratorium or for some other reason which may be an abuse.

The watershed meeting can be adjourned by resolution of the creditors for up to 30 working days only but the court can, on application by the administrator, order a longer adjournment.¹⁰¹ However, the thrust of the scheme is for decisions to be made swiftly and the court is not likely to accommodate any lengthy adjournment. If, at the watershed meeting, the creditors do not vote for a DOCA, the administration ends. There is either a reversion to the position before the administration or, if the creditors vote for it, an immediate liquidation.¹⁰²

G. *The Deed of Company Arrangement (DOCA)*

At the watershed meeting a simple majority in number and value of the creditors can resolve on execution of a deed of company arrangement (DOCA),¹⁰³ which does not have to be the same as was proposed in the notice of meeting.¹⁰⁴ This flexibility is important as it enables changes to be negotiated with the creditors at or before the meeting. The administrator has the power to make decisions on who can vote and with what voting power.¹⁰⁵ If the creditors vote in favour of a DOCA but the deed is not fully approved at the meeting, the administrator must complete the drafting and circulate the proposed deed to creditors within 10 working days after the meeting.¹⁰⁶ The creditors then have a period of 3 working days to consider the final form of the deed.¹⁰⁷

The deed must appoint a deed administrator who will typically but not necessarily be the person already acting as company administrator. The deed must specify:

- The property available to pay creditors.
- The nature and duration of any moratorium.
- The extent to which the company will be released from its debts.
- The order in which proceeds of realisation of property will be distributed.
- The cut-off day (not later than the day when the administration began) on or before which creditors' claims must have arisen if they are to participate.¹⁰⁸

One matter which has been the subject of uncertainty in Australia and is not addressed in the New Zealand Bill is whether preferential creditors can be crammed down to the

level of other creditors without their consent. It is clear however that in Australia ordinary creditors need not be treated equally in a DOCA. Creditors do not vote in classes. But the Federal Court has commented in *Lam Soon Australia Pty Ltd v Molit (No 55) Pty Ltd* that where a deed which is proposed will discriminate between creditors and there is no community of interest between the groups,

101 Corporations Act 2001, s 439B(2); draft NZ Bill, s 239AV.

102 Corporations Act 2001, s 439C; draft NZ Bill, s 239AW.

103 Corporations Regulations 2001 (Cth), reg 5.6.21.

104 Corporations Act 2001, s 439C; draft NZ Bill, s 239AW(a).

105 Corporations Regulations 2001 (Cth), reg 5.6.23. See *Expile Pty Ltd v Jabb's Excavations Pty Ltd* (2003) 46 ACSR 446, 454.

106 Draft NZ Bill, ss 239AX, 239ACL(1)(a).

107 Draft NZ Bill, s 239ACL(1)(b).

108 Corporations Act 2001, s 444A(3)-(5); draft NZ Bill, s 239ACJ.

... it is important that an administrator examine the proposal carefully and critically in order to ensure that the less advantaged group is not unfairly prejudiced. That must involve at least that the administrator takes steps to ensure, so far as it is possible, that the deed is no less beneficial to all creditors than liquidation is likely to be.¹⁰⁹

This may suggest that an administrator should not put forward a scheme which reduces preferential creditors to the level of unsecured creditors without their consent.¹¹⁰

The deed is executed on behalf of the company by the administrator. The company may not execute the deed unless a board resolution has authorised that action. The deed has to be executed by the company and the deed administrator within 15 working days after the watershed meeting has approved it or within any further time allowed by the court on the application of the deed administrator made within that period.¹¹¹ If not, the administrator must apply to the court for the appointment of a liquidator.¹¹² A court will be hesitant about granting any extension of time for any purpose other than settling the final form of the deed.¹¹³

The administration comes to an end when the deed is signed. The administrator is replaced by the deed administrator who may be the same person but now playing a different role. Depending upon the terms of the deed, the directors may have their powers of management restored to them, with supervision by the deed administrator. The automatic moratorium also comes to an end. There is an ongoing moratorium only as may be provided for in the DOCA and affecting only those who are bound by the deed. It binds all creditors in respect of claims that arise on or before the cut-off day.¹¹⁴ It does not however prevent a secured creditor or an owner or lessor of property used by the company from enforcing its rights (for example, under a retention of title clause) unless the deed provides otherwise *and that creditor voted in favour or the court so orders on the application of the deed administrator*.¹¹⁵

H. Termination of the Deed of Company Arrangement

The company is then administered in accordance with the DOCA. If things do not go to plan the DOCA can be terminated by the court on the application of the company, a creditor, the deed administrator or any other interested person.¹¹⁶ A liquidator can then be appointed. This can occur if there is a material contravention of the deed by the company or other person who is bound by it; or effect cannot be given to the deed without injustice or undue delay; or it transpires that the administrator or the creditors were given false or misleading information; or the deed will operate in a manner which is oppressive or unfairly prejudicial to or unfairly discriminatory against one or more creditors or contrary to the interest of the company as a whole; or the court considers that the deed should be terminated for some other reason.¹¹⁷ The creditors can also at a meeting resolve that the deed be terminated if there has been a material breach. They can appoint a liquidator.¹¹⁸

109 (1996) 22 ACSR 169, 185.

110 Cf. UK position at above n 50.

111 Corporations Act 2001, s 444B; draft NZ Bill, s 239ACK.

112 Draft NZ Bill, s 239ACN. Cf. Corporations Act 2001, ss 446A and 444B(2).

113 *Re Mentha* (2002) 41 ACSR 352; [2002] FCA 530, para 60.

114 Corporations Act 2001, s 444D(1); draft NZ Bill, s 239ACP(1).

115 Corporations Act 2001, s 444D(2)(3); draft NZ Bill, s 239ACP(2)(3).

116 Corporations Act 2001, s 445D(2); draft NZ Bill, s 239ACZ(1).

117 Corporations Act 2001, s 445D(1); draft NZ Bill, s 239ACZ(2).

Alternatively, whether or not there has been a breach, they can resolve upon a variation of the DOCA.¹¹⁹ Where a company is in liquidation when a DOCA is adopted the liquidation continues unless it is terminated by the court, but the company is administered in terms of the DOCA and when it ceases the liquidator takes over.¹²⁰

I. Liability of Administrator and Deed Administrator

During the period of administration, that is, before execution of a DOCA or the passing of a resolution at a watershed meeting that a liquidator be appointed or a resolution that the administration should end, the administrator is given full power of management but is liable for debts incurred for services rendered, goods bought or property hired, leased, or occupied.¹²¹ The liability is not as all embracing as a New Zealand's receiver's liability¹²² but there is the now familiar provision for personal liability for rent for property used or occupied by the company during the administration (other than the first 7 days).¹²³ The administrator is entitled to an indemnity out of, and lien on, the company's property ahead of general creditors and charges over accounts receivable and inventory.¹²⁴ It is proposed that in a liquidation, the fees, expenses and remuneration of an administrator (but, unlike Australia, not those of a deed administrator)¹²⁵ will be preferential, ranking immediately after the liquidator's fees, expenses and remuneration.¹²⁶

A deed administrator, in contrast, generally will have no personal liability to persons who give credit to the company while the deed is operating. In any subsequent liquidation those persons would rank equally with the earlier unsecured creditors under the deed. Therefore anyone funding or giving credit to the company during that time must bargain for priority.

J. Voidable Transactions

The voidable transactions sections of the Companies Act will not apply to transactions carried out by or with the authority of the administrator or deed administrator or specifically authorised by the DOCA.¹²⁷ An administrator cannot recover voidable transactions carried out by the directors. If such transactions were substantial, the creditors may favour a liquidation.

118 Corporations Act 2001, s 445E; draft NZ Bill, s 239ADA.

119 Corporations Act 2001, s 445F; draft NZ Bill, s 239ADB.

120 *Mercy & Sons Pty Ltd v Wanari Pty Ltd* (2000) 35 ACSR 70; *Re Nardell Coal Corp Pty Ltd* (2004) 49 ACSR 110.

121 Corporations Act 2001, s 443A; draft NZ Bill, s 239ADD. Employees' claims for wages owing for the period of administration will rank equally with other unsecured creditors but in the event of liquidation they will have a preferential claim under Schedule 7 to the Companies Act 1993 in the draft NZ Bill.

122 Receiverships Act 1993, s 32.

123 Corporations Act 2001, s 443B(1)(2); draft NZ Bill, s 239ADE.

124 Corporations Act 2001, ss 443D, 443E and 443F; draft NZ Bill, ss 239ADH, 239ADI and 239ADJ.

125 Corporations Act 2001, s 556.

126 Schedule 7(1)(b) to the Companies Act 1993 in the draft NZ Bill.

127 Draft NZ Bill, s 239ABX. There is no equivalent provision in the Corporations Act 2001.

IV. THE PREFERRED OPTION – VOLUNTARY ADMINISTRATION

Chapter 11 seems to be off the radar in Australia and New Zealand, having been rejected by government committees in Australia and by the Law Commission in New Zealand.¹²⁸ The Ministry seems to agree. Nor have I detected any enthusiasm for copying the English reforms in the Enterprise Act. In truth, the voluntary administration regime has worked fairly well in Australia – all that is now being suggested in that country is minor adjustment – and, with reservations about the position of the Commissioner of Inland Revenue which I will mention, it appears to be the best of the models for New Zealand's circumstances.

The Australian courts have caught the spirit of the legislation and have sometimes been able to render assistance to administrators with generous and creative rulings. They have also been prepared to intervene in order to prevent abuse of the procedure by directors.

In Australia substantially more companies now undergo administration than are wound up by the court, although there is still common use of receiverships ordered by the court or resulting from an appointment by a secured creditor. The popularity of administration is illustrated by a table showing that in the year before the administration regime commenced there were 1416 windings up ordered by the court. By 1997-1998 there were only 433, but in that year there were already 664 voluntary administrations.¹²⁹

However, the uptake and perhaps the success rate in New Zealand may not be so great. I say this because I have concerns about the position and possible attitude of the Commissioner of Inland Revenue. There are two points. First, the Commissioner retains a preferential status for claims for unpaid PAYE, withholding deductions and GST.¹³⁰ If the amount owing to the Revenue is at all substantial and the Commissioner cannot be crammed down, and is uncooperative, he may effectively block adoption of a proposal by the creditors as a whole.

Secondly, an incentive to directors to put their company into administration, which is present in Australia, is missing here in the draft legislation. In Australia under a provision of the Income Tax Assessment Act 1936 directors are made personally liable for the company's failure to pay over the equivalent of PAYE deductions or similar retentions, but the personal liability does not attach if within a specified time the company has appointed an administrator or gone into winding-up.¹³¹ Where a company is not in a position to discharge its tax obligations there is therefore a very considerable incentive for the directors to initiate an administration. This provision was introduced in Australia in conjunction with the abolition of the Revenue's preferential status. The trade-off was that the directors of a company which had not paid over tax deductions would have to ensure that matters were brought to a head and the company's position evaluated by an independent administrator and the general body of creditors. It is apparently not proposed to have a comparable provision in New Zealand. There will be a legislative direction that, in a liquidation, in making an order against a director under section 301 of the Companies Act for neglect of duty in relation to the company, the court must, where relevant, take into

128 CAMAC Report, above n 22, 5; New Zealand Law Commission, 'Insolvency Law Reform. Promoting Trust and Confidence: An Advisory Report to the Ministry of Economic Development', Study Paper 11 (2001), 130-131.

129 G Hall, 'Voluntary Administration. The Australian Experience' Seminar Presentation at a Roundtable Discussion on the Insolvency Law Reform Bill, PriceWaterhouse Coopers, 20 May 2004.

130 Companies Act 1993, sch 7 in draft NZ Bill.

131 Income Tax Assessment Act 1936 (Cth), s 222AOB.

account any action the director took for the appointment of an administrator.¹³² But whether neglectful directors will take much account of that is doubtful. Without a real incentive for directors, and bearing in mind the quite heavy professional and other costs involved in administration, some companies may not think it worthwhile to go through the administration process, particularly if the Commissioner is unaccommodating.

Much will depend on the attitude of the Commissioner of Inland Revenue. Perhaps the Commissioner will not want to be too unyielding lest there be further calls for abolition of the Revenue's priority. If the Commissioner does feel able to take a flexible approach, the advent of the voluntary administration regime could well still work, especially in rehabilitating medium and large size companies which have run into financial difficulties. The very real advantage where such a company could be fully rehabilitated, or at least more saved from the wreckage than would be the case in a liquidation, is that an appointment of an administrator can be made quickly and that there will be an immediate moratorium unless a general charge holder decides to intervene and enforce its security. The process of putting a proposal before the creditors is both speedy and flexible and it is entirely appropriate that the creditors as a body should make the decision whether there should be a workout in accordance with a DOCA or whether the company should immediately be put out of its misery and go into liquidation. Particularly if provision for registration of insolvency practitioners is included in the legislation, the creditors will have the comfort of an administration by an independent qualified person who, unlike a receiver, is obliged to act in the interests of all concerned rather than primarily in the interest of a particular secured creditor. The gap in New Zealand's company law would then at last be filled.

132 Draft NZ Bill, s 432(2) adding subs 301(4) to the Companies Act 1993.

CORPORATE GOVERNANCE POST-ENRON

BY JANE DIPLOCK AO*

I. INTRODUCTION

‘Corporate governance is a topic close to the heart of anyone engaged in securities market regulation — and by now, ‘Enron’ is obviously a byword for the worst kind of corporate governance.’¹

After Enron’s collapse in 2001, a United States Senate inquiry concluded that there had been ‘systemic and catastrophic’ failure by everyone who should have been protecting the shareholders of the former energy markets high flyer. It was the biggest corporate bankruptcy in American history. And of course, it pulled down the international audit firm of Arthur Andersen and tarnished reputations far and wide.

Since then, there have been other large international corporate failures — Worldcom and Italy’s Parmalat to name just two — and an intense focus on corporate governance and on corporate governance regulation around the globe. The Enron collapse was a wake-up call for law makers and for securities regulators everywhere. Today we are, indeed, living in the post-Enron world.

I want to discuss what that means in the New Zealand context. And I want to give a perspective on the international efforts of regulators, including our Securities Commission (hereafter referred to as Commission), to raise standards and strengthen their ability to deal effectively with bad corporate governance as it impacts on securities markets.

II. REGULATORY FRAMEWORK

Like all OECD countries, New Zealand has put its own standards of corporate governance and relevant legal frameworks under close scrutiny over the past three years. We have seen that reflected in various substantial pieces of securities market legislation and the recently-passed Crown Entities Act 2004. For its part, the New Zealand Exchange adopted a Corporate Governance Best Practice Code in October 2003 — now forming an appendix to the NZX Listing Rules.²

As many will know, the Commission has contributed a robust principles-based framework for good corporate governance across the full spectrum of economic entities in New Zealand; from listed companies, to community-owned trusts, to Crown entities. The framework is an important piece of work by the Commission — work that drew on a survey of post-Enron regulatory

* Chairperson, New Zealand Securities Commission. This article is a revised version of a paper presented to the annual conference of the Australasian Law Teachers’ Association, University of Waikato, 5-8 July 2005.

1 C Quinn ‘Corporate Governance Post-Enron’ New Zealand Securities Commission - Legal Teachers Forum (8 July 2005), available <www.sec-com.govt.nz>.

2 NZX, ‘NZX Listing Rules’ (29 October 2003) is available <www.nzx.com/>.

developments in Australia, the United States, and elsewhere, and on diligent consultation with our own business and governance community in New Zealand. This consultation made it very clear that the New Zealand business community favoured a principles-based rather than a more prescriptive rules-based approach. We listened and the Commission drafted the Principles accordingly.³

The Commission takes the standard view that corporate governance is about the way in which entities are directed and controlled, within structures that formally separate supervisory and managerial functions, and that ensure accountability between these, and between the entity and its investors and other external stakeholders. In a free-market business context, the OECD has recently summed up the corporate governance challenge neatly in these terms: ‘Good governance helps to bridge the gap between the interest of those that run a company and those that own it, increasing investor confidence and making it easier for companies to raise equity capital and to finance investment’. The OECD also states that corporate governance should always ‘help ensure that a company honours its legal commitments and forms value-adding relations with stakeholders including employees and creditors’. In New Zealand we see good governance very much in the same terms — accountability, legal compliance, stakeholder relationships, and strong performance by the entity in whatever area it is operating.

III. THE NEW ZEALAND APPROACH

The Commission published ‘Corporate Governance in New Zealand: Principles and Guidelines’⁴ in February 2004, primarily as a tool for boards of directors and others involved in board governance of every kind. Our framework consists of nine high-level statements of principle, each supported by suggestions or guidelines as to how the Principle should be implemented. The Principles articulate the need for ethical behaviour, the need for balance in the composition of boards, the role of effective board committees, the critical importance of integrity in reporting, the basics of good remuneration policy, the need for risk management processes, the imperative of maintaining auditor independence, the importance of constructive shareholder relations, and the potential significance of other stakeholders in a governance context.

The framework, comprehensive as it is, has been very well received. I think this is largely because we made a real effort to come down with a distinctly New Zealand approach to promoting high standards of governance. We started by acknowledging two fundamentally important considerations about New Zealand and our well established system of economic management. First, the standards of governance in any particular entity will depend inevitably on the knowledge, experience and integrity of its directors and managers. These are the people making the critical decisions that drive performance, in financial and other terms. And they are the people best placed and best motivated to decide how those decisions are made, within the particular structures and accountability mechanisms of their business. The most effective steps for engagement with shareholders and stakeholders also vary from one entity to another. In short, any securities regulator will be limited in its ability to determine exactly which structures and practices deliver high standards governance for all entities. The second consideration is that the

3 New Zealand Securities Commission, ‘Corporate Governance in New Zealand: Principles and Guidelines’ (18 February 2004) available <www.sec-com.govt.nz>.

4 *Ibid.*

New Zealand model of economic management is based squarely on the disciplines of the market, and the ability of interested parties to hold accountable directors and managers.

In the banking sector, for instance, we see a strong emphasis on good corporate governance. To quote the Reserve Bank Governor, Allan Bollard,

Our supervisory framework is deliberately light-handed in nature, in the sense that we minimise our intrusion into the management of banks risks and the structure of their operations. Instead, we try to foster robust self discipline in banks through the corporate governance and disclosure frameworks we have established.⁵

The central bank has laid down corporate governance and reporting standards, and thereafter looks largely to commercial imperatives and marketplace accountabilities to deliver stability in the banking and payments system. At the Commission, we see parallels with the capital market — stability and performance are served by having companies with sound corporate governance structures and processes that put a strong emphasis on reporting and on enabling owners to exercise ultimate control.

IV. REGULATORY OPTIONS

Worldwide, there is a spectrum of regulatory options for promoting high governance standards — principles-based approaches on one side and rules-based approaches on the other. The Sarbanes-Oxley Act of 2002 in the United States, a direct legislative response to Enron and Worldcom, has come to be seen as a benchmark in rules-based regulation — detailed in its prescription of what boards and executives must do for good governance and backed by the force of law. In contrast, a principles-based approach usually gives boards flexibility in deciding how they should implement generally-stated requirements for good governance. There are various models along the spectrum. It is fair to say that principles become more prescriptive when written in more detail and accompanied by ‘comply or explain’ requirements. In Australia, an ASX Corporate Governance Council produced a set of ‘comply or explain’ principles in 2003.⁶

So, where to locate New Zealand along the regulatory spectrum? The Commission’s consultation during 2003, as I have stated, elicited a clear preference for principles over rules. In any event, we saw some form of principles-based approach as most appropriate to our context, bearing in mind the fundamental considerations I mentioned before. We think New Zealand boards are quite capable of sorting out the best policies and processes for their circumstances, within a broad principles framework of expectations.

The last thing we want in this country is a ‘tick the box’ compliance mentality on corporate governance. In our view, the purpose of governance is to drive organisational behaviour and performance for the company, shareholders and stakeholders — and that is where board attention should be focused, not on compliance with rules per se. For all these reasons, the Commission decided on a relatively flexible principles-based approach.

Indeed, our framework creates a baseline for the behaviour of boards and executives that should drive performance and, at the same time, help them to ensure that their organisation is

5 A Bollard, ‘Corporate Governance in the Financial Sector: An Address to The Annual Meeting of the Institute of Directors in New Zealand’ (7 April 2003) available <www.rbnz.govt.nz> (last visited on 8 December 2005).

6 ASX Corporate Governance Council, ‘Principles of Good Corporate Governance and Best Practice Recommendations’ (March 2003) <www.shareholder.com/>.

complying with its legal obligations. The Principles and Guidelines are obviously also compatible with those legal obligations that bear directly on governance — elements of the Companies Act 1993, Stock Exchange Listing Rules, the Securities Act 1978 and Amendments, the Crown Entities Act 2004 and so on.

Reporting and disclosure are obviously critical to ensure a principles-based approach works. The Commission wants to see companies and other entities reporting how they achieved each of the nine Principles. We want the Principles to be discussed and actioned in boardrooms everywhere — and reporting and disclosure to then reflect those discussions and actions. We will all see a rising standard of governance when we see more comprehensive and timely reporting and disclosure.

Among New Zealand listed companies, we do see a significant step up in this regard over the past two years. The Commission's own monitoring of 2004 company annual reports show that large corporates have lifted their game, and others are definitely starting to wake up to the new expectations on them. The NZX Listing Rule changes introduced in October 2003 have been a significant contributor. Our monitoring shows that the governance issues most on directors' minds during 2004 were the composition of boards and board committees, along with board nomination processes and directors' remuneration. Well over 90 per cent of company reports examined put a focus on these matters. Half of the companies in our monitoring show their board has both; a majority of non-executive directors and one third or more who are 'independent' directors. This is pleasingly in line with the expressed preference of the Commission. As yet, few companies are actually disclosing details on their directors or substantiating their independence case-by-case. They should be.

Of companies encompassed by the Commission's monitoring of 2004 annual reports, almost half disclose that they have a board audit committee, while a slightly higher number report that they have also have remuneration and nomination committees. The NZX Code states that having all three committees is part of best practice and the Listing Rules require companies without them to report accordingly. The Commission wants to see proactive disclosure on the composition and charter of all board committees, and our Guidelines are very clear on our preferred structure for audit committees in particular.

Listed companies have generally got the message about the need for reassurance on the integrity of financial reports and other disclosures — and of course this is a central concern in our Principles and Guidelines. Integrity in reporting is a matter of both board process and the inclusion of meaningful information in reporting to shareholders and others.

In our monitoring, around 80 per cent of companies report on their processes for this during 2004. In many cases, they include specific processes for ensuring compliance with reporting standards and other legal obligations.

Our Guidelines promote the idea of formal public certification on company accounts by the Chief Executive and Chief Financial Officer. So far, we have found only 11 out of 116 companies that take this step — this is a little disappointing.

In other areas, we have found that most companies report on remuneration practices, risk management and auditor independence. In the annual reports, 70 per cent of the companies talk about how they maintain independence, with the focus principally on limiting non-audit work by the company's audit firm. A majority of the companies acknowledge the need for a high ethical standard of behaviour right across the company — 40 per cent of the reports in our monitoring project confirm that this concern has been, or will be, embodied in a company code of ethics.

Looking at listed company reports for 2004, there are two areas of distinct disappointment. One is the importance, or lack of it, attached to fostering constructive relationships with shareholders. The other is the level of reporting attention given to companies' interaction with other stakeholders. Our Principles and Guidelines address both of these very clearly. We think companies should have plenty of flexibility in how they work with shareholders and stakeholders, but also make more of an effort to report on what they are doing.

Overall, the Commission is pleased with progress both in reporting and in the standards of corporate governance indicated through that reporting. There are some extremely informative reports on listed company governance – Telecom NZ Ltd, Air New Zealand Ltd and The Warehouse Ltd are among the best. Our monitoring will continue and we are looking for progress across the board.

V. COMMISSION ENFORCEMENT

Let me turn now to other areas of focus for the Commission that also have critical bearings on corporate governance, especially among issuers of securities in the New Zealand market. First, securities law enforcement. It is a plain fact that many breaches of the Securities Act 1978 and regulations relate back to lapses in corporate governance within the issuer concerned. Often, it becomes very clear to the Commission that if the issuer's board had the right focus in its decision making and was really ensuring that the entity followed sound processes, then non-compliance with securities law would not have occurred.

The Commission finds lapses often in the context of investment offerings to the public. Our Enforceable Undertakings regime, in place since late 2002, has provided a stream of examples. One example is Prudential Mortgage Ltd, a contributory mortgage broker in Christchurch which came to our attention for newspaper advertising that was plainly deficient under Securities Regulations 1983. The advertisements offered interests in a contributory mortgage over a property to be purchased by another party, but they failed to state the minimum amount of securities that would have to be held or minimum term of investment for the advertised interest rate to apply. The Commission found that the advertising content had not been checked for compliance with the Regulations and that no authorising certificate had been signed. Furthermore, it transpired that a valuation report provided to contributors had various omissions making it in breach of the Securities Act (Contributory Mortgage) Regulations 1988. We secured an Enforceable Undertaking by the directors of Prudential Mortgage in the middle of last year. They agreed to ensure that future advertising would be prepared or reviewed by professional advisers, and that the company's employees and marketing agents would be trained in relevant securities law requirements. The directors also agreed to prepare a written compliance plan for future advertising, this plan to be updated annually and subject to compliance checking by auditors. The understandings were satisfactory to the Commission but the need for them revealed critical gaps in the knowledge of an issuer's directors and staff, and poor performance by a board on matters at the very core of a business under its direction.

Unfortunately, such circumstances are not uncommon in our experience. From time to time, the Commission encounters other types of apparent corporate governance failure involving far more serious wrongdoing. Insider trading, and other deceptive or manipulative behaviour involving securities, can also amount to serious corruption of corporate governance practice. The Commission is on the regulatory frontline against such wrongdoing — and, on a case-by-case

basis, we will use all our powers to call individuals to account before the civil or criminal justice systems.

VI. IOSCO INITIATIVES

This brings me to another area of Commission focus — our keen participation in building a network for international information exchange and enforcement cooperation among securities regulators. Currently, I am also Chair of the Executive Committee of IOSCO — the International Organisation of Securities Commissions, and New Zealand has taken a lead role in developing this initiative over the past year. IOSCO and its expanding network for cooperation makes an important contribution to promoting corporate governance standards in local and global securities markets.

For those not familiar with IOSCO, some background is offered⁷. Its members are securities regulators and other relevant national bodies from more than 100 countries, and its organisational coverage is more than 90 per cent of the world's securities markets. It has grown substantially in membership and status over the past 30 years, and is now being recognised as the leading international standard-setter for securities regulation.

IOSCO promotes regulation that: protects investors against the misuse of assets, insider trading and other forms of fraud; that ensures fairness, efficiency and transparency in securities markets; and reduces systemic risk. Corporate governance is a central theme across much of IOSCO's broad agenda — and over the past three years, Enron and other high profile corporate collapses have added huge impetus to this forum. In particular, national regulators like the Commission are looking to IOSCO for stronger, more effective cross-border detection and enforcement against corporate wrong-doing.

In 2002, the organisation adopted a Multilateral Memorandum Concerning Consultation and Cooperation and the Exchange of Information — in IOSCO, they simply refer to the MMOU.⁸ New Zealand, and Australia, were among the early signatories, who now number 27 regulators worldwide. They agree to exchange information and otherwise assist each other in monitoring market activity, and in combating fraud and other wrongdoing. All signatories to the MMOU have the legal powers and organisational capabilities necessary for efficient and timely cooperation. It is a major step forward in regulation of the fast growing global capital market and of the threats posed by poor corporate governance among companies operating in that market. Our Commission has used the MMOU in its enforcement work and its usefulness has certainly been proved to us.

So important is the MMOU, and its utility to IOSCO members like New Zealand, that the organisation has this year committed itself to requiring all members to become signatories, or be committed to becoming signatories, by January 2010. This was a high significant outcome of the IOSCO national conference in Sri Lanka in April. There will be seamless cross-border cooperation between an expanding number of securities regulators. The latter will be much better placed to track and curb illegal behaviour in capital markets, and to hold international companies to high standards of corporate governance in a way that Enron and Parmalat never were.

7 For further information visit <www.iosco.org/>.

8 OICU – IOSCO, 'Multilateral Memorandum Concerning Consultation and Cooperation and the Exchange of Information' (May 2002) <www.iosco.org/>.

An IOSCO Task Force reviewed securities regulation worldwide in the wake of Parmalat and came back with a report.⁹ It concluded that core issues of corporate governance were evident in all the major corporate collapses: issues of board conduct, of auditor independence and effectiveness, of disclosure by securities issuers and market transparency, and of behaviour by market intermediaries and analysts. This important report has served to further build consensus on the need for consistent international standards and effective enforcement mechanisms.

VII. CONCLUSION

Looking back over the past three years, the world — and New Zealand — has come a long way in their awareness of corporate governance issues and of how to promote higher standards. There is a high level of consistency between developments here and internationally, although the Commission and others made a substantial effort to establish a particular New Zealand model for corporate governance regulation. We think good governance should be predominantly the concern of boards of directors and governors, and of their owners and stakeholders — not law makers and securities regulators. That said, the Commission is taking a proactive stance on enforcement where investor protection, market efficiency or systemic risk are at stake. And we are increasingly acting in concert on these matters with our regulatory peers throughout the world.

9 OICU-IOSCO, 'Strengthening Capital Markets Against Financial Fraud' (February 2005). <www.cmvm.pt/> (last visited on 8 December 2005).

THE FIDUCIARY DUTIES OF THE CROWN TO MAORI: WILL THE CANADIAN REMEDY TRAVEL?

BY ALEX FRAME*

I. INTRODUCTION

This article has three purposes. First, to analyse and identify the elements of the equitable remedy developed in recent years, mainly in Canada, under which the Crown may be held liable to indigenous peoples for acts and omissions in breach of a fiduciary duty, where such a duty is established on the facts. Secondly, the article will suggest that the remedy, and the principles on which it is based, appear, subject to one recent and controversial statutory exception, to be generally applicable in New Zealand as the law presently stands. Thirdly, an assessment will be attempted of the features of the Crown/Maori relationship most likely to provide occasion for the use of the remedy, together with an analysis of the important question of the effect of lapse of time on availability of the remedy.

The writer's interest in exploring the development in Canada of a remedy for breach of fiduciary duty by the Crown in respect of First Nations peoples was first aroused by an engagement to advise in Fiji on indigenous land rights in 2001. New Zealand lawyers are accustomed to using the Treaty of Waitangi as a starting point for inquiry into Maori rights *vis à vis* the Crown. As is well known, that Treaty, signed in Maori and English, stipulated some very definite conditions and protections as the price paid by the Crown for the acquisition of 'kawanatanga', and these had naturally become, and continue to be, the basis for Maori claims. In Fiji is found the Deed of Cession of 1874, signed only in English, which explicitly made the gifting of sovereignty to the Queen by Cakobau and the leading chiefs unconditional. The approach for a legal adviser was therefore to ask whether this very vulnerability might not itself contain the seeds of an alternative legal strategy. Could less be more? The open-hearted commitment of Cakobau and his fellow Chiefs to Queen Victoria and her representatives in 1874 seemed to indicate that the fundamental relationship was not intended to be a contractual bargain, but rather one of protection and trust. The question became whether such a relationship might in some respects be supervised and enforced by the courts of law.

This article has a technical legal purpose – to evaluate the possibilities of an untried legal remedy in the context of Aotearoa/New Zealand – and some preliminary observations are necessary about equity as a body of rules administered by our courts, and what it might mean to say that breach of fiduciary duty by the Crown is an equitable remedy.

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There were historically two strands in the English legal system. The rules of the common law administered in the King's courts had become somewhat rigid but it was possible to resort to the Lord Chancellor as an alternative source of a more flexible jurisprudence based on general concepts of fairness and good conscience. In time, the Chancellor's jurisdiction, which itself began to take on the character of fixed rules, came to be exercised by the Court of Chancery, and termed 'equity'. The growth area for its activities lay with the increasingly popular trusts – the arrangement by which property could be owned by one person on the understanding that it was held for the benefit of another. The great legal historian, Maitland, describes the process in this way:

Common honesty requires that a man shall observe the trust that has been committed to him. If the common law will not enforce this obligation it is failing to do its duty. The chancellor intervenes, but in enforcing trusts he seizes hold of and adopts every analogy that the common law presents. For a long time English equity seems to live from hand to mouth ... Even in the seventeenth century men said that the real measure of equity was the length of the chancellor's foot.¹

Trusts were not the only arrangement which equity saw as evidencing a 'fiduciary' relationship requiring one party to act with particular care towards another; partners, solicitors and clients, company directors and shareholders, and other similar situations provided instances also. The fiduciary obligation would require a party fully to disclose to the other any relevant information, and, in particular, to refrain from profiting from opportunities which the position of power might offer.

Until 1873, the two strands of 'common law' and 'equity' continued to be administered in separate courts in England. Thereafter they became 'fused' in the single body of law applied in the general courts of law. In New Zealand, they were applied from the beginning by all courts in 'fused' form. In modern times the position is stated in section 5 of the Imperial Laws Application Act 1988:

After the commencement of this Act, the common law of England (including the principles and rules of equity), so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand.

Is there any significance, therefore, in the origin of the remedy for breach of fiduciary duty in the equity jurisdiction? The answer lies in the discretionary nature of the remedy. The Chancellor's jurisdiction to make an order based on good conscience would only be exercised in favour of a plaintiff with a meritorious case. It was a remedy within the discretion of the Court, which would require the plaintiff to come to it with clean hands. Equitable remedies continue today to contain that condition, the significance of which will be explored later in this article.

II. THE CROWN AS FIDUCIARY – A HIGHER BUT UNENFORCEABLE DUTY

If our inquiry as to the availability of the equitable remedy of breach of fiduciary duty against the Crown were being made twenty years ago, we would have found the prospects bleak. We would quickly have discovered the massive 1976 judgment of Megarry V-C in *Tito v Waddell*² concerning the attempts of the Banaba islanders to hold the British Crown to an equitable fiduciary duty for the sequence of events which led to the virtual destruction of their island, and

1 H M Cam (ed), *Selected Historical Essays of F.W. Maitland* (1957), 133.

2 *Tito v Waddell* (No.2) [1977] 1 Ch 106.

the resettlement of its people in Fiji, as a result of the open-cast mining and export of phosphate. We must begin with an analysis of the Banaba case.

The measures and transactions by which the Banabans were induced to agree to the mining of their island are complex, but the core feature was the payment to the Crown by the mining interests of a royalty on every ton of phosphate exported. The variously-expressed concept was that these royalties would be dispensed by the Crown for the needs and in the interests of the islanders. During the Second World War Banaba (also known as Ocean Island) suffered a Japanese occupation which decimated the population, and in 1947 the survivors were persuaded to give their remaining lands over to mining and to re-settle in the island of Rabi in the Fiji group. In the 1970s some Banabans brought action in the High Court in London asserting that the Crown had failed to live up to the fiduciary duties it had explicitly and/or implicitly accepted to preserve the interests of the islanders.

In November 1976 Megarry V-C delivered his 241-page judgment. The central issue was quickly seen to be whether the Crown had placed itself in a fiduciary relationship which could be overseen and enforced by the Courts. The learned Judge drew a distinction between a 'true trust', which would place the Crown under fiduciary duties enforceable by the Court, and a 'trust in the higher sense', which would be a reflection of the general obligation of government, but not judicially enforceable. Megarry V-C stated in respect of the second category:

Though this latter type of obligation is not enforceable in the Courts, many other means are available of persuading the Crown to honour its governmental obligations, should it fail to do so.³

A 'true trust' might have been one way to get to an enforceable fiduciary duty – which would have brought into play strict rules of equity about fair-dealing – but there were other routes to the same point. The Banabans had pointed to the statute empowering the Crown's officials to fix and receive the phosphate royalties:

It is of course well settled that the fair-dealing rule, with or without modifications applied to many persons other than trustees, including agents, solicitors, company directors, partners and many others ... The categories of fiduciary obligation are not closed, and I see no reason why statute should not create a relationship which carries with it obligations of a fiduciary nature. The question, however, is not what statute could do, but what this statute has done.⁴

Although the learned Judge found much to criticise in the conduct of the British government in relation to Banaba, specifically citing the process by which the level of royalty was fixed and the failure to provide independent advice to the Islanders in 1947, his Honour held that:

My conclusion, therefore, is that the Crown was not in a fiduciary position ... Throughout, the obligations of the Crown were governmental obligations and not fiduciary obligations enforceable in the courts.⁵

The Banaba case seemed therefore to exclude the possibility that the Crown might, in the course of the formation and eventual dissolution of the Empire, have assumed fiduciary duties in respect of indigenous people which could be enforced by the Courts. Megarry V-C's recognition that only a 'higher' trust could be discerned – one not enforceable in the Courts – seemed ironic but final.

3 Ibid, 217.

4 Ibid, 235.

5 Ibid, 235.

III. THE CANADIAN DEVELOPMENT – THREE CASES DISCUSSED

The apparent dead-end of *Tito v Waddell* must now however be reconsidered in the light of the development in Canada of a refashioned concept of fiduciary duty in relations between the state and its indigenous peoples. Three cases in which the new doctrine is articulated will be examined.

A. *Guerin v The Queen*

The facts in *Guerin v The Queen*⁶ were these. In the 1950s, the Indian Affairs Branch of the Federal Government of Canada granted a lease to a Golf Club over certain lands of the Musqueam Indian Band, descended from the original inhabitants of Vancouver in British Columbia. Although there had been consultation with the Band in general terms and the Band had agreed that its surplus lands could be leased for the proposed purposes, the terms of the lease (which were very unfavourable to the Band) were found by the trial judge to have been put to the Band ‘only in the most general terms’, and that when the Band agreed in 1957 to the ‘surrender’ of the relevant lands to the Crown, it did not have before it several of the most unfavourable features of the lease subsequently agreed between the Crown and the Golf Club. The Crown argued that once the surrender documents were signed, the Crown was free to lease on any terms it saw fit. The matter eventually came before the Supreme Court of Canada, which found that a fiduciary duty lay upon the Crown to deal with the lands for the benefit of the Musqueam Band, and that this duty was enforceable by the courts in the same way as if a trust were in effect.

The Supreme Court upheld the award of damages of ten million dollars to the Band. Dickson J, as he then was, stated:

In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

... The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in land is inalienable except upon surrender to the Crown.⁷

The significance of this requirement that Indian lands could only be disposed of to the Crown was addressed by Dickson J:

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited ... Parliament has conferred upon the Crown a discretion to decide for itself where the Indians’ best interests really lie ... This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown’s obligation into a fiduciary one.⁸

6 *Guerin v The Queen* [1984] 2 SCR 335, 13 DLR (4th) 321, also [1986] LRC (Const.) 840. Page references here are to DLR.

7 *Guerin*, *ibid*, 334.

8 *Guerin*, *ibid*, 340.

Dickson J was careful to say that the Crown's fiduciary obligation was not a trust, but that it was 'trust-like' in character, and his Honour employed the trust analogy to assess damages.

Justice Wilson gave the other central judgment in *Guerin*. Her Honour was more ready to find a trust relationship:

There is no magic in the creation of a trust. A trust arises, as I understand it whenever a person is compelled in equity to hold property over which he has control for the benefit of others (the beneficiaries) in such a way that the benefit of the property accrues not to the trustee, but to the beneficiaries. I think that in the circumstances of this case as found by the learned trial judge the Crown was compelled in equity upon the surrender to hold the surrendered land in trust for the purpose of the lease which the band members had approved as being for their benefit ...⁹

The Supreme Court of Canada had thus broken free of the 'political trust' shackles of the British cases. It had fastened on to the open-ended character of the equitable concept of the fiduciary relationship. Dickson J had observed:

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.¹⁰

The critical fact for the *Guerin* Court was that the Crown had mandatorily 'interposed' itself with a statutory discretion to determine what was in the interests of the Indian band.

B. *Semiahmoo Indian Band v Canada*

In *Semiahmoo Indian Band v Canada*¹¹ the facts were these. Government authorities wanted land at the Canada/US border for a customs facility and accordingly sought the surrender of reserve lands of the Semiahmoo Indian Band. The law provided for such surrender by consent either conditionally or unconditionally. However, more land than required for the customs facility was surrendered, and no reversionary condition was included to cover the situation where, as transpired, the land was not used for the purpose originally contemplated. The Federal Court of Appeal held that two distinct fiduciary duties on the State could be identified. First a pre-surrender duty to avoid an exploitative bargain and, secondly, a post-surrender duty to correct any breach of the pre-surrender fiduciary duty if the Crown retains control of the land. The Court found breaches of both duties. Isaac CJ stated:

I find that the respondent did breach its fiduciary duty to the Band in its 1951 surrender even though the Band may have received compensation ... somewhere in the neighbourhood of market value.¹²

The Court pinpointed the post-surrender breach or duty as occurring, for the purpose of limitation periods, when a reasonable person would have realised their original breach and exercised their power to correct it. As to remedies, the Court imposed a constructive trust in favour of the Band in respect of the land. The great significance of the post-surrender breach (converted into New Zealand circumstances it would become a 'post-taking breach') is that it avoids the limitation period which might otherwise have barred action on the original breach.

9 *Guerin*, *ibid*, 361.

10 *Guerin*, *ibid*, 341.

11 *Semiahmoo Indian Band v Canada* (1997) 148 DLR (4th) 523.

12 *Semiahmoo*, *ibid*, 539.

This case makes it clear that the fiduciary doctrine as developed by the Canadian courts is not confined to land compulsorily acquired, but extends also to land acquired by consent, and even where market price may have been paid.¹³

C. *Wewaykum Indian Band v Canada*

In December 2002 Justice Binnie gave judgment for the Supreme Court of Canada in *Wewaykum Indian Band v Canada*.¹⁴ The case arose from the claim by two Indian bands on Vancouver Island to each other's reserve lands. Each band asserted that, but for the Crown's failures, it would have been in possession of the other's reserves. Although the Supreme Court found against both bands, it took the opportunity to affirm and clarify the principles in what it termed the 'watershed decision in *Guerin*':

The enduring contribution of *Guerin* was to recognize that the concept of political trust did not exhaust the potential legal character of the multitude of relationships between the Crown and aboriginal people. A quasi-proprietary interest (e.g. reserve land) could not be put on the same footing as a government benefits program. The latter will generally give rise to public laws remedies only. The former raises considerations 'in the nature of a private law duty' (*Guerin* at page 385). Put another way, the existence of a public law duty does not exclude the possibility that the Crown undertook, in the discharge of that public law duty, obligations 'in the nature of private law duty' towards aboriginal people.¹⁵

The *Wewaykum* Court confirmed the distinction made in *Guerin* between the 'political trust' cases, which were about distributing government funds and property, and the Crown's dealings with pre-existing legal interests of indigenous peoples. The Court quoted from *Guerin* as follows:

As the 'political trust' cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that duty is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.¹⁶

The *Wewaykum* Court stressed that 'the fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples'¹⁷ quoting with approval the comment by Professor Slattery that:

The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a 'weaker' or 'primitive' people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.¹⁸

13 *Kruger v The Queen* (1985) 17 DLR (4th) 591 is an example of a case involving compulsory acquisition for public purposes where the fiduciary duty was held to apply.

14 *Wewaykum Indian Band v Canada* (2002) 220 DLR (4th) 1.

15 *Wewaykum*, *ibid.*, 32.

16 *Wewaykum*, *ibid.*, 33-34.

17 *Wewaykum*, *ibid.*, 35.

18 *Wewaykum*, *ibid.*, 35. The quotation is from B Slattery, 'Understanding Aboriginal Rights' (1987) 66 Can Bar Rev 727, 753.

Perhaps the greatest value of the *Wewaykum* review and affirmation of the *Guerin* doctrine lies in its statement of what the principle cannot do – its limits. The Court noted that since *Guerin* a ‘flood’ of fiduciary duty claims had come before Canadian courts. It listed some areas in which the fiduciary duty had been claimed; the organising of elections, the provision of social services, the rewriting of negotiated agreements, the suppression of public access to information about band affairs, legal aid funding, and the invalidation of a consent signed by an Indian mother to adoption of her child. The Court clearly doubted that the principle could be applied to these matters, and Binnie J stated:

... I think it desirable for the Court to affirm the principle...that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature...and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.¹⁹

The *Wewaykum* Court went on to list and discuss limiting features of the remedy. The duty varied with the nature and importance of the interest sought to be protected – it did not provide a general indemnity. The duty varies with subject matter, and it may also vary as between stages of dealing with the same subject matter. Where the Crown interposes itself between Indian bands and other interests, it must prevent ‘exploitative bargains.’ Enforcement of any equitable duty is subject to the usual equitable defences, in particular as to delay and acquiescence. The Court observed that Wilson J’s comments in *Guerin*:

... should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band’s quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself ...²⁰

What standard would the Crown have to meet where it was found to be under a fiduciary duty? The *Wewaykum* Court thought that:

In a substantive sense the imposition of a fiduciary duty attaches to the Crown’s intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting with what it reasonably and with diligence regards as the best interest of the beneficiary.²¹

What told against the bands in *Wewaykum* was that their forbears had, as autonomous and fully informed actors, agreed to resolve their dispute by recognising each other’s reserves. The cross claims now mounted seemed to the Court to be a technical device to enable breach of fiduciary duty to be alleged against the Crown:

The various technical arguments arrayed by the bands are ... singularly inappropriate in a case where they seek equitable remedies. As noted, each band has, over the past 65 or more years, reasonably relied on the repeated declarations and disclaimers of its sister band, and on the continuance of the status quo, to reside on and improve its reserve.²²

Broadly then, the approach of the Canadian courts to finding a fiduciary duty owed by the Crown to First Nations has been faithful to the principles applying to fiduciary duties generically. These appear well-stated by Paul Finn:

19 *Wewaykum*, *ibid*, para 83.

20 *Wewaykum*, *ibid*, para 100.

21 *Wewaykum*, *ibid*, para 94.

22 *Wewaykum*, *ibid*, para 105.

What must be shown ... is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interest in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement.²³

Specifically, Dr Rotman summarises the result of the Canadian cases in this way:

... the Crown may not unilaterally ignore the promises that it made to the Aboriginal peoples or the situation of dependence that it created without legal implication based on fiduciary principles.²⁴

IV. IS THE CANADIAN JURISPRUDENCE APPLICABLE IN NEW ZEALAND?

As an abstract question of law, there is no reason why the Canadian development should not be applicable in Aotearoa/New Zealand. As seen in the introduction, the 'common law including the rules and principles of equity' are part of the law of New Zealand, and there is no reason to prefer articulations of that body of law from the High Court in London to more recent explications from the senior appellate courts in Canada. On the contrary, the similarities in colonial background and the common need to find a legal framework for assessing the claims of indigenous peoples make the Canadian jurisprudence more relevant to New Zealand circumstances. This view is supported by the former, and distinguished, President of the New Zealand Court of Appeal, now Lord Cooke, who stated from the bench in 1990:

The judgments in *Guerin* ... delivered by Dickson J and Wilson J seem likely to be found of major guidance when such matters come finally to be decided in New Zealand ... There are constitutional differences between Canada and New Zealand, but the *Guerin* judgments do not appear to turn on these. Moreover, in interpreting New Zealand parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of aboriginal peoples are in North America.²⁵

Cooke P returned to the fiduciary ramparts in 1993 with a repetition of his belief that the doctrine had applicability elsewhere in the Commonwealth, including New Zealand. Noting the *Sparrow* case of 1990 in Canada, from which he quoted the sentence 'The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation', and the *Mabo* case of 1992 in Australia, the President of the Court of Appeal observed:

In these judgments there have been further affirmations that the continuance after British sovereignty and treaties of unextinguished aboriginal title give rise to a fiduciary duty and a constructive trust on the part of the Crown ... clearly there is now a substantial body of Commonwealth case law pointing to a fiduciary duty.²⁶

Yet again in 1994, Cooke P observed of the Crown's historical power to extinguish Maori customary title:

An extinguishment by less than fair conduct or on less than fair terms would be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power.²⁷

23 P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries, and Trusts* (1989), 46.

24 L Rotman, 'Conceptualizing Crown-Aboriginal Fiduciary Relations', in Law Commission of Canada, *In Whom We Trust: A Forum on Fiduciary Relationships* (2002) 54.

25 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 655.

26 *Te Runanga o Wharekaui v Attorney-General* [1993] 2 NZLR 301, 306.

That judicial view might be thought to be strengthened by similarities between the historical factors regarded by the Canadian Supreme Court as favouring the imposition of a fiduciary duty on the Crown in Canada on the one hand, and those found in New Zealand on the other. Reference is particularly made to the feature repeatedly found relevant by Canadian Courts – the mandatory interposition of the Crown between Indian bands and other parties in dealings with Indian land interests. That feature is replicated in New Zealand in the form of the ‘pre-emption’ clause in the Treaty of Waitangi and the somewhat zigzagging incorporation of it in subsequent New Zealand legislation.²⁸

Furthermore, the *Instructions* from Lord Normanby to Captain Hobson dated 14 August 1839, which provided the authority for, and the conditions of, the British proposals leading to the Treaty of Waitangi in 1840, contain several expressions indicative of a fiduciary duty assumed by the Crown. Lord Normanby instructed Hobson as follows:

the benefits of British protection, and of Laws administered by British Judges would far more than compensate for the sacrifice by the Natives of a National independence which they are no longer able to maintain.

All dealings with the Aborigines for their Lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of Her Majesty’s Sovereignty in the Islands. Nor is this all. They must not be permitted to enter into any Contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any Territory the retention of which by them would be essential or highly conducive to their own comfort, safety or subsistence.²⁹

The ensuing Treaty itself contains language correspondingly redolent of a fiduciary burden. The Maori chiefs heard in the preamble read out at Waitangi in February 1840 that Queen Victoria regarded them with her ‘mahara atawai’ (concern to protect), and that Her Majesty would ‘tiakina ... nga tangata maori katoa o Nu Tirani’ (protect all the Maori people of New Zealand).³⁰

However, at least one respected New Zealand academic commentator has doubted that the *Guerin* doctrine would be applied in New Zealand. Dr Paul McHugh has recently expressed this view:

In New Zealand the possibility of any such extension of the ‘fiduciary-like’ obligations of the Crown (derived from common law in association with Treaty principles) was stemmed after *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (*Broadcasting Assets*) re-affirmed the orthodox rule that Treaty rights required a statutory basis. Moreover, in *Attorney-General v Maori Land Court and Proprietors of Tahora 2 F2 and Wairoa District Council* (unreported, CA, 9 December 1998), the Court of Appeal read narrowly the statutory jurisdiction of the Maori Land Court to declare land was held on a

27 *Te Runanga o te Ika Whenua Inc v Attorney-General* [1994] 2 NZLR 20, 24.

28 See particularly New Zealand Constitution Act 1852 (UK) s 73 which provided that: ‘It shall not be lawful for any person other than Her Majesty ... to purchase, or in anywise acquire, or accept, from the aboriginal Natives, land of or belonging to or used or occupied by them in common as Tribes or Communities ...’ Although this section was repealed by the UK Parliament (which alone could do so) in the Statute Law Revision Act 1892 (UK) s 1, it was reinstated in substance, if not in name, by the Native Land Court Act 1894 (NZ) s 117 which made it unlawful for any person other than the Crown to acquire interests in Maori land.

29 Lord Normanby’s Instructions to Captain Hobson of 14 August 1839. These may conveniently be consulted in W D McIntyre and W J Gardiner (eds) *Speeches and Documents on New Zealand History* (1971), 10, at 12 and 14.

30 The Chiefs signed the Maori version of the Treaty. The translations provided are those of Professor Sir Hugh Kawharu, whose literal and ‘reconstructed’ translations into English are widely accepted.

fiduciary basis. The fiduciary doctrine therefore failed to take root in New Zealand public law, whereas in Canada it was potted in s. 35 of the *Constitution Act* 1982.³¹

With respect to Dr McHugh, who has made a valuable and well-known contribution to the development of our jurisprudence on Maori rights, the passage quoted contains several misconceptions which detract from the force of its overall conclusion.

- (i) Use of the expression ‘fiduciary-like’ suggests a misapprehension of the nature of the *Guerin* remedy. Examination of the passages from the *Guerin* judgment quoted above will show that the Court found a true fiduciary duty to lie upon the Crown. Some judges, however, thought that the duty was founded on a ‘trust-like’ relationship.
- (ii) The fiduciary duty of the Crown would not be ‘derived from common law in association with Treaty principles’, but rather from the circumstances of the course of dealings between the Crown and indigenous people as seen through the prism of equity. The Treaty of Waitangi is not a necessary element of the equitable remedy for breach of fiduciary duty.
- (iii) The re-affirmation of ‘the orthodox rule that Treaty rights required a statutory basis’ in the Broadcasting Case referred to by Dr McHugh could not possibly have anything to do with the equitable remedy for breach of fiduciary duty found to be available in *Guerin* and other Canadian cases, and thought to apply in New Zealand by Lord Cooke.
- (iv) The decision of the Court of Appeal in *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 has not been ‘unreported’ for quite some time. Justice Blanchard did not decide in that case anything about the applicability of the equitable remedy for breach of fiduciary duty by the Crown in New Zealand law. His Honour decided that the Maori Land Court’s limited jurisdiction did not permit it to consider the question:

In our view jurisdiction under s.18 (1) (i) (of Te Ture Whenua Maori Act 1993) is limited to the making of vesting orders and granting other relief consistent with the purposes of the Act. The Solicitor-General was able to refer us to examples of its use by the Court in connection with trusts relating to Maori land. But a use relating to General land or Crown land was not intended by Parliament. Claims of Maori to such land based upon the existence of a fiduciary duty *are for the High Court to adjudicate...*³²

- (v) The fiduciary doctrine did not ‘fail to take root in New Zealand public law’, but rather has not yet been seriously pleaded before the New Zealand courts with general jurisdiction, as Justice Blanchard explicitly foreshadowed.
- (vi) The doctrine has not been ‘potted’ by section 35 of the Constitution Act 1982 in Canada, but rather has been determined to be alive and well there as recently as the *Wewaykum* case. The fiduciary remedy and section 35 were seen as capable of co-existence. See for example Binnie J’s observation that:

The *Guerin* concept of a *sui generis* fiduciary duty was expanded in *R. v Sparrow*...to include protection of the aboriginal people’s pre-existing and still existing aboriginal and treaty rights within s. 35 of the Constitution Act, 1982 ...³³

A final reason for suspecting that Lord Cooke’s conclusion as to the viability of the ‘fiduciary duty’ remedy in New Zealand is to be preferred to Dr McHugh’s requires examination of the recently enacted and controversial Foreshore and Seabed Act 2004. The Act has the purpose of

31 P McHugh, ‘What a Difference a Treaty Makes – The Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law’ (2004) 15 Public L Rev 87, 94.

32 *Attorney-General v Maori Land Court* [1999] 1 NZLR 689, 702, emphasis and parenthesis added.

33 *Wewaykum Indian Band v Canada* (2002) 220 DLR (4th) 1, para 78.

extinguishing common law customary rights in the foreshore and seabed and replacing these by the more circumscribed rights provided in the Act. Accordingly, the Bill as referred to the Select Committee provided in clause 9(3) that ‘customary rights claims’ were to be transmuted into the limited form provided in the Bill. The term ‘customary rights claim’ was then defined as follows:

In this section, customary rights claim means any claim in respect of the public foreshore and seabed that is based on the recognition at common law of customary rights, customary title, aboriginal rights, aboriginal title, fiduciary duty of the Crown, or rights, titles, or duties of a similar nature.

Quite apart from the extraordinary opportunism of the Crown’s advisers in ‘potting’, to use Dr McHugh’s cheerful phrase, the fiduciary remedy *en passant* – and the present writer appeared before the Select Committee to oppose that aspect of the legislation³⁴ – the clause is noteworthy for its assumption that the remedy would otherwise apply. The exclusion was not couched in the ‘for the avoidance of doubt’ form familiar where the drafter is just making sure of a conclusion believed to apply anyway.

The final form of the Foreshore and Seabed Act 2004 as enacted by Parliament repeated the scheme of the Bill. Section 10 defines ‘customary rights claim’ – again for the purpose of their extinguishment and replacement by a more limited right:

... ‘customary rights claim’ means any claim in respect of the public foreshore and seabed that is based on, or relies on, customary rights, customary title, aboriginal rights, aboriginal title, the fiduciary duty of the Crown, or any rights, titles, or duties of a similar nature, whether arising before, on, or after the commencement of this section and whether or not the claim is based on, or relies on, any 1 or more of the following:

- (a) a rule, principle, or practice of the common law or equity;
- (b) the Treaty of Waitangi;
- (c) the existence of a trust;
- (d) an obligation of any kind.

Just in case anyone has missed the point, section 13(4) of the Act thunders that:

The Crown does not owe any fiduciary obligation, or any obligation of a similar nature, to any person in respect of the public foreshore and seabed

This is a little like Parliament enacting that ‘the world shall be flat.’ No sane person has ever argued that parliamentary legislative supremacy can reshape the real world. What Parliament means, and could undoubtedly accomplish in proper form, is that no fiduciary obligation of the Crown which may exist in respect of the foreshore and seabed shall be enforceable in the Courts. Parliament could require the courts to treat the world as if it were flat. A question arises in the writer’s view whether Section 13(4) is an expression of legislative will in proper form, to which supremacy must be accorded under the ‘ultimate legal principles’ of our constitutional

34 Submission of Dr Alex Frame to Fisheries and Other Sea-Related Legislation Select Committee, dated 12 July 2004. The writer appeared before the Committee to give evidence in support of the submission on 12 August 2004 and urged that ‘the inclusion in clause 9(3) of the words ‘fiduciary duty of the Crown’ will have the effect of also extinguishing any right to redress where the Crown may, by word or conduct, have assumed fiduciary duties in relation to specific parts of the foreshore and seabed. If enacted it would appear to release the executive branch of government from any enforceable duty, past or future, to preserve interests which it may have committed the Crown’s honour and good faith to protecting ... It is submitted that it would be a very bad practice and precedent for the Executive branch of Government to be released from the consequences of its own breach of present and future fiduciary duties where these are established to the satisfaction of Her Majesty’s Judges.’

arrangements,³⁵ or whether it is rather an attempt to make a judicial decree clothed in legislative form.

Parliament is sometimes referred to in New Zealand as ‘the highest court in the land’. The metaphor is constitutionally misleading and dangerous to the extent that it tempts lawmakers to believe that they are judges. Parliament is not the ‘highest court in the land’ because it is not a court at all. Unlike the Parliament in London, whose House of Lords component is a court, the New Zealand Parliament has never had, and has not now, any judicial function whatsoever.³⁶

Although this is not the place to rejoin the debate on Lord Cooke’s speculation that ‘some common law rights presumably lie so deep that even Parliament could not override them’, it is permissible to wonder whether an alternative judicially-patrolled limitation on the legislative powers of Parliament might hinge on the form rather than the content of purported legislation. If Parliament purported to enact the Telephone Directory, and the Governor-General assented to it, a court might decline to treat the result as valid law not because Parliament lacked legislative capacity, but because what it enacted failed to attain the form of a law.³⁷ It is not necessary fully to espouse Lon Fuller’s requirement for an ‘inner morality’ of law without which a lawmaker will fail to make law³⁸ to appreciate that some legislative utterances may fail to achieve the status of law. Courts have, for example, been prepared to deny the character of law to legislative attempts to intrude upon the judicial function.³⁹

Dr Rotman has, in the Canadian context, doubted whether the fiduciary duty of the Crown to Native peoples is susceptible of legislative annulment:

Therefore, even if it were possible to obtain a constitutional amendment removing the Crown’s fiduciary duty to Native peoples from Section 35(1), that action would be insufficient to eliminate the Crown’s duty ... Even in the absence of any positive legal basis on which to ground the Crown’s fiduciary obligations, the Crown’s duty nonetheless exists on the extralegal plane, just as it existed prior to its judicial recognition in *Guerin*.⁴⁰

The Act is even more specific than the preceding Bill. Truly, Parliament has sought to make the Crown a ‘faithless fiduciary’! The Crown’s advisers have seen the danger from the Canadian doctrine and have stomped quite specifically on it, in relation to the seabed and foreshore. But what are we to conclude as to the applicability of the fiduciary duty of the Crown in relation to all other land and interests in Aotearoa/ New Zealand? The conclusion is invited that the doctrine applies in full Canadian vigour – why else exclude it so methodically from application to claims concerning the seabed and foreshore?

Two helpful discussions of the relevance for New Zealand law of the fiduciary obligation are those of Gerald Lanning⁴¹ and Claire Charters.⁴² Lanning’s careful treatment in 1996 rightly

35 For a developed argument on the supremacy of Parliament as one of the three ‘ultimate legal principles’ of the New Zealand legal system, see A Frame, *Grey and Iwikau: A Journey into Custom* (2002) 68-70.

36 For a Commonwealth case on the point, see *M’wembe v The Speaker* [1996] 1 LRC 584, 594, per Kabazo Chanda J; internal disciplinary functions under Standing Orders are only that.

37 Lord Cooke’s suggestion is found in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398. See Frame, above n 35, 68-70.

38 L Fuller, *The Morality of Law* (1969), chap 2, in which Fuller discusses ‘Eight Ways to Fail to Make Law’.

39 See the Privy Council’s decision in *Liyana v The Queen* [1967] 1 AC 259 and, closer to home, that of the Court of Appeal of the Solomon Islands in *Kenilorea v Attorney-General* [1986] LRC (Const.) 126.

40 L I Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (1996) 257.

41 G Lanning, ‘The Crown-Maori Relationship: The Spectre of a Fiduciary Relationship’, (1996) 8 Auck U L Rev 445.

dwells on the important Canadian case of *Frame v Smith*⁴³ which, although concerned with the quite different context of parental rights, is referred to in several of the Canadian First Nation cases as a useful statement of the fundamental elements giving rise to a fiduciary duty. In that case, Wilson J lists three general characteristics giving rise to the duty:

- (1) The fiduciary has scope for the exercise of some discretion or power
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.⁴⁴

Lanning pays close attention to the judgment of Toohey J in the Australian *Mabo* case,⁴⁵ describing it as 'one of the most useful in this area' which emphasises the overall power/vulnerability relationship between the Crown and Aboriginal people as evidencing a broad-based fiduciary relationship. Although the point is useful, a decade later it may be that the *Wewaykum* decision warns us of the danger of claiming a generalised all-purpose fiduciary umbrella, and of the need to be more specific as to the area in which, and the particular interest over which, the fiduciary relationship arises. This point is also emphasised in Dr Rotman's comprehensive commentary on the Canadian jurisprudence:

The most vital aspect of fiduciary doctrine, and what ought to receive the bulk of judicial attention, is its focus on the specific characteristics of individual relationships ... Because of its implementation on a case-by-case basis, fiduciary doctrine is most appropriately described as situation-specific.⁴⁶

Another interesting suggestion made by Lanning relates to the general principle that a fiduciary duty cannot be delegated, and he proposes that state-owned enterprises may be subject to the Crown's fiduciary obligations:

This must be the correct result given that these enterprises are performing functions formerly carried out by the Crown in its executive capacity.⁴⁷

Most recently, Claire Charters' equally helpful discussion begins with a protest at what she terms 'the legislative override of Crown fiduciary duties under the Foreshore and Seabed Act 2004'. Ms Charters tackles the most recent of the Canadian cases, *Haida Nation v British Columbia (Minister of Forests)*,⁴⁸ showing that the Supreme Court of Canada has reinforced the *Wewaykum* Court's insistence on a specific context and a specific interest for a fiduciary duty to be enforceable, as well as the variable strength of the duty according to circumstance. On the other hand, the Chief Justice in Canada in the *Haida* case pithily summarised the source of the fiduciary duty:

42 C Charters, 'What Could Have Been and What Should Be: A Comparative Analysis of Crown Fiduciary Duties to Indigenous Peoples and Maori Interests in the Foreshore and Seabed', paper presented at a conference 'Foreshore and Seabed: the New Frontier', 10 December 2004, Victoria University of Wellington.

43 *Frame v Smith* (1987) 42 DLR (4th) 81. As Lanning points out, the decision receives favourable mention from Richardson J in the New Zealand case *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10, 22.

44 *Frame v Smith*, *ibid*, 99.

45 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

46 Rotman, above n 40, 155.

47 Lanning, above n 41, 463.

48 *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511.

Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty.⁴⁹

The sourcing of the fiduciary duty in the ‘honour of the Crown’ recalls Lord Cooke’s observations in the *Muriwhenua* case quoted above, which we might now paraphrase in the comment that it should not come to be thought that the honour of the Queen is less guarded by her courts in New Zealand than by those in Canada.

Ms Charters reluctantly concludes, as does the present writer in respect of section 10 but with a reservation expressed as to section 13(4), that the legislative override of fiduciary duty in the Foreshore and Seabed Act 2004 is not itself challengeable in the New Zealand courts, but goes on to consider the likely approach of our courts to the doctrine generally:

In summary, Court of Appeal cases in the early 1990’s clearly endorsed the application of Canadian jurisprudence on Crown fiduciary duties to aboriginal peoples here. Cooke P seemed to be inviting a robust fiduciary duty claim ... Nevertheless, it seems unlikely that the New Zealand courts would impose a fiduciary duty on the Crown when a breach of that duty takes place in a political process such as the development of legislation ...⁵⁰

V. TWO BACKGROUND EXAMPLES

It may be useful to consider two examples of New Zealand contexts in which the Crown might arguably be fixed, in the first case, with the duties of a trustee, and, in the second case, with a more general obligation as a fiduciary.

A. *Example 1*

A good historical example from the New Zealand context of the Crown holding compulsorily-acquired Maori land as a clear trustee for Maori beneficiaries is provided by the Native Townships Act 1895. The long title of the Act reveals the intention:

Whereas, for the purpose of promoting the settlement and opening-up of the interior of the North Island, it is essential that townships be established at various centres: and Whereas in many cases the Native title cannot at present be extinguished in the ordinary way of purchase by the Crown, and other difficulties exist by reason whereof the progress of settlement is impeded...

The scheme of the 1895 Act was to empower the Executive branch of government to declare ‘any parcel of Native land to be set apart as a site for a Native township’. As a concession, the Act required that ‘native allotments’, not to exceed twenty per cent of the total area, be reserved. The status of these allotments was dealt with in section 12(3) as follows:

All Native allotments ... shall be deemed to be ... vested in Her Majesty in trust for the use and enjoyment of the Native owners...

All other allotments were also declared to be ‘similarly vested in Her Majesty, in trust for the Native owners according to their relative shares or interests therein’. The streets and reserves other than the Native allotments, however, were ‘deemed to be vested in Her Majesty for an estate in fee-simple in possession, free from encumbrance’. It is submitted that the Native and other allotments represent a clear instance of the creation of an explicit and full trust binding on the Crown and enforceable by the beneficiaries.⁵¹

49 *Haida Nation*, *ibid*, per McLachlin CJ, p 523.

50 Charters, above n 42, 21.

B. Example 2

The next example is submitted to be of a clear fiduciary duty but probably falling short of an explicit and full trust. It concerns what are known as the ‘Old Land Claims’. These were lands which were claimed to have been purchased from Maori before the accession to British sovereignty following the Treaty of Waitangi in 1840. The British Government had, both before and after the Treaty, made clear its intention not to recognise such purchases unless found, on formal inquiry, to have been transacted with the true owners, for proper value, and did not represent an excessive area concentrated in a single purchaser. The story of these ‘Old Land Claims’ is lengthy and convoluted,⁵² but the question arising is, what was the fate of those lands which the various Land Commissions (as the formal inquiries were called) determined not to have been properly acquired within the three conditions laid down by Government?

The reader may be forgiven for thinking that the lands must surely have been returned to the Maori owners from whom they had been determined not to have been properly purchased. It seems, however, that this was not always the case; sometimes these lands were treated as ‘surplus lands of the Crown’, and we have no lesser authority for this conclusion than the distinguished jurist and Solicitor-General of New Zealand between 1910 and 1920, Sir John Salmond.⁵³ It is suggested that the lands found not to have been validly purchased from Maori must thereafter have been held by the Crown in a ‘trust-like’ relationship in favour of the true Maori owners to whom the Crown owed an apparent fiduciary duty.

VI. PROCEDURAL DIFFICULTIES – LIMITATIONS AND LACHES

A critical factor for claims by indigenous peoples against the Crown for acts and omissions in the colonial period and its aftermath will always be the lapse of time between the alleged dereliction and the realisation of the loss. In that regard, a considerable advantage of the Waitangi Tribunal process provided under the Treaty of Waitangi Act 1975, to be balanced against the disadvantage of the usually non-binding status of the result, is that claims may be founded on Crown policies and actions going back to 1840.⁵⁴

Conventional civil proceedings must, however, face the obstacle of limitation periods which will typically appear in the form of a bar on legal action as a result of a statutory limitation period; the law will provide that no action for breach of a contract may be commenced after, say, twelve years from the time the cause of action arose. The reasons for such a restriction are understandable – human affairs require some finality and certainty and it would be impractical to allow the courts to entertain claims in respect of ancient history which people have come to regard as settled. As it is sometimes put, ‘the world must move on.’ In relation to Maori claims, the situation prior to the enactment of Te Ture Whenua Maori Act 1993 had been that the clauses drafted by Sir John

51 For the sake of completeness I should add that the Native Townships Act 1910, No.18 transferred land in the Townships held in trust by the Crown under the 1895 Act to the Maori Land Boards in the respective Districts.

52 For a detailed treatment, see A Frame, *Salmond: Southern Jurist* (1995) chap 10.

53 Sir John Salmond’s ‘Printed Case’ for the Webster Case, in the British records as CO 209.275, Paper 29936 [1912], a microfilm of which is available in the Turnbull Library in Wellington as Micro 499. For the conclusion, see Frame, *Salmond: Southern Jurist*, above n 52, 144.

54 Section 6 of the Treaty of Waitangi Act 1975 was amended in 1985 to permit claims to be founded on events stretching back to the date of the initial signing of the Treaty – 6 February 1840.

Salmond in the Native Land Act 1909, no doubt on the instruction of his Ministers, and continued in subsequent legislation, had precluded almost all actions to assert customary Maori ownership of lands.⁵⁵

The passage of Te Ture Whenua Maori Act 1993 repealed the remnants of Salmond's drafting and it was realised that the bars against claims would have to be replaced. This was effected by amending the Limitation Act 1950 to bring claims to Maori customary land within the purview of its provisions setting up general 'limitation periods' for proceedings in the New Zealand courts. Accordingly, new sections were inserted into the Limitation Act declaring that:

Where any action to recover land that is Maori customary land ... is brought against the Crown...this Act shall apply to that action; and where any action for damages or an injunction in respect of any trespass or injury to Maori customary land is brought against the Crown ... this Act shall apply to that action.

Limitation of actions in relation to Maori customary lands – no action to which this Act applies... shall be brought after the expiration of [12 years for recovery of land, and 6 years for damages for trespass or injury] from the date on which the right of action accrued to the person bringing the action or to some other person through whom the person bringing the action claims ...

For the avoidance of doubt, it is hereby declared that ... the date on which the right of action ... accrued shall be the date on which the wrong occurred, whether before or after the commencement of this Act ...⁵⁶

These limitation provisions might be thought to make it difficult for Maori claimants to bring actions in respect of alleged breaches of contracts, or other civil wrongs dating from the nineteenth and early twentieth centuries, when most Maori customary land was alienated. However, and this is a possible attraction of the equitable remedy for breach of trust and/or fiduciary duty, the Limitation Act 1950 recognises, in section 21, an exception as follows:

No period of limitation ... shall apply to an action by a beneficiary under a trust, being an action –

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was privy...

(a) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee ...

A further provision of the Limitation Act 1950, section 28, provides a more general postponement of the commencement of any limitation period in the case of 'fraud' or 'concealment'. The period does not begin to run until the plaintiff discovers the fraud or concealment 'or could with reasonable diligence have discovered it'. It is important to understand that 'fraud' in sections 21 and 28 bears a much wider meaning than it does in the criminal law, or even popular, context. As Megarry V-C observed of the identical provision in UK law in *Tito v Waddell*:

the word 'fraud' is here used in a sense which embraces conduct or inactivity which falls far short of fraud at common law: see, e.g., *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563... Indeed, as the authorities stand, it can be said that in the ordinary use of language not only does 'fraud' not mean 'fraud' but also 'concealed' does not mean 'concealed', since an unconscionable failure to reveal is enough.⁵⁷

Use in Maori claims against the Crown of the section 21 exemption from any limitation period for trusts depends, of course, on acceptance of the view of Justice Wilson over that of Justice Dickson in *Guerin*. If a New Zealand court were not prepared to go as far as finding a full trust relationship, but preferred Justice Dickson's view that, although no trust could be established, a 'trust-like' status created a fiduciary relationship, then Maori litigants and their advisers would

55 The matter is dealt with in detail in Frame, *Salmond: Southern Jurist*, above n 52, chap 9, p 113, n 14.

56 The amendments were effected by Te Ture Whenua Maori Act 1993 s 360.

57 *Tito v Waddell (No.2)* [1977] 1 Ch 106, 245.

doubtless wish to pay close attention to the finding in the *Semiahmoo* case discussed above, namely that two breaches of fiduciary duty could sometimes be identified – one before the taking of land and the other, later in time, when the Crown failed to provide redress when the extent of the prejudice had been drawn to its attention by the injured party. The second, and later, date would provide a new starting point for the running of any limitation period which might apply.

It will also have to be kept in mind that the remedy for breach of fiduciary duty by the Crown is an equitable remedy. As Binnie J observed in *Wewaykum*:

One of the features of equitable remedies is that they not only operate ‘on the conscience’ of the wrongdoer, but require equitable conduct on the part of the claimant. They are not available as of right. Equitable remedies are always subject to the discretion of the court ...

Equity has developed a number of defences that are available to a defendant facing an equitable claim such as a claim for breach of fiduciary duty. One of them, the doctrine of laches and acquiescence is particularly applicable here...⁵⁸

The doctrine of laches may be regarded as equity’s more flexible form of limitation period. It does not work on numbers of years, but rather on a broader consideration of the respective positions of the parties. In Canada again, La Forest J expressed matters in this way in a 1992 case:

What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches ... Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.⁵⁹

In *Wewaykum*, Binnie J found that the doctrine of laches did apply to defeat any equitable claim by the two Indian bands. Again, this finding arose from the tactical nature of the claimants’ case. The two bands had previously acquiesced in each others’ reserves, with sufficient knowledge of the underlying facts, and, it seemed, had only erected the belated claims to provide a basis for engaging the Crown’s fiduciary position.

VII. CONCLUSIONS – A PROFILE OF THE FIDUCIARY REMEDY

We are now in a position to draw some general conclusions as to the factual matrices which appear to have persuaded Canadian courts to apply the equitable remedy of breach of fiduciary duty against the Crown. As valuable will be indications of circumstances which have not been persuasive.

A. *Profile of the Remedy*

- Where either a true Trust (example 1 above), or a ‘Trust-like’ (*Guerin* etc) relationship exists between the Crown and Maori, equity will detect and enforce a fiduciary relationship.
- For a trust-like relationship to be found the court must be shown specific circumstances, albeit coloured by the context of the general Crown/Maori relationship including the Treaty of Waitangi, and a specific Maori legal interest which pre-dated the Crown’s intervention, over which the Crown has assumed a discretionary control.
- The remedy is unlikely to be available to constrain the Crown in its general administration of social services or the political system.

58 *Wewaykum Indian Band v Canada* (2002) 220 DLR (4th) 1, 45.

59 La Forest J in *M(K) v M(H)* (1992) 96 DLR (4th) 289, quoted with approval by Binnie J in *Wewaykum*, *ibid*, 46-47.

- Breach of the fiduciary duty will occur where the Crown has failed fully to disclose relevant matters, or has acted in breach of the rules against profiting or self-dealing, or has failed to act with ordinary diligence in protecting the plaintiff's interests, or has permitted an exploitative bargain.
- The plaintiff must come to the Court 'with clean hands' and have commenced the proceedings within a reasonable time of either the acts or omissions complained about, or of the time when the Crown, having been made aware by the plaintiff of the complaint, has failed to provide redress.

B. General Conclusion

This article has concluded that the equitable remedy of breach of fiduciary duty is likely to be available against the Crown in New Zealand, except, probably, in relation to the foreshore and seabed, and that the circumstances for its application by New Zealand courts are likely to be those outlined by the Supreme Court of Canada in the line of cases beginning with *Guerin* in 1984 and which have been sketched above.

THE DEPOSIT IN THE SALE OF LAND: RECENT DEVELOPMENTS

BY THOMAS GIBBONS*

I. INTRODUCTION

The decision of the Supreme Court in *Otago Station Estates Limited v Parker*¹ resolved an important issue; it is now clear that in the absence of agreement to the contrary, a deposit paid pursuant to the REINZ-ADLS agreement for sale and purchase must be made by cash or bank cheque – and in practice, it will generally be the latter.

But *Otago Station Estates* is also worthy of attention for what it did not say. With reference to *Rick Dees Limited v Larsen*,² it invites a situation where a deposit paid by electronic means may be subject to dispute as to its validity. Furthermore, the decision in *Otago Station Estates* failed to draw a proper distinction between a deposit as an earnest and a deposit as part payment of the contract price. These matters are each given attention in this article, and each highlights the space between theory and practice in property law that lawyers and the courts must do their best to alleviate.

II. THE SUPREME COURT CONTEXT AND THE REINZ-ADLS AGREEMENT

Otago Station Estates hinged on a basic question: ‘whether a purchaser can remedy a default in paying a deposit due under an agreement for sale and purchase of land on the Real Institute of New Zealand / Auckland District Law Society (REINZ/ADLS) form [of agreement for sale and purchase of real estate] by tendering a personal cheque if the vendor objects to that mode of payment.’³ This was a private law matter of ‘general commercial significance’ under section 13(2)(c) of the Supreme Court Act 2003 – significant not only to the parties to the case, but also to the hundreds of lawyers, legal executives, real estate agents and other parties throughout New Zealand who conduct property transactions using the REINZ-ADLS form of agreement on a regular basis.

The REINZ-ADLS agreement under which the dispute arose has gone through a number of different versions over the past several years. It is worth noting that Blanchard J, who delivered the judgment of the Court, was involved in drafting some of the earlier editions of this agreement, as well as a widely used commentary on the standard form.⁴ The current form, and the one used in this case, was the Seventh Edition (2) July 1999 form, and the decision hinged on the

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1 *Otago Station Estates Ltd v Parker* [2005] 2 NZLR 734.

2 (2005) 5 NZConvC 194,127.

3 *Otago Station Estates Ltd v Parker* [2005] 2 NZLR 734, para 1.

4 P Blanchard, *A Handbook of Agreements for Sale and Purchase* (4th ed, 1988).

interpretation of clause 2 of the form, which provides that any deposit is to be paid to the vendor or the vendor's agent 'immediately upon execution' of the agreement 'and/or at such other time as is specified' in the agreement, time being of the essence. Clause 2.2 states that:

The vendor shall not be entitled to cancel this agreement for non-payment of the deposit unless the vendor has first given to the purchaser three working days' notice of intention to cancel and the purchaser has failed within that time to remedy the default. No notice of cancellation shall be effective if the deposit has been paid before the notice of cancellation is served.

III. *OTAGO STATION ESTATES LTD V PARKER*

A. *Facts*

The case involved two contracts, both dated 22 November 2000, and both relating to rural land in north Otago. The first was between DJ & LM Parker as vendor and Willowbank Holdings Limited or nominee as purchaser, at a price of \$2,950,000 (the 'first agreement'). The second was between JR Parker and Livingstone Properties Limited or nominee, at a price of \$900,000 (the 'second agreement'). Each contract was conditional on confirmation by the directors of the relevant purchaser company, with an eventual date for satisfaction of 6 March 2001. The second agreement also had a condition for the vendor to obtain a resource consent, with no specified date for satisfaction. Each agreement provided for a deposit of 10 per cent to be paid on confirmation, with the balance payable 'in cash' on the agreed possession date of 1 March 2001.⁵

The purchaser companies confirmed the agreements on 6 March 2001, but the deposits were not paid. The vendors' solicitors confirmed by fax on 20 March 2001 that payment of the deposits could be deferred until after a meeting between the parties scheduled for 28 March 2001, but the deposits remained unpaid following that date. On 27 September 2001, the purchasers nominated Otago Station Estates Limited to complete both agreements, and on 4 February 2002 this company gave notice that it was ready, willing and able to settle and enquired about progress with the subdivision envisaged by the second agreement. On 10 October 2002, the deposits still unpaid, the purchasers issued proceedings for specific performance. On 13 November 2002, the vendors' solicitors issued notice to the original and nominee purchasers stating the vendors' intention to cancel each agreement for non-payment of deposit unless it was paid to the vendors' solicitors office (Berry & Co) within three working days of the date of service. Reference was made to the firm's trust account in a manner which, the Court said at paragraph 7 'clearly invited payment directly to that account.'

The expiry of the three working day period was 5 pm on 18 November 2002. At 4.32 pm on that day, the solicitors for Otago Station Estates Limited sent a fax to Berry & Co advising that \$433,892.78 (being the deposits plus interest) had been deposited into the Berry & Co trust account that afternoon. The purchaser's solicitors also sent a copy of the deposit slip and the cheque – the latter being a personal cheque of Otago Station Estates Limited. The following day, Berry & Co advised that the personal cheque was not legal tender and therefore not in compliance with clause 2.2 of the agreement, and gave notice of cancellation of the agreements. The purchaser did not stop payment on the cheque and it was refunded by bank cheque a few days later.

5 *Otago Station Estates*, above n 3, paras 2-3.

B. *Proceedings*

The case was initially heard in the High Court.⁶ Here, Chisholm J drew a distinction between payment of a deposit in usual circumstances – where a personal cheque was a common and valid form of tender, and the ‘much less common situation where payment was being made in response to a cl 2.2 notice’.⁷ The issue of a default notice triggered a right of cancellation, and it was essential for a vendor to be able to cancel immediately without having to wait for a cheque to clear. A bank cheque was required to satisfy a default notice, unless the vendor was prepared to accept something less, and the purchaser had to take the initiative in obtaining such a concession to modify clause 2.2. The personal cheque was therefore not good tender and the vendors were entitled to reject it and cancel the agreement.⁸

The Court of Appeal did not accept the distinction drawn in the High Court between deposits paid in ordinary circumstances (under clause 2.1), and deposits paid after notice of intention to cancel (under clause 2.2). Personal cheques was not valid tender under 2.1, even if vendors or their agents made a practice of accepting them. The practice of accepting personal cheques for deposits was, in the Court’s view, illustrative of a payee accepting a cheque without objection to its form, and thereby waiving its right to payment by cash or bank cheque. If not accepted, the legal obligation to pay in clear funds remained. The vendors’ solicitors’ advice to pay the deposit direct to the trust account did not waive the requirement that payment of the deposit be made in legal tender. The Supreme Court granted leave the appeal the case, but declined to hear a new point raised by counsel.

C. *The Reasoning*

1. *The Deposit*

The Court began with a definition of a deposit from Black’s Law Dictionary (7th edition): ‘[m]oney placed with a person as earnest money or security for the performance of a contract. The money will be forfeited if the depositor fails to perform’ – the deposit being ‘security to the vendor against the purchaser’s unlawful repudiation of the contract’. Under general law, the Court determined, time for payment of the deposit is of the essence, with failure to pay in due time a breach of an essential stipulation enabling immediate cancellation by the vendor under sections 7(3)(b) and 7(4)(a) of the Contractual Remedies Act. The REINZ-ADLS form then modifies this to require, even if the deposit is already overdue, that the vendor give notice that the purchaser has three working days to pay the deposit before the vendor will cancel.⁹

2. *Payment*

The Court observed that clause 2 of the REINZ-ADLS form is silent on the mode of payment of a deposit. The Court was of the view that the words ‘pay’, ‘non-payment’ and ‘paid’ in clause 2 must be interpreted against the general law of vendor and purchaser and in the context of the REINZ-ADLS agreement as a whole. The general law required that any payment towards the purchase price (such as a deposit) be in cash, by bank cheque,¹⁰ or by other cleared funds, and a

6 [2003] 3 NZLR 567.

7 *Otago Station Estates*, above n 3, para 14.

8 *Ibid*, paras 15-17.

9 *Ibid*, paras 21-22.

number of earlier cases¹¹ were clear that a personal cheque was not good tender, even if it came from someone of good credit or was often accepted in practice. It was submitted for the purchaser that the legal requirement that a deposit be paid in legal tender rather than by means of a personal cheque was something of a fiction – for example, where an auction was conducted outside business hours and the terms required that the deposit be paid immediately on the fall of the hammer, the bank cheque requirement might be impossible to fulfil. The Court disagreed, emphasising that ‘the certainty of actual receipt’ could be all-important to a person entitled to payment of a deposit,¹² and going on to say that the law relating to how deposits must be paid was ‘well understood and workable in practice’:

It was undoubtedly known to those who prepared the seventh edition of the standard form that a contractual requirement for the making of a payment must, as a matter of law, be performed by means of legal tender, bank cheque or other cleared funds unless the payee by words or conduct indicates a preparedness to accept a personal cheque.¹³

The Court observed that a vendor may accept a personal cheque (or knowingly allow his or her agent to do so) without objection specifically to its form, and is then estopped from asserting that the mode of payment has not complied with the terms of the contract. In the case of an auction or sale outside working hours (and not using the REINZ-ADLS form), the Court’s ‘tentative’ view was that a personal cheque could implicitly be used when a bank cheque would not be immediately obtainable and the deposit’s size made a cash payment unlikely – though this would often be in the vendor’s interests as well.¹⁴

The Court also suggested that if it were to insist that a vendor accept a personal cheque tendered in payment of a deposit, then under clause 2 of the REINZ-ADLS form:

a notice given by a vendor after the purchaser’s personal cheque for the deposit had been dishonoured could be met by the tendering of a personal cheque. That tender could be made at any time prior to the service of a cancellation notice, thereby suspending the vendor’s right to cancel, or even to sue for the debt, until it was known whether the second cheque was met on presentation ... that could take four or five days ... [and] would produce an uncertain and thoroughly unsatisfactory situation. The vendor would not yet know whether he or she had the security of a deposit.¹⁵

The Court therefore determined that the appeal should be dismissed, and that a purchaser could not remedy a default in payment of a deposit due under the REINZ-ADLS agreement for sale and purchase of land by tendering a personal cheque if the vendor objected to that mode of payment. The rule in *William v Gibbons*¹⁶ – that a bank cheque must, unless the payee reasonably believes the bank is insolvent, be accepted as legal tender equivalent to cash – was also approved.

10 Following *William v Gibbons* [1994] 1 NZLR 273, where the Court stated that a bank cheque must be accepted as legal tender unless the recipient has reasonable grounds to believe that the bank is insolvent and may not be able to honour it.

11 See *Johnstone v Boyes* [1899] 2 Ch 73 and *Stembridge v Morrison* (1913) 33 NZLR 621.

12 See *Henderson v Ross* [1981] 1 NZLR 417, 433.

13 *Otago Station Estates Ltd*, above n 3, para 27.

14 *Ibid.*

15 *Ibid.*, para 30.

16 [1994] 1 NZLR 273.

D. Conclusion

On its fact, the decision in *Otago Station Estates* appears entirely reasonable and commercially sound. Indeed, it is difficult to how the Court could properly have made any other decision: where cleared funds are required, a personal cheque is insufficiently reliable. A bank cheque, on the other hand, is, following *Williams v Gibbons*, prima facie as good as cash, and considerably safer for day to day use.

However, considered and reasonable as the decision in *Otago Station Estates* is – and useful as it is to practitioners in clarifying the method of payment for deposits – the decision is also silent on some important matters. Primarily, it does not make clear whether a deposit may be paid by electronic means, and it does not determine the nebulous issue of what a reasonable deposit must be. Each of these issues is now examined in turn, the first with particular reference to the High Court decision in *Rick Dees Limited v Larsen*.¹⁷ These matters indicate considerable uncertainty – both doctrinal and practical – in the law relating to deposits.

IV. RICK DEES LIMITED V LARSEN

A. Introduction

The case of *Rick Dees Limited v Larsen* was decided shortly after *Otago Station Estates*, and touched on many of the same issues. The first main question before the High Court was whether tender of settlement by means of the lodgement by electronic funds transfer of purchase moneys into the vendor's solicitor's bank account was a sufficient tender of settlement, when the vendor had agreed to payment into that account by deposit of bank cheque. The second was whether tender of settlement also required facsimile notification to the vendor's solicitor of the lodgement. Finally, if facsimile notification was required, the Court had to consider whether the facsimile notice was complete when the purchaser's solicitor attempted transmission of the facsimile to the vendor's solicitor's facsimile number, upon actual transmission, or only upon receipt by the vendor's solicitor. These questions were set against clause 3.7 of the REINZ-ADLS agreement, which provides for the purchase to pay or satisfy the balance of the purchase price on the settlement date, and for the vendor to provide a memorandum of transfer and all other documents to allow the purchaser to register the memorandum of transfer.

B. The Facts

The plaintiff entered into 10 agreements to purchase 10 flats in November 2003, each on the Seventh Edition (2) July 1999 REINZ-ADLS form. Each agreement was on its face independent, and the agreements became unconditional on 8 December 2003, with settlement set for 10 February 2004.

The deposits for the properties were originally \$3,500 each, though this was varied by agreement to \$2,500 each, with the total of \$25,000 to be paid on 19 December 2003. The vendor's solicitor wrote to the purchaser's solicitor on 8 December 2003 confirming that payment on 19 December 2003 would be acceptable, and enclosing a copy of the vendor's solicitor's trust account deposit slip '[i]n order that the deposit can be paid directly to our trust account on the 19

17 (2005) 5 NZ ConvC 194,127.

December, 2003'. The \$25,000 was deposited in the vendor's solicitor's trust account on 19 December 2003 by way of electronic funds transfer, and the purchaser's solicitor sent a standard letter on the same day confirming the electronic transfer and undertaking not to reverse the transaction.¹⁸

Though settlement had been set for 10 February 2004, the vendor's solicitor did not deliver settlement statements for the properties to the purchaser's solicitor until 17 February 2004, nominating that day as the day for settlement. The letter, with a copy of the firm's trust account deposit slip attached, confirmed that the required title documents were held and contained an undertaking that these would be forwarded to the purchaser's solicitor on receipt of the purchaser's solicitor's faxed undertaking that a bank cheque for the settlement figure had been credited to the vendor's solicitor's trust account in accordance with the settlement statement; and a faxed copy of the bank cheque, endorsement and stamped deposit slip. Settlement was not completed on 17 February 2004 and the following day a settlement notice was issued in accordance with the terms of the REINZ-ADLS form. This gave the purchaser until 5.00 pm on 5 March 2004 to cancel, or the vendor would be entitled to cancel the agreements.

An issue arose at this point as to whether the purchaser could settle only four of the 10 transactions at one time. The vendor argued that this was not the case, and the purchaser did not pursue the matter, believing settlement in full would be possible by 5 March 2005. Amended settlement statements were sent to the purchaser's solicitor on 5 March 2004, and these made no mention of the proposed or required method of settlement. Due to lender difficulties, the funds to settle were not available to the purchaser until after 4 pm on 5 May 2004. The purchaser's solicitor then had some discussions with the vendor's firm, in which electronic funds transfer was discussed. At 4.25 pm, however, the vendor's solicitor faxed the purchaser stating that settlement was required to be completed in person. This was unsatisfactory – perhaps even impossible – to the purchaser, who attempted (unsuccessfully) to telephone the vendor's solicitor. The transactions to complete settlement were then processed electronically at 4.50 pm, with transmission reports confirming this had been completed by 4.54 pm.

It is here that things turn ugly – and that practising conveyancers must hold their breath. The purchaser's solicitor attempted to send an undertaking with the confirmation reports. The fax number was engaged, and one attempt went to the wrong number. At 5.07 pm the fax (on automatic redial) was transmitted to and received by the vendor's solicitors. A few minutes earlier, however, at 5.03 pm, the purchaser's solicitor had received a fax letter purporting to cancel the contract, noting that the purchaser had failed to settle in accordance with the terms of the contract. The vendor's solicitor confirmed on 8 March 2005 that the moneys paid had been redeposited in the purchaser's solicitor's trust account – by electronic funds transfer!

C. The Reasoning

There was some discussion as to common practice in settlements. As the Court noted at paragraph 24, the REINZ-ADLS form 'clearly contemplates a face to face settlement', but remote settlements (with faxed undertakings by each solicitor) are very common. The vendor's solicitor had allowed for remote settlement by the letter enclosing the settlement statement on 17 February 2004. The vendor's solicitor was of the view that the subsequent issue of a settlement notice

18 Ibid, paras 3-5.

negated previous arrangements, requiring, in the absence of further agreement, face-to-face settlement. The Court disagreed – finding that the parties had agreed on remote settlement, and that the vendor could not unilaterally alter this arrangement (para 29). Furthermore, the vendor’s solicitor’s actions in requiring face to face settlement at 4.25 pm on the final settlement date when this was practically impossible ‘would fall foul of the rule that a contracting party is itself in breach of contract if it engages in conduct which can be said to amount to ‘of its own motion’ bringing about the impossibility of performance’.¹⁹

While the purchaser argued that settlement was complete on deposit of the monies into the vendor’s account, or alternatively when fax confirmation was sent, the vendor argued that fax confirmation of deposit must be *received* to complete settlement. The Court again referred to the vendor’s settlement requirements, which required confirmation to be sent. This was logical:

When a settlement is face to face the vendor’s solicitor is immediately aware of tender of payment by the purchaser. Therefore when the parties agree to a remote settlement and it is stipulated as part of that, that there be confirmation of payment and related undertakings communicated, this stipulation is significant both practically and contractually. The purchaser has not tendered settlement until the agreed confirmation is given in the agreed manner.²⁰

Clause 1.2(3)(c) of the agreement stated that facsimile notice was deemed to have been served ‘when sent ... to the facsimile number of the solicitor’s office’. However, the settlement requirements of the vendor stipulated that the vendor’s solicitor must actually have received the fax confirmation and undertakings. The Court found this a valid variation of the terms of the standard agreement, with the settlement requirements contemplating actual receipt rather than deemed service. In any case, facsimile notice was not ‘sent’ merely by the recipient’s number having been dialled – the Court’s view being that business efficacy demanded that ‘once the facsimile is *transmitted* to the facsimile number it is deemed served’.²¹ The Court was therefore satisfied that settlement was not effectively tendered before the vendor’s cancellation of the contract.

D. Electronic Funds Transfer

The standard agreement is silent as to the method of payment. Cash payment often being impractical, in *Williams v Gibbons*²² the High Court had determined that it was an implied terms of contracts for the sale of land that tender of a bank cheque on settlement was equivalent to cash, and could be refused only if the recipient had reasonable grounds to believe that the bank might not honour it because of insolvency. As discussed above, *Otago Station Estates* had also determined that payment by bank cheque was required for payment of deposits as well as for settlement monies. In the present case, there was expert evidence that electronic funds transfer was less risky than paying by bank cheque, ‘because payment by electronic transfer is payment of cleared funds whereas some banks still require clearance of bank cheques’.²³ Though the Court noted that electronic funds transfer is now an accepted means of payment according to 2004

¹⁹ Ibid, para 30, citing *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, 717.

²⁰ Ibid, para 35.

²¹ Ibid, para 42 (emphasis added).

²² [1994] 1 NZLR 273, 277.

²³ *Rick Dees Ltd v Larsen*, above n 17, para 47.

NZLS guidelines, it is the writer's experience that many firms are more willing to accept fax settlement by bank cheque than by electronic transfer – or unwilling to accept the latter entirely.

The judge commented:

Although I am not required to decide the point in this case it may well be that the time has come to imply a term to similar effect to that implied in *Williams v Gibbons* in relation to electronic funds transfer. The evidence before me is that the transfer gives the payee an unconditional right to the immediate use of the funds.²⁴

The Court then referred to the *Otago Station Estates* decision, noting that the Supreme Court had equated bank cheques with 'other forms of cleared funds', 'other cleared funds' and 'bank transfer in cleared funds'. Unfortunately, neither the Court in *Rick Dees* nor that in *Otago Station Estates* drew a distinction between the different kinds of cleared funds used in practice. Probably the most common method of electronic funds transfer involves sending a fax undertaking that payment has been made and that it will not be reversed, together with a copy of the transmission printout. However, while the funds may be used by the recipient against this undertaking, they do not 'clear' until the next day. We could assume from *Otago Station Estates*' reference to 'cleared funds' that this would not be sufficient tender of settlement. On the other hand, *Rick Dees* is less clear on this point. Another method of electronic funds transfer (primarily used by ASB Bank, though are versions have been or are being developed) involves a 'real time' transfer. However, both parties must use ASB Bank systems. While the funds clear immediately (and so would presumably be acceptable under both *Otago Station Estates* and *Rick Dees*) this system is not widely used in practice.

E. Of Rick Dees and Otago Station Estates

It should also be noted that the Court's finding on as to the acceptability of electronic funds transfer was immediately ameliorated by the Court agreeing with the vendor's position. The Court found that even if electronic funds transfer was sufficient payment under the agreement for sale and purchase, because the vendor had agreed to remote settlement (as against the default of face to face settlement), the vendor was entitled to require a particular form of settlement. Deposit by electronic transfer rather than bank cheque was not strictly compliant with the vendor's requirements, notwithstanding that this was a difference of form rather than substance.²⁵ The Court therefore found for the vendor. The effect of this finding is that if electronic settlement is intended, then the purchaser should provide for this in the agreement. The vendor will not necessarily then be able to insist on strict compliance with its settlement requirements. It may be that future versions of the REINZ-ADLS agreement provide for remote settlement in the standard terms, thereby removing the difficulties of purchasers having to pay overly-rigorous attention to the details of settlement requirements.

The importance of settlement requirements in determining the arrangements between the parties highlights that *Rick Dees* and *Otago Station Estates* may create some difficulties in future when read together. Settlement requirements are not in practice issued for the payment of deposits. Where there is a real estate agent, as is the case in normal residential transactions, the deposit is generally paid by personal cheque to that agent. The Real Estate Agents Act 1976

²⁴ *Ibid.*, para 49.

²⁵ *Otago Station Estates Ltd v Parker* [2005] 2 NZLR 734, para 50.

requires in section 57 that agents hold deposits for 10 days unless the parties agree otherwise, and this 10 day period is invariably sufficient to give the cheque time to clear. In addition, the real estate agent will often advise (on behalf of the vendor) that a personal cheque is acceptable. The dispute that arose in *Otago Station Estates* would not have arisen in the average residential sale and purchase where an agent was involved.

However, where a deposit is to be paid directly between the parties (as was the case in *Otago Station Estates*), the decision of the Supreme Court in that case makes it clear that payment by cash or bank cheque is acceptable, but that a vendor may refuse to accept payment by personal cheque as this is not cleared funds. *Rick Dees* then suggests that payment by electronic means should be considered equivalent to payment by bank cheque. Therefore, a deposit could, unless the parties had agreed to the contrary – that is, in normal circumstances – be paid by electronic means.

It may be that *Rick Dees* has simply misinterpreted *Otago Station Estates*, and that the Supreme Court never meant to explicitly equate bank cheques with an electronic transfer of funds. As it is, however, these cases may create practical difficulties for the future when read together. Where there is no real estate agent and a deposit is paid by electronic transfer directly from one party to another, the vendor may be required to accept such payment. On settlement, the vendor may on the other hand provide settlement requirements that, read strictly, do not allow settlement by electronic transfer. One solution from the vendor's perspective may be to send out settlement requirements in relation to the payment of the deposit. Another may be to amend the agreement so that the requirements for payment of a deposit are as strict as those for payment of settlement monies. In either event, however, the current situation is unclear, and those attempting to rely on both *Otago Station Estates* and *Rick Dees* may find themselves in a further dispute – perhaps all the way to the Supreme Court again!

V. DEPOSITS AND EARNESTS

A. *The Function(s) of a Deposit*

Otago Station Estates also deserves some attention for what it did not say about the twin functions of a deposit. It was noted above that the Court drew its definition of 'deposit' from *Black's Law Dictionary*:

Money placed with a person as earnest money or security for the performance of a contract. The money will be forfeited if the depositor fails to perform.

This definition is however insufficient.²⁶ A deposit is indeed 'earnest money' that may be forfeited if the depositor (invariably the purchaser) fails to perform. But it is also a part payment of the purchase price – a point so obvious that it was perhaps silently assumed by both the editor of *Black's* and the Supreme Court. If so, it was a dangerous assumption, because a sum paid in part payment of the purchase price might be different from a sum paid as an earnest, even though, in common parlance, both are referred to as a 'deposit'.

Reference to the standard REINZ-ADLS agreement illuminates this point. The front page of the Seventh Edition (2) July 1999 provides space after the words 'Deposit: (refer clause 2) \$' for a

²⁶ Compare *Laws of New Zealand* 'Sale of Land' para 13: 'A deposit is both a part payment of the purchase price and an earnest for the performance of the purchaser's contractual obligations.'

deposit to be inserted. Clause 2.2 was the key provision in *Otago Station Estates*, while clause 2.3 provides ‘The deposit shall be in part payment of the purchase price.’ There is no mention at this point of the deposit being an earnest.

Clause 9 of the agreement provides for one party to issue a settlement notice to the second if the second has defaulted on settlement. Clause 9.4 provides (in part):

If the purchaser does not comply with the terms of the settlement notice served by the vendor then:

1) Without prejudice to any other rights or remedies available to the vendor at law or in equity the vendor may:

a) sue the purchaser for specific performance; or

b) cancel this agreement by notice and pursue either or both of the following remedies namely:

i) forfeit and retain for the vendor’s own benefit the deposit paid by the purchaser, but not exceeding in all 10 per cent of the purchase price; and/or

ii) sue the purchaser for damages.

Clause 9.4(1)(b) illustrates the point of an earnest. If the purchaser is in default (and does not comply with the vendor’s settlement notice), then the deposit paid is forfeited and may be retained by the vendor. This forfeiture is not however absolute. The deposit will only be forfeited and may only be retained by the vendor if it does not exceed 10 per cent of the purchase price.

B. Worsdale v Polglase and Workers Trust

The words in the standard agreement reflect the common law position. The leading New Zealand case is *Worsdale v Polglase*.²⁷ Here, A agreed to purchase a house from B for \$60,000. The deposit of \$6,000 was paid to B on signing. There was no express clause in the agreement used permitting B to retain the deposit if A defaulted. A defaulted on the agreement and B entered into a new agreement to sell the property and retained A’s deposit. A sued B for the deposit (less the real estate agent’s commission). Though the case primarily concerned the application of the then-new Contractual Remedies Act 1979, there was also some commentary on deposits generally. In particular, the following definition cited by the Court is clearly superior to that used by the Supreme Court in *Otago Station Estates*:

Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes – if the purchase is carried out it goes against the purchase-money – but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.²⁸

The Court in *Worsdale v Polglase* determined that a deposit of 10 per cent was ‘normal’ in property transactions and would not be held to be penal in usual circumstances. However, if the deposit was 50 per cent of the purchase price, and that sum was retained by the vendor for the purchaser’s default, then that earnest would be penal and the Court would order a refund to the purchaser.²⁹

27 [1981] 1 NZLR 722.

28 *Soper v Arnold* (1889) 14 App Cas 429, 435, per Lord Macnaghten, cited *ibid* at 725.

29 *Worsdale v Polglase* [1981] 1 NZLR 722, 727.

The Privy Council offered its thoughts on the matter in *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd*,³⁰ a Jamaican appeal. Here, the deposit was 25 per cent of the purchase price. The purchaser defaulted and the vendor sought to retain the deposit as an earnest. The Privy Council emphasised that a deposit must be of a reasonable amount, and that 50 per cent of the purchase price was clearly unreasonable. The 25 per cent deposit was also found to be unreasonable, and the Board ordered the entire earnest retained to be refunded – not simply that amount that exceeded 10 per cent of the purchase price.

The *Workers Trust* case, though not binding on New Zealand courts, would no doubt be of considerable persuasive authority. It expands on the approach taken in *Worsdale v Polglase*: while that case found a 10 per cent deposit reasonable and a 50 per cent deposit unreasonable, *Workers Trust* states that a 25 per cent deposit is similarly unreasonable. In addition, it makes it clear that the payment of a deposit of 50 per cent of the purchase price by a purchaser will not entitle the vendor, if such purchaser defaults, to retain 10 per cent of the purchase price and refund the other 40 per cent. The entire deposit may be found to be unreasonable and a penalty, and the vendor will be required to refund the entire deposit to the purchaser (less damage). The applicability of the decision could however be questioned on the basis of New Zealand's unique Contractual Remedies Act.

C. *Garratt v Ikeda*

Garratt v Ikeda is a more recent case, revisiting *Worsdale v Polglase* and the Contractual Remedies Act 1979 in the context of the payment of deposits. Here, a deposit just under 10 per cent of the purchase price was payable in three instalments, with the final instalment not being paid on time. After some delay, the vendor gave notice that unless the final instalment of the deposit was paid within three working days, the contract would be cancelled (pursuant to clause 2.2 of the REINZ-ADLS terms). Payment was not made within the relevant period, and the vendor cancelled the contract and issued proceedings for payment of the third instalment. The vendor was also able to re-sell the property for more than the original contract price. With reference to clause 9.4 of the REINZ-ADLS agreement, the Court stated:

The primary nature of a deposit as expressed in the authorities ... and both the popular and legal usage of the word, support the view that when the parties describe as a deposit a sum not exceeding 10 per cent, paid or payable to seal the bargain, they must be taken as knowing and intending that if the purchaser defaults the deposit will be liable to forfeiture or recovery by the vendor. There can be few, if any, purchasers in New Zealand who do not understand and accept that a 10 per cent deposit is not refundable if they default.³¹

The Court went on to clarify that this 10 per cent sum may not only be forfeited under clause 9.4. It may also be recovered from the defaulting purchaser through proceedings. In the Court's view:

Although the deposit is part of the purchase price its primary function is as an earnest. It is when the purchaser is in default and the vendor cancels and there is no purchase price payable any more, that the question of forfeiture or recovery of the deposit arises. That is why the primary function of the deposit is to seal the bargain. In a sense it is the price paid by the purchaser for the vendor's willingness to commit to a sale. If the sale goes off through the purchaser's default, it has been axiomatic since Roman times that the vendor may keep or recover the price of such commitment.³²

30 [1993] 2 All ER 370.

31 *Garratt v Ikeda* [2002] 1 NZLR 577, 591.

Worsdale v Polglase was overturned inasmuch as it allowed a defaulting purchaser to make a claim under section 9 of the Contractual Remedies Act. Section 9 allows the court to grant relief on such terms as the court thinks fit where one party has cancelled a contract and it is just and practicable to do so. The Court in *Garratt* found that where the deposit was not more than 10 per cent of the purchase price, the purchaser was deemed to have agreed that section 9 of the Act would not apply. Furthermore, section 5 of the Act states that if the contract expressly provides for a remedy, then that express provision overrides section 9 and other provisions of the Act. Relief under section 9 was therefore not granted.

D. Commentary

The *Worker's Trust* case might at first blush seem rather harsh – a vendor who collects a proportionally large deposit and, on the purchaser's default, attempts to retain this as an earnest risks losing the entire sum – as it may be seen as penal. On the other hand, there are circumstances where, due to the nature of the transaction (such as the risks assumed by the vendor, the opportunity cost of the vendor in dealing with one purchaser rather than another, or other similar matters) an earnest above 10 per cent might be reasonable. Indeed, where the parties are commercially astute and understand fully the nature of the transaction, there are times when the application of *Worker's Trust* may lead to injustice. On the other hand, *Garratt v Ikeda* has clarified that a deposit of 10 per cent can be received and retained by a vendor with confidence that it will not be required to be repaid pursuant to the Contractual Remedies Act.

The uncertainty in the current law is obvious when a deposit of 15 per cent of the purchase price is considered. This will in many circumstances be a reasonable sum in part payment of the purchase price. It would also appear in many circumstances be a reasonable earnest. If it is to be retained as an earnest, then the standard terms of the REINZ-ADLS form will need to be altered (clause 1.1(3) of the standard form provides that any inserted terms prevail over the standard terms). The writer has seen clauses of this nature stating that the purchaser acknowledges that, if in default, the entire deposit may be retained by the vendor as an earnest and none of this sum is to be seen as a penalty. However, whether this would be sufficient to overcome the common law position as stated in *Worker's Trust* is regrettably unclear. *Garratt v Ikeda*, with its use of the words 'not exceeding 10 per cent' (quoted above) indicates that 10 per cent is a maximum, but many lawyers in practice take it only as a guideline.

A deposit of 10 per cent will, it appears, never be unreasonable – either as a part payment or as an earnest. Retention of an earnest of 50 per cent will clearly be penal, and so too will an earnest of 25 per cent – though a deposit in part payment of the purchase price may be either of these and still be acceptable to the Courts. However, a vendor seeking to retain more than 10 per cent of the purchase price as an earnest runs the risk that this will be seen as penal, and that a Court will order repayment of the entire sum to the purchaser. Where the line should be drawn (11 per cent, 17.5 per cent or 24 per cent) is unclear, and the circumstances of the case may be the deciding factor. The role of the contract drafter in drawing attention to the circumstances justifying an earnest of (say) 15 per cent - and in avoiding the application of the Contractual Remedies Act – may well be crucial.

VI. CONCLUSION

This article has, with reference to *Otago Station Estates Ltd v Parker* and *Rick Dees Ltd v Larsen*, illustrated some of the difficulties surrounding the law of deposits, and has also sought to clarify the role of a deposit both as part payment of the purchase price and as an earnest which may be forfeited for non-performance of the contract. Though a deposit as part payment may be any sum, a deposit retained as an earnest may not normally exceed 10 per cent of the contract price, and *Garratt v Ikeda* has not clarified precisely when a deposit becomes unconscionable. These uncertainties may invite future disputes.

The difficulties and inconsistencies of this area of law also illustrate that as business is transacted at an increasingly rapid pace, the law governing property transactions must work to govern the space between theory and practice. The courts may try to narrow this space, but they will not always succeed. Within this space lie considerable risks for those involved in property transactions, and it is the task of lawyers to attempt to ameliorate these risks. As the courts work to try to eliminate uncertainty in the law in the context of particular disputes, property lawyers must also work to ensure, as much as is possible, that uncertainty and dispute between particular parties is minimised and averted.

VOID TRANSACTIONS UNDER THE SECURITIES ACT 1978

BY STEPHEN POTTER*

The Securities Act 1978 provides legislative safeguards for investors. One of these safeguards is for an issuer to provide certain disclosure documents. The principle underlying this safeguard is that investors ought to be informed of the securities, and the market, they choose to invest in. As stated by Richardson J in *Re AIC Merchant Finance Ltd*,

the broad statutory goal [of the Securities Act 1978] is to facilitate the raising of capital by securing the timely disclosure of relevant information to prospective subscribers ... the Act is aimed at the protection of investors.¹

The protection of investors is perhaps, *prima facie*, exemplified by section 37: failing to disclose relevant information to prospective subscribers can result in any allotment of securities deemed to be invalid and of no effect.²

People who invest, or are thinking of investing, in securities in New Zealand are protected by certain provisions of the Securities Act 1978.³ An issuer who offers securities to the public and fails to meet the minimum disclosure thresholds stated in the Act ought to expect the very real risk of any consequential allotment made being invalidated and of no effect.⁴ However, an issuer who has made an allotment of securities that contravenes section 37 does not, in practice, find its allotment invalid and of no effect. This is manifestly apparent where the Securities Commission enters into an 'enforceable undertaking' with an issuer who has contravened section 37 of the Act.⁵ This often takes on the appearance of validating and making effective an allotment which is invalid and of no effect under section 37(4).⁶ The dilemma here is that, on the one hand, the Act explicitly states that any allotment of securities in contravention of any of the provisions of section 37 shall be invalid and of no effect, and on the other hand an enforceable undertaking can result in a void allotment made valid and of effect. It is worth noting that in 2004 there were wide-ranging amendments to the Securities Act 1978, and these amendments occurred as part of an Omnibus Bill. Section 37 and section 37A (which relates to voidable irregular allotments) survived the 2004 amendments intact. 'Enforceable undertakings' entered into by the Securities Commission with issuers who have breached section 37 have, prior to the 2004 amendments, been evidence of that an allotment of securities that are void are not actually 'void.' Further, the 2004 amendments included a number of qualifications to section 37, and these amendments have

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1 [1990] 2 NZLR 385 (CA).

2 Adapted from s 37(4) Securities Act 1978 and *Re AIC Merchant Finance Ltd*, *ibid*.

3 The Securities Act 1978 will be referred to from here on as 'the Act'.

4 Securities Act 1978 s 37.

5 Securities Act 1978 s 69J.

6 See, for example, South Pacific Energy Limited and Calgary Petroleum Limited: Enforceable Undertaking with the Securities Commission, 21 February 2005, available <www.sec-con.govt.nz>.

caused further confusion as to what the meaning of 'void' under the Securities Act 1978 actually means.

The distinction between a void allotment and a voidable allotment seems to have become blurred to the point where, in terms of the Securities Act 1978, void means something other than being invalid and of no effect. This article examines the impact of the 2004 Amendments⁷ to the Act on section 37. Of particular interest is whether section 37(4) means 'void,' or whether it means something less than 'void.'⁸ In truth, this problem in the securities legislation has its parallels in other fields of law. In contracts we encounter it in conditional contracts and in dealing with illegal contracts. In administrative law, we meet it in arguments that administrative action is void, voidable, or simply invalid.

Section 37(4) provides 'any allotment made in contravention of the provisions of ... section [37] shall be invalid and of no effect'. An impression that could be reasonably gleaned from this provision is that an allotment of securities failing to meet the required disclosure standards is invalid and is of no effect. In *Cowles v Syndicated Investigations Limited*⁹ Master Venning (as he was then) commented on the meaning and effect of section 37(4). The Master, in very clear terms, observed that section 37(4) provides that any allotment of securities in contravention of section 37 is invalid and of no effect. No steps need to be taken by a subscriber, or the issuer, under section 37 to avoid an allotment in contravention of section 37. Such an allotment is void ab initio as opposed to voidable. This observation is echoed in a decision by the Privy Council in *Christchurch Pavilion Partnerships No 1 v Deloitte Touche Tohmatsu Co Ltd*.¹⁰ An offer of securities failed to meet the subscription threshold stated in the registered prospectus.¹¹ It was held that the terms set out in section 37(4) expressly and clearly stated that any allotment in contravention of section 37 was necessarily invalid and of no effect.

A casual observer could be forgiven for forming the impression that a contravention of the section 37 requirements necessarily results in an allotment being invalid and of no effect. The case law, as well as the statute, appears to demand exactly that. However, this is not always the case. Perhaps it is timely to consider an observation by Kirby P in the Australian case of *Hurst v Vestcorp*.¹² This case is of interest to the Securities Act 1978 because the New Zealand Government has entered into, and recently commissioned a review on, a Memorandum of Understanding on business law co-ordination with Australia.¹³ This Memorandum of Understanding is an attempt to harmonise the securities and commerce legislation between New Zealand and Australia.¹⁴ It is prudent to take from Australian case law those observations made and experiences seen in relevant commercial and securities cases before their courts. Kirby P was

7 Securities Amendment Act 2004.

8 Compare the construction of Section 37 Securities Act 1978 (void) with Section 37A Securities Act 1978 (voidable).

9 (1998) 8 NZCLC 261 581 (HC).

10 (2002) 2 NZCLC 262 812 (PC).

11 Securities Act 1978 s 37(2).

12 (1988) 6 ACLC 286.

13 Press Release from the Minister of Commerce, P Hodgson, 25 July 2005, available <www.beehive.govt.nz>. The Memorandum of Understanding was signed by the Governments of New Zealand and Australia in 2000. The review has identified eight areas of interest for better coordination between New Zealand and Australia, including 'Seeking greater compatibility in disclosure regimes for financial products'.

14 *Ibid.*

concerned that statutory invalidity of a transaction could have dire consequences for innocent third parties. To insulate innocent parties from such injustice, the learned Judge proposed that a court may be prudent to consider four principles: (1) that the transaction is such that the statute demands the offending transaction be void, but (2) that this is not always the case, particularly where (3) the statute adequately provides machinery to meet its objects, while being ever mindful of the possible consequences upon innocent third parties, and (4) that the proscription ought not be extended beyond those transactions clearly in breach of the statute.¹⁵ These principles aim to mitigate the impact that a strict interpretation of an invalidating provision may have upon innocent third parties. With this in mind, it is useful to consider the application of section 37 of the Securities Act 1978 before and after the 2004 Amendments.

The law surrounding allotments that contravene section 37 appears to be somewhat anomalous. This is evidenced by the discretion the Securities Commission exercises against issuers contravening section 37. Often the Securities Commission approaches an issuer in breach of the Act and the parties come to an undertaking that will remedy or resolve the breach.¹⁶ Where there has been a contravention of section 37, any undertaking between the Securities Commission and the contravening issuer is something other than the allotment being 'invalid and of no effect'. The undertaking is commonly made under section 69J of the Act. The result is that the contravening allotment now becomes voidable, rather than void. It is submitted that an undertaking by way of section 69J makes voidable an allotment that is deemed void by section 37(4). A change from an allotment being void to being voidable is not, however, difficult to resolve in light of the related case law.

While these cases appear to take strict approach to the issue of invalidity under section 37(4), the overall scheme of the cases does not support such a proposition. *Cowles v Syndicated Investigations Limited*¹⁷ stated that an allotment contravening section 37 is void *ab initio* as opposed to voidable. The Privy Council in *Christchurch Pavilion Partnerships No 1 v Deloitte Touche Tohmatsu Co Ltd*¹⁸ stated that an allotment in contravention of section 37 is necessarily invalid and of no effect. Read together these cases provide support to the proposition that an allotment contravening section 37 is an illegal contract. The Court of Appeal in *Re AIC Merchant Finance Ltd*¹⁹ followed this reasoning to provide relief to subscribers of an issue that contravened section 37. The Court founded its reasoning on an *obiter* statement by Cooke J (as he was then) in *Harding v Coburn*.²⁰ This statement provided that an unlawful contract is a condition precedent to seeking relief under the Illegal Contracts Act 1970. The Court had no difficulty finding that the Illegal Contracts Act 1970 applied to contraventions of section 37.

There is an interesting discussion by Richardson J in *Re AIC Merchant Finance Ltd*²¹ about the relationship between validation of an illegal contract and the provision of relief from an illegal contract. He said:

15 (1988) 6 ACLC 286, 299.

16 See for example South Pacific Energy Limited and Calgary Petroleum Limited: Enforceable Undertaking with the Securities Commission, 21 February 2005.

17 (1998) 8 NZCLC 261 581 (HC).

18 (2002) 2 NZCLC 262 812 (PC).

19 *Re AIC Merchant Finance Ltd* [1990] 2 NZLR 385 (CA).

20 *Harding v Coburn* [1976] 2 NZLR 577, 584 (CA).

21 *Re AIC Merchant Finance Ltd* [1990] 2 NZLR 385 (CA).

... section 7 [of the Illegal Contracts Act 1970] cannot be employed to negate the effect of a provision of the Securities Act ... it follows that an allotment which is invalid under section 37(4) cannot be validated under section 7 [of the Illegal Contracts Act 1970].²²

An allotment contravening section 37 is invalid. Relief can be provided under the Illegal Contracts Act 1970, but the allotment remains invalid and of no effect. The framing of section 7(1) of the Illegal Contracts Act 1970 provides the court a wide discretion in providing relief and includes, amongst other things, validation of the contract in whole or part. It is submitted that Richardson J in *Re AIC Merchant Finance* provided that section 4 of the Securities Act 1978 proscribes absolutely the validation of an allotment in contravention of section 37 under section 7 of the Illegal Contracts Act 1970. The scope of the relief available does not include validation of an allotment in contravention of section 37. Should the Court in *Re AIC Merchant Finance* have meant to have provided that the validation of an allotment contravening section 37 could be effected under the Illegal Contracts Act 1970, then Richardson J would not have stated 'that an allotment which is invalid under section 37(4) cannot be validated under section 7 [of the Illegal Contracts Act 1970]'.²³ The practice of the Securities Commission in exercising its jurisdiction under section 5(5) and section 69J of the Act could be viewed as being *prima facie* at odds with the way in which the law has developed. An allotment that is invalid and of no effect by dint of contravening section 37 ought not be validated, but rather ought to be the subject of relief according to the equity of the circumstances. This is what both the courts and section 69J undertakings have achieved.

The current Securities Act 1978 was amended during April 2004. The Bill which gave rise to the amendments was divided from an Omnibus Bill introduced by the Government and titled the 'Business Law Reform Bill'. The amendments of note for this article are found in Part II of the Act. They are sections 4(5), 37AA, 37AH, and 37AI.

Section 4(5) provides that '... Nothing in the Illegal Contracts Act 1970 applies to sections 37 and 37A.' The scope of this amendment was to provide some basis for capturing issuers in jurisdictions other than New Zealand who may contravene section 37 or section 37A.²⁴ It is submitted that this amendment has contributed nothing to the effectiveness of the Act against parties in jurisdictions other than in New Zealand. An equally effective mechanism would have been to have amended the principal Act to read 'The Illegal Contracts Act 1970 applies to sections 37 and 37A.' However, the drafters of the Bill which amended the Securities Act 1978 during April 2004 also provided relief provisions which can be found in Part II of the Securities Act 1978. These provisions are '37AA: Applications for relief orders in respect of section 37', '37AC: Court must make relief order in certain circumstances', and '37AH: When Court may make relief order in respect of Section 37'.

Section 37AA provides for applications for relief orders. It sets a tripartite statutory threshold to be met for any relief order in respect of section 37. There must be a contravention of section 37, the contravention of section 37 can be retrospective, and there must be at least one subscriber. Where the security in question has been repaid under section 37(5) or section 37(6), the subscriber may not have standing to apply for a relief order.

22 Ibid at 393.

23 Ibid.

24 Brian Connell MP (National-Rakaia) *Hansard* 6 April 2004 p 12425; Stephen Franks MP (ACT) *Hansard* 6 April 2004 p 12426.

It is submitted that the wide scheme provided by section 37AA for determining standing to apply for a relief order where allotments contravene section 37 is beneficial to the administration of the Act. The provision empowers subscribers who have been exposed to allotments that contravene section 37 to recognise whether or not they have standing to apply for a relief order. In this sense section 37AA supports the purpose of the Act, which is to protect investors.

Some relief orders are mandatory. A court must make a relief order where the application of section 37 to the allotment of the security has been made by certain persons. These persons include a subscriber, a security holder, and an issuer. Where the issuer is the applicant for a mandatory relief order, the consent of the subscriber or the security holder must be obtained. Where the issuer has contravened section 37 of the Act by failing to comply with the terms of an exemption issued under section 5(5), the issuer has standing to apply for a mandatory relief order subject to certain conditions. These conditions are focussed around the subscriber. The issuer must give notice of the contravention to the subscriber, and the subscriber ought not to have objected to the making of a relief order. Application of a mandatory relief order can include contraventions of section 37 that have occurred regardless of time, and can be sought in conjunction with a discretionary relief order.

A difficulty with section 37AA is the manner in which its provisions have been framed. The jurisdiction captured by the section appears to, in section 37AA (1), include any circumstance relating to the application of section 37. The specific wording is 'in respect of the application of section 37 to the allotment of the security'. The provision is not limited to contraventions of section 37. However, section 37AA (2) relates exclusively to contraventions of section 37 regardless of time. The difficulty is further compounded when exploring the legislative history of the part; there appears to be a curtain of silence over the reasons behind the drafting of the provision in the manner in which it was enacted. It is submitted that the purpose of the mandatory relief order is to fill the 'void' left by section 4(5) in denying any relief from contraventions of section 37 by way of the *Illegal Contracts Act 1970*.

Discretionary relief orders under section 37AH may also be considered. Section 37AH appears, at face value, to be the most significant amendment made to the *Securities Act 1978* by the *Securities Amendment Act 2004*. Its terms not only echo, but widen, the principles seen in section 7 of the *Illegal Contracts Act 1970* and the law developed by the courts in the application of section 37. This is particularly the case for contraventions of section 37, as captured by section 37(4). The court has a discretion to make any relief order that it considers 'just and equitable' to make in the application of section 37. Clearly, this includes validating an allotment that is void, if the court considers that it is just and equitable to do so. As seen in sections 37AA and 37AC, this section applies to contraventions of section 37 irrespective of when the contravention occurred. The discretion of the court under this section is unfettered. There is a list of matters to which the court must have regard when considering a relief order under section 37AH. The provision endows an unfettered discretion upon the court. The provision states the court must have regard to, amongst others, 'any other matters that the Court thinks fit' when considering a relief order in terms of section 37. As with section 37AC, it is submitted that the scope of section 37AH ought to fall within the ambit of section 37(4), namely, that a contravention of section 37 must exist. The effect of section 4(5) is thus provided for in the machinery provisions of sections 37AA, 37AC, and 37AH, amongst others. An allotment which is, by virtue of section 37(4), deemed to be invalid and of no effect, allows a party with standing, to apply for relief from the invalidity.

The provisions of sections 37AC and section 37AH can be compared. They both appear to capture a larger range of matters than void irregular allotments alone. There is scope within the drafting of these provisions to interpret ‘in respect of the application of section 37 to the allotment of the security’ to go beyond those allotments that are irregular and also void. It may or may not capture situations where an allotment has not been made. For example, a disgruntled subscriber who fails to secure an allotment because of section 37 may have standing under section 37AA to bring an application to the court to seek a mandatory relief order. The relief order sought by the subscriber may be the allotment of the securities. The scope of the relief orders available to the court are not provided under section 37AC. It may be that the court issues a declaration stating a specific kind of relief, or that the relief sought has to be provided for in the application to the court for mandatory relief. Common sense dictates that the applicant ought to state the scope of the relief sought. The provisions of section 37AC are silent. Whether the legislative intent was to provide the court with as wide a jurisdiction as possible when considering the options for mandatory relief orders, or whether the drafters never turned their mind to this, is something I have not been able to ascertain. The difficulty with a mandatory relief order is best seen in light of section 37AH. Here the statutory provisions empower the court with a wide discretion when considering relief orders. In light of the contrasts between the jurisdictions of the court to issue relief orders, an applicant would, it is submitted, be prudent to do so under section 37AH. The court’s jurisdiction under section 37AH is more reflective of an equitable one than under section 37AC. This is made out on the statutory terms.

The statutory scheme of section 37AH is in accord with the existing body of case law. One common thread running through the cases decided under section 37 is that of a sense of equity. The courts look to find an outcome that is just and fair between the parties. In *Re Dingwall & Paulger Ltd (in rec); Steel v New Zealand Guardian Trust Co Ltd*,²⁵ Ellis J held that equitable principles were at work which estopped an issuer from claiming funds held in trust for subscribers were part of an allotment that was invalid and of no effect. The relief provided the subscribers was found in the Illegal Contracts Act 1970. In *Westpac Financial Services Ltd v Securities Commission*²⁶ Doogue J in the High Court exercised an equitable discretion available under the Illegal Contracts Act 1970 to validate an allotment that had fallen foul of section 37. It appears that both parties came to the court with clean hands, the oversight that resulted in the contravention being unintentional and trivial. In *Re AIC Merchant Finance Ltd*²⁷ the Court of Appeal also employed equitable principles in finding that relief under the Illegal Contracts Act 1970 was available to subscribers of an allotment contravening section 37. The Illegal Contracts Act 1970 provides that the court can grant ‘such relief ... as in its discretion thinks just’,²⁸ and further when considering the relief to be given to have regard to ‘such ... matters as it thinks proper’.²⁹ This clearly provides the court with a wide discretion as to the relief available to a party to an invalid allotment. The fit that the Illegal Contracts Act 1970 has with the Securities Act 1978, as amended, is, as noted above, nowhere closer than in section 37AH.

25 (1990) 5 NZCLC 66780.

26 (1996) 7 NZCLC 261106.

27 [1990] 2 NZLR 385.

28 Illegal Contracts Act 1970 s 7(1).

29 Illegal Contracts Act 1970 s7(3)(c).

We have seen that an allotment that contravenes section 37 of the Securities Act 1978 is deemed to be invalid and of no effect.³⁰ However, the Illegal Contracts Act 1970 has provided a firm basis to provide relief where adherence to the strict letter of the law would deliver injustice to innocent parties. Kirby J was concerned that statutory invalidity of a transaction could have dire consequences for innocent third parties. This concern has been echoed in New Zealand judgments, including that of Fisher J in *DFC Financial Services v Abel*.³¹ The concern of the courts has been to ensure their treatment of the equity of the case before them is not shackled by narrow or strict interpretations of invalidating provisions. The Securities Act Amendment Act 2004 provided machinery for the courts to provide relief directing out of the Securities Act 1978. Of particular note are sections 37AC and 37AH. The difference between these may be illusionary, but it is submitted that an applicant seeking relief under one of these provisions would be wise to seek it under a discretionary relief order. The machinery of the provision endows the court with any extremely wide ambit to do justice between the parties, particularly where a subscriber has suffered losses following an allotment that contravenes section 37.

The question whether void means void, or is something else, has never really been in question. As noted, Kirby J was concerned that a strict approach to an invalidating provision could cause hardship and injustice to innocent third parties. It is submitted that it is not only innocent third parties that can be dealt an injustice by a narrow interpretation of an invalidating provision, but also innocent parties to an allotment. Void, in terms of the Act, has never strictly meant void; it has always meant something else. That something else is now manifested in sections 37AC and 37AH in particular. An allotment which contravenes section 37 may appear invalid and of no effect, but this is not the case at all. The allotment is subject to inquiry by the courts, enforceable undertakings with the Securities Commission, and other mechanisms of resolution now available under the Securities Act 1978.

30 Securities Act 1978 s 37(4).

31 [1991] 2 NZLR 619.

TAMIHANA KOROKAI AND NATIVE TITLE: HEALING THE IMPERIAL BREACH

BY JOHN WILLIAM TATE*

The New Zealand courts' response to native title from 1847 to 1912 makes a fascinating story. It is one of inconsistencies, prevarication and shifts of opinion. Although the New Zealand courts, very early in their history, fully recognized native title at common law, the infamous judgment of *Wi Parata v Bishop of Wellington*, delivered by the New Zealand Supreme Court in 1877, led to a complete reversal in this regard, native title being refused recognition in the courts altogether.¹ It was the *Wi Parata* judgment which governed New Zealand judicial opinion on native title in the following decades. However, the affirmation of this precedent in subsequent judgments eventually led to an open breach between the New Zealand Court of Appeal and the Privy Council in 1903, the latter holding to a very different position on native title and its justiciability in the courts.² This breach is understandable when we consider that much was at stake for New Zealand colonial society in the question of native title at this time. If it was upheld in the courts that Maori plaintiffs could bring a native title claim against the Crown, then, it was generally believed among New Zealand colonial authorities, that the stability and security of all Crown titles in the country would be at risk.³ On the other hand, if it was held that native title claims were not enforceable against

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1 See *Wi Parata v Bishop of Wellington* (1878) 2 NZ Jur. (NS) SC 72, at 79, 80. For the earlier New Zealand judgments which did recognize native title at common law, see *The Queen v Symonds* (1847) NZPCC(SC), at 390, per Chapman J; *Re The Lundon and Whitaker Claims Act 1871* (1872) 2 NZ Court of Appeal Reports 41, 49-50.

2 This breach took the form of an official protest by the Court of Appeal against the Privy Council. See '*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903', [1840-1932] NZPCC Appendix, 730. Concerning my contention that it was really the differences between the Privy Council and the New Zealand courts concerning native title that animated this protest, see below n 5.

3 This is because such native title claims generally involved a challenge to the legality of specific Crown titles on the grounds that the native title to those lands had not been extinguished by the Crown as a preliminary to the grant of such titles. The Solicitor-General, in *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321, gave expression to settler concerns over this issue when, in presenting the case for the Crown, he said: 'Native title is not available in any manner and for any purpose against the Crown. As against the Crown it is not a legal title at all ... If this is not the principle the Natives could go on a claim based on customary title to the Native Land Court and claim to have the title to all Crown lands investigated.' *ibid*, at 331-32. See below nn 39 and 40 where judges of the Court of Appeal expressed similar concerns.

the Crown, then this danger no longer arose.⁴ It was precisely these two alternatives which divided the New Zealand courts and the Privy Council from the time of the latter's first determination of a New Zealand native title case on appeal.⁵

It is for this reason that the New Zealand Court of Appeal's decision in *Tamihana Korokai v Solicitor-General* in 1912 is so significant, because it allowed the Court of Appeal to go some way to healing the imperial breach on native title that had reached its culmination in 1903. At first sight, it would appear that this healing was achieved largely by the Court of Appeal yielding, in this case, to the Privy Council position on native title. Yet as we shall see, a closer reading suggests a much more subtle strategy, involving the Chief Justice of the Court of Appeal attempting to elide some of his Court's past differences with the Privy Council, albeit somewhat unsuccessfully, in an attempt to minimize the break of some nine years before.⁶

Further, although the 1912 judgment did in many ways break from the precedent of *Wi Parata v Bishop of Wellington*, and adopt a position closer to that of the Privy Council, this was only in the context of those areas where the Privy Council had itself departed from *Wi Parata*. As we shall see, despite the breach between the New Zealand courts and the imperial authorities over native title, there was one key area in which there was no breach at all, and that was the status of Crown grants in relation to native title.

Also, to the extent that *Tamihana Korokai v Solicitor-General* affirmed the Privy Council's departure from *Wi Parata*, it did so in the context of a broader New Zealand legislative framework whose intent was to uphold the *Wi Parata* precedent, and so protect it from such judicial

4 Hence in *Tamihana Korokai*, the Solicitor-General, in presenting the case for the Crown, focuses on these alternatives, stating that only if the Crown was able, on its own behalf, to decide the outcome of the native title claims against it, independently of the Courts, would Crown grants be secure; see *Tamihana Korokai v The Solicitor-General*, above n 3, at 331-32.

5 The first New Zealand native title case which the Privy Council considered was *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371, which was an appeal from the New Zealand Court of Appeal ruling in *Nireaha Tamaki v Baker* (1894) 12 NZLR 483. This judgment, along with the following Privy Council decision in *Wallis v Solicitor-General* [1903] AC 173, departed sufficiently from established New Zealand precedent on native title, as embodied in the *Wi Parata* judgment, that it led directly to the Court of Appeal's official protest against the Privy Council in 1903. Of course, the Protest itself was not officially concerned with the Privy Council's departure from the *Wi Parata* precedent. Rather, its ostensible pretext was the aspersions which the Court of Appeal believed the Privy Council had cast in their *Wallis* judgment on the independence and integrity of the Court of Appeal (see '*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903', above n 2, at 730, per Stout CJ; at 747, 755-56 per Williams J; at 757, per Edwards J). However the real animus motivating the Protest appears to be the extent to which the Privy Council had undermined the established New Zealand precedents on native title, thereby, in the opinion of the Court of Appeal judges, threatening the stability and security of land tenure in New Zealand (see *ibid*, at 746, per Stout CJ; at 750, per Williams J; at 757, per Edwards J). Indeed, all went as far as to accuse the Privy Council of ignorance of New Zealand law on these and other matters (see *ibid*, at 732, 737, 743, 745, 746, per Stout CJ; at 756, per Williams J; at 758-59, per Edwards J).

6 It was my reading of Paul McHugh's account of the *Tamihana Korokai* judgment which first brought this strategy of the Chief Justice to my attention: P. McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991) p 121. This strategy involved the Chief Justice, Sir Robert Stout's decision to base his statutory recognition of native title rights in New Zealand on the Native Land Act 1909. Yet whereas McHugh believes that Stout CJ was successful in his strategy, managing to 'extricate himself, in so far as the choice of the 1909 legislation cast no shadow upon his earlier decisions' (*ibid*), I argue later in this article that he was very far from successful, his choice of the 1909 legislation being at odds not only with part of his earlier decision in *Hohepa Wi Neera v The Bishop of Wellington* (1902) 21 NZLR 655 (CA), but also with earlier parts of his same judgment in *Tamihana Korokai*.

departures. In this respect, I argue below that the Court of Appeal's *Tamihana Korokai* decision was essentially *ironic*, in this as in other ways.

Finally, although *Tamihana Korokai v Solicitor-General* did break from *Wi Parata v Bishop of Wellington* in ruling that, in specific circumstances, Maori did have a statutory right to bring native title claims against the Crown in the Native Land Court, thereby reversing the *Wi Parata* trend which had marginalized Maori claims for the sake of settler interests, nevertheless it was very far from a return to those landmark pre-*Wi Parata* decisions which had actually gone further in the recognition of native rights against the Crown by upholding a common law basis for native title.⁷

Consequently, besides looking at how the New Zealand Court of Appeal responded to the Privy Council's departure from *Wi Parata*, one other purpose of this paper is to qualify the misleading claim that the New Zealand courts were able to ignore this departure and maintain their allegiance to *Wi Parata* altogether.⁸ As the following discussion of *Tamihana Korokai v Solicitor-General* will show, while certain elements of the *Wi Parata* judgment were retained, nevertheless in other respects, there was a significant move on the part of the New Zealand Court of Appeal to embrace the Privy Council view on native title. Consequently, the history of the reception of native title in New Zealand courts in the wake of *Wi Parata* is more nuanced and complex than is suggested by the view that there was a mere confirmation of *Wi Parata* throughout. And it is precisely this complexity that is demonstrated by a close analysis of the *Tamihana Korokai* judgment.

7 For these pre-*Wi Parata* decisions, see above n 1.

8 Paul McHugh gave some credence to this view when he suggested that the Court of Appeal took 'scant stock' of the Privy Council decision in its subsequent *Hohepa Wi Neera* judgment (McHugh, *The Māori Magna Carta*, above n 6, at 119). I have strongly criticized McHugh's reading of this case in Tate, 'Hohepa Wi Neera: Native Title and the Privy Council Challenge' (2004) 35 VUWLR 73 at 75. Nevertheless it is important to note that McHugh does recognise that there was a subsequent attempt by the Court of Appeal to move away from *Wi Parata* and meet the Privy Council position in the Court of Appeal's *Tamihana Korokai* decision (see McHugh, *The Māori Magna Carta*, above n 6, at 121). The Waitangi Tribunal has also upheld this notion that the New Zealand Courts continued to affirm *Wi Parata* despite the Privy Council departure from it. As the Tribunal has said, despite the Privy Council judgments in *Nireaha Tamaki v Baker* (1901) and *Wallis v Solicitor-General* (1903), 'the New Zealand Courts pursued the *Wi Parata* view'. (Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (1987), s 4.6). However while it is true, as the Tribunal states, that 'a host of subsequent cases' did affirm the *Wi Parata* principle that 'the Maori people have no particular aboriginal rights, save those conferred by statute', there were other important aspects of the *Wi Parata* judgment which the Court of Appeal did reject in the wake of the Privy Council rulings, not least the *Wi Parata* defence of Crown prerogative over native title (see 'IV. Tamihana Korokai and the Question of Crown Prerogative' below). Similarly, it is not correct for the Waitangi Tribunal to claim that subsequent judgments upheld the *Wi Parata* view that the Treaty of Waitangi has 'no persuasive let alone legal status' (Orakei Report, above, s. 4.6). Numerous New Zealand court judgments in the wake of *Wi Parata* testified to the moral, if not legal, status of the Treaty of Waitangi, some even going so far as to claim that it was binding on the conscience of the Crown: *Mangakahia v New Zealand Timber Co* (1881-82) 2 NZLR 345, at 350 per Gillies J; *Mueller v Taupiri Coal-Mines* (1900) 20 NZLR 89, at 122 per Edwards J; '*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903', above n 2, at 732 per Stout CJ; *Hohepa Wi Neera v Bishop of Wellington*, above n 6, at 662 per Stout CJ; *Tamihana Korokai v Solicitor-General*, above n 3, at 343 per Stout CJ.

I. NATIVE TITLE IN THE NEW ZEALAND COURTS 1847-1903

A. Early Native Title Decisions

Native title first came before the New Zealand Courts in 1847. In this case, *The Queen v Symonds*, the New Zealand Supreme Court followed what it believed to be a wide range of authorities, including English common law, the United States Supreme Court, and the law of nations, in holding that native title was cognisable at common law, and so justiciable in the courts against the Crown.⁹ Similarly, some twenty-five years later, in *Re The Landon and Whitaker Claims Act 1871* (1872), the New Zealand Court of Appeal also upheld this common law recognition of native title. As Arney CJ said, in delivering the judgment of the Court:

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. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land by English tenure must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand is vested and resides in the Crown, until it be parted with by grant from the Crown. In this large sense, all lands over which the Native title has not been extinguished are Crown lands.¹⁰

B. *Wi Parata v Bishop of Wellington*

Yet in 1877, the New Zealand Supreme Court, under Prendergast CJ, fundamentally reversed this position, in a way that did not even directly confront these earlier judicial decisions.¹¹ Prendergast

9 It was the judgment of Chapman J which most fully confirmed this recognition of native title, although Martin CJ fully concurred with him on the matter: *The Queen v Symonds*, above n 1, at 393. Hence Chapman J said: 'Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers': *ibid*, at 390. On Chapman J's reliance on the wider authorities mentioned above (including common law) in arriving at this conclusion concerning native title, see *ibid*, at 388.

10 *Re The Landon and Whitaker Claims Act 1871*, above n 1, at 49-50. With these words, the Court of Appeal was simply recognising the common law principle that native title precedes the radical title of the Crown, is a 'burden' upon that radical title, and is therefore co-existent with that radical title. This principle is fundamental to native title in English common law. A recent expression of it occurred in the *Mabo* case: 'Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory'. *Mabo v Queensland* [No. 2] (1992) 175 CLR 1, at 51, per Brennan J. Cf *ibid*, 50-51, 63 per Brennan J; *ibid*, 86-87, per Deane and Gaudron JJ. For a recent New Zealand ruling that expresses a similar view, see *Ngata Apa v Attorney-General* (2003) 3 NZLR 643, at 654-56 per Elias CJ.

11 For a discussion of the strategies which Prendergast CJ employed within his *Wi Parata* judgment to avoid directly confronting these earlier contrary rulings on native title, even though his judgment necessarily overturned them as precedents, see J W Tate, 'Pre-*Wi Parata*: Early Native Title Cases in New Zealand', (2003) 11 *Waikato L Rev* 112, 123-25. Because he avoided confronting these earlier precedents head-on, Prendergast CJ's actual references to them in his *Wi Parata* judgment were oblique. His single reference to Landon and Whitaker Claims involved a point of law unrelated to native title: *Wi Parata v Bishop of Wellington*, above n 1 at 79. While his two references to *The Queen v Symonds* either asserted that it gave rise to a precedent which conformed to his own ruling (see *ibid*, at 78); or that it was mistaken in its interpretation and citation of one of the early American precedents on native title (see *ibid*, at 80-81).

CJ insisted that native title was not cognisable at common law, and therefore was not justiciable within New Zealand courts.¹² Further, he insisted that native title claims were not enforceable against the Crown because they fell within the Crown's prerogative powers.¹³ Such prerogative powers were held to be outside the jurisdiction of the Courts, and so Prendergast CJ held that any native title claims involving the Crown were 'not examinable by any Court'.¹⁴ The result was that the Crown was to be the 'sole arbiter of its own justice' on native title issues, able to terminate native title claims in the Courts simply by its own declaration that native title had been lawfully extinguished.¹⁵

Regarding land that had already been alienated to settlers in the form of Crown grants, Prendergast CJ held that these were immune from any native title challenge, because the fact the Crown had issued a grant for land was considered by Prendergast CJ to be, in itself, sufficient declaration by the Crown that the native title had been lawfully extinguished.¹⁶ In this way, Prendergast CJ protected all existing Crown grants from native title challenge, because the grants themselves were held to be sufficient proof of their own lawful validity.

12 Prendergast CJ denied that Maori had any native title cognisable at common law by denying they had any native title at all. He did so by claiming that Maori lacked any customary basis on which such property rights could be based (see *Wi Parata v Bishop of Wellington*, above n 1, at 77, 79). On this basis, he claimed, the Crown assumed in its land legislation in New Zealand that 'there existed amongst the natives no regular system of territorial rights nor any definite ideas of property in land' (ibid, at 77). Concerning the non-justiciability of native title in the Courts, Prendergast CJ said: 'On the one hand, it has always been certain that a Maori could bring trespass or ejection in respect of land held by him under a Crown grant. On the other hand, it has been equally clear that the Court could not take cognizance of mere native rights to land'. (ibid, at 79).

13 Prendergast CJ argued that native title matters fell within the Crown's prerogative powers because any obligations or duties of the Crown arising under them were 'in the nature of a treaty obligation' (ibid, at 79). Hence being 'in the nature of a treaty obligation', Prendergast CJ held that any actions of the Crown in regard to native title must be regarded as 'acts of State' and 'therefore are not examinable by any Court' (ibid, at 79). Paul McHugh has criticized Prendergast CJ's assumption that it was possible for the Crown to 'make or claim an 'act of state' against its own subjects', arguing that even at the time of his judgment, such an assumption was mistaken in law: McHugh, *The Māori Magna Carta*, above n 6, at 114.

14 See *Wi Parata v Bishop of Wellington*, above n 1, at 79.

15 Concerning the Crown as the 'sole arbiter of its own justice', Prendergast CJ said: '[I]n the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be *the sole arbiter of its own justice*. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based': (ibid, at 78, my emphasis). Part of this capacity of the Crown as the 'sole arbiter of its own justice' on native title issues concerned its capacity, according to Prendergast CJ, to oust the jurisdiction of the courts on any native title matter simply by declaring, on its own authority, that the native title in question had been extinguished. Prendergast CJ actually referred to two Native Land Acts which he believed gave the Crown a statutory authority in this regard: ibid, at 80. But he believed that these statutes themselves simply recognized and confirmed, rather than created, a pre-existing prerogative right of the Crown to make such declarations. As Prendergast CJ stated: 'In our judgment these enactments introduce no new principles, but merely provide a convenient mode of exercising an indubitable prerogative of the Crown': ibid. Certainly counsel for the Crown went to great lengths to advance this declaratory principle against native title claimants in the courts, insisting that the Crown's declaration on the status of the native title in question should be conclusive upon the courts. See *Nireaha Tamaki v Baker* (1894), above n 5, at 486-87 per Gully for the defendant; *Hohepa Wi Neera*, above n 6, at 659, per Gully for the Solicitor-General; *Tamihana Korokai v Solicitor-General*, above n 3, at 331-32 per Solicitor-General.

16 As Prendergast CJ stated: 'In this country the issue of a Crown grant undoubtedly implies a declaration by the Crown that the native title over the land which it comprises has been extinguished': *Wi Parata v Bishop of Wellington*, above n 1, at 78.

Not all aspects of Prendergast CJ's native title judgment were consistent, and I have argued elsewhere that, taken as a whole, *Wi Parata v Bishop of Wellington* was fundamentally contradictory.¹⁷ Nevertheless it became the authoritative precedent on native title in New Zealand for the next twenty-five years.¹⁸

C. *Nireaha Tamaki v Baker*

However in 1901, the Privy Council delivered a judgment in *Nireaha Tamaki v Baker* which overturned part of this *Wi Parata* legacy.¹⁹ The New Zealand Court of Appeal, some years earlier, had rejected the appellant's case by upholding the *Wi Parata* precedent that the courts had no jurisdiction to inquire into native title matters involving the Crown. Delivering the judgment of the Court of Appeal, which at that stage still included Sir James Prendergast as Chief Justice, Richmond J had said:

[T]he case is within the direct authority of *Wi Parata v The Bishop of Wellington*. We see no reason to doubt the soundness of that decision ... According to what is laid down in the case cited, the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the colony.²⁰

In making this claim, the New Zealand Court of Appeal was merely upholding that part of *Wi Parata* which held that native title matters involving the Crown fell within the Crown's prerogative powers, and so could be excluded by the Crown from the jurisdiction of the courts. The Privy Council, in considering the judgment on appeal, did not deliver a ruling on the prerogative in general, but it did reject the Court of Appeal's application of the prerogative in the specific instance of the case before it. It did so by insisting that, contrary to *Wi Parata*, there existed within the Native Rights Act 1865 a statutory right to native title in New Zealand that, in specified circumstances, was enforceable against the Crown. Prendergast CJ had denied that the Crown was subject to the Native Rights Act by claiming that the right of Maori referred to in the Act to have their native title claims determined in the Native Land Court was not binding on the Crown.²¹ The Privy Council, in contrast, produced a very different reading of the Native Rights Act, which held it to be binding on the Crown:

17 See Tate, 'Pre-Wi Parata: Early Native Title Cases in New Zealand', above n 11, at 121-25. See also Tate, 'The Three Precedents of *Wi Parata*' (2004) 10 Canterbury L Rev 273.

18 For the orthodox line of New Zealand judicial authority upholding the *Wi Parata* precedent on native title see *Nireaha Tamaki v Baker* (1894), above n 5 at 488 per Richmond J; *Solicitor-General v The Bishop of Wellington* (1901) 19 NZLR 665 at 685-86 per Williams J; *Hohepa Wi Neera v Bishop of Wellington*, above n 6, at 667 per Stout CJ; and *ibid.*, at 671-72 per Williams J. For the New Zealand judgments which were an exception to this rule, and so challenged the authority of *Wi Parata*, see Tate, 'Pre-Wi Parata: Early Native Title Cases in New Zealand', above n 11, at 112, note 2. Yet these exceptions were minor and were, in any case, primarily centered on Prendergast CJ's dismissal of the Treaty. As such, the dominant precedent in New Zealand on native title which the Privy Council eventually confronted was *Wi Parata*.

19 In this case, the appellant, Nireaha Tamaki, claimed an interest in a piece of land the native title to which, he argued, had never been extinguished – see *Nireaha Tamaki v Baker* (1900-01), above n 5, at 371. On this basis, he brought an action to prevent the respondent, the Commissioner of Crown Lands, from selling the land pursuant to ss 136 and 137 of the Land Act 1892.

20 *Nireaha Tamaki v Baker* (1894), above n 5, at 488.

21 See *Wi Parata v Bishop of Wellington*, above n 1, at 80.

It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence. By s. 5 it is plainly contemplated that cases might arise in the Supreme Court in which the title or some interest in Native land is involved, and in that case provision is made for the investigation of such titles and the ascertainment of such interests being remitted to a [Native Land] Court specially constituted for the purpose ... Their Lordships think that the Supreme Court are bound to recognize the fact of the 'rightful possession and occupation of the Natives' until extinguished in accordance with law in any action in which such title is involved, and (as has been seen) means are provided for the ascertainment of such a title ... Their Lordships therefore think that, if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the lands in dispute under a Native title which has not been lawfully extinguished, he can maintain this action to restrain an unauthorized invasion of his title.²²

This statement in *Nireaha Tamaki v Baker* constitutes the first significant imperial departure from *Wi Parata v Bishop of Wellington*. In it, the Privy Council insisted that native title was cognisable within the municipal courts, though it seems largely on the basis of sections 3 to 5 of the Native Rights Act 1865.²³ Further, in the passage above, it insisted that all such matters may be referred by the municipal courts to the Native Land Court. It seems therefore that, contrary to *Wi Parata*, the Privy Council found that, at least in the instance of the case before it, the Crown is not the 'sole arbiter of its own justice' on native title matters, but rather is subject to the determination of the courts.²⁴

Yet the Privy Council arrived at this conclusion only by evading the question which had been at the heart of *Wi Parata* – the status of the Crown's prerogative powers over native title in general. In particular, it avoided the question of whether, as a matter of principle, native title matters could still fall *within* this prerogative and therefore *outside* the jurisdiction of the courts, irrespective of its judgment in the present case. It did so by ruling that the defendant in the case before it, the Commissioner of Crown Lands, was exercising his authority not under Crown prerogative, but under statute, the determination of which fell squarely *within* the jurisdiction of the courts.²⁵ This allowed the Privy Council to reserve judgment on whether the case would still be within its jurisdiction if the Commissioner had been exercising his authority under Crown prerogative.²⁶

So although the Privy Council clearly affirmed that native title existed in New Zealand (a point at times denied by Prendergast CJ in *Wi Parata*²⁷) and affirmed that it was cognisable within the Courts if it fell within statutory limits, nevertheless it refused to challenge the central *Wi Parata* ruling that the Crown was the 'sole arbiter of its own justice' on native title matters falling within its prerogative powers, because it refused to rule out the continued existence of the prerogative.

The other element of *Wi Parata v Bishop of Wellington* that the Privy Council did not challenge, but in this case affirmed, concerned Prendergast CJ's claim that the existence of a

22 *Nireaha Tamaki v Baker* (1900-01), above n 5, at 382-83. My addition. The other aspect of the *Wi Parata* legacy overturned by the Privy Council in this case was the claim by Prendergast CJ that native title had no existence whatsoever, there not being the customary laws and practices within Maori society capable of giving rise to 'definite ideas of property in land': see above n 12. The Privy Council responded that, given the explicit references to native title in the Native Rights Act 1865, 'it is rather late in the day for such an argument to be addressed to a New Zealand Court': *Nireaha Tamaki v Baker* (1900-01), above n 5, at 382.

23 See *ibid*, at 382-83.

24 For an account of how the Court of Appeal was forced to respond to such a ruling in the next native title case it adjudicated, see Tate, 'Hohepa Wi Neera: Native Title and the Privy Council Challenge', above n 8.

25 See *Nireaha Tamaki v Baker* (1900-01), above n 5, at 380-81.

Crown grant to the land in question was, in itself, sufficient declaration by the Crown that the native title had been lawfully extinguished, and so was binding on the courts.²⁸ However, while Prendergast CJ viewed the existence of a Crown grant as evidence of the Crown's 'declaration' that native title had been extinguished, and therefore as a sign that a prerogative power had been exercised, the Privy Council's reservation of judgment concerning that prerogative makes it likely that it saw the Crown grant, not as a sign of a prior exercise of the prerogative, but rather as conclusive material evidence that the Crown had actually concluded lawful native title negotiations with the original Maori owners. Nevertheless, even this use of the grant as conclusive material evidence is essentially question-begging, since it assumes that the mere existence of a grant implies that, in all instances, the Crown has acted lawfully in its extinguishment of native title. (Such an assumption of legality had also always been made in relation to the exercise of the prerogative.²⁹) Indeed, the effect of this assumption, in so far as it allows all Crown grants to be sufficient material testimony to their own lawful validity regarding the extinguishment of native title, is the same as the prerogative. This effect is to ensure that in matters of native title, the

26 Lord Davey, in delivering the judgment for the Privy Council, reserved judgment on the question of the prerogative as follows: 'If all that is meant by the respondent's argument is that in a question between the appellant and the Crown itself the appellant cannot sue upon his Native title, there may be difficulties in his way (whether insurmountable or not it is unnecessary to say), but for the reasons already given that question, in the opinion of their Lordships, does not arise in the present case': *ibid.*, at 383. However contrary to the line of authority which had upheld *Wi Parata* in New Zealand and had treated the Crown prerogative over native title as a material reality capable of excluding the jurisdiction of the courts, the Privy Council implied that it would be extremely rare for the Crown prerogative over native title to still arise given that the extinguishment of native title in New Zealand seemed to now be wholly governed by statute. In fact, they even cast doubt on the continued existence of this prerogative power. As Lord Davey stated: 'But it is argued that the Court has no jurisdiction to decide whether the native title has or has not been extinguished by cession to the Crown. It is said and not denied that the Crown has an exclusive right of pre-emption over native lands and of extinguishing the Native title. But that right is now exercised by the constitutional Ministers of the Crown on behalf of the public in accordance with the provisions of the statutes in that behalf, and there is no suggestion of the extinction of the appellant's title by the exercise of the prerogative outside the statutes *if such a right still exists*': (*ibid.*, at 381-82. My emphasis). Yet although they passed doubt on its continued existence, the Privy Council still reserved judgment on the actual status of this prerogative power, and whether it could still arise to exclude native title matters from the Courts, stating: 'Their Lordships ... express no opinion on the question which was mooted in the course of the argument whether the Native title could be extinguished by the exercise of the prerogative, which does not arise in the present case': *ibid.*, at 385.

27 See above n 12.

28 See above n 16. Hence in *Nireaha Tamaki v Baker*, although the Privy Council criticized and overruled some of the wider elements of *Wi Parata*, it nevertheless affirmed the latter's strict conclusions on the facts of the case. These conclusions included Prendergast CJ's claims concerning the status of Crown grants in relation to native title. As Lord Davey stated: 'In the case of *Wi Parata v. The Bishop of Wellington*, already referred to, the decision was that the Court has no jurisdiction by *scire facias* or other proceeding to annul a Crown grant for matter not appearing on the face of it, and it was held that the issue of a Crown grant implies a declaration by the Crown that the Native title has been extinguished. If so, it is all the more important that Natives should be able to protect their rights (whatever they are) before the land is sold and granted to a purchaser ... As applied to the case then before the Court however, their Lordships see no reason to doubt the correctness of the conclusion arrived at by the learned judges': *Nireaha Tamaki v Baker* (1900-01), above n 5, at 383-84.

29 Hence in relation to the prerogative, Prendergast CJ stated: 'Especially it cannot be questioned, but must be assumed, that the sovereign power has properly discharged its obligations to respect and cause to be respected, all native proprietary rights': *Wi Parata v Bishop of Wellington*, above n 1, at 79.

Crown is still the ‘sole arbiter of its own justice’ regarding the validity of existing Crown grants, since the grants themselves are conclusive evidence in favour of the Crown.

Consequently, the decision of the Privy Council in *Nireaha Tamaki v Baker* to uphold this aspect of *Wi Parata v Bishop of Wellington* meant that subsequent New Zealand courts were still able to rule against native title claims that purported to declare that a Crown grant was unlawful because native title had not been lawfully extinguished as a preliminary to its issue. They were able to do so because the very existence of the grant was held to be conclusive evidence to the contrary.³⁰

D. *Wallis v Solicitor-General*

Yet whereas *Nireaha Tamaki v Baker* pointedly reserved judgment on the Crown’s prerogative power over native title, the next Privy Council decision on appeal from New Zealand was not so chary. In this respect, *Wallis v Solicitor-General* went even further than *Nireaha Tamaki v Baker* in its departure from the precedent of *Wi Parata v Bishop of Wellington*. *Wallis v Solicitor-General* arose on appeal from another New Zealand Court of Appeal decision which, in *obiter dicta*, seemed to once again uphold the *Wi Parata* principle that the courts had no jurisdiction over any native title matter potentially involving the prerogative power of the Crown.³¹ The Court of Appeal implied that it should be left to the Crown to determine what is justice in those instances, stating:

What the original rights of the Native owners were, what the bargain was between the Natives and the Crown when the Natives ceded the land, it would be difficult, if not impossible, for this Court to inquire into, even if it were clear that it had jurisdiction to do so.³²

The Privy Council responded to this claim in the most excoriating terms:

The proposition advanced on behalf of the Crown is certainly not flattering to the dignity or the independence of the highest Court in New Zealand, or even to the intelligence of the Parliament. What has the Court to do with the executive? Where there is a suit properly constituted and ripe for decision, why should justice be denied or delayed at the bidding of the executive? Why should the executive Government take upon itself to instruct the Court in the discharge of its proper functions? Surely it is for the Court, not for the executive, to determine what is a breach of trust.³³

In other words, the Privy Council was rejecting the Court of Appeal’s suggestion that the declaration of the Crown, on the basis of its prerogative, was sufficient to exclude the jurisdiction of the courts on native title matters. On the contrary, the Privy Council insisted that any evidence concerning native title offered by the Crown should be subject to the determination of the courts

30 Hence in *Tamihana Korokai v Solicitor-General*, Stout CJ ruled that the existence of a Crown grant is conclusive against native title claimants, and capable of concluding any claim before the Native Land Court regarding the lawful extinguishment of native title: *Tamihana Korokai v Solicitor-General*, above n 3, at 345, per Stout CJ.

31 The *obiter dicta* concerned a late amendment to the statement of defence submitted by council for the Solicitor-General, which outlined the obligations the Crown felt it had to Maori to abide by the terms of cession under which the native title to the piece of land in question had been extinguished. *Solicitor-General v Bishop of Wellington*, above n 18, at 685-86. For a full quotation of the amendment to the statement of defence, see ‘*Wallis and Others v Solicitor-General*. Protest of Bench and Bar, April 25, 1903’, above n 2, at p 741.

32 *Solicitor-General v Bishop of Wellington*, above n 18, at 685-86.

33 *Wallis v Solicitor General*, above n 5, at 188. See *ibid*, at 187.

in the same way as evidence from any other party.³⁴ A central feature of *Wi Parata v Bishop of Wellington*, and the privileges it reserved for the Crown, was in this manner overturned by the imperial Court in London.

E. Court of Appeal Protest, 1903

The response of the New Zealand Court of Appeal to this dismissal of its cherished precedent was nothing short of unique. It engaged in a formal protest against the Privy Council.³⁵ The protest was ostensibly centered on suggestions by the Privy Council in its decision in *Wallis v Solicitor-General* that the Court of Appeal had shown insufficient independence from the executive in deferring to the latter's declarations on native title.³⁶ However the real animus behind the Protest seemed to be the extent to which the Privy Council had departed from the *Wi Parata* precedent in arriving at its last two judgments on native title.³⁷ Above all, this departure had taken the form of finding that native title claims were cognisable in the courts in specific circumstances, and enforceable against the Crown. In the case of *Nireaha Tamaki*, this proposition had been limited to those instances when the Crown officers were exercising their powers under statute. But in the case of *Wallis v Solicitor-General*, the ruling seemed to be much broader, extending to the Crown prerogative as such. It was this conclusion which most threatened the *Wi Parata* precedent because it meant that the Crown prerogative over native title, upheld in *Wi Parata*, was no longer enforceable so as to exclude native title from the jurisdiction of the courts. This meant that the Crown was no longer always the 'sole arbiter of its own justice' on native title issues, able by its own declaration to terminate any proceedings in the Courts. These developments did not so much affect land already alienated by the Crown, in the form of existing Crown grants, because *Nireaha Tamaki* had affirmed *Wi Parata* in this regard.³⁸ It did however affect all other Crown land on which the native title might otherwise have thought to have been extinguished, or Crown land where it might be thought not to apply (such as beds of lakes and rivers or foreshores). Consequently, after the Privy Council judgments in *Nireaha Tamaki* and *Wallis*, the Crown in New Zealand could no longer assume that the exercise of its prerogative was sufficient to render it immune from native title challenge in these areas.

Given these implications, it was the opinion of the Court of Appeal that this departure from *Wi Parata* by the Privy Council threatened the stability and security of land settlement in New Zealand. For instance, in regard to the Privy Council's decision in *Nireaha Tamaki v Baker*, the Chief Justice of the Court of Appeal, Sir Robert Stout, said in the Protest, 'If the dicta in that case were given effect to, no land title in the Colony would be safe.'³⁹ This was perhaps a slight exaggeration given that the Privy Council's *Nireaha Tamaki* ruling had held that land already

34 As the Privy Council said: '[I]f the Crown seeks to recover property and to oust the present possessors, it must make out its case just like any other litigant. All material allegations must be provided or admitted. Allegations unsupported go for nothing.' *Ibid.*, at 188.

35 Sir Robin Cooke has said that it is 'the only recorded instance of a New Zealand Court's publicly avowing its disapproval of a superior tribunal'. R Cooke, 'The Nineteenth Century Chief Justices', in R Cooke (ed) *Portrait of a Profession. The Centennial Book of the New Zealand Law Society* (1969) at 36, 46.

36 See above n 5 and 33.

37 See above n 5.

38 See above n 28.

39 '*Wallis and Others v Solicitor-General*. Protest of Bench and Bar, April 25, 1903', above n 2, at 746.

alienated by Crown grant still remained immune from native title challenge. Nevertheless this did not allay the concerns of the colonial authorities. Referring to the Privy Council decisions in both *Nireaha Tamaki v Baker* and *Wallis v Solicitor-General*, Edwards J said:

It would be easy by reference to numerous decisions of the Court of Appeal and of the Supreme Court of this Colony, and to statutes which, passed after such decisions, recognizing their validity, have virtually confirmed them, to show still further that the interpretation which their Lordships have put upon the laws relating to Native lands in this Colony is subversive of the law which has prevailed from its foundation; and that if that interpretation were acted upon, and carried to its legitimate conclusion in future cases, the titles to real estates in this Colony would *be thrown into irretrievable doubt and confusion*.⁴⁰

F. *The New Zealand Legislative Response*

The concern of these judges was matched by that of the New Zealand legislators. Both were worried about the possible effects of these Privy Council decisions on the stability and security of land settlement in their country. After all, *Wi Parata* had provided such security by immunizing all Crown titles from native title challenge. The New Zealand Parliament therefore legislated to enshrine the central aspects of the *Wi Parata* principle in statute, thereby ensuring that the common law decisions of the Privy Council would no longer be of any effect on the Crown and its capacity to act as the ‘sole arbiter of its own justice’ on native title matters.

The first attempt to do so was made in the wake of the Privy Council’s *Nireaha Tamaki* judgment. The long title to the New Zealand Parliament’s Land Titles Protection Act 1902 reflects these origins.⁴¹ The long title stated that it was ‘An Act to protect the Land Titles of the Colony from Frivolous Attacks in certain Cases,’ and the preamble then went on to make clear that these ‘frivolous attacks’ were those arising from native title claims in the courts.⁴² The preamble then stated that the purpose of the Act was to ensure that ‘reasonable protection should be afforded’ from such ‘frivolous attacks’ to those settlers holding land grants from the Crown.⁴³ Again, like the Court of Appeal judges, it seemed the New Zealand Parliament was labouring under the misapprehension that as well as discarding other aspects of the *Wi Parata* precedent, the Privy Council had also enabled native title claimants to attack the validity of existing Crown grants, rather than (as was in fact the case) the Privy Council having ruled in favour of *Wi Parata* on this question. The Act then went on to declare the following:

In the case of Native land or land acquired from Natives, the validity of any order of the Native Land Court, Crown grant, or other instrument of title purporting to have been issued under the authority of law which has subsisted for not less than ten years prior to the passing of this Act shall not be called in question in any Court, or be the subject of any order of the Chief Judge of the Native Land Court under section thirty-nine of ‘The Native Land Court Act, 1894’, unless with the consent of the Governor in Council first had and obtained; and in the absence of such consent this Act shall be an absolute bar to the initiation of any proceedings in any Court calling in question the validity of any such order, Crown grant or instrument of title, or the jurisdiction of the Native Land Court to make any such order, or the power of the Governor to make and issue any such Crown grant.⁴⁴

⁴⁰ *Ibid*, at 757. My emphasis.

⁴¹ Paul McHugh has also argued that the Land Titles Protection Act 1902 was a direct legislative response to the threat to *Wi Parata* posed by the Privy Council’s *Nireaha Tamaki* judgment: above n 6, at 118.

⁴² Land Titles Protection Act 1902, long title and preamble.

⁴³ *Ibid*, preamble.

⁴⁴ *Ibid*, s 2(1).

In other words, the legislation attempted to provide the sort of protection for Crown titles from native title claims which *Wi Parata* had provided at common law. The Land Titles Protection Act 1902 was ‘consolidated’ in the Land Titles Protection Act 1908, which in turn was repealed by the Native Land Act 1909.⁴⁵ All of these statutes constituted a continuing attempt to enshrine the *Wi Parata* precedent in legislation.⁴⁶ Indeed, this attempt continued well into the twentieth century, with section 155 of the Maori Affairs Act 1953 stating: ‘Except so far as may be otherwise expressly provided in any other Act, the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any other manner as against Her Majesty the Queen or against any Minister of the Crown or any person employed in any Department of State acting in the execution of his office’.⁴⁷

So when the Court of Appeal was once again confronted by a native title case in 1912, the status quo was as follows. The New Zealand courts had spent decades upholding the *Wi Parata* precedent – a precedent which provided the Crown and its land titles with all the protection it could wish for at common law from native title claims. Suddenly, New Zealand settler society was confronted with two Privy Council decisions which departed significantly from *Wi Parata* and undermined large elements of that judgment as common law precedent. Both New Zealand judges and legislators expressed concern at this – the judges in the context of an official protest against the Privy Council, and the legislators in the form of a series of native land Acts which sought to enshrine the *Wi Parata* precedent in statute. A significant divide had therefore opened up between colonial and imperial opinion on native title (as defined by the legacy of *Wi Parata*) and this divide remained until the Court of Appeal revisited this troubled ground in *Tamihana Korokai v Solicitor-General* in 1912.

II. TAMIHANA KOROKAI V SOLICITOR-GENERAL

*Tamihana Korokai v Solicitor-General*⁴⁸ involved a claim to a native title interest in Lake Rotorua. This claim was opposed by the Crown. The plaintiff asserted that the land in question was not in the exclusive possession of the Crown but was subject to (among other things) Maori native title.⁴⁹ The plaintiff wished to put this claim before the Native Land Court, in order to determine if the land was subject to native title. However the Crown insisted, on the basis of *Wi Parata v Bishop of Wellington* and subsequent cases upholding that decision, that it had a right to conclude the matter simply by declaring that the land in question was Crown land to which no surviving

45 My thanks to Alan Edwards, Law Librarian at the University of Otago, for this legislative history.

46 The evidence that the Native Land Act 1909 was also intended to enshrine the *Wi Parata* precedent in statute and reverse the Privy Council’s departure from it is provided by the Solicitor-General in *Tamihana Korokai v The Solicitor-General* (1912). In presenting the evidence for the Crown, the Solicitor-General stated that the Privy Council’s decision in *Nireaha Tamaki* would now be ‘prohibited’ as inconsistent with section 88 of the Native Land Act 1909: *Tamihana Korokai*, above n 3, at 332. This indicates the extent to which the Native Land Act 1909 (like its predecessor statutes) was widely perceived as reversing the trend on native title which had been established by the Privy Council decisions in *Nireaha Tamaki v Baker* (1900-01) and *Wallis v Solicitor-General* (1903), and instead re-asserting the authority of the Crown over all native title claims, as had originally been guaranteed by Prendergast CJ in *Wi Parata*. It is in this respect, therefore, that we can perceive the Native Land Act 1909 as a re-assertion of the *Wi Parata* precedent in statutory form.

47 Maori Affairs Act 1953 s 155.

48 See above n 3.

49 See *Tamihana Korokai v The Solicitor-General*, above n 3, at 328-31.

native title attached, thereby precluding any case going before the Native Land Court.⁵⁰ The issue was eventually brought before the New Zealand Court of Appeal.

The case was a clear instance of native title rights being asserted *against* the Crown, and as such was a direct challenge to *Wi Parata*, which had endeavoured to ensure that the Crown was immune to such threats. But how was it possible that such a judicial challenge asserting native title rights against the Crown could arise in 1912, given that the wording of section 84 of the Native Land Act 1909 seemed to bar any such proceeding? As section 84 stated:

Save so far as otherwise expressly provided in any other Act the Native customary title to land shall not be available or enforceable as against His Majesty the King by any proceedings in any Court or in any other manner.⁵¹

The answer is that an undertaking was entered into by the parties to this case, prior to the passing of the Native Land Act 1909, whereby the Solicitor-General agreed to waive ‘... any objection or defence which might be based on the provisions of section 84 of that Act ... except in so far as these provisions may be held to be merely declaratory of the law as existing *before* the passing of the said Act’.⁵²

A. *The Facts of the Case*

The subject of the case was a native title claim to the bed of Lake Rotorua. As pointed out in the notes to the case: ‘From time immemorial the Native tribes occupying land adjoining the lake have habitually fished in the lake as of right’.⁵³ Indeed, it was claimed by the plaintiff ‘that defined portions of the lake have from time immemorial been exclusively appropriated and occupied as fishing-grounds by particular tribes, communities, or individuals.’⁵⁴

The plaintiff claimed, as one of his grounds of ownership, that the bed of the lake was subject to Maori native title.⁵⁵ In response, the Crown denied ‘that the lake or the bed thereof is customary Native land, or that any Natives possess in respect thereof, by virtue of Native custom or otherwise, any proprietary right or any right of user other than such rights of navigation and other user as are possessed by Natives in common with all of His Majesty’s subjects.’⁵⁶ The Crown insisted that ‘if Native customary title at any time extended to the bed of the lake such title has been extinguished by implied surrender, abandonment, or cession.’⁵⁷

50 See *ibid*, at 331-32, per Solicitor-General. See also *ibid*, at 329.

51 Native Land Act s 84. Sir John Salmond, as Solicitor-General, had been instrumental in drafting this Act: A Frame, *Salmond: Southern Jurist* (1995) at 112. He also represented the Crown in *Tamihana Korokai*. Alex Frame argues that the ‘battery of privative and other clauses’ within the Act ‘aimed at making Maori assertions of customary title non-justiciable against the Crown’ were ‘presumably’ included by Salmond in the Act ‘on the instruction of Ministers [of the Crown]’: *ibid*, pp 112-113.

52 *Tamihana Korokai v The Solicitor-General*, above n 3, at 326. My emphasis. Alex Frame has questioned whether the Solicitor-General did indeed agree to ‘waive’ s 84 in the context of the case, suggesting instead, on the basis of a note written by the Solicitor-General to counsel for the plaintiff, that he was merely acknowledging that s. 84 did not bar a declaration by the Court on the matter of native title, though it did bar any attempt to enforce such a declaration against the Crown: Frame, *Salmond: Southern Jurist*, above n 51, at 115.

53 *Tamihana Korokai v The Solicitor-General*, above n 3, at 323.

54 *Ibid*.

There were numerous questions submitted for the decision of the Court, but the main one concerned whether the Court itself had jurisdiction to hear the case.⁵⁸ This question centered on the validity of the *Wi Parata* principle which insisted that native title matters involving the Crown fell within the Crown's prerogative powers and so were outside the jurisdiction of the municipal courts.⁵⁹ Under this rule, the declaration of the Crown that the native title under investigation had been lawfully extinguished was binding on the courts and sufficient to oust any legal challenge to the Crown.⁶⁰ In terms of the *Wi Parata* precedent, therefore, native title claimants had no rights enforceable against the Crown within a municipal or a statutory court, unless of course the Crown itself was willing to let the case proceed.⁶¹ In this manner, *Wi Parata* viewed the Crown as the 'sole arbiter of its own justice' on native title issues.⁶²

B. *The Native Land Act 1909*

As we have seen, these principles emanating from *Wi Parata v Bishop of Wellington* assumed the status of authoritative precedent and guided subsequent New Zealand judicial pronouncements on native title, until two decisions of the Privy Council, over two decades later, seemed to throw the

55 In fact, three separate claims to the bed of the lake were associated with the plaintiff's case, only the first of which concerned native title. The first claim was that 'the bed of the lake is customary native land in respect of which the Native Land Court has jurisdiction to make freehold orders under the Native Land Act, 1909': *ibid*, at 324. However the plaintiff also claimed that members of his tribe also owned the bed of the lake as an extension to their freehold holdings on the shore of the lake (*ibid*). Hence this gave rise to the second claim that 'the bed of the lake or some part thereof is land held in freehold tenure by those Natives as accessory to their freehold title to land adjoining the bed, and is included by implication of law in the Native Land Court certificates of title which have been issued as aforesaid, and in the freehold titles obtained by virtue of these certificates of title': *ibid*, at 324. Thirdly, there was the claim to certain usufructary rights to the lake, insisting that 'the lake is subject to certain customary and exclusive rights of fishing, navigation, and other user vested in those Natives, and that those rights are capable in some manner of legal recognition and enforcement by this Court or by the Native Land Court': *ibid*, at 325. Our discussion concerns the first claim, since it was this claim that most directly confronted the *Wi Parata* precedent.

56 *Ibid*, at 324.

57 *Ibid*.

58 The question of jurisdiction in this case was never a question of whether the Court of Appeal or any other municipal Court had jurisdiction to determine the issue of native title *themselves*. Under various statutes since the 1860s, native title questions had been exclusively reserved for an independent statutory body, the Native Land Court. Consequently, the question of jurisdiction for the Court of Appeal in this case was whether it had jurisdiction to determine if the case could be referred to the Native Land Court for decision (as desired by the plaintiff). Edwards J clarified these issues as follows: 'The Supreme Court has no jurisdiction to inquire into purely Native titles, nor can it investigate questions arising out of the procedure and practice of the Native Land Court so long as that Court confines itself within the limits of its peculiar jurisdiction. The Supreme Court has, however, jurisdiction to interpret the statutes to which the Native Land Court owes its existence and its jurisdiction; to confine that Court within the limits of that jurisdiction if it is being exceeded; and to compel that Court to exercise its jurisdiction if, for some fancied reason not arising out of Native customs and usages, it refuses or fails to do so': *ibid*, at 349.

59 See above n 13.

60 See above n 15.

61 Hence in *Wi Parata*, Prendergast CJ allowed for the possibility of the Crown itself assisting a native title claim against itself to proceed in the Courts. For instance, concerning the Crown's declaration that native title has been lawfully extinguished, Prendergast CJ states: '[T]his implied fact is one not to be questioned in any Court of Justice, unless indeed the Crown should itself desire to question it, and should call upon the Court to lend its aid in correcting some admitted mistake': *Wi Parata v Bishop of Wellington*, above n 1, at 78. Emphasis added.

62 See above n 15.

Wi Parata precedent into doubt and leave open the possibility that native claimants could enforce their native title claims against the Crown within municipal courts.⁶³ However any uncertainty produced by this departure of the Privy Council seemed to have been put to rest by the series of legislative enactments culminating in the Native Land Act 1909, whose provisions made abundantly clear that native title claimants have no rights against the Crown in this regard.⁶⁴ In particular, as we saw above, section 84 of the Act followed *Wi Parata* in holding that native title claims are not enforceable against the Crown.⁶⁵ Section 85 also followed this precedent by stating that a declaration by the Crown that native title is extinguished shall be binding on the courts:

A Proclamation by the Governor that any land vested in His Majesty the King is free from the Native customary title shall in all Courts and in all proceedings be accepted as conclusive proof of the fact so proclaimed.⁶⁶

The Act therefore guaranteed the security of all land titles deriving from the Crown from any unwanted native title challenge. As section 86 states:

No Crown grant, Crown lease, or other alienation or disposition of land by the Crown, whether before or after the commencement of this Act, shall in any Court or in any proceedings be questioned or invalidated or in any manner affected by reason of the fact that the Native customary title to that land has not been duly extinguished.⁶⁷

C. *The Centrality of Wi Parata v Bishop of Wellington to Tamihana Korokai v Solicitor-General*

While the Solicitor-General in *Tamihana Korokai* agreed to waive any defence based on section 84 of the Native Land Act 1909, nevertheless in his statement to the Court, the Solicitor-General (in person) still relied on *Wi Parata v Bishop of Wellington* itself as the basis of the Crown's defence. He stated:

The nature of Native customary title has been considered in many cases, the most important being *Wi Parata v Bishop of Wellington* and *Nireaha Tamaki v Baker* [1894]. It is true that the judgement in the second case was reversed by the Privy Council, but the principle the basis of the decisions was unaffected by the judgment of the Privy Council, and we ask the Court to confirm and ratify the principle acted on in those cases. That principle is – Native title is not available in any manner and for any purpose against the Crown. As against the Crown it is not a legal title at all.⁶⁸

The Solicitor-General concluded by insisting on the power of the Crown arising under its prerogative to terminate native title claims by mere declaration:

63 See the subsections 'Nireaha Tamaki v Baker' and 'Wallis v Solicitor-General', in the section 'Native Title in the New Zealand Courts 1847-1903', above.

64 See above nn 42-46.

65 See above n 51.

66 Native Land Act 1909, above n 51, s 85.

67 *Ibid*, s 86. However it is important to note that the Native Land Act 1909 did not nullify the legal existence of native title itself, which would have produced the sort of *terra nullius* outcome that characterized elements of the *Wi Parata* judgment: above n 12. Rather, native title was recognised within the statute. This recognition is evident in s 90 of the Act, which followed previous Acts in reserving to the Native Land Court the 'exclusive jurisdiction to investigate the title to customary land, and to determine the relative interests of the owners thereof'. The statute simply held that native title was not effective against the Crown in any instance where the Crown decided to refuse native title claims: see above nn 51, 66 and 67.

68 *Tamihana Korokai v The Solicitor-General*, above n 3, at 331. My addition.

The conclusiveness of a claim by the Crown extends to all cases, whether the claim is based on cession, abandonment, confiscation, or any other ground, and the claim is not examinable by this Court.⁶⁹

Consequently, as a result of the Solicitor-General's assertion of the *Wi Parata* principle as central to the Crown's defence, the Court of Appeal in *Tamihana Korokai v Solicitor-General* was once again obliged to consider the legacy of that case.⁷⁰ In particular, the Solicitor-General seemed to be reasserting the proposition which, at least after *Wallis v Solicitor-General*, had apparently been overturned – that native title matters fell within the prerogative powers of the Crown, and for this reason, the Crown's declaration on the matter was binding on the courts. He articulated such a position as follows:

If ... any dispute exists as to whether the land is Native customary land or Crown land the *ipse dixit* of the Crown is conclusive, and the question cannot be litigated in this or any other Court. This is the principle that has dominated all native land law since the foundation of the colony: See *Wi Parata v Bishop of Wellington* [3 N.Z. Jur. N.S. S.C. 72, at p. 78]; *Nireaha Tamaki v Baker* [12 N.Z.L.R. 483, at p. 488]. If this is not the principle the natives could go on a claim based on customary title to the Native Land Court and claim to have the title to all Crown lands investigated. There is no known method upon which the validity of a cession can be determined, and so if the Crown's claim is not conclusive there is no method of determining its title, and the security of title to all Crown land will be jeopardized.⁷¹

Consequently, the status of *Wi Parata* as authoritative precedent on native title in New Zealand was central to the Court of Appeal's deliberations in *Tamihana Korokai*.⁷² In relation to one of the key issues arising from *Wi Parata* therefore – whether native title was cognisable in the municipal courts – the following question was submitted for the Court's determination:

Is Native customary title a ground on which any action can be instituted in this Court, whether for a declaration of title or for any other relief?⁷³

On the other issue in *Wi Parata*, that of Crown prerogative, the questions submitted to the Court fell into two parts. First, whether the courts had jurisdiction to enforce a native title claim against the Crown; and second, whether the declaration of the Crown on native title matters was binding on the courts. Hence these two questions were as follows:

69 Ibid at 334-35.

70 As part of this process, the Solicitor-General had to distinguish the Privy Council judgments, and so nullify their impact on *Wi Parata*. He argued strongly that aspects of the Privy Council decisions were wrong in law and, in the case of *Nireaha Tamaki v Baker*, would be undermined by the Native Land Act 1909: cf *Tamihana Korokai v Solicitor-General*, above n 3, at 332. In this way, the Solicitor-General was able to claim that *Wi Parata* was still the relevant precedent in the case at hand: see above n 68.

71 *Tamihana Korokai v Solicitor-General*, above n 3, at 331-32, per Solicitor-General. In making such a claim the Solicitor-General was of course forgetting those early native title cases which had upheld the jurisdiction of the Courts over native title, even in those cases involving the Crown: see above n 9. He was also ignoring the fact that the Court of Appeal's *Hohepa Wi Neera* judgment in 1902 had taken on board the Privy Council's departure from *Wi Parata* to the point that they no longer upheld the broad *obiter dicta* of *Wi Parata* on native title which had been criticized by the Privy Council in *Nireaha Tamaki v Baker* (1900-01): see the discussion in Tate, 'Hohepa Wi Neera: Native Title and the Privy Council Challenge', above n 8. Yet it is precisely this *obiter* which the Solicitor-General is upholding in the passage above.

72 This was despite the fact that the Court of Appeal, in its *Hohepa Wi Neera* judgment some ten years earlier, had seemed to depart from the wider elements of *Wi Parata* in deference to the Privy Council's criticism of that judgment in *Nireaha Tamaki v Baker*. See the discussion in Tate, 'Hohepa Wi Neera: Native Title and the Privy Council Challenge', above n 8.

73 *Tamihana Korokai v Solicitor-General*, above n 3, at 325.

Has this Court any jurisdiction to determine as against the Crown that any land claimed by the Crown as being Crown land free from Native customary title is nevertheless Native customary land?⁷⁴

And:

Is the claim by the Crown that the bed of the lake is Crown land free from Native customary title or from any other customary right of Native user conclusive in this Court and in this action that no such Native customary title or customary right of Native user exists?⁷⁵

The final element of *Wi Parata* that was central to the present case was the status of the Native Land Court. Parliamentary legislation in New Zealand had long established the Native Land Court as the sole statutory authority dealing with native title claims.⁷⁶ However in his *Wi Parata* judgment, Prendergast CJ had insisted that the Crown itself was not subject to the determination of the Native Land Court on native title issues, because it was not bound by the relevant legislation establishing and authorizing the Court. In reference to the Native Rights Act 1865, Prendergast CJ had said:

The Crown, not being named in the statute, is clearly not bound by it; as the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when the native title has been duly extinguished ... If this prerogative be left intact, and we hold it is, the issue of a Crown grant must still be conclusive in all Courts against any native person asserting that the land therein comprised was never duly ceded.⁷⁷

Consequently, even in the face of a statute implying the contrary, Prendergast CJ explicitly reserved to the Crown the prerogative power to unilaterally determine native title claims by mere declaration, independent of the Native Land Court. The circumstances of the present case meant that the Court of Appeal was once again called upon to consider the validity of *Wi Parata* in this respect. The present case involved an attempt by the Crown to preclude the plaintiff from bringing a claim before the Native Land Court. The Court of Appeal was therefore required to determine, in the face of a declaration by the Solicitor-General representing the Crown that the land in question was not subject to native title, whether the matter could still be referred by the Court of Appeal to the Native Land Court; or whether such a declaration by the Solicitor-General, being a sufficient exercise of the Crown's prerogative and so binding on the Court, terminated proceedings.⁷⁸

74 Ibid.

75 Ibid.

76 See Native Rights Act 1865, Pt V; Native Lands Act 1865, Pt V. As Stout CJ put it in an earlier native title case: 'There has since 1865 ever been a Native Land Court to investigate Native title; and the uniform rule has been, until such investigation was determined the Supreme Court did not recognise the title of any Native to sue for possession of land uninvestigated by the [Native Land] Court': *Hohepa Wi Neera v The Bishop of Wellington*, above n 6, at 665, per Stout CJ. The *Tamihana Korokai* case was not a violation of that principle, as the purpose of the case was not to recognize or determine native title, but simply to investigate if the municipal Courts had authority to refer a native title matter to the Native Land Court for such determination, against the wishes of the Crown.

77 *Wi Parata v Bishop of Wellington*, above n 1, at 80.

78 Indeed Stout CJ simplified the matters raised in this case to this very issue alone, stating: 'The point in dispute between the parties is a narrow one. The plaintiff contends that he has a statutory right to go to the Native Land Court claiming under the Native Land Act a freehold title. The Solicitor-General contends that if he, as Solicitor-General, says the land – that is, the bed of Lake Rotorua – is Crown land, that concludes the matter, and the Native Land Court cannot proceed to make any inquiries as to whether the land is Native customary land. That is the matter in contention, and it appears to me that it is the only question that this Court has at present to decide': *Tamihana Korokai v The Solicitor-General*, above n 3, at 338, per Stout CJ.

III. SIR ROBERT STOUT'S 'OLIVE BRANCH' TO THE PRIVY COUNCIL

Among the Court of Appeal judges who sat in *Tamihana Korokai v Solicitor-General* was Chief Justice Stout who, several years earlier, in the Court of Appeal's Protest against the Privy Council, had vigorously defended *Wi Parata v Bishop of Wellington* against the Privy Council's departure from that precedent.⁷⁹ However the Chief Justice now took a much more conciliatory line on native rights, beginning his judgment with a long recitation of the native land legislation which, he claimed, recognised native title.⁸⁰ He even went so far as to affirm the Treaty of Waitangi as an important moral (if not legal) source for Maori rights in New Zealand. As he put it:

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. Since the recognition of the Native rights so often made there may have been interference by legislation with Native lands, both before and after the ascertainment of title. If, however, there were such interferences, they have been based on the theory of eminent domain ... Native lands and freehold lands belonging to persons of the white race have also been taken under such a theory, when it appeared it was for the interest of the State to do so. In such cases compensation has been awarded. To interfere with Native lands merely because they are Native lands and without compensation would, of course, be such an act of spoliation and tyranny that this Court ought not to assume it to be possible in any civilized community.⁸¹

The theory of 'eminent domain' refers to the 'inherent right of the government to acquire private property for public purposes'.⁸² In claiming that the 'interference' with 'Native lands' by the Crown was guided by this principle, rather than by a prerogative right to unilaterally extinguish native title, Stout CJ was effectively claiming that land subject to native title had similar rights under the law to land which was subject to freehold title. Indeed, he argues that for the Crown to claim a right to 'interfere' with Native lands 'merely because they are Native lands' (that is, on the grounds that 'native title' is a lesser title to land than any other title) would be 'such an act of spoliation and tyranny that this Court ought not to assume it to be possible in any civilized community'. Yet it was precisely because native title had always been assumed to be a 'lesser title' than freehold or other titles (as unlike these other titles, it did not derive from the Crown's ultimate title but was merely a 'burden' upon it⁸³) that it had often been held at common law to be unilaterally extinguishable by the Crown, independent of the consent of its holders.⁸⁴ In his statement above, by basing Crown extinguishment of native title on 'the theory of eminent

79 See '*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903', above n 2, at 732, per Stout CJ.

80 Indeed, Stout CJ begins by citing an extremely early source for the statutory recognition of native title in New Zealand, stating that 'the New Zealand Constitution Act (15 & 16 Vict., c. 72, section 73), recognized the Native title': *Tamihana Korokai v Solicitor-General*, above n 3, at 341, per Stout CJ. *The New Zealand Constitution Act* was enacted in 1852. Stout CJ's reasons for this long recital of native title legislation may have been to provide an effective response to the assertion of the Solicitor-General at 332 who, in presenting the evidence for the Crown in this case, stated: 'In *Nireaha Tamaki v Baker* the Privy Council were of opinion that the extinguishment of native title was regulated by statute, which is not the case, and so any general observations of the Privy Council upon the force or validity of Native title are of little moment'. Later in his argument at 334 the Solicitor-General asserted that even if there was statutory recognition of native title in New Zealand, it was not a title enforceable against the Crown. In this respect therefore, Stout CJ's long recital of native land legislation in New Zealand might be interpreted as a defence of the Privy Council's position relative to that of the Solicitor-General.

81 Ibid, at 343-44, per Stout CJ.

82 See P E Nygh and P Butt (eds) *Butterworths Australian Legal Dictionary* (1997) at 412.

83 See above n 10.

domain' rather than prerogative powers, Stout CJ was assigning to native title far greater protection against extinguishment by the Crown than was usually accorded it under common law.

Consequently, such statements carry Stout CJ a long way from the spirit of Prendergast CJ's judgment in *Wi Parata*, and a long way from his own position in the Court of Appeal Protest in 1903 which had expressed support for that precedent.⁸⁵ In the first place, his statement above upholds the Treaty as a necessary instrument to avoid the perpetuation of a 'gross wrong' by the Crown against the natives. While such a claim does not go any further than Prendergast CJ in its willingness to ascribe to the Treaty the force of law, nevertheless the moral onus which each judge places on the treaty is vastly different. Prendergast CJ had dismissed the Treaty as a 'simple nullity' in so far as it purported to be an instrument of cession or purported to give rise to obligations binding on the Crown.⁸⁶ Stout CJ, on the other hand, clearly insisted that the Treaty is a source of moral constraint upon the Crown in its dealings with Maori.⁸⁷

Yet while departing from the moral outlook of *Wi Parata*, Stout CJ tries to minimize that departure by insisting that it is in fact no departure at all. Referring to his statement above concerning the status of the Treaty and the Crown's obligations to Maori under it, Stout CJ states:

The decision of *Wi Parata v The Bishop of Wellington* does not derogate from that position. It only emphasized the decision in *Reg v Symonds* that the Supreme Court could take no cognizance of treaty rights not embodied in a statute, and that Native customary title was a kind of tenure that the Court could

84 Hence it was on these grounds that Prendergast CJ assumed that a Crown grant automatically extinguished native title, independent of the consent of the native title holders themselves: *Wi Parata v Bishop of Wellington*, above n 1, at 78, 80. Indeed, even more recent native title decisions, such as the *Mabo* judgment in Australia, have reserved for the Crown a right to unilaterally extinguish native title independent of the consent of the native title holders, so long as the Crown exhibited a 'clear and plain intention' to do so: *Mabo v Queensland*, above n 10, at 64-65, 69-70 per Brennan J; *ibid* at 89-90 per Deane and Gaudron JJ. Such a right of unilateral extinguishment, independent of the consent of the native title holders, did not extend to other property titles, which therefore had greater legal protection against Crown encroachments: *ibid*, at 63-64 per Brennan J. However in an earlier New Zealand Supreme Court judgment, *The Queen v Symonds* (1847), Chapman J insisted that native consent was required as a precondition for the Crown's extinguishment of native title: see above n 9. Interestingly, in *Mabo*, Toohey J also expressed reservations about the distinction between native title and all other titles when it came to Crown extinguishment, suggesting that native title's vulnerability to extinguishment was on an equal footing with the titles to land deriving directly from the Crown. As he put it: 'Furthermore, even assuming the power of extinguishment to be a power to act unilaterally, it is not easy to discern the basis for such a proposition. There are suggestions in decided cases that it may be a concomitant of an assertion of sovereignty ... But to say that, with the acquisition of sovereignty, the Crown has the power to extinguish native title does not necessarily mean that such a power is any different from that with respect to other interests in land. The Crown has the power, subject to constitutional, statutory or common law restrictions, to terminate any subject's title to property by compulsorily acquiring it ...': *Mabo v Queensland*, above n 10, at 193-94.

85 See above n 79.

86 For Prendergast CJ's dismissal of the Treaty as a 'simple nullity', in so far as it 'purported to cede the sovereignty' from Maori to the Crown, see *Wi Parata v Bishop of Wellington*, above n 1, at 78. Indeed, Prendergast CJ argued that the Crown's obligations towards Maori arose on a *jure gentium* (law of nations) basis, rather than from the Treaty, precisely because he believed the Maori lacked any legal capacity to assert such rights on their own behalf, either through a treaty or otherwise.

87 Indeed, in his Protest in 1903, the Treaty was the one point on which Stout CJ was willing to depart from his defence of *Wi Parata*. Hence far from endorsing Prendergast CJ's dismissal of the Treaty as a 'simple nullity', Stout CJ upheld the moral status of the Treaty while denying its legal status, saying: 'It is an incorrect phrase to use to speak of the Treaty as a law. The terms of the Treaty were no doubt binding on the conscience of the Crown. The Courts of the Colony, however, had no jurisdiction or power to give effect to any Treaty obligations'. '*Wallis and Others v Solicitor-General*. Protest of Bench and Bar, April 25, 1903', above n 2, at 732.

not deal with. In the case of *Nireaha Tamaki v Baker* [(1901) A.C. 561] the Judicial Committee of the Privy Council recognized, however, that the Natives had rights under our statute law to their customary lands.⁸⁸

It is the last sentence in this statement which is, for our purposes, significant. Stout CJ merely states that the Privy Council had determined in *Nireaha Tamaki* that ‘the Natives had rights under our statute law to their customary lands’. He does not criticise this view or reflect on it further. It is presented as a statement of fact and, in so far as it refers to the judgment of a superior court, presumably also a binding precedent. The statute upon which the Privy Council based this conclusion was the Native Rights Act 1865.⁸⁹ Yet in his judgment in *Hohepa Wi Neera v Bishop of Wellington* ten years earlier, and more openly in his formal protest against the Privy Council a year after that, Stout CJ was critical of the Privy Council’s interpretation of this statute, particularly in so far as the Privy Council had used it as a statutory basis for native rights. Hence in *Hohepa Wi Neera*, Stout CJ says that the Privy Council’s interpretation of this statute ‘may have an effect not dreamed of by the Legislature that passed [the Act], nor understood by the Judges of the Supreme Court since it was enacted’.⁹⁰ Then in his protest the following year, Stout CJ suggested that the Privy Council’s interpretation of the Act was a source of instability for New Zealand land settlement, arguing that if the dicta of that Court in *Nireaha Tamaki v Baker* were given effect to, ‘no land title in the Colony would be safe’.⁹¹ In *Hohepa Wi Neera*, Stout CJ also upheld the view of Prendergast CJ in *Wi Parata* that regardless of the rights which Maori were accorded under the Native Rights Act 1865, the Crown was not bound by it, not having been mentioned in the statute.⁹²

Thus we can see that Stout CJ had a history of strong criticism of the Privy Council’s *Nireaha Tamaki* decision, particularly regarding its interpretation of the Native Rights Act 1865. Yet ten years later, in *Tamihana Korokai*, he simply registered this interpretation without criticism, as apparently binding precedent in the present case. In the ten years since his judgment in *Hohepa Wi Neera*, and the nine years since his protest in 1903, it is clear that Stout CJ had come to terms with the full implications of *Nireaha Tamaki v Baker*. This is again evident when, further in his judgment, Stout CJ followed the Privy Council in *Nireaha Tamaki* in also providing for the

88 *Tamihana Korokai v The Solicitor-General*, above n 3, at 344, per Stout CJ. My addition. In aligning *Wi Parata* with the much earlier case of *The Queen v Symonds* (1847), and insisting that both exclude native title from the jurisdiction of the Courts, Stout CJ was insisting that New Zealand Courts have, from the beginning, adopted a uniform opinion on native title. Such a view is also evident in his earlier judgments: see *Hohepa Wi Neera v Bishop of Wellington*, above n 6, at 665-666; ‘*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903’, above n 2, at 732. Yet as we have seen, *The Queen v Symonds* did precisely the opposite, affirming the justiciability of native title in the Courts (see above n 9), and is therefore in no way identifiable with *Wi Parata*. For a discussion of Stout CJ’s misreading of *The Queen v Symonds*, see Tate, ‘Pre-*Wi Parata*: Early Native Title Cases in New Zealand’, above n 11, at 125-30.

89 See *Nireaha Tamaki v Baker* (1900-01), above n 5, at 382-83.

90 *Hohepa Wi Neera v Bishop of Wellington*, above n 6, at 667. My addition.

91 ‘*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903’, above n 2, at 746.

92 Hence Stout CJ states: ‘I may further point out that so far as the Native Rights Act is concerned it could not bind the Crown. Our “Interpretation Act, 1888”, is very explicit. It says that no Act must be read “in any manner or way whatsoever to affect the rights of the Crown unless it is expressly stated therein that the Crown is bound thereby ...” I mention these facts, as they are not referred to in the judgment of *Tamaki v Baker*, and the Privy Council does not seem to have been informed of the circumstances of the colony when – and for many years afterwards – the Act was passed’: *Hohepa Wi Neera v Bishop of Wellington*, above n 6, at 667.

statutory recognition of native title in New Zealand, albeit one based on a 1909 statute, not the 1865 statute relied upon by the Privy Council. As he put it:

I am of opinion that the Native Land Act recognizes that Natives have a right to their customary titles.⁹³

Perhaps one reason for this change of view on the part of Stout CJ was his extensive involvement with Maori land issues in the intervening period between the 1903 Protest and the 1912 *Tamihana Korokai* judgment. Between 1907 and 1909, Sir Robert ‘acted as a royal commission with Sir Apirana Ngata ... to consider the best methods of dealing with native lands’.⁹⁴ The result were the comprehensive reports of the Stout-Ngata Commission. However while Stout CJ was critical in these reports of some Crown policies regarding the public and private purchase of Maori land, his conclusions do not indicate a profound reorientation toward Maori as opposed to settler interests regarding native title. Rather, the very terms of the Commission tended to focus on the efficient ‘economic’ use of land by Maori and so tended to assimilate Maori land issues to a small settler outlook.⁹⁵ Nevertheless it is possible that participation on the Commission reconciled Stout CJ to the legitimacy of native title in a way that was not apparent in the context of his earlier judgments.

IV. TAMIHANA KOROKAI AND THE QUESTION OF CROWN PREROGATIVE

As indicated by the questions submitted for judgment above, a major legacy of *Wi Parata v Bishop of Wellington* which the Court of Appeal had to confront in *Tamihana Korokai v Solicitor-General* was the question of the Crown prerogative over native title. Indeed, this question dominated the judgments of most of the judges in this case and their views on the matter demonstrated the extent to which they had identified themselves with the Privy Council perspective – a perspective that in *Nireaha Tamaki v Baker* questioned, and in *Wallis v Solicitor-General* denied this prerogative. As we have seen, the Solicitor-General had asserted this prerogative in *Tamihana Korokai*, arguing that the declaration of the Crown should be sufficient evidence that the native title had been lawfully extinguished.⁹⁶ Similarly, the Native Land Act 1909 also seemed to uphold this position, stating in section 85 that ‘A Proclamation by the Governor that any land vested in His Majesty the King is free from the Native customary title shall in all Courts and in all proceedings be accepted as conclusive proof of the fact so proclaimed.’⁹⁷

93 *Tamihana Korokai v Solicitor-General*, above n 3, at 345.

94 ‘Stout, Sir Robert (1844-1930)’, in *A Dictionary of New Zealand Biography*, Vol. 2, GH Scholefield, ed, (1940), at 342.

95 As Stout and Ngata put it, the Commission was to investigate which areas of Native land were unoccupied or not profitably occupied, and how such lands can best be utilized and settled in the interests of the native owners and the public good: R Stout and A T Ngata, ‘Interim Report of the Commission Appointed to Inquire into the Question of Native Lands and Native Land Tenure’ (1907) III AJHR G 1, cited in R Boast et al, *Maori Land Law* (1999), at 87. The result was that ‘profit’ and ‘development’, when applied by the Commissioners to Maori land, tended to be understood in European terms. This is evident in the following account of the Commission’s conclusions: ‘In many respects the most significant feature of the commission’s reports was the emphasis on the importance of encouraging and training the Maoris to settle their own lands efficiently. The Commission recommended that the education of Maoris should be given an agricultural bias, that model farms should be established and that the government should provide instructors to advise upon farm and stock management’: W H Dunn and I L M Richardson, *Sir Robert Stout: A Biography* (1961) at 174.

96 See above nn 68, 69 and 71.

97 See above n 66.

Yet what became the material issue in *Tamihana Korokai* was whether the Solicitor-General, as representative of the Crown in this case, was entitled to exercise these powers himself, on behalf of the Crown, so that his *own* declaration could be held to be a legitimate exercise of the prerogative and therefore binding on the courts. Certainly this was the position which the Solicitor-General himself asserted in presenting the evidence of the Crown.⁹⁸ Yet as we shall see, each of the judges in *Tamihana Korokai* took a hostile attitude towards this suggestion.

A. *Stout CJ*

The Chief Justice, Sir Robert Stout, rejected the authority of the Solicitor-General to exercise Crown prerogative powers over native title in his own person. As he said:

The Native Land Act, 1909, has various sections dealing with the customary land of the Maoris – viz., sections 84, 85, 86, and 87. What was the need of such sections if a mere declaration by a Law Officer of the Crown was all that was necessary to say that the land claimed as Native customary land was Crown land?⁹⁹

He continued:

I know of no statutory authority that the Attorney-General as Attorney-General, or the Solicitor-General as Solicitor-General, has to declare that land is Crown land. The Attorney-General and the Solicitor-General are both high officers of State. They are legal officers, and they can appear as solicitors or counsel for the Crown, but there their functions and powers end. Their statement as to what is Crown property, unless made in accordance with some statutory power, is of no avail. If in an action they put in a plea to that effect it would have to be proved like any other pleading of a party to the action. The Solicitor-General has failed to cite any authority that the mere statement of the legal adviser of the Crown or the Crown's Attorney- or Solicitor-General was to be taken as a true averment without proof.¹⁰⁰

In other words, Stout CJ was insisting that, regardless of the status of the Crown's prerogative over native title, the authority of the Solicitor-General is limited by statute, and so he can in no way exercise such a prerogative on his own behalf. Needless to say, the Privy Council had come to exactly the same conclusion concerning the authority of Crown officers to make declarations on behalf of the Crown in *Nireaha Tamaki v Baker*, eleven years before, although Stout CJ does not directly cite this case as authority for his own conclusion in this respect.¹⁰¹

However, I would argue that Stout CJ's judgment in *Tamihana Korokai v Solicitor-General* provides significant evidence that he also moved significantly beyond *Nireaha Tamaki v Baker* in actually excluding the Crown prerogative as a basis for terminating court proceedings on native title. For instance, he seems to do so in the following passage where he refers to three means by which the jurisdiction of the Native Land Court can be excluded from a consideration of native title, but none of them refer to the Crown's prerogative power:

There are, in my opinion, only three things that can prevent the Native Land Court entering on an inquiry as to such customary title – 1, a Proclamation of the Governor under a statute, such as has been provided in many Acts, and is so provided in section 85 of the Native Land Act, 1909; 2, a prohibition by the Gov-

98 See above n 71.

99 *Tamihana Korokai v The Solicitor-General*, above n 3, at 344.

100 *Ibid*, at 345, per Stout CJ. See also *ibid*, at 346 per Williams J; *ibid*, at 358 per Chapman J.

101 Hence as Lord Davey put it for the Privy Council: 'In a constitutional country the assertion of title by the Attorney-General in a Court of Justice can be treated as pleading only and requires to be supported by evidence': *Nireaha Tamaki v Baker* (1900-01), above n 5, at 381.

error under section 100 of the Native Land Act, 1909; 3, proof that the land has been ceded by the true owners, or that a Crown grant has been issued.¹⁰²

The proclamation and prohibition by the Governor which Stout CJ refers to as the first two bases upon which the Court's jurisdiction can be excluded is not a proclamation on the basis of the Crown's prerogative, but a proclamation on the basis of statute. Does that mean that he believes statutes have actually replaced the powers over native title which the Crown formerly exercised under its prerogative? Of course, Prendergast CJ also confronted statutes in *Wi Parata* which upheld such right of proclamation, but he claimed that far from replacing the Crown's prerogative, they were simply a recognition of it.¹⁰³ However the trend in both *Nireaha Tamaki v Baker and Wallis v Solicitor-General* was definitely to assume that any Crown extinguishment of native title was now largely regulated by statute (as distinct from the prerogative), the later case strongly implying that the prerogative was no longer exercisable by the Crown to the exclusion of the Courts.¹⁰⁴ In this respect, I think we can interpret Stout CJ's concluding reference to the Native Land Act 1909 in the same way, as replacing, rather than simply affirming, Crown prerogative rights over native title:

I am of opinion that it is not necessary specifically to answer the questions put, but only to say that the plaintiff and his people have a right to go to the Native Land Court to have their title investigated, and that the Native Land Court can only be prevented from performing its statutory duty, first, under the Native Land Act; or, second, on proof in that Court that the lands are Crown lands freed from the customary title of the natives; or third, that there is a Crown title to the bed of the lake.¹⁰⁵

In other words, it is my suggestion that Stout CJ not only affirmed the judgment of *Nireaha Tamaki v Baker* in refusing to recognise the authority of the Solicitor-General to make declarations on behalf of the Crown, he also affirmed *Wallis v Solicitor-General* in effectively denying that any such prerogative was still exercisable by the Crown, to the exclusion of the Courts. All of the bases upon which he held that the jurisdiction of the Native Land Court could be excluded in this matter referred to evidence which seemed to be independent of the prerogative. His judgment on the prerogative was therefore another instance in which the divide on native title between the Privy Council and the New Zealand Court of Appeal, which seemed so cavernous in 1903, had closed significantly by 1912.¹⁰⁶

B. *Williams J*

The judgment of Justice Williams in *Tamihana Korokai* was exclusively directed to the question of the prerogative. Williams J put forward what he believed to be the argument to be considered as follows:

102 *Tamihana Korokai v Solicitor-General*, above n 3, at 345. Section 100 of the Native Land Act 1909 stated: 'In respect of any area of customary land the Governor may, at any time and for any reason which he thinks fit, by Order in Council prohibit the Native Land Court or the Appellate Court from proceeding to ascertain the title to that land or to make a freehold order in respect thereof; and no freehold order made in breach of any such prohibition shall be of any force or effect'.

103 See above n 15.

104 See above nn 26, 33 and 34.

105 *Tamihana Korokai v Solicitor-General*, above n 3, at 345-46.

106 Though, interestingly, in his discussion relating to the prerogative above, Stout CJ does not explicitly acknowledge either *Nireaha Tamaki* or *Wallis* as authoritative precedent for his position – see above ns 99 and 100.

The contention of the Solicitor-General is that in all cases where land is claimed by Natives to be held by them under their customs and usages, and they seek to have their titles ascertained by the Native Land Court and a title in fee-simple granted to them, the Solicitor-General, by virtue of the prerogative right of the Crown, and apart from any statutory authority, could at any time step in and prevent proceedings being taken or continued.¹⁰⁷

Like Stout CJ, Williams J rejected any possibility that the Solicitor-General, as representative of the Crown in the case, could exercise this prerogative power on his own behalf.¹⁰⁸ He argued that such a prerogative power, if it exists, involves a capacity to override statutory Acts, including those giving the courts jurisdiction to hear native title cases, and so must be delegated to the Solicitor-General from the Governor of New Zealand, and to the Governor from the Crown in Britain:

However worthy a person the Solicitor-General may be, he can hardly contend that he has been invested by his Sovereign with the power of disregarding treaties and overriding Acts of Parliament. Any authority the Solicitor-General has must be derived from the Governor, the representative of the Crown in the colony. Has, then, the power which the Solicitor-General claims to exercise been delegated by the Crown to the Governor? That is a question which this Court has undoubtedly jurisdiction to determine.¹⁰⁹

Consequently, with this statement alone, Williams J has moved well beyond *Wi Parata v Bishop of Wellington*. Contrary to the view of Prendergast CJ, or the view of the Court of Appeal in *Nireaha Tamaki v Baker* (1894) or *Solicitor-General v Bishop of Wellington* (1901), which seemed to uphold Prendergast CJ's conclusions, Williams J insisted that any assertion on the part of those representing the Crown that the Crown has exercised a prerogative power over native title to exclude the matter from the courts is an assertion that the courts cannot simply accept at face value, but rather is subject to their judicial determination. Williams J then cited as authority for this view the Privy Council judgment in *Musgrave v Pulido* as follows:

When the Governor does acts which are wholly beyond his authority, 'such acts ... cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State'. The judgment continues: 'When questions of this kind arise it must necessarily be within the province of municipal Courts to determine the true character of the acts done by a Governor'.¹¹⁰

Williams J also cited *Musgrave v Pulido* as authority for determining just what rights a Governor inherits from the Crown. This judgment denied that a Governor could be held to automatically exercise 'general sovereign power', and therefore to necessarily possess *all* the sovereign rights held by the Crown.¹¹¹ Rather, it insisted that the authority of the Governor 'is derived from his commission, and limited to the powers thereby expressly or impliedly intrusted to him'.¹¹² On this basis, therefore, Williams J claimed a jurisdictional capacity to deny that the Governor of New Zealand had inherited from the Crown, or had delegated to him, the prerogative power to exclude

107 *Tamihana Korokai v Solicitor-General*, above n 3, at 346, per Williams J.

108 As Williams J says of any power to exclude the jurisdiction of the courts: 'To interfere with the proceedings of a Court of justice authorized by statute to be taken is the assumption of an act of sovereign power, and the question at once arises whether the person who purports to exercise that power has authority to do so': *ibid.*

109 *Ibid.*

110 *Ibid.*, at 347 per Williams J.

111 As *Musgrave v Pulido* (1879) 5 App Cas 102 states: 'the Governor of a colony (in ordinary cases) cannot be regarded as a Viceroy, nor can it be assumed that he possesses general sovereign power.' Cited in *Tamihana Korokai v Solicitor-General*, above n 3, at 346.

112 *Musgrave v Pulido*, *ibid.*, cited in *Tamihana Korokai v Solicitor-General*, *ibid.*, at 346-47.

native title claims from the jurisdiction of the Courts, and did so on the basis of the limited nature of his commission:

There is nothing in the Governor's commission or in the Royal Instructions which expressly authorizes him to interfere on behalf of the Crown to prevent the exercise of rights given to Natives by the statute law of the Dominion.¹¹³

Williams J then insisted that, besides the absence of any express power in his commission giving the Governor such authority, there is no implied power either.¹¹⁴ He therefore insisted that any prerogative power to exclude native title claims from the jurisdiction of the courts, if it has not been delegated to the Governor, existed, if it existed at all, elsewhere than in New Zealand itself. As Williams J states:

There is a special reason why the power now claimed should not be implied. The power now claimed is by an act of State to disregard rights given by statutes which have been passed to carry out treaty obligations binding upon the honour of the Crown. If the Crown has this power it is exercised on the advice of the Responsible Minister of the Crown. Whether it should be so exercised or not is a matter affecting the honour of the Crown, not merely as the Sovereign of this Dominion, but as the Sovereign of the British Empire. It is with the Sovereign of the British Empire that the Treaty of Waitangi was entered into. Whether Imperial obligations should or should not be observed is a matter of Imperial concern for the Responsible Advisers of the Crown in Great Britain to decide upon, and not for the advisers of the Governor here, unless the power of deciding has been expressly delegated to the Governor.¹¹⁵

In putting forward the argument in the passage above that the import of the statutes was to give expression to the Treaty of Waitangi, thereby involving the honour of the Crown at an imperial (rather than simply a national) level, Williams J was again taking a substantial step beyond *Wi Parata* in viewing the Treaty itself as having some claims upon the honour of the Crown, rather than dismissing it as a 'simple nullity' as Prendergast CJ did.

Yet although Williams J claimed in the passage above that one of the capacities of the prerogative was to override statutes and treaties, he also saw the prerogative as now limited by statute. Williams J insisted that the authority of New Zealand native title statutes were sufficient to deny any remaining prerogative power in the Crown, even the Crown in Great Britain, to the extent that such a power was repugnant to the native rights created under these statutes. Prendergast CJ had avoided this possibility in *Wi Parata v Bishop of Wellington* by arguing that the statute he placed in question, the Native Rights Act 1865, did not bind the Crown, and so did not affect its prerogative powers.¹¹⁶ But Williams J insisted that the Native Land Act 1909 did bind the Crown, and therefore limited any residual prerogative powers to the extent of such repugnancy. As he put it:

113 *Tamihana Korokai v Solicitor-General*, above n 3, at 347.

114 On the question of implied powers attaching to the commission of Governor, Williams J again cited the Privy Council as authority: 'The question of what powers are implied was dealt with by the Privy Council in the earlier case of *Cameron v. Kyte* [(1835) 3 Knapp 332, 12 ER 678]. The judgment there says, 'Implied powers may be given to an office as incident, either because they are necessary to its due execution or because they are such as have been usually exercised by those who have borne it. It is clear that a power to alter the laws by which the colony is usually governed, which is an extraordinary power, is not necessary to the due discharge of the office of Governor': *Tamihana v Solicitor-General*, above n 3, at 347.

115 *Ibid.*, at 347.

116 See above n 21.

I have considered the case so far as if the right claimed by the Solicitor-General existed in the Crown as part of its sovereign power, but had not been delegated to the Governor. I agree, however, with the conclusion arrived at by His Honour [Stout CJ] that rights given to Natives by statute to have their customary titles determined can only be divested in the manner prescribed by statute. The rights given to Natives by section 90 to 93 inclusive of the Native Land Act, 1909, to have a legal estate in fee-simple in possession vested in the persons found to be entitled, are rights expressly given against the Crown. If these sections do not bind the Crown they are meaningless and inoperative. The Crown is a party to the statute. It is difficult to see how, when rights which expressly affect pre-existing rights of the Crown are created by statute, the Crown, upon the passing of the statute, can disregard the rights so created and exercise its pre-existing rights as if the statute had not been passed.¹¹⁷

Consequently, on this very broad basis, which limited the continued existence of the prerogative powers of the Crown to the extent that they were inconsistent with the statutes passed by New Zealand Parliament, Williams J followed Stout CJ in rejecting the claim of the Solicitor-General to exercise such prerogative powers in his own person on behalf of the Crown:

Even if the power had been so delegated [to the Governor] the Court would properly require some evidence beyond the mere statement of the Attorney- or Solicitor-General that the authority of the Crown was being exercised ... If the Solicitor-General in the above circumstances sought the aid of the Supreme Court to prohibit the Native Land Court from proceeding, this Court would certainly not act upon his mere statement, but would require the production of a Proclamation, an order in Council, a Warrant under the hand of the Governor, or other like evidence to show that the authority emanated from the representative of the Sovereign.¹¹⁸

C. *Edwards J*

In *Tamihana Korokai v Solicitor-General*, Stout CJ and Williams J considered the Solicitor-General's claim on its own merits. But although arriving at the same conclusion as the Privy Council in *Nireaha Tamaki v Baker* (and also *Wallis v Solicitor-General*, to the extent that they deny the continued existence of the prerogative) they do not directly cite these cases as authority for their own position. Edwards J on the other hand, situates his response to the question entirely in terms of Privy Council precedent:

The last question for determination, and the question upon which the greatest stress has been laid by the Solicitor-General, is as to whether or not the Crown, speaking through its Attorney-General or Solicitor-General, or counsel acting for it, can, by a bare declaration made in the Native Land Court that the Crown claims that the Native title never has existed or has ceased to exist in any particular parcel of land, whether a lake or part of a lake or not, bar the jurisdiction of that Court to investigate claims to the ownership of such land made by Natives invoking the ordinary jurisdiction of the Court. It appears to me that it has already been decided by the Judicial Committee of the Privy Council, and decided in the most emphatic manner in *Nireaha Tamaki v Baker*, that this claim is without basis ... In my opinion it is clear that, if the Crown desires to set up its title as a bar to the investigation by the Native Land Court in its ordinary jurisdiction of claims by Natives, it must either be prepared to prove its title, or it must be able to rely upon a Proclamation in accordance with the terms of the 85th section of the Native Land Act, 1909.¹¹⁹

117 *Tamihana v Solicitor-General*, above n 3, at 348.

118 *Ibid.*, at 347-48.

119 *Ibid.*, at 351-52.

D. Chapman J

Like Edwards J, Chapman J also buttressed his claim that the Solicitor-General could not, on his own behalf, exercise the prerogative power of the Crown to exclude native title from the jurisdiction of the Courts, by referring to the decision of the Privy Council in *Nireaha Tamaki v Baker* as binding authority on this matter:

[T]he legislature has given the Crown power, now expressed in section 85 of the Native Land Act, 1909, to declare that the Native title is extinguished. It is presumed that that power will be honestly exercised, but when it is exercised the exercise is final. On behalf of the Crown it is now virtually claimed that there is another mode of producing the same result – namely, by the assertion by the Attorney-General or Solicitor-General in the Native Land Court that the land is the property of the Crown. It is clear, however, that, whether the Crown has or has not a prerogative right to defeat this claim, it cannot be defeated by the act of the Attorney-General. It is pointed out by the Judicial Committee that neither the Attorney-General nor any other State functionary represents the Crown in this sense ... *Nireaha Tamaki v Baker* [1901 AC 561 at 576]. What evidence, then, is required? The evidence must at least show some formal and deliberate act in exercise of the prerogative. That case appears to leave open the question whether such an act would be effectual.¹²⁰

However, like Williams J, Chapman J also goes further than simply affirming the Privy Council's decision in *Nireaha Tamaki v Baker*. In the following passage, he questions whether this prerogative still exists, and suggests it has been replaced by the provisions allowing for a declaration by the Governor under section 85 of the Native Land Act 1909, although also affirming, as the Privy Council had done in *Nireaha Tamaki*, that the question of its continued existence was not material to the case at hand. In suggesting that the prerogative had been replaced by the Native Land Act 1909, Chapman J provides a possible answer to the question, to some extent left open by Stout CJ, as to whether that Act affirmed a prior Crown prerogative (as Prendergast CJ had argued in relation to the Native Lands Acts of 1867 and 1873¹²¹) or whether its provisions concerning the declaration by the Governor had a purely statutory basis, thereby displacing this prerogative altogether.¹²² Chapman J makes these points as follows:

In the case of *Reg. v. Clarke* [(1851) 7 Moore PC 77, 13 ER 808] the Judicial Committee did not expressly decide that prerogative was entirely merged in statutory provisions relating to the alienation of Crown lands. It may, however, be regarded as questionable whether there is any other mode of putting an end to the jurisdiction of the Native Land Court than a Proclamation under section 85. The question is immaterial, as, in this case as in that, there has been no exercise of the prerogative. It is within the power of a colonial Legislature to limit the prerogative or to direct how it shall be exercised, and perhaps it has done so by section 85. The question does not seem to me to be material. It is sufficient to say that it cannot be exercised in the manner suggested.¹²³

E. Cooper J

Cooper J's method of dealing with the Solicitor-General's claim was somewhat different. On the basis of his reading of the Land Act 1908 he takes the position that lands still subject to native title

¹²⁰ Ibid, at 357-58.

¹²¹ See above n 15.

¹²² While Stout CJ did indeed leave this question open, nevertheless as we saw above, the details of his judgment in *Tamihana Korokai* strongly implied that he too was of the opinion that the Crown's prerogative powers over native title had been replaced by the relevant provisions of the *Native Land Act* 1909. See above ns 99, 100, and 102.

¹²³ *Tamihana Korokai v Solicitor-General*, above n 3, at 358.

cannot be 'Crown lands', in the legal sense of the term, because they have not yet been ceded to the Crown.¹²⁴ He then rests his argument on the semantic claim that the Solicitor-General has no right to declare land subject to Native title to be Crown land, devoid of such title, because under statute the two forms of title are quite distinct.¹²⁵ As he puts it:

It is therefore, in my opinion, impossible to hold that the Attorney-General or Solicitor-General may, by his mere declaration that Native customary land is Crown land, prevent a Court specially constituted by statute for the purpose of determining the rights of Natives who claim to be the customary owners from exercising its statutory jurisdiction. Even in respect of lands which are not Native customary lands the Legislature has, in section 35 of the Land Act, provided that the averment in a proceeding under the Land Act that the land referred to in the proceeding is Crown land is only *prima facie* evidence, and may be rebutted by proof to the contrary. I mention these matters as they, I think, strengthen the conclusion that the claim that the Solicitor-General now makes that he, on behalf of the Crown, can by a mere assertion that Native customary land is Crown land destroy the jurisdiction of the Native Land Court is untenable. If the Crown desires to prevent the Native Land Court from inquiring into the claim of the plaintiffs to the bed of Lake Rotorua as their customary land, there is a statutory and a constitutional method of doing so by the invocation of the powers vested in the Crown under sections 85 and 100 of the Native Land Act, 1909, or by proof that the land has been ceded to the Crown, or that it is not Native customary land.¹²⁶

F. Conclusion

The extent to which the Court of Appeal had moved away from the *Wi Parata* precedent on the question of Crown prerogative over native title and its capacity to bind the courts is evident in comparing the Court of Appeal's decision on the prerogative in *Tamihana Korokai* with its *obiter dicta* eleven years earlier in *Solicitor-General v Bishop of Wellington*.¹²⁷ In this earlier case, the Court of Appeal had arrived at an entirely contrary conclusion. On the strength of a mere suggestion by the Solicitor-General in an amended statement of defence that obligations had arisen between the Crown and a particular Maori tribe involving the cession of land, the Court of Appeal suggested that it had no jurisdiction to interfere.¹²⁸ In other words, it concluded that such a declaration on the part of the Solicitor-General, as representing the Crown, was sufficient to oust the jurisdiction of the court. As Williams J put it, 'What the original rights of the native owners were, what the bargain was between the natives and the Crown when the Natives ceded the land, it would be difficult, if not impossible, for this Court to inquire into, even if it were clear that it had jurisdiction to do so.'¹²⁹

As we have seen, it was precisely this view in the Court of Appeal that led to scathing criticism by the Privy Council in *Wallis v Solicitor-General*, and which in turn was the catalyst for the Court of Appeal's protest against the Privy Council in 1903, where the divergence between their respective views on native title and Crown prerogative were at their widest. Nevertheless some

¹²⁴ See *ibid.*, at 352-53.

¹²⁵ This view that lands subject to native title cannot also be Crown lands is challenged by Chapman J in this case: *ibid.*, at 356, 357. Similarly, the Court of Appeal, in *Re Landon and Whittaker Claims*, had also insisted that native title and Crown land were co-existent, in the sense that the ultimate title over such lands resides in the Crown, stating 'In this large sense, all lands over which the Native title has not been extinguished are Crown lands': above n 10.

¹²⁶ *Tamihana Korokai v Solicitor-General*, above n 3, at 353-54.

¹²⁷ See above n 31.

¹²⁸ See above n 32.

¹²⁹ *Solicitor-General v Bishop of Wellington*, above n 18, at 686.

nine years later, the Court of Appeal followed the Privy Council's ruling in *Nireaha Tamaki v Baker* in rejecting the capacity of Crown officers to make declarations on behalf of the Crown capable of ousting the jurisdiction of the Courts. It even went further in so far as some judges strongly suggested that the Crown prerogative over native title was no longer extant, thus implicitly aligning themselves with the Privy Council view in *Wallis v Solicitor-General*.¹³⁰ Consequently, the Court of Appeal's rulings on Crown prerogative in *Tamihana Korokai v Solicitor-General* arrived at precisely those Privy Council conclusions which they had so vehemently criticised all those years before. Nothing could more clearly show how the Court of Appeal had ultimately come around to the Privy Council's way of thinking about such matters. In this respect, *Tamihana Korokai v Solicitor-General* shows the extent to which, on the question of Crown prerogative at least, the Court of Appeal had definitely departed from *Wi Parata v Bishop of Wellington* and healed the imperial breach with London.

V. TAMIHANA KOROKAI AND THE STATUTORY RECOGNITION OF NATIVE TITLE

A. *Stout CJ*

In denying the authority of the Solicitor-General to determine the issue of native title merely by his own declaration, we saw that Stout CJ insisted that there are only a specified number of ways that the Crown can sufficiently 'declare' native title to be lawfully extinguished in a manner binding on the municipal courts, thereby preventing such matters being referred to the Native Land Court. These were a proclamation by the Governor under statute (and in particular, section 85 of the Native Land Act 1909) that the native title has been lawfully extinguished; a prohibition by the Governor under section 100 of the Native Land Act 1909, or 'proof that the land has been ceded by the true owners, or that a Crown grant has been issued'.¹³¹ Given that he found that none of these grounds had been established by the Crown in this case, Stout CJ concluded that there was not sufficient proof to determine that the native title had been lawfully extinguished. Consequently, he argued, the claimants had a right to take their case to the Native Land Court to determine the status of the native title and their claims against the Crown.¹³²

In other words, Stout CJ was effectively recognizing the altered situation produced by the Privy Council's ruling in *Nireaha Tamaki v Baker* that 'the Natives had rights under our statute law to their customary lands'.¹³³ Stout CJ still seemed to uphold the *Wi Parata v Bishop of Wellington* principle that in terms of common law, 'Native customary title was a kind of tenure that the [municipal] Court could not deal with'.¹³⁴ He also maintained the *Wi Parata* position (upheld by the Privy Council in *Nireaha Tamaki v Baker*) that a Crown grant is, in itself, sufficient evidence that the native title has been extinguished.¹³⁵ Yet it is clear that Stout CJ also assumed, in line with the Privy Council, that there is a statutory basis for native title in New Zealand, as

130 See the discussions by Williams J and Chapman J in section 'IV. Tamihana Korokai and the Question of Crown Prerogative', above.

131 See above n 102.

132 See above n 105.

133 *Tamihana Korokai v Solicitor-General*, above n 3, at 344, per Stout CJ.

134 *Ibid.* My addition. In other words, it was a form of tenure that the municipal courts were obliged, by statute, to refer to the Native Land Court.

reflected in his claim that: ‘I am of opinion that the Native Land Act [1909] recognizes that Natives have a right to their customary titles.’¹³⁶

B. *The Other Judges*

The other judges followed Stout CJ in recognizing a statutory basis for native title in New Zealand. But some went further in citing the Treaty as the basis for such statutory recognition. Williams J went so far as to claim that the statutes regulating native title ‘have been passed to carry out treaty obligations binding upon the honour of the Crown’ and it was for this reason that he was reluctant to grant even the Governor of New Zealand a prerogative power to disregard them.¹³⁷ Edwards J even makes the extraordinary claim that the Treaty itself had received statutory recognition in New Zealand, and that all subsequent native title legislation is built on this basis:

Whatever rights were conserved to the Maoris by the Treaty of Waitangi were fully recognized by the Native Lands Act, 1862, which recited the treaty, and was enacted with the declared object of giving effect to it. All the subsequent Native Land Acts have in turn given to the Maoris the right to invoke the jurisdiction of the Native Land Court for the purposes of investigating their claims to lands alleged by them to be owned under Native customs and usages. If it can be established that under these customs and usages there may be a separate property in the bed of a lake, I cannot doubt that the jurisdiction of the Native Land Court with respect to Native lands extends as much to the land covered with water as it does to lands covered with forest.¹³⁸

Cooper J also followed Stout CJ in providing statutory recognition for native title, though on the basis of a 1908 statute rather than Stout CJ’s 1909 one.¹³⁹ While Chapman J followed Stout CJ in reciting a history of native title legislation in New Zealand, he cites the first statutory recognition of native title very early in this history, in the year 1846:

135 Hence under the third means by which native title can be lawfully extinguished, Stout CJ refers to the proof ‘...that a Crown grant has been issued’: above n 102. For the *Wi Parata* claim that Crown grants are an effective declaration by the Crown that native title has been lawfully extinguished, and are binding on the courts, see above n 16. On the Privy Council confirmation of this view in *Nireaha Tamaki v Baker*, see above n 28.

136 *Tamihana Korokai v Solicitor-General*, above n 3, at 345. My addition.

137 See *ibid*, at 347. On Williams J’s reluctance to assume that a prerogative power over native title was either explicitly or implicitly situated within the Governor’s delegated authority, see above nn 113 and 115.

138 *Tamihana Korokai v Solicitor-General*, above n 3, at 351. The status of the Native Lands Act 1862 which Edwards J makes reference to in this passage is somewhat ambiguous in the *Tamihana Korokai* judgment. For instance, Stout CJ also recites this Act, stating: ‘In 1862 the first Act to provide for the ascertainment of the ownership of Native lands, and for granting certificates of title therein, and for regulating the disposal of Native lands, was passed’: *ibid*, at 342. He then recites the preamble which makes reference to the Treaty. Yet although stating that the Act was passed by Parliament, he does not say it attained the force of law by securing the signature of the Governor. The Solicitor-General, on the other hand, in presenting the evidence for the Crown in this case, claimed that although the Native Land Act 1862 ‘recites the Treaty of Waitangi’, it ‘did not come into operation’ (*ibid*, at 334) – which presumably means it did not receive the Governor’s assent after passage through Parliament. Supporting the view of the Solicitor-General, it has generally been held within New Zealand jurisprudence that the Treaty of Waitangi has not, as a whole, been enacted in statute. As the Privy Council stated in *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 500, 598-99: ‘As regards the appellant’s argument that the New Zealand Legislature has recognized and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the Treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the Native lands...’. It concluded that the rights expressed in the Treaty had yet to receive statutory enforcement.

139 See *Tamihana Korokai v Solicitor-General*, above n 3, at 352-53.

From the earliest period of our history the rights of the natives have been conserved by numerous legislative enactments. Section 10 of 9 & 10 Vict., c. 103, called 'An Act to make Further Provision for the Government of the New Zealand Islands' (Imperial, 1846), recognizes the laws, customs, and usages of the natives, which necessarily includes their customs respecting the holding of land. Section 1 of 10 & 11 Vict., c. 112, called 'An Act to promote Colonization in New Zealand, and to authorize a Loan to the New Zealand Company' (Imperial, 1847), recognizes the claims of the aboriginal inhabitants to the land. To the same effect is the whole body of colonial legislation. The expressions 'land over which the Native title has not been extinguished', and 'land over which the Native title has been extinguished', familiar expressions in colonial legislation, are both pregnant with the same declaration.¹⁴⁰

So, contrary to Prendergast CJ's claim in *Wi Parata* that 'a phrase in a statute cannot call what is non-existent into being',¹⁴¹ Chapman J follows the Privy Council in *Nireaha Tamaki v Baker* in insisting that it is these very phrases which confirm the statutory recognition of native title. As such, unlike Stout CJ, Chapman J situates his conclusions concerning this statutory recognition very much within the explicit authority of *Nireaha Tamaki* as follows:

The due recognition of this right or title by some means was imposed on the colony as a solemn duty: *Nireaha Tamaki v. Baker* [1901 A.C. 56, at p. 579]. That duty the Legislature of New Zealand has endeavoured to perform by means of a long series of enactments culminating in the Native Land Act, 1909.¹⁴²

And again:

I rely, as the Privy Council relied, on the whole plan of the statutes. *Nireaha Tamaki v. Baker* is an authority which obliges us to say that, though this Court does not know and cannot recognize the nature of the Native title, it at least amounts to a right to have the nature of that title ascertained [in the Native Land Court].¹⁴³

VI. THE IRONY OF *TAMIHANA KOROKAI*

In many ways, *Tamihana Korokai v Solicitor-General* is an ironic judgment. Perhaps one of its most ironic aspects is the manner in which it broke from the legacy of *Wi Parata v Bishop of Wellington*, which had dominated New Zealand jurisprudence on native title for over three decades. The most significant departure in this respect was the statutory recognition of native title which all of the judges in *Tamihana Korokai* affirmed. But whereas most of the judges in the case tended to affirm this recognition on the basis of a range of statutes stretching back into the New Zealand past, Stout CJ affirmed it on the basis of the Native Land Act 1909. It was on the basis of this statute that Stout CJ concluded that Maori have a right to their customary titles.¹⁴⁴

As we have seen, the Native Land Act 1909 was clearly intended to uphold the protection which the *Wi Parata* precedent had afforded the Crown regarding unwanted native title claims.¹⁴⁵ This statute set out the means by which the Crown was able to unilaterally declare native title lawfully extinguished, thereby disencumbering itself from any unwanted native title claims and preventing such matters being referred to the Native Land Court. In other words, it established the

140 Ibid, at 355-56.

141 See *Wi Parata v Bishop of Wellington*, above n 1, at 79.

142 *Tamihana Korokai v Solicitor-General*, above n 3, at 356.

143 Ibid, at 357. My addition.

144 See above n 136.

145 See above nn 51, 66, 67.

Crown as ‘the sole arbiter of its own justice’ on native title matters, just as *Wi Parata* had intended.

Consequently, perhaps the most ironic aspect of Stout CJ’s judgment is that he bound the Crown over to the determination of the Native Land Court on the basis of a statute which was intended to ensure the contrary.¹⁴⁶ Stout CJ held that the 1909 statute had significantly reduced the discretion of the Crown over native title which had characterized the *Wi Parata* legacy. Consequently, he ruled that the Crown was bound by very strict statutory procedures in the extinguishment of native title. And given that it had not abided by these procedures in the present case, Stout CJ ruled that it had failed to prove that the native title was extinguished, and so could be bound over to the Native Land Court to determine the appellant’s claims.¹⁴⁷ The other judges in the case, although citing earlier statutory authority than Stout CJ for the recognition of native title, all concurred with his ruling in this respect.¹⁴⁸

So despite the fact that the clear import of the Native Land Act 1909 was to defend the Crown from native title claims, Stout CJ interpreted the Act in such a way as to affirm native title rights against the Crown. He did so by presenting it both as a source of statutory recognition of native title, and as a limit on the capacity of the Crown to extinguish that title except under the strict terms of the Act or other specified procedures. In this manner, the Court of Appeal hoisted the Crown on its own petard, denying it the protection it had found in *Wi Parata* by the very means through which it had sought it.¹⁴⁹

The fact that the Court of Appeal was so willing in *Tamihana Korokai* to confront the Crown on native title, rather than simply accept the Crown’s declaration on the matter, shows the extent

146 Hence the irony of Stout CJ’s use of the Native Land Act 1909 in *Tamihana Korokai* can be expressed in two ways. Firstly, he used a statute whose intent was to enshrine the *Wi Parata* precedent to reach a conclusion which was at odds with that precedent. Secondly, in so far as the 1909 statute was the latest in a series of statutes that had arisen directly in the wake of the Privy Council’s decision in *Nireaha Tamaki v Baker*, with the purpose of nullifying the force of that decision at common law (see the section ‘The New Zealand Legislative Response’ above), one could say that the instrument Stout CJ used to heal a breach with the Privy Council on native title was one whose roots lay in a legislative intention to make that breach permanent. Indeed, Stout CJ’s strategy in this respect aroused the ire of the Solicitor-General, Sir John Salmond, who had represented the Crown in the case. Sir John insisted, both at the conclusion of the judgment and in the hearing to determine costs one week later, that the Court had not delivered a judgment on the question at issue in the case – which, in his view, was whether a Maori plaintiff could bring suit against the Crown in the Native Land Court against the wishes of the Crown (see Frame, *Salmond: Southern Jurist*, above n 51, at 117-18). Sir John was under the impression that all the Court had ruled on was whether the Maori plaintiff was entitled to have their claim determined by the Native Land Court – a proposition, he said, the Crown had never sought to deny. He did, however, believe that the Native Land Act 1909 clearly precluded the plaintiff from pursuing such claims in the Native Land Court against the wishes of the Crown (*ibid*). Sir Robert Stout’s close interpretation of the Act, allowing for a conclusion which the Act had sought to deny, was clearly the source of the Solicitor-General’s perplexity about the implications of the judgment, not least in regard to the Crown’s statutory authority under the 1909 Act to conclude native title claims.

147 Above n 105.

148 Hence Williams J states: ‘I agree, however, with the conclusions arrived at by His Honour that rights given to natives by statute to have their customary titles determined can only be divested in the manner prescribed by statute’: *Tamihana Korokai v Solicitor-General*, above n 3, at 348. Chapman J continued this exclusive focus on statute, saying: ‘It may, however, be regarded as questionable whether there is any other mode of putting an end to the jurisdiction of the Native Land Court than a Proclamation under section 85 [of the Native Land Act 1909]’: *ibid*, at 358, my addition. The other judges followed Stout CJ in declaring that the Crown must either abide by the statutory procedures for lawful extinguishment of native title, or provide other material proof that the land has been ceded to the Crown: see *ibid*, at 352 per Edwards J; at 354 per Cooper J.

to which affairs had moved on since *Wi Parata*, or indeed since the *Solicitor-General v Bishop of Wellington* some twenty-four years later.¹⁵⁰ Part of the reason for this is that in *Tamihana Korokai* the Court of Appeal was unwilling to uphold the key notion which had supported the Crown's case in these earlier judgments – that there was a prerogative power over native title, inherent in the Crown, which rendered its declarations on the matter binding on the courts. Instead, the Court of Appeal accepted the Privy Council view, first raised in *Nireaha Tamaki v Baker* but fully asserted in *Wallis v Solicitor-General*, that the Crown no longer had a privileged position concerning native title, and its declarations on the matter were subject to the determination of the courts.¹⁵¹

VII. THE CONTINGENCIES OF TAMIHANA KOROKAI

Yet the Court of Appeal in *Tamihana Korokai v Solicitor-General* could only find against the Crown on native title because of the specific circumstances of the case. These circumstances allowed the Court of Appeal to determine that the Crown had failed to provide sufficient evidence that the native title had been extinguished.¹⁵² Only in this way was it possible to overcome the import of the Native Land Act 1909 which had clearly been enacted to produce a contrary conclusion, upholding the Crown's full executive capacity to overturn native title claims.

The conclusion of *Tamihana Korokai* was therefore only possible due to the contingencies surrounding the case, which allowed the Court an opening for such a ruling. As far as the wider legislative environment was concerned, the cards were definitely stacked in the Crown's favour, upholding its capacity to overturn unwanted native title claims, and preventing them being referred to the Native Land Court. For the next three-quarters of a century and beyond, this legislative environment ensured that, in almost all circumstances, native title would not be a legal claim enforceable against the Crown. Further, those native title claims that did arise against the Crown concerned titles that tended to fall outside the scope of this land legislation – river beds, coastal foreshores, or claims not directly related to land, such as native customary rights to collect seafood.¹⁵³ It is indeed in the context of this highly skewed legislative environment that the decision of the Court of Appeal in *Tamihana Korokai*, in finding for the plaintiff against the Crown and allowing the matter to be referred to the Native Land Court, derives its deepest irony.

VIII. HEALING THE BREACH?

However the Native Land Act 1909 served another purpose for Stout CJ. It was the basis upon which he attempted to heal the breach that had earlier emerged between the Court of Appeal and the Privy Council over native title, most clearly manifested in the Protest of 1903. As we have seen, the Privy Council had claimed in *Nireaha Tamaki v Baker* that native title claims had a

149 As we have seen, it was effectively able to do so because the Solicitor-General had agreed with the plaintiff to waive any defence based on the most explicit section of the Native Land Act 1909 which denied Maori the right to bring native title claims against the Crown – see above n 52.

150 For *Wi Parata*, see above nn 13, 14, and 15. For *Solicitor-General v Bishop of Wellington*, see above n 32.

151 See above nn 26 and 33.

152 See above n 105.

153 See for instance, *Waipapakura v Hempton* (1914) 33 NZLR 1065; *In Re the Bed of the Wanganui River* (1955) NZLR 419; *In Re The Bed of the Wanganui River* (1962) NZLR 600; *In Re The Ninety-Mile Beach* (1963) NZLR 461; *Te Weehi v Regional Fisheries Officer* (1986) 1 NZLR 680; *Attorney-General v Ngati Apa* (2003) 3 NZLR 643.

statutory basis in New Zealand law, and this ensured that these claims were cognisable within New Zealand courts.¹⁵⁴ It was this point of view which drew heated protest from Stout CJ and Williams and Edwards JJ in 1903. Indeed at one point, Stout CJ went so far as to claim that ‘in *Nireaha Tamaki v Baker*, the [Privy] Council was ignorant of ... the Ordinances, Acts, and Charters regarding Native lands’.¹⁵⁵ Similarly, the Privy Council had strongly indicated in *Wallis v Solicitor-General* that the Crown no longer had prerogative rights over native title capable of binding the Courts.

We have already seen how the judges in *Tamihana Korokai* effectively adopted the Privy Council’s position concerning the prerogative. However the Native Land Act 1909 also allowed Stout CJ to find a creative way of coming to terms with *Nireaha Tamaki v Baker* and its statutory recognition of native title. The 1909 Act allowed Stout CJ to accept the view of the Privy Council concerning statutory recognition in *Nireaha Tamaki v Baker*, but to do so in a way that allowed him to avoid directly contravening his earlier contrary opinion in the Protest. By focusing on an Act promulgated in 1909 as the source of native title – an Act which *post-dates* his protest against the Privy Council in 1903 – Stout CJ was able to affirm the position of the Privy Council that there is a statutory basis for New Zealand native title, but to do so in a way that did not contradict his claims to the contrary in 1903.¹⁵⁶ Paul McHugh has pointed to this face-saving manoeuvre by Stout CJ as follows:

Ignoring the possibility that earlier statutes affecting Maori traditional lands could have provided a basis for this ‘statutorily recognized’ title, Stout held it to have been created by the 1909 legislation. Here Stout had extricated himself, in so far as the choice of the 1909 legislation cast no shadow upon his earlier decisions.¹⁵⁷

However although I agree with McHugh that this was the reasoning behind Stout CJ’s adoption of the 1909 Act as the basis for native title recognition, I would disagree with McHugh that, in adopting such a strategy, Stout CJ ‘had extricated himself, in so far as the choice of the 1909 legislation cast no shadow upon his earlier decisions’. On the contrary, a very long shadow is cast by the fact that Stout CJ’s use of the 1909 legislation as the source of statutory recognition is somewhat at odds not only with his judgment in *Hohepa Wi Neera v Bishop of Wellington* some ten years before, but also with aspects of his own judgment in *Tamihana Korokai v Solicitor-General*.

Stout CJ’s judgment in *Hohepa Wi Neera v Bishop of Wellington* occurred directly in the wake of the Privy Council’s decision in *Nireaha Tamaki v Baker*, and was adjudicated very much in the

154 See *Nireaha Tamaki v Baker* (1900-01), above n 5, at 382.

155 ‘*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903’, above n 2, at 746. My addition.

156 A similar belated acquiescence to the Privy Council’s decisions on native title can be seen in Edwards J’s judgment in *Tamihana Korokai*. In the course of his Protest against the Privy Council in 1903, he had claimed that ‘the interpretation which their Lordships have put upon the laws relating to Native lands in this Colony is subversive of the law which has prevailed from its foundation’: ‘*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903’, above n 2, at 757. The Privy Council interpretations that Edwards J was referring to were those in *Nireaha Tamaki v Baker* (1900-01) and *Wallis v Solicitor-General* (1903). Yet nine years later, in *Tamihana Korokai v Solicitor-General*, he referred to *Nireaha Tamaki v Baker* in a positive light, stating that it is this precedent which is the source of the New Zealand courts’ jurisdiction over native title: *Tamihana Korokai v The Solicitor-General*, above n 3, at 349-50 and 352. Therefore we can see that Edwards J performs the same move as Stout CJ in retrospectively embracing a Privy Council decision which, some years earlier, had been the subject of his vehement disagreement.

157 McHugh, *The Māori Magna Carta*, above n 6, at 121.

shadow of the changes which that judgment had made to the *Wi Parata* legacy in New Zealand.¹⁵⁸ Although Stout CJ criticizes the Privy Council's interpretation of the Native Rights Act 1865 in that judgment, in particular its claim that this Act was binding on the Crown, nevertheless Stout CJ clearly follows the Privy Council in recognizing the statutory recognition of native title in New Zealand, and on the basis of sources prior to 1909.¹⁵⁹ Similarly, in *Tamihana Korokai v Solicitor-General*, Stout CJ (like the other judges in this case) acknowledges quite early statutory sources for the recognition of native title in New Zealand. For instance, he refers to an 1852 Act as follows: '[T]he Imperial Parliament, in the New Zealand Constitution Act (15 & 16 Vict., c. 72, section 73), recognized the Native title.'¹⁶⁰ He refers to the *Native Lands Act 1862* in a similar way: 'In 1862 the first Act to provide for the ascertainment of the ownership of Native lands, and for granting certificates of title therein, and for regulating the disposal of Native lands, was passed.'¹⁶¹

One might argue that the difference in Stout CJ's views concerning these early statutes and the Native Land Act 1909 was a view that these early statutes were not binding on the Crown, and so only the 1909 Act was sufficient as a statutory recognition of native title in this respect. We have seen that in *Hohepa Wi Neera*, Stout CJ went to some lengths to insist that the Native Rights Act 1865 was not binding on the Crown.¹⁶² Perhaps he thought that the 1909 statute was the first Act regarding native title that was binding on the Crown? Yet we saw that the other judges in *Tamihana Korokai* viewed earlier statutes as equally binding on the Crown, in so far as such statutes were deemed to limit the Crown's prerogative over native title.¹⁶³ Further, despite the suggestion that Stout CJ only saw the 1909 Act as binding, he makes the following claim in relation to the 1862 statute (and subsequent ones) mentioned above, which gives the impression that he believed these statutes were also binding on the Crown in so far as they limited the Crown's actions in relation to native title:

158 For a comprehensive discussion of how the Court of Appeal's *Hohepa Wi Neera* judgment was shaped by their response to the Privy Council's ruling in *Nireaha Tamaki v Baker*, see Tate, 'Hohepa Wi Neera: Native Title and the Privy Council Challenge', above n 8.

159 As in *Tamihana Korokai*, Stout CJ began his judgment in *Hohepa Wi Neera* with a long discussion of New Zealand legislation relating to Native land. Within this discussion he referred to chapter xiii, section 9 of the Imperial Instructions of 1846 which, he says, allowed land claims of aboriginal inhabitants to be admitted to statutory land courts (as distinct from municipal Courts) if 'the claimants or their progenitors or those from whom they derived title had actually had the occupation of the lands so claimed, and had 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': *Hohepa Wi Neera v Bishop of Wellington*, above n 6, at 664-65. In other words, he clearly saw these Instructions as a recognition of Maori customary rights to land. He also points to the Native Rights Act of 1865 with its reference to 'titles to land held under Maori custom and usage': *ibid*, at 666. However Stout CJ explicitly disagrees with the Privy Council's interpretation of this Act in *Nireaha Tamaki v Baker*, arguing that it was mistaken in overturning Prendergast CJ's view in *Wi Parata* that this Act was not binding on the Crown (cf *ibid*, at 667. See also above n 92). Both of these statements seem to amount to a clear admission, on the part of Stout CJ, of the statutory recognition of customary occupation and use of land as a legitimate basis for land title among the Maori population. In other words, they appear to be an effective recognition of native title, and to this extent, clearly depart from those elements of Prendergast CJ's judgment in *Wi Parata* which, at some points, had denied the very existence of such: see above n 12.

160 *Tamihana Korokai v Solicitor-General*, above n 3, at 341.

161 *Ibid*, at 342.

162 See above n 92.

163 See the section 'Tamihana Korokai and the Statutory Recognition of Native Title', above.

That the Crown in New Zealand recognized that it could not treat the Native land – that is, the land over which the Natives had not given up their rights of cession – as Crown land in the fullest sense is plain from various things done.¹⁶⁴

Consequently, the evidence in both Stout CJ's *Hohepa Wi Neera* judgment of 1902, and his *Tamihana Korokai* judgment of 1912, indicates that he had already provided for a statutory recognition of native title, which was apparently binding on the Crown, but which pre-dated his 1909 legislation. While it is clear that these earlier instances of statutory recognition were not as comprehensive as the 1909 legislation, nevertheless the fact that Stout CJ himself engaged in such earlier recognition means that his emphasis at the end of *Tamihana Korokai* on the 1909 Act as the sole source of native title recognition is certainly at odds with his earlier views.

IX. CONCLUSION

In at least two respects, *Tamihana Korokai v Solicitor-General* was a significant departure from the Supreme Court's decision in *Wi Parata v Bishop of Wellington*, delivered over three decades earlier. In *Wi Parata*, the Supreme Court had insisted that the Crown is the 'sole arbiter of its own justice' on native title issues. The two primary means by which Prendergast CJ had asserted this proposition was by insisting that (a) native title matters involving the Crown fell within the latter's prerogative powers, whose declaration was therefore binding on the Courts; and (b) this prerogative was not limited by the Native Rights Act 1865, which otherwise guaranteed Maori the right to have their native title claims investigated in the Native Land Court. *Tamihana Korokai* broke absolutely from both of these precedents, in that it largely refused to recognize any semblance of the Crown's prerogative over native title, and insisted that the Crown's actions in regard to such title, in particular its extinguishment, was now bound by strict statutory procedure.

In arriving at this view, however, *Tamihana Korokai* did not consign the *Wi Parata* precedent entirely to history. That precedent lived on in a series of native land Acts whose purpose was to provide the Crown with the sort of protection from unwanted native title claims which had characterized Prendergast CJ's judgment in *Wi Parata*. Further, the Court of Appeal followed the Privy Council in upholding that aspect of the *Wi Parata* judgment which held that Crown grants, in themselves, were sufficient evidence that the native title preceding them had been lawfully extinguished. Both of these elements effectively meant that any future native title claims against the Crown which the municipal (as distinct from statutory) courts would have to deal with would largely involve Crown territory not alienated by Crown grants or covered by these statutes (riverbeds, coastal foreshores) or else native customary rights that fall outside such restrictions, such as the customary collection of sea-food.¹⁶⁵

Nevertheless there are features of *Tamihana Korokai v Solicitor-General* that make it a landmark native title case in New Zealand. It was the first Court of Appeal judgment on native title in the wake of that Court's protest against the Privy Council in 1903, and it is clear that all of the Court of Appeal judges took significant steps in *Tamihana Korokai* to close the breach that this protest had revealed between local and imperial positions on native title. They did so by strongly adopting the Privy Council position outlined in *Nireaha Tamaki v Baker* and *Wallis v Solicitor-General*, concerning Crown prerogative, the statutory recognition of native title, and its

¹⁶⁴ *Tamihana Korokai v Solicitor-General*, above n 3, at 342.

¹⁶⁵ See above n 153.

enforceability against the Crown, which they had so strongly criticized nine years before. In this respect, the judgment is very different from the previous Court of Appeal ruling on native title in *Hohepa Wi Neera v Bishop of Wellington* ten years earlier. Like *Tamihana Korokai*, this earlier judgment was also delivered by the Court in the shadow of the Privy Council's departure from *Wi Parata* (though that departure was only limited to *Nireaha Tamaki v Baker* at that time). However, there was no such effort on the part of the Court of Appeal at that time to accommodate itself to the Privy Council position on native title. Rather, the Court of Appeal made a concerted effort to salvage as much of the *Wi Parata* precedent as it could by evading the full impact of the Privy Council ruling.¹⁶⁶ The difference between the Court of Appeal's approach to the *Wi Parata* precedent in *Hohepa Wi Neera*, and its approach in *Tamihana Korokai* ten years later, is in itself a remarkable indication of the distance that the Court of Appeal had traveled in healing the imperial breach on native title.

166 See the discussion in Tate, 'Hohepa Wi Neera: Native Title and the Privy Council Challenge', above n 8.

CONTEMPORARY ISSUES IN MĀORI LAW AND SOCIETY

BY LINDA TE AHO*

This article is the first of what is hoped to be a regular feature in the Waikato Law Review reviewing and commenting upon significant recent developments in Māori law and society. It is not intended to be an exhaustive review; but rather it explores a select range of diverse issues concerning Māori law and society that arose in the course of the year. It begins by considering the impact of the involvement of the Court of Appeal in the Matauri X litigation regarding the powers of Māori incorporations. Part Two considers some important issues that have arisen in relation to the Foreshore and Seabed and Māori Fisheries. Part Three reflects upon concerns that were voiced during this year's government consultation process with Māori concerning freshwater, and that discussion flows easily into a consideration of recent amendments to the Resource Management Act 1991. The final part contemplates an interesting development in the area of Treaty of Waitangi claims in the context of Transpower's proposed new transmission line.

I. MĀORI INCORPORATIONS AND THE CASE OF MATAURI X

Māori incorporations have long provided an option for the management, development and use of multiply-owned Māori Land. A Māori incorporation acts by and through a Committee of Management. A recent Court of Appeal decision continues a deliberation of issues concerning the powers of Māori incorporations to borrow money and to mortgage its land, and the powers of a Committee of Management.

The Committee of Management of Matauri X, a Māori incorporation, borrowed more than \$3 million from Bridgecorp Finance Limited for the purpose of investing in Eternal Springs, a water bottling business in Whakatāne. Matauri gave as security a mortgage over its land in the spectacularly beautiful Matauri Bay in Northland. Matauri defaulted on the loan and Bridgecorp seeks to rely upon its security. Matauri has continued to argue that the loan was void, having been beyond its powers. At first instance, that argument was rejected. Fisher J held that the loan was valid and that Matauri had the power to enter it.¹ Matauri challenged that decision and the Court of Appeal was called upon to determine the extent of Matauri's borrowing powers.² Ultimately, because a relevant transitional provision of Te Ture Whenua Māori Act 1993 had not been referred to the High Court in its deliberations, the matter was referred back for further deliberation. In the

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1 *Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2004] 2 NZLR 792 (HC).

2 *Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2005] 3 NZLR 193 (CA).

meantime some important lessons have emerged from the judgments of both Courts regarding Māori governance generally.

By way of general background to Māori incorporations, the process of incorporation vests land into a corporate body with full legal personality operated by a Committee of Management. The Committee makes decisions to develop the land in the best interests of collective landowners who are connected by kinship though often scattered to the four winds. Those decisions must also be made in accordance with the fundamental objectives of the Te Ture Whenua Māori Act 1993. While incorporations hold legal title to land, the owners retain the beneficial ownership and therefore their link to their ancestral land. External institutions such as banks have a definite corporate body to deal with – making the prospect of financial lending to incorporations more likely.

A. *The ‘Progressive Emancipation’ of Incorporations*

Prior to Te Ture Whenua Māori Act 1993 (Te Ture Whenua Māori), legislation limited the powers of incorporations to the objects specified in the order of incorporation. Such objects often included farming, forestry, coal mining, and alienation by sale and lease. Section 271(2) of the Māori Affairs Act 1953 had explicitly required that the order of incorporation define the object or objects for which the body corporate was established and every object had to relate exclusively to the land. Matauri X (Matauri) was incorporated in 1967 under this section. Its original objects included a provision to alienate land by sale, lease or otherwise of the land or of any portion thereof. So, alienation was technically possible, but the objects did not expressly include mortgage. The Court of Appeal took the view that, had the 1953 Act still been in force, Matauri’s proposed investment would have been unlawful, being beyond the objects and powers of Matauri.³

With the enactment of the Māori Affairs Amendment Act in 1967 came new provisions dealing with Māori incorporations such as section 48 which expressly authorised incorporations to ‘alienate, mortgage, charge, or otherwise dispose of or deal with the assets from time to time invested in it in the same manner if it were a private person of full capacity’. The Court of Appeal concluded that this provision, while empowering a Māori incorporation to grant mortgages, clearly only applied in circumstances where the mortgage was security for a debt incurred in furtherance of the incorporation’s objects.⁴ Accordingly, an investment like Eternal Springs and the Bridgecorp loan would have been no more permissible under the 1967 Act as under the 1953 Act.

Incorporations are continued under the Te Ture Whenua Māori Act 1993 with substantial increases in their objects and powers. Under this Act, incorporations and Committees of Management have been given greater flexibility with regard to the commercial development of their land. A key example of this greater flexibility, or in Fisher J’s words, the ‘progressive emancipation’ of Māori incorporations, is section 253 which provides as follows:

Capacity and powers of incorporation – Subject to this Act and any other enactment, and the general law and to any express limitations or restrictions imposed by the Court in the order of incorporation or

3 Ibid, 197.

4 Ibid, 198, para 18.

included in its constitution pursuant to section 253A of this Act, every Māori incorporation has, both within and outside New Zealand, in addition to the powers conferred on it by this Part of this Act—

(a) full capacity in the discharge of the obligations of the trust in the best interests of the shareholders, to carry on or undertake any business or activity, do any act, or to enter into any transaction; and

(b) for the purposes of paragraph (a) of this section, full rights, powers, and privileges.

Another example of the greater flexibility enjoyed by incorporations under the 1993 legislation is that Māori incorporations can hold land for investment purposes, and such investment lands are not affected by the restrictions of Te Ture Whenua Māori.⁵ However, corpus land, or land that does form part of the incorporation, is classified as Māori Freehold Land and section 150B Te Ture Whenua Māori imposes restrictions on how and to whom it can be alienated.

Matauri has maintained its argument that its investment in Eternal Springs went beyond its objects. According to Fisher J, however, section 253 of Te Ture Whenua Māori gives an incorporation the capacity to undertake any business or activity, do any act, and enter into any transaction, *unless the legislation or order of incorporation positively prevented it from doing so*. Incorporating principles of company law, Fisher J expressed his view that an ultra vires doctrine limiting a corporate entity's powers by reference to objects stated in its constitution no longer had any place in the modern legal world. To limit commercial activities of an incorporation or a company would place it at a distinct disadvantage to operate effectively in the commercial world. Based on this line of reasoning Fisher J concluded that section 253 of Te Ture Whenua Māori effectively allows existing incorporations to act in ways which go beyond their empowering objects.

Applying this to Matauri, Fisher J found that there were no express limitations or restrictions for the purpose of section 253, and that the mortgage was valid:

It is true that one of the objects of Te Ture Whenua Māori Act is to halt the dispossession, alienation and fragmentation of Māori land. But another is to place the destiny of Māori land in the collective hands of its owners and their duly appointed representatives. In this Act Parliament has recognised Māori as adults capable of coming together to determine the way in which their own land will be dealt with in a modern world. If that includes mortgaging the land, that is their prerogative. But everyone knows that if money borrowed on mortgage is not repaid, the mortgagee takes the land. One cannot have it both ways. Matauri X had the power to borrow on mortgage but cannot escape the consequences.⁶

But, in reaching his decision, Fisher J had not considered the transitional provision, section 358A, that had been inserted by Te Ture Whenua Māori Amendment Act (No 2) 1993. Section 358A applied to Matauri, as an incorporation that had been established under or continued in existence by the Māori Affairs Amendment Act 1967. Under this provision, incorporations may apply for an order redefining or adding objects by resolution passed at a general meeting of shareholders. But more significantly, until the making of any such order, *the objects of the incorporation shall continue to be the objects specified in its order of incorporation*.

In addition, the Court of Appeal was of the firm view that Matauri's objects did not include, as an object, alienation in the sense of mortgaging. The Court referred the matter back to the High Court for further determination, resisting the invitation to form a view in relation to issues of ratification, ultra vires and the 'indoor management rule'.

5 Sections 256(4), 256(4A).

6 *Bridgecorp* [2004] 2 NZLR 792, 794 (HC).

B. Importing Principles of Company Law

Throughout the High Court judgment, principles of company law were imported and applied to Te Ture Whenua Māori. While the Companies Act and Te Ture Whenua Māori 1993 were indeed passed in the same year, the two statutes have fundamentally different purposes and premises, and it is inappropriate simply to import principles of company law without a deeper appreciation of the different purposes of those statutes. The purpose of the Companies Act 1993 is squarely focussed upon business risk and allowing wide discretion in matters of business judgement whilst also providing some protection for directors, shareholders and external parties. In contrast, Te Ture Whenua Māori explicitly recognises that land is a taonga tuku iho of special significance to Māori people and that retention of it should be promoted. In support of that object and principle, the occupation, development and utilisation of land for the benefit of its owners, their whānau and their hapū is to be facilitated. The High Court decision turned on the interpretation of section 253 Te Ture Whenua Māori, and Fisher J made much of the similarities between that section and section 16 of the Companies Act both of which deal with the capacity of companies and incorporations respectively to enter into contracts and transactions.

Though the sections share similar wording, they differ in two important respects. First, section 253 is expressly subject to Te Ture Whenua Māori, and therefore its kaupapa, or objectives. At most, Māori Freehold Land currently constitutes just 6 per cent of the total landmass of Aotearoa. This comes as a result of ‘endless legislative tinkering’ designed to alienate Māori land from Māori collective tenure – hence the emphasis on retention. Equally as damaging was the interpretation of that legislation which was sometimes broad enough to embrace Māori custom – such as section 30 of the Native Land Act 1865 for example – but not interpreted in that manner by courts. As a result of a long and complicated legislative history, the land that does remain in Māori hands is typically fragmented and uneconomic – hence the provisions in the Act allowing for trusts and incorporations to administer and develop lands on behalf of multiple owners.

While some restrictions on alienating land by incorporations have been relaxed (largely as a result of the 2002 amendment) there is a high threshold to achieve for the sale of corpus lands. Section 150B Te Ture Whenua Māori requires that that a 75 per cent majority of the landowners must agree to the alienation; and an option of sale or purchase must be offered firstly to the preferred group of alienees. Accordingly, while retention is not absolute, if there is an interpretation of the legislation that promotes retention whilst at the same time providing for the use and development of that land, surely that interpretation must be preferred.⁷ In terms of the clear purpose of the Act, it does not seem consistent for there to be such a high threshold to achieve for the alienation of corpus land by sale, when those lands could so easily be alienated by mortgage.

C. Powers of Management Committees

The power of the Management Committee was another central issue in the Matauri decision. The effect of Fisher J’s point of view is that the Management Committee has a significant amount of power very much akin to a Board of Directors operating under the Companies Act 1993. Te Ture Whenua Māori establishes a framework of accountability that the Committee of Management must provide to the shareholders and the Māori Land Court has a supervisory role.

⁷ *Brown v Māori Appellate Court* [2001] 1 NZLR 87.

Turning back to the Matauri situation, Matauri's Management Committee comprised a Chairperson and six others as members, one of whom was also Secretary. The Chairperson sent a letter to the Committee members advising that he had accepted an offer from Bridgecorp in June 2001 which would involve the use of valuable land as security to raise funds for the investment in Eternal Springs. The joint venture operation required Matauri X Incorporation to raise a first mortgage of \$2 million. The Committee met on two subsequent occasions during June that year and at the second meeting the Committee endorsed and supported the proposal, including the loan. That same day the Chairperson and Secretary signed the necessary documents on behalf of the incorporation with the affixing of the seal. At a further Management Committee meeting in August 2001 these actions were formally ratified. The Annual General Meeting of the shareholders also voted in favour of the action. When the joint venture failed, one of the issues was whether the Management Committee had in fact authorised this transaction. Could the incorporation be bound by the actions of its Chairperson and its Secretary?

Fisher J held that section 270(1) Te Ture Whenua Māori makes the decisions of a Management Committee binding on the incorporation, and no person dealing with the incorporation is bound to inquire further to see whether the Committee had been authorised or restricted by any resolution of the shareholders: section 271. A Committee of Management only requires that three members of a Management Committee concur on a decision to make it effective; and under section 270(5) Matauri is able to enter into contracts in the same manner as if it were a limited liability company. The Incorporation's common seal can be affixed to a document in the presence of any two members of the Committee. In developing these points, Fisher J also applied another principle of company law, the 'indoor management rule', and the basic principles of ratification; if a Board subsequently adopts unauthorised acts of an agent the action becomes fully valid. The Committee had ratified the decision and so had the shareholders.

The Court of Appeal declined to delve into these issues, preferring to refer the case back to the High Court for further determination in light of section 358A. The Court of Appeal cautioned that 'while Matauri X has had a victory in this battle, it may yet lose the war'.⁸

D. Lessons

In relation to the activities of incorporations, the Matauri litigation may herald a shift in the emphasis from the retention principle of Te Ture Whenua Māori (at least by courts other than the Māori Land Court), towards emphasising use and development in the 'modern commercial world.' The significance of this is that the Committee of Management has a large amount of power which must be carefully monitored by owners. Beneficial owners may provide their Committees of Management with guidelines that can be stipulated in redefined objects or constitutions. For example, owners can stipulate that retention is paramount, and that any commercial development must occur within a framework of retention. Matauri is an example of a typically 'asset rich, cash poor' Māori incorporation. In order to fulfil the retention objective, in the Act at least, alternative avenues exist for incorporations to raise finance other than mortgaging land, such as raising security over leasehold, or stock, or other assets.

⁸ *Bridgecorp* [2005] 3 NZLR 193 (CA) para 47.

The Matauri litigation does not end in the Court of Appeal. Bridgecorp has been granted leave to appeal to the Supreme Court to determine whether the borrowing and granting of the mortgage to Bridgecorp was within the powers of Matauri.⁹

II. FORESHORE AND SEABED ACT 2004

Nā wai te koau ka ruku ki te aromaunga e peka.

Reweti Kohere has recorded this saying that a bird flying along a narrow valley would not turn back even if one tried hard to turn it. The bird is unswerving in its path to its chosen destination.¹⁰

The enactment of the Foreshore and Seabed Act 2004 has ignited further issues relating to Māori customary rights in Aotearoa. The Act was passed hastily in the wake of the unanimous decision of five Court of Appeal judges that the Māori Land Court has the jurisdiction to determine whether the foreshore and seabed are Māori customary land under Te Ture Whenua Māori. Despite widespread and passionate opposition, and in defiance of strong recommendations made by the Waitangi Tribunal,¹¹ the Act came into force on 17 January 2005 and has since drawn criticism from the United Nations Committee on the Elimination of Racial Discrimination.

The Court of Appeal's decision in *Attorney General v Ngati Apa*¹² draws together a long history of legal action concerning the determination of status of foreshore and seabed as Māori customary land under Te Ture Whenua Māori. Litigation had initially been brought by Māori groups in the Marlborough Sounds dissatisfied with the management of local marine farming activities in the top of the South Island.¹³ Court orders were sought declaring the land below mean high-water mark in the Marlborough Sounds, out to the limits of the territorial sea, to be Māori customary land, as defined by Te Ture Whenua Māori. The Attorney General and other interested parties opposed the application relying upon an earlier Court of Appeal decision, *Re Ninety Mile Beach*.¹⁴

While the Foreshore and Seabed Act may trump the Court of Appeal decision in many respects, *Ngati Apa* still serves to clarify some 100 years of precedents involving judges going back and forth over customary rights issues. For instance, Elias CJ clarified that the *Ninety Mile Beach* case is wrong, largely because it is based on the discredited authority of *Wi Parata v Bishop of Wellington*.¹⁵

The Court of Appeal also determined that upon the Crown's acquisition of sovereignty under the Treaty of Waitangi, it acquired territorial authority ('imperium') over New Zealand, not ownership. Therefore any Crown title (radical title) is burdened by pre-existing Māori customary proprietary rights. This means that Māori customary rights endure until they are extinguished in accordance with law.¹⁶ Customary title continued after British Crown's assertion of sovereignty in

9 *Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2005] NZSC 31.

10 R Kohere, *He Konae Aronui Maori Proverbs and Sayings* (1951).

11 Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071 2004).

12 [2003] 3 NZLR 643 (CA).

13 *Re Marlborough Sounds Foreshore and Seabed* 22A Nelson MB 1(MLC), Hingston J; *Re Marlborough Sounds Foreshore Decision of the Maori Land Court* [2002] 2 NZLR 661 (HC), Ellis J.

14 [1963] NZLR 461.

15 (1877) 3 NZ Jur (NS) SC 72; see *AG v Ngati Apa* [2003] 3 NZLR 643 (CA) at para 13 per Elias CJ.

16 *AG v Ngati Apa* (CA), *ibid*, 651.

1840 and was not extinguished by any general or specific legislation; any such extinguishment must occur as a result of plain and clear legislative provision.¹⁷ The Foreshore and Seabed Act 2004 contains such provisions in relation to the foreshore and seabed.

A. The Waitangi Tribunal Report on the Government's Proposals

The Waitangi Tribunal considered the Crown's unilaterally-announced policy on the foreshore and seabed as a matter of urgency. In strong words the Tribunal concluded that the Crown's policy amounted to a serious breach of the Treaty of Waitangi¹⁸ and very serious prejudice to claimants.¹⁹ The Government's policies had also failed in terms of wider norms of domestic and international law that underpin good government: the Rule of Law; and the principles of fairness and non-discrimination.²⁰ The Tribunal recommended that any pathway forward should be determined by consensus between the Treaty partners who needed to engage in dialogue. And as legal rights had effectively been taken away, compensation is essential.

The Government's unswerving response to the Tribunal report was to label it as 'flawed.' Despite widespread opposition to the Bill and the strong recommendations of the Tribunal, the Government proceeded to obtain the enactment of the Foreshore and Seabed Act 2004 (the Act).

B. Features of the Foreshore and Seabed Act 2004

The Act in section 13 vests all of the full, legal and beneficial ownership of the public foreshore and seabed in the Crown so that the Crown holds it as its absolute property. The object of the Act is to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all the people of New Zealand, including the protection of the association of whānau, hapū and iwi with areas of the public foreshore and seabed. That protection apparently comes in the form of customary rights orders, territorial customary rights findings, foreshore and seabed reserves, and the continued right to direct negotiations.

Customary Rights Orders

Customary rights orders are available under sections 48 to 50, and are designed to recognise a particular activity, use or practice in a specific area of 'public foreshore and seabed'. Section 47 sets out powers and procedures of the Māori Land Court and the application of Te Ture Whenua Māori 1993. Applications under section 48(1) are made to the Chief Registrar. They are then referred to the Chief Judge who directs the application to the appropriate Māori Land Court Judge to hear and determine.

Section 50 outlines the situations in which the Māori Land Court can make a customary rights order. The Court needs to be satisfied that the order applies to a whānau, hapū or iwi; and that the activity use or practice for which the applicant seeks a customary rights order:

- is and has been since 1840 integral to tikanga Māori;

17 The case is not without its critics; for a range of responses to the case see *New Zealand Law Journal*, November 2003 issue.

18 Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071 2004) 129, para 5.1.3.

19 *Ibid*, 138, para 5.2.

20 *Ibid*, 136, para 5.2.1.

- has been carried out in a substantially uninterrupted way by the applicant groups since 1840;
- continues to be carried on, exercised or followed in the same area of the public foreshore and seabed in accordance with tikanga Māori; and
- is not prohibited by law.

Early applicants for customary rights orders under section 50 will test the legislation.²¹ As yet there are no guidelines or practice notes to assist applicants, and the haste in which the legislation was enacted means that amendments are likely to be made.

Before an application can be notified, Schedule 1 requires applicants to particularise in writing the customary rights sought to be recognised as well as the tikanga governing the right and the scale, extent, and frequency of such rights, which potentially could span from very broad concepts of mana motuhake (separate authority) and kaitiakitanga (guardianship) to more specific rights such as harvest, extraction, and access.

It seems that the Court will utilise similar processes to that of Waitangi Tribunal inquiries, which in turn raises a raft of questions such as who are the appropriate claimants, and associated mandate issues. Claimants who have no Tribunal report bear a heavy burden in terms of collating the necessary information. Claimants will also have to navigate areas of overlap with Māori fisheries issues and marine farming regimes.

Quite apart from the evidentiary burden, concerns have also been voiced about the incorporation of the '1840 rule' into the Act fixing the date for which Courts will ascertain customary rights to 1840. This rule poses problems for those iwi who acquired their customary tenure after 1840.

Customary rights orders will not carry any rights of exclusive occupation. Rather, under section 52 a customary rights order confers a right on the whānau, hapū, or iwi to carry out a 'recognised customary activity' in accordance with the Resource Management Act 1991 and to enable protection of a recognised customary activity under the Resource Management Act. For reasons better explained in Part V below, many Māori have long been sceptical about the interpretation and implementation of Resource Management Act provisions with regard to their interests and values being 'taken into account' or 'recognised and provided for' in decisions concerning resource consents.

Fortunately, from an applicant's point of view, access to funding from the Special Aid Fund of the Māori Land Court has been preserved for customary rights orders. Part 4 of the Act provides for groups of natural persons with a 'distinctive community of interest' to apply to the High Court for customary rights orders.

D. Territorial Customary Rights Findings

Section 33 of the Act allows an application to the High Court for a finding that a certain group (which may or may not be Māori) has had exclusive use and occupation of a part of the public foreshore and seabed since 1840. The procedure for applications for 'territorial customary rights findings' includes a power for the High Court to refer any question of tikanga Māori which arises with regard to an application under section 33 to the Māori Appellate Court: section 35. The High Court may take into account other matters including:

21 As at the date of writing (November 2005) two applications have been publicly notified: Te Whakatōhea and Te Makati Whānau Trust.

- customary rights orders made by the Māori Land Court;
- the applicant group's overall territorial association with the area;
- evidence of non-commercial customary fishing activity; and
- any other evidence or information that the Court considers to be reliable, whether or not that evidence would otherwise be admissible.

These provisions of the Act contain an odd mixture of common law themes. The stringent requirement of exclusivity since 1840 is one example: section 32(1). The requirement of continuous ownership of contiguous land in order to acquire territorial customary rights findings to adjoining foreshore is another,²² given that this requirement is sourced from *Re Ninety Mile Beach*, the reasoning in which case was so strongly criticised by the Chief Justice in *Ngāti Apa*.²³

Though claimants to the Waitangi Tribunal are able to apply for and access legal aid funding with regard to the costs of legal counsel, the Legal Services Act does not seem to allow legal aid for territorial customary rights findings. This could prove to be a real barrier for claimants given the likelihood that applicants will utilise similar processes to that of Waitangi Tribunal inquiries to collate the necessary evidential basis for their applications.

E. Foreshore and Seabed Reserves

Where a territorial customary rights finding is made by the High Court under section 33, the applicants may enter discussions regarding redress or seek to establish a foreshore and seabed reserve. Such reserves are intended to acknowledge the exercise of kaitiakitanga whilst ensuring that the area is to be held 'for the common use and benefit of the people of New Zealand', and that no charges or fees will be payable for the use of the reserve by the public. This concept seems to be modelled upon the Orakei Reserves Board. More detail about this Board is contained in Part V below, in the context of recent amendments to the Resource Management Act that provide for joint management agreements.

F. Direct Negotiations

To avoid doubt, section 101 of the Act preserves the right of claimant groups and the Crown to enter agreements to settle historical Treaty of Waitangi claims. It is understood that two major coastal iwi, Te Whānau a Apanui and Ngāti Porou, both of the East Coast of the North Island, are engaged in such negotiations currently. Whilst some iwi seem to have acquiesced by initiating applications under the Act, many Māori continue to perceive that the legislation is discriminatory. This perception has the support of the United Nations Committee on Elimination of Racial Discrimination.

G. The Committee on Elimination of Racial Discrimination

This international committee reviewed the compatibility of the Foreshore and Seabed Act 2004 with the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. In Decision 1(66) published on 27 April 2005, the Committee noted its concern at the apparent haste with which the legislation was enacted and that insufficient consideration may

22 Foreshore and Seabed Act 2004 s 32(2).

23 Above n 15.

have been given to alternative responses to the *Ngāti Apa* decision, which might have accommodated Māori rights within a framework more acceptable to both the Māori and all other New Zealanders. Bearing in mind the complexity of the issues involved, the Committee formed the view that:

the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Māori, in particular in its extinguishment of the possibility of establishing Māori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress.

The Committee recommended that the implementation of the Act be closely monitored, as well as its impact on Māori and the developing state of race relations in New Zealand. It also recommended that steps be taken to minimize any negative effects, especially by way of a flexible application of the legislation and by broadening the scope of redress available to Māori.

III. MĀORI FISHERIES ACT 2004

Criticism levelled at the haste in which the Foreshore and Seabed Act was enacted certainly cannot apply to the Māori Fisheries Act, which came into force in September 2004 after more than fifteen years of harrowing debate. The Act provides a long-awaited scheme of allocation to iwi of assets from the Treaty of Waitangi fisheries settlement. Very simply, the allocation scheme provides for allocation to iwi of inshore quota in proportion to the coastline of that iwi, while deepwater quota is to be allocated 25 per cent as to coastline and 75 per cent as to the population of the iwi.

The continuing administration of the settlement assets will be carried out by Te Ohu Kai Moana Trustee Limited (TOKMTL) and will include determining the appropriate classification of quota, allocating and transferring settlement assets, determining coastline entitlements and maintaining an iwi register recording matters related to mandated iwi organisations. The allocation to an iwi will be made through a ‘Mandated Iwi Organisation’, and the Act sets out the requirements that must be fulfilled before TOKMTL will recognise an organisation as a mandated iwi organisation.

A noteworthy inclusion in the Act is the set of provisions allowing for reorganisation of specified mandated iwi organisations. This review highlights these provisions that are causing a stir amongst Māoridom in relation to tribal organisation and identity, with reference to the case of Rongomaiwahine.

A. *The Case of Rongomaiwahine as a ‘Withdrawing Group’*

Rongomaiwahine is the principal ancestor of the people of the Māhia Peninsula, on the East Coast of the North Island. Rongomaiwahine’s first husband was Tamatakutai. In a well-rehearsed story involving the partaking of pāua roe and subsequent deception,²⁴ Tamatakutai was drowned and, in time, Rongomaiwahine took Kahungunu for her husband. Because of the mana of Rongomaiwahine, the people of Rongomaiwahine hold strongly to their separate identity. Some identify themselves as both Rongomaiwahine and Ngāti Kahungunu, but those who are descended from Rongomaiwahine’s first daughters identify themselves only as Rongomaiwahine.

²⁴ The story is best told in the words of a descendant of Rongomaiwahine, acclaimed author and historian, Mere Whaanga, ‘Ngāti Rongomaiwahine’ *Te Ara: the Encyclopaedia of New Zealand* <www.teara.govt.nz>.

In 1943 the chiefs of Rongomaiwahine asserted this identity petitioning the Government seeking exclusive use and benefit over their tribal fishing grounds. The petition stated:

in ancient days these fishing grounds were always the 'rahui' or reserved property of the said Rongomaiwahine Tribe and the neighbouring tribes dare not encroach upon such property for fear of being attacked and killed by the owners.

The Māhia Peninsula is predominantly a fishing area. Seafood of all kinds, including fish, continues to be an important part of the diet of Rongomaiwahine people. The turmoil created by the Government's proposed introduction of a Quota Management System (QMS) in the 1980s would prove to have severe consequences for this iwi.

The Māori text of the Treaty of Waitangi guaranteed 'te tino rangatiratanga' (sovereign authority) in respect of our fisheries, and the English text contains a guarantee of full, exclusive and undisturbed possession of our fisheries.

Māori were granted a court injunction preventing the Government's proposed QMS on the basis that the system directly conflicted with the Treaty. Ensuing negotiations resulted in an interim fisheries settlement in 1989, followed by the final settlement embodied in legislation in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The Act had, in the words of one commentator, a 'turbulent passage' through Parliament²⁵ because no Māori member of the House supported it, and there was considerable opposition to the settlement and the means by which it was achieved amongst Māori generally.²⁶ Treaty rights in respect of the commercial fishery were extinguished, there was a lack of consultation with iwi, there was lack of detail about the terms of the settlement, and the timeframe for what consultation did take place was rushed. Many Māori were unhappy about the alleged lack of mandate of some of the signatories. Nevertheless, iwi are bound by the settlement whether they supported it or not.

For the coastal iwi of Rongomaiwahine, the consequences of that settlement have been particularly severe. Apart from the very first year of quota leasing under the Settlement Act, Rongomaiwahine has never received and utilised its own fisheries entitlements under its own identity. Following some 12 years of unsuccessful attempts (including legal action) Rongomaiwahine, led by their kuia, Miniata Westrupp, approached the Māori Affairs Select Committee to address their concerns. For their efforts, Rongomaiwahine is identified in the Act as a 'withdrawing group'. Withdrawing groups may, if they so choose, withdraw from the first mandated iwi organisation, called the 'joint mandated iwi organisation' or JMIO. For the purposes of the Act, Rongomaiwahine is defined as 'a member of Ngāti Kahungunu', Ngāti Kahungunu Iwi Incorporation being the relevant JMIO.

'Tukuna matou kia haere, i roto i te rangimārie.'

This collective plea to 'allow us to go, in peace' resounded from a hui of Rongomaiwahine people in September 2004 following the enactment of the Māori Fisheries Act. Section 20 requires that the constitutional documents of Ngāti Kahungunu's Iwi Incorporation provide for Rongomaiwahine, if it so chooses, to withdraw. (This requirement is in addition to the matters required for the constitutional documents of a mandated iwi organisation under section 17.)

25 A Waetford, 'Treaty of Waitangi (Fisheries Claims) Settlement Act 1992' (1993) 7 Auck Univ L Rev 402.

26 See S Milroy, 'The Māori Fishing Settlement and the Loss of Rangatiratanga' (2000) 8 Waikato L Rev 63 for an excellent discussion of the fisheries settlement.

Rongomaiwahine would become, upon completion of its withdrawal, an iwi for the purposes of the Act.

B. Provisions that Apply to the Withdrawal Process

While this review considers the withdrawal provisions as they apply to Rongomaiwahine, the following provisions apply, for the most part, to the other withdrawing groups identified in the Act, notably Ngāti Hine (Northland), and iwi groups in Hauraki and Te Arawa (Eastern Bay of Plenty). The constitutional documents of the JMIO must provide the process that the withdrawing group must undertake in order to withdraw, and the process for determining, consistently with the Act, the amount of the notional iwi population that must be attributed to the withdrawing group. The documents must also provide for the division of settlement assets. And, in order to complete the withdrawal process, the withdrawing group must have a Mandated Iwi Organisation recognised by TOKMTL in accordance with the Act. In order for any iwi to secure Mandated Iwi Organisation status, it must satisfy the criteria in sections 12 and 13 which include the necessity of having an asset-holding company.

In determining the withdrawing group's notional iwi population and the proportion of settlement assets that the withdrawing group must receive, any relevant information may be used, including the relevant data from the census of 2001 or 2006, but no other census data. The preference of Rongomaiwahine is to use the 2001 figures which reflect people's declarations as to iwi affiliation unconfounded by any political pressure concerning fisheries allocation that will inevitably surround the 2006 census.

Should the withdrawing group choose to withdraw it must commence the process of withdrawal, in accordance with the process provided for under the Act, within 5 years of the recognition of the JMIO as a Mandated Iwi Organisation under the Act.

Even if the withdrawing group withdraws, TOKMTL will distribute, allocate and transfer settlement assets to the JMIO as if the withdrawing group had not withdrawn from the JMIO.

The JMIO must not transfer any assets or make payments to the withdrawing group under the Act until the withdrawing group has completed the process of withdrawal and any such transfer of assets must be free of charge to the withdrawing group (other than reasonable administrative costs) and treated as if it were between wholly-owned asset-holding companies of the JMIO. After it has completed the process of withdrawal, the withdrawing group's Mandated Iwi Organisation will have all the voting rights of a mandated iwi organisation with some exceptions in respect to the appointment or removal of members to certain committees.

C. Dispute Resolution

Part 5 of the Act provides a process for dispute resolution including extending the jurisdiction of the Māori Land Court to deal with matters referred to that Court for determination. Such matters include coastline entitlements, mandate and quota allocation. Under section 187, if a dispute arises in relation to the withdrawal process provisions, a party to a dispute may apply to the Māori Land Court under section 26C(d) of Te Ture Whenua Māori Act 1993 for a determination by order in accordance with Te Ture Whenua Māori. Any application under section 187 must be notified to every affected party.

Where parties are seeking a determination of the Māori Land Court, the judge addressing the matter may determine the issue, refer the matter to the Court for hearing and determination, call a

judicial conference, give directions, or defer or dismiss the application: section 26F Te Ture Whenua Māori. A judge may also refer the matter to mediation where appropriate. The Chief Judge or the Court, where the matter has been referred to the Court for hearing, may also appoint one or more additional members who have knowledge of relevant tikanga Māori or other expertise to assist the Court.

D. Designing a Withdrawal Process

Apart from the provisions summarised above, the Act has left the task of designing the withdrawal process largely up to the JMIO. While the apparent lack of direction has drawn some criticism – an alternative view is the Act leaves the parties relatively free to custom-design a process that works for them. The problem is that the whole issue of withdrawal is contentious, to say the least. Whether based on reasons of whakapapa and history or reluctance of losing a proportion of a very valuable asset, many members of JMIOs do not support the concept of withdrawal.

The Act does not require agreement, nor does it require that the parties work together. Nevertheless, there is nothing in the Act that *prevents* the parties working together. The JMIO wields most of the power in terms of providing a withdrawal process, and the benefits of holding resources from past allocation of fisheries assets, but the JMIO cannot receive allocation of assets under the Act unless a withdrawal process is provided.

If a withdrawing group is dissatisfied with the proposed withdrawal process, it may invoke the dispute resolution process under section 187 which will undoubtedly delay allocation. So there is some incentive for the parties to work together to come up with a mutually acceptable withdrawal process, and according to Judge Milroy of the Māori Land Court the provisions of the Māori Fisheries Act and Te Ture Whenua Māori Act, ‘make it clear that, except in certain limited circumstances, the Court is to be seen as a last resort rather than the first port of call.’²⁷

A withdrawal process would need to address how to determine coastline issues and the amount of the notional iwi population that must be attributed to the withdrawing group. Issues around definition of who is entitled to vote will also need to be dealt with. For example, for the purposes of voting; is Rongomaiwahine all of the descendants of Kahungunu and Rongomaiwahine, or just those who have maintained ahi kā in the Māhia Peninsula region? Should voters be limited to those who are registered with the proposed mandated iwi organisation of the withdrawing group? These will be important issues when the withdrawing group embarks upon the process of voting to determine whether it chooses to withdraw, and on issues around its own Mandated Iwi Organisation.

The significance of these issues cannot be underestimated, for instance, descendants of both Kahungunu and Rongomaiwahine are now faced with balancing a myriad of complicated issues involving their often indivisible whakapapa with Rongomaiwahine’s continued struggle for independence. Of wider interest, these provisions foreshadow renewed dynamism concerning tribal reorganisation. Any determination of these matters in terms of the Māori Fisheries Act would also need to take into account settlements that are reached in terms of aquaculture.

27 Te Pouwhenua, April 2005.

IV. WAIMĀORI – TANGATA WHENUA RESPONSES TO THE GOVERNMENT'S PROPOSALS ON FRESHWATER FOR A SUSTAINABLE FUTURE

From *waitai* (tidal waters) to *waimāori* (freshwater), I turn now to reflect upon the Government's consultation process with tangata whenua regarding the Government's proposals for sustainable management of freshwater. In places I use the eloquent words of the hui participants themselves to illustrate the significance of the relationship between tangata whenua and their waters. The potential for the Government's proposals to shatter that relationship cannot be ignored. Traditionally, waimāori is highly treasured by Māori and goes to the heart of our identity. For these reasons I emphasise here the need for Māori to scrutinise the Government's proposals and to ensure that Māori are involved in every future step of planning and policy in relation to freshwater.

'E kore a Parawhenua e haere ki te kore a Rakahore.'

I begin however with reference to ancient genealogy indicating that Tāne wedded Hinetuparimaunga, the mountain woman. Their offspring were Pūtoto and Parawhenuamea. Parawhenuamea is the personified form of water, and particularly of mountain streams.²⁸ A literal translation of the above proverb is 'Parawhenua will not venture out in the absence of Rakahore', meaning that mountain springs and streams would not be able to flow if it were not for the rock from which they issue – a plea to consider our natural environment in a holistic way, and an appropriate platform for this part of the review.

In February 2005, as part of a wider consultation process, a series of hui was conducted throughout the country in order to consult specifically with tangata whenua about the notorious problems of declining quality and over-abstraction of freshwater. The consultation was co-ordinated by the lead ministries involved, the Ministry for the Environment and the Ministry of Agriculture and Forestry. Also present at the hui were representatives from Te Puni Kōkiri and the Ministry of Economic Development.

At each of the hui, tangata whenua expressed their own values and unique world views in relation to freshwater.²⁹ Tangata whenua groups clearly require their own solutions to the problems in their respective rohe, and reserve their right to engage directly with the Crown on their own behalf. Without wanting to detract from that, there are some relatively common issues that emerged from the consultation hui. They are summarised below:

A. *Prioritising Māori values, Māori world view and the Treaty of Waitangi*

*'... if the river is rested, it will heal itself.'*³⁰

According to a Māori world view, waterways are said to be the veins of Papatūānuku, some say that all water originates from the pain of separation of Ranginui and Papatūānuku. Water has a mauri or life force, which, given the current state of freshwater in this country, needs to be

28 A W Reed, *Reed Book of Māori Mythology* (R Calman, ed, 2004), 325.

29 Minutes of these hui were made available at <www.mfe.govt.nz>. Also available from that site are associated documents and reports, including the Discussion Document distributed during the consultation process, which document explains the problems facing freshwater and proposes some solutions.

30 Quotation taken from the Waitara consultation hui.

restored. Such restoration could occur by way of rāhui, by reserving or prohibiting use. All waterways are significant given that iwi and hapū often align their very identity with their waterways. The longest river in the land, Waikato, is a pre-eminent example. It is said to contain the life-giving water that the ancestral mountain Tongariro sent to the Maiden Taupiri. People that traditionally lived alongside its banks descend from and take their tribal name from this ancestral river.

Concepts such as mauri and rāhui could play a valuable part in any new policy or legislation to restore waimāori to its pristine condition. Too often, decisions about water have not prioritised Māori spiritual or cultural values. For too long pākehā values and systems have dominated those decisions – detrimentally. It is time to embrace Māori wisdom – ancient wisdom that treasures water, and that sees waterways as being connected – requiring, in turn restoration, protection and integrated management.

B. Te Tiriti o Waitangi – The Treaty of Waitangi

The call by iwi for more effective recognition of their values and their authority as tangata whenua echoed throughout the consultation hui:

Māori (particularly in the context of the RMA) shouldn't be seen as anti-development, or as problematic but we are kaitiaki – to protect the whenua, the awa and sacred sites and this is affirmed in Te Tiriti o Waitangi. As we move forward, we must be in partnership. Any water programme of action must see water as a taonga in the context of the Treaty and this benefits all of us, not just Māori. The [Resource Management Act] seemed to set us apart as world leaders in this area, let's not let that go. Don't just consult with us; allow us to participate. Don't let Māori be relegated to a second tier level of consultation when Māori are the Treaty partner.³¹

The Māori world view condensed into the preceding few paragraphs illustrates why, almost without exception, waimāori was considered to be a taonga under the Treaty of Waitangi, protected under Article Two.

Many Māori feel that the problems of declining water quality and over-abstraction are a result of the Crown's failure in its duty of kāwanatanga and that Māori have been prohibited from exercising their obligations of kaitiakitanga, or guardianship. They have been voicing these sorts of concerns by way of Waitangi Tribunal processes for decades.

The Te Atiawa Tribe of Taranaki, for example, brought a claim more than twenty years ago that the Crown's failure to properly control discharge of sewage and industrial waste onto or near significant traditional fishing grounds and reefs; and the ensuing pollution of the fishing grounds, were inconsistent with the principles of the Treaty of Waitangi. In one of its earliest reports (*Motunui-Waitara Report Wai 6 1983*), the Waitangi Tribunal upheld those claims. In the Tribunal's view, the Treaty of Waitangi obliges the Crown to protect Māori people in the use of their fishing grounds to the fullest extent practicable, and to protect them especially from the consequences of the settlement and development of the land. This protection would involve at one level the physical protection of the fishing grounds from abuse and deterioration as a result of pollution or destruction. At another level the protection envisaged by the Treaty involves recognising the rangatiratanga of the Māori people to both the use and the control of their fishing grounds in accordance with their own traditional culture and customs and any necessary modern

31 The words of a participant at the North Harbour Hui.

extensions of them. The Motunui-Waitara claim encompasses three very common themes that arose during the consultation hui:

- the impact that poorly controlled disposal of sewage has on water, and Māori preference for land based disposal of effluent;
- the loss and deterioration of food species and mahinga kai as a result of pollution; and
- the call for recognition of tangata whenua rights confirmed by the Treaty, particularly in relation to regulation and restriction of use.

More recently, *The Whanganui River Report*, in 1999 dealt briefly with another common theme that arose throughout the hui, the impacts of hydro-electricity projects on freshwater. The essence of the Whanganui Report was whether Māori interests in the river were extinguished, and if so, whether that had been done in accordance with the principles of the Treaty.

The Tribunal found that as at 1840, the Whanganui River and its tributaries were possessed by Te Atihaunui-a-Paparangi as a taonga of central significance. The river was conceptualized as a whole and indivisible entity, not separated into beds, banks, and waters, nor into tidal and non-tidal, navigable and non-navigable parts. Through creation beliefs, the river is a living being, an ancestor with its own mauri, mana, and tapu. The Tribunal also found that the extinguishments of the river interests of Te Atihaunui-a-Paparangi arose from acts and policies of the Crown that were inconsistent with the principles of the Treaty of Waitangi.

Based on these findings, the Tribunal recommended that the Crown negotiate with Atihaunui having regard to two proposals; firstly, that the river in its entirety be vested in an ancestor or ancestors of Atihaunui. Any resource consent application in respect of the river would require the approval of the recommended trustee, the Whanganui River Māori Trust Board. An amendment to the regional plan relating to the river would be needed. The second option was for the Whanganui River Māori Trust Board to be added as a 'consent authority' in terms of the Resource Management Act to act with the current consenting authority. Both would need to consent to any application for the consent to be exercised. Negotiations currently continue between the Crown and the people of Whanganui in relation to issues concerning the ancestral river.

Recently, however, a determination of the Environment Court has been hailed as a victory for the Whanganui people who have battled for decades to protect the health and wellbeing of their ancestral waterways. In 2001, Genesis Power Limited was granted resource consent to continue to divert water for hydro-electricity operations from the ancestral rivers of Whanganui, Whangachu and Moawhango on the west coast of the North Island for a further 35 years. Local iwi, Ngāti Rangī appealed to the Environment Court objecting to the 35 year resource consent contending that, for a number of reasons, relevant diversions were culturally unacceptable. Reduced flows and water levels, increased siltation, and consequent changes to the ecological system inhibited their fishing and other cultural practices.

The Environment Court released its findings in May 2004 allowing the appeals to the extent that the term of consent is reduced from 35 years to 10 years subject to conditions as to minimum flows.³² In balancing the various matters under the Resource Management Act the Court acknowledged that it had some difficulty in weighing the metaphysical matters against physical and scientific matters, but went on to determine that the diversion of waters did have considerable deleterious effects on cultural and spiritual values of the Māori people in the area. This was

32 *Ngāti Rangī Trust v Manawatu-Wanganui Regional Council*, Environment Court A067/2004, noted (2004) 5 BRMB 153, [2004] BRM Gazette 77.

reflected by the immense depth of feeling apparent from Māori witnesses. However, Genesis' evidence as to strategic significance and the value of the relevant hydroelectric generating stations was also accepted. The shortened term provided time for both parties to work through complex and difficult issues together. Genesis has appealed the decision.

C. *Who owns the Water? Issues of Ownership and Co-Management*

This year, the people of Te Arawa³³ accepted the Crown's settlement offer acknowledging the Crown's historical breaches of the Treaty of Waitangi and recognising Te Arawa's relationships. The settlement package includes the transfer of 13 lakebeds, and financial redress of \$10 million. Te Arawa is to have a formal role in the strategic management of all the lakes in conjunction with the others involved in a proposed Lakes Forum which will include representatives of groups with a statutory interest in the lakes.³⁴

While the settlement offer includes the transfer of *lakebeds*, during the consultation hui on freshwater, tangata whenua time and time again asserted their belief, that the *freshwater resource* belongs to Māori. While some iwi declared that they assumed ownership rights and merely wished to engage with the Crown to discuss co-management, others called for direct and immediate engagement with the Crown to discuss ownership. It was for reasons relating to ownership that many iwi were opposed to the Government's proposals for transferable water rights, as these seemed too akin to property rights.

These Government proposals contemplating the introduction of 'market mechanisms' such as tendering for and auctioning of water have the potential to further shatter tangata whenua relationships with water. To the credit of the lead ministries the proposals, as presented during the consultation process on freshwater, were early thoughts presented to canvass Māori ideas and feedback as part of a much broader consultation process. They were, however, met with a large degree of scepticism and disillusionment regarding governmental consultation generally, particularly as the hui were held in the wake of the foreshore controversy. According to hui participants, too often Māori views, values, and submissions were simply ignored. Māori pleaded for better quality engagement in all policy and planning processes.

D. *Local Authorities and the Resource Management Act 1991*

With one or two notable exceptions, Māori lamented the poor performance of regional and district councils in terms concerning relationships with tangata whenua. Across the nation Māori were unhappy that their concerns about water always seem to be overridden by industry concerns:

The Resource Management Act has always provided the opportunity for Māori to participate at planning level, but it never happens because there is no willingness, we have no political weight. So we are shut out, and we become one voice amongst any other constituencies.³⁵

In Murihiku, however, the Ngāi Tahu report and the legislation recognising Ngāi Tahu, were seen as a key underpinning of a positive working relationship involving their 'roopu Taiao', an

33 A confederation of tribal groups that affiliate to the Te Arawa waka or canoe, and who reside in and around the Central North Island.

34 Te Arawa, the Eastern Fish and Game Council, the Rotorua District Council, Environment Bay of Plenty and the Department of Conservation.

35 Quotation from the Whanganui hui.

environmental forum made up of representatives from tangata whenua and councils that has a charter of understanding and that meets regularly to discuss policies and consents.

Many Māori shared their view that councils should be accountable for the cumulative negative effects on our waters resulting from those councils' decisions in granting resource consents over many years. Many also complained that the use of non-notified application processes resulted in iwi missing the opportunities to participate in resource management processes, and that regional councils lacked the ability to enforce the provisions of the Resource Management Act 1991 (RMA).

The purpose of the RMA in section 5 is to promote 'sustainable management' of the natural and physical resources, and that is defined to mean their use, development, and protection in a way, or at a rate, that enables people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety while:

- (a) sustaining the potential of physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 6 requires all persons exercising functions under the Act to recognise five matters of 'national importance'. The first four refer to the protection of coastal marine areas, wetlands, lakes and rivers, outstanding natural features, and indigenous traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. Also, those persons shall have regard to eight matters under section 7, the first being 'kaitiakitanga' – the 'exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship' according to section 2. The seven other matters include the efficient use and development of resources, protecting the heritage value of sites and buildings, and enhancing amenity values and the environment. There is specific provision for protecting the habitat of trout and salmon, but no specific reference is made to indigenous fish. In achieving the purpose of the RMA with regard to the above principles, section 8 requires that those with responsibilities shall 'take into account' the principles of the Treaty of Waitangi.³⁶

These provisions of the RMA have not been effective for Māori. Many hui participants disclosed stories of blatant breaches of the RMA that cause negative impacts on waimāori. Practitioners complained that councils seemed to place too much emphasis on *mitigating* and *remedying* damage rather than *avoiding* damage. Ultimately, Māori seek strong legislative direction from central government directing local councils to engage more effectively with tangata whenua, and to enable tangata whenua to participate at all levels of local government on freshwater issues: for example at governance level there could be regional tangata whenua water boards, at management level the development of iwi management plans and at regulatory level, a system akin to the honorary fishing officers could be established.

E. Education and Resourcing

Conscious of the need to protect the resources for the future, the Government was also frequently called on to do more to *educate* people around water usage and recycling, thus changing the culture and attitude of New Zealanders with respect to valuing water more. There were also calls

36 Waitangi Tribunal, *The Whanganui River Report* (Wai 167, 1999), 311.

for better education and public relations about the role of Māori, targeted at councillors, local authorities and farmers,³⁷ to improve awareness that Māori are more than protestors, Māori are landowners with economic development aspirations. Oral histories about rivers and streams could be collated and integrated into school curricula.

F. Support for Proactive Regeneration

Māori, in general, supported any initiatives towards the proactive regeneration of waimāori and more recycling and conservation of water. Specifically these include stronger commitment to and resourcing of iwi management plans, national standards (as to quality and minimum flows and levels) subject to those standards being high (such as, for example, drinkable water within a certain timeframe). A common request was for the Crown to resource a national forum designed by Māori for Māori to discuss issues relating to the future of waimāori and that there be some opportunity to be consulted in te reo Māori.

G. Objections to Market Mechanisms

It is fair to say that Māori across the county were consistent in their opposition to the idea of market mechanisms such as auctioning and tendering of water. The main reasons for this opposition seemed to be lack of resourcing for Māori in particular to be able to compete against the wealthy (such as power generation companies, Meridian and Genesis), and that such mechanisms would allow the ‘rich to get richer and the poor to stay poorer’. Māori also opposed the idea of transferring consents or permits on the basis that to allow this would be too akin to the creation of property rights, and this would contravene their rights under the Treaty of Waitangi.

V. RECENT AMENDMENTS TO THE RESOURCE MANAGEMENT ACT 1991

The foregoing section illustrates a strong perception amongst Māori that despite the potential in the Resource Management Act 1991 (RMA) to provide for Māori interests and to allow for meaningful participation, that potential has gone unfulfilled. Will the recent amendments to the RMA make a difference? As demonstrated in the quoted passages from the freshwater consultation hui, prior to the recent amendments to the RMA, it was largely up to individual councils to determine how Māori participated in the planning process, if at all. This inconsistency in approach was one of the driving factors for reviewing the Act. This part of the review briefly overviews those recent amendments to the Act, that were ‘intended to improve certainty and clarity for consultation and iwi resource planning’. It will analyse how those amendments affect Māori and share some best practice examples for effective participation in resource management processes.

Section 36A clarifies the existing legal position by confirming that neither an applicant nor a consent authority has a duty to consult any person in respect of applications for resource consents and notices of requirement.

Section 35A imposes mandatory duties on councils to keep records as to contact details, planning documents, and area in relation to kaitiakitanga, for each iwi and hapū within their

37 Particularly with regard to irrigation, fencing waterways and riparian planting. Excellent initiatives encouraged by Fonterra such as the Clean Streams Accord are not widely advertised, and may not be readily implemented.

regions. It also requires the keeping of records as to contact details for any groups that represent hapū for the purposes of the Act. The First Schedule requires councils, during the preparation of proposed policy statements or plans, to consult with tangata whenua through iwi authorities.

The intention of these recent RMA amendments is to improve processes for consultation with iwi and hapū in the development of plans and policy statements. Relatedly, the Local Government Act 2002 requires councils to provide opportunities for Māori to participate in decision-making processes.³⁸

While it is encouraging to see a mandatory requirement to consult ‘tangata whenua’ regarding the preparation of policies and plans in the RMA, there is a concern that councils are only required to deal through iwi authorities. Given that hapū signed the Treaty, and that some iwi authorities may be poor representatives in the often technical area of resource management issues, iwi authorities may not be the best entities with which to engage for the purposes of consultation. A preferred model is consultation via an entity specifically established to address resource management issues such as the Te Mana Taiao model operating successfully in the regions of Murihiku (Southland), Māhia Peninsula and Wairoa, and Raukawa.³⁹ This model brings together, as a consultative forum, representatives selected by tangata whenua for tangata whenua with both the expertise needed and the passion for environmental and resource management issues.

Fortunately, regardless of the technical legal position, consultation can still be provided for, and achieved, in relation to iwi, hapū and other groupings as illustrated by the draft brochure ‘Resource Consents – Consultation in the Māhia Region.’⁴⁰ This brochure outlines some background information about the RMA and the resource consent process, while also identifying the tangata whenua groups that ought to be consulted as part of a resource consent application in their district. The brochure notes the approach of the Wairoa District Council that if the nominated body for consultation recommends against a consent, the consent will be notified and a hearing held, and goes on to clarify that:

For resource consent purposes Te Mana Taiao o Rongomaiwahine act as kaitiaki (guardians) of Māhia’s natural and cultural environment. Where subdivisions are concerned, tangata whenua must be consulted as to environmental impacts, and the potential for cultural and social impacts. With regards to land use activities, such as earthworks, tangata whenua should be consulted in respect of the possible impacts on archaeological sites and sites of cultural significance.

Thanks to the joint efforts of the Wairoa District Council and Te Mana Taiao o Rongomaiwahine this is a best practice model that other tangata whenua groups may find useful in their own tribal areas.

A. Joint Management Agreements and the Ngāti Whatua o Orākei Experience

New sections 36B to 36E provide the power to make joint management agreements. These sections provide a new framework for public authorities, iwi authorities, and groups that represent hapū to enter into joint management agreements about natural or physical resources. The framework is aimed at developing and encouraging collaborative projects between councils and

38 For a review of major reforms delivered in the Local Government Act 2002 see K Palmer, ‘Local Government Law and Resource Management’ [2004] NZ L Rev 751, 752-756.

39 The Te Mana Taiao model is the brainchild of Willie Te Aho, CEO Indigenous Corporate Solutions Ltd.

40 It is important to note that as at October 2005 the brochure was still in draft form, though it had been approved by Te Mana Taiao o Rongomaiwahine.

Māori. There are a number of successful joint management models already operating where title to resources such as lakebeds, and the foreshore may be vested in tangata whenua and there is joint management and protection of public use rights.

The joint management arrangement between Ngāti Whatua o Orākei and the Auckland City Council is a pre-eminent example. Under section 8 of the Orakei Act 1991, almost fifty acres of land was set aside as a Māori reservation 'for the common use and benefit of the members of the hapū and the citizens of the City of Auckland'. The reservation comprises the Takaparawhau and Okahu Parks and part of the foreshore encompassing the original papakāinga.⁴¹ The fee simple title to the land is registered in favour of the Ngāti Whatua o Orākei Māori Trust Board. The reservation is jointly administered by the hapū and the Auckland City Council through a body known as the Orākei Reserves Board which comprises three representatives of the Ngāti Whatua o Orākei Māori Trust Board and three representatives from Auckland City Council. By statute, the land is managed, financed and developed at the expense of the Auckland City Council in view of the land, including foreshore, being kept for public as well as hapū enjoyment. The chairperson (and the casting vote) is reserved for a Ngāti Whatua representative in recognition of the hapū's title and mana whenua. In the words of Sir Hugh Kawharu, Chairperson of the Orākei Reserves Board:⁴²

... from the trauma and the ashes the Crown restored title to Orakei's 150 acre 'Whenua Rangatira' ... The arrangement has worked successfully and without untoward incident since its inception in 1992 ... It is a benign but efficient regime; and here at least the mana of Ngati Whatua stands tall, intact and protected ... [P]ublic access to the foreshore of Okahu Bay has been unrestricted from the day title returned to Ngati Whatua.

The inclusion of the provisions that might enable more collaborative management models combining Māori knowledge and experience and western knowledge is a welcome addition to the RMA.

B. Observations

While it may now be explicit that there is no duty on councils and applicants to consult with Māori specifically in relation to resource consents, there are duties and guidelines for consultation with Māori in relation to local government decision-making processes. So, Māori are encouraged to be more proactive in working with councils at earlier stages of resource management processes, such as in the drafting and review and monitoring of plans and policies.

How councils will go about engaging Māori participation in planning and policy development and the management of resources is uncharted territory. However the best practice examples referred to above not only illustrate how some of the new principles and guidelines in the Resource Management Act can operate in practice, they also highlight the importance of working relationships; and the potential for Māori and local government to custom-design collaborative planning tools.

There are many ways to achieve good environmental results. Participating in formal legal processes is by no means the only way. For Māori there is strength in unity – and where possible

41 I H Kawharu, 'Orakei', in *Waitangi Revisited* 158 (2004).

42 As quoted in P Sneddon, 'Rangatiratanga and Generosity: Making the Connections', *Philanthropy New Zealand Conference*, 2004.

hapū and iwi groups should work together particularly on issues of regional or national significance. Māori must work proactively with Councils to develop clear and consistent processes for more effective participation by Māori, at all levels of decision-making. Sharing information about best practice models is to be encouraged between tangata whenua, councils, industry and community groups.

VI. TRANSPOWER'S PROPOSED TRANSMISSION LINE – IS THIS STATE-OWNED ENTERPRISE ACTING 'ON BEHALF OF THE CROWN'?

This final section briefly considers an interesting point of jurisdiction that emerges from a recent decision of the Chairperson of the Waitangi Tribunal in relation to state-owned enterprises.

Transpower proposes to introduce a 200 kilometre long 400kV transmission line between Whakamaru and Otahuhu. A portion of the preferred route passes through the rohe of Ngāti Korokī-Kahukura in and around the town of Cambridge in the central North Island. The current transmission line already runs close to a marae and established urupā (burial ground). The new proposed route, announced in mid-2005, will directly encroach upon other burial sites.

Sadly for Ngāti Korokī-Kahukura, this is not the first time that they have been directly affected by the nation's electricity needs. Rocks that formed the centrepiece of a very significant and sacred site, were detonated and destroyed in order to create the Karapiro Dam which lies squarely within our tribal area.⁴³ The same site was further desecrated to facilitate international rowing competitions on Lake Karapiro. A memorial stands in the Karapiro Domain acknowledging the site and its historical significance. It is not surprising, then, that members of Ngāti Korokī-Kahukura would seek meaningful engagement regarding any further transgressions of sacred sites within our rohe. It is argued that Transpower has refused to adequately consult with mandated hapū representatives regarding the designated route.

Relevantly, section 6(1) of the Treaty of Waitangi Act 1975 confers jurisdiction on the Waitangi Tribunal to hear claims by Māori who claim to be prejudicially affected by any policy or practice adopted or proposed to be adopted by the Crown or any act done or admitted by or on behalf of the Crown which is inconsistent with the principles of the Treaty of Waitangi. The claimants of Ngāti Korokī-Kahukura sought to have a claim heard under urgency in the Waitangi Tribunal alleging that the establishment of the transmission line was an act carried out by Transpower on behalf of the Crown, and that in failing to adequately consult, the so-called Treaty principles of active protection and good faith were breached.

In a decision dated 31 August 2005, the Chairperson of the Waitangi Tribunal dismissed the application for urgency on the basis that hearing rights and opportunities to consider Treaty principles existed in accordance with Resource Management Act processes which were yet to be played out.⁴⁴

Despite the finding in relation to urgency, the Chairperson's decision raises an important point concerning the jurisdiction of the Waitangi Tribunal in relation to state-owned enterprises. Based on the terms of the Public Finance Act 1989 and the State-owned Enterprises Act 1986, which statutes clearly distinguish between a state-owned enterprise and the Crown, both the Crown and

43 I am a descendant of Ngāti Korokī-Kahukura.

44 Wai 1294.

Transpower asserted that Transpower is not, technically speaking, the Crown. Therefore, they argued, the Tribunal did not have jurisdiction to consider the claim, let alone do so under urgency.

The Chairperson rejected this argument on the basis that Transpower is required to work closely with the shareholding ministers and through them, the Crown, in undertaking the project and building relationships with Māori. While the relationship is not one of agency, the Chairperson determined that Transpower undertakes its mission in the public interest as a socially responsible Crown-owned company. Its business is carried out in the Crown's name. Accordingly, for the purposes of section 6 of the Treaty of Waitangi Act 1975, the Chairperson concluded that the transmission project is a policy or practice promoted by Transpower on behalf of the Crown and jurisdiction was therefore established.

The decision is clearly based on the particular facts of the case, but gives rise to what could be a major development in the area of Treaty claims. Many state-owned enterprises, such as the likes of Mighty River Power Ltd, exercise control over resources that are the subject of Treaty claims, such as the Waikato River and geothermal resources. The Chairperson's decision appears to provide a further option for trying to ensure that state-owned enterprises act consistently with the principles of the Treaty of Waitangi in their day-to-day operations.

The Chairperson optimistically observed that the project is at an early stage and there is still room for dialogue between the parties.

VII. SUMMARY AND CONCLUSION

Historically, the application and interpretation of successive Māori land statutes has shattered Māori customary land tenure and social structures, but the Te Ture Whenua Māori Act 1993 introduced a new philosophy that would restore some sense of balance. The Matauri litigation seems to signal the perturbing possibility that the retention principle, so fundamental to that statute, may be overridden by the interests of the 'modern commercial world'.

As regards the Foreshore and Seabed Act 2004, while some attempts have been made to provide for some Māori customary rights, the legislation remains tainted by its extinguishment of the possibility of establishing Māori customary title over the foreshore and seabed and its failure to provide a guaranteed right of compensation.

Staying with matters concerning the sea, the significance of issues around tribal reorganisation for the purposes of fisheries allocation cannot be overstated. Māori social organisation has always been dynamic, and the provisions regarding tribal reorganisation for the purposes of allocation of fisheries assets under the Māori Fisheries Act 2004 provide a modern day example of that dynamism while introducing a new set of complicated issues for certain iwi groups that must now balance often indivisible whakapapa with the desire for independence.

Turning inland to issues relating to fresh rather than tidal waters, there can be no doubt that the problems of declining water quality and over-abstraction are being felt keenly throughout the country. According to Māori, at least, these problems, and problems concerning the environment and the management of resources generally, are a result of decision-makers failing to prioritise Māori spiritual or cultural values and can be improved by better quality of engagement with iwi and hapū as tangata whenua, rather than superficial 'consultation'.

This review illustrates that the potential has long existed, whether in statutes such as the Resource Management Act 1991 or in situations concerning the transmission of electricity, to provide for Māori interests and to allow meaningful participation by Māori. Regrettably, that

potential has gone unfulfilled in too many cases. It will be interesting to observe just how councils will go about engaging Māori participation in planning and policy development, and the management of resources, in the light of recent amendments to the Resource Management Act and the Local Government Act 2002.

One lesson to be learned across the diverse range of issues covered in this review is that there has always been the potential for Māori world views, interests, values and rights to be recognised and provided for by decision makers; for dialogue to occur, and for building positive working relationships – whether they be between Māori and local government, Māori and the Crown (including entities that act on the Crown's behalf), Māori and industry or, as between Māori and Māori. Examples in this review provide evidence of this. The challenge is the willingness to fulfil that potential.

Glossary of Māori terms

Papatūānuku	Earth mother
Ranginui	Sky Father
Tāne	Revered Ancestor of forest, flora and fauna
Parawhenuamea	Personification of mountain streams and springs
Ahi kā	'site of burning fires', continuous occupation
Hapū	subtribe
Hui	meeting, assembly
Iwi	tribe
Kaitiakitanga	guardianship, stewardship
Kaupapa	purpose, objectives
Kōrero	dialogue
Kuia	female elder
Mana	prestige, power, authority
Mana motuhake	separate or independent authority
Mana whenua	customary authority and title exercise by a tribe or sub-tribe over land and other taonga within the tribal district
Māori	the indigenous peoples of Aotearoa/New Zealand
Mauri	life force, life principle
Pākehā	people of European descent
Pāua	shellfish, abalone
Rāhui	reserve, preserve
Tangata whenua	people of the land
Taonga	treasured, prized possessions
Taonga tuku iho	treasured, prized possession handed down (from ancestors)
Tikanga Māori	laws, ethics and customs of the Māori
Tapu	sacred
Waimāori	freshwater
Waitai	tidal waters, saltwater
Waka	canoe, or kinship group based on affiliation to canoe
Whānau	family, descent group
Whenua	land

WILL THERAPEUTIC JURISPRUDENCE PROVIDE A PATH FORWARD FOR MAORI?

BY VALMAINE TOKI*

I. INTRODUCTION

Prior to colonisation, Maori had effective legal and social systems in place. The Maori system of law was based on values and because it was a values-based system Maori adhered to principles rather than rules. Upon colonisation these systems were not encouraged by colonial rule. The Maori cultural definitions and theology that shaped notions of criminality were instead replaced by those of the colonising power. This resulted in a changing world for Maori. Critics¹ argue that this problem in part is manifested in statistics such as those released by the Justice Department's publication *Responses to Crime: Annual Review*.² They indicate that Maori offending rate is higher than any other ethnic group in New Zealand. This statistical trend reappears in the January 2003 report released from the Crime and Justice Research Centre at Victoria University.³ The Law Commission in a recent report concurs with this finding, that Maori are disproportionately represented in court.⁴ This is similar to other indigenous peoples in many post-colonial countries such as Australia and Canada.⁵ Maori appear more highly in recorded rates of criminal offending and incarceration than other ethnic groups when measured on a population size.

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1 See M Jackson, *The Maori and the Criminal Justice System: A New Perspective: He Whaipaanga Hou (Part 2)* (Department of Justice, 1987-88), and R Walker Nga Pepa a Ranginui (1996). Also see New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (2001) NZLC SP9, 15, for a discussion of Maori customary law; and A Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Maori' in M Belgrave et al (eds) *Waitangi Revisited* (2005), 330 for discussion of the recognition of the Treaty of Waitangi.

2 See Ministry of Justice, *Responses to Crime: Annual Review Statistics – Responses to offending by Maori and Pacific Peoples* (2000) chap 7, available <www.justice.govt.nz>.

3 G Maxwell and E Poppelwell *Youth Court Offending Rates – Final Report to the Department for Courts* (Crime and Justice Research Centre, Victoria University, 2003), 11.

4 New Zealand Law Commission *Seeking Solutions: Options for Change to the New Zealand Court System: Have Your Say: Part 2*. (2002) NZLC PP52, 218.

5 P Spier, *Conviction and Sentencing of Offenders in New Zealand 1990 to 1999*, (Ministry of Justice, 2000), available <www.justice.govt.nz>.

These perturbing statistics have social and economic repercussions for both Maori and non-Maori. This concern has led to a raft of initiatives introduced by the Government such as the Kaiwhakanama Intervention Programme⁶ and Te Whanau Awhina⁷ Programmes. These initiatives have shown some success, however it is hard to ignore the recent statistics from the Ministry of Justice.⁸ These statistics support the findings that Maori offending rate continues to remain higher than any other ethnic group within New Zealand. Sociological theorists⁹ propose explanations for this social phenomenon that range from colonisation and the social marginalisation of Maori to traditional Maori culture itself.¹⁰

This article suggests that therapeutic jurisprudence is a solution to the problem of disproportionate representation of Maori in the negative criminal justice statistics. Therapeutic jurisprudence would involve a specialized court, embracing Maori customs, ethics, values, and norms. It offers a way for underlying reasons for Maori offending to be addressed in a Maori manner, so as to produce positive therapeutic outcomes.

Maori are today disproportionately represented in New Zealand prisons.¹¹ Although there are subsisting methodological difficulties¹² associated with gathering of statistics, such as the classification of how a person is determined to be Maori, who is a 'Maori', the circumstances under which the statistics were gathered, and the interpretation of the statistics; it must be acknowledged that these statistics¹³ suggest 50 per cent of the New Zealand prison population¹⁴ is Maori. Furthermore, Maori have a higher offending rate and recidivism rate than non-Maori.¹⁵ In 2000, Maori comprised 42 per cent of all convictions, 46 per cent of convictions for violence and 56 per cent of proved cases in the Youth Court.¹⁶ More troubling perhaps, are the statistics from the Department of Corrections¹⁷ that forecast Maori offending rates will not only remain high but will continue to surpass non-Maori offending rates.

6 Launched by Corrections Minister Matt Robson in Rotorua 9th May 2002, see M Robson 'Intelligent approach to reduce re-offending is working, says Robson' (2002), available <www.beehive.govt.nz>.

7 A programme is run at Hoani Waititi Marae, Henderson, West Auckland.

8 P Spier, *Conviction and Sentencing of Offenders in New Zealand 1992 to 2001*, (Ministry of Justice, 2002), available <www.justice.govt.nz>.

9 See J Pratt *Punishment in a Perfect Society: The New Zealand Penal System 1840-1939* (1992); also Jackson above n 1.

10 R Webb, 'Social Change and Theorising on Maori Crime' (2000) available <apru.nsu.edu>.

11 M Rich, *Census of Prison Inmates 1999* (Department of Corrections, 2000), 43, available <www.corrections.govt.nz>.

12 On problems of self-identification or justice system identification, see J M Tauri 'Indigenous Justice or Popular Justice Issues in the Development of a Maori Criminal Justice System', in P Spoonley et al (eds) *Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand* (1996), 214.

13 B Baybrook and R O'Neill, *A Census of Prison Inmates* (Department of Justice, 1988); see also Rich above n 11.

14 Rich, *ibid*, identifies 54% inmates as Maori. See also Department of Corrections *About Us, Facts and Statistics, Prison Statistics* (2003), which identifies 50% of male inmates as Maori, available <www.corrections.govt.nz>.

15 J Lux, 'Kia Mauritau' in D Biles and J Vernon (eds), *Private Sector and Community Involvement in the Criminal Justice System: Proceedings of a Conference held 30 November 1992, Wellington, New Zealand* (Australian Institute of Criminology, 1994), available <www.aic.gov.au>.

16 Refer Ministerial Briefings, *Justice, Maori and Pacific Crime and Victimisation*, 2.3.6, (2002) available <www.beehive.govt.nz>.

17 *Ibid*.

A rider on these statistics that has not been accounted for is the interplay between Maori and the police. It is a commonly held view by Maori¹⁸ that the police harass them with the intent of provoking them into retaliation to justify subsequent arrest and conviction. Maori perceive the police as a racist institution that perpetuates strong anti Maori attitudes. The associated disrespect for tikanga values by the police, the continual stopping and questioning of Maori on the pretext of criminal suspicion when no crime has been committed, racist verbal abuse by the police that precede or accompany physical abuse, and or arrest, and the minimalisation by the police of racist attacks all foster this commonly-held view.¹⁹

It appears that the police have not kept pace with the times as far as Maori are concerned. While Maori society had changed over the last 160 years, the policing of Maori has not. This has given rise to accusations by Maori that they are still undergoing a systematic outdated process of colonisation by the police.²⁰ This highlights the importance of the relational element between Maori and the police. On the assumption that there could be an effective relationship between Maori and the police, the Maori offending rate in part can be attributable to mistrust and relationship breakdown. The importance of trust and the relational ethic is central to a healing process.

The present criminal justice system recognises the problem and has taken steps to address it. But Maori offending rates remain high. Maori society and all of New Zealand bear a heavy cost from criminal offending. I propose to identify the ingredients of programmes that have shown some success and develop them further. I suggest a shift in direction to investigate whether the answer might lie in the philosophy of therapeutic jurisprudence.

This approach is not novel. J McGuire²¹ addressed the question of whether criminal law, especially in sentencing and penological aspects, can be adjusted in its workings to incorporate the perspective of therapeutic jurisprudence. He notes that of considerable importance in this exercise is a mounting volume of evidence concerning the outcomes of work with adjudicated offenders. The evidence illustrates the potential of psycho-educational, behavioural cognitive skills training and therapeutic programmes for the reduction of recidivism. This work is not too dissimilar to those programmes offered by Te Whanau Awhina and implemented in Rimutaka Prison. McGuire concludes that in principle the criminal law can have positive therapeutic outcomes. I propose to extend this notion to a Maori model.

II. THERAPEUTIC JURISPRUDENCE

A. Definition

Therapeutic jurisprudence developed out of the mental health system. American Professors Bruce Winick and David Wexler, from the academic practice of mental health issues, are known as the pioneers of this movement. During their practice within the American health system, they

18 P T Whaiti and M Roguski, *Maori Perceptions of the Police* (He Parekereke Victoria Link Ltd, 1998), 2. See also G Maxwell and C Smith, *Police Perceptions of Maori A Report to the New Zealand Police and Ministry of Maori Development: Te Puni Kokiri* (Institute of Criminology, Victoria University, 1998), 37, available <www.police.govt.nz>.

19 Whaiti and Roguski, *ibid*.

20 *Ibid*.

21 J McGuire 'Can Criminal Law ever be Therapeutic?' (2000) 18 *Behavioural Sciences and the Law* 413.

conceived the idea that the operation of law and its accompanying legal processes can have a direct psychological impact on all the players including lawyers, judges and the offender. This impact could be both therapeutic or anti-therapeutic. Thus a system that is designed to help people recover or achieve mental health often backfires and has the opposite effect.

Therapeutic jurisprudence is a perspective that regards the law as a social force that produces behaviours and consequences. Sometimes these consequences fall within the realm of what we call therapeutic; other times anti-therapeutic consequences are produced. Therapeutic jurisprudence raises our attention to this and encourages us to see whether the law can be made or applied in a more therapeutic way so long as other values such as justice, can be fully respected.²² It does not trump other considerations or override important societal values such as due process or freedom of speech and press.²³ Therefore therapeutic jurisprudence is the study of therapeutic and non-therapeutic consequences of the law.

Therapeutic jurisprudence is thus described as the ‘study of the role of law as a therapeutic agent’.²⁴ One author offers the following definition as best capturing the essence of therapeutic jurisprudence: ‘the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well being of the people it affects.’²⁵ In this sense therapeutic jurisprudence is more a descriptive and instrumental tool than an analytical theory.²⁶ It focuses on the law’s impact on emotional life and psychological well being.²⁷ Therapeutic jurisprudence can be thought of as a lens through which to view regulations and laws as well as the roles and behaviour of legal actors, legislators, lawyers, judges, and administrators.²⁸

B. Therapeutic Jurisprudence within a Court Setting: Current Models

One of the basic premises of the therapeutic movement has been to refocus the court from a finality to a process.²⁹ It seeks to examine the psychological effects of the process on the participants. The continuity of the relationship between the parties, or the evolution of the participants after the court process is often recognised and emphasised.³⁰ Therapeutic jurisprudence at present has a strong practical focus. It is noted by Judge William Schma that therapeutic jurisprudence is the study of law as a healing agent,³¹ which has now grown into problem-solving courts.³²

Judge Stan Thorburn recently stated:³³

22 D Wexler and B Winick, *Law in Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996).

23 W Schma, ‘Judging for the New Millenium’ (2000) Court Review, available <aja.ncsc.dni.us>.

24 Wexler and Winick, above n 22.

25 C Slobogin, ‘Therapeutic Jurisprudence: Five Dilemmas to Ponder’ (1995) 1 Psychol Pol and Law 193, 196, reprinted in Wexler and Winick, above n 22.

26 W Brookbanks, ‘Therapeutic Jurisprudence: Implications for Judging’ delivered at the District Court Judges’ Triennial Conference, Rotorua, 1 April 2003.

27 Wexler and Winick, above n 22.

28 Schma, above n 23.

29 N Des Rosiers, ‘From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts’ (2000) 37 Court Review 54, available <aja.ncsc.dni.us>.

30 Ibid, 55.

31 Schma, above n 23.

32 Such as the Drug Court in Dade County, Miami, USA.

Therapeutic Jurisprudence proposes a broadening of the role of the judge, which has traditionally been limited to fact-finding and law-applying. Therapeutic Jurisprudence asks why the judicial role should not extend to the search for solutions to an individual's cycle of offending. This is a perspective that deserves to be taken very seriously by the judiciary.

Problem-solving courts usually focus on the underlying chronic behaviours of criminal defendants. The precursor to the development of therapeutic jurisprudence into problem-solving courts can be traced back to the juvenile court that started in Chicago in the United States in 1899. This was an attempt to provide a rehabilitative approach to juvenile criminal behaviour. 'Early' modern models can be found in the drug treatment courts that originated in Miami in 1989. It was recognised that the sentencing of an offender to prison for non-violent drug possession charges did not change the offender's addictive behaviour.³⁴ Instead of relying on the traditional criminal justice approach, the drug treatment court emphasised the rehabilitation of the offender and cast the judge into a role as a member of the treatment team. The recognised success of these courts has resulted in a proliferation of similar drug courts throughout the United States and, recently, in Australia³⁵ and in New Zealand.³⁶ This model has also been used as a way of effectively combating other social problems. This has led to the establishment of domestic violence courts,³⁷ mental health courts,³⁸ teen courts,³⁹ and re-entry courts.⁴⁰

In Queensland, the increasing number of mental health patients together with the increasing complexity of the governing legislation, led to the development of a separate mental health jurisdiction and an accompanying specialist court being established. The same situation could occur in New Zealand with the raft of current⁴¹ and proposed legislation⁴² afoot. This 'global approach' was foreshadowed in recommendations made by Associate Professor Warren Brookbanks.⁴³ He suggested a model that would manage the needs of the intellectually disabled who fall foul of the criminal justice system. This model would take the 'offender' right through to appropriate aftercare.

The programmes in place for Maori offenders may be stemming the tide but are not solving the problem. The physical and spiritual move of Maori away from their *turangawaewae* (place to stand) over the generations have effectively alienated many urban Maori from their culture. The result of this is manifested in part, with some Maori perceiving a *marae* setting for the *Te Awhina*

33 Comments made by Judge Thorburn in his Book Review of B Winick and D Wexler (eds) *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) available <www.brucewinick.com>.

34 B Winick and D Wexler *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003), 4.

35 Such as the Geraldton Alternative Sentencing Regime in Western Australia.

36 Such as the recently-established Drug Court in Christchurch which specifically targets young offenders.

37 Such as domestic violence courts attempt to protect the victims and motivate the perpetrator to seek help and monitor the behaviour of the perpetrator.

38 For example the court in Broward County, Florida.

39 Such as teen courts deal with juveniles charged with minor offences. The court is like a peer mediating forum. It is effectively a court run by teens for teens. Similar ideas such as the Peer Mediator Council is established at Victoria Ave Primary School, Remuera, Auckland.

40 Re-entry courts are designed to assist offenders released from prison re-enter the community.

41 Mental Health Act 1992, Human Rights Convention Criminal Justice Amendment Bill No 7.

42 Intellectual Disability (Compulsory Care) Bill 1999.

43 W Brookbanks, *The Development of Legislation to Meet the Needs of Individuals with Intellectual Disability, Who Because of their Disability, are Considered to Present a Serious Risk to Others* (Ministry Of Health, 1995).

Whanau programme as being as alien as a courtroom, and therefore having an anti-therapeutic effect. This supports the need to consider an alternative system to address the disproportionate Maori offending rate.

Therapeutic jurisprudence thinking has encouraged people to think creatively about how to bring promising developments into the legal system. The avenue of using the tools of the social sciences to promote psychological and physical well being opens the door to tikanga Maori. In doing so, therapeutic jurisprudence may be able to offer a vehicle to ultimately decrease Maori offending rates. I will now address the tikanga Maori issues involved.

III. TIKANGA MAORI

A. *Disputes*

The two overarching concepts of tikanga Maori affecting law and legal processes, mana⁴⁴ and tapu,⁴⁵ are the relevant foundational principles for dispute resolution.⁴⁶ Disputes such as an assault, rape or killing involved a breach of personal tapu, whereas eloping, cheating on spouse, insults to your reputation or groups of people were insults to mana. Collective disputes arose when outsiders challenged the mana of a group. This was seen, for example when one tribe took resources from another area. This was a challenge to the mana of the area, a challenge to their mana whenua,⁴⁷ a trespass. These disputes could be criminally, politically, or territorially based.

In disputes, it was the breach of human integrity and authority that was considered important, an intention to offend was not essential. The spiritual violation of the individual and the ensuing damage to the mana and tapu of the group were major reasons for disputes amongst individuals and groups.⁴⁸ The collective nature of disputes could result in inter-hapu battles and matters would continue to deteriorate until a rangatira intervened.

A major criticism of the pakeha criminal law system is that it does not recognise collective structures, in contrast for example to its treatment of corporate law. It provides instead a forum in which a series of individual rights are enforceable against other individuals thereby creating strangers of close relatives. Some Maori today, who find marae justice alien, prefer to use the pakeha legal system.⁴⁹ The reasons for this include anonymity, privacy, and an unwillingness to take responsibility for their actions. But, as previously indicated, I submit that the effects of colonisation and urbanisation on past generations has effectively alienated many urban Maori from tikanga values. This preference, I suggest, could be accommodated in a community court model.

1. *Facilitator*

44 P Ryan, *Reed Dictionary of Modern Maori* (1997), 143 'mana' defined as integrity, charisma.

45 *Ibid*, 277 'tapu' defined as sacred, forbidden.

46 N Tomas and K Quince 'Maori Disputes and their Resolution' in P Spiller (ed) *Dispute Resolution in New Zealand* (1999), 222.

47 Ryan above n 44, 143 'mana whenua' defined as trusteeship of land.

48 Tomas and Quince above n 46, 210.

49 For some urban Maori who do not desire to affiliate to an iwi group, it is not unusual that they find a marae forum alien, and prefer to use the general court system.

The facilitation is usually by a rangatira⁵⁰ as an advocate, and the responsibility for the muru and dispute lies with the group. Most facilitators or rangatira were born into the role⁵¹ and are trained for this position from an early age. They acted on behalf of their people in public forums, entered into binding agreements with other hapu and their leadership largely went unchallenged.

In demonstrating her mana and strengthening the cohesiveness of the group, the rangatira demonstrated three principles of whanaungatanga (relatedness). The first was aroha (love); an emotional response instigated by kindness to others. The second was atawhai (support); the obligation to protect the well being of their people. The third was manaaki (blessing); the ability to look after those temporarily in your care. A parallel exists here between the rangatira and a judge in therapeutic jurisprudence forum. However, in the pakeha criminal system, principles such as aroha and atawhai as a basis for dispute resolution were replaced by strict rules of common law and statutory law.

Through employing these principles the rangatira was able to settle disputes. The ultimate objective of the rangatira was always to maintain the integrity of the whakapapa line, to keep strong the obligations of whanaungatanga amongst the individuals of the group, and to uphold and extend the mana of the group.⁵² In this way, the well-being and balance of the group is restored to enable the successful functioning of the community. This is analogous to the healing approach inherent in therapeutic jurisprudence.

2. Forum

The importance of the marae as a forum cannot be underestimated, it represents the body of ancestors and represented a world in balance. It is a place where mana could be restored and wairua healed. The marae protocol is similar to court protocol in the sense that there is an agreed framework. The whole point of marae encounter is to dispel tapu and bind people together; the notion of pae heretangata. So, dispute resolutions and marae encounter have a metaphorical weaving exercise dispelling tapu of visitors/disputants in uniting for a common purpose.

3. Process

The re-offending of an individual on a regular basis indicates an imbalance of their tinana (body), wairua (spirit), and mauri (life force). This results in the inability to establish a state of ora or balance and in turn creates an imbalance within the community. The process of dispute resolution is to identify the causes of the dispute or reasons for offending in order to uncover and address the source of the problem.⁵³ This moves the focus away from the individual to an analysis of cause and effect.

The principle of kotahitanga (inclusiveness) in participation and accountability underpins any process of Maori dispute resolution.⁵⁴ All parties to a dispute must be represented and given the opportunity to be heard. Unlike the present criminal justice system, it is not essential that the

50 Ryan above n 44, 239 'rangatira' is defined as chief, noble.

51 It is acknowledged that instances can arise where a rangatira can be appointed by their people for example when a hapu loses a rangatira.

52 Tomas and Quince above n 46, 215

53 Ibid, 229.

54 Ibid.

individual be present as the defendant and plaintiff are the collective. But the individual will suffer a loss of mana if they do not attend.

If the wrong-doing is not admitted to by the group or offender, it passes to the living relations by whanaungatanga because of the obligations between each other, an intergenerational relationship. The offender is encouraged to accept responsibility and in doing so re-establish mana among the group. The group then decides what actions are required by the offender to establish utu with the victim and their community. The dispute process was one of pono or just and tika or right. In the dispelling of tapu between people, food is shared to show acceptance.

4. Overall Aim

'Going through the process' was seen as cathartic or therapeutic. For Maori, procedural justice was just as important as the result. There was no distinction between the procedural or substantive justice. Maori place much value on the process as distinct from the outcome. The process is seen as an inherent good, because it empowers the parties and the community to take responsibility for the future. Allowing time and resources for a proper airing of the grievance is, of itself a large part of the healing process.⁵⁵ In practical contemporary terms, this can be demonstrated in the Waitangi Tribunal claims⁵⁶ where the cathartic nature of airing the grievance is an essential part of the process, ensuring that healing can occur. This fundamental element is also a tenet central to therapeutic jurisprudence.

The overall aim of dispute resolution remains the restoration of mana through utu, to achieve a balance of all considerations and to achieve a consensus; it is not an adversarial process. When there has been a dispute that has affected the spirit and mauri, the question is how to bring it back into balance. Regardless of what level or who is involved the same fundamental principle is involved, the principle of whakahoki mauri or restoring the balance. Apparent here is the parallel notion of 'healing' with therapeutic jurisprudence.

B. Criminality

1. Concepts

For Maori, a hara⁵⁷ means both a sin and a crime and there is no distinction between the two. This is completely different to the State's definition of a crime in section 2 of the Crimes Act 1961 as 'an offence for which the offender may be proceeded against by indictment'. Also, unlike the pakeha criminal system, which requires both mens rea and actus reus for a crime, a hara is seen as strict liability where the intention of mens rea is not required. Intention and motive are relevant only to the penalty.

The definitions of 'hara' arose from a framework of social relationships based on group rather than individual concerns. The rights of individuals, or the hurt they might suffer when their rights were abused, were indivisible from the welfare of the whanau, the hapu, the iwi.⁵⁸ This is the notion of 'collective responsibility'. An interesting extension of collective responsibility is the

55 Ibid, 230.

56 See Waitangi Tribunal, *Muriwhenua Report*, Wai 45 (1987), particularly submissions given on 7 July 1993, available <www.waitangi-tribunal.govt.nz>. See also E Durie and G Orr 'The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence' (1990) 14 NZULR 62.

57 Ryan above n 44, 89 'hara' is defined as sin, crime.

58 Jackson above n 1, 27.

notion of ‘rota rota’ when no one accepted responsibility. The ‘drawing of the short straw’ from among the offender group represented the ultimate of collective responsibility.

2. Overall Aim

For pakeha, the concept of punishment is not always necessary. For instance the court can impose a penalty such as discharge without conviction: section 19 of the Criminal Justice Act 1985. But for Maori utu is always necessary. Although both punishment and utu involve a deliberate response to an offence and aim to achieve retribution they differ in important aspects. Ethically speaking punishment can be foregone, but utu cannot; punishment should be unpleasant enough to deter, but utu may be entirely friendly and welcome; punishment should be confined to offenders who have been proven of guilty intentional offences, but utu may be exacted from individuals who have done no wrong.⁵⁹ This different conceptual thinking cannot be accommodated in the existing criminal justice system, but can be adopted in a therapeutic jurisprudential forum.⁶⁰

In assessing what muru (to absolve from sin) was to be paid, factors such as precedents, the status of the parties, what could be afforded, and was appropriate for the type of offending were considered. The penalty agreed reflected a ‘collective’ concern. Muru like hara was inter-generational and taking the penalty also increases the group’s mana.

The primary aim in the breach of hara, as in dispute resolution, is to restore the balance – whakahoki mauri – to restore the individual mauri, to restore both the mana of the offender and victim, so that they can be continue to be part of a functioning community, a healing approach. The group as a collective has an interest to maintain its mauri. The utu was an ongoing process of restoring the balance. This holistic healing approach again has similarities in therapeutic jurisprudence.

IV. THERAPEUTIC JURISPRUDENCE

A. Disadvantages and Criticisms

One of the early criticisms of therapeutic jurisprudence was that it was paternalistic, perhaps a confusion in the title itself which may have suggested a return to a therapeutic state.⁶¹ But the state legal system is paternalistic; so, if therapeutic jurisprudence is successful in reducing Maori offending rates then the positive outcome would justify the paternalistic means.

Judge Arthur Christean in a recent article⁶² has outlined a number of criticisms that are echoed by David Wexler.⁶³ These criticisms involve the use of therapeutic jurisprudence within a specialist court setting. They include the belief that therapeutic jurisprudence puts a tremendous strain on resources and judicial collegiality because of the one-court-one-judge concept common to specialised courts. Nevertheless, in New Zealand there is a trend towards a proliferation of

59 J Patterson, *Exploring Maori Values* (1992), 135.

60 See below, under ‘Procedure.’

61 D P Stolle, D B Wexler, B J Winick and E A Dauer ‘Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering’ in D P Stolle, D B Wexler and B J Winick (eds) *Practising Therapeutic Jurisprudence: Law as a Helping Profession* (2000), 8.

62 A G Christean ‘Therapeutic Jurisprudence: Embracing a Tainted Ideal’ (Sutherland Institute, 2002) available <www.sutherlandinstitute.org>.

63 Wexler and Winick above n 22, 80.

specialised courts.⁶⁴ Christean further adds that therapeutic jurisprudence works against the goal of unified courts in the direction of a proliferation of specialised courts that operate on the basis of a different judicial philosophy from those of other courts within the same district. However, proponents of problem-solving courts have been adamant about not allowing critics to pick apart these new initiatives by comparing them to an idealised vision of justice that does not exist in real life.⁶⁵

There is also the concern that therapeutic jurisprudence compromises the separation of powers by asking the courts to fashion solutions to social problems rather than leaving that to the legislature. Christean states that the line between the judicial and executive branch becomes blurred when courts become service providers intent on achieving specific outcomes. The judge thus becomes part of a treatment team and assumes the responsibility of overseeing programmes sponsored by the team so exercises an executive and a judicial function. Nonetheless, this occurs in New Zealand in the youth justice sector as well as in family court jurisdiction. The judge in effect makes policy by taking advantage of the discretion that has been traditionally afforded to them over sentencing to craft more meaningful sanctions.⁶⁶

There is merit in maintaining clear boundaries with respect to the doctrine of parliamentary sovereignty⁶⁷ and separation of powers.⁶⁸ But, in a therapeutic problem-solving court, it could result in undermining the relational element that is necessary between the judge and the offender. By stating clear boundaries and defining roles at the outset this problem may be overcome and the judge's position of respect maintained. Also, therapeutic jurisprudence does not trump longstanding notions of due process or the rule of law. But to work strictly within the current Westminster system a compromise has to be made.

In a marae forum everyone is on the same level and the whole process belongs to the people. It is a face-to-face or *kanohi ki te kanohi* meeting. So this criticism is not fatal.

It has been claimed that therapeutic jurisprudence compromises the objectivity and impartiality of judges. Christean argues that the collaborative process requires the judge to act as part of the therapeutic team. Acting as part of a clinical team the judge cannot avoid unethical *ex parte* communications that are traditionally a serious ethical breach for judges, but such communications form a regular part of the therapeutic process.⁶⁹ When the judge becomes the central focus of the entire effort as the enforcer of the treatment team decisions, rather than an independent adjudicator of the facts and the law, the appearance of bias cannot be avoided. To the defendant the judge becomes one of them. On the other hand, this can also be seen to be an effort by the judge to deal more effectively and humanely with the people who come before the court.

64 Such as the Family Court, Youth Court, Environment Court, and Maori Land Court.

65 Wexler and Winick above n 22, 82.

66 Wexler and Winick above n 22.

67 See P Joseph, *Constitutional and Administrative Law in New Zealand* (1993), 418, 'Parliament enjoys unlimited and illimitable powers of legislation'.

68 *Ibid*, 208, 'the doctrine of separation of powers seeks a unified reconciling theory of constitutional government – the separation of powers identifies the legislative, executive and judicial functions of government – it provides a check and balance system'.

69 Christean above n 62.

Turning to tikanga Maori, the facilitator in a dispute is usually a rangatira or tohunga.⁷⁰ The set of principles attached to resolving disputes is supported by other principles that provided the guidelines for actions amongst individuals and groups throughout Maori society. When incorporated into a system of resolving disputes the principles provided endless flexibility as to choice of action.⁷¹ There is less emphasis on the rule but more emphasis on the principle. So, within a tikanga Maori perspective the principle of a healing outcome would move towards outweighing the rule based notion of unethical ex parte communications. The collectivity tenet central to tikanga together with the principle of everyone being on the same level, effectively dispels the idea that the defendant perceives the judge becoming the same as them together with the objectivity and impartiality criticism. Therapeutic jurisprudence like tikanga Maori is a relational ethic.

It is also argued that the new model substitutes a judge's subjective judgement for time honoured due process checks. This eliminates a vital check on the abuse of government power. Christian is concerned that judges cannot effectively act as impartial and detached judicial officers to hear and rule on the competing claims of adversaries when they simultaneously function as advocates and defenders of the programmes and procedures under challenge. Beneficial intent not legal soundness is seen to be the benchmark of the effectiveness of treatment regimes that are imposed.⁷²

Finally, therapeutic jurisprudence abandons the role of equal justice under the law, in that programmes are necessarily limited to those offenders who qualify rather than all defendants who would like to participate. This implies that some defendants will be treated differently from others depending on whether they are deemed worthy candidates for available programme openings. Christian suggests that difficult or resistant candidates are 'screened out' in favour of presenting a public face to a programme that may be attractive to the media and an endorsement of the programme's success. However, there would be no reason why the jurisdiction could be widened to include all offenders after the programme becomes successful.

I acknowledge the validity of these criticisms, and therapeutic jurisprudence advocates are currently addressing them.⁷³ Nonetheless, one should not lose sight of the aim and bear in mind that law does not exist in a vacuum and is ever-changing. If therapeutic jurisprudence has the desired healing effect it will result in less offending. The flow-on from this will be a lighter case load and a lessening strain on resources and arguably one justification against these criticisms.

If this is the case, it seems possible from a policy perspective that therapeutic jurisprudence can be mainstreamed. This rationalisation is not new. The mainstreaming of Restorative Justice⁷⁴ into the Sentencing Act 2002 requires the court to take into account offer, agreement, and response to make amends: section 10.

These criticisms should not discount the possibility that therapeutic jurisprudence as a vehicle may assist in the reducing the Maori offending rate. The commonalities between the philosophy

70 Ryan above n 44, 305 'tohunga' is defined as expert.

71 Tomas and Quince above n 46, 214.

72 Brookbanks, above n 26, 9.

73 Wexler and Winick, above n 22.

74 See J Braithwaite 'Restorative Justice and Therapeutic Jurisprudence' (2000) 38 CLB 244. Restorative Justice is defined as 'a process where all stakeholders involved in an injustice have an opportunity to discuss its effect on people and to decide what is to be done to attempt to heal those hurts'.

behind therapeutic jurisprudence and the Maori world view will show that therapeutic jurisprudence should not be dismissed as a relevant and effective model.

B. Advantages and Suitability

From a practical point of view, a significant advantage of therapeutic jurisprudence is that it co-exists with the existing legal system. This would answer the political arguments against a separate system for Maori. Additionally, therapeutic jurisprudence contemporaneously allows for the incorporation of tikanga Maori. The inclusion of tikanga can occur, *prima facie*, at all levels of the criminal justice process. I apply this to my proposed model.⁷⁵

Collectivity is a central tenet to Maori.⁷⁶ Therapeutic jurisprudence is asserted as being a relationally-based construct.⁷⁷ The Maori world view, like therapeutic jurisprudence, shares the idea of communitarianism or collectiveness and the notion of whanaungatanga or relatedness. This move away from a rule-based approach towards a principle-based approach is consistent with Maori tikanga. So, from a conceptual point of view therapeutic jurisprudence represents a movement away from the heavily rule-based approach to legal processes to one that is more communitarian, relational and principle-based.

Therapeutic jurisprudence allows and acknowledges different conceptual frameworks. The Maori conceptual framework is at odds with the existing monocultural system in New Zealand. Issues central to Maori such as reciprocity have no equal in the State system. So we see the different approaches and administration of justice between the Maori and State systems. Critics⁷⁸ widely voice their concern that the current system does not allow Maori to administer justice to Maori.

Therapeutic jurisprudence like tikanga Maori is a forward-looking concept. The criminal justice system in comparison looks back, punishing the past actions and focussing on the penalty. Tikanga Maori like therapeutic jurisprudence is not primarily penalty orientated. It looks for the 'right way' or the tika way, ultimately resulting in a healing for the participants.

There are two important points to be made from this. The first is that the commonalities between therapeutic jurisprudence and tikanga Maori allow them to work in tandem. This also provides a window to introduce social theories such as those offered by Jackson into the process. The second is that the theory of therapeutic jurisprudence allows the administration of justice in the existing legal system to promote the well-being of communities, thereby allowing Maori to look after Maori.⁷⁹ This point I will again address when I explore the proposal of a specialised Maori Court. The challenge will be the realisation, implementation, and practicality of therapeutic jurisprudence in a suitable Court forum.

75 Refer below 'Proposed Maori Court Model.'

76 Jackson, above n 1.

77 W Brookbanks, 'Therapeutic Jurisprudence: Conceiving an Ethical Framework' (2001) 8 J Law and Medicine 328.

78 Radio New Zealand 'National Programme Morning Report Interview by Linda Clark with Annette Sykes' 18 July 2003; also Spier, above n 5, 191.

79 *Ibid.*

V. A SPECIALISED MAORI COURT: A WAY FORWARD

The idea of a specialised court for Maori is perhaps not as revolutionary as it seems. There are current calls for the powers of the Maori Land Court to be expanded or even transformed into a new Maori court with jurisdiction over family and criminal cases.⁸⁰ A national hui was called by the Law Commission and Te Puni Kokiri in Taupo to debate the court system. Law Commissioner Dr Ngatata Love noted that the hui followed discussion documents circulated by the Commission two years ago which proposed the widening of the Maori Land Court jurisdiction.⁸¹ There were also views that the Land Court precedents, together with the Judge's knowledge of tikanga Maori, and Maori communities, meant it could respond better to family disputes.⁸²

Critics of this initiative, however, point out that the Maori Land Court was established by the Crown in the first instance to turn customary Maori Land into freehold land enabling settlers to acquire land and for the land to come under Crown control.⁸³ The actions of the Maori (Native) Land Court were also reasons and grounds for Waitangi Tribunal⁸⁴ proceedings. This heightened Maori mistrust of the Court. Over time the Crown has 'fiddled'⁸⁵ with the constitution of the Court adding to this scepticism. The Maori Land Court facilitated land-based actions predicated upon a Crown system, and did not allow for any cathartic processes associated with Waitangi Tribunal claims. There is therefore some feeling that this creature of colonisation is not the appropriate vehicle for taking Maori forward, to effectively manage wider Maori issues. Irrespective of where the Court comes from, the recognition of the possibility of an alternative justice system by the Law Commission⁸⁶ supports a framework such as a community-based, specialised, problem-solving hybrid court. It is not a question of different laws and different rules, but different processes and different principles.

VI. HOW CAN THERAPEUTIC JURISPRUDENCE HELP IN A SPECIALISED COURT?

The therapeutic consequences of court actions and decisions should be sought provided those consequences do not violate other standards of good court performance.⁸⁷ They should not, for example, create a backlog of cases, a position that currently exists in the court system or interfere with due process. Even though application of therapeutic jurisprudence principles should not 'trump' other legal precepts in respect of a Maori Community Court, the incorporation of tikanga Maori would not be seen as trumping other legal precepts. Rather it would 'parallel' those precepts or be more applicable in particular circumstances particularly when there may be

80 R Berry, 'Hui looks at parallel justice for Maori' *New Zealand Herald*, 17 July 2003.

81 Law Commission, *Seeking Solutions*, above n 4.

82 There is limited legislative provision to allow tikanga Maori to be adopted under Te Ture Whenua Maori Land Act 1993 s 62. But the subject matter is primarily tangible and does not deal with criminal or family court matters. Also see comments of Judge Williams in *Mikaere*, above n 1, 339.

83 See D V Williams *Te Kooti Tanga Whenua: The Native Land Court 1864-1909* (1999).

84 Waitangi Tribunal, *Waiheke Report*, Wai 010, (2001), in particular the commentary on history, available <www.waitangi-tribunal.govt.nz>.

85 Such as the implementation of the Preamble in Te Ture Whenua Act 1993 now to promote retention of Maori land in Maori hands.

86 Law Commission, *Seeking Solutions*, above n 4, 27.

87 P Casey and D B Rottman, 'Therapeutic Jurisprudence in the Courts' (2000) 18 *Behavioural Science and Law* 445.

conflicting principles. For instance the notion and importance of reciprocity for a Maori offender should not be compromised.

A therapeutic jurisprudence examination of legal rules, procedures and roles would be conducted in conjunction with social science theory. At this time for instance, other Maori social theories can be utilised conjointly with legal rules and procedures. A therapeutic jurisprudence approach is not necessarily automatically paternalistic in its objectives and methods. The term ‘therapeutic jurisprudence’ might suggest a paternalistic role for the legal system for some observers, but such a role is decidedly not the vision of the proponents of therapeutic jurisprudence. In some cases, paternalistic behaviours may be more therapeutic and in other cases behaviours which foster individual self determination may be more therapeutic.⁸⁸ Indeed Winick writes that much of his work:⁸⁹

rather than defending government paternalism is animated by the insight that such paternalism is often anti therapeutic and that legal protection for individual autonomy can have positive therapeutic value.

The concept of tino rangatiratanga or self determinism can be sourced from the Treaty of Waitangi signed between the Crown and Maori in 1840. Therapeutic jurisprudence recognises the anti therapeutic effects of a paternalistic government. As such, legal protection for individual autonomy or self-determination, as indicated from above, becomes a possibility. The use of a Maori system and a Maori court process would consolidate the establishment of tino rangatiratanga, self-determination or autonomy that is inherent in therapeutic jurisprudence and Maoridom – iwi katoa. So, potentially, it appears that the implementation of therapeutic jurisprudence would support Maori self determination.

VII. IMPLEMENTATION OF THERAPEUTIC JURISPRUDENCE IN A SPECIALISED COURT

Therapeutic jurisprudence is an approach, a practice, a way of looking at the law and the legal system. A specialised court must systematically reinforce that approach and allow it to flourish to be an optimal venue for the practice of therapeutic jurisprudence.

The worldwide lesson is that effective justice for indigenous peoples relies upon:

- traditional institutions;
- the use of traditional values and procedures;
- community settings;
- the traditional language where it is still spoken;
- affirmation of spiritual religious and moral values; and
- use of all human facilities in the process, including emotions.⁹⁰

These can all be accommodated within a specialised Maori court. Pamela Casey and Brian Rottman⁹¹ propose several reasons to support the premise that a specialist court might reinforce and enhance therapeutic jurisprudence principles. One can apply them to a hypothetical specialised Maori court situation.

⁸⁸ Ibid.

⁸⁹ Wexler and Winick above n 22.

⁹⁰ D D Hall ‘Restorative Justice: A Maori Perspective’ in J Consedine and H Bowen (eds) *Restorative Justice: Contemporary Themes and Practice* (1999), 32.

⁹¹ Casey and Rottman, above n 87.

When a court's caseload includes a large proportion of cases in which similar therapeutic jurisprudence issues are likely to arise, judges and court staff would become more sensitive to identifying issues and more adept at developing individual and systemic responses to address the issues. For example, the identification that reciprocity is important for a Maori offender. The same therapeutic issues might be overlooked if a judge is handling a more general docket case.

Greater flexibility in procedures and practice may be easier to achieve in a specialised context than in a general court. In particular Casey and Rottman⁹² state that a specialised court facilitates the modification of the adversarial process in ways that support new judicial roles and highlight ethic of care considerations to achieve therapeutic jurisprudence outcomes. A Maori specialised court may, for example, facilitate a collective offender/victim hui as a step to healing the damage.⁹³ Skill development in applying therapeutic jurisprudence principles may proceed faster because of a common focus, or in this case the education of judges. In New Zealand the judicial fraternity already engage the education of tikanga issues.⁹⁴ So, theoretically judges should be able to apply and maintain this knowledge more successfully in this forum. Courts (such as a specialised court) with exclusive subject matter jurisdiction are more likely to attract a vigilant bar. This will further enhance the identification of therapeutic issues and possible remedies such as the consideration of an 'Anger Management Course' for a violent offender.

Economies of scale can potentially be achieved with specialised courts. Casey and Rottman add that establishing a specialised court may allow judges to have routine access to mental health and other professionals who can assist in identifying and addressing therapeutic issues. This could include recognising certain trends in offenders such as dysfunctional behaviour as a result of abuse.

Integrating the work of community services into the judicial system may be easier in a specialised court than in a general court. Specialised subject matter allows the judges and community professionals a frequency of contact that builds mutual understanding and respect. Such regard is hard to foster through infrequent contacts that judges have in a generalist court. Casey and Rottman pose two additional reasons in favour of a specialist court. They include cost effectiveness with regard to access to social services and treatments; and the specialised judge's expertise in the relevant jurisdiction, which enables her to secure community wide support for the operation of the court.

Problems with a specialised court relate to the mechanics of the court itself. They include burnout of the judges, ability to define the subject matter of the court so it is not too broad or too wide and disadvantages to judges' career advancement in specialising. With regard to specialist courts, these judicial constraints are also expressed by the Law Commission.⁹⁵ But some think it is unrealistic for judges to continue being generalists, believing they would work more effectively within their own areas of expertise.⁹⁶

92 Ibid.

93 Te Whanau Awhina programmes. See also comments of Judge Cooper in Department of Corrections, 'Rotorua Judges Innovative Sentencing' (2001) Judges Update, available <www.corrections.govt.nz>.

94 Institute of Judicial Studies, *Report on Activities 1 July 2000-30 June 2001*, where inter-bench activities such as marae visits and te reo/tikanga seminars are held, available <www.beehive.govt.nz>.

95 Law Commission, *Seeking Solutions*, above n 4 at 173.

96 Ibid.

The biggest hurdle is the balance between a ‘rights of the offender’ approach and an ‘ethic of care’ approach. The shift in this balance has consequences for the judge’s role and the courts’ independence. But an ethic-of-care approach as reflected in the concept of ‘appropriate trust’⁹⁷ calls for greater levels of accountability precisely in order to limit the destructiveness caused by relationally unconnected clinical and administrative regimes.⁹⁸ So when considering a Maori specialised court or similar model with therapeutic jurisprudence as its vehicle, there must be a robust set of defining principles sourced in tikanga Maori as opposed to a set of rules. This would theoretically overcome any perceived imbalance.

VIII. CAN A COMMUNITY COURT MODEL WORK?

Community courts are types of problem-solving courts and devote resources to learn about the unique problems of a community. Community courts grew out of frustration. They are located in the community close to where the crimes take place. They repay the community damaged by requiring offenders to compensate the neighbourhood through community service. Community courts use the leverage of the court sentence to complete social services that will help them address problems such as drug addiction. This brings the court and the community closer by making the court accessible and uses the court as a gateway to treatment and making social services available to offenders right at the courthouse.

A Community court may not satisfy Moana Jackson’s call for a separate legal system for Maori, but I submit if the court is tikanga based it will cater for Maori, including urban Maori, who at times feel ostracised from tribal based Maori. This Court would not be located on a traditional marae nor in a modern courtroom. It could be a facility some where between the two.

IX. PROPOSED MAORI COURT MODEL

Community justice is about creating new relationships between the justice system and stakeholders in the community such as residents. The aim is to test new and aggressive approaches to public safety rather than just responding to crime. Partnership and problem-solving are at the core of community justice. Community courts are problem-solving courts, and must devote significant resources to learning about the unique problems of a neighbourhood. Solutions to neighbourhood problems need to be derived from input from community members acknowledging that even so called victimless crimes inflict injury to the community. This reflects the tikanga Maori view that there is no victimless crime.

Problem-solving courts generally focus on the underlying chronic behaviours of criminal defendants. Acting on the input of a team of experts from the community, a problem-solving court judge orders the defendant to comply with an individualised plan, and then the judge (with the assistance of the community team) exercises intensive supervision over the defendant to ensure compliance with the terms of the plan.⁹⁹

97 Brookbanks, above n 77.

98 Brookbanks, *ibid.*

99 D J Becker and M D Corrigan ‘Moving Problem Solving Courts into the Mainstream’ (2002) Court Review <aja.ncsc.dni.us>.

The model I propose is a hybrid of both the community court and problem-solving court that implements the vehicle of therapeutic jurisprudence as a solution for Maori offending rates. From a practical point of view this model will utilise the relevant systems and framework already in place such as the existing court forums, existing marae, Maori Committees and existing legislative provisions such as the Community Development Act 1962. To some extent, the hui in Taupo has foreshadowed the need for a suitable forum to address Maori offending rate, with the calls to expand the jurisdiction of the Maori Land Court.

Ideally, the judges would be Maori. However, it is acknowledged that there is a shortage of Maori judges. Considering the education and continuing training of judges in the fields of tikanga, te reo and marae protocol, it is possible that non-Maori judges could fill the roles. But, they would need to be well versed. In the alternative, kaumatua or a panel of kaumatua could assist a non-Maori judge in an advisory capacity.¹⁰⁰

A. Procedure

The jurisdiction would ideally be open to all offenders. But the practical difficulties of dealing with hardened criminals alongside first offenders is acknowledged. In the initial stages the jurisdiction could be confined to first-time offenders for minor offences (excluding any violence to person crimes). It is anticipated that after the success of this model has been proven, the jurisdiction be widened to include all offending. At this time necessary provisions for security of the offender and community would need to be addressed.

This model and accompanying process is totally integrated. It takes effect at the beginning of the criminal procedure, upon arrest of the offender. The arresting officer would inquire as to whether the offender identifies himself or herself as Maori and advise them of the process. If identified as Maori, it would be mandatory that a Maori representative is called in and mandatory that the offender becomes part of the programme.¹⁰¹ This is similar to the arrest of a juvenile. It is helpful but not vital that the representative be legal. This representative would become responsible for the offender until their court appearance. At this point if the offender is clearly non-Maori, but identifies as being Maori, this should not inhibit the offender from partaking in the process, primarily because the process is a principle-based process. If successful there should be no reason why it should not be extended to non-Maori.¹⁰² However, as this paper is primarily focussed on reducing Maori offending rate, then Maori offenders would be targeted.

The offender would be assessed within the local marae forum allowing for whanau involvement. The offender has no choice of which marae.¹⁰³ After the 'intake' has been completed, an appropriate programme would be specified for the offender, thus taking on board the success from Te Whanau Awhina Programmes and utilising existing Youth Programmes.¹⁰⁴ This process demonstrates direct intervention, administration of tikanga Maori and the notion of Maori looking after Maori.

100 Section 62 Te Ture Whenua Maori Land Act 1993 – Additional members with knowledge and experience in tikanga Maori.

101 See for discussion of powers for mandatory involvement to compel whanau to attend, etc and employ Maori justice practices see Tauri, above n 12, 204.

102 See Tomas and Quince, above 46, 221.

103 This is similar to the Maori Focus Units in prisons where upon sentencing the offender has no choice but is allocated to an area where his protocol or kawa may or may not apply.

Alternatively, at this point there is room for the adoption of Moana Jackson's concept of a marae-based model of diversion. Maori Committees established under legislation such as The Maori Social and Economic Advancement Act 1945 and its replacement the Maori Welfare Act 1962 could easily be reconstituted as community or marae-based committees. These committees would then have the right to hear all charges under the Maori Community Development Act 1977 and instead of processing them under the Summary Offences Act. Where the offender is Maori and there is no conventional question of guilt, the offender would enter into a marae-based programme.

The philosophy behind this 'First Intervention Step' or 'Pre Plea' is two fold. First, it allows involvement of whanau and implementation of tikanga Maori. This moves towards satisfying the call for the administration of justice to Maori by Maori.¹⁰⁵ Secondly, this recognises that defendants often come before the court with problems that place them at risk of offending. Such defendants if left without treatment may well find themselves back before a court having been charged with further offences committed while on bail. Early treatment or intervention may prevent this situation from occurring and reduce the amount of offending while on bail.¹⁰⁶ Ideally admission to this first intervention stage would be contingent upon the offender having a problem that places them at risk of offending. Also, their acknowledgement of the existence of the problem, a commitment to its resolution, and participation in the marae or other suitable programme would be preferable.

Upon the offender's court appearance the judge would call for a report from the Maori representative, similar to a probation report. The judge, taking into account the findings of the report, would then assess the effectiveness of the programme, and, if he or she was satisfied, the offender could be returned to the community and be convicted and discharged.¹⁰⁷

However, there will also be offenders who have not satisfactorily completed the programme for various reasons that may include the marae forum being an alien forum for the offender. If in the opinion of the judge the programme had not worked,¹⁰⁸ the judge could incorporate other social sciences to assist in further treating the offender. For instance, the judge, in recognising the offender's adverse behaviour has led to the offending, could adopt a preventive approach such as confining the offender to home detention on the days he is more likely to offend.¹⁰⁹

The Judge could also incorporate tikanga Maori. For instance:

- kanohi ki te kanohi encounter;
- maintaining the importance of reciprocity between the offender and victim; and
- Adhering to the principles used by rangatira such as aroha, atawhai and manaaki.

104 He Tete Kura Mana Tangata Program for Maori violent offenders based at Nga Whare Waatea Marae in Mangere Auckland. See also Department of Corrections 'Judges Update: Information for the Judiciary' 2001, available <www.corrections.govt.nz>.

105 Sykes, above n 78.

106 Ministry Of Justice, *Trends in the Use of Bail and Offending while on Bail 1990-1999* (2003) available <www.justice.govt.nz> indicates that 21% of people offended while on bail.

107 Criminal Justice Act 1985 s 19.

108 Unlike the Youth Court where the Judge does not tend to depart from the Family Group Conference Report, the discretion would be broader here for various reasons one being there is still another step before the General Court process would come into effect and secondly the offender would not always be a youth.

109 See for discussion Wexler and Winick above n 22.

By considering the notion of *utu*, the Judge could also incorporate the offender's wider family in assisting the offender complete the programme. This is in the understanding that *utu* may be exacted from those who have done no wrong, and that *utu* is essentially a mechanism for restoring lost *mana*; a 'healing' tool.

The judge would take a more active role with the offender similar to the probation or re-entry courts by using the court processes aimed at promoting the rehabilitation or crime prevention process. These processes will seek to facilitate an offender's participation in a programme, to maintain the dignity of the offender and to promote the offender's trust. Upon entry into the programme the offender would sign a behavioural contract¹¹⁰ agreeing to comply with the programme agenda. The offender could also be encouraged to participate to develop the programme. So, this programme could be tailor-made to suit the problem or offence relevant to the offender, and could be specific such as an anger management course. Part of the programme would include regular court appearances for review that decline as progress is made. Participants would be actively involved in the process and could provide input into the programme for changes. The judge would interact with the offender expressing interest in their life and praising any progress that has been made. This is an endeavour to establish the '*tika*' or correct approach.

Successful completion is acknowledged with the award of a 'graduation certificate'. This philosophy is based on the ethic of care and the central tenet of therapeutic jurisprudence, of it being a 'relational-based' construct. The ethic of care recognizes, and is capable of offering, such an alternative approach to legal problem-solving which is more overtly relational and deliberately less adversarial.¹¹¹ There will be occasions when the offender makes no progress in the programme. In such instances the programme would be terminated and offender made subject to the jurisdiction of the general court process.

Once assigned to the general court system, when the jurisdiction broadens to catch all offenders, there is still the possibility of the intervention found at the Maori Focus Units in prisons. Although contrary to the philosophy of therapeutic jurisprudence, at least *tikanga* Maori is utilised and may have a positive effect in the prison system. This enables a basic framework while preserving flexibility. It acknowledges and provides the opportunity for implementation of *tikanga* Maori at three stages, pre-plea, post-plea, and in prison. Similar processes have already occurred within the existing system. I note that Judge Cooper,¹¹² taking an innovative approach to sentencing, attempted to break the cycle of offending by allowing the intervention of the probation officer. A series of victim and offender *hui* were held, a community programme was entered into by the offender, and now the two protagonists have shaken hands and 'healed.'

A similar model in operation in Geraldton in Western Australia has integrated therapeutic jurisprudence into its sentencing regime and has already shown promising results.¹¹³ This is comparable to the drug courts and uses therapeutic jurisprudence to import holistic concepts such as transcendental meditation. This is based on the premise that alleviating stress related problems

110 See also D B Wexler 'Robes and Rehabilitation: How Judges can Help Offenders Make Good' (2001) Court Review 19; D B Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *TM Cooley Review* 131, available <www.law.arizona.edu>.

111 Brookbanks, above n 77.

112 See *Judges Update* above n 93.

113 M King, 'Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush' (2002) 26 *Criminal LJ* 260.

on the levels of mind, body and behaviour and promoting overall growth in life can remove the underlying causes of substance abuse and offending.¹¹⁴

Introducing a mix of tikanga Maori values and problem-solving skills or other more mainstreamed legal practices is not a new concept and conforms to the long term plan to integrate problem-solving courts into established judicial systems.¹¹⁵ Judge Williams, the Chief Judge of the Maori Land Court, in considering the future of the Maori Land Court, proposed a model which would incorporate principles from equity and public law mixed with tikanga values.¹¹⁶ The changes envisaged also included a name change and a change to a forum like that of the Waitangi Tribunal, incorporating more of a community or people's court notion.

To undertake an analysis of the practicalities in terms of government resourcing for such a model is beyond the scope of this article, except to note that it is a problem recognised by the government which has allocated resources¹¹⁷ to reduce the Maori offending rate. If this system is trialed and shown to be effective, then the end result should go towards overcoming the resourcing hurdle. To put this into perspective, the proposed Intellectual Disability (Compulsory Care) Bill introduced in 1999, but not yet implemented, has attracted \$50 million in funding. This amount is over three years and will be set aside at the time of introduction and is expected to have a jurisdiction of at most 200 people.¹¹⁸ A large amount of funding has been allocated for relatively few people. This same funding applied to implementation of a proposed model would benefit more people both directly and indirectly.

X. CONCLUSION

The primary aim of this article was to examine why Maori offending rates remain high and in doing so propose a workable model to address and reduce the disproportionate rate of offending by Maori. The current criminal justice system is not working. Elements of the existing system such as the inaccessibility of the judge to the offender's dynamic, the alien court process, the lack of concern or relationship with the offender after their court appearance have shown to be monocultural and in opposition to tikanga Maori. The persistence of these elements have resulted in anti therapeutic results. Therapeutic jurisprudence as a vehicle allows:

- Maori to take responsibility;
- formal recognition of the validity and applicability of tikanga Maori;
- a fully integrated bicultural approach;
- involvement of Maori through the whole process;
- Maori to administer justice;
- the placing of decision-making back to the community; and
- a system predicated upon tikanga Maori as well as Maori people.

The most important commonality between tikanga Maori and therapeutic jurisprudence is the recognition of collective responsibility or communitarianism in the healing process. Therapeutic jurisprudence allows the underlying reasons for Maori offending to be addressed in a Maori way.

¹¹⁴ Ibid, 267.

¹¹⁵ Becker and Corrigan, above n 99, 7.

¹¹⁶ J Williams, 'The Maori Land Court' lecture, University of Auckland, 24 July 2003.

¹¹⁷ Such as the Tahua Kaihoatu Fund that is administered by Te Puni Kokiri.

¹¹⁸ W Brookbanks, 'Compulsory Care and Intellectual Disability' lecture, University of Auckland 23 August 2003.

The goal for both therapeutic jurisprudence and tikanga Maori is whakahoki mauri or restoring the balance through healing. This enables the offender to successfully participate in the community. The recognised social problem of offending challenges our politicians and judiciary to rise to the occasion to implement a therapeutic jurisprudential approach within a New Zealand court setting. If they can, it will effectively open a pathway for tikanga Maori to walk together with te ture pakeha to turn around the disproportionate offending rates of Maori.

BOOK REVIEW

EVOLUTION AND THE COMMON LAW by Allan C. Hutchinson (Author), Cambridge University Press, 2005, x, 294 pp, recommended retail price \$79.95 (paperback), \$175.00 (hardback).

Who would have thought? A book about the essence of the common law that is both compelling and exciting. When looking over the books available for review, I chose a couple of titles that looked interesting. I mistakenly read the title for Hutchinson's book as 'The Evolution of the Common Law,' and thought that it might be interesting and that at the very least it would be a handy reference with a swath of historical turning points and important cases. I was both right and wrong.

Imagine my dismay when the book arrived and, upon thumbing through it, I saw chapters on Darwinian and Creationist theories. Oh no! I'd chosen a tome that was another kitschy attempt to cast law in the framework of either widely familiar or currently 'hot' themes of physical science. Having a physics background makes the lack of rigour or data or *anything* remotely resembling science in such attempts perhaps more annoying to me than they are to others, but I think the reader will recognize my sinking feeling. I had been suckered into another 'Botany and the Law' product. Then I saw that Gadamer figured in as well. Oh yes, Allan Hutchinson. Isn't he one of those Law and Literature deconstructionist types? Okay, so this would be another earnest (yawn) discourse on how language and law's so-called 'neutrality' operate as modalities of hegemonic oppression.

However, I could not resist just a bit of a read to see exactly how wacky this attempt to be clever would be. I am so grateful I did that. This book is a very serious (and I think successful) attempt to examine the dynamic and evolution of the common law, as the common law, and the normative mind-set of legal practitioners steeped in the methodology and values of the common law which allows that to happen in a sometimes, but not always, functional and socially valuable way. His broader enterprise is to explore the appropriate role of the common law, as he considers it to be properly understood, in a constitutional democracy. As the recently created Supreme Court of New Zealand begins to develop its own nascent and unique common law jurisprudence, this book will be of particular interest for both judges and practitioners.

To 'recast' the common law, the author examines the extant jurisprudential schools of thought relating to it, both those that embrace the common law and those that criticize its coherency as a legal enterprise. He uses both Darwin and Gadamer to elucidate and support his thesis that the common law is indeed the 'work in progress' that we commonly acknowledge it to be. It is, however, neither a noble or rational teleological enterprise progressing towards a good end, as its most avid supporters would claim, nor a systemically oppressive or arbitrary imposition of ideological values as its detractors would claim.

The author engages with current and past scholars and critics of the common law, both in terms of individual jurisprudes and in terms of schools of thought. Approaches to understanding the common law ranging from formalism, positivism, pragmatism, moral realism and naturalism,

and the views of scholars ranging from Bentham and Austin through to Dworkin, Rorty, Posner and Epstein are considered in an integrated fashion as the book progresses.

To present his thesis, Hutchinson first explores what he considers to be a correct understanding of Darwin's theory. There is interesting history here, showcasing the tendency to misuse Darwin's ideas, in law and in other fields, as ultimately teleological (evolving towards perfection) rather than as historic (explanatory of how we got to here, but with no predictive value of what either will or *should* come next). The point is not that things are evolving towards anything better than the last thing, but that evolution is a series of random mutations, some of which persist because they are a better fit for their situational context. Hutchinson likewise uses Gadamer to remind us that language, meaning, and knowledge are situationally contextual. From here, the author argues that any development of the common law is and can only be guided by the situation at hand, rather than by any sort of adjudicative or jurisprudential theory, when judges and practitioners are faced with the problem of doing 'the best thing', all things considered. This is where the common law differs profoundly from evolution, for the changes to the common law are not random and intrinsically amoral, but reflective of considered judgment about what is 'the best thing', morally, politically, and within the particular legal tradition, and for those judgments we have responsibility.

Hutchinson is arguing for the common law to be considered as understandable and theorizable only in a historicized fashion. In the common law, just as with evolution or with meaning, it is only looking back that we can organize in any theoretical fashion what has happened or transpired to bring us to this point. Once at the present, we accept that the common law is not static and is a 'work in progress', and we ought to accept that it is a work that progresses in ways unpredictable by any theories of jurisprudence or adjudication. This, he argues, is not to advocate or embrace the 'anything goes' or post-modernist nightmare. Unpredictable is not synonymous with inexplicable either in nature or in law. In the common law, change is not driven by random chance, but by considered reflection at the margins. Its path is influenced by the very tradition of respecting and understanding the reasons for past wisdom, but is in no way confined by that wisdom, even as it values that past simply for *being* the past and the roots of the present, and as the source of both its meaning and its legitimacy.

He differentiates both Dworkin and Posner, one who sees 'the logical as expedient' and the other who sees 'the expedient as logical', from his own understanding of the common law, and criticizes many scholars' tendency to transpose the 'is' of the common law into an 'ought', without acknowledging that one cannot go from an is to an ought without one's own informed view of the 'ought'. The common law alone does not provide an 'ought', it can only provide an explanation of the past, a source of wisdom and tradition, a potential guide, but never an 'ought'. The 'ought' comes from the situation at hand and from the players' sense of social justice and of 'the best thing' in this political and moral context. This he labels a 'Darwinian-informed pragmatism' or a 'jurisprudence of doubt'.

In a sense, Hutchinson's view (although he would probably disagree) could be considered as a recasting of the legal realists, but in a more constructive fashion. He acknowledges the implicit power dynamics, ideological conservatism, and unpredictable outcomes of the common law, but denies that those outcomes are arbitrary. He uses Gadamer to anchor his quasi-Dworkinesque explication of the common law as an ongoing social and political conversation 'within, over, and across time', and as a tradition that must be respected and understood as a prerequisite for meaningfulness itself, but as one with no predictable 'right' result. It provides people with a

crucial ‘sense of what is feasible, what is possible, what is correct, here and now’. That people exist and thrive in tradition does not detract from the fact that ‘it is still in the nature of people to be able to break with tradition, to criticise and dissolve it’. He finds the common law’s institutional capacity for reflective yet unpredictable change and evolution in response to local circumstances a legitimating dynamic for both itself and for the constitutional democracy in which it is situated.

Constitutional democracies depend not only on procedural bases for their legitimacy but also on substantive bases. It is their substantive actions that ultimately differentiate them from tyranny and oppression. The common law provides an arena for substantive justice to be done, even if tradition dictates otherwise, in an incremental and pragmatic fashion. If the common law is to serve a legitimate role in a constitutional democracy, it is as an arena where protagonists of different ideological viewpoints present their preferences for what best promotes social justice in *this* particular discrete controversy in this particular social and historical context, and for judges to openly to use past and present wisdom and the present social, ideological and economic context to do ‘the best thing’ for this case. The constitutional democracy provides the background against which the ‘evolutionary’ change can either thrive and be embraced as a substantively ‘better’ approach to justice or wither away, as many cases do. The very possibility of achieving incremental social justice through common law adjudication is an important interstitial legitimator of constitutional democracy. This view echoes Dicey’s casting of common law as the source of the ‘unwritten’ English constitution itself, making the book particularly interesting for practitioners and adjudicators operating in the New Zealand constitutional context.

The author, due to his context, examines the dynamics of common law adjudication in the context of constitutional higher law that cannot be easily amended by the democratic legislature due to the provisions of a written constitution. However, whether a constitution is written or not is not the only reason that some court decisions are difficult for democratically elected legislatures to change. While we don’t have the added dimension of a formally written, entrenched, and superior law constitution in New Zealand, we certainly have a constitution and a political morality that limits what the democratically elected legislature can realistically do. Those limitations combined with the recent siting of our final court of appeal in our local context and the added legitimacy that brings to their decisions, make those chapters essential reading for us all.

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