

WAIKATO LAW REVIEW

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EDITOR'S INTRODUCTION

I am pleased to present the twelfth edition of the *Waikato Law Review*. I thank the authors who submitted articles to the *Review*, the referees to whom articles were sent, and the staff of the Waikato Law School who have assisted.

The *Review* is proud to publish the Harkness Henry Lecture of Hon Justice Noel Anderson, President of the Court of Appeal of New Zealand. His lecture on the appearance of justice covered significant and topical themes. Through the publication of the Lecture, kindly sponsored by the partners of Harkness Henry, Justice Anderson's valuable Lecture will reach a wider audience.

The growing prestige of the *Review* continues to be reflected in the articles received from outside the University of Waikato. The *Review* is pleased to publish a further article on the highly topical issue of native title by John Tate of the University of Newcastle in Australia.

A graduate of the Waikato Law School, Thomas Gibbons, has written on "The Explosion of New Zealand Legal Scholarship in the 1960s". The other articles in the *Review* were written by staff at the University of Waikato. These articles, and the others noted above, underline the Waikato Law School's continuing commitment to its foundation goals, namely, professionalism, biculturalism and law in context.

Professor Peter Spiller,
Editor, *Waikato Law Review*.

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THE APPEARANCE OF JUSTICE

BY HON JUSTICE ANDERSON*

A discussion of the appearance of justice would seem incomplete without some reference to Lord Hewart's dictum in *R v Sussex Justices; ex parte McCarthy* that justice must not only be done but should manifestly and undoubtedly be seen to be done.¹ But even to his contemporaries Gordon Hewart was an abysmal example of the judiciary. Indeed a few years later Mr Justice Avory was moved to suggest that Lord Hewart's words had been misreported.

Hewart was biased and bullying. One reasonably benign biographer, Robert Jackson, described him as autocratic and irascible in Court, one whose obstinacy sometimes drove to despair counsel in whose favour he was about to find.² The alacrity with which Lord Hewart would dismiss appeals in hanging cases, or force juries into questionable verdicts, is disgraceful.

But there is a dramatic force in the utterance of wise counsel by its human antithesis. Consider for example the admonitions of the seemingly foolish Polonius to Laertes:

To thine own self be true,
and it must follow as the night the day,
Thou canst not then be false to any man.³

Or, the hypocritical protestations about honour by Iago:

But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.⁴

My point is that Hewart's aphorism is emphasised by the irony of its source. It is so frequently recalled because it appeals to our perception of a fundamental aspect of justice, its appearance.

* DCNZM, President of the Court of Appeal of New Zealand.

¹ [1924] KB 256, 259.

² Jackson, Robert *The Chief* (1959) 197.

³ *Hamlet*, Act I, Scene 3.

⁴ *Othello*, Act III, Scene 3.

In its most obvious expression, the appearance of justice is a Judge who listens courteously, deals with the parties and their counsel even-handedly and articulates a judgment convincingly and with appropriate moderation. Such a Judge may have heard of Sir Graham Speight's advice to new appointees that the most important person in the Courtroom is the loser. But the issues run deeper and more extensively than the way in which a Judge appears to conduct a trial. The appearance of justice is conditional on institutional, procedural, functional, participatory and public elements of justice.

The institutional requirements are concerned with the appointment, tenure and accountability of the judiciary. It goes without saying that Judges should be appointed on the basis of merit, without political considerations, and should discharge their duties without external influences. To achieve those objectives there must be sound and impartial appointment procedures and permanent tenure of office.

I. LIMITS ON NUMBERS

Safeguarding against Executive manipulation of courts by swamping them with new appointments are the statutory limits on the numbers of High Court Judges (which include the Judges of the Court of Appeal and Supreme Court), the limits on the numbers within those two appellate courts, and the numbers of District Court Judges. At present the total numbers in the higher judiciary are the Chief Justice and 56 High Court Judges. Of these the Chief Justice and no fewer than 4 and no more than 5 may be Judges of the Supreme Court. In addition to the President, no fewer than 5 and no more than 6 may be Judges of the Court of Appeal.⁵ The maximum number of District Court Judges is 140.⁶

Obviously it is possible for Parliament to alter these provisions but the necessity for structural change by a democratic process is a hurdle to arbitrariness or manipulation.

II. APPOINTMENT OF JUDGES

The appointment of Judges is a perennial subject of public discussion. The issue gathered particular prominence in the debate over the abolition of appeals to the Privy Council. The repatriation of final appeals makes this issue particularly important because it is not difficult to imagine how, in

⁵ Judicature Act 1908, ss 4(1) and 57(2), and Supreme Court Act 2003, s 17(1).

⁶ District Courts Act 1947, s 5.

theory, certain outcomes might be rendered more likely by the appointment of Judges predisposed to them by personality or philosophical inclination. The ability to influence the character of a final court would be, in a general sense, a matter of genuine concern. Fortunately, this type of problem has not been a practical issue in New Zealand for a number of reasons. Not least amongst these is the conventionally astute observance by Attorneys-General of impartiality in making appointments. The exemplar, Sir Geoffrey Palmer, has from time to time emphasised to the judiciary the anxious concern with which he considered every case of judicial appointment by him. And as far as the Supreme Court is concerned, public anxiety evaporated when appointments were made on the unquestionably principled basis of seniority.

High Court Judges are appointed by the Governor-General in the name and on behalf of Her Majesty.⁷ Judges of the Supreme Court, the Court of Appeal, Associate Judges and District Court Judges are appointed by the Governor-General.⁸ The reference to Her Majesty is absent in respect of the Court of Appeal and Supreme Court because the superior court Judges are *ipso facto* the Queen's Judges, and other members of the judiciary are not.

In respect of the High Court, what used to happen in practice was that the Attorney-General and the Chief Justice would discuss possible candidates identified by their coming to the notice of the Attorney-General or Chief Justice through their eminence as practising barristers. The Presidents of Law Societies and others who might be expected to have an informed view were sounded. An approach would then be made, often by the Chief Justice but sometimes by the Attorney-General. If the responsibility of office were accepted, as it usually was, the Attorney-General would decide to advise the Governor-General to appoint. By convention, the Attorney-General mentioned the new Judge's name in Cabinet only at that point and simply by way of advice, not for the purposes of discussion, thereby maintaining the Attorney-General's independence in the matter of appointments. It has not been conventional to mention in this way appointments below the level of the High Court.

In respect of the District Court, appointments to which were advised by the Minister of Justice, the procedure was analogous. Consultation would occur between the Minister and the Chief District Court Judge or, earlier, senior Magistrates in the area of appointment, as well as senior practitioners who

⁷ Judicature Act 1908, s 4 (ID).

⁸ Supreme Court Act 2003, s 17(1), Judicature Act 1908, ss 57(7) and 26(1), and District Courts Act 1947, s 5(1).

could be expected to know the standing and reputation of a potential appointee.

The process worked well when the bar was the expected source of appointees and the potential pool was both small and self-evident. But lack of transparency became an increasingly troublesome feature. Hence there were calls, from time to time, for a more public process. Underpinning that expectation was the understanding that, amongst other considerations (such as inherent qualities), structures for the preservation of judicial independence needed to address not just the relative stability of present-day New Zealand, but also the possible turbulence of society in the distant future. Constitutional insurance must be taken out well in advance.

The present situation is somewhat more structured, and is explained in Ministry of Justice documents which are published on the world wide web.⁹ The process involves the publication of advertisements of expressions of interest. Respondents who meet the statutory criteria are identified in a confidential register maintained by the Attorney-General's Appointments Unit. Depending on whether the practitioner has expressed interest in the High Court or the District Court, certain consultation and interview processes may follow. Potential consultees may be the Chief Justice, President of the Court of Appeal, Secretary for Justice, President of the Law Commission, the New Zealand Bar Association, the New Zealand Law Society, the Chief District Court Judge and others who may have an informed view of prospective appointees. Ultimately an appointment is made. In the case of the High Court mention is still made in Cabinet.

The process is less open than occurs, for example, in the highest levels of the USA judiciary. But there is an understandable and valid tension between open process and an applicant's privacy rights. The future may see a more open method of appointment but, I suggest, at the possible cost to society of the concept of the judiciary as impartial ministers of justice rather than public servants.

III. TENURE

The tenure of High Court Judges is assured by sections 23 and 24 of the Constitution Act 1986, which provide:

⁹ <http://www.justice.govt.nz/pubs/other/pamphlets/2003/judicial-appointments/high-court-judge.html>; and <http://www.justice.govt.nz/pubs/other/pamphlets/2003/judicial-appointments/district-court-judge.html>.

23 Protection of Judges against removal from office

A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office.

24 Salaries of Judges not to be reduced

The salary of a Judge of the High Court shall not be reduced during the continuance of the Judge's commission.

The recent extension of permanent tenure to Associate Judges removes the scope for any suggestion that a decision by them might be influenced by concerns about reappointment at the expiration of what was a five-year term. There is a compulsory retirement age of 68 years for all Judges.

The Judicial Conduct Act 2004 established formal, antecedent procedures for the removal of Judges. The justification for that Act is to provide structures for complaints and institutionalised processes for informing the Attorney-General when to initiate a motion in Parliament for address to the Governor-General seeking removal in the case of the higher judiciary; and when to advise the Governor-General to remove other Judges from office.

The value of the first objective may be moot. There are appellate structures, media sanctions and the discipline and authority of peers, to regulate individual conduct. Going beyond that raises serious questions about judicial independence. It is perhaps the case that the establishment of a complaints system is as much a catalyst as a process. There are, however, sound arguments in terms both of natural justice and judicial independence, for a defined advisory process before resort to a motion in Parliament.

IV. ACCOUNTABILITY

It is sometimes said that Judges lack accountability because they are appointed, not elected. In fairness I should add that the context of such observations is not a debate about whether Judges in New Zealand should, as in some American state jurisdictions, be elected, but rather whether Judges should not over-reach and intrude into the domain of the legislature. In reality Judges are constrained and accountable. They are subject to legislation defining or recognising their jurisdiction. They are subject to obligations including, for example, the New Zealand Bill of Rights Act 1990. They are also constrained by the limits of the common law in any particular area. The reasons for decisions are almost invariably public and,

except at the highest level, the courts are subject to appellate or reviewing supervision.

To draw a distinction in terms of accountability between Members of Parliament and the judiciary solely on the basis of electoral supervision is, in any event, simplistic. Members also make their decisions in public, may be criticised in the public media, and are subject to the discipline of Standing Orders of the House. The constraints on the exercise of power, whether judicial or political, are more extensive than the ballot box.

V. ASSIGNMENT OF JUDGES TO CASES

No system of appointment of Judges can obviate differences in skills and personalities amongst Judges. Every practising lawyer knows that a client may have a better chance or a lesser chance of success in a case, or on an issue, depending on what Judge is hearing it. If the selection is random for all litigants then of course the drawing of a particular Judge for a case will be a matter of chance, and all litigants are subject to the same odds in the judicial lottery, as it were. There are various methods of achieving an acceptable degree of randomness, such as computer allocation, or the assignment of Judges to cases on the basis of order of filing and judicial seniority.

In a recent paper, Dr Petra Butler examines methods of case allocation in the Court of Appeal and the several High Court registries.¹⁰ She argues that the neutral assignment of cases to Judges is part of the rule of law and serves four functions.

First, it prevents the manipulation of judicial results by the ability to choose a particular Judge. Second, it is conducive to public confidence in the impartiality and independence of the judiciary. Third, it guarantees that everyone has the same chance of getting a Judge favourable to the party's cause. Fourth, it ensures that basic rights and freedoms are not compromised by systems which are not robust.

If Dr Butler is correct, the assignment of cases will be impeachable, on appearance of justice grounds, unless assignment is random or choice is otherwise entirely excluded.

¹⁰ Butler "The Assignment of Cases to Judges" (2003) 1(1) *New Zealand Journal of Public and International Law* 83.

1. Supreme Court Benches

To some extent the ideal is achievable by the Supreme Court with its present composition of five Judges, because it must sit as a five-judge court when hearing a substantive appeal. But the gateway to a substantive appeal may be blocked by as few as two Judges because appeals are by leave and two Judges could deny leave. But what if permanent Judges are, for some reason, unable to sit? Who may fill the gap?

The Supreme Court Act 2003 provides:

17 Constitution of Court

(1) The Supreme Court comprises—

(a) the Chief Justice; and

(b) not fewer than 4 nor more than 5 other Judges, appointed by the Governor-General as Judges of the Supreme Court.

(2) The Supreme Court's jurisdiction is not affected by a vacancy in the number of its Judges.

Provision for Acting Judges is made in the Supreme Court Act 2003:

23 Acting Judges

(1) The Governor-General may appoint as acting Judges of the Supreme Court retired Judges of the Supreme Court or the Court of Appeal who have not reached the age of 75 years.

(2) Each acting Judge must be appointed for a stated term that—

(a) is not more than the time until the Judge will reach the age of 75 years;

(b) in any case, is not more than 24 months.

(3) During the term of his or her appointment, an acting Judge may act as a Judge of the Supreme Court to the extent only that the Chief Justice authorises under subsection (4).

(4) The Chief Justice may authorise an acting Judge to act as a member of the Supreme Court—

(a) to hear and determine any proceedings within a stated period; or

(b) to hear and determine stated proceedings.

(5) The Chief Justice may authorise an acting Judge to act as a member of the Supreme Court only if satisfied that—

(a) there is a vacancy in the Supreme Court; or

(b) a Judge of the Supreme Court is for any reason unavailable to hear proceedings or particular proceedings.

(6) An acting Judge is authorised when the Chief Justice gives the Attorney-General a certificate, signed by the Chief Justice and at least 2 other permanent Judges of the Supreme Court, to the effect that in their opinion it is necessary for the proper

conduct of the Court's business for the acting Judge to be authorised to act as a member of the Supreme Court—

(a) to hear and determine proceedings within the period concerned; or

(b) to hear and determine the proceedings concerned.

(7) An acting Judge has the jurisdiction, powers, protections, privileges, and immunities of a Judge of the Supreme Court and the High Court, but only in relation to acting as a member of the Supreme Court, under the authority of subsection (4), in the hearing and determination of a proceeding.

(8) While acting as a member of the Supreme Court, under the authority of subsection (4), in the hearing and determination of a proceeding, but not otherwise, an acting Judge must be paid—

(a) a salary at the rate for the time being payable to a Judge of the Supreme Court other than the Chief Justice; and

(b) any applicable allowances, being travelling allowances or other incidental or minor allowances, determined by the Governor-General for acting Judges.

(9) The fact that an acting Judge acts as a member of the Supreme Court is conclusive proof of the Judge's authority to do so. No action of the Judge, and no decision of the Court, may be questioned on the ground that the occasion for the Judge to act as a member of the Court had not arisen or had ceased.

(10) An acting Judge may resign office by written notice to the Attorney-General.

The pool of potential Acting Judges must always represent a theoretical opportunity for court stacking. However the grounds for concern at this elevated level may, at present, be more theoretical than real. Compare, for example, the United Kingdom where only five of the twelve Lords of Appeal in Ordinary usually sit on appeals.

In *Campbell v MGM Ltd*, an important case involving the balancing of competing rights or values, the House of Lords extended the scope of liability for a breach of privacy rights by a majority of three to two.¹¹ The issues were similar to those raised in *Hosking v Runting* where the New Zealand Court of Appeal also extended liability by a majority of three to two.¹² It is speculative whether the outcome in the New Zealand case would have been different if judges in the majority had been replaced by any of the three other judges, including the Chief Justice, who, theoretically, could have sat on the case. But there must be a fair chance that the *Campbell* case would have had a different outcome if any of the seven Lords who did not sit had replaced any one of the majority. In that case the outcome was highly likely to have been dependent upon the composition of the Bench.

¹¹ [2004] UKHL 22.

¹² [2003] 3 NZLR 385.

There is a New Zealand case which has attracted criticism on the ground that its outcome was by way of three to two majority which resulted from an unusually constituted Court of Appeal. In *Brighouse Ltd v Bilderbeck*,¹³ a permanent Judge of the Court, McKay J, did not sit, whilst an Acting Judge, Sir Gordon Bisson, who had previously retired, did sit and voted to constitute the majority. The temporal proximity of that case, with its attendant criticism, to significant changes to the Judicature Act in 1998, is unlikely to have been merely coincidental.

2. Benches in the Court of Appeal

Supplementary assistance to the Court of Appeal is now restricted to High Court Judges who have been nominated by the Chief Justice, after consulting the President of the Court of Appeal and the Chief High Court Judge, as Judges of the High Court who may comprise members of the Court of Appeal.¹⁴ Judges are assigned to act as members of a Criminal or Civil Division, comprising three Judges, in accordance with a procedure adopted from time to time by Judges of the Court of Appeal.¹⁵ The President of the Court of Appeal must publish in the Gazette any procedure adopted under s58C(1). A nominated High Court Judge may not be assigned to a Division without the concurrence of the Chief Justice and the Chief High Court Judge. Section 58D provides when the Court of Appeal is to sit as a Full Court of five Judges. The extraordinary situation of a High Court Judge sitting on a Full Court is covered by s58F, which requires a certificate by the President. No more than one Judge of the High Court may sit as a member of the Full Court at any one time.

These measures meet the concerns raised by the *Brighouse* case but Dr Butler still perceives weaknesses in the procedures. She argues in her article that there is a lack of transparency about how Judges are allocated to divisions of the Court and which divisions of the Court get to hear which cases. Further, although the criteria for the allocation of a case to a Full Court are relatively clear, there are no transparent criteria or procedures in place to determine the selection of Judges to sit on a Full Court. Overall, she says, the Court of Appeal system appears to give substantial discretion to the President to control the allocation of cases and the selection of particular panels.¹⁶

¹³ [1995] 1 NZLR 158.

¹⁴ Judicature Act 1908, ss 58A, 58B.

¹⁵ Section 58C.

¹⁶ *Supra* note 10, at 112.

Recently the current members of the Court approved the gazetting of a new Notice outlining procedures for assignment of Judges to divisions and determining which appeals were of sufficient significance for a Full Court. That Notice was executed on 30 April and gazetted on 13 May 2004.¹⁷ The procedures do not differ substantially from the previously gazetted procedures but at least have the merit of subscription by all the present Judges of the Court. It is the case that assignment to particular appeals or a particular appeal will be by the President, the Acting President or nominee. In assigning Judges to cases the President, Acting President or nominee shall take into account the following:

- the forward planning programme and the availability of Judges;
- the equitable sharing of work among the Judges;
- the efficient dispatch of the Court's business;
- that it is often desirable for at least one Judge with expertise in an area of law that is in issue to hear a case;
- the role of all the permanent Judges of the Court in the clarification and development of all areas of the law; and
- the desirability of related litigation (ongoing litigation arising out of the same facts between the same or some of the same parties) being heard by the same or some of the same Judges.

In the three years I have sat on the Court of Appeal I have heard no concerns expressed by Judges about assignments to cases. I do not doubt that if there were any concerns they would be raised because the members of the Court would have a duty to do so. Section 58C(1) imposes the responsibility for adopting a procedure upon the Judges of the Court of Appeal, not the President, and the gazetted Notice stipulates that Judges will review the assignment process from time to time and that the members of the Court will also consult regularly to review the process in the light of the ongoing workload of the divisions and the efficient dispatch of business. At present Dr Butler's criticisms have a theoretical justification but are not realised in practice. However, the concerns she raises are a valuable reminder of the need for preventive vigilance and protective structures.

VI. BIAS

I turn now to the issue of fairness in action and more particularly apparent bias. As the Court of Appeal pointed out in *Erris Promotions*:

¹⁷ *New Zealand Gazette* No 52.

The integrity and moral authority of a legal system depends on those factors which satisfy the reasonable informed observer that it is fair in practice. To be fair in practice its adjudicators must be and must appear to be impartial.¹⁸

The courts have had difficulty in articulating a comprehensible and workable test. To some extent the difficulty arises from the need to balance efficiency and robustness against possible hypersensitivity of litigants on the issue of impartiality. As Callaway JA observed in *Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd*:

As a general rule it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions a Judge or Magistrate should not accede to an unfounded disqualification application.¹⁹

Underscoring those sentiments is the apprehension that reluctant parties may seek to delay litigation or cunning parties may seek to “forum shop” by raising issues of apparent bias. On the other hand, a test of real apprehension of bias may impugn the principle of apparent justice. As the Court of Appeal pointed out in *Erris Promotions*, the High Court of Australia in *Eber v Official Trustee* favoured a test of reasonable apprehension, expressed in these terms:

Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver ... or necessity ... a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.²⁰

The New Zealand approach was influenced by the speech of Lord Goff of Chieveley in *R v Gough*:

¹⁸ *Erris Promotions Ltd & Ors v The Commissioner of Inland Revenue* (2003) 21 NZTC 18,214; (2003) 16 PRNZ 1014.

¹⁹ [1999] VSCA 35, para 89(e).

²⁰ (2001) 205 CLR 337, 344.

Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the Court is thinking in terms of possibility rather than probability of bias. Accordingly having ascertained the relevant circumstances, the Court should ask itself whether having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of the party to the issue under consideration by him ...²¹

The New Zealand Court of Appeal followed *R v Gough* in *Auckland Casino Ltd v Casino Control Authority*.²² However, the House of Lords in *Porter v MaGill* altered the test (or in their euphemistic term “adjusted” it). Their Lordships said that “[t]he question is whether the fairminded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased”.²³ I confess some difficulty in understanding what the epithet “real” adds to the test.

Following the House of Lords “adjustment” in *Porter v MaGill* one could choose if one wished between tests of “real danger”, “real possibility”, or “reasonable apprehension”. One could also choose between “the Court’s own view” and “the Court’s view of the public view”.

Without deciding the issue the Court of Appeal anticipated the need to do so in *Erris Promotions*:

This Court will no doubt need to consider, in due course, whether to discard the *Gough* test, as England has, and adopt not only a specifically objective approach but also a standard other than “real danger”, in terms of the English or other Commonwealth principles. We would certainly have to make a choice if faced with a case where the outcome would be affected differently by different tests. It is reasonably arguable that the Australian approach, which examines reasonable apprehension by a fair-minded and informed observer, gives full weight to public perceptions concerning the impartial administration of justice. Public as well as litigant confidence in the impartial administration of justice is at the heart of the issue we have been discussing. The observations made by Mason CJ and McHugh J in *R v Webb* (1994) 181 CLR 41, at 50-53 about the respective features of the then English and the Australian approaches are particularly helpful. A revised test, which gives full weight to the requirements of public perception and objectivity, as well as being capable of straight-forward application, might be “Would the reasonable informed

²¹ [1993] AC 646, 670.

²² [1995] 1 NZLR 142, 149, Cooke P for the Court.

²³ [2002] 2 AC 357, 494, per Lord Hope of Craighead.

observer think that the impartiality of the adjudicator might be/might have been affected?”. This suggestion is made, not in any declaratory way but as a reference for possible future discussion.²⁴

Again without finally deciding, this Court thought it appropriate to apply the suggested test in *Erris Promotions* to the facts of the case in *Ngati Tahinga v Attorney-General*.²⁵ As matters stand, however, the *Gough* test of real danger, favoured in the *Auckland Casino* case, has not been overruled but it does seem to have been left behind. Those who may be minded to read *Erris Promotions* and *Ngati Tahinga* may take what inference they will from the fact that I wrote the judgment of the Court in each of them, but that cannot be taken as any indication of what might happen in a future case.

It may be noted however that the test discussed in *Erris Promotions* and *Ngati Tahinga* is consonant with the jurisprudence not only of Australia but also of the USA. For example, in *Liteky v US*, the US Supreme Court held that:

disqualification is required if an objective observer would entertain reasonable questions about the Judge’s impartiality. If a Judge’s attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the Judge must be disqualified.²⁶

VII. OPEN COURTS

A clear and informative statement of the provenance of and justification for open justice is set out in the first four paragraphs of Chapter 8.1 of the Law Commission’s Report 85 “Delivering Justice for All”. I will not reproduce it in this paper but I do commend it. It reminds us that open processes are central to maintaining public confidence in the administration of justice and ensuring the accountability of Judges, and are assured by international instruments and affirmed by the New Zealand Bill of Rights Act 1990.

As the Law Commission points out and as we all would appreciate there may be situations justifying a limitation on openness. These are more obvious where there is a need to protect vulnerable witnesses or victims, such as in cases of alleged sexual offending, when the public is excluded from the courtroom and where limitations are placed on the publication of names. Although the exclusion of the public in the course of testimony by

²⁴ *Erris Promotions Ltd & Ors v The Commissioner of Inland Revenue*, supra note 18.

²⁵ CA163/03, 24 September 2003.

²⁶ 114 S Ct 1147,1162 (1994).

victims of sexual offences is commonplace, protection of the public interest is nevertheless maintained by the right of the public media to remain and to publish details, albeit without identifying the complainant. In certain types of proceedings there is a constraint placed on publication in furtherance of the administration of justice. Typical would be the particulars of pre-trial determinations of questions of admissibility of evidence, particularly when evidence is excluded. Obviously the utility of rulings excluding evidence from a trial would be compromised if potential jurors could read about it in the media. Sometimes details of litigation must remain secret in order to protect secret commercial interests. And constraints on publication may be needed to protect personal privacy interests.

The relevance of the media to the principles of open justice cannot of course be overstated. Knowledge of how the courts function generally and how particular cases are dealt with must contribute greatly to public confidence in the judicial system. As one who was originally rather sceptical of the introduction of visual and audio media into courts I am now persuaded of its social utility in raising awareness of the role of the judicial system in New Zealand society. I well remember the anxious discussions amongst the judiciary when the question of allowing television and radio reports from the courtroom was first mooted. Guidelines for ensuring that the integrity of the court process was not compromised by audio-visual recording for transmission were developed in discussion with representatives of the public media. The latest guidelines were developed in 2003 and have been operating since the beginning of this year. The procedures seem to be working satisfactorily from the point of view of both the media and the courts. My only reservation is that the media seem too sparing in the use of the informative and often dramatic material available for their use.

Of no less concern than the cases where we positively limit public access are the areas where we do nothing or insufficient to extend public access in accordance with modern methods of communication. The courts have been slow, for example, in establishing a website, which could convey information to a vast audience about the functioning of the courts, as well as a sentencing and other decisions database. I should point out, in fairness, that the importance of such facilities is recognised by the present Minister for Courts and his Department, and some progress is being made in this area.

VIII. APPEALS IN ABSENTIA

One matter of particular concern to the Court of Appeal is that persons in custody, whether on remand or after sentence, have no legal right to be

present at court hearings affecting their liberty. Section 395 of the Crimes Act provides:

395 Right of appellant to be represented, and restriction on attendance

(1) At the hearing of an appeal, or an application for leave to appeal, or on any proceedings preliminary or incidental to an appeal or application, the appellant may be represented by counsel.

(1A) If an appellant is in custody, he or she is not entitled to be present at a hearing involving oral submissions unless—

- (a) the rules of Court provide that he or she has the right to be present; or
- (b) the Court of Appeal gives leave for him or her to be present.]

(2) The power of the Court of Appeal to pass any sentence under this Act may be exercised, notwithstanding that the appellant is for any reason not present.

(3) Subsections (1) to (2) do not apply to—

- (a) an appeal to the Supreme Court; or
- (b) an application for leave to appeal to the Supreme Court.]

In practice, leave is granted by the Court of Appeal only where the presence of the prisoner is necessary for the hearing of the appeal, as for example where the prisoner may be required for cross-examination on an affidavit alleging some factual basis for the appeal. The Court of Appeal does not have holding facilities for prisoners either in the courtroom or in the court precincts. Where cross-examination of a prisoner is required the appeal is heard in a High Court. There is a strong argument that the appearance of justice, as well as elementary human rights, mandate the presence of an appellant, if desired, at the hearing of an appeal. It could also be relevant to the rehabilitation of prisoners that they see the arguments presented to the court for and against their cause. The administration of justice by the courts should be seen, not as through a glass darkly, but face to face.

Such presence need not be physically in the face of the court. The presence could be by audio-visual links between courts and prisons as can occur, for example, in hearings before the County Court of Victoria and the Federal Court in New South Wales. Audio-visual links are cost effective, do not compromise security and allow prisoners to see and instruct their counsel in relation to their appeal. I ask, rhetorically, why have we, as a society, tolerated the hearing of criminal appeals in absentia? The Court of Appeal cannot routinely grant leave to be present, on the basis of an appellant's rights, because the Crimes Act presumption is against entitlement. But the time may come when the Court has to consider whether the integrity of the appellate process itself presumptively indicates the grant of leave. In the meantime the Justice Department is looking into the matter of audio-visual links.

IX. REASONS FOR JUDGMENT

We have come some distance since Lord Mansfield reputedly advised a colonial governor who was required to undertake judicial duties never to give his reasons because his judgment would probably be right but his reasons would certainly be wrong. These days a judgment is likely to be considered bad in law if it gives no reasons. Over 20 years ago the Court of Appeal pronounced, in *R v Awatere*, that a failure to follow the normal judicial practice of giving reasons which can sensibly be regarded as adequate to the occasion could jeopardise a decision.²⁷ More recent perceptions, informed not only by the New Zealand Bill of Rights Act 1990 but also by developments in the area of judicial review, suggest that a decision without reasons will be regarded, presumptively, as invalid. In my opinion, this is because such a decision must be justified as inevitable, not merely available. Jury verdicts, alone, are an exception because trials by jury are deliberately structured for a verdict, not an articulated judgment, and the Judge's directions of law and rulings are recorded.

The giving of reasons imposes a discipline on a Judge, provides a basis for accountability both in an appellate and public context, and limits the risk of, as well as demonstrating where appropriate the fact of, arbitrariness. Notwithstanding this elemental component of open justice, courts may be tempted for administrative reasons, such as inadequate or inappropriate resources for dealing with litigation demands, to strive for minimalism in this area. For example in 1968 the United States Court of Appeals for the Fifth Circuit established screening panels of three Judges each to determine whether an appeal should go to an oral hearing or be dismissed by the simple order "Affirmed". If all three Judges of a panel formed the view that there was no error of law and no basis for disturbing the trial Court's factual findings, and that an opinion would have no precedent value, then an opinion would not be written. The process involved, not a hearing in any sense, but rather successive consideration of a file by each of the three Judges of the panel. It will be recalled that this type of procedure found little favour with their Lordships in *R v Taito*.²⁸

There is now statutory jurisdiction for the Court of Appeal to deal with criminal appeals on the papers, but in practice that method of determination of an appeal is infrequently resorted to. Its availability depends on a screening Judge deciding, amongst other things, that an appeal can fairly be dealt with on the papers. At the time when such a decision needs to be made

²⁷ [1982] 1 NZLR 644.

²⁸ [2003] 3 NZLR 577.

for case management reasons, such an opinion cannot usually be formed. It is invariably only in cases of glaringly obvious want of merit that such a decision could be made, but sometimes the merits of the appeal seem incontrovertible. Every case dealt with on the papers involves a conference of the Judges seized with it before the reasons and result are confirmed. The nature of appeals apt for disposition on the papers means that the reasons for judgments will not be extensive. I am confident, however, that they are always adequate to explain the outcome.

The formal reasons for judgment are the only ones a court can properly give. A judgment must speak for itself and once it has been delivered, except in rare situations which I do not examine in this paper, a Court is *functus* in the particular matter. For reasons of finality and propriety, Judges do not discuss in a personal way the reasons that led them to a particular result. That is why I could not, for example, properly discuss in this lecture the reasons for and ramifications of *Ngati Apa v Attorney-General*, the so-called foreshore and seabed decision.²⁹ That leads me to my final point.

X. CONFIDENCE

It is essential to any society that its system of justice and its courts should have the confidence of litigants and of the community generally. That ideal underpins all of the arguments for the appearance of justice, judicial independence, open courts, disqualification or invalidation for apparent bias as well as actual bias, and reasons for judgment. Occasionally that confidence may be undeserved. More often it is likely to be undermined.

David Pannick QC remarked that Judges spend their lives doing what other people try to avoid, namely, making decisions.³⁰ Sometimes the decisions are unpopular which, on one view, may be a good thing because it indicates indifference to popular acclaim or denigration. Sometimes sentencing decisions are disparaged by those who have very understandable reasons for anguish and grief over criminal acts to them or their loved ones. All the more reason therefore that Judges should moderately and clearly articulate their reasons, according to law, why a particular sentence has been imposed or a particular decision been handed down.

Judges should not expect to be immune to criticism. Except where the publication of views may imperil a still undetermined case before the courts, freedom of expression is untrammelled by the judicial nature of its subject.

²⁹ [2003] 3 NZLR 643.

³⁰ Pannick, David *Judges* (1987) 1.

There are however conventions affecting the relationship between the judiciary and members of the House of Representatives. These constrain criticism of one by the other for reasons relating to recognition, for the public good, of the dignity and authority of each of these principal branches of government. The Standing Orders of the House of Representatives, Order 113 stipulates that a Member may not use offensive words against the House or against any Member of the judiciary. Orders 111 and 112 prohibit comment in the House which may endanger or prejudice a current trial or appeal.

Ministers are subject to more specific obligations. The Cabinet Manual, currently revised as at 2001, provides:

The separation of the executive and the judiciary under New Zealand's system of government means that Ministers must exercise prudent judgements before commenting on judicial decisions – either generally, or in relation to the specifics of an individual case (for example, the sentence). Ministers, following a long-established principle, do not involve themselves in deciding whether a person should be prosecuted, or on what charge. Therefore, they should not express comment on the results of particular cases or on any sentence handed down by a court. Sentencing is a complex process. Ministers must avoid commenting on any sentences within the appeal period, and should avoid at all times any comment that could be construed as being intended to influence the courts in subsequent cases.³¹

Although the temptation to comment publicly is most likely to arise in relation to the conduct and result of criminal proceedings, the restraint referred to in paragraph 2.115 applies equally to civil cases.

Ministers should not express any views that are likely to be publicised where they could be regarded as reflecting adversely on the impartiality, personal views or ability of any Judge. If a Minister thinks that he or she has grounds for concern over a sentencing decision, the Attorney-General should be informed.

It is, however, proper for Ministers to comment on the effectiveness of the law or about policies on punishment (that is, on those matters where the executive has a proper involvement), but not where the performance of the courts is brought into question.

Subject always to the discretion of the Speaker and to the right of the House to legislate, matters awaiting or under adjudication in any court of record

³¹ *Cabinet Manual*, para 2.115.

may not be referred to in any motion, or in any debate, or in any question, including a supplementary question, if it appears to the Speaker that there is a real and substantial danger of prejudice to the trial of the case.

Standing Order 111 has effect, in relation to a criminal case, from the moment the law is set in motion from a charge being laid; and in relation to cases other than criminal, from the time when proceedings have been initiated by the filing of the appropriate document in the registry or office of the court. Standing Order 111 ceases to have effect in any case when the verdict and sentence have been announced or judgment given. In any case where notice of appeal is given, Standing Order 111 has effect from the time when the notice is given until the appeal has been decided.

Judges for their part are astute in their judicial utterances to show respect for the House and its Members and Her Majesty's Ministers. These conventions have not prevented political criticism of the judiciary from time to time.

XI. *PLUS CA CHANGE*

In 1993 the then Chief Justice, Sir Thomas Eichelbaum, addressed the New Zealand Law Society Conference in Wellington in the following terms:

It has long been recognised that there need to be restraints upon political comment about the Court process. Reciprocal restraints of course are imposed upon the Judges which in this country have been observed meticulously. Unhappily the same cannot always be said about political comment.³²

New Zealand is not alone in this respect as one would imagine. A judiciary which observes a convention of restraint may be seen as an easy target for a political sniper irrespective of the *locus in quo*. Lord Ackner remarked:

There are currently many references to the alleged 'unprecedented antagonism' between the Judges and the Government in relation in particular to judicial review of ministerial decisions and the restrictions which the Government propose on judicial discretion in sentencing. As regards judicial review, it has been suggested that the Judges are getting above themselves, challenging the supremacy of Parliament or exercising a political function in judicial review cases instead of simply upholding the rule of law.³³

³² *New Zealand Law Conference Papers* (1993) Vol 2, 122.

³³ (1996) 146 *New Law Journal* 1789.

Lord Ackner said that he did not believe there was any substance in the criticism, and he affirmed the courts' inherent power to determine what was lawful or not and to award the appropriate remedy where there was unlawfulness. In doing so, he pointed out that "[t]he Court is performing its ordinary function of upholding the rule of law".³⁴ I say that it is a Judge's absolute duty to society, not only to uphold the rule of law, but to be seen manifestly and undoubtedly to be doing so.

I began this lecture with references to William Shakespeare and I conclude with another example of his wisdom. These words also were put in the mouth of Polonius as he spoke to his son. He could well have been giving wise counsel to many a Judge:

Give every man thy ear but few thy voice;
Take each man's censure, but reserve thy judgment.³⁵

³⁴ *Ibid.*

³⁵ *Hamlet*, Act 1, Scene 2.

SPECIALIST COURTS AND TRIBUNALS

BY TREVOR DAYA-WINTERBOTTOM*

I. INTRODUCTION

The development of administrative law in the United Kingdom (“UK”) and New Zealand has been described by Joseph as “essentially a post-war phenomenon”.¹ It has developed incrementally since Victorian times in response to changes in society due to events such as the industrial revolution, the outbreak of war, and the creation of the welfare state.

For example, during the 19th century the industrial revolution in the UK provided the impetus for the growth in administrative law to address problems relating to the regulation of factories, the Poor Law, railways, and public health. The growth in administrative law continued in the 20th century due to the need to regulate pensions and workers compensation schemes, and the development of the national health service. This led Taylor to comment that:

Until August 1914 a sensible, law-abiding [citizen] could pass through life and hardly notice the existence of the state, beyond the post office and the policeman. ... The state intervened to prevent the citizen from eating adulterated food or contracting certain infectious diseases. It imposed safety rules in factories, and prevented women, and adult males in some industries from working excessive hours. ... This tendency toward more state action was increasing. ... Still, broadly speaking, the state acted only to help those who could not help themselves. It left the adult citizen alone.²

A consequence of the changes in society has been “the increase in delegated legislation and the growth of administrative tribunals”.³ The development of specialist courts and tribunals therefore arose at the critical point of the establishment of British rule over New Zealand. As a result it is not surprising that New Zealand has inherited a strong administrative tradition. This included a passion for setting up a range of tribunals which provide an alternative avenue of complaint for the citizen instead of having recourse to judicial review in the High Court. The importance of the jurisdiction

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¹ Joseph, P *Constitutional and Administrative Law in New Zealand* (1993) 656.

² Taylor, A J P *English History 1914-1945* (1977) 1.

³ Joseph, *supra* note 1.

exercised by some tribunals has also resulted in the development of specialist courts, particularly in relation to property rights.

This article will focus on the role of specialist courts and tribunals. In particular, the Environment Court will be used as a case study. Critical questions in this analysis will relate to the arguments which justify assigning tasks to specialist courts and tribunals; their independence, both political and financial; and the effectiveness of the remedies provided.

II. SPECIALIST COURTS AND TRIBUNALS

The Law Commission has identified over 100 specialist tribunals that have been established in New Zealand ranging from Consent Authorities under the Resource Management Act 1991 (“RMA”) to the New Zealand Parole Board.⁴ They are responsible for adjudicating disputes in a wide range of matters, including “disputes between citizens and government departments” in relation to matters such as environmental and planning issues, immigration, welfare and benefits, and taxation.⁵

Other specialist tribunals are responsible for “occupational licensing & discipline” (for example the Police Complaints Authority), “decisions on economic matters” (the Commerce Commission), “decisions on human and cultural rights” (the Waitangi Tribunal), deciding “disputes between individuals (the Tenancy Tribunal), and “censorship” (the Office of Film and Literature Classification).⁶

Specialist tribunals also exercise divergent jurisdiction with some tribunals exercising original jurisdiction to determine matters at first instance (the Consent Authorities), some tribunals reviewing the decisions taken by others (the Deportation Review Tribunal), and some tribunals exercising concurrent jurisdiction (both original and review) (the Refugee Status Appeals Authority).⁷

There are differences between the appeal rights available from the various specialist tribunals to the general courts. For example, in some cases there are no appeal rights (the Student Allowance Appeal Authority), whilst in other cases rights of appeal to the District Court, High Court, or Court of

⁴ Law Commission, *Striking the Balance* PP51 (2002) 78-90.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

Appeal are provided (the Residence Appeal Authority).⁸ Beyond that, there are also differences in the category of appeal rights provided. A general right of appeal is allowed in some cases (the State Housing Appeals Authority). In other cases appeal rights are limited to questions of law, matters of public importance, or specified grounds, or are restricted to specific statutory provisions. In some cases the right of appeal can be exercised only if leave is obtained from the general courts.⁹

The Department for Courts has played a key role in the administration of justice in New Zealand.¹⁰ The Department's *Annual Report for the Year Ended 30 June 2002* stated that:

Maintaining the separation of powers and the independence of each of the branches of Government is fundamental to New Zealand's constitutional arrangements. Within the New Zealand public sector, the Department for Courts has a key and unique role as an agency working for the Executive, while, at the same time, working in the interests of the independent Judiciary to administer the Court system.¹¹

As a result the Department is responsible for managing "administrative services within the court system, supporting the work of the Judiciary in determining and managing criminal, civil and family cases" in the general courts.¹² The Special Jurisdictions Unit of the Department, however, plays a more limited role in being responsible for managing "administrative services supporting a range of specialist courts, tribunals, and authorities including the Maori Land Court, Waitangi Tribunal, Environment Court, Coroners, Disputes Tribunal, Tenancy Tribunal and Land Valuation Tribunal".¹³

What emerges from this brief analysis of the work of the Department for Courts is the fact that the Department is currently responsible for supporting only 24 out of more than 100 specialist courts and tribunals. The majority of specialist tribunals, therefore, rely on the government department or agency which they were set up to supervise. As a result there is considerable variety in the jurisdiction given to specialist courts and tribunals in New Zealand.

⁸ Ibid.

⁹ Ibid.

¹⁰ The Department for Courts was disbanded on 1 October 2003, and its work in this area has subsequently been undertaken by the Department of Justice.

¹¹ Department for Courts, *Annual Report for the Year Ended 30 June 2002* 8.

¹² Ibid, 19.

¹³ Ibid, 23.

III. ARGUMENTS FOR ASSIGNING TASKS TO SPECIALIST COURTS AND TRIBUNALS

The growth in the number of specialist courts and tribunals, particularly during the second half of the 20th century, has been pragmatic rather than principled, as will be readily apparent from the historical background above. As a result it will be relevant to consider next the arguments which justify assigning tasks to specialist courts and tribunals, before turning to look at proposals for reform of the system.

Legomsky considered the criteria for establishing specialist courts and tribunals in *Specialized Justice – Courts, Administrative Tribunals and a Cross-National Theory of Specialization*. He identified 12 criteria which can be used to assess the benefits and costs of specialization, namely:

- Mix of law, fact, and discretion;
- Technical complexity;
- Degree of isolation;
- Cohesiveness;
- Degree of repetition;
- Degree of controversy;
- Clannishness;
- Peculiar importance of consistency;
- Dynamism;
- Logistics: volume, time per case, and geographic distribution;
- Special need for prompt resolution;
- Unique procedural needs.¹⁴

The criteria identified by Legomsky are not new, but provide a useful one-stop summary of the factors which may be relevant to the decision to establish specialist courts and tribunals.¹⁵ It will be noted that the criteria will sometimes conflict with each other, and that all criteria will not be relevant in every case.¹⁶ Whilst this article concentrates on current proposals for reform of the system of specialist courts and tribunals in New Zealand, the criteria provide a litmus test of the continuing need for assigning tasks to these bodies. Legomsky used the criteria to examine the possible models that “specialization [should] take”.¹⁷ Based on the experience of the former

¹⁴ Legomsky, S H *Specialized Justice – Courts, Administrative Tribunals and a Cross-National Theory of Specialization* (1990) 20-32.

¹⁵ Finnie, W “Recent Literature” *Juridical Review* (October 1991) 261.

¹⁶ Sainsbury, R “Book Reviews” *Public Law* (Summer 1992) 349.

¹⁷ Legomsky, *supra* note 14, at 33.

Administrative Division of the High Court of New Zealand, he argued for a “multi-speciality” approach to adjudication with a core group of judges being responsible for determining cases from a range of specialist statutory regimes (for example, Town and Country Planning Appeals), similar to the “umbrella” approach now recommended by the Law Commission.

1. Law, Fact, and Discretion

Legomsky found that the exercise of discretion provides a general rationale for specialization. In particular, he found that “the application of broadly worded statutory provisions” and “decisions that depend heavily on personal value-judgments” are well suited to a specialist approach.¹⁸ For example, he noted that:

The greater the scope of the decision-maker’s choice, the more essential become several qualities: a deep understanding of the relevant policy objectives, a reduced probability of simple inadvertence, the pursuit of coherence, and the minimizing of dependence on the views and comparative adversarial skills of opposing counsel.¹⁹

Questions of law on the other hand were found to be more suitable for determination by the “legal generalist” as legal training in itself reduces the need for relatively confined legal matters to be determined by specialist courts and tribunals.²⁰

2. Complexity

Technical complexity was identified by Legomsky as one of the “traditional” reasons for establishing specialist courts and tribunals.²¹ He found that technical complexity can arise from a number of factors including “the sheer size of the pertinent legislation”. Specifically, he noted that “a massive statute, particularly if accompanied by lengthy administrative regulations, might ... be seen as introducing a high degree of ‘technicality’”.²²

Similarly, an area of law may be considered technically complex due to the fact that professional expertise from other disciplines is required in order to

¹⁸ Ibid, 22.

¹⁹ Ibid.

²⁰ Ibid, 23.

²¹ Ibid, 24.

²² Ibid.

determine the facts of a particular case before the tribunal for adjudication.²³ For example, Legomsky noted that:

Some environmental cases will be comprehensible only to chemists; some patent cases will be understood only by mechanical engineers. In these instances, even an appellate body charged only with assuming there is evidentiary support for the findings of the lower tribunal might be mystified.²⁴

3. Isolation

The degree of isolation, or the extent to which a particular area of law is “discrete” or “unique” will be determined by considering whether reference to other areas of law or non-legal issues is necessary in order to determine the matters in issue in a given case.²⁵ Legomsky found that:

... the quality of a decision can be enhanced when the adjudicator is aware of approaches taken in analogous situations. That awareness can also promote consistency between or among areas. And efficiency is improved if a tribunal has already had access to a situation that avoids duplication of someone else’s effort. Again a tribunal with jurisdiction over all these analogous areas might be ideal, but when either the number or the nature of those areas makes that arrangement unworkable, specialization within one such field alone might pose unacceptable costs.²⁶

4. Other Factors

Other factors which indicate that a specialist approach is desirable include cohesiveness or “a high degree of inter-relationship within a single subject”, the degree of repetition or frequency with which similar issues arise for determination, and clannishness or the degree to which “the private lawyers, the government officials, the expert witnesses, and others [engaged in a particular field] form a relatively closed group”.²⁷

However, the degree of controversy or the extent to which “the public is likely to perceive [professional] bias in the decisions of specialized experts”,

²³ Ibid, 25.

²⁴ Ibid.

²⁵ Ibid, 26.

²⁶ Ibid, 26-27.

²⁷ Ibid, 27-28.

provides a counter-factual argument against assigning jurisdiction to specialist courts and tribunals.²⁸

5. Consistency

Legomsky found that specialist courts and tribunals can promote consistency in a particular area.²⁹ He also found that the need for consistency is “magnified” by the presence of trade competition.³⁰ He observed that:

If one restaurant is granted a liquor licence and an adjacent restaurant in similar circumstances is denied one, that latter is worse off than if both licence applications had been denied. The good fortune of one business can, in a competitive setting, be the bad fortune of another.³¹

6. Dynamism and Logistics

Legomsky found that dynamism or “the increased need to monitor and apply current developments makes specialized expertise more valuable”.³² He also found that the volume and geographic spread of litigation can justify “establishing a specialized adjudicative body”.³³ There is, however, an operational limit in terms of the number of cases that can be determined in any given period. As a result Legomsky noted that:

Just as a high volume of cases can impair the functioning of the general courts, a low volume can make specialized adjudication ineffectual. So much of the *raison d’être* for specialized tribunals is the enhanced expertise, consistency, and efficiency that specialization can bring. All these benefits require a sufficient case-load.³⁴

7. Speed of Decision

Specialist courts and tribunals also lend themselves well to “prompt resolution” of disputes.³⁵ Legomsky noted that:

²⁸ Ibid.

²⁹ Ibid, 28.

³⁰ Ibid, 29.

³¹ Ibid.

³² Ibid.

³³ Ibid, 30.

³⁴ Ibid, 31.

³⁵ Ibid.

For several reasons, specialized adjudication can be a device to speed the disposition of cases. Experts can presumably handle greater case-loads because their familiarity with the subject diminishes the time they will need per case. Further, if the authority creating a specialized tribunal wishes, it can tailor the resources of the tribunal to the special need for promptness in that subject area – an option not as readily available when the cases comprise merely one small part of the work of a tribunal with general jurisdiction.³⁶

Legomsky also observed that the disposal rate of cases before the courts is “crucial” when dealing with “frivolous actions [lodged] for purposes of delay’. Speedy decision-making “discourage[s] frivolous actions”.³⁷

Similarly, Craig has identified speed of decision as one of the arguments that support assigning jurisdiction to specialist courts and tribunals. He noted that:

... they have advantages of speed, cheapness, informality and expertise. These advantages are of particular importance in areas involving mass administrative justice, such as the distribution of social welfare benefits. It would ... be extremely difficult for the ordinary courts to cope with the large increase in case load if these matters were assigned to the ordinary judicial process. The creation of a tribunal system can also alleviate problems for the courts, which can become inundated by judicial review applications within a particular area.³⁸

8. *No Single Answer*

Interestingly, whilst Legomsky identified a number of criteria that indicate the circumstances where it may be appropriate to establish specialist courts and tribunals to deal with specific areas of law and the disputes which arise in these areas, overall he found that “[n]o one procedure is ideal for all disputes”.³⁹ Indeed, this point was emphasized by the Law Commission in *Striking the Balance*. It noted that:

Over the years, a number of specialist courts have developed to hear particular types of cases such as family disputes and employment problems, and environmental matters. This has benefits in that a multi-million dollar planning case heard in the

³⁶ Ibid.

³⁷ Ibid, 31-32.

³⁸ Craig, P P *Administrative Law* (2003) 253.

³⁹ Legomsky, *supra* note 14, at 32.

Environment Court may well require different expertise and processes than a case about child custody heard in the Family Court.⁴⁰

9. *Other Arguments*

Beyond the criteria identified by Legomsky, Craig offers three arguments to explain the rationale for establishing specialist courts and tribunals⁴¹, namely:

... [a] different type of argument was that the ordinary courts might not be sympathetic to the protection of the substantive interests contained in the legislation that laid the foundation of the welfare state ... and therefore the matter should be assigned to a tribunal instead;

... [a] more radical argument sees the creation of some tribunals as a symbolic means of giving the appearance of legality in a particular area in order to render more palatable unpopular changes in the substantive benefits to which individuals were entitled. ... [it was] argued that appeals machinery introduced in the [UK] Unemployment Act 1934 was designed to defuse opposition to cuts in benefits by directing it into channels where it could be controlled and have a minimal effect.⁴²

Whilst Legomsky and Craig hold similar positions about “speed of decision” and the particular benefits specialist courts and tribunals can bring in this area, the other arguments put forward by Craig raise matters that were not previously identified by Legomsky in his analysis of the factors which “point toward specialized adjudication for a given group of cases”.⁴³

10. *Questions for Policy Makers*

To avoid the temptation for further *pragmatic* growth in the number and variety of specialist courts and tribunals, the Law Commission has identified two questions that “could usefully be asked by policy makers at the outset”, as the basis for a more principled approach to the issue, namely:

Can this matter be dealt with through the ordinary mechanisms of the general courts?
Are there compelling reasons related to subject matter or process which require a tribunal?

⁴⁰ Law Commission, *supra* note 4, at 50.

⁴¹ For the first argument put forward by Craig, see discussion under “Speed of decision” above.

⁴² Craig, *supra* note 38, at 253.

⁴³ Legomsky, *supra* note 14, at 33.

If it is thought that a tribunal is required, can an existing tribunal deal with this matter, rather than creating a new one? We suggest that in the future, this is a decision in which the President of the unified tribunal framework should play an important advisory role.⁴⁴

However, how far these safeguards will go toward preventing the cynical abuse of the tribunal system identified by Craig in his “radical” argument, will be a test of time. Certainly, the UK experience of consultation with the umbrella body of the Council on Tribunals in relation to the creation of new tribunals has not been uniformly observed.

IV. REFORMING THE TRIBUNAL SYSTEM

Since the mid-20th century various attempts have been made to reform the tribunal system both in the UK and New Zealand. Given the similarity in the administrative traditions in these jurisdictions, the reforms in the UK provide a useful background to the debate in New Zealand. To date the “reforms” have been successful only in part.

1. UK Experience

The Franks Committee made a number of recommendations in relation to the UK tribunal system:

Tribunal should be regarded as part of the machinery of adjudication rather than as part of the machinery of administration;
Lord Chancellor should be responsible for appointment of tribunal chairmen, other tribunal members should be appointed by the Council on Tribunals;
Council on Tribunals should formulate procedure for particular tribunals;
Reasoned decisions should be given by tribunals setting out the findings of fact and informing those persons affected by the decision of any right of appeal;
Provision for appeals on fact, law, and merits from first instance tribunals to an appellate tribunal, unless the first instance tribunal “was particularly well qualified”.⁴⁵

In practice the recommendations as to appointments and appeals were not adopted in full. This resulted in some tribunal members being appointed by the Lord Chancellor and others by the Minister responsible for the matters which the tribunal was established to supervise. Rights of appeal were also generally limited to appeals on a question of law to the High Court. No

⁴⁴ Law Commission, *supra* note 4, at 293-294.

⁴⁵ *Report of the Committee on Administrative Tribunals and Enquiries* Cmnd.218 (1957).

uniform procedure was established for tribunals by the Council on Tribunals. Additionally, consultation with the Council on Tribunals about establishment of new tribunals appears to have been sporadic. On occasion insufficient time has been allowed for the Council to provide a reasoned submission to the government on the issue of whether jurisdiction should be assigned to an existing court or tribunal or whether a new tribunal should be established to deal with the particular matter of concern.⁴⁶

The Leggatt Report⁴⁷ again considered the need to review the UK tribunal system and made a number of recommendations:

Establishing a Tribunals Service, organised on a regional basis, divided into subject matter divisions, presided over by a High Court judge;

Rights of appeal from first-tier tribunals would be provided to a single appellate tribunal;

Further appeals, by leave, would be provided to the Court of Appeal on points of law;

Judicial review of first-tier tribunals would be precluded, unless appeal rights have been exhausted, and the ability to challenge decisions of the appellate tribunal by judicial review in the High Court would be prohibited.⁴⁸

The UK Government has given a commitment to implement the recommendations in the Leggatt Report by establishing a unified tribunal system on a rolling basis. It has indicated that the first tribunals to be amalgamated into the new system would cover matters such as immigration, employment, criminal injuries compensation, mental health, social security, tax, special educational needs and disability, pensions, and land valuation. Other tribunals are to be amalgamated into the new system over time.⁴⁹

Overall, the attempts made to reform the tribunal system in the UK foreshadow the recommendations made by the Law Commission in New Zealand in the documents referred to below. In particular, the proposed “umbrella” structure has to varying degrees been the subject of positive comment by the Franks Committee and the Leggatt Report. When viewed in the wider Commonwealth context alongside recent developments in Australia, the reforms establish a trend in the development of administrative law which may be difficult for New Zealand to resist.

⁴⁶ Craig, *supra* note 38, at 255-257.

⁴⁷ *Tribunals for Users – One System, One Service* (2001).

⁴⁸ *Ibid*, paras 5.3-5.4 & 6.3-6.4.

⁴⁹ Craig, *supra* note 38, at 273.

2. New Zealand Experience

Previously the Legislation Advisory Committee (“LAC”)⁵⁰ considered the New Zealand experience with specialist courts and tribunals and recommended that:

... New Zealand tribunals should be ordered in larger clusters, beginning with three major tribunals encompassing 20 distinct jurisdictions. One would be concerned with welfare, another resources and a third revenue. The LAC saw licensing and indecent publications as two other areas worthy of major tribunals.⁵¹

More recently, the Law Commission has been active in relation to review of the courts system (including tribunals) and has produced a series of three documents on the topic. The findings of the Law Commission based on the consultation exercise in the first two preliminary papers are likely to exert a strong influence on the future structure of New Zealand specialist courts and tribunals. The Law Commission process has been informed, in particular, by attempts to reform the tribunal system in the UK and Australia.

In 2002 the New Zealand Law Commission began a consultation process on the future of the courts system with publication of the preliminary paper *Striking the Balance*.⁵² One of the matters considered was the administration of specialist courts and tribunals.

The paper noted the fragmented and pragmatic manner in which tribunals had been constituted over the years in response to specific issues and the lack of any standardised processes. In particular, the paper noted the response developed in Victoria to such issues where an umbrella body, the Victorian Civil and Administrative Tribunal (“VCAT”), has been established:

The benefits of an arrangement like VCAT include detachment from the agencies or organizations whose decisions are being challenged, a better use of resources, and a higher standard of process. The integrity of the system and the reality of independence have real bite.⁵³

The paper also noted the benefits to be derived from specialist courts, namely:

⁵⁰ Legislation Advisory Committee, *Administrative Tribunals* (1989).

⁵¹ Law Commission, *Delivering Justice for All* Report 85 (2004) 286.

⁵² NZLC PP51.

⁵³ Law Commission, *supra* note 4, at 51.

Over the years, a number of specialist courts have developed to hear particular types of cases such as family disputes and employment problems, and environmental matters. This has benefits in that a multi-million dollar planning case heard in the Environment Court may well require different expertise and processes than a case about child custody heard in the Family Court.⁵⁴

The Law Commission returned to these issues later in 2002 with publication of a second preliminary paper *Seeking Solutions*. The paper considered a number of specific issues in relation to tribunals.

In response to the question “Why we have tribunals” the document noted that:

Tribunals resolve disputes between individuals and between citizens and the state. They provide specialist, speedy, less formal and less expensive justice in matters that do not require full court treatment. They also resolve problems that call for special expertise such as claims over accident compensation or objections to tax assessments.⁵⁵

Next, the Law Commission looked at “What tribunals should decide”. The paper noted the diverse range of decision-making options currently found in New Zealand tribunals. For example, the Deportation Review Tribunal determines appeals on the basis of the facts, the Waitangi Tribunal investigates matters and makes recommendations to the Government, and the Environment Court is frequently required to make decisions “involving the interpretation of law” and is presided over by a judge.

In relation to the linked question of “Who should decide” cases coming before tribunals, the Law Commission noted that:

Lawyers or judges are best suited to make decisions that involve the interpretation of the law. Elected officials are best suited to make decisions with high policy content. Decision-makers, who have specialist knowledge, are best suited to decide issues that require specialist expertise.⁵⁶

When considering the question of “How tribunals should decide” the Law Commission noted the views expressed by submitters in response to the questions asked in the previous paper *Striking the Balance*. For example, most submitters:

⁵⁴ Ibid, 50.

⁵⁵ Law Commission, *Seeking Solutions* PP52 (2002) 197.

⁵⁶ Ibid, 198.

... supported formal rules in complex cases, or those with potential to affect individual rights seriously. But ... saw advantage in more informality, relaxed rules of evidence, and a more investigative enquiry.⁵⁷

In relation to administrative support, the paper again noted the diversity found in existing arrangements. For example, twenty-four tribunals were administered by the Ministry of Justice (now Department for Courts), whilst other tribunals either had independent arrangements for their support or were dependent for their administration on the Government departments and agencies which they supervised.

The paper then asked the question “What we could do” in relation to administrative support for tribunals. The Law Commission looked at this question against the background of experience in other jurisdictions. The success of the Australian experience in amalgamating a number of tribunals under the umbrella of VCAT was noted again, together with similar recommendations for reform of the tribunal system in the United Kingdom found in the Leggatt Report.

The structural options considered included “No change”, “Consolidation of tribunals” into three topic based tribunals (welfare, resources, and revenue) as previously suggested by the LAC in 1989, and the creation of a “Super-tribunal”. Most submitters appeared to support establishment of a “Super-tribunal” similar to the Australian experience with VCAT. In particular, submitters were critical of existing arrangements where tribunals are administered by the Government department or agency they are set up to supervise:

They stressed the importance of impartial decision-making, and the removal of any perception of bias. Such perceptions could undermine public confidence in the tribunal system.⁵⁸

Procedure followed by tribunals was considered next. The paper noted that the Leggatt Report had “recommended a single consistent procedure for all tribunals” in the UK. In addition, the paper also noted previous reviews of procedure by New Zealand tribunals carried out by the LAC which had resulted in the publication of “a non-binding statement of principles” in 1991.

⁵⁷ Ibid.

⁵⁸ Ibid, 204.

The final question considered by the paper in relation to the review of tribunals was “Appeal options”. Again, current arrangements exhibit a wide diversity of approach including tribunals whose decisions are final and not subject to appeal, tribunals where a right of appeal to another tribunal is provided, and tribunals where the right of appeal is justiciable before the courts. Here the Law Commission asked:

... whether appeal rights are necessary at all. Judicial review of a tribunal decision is always possible if the tribunal is exercising a “statutory power” of decision-making or is exercising a power that is “in substance public” or has “important public consequences”. However, it can involve litigants in considerable expense and is subject to court timetabling delays.⁵⁹

It then noted that:

If some form of appeal is necessary further questions arise, such as whether there is any good reason for the current proliferation of differing appeal rights and how many tiers of review there should be.⁶⁰

Subsequently, in March 2004, the Law Commission issued its report on the review of New Zealand courts and tribunals, *Delivering Justice for All*. Building on previous work in the two preliminary papers, the Law Commission has concluded that:

... for all aspects of tribunal justice to be coherent and accessible, the approach should be to create fewer and stronger tribunals by amalgamating or grouping existing tribunals according to their functions. In contrast to the LAC approach, we consider that these clusters can and should be integrated within a single entity. The VCAT model is both desirable and achievable in New Zealand. Most New Zealand tribunals should be integrated within a unified tribunals framework.⁶¹

The proposal for a new tribunal structure does not, however, mean that diversity between tribunals will be sacrificed. For example, the report noted:

This is not to suggest that all tribunals should become the same. Clearly, there will be significant differences between many tribunals, as their functions and the processes and membership they require may be very different. Where there is a principled reason for diversity it should and can be maintained within the unified tribunal

⁵⁹ Ibid, 206.

⁶⁰ Ibid.

⁶¹ Law Commission, *supra* note 51, at 288.

framework. But the unified structure will help to reduce needless difference, and allows tribunals to benefit from each other's experience.⁶²

The Law Commission considered that the benefits of the proposed new tribunal structure are likely to include:

The process of clustering individual bodies within the structure, and standardising processes and rationalising membership, will be incremental. Even tribunals which continue to operate very much as they do at present can still derive advantages from being within the framework, in terms of accessibility, administration, support, and potential for cross-membership.⁶³

Certain tribunals, however, are to be excluded from the proposed new "unified" tribunal structure. These include a "free-standing" Waitangi Tribunal, and the Disputes Tribunal and the Tenancy Tribunal which, due to the nature of their work, are to become divisions of the proposed Community Court.

A hallmark of the new structure will be "the opportunity it affords to make processes uniform and more accessible". However, it was suggested that this approach should not preclude diversity where appropriate:

We commend the model used in Victoria, where the essential elements are prescribed generally, but the necessary particular processes of individual jurisdictions are respected and promoted. A rules committee with wide discretion and powers would be essential.⁶⁴

One exception from the general rule in favour of diversity of process concerns the availability of appeal rights. Here the Law Commission recommended that:

... the unified tribunals structure includes an appellate panel from the outset, to deal with first appeals from decisions of tribunals within the framework, on matters of fact and/or law according to the primary statute establishing the primary statute establishing the particular tribunal. A further appeal to the High Court (sitting as a full bench of two judges) would also exist, with leave, on a matter of law only.⁶⁵

⁶² Ibid, 288-289.

⁶³ Ibid, 289.

⁶⁴ Ibid, 294.

⁶⁵ Ibid, 298.

In addition to the advantages identified above, the proposed new tribunal structure would also finally divorce some tribunals from reliance on the Government department or organisation they are intended to supervise on appeal (for example, the Deportation Review Tribunal, which currently relies on the Department of Labour for administrative support). This should provide a “neutral administrative base” for all tribunals within the new structure. Indeed, the Law Commission observed:

Those tribunals in all probability function independently. Their members are unlikely to ever to consider themselves captured by their host agency. But do they enjoy the full confidence of those whose appeals they hear? There is a risk they may be seen as just another tier of departmental officers, working to a fixed policy, merely vindicating the decision under appeal.⁶⁶

Most recently, in September 2004, the Government released its response to the Law Commission report.⁶⁷ Whilst the Government is not in favour of radical changes to the Courts structure, it is committed to supporting a unified tribunal framework. In particular, the Government made the following statement on the administration of tribunals:

The Government acknowledges that, in some cases, the housing of a tribunal in a related Department or Ministry may lead to the perception of lack of independence. Where, as part of the consideration of a tribunal against the proposed guidelines, a potential perceived lack of independence is established, that tribunal will be treated with some priority for consideration of transfer to the Ministry of Justice. This will include consideration of tribunals highlighted by the Commission, including the Removal Review Residence Appeal and Refugee Status Appeals Authorities.⁶⁸

No specific changes are proposed by the Government in relation to the Environment Court independent of the RMA review process.

V. ENVIRONMENT COURT: A CASE STUDY

The Law Commission paper *Striking the Balance* noted that some tribunals:

⁶⁶ Ibid, 296.

⁶⁷ Ministry of Justice, *Government Response to Law Commission Report on Delivering Justice for All* (2004).

⁶⁸ Ibid, 51-52.

... like the Town and Country Planning Tribunals have developed into the full scale Environment Court where there are specialist judges who sit permanently and have developed their own approaches and processes.⁶⁹

The Environment Court therefore provides an interesting example of the development of specialist courts and tribunals. Originally established as the Town and Country Planning Appeal Board under the Town and Country Planning Act 1953, it has made the transition from an Appeal Board to become a Tribunal under the Town and Country Planning Act 1977 (“TCPA 1977”), and most recently to become a full scale Court under the Resource Management Amendment Act 1996 (“RMAA”). Before 1953 the Minister of Works was responsible for determining appeals under the Town and Country Planning Act 1926.

From the outset the composition of the Town and Country Planning Appeal Board recognized the technical nature of the decisions that would need to be made in response to appeals against local authority decisions relating to the subdivision and zoning of land. For example, when reviewing the development of the planning appeal system Judge Sheppard (formerly Principal Environment Judge) noted that:

It was recognized that the Appeal Board would be dealing with matters largely of a technical nature; and that the chairman, as well as having a barrister’s knowledge of the law, and being a judicial person, would need to have some general idea of the operations of town planning and local body administration. The members [of the Appeal Board] from the Municipal Association and the Counties Association would be selected for their local body knowledge, particularly of town planning. The chairman of the local town-planning committee would be suitable. An architect or a town planning officer would be of great value. Although the Board would have a great deal of legal work to do, its members would also require a general knowledge of administration.⁷⁰

The purpose of the Town and Country Planning Appeal Board was “to preserve the rights of the individual”⁷¹ against administrative action by local government. There has been little change in the composition of the Court which normally consists of a Presiding Judge sitting with two Environment Commissioners who are appointed as a result of their experience in resource management matters.

⁶⁹ Law Commission, *supra* note 4, at 50.

⁷⁰ Sheppard, “Forty Years of Planning Appeals” (May/June 1995) *Resource Management News* 20.

⁷¹ *Ibid.*

The jurisdiction of the Town and Country Planning Appeal Board was expanded following enactment of the Water and Soil Conservation Act 1967. The significance of this event was noted by Judge Sheppard:

What would prove to be a significant event in the development of the jurisdiction was the enactment of the Water and Soil Conservation Act 1967. Providing for the first time a coherent system for controlling the taking, discharge, and damming of [sic] nature water, the Act (as reported back from select committee) also empowered the Appeal Board to hear appeals from decisions of regional water boards. The original proposal had been for appeals to the National Water and Soil Conservation Authority, but the select committee had decided that the Appeal Board was the type of authority that would be right to protect the rights of the individual, and designed to bring about the correct use of land and the multiple use of water. The addition of that jurisdiction to the land use planning jurisdiction conferred by the Town and Country Planning Act 1953 provided the basis for evolution to the broader environment court functions of the Planning Tribunal.⁷²

Subsequently (in term of the TCPA 1977), the Town and Country Planning Appeal Board was replaced by the Planning Tribunal following “a full review and consolidation” of the legislation. The standing of the Planning Tribunal was also enhanced by its formal designation as a Court of record “which, in addition to the jurisdiction and powers conferred on it by [statute] ... shall ... have all the powers inherent in a Court of record”.⁷³ Following the coming into force of the Town and Country Planning Amendment Act 1983 the chairmen of the various divisions of the Planning Tribunal were re-designated as Planning Judges.

The Planning Tribunal was re-named the Environment Court by the Resource Management Amendment Act 1996 (“RMAA”), and the Planning Judges and Planning Commissioners were re-designated as Environment Judges and Environment Commissioners.⁷⁴ At the same time the jurisdiction of the Court was expanded by amending s 278 of the Resource Management Act 1991 to provide that the Environment Court and Environment Judges had the same powers that a District Court had in the exercise of its civil jurisdiction.⁷⁵

The effect of this provision has been most readily observed in relation to the range of interlocutory orders which can be made by the Court in relation to

⁷² Ibid.

⁷³ RMA, s 247; RMAA, s 6.

⁷⁴ Ibid.

⁷⁵ Ibid, s 14.

the management of proceedings. Such orders include discovery and security for costs.⁷⁶

More recently, the Law Commission has recommended that the Environment Court should become part of the Primary Court structure “due to the public importance and complexity of a significant proportion of the work that comes before it”.⁷⁷

In his review of the planning appeals system Judge Sheppard concluded that the establishment of the Environment Court has been a notable success. He stated that:

Over forty years of hearing and deciding appeals, the Tribunal has established a practice of open and patient hearings, and reasoned decisions that have normative value for primary decision-makers and professional advisers. As envisaged in 1953, it continues to travel all parts of the country, view schemes, hear evidence in the locality, and give decisions. It continues to hear appeals about subdivisions, and to decide questions of a technical nature. That the Tribunal has been entrusted with increased jurisdiction and judicial powers demonstrates the acceptance in this country, as elsewhere, of a multi-disciplinary specialist court to review planning and resource management decisions on the merits. The original intentions when the Appeal Board was first set up have been fulfilled and have been surpassed.⁷⁸

Whilst a cynical person could regard these comments as self-serving, it is of note that Grant has also identified a high level of satisfaction regarding the work of the Court from a wide range of stakeholders.⁷⁹ For example, he observed that:

We encountered a common perception amongst the practitioners and groups we spoke to that the calibre of the judges is high, and the intellectual standards of the Court more than satisfactory. The calibre of its decision-making is seen as being on a par with the High Court, and this is probably borne out in the relatively low success rate of appeals to the High Court from the Environment Court.⁸⁰

However, since 1991, the Environment Court has come under pressure from increased workload, and has been subject to criticism about delays in the processing of appeals. The number of cases waiting for a hearing rose from

⁷⁶ The power to award security for costs was subsequently repealed by the RMAA 2003.

⁷⁷ Law Commission, *supra* note 46, at 219.

⁷⁸ Sheppard, *supra* note 63, at 25.

⁷⁹ Grant, *M Environmental Court Project: Final Report* (1999), paras 4.2, 4.6.2, & 4.13.1.

⁸⁰ *Ibid*, para 4.6.2.

500 in 1993/94 to a peak of 3,000 in 2000/01. The increase in workload arose primarily from appeals lodged against district and regional plans prepared under the RMA, which accounted for 51% of the Court's workload. Increasing dissatisfaction with the speed of decision-making by the Court during this period was not surprising, given the historic underfunding of the Court by previous Governments. Subsequently, as noted below, a funding package of \$1.2 million per year for a period of four years announced in May 2002 has increased the capability of the Court by enabling the appointment of additional judges and the provision of enhanced administrative support. However, notwithstanding these initiatives and the consequent reduction in the number of cases waiting for a hearing, criticism of the decision-making process under the RMA continues.

On 12 May 2004 Associate Minister for the Environment, David Benson-Pope, launched a review of the RMA. One of the improvements which the RMA Review has focused on is "[i]mproving the consent decision making process". In particular, the scope document noted that:

The concerns about consent decision making include lack of consistency between councils; delays and costs; lack of clarity and certainty for applicants; abuse of the process for personal gain, trade competition, or other vexatious reasons; and lack of clarity and consistency about consultation requirements.⁸¹

Release of the scope document was followed by intense speculation in the media as to the detail of improvements that should be made to the RMA, with both the Labour and National Parties raising the issue of *de novo* appeals to the Environment Court, and questioning whether the scope of the appeal process should be changed. Specific concerns have focused on transport and energy projects. For example, *Improving the RMA A Progress Report on Achievements*, released by the Ministry for the Environment in May 2004, noted that the demise of Project Aqua had led to claims that the Resource Management Act was a disincentive to investment in large projects.⁸²

Concern about delays in consent-processing in relation to major projects may, however, be overstated. For example, *Fixing the Resource Management Act*, released by the Ministry for the Environment in October 2003, noted that such projects are "the exception rather than the norm with

⁸¹ Ministry for the Environment, *RMA Review Scope Document* (May 2004) 2.

⁸² Ministry for the Environment, *Improving the RMA A Progress Report on Achievements* (May 2004) 2.

around 3-6 projects nationally per year”.⁸³ The document also indicated that concerns about delays are not clearcut. For example, it noted that “considerable delays result where the issues that arise are not proactively managed”.⁸⁴

Proposals to improve the RMA were announced by the Associate Minister on 15 September 2004, and a series of eight information sheets detailing proposed changes to the RMA were released by the Ministry. The overview noted that:

Many of the problems have been dealt with by previous amendments to the Act, improvements in the Environment Court and sharing of best practice among councils. However, other concerns were identified during consultation with business, local government, environmental organizations and the wider community.⁸⁵

However, *Feedback from business and non-governmental organizations at Improving the RMA meetings, June 2004*, posted on the Ministry’s website, recorded that concern about *de novo* hearings in the Environment Court in relation to consent decision-making was raised by only one of three discussion groups at the industry meeting in Auckland on 30 June 2004.⁸⁶

The *Summary of written feedback about improving the RMA*, also posted on the Ministry’s website, recorded a more balanced view. Some respondents held the view that *de novo* hearings took too much time and money, and suggested that a “focused hearing approach” be adopted.⁸⁷ Other respondents, however, considered that “the scope of the Environment Court should not be reduced”, and that “the Environment Court should not be limited to considering points of law”.⁸⁸

Notwithstanding the lack of a clear mandate for changes to Environment Court procedure from the “four month” review process, the proposals to improve the RMA, announced on 15 September 2004, reported that the Government had decided that some legislative changes were needed to reduce further the length and cost of the hearing process at the Environment

⁸³ Ministry for the Environment, *Fixing the Resource Management Act* (October 2003) 2.

⁸⁴ *Ibid.*

⁸⁵ Ministry for the Environment, *Improving the RMA – Overview* (September 2004) 1.

⁸⁶ Ministry for the Environment, *Feedback from business and non-governmental organizations at Improving the RMA* (June 2004) 3.

⁸⁷ Ministry for the Environment, *Summary of written feedback about improving the RMA* 4.

⁸⁸ *Ibid.*

Court. In particular, it was proposed that the Court would be required, as a matter of statute, to have regard to the Council's decision and conduct a hearing that only focused on matters in contention. This would replace the presumption in favour of a fresh hearing (*de novo*) which did not refer to the council's decision. It is, however, submitted that the proposals for improving decision-making in the Environment Court are based on a fundamental misconception about how such hearings are conducted in practice, and how the Court views evidence about Council decisions.

This can be illustrated by the decision of the High Court in *Westfield (New Zealand) Ltd v Hamilton City Council*.⁸⁹ Here the High Court was required to consider an appeal from the Environment Court on a question of law under section 299 of the RMA. It was alleged that the Court had failed to conduct its own inquiry under section 32 of the RMA (which imposes a duty to consider alternatives) before confirming rules in the proposed district plan which provided for retail shopping malls in the commercial services and industrial zones as controlled activities. Westfield argued that "unrestricted retail activity" would give rise to adverse traffic effects, and that "more restrictive" rules providing for retail activity as a discretionary activity should be adopted. To determine this issue Fisher J was required to consider the nature of *de novo* hearings in the Environment Court. He found that:

It is ... true that hearings in the Environment Court are rehearings conducted *de novo*. However the Court does not have to ignore the fact that Council officers and the Council had already covered the same ground. The evidence the Council broadly conveyed to the Court regarding the Council's own investigations and conclusions with respect to a proposed plan itself represents fresh evidence before the Environment Court. The Court is entitled to rely upon that evidence in the absence of specific issues to which their attention is drawn. The Court is not expected to conduct the type of broad-ranging inquiry that would have been appropriate if the whole exercise were approached afresh.⁹⁰

The decision of the High Court in *Westfield* provides interesting and timely commentary on the nature of *de novo* hearings in the Environment Court in the context of the current RMA review. However, the decision is not surprising from a practical perspective as the scope of a hearing will in practice be defined by the relief sought in the notice of appeal. Similarly, evidence given during the hearing will be directed to support the grounds of appeal or will be tendered by other parties to rebut the evidence given by the

⁸⁹ High Court, Hamilton, CIV2003 485 000953, 54, & 56, 17 March 2004.

⁹⁰ *Ibid*, para 40.

appellant. As a result, whether a particular matter is put in issue before the Court will usually be determined by the parties rather than the Court.

More importantly, whilst the proposals for improving the RMA acknowledge that “there has been a substantial reduction in the backlog of cases awaiting a hearing in the Environment Court from over 3,000 in 2001 to around 1,400 in 2004”, no account has, in reality, been taken of more recent improvements in Environment Court procedure due to their recent vintage.

First, the number of cases waiting for a hearing in the Environment Court has been halved from 3,000 to 1,498 since May 2002 following the provision of additional funding of \$1.2 million per annum for a period of four years to increase the number of Judges and Commissioners, and to ensure that each Judge is assisted by a Case Manager and a legally qualified Hearing Manager. Secondly, the use of digital audio technology has also reduced hearing time by 30-40%. Thirdly, the introduction of Case Management in April 2004 should result in the majority of cases being heard within 6 months of the appeal being lodged. Fourthly, the increased provision made in the RM Amendment Act 2003 for Environment Commissioners “to sit alone to hear and decide cases” also has the potential to increase the Court’s ability to dispose of cases expeditiously still further. Fifthly, the announcement of changes to Civil Court Fees on 1 June 2004 may provide a disincentive for vexatious and frivolous objectors to pursue appeals or become parties to proceedings before the Environment Court. For example, the filing fee is to be increased to \$245 for both appellants and section 274 parties, and appellants will be required to pay a hearing fee of \$440 per day for the duration of the hearing. Finally, the information sheet also noted that the Court proposed to issue “practice notes” on the use of Environment Commissioners sitting alone and on when alternative dispute resolution processes (mediation and arbitration) were to be used.

When viewed against the background of these improvements, the proposals in the current RMA Review process that there should be a move away from *de novo* hearings by the Environment Court are not warranted. Such a move would also reverse the trend to make Local Authority decisions more transparent and susceptible to review by the courts established during the 20th century.

It also remains unclear what, if any, monitoring is proposed in terms of assessing the impact of the new systems and procedures introduced by the Court since August 2003. In the absence of empirical evidence about the success or failure of these measures it will be difficult to determine with

precision what, if any, legislative changes are required to improve decision-making in the Environment Court.

VI. CONCLUSIONS

It is clear from the work of Legomsky that there are compelling reasons for assigning jurisdiction to specialist courts and tribunals in appropriate cases, particularly where large complex statutes such as the RMA need to be administered consistently throughout the country. The documents produced by the Law Commission on the courts system, together with the work done overseas by the Leggatt Report and VCAT, indicate strong grounds for making changes to the current tribunals system in New Zealand in terms of administrative efficiency. Beyond that, however, there are no compelling arguments for imposing a single solution on all specialist courts and tribunals in terms of jurisdictions or procedure.

Whilst there is no evidence of political interference in the New Zealand tribunal system, the historic lack of funding in relation to the Environment Court shows that lack of financial independence can place real strains on the system and lead to significant delays. Given the importance attached to speed of decision-making, it is reasonably clear that there is a strong relationship between funding and the rate at which cases can be determined.

As a result, public perception about the effectiveness of the remedies provided under statute will be a reflection of the adequacy of funding provided by the Government. For example, recent initiatives in the Environment Court demonstrate the gains that can be made in terms of speed of decision-making when adequate funding is provided. However, the historic under-funding of the Court in the period before May 2002, relative to its increased case load under the RMA, also demonstrates that public dissatisfaction can become entrenched and difficult to dispel notwithstanding the efforts made to improve matters. This is a lesson which may have been learned the hard way with the Environment Court. As a result, in terms of public perception, the key to success for the new “umbrella” structure proposed by the Law Commission and the Government for the majority of specialist courts and tribunals may therefore lie in adequacy of funding.

THE EXPLOSION OF NEW ZEALAND LEGAL SCHOLARSHIP IN THE 1960S

BY THOMAS GIBBONS*

I. INTRODUCTION

At the New Zealand Law Conference in 1960, prominent barrister Robin Cooke complained that “the lack of a critical law review like those published overseas has militated against the debate of legal issues”.¹ At the time, New Zealand was served by only two domestic legal periodicals. The established *New Zealand Law Journal* published some articles on legal topics alongside its notes on cases and legislation and general news for the legal profession. The *Victoria University College Law Review* was intended primarily as a pedagogical tool for students at the Victoria Law School. But by the end of the decade things were very different. A further four law reviews were being published in New Zealand, and all, to a greater or lesser extent, were proving “critical” in the way Cooke desired. This record – the emergence of four New Zealand law reviews in one decade – was not to be exceeded until the 1990s. In addition, a considerable number of treatises on New Zealand law were published during the 1960s.

For these reasons, it is fair to talk of an “explosion” of New Zealand legal scholarship during the 1960s. This essay explores both the *how* of this explosion, through an examination of legal publications of the time; and the *why*. It is argued that three phenomena were particularly important. First, the nature of legal education altered considerably during the 1960s, with the numbers of both full-time students and full-time faculty growing markedly. These trends helped bring about an amplified emphasis on legal research, with law reviews and treatises emerging as the natural forum for such scholarship. Second, the New Zealand Court of Appeal, constituted as a separate body in 1958, came to play an increasingly confident and obtrusive role in the development of New Zealand law during the 1960s. This obtrusiveness naturally led to comment from legal scholars. Finally, the 1960s were a time of change in New Zealand legislation, with Parliament attempting to resolve or minimise various social and legal problems through statute. Many of these statutes attracted the attention of academics. But it was not only the volume of New Zealand legal scholarship that grew during the 1960s. The quality of scholarship improved as well: many writers came

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1 Cooke, “The Changing Face of Administrative Law in New Zealand” [1960] NZLJ 128.

to approach legal problems in a critical manner and looked to the social, theoretical and political aspects of the law.

II. THE EXPLOSION OF LEGAL SCHOLARSHIP

1. *The Law Reviews into the 1960s*

During the nineteenth century, the *Colonial Jurist* and the *New Zealand Jurist* published articles on legal topics alongside their reports of cases. The one extant volume of the *Colonial Law Journal*, covering the period 1865-1875, featured 40 pages of notes and articles alongside 140 pages of law reports.² The *New Zealand Law Journal* first appeared in 1925, though it was known as *Butterworths Fortnightly Notes* for a number of years. The articles that appeared therein were, in general, geared towards providing practitioners with summaries of legal developments, though some more ambitious articles appeared from time to time.

Things changed somewhat during the 1950s. After a trip to the United States in the early part of that decade, Professor Robert McGechan of the Victoria Law School became fascinated with American methods of legal education.³ He soon sought to imitate its best features at Victoria: a visiting lecturer programme was established, the use of the Socratic method encouraged, and a law review created. The *Victoria University College Law Review*, modelled on the American university law reviews of which the *Harvard Law Review* is the most famous, was intended primarily as a pedagogical tool. It drew largely on student writing in the form of case notes, with regular contributions from academics. However, though it sought to look beyond black-letter law to social and political aspects of law and legal doctrine, it had few ambitions beyond the university community. The pedagogical basis of the *Victoria Review* meant that it was largely written *to be written*, rather than to be read, in a non-pejorative sense.

While only one law review was founded during the 1950s, matters progressed much more rapidly in the 1960s. Four law reviews were created over the course of the decade: the *New Zealand Universities Law Review* (1963), the *Otago Law Review* (1965), the *Auckland University Law Review* (1967) and *Recent Law* (1968). This phenomenon itself deserves some attention: no new law review was established in the 1970s, and only one in

2 Irvine, "Law Publishing in New Zealand" [1962] NZLJ 73, 75. Some of these articles could hardly be called scholarship, however, as they were rather casual commentaries on such topics as cricket matches and law examination papers.

3 See McGechan, "Law Teaching Overseas" (1951) 27 NZLJ 361.

the 1980s. Not until the 1990s did New Zealand see a comparable emergence of legal periodicals. Yet equally notable is the sense of reluctance that accompanied the birth of these law reviews. In the preface of the first *Otago Law Review*, the faculty's Dean commented that:

I had certainly hoped that in a few years Otago would be able to produce a small publication of this type but in the meantime I thought that we were too small a Faculty ... [a] few enthusiastic students decided as an experiment and for their own pleasure and good to produce a small Review for this year only, leaving it to others to decide whether further issues might be published later ... there can be no promise of an annual Review.⁴

The foundations of the *Auckland University Law Review* were scarcely more confident. The Dean of the Auckland Faculty noted:

Most law schools with an enrolment of 600 already have a student law review. A number of reasons explain the relatively late appearance of an *Auckland Review*. We not only wished to be assured that student contributions could be maintained at a high level but we were also anxious to ensure that satisfactory editorial and management arrangements could be made.⁵

The respective Deans need not have worried. Each of these periodicals survived and prospered, as did the *New Zealand Universities Law Review* and *Recent Law*. It is worth noting that these latter two publications were not tied to any particular law school, and also sought to serve the profession as well as the education of students.

The reviews included articles from a wide range of contributors. The first edition of the *New Zealand Universities Law Review*, for example, contained one article by a retired judge, two by overseas jurists, and only one from a New Zealand law lecturer. One has to look to the case notes, legislation notes and book reviews to see names such as Keith, Coote and Richardson pointing to the future of New Zealand legal scholarship.⁶ The *Otago Law*

4 Guest, "Preface" (1965) 1 *Otago Law Review* 13.

5 Northey, "Preface" (1967) 1 *AULR* i. Similarly cautious in praise, in introducing another law review Barrowclough CJ stated: "In universities such as ours which are not so well endowed as the older British universities and which have not as yet been able to make any great provision for post-graduate study and research in the field of law the production of this Review is something of a triumph" (Barrowclough, "Foreword" (1963) 1 *NZULR* 1).

6 Keith, "Corbett's Case" (1963) 1 *NZULR* 124; Coote, "Book Review: Cases and Materials on Contract" (1963) 1 *NZULR* 172; Richardson, "Book Review: Sir William Martin" (1963) 1 *NZULR* 168.

Review and the *Auckland University Law Review*, formed with pedagogy in mind, consisted largely of student writing, though some practitioners contributed as well. Though aimed at the profession, most of the articles in the first issues of *Recent Law* were by academics at the Auckland Law Faculty. Over the course of the decade, there was a clear trend towards most of the articles being by New Zealand legal academics rather than practitioners or overseas scholars.

The articles themselves spanned a myriad of topics. At the beginning of the 1960s, the emphasis was clearly on black-letter law, with some consideration of policy issues. The early numbers of the *New Zealand Universities Law Review* and the *Otago Law Review*, for example, carry articles on such topics as confessions, liability for animals, trust issues, and car park ownership⁷ alongside more policy-oriented and theoretical articles on Australian precedents in New Zealand, “Law and Philosophy”, and indecent publications.⁸ As the decade progressed, these two journals came to place increased emphasis on policy-oriented scholarship, with many articles explicitly addressing social and political issues.⁹ Even those which dealt with “lawyer’s law” drew increasingly on comparative and interdisciplinary perspectives.¹⁰ This trend was also apparent in the other two New Zealand law reviews established during the 1960s, with early articles in the *Auckland University Law Review* and *Recent Law* on privacy, automatism, and criminology,¹¹ alongside more doctrinal articles and notes.¹²

7 Adams, “Confessions” (1963) 1 NZULR 5; Davis, “Liability for Animals in New Zealand” (1964) 1 NZULR 206; Burns, “Salvage of Trusts with Mixed Charitable and Non-Charitable Purposes” (1965) 1 Otago LR 41; Rutherford, “Liability of Car Park Owners” (1965) 1 Otago LR 83.

8 Mathieson, “Australian Precedents in New Zealand Courts” (1963) 1 NZULR 77; McElrea, “Law and Philosophy” (1965) 1 Otago LR 48; McKean, “The War Against Indecent Publications” (1963) 1 Otago LR 75.

9 See eg Turner, “Changing the Law” (1969) 3 NZULR 404; Sim, “F W Guest Memorial Lecture: Jurisprudence and the Legal Process – Some Contemporary Trends” (1969) 2 Otago LR 1; Symposium on “Report of the Royal Commission on Personal Injuries” (1969) 2 Otago LR 32.

10 See eg Palmer, “The Admissibility of Judgments in Subsequent Proceedings” (1968) 3 NZULR 142; Tobin, “Products Liability: A United States and Commonwealth Comparative Survey” (1969) 3 NZULR 377.

11 Hammond, “Privacy and the Press” (1967) 1(1) AULR 20; Flitton and Palmer, “The Right to Privacy: A Comparison of New Zealand and American Law” [1968] *Recent Law* 86 and 149; Keene, “The Problem of Automatism” (1968) 1(2) AULR 15; Seymour, “The Mental Health and Criminal Justice Amendment (No 2) Bills: Implications for Criminal Justice” [1968] *Recent Law* 160.

While there was initially some caution in creating the four New Zealand law reviews of the 1960s, each of them survived. Over the course of the decade, there was a clear trend towards the articles being written by academics and students rather than practitioners. There was also an increased slant towards contextual and interdisciplinary articles. Though doctrinal articles and brief notes of law changes remained important, by the end of the decade there were clear signs of the emerging “Great Project” to integrate legal research with the study of society in general.¹³

2. *Treatises and Other Legal Books*

In 1962, the editor of the *New Zealand Law Journal* commented on the view of the “average practitioner” that it was only in the last few years that much progress had been made in the production of New Zealand legal textbooks. However, the editor argued, this was not the case: there had been New Zealand legal texts since at least the 1870s, and some later treatises, such as *Stout and Sim’s Practice and Procedure* (1892) and *Morison’s Company Law* (1904), had survived through to the 1960s.¹⁴ New Zealand texts on other topics, such as personal property, criminal law, trusts and evidence also followed these, and the 1950s saw the first editions of Nevill’s work on trusts and Northey’s *Commercial Law in New Zealand*.¹⁵ These latter books show considerable development from those published earlier. They are written as treatises rather than simply as annotated statutes, and they exhibit a greater concern for the conceptual unity of the subject.

12 Blanchard, “The Requisitions Clause” (1968) 1(2) AULR 1; McMorland, “Indefeasibility Under the Land Transfer Act” [1968] Recent Law 143 and 187; “Four Family Law Bills” [1968] Recent Law 193.

13 See Sutton, “The Law Faculties – A Reminiscence” in Barker, Sir Ian (ed) *Law Stories: Essays on the New Zealand Legal Profession 1969-2003* (2003) 325, 327. Coote, “A Law Teacher Looks at His Trade” (1968) 3 NZULR 38, 49 believed that law teachers had the task of showing New Zealand lawyers out of the ivory tower that the common law system had built around them, by opening the law “to scrutiny by the light of other disciplines ... sociology, anthropology, economics, history and political studies, in addition to philosophy and comparative law”. Sim, “Legal Education in the United States and New Zealand” [1968] NZLJ 87, 89 noted the increasing tendency “to emphasise a sociological approach to legal problems” in much LLB (Hons) seminar work.

14 Irvine, *supra* note 2, at 73-74.

15 Nevill, P *Concise Law of Trusts, Wills and Administration in New Zealand* (1955); Northey, J F and Leys, W C S *Commercial Law in New Zealand* (1956).

As with the law reviews, however, it was in the 1960s that things really took off. There were books on hire purchase law, banking law, New Zealand editions of English texts on contract and evidence, and, towards the end of the decade, new works on public law subjects such as administrative law and town planning.¹⁶ There were also scholarly essay collections, both specific and general,¹⁷ and books written by lawyers and legal academics from historical and sociological perspectives.¹⁸ During the 1960s, New Zealand legal books ran the whole spectrum of scholarship, from practitioner-oriented texts and annotated statutes to academic commentaries and interdisciplinary treatises of considerable depth.

Trade Unions and the Law may be taken as an example. Author Alexander Szakats was involved in teaching both Law and Political Science at Victoria University of Wellington. The book was “not intended to be a law book, but merely a brief introduction to the problems of trade unionism aimed at students of political science, economics and business”.¹⁹ However, the book contains a table of cases and considerable exposition of the law, suggesting that it was intended to be used as a legal text as well. On the other hand, the jurisprudential discussion of law in labour relations and the outline of the role of trade unions in society – which include a number of references to economic and sociological sources – would hardly have interested many practitioners.²⁰ The book indicates that, by the end of the 1960s, New Zealand legal scholars were prepared to produce explicitly interdisciplinary material.

More traditional in style and scope was *Banking Law and Practice in New Zealand*.²¹ Both case and statute law are considered, though the emphasis is on exposition of the law rather than criticism. The historical introduction is virtually the only part of the book that is contextual: the rest is purely a

16 Dugdale, D F *New Zealand Hire Purchase Law* (1960); Bright, T N *Banking Law and Practice in New Zealand* (1961); Northey, J F *The Law of Contract* by G C Cheshire and C H S Fifoot (NZ edition, 1961); Cross, R *Evidence* (NZ Edition, 1963); Paterson, D E *An Introduction to Administrative Law in New Zealand* (1967); Robinson, Keith *The Law of Town and Country Planning* (1968).

17 Inglis, B D and Mercer, A G (eds), *Family Law Centenary Essays* (1968); Northey, J F (ed) *The A G Davis Essays in Law* (1965).

18 Foden, N A *New Zealand Legal History (1642-1842)* (1965); Szakats, A *Trade Unions and the Law* (1968).

19 Szakats, *ibid*, at v.

20 *Ibid*, at ch 1-2.

21 Bright, T N *Banking Law and Practice in New Zealand* (2nd ed, 1969). Note that this was the second edition of this book; the first appeared in 1961.

treatise on aspects of banking law. A similar approach was taken in a text on Justices of the Peace,²² designed for the “informed layman”. Besides a brief historical outline in chapter 1, the remainder of the book is simply exposition, with some commentary on practical applications. These two books show that there was still plenty of scope for legal scholarship that simply collated the law on a subject from various sources and presented it in concise form for student, practitioner or public use.

The legal books of the time often served a different role from that of law review articles. Articles could critique minor changes in the law, while treatises were designed to provide more of an overview of their subject matter. While towards the end of the decade certain treatises took on critical and interdisciplinary perspectives, expository scholarship remained important as well. This probably reflects the texts’ intended use as a source of legal doctrine. In the law reviews, a greater proportion of work – particularly towards the end of the decade – was critical rather than merely expositive, and drew increasingly on interdisciplinary perspectives. It is fair to say that, in the 1960s, New Zealand legal scholarship went through an explosion in volume, in ambition, and in outlook.

III. EXPLAINING THE EXPLOSION

1. Introduction

Having seen *how* New Zealand legal scholarship prospered in the 1960s, this article explores the *why* of the explosion. It is argued that three factors, relating to changes in New Zealand legal education, the New Zealand Court of Appeal and statute law, were particularly important. This section discusses each of these phenomena in turn. However, the three factors should not be seen as entirely discrete: there was, on occasion, overlap between Parliamentary law reform, judicial law-making, and the commentaries of legal scholars with more time to analyse and critique the law than in previous eras.

2. Legal Education

All four law schools experienced considerable growth during the 1960s. While only around one third of students studied full-time at the beginning of

22 Burns, P and O’Keefe, J A B *The Functions and Powers of Justices of the Peace and Coroners* (1968).

the 1960s, by the end of the decade the large majority were full-time.²³ The university faculties themselves came to favour students spending most of their LLB programme in full-time study, and began to timetable lectures accordingly.²⁴ This made it difficult for students to maintain full-time jobs while studying. In addition, many students preferred full-time study, and government bursaries made this a more financially viable option for them.²⁵

The increase in full-time students was matched by a marked increase in full-time faculty members. In 1960, there were “nearly 20” full-time law teachers throughout the country, while by the end of the 1960s there were over 25 full-time law teachers at Auckland and Victoria alone, with a further dozen or so at Canterbury and Otago. Twelve of this total held Chairs in Law.²⁶ Full-time faculty and students undoubtedly had more time to engage in legal research and scholarship than part-timers who necessarily expended most of their energies meeting the demands of legal practice. The production of scholarship boomed.

These trends – which were obviously interdependent – are not the full story. Law school libraries – “the most important part of any law school”²⁷ – also grew considerably during the 1960s.²⁸ The Legal Research Foundation, formed in 1965 as a cooperative enterprise between the legal academy and the profession, also provided for greater recognition of legal research.²⁹ Many of the increasing numbers of full-time students were keen to be involved in legal research and advanced legal studies, and the 1960s saw the introduction of LLB Honours courses and an expansion in post-graduate

23 Spiller, P, Finn J and Boast, R *A New Zealand Legal History* (1995) 271, note 212 give the following figures for 1969: Auckland 567 FT, 161 PT, Otago 220 FT, 33 PT. The Auckland Dean noted in 1970 that around 80% of students were taking at least three years of the degree full-time, with an increasing number completing all four years as full-time students. See also Northey, “Trends in Legal Education” [1970] NZLJ 250, 250-251.

24 Wilson, “A New Look at Legal Education” [1960] NZLJ 148, 152-153 described the “secret ambition” of some university members to make the entire law course full-time. Wilson, a QC, was “wholly unconvinced” that this was beneficial. At the other end of the 1960s, Temm, “Legal Education in the Seventies” [1970] NZLJ 345, 347 saw the preference for full-time study which had developed over the decade as “a marked change for the better”.

25 See Temm, “The Profession and the Future Years” [1964] NZLJ 80 and 104, 106.

26 Northey, *supra* note 23, at 250.

27 Derham, “Legal Education” (1966) 2 NZULR 130, 142.

28 Spiller, Finn and Boast, *supra* note 23, at 272.

29 See “Legal Research Foundation” [1970] NZLJ 455.

work, often with an interdisciplinary slant.³⁰ Subjects like comparative law and criminology became options in the LLB curriculum.³¹ With both students and faculty having greater time, inclination and facilities for research, legal scholarship prospered, both in law reviews and in books.

3. *The Court of Appeal*

The changing role of the New Zealand Court of Appeal was also important. Before 1958, the Court operated as a branch of the Supreme (now High) Court, with Supreme Court judges periodically exercising the appellate function. By the 1950s, this system, designed for a time when New Zealand judges were few, was recognised as problematic. Not all Supreme Court judges were suited to appellate work, and their switching back and forth between the Supreme Court and the Court of Appeal often gave rise to administrative problems, such as delays in hearings and in producing judgments.³² In order to alleviate these problems, the Court of Appeal became a permanent and separate body in 1958. It was hoped that the separate Court would be able to act as an appellate court with greater speed, expertise, efficiency and collegiality.³³ The success of the separate Court of Appeal in building this collegiality is evident in the fact that all of the Court's decisions in its first fifteen months were unanimous.³⁴ But while the separate Court of Appeal initially operated in "fairly leisurely fashion", this was not to last. By the early 1960s the case load of the Court exceeded that of most final appeal courts elsewhere, and difficulties in managing the Court's workload soon arose.³⁵

The docket of the Court had a number of implications for legal scholarship. First, the large number of cases being heard meant that the members of the Court were sometimes unable to give individual cases the attention they deserved. This increased the chance that the decisions of the Court would be open to criticism. The large number of cases also meant that legal commentators had plenty to write about. Another factor played out during the 1960s was that societal change and social restiveness led to the Court

30 Collinge and Shenkin, "Legal Education: A Student Viewpoint" [1962] NZLJ 544, 546; Northey, "Practical Training in University Law Schools" [1964] NZLJ 132, 133; Sim, *supra* note 13, at 89.

31 "Comparative Law at Victoria – The First Year" [1969] NZLJ 48; "Criminology in the University of Auckland" [1964] NZLJ 516.

32 Spiller, P *The New Zealand Court of Appeal 1958-1996: A History* (2002) 2.

33 *Ibid*, at 4.

34 Cooke, "Dangerous Premises: Court of Appeal Decisions" (1959) 35 NZLJ 117, 117. Cooke called this a "remarkable and perhaps unique record".

35 Spiller, *supra* note 32, at 5.

hearing an increasing number of cases that impinged on major public and social issues.³⁶ When the Court was involved in law-making in such cases, legal commentators – often armed with time and interdisciplinary resources that the Court of Appeal did not have – were well positioned to critique the Court’s performance. Finally, the reconstituted Court worked more as an *appellate* body than it had previously. It heard more hard cases – and, while hard cases may make bad law, they can often make for good scholarship.

Throughout the decade, then, the role, function, and performance of the Court of Appeal was analysed and critiqued through legal scholarship. *Corbett v Social Security Commission*,³⁷ for example, was written about in the *New Zealand Law Journal*, the *New Zealand Universities Law Review*, and the *Victoria University of Wellington Law Review*.³⁸ Each of these contributions went beyond being a simple case note: issues such as the policy implications of the Court of Appeal following Privy Council but not House of Lords precedents, and of the courts reviewing Ministerial decisions, were teased out and discussed in some depth. This early 1960s case, and the academic comment it created, indicate that even at the beginning of the decade the Court of Appeal’s role in the development of the law was obtrusive and hence worthy of criticism.

But the legal scholarship being produced in the 1960s was not only reactive: it was propositional as well. In the latter part of the decade, the issue of the admissibility of judgments in subsequent proceedings was being considered by the Torts and General Law Reform Committee. Geoffrey Palmer, a New Zealand and United States law graduate then teaching Political Science, wrote an article on the topic as a contribution towards the Committee’s discussions.³⁹ Drawing on material from the United States, England and New Zealand, and a combination of case law, statute, law reform documents, and scholarship, Palmer argued against the rule in *Hollington v Hewthorn*⁴⁰ that a criminal conviction was inadmissible in subsequent proceedings to prove the facts on which it was based. But Palmer did not favour or expect *judicial* reform of the law:

36 *Ibid*, at 6.

37 [1962] NZLR 878.

38 See Cooke, “The Board of the Lords?” [1962] NZLJ 463 and 534; Keith, *supra* note 6; “Investigate or Override?” (1963) 1 NZULR 137; Mathieson, “Some reflections on *Corbett v Social Security Commission*” (1965) 4 VUWLR 55.

39 Palmer, *supra* note 10, at 143.

40 [1943] 1 KB 587.

What is called for is a detailed examination of the entire problem from the standpoint of principle. A piecemeal approach is to be avoided. ... Perhaps the increasing reluctance of judges to change judge-made rules can be compensated for by bold legislative activity.⁴¹

Palmer was wrong, however, about the reluctance of judges to get involved in such matters. A few months after Palmer's article was published, Turner J of the Court of Appeal commented that he supported the abolition of the rule in *Hollington v Hewthorn*,⁴² and the issue was directly addressed by the Court in *Jorgensen v News Media (Auckland) Limited*.⁴³ Palmer's article was cited in argument, indicating the increasing importance of legal scholarship in the courts, and the Court agreed that the rule should be overturned. While the Court of Appeal was prepared to step up to law reform, however, Parliament was much slower: it was only in 1980 that there was legislative intervention of the kind Palmer envisaged.⁴⁴

Scholarship appeared after the decision as well. Richard Sutton recognised the case as an important (though elusive) statement of the law of evidence; a decision that, though lacking an overall theory, provided a strong indication that the Court of Appeal was "irrevocably committed to a leading role in the reform of the adjectival law of New Zealand".⁴⁵ Sutton was not alone in casting such judgment on the Court. Another scholar commented that the case of *Dimond Manufacturing Co Ltd v Hamilton*⁴⁶ lent support to his theory that New Zealand judges often interjected their own theories into judgments, and "[did] not accept the narrowing limitations on their own initiative which are sometimes found elsewhere".⁴⁷

By the end of the 1960s, the increasingly obtrusive and confident role of the Court of Appeal in law making was fertile ground for legal scholarship. The number of decisions heard, the "hard cases", and the political and social issues before the Court all invited scholarly comment. Such comment often wandered "beyond the traditional paths of exposition and criticism";⁴⁸ the scholarship being produced was policy-oriented, directed towards social issues, and often had reform in mind.

41 Palmer, *supra* note 10, at 168.

42 "Introduction and Discussion" [1969] NZLJ 240, 242.

43 [1969] NZLR 961.

44 Evidence Amendment Act (No 2) 1980, s 23. See Spiller, *supra* note 32, at 391.

45 Sutton, "Judgments as Evidence" [1970] NZLJ 81, 82.

46 [1969] NZLR 609.

47 Ryan, "That Damned Elusive Special Relationship!" (1970) 4 NZULR 48, 49, 50.

48 Sutton, *supra* note 45, at 85.

4. Statute Law

Legal historians have commented that the period from 1960 to today has been marked by an “invigorating climate for reform” and that “many areas of the law have been transformed by legislation”.⁴⁹ The 1960s certainly saw the emergence of a number of major statutes; far more than, say, the 1950s. This section of the article outlines how legal scholarship reflected, and sometimes influenced, statute law in the 1960s.

The social restiveness evident in many Court of Appeal judgments in the 1960s was also apparent in legislation. Obvious examples include the Narcotics Act 1965 and the Alcoholism and Drug Addiction Act 1966. One commentator on the Narcotics Act observed that it was passed primarily in order to meet international obligations, with social factors also playing a role.⁵⁰ Particularly notable, however, are the perspectives taken in this analysis. Traversing contemporary American and English legal scholarship, modern policy considerations, international law and ancient common law rights, the writer examines common law “search and seizure” objections to the Act; the problems of the burden of proof in drug offences; and the socio-legal issues surrounding imprisonment for those with addictions.⁵¹ This kind of critique clearly shows how the statutes of the 1960s demanded more ambitious, critical and interdisciplinary forms of legal scholarship.

David Williams wrote on defences to crimes committed under the influence of alcohol in early 1966.⁵² Williams was aware that reform was imminent, and by the time his article appeared the Alcoholism and Drug Addiction Act 1966 had been passed. But this did not make Williams’ article redundant. Besides an analysis of the development of the common law in this area in England, the article considers United States case law, policy and jurisprudential issues, psychology and social science, and social trends in relation to alcoholism, and concludes by discussing the problems with the current law and the desirability of reform.⁵³ Just a few years earlier, an article of this scope and depth would have been unthinkable in New Zealand. Furthermore, Williams’ propositional scholarship placed him in an

49 Spiller, Finn and Boast, *supra* note 23, at 120.

50 Clark, “Narcotics Act 1965” (1966) 2 NZULR 92, 92, 97.

51 *Ibid.*, at 92-97.

52 Williams, “Drunkenness and the Criminal Law in New Zealand” (1967) 2 NZULR 297.

53 *Ibid.*, generally.

excellent position to criticise the legislation that actually emerged, particularly in the light of policy and socio-legal considerations.⁵⁴

Family law was another area that was altered considerably by statutory reform in the 1960s. In the early part of the decade, the Matrimonial Property Act 1963 and the Matrimonial Proceedings Act 1963 were passed. These Acts covered a number of different aspects of matrimonial law, including the rights of husband and wife to sue each other in tort, criminal offences, dissolution on the grounds of existing pregnancy, and the new technology of artificial insemination. The courts were also empowered to make orders as to the occupation of a matrimonial home. These developments were initially noted, in outline form, in the *New Zealand Universities Law Review*.⁵⁵ Another, more ambitiously comparative article, on the latter Act illustrates – as do the articles by Williams and Palmer noted above – the influence of overseas training in legal research and writing at a time when LLB Honours courses and legal research were still developing.⁵⁶

The year 1967 represented 100 years since New Zealand's first divorce legislation, and this milestone was celebrated with an essay collection published by the Victoria Law School.⁵⁷ The essays in this book considered both historical and contemporary aspects of family law, with the new matrimonial property regime receiving some attention, and interdisciplinary work making an appearance with an essay by a psychologist. A "source book", including both statute and case law, appeared in the same year.⁵⁸ This area of law was clearly considered sufficiently interesting (and dynamic) to give rise to a wide range of publications.

Reform in this area of law proceeded even further in the latter part of the decade, with the Domestic Proceedings Act, the Guardianship Act, a new Matrimonial Property Act, and a Matrimonial Proceedings Amendment Act being passed in quick succession in 1968. One note observed that certain provisions of these Acts reformed the law considerably: the length of time

54 Williams, "Alcoholism and Drug Addiction Act 1966 – Criminal Justice Amendment Act 1966" (1968) 3 NZULR 90.

55 "Family Law" (1964) 1 NZULR 328.

56 Gould, "The Matrimonial Proceedings Act 1963 and the Conflict of Laws" in Northey, *supra* note 16, at 26. In addition to their New Zealand law degrees, Gould had studied at Oxford, Williams at Harvard, and Palmer at Chicago. Gould's essay was described as being of considerable "practical value" by a reviewer: Turner, "Book Review: The AG Davis Essays in Law" (1967) 2 NZULR 361, 363.

57 Inglis and Mercer (eds), *supra* note 17.

58 Webb, P R H, Caldwell, R A and Davis, J L R *Source Book of Family Law* (1967).

for some grounds of divorce was shortened, and serious disharmony was established as grounds for a separation order. A “totally new procedure” for court-assisted reconciliation was put in place.⁵⁹ Another note on these reforms, written while they were still going through Parliament, was more critical, arguing that an overall consolidation should be preferred to piecemeal development through separate Acts.⁶⁰ The relatively rapid pace of law reform in this area made things difficult for some legal scholars: one text on family law was effectively out of date by the time it appeared.⁶¹ It is clear from reading publications of the time that exposition-based scholarship was still popular;⁶² however, interdisciplinary work on the “social implications” of the family law reforms appeared as well.⁶³

The areas of drug law and family law illustrate how changes in statute law helped produce different kinds of New Zealand legal scholarship of the 1960s. Some was “black-letter” scholarship, aimed at summarising legal developments without critique. Some took a nominally critical approach, pointing out where the law could be improved, and in what ways. Other scholarship was explicitly interdisciplinary, using a range of sources to reflect more broadly on the law. Law reviews, essay collections and legal texts all featured these varying approaches to greater and lesser extents. Of further significance is the fact that the pace of reform in these areas gave legal scholars plenty to write about.

IV. CONCLUSION

The notion that the 1960s saw an “explosion” of legal scholarship is easily shown by the sheer volume of periodicals, articles, essays and texts that appeared during that decade. Also apparent from a close reading of this literature is that, particularly towards the end of the decade, the scholarship being produced was increasingly critical, ambitious and interdisciplinary, though expository scholarship remained important.

59 Sim, “Matrimonial Proceedings Amendment Act 1968 – Domestic Proceedings Act 1968 – Guardianship Act 1968 – Matrimonial Property Act 1968” (1969) 3 NZULR 460, 460-471.

60 “Four Family Law Bills” [1968] Recent Law 193, 212.

61 Inglis, B D *Family Law: Volume 1* (1968). See Webb, “Book Review: Family Law” [1968] Recent Law 217.

62 See eg Webb, “The Maintenance Proceedings of the Domestic Proceedings Act 1968 – An Introduction” [1968] Recent Law 327.

63 Woodhouse, “Family Law in Society” (1969) 1(2) AULR 44, 62. See also Bisson, “The Reform of the Law Regarding Maintenance and Settlement of Property Rights Between Spouses in Matrimonial Disputes” [1963] NZLJ 241.

Three key factors explain the explosion. Changes in legal education saw greater numbers of full-time faculty and students in the law schools, many with a strong inclination to research and write, and with improved facilities for doing so. The separation of the Court of Appeal from the High Court in 1958 saw it take on a much more conspicuous law-making role during the 1960s, and this phenomenon attracted the attention of legal scholars. A number of statutory law reforms during the 1960s were also deemed worthy of comment, and those reforms which touched on social issues as well as “lawyer’s law” often required interdisciplinary approaches in order to be critiqued effectively.

But not everyone saw the explosion of legal scholarship in the 1960s as a good thing. Towards the end of the decade, Sir Alexander Turner of the Court of Appeal suggested that, while some New Zealand legal scholarship was admirable, some was not. He wrote that examples of the worst variety of legal scholarship could be found:

among contributions, sometimes rather hastily put together, of junior university staff to legal journals ... the rat-race has invaded the universities, and what had its origin in a praiseworthy desire to do a decent job of legal research ... has in some universities involved the junior lecturer in a frantic necessity to publish, publish, and publish again, even if he has nothing much to say, and what he has been not particularly sound.⁶⁴

Chief Justice Richard Wild held similar views. He welcomed the development of the periodical law reviews as “a mark of the increasing maturity of the law schools”, but thought it important not to sacrifice quality for quantity: “[t]o write merely for the sake of filling half a page of type is scarcely worth the trouble”.⁶⁵ Wild also thought that a number of errors were creeping into legal commentaries.⁶⁶

These criticisms show that not everyone saw the explosion of legal scholarship in the 1960s as an inherently good thing. Nonetheless, over the course of the decade, New Zealand legal scholarship had become more voluminous, more ambitious, more critical, and more diverse. In short, Robin Cooke’s call for more debate of legal issues was manifestly and

64 Turner, *supra* note 9, at 408. Turner went on to say that “the academic lawyers may be thought of as praying every night before retiring to rest that the law may change tomorrow, in which direction it matters not, so long as there is some change which may be the subject of a paper to be published in the reviews”.

65 Thomson, “Opening of New Law School” [1969] NZLJ 453, 453 (comments of Wild CJ).

66 *Ibid.*

undoubtedly answered, in a way which still resonates for the New Zealand jurisprudence of today.

DELIVERING A BICULTURAL LEGAL EDUCATION: REFLECTIONS ON CLASSROOM EXPERIENCES

BY JACQUELIN MACKINNON AND LINDA TE AHO*

I. INTRODUCTION**

The School of Law at the University of Waikato was founded to provide a professional, bicultural and contextual legal education. This article reflects on the experience of incorporating the School's tripartite mission into the design and delivery of a Law I Legal Method paper. It provides an historical background of the Waikato Law School and contextualises the need for a bicultural approach to teaching and learning in the School's Legal Method paper. The authors describe ways in which the Legal Method teaching team has incorporated kaupapa Māori dimensions in an effort to promote understandings of both Māori and European conceptions of justice and law. The article briefly reflects upon some of the negative experiences encountered in the classroom when we have exposed our students to Māori perspectives about knowledge and the place of the Treaty of Waitangi in the legal system and in society generally.

II. "THE MAKING OF A NEW LEGAL EDUCATION IN NEW ZEALAND: WAIKATO LAW SCHOOL"¹

Te Matahauariki: The horizon where the earth meets the sky; the meeting place of people and their ideas and ideals; in a spiritual or metaphysical sense, aspiring towards justice and social equity...[A] philosophy which reflects concerns that "humans have for each other...[A]n environment of participation, of challenge, debate and justice in the world as it was, as it is, and as we want it to be."²

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** In the ensuing article, reference is made to "kaupapa Māori". This term includes Māori perspectives on legal issues, including those relating to the Treaty of Waitangi. This Treaty was signed in 1840 between many Māori tribes and the British Crown and marks the beginning of colonization of Aotearoa by the British settlers. The Treaty is considered the basis of legitimate government in New Zealand and has been interpreted by the courts to create a "partnership" between Māori and the Crown.

1 Wilson, "The Making of a New Legal Education in New Zealand: Waikato Law School" (1993) 1 WLR 1.

2 *Te Matahauariki*, University of Waikato (1988) 1.

The founding of the School of Law has been well documented in a number of books and articles.³ This article re-visits some of that material in order to contextualise the authors' case studies, which demonstrate the impact of the School's bicultural mission and our commitment to the Treaty of Waitangi on teaching and learning in our Law I Legal Method paper.

During the 1970s Māori actively challenged the monocultural status quo and asserted their ancestral rights as tangata whenua over the land (rights as first people of the land).⁴ As a result of the momentum created during the 1970s, and against the backdrop of the most significant economic restructuring this country has ever seen,⁵ the decade that followed was a time during which Māori successfully lobbied for education strategies developed by Māori for Māori at preschool and primary school levels.⁶ In 1987 the Māori language was recognised as an official language of Aotearoa/New Zealand.⁷ Against that background, it was opportune in the 1980s for New Zealand legal educators and practitioners to reflect upon the objectives, content and delivery of legal education. The impetus for reflection was the discussion of a proposal for the establishment of a fifth law school in New Zealand and a growing disenchantment with the quality of professional legal training.

In 1988, the University of Waikato published *Te Matahauriki*, the Report of the Law School Committee of the University of Waikato. The Report argued for the establishment of a new School of Law at the University of Waikato. Central to the Report was a recognition of the need for a legal education that reflected the needs and concerns of people in a bicultural society; that was accessible to both Pakeha (non-Māori) and Māori

3 Goldring, J, Sampford, C, Simmonds, R *New Foundations in Legal Education* (1998); Seuffert, Milroy and Boyd, "Developing and Teaching an Introduction to Law in Context: Surrogacy and Baby M (1993) 1 WLR 27; Havemann, "Law in Context-Taking Context Seriously" (1995) 3 WLR 137, 145 et seq; Wilson, M supra note 1.

4 Kelsey, J *The New Zealand Experiment* (1995) 20. Examples of such challenges include the Land March of 1974 and the occupation of the Raglan Golf course which was situated on land taken by the New Zealand Government for certain public purposes, and not returned to the original Māori owners when no longer needed for those purposes. See also Smith, L T *Decolonising Methodologies* infra note 43, at 109 cited in Whiu, infra note 17, at 265.

5 For a detailed analysis of the impacts of and alternatives to that restructuring 'experiment' see Kelsey, J ibid.

6 Kohanga Reo or immersion language nests for preschool age children were established in 1982, and Kura Kaupapa Māori or Māori language immersion primary schools were established in the mid 1980s.

7 Māori Language Act 1987.

(particularly those from the region served by the University of Waikato),⁸ and that had a “law and society” focus.⁹ The “law and society” perspective reflected undergraduate law degree curricula in new law schools overseas,¹⁰ but was located in *Te Matahauariki* within the particular New Zealand context of the Treaty of Waitangi. The Report also regarded as desirable the integration of law courses with courses from other disciplines.¹¹

The University of Waikato School of Law was established in 1990 and began teaching its first in-take of students in 1991. The undergraduate law degree was approved by the New Zealand Council of Legal Education (CLE) and includes the courses prescribed by that Council as required for admission as a barrister and solicitor.¹² The Prescription of Subjects (contained in the schedule to the Professional Examinations in Law Regulations 1987) makes no specific reference to the Treaty of Waitangi, however it was recognised that a new Law School would provide an opportunity to give meaning to the notion of partnership in good faith that is central to the Treaty of Waitangi.¹³

Building upon *Te Matahauariki*, the University of Waikato School of Law adopted for itself the founding goals of professionalism, biculturalism, and the teaching of law in context. Each of these goals will now be briefly discussed.

1. Professionalism

The provision of a professional legal education was a goal familiar to all legal academics and generations of law students in New Zealand as in other comparable legal jurisdictions. It involved compliance with CLE requirements and prescriptions as well as the provision of skills teaching to support the role of the lawyer as the provider of legal advice. Professionalism also requires the recognition on the part of employers and the wider community that there are benefits from learning lawyers’ skills that go beyond the production of barristers and solicitors. Such “generic”

8 *Te Matahauariki*, supra note 2, at 14-17.

9 *Te Matahauariki*, ibid, at 22-24.

10 Such as those at Warwick and Keele in the United Kingdom, and Monash and Macquarie in Australia.

11 *Te Matahauariki*, supra note 2, at 1.

12 Law Practitioners Act 1982, Law Practitioners Admission Rules 1987, Professional Examinations in Law Regulations 1987 made under s 39 of the Law Practitioners Act 1982.

13 *Te Matahauariki*, supra note 2, at 1.

skills ought to be taught effectively and in tandem with a conceptual legal education.

2. Law in Context

Whilst ensuring that the undergraduate law degree continues to be a pathway to the legal profession, to achieve its aim for law to be studied in context, the Waikato degree includes more non-law papers than other New Zealand law degrees, and conjoint degrees are encouraged to facilitate interdisciplinary study. The first two years of law study are weighted towards public law, rather than private law, in order to provide a context for understanding the operation of private law.¹⁴ Contextual matters are also addressed within the individual Law I papers, Legal Systems, Legal Method and Law and Societies. There are tensions between the professional and contextual goals within the current Law I programme. “Professional” knowledge and skills cannot be taught in a vacuum, and the Legal Method paper has no private law paper in the first year on which to “hang” concepts and skills. We have to teach some contract, tort and criminal law to enable students to replicate lawyering tasks, and lecturers from these subject areas form part of the Legal Method teaching team.

3. Biculturalism

Since its inception, it has been a stated goal of our Law School, through its curriculum, research activities and its own structures, to be in the forefront of the development of a new bicultural legal philosophy.¹⁵ Biculturalism is a contested term, but can mean promoting understandings of both Māori and European conceptions of justice and law. Research has demonstrated that Waikato Law School is the Law School of choice for Māori, largely due to the School’s stated commitment to biculturalism. This is evidence of a real attempt to provide a meaningful legal education for Māori.¹⁶ Māori students and staff of the Law School have analysed and critiqued the School’s attempts to develop the bicultural objective since its establishment.¹⁷

14 Wilson, *supra* note 1.

15 *University of Waikato School of Law Handbook* (2001) 4.

16 Milroy, S “Waikato Law School: An Experiment in Bicultural Legal Education” (unpublished LLM thesis, Waikato Law School, 1996); Papuni-Ball, M “The Realities of Māori at Law School” (unpublished LLM thesis, Waikato Law School, 1996).

17 See, for example, Mikaere, *infra* note 39, and Whiu, “Waikato Law School’s Bicultural Vision” (2001) 9 WLR 265, who concludes that, for all its shortcomings, the bicultural commitment of Waikato Law School continues to provide a way forward.

The responsibility for fulfilling the goal of biculturalism has largely fallen upon, and been embraced by Te Piringa,¹⁸ the indigenous Māori staff collective of the School of Law of Waikato University, who in 2002 received a University of Waikato Staff Merit Award for “[o]utstanding, sustained achievement in furthering Māori aspirations in Legal Education”. The goal of biculturalism is, however, a goal of the Law School as a whole, and the responsibility for providing a bicultural legal education lies with all Waikato legal academics involved in the design and delivery of papers. That biculturalism is not a goal that is easily understood within the wider community was identified by the Foundation Dean, Margaret Wilson, who recorded that she had received requests for reassurance that the Waikato LLB was of the same standard because of the number of Māori students and the commitment to develop a bicultural approach to legal education.¹⁹

Understanding what is required in developing and delivering a bicultural legal education has not been easy for Waikato legal academics charged with the task. As our former colleague Stephanie Milroy²⁰ observed:

It was clear from the beginning that biculturalism was not a teaching product that could be designed and produced in the same way that one might produce, say, a Contract law course. A commitment to biculturalism means an ongoing challenge requiring one to change one’s own ideas, attitudes and behaviour, and corresponding changes in the institutions which seek to foster biculturalism.²¹

It has to be said that the Legal Method paper could have followed the well-trodden path, in content and delivery, of other common law jurisdiction first year law papers. It could have been said that there was no bicultural dimension to legal skills within the New Zealand legal system and that the Law I programme as a whole demonstrated our commitment to biculturalism. The authors rejected this approach because of our conceptions of the purposes of teaching and learning law in Aotearoa/New Zealand.

18 Te Piringa was the name given to the Law School building by the paramount chief of the local tribe, Te Arikiniui Dame Te Atairangikaahu, often referred to as the ‘Māori Queen’. Te Piringa literally means to be close together, or a gathering place where this can occur. The Māori staff have adopted this as their collective name.

19 Wilson, “The Making of a New Legal Education in New Zealand: Waikato Law School” (1993) 1 WLR 1, 19 note 22.

20 Now Māori Land Court Judge Stephanie Milroy.

21 Seuffert, Milroy and Boyd, *supra* note 3, at 42.

II. WHY A BICULTURAL LEGAL EDUCATION?

1. General Context

The ways in which the authors teach and conceive of teaching are the result of internalising the goals and values of the contexts in which we teach and have been taught. The pattern of values and goals existing at any one time provides a context for this examination and it influences not only the individual academic's conception of the purposes of teaching and learning, but also his or her professional practice of tertiary teaching.

The School of Law's goals and the attendant values provide one context for, and influence the conceptions of, the purpose of teaching and learning. Values such as equality, access, development of the individual, promoting higher-order thinking, and working for the public good are implicit in the goals of professionalism, law in context and biculturalism and they align with society's goals and values in respect of higher education. Social structures and regional needs (along with the state), which historically resulted in universities that functioned to pursue scholarship and elite education and which valued pure research and the development of moral character,²² now result in mass higher education systems in OECD countries (including New Zealand). The functions (or goals) of these mass higher education systems are expressed as the need to achieve greater equality of opportunity, to provide education adapted to a great diversity of individual qualifications, motivations, expectations and career aspirations, and to facilitate the process of lifelong learning and the need to assume a public service function.²³

In the 21st Century, as in the past, there is a relationship between the university and society in terms of benefits and utility that results in the articulation of society's values and goals in relation to higher education and an expectation that the purposes of a university will include the purposes attributed to it by society. That universities accept this can be illustrated in the case of the University of Waikato. Its website makes explicit that society's values and goals referred to above have an impact on the values and goals, and thus the purposes, of the institution:

22 Ben-David and Zloczower, "Universities and Academic Systems in Modern Societies" (1962) 3(1) *Archives Europeennes de Sociologie* 45 - 54.

23 Cerych, Furth and Papadopoulos, "Policies for higher education: General report on the conference on future structures of post-secondary education" in Smith, R *The Transition from Elite to Mass Higher Education* (1993).

We adhere to the concept of a university education that is, by definition, researched. Through sustained research intensity and the attraction of high levels of external funding from public sector and industry sources, we aim to maintain a highly competitive research profile which is measured by the quality and productivity of our academic staff. Our strong research programme makes a substantial contribution to the social and economic development of the local, regional, national and international communities. We are part of a very significant cluster of research capability in the country. Located in the centre of a hub of Crown Research Institutes and a recently established Innovation Park, we are exceptionally well-placed to increase our contribution to the regional and national economies. We continue to foster a culture of internationalisation, measured through the diversity of our student and staff profiles, the support and celebration of that diversity, a long-standing pride in our reputation for the pastoral care of our international students, and the measures we take through curriculum, programme design and our global networks and connections to expose our students to international influences.²⁴

Tihē mauriora ki te Whaiao ki te Ao Mārama

The University of Waikato is committed to meaningful partnerships under the Treaty of Waitangi, and to providing leadership in research, scholarship and education that is relevant to the needs and aspirations of iwi and Māori communities. As a foundation to this commitment, we recognise the value of Māori students and staff, and the significance of their contributions to the University and to the wider community.

The University values its relationship with Tainui as mana whenua, and is committed to working closely with local hapū and iwi to ensure responsiveness to Māori. As a partner to the University, the iwi forum of Te Rōpū Manukura continues to work with the University Council, and to support the development of research and tertiary education opportunities for Māori.²⁵

There is an overlap between society's values and goals and the values and goals articulated by the University of Waikato. But it is possible to identify particular institutional values and goals in relation to the University of Waikato that sit alongside the values and goals already identified, and which directly have an impact on our conceptions of the purposes of tertiary

24 <<http://calendar.waikato.ac.nz/organisation/theuniversityofwaikato.html>>.

25 <<http://calendar.waikato.ac.nz/organisation/commitmenttotow.html>>. "Tihē mauriora ki te Whaiao ki te Ao Mārama" is used as an announcement that something important is to follow. Tainui is the tribal confederation with "mana whenua" or rights as first people of the lands within which the university is located. Iwi means tribe and hapu means sub-tribe.

teaching and learning. The University of Waikato Charter contains a mission statement of educational purposes and values, and sets out the University's defining characteristics. These statements value academic excellence and international competitiveness for the benefit of people of the Waikato, the nation and the Pacific region. The commitment to partnerships with Māori "as intended by the Treaty of Waitangi" and to kaupapa and tikanga Māori is affirmed.²⁶ In addition, the University must achieve "the advancement of knowledge and the dissemination and maintenance thereof by teaching and research" under the University of Waikato Act 1963.²⁷ The University must also accept a role as "the critic and conscience of society" in terms of the Education Act 1989.²⁸

It is the people who are employed by the University, including individual academics, who must support the values and achieve the goals to which the University has expressed a commitment and in terms of the University's statutory obligations. Individual conceptions of the purposes of tertiary teaching and learning must accommodate, in addition to purposes in relation to student learning and the creation of new knowledge that reflect society's values and goals, purposes that relate to the development of a classroom environment which reflects appropriate social, cultural and spiritual values, the development of appropriate forms of instruction and the promotion of critical thinking and reflexivity that empowers learners, inter alia, to become academics who are the critics and conscience of society.

The values and goals articulated by the University of Waikato include values and goals regarded as those traditionally held by academics themselves, such as freedom in the exchange of ideas and information, freedom of thought and expression (universities as "critic and conscience of society"), the advancement of knowledge and the dissemination and maintenance thereof by teaching and research. Some organisational units within a university (faculties, departments and schools, for example) may hold additional values and goals from those articulated by the university and from each other. Often it is here that there is an uneasy interface between the values and goals of the institution reflecting societal (and state) views, and the traditional culture of academics and their discipline-specific values on the other.

Along with those values and goals in relation to research and scholarship, Goldschmid identifies exchange of information, social responsibility,

26 <<http://www.waikato.ac.nz/charter/>>. Tikanga Māori embodies the values, standards and norms which indigenous Māori societies have developed to govern themselves.

27 University of Waikato Act 1963, s 3(1).

28 Education Act 1989, s 162(4)(a)(v).

creativity and imagination, critical thinking, self-reflection and personal growth.²⁹ Tensions may arise in relation to resourcing that which is valued and goals that have been identified.

The state has interests in tertiary education distinct from those of society in general. For example, the state needs an educated workforce to produce and to compete internationally. Knowledge, skills, culture and research can be viewed as resources within the economy that the state manages. However, for economic and ideological reasons, states have increasingly demanded that the market is the mechanism for identifying and prioritising educational values and goals. We are now familiar with the discourse of student as consumer and purchaser of teaching, with industry as consumer (and, increasingly, direct purchaser) of research and knowledge, and employers as consumers of graduate skills. This international shift in economic policy relating to higher education sees it primarily as a private, rather than a public good in relation to funding, whilst at the same time stating that higher education is a public good in relation to productivity within the “knowledge economy”.

In New Zealand, the policy shift was made explicit in the Green Paper produced by the then Government in 1997.³⁰ Its vision for tertiary education required the achievement of goals that included increased opportunities for greater participation in tertiary education to “meet the changing needs of the labour market, economy and society”,³¹ increased participation and achievement of currently under-represented groups (particularly Māori and Pacific Islands people), qualifications, programmes and providers of world-class standards, and “value for the students’ and the Government’s financial contribution” in recognition of the limited resources available for all government spending, including tertiary education.³² The reality was that state subsidies for students were reduced on the premise that funding per student had to be reduced to allow more places for more students in a context of finite resources for the whole education sector.

The Labour-Alliance Government established a Tertiary Education Advisory Commission (TEAC) and issued a discussion document that set out this

29 Goldschmid, “Strengthening Traditional Academic Values and Increasing Efficiency and Quality in Higher Education: Is It Feasible?” in *23rd International Conference on Improving University Learning and Teaching Contributed Papers* (1998) 459-469.

30 *A Future Tertiary Education Policy for New Zealand: Tertiary Education Review* (1997) 7-9.

31 *Ibid*, at 7.

32 *Ibid*, at 9.

Government's vision for tertiary education, and the issues to be addressed by TEAC.³³ The Discussion Document states that the Government's vision is for New Zealand to become a "...world leading knowledge society that provides all New Zealanders with opportunities for lifelong learning..."³⁴ To achieve this, the Government identifies the need for:

- a commitment to excellence in teaching, scholarship and research;
- an environment where all those involved in teaching, scholarship and research are committed to contributing to the nation's future direction;
- an environment where participation by all is encouraged, and where Māori aspirations for development are fully supported;
- a sector that fully supports regional and local communities...³⁵

2. Common Themes in Conceptions of Tertiary Teaching and Learning

Whether social, institutional, academic or articulated by the state, the values and goals underpinning the purposes of tertiary teaching and learning have strong commonalities, such as a belief in equal access, equal opportunity for participation by learners in a safe and appropriate environment, in universities as providers of quality education to an international standard which support the needs and aspirations of regional and local communities and are committed to biculturalism and partnership based on the Treaty of Waitangi. Academics are seen as contributors to knowledge, who model and value intellectual honesty, critical thinking, collaboration/exchange/partnership, creativity and self-reflection, thereby creating and transmitting a culture that encourages and empowers all learners to contribute to the creation of knowledge for the benefit of self and society.

It is our position that these values and goals made it imperative that we rose to the "challenge" of biculturalism in the design and delivery of the Legal Method paper despite our lack of experience of biculturalism in this context. The place of the Treaty of Waitangi within our society, our University and our Law School, and the legal system (along with the central notion of "partnership") should be reflected in curriculum design which promotes understanding of both the English legal tradition and that of tangata whenua.

33 Hon Steve Maharey, Associate Minister of Education, Tertiary Education Advisory Commission, *Nation-Building: Lifelong Learning in a Knowledge Society* (2000).

34 *Ibid.*, at 3.

35 *Ibid.*

III. WAIKATO LAW SCHOOL'S LEGAL METHOD PAPER

The Law I Programme comprises three compulsory courses: Legal Systems, Law and Societies and Legal Method. As explained in the Legal Method Paper Outline:

The purpose of the Law I programme is to give students an introduction to the history and structure of the New Zealand legal system, its institutions, processes and key actors, the skills of legal reasoning, writing and research, and an understanding of the societal context in which law is made and evolves. The Programme provides the foundation for the School's commitment to promote professionalism, biculturalism and the understanding of Māori and European understandings of justice and law, and the teaching of law in context.³⁶

The primary objective of Legal Method is to provide students with the essential skills needed in the study and practice of law including skills in legal research, case analysis, problem solving, statutory interpretation and legal reasoning.

The Legal Method paper was originally monocultural in both design and delivery. The paper was later re-designed in the context of the values and goals identified above. It was easy to meet the goal of professionalism in a traditional legal methods paper. Contextualism in Aotearoa/New Zealand, however, must mean more than cognitive apprenticeship in traditional (Western) lawyers' skills. Consideration by the Legal method teaching team of professionalism, contextualism and biculturalism led to the development of Māori perspective small group teaching, the integration of kaupapa Māori into teaching and learning techniques, mootings in te reo Māori, and a research component that included an introduction to the Māori oral tradition and appropriate protocols for researchers with projects involving kaupapa Māori.

1. Māori Perspective Small Group Teaching

As part of Waikato Law School's commitment to developing a different kind of legal education, staff have endeavoured to create learning spaces which facilitate optimum learning in a supportive manner. Overall, the School has a balance between small and large group teaching, though the Law I programme features mainly smaller group teaching. In all three of the large (180-240 students) compulsory first-year courses, the large group lecture format has been retained to varying degrees, but the emphasis has

³⁶ Legal Method Paper Outline 2004.

been on the “streams” or weekly smaller group sessions (25-35 students) of two-hours duration.

One stream in each of the three compulsory Law I courses is taught from a Māori perspective by a Māori lecturer. While the same core materials and assessment methods as those used in other streams are often used in these streams, the teaching perspectives differ and students are encouraged to build upon their own cultural knowledge bases. These “Māori Perspective Streams” provide a space where lecturers can draw upon culturally relevant and appropriate examples to illustrate points and engender discussion, and in some instances conduct classes in *te reo Māori*.

Recognising that Māori students have diverse needs and expectations in terms of their legal education, Māori students are offered the choice of entering a Māori Perspective Stream or one of the other streams. And though it is important to avoid making generalisations about Māori students, recent research confirms that Māori students find that Māori Perspective Streams provide a safe and supportive learning environment where Māori students feel comfortable being Māori and which are more conducive to establishing *whanaungatanga* or relationships.³⁷

The Māori Perspective Streams have been so successful that often non-Māori have chosen to participate in them. Māori students have raised a concern that the inclusion of non-Māori in the Māori Perspective Streams has had an impact on teaching and learning – but from a teaching point of view the way in which that stream is taught is not compromised or changed by the inclusion of non-Māori students. Māori students have also requested that Māori Perspective Streams be offered in the second year programme as well as the first. The main constraint in being able to offer more Māori Perspective Streams is the availability of suitably qualified staff to teach from a Māori perspective.

Māori Perspective Streams also provide a safe environment for Māori lecturers when dealing with contentious issues. Māori legal academics at Waikato have recounted negative experiences involving class discussion about such things as Māori views of knowledge, the validity of the oral tradition,³⁸ and Māori perspectives on the Treaty of Waitangi.³⁹ Sometimes

37 Kaupapa Māori and Treaty Content in Waikato Law School Courses 2002-2003, *infra* note 40.

38 *Supra* notes 16 and 17.

39 Mikaere, “Rhetoric, Reality and Recrimination: Striving to Fulfil the Bicultural Commitment at Waikato Law School” (1998) 3 *He Pukenga Korero* 4, 11; “On Being

such classroom experiences emulate what is happening in society generally. For instance, amongst the furore in 1997 when a Māori individual took and damaged the America's Cup as a demonstration of protest, lecturers facilitating classes exploring the role of the Treaty of Waitangi in the legal system experienced heated exchanges between students. Similarly, some classes required skilful facilitation at the height of the national debate over ownership of the foreshore and seabed. Such interactions have the potential to have an impact on learning outcomes if students close their minds to the ideas behind these topics. It is in the small group streams where we find that discussion and engagement on these issues can be facilitated in a more manageable and safe way.

The presence of Te Piringa for the most part as a strong, cohesive group within the Law School provides a forum for mutual support and also provides non-Māori lecturers with an avenue to seek support and information when dealing with lecturing either Treaty of Waitangi content or other Kaupapa Māori content in their courses.

2. Integrating Kaupapa Māori into Teaching and Learning tools

In 2003 Te Piringa co-ordinated a research project aimed at reviewing the Kaupapa Māori content in law courses offered at the Waikato Law School.⁴⁰ The objective of the project was to enable the Te Piringa team, and the Law School generally, to gain an insight into what, if any, kaupapa Māori was integrated in Waikato Law School courses. "Kaupapa Māori" was an undefined term that was discussed during the research process, but included Māori perspectives on legal issues and content relating to the Treaty of Waitangi. The information drawn from the research project has, to date, assisted Te Piringa to do a number of things.

First, it has improved institutional knowledge of what kaupapa Māori has been incorporated across the degree programme. This has become important for the purposes of induction and succession planning, as a result of the high turnover of Te Piringa members in recent years.⁴¹

Secondly, it has provided a basis for Te Piringa to assess whether the school is generally fulfilling its foundation goal of biculturalism, and, in particular

Māori and Being a Lawyer: Musings of a Māori Legal Academic" in Ki Te Ao Marama: 1998 Te Hunga Roia Māori o Aotearoa Conference Proceedings 70; Kaupapa Māori and Treaty Content in Waikato Law School Courses 2002-2003.

40 Kaupapa Māori and Treaty Content in Waikato Law School Courses 2002-2003.

41 This was noted as an EEO concern in the School of Law Business Plan 2003.

instances, to make suggestions to course convenors as to how courses might better fulfil the bicultural mission, in Te Piringa's view. It is, of course, up to individual course convenors whether or not to take up any suggestions made.

Thirdly, Te Piringa has suggested that it may incorporate key findings of the research into the curriculum review being undertaken in 2004.

The Legal Method paper is notable in this research project as being one of the non Māori-specific courses where kaupapa Māori has been consciously incorporated into delivery methods and classroom practices in a variety of meaningful ways.

It is a course where, over time, Māori academics have designed problem-based learning exercises that integrate kaupapa Māori as tools for teaching legal method skills in the Māori perspective streams as well as across all streams. The following problem⁴² is an example of an effective teaching and learning tool that explores the inter-relationship of legal topics and integrates legal skills and legal knowledge, as well as the integration of the knowledge, skills and methods of other disciplines, alongside law.

Donald Mason is a 22-year-old Māori. He obtained his driver's licence in January 2001. On the application form for his driver's licence he indicated that he wished to be a donor of organs. He believes that it is important to help others by donating organs when they are no longer needed by the donor. He is also aware that Māori who need organ transplants are most likely to find compatible organs from other Māori and that there is a great scarcity of Māori donors. As soon as he obtained his licence he told his wife, Dana, who is of European descent, that if he dies she can consent to the removal of his organs for donation. A few weeks later Donald was visiting his parents, who are both Māori. Donald told his parents that he had agreed to be an organ donor. Mr and Mrs Mason were both very upset about his decision. They told Donald that it went against Māori custom to take parts of the body away and give them to someone else. They also said that his body was sacred; his organs were part of him and he belonged to his whanau, his hapu, his ancestors and future generations to come and he had no right to give away his body parts. Donald felt confused and told his parents that he would have to "think about all this and in the meantime I'll put my organ donation indication on my licence 'on hold' until I make up my mind".

However, before Donald could change the indication on his licence he was involved in a serious car accident. He was taken to Cambrook Hospital in a coma with serious

42 Designed by Stephanie Milroy.

head injuries, broken ribs, a punctured lung, trauma to his heart and broken legs. At the hospital the doctors put him on life support but noted that brain function had ceased and that he had entered a persistent vegetative state. Dana was contacted by the police and, after she had rung Donald's parents to tell them what had happened, she rushed to Donald's bedside. The doctors advised Dana that there was nothing more they could do for Donald and that without the life support he would die almost immediately from the injury to his heart. They asked Dana if she would consent to the turning off of the life support equipment and to the removal of Donald's undamaged liver, which was urgently needed for transplant into a 13-year-old Māori child. Dana, although distraught, said that she would consent to the organ removal but that she could not make the decision to remove life support without Donald's parents being there. Donald's parents arrived shortly thereafter and, together with Dana, they all agreed that there was no point prolonging Donald's life, but they decided to sit with Donald awhile until they felt ready to let him go. Eventually the family withdrew and the hospital turned off the life support and removed the liver. Donald's parents were extremely upset when they found out about the removal of his liver. They approach their lawyer for advice as to what action they can take.

On one level this is a typical problem-solving exercise that may be used to introduce students to the study of law by providing students with basic skills in legal research and writing, case analysis, problem solving, statutory interpretation and legal reasoning on issues relating to ownership of body parts, organ donation, drivers' licensing, consent to medical procedure, lack of consent, damage or loss, and Māori cultural perspectives such as tapu (sacredness) and whakapapa (genealogy).

On another level, the problem encourages students to understand that although Legal Method may seem, as they go through the course, to be divorced from "real life" they will need these tools of legal method to help clients in situations like this. Law, then, is not merely a series of rules which they are going to learn. The legal system and lawyers operate within the context of wider society and, as lawyers, policy analysts, advisers and researchers, students will come to face situations which are not just legal problems but which contain a whole range of issues from ethical to cultural to political to economic which they as lawyers will be asked to deal with. In this it is hoped that they recognise their "other" knowledge about these sorts of issues, and which they will also need to bring to bear in their legal careers. It may also get them thinking that law may not hold all the answers.

3. Te Reo Māori Mooting

Fact situations similar to the above-mentioned problem have been incorporated into the compulsory Law I Mooting Programme - the

culmination of the Legal Method course. This moot programme requires students to write a joint synopsis with a moot partner, and make an individual oral presentation.

The objectives of the moot are to encourage students to work as a team, and to give students an opportunity to demonstrate research skills, case analysis skills, statutory interpretation skills, critical thinking and reasoning skills and writing skills, and present legal argument in a situation that approximates an appellate court oral presentation.

The Legal Method team has long recognised that students may have skills in Te Reo Māori (the Māori language) and may wish to use Te Reo Māori for both their written synopsis and their oral arguments. In consideration of this, students are able to present their written synopsis and oral presentation in Te Reo Māori so long as specific procedures are followed.⁴³ All documents and proceedings for a Te Reo Māori Moot are written and conducted primarily in Te Reo Māori. This includes the written synopsis, the oral presentation and the proceedings for the moot hearing.

The inauguration of the Te Reo Māori Moots was not without problems. The very first te reo moot experience involved an amusing situation in which two arguments and synopses were presented in te reo Māori and while the other two arguments were presented in English. The introduction of Māori protocol into the proceedings meant that the moot took considerably longer than anticipated to run.

The effort to embrace different approaches to mooted within a bicultural framework was commendable, but it was immediately obvious that there needed to be a special space and context within which Māori mooted would take place, and that this needed to be facilitated by those faculty members with the requisite knowledge and expertise of the necessary Māori protocols – Te Piringa. These early moots have paved the way for more sophisticated Māori Mooting competitions open to all students and conducted either in te reo Māori or English, with a fact problem based on kaupapa Māori.

4. The Oral Tradition

Another Māori dimension that has come to be incorporated into the Legal Method paper over time is a short series of lectures that explore the role of the Māori oral tradition in the legal research process. We have summarised

43 Legal Method paper outline 2004.

in some detail elsewhere the content of and rationale for these lectures.⁴⁴ However, this article retraces some of that material in this final case study, which provides a further example of the impact of the School's bicultural mission and our commitment to the Treaty of Waitangi on teaching and learning in our Law I Legal Method paper.

The increase in the intermingling of Treaty of Waitangi jurisprudence and Māori customary law in the legal system has in turn heightened appreciation for oral knowledge retained in the minds and memories of the indigenous Māori. We have introduced into the teaching syllabus a series of lectures and material about this oral tradition because it provides a world-view about knowledge and of the intricacies of Māori beliefs and understandings of the world. We also stress that a researcher who has an understanding of the oral tradition also understands that the research path must be structured in a way that recognises that people who are asked to share knowledge (the sources of the knowledge) are important *participants* in the research project. This is in contrast to written sources of law that are the *subjects* of research and are *used* by the researcher, and accordingly the introduction to the Māori oral tradition includes recommendations as to culturally appropriate research protocols and methodologies such as obtaining necessary permissions, and adopting appropriate methods of conducting and recording interviews.⁴⁵

In Māori tradition the retention of knowledge and its use is a very spiritual discipline. Knowledge would only be entrusted to those who had been carefully selected as worthy recipients, individuals who would assume the responsibility of looking after such knowledge on behalf of the collective, and these students were taught in *whare wananga* or traditional schools of higher learning. *Whare wananga* have been likened to medieval monasteries where practical skills were taught based on strongly-held esoteric principles, moral codes, and strict adherence to prescribed rituals.⁴⁶

The oral tradition embodies some of the fundamental values and principles upon which Māori society is based. One such principle is that knowledge is a *taonga*, something of great value, which must be respected. As noted above, particular kinds of knowledge, such as *whakapapa* (genealogy) for example, are not considered freely accessible because of their spiritual power.

44 Te Aho, Mackinnon and Greville, "Bicultural Perspectives on Māori Legal Research" Greville, M et al *Legal Research and Writing in New Zealand* (2 ed, 2004) 259.

45 Smith, L *Decolonising Methodologies* (1999) 172.

46 Hemara, W *Māori Pedagogies A View from the Literature* (2000) 17.

The practical significance for students lies in the fact that oral histories and the recitation of information form a large and important part of claimant cases to the Waitangi Tribunal and that the Treaty of Waitangi and Māori customary law are increasingly being seen as important sources of law in the legal regime of Aotearoa/New Zealand.

As has been traversed elsewhere, the Waitangi Tribunal was established in 1975 against a backdrop of increasing pressure from Māori to have Treaty grievances addressed by the Crown.⁴⁷ Under its establishing statute, the Treaty of Waitangi Act 1975, any Māori person who claims to be prejudicially affected by the actions, policies or omissions of the Crown in breach of the Treaty of Waitangi may make a claim to the Tribunal.⁴⁸ The Tribunal has the power to inquire into claims made by Māori under the Treaty of Waitangi, and then make recommendations to the Crown.

The Tribunal's inquisitorial approach brings together Māori and European concepts of law, history, research and procedure: its objective is to resolve claims and provide for lasting or enduring settlements. It will often travel to tribal meeting places to hear the evidence of claimants and such hearings often include a site visit to the rivers, land, lakes, and homes that are often the subject of the grievance that Māori have with the Crown.

The specialist Māori Land Court frequently refers to Māori concepts of law when interpreting and applying Māori land legislation.⁴⁹ New Zealand's Resource Management Act 1991 stipulates that, in achieving the purposes of that Act, certain matters of national importance must be recognised and provided for, including "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga".⁵⁰ Persons exercising functions and powers under the Act must have particular regard to "kaitiakitanga".⁵¹

There has been a growth in the number of statutes that incorporate reference to the Treaty of Waitangi. For example, the Conservation Act 1987 provides that "this Act shall be so interpreted and administered as to give effect to the

47 Te Aho, Mackinnon and Greville, *supra* note 44.

48 Treaty of Waitangi Act 1975, s 6(1).

49 This has particularly been the case since the passing of Te Ture Whenua Māori Act 1993 (Māori Land Act 1993).

50 Resource Management Act 1991, s 6(e); waahi tapu are sacred sites, and taonga are treasures.

51 Resource Management Act 1991, s 7, kaitiakitanga is a Māori concept of guardianship of natural resources.

principles of the Treaty of Waitangi”.⁵² And in the Education Act 1989 “it is the duty of the Council of an institution, in the performance of its function and the exercise of its powers, - (b) to acknowledge the principles of the Treaty of Waitangi”.⁵³

On increasing occasions, too, courts are looking to the Treaty of Waitangi as an aid to interpret statutes even where there is no explicit reference to the Treaty in the statute, because the Treaty has been said to be part of the “fabric of New Zealand society”,⁵⁴ and viewed as being of constitutional importance.⁵⁵

The number of references to Māori customary law in the courts also continues to grow. The notorious cases concerning the disposition of fisheries assets following the Sealord’s Deal, whether the fishing of imported species falls within customary Māori fishing rights⁵⁶ and, most recently, the aftermath of the Court of Appeal’s decision in *Ngati Apa v Attorney General*⁵⁷ (the Marlborough Foreshore case) are but a few examples.

While the Māori oral tradition provides a world-view about knowledge and of the complexity of Māori beliefs and understandings of the world, it also plays a significant role in our legal system, particularly in relation to the proceedings of the specialist Māori Land Court, the Environment Court and the Waitangi Tribunal. The oral tradition is an important legal context and must be made accessible, in an appropriate way, to our students whether as future lawyers or citizens. On another level, it serves as a point of resistance for Māori academics who seek to challenge the established understandings of our colonial past and reassert the legitimacy of Māori knowledge and the mode of transmission of that knowledge. For these reasons we have introduced students in the Legal Method paper to the ways of the oral tradition in our attempt to promote understandings of both Māori and European conceptions of justice and law and thus fulfil, at least in part, our promise of teaching law in the context of a bicultural society.

Our efforts have not always been appreciated. Māori students have generally embraced the lectures on the oral tradition and Māori knowledge. And, on

52 Conservation Act 1987, s 4.

53 Education Act 1989, s 181.

54 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210.

55 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179.

56 *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139.

57 *Attorney General v Ngati Apa* [2003] 3 NZLR 643.

the whole, the lectures have generally been well received by Pakeha. On one occasion however, during the introduction to the first lecture on the oral tradition, a student questioned how an *oral* tradition could possibly be credible: surely it was too prone to exaggeration and partiality. The tone in which the question was asked triggered an uneasiness in the lecture room, requiring a measured response.

It was explained that the resilience of the oral tradition in the face of many negative influences is remarkable, and that the student's question mirrored the lack of recognition that the oral tradition faces as a form of information transfer and retention or as a legitimate source of law by the academic research community, and the legal system.⁵⁸ Rather than being an introduction as intended, the lecture had to jump forward to explain that culturally bound assumptions have constructed the *printed* word as the official record. However, the recorded histories of this country contain countless flaws as a result of early ethnographic and historical records being influenced by a foreign set of values. For example, during times of early settlement, land transactions in the far north were known as "tuku whenua". European settlers who became relatively bilingual translated the words "tuku whenua" to mean land *sales*. Yet it has been established through oral tradition that, at the time the translations were written, Māori in the far north had no concept of selling land. Tragically for the people of the far north, the Crown used the translations of the transactions to assert its right of ownership over lands.⁵⁹

On another occasion a Pakeha student walked out of a lecture theatre in obvious and disruptive fashion whilst a guest lecturer was sharing his expertise on the oral tradition of the Māori. In order to avoid such situations, we have learned to give students explicit forward notice of lectures and classes that are going to address any kaupapa Māori issues, so that students may choose not to attend. On a handful of occasions, some have chosen to leave soon after they are reminded what the topic is for the lecture – in these situations, skilful navigation is required by the lecturer to minimise inevitable distraction.

Such negative reactions have caused some academics to question why they should share certain types of knowledge with these students, and why they

58 Mutu, M "Barriers to Research: The Constraints of Imposed Frameworks" *Proceedings of Te Oru Rangahau Māori Research and Development Conference, 7-9 July 1998*, Massey University, 51, 57.

59 Mutu, *ibid*; and see also Yates-Smith, A *Hine! E Hine! Rediscovering the Feminine in Māori Spirituality* (1998) (unpublished PhD Thesis, University of Waikato) 4.

should expose themselves and expose Māori students to such blatant racism.⁶⁰ The authors cannot say that their willingness to further the School's tripartite mission has always resulted in successful teaching and learning experiences. The values and goals of tertiary education in Aotearoa/New Zealand, however, make it necessary to continue to strive for success through dialogue with colleagues and students. Such dialogue is itself an education.

IV. CONCLUSION

According to Māori oral tradition, the Māori ancestors, Tawhaki⁶¹ and Tane, overcame a number of obstacles to ascend the heavens in search of knowledge. The following oft-cited proverb or whakatauki reminds us that the importance of higher knowledge cannot be overstated:

He manu kai miro, nona te ngahere,
he manu kai i te matauranga, nona te ao.
A bird that feasts on miro berries, his or hers is the forest,
a bird that feasts on knowledge, his or hers is the world.

Through this article we join a number of our current and former colleagues in having reflected upon our experiences within the framework of the Waikato Law School's tripartite mission to provide a professional, bicultural and contextual legal education. Such a level of self-reflection underscores the significance of that mission to many of the people involved in fulfilling it.

We have referred briefly to some of the obstacles that we have faced, and realise that there will continue to be challenges on the horizon. In the spirit of sharing, we include some of the lessons learned and models that we have designed along the way in our attempt to promote the creation of knowledge that reflect society's values and goals, and to develop a classroom environment which reflects appropriate social, cultural and spiritual values. These values and goals made it imperative for us to rise to the "challenge" of biculturalism in the design and delivery of the Legal Method paper by promoting understanding of both the English legal tradition and that of tangata whenua.

60 Mikaere, *supra* note 39.

61 According to Tainui oral tradition it was Tawhaki who ascended the heavens, in the oral tradition of other iwi, it was the ancestor Tane.

JUDGING IN CONTEXT: LORD WILBERFORCE'S LEGACY TO NEW ZEALAND LAW

BY PETER SPILLER *

Judging in context stresses that legal phenomena need to be assessed in their relevant setting. This approach is in tune with reality-based judging, in the interests of achieving substantial merits and justice in the individual case. This approach is the antithesis of one which looks at legal issues in isolation or in the abstract, which focuses on technical considerations, and which gives rise to artificial outcomes.

Judging in context was one of the hallmarks of the judicial approach of Richard Wilberforce. He was a lord of appeal from 1964 until 1982, during which time he played a central role in the Appellate Committee of the House of Lords and in the Privy Council. Many of his speeches and judgments exercised considerable influence on New Zealand law.

This article focuses on one aspect of Lord Wilberforce's contribution to New Zealand law, namely, his contextual approach to judging. The article begins by outlining the main features of his approach to judging, and then analyses how this approach influenced New Zealand law.

I. CONTEXTUAL APPROACH OF LORD WILBERFORCE

Lord Wilberforce's contextual approach related to the importance he attached to realities, common sense and individual justice in decision-making, and to his view of the courts in formulating case-law.

1. Realities, Common Sense and Justice in Decision-making

Underlying Lord Wilberforce's approach to judging was a keen sense that his decisions and the consequences thereof should square with reality as he saw it.¹ He viewed the court's task in terms of grappling individually with each case that arose,² and trying to provide just and sufficient responses after taking all factors into account.³ He would for example speak of "real facts

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¹ *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1248 (HL).

² *Parry v Cleaver* [1970] AC 1, 39 (HL).

³ *Jobling v Associated Dairies Ltd* [1982] AC 794, 804 (HL).

which cannot be changed”.⁴ He believed that it was necessary, under a system of judge-made law, that judicial formulations should have “the benefit of hard testing in concrete applications”.⁵ In the context of a torts case, he observed that “human conduct can rarely be squeezed into a predetermined slot; and if this is what courts are told to do, they will find ways, according to their views of the merits, of crossing the lines”.⁶

Lord Wilberforce also spoke of the need for decision-making to be in tune with common sense.⁷ He believed that the common law was strongly influenced by practical considerations, and he noted that it “always leaves a residue to be completed by common sense”.⁸ He once cited a passage from a case for its common sense as between landlord and tenant, and observed that “you cannot overrule common sense”.⁹

For Lord Wilberforce, considerations of justice corresponded with “good sense”, and were more likely where the court addressed the realities of the parties instead of being bound by rigid and artificial considerations.¹⁰ On one occasion he referred to a previous case as showing “how easy it is to reach a just and sensible conclusion once one escapes from a narcotic preoccupation with the occupier/trespasser relationship”.¹¹

2. Role of the Judge in Formulating Case-law

Lord Wilberforce saw the common law as a developing entity, adjusted and expanded by the judges from case to case by the use of analogy.¹² He was well aware that the common law did not reveal pure logic and clarity.¹³ He remarked that the common law often “thrived on ambiguity”,¹⁴ and that

⁴ *Chancery Lane Safe Deposit and Offices Co Ltd v Inland Revenue Commissioners* [1966] AC 85, 136 (HL).

⁵ *Chaplin v Boys* [1971] AC 356, 391 (HL). See also *Ratten v Regina* [1972] AC 378, 390 (PC), and *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, 1011 (HL).

⁶ *British Railways Board v Herrington* [1972] AC 877, 912-913 (HL).

⁷ *Mulholland v Mitchel* [1971] AC 666, 680 (HL), and *McLoughlin v O'Brian* [1983] AC 410, 423 (HL).

⁸ *British Railways Board v Herrington* [1972] AC 877, 919 (HL).

⁹ *Liverpool City Council v Irwin* [1977] AC 239, 255 (HL).

¹⁰ *Indyka v Indyka* [1969] 1 AC 33, 100 (HL).

¹¹ *British Railways Board v Herrington* [1972] AC 877, 914 (HL).

¹² *British Railways Board v Herrington* [1972] AC 877, 921 (HL), and *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, 719 (PC).

¹³ *Pickett v British Rail Engineering Ltd* [1980] AC 136, 148-149.

¹⁴ *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 331 (HL).

“logic in excess has never been the vice of English law”.¹⁵ In a torts case he remarked that “[w]e do not live in a world governed by the pure common law and its logical rules”, and cautioned against compensating “on the basis of selected rules without regard to the whole”.¹⁶ He reflected that the common law often worked by description rather than by definition,¹⁷ and he suggested that “sweeping, unscientific and unpractical” doctrines were “unlikely to appeal to the common law mind”.¹⁸

The potential misuse and rigidity of legal classifications and distinctions were evident to Lord Wilberforce.¹⁹ For example, he noted in the context of administrative law that there was “the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues”.²⁰ Lord Wilberforce also warned against the “formula trap”.²¹ He was averse to legal rules and concepts being treated as “universal solvents” or formulae which would provide solutions to every situation.²² Indeed, he pointed out that a formula (such as acting “*bona fide* in the interests of the company”) could become “little more than an alibi for a refusal to consider the merits of the case”.²³

Lord Wilberforce was aware of his difficulty as a judge in going beyond the resolution of an individual problem and stating general principles which could be guides in the future.²⁴ He noted that facts might differ so greatly that it was impossible to lay down any precise or mechanical general rule.²⁵ In a case where he could give no clear definition of a dwelling-house entitled to protection, he remarked that the untidy situation reflected “the reality of

¹⁵ *Cassell & Co Ltd v Broome* [1972] AC 1027, 1114 (HL).

¹⁶ *Jobling v Associated Dairies Ltd* [1982] AC 794, 803 (HL).

¹⁷ *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, 309 (HL).

¹⁸ *Commissioner for Railways v Valuer-General* [1974] AC 328, 351-352 (PC).

¹⁹ *Secretary of State for Employment and Productivity v C Maurice & Co Ltd* [1969] 2 AC 346, 360 (HL), and *Spelthorne Borough Council v Davy* [1984] AC 262, 276 (HL).

²⁰ *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278, 1294 (HL).

²¹ *Tucker (Inspector of Taxes) v Granada Motorway Services Ltd* [1979] 2 All ER 801, 805 (HL).

²² *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1977] AC 1014, 1047 (HL), *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei Gmb* [1977] 2 All ER 463, 467 (HL), and *Calvin v Carr* [1980] AC 574, 594 (PC).

²³ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 381 (HL).

²⁴ *Ashfield Municipal Council v Joyce* [1978] AC 122, 133 (PC).

²⁵ *Chaplin v Boys* [1971] AC 356, 391 (HL) and *Ratten v Regina* [1972] AC 378, 391 (PC).

life”.²⁶ On another occasion he remarked that “many difficult questions arise and will continue to arise in the infinitely varied situations in which contracts come to be breached”, and that to “plead for complete uniformity may be to cry for the moon”.²⁷ Instead, Lord Wilberforce believed that all judicially evolved doctrines ought to be “flexible and capable of new applications”, allowing for a decision as to what was most appropriate to the particular matter under consideration.²⁸ He once observed that the process of ascertaining the meaning of the rule in question “must vary according to the subject matter”.²⁹

The conflicting pressures in favour of certainty in the law and those in favour of flexibility in the interest of individual justice were apparent to Lord Wilberforce.³⁰ He believed that it was “often simpler to produce an unjust rule than a just one”, and that “[t]he question is whether, in order to produce a just, or juster, rule, too high a price has to be paid in terms of certainty”.³¹ Nevertheless, where it was possible and appropriate, Lord Wilberforce would favour the judicial formulation which accorded with the contextual realities of the case before him. He once commented:

If I am faced with the alternative of forcing commercial circles to fall in with a legal doctrine which has nothing but precedent to commend it or altering the doctrine so as to conform with what commercial experience has worked out, I know where my choice lies. The law should be responsive as well as, at times enunciatory, and good doctrine can seldom be divorced from sound practice.³²

II. INFLUENCE OF THE WILBERFORCE APPROACH ON NEW ZEALAND LAW

Lord Wilberforce’s contextual approach was influential in two key areas of New Zealand law, namely, the interpretation of legal transactions and the formulation and application of legal principles.

1. Interpretation of Legal Transactions

Lord Wilberforce’s contextual approach was evident in the interpretation of contracts. The general rule of contract was that, where an agreement was

²⁶ *Maunsell v Olins* [1975] AC 373, 389 (HL).

²⁷ *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 843-844 (HL).

²⁸ *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 693-694 (HL).

²⁹ *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 273 (HL).

³⁰ *Chaplin v Boys* [1971] AC 356, 389 (HL).

³¹ *Owners of mv Eleftherotria v Owners of mv Despina R* [1979] AC 685, 698 (HL).

³² *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, 464 (HL).

reduced to writing, it was not permissible to present extrinsic evidence to show the parties' intention or to contradict, vary or add to the terms of the contractual document.³³ However, this rule became subject to a number of exceptions.³⁴ Particularly as a result of Lord Wilberforce's speeches in two major cases, a fundamental change took place in contract law, away from a legalistic approach in favour of the contextual interpretation of contractual documents. This change was later seen to "assimilate the way in which [contractual] documents are interpreted by Judges to the common sense principles by which any serious utterance would be interpreted in ordinary life".³⁵

The first key case was the *Prenn* case.³⁶ Here, in terms of an agreement, Simmonds was entitled to acquire from Prenn an interest in the ordinary capital of a company controlled by Prenn called Radio & Television Trust Ltd ("RTT"). A necessary condition set by the agreement was that £300,000 profits had to be earned on the ordinary stock of RTT over the relevant period. A dispute arose over the definition of "profits of RTT". If these words meant the separate profits of RTT alone, as contended by Prenn, the amount over the period fell just short of the target. If the words meant the consolidated profits of the group consisting of RTT and subsidiaries, as contended by Simmonds, the amount was largely exceeded.

In the course of his speech, Lord Wilberforce referred with approval to the "intelligent realism" of a judgment of Cardozo J, that surrounding circumstances may "stamp upon a contract a popular or looser meaning".³⁷ Lord Wilberforce stressed that "the time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations".³⁸ In the case at hand, Lord Wilberforce noted that the scheme of the Companies Act, accepted business practice, the relevant accounts, and the purpose of the agreement pointed to the profits being the consolidated profits of RTT and its subsidiaries. Lord Wilberforce concluded that Prenn's construction did not "fit in any way the aim of the agreement, or correspond with commercial

³³ See eg *Edwards v O'Connor* [1991] 2 NZLR 542, 548.

³⁴ See eg *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763.

³⁵ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, 114 (HL), per Lord Hoffmann.

³⁶ *Prenn v Simmonds* (1971) 3 All ER 237 (HL).

³⁷ (1971) 3 All ER 237, 240, reference to *Unica City National Bank v Gunn* (1918) 118 NE 607.

³⁸ (1971) 3 All ER 237, 239.

good sense, nor is it, even linguistically, acceptable". He therefore found in favour of Simmonds.³⁹

The second key case was the *Reardon* case.⁴⁰ Here, a Japanese steamship company ("Sanko") organised a programme for the construction of tankers in Japanese shipyards. One of the agreements concluded was that Sanko would deliver to Reardon Smith, an English company, a motor tank vessel to be built by Osaka Shipbuilding Co Ltd ("Osaka") and numbered 354. Osaka was unable to build the vessel in its own yard and subcontracted the work to a company newly created for that purpose ("Oshima"), although Osaka provided a large part of Oshima's work force and managerial staff. The vessel to be constructed was numbered 004 in Oshima's books, but 354 in Osaka's books and in export documents. Although the vessel when built complied fully with the physical specifications in the charters and was fit for the contemplated service, Reardon Smith refused to take delivery of it. This was on the ground that the vessel did not correspond with the contractual description, since it had not been built personally by Osaka and did not bear its yard number.

Lord Wilberforce's speech began by noting that the underlying reason why Reardon Smith had refused to take delivery was that by the time the tanker was ready for delivery the market had collapsed, owing to the oil crisis of 1974, so that the charterers' interest was to escape from their contracts. Lord Wilberforce stressed that one did not have to be "confined within the four corners of the document". He noted the importance of the surrounding circumstances in aiding construction:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. ... what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were.⁴¹

Lord Wilberforce then proceeded to examine the objective setting of the contract. He noted that "regard may be had to the actual arrangements for building the vessel and numbering it before named". He pointed out that, so long as the charterers could identify the nominated vessel, they had no interest in whatever contracting or sub-contracting arrangements were made

³⁹ At 241-244.

⁴⁰ *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570 (HL).

⁴¹ At 574-575.

in the course of the building, and that if the market had risen instead of falling it would have been quite impossible for Osaka or Sanko to refuse to tender the vehicle in accordance with the charters. Lord Wilberforce concluded that this was a “simple and clear case” for dismissing the appeals of the charterers.⁴²

From the mid-1970s onwards, Lord Wilberforce’s contextual approach to contractual interpretation was regularly cited and applied in New Zealand courts where parties were in dispute as to the terms of their contract. The approach was adopted in interpreting contracts for the sale of land, the payment of royalties on a licensing agreement, and the sale of a fishing licence.⁴³ The seal of approval for the use of the approach in New Zealand was given by the Privy Council in a case concerning the terms of the sale of shares in a public company.⁴⁴ The Wilberforce approach was seen to be in line with commercial reality rather than rigid artificiality.⁴⁵

On one occasion, where a contract for the sale of a business did not contain an expressed restraint of trade clause, the High Court granted an interim injunction that the former owners cease their new business. This was on the basis that it was open to rational argument that the parties must have intended that the former owners would not compete against the purchaser of the business within the original area of operation. In support, Baragwanath J referred to Lord Wilberforce’s “factual matrix” approach, and remarked:

I am of the view that in the case of a layman’s transaction entered into by persons contracting on equal terms, the law should generally strive to give effect to the whole of their common intention, not simply as expressed but also as it may be deduced from their language considered within its factual matrix. A purposive construction is therefore to be preferred, as giving better effect to such policy. To apply a lawyer’s standard of precision to a deal done by two businessmen is likely to defeat their common intention and give an undeserved windfall to one of them.⁴⁶

The use of the Wilberforce approach was not without certain difficulties. On occasions the New Zealand Court of Appeal found that High Court judges allowed context to create uncertainty of meaning, and then used the context

⁴² At 578.

⁴³ *Herriott v Crofton Holdings Ltd* [1974] 2 NZLR 383, 387 (SC), *Volk v Hirstlens (NZ) Ltd* [1987] 1 NZLR 385, 391 (HC), and *Edwards v O’Connor* [1991] 2 NZLR 542, 548 (CA).

⁴⁴ *Chase Securities Ltd v GSH Finance Pty Ltd* [1989] 1 NZLR 481, 486-487 (PC).

⁴⁵ *Henderson v Ross* [1981] 1 NZLR 417, 429 (CA).

⁴⁶ *United Pukekohe Ltd v Grantley* [1996] 3 NZLR 762, 765 (HC).

to resolve that uncertainty in a manner which was contrary to the plain meaning of the contractual words.⁴⁷ For example, in the *Pyne Gould* case, the court had to decide whether a fax had imposed an obligation on the principal contractor merely to co-ordinate the secondary consultant's work, or a more extensive obligation as to the quality of the secondary consultant's work. The fax in question stated that the secondary consultant's input would be "completely controlled and overseen" by the principal contractor. The High Court judge found, by placing "decisive contextual importance" on surrounding circumstances and evidence, that the primary consultant's role was one of co-ordination. However, the Court of Appeal found, as a matter of plain and ordinary language, that the fax carried a clear assumption of consistent responsibility for technical aspects of the secondary consultant's work. The Court, on turning to "Lord Wilberforce's famous 'matrix'" test, that the non-textual surrounding circumstances did not much assist interpretation.⁴⁸

Nevertheless, Lord Wilberforce's contextual approach remained entrenched in New Zealand law. Indeed, it was given new vitality in 1998, when the majority of the House of Lords affirmed and extended Lord Wilberforce's approach.⁴⁹ Lord Hoffmann's landmark statement on that occasion was later adopted by the New Zealand Court of Appeal.⁵⁰ The *Yoshimoto* case, decided by this Court nearly three decades after the *Prenn* case, showed the continuing importance of the contextual approach. Here, Canterbury Golf International Ltd agreed to buy Yoshimoto's shares in a company in order to acquire land owned by that company for development. There was doubt whether resource consents could be obtained to enable profitable development, in particular, as to access over an unformed paper road. The parties' contract therefore provided that Yoshimoto had to obtain all necessary resource consents within 12 months to qualify for payment of a second instalment of the price. Consent under the Christchurch City Council's district plan for access via the paper road was eventually obtained shortly before the expiry of the time limit in the contract. However, Yoshimoto then required consent under another (proposed) district plan of

⁴⁷ *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189, 203 (CA).

⁴⁸ *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789, 800-806 (CA).

⁴⁹ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, 114. Lord Hoffmann said that the background of the contract was famously referred to by Lord Wilberforce as the "matrix of fact", and that subject to certain exceptions included "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man".

⁵⁰ *Board Park Ltd v Hutchinson* [1999] 2 NZLR 74, 81 (CA).

the Council, and this consent was not obtained until after the deadline. Canterbury Golf refused to pay Yoshimoto the second instalment of the price on the basis that consent under the proposed plan was obtained outside the time limit in the contract. The Court of Appeal held that a literal construction of the word “necessary” was untenable. The Court found that “necessary” consents meant only those consents required to enable the project “in essence” to proceed, not more technical authorities or consents relating to detail. Consent under the proposed plan was seen to be a technical requirement and not “necessary” under the contract, since it was unrealistic to think that consent to this plan would not follow endorsement already obtained. Thomas J referred to the “shift away from the black-letter approach in the interpretation of contracts” as a result of the Wilberforce speeches in *Prenn and Reardon*; and affirmed that the meaning of the contract had been identified by “examination of the contract, the commercial objective of the contract and the matrix to the contract”.⁵¹

Akin to Lord Wilberforce’s emphasis on the contextual interpretation of contracts was his approach to the legal nature of transactions to which tax was potentially attached. In the *Ramsay* case, the question arose whether tax avoidance schemes consisting of a number of separate transactions, none of which was a sham, but which were self-cancelling, had the effect of producing a loss which was allowable as a deduction for the purpose of assessing capital gains tax. In each case the scheme included a transaction designed to produce a loss to be offset against a gain previously made by the taxpayer which would otherwise be taxable, while another transaction produced a matching gain which was not liable to tax. The House of Lords held that for fiscal purposes the matter should be approached in a broad way, explained as follows in the leading speech of Lord Wilberforce:

Given that a document or transaction is genuine, the Court cannot go behind it to some supposed underlying substance. ... This is a cardinal principle but it must not be overstated or overextended. While obliging the Court to accept documents or transactions, found to be genuine, as such, it does not compel the Court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task of the Court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of

⁵¹ *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523, 531-532 (CA).

transactions, intended to operate as such, it is that series or combination which may be regarded.⁵²

The *Ramsay* approach came to be applied by New Zealand judges, even in non-tax situations, where the Court believed that if “documents were meant to operate as a series or combination, their effect may be looked at as a whole”.⁵³ The best-known case in which the *Ramsay* approach was adopted was the *Peters* case. Here the plaintiff member of Parliament alleged that the Commissioner of Inland Revenue and the Director of the Serious Fraud Office had acted unlawfully and incompetently in not prosecuting a group of companies for tax evasion. This evasion allegedly related to transactions in which a taxpayer company claimed credits against New Zealand tax for tax paid in the Cook Islands without disclosing that the Cook Islands government had simultaneously repaid almost all of the tax to another company in the same group of companies as the taxpayer. A commission of inquiry was appointed to look into the conduct of the Inland Revenue Department and the Serious Fraud Office. The commission found no tax avoidance or fraud, and no incompetence by the Inland Revenue Department or the Serious Fraud Office. The plaintiff sought judicial review.

The High Court pointed out that, under the Income Tax Act 1976, a taxpayer had to disclose all information necessary to determine the amount of a tax credit, including information to determine whether the taxpayer was entitled to any relief or repayment of foreign tax. The Court said, with reference to Lord Wilberforce’s judgment, that the Inland Revenue Department would have been entitled to look at the effect as a whole of the series of transactions and would undoubtedly have invoked the Income Tax Act if it had been informed of the combination of features of the transactions. The commission was found therefore to have erred in law in concluding that the taxpayer was not required to disclose the tax repayment.⁵⁴

2. Formulation and Application of Legal Principles

Reflecting his reality-based approach to judging, Lord Wilberforce repeatedly held that legal principles needed to be formulated and applied with due regard to practical contexts. In the *Esso Petroleum* case, Lord Wilberforce was at pains to emphasise that the “[t]he doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason”, and that there was “probably no precise, non-exhaustive test” for

⁵² *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300, 323-4 (HL).

⁵³ *Mills v Dowdall* (1983) 2 NZFLR 210 (a family transaction).

⁵⁴ *Peters v Davison* [1999] 3 NZLR 744, 756-757 (HC).

deciding when contracts did not enter into the field of restraint of trade.⁵⁵ Lord Wilberforce's emphasis on the practical working of restraint irrespective of legal form, and in the light of the circumstances of each case, was used by New Zealand judges.⁵⁶ Again, in the *Kuys* case, Lord Wilberforce delivered the advice of the Board on an appeal based on an alleged breach of a fiduciary position. He remarked that the obligation not to profit from a position of trust had "different applications in different contexts", and that "the precise scope of it must be moulded according to the nature of the relationship".⁵⁷ In a series of subsequent cases in which New Zealand judges found breach of fiduciary duty, they quoted Lord Wilberforce's judgment, variously referring to it as a "broad principle ... stated by our highest authority" and a set of "important directives" to be kept in mind.⁵⁸

One of Lord Wilberforce's most influential speeches was given in the *Boardman* case. Here a headmaster was charged with offences involving two pupils at his school. The judge directed the jurors that it was open to them to find the evidence of each boy as corroboration of the evidence of the other. The issue before the House of Lords was whether this evidence was admissible even though it tended to show that the accused had been guilty of a criminal act other than that charged. Lord Wilberforce said that "[q]uestions of this kind arise in a number of different contexts and have, correspondingly, to be resolved in different ways". He also said that "much depends in the first place upon the experience and common sense of the judge", and that "whether the judge has properly used and stated the ingredients of experience and common sense may be reviewed by the Court of Appeal".⁵⁹

The *Boardman* principles provided judges with a helpful framework while allowing them the discretion to do justice to the particular facts of each case. The flexibility of the speech also meant that it could be used in fact situations remote from the *Boardman* case, for example in a case of alleged importing of cannabis.⁶⁰ The *Boardman* speech was sometimes used by New

⁵⁵ *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 331-332 (HL).

⁵⁶ *Prudential Assurance Co Ltd v Rodrigues* [1982] 2 NZLR 54, 62 (CA).

⁵⁷ *New Zealand Netherlands Society 'Oranje' Incorporated v Kuys* [1973] 2 NZLR 163, 166 (PC).

⁵⁸ *Coleman v Myers* [1977] 2 NZLR 225, 333 (CA), and *Official Assignee of Collier v Creighton* [1993] 2 NZLR 534, 537 (CA).

⁵⁹ *Boardman v Director of Public Prosecutions* [1975] AC 421, 442-443, 444-445.

⁶⁰ *R v Te One* [1976] 2 NZLR 510, 513 (CA).

Zealand judges to support their rejection of similar fact evidence. In a case where the Court of Appeal held that the trial judge had not warned the jury of the limited and specific purpose for which similar fact evidence could be used, Richardson J quoted in support “the leading modern authority in this notoriously difficult field”.⁶¹ In a case involving five witnesses, the speech was quoted in support of rendering some of the evidence admissible but the rest inadmissible.⁶² In other cases, the speech was used (as it was in the *Boardman* case itself) to support the admission of similar fact evidence.⁶³ In the *Hsi En Feng* case, an acupuncturist was charged with counts of indecency on five women patients. The similar fact evidence showed that the accused had conducted his practice in such a way as to create and take advantage of opportunities of sexual contact, not necessary for treatment purposes, with women patients. The Court of Appeal held that it “would be contrary to the requirements of justice to deny the jury the advantage of the full picture”, and the order for separate trials was vacated. Cooke J quoted the landmark judgment of Lord Wilberforce in *Boardman*, and said that “[w]e take the same approach again in this case”.⁶⁴

Lord Wilberforce returned to the theme of the contextual application of legal concepts in two highly significant cases decided in 1981, towards the end of his judicial tenure in the House of Lords. One of these cases, the *Playa Larga* case, raised questions as to the scope of the “restrictive” theory of sovereign immunity.⁶⁵ Sovereign immunity is a doctrine of international law which applies to sovereign states. This doctrine provides that, in general, a sovereign state will not be brought before the courts of another country against the state’s will and without its consent. The exercise of outside jurisdiction is seen to be incompatible with the dignity and independence of a sovereign state. However, the late 20th century saw the rise of state-controlled enterprises, with ability to trade and to enter into contracts of private law. In response, a line of cases, decided in England in the mid-1970s, adopted a “restrictive theory” of sovereign immunity.⁶⁶ This theory meant that the commercial activities of states were no longer protected by sovereign immunity.

⁶¹ *R v Paunovic* [1982] 1 NZLR 593, 597 (CA).

⁶² *R v Geiringer* [1976] 2 NZLR 398, 402 (SC).

⁶³ *R v Katavich* [1977] 1 NZLR 436, 438 (SC).

⁶⁴ *R v Hsi En Feng* [1985] 1 NZLR 222, 225, (CA).

⁶⁵ *Playa Larga v I Congreso Del Partido* [1983] 1 AC 244 (HL).

⁶⁶ *The Philippine Admiral* [1977] AC 373 and *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* [1977] QB 529.

In the *Playa Larga* case, pursuant to a contract for the sale of sugar by a Cuban state enterprise to the plaintiff (a Chilean company), cargoes of sugar were dispatched to Chile on the vessels “Playa Larga” and “Marble Islands”. In September 1973, following a revolution in Chile, the government of Cuba decided to have no further commercial dealings with Chile. At that time the “Playa Larga”, having discharged part of her cargo, was lying in a Chilean harbour and the “Marble Islands” was still at sea. The remaining cargo from the “Playa Larga” was returned to Cuba and the cargo from the “Marble Islands” was discharged in Vietnam. The plaintiff commenced proceedings against the owners of the “Congreso”, a trading vessel registered in the name of the Cuban government and which was arrested in England. The plaintiff’s actions were in respect of the cargo on the “Playa Larga” and the “Marble Islands”. The High Court granted relief to the Cuban government on the basis of sovereign immunity.

In his speech, Lord Wilberforce conceded that in some situations it might not be easy to decide whether the act complained of was within the area of non-immune activity or was an act of sovereignty wholly outside it. This he said was because the activities of states “cannot always be compartmentalised into trading or governmental activities”. It was against this background that Lord Wilberforce outlined his approach to sovereign immunity:

[I]n considering, under the ‘restrictive’ theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.⁶⁷

In relation to “Playa Larga”, Lord Wilberforce noted that the question had to be answered on a “broad view of the facts as a whole” and not upon narrow issues as to Cuba’s possible contractual liability. He concluded from the evidence that everything done by the Cuban government in relation to “Playa Larga” was done as owners of the ship, and that the government exercised no sovereign powers and invoked no governmental authority. He noted that to hold otherwise would make trading relations as to state-owned ships impossible, and that the restrictive theory was meant to protect private traders against politically inspired breaches or wrongs. However, in relation to “Marble Islands”, Lord Wilberforce found that the acts of the Cuban

⁶⁷ At 262, 264, 267.

government remained in their nature purely governmental. Thus, whereas Lord Wilberforce would have allowed the “Playa Larga” appeal, he would have dismissed the “Marble Islands” appeal.⁶⁸

Within a year after Lord Wilberforce’s speech, a New Zealand court applied his contextualised test and its underlying rationale. This was in the *Buckingham* case, where a United States military transport ship carried private cargo, and a warrant of arrest was issued against the cargo preventing the ship from leaving port with the cargo on board. Hardie Boys J quoted Lord Wilberforce’s speech and, on “[a]pplying that test to this case”, decided on the evidence that the ship had at all relevant times been operating within the sphere of governmental or sovereign activity.⁶⁹ Over five years later, in the *Reef Shipping* case, the Wilberforce approach and supporting policy were applied where a ship owned by the Tongan government and engaged in commercial trading was arrested in New Zealand. Smellie J held that the restrictive doctrine of sovereign immunity as outlined by Lord Wilberforce applied in New Zealand, and that on the facts of the case immunity was not available.⁷⁰ The Wilberforce approach came to be affirmed by the New Zealand Court of Appeal, where Cooke P remarked that the “leading exposition of the modern principles” of the doctrine of sovereign immunity “was generally taken to be the speech of Lord Wilberforce in *Playa Larga*”.⁷¹

A significant application of the Wilberforce approach to sovereign immunity occurred in the *Winebox Inquiry* case. This case arose out of the litigation relating to the use of the Cook Islands as a tax haven and which later prompted the *Peters* case noted above. The commissioner who had been appointed to investigate the matter sought production of documents held in New Zealand by the Audit Office of New Zealand, in its capacity as auditors of the Cook Islands government account. In response, the Audit Office sought judicial review of the commissioner’s action, one of the grounds being that it infringed the sovereign immunity of the Cook Islands.

The Court of Appeal unanimously dismissed the application. All the judges of the Court who delivered judgment quoted the contextual approach of Lord Wilberforce in *Playa Larga*, and the majority of the Court held that sovereign immunity did not apply in terms of this approach. Cooke P remarked that, seen in isolation, the issuing of a tax credit was an act which

⁶⁸ At 268-272.

⁶⁹ *Buckingham v Hughes Helicopter* [1982] 2 NZLR 738, 740 (HC).

⁷⁰ *Reef Shipping Co Ltd v The ship “Fua Kavenga”* [1987] 1 NZLR 550, 569-573 (HC).

⁷¹ *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426, 428 (CA).

could only be performed by a state, and that, at least on the surface, this act would by itself attract sovereign immunity. However, he said that the commercial aspect of the Cook Islands Government dealings was so significant that there could be no doubt that the doctrine of sovereign immunity had to be excluded in relation to the whole inquiry. Henry J, in support, made the following observations, echoing the Wilberforce line:

The context in which the act of the Cook Islands Government in issuing the tax credit is to be considered must include the directly associated promissory note dealing involving the state corporation. That dealing cannot be divorced from the associated collection of “revenue”, and in my opinion lends the transaction as a whole a commercial character, with the element of tax collection becoming largely illusory. To use the words of Lord Wilberforce, when put in context the acts in question can properly be considered as falling within a commercial area of activity of a private law character.⁷²

The second leading speech that Lord Wilberforce delivered in 1981 (alongside that in *Playa Larga*) was in the *National Federation* case. Here the issue was whether an applicant for judicial review had a “sufficient interest” in the matter reviewed. In 1977, English law had adopted a simplified set of remedies for judicial review of administrative actions by statutory bodies. In terms of this system, a court could not grant leave to bring an application for judicial review unless the court considered that the applicant had a “sufficient interest” in the matter to which the application related.⁷³

In the *National Federation* case, a federation of self-employed and small businesses, representing a body of taxpayers, claimed a declaration that the Inland Revenue had acted unlawfully. The alleged unlawful action related to the so-called “Fleet Street casuals”. These were workers in the printing industry who had for some years been engaged in a process of depriving the Inland Revenue of tax due in respect of their casual earnings. The Inland Revenue, having become aware of this, made an arrangement under which future tax could be collected in the normal way, certain arrears of tax were to be paid, but investigations as to tax lost in earlier years were not to be made. The federation wished to attack this arrangement, and asserted that the Revenue had acted unlawfully in not pursuing the claim for the full amount of tax due. A Divisional Court held that the federation as mere taxpayers did not have a “sufficient interest” to make the application and refused the

⁷² *Re Winebox Inquiry: Controller and Auditor-General v Davison, KPMG Peat Marwick v Davison, Brannigan v Davison* [1996] 2 NZLR 278, 289, 308-309 (CA).

⁷³ RSC Ord 53, r 3(5).

declaration sought by the federation. The Court of Appeal, by a majority decision, allowed the federation's appeal, and the Inland Revenue appealed.

Lord Wilberforce declared that “the question of sufficient interest can not, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context”.⁷⁴ He pointed out that, not only was there no provision in the relevant legislation on which the appellant's right could be claimed, but to allow it would undermine the whole taxation system. He decided, on “the evidence as a whole”, that a court had to conclude that the Inland Revenue had acted in this matter genuinely in the care and management of the taxes under the powers entrusted to it. He said that the court should not intervene in this matter at the instance of a taxpayer.⁷⁵

Within a short time, the *National Federation* approach was adopted by the New Zealand Court of Appeal and became an established part of New Zealand law. In the *Wall* case there was a challenge to the authorisation of an abortion, and the challenger was not one of the statutory participants in the authorisation procedure. The Court referred to the “important recent decision of the House of Lords”, where Lord Wilberforce had remarked that the “vitaly important decision of standing is a mixed question of fact and law”, with emphasis on the relevant statutory scheme. The Court decided that no legal statutory right in the unborn child could be spelled out of the Act under consideration, so as to allow standing.⁷⁶ A different result was reached in the *Budget Rent a Car* case, where two exclusive licences were granted by Auckland Airport Authority for rental car concessions, and judicial review of the Authority's decision was sought by a third rental car operator wishing to apply for a similar concession. Cooke J referred to the *National Federation* approach with its emphasis “on the totality of the facts”, and said that “[a]ny tendency to consider the issue of standing in isolation from the nature of the complaint is resisted”. He concluded that, in the present case, the applicant had a “real and obvious interest in the effect of the existing licences”.⁷⁷

The telling impact of the *National Federation* approach was revealed in the *Consumers Co-operative* case. A Consumers Co-operative, which carried on a business in foodstuffs and related lines, operated two substantial supermarkets in a business centre. The City Council owned a substantial

⁷⁴ *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 630 (HL).

⁷⁵ At 630, 633, 635.

⁷⁶ *Wall v Livingston* [1982] 1 NZLR 734, 739-740 (CA).

⁷⁷ *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414, 419 (CA).

block of land adjacent to land owned by the Co-operative, and proposed to sell this land to Foodtown Supermarkets. The Co-operative claimed that the Council had not complied with the Public Works Act, and applied for an injunction restraining the Council from proceeding with the sale. In the High Court the judge refused the application for an interim injunction on the ground that the Co-operative did not have *locus standi*. The Co-operative appealed. The Court of Appeal allowed the appeal and granted an interlocutory injunction. McMullin J stated that “[t]echnical restrictions on *locus standi* in the interim stages of proceedings should not as a rule be allowed to prevent litigants bringing such matters to the attention of the Courts and, where a case is made out, having them stopped”. In support, he quoted at length the contextual approach of Lord Wilberforce in the *National Federation* case.⁷⁸

III. CONCLUSION

The valuable message of Lord Wilberforce, heeded by New Zealand judges, is that legal issues need to be adjudicated upon in the light of the individual contextual realities of the case at hand. Over the past three decades, the judgments of Lord Wilberforce have been used by New Zealand judges in a range of cases. These have involved, *inter alia*, the assessment of contracts and taxable transactions, and the application of principles of evidence, private international law and judicial review. The effect of the Wilberforce influence has been to focus judicial attention, in reaching decisions and applying legal principles, on achieving substantial merits and justice in specific contexts, at the expense of artificial, technical or abstract considerations. Repeatedly, New Zealand judges have relied upon Lord Wilberforce’s speeches to give decisions in tune with the parties’ intentions, practical realities and the facts as a whole.

The criticism often made of a contextual approach is that this undermines legal certainty and predictability. It is true that the use of the Wilberforce approach in New Zealand has produced a variety of outcomes in individual cases. As has been seen above, the factual matrix test was sometimes used to supplant clear contractual rights. But the hope of legal certainty in the sense of predictable outcomes in every case is an illusory one and carries the potential for injustice. Lord Wilberforce’s legacy to New Zealand law lay in

⁷⁸ *Consumers Co-operative Society (Manawatu) Ltd v Palmerston North City Council* [1984] 1 NZLR 1, 5, 6 (CA). For a more recent example of the influence of Lord Wilberforce’s speech in *National Federation*, see *Quarantine Waste (NZ) Ltd v Waste Resources Ltd* [1994] NZRMA 529.

flexible principles which took account of relevant circumstances and were designed to achieve appropriate and just results. He once observed:

To say that this [approach] produces a measure of uncertainty may be true, but this is an uncertainty which arises in the nature of things from the variety of human experience. To resolve it is part of the normal process of adjudication. To attempt to confine this within a rigid formula would be likely to produce injustices which the courts and arbitrators would have to put themselves to much trouble to avoid.⁷⁹

⁷⁹ *Owners of mv Eleftherotria v Owners of mv Despina R* [1979] AC 685, 698-699 (HL).

THE PRIVY COUNCIL AND NATIVE TITLE: A REQUIEM FOR *WI PARATA*?

BY JOHN WILLIAM TATE *

The New Zealand Supreme Court's decision in *Wi Parata v Bishop of Wellington*¹ was nothing less than a watershed in New Zealand legal history. And this for reasons other than those usually thought. Chief Justice Prendergast's *Wi Parata* judgment is infamous in New Zealand judicial annals for its dismissal of the Treaty as a "simple nullity".² Paul McHugh has referred to this aspect of the judgment as "notorious", and the case is widely remembered for this reason.³ However, far from its statements on the Treaty being of overriding importance, it is the precedent which *Wi Parata* established for native title in New Zealand which was to have the most widespread legal ramifications over the next three decades.⁴ Subsequent

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¹ (1878) 2 NZ Jur (NS) SC 72.

² As Prendergast CJ notoriously put it: "The existence of the pact known as the 'Treaty of Waitangi', entered into by Captain Hobson on the part of Her Majesty with certain natives at the Bay of Islands, and adhered to by some other natives of the Northern Island, is perfectly consistent with what has been stated. So far indeed as that instrument purported to cede the sovereignty – a matter with which we are not here directly concerned – *it must be regarded as a simple nullity*. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist. So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case" (*Wi Parata v Bishop of Wellington*, supra note 1, at 78, emphasis added).

³ See McHugh, Paul *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi* (1991) 113.

⁴ The reason why I claim that *Wi Parata* was far more influential on subsequent judicial developments in terms of its ruling on native title than its ruling on the Treaty is because many New Zealand judges did not follow Prendergast CJ in his stronger claim concerning the Treaty above. Prendergast CJ's dismissal of the Treaty as a "simple nullity" was not simply an assertion of the conventional rule that the Courts could not take cognizance of the Treaty unless embodied in statute. It was a much stronger claim that the Treaty itself was an illegitimate instrument for the transfer of sovereignty between Maori and the Crown. Prendergast CJ believed that no such transfer took place

New Zealand Courts clung to this precedent with great tenacity, even to the point of an open breach with the Privy Council.

This article focuses on the two Privy Council decisions which, more than any other, overturned much of the *Wi Parata* precedent on native title. These were the judgments of *Nireaha Tamaki v Baker*,⁵ delivered in 1900-01, and *Wallis v Solicitor-General*,⁶ delivered in 1903. The article also focuses on the response of New Zealand's highest Court, the Court of Appeal, to these Privy Council departures. This response took the highly unprecedented form of a formal protest against the Privy Council. This protest ostensibly concerned the provocative use of language adopted by the Privy Council in its *Wallis* judgment where, at one point, it suggested that the New Zealand Court of Appeal lacked sufficient independence from the New Zealand executive authorities.⁷ But, as we shall see, the underlying issue motivating the Court of Appeal's animus towards the Privy Council was the extent to which the Privy Council had departed from the *Wi Parata* precedent and, in the opinion of these New Zealand judges, endangered the stability and security of land settlement in New Zealand as a result.

What these conflicts suggest is that, in the late 19th and early parts of the 20th centuries, native title was not some arcane legal doctrine of little

under the Treaty because Maori lacked the capacity to claim sovereignty over their own islands, with the result that the Treaty gave rise to no obligations on the part of the Crown towards Maori, these arising solely from a *jure gentium* basis independent of the Treaty (see *Wi Parata v Bishop of Wellington*, supra note 1, at 77, and Prendergast CJ's statement at supra note 2). Yet subsequent judicial authorities in New Zealand did not wholly follow Prendergast CJ in this view. While they upheld the orthodox position that the Treaty had to be embodied in statute before its terms could be considered legally binding in the Courts, nevertheless they refused to view the Treaty as a "simple nullity", giving rise to no obligations at all. Rather, they recognised the moral obligations which the Treaty imposed on the Crown, and so, by implication, presumably viewed the Treaty as a legitimate instrument for the transfer of sovereignty. See *Mangakahia v New Zealand Timber Co* (1881-82) 2 NZLR 345, 350, per Gillies J; *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655, 662, per Stout CJ; "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, 732, per Stout CJ; *Tamihana Korokai v Solicitor-General*, (1912) 32 NZLR 321, 343, per Stout CJ.

⁵ (1900-01) [1840-1932] NZPCC 371.

⁶ [1903] AC 173. Note that, for the sake of brevity, the term "Privy Council" will be used throughout this article to refer to the Judicial Committee of the Privy Council.

⁷ See "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", supra note 4, at 730, per Stout CJ; at 747, 755-56 per Williams J; at 757, per Edwards J.

material interest to New Zealand settler society. On the contrary, it struck at the very heart of settler interests. This explains the extraordinary lengths to which the New Zealand Court of Appeal was willing to go in its defence of the *Wi Parata* precedent – a precedent which, it believed, guaranteed the security of land titles in New Zealand from native title challenge.

I. THE LEGACY OF *WI PARATA*

Wi Parata guaranteed the security of land titles in New Zealand primarily because it insulated the Crown from all unwanted native title claims. All land held by settlers in New Zealand was held by some form of grant issued by the Crown.⁸ As a prelude to the issue of these grants, the native title to the land covered by the grant had to be lawfully extinguished by the Crown. This was recognised by the New Zealand Supreme Court in *The Queen v Symonds*, in 1847, and the role of the Crown in extinguishing that title was exclusive.⁹ However, since the 1860s, there had been in existence a statutory body known as the Native Land Court, whose purpose was to investigate the native titles of Maori and issue a freehold certificate to all native titleholders for the land that they claimed.¹⁰ Maori could have their native title claims investigated in the Native Land Court either by applying directly to the Court or having their case referred to that body by a municipal Court.¹¹ Under the legislation of the time, the decisions of the Native Land Court concerning native title were “conclusive” for the municipal Courts, and had the same legal effect as a jury verdict in the Supreme Court.¹²

It was soon realized by settlers and the Crown that if Maori could claim that existing Crown grants, already issued to settlers by the Crown, were unlawful, on the ground that the native title had not been extinguished as a preliminary to the issue of the grant, the stability and security of the existing

⁸ The Crown held ultimate or radical title over the land in New Zealand, and it was on this basis that it issued grants of tenure to settlers – see *The Queen v Symonds* (1847) *N.Z.P.C.C.* (SC), 387, 388-89, 391-92, per Chapman J. On the radical title of the Crown as the foundation for its grant-making power, see *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 47-48, 50-51, per Brennan J.

⁹ See *The Queen v Symonds*, supra note 8, at 389-90, per Chapman J; *ibid.*, at 393-95, per Martin CJ.

¹⁰ See Native Rights Act 1865, 29 Victoriae, No. 11, s 5; Native Lands Act, 29 Victoriae, No. 71, s 5, 23.

¹¹ See Native Rights Act 1865, supra note 10, s 5; Native Lands Act 1865, supra note 10, s 21.

¹² See Native Rights Act 1865, supra note 10, s 5.

system of land tenure in New Zealand would be in jeopardy.¹³ Any Crown grant could then be challenged in the Courts and its status determined, not by the Crown, but by an independent body, the Native Land Court. The security of tenure which New Zealand settler society had always assumed they possessed over their lands would therefore be thrown into doubt.

It is clear that Prendergast CJ, and his brother judge, Richmond J, of the New Zealand Supreme Court, were fully seized of these concerns when they came to decide the *Wi Parata* case. In particular, they recognised that if the municipal Courts were obliged under statute to refer any native title case involving the Crown to the Native Land Court for independent determination, the status of existing Crown grants would no longer remain within the discretion of the Crown. The Crown would thereby lose control over the land settlement process, because it would no longer be able to guarantee the lawful validity of its own grants, with the result that all existing New Zealand land tenures deriving from the Crown would be in potential jeopardy. Perhaps this explains the “alarm” with which Prendergast CJ greeted this possibility. As he stated:

[I]t may be thought that the Native Rights Act, 1865, has made a difference on this subject, and by giving cognizance to the Supreme Court, in a very peculiar way, of Maori rights to land, has enabled persons of the native race to call in question any Crown title in this Court. This would be indeed a *most alarming consequence*; but if it be the law, we are bound so to hold.¹⁴

Then referring to section 5 of the Native Rights Act 1865 he stated:

[A]ll questions of native title are by the 5th section relegated to a new and peculiar jurisdiction, the Native Lands Court, supposed to be specially qualified for dealing with this subject. To that tribunal the Supreme Court is bound to remit all such questions, and the verdict or judgment of the Native Lands Court is conclusive. If, therefore, the contention of the plaintiff in the present case be correct, the Native Lands Court, guided only by ‘the Ancient Custom and Usage of the Maori people, so

¹³ Such concerns were expressed on behalf of the Crown as late as 1912, when the Solicitor-General stated the Crown’s position in the case of *Tamihana Korokai v Solicitor-General*: “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” (*Tamihana Korokai v Solicitor-General*, supra note 4, at 331-32, per Solicitor-General, emphasis added).

¹⁴ *Wi Parata v Bishop of Wellington*, supra note 1, at 79, per Prendergast CJ (emphasis added).

far as the same can be ascertained', is constituted the sole and unappealable judge of the validity of every title in the country.¹⁵

Prendergast CJ referred to this possibility as a "startling conclusion".¹⁶ During the course of argument with counsel, his brother judge, Richmond J, went even further, expressing his horror that the Courts could be required to refer to the Native Land Court all questions involving native title and the Crown. He referred to this possibility as "monstrous", and indeed, even intimated that he would be prepared to defy the will of Parliament, as expressed in statute, in his determination to resist such a possibility:

The Native Rights Act, 1865, declares this Court shall take cognizance of Maori custom, but the Legislature requires us to send any question of Maori title to the Native Lands Court. It is as much as to say, it is a jurisdiction we are incapable of exercising.... It is quite plain that we have no power to refer to the Native Lands Court the question whether the native title has been effectually extinguished by her Majesty, and it would be a *monstrous* thing if we could be required to do it.¹⁷

Yet the conclusions which the Supreme Court arrived at in *Wi Parata* avoided any such possibilities, unnerving as they were to the 19th century judicial mind, by providing assurance for the stability and security of land tenure in New Zealand. It did so by insulating the Crown from all unwanted native title claims, in the following manner.

In the first place, the Supreme Court had to deal with the threatened removal of native title matters from the discretion of the Crown by the apparent requirement, under the Native Rights Act, that all native title claims be determined by an independent statutory body, the Native Land Court. In delivering his judgment in *Wi Parata*, Prendergast CJ avoided such a possibility by ruling that the Crown was not required by the Native Rights Act 1865 to submit to the judgment of the Native Land Court. He did so on the ground that, because the Crown was not directly referred to in the statute, it could not be assumed that Parliament meant to bind the Crown to the statute or to the jurisdiction of the Native Land Court to which the statute referred.¹⁸

¹⁵ Ibid, at 80, per Prendergast CJ.

¹⁶ Ibid.

¹⁷ Ibid, at 75, per Richmond J (emphasis added).

¹⁸ As Prendergast CJ stated: "The Crown, not being named in the statute, is clearly not bound by it..." (ibid, at 80, per Prendergast CJ). Indeed, some 25 years later, Prendergast CJ's successor as Chief Justice, Stout CJ, affirmed Prendergast CJ's ruling in this respect. In his *Hohepa Wi Neera* judgment, Stout CJ stated: "I may further point

Indeed, far from accepting that the Crown was subject to the jurisdiction of either statutory or municipal courts on the question of native title, Prendergast CJ referred to some subsequent Native Land Acts which, he claimed, provided evidence that Parliament had allowed the Crown the right unilaterally and conclusively to declare that the native title to any piece of land had been lawfully extinguished, thus terminating any proceedings within the courts.¹⁹ In fact, he argued that such legislation merely affirmed an existing prerogative right of the Crown to make such declarations, in a manner binding on the courts.²⁰ Prendergast CJ concluded that a grant issued

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'..." (*Hohepa Wi Neera v Bishop of Wellington*, supra note 4, at 667, per Stout CJ). However, some years later, in *Tamihana Korokai v Solicitor-General*, a statement by one Court of Appeal judge, Chapman J, implied that the absence of a reference to the Crown in a statute did not necessarily mean that Parliament did not intend to bind the Crown. Rather, if the Act provided rights *against* the Crown, then, Chapman J implied, the Courts ought to assume that the Crown was bound by it, since any judgment to the contrary would be repugnant to those rights. As he put it: "Throughout the greater part of the history of New Zealand there have been three separate sets of statutes relating to the alienation of the lands and the privileges of the Crown – namely, the Land Acts, or, as they were formerly called, the Waste Land Acts; the Mining Acts, formerly Goldfields Acts; and the Native Land Acts. None of them are expressly declared to be binding on the Crown; all of them are from their very nature framed to create rights adverse to those of the Crown. Formerly some of these Acts contained express declarations that they did not affect the rights of the Crown.....These declarations were invariably regarded as repugnant to so much of the Acts as created titles against the Crown" (*Tamihana Korokai v Solicitor-General*, supra note 4, per Chapman J, at 355).

¹⁹ As Prendergast CJ stated: "This conclusion is strongly confirmed by remarkable provisions in the Native Lands Act of 1867 and 1873. By section 10 of the former Act, a copy of the New Zealand Gazette, notifying the extinction of the native title over any land therein comprised, was made conclusive proof of that fact in the Native Lands Court. This provision is re-enacted by the 105th section of the Native Lands Act, 1873, and is extended in its effect to all Courts....[W]e cite these provisions as plain intimations on the part of the Colonial Legislature that questions respecting the extinction of the native title are not to be raised either here or in the Native Lands Court in opposition to the Crown, or to the prejudice of its grantees" (*Wi Parata v Bishop of Wellington*, at 80, supra note 1, per Prendergast CJ).

²⁰ As Prendergast CJ stated, referring to the Native Lands Acts of 1867 and 1873: "In our judgment these enactments introduce no new principles, but merely provide a convenient mode of exercising an indubitable prerogative of the Crown" (*ibid*, at 80, per

by the Crown is itself sufficient evidence of such a binding declaration by the Crown that the native title preceding the grant has been lawfully extinguished.²¹ In this way, Prendergast CJ provided for the land security which New Zealand settler society was looking for, by ruling that the very grants through which these settlers held their land from the Crown would, in themselves, be a guarantee of their own lawful validity. Existing crown grants could not, therefore, be subject to native title challenge.

Yet Prendergast CJ went even further and insisted that, even in the absence of a Crown grant, the Crown was still entitled to “declare” native title to be extinguished on any piece of land, thereby terminating proceedings within the Courts. He did so by insisting that the Crown’s obligations and responsibilities to Maori concerning native title were “in the nature of a treaty obligation”, and therefore “... constitute an extraordinary branch of the prerogative, wherein the sovereign represents the entire body-politic, and not, as in the case of ordinary prerogative, merely the Supreme Executive power...”.²² Therefore any declarations by the Crown in relation to native title were to be regarded as “acts of State”, and so “are not examinable by any Court”.²³ In this respect, Prendergast CJ ruled, the Crown was the “sole arbiter of its own justice” on native title, because there was no basis upon which the Courts could interfere with the Crown’s declarations on such matters. As Prendergast CJ put it: “...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”.²⁴

In other words, by insulating the Crown from the demands of the Native Rights Act 1865, by insisting that native title matters involving the Crown fell within the latter’s prerogative power and so were outside the jurisdiction of the Courts, and therefore in allowing the Crown, on the basis of this

Prendergast CJ). For the origins of this prerogative in Prendergast CJ’s judgment, see *ibid*, at 79, per Prendergast CJ.

²¹ As Prendergast CJ put it: “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” (*ibid*, p. 78).

²² *Ibid*, at 79, per Prendergast CJ.

²³ *Ibid*, at 79, per Prendergast CJ. For a criticism of Prendergast CJ’s conclusion that it was possible for the Crown to claim acts of state against its own Maori subjects, see McHugh, “Aboriginal Title in New Zealand Courts” (1984) 2 *Canterbury Law Review* 247. See also McHugh, *The Maori Magna Carta*, *supra* note 3, at 114.

²⁴ *Wi Parata v Bishop of Wellington*, *supra* note 1, at 79, per Prendergast CJ (emphasis added). On the Crown as the “sole arbiter of its own justice”, see *ibid*, at 78, per Prendergast CJ.

power, to “declare” the native title to any land extinguished, in a manner binding on the Courts, the *Wi Parata* judgment ensured that the land settlement process in New Zealand remained entirely within the control of the Crown, rather than in the hands of independent bodies like municipal or statutory Courts. It was in this way that Prendergast CJ managed to overcome the concerns animating him and Richmond J, but also no doubt New Zealand settler society, concerning the capacity of Maori to challenge existing Crown titles and the possibility that the outcome of such challenges might be outside the control of the Crown. This concern was no doubt heightened by the fact that two New Zealand Court judgments prior to *Wi Parata* had in fact upheld the status of native title at common law, and so presumably its enforceability against the Crown within the municipal Courts.²⁵

However, despite the fact that the Supreme Court’s *Wi Parata* judgment on native title was at odds with existing New Zealand precedent, subsequent

²⁵ It was the judgment of Chapman J which, in *The Queen v Symonds*, most fully confirmed this common law recognition of native title, although Martin CJ fully concurred with him on the matter (see *The Queen v Symonds*, supra note 8, at 393, per Martin CJ). 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, per Chapman J). On Chapman J’s reliance on wider authorities, including English common law, in support of this recognition of native title, see ibid, at 388, per Chapman J. Similarly, some 25 years later, in *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” (*In re ‘The Landon and Whitaker Claims Act 1871’* (1872) 2 NZCA 49). Given that these earlier judgments upheld precedents contrary to his own ruling, one of them delivered by a superior Court, it is not surprising that Prendergast CJ’s references to them in *Wi Parata* are oblique, and failed to confront their contrary positions head-on. Hence his single reference to *Landon and Whitaker Claims* involved a point of law unrelated to native title (see *Wi Parata v Bishop of Wellington*, supra note 1, at 79, per Prendergast CJ); while his two references to *The Queen v Symonds* either asserted that it gave rise to a precedent which conformed to his own ruling (ibid, at 78); or that it was mistaken in its interpretation and citation of one of the early American precedents on native title (ibid, at 80-81).

New Zealand judgments largely affirmed *Wi Parata*.²⁶ Indeed, the extent to which these judgments perceived *Wi Parata* as providing stability and security for land settlement in New Zealand was directly testified to by Richmond J in 1894 when, in delivering a judgment of the Court of Appeal (which at that time still included Sir James Prendergast as Chief Justice) he said:

The plaintiff comes here, therefore, on a pure Maori title, and the 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. There can be no known rule of law by which the validity of dealings in the name and under the authority of the Sovereign with the Native tribes of this country for the extinction of their territorial rights can be tested. Such transactions began with the settlement of these Islands; so that Native custom is inapplicable to them. The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice. *The security of all titles in the country depends on the maintenance of this principle.*²⁷

II. NIREAHA TAMAKI V BAKER

It was the appeal which the Privy Council heard from this 1894 judgment which heralded the first significant departure from the *Wi Parata* precedent. The appellant from the 1894 case claimed title to a particular piece of land in the Mangatainoko Block. He did so on two grounds. First, he claimed that the land had been the subject of an order by the Native Land Court in 1871,

²⁶ Although there were some New Zealand judgments which departed from the *Wi Parata* precedent, even prior to the Privy Council Council judgments in 1901 and 1903, nevertheless these departures were minor and did not affect the main line of precedent on native title in New Zealand in the latter part of the nineteenth century which upheld the *Wi Parata* precedent. For a discussion of those minor New Zealand judgments which did depart from *Wi Parata*, see Tate, "Pre-*Wi Parata*: Early Native Title Cases in New Zealand" (2003) 11 Waikato Law Review 112.

²⁷ *Nireaha Tamaki v Baker* (1894) 12 NZLR 483, 488, per Richmond J, emphasis added. I have argued elsewhere that Prendergast CJ's various conclusions regarding native title in *Wi Parata* are not consistent with each other, and the judgment as a whole is contradictory (see Tate, "Pre-*Wi Parata*: Early Native Title Cases in New Zealand", supra note 26, at 121-25). However, in the present context, what is of concern is how subsequent authorities interpreted *Wi Parata*, and they did not seem to perceive such contradictions, or at least did not openly express any reservations they had in this regard (see the discussion of these subsequent authorities in *ibid*, at 125-30).

whereby the certificate for the land was to be issued to the appellant once a proper survey of the land had been carried out. That survey was not carried out, and so the certificate had not been issued.²⁸ Secondly, he claimed that the native title on the land had never been extinguished and so the land still belonged to its original owners.²⁹

The first ground had been rejected by the Court of Appeal ruling in 1894, which held that, because no survey had been carried out and no certificate issued, the plaintiff could base his action only on his second claim, that of a “pure Maori title”.³⁰ Similarly, the Privy Council ruled that the first ground could not constitute a claim to title, but was only evidence of that title, and so their Lordships too focused on the second claim concerning native title.³¹ It was on the basis of a native title claim, therefore, that the appellant attempted to prevent the respondent, the Commissioner of Crown Lands for the Wellington District, from selling the land in question as Crown land or from advertising such a sale.³² The respondent, on the other hand, argued that the Courts had no jurisdiction to investigate the matter, citing the *Wi Parata* precedent that native title matters are solely the concern of the Crown.³³ Consequently, the question concerning the jurisdiction of the Courts over native title matters, inherited from the *Wi Parata* judgment, were very much at the centre of this case.³⁴

²⁸ See *Nireaha Tamaki v Baker* (1894), supra note 27, at 483, 484; *Nireaha Tamaki v Baker* (1900-01), supra note 5, at 378.

²⁹ See *Nireaha Tamaki v Baker* (1894), supra note 27, at 487-88; *Nireaha Tamaki v Baker* (1900-01), supra note 5, at 378.

³⁰ See *Nireaha Tamaki v Baker* (1894), supra note 27, at 488.

³¹ See *Nireaha Tamaki v Baker* (1900-01), supra note 5, at 378.

³² See *Nireaha Tamaki v Baker* (1894), supra note 27, at 483, 484-85; *Nireaha Tamaki v Baker* (1900-01), supra note 5, at 378-79.

³³ Indeed, in the 1894 case, the counsel for the defendant (now respondent) couched the argument which he presented to the Court of Appeal very much in terms of the *Wi Parata* precedent, as follows: “The Court has no jurisdiction to entertain the suit. The acts and proceedings of the Crown are conclusive that the Native title has been extinguished: *Wi Parata v The Bishop of Wellington*. The declaration gazetted under section 136 of ‘The Land Act, 1892’, is alone a sufficient exercise of the Crown’s prerogative in this respect” (*Nireaha Tamaki v Baker* (1894), supra note 27, at 486-87, per Gully for the defendant).

³⁴ Indeed, the Privy Council argued that this question displaced all others: “Their Lordships, however, have not now to deal with the merits of the case, or to say whether the appellant has or ever had any title to the pieces of land in question, or whether such title (if any) has or has not been duly extinguished, or to express any opinion on the regularity or otherwise of the respondent’s proceedings. The respondent has pleaded

The final ruling of the Privy Council was a shock to New Zealand judicial authorities. In the first place, as we shall see, the Privy Council reversed the ruling of the Court of Appeal, holding that, in this case, the Courts *did* have jurisdiction to investigate native title. In the second place, it challenged several aspects of the *Wi Parata* precedent. For instance, it overturned the ruling of Prendergast CJ that Maori lacked native title altogether.³⁵ Lord

amongst other pleas that the Court has no jurisdiction in this proceeding to inquire into the validity of the vesting or.....non-vesting of the said lands or any part thereof in the Crown. An order was made for the trial of four preliminary issues of law of which two only (the 3rd and 4th) were dealt with in the order now under appeal. They are in these terms: - 3. Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding? 4. Has the Court jurisdiction to inquire whether as a matter of fact the land in dispute has been ceded by the Native owners to the Crown? Both questions were answered by the Court of Appeal in the negative” (*Nireaha Tamaki v Baker* (1900-01), supra note 5, at 379). As we saw, the Court of Appeal answered both questions in the negative by citing *Wi Parata v Bishop of Wellington* as the relevant authority in this matter (see supra note 27).

³⁵ Prendergast CJ had argued that Maori lacked native title because they lacked the customary laws on which such native title was based. Customary law defines the content of the native title which English common law is capable of recognizing. As *Butterworths Australian Legal Dictionary* states: “The content and nature of the rights that may be enjoyed by the owners of native title is determined by the traditional laws and customs observed by those owners” (Nygh, Peter and Butt, Peter (ed) *Butterworths Australian Legal Dictionary* (1997) 775). Within his *Wi Parata* judgment, Prendergast CJ denied the very existence of such traditional laws and customs among Maori tribes. Faced with a section of the *Native Rights Act 1865* which referred to the “Ancient Custom and Usage of the Maori People”, Prendergast CJ responded that “.....a phrase in a statute cannot call what is non-existent into being. As we have shown, the proceedings of the British Government and the legislation of the colony have at all times been practically based on the contrary supposition, *that no such body of law existed*; and herein have been in entire accordance with good sense and indubitable facts” (*Wi Parata v Bishop of Wellington*, supra note 1, at 79, per Prendergast CJ, emphasis added). He argued that the perceived absence of such customary law was not due to some oversight on the part of a culturally insensitive imperial power, but rather due to its non-existence in fact. As he put it: “Had any body of law or custom, capable of being understood and administered by the Courts of a civilised country, been known to exist, the British Government would surely have provided for its recognition, since nothing could exceed the anxiety displayed to infringe no just right of the aborigines” (ibid, at 77-78, per Prendergast CJ). Prendergast CJ’s belief that there was an absence of customary law within traditional Maori society was informed by his wider opinion that New Zealand, prior to its acquisition by the Crown, was “....a territory thinly peopled by barbarians without any form of law or civil government” (ibid, at 77, per Prendergast CJ). He

Davey, delivering the judgment of the Privy Council, responded to this aspect of Prendergast CJ's judgment as follows:

[I]t was said in the case of *Wi Parata v Bishop of Wellington*, which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of law can take cognizance. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of ss. 3 and 4 of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that 'a phrase in a statute cannot call what is non-existent into being'... [O]ne is rather at a loss to know what is meant by such expressions 'Native title', 'Native lands', 'owners', and 'proprietors', or the careful provision against sale of Crown lands until the Native title has been extinguished if there be no such title cognizable by the law and no title therefore to be extinguished.³⁶

Consequently, on the basis of the wording of the Native Rights Act 1865, with its explicit reference to native title, the Privy Council ruled that there did exist statutory rights to native title in New Zealand, enforceable against the Crown, and Maori were entitled to bring claims based upon such rights before the Courts:

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 section 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 Court specially constituted for the purpose. The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction and effect of the Native Rights Act.... 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

therefore concluded that "...there existed amongst the natives no regular system of territorial rights nor any definite ideas of property in land..." (ibid). In other words, Prendergast CJ's denial of the existence of customary law within traditional Maori society forms the basis of his denial of native title. Needless to say, Prendergast CJ's denial of the existence of native title is at odds with his recognition of that title elsewhere in this judgment, where he subordinates it to the prerogative powers of the Crown. For a discussion of this and other contradictions in the *Wi Parata* judgment, see Tate, "Pre-Wi Parata: Early Native Title Cases in New Zealand", supra note 26, at 121-25.

³⁶ *Nireaha Tamaki v Baker* (1900-01), supra note 5, at 382-83.

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.³⁷

This recognition of a statutory right to bring native title claims against the Crown within the municipal Courts was clearly at odds with Prendergast CJ's view, which, as we saw, went to great lengths precisely to avoid this possibility. Yet, ironically, the Privy Council arrived at this position at odds with *Wi Parata* by reserving its opinion on one of the central assumptions of the *Wi Parata* judgment itself – the existence of the Crown's prerogative over native title. As we have seen, it was precisely this aspect of the *Wi Parata* judgment which had been upheld by the Court of Appeal in 1894, when the Court insisted that “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”.³⁸ However the Privy Council was quite clear that the reason it could arrive at its conclusion above concerning statutory rights to native title, and their enforceability in the courts, was because it did not raise the question of the prerogative.³⁹ For instance, it held that the respondent in the case, the Commissioner for Crown Lands, was exercising his authority under statute rather than under the prerogative power of the Crown.⁴⁰ In so far as

³⁷ Ibid, at 382-83.

³⁸ See supra note 27. Although Prendergast CJ held in *Wi Parata* that this declaratory power of the Crown was recognised in two statutory Land Acts, he argued that these Acts merely recognised “an indubitable prerogative of the Crown” in this regard (see supra note 20). Consequently it was assumed by the New Zealand judicial authorities that such declarations by the Crown were an expression of its prerogative power over native title, and were thereby sufficient to oust the jurisdiction of the municipal Courts.

³⁹ Hence, in delivering its order to the lower Court, the Privy Council explicitly stated that its ruling is premised on the assumption that the status of the Crown prerogative has not been at issue in the present case: “Their Lordships are therefore of opinion that.... *it not appearing that the estate and interest of the Crown in the subject-matter of this suit subject to such Native titles (if any) as have not been extinguished in accordance with law is being attacked by this proceeding*, the Court has jurisdiction to inquire whether as a matter of fact the land in dispute has been ceded by the Native owners to the Crown in accordance with law....” (*Nireaha Tamaki v Baker* (1900-01), supra note 5, at 385, emphasis added).

⁴⁰ As Lord Davey put it for the Privy Council: “Their Lordships think that the learned Judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown or acting under the authority of the Crown for the purposes of this action. The object of the action is to

he was exercising his power under statute, his actions fell within the jurisdiction of the courts, and the courts could thereby deliver a judgment enforceable against the Crown. However, the Privy Council reserved judgment on whether the Land Commissioner's actions would still fall within their jurisdiction if he was exercising his authority directly under the Crown's prerogative power over native title.⁴¹ Admittedly, the Privy Council raised doubt as to whether this prerogative power still existed, expressing their view that all native title matters would presumably fall within the realm of statute by now.⁴² Nevertheless, they did not categorically exclude the continued existence of this prerogative power, or its capacity to prevent Maori claimants from bringing native title claims before the courts, and merely held that it did not arise in the present case:

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.⁴³

restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority the conditions of which (it is alleged) have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes and is confined within the four corners of the statutes. The Governor in notifying that the lands were rural land open for sale was acting and stated himself to be acting in pursuance of s. 136 of the Land Act, 1892, and the respondent in his notice of sale purports to sell in terms of s. 137 of the same Act. If the land were not within the powers of those sections (as is alleged by the appellant), the respondent had no power to sell the lands, and his threat to do so was an unauthorized invasion of the appellant's alleged rights" (*Nireaha Tamaki v Baker* (1900-01), supra note 5, at 380-81).

⁴¹ As Lord Davey put it for the Privy Council: "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).

⁴² 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, emphasis added).

⁴³ *Ibid*, at 383.

Finally, although the Privy Council criticized the wider *dicta* of the Supreme Court in *Wi Parata*, not least Prendergast CJ's claim that native title does not exist, it did uphold the strict conclusions of that judgment decided on the facts of the case. This included that aspect of *Wi Parata* which effectively declared that Crown grants were sufficient evidence of their own lawful validity regarding the prior extinguishment of 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.⁴⁴

III. FUDGING THE ISSUE?

Thus, the Privy Council's judgment in *Nireaha Tamaki v Baker* was only a partial departure from *Wi Parata*. Although the Privy Council clearly affirmed that native title existed in New Zealand (a point at times denied by Prendergast CJ in *Wi Parata*⁴⁵) and that it was cognisable within the courts and enforceable against the Crown if the Crown's actions fell within the limit of statute, nevertheless it upheld the *Wi Parata* ruling concerning the lawful validity of existing Crown grants, and refused to challenge the other ruling, central to that judgment, that the Crown had prerogative power over native title, allowing it to make declarations on native title binding on the Courts. As we have seen, it was this declaratory power which gave meaning to Prendergast CJ's claim in *Wi Parata* that the Crown is the "sole arbiter of its own justice" on native title issues.⁴⁶ And, as we also saw, the Court of Appeal in *Nireaha Tamaki v Baker* (1894) upheld this Crown prerogative over native title, and its declaratory power, insisting that "[t]he security of all titles in the country depends on the maintenance of this principle".⁴⁷

Yet, in failing to challenge the *Wi Parata* judgment concerning Crown prerogative, I believe that the Privy Council effectively "fudged" one of the

⁴⁴ Ibid, at 383-84.

⁴⁵ See supra note 35.

⁴⁶ See the discussion in "The Legacy of *Wi Parata*" above.

⁴⁷ See supra note 27.

fundamental issues at stake in the case before it. This issue of the prerogative was fundamental because key aspects of the Privy Council's *Nireaha Tamaki* judgment required that it be placed in question, and yet the Privy Council failed to do so. This is most apparent in the Privy Council's discussion of the Native Rights Act 1865. In the context of this discussion, the Privy Council affirmed the legality of section 5 of the Native Rights Act, stating:

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 Court specially constituted for the purpose.⁴⁸

In other words, the Privy Council clearly affirmed that the Native Rights Act authorized the Supreme Court to refer native title cases to the Native Land Court. And, as we have seen, it also affirmed that the Crown was subject to the Courts in these matters if the Crown's actions fell within the scope of the relevant statutes.⁴⁹

Yet, in *Wi Parata*, both Prendergast CJ and Richmond J denied that the Crown was subject to the Native Rights Act, and on this basis denied that the Supreme Court could refer native title matters involving the Crown to the Native Land Court, or that the Crown could be bound by the determinations of the Native Land Court. They did so on two grounds – first, on the ground that the Crown was not named in the Native Rights Act; and secondly, on the ground that any attempt to bind the Crown to the terms of this Act would be inconsistent with the Crown's prerogative over native title.⁵⁰ In the following passage, Prendergast CJ implied that both grounds were inextricably connected, the assumption of the prerogative itself governing how the absence of any reference to the Crown in the statute was to be interpreted:

⁴⁸ *Nireaha Tamaki v Baker* (1900-01), supra note 5, at 382.

⁴⁹ See supra note 37 which places the Privy Council's comments on s 5 in their broader context, and clearly indicates that the Privy Council saw s 5 as binding the Crown over to the Native Land Court in the requisite circumstances. If the Privy Council did not believe that the Crown was also subject to the Native Rights Act 1865, its reversal of the order of the Court of Appeal in the *Nireaha Tamaki* case, and its declaration that "...the [Supreme]Court has jurisdiction to inquire whether as a matter of fact the land in dispute has been ceded by the Native owners to the Crown in accordance with law" (*Nireaha Tamaki v Baker* (1900-01), supra note 5, at 385) would make little sense.

⁵⁰ See supra notes 18, 23 and 24.

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....⁵¹

Consequently, as this passage indicates, the Supreme Court's ruling in *Wi Parata* that the Crown was not subject to the Native Land Court in its determination of native title was premised on a prior assumption concerning the continued existence of the Crown's prerogative over native title. This position was maintained by the Court of Appeal in its 1894 judgment and it was this judgment which the Privy Council was now considering on appeal.⁵²

In other words, we have a clear conflict of opinion between the New Zealand Courts and the Privy Council as to whether the Crown is bound by the Native Land Court in its determination of native title cases – where the key points at issue concern their respective interpretations of the Native Rights Act 1865 and the existence of the Crown prerogative over native title. Yet the Privy Council completely avoided this issue. It avoided any consideration of Prendergast CJ's wider interpretation of the Native Rights Act, to exclude the Crown in favour of its prerogative, merely focusing on Prendergast CJ's "limited construction" of that Act in relation to the existence of native title.⁵³ Further, the Privy Council claimed that it was able to avoid this larger question of the prerogative because of its assumption that the Commissioner of Crown Lands was exercising his authority under statute.⁵⁴ Yet this larger question cannot be avoided, because, even given this statutory assumption, the Supreme Court's claim in *Wi Parata* (and its implicit affirmation by the Court of Appeal in 1894) that the Crown is not bound by the Native Rights Act because it is not named in the statute, would

⁵¹ *Wi Parata v Bishop of Wellington*, supra note 1, at 80. Needless to say, Prendergast CJ's reasoning in this passage is inherently circular. He effectively justified his claim that the statute did not limit the Crown's prerogative on native title by claiming that any other interpretation would indeed limit that prerogative. Prendergast CJ however went on to provide further evidence for the continued existence of the prerogative in his interpretation of the Native Lands Acts of 1867 and 1873, where he held the Crown was entitled to declare, within the New Zealand Gazette, that the native title had been extinguished (see *ibid*, at 80). Far from suggesting that the declaratory power of the prerogative had now been extinguished in favour of its recognition in statute, Prendergast CJ claimed that these statutes merely recognised and affirmed this prior prerogative (see supra note 20).

⁵² For the affirmation of the *Wi Parata* ruling in the 1894 judgment, see supra note 27.

⁵³ See *Nireaha Tamaki v Baker* (1900-01), supra note 5, at 382-83, 384.

⁵⁴ See *ibid*, at 380.

still apply. And, as we saw, Prendergast CJ saw this claim as inextricably linked with the question of the Crown's prerogative over native title. The question of the prerogative, therefore, cannot be avoided.

So the Privy Council's ruling that the Crown is bound by the Native Rights Act 1865 to the determination of the Native Land Court if its actions concerning native title fall within the realm of statute, far from avoiding the question of prerogative, *presupposes* this question, because it still requires that the Privy Council show why the *Wi Parata* ruling that the Crown is not bound by the statute (as it is not named in it and because such a statutory limit would be inconsistent with its prerogative) no longer applies. By avoiding this question, and failing to refute *Wi Parata*, the Privy Council at best merely *assumed* that the Crown is subject to the Native Rights Act (and thereby to the Native Land Court), since only on this basis could they argue that Maori, under this Act, have statutory rights to native title, cognisable by the Courts and enforceable against the Crown. But they do not *justify* this assumption – their discussion of the Native Rights Act being confined to Prendergast CJ's "limited construction" of that Act regarding the existence or non-existence of native title.⁵⁵ Indeed the following year, in *Hohepa Wi Neera v Bishop of Wellington*, the Privy Council's failure effectively to refute the *Wi Parata* ruling on the Native Rights Act became apparent when the Chief Justice of the Court of Appeal, Sir Robert Stout, once again insisted that the Crown was not bound by this Act:

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.⁵⁶

So the very terms of the Privy Council's judgment in *Nireaha Tamaki v Baker*, particularly its interpretation of the Native Rights Act 1865, required that it directly consider the full *Wi Parata* ruling on this Act, which in turn would have required it to deal directly with the question of the Crown prerogative over native title. Yet it chose not to do so, putting up a spurious claim that the question of the prerogative could be avoided if it was assumed that the Commissioner of Crown Land was acting under statute. It was therefore left to the next New Zealand native title judgment delivered by the

⁵⁵ See *ibid*, at 382-83, 384.

⁵⁶ *Hohepa Wi Neera v Bishop of Wellington*, *supra* note 4, at 667, per Stout CJ.

Privy Council to confront *Wi Parata* directly over the question of Crown prerogative.

IV. THE COLONIAL RESPONSE TO *NIREAHA TAMAKI*

Despite the fact that the Privy Council's departure from *Wi Parata* was only partial, its *Nireaha Tamaki* judgment sent shock waves through New Zealand colonial society, forcing the colonial authorities to take immediate action. What most concerned these authorities was the fact that the Crown could now be subject to the determination of the courts on native title issues if the courts ruled that the officers of the Crown were exercising their authority under statute. This meant that the Crown was no longer the "sole arbiter of its own justice" on native title issues, and so undermined the very protection that *Wi Parata* had provided in this respect. Even though the Privy Council's *Nireaha Tamaki* decision had retained the *Wi Parata* rule that existing Crown grants were immune from native title challenge, nevertheless there was much unalienated Crown land in New Zealand which could still be subject to such challenge.

The immediate action which the New Zealand Legislature took in response to the Privy Council decision was to pass the Land Titles Protection Act 1902, which attempted to enshrine the *Wi Parata* precedent in statute, thereby rendering the contrary common law decision of the Privy Council null and void, at least in so far as it applied to New Zealand affairs.⁵⁷ The long title and preamble to the Act reflected the anxiety of the colonial authorities to avoid any possibility that Crown titles could now be subject to native title challenge. The long title stated that this was "AN ACT to protect the Land Titles of the Colony from Frivolous Attacks in Certain Cases", and, as the preamble made clear, the "frivolous attacks" referred to were those arising from native title claims in the Courts:

WHEREAS several actions by Natives calling in question, after a lapse of at least thirty years, certain orders of the Native Land Court made under the provisions of 'The Native Lands Act, 1865', and the Crown grants and other instruments of title issued in pursuance thereof, have lately been taken in the Supreme Court of the colony: And whereas the said actions have been dismissed by the Court of Appeal, and the Native plaintiffs have been cast in costs and expenses amounting in the aggregate to at least two thousand pounds: And whereas, through the death or retirement of Judges of the Native Land Court and other responsible officers of the

⁵⁷ For a discussion of this Act as a specific response by the New Zealand legislative authorities to the Privy Council's judgment in *Nireaha Tamaki v Baker*, see McHugh, *supra* note 3, at 118.

public service who could give official evidence, the defence of such actions may be a matter of very great difficulty, if not an impossibility: And whereas considerable alarm has been caused amongst the European landholders of the colony at such attacks upon their titles, and it is expedient that reasonable protection should be afforded to the holders of such titles: BE IT THEREFORE ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:⁵⁸

The preamble indicated that the colonial authorities, in their perception of the threat, seemed to be labouring under the misapprehension that the Crown titles that could be subject to native title challenge included the Crown grants to settlers. But, as we saw, the Privy Council in *Nireaha Tamaki* followed *Wi Parata* in insisting that such grants were immune from native title challenge.⁵⁹ Nevertheless the statute tried to provide the Crown with the universal immunity from native title claims which, it was believed, had been provided by *Wi Parata*, by ensuring that the Crown was not subject to the Native Land Court without its own consent. As section 2(1) of the Act stated:

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.⁶⁰

The response of the judiciary in the wake of the Privy Council's *Nireaha Tamaki* decision was equally strident, and was also animated by a perceived threat to the security of existing Crown titles. This response was best represented by the Chief Justice, Sir Robert Stout. For instance, in 1903, referring to the Privy Council's decision in *Nireaha Tamaki*, Stout CJ said that "...[i]f the dicta in that case were given effect to, *no land title in the*

⁵⁸ Land Titles Protection Act 1902, No 37, 2 Edw VII, Preamble.

⁵⁹ See supra note 44.

⁶⁰ Land Titles Protection Act 1902, s 2 (1).

Colony would be safe".⁶¹ He went even further, arguing that, in the *Nireaha Tamaki* decision, the Privy Council had been "... ignorant ... of the Ordinances, Acts, and Charters regarding Native lands" in New Zealand.⁶²

V. *THE SOLICITOR-GENERAL V THE BISHOP OF WELLINGTON*

This case was adjudicated upon by the New Zealand Court of Appeal after the Privy Council's *Nireaha Tamaki* decision, but before the Court of Appeal had actually received a copy of that judgment.⁶³ Consequently, the New Zealand Court of Appeal assessed the case in the context of its full affirmation of the *Wi Parata* precedent seven years before in *Nireaha Tamaki v Baker* (1894), and not in terms of the more recent Privy Council judgment which had emerged on appeal from this earlier decision.

*The Solicitor-General v Bishop of Wellington*⁶⁴ involved the same land and the same Crown grant that were in dispute in *Wi Parata v Bishop of Wellington*.⁶⁵ Unlike *Wi Parata*, however, in this case there was no dispute

⁶¹ "*Wallis and Others v Solicitor-General*. Protest of Bench and Bar, April 25, 1903", supra note 4, at 746, per Stout CJ.

⁶² Ibid. The other response of the New Zealand judiciary to the Privy Council's judgment in *Nireaha Tamaki v Baker* occurred in the first native title judgment which the Court of Appeal delivered after receiving notice of the recent Privy Council decision. This was the Court of Appeal's ruling in *Hohepa Wi Neera v Bishop of Wellington* (1902), supra note 4. As I have argued elsewhere, the Court of Appeal judges displayed in this judgment a clear desire to evade the full implications of the recent Privy Council decision, thereby to preserve intact as much of the *Wi Parata* precedent as they could. See Tate, "Hohepa Wi Neera: Native Title and the Privy Council Challenge" (2004) 1 *Victoria University of Wellington Law Review* 35.

⁶³ As Williams J stated: "The case of *Nireaha Tamaki v Baker* was decided by their Lordships shortly before our decision in the present case, but the judgment had not then reached the Colony". ("*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", supra note 4, at 749, per Williams J).

⁶⁴ (1901) 19 NZLR 665.

⁶⁵ The *Wi Parata* case involved the Ngatitōa tribe, resident principally in the Porirua District, whose chiefs desired in 1848 that a school be erected on their land at Witireia (see *Wi Parata v Bishop of Wellington*, supra note 1, at 72). Negotiations were entered into between the Chiefs and the Bishop of New Zealand concerning this school (ibid). However while it is clear that in 1850 the Crown granted land to the Bishop for the building of a school in the area, it was open to dispute in the *Wi Parata* case whether the Ngatitōa tribe ever ceded land to the Crown for this purpose (ibid, at 73). Counsel for the plaintiff argued that the Ngatitōa tribe could not legally cede their lands for this purpose, and therefore that the Crown grant to the Bishop was illegal because the native

as to whether the land in question had actually been ceded by the Maori to the Crown for the purposes of building a school.⁶⁶ Rather, the question was whether the trustees of the grant had a right to use the money for an alternative purpose, given that no school had been built, or whether in such circumstances the grant reverted to the Crown because of the non-fulfilment of its conditions.⁶⁷

The facts of the case concerned negotiations between the Ngatitōa tribe and the Bishop of New Zealand in 1848, for the purposes of building a college on native land.⁶⁸ This land was transferred to the Bishop by a Crown grant in 1850 - the terms of the grant indicating that the land had been ceded by the natives to the Crown for this purpose.⁶⁹ Under the terms of the Bishop of New Zealand Trusts Act 1858, the Bishop transferred this land into the hands of a trust in 1859.⁷⁰ The land was then rented and money accrued to the trust. By 1901, no college had been built, and, as many of the local Maori had moved from the area, it seemed that the building of a college would be a waste of the trust's money.⁷¹ Consequently, the trustees appealed to the government for permission to use the money for alternative, but related purposes.⁷² The government refused, indicating that it wished to

title had not been lawfully extinguished. Failing this, the counsel for the plaintiff argued that the purpose for which the Crown grant was issued (the building of a school) had never been fulfilled, and therefore the grant should revert to the original owners (*ibid*).

⁶⁶ As Williams J stated in the present case: "There is practically no dispute as to the circumstances which led up to the issue of the Crown grant, nor as to what had been done under the Crown grant" (*The Solicitor-General v Bishop of Wellington*, *supra* note 64, at 677). However we can see the legacy of *Wi Parata* in the following statement, where Williams J effectively insists that any issues connected with the Maori cession of land to the Crown cannot invalidate the Crown grant once made - the latter being a conclusive declaration by the Crown that the native title had been lawfully extinguished (see *supra* note 21). As Williams J put it: "Any circumstances which led up to the issue of the Crown grant are manifestly inadmissible as evidence to contradict or vary the terms of the Crown grant, although they may be relevant on the inquiry as to what scheme should be adopted" (*supra* note 64, at 677).

⁶⁷ Hence there was no native plaintiff involved in this case, and so no direct claim concerning native title. The dispute was purely between the trustees and the Crown.

⁶⁸ Subsequent evidence tabled on behalf of the Solicitor-General indicated that other tribes besides the Ngatitōa were involved in the donation of the land (see *ibid*, at 667).

⁶⁹ *Ibid*, at 675.

⁷⁰ See *Wallis v Solicitor-General*, *supra* note 4, at 180.

⁷¹ *Ibid*, at 181.

⁷² *Ibid*.

review the matter further.⁷³ When no review took place, the trustees appealed to the Supreme Court for permission to use the money for an alternative but related purpose.⁷⁴ The Solicitor-General (representing the Crown) opposed the motion, claiming that the lands had reverted to the Crown because the original terms of the grant (involving the use of the land to support a college) had not been fulfilled.⁷⁵ Prendergast CJ, for the Supreme Court, rejected the Solicitor-General's claim, but, not being convinced that the original purpose of building a college on the land was defunct, reserved matters for further determination.⁷⁶ The subsequent Supreme Court case which considered these matters found for the trustees, and approved their alternative plan for the use of the trust's money.⁷⁷

The Solicitor-General then appealed this decision in the Court of Appeal, giving rise to the present case. Williams J, who delivered the judgment of the Court, found for the Solicitor-General on two grounds. First, he ruled that the Crown had been "deceived" in its grant to the Bishop, since the purpose of the grant had never been fulfilled.⁷⁸ Secondly, he found that the land reverted to the Crown because the "true construction" of the Crown grant to the Bishop "was in the nature of a conditional limitation" which was determinable when the purpose of the grant - religious education, industrial training, and instruction in the English language - ceased to be given in the

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ See *Solicitor-General v Bishop of Wellington*, supra note 64, at 676-77. Needless to say, the Solicitor-General had a series of reasons which informed his opposition to the plan put forward by the trustees. As Williams J put it, the Solicitor-General, in his statement of defence to the Supreme Court, argued that the Executive Government had been "...advised that by reason of the failure of the trusts the land and moneys have reverted to the Crown without any trust being attached to them, and submits, accordingly, that the question should be dealt with by Parliament, and that the Court has no jurisdiction". (ibid, at 677). Hence in the first instance, the Solicitor-General's claim that the Court had no jurisdiction had nothing to do with native title matters, but was premised on his claim that the grant had reverted back to the Crown, and so was a Crown matter. Indeed, the Court of Appeal ultimately accepted this argument, with Williams J. concluding "...the Court has no jurisdiction because the property is now vested in the Crown" (ibid, at 685). However if it had have been found that the Court did have jurisdiction over the matters relating to the trust, the Solicitor-General, in his statement of defence to the Supreme Court, adopted a second position, proposing an alternative scheme to the one proposed by the trustees (see ibid, at 677).

⁷⁶ Ibid, at 677.

⁷⁷ Ibid.

⁷⁸ Ibid, at 678-80.

college.⁷⁹ Finding on these two grounds that the land had become the property of the Crown, Williams J concluded that the Court had no jurisdiction to adopt the scheme proposed by the trustees.⁸⁰

However, what is much more significant for our purposes was the Court of Appeal's response to a late amendment to the statement of defence offered by counsel for the Solicitor-General. This late amendment was as follows:

The defendant by Hugh Gully, Crown Solicitor for the Wellington District, further amends his statement of defence filed herein by adding thereto the following paragraph: 'That the terms of cession to the Crown by the aboriginal Natives of the lands comprised in the grants were such as to preclude the Crown from consenting to the application of the said lands and rents and profits thereof to any other purposes or objects than those expressly mentioned in the grant. And that the Crown has a duty to observe the terms of the cession to itself and the trust thereby confided by the aboriginal Natives in the Crown. And that the Executive Government has determined, so far as the matter is one for the determination of the Crown, that any departure from the precise terms of the grant by the application *cy-près* of the said lands and funds without the consent of the Parliament of the Colony would contravene the terms of the said cession and be a breach of the trust thereby confided in the Crown.'⁸¹

With this statement, the Crown was claiming that, if the trust was allowed to be administered on a *cy-près* basis (thereby allowing the trustees to fulfil the terms of the trust by an alternative, but related, purpose), this would violate a purported duty of the Crown to the natives to ensure that the land ceded by the natives was used expressly for the purposes originally stated in the Crown grant.⁸²

In its judgment, the Court of Appeal stated that it did not have to consider the matters raised in the late amendment to the statement of defence, as it had already determined the case in favour of the Crown on the two grounds

⁷⁹ Ibid, at 681.

⁸⁰ Ibid, at 687.

⁸¹ Cited in "*Wallis and Others v Solicitor-General*. Protest of Bench and Bar, April 25, 1903", supra note 4, at 741.

⁸² The *cy-près* doctrine is a doctrine within the law of charitable trusts. It operates in a case where a donor has expressed a general charitable intention that it is impossible or impractical to effect, and so the courts will allow the intention to be fulfilled as closely as possible to the original intention (cf *Butterworths Australian Legal Dictionary*, supra note 35, at 316).

cited earlier.⁸³ But the Court said that it would consider the issues raised, as these were matters argued at length in the case.⁸⁴ The Court's views on the amended statement of defence, therefore, clearly fell outside its reasons for judgment in this case, and so were *obiter dicta*.

The Court of Appeal's response to the amended statement of defence was to agree with the import of the statement that issues of trust and duty arising between the Crown and Maori were outside the jurisdiction of the courts, particularly as regards the cession of native land to the Crown. As the Court put it:

In the present case there are, however, circumstances which make the question of exercising the jurisdiction more difficult. The land, as appears from the grant, was ceded by Natives to the Crown. Mr. Bell, who appeared for the Solicitor-General, the representative of the Crown, made a statement at the bar as from the Crown that the terms of the cession by the Natives were such as to preclude the administration of the gift otherwise than in the direct terms of the grant.....[T]he Crown therefore asserts that it has duties towards the Natives who ceded the land which could not be performed if the Court administered the trust *cy-près*. This would place the Court in a considerable difficulty. 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.⁸⁵

In making this statement, was the Court once again affirming the precedent of *Wi Parata* that issues between Maori and the Crown concerning the cession of native title were matters of Crown prerogative, over which the Court had no jurisdiction to interfere? At one level it does not appear so. This is because the Court went on to point out below that the reason it did not have clear jurisdiction in this matter was that the Crown's special duty to protect the Natives and their title to land was a duty *parens patriae*. This duty seemed to be distinct from any consideration of acts of state which had been associated with the Crown prerogative in *Wi Parata*, since *parens patriae* referred to a specific obligation of the Crown to assume responsibilities for those unable to fend for themselves, where these responsibilities are administered through the Courts.⁸⁶ As Williams J put it:

⁸³ See *The Solicitor-General v Bishop of Wellington*, at supra note 64, at 686-87.

⁸⁴ *Ibid*, at 685.

⁸⁵ *Ibid*, at 685-86.

⁸⁶ According to *Butterworths Australian Legal Dictionary*, the doctrine of "parens patriae" is: "A common law doctrine by which the Sovereign has an obligation for the welfare of children and 'lunatics'. That obligation was in return for the allegiance of the

The position appears to be somewhat as follows. The Crown ... as *parens patriae*, is under a solemn obligation to protect the rights of Native owners of the soil. When, therefore, the Crown as *parens patriae*, asserts that in that capacity it is under an obligation to Natives in respect of a property, can this Court, representing the Crown as *parens patriae*, say to the Crown, You shall not carry out this obligation, but the property you have granted shall be devoted to charitable purposes, to be determined by the Court irrespective of your obligations? We see great difficulty in holding that, in such circumstances, the Court could or ought to interfere... In the above circumstances it seems more appropriate that the matter should be dealt with by the Legislature than by this Court.⁸⁷

So the doctrine of *parens patriae* seemed to be distinct from the Crown prerogative as a reason for the Court excluding its jurisdiction over the matters raised by the Crown in its amended statement of defence. The Court's refusal of jurisdiction above, in terms of *parens patriae*, therefore seemed to be separate from its similar refusal in *Wi Parata*, on the basis of Crown prerogative. As we shall see in the section "Retrospective Re-Writing" below, Williams J would claim in his 1903 protest that the Court of Appeal was in reality defending the *Wi Parata* precedent, including the Crown prerogative over native title, in its discussion of the amended statement of defence in *Solicitor-General v Bishop of Wellington*. But I think that this is a fabrication after the fact. It seems clear that the *parens patriae* doctrine, as discussed by the Court of Appeal in this context, cannot be reduced to *Wi Parata* principles, and constitutes a separate ground for the *obiter dicta* that the Court has no jurisdiction to interfere with the matters raised in the Solicitor-General's amended statement of defence.

VI. WALLIS V SOLICITOR GENERAL

In the wake of the New Zealand Court of Appeal's ruling against them in *The Solicitor-General v Bishop of Wellington*, the trustees appealed to the Privy Council. In the resulting case, *Wallis v Solicitor-General for New*

sovereign's subjects" (*Butterworths Australian Legal Dictionary*, supra note 35, at 841). Williams J argued in the present case that the doctrine of *parens patriae* extends even further than this. He argued that the Crown is in a position of *parens patriae* when it comes to the administration of funds devoted to charity, to ensure that the funds are spent for the right purposes (a role administered through the courts) and that it is also in a position of *parens patriae* when it comes protecting the rights of Native owners of the soil (see *The Solicitor-General v Bishop of Wellington*, at supra note 64, at 686). So clearly the doctrine of *parens patriae* has been extended beyond the realm of children and lunatics over time.

⁸⁷ Ibid.

Zealand,⁸⁸ the Privy Council overturned the Court of Appeal's ruling and found in favour of the trustees. While the Privy Council rejected the basis upon which the Court of Appeal had earlier found for the Crown, it reserved its strongest criticism for the *obiter dicta* at the end of the Court of Appeal's judgment, where, as we saw, the Court of Appeal had discussed the late amendment and its implications concerning the Court's jurisdiction over Crown-Maori affairs.

1. *The Privy Council and Maori Land Rights*

A fundamental difference between the reasoning of the New Zealand Court of Appeal and the Privy Council which led to their divergent judgments in *The Solicitor-General v Bishop of Wellington*, on the one hand, and *Wallis v Solicitor-General* on the other, can be traced to their very different understanding of the role the Crown played in the cession of native title by the Ngatitooa tribe. As we have seen, the Court of Appeal took the view that the Ngatitooa tribe had ceded the land directly to the Crown, and the Crown had thereupon provided a grant to the Bishop.⁸⁹ The Privy Council, on the other hand, took the view that the cession was effectively between the native tribe and the Bishop, the Crown merely playing an intermediary or "conveyancing" role in waiving its right to pre-emption and issuing a Crown grant to the Bishop.⁹⁰ As Lord Macnaghten, who delivered the judgment for the Privy Council, put it:

⁸⁸ *Supra* note 4.

⁸⁹ *Supra* note 66. Indeed, the whole thrust of the Solicitor-General's late amendment, and the Court of Appeal's conclusion, on the basis of this amendment, that a *parens patriae* relationship existed between the Crown and Ngatitooa tribe, is premised on the assumption that a direct cession of land had occurred between the Ngatitooa tribe and the Crown.

⁹⁰ See *Wallis v Solicitor-General*, *supra* note 4, at 179-80. In his Protest against the Privy Council's judgment, Justice Williams clearly recognised that the most significant difference of opinion between the Court of Appeal and the Privy Council, giving rise to their divergent judgments in this case, was their disagreement over precisely this question of *who* had ceded the land to the Bishop of New Zealand. Williams J pointed out that the Privy Council's judgment in *Wallis* "seems to have been based in the main" on the opinion that the Ngatitooa tribe ceded the land directly to the Bishop, the Crown merely fulfilling a "conveyancing" role in the process ("*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", *supra* note 4, at 750, per Williams J). In response, Williams J argued that, at the time, the Maori had no legal right to their land cognizable in a Court of law, as there were no statutes at the time "regulating the extinction of native title" (*ibid*, at 749, per Williams J). As he put it: "If the Native occupiers had no right cognizable in a Court of law, it is difficult to see how they could

When the Government had once sanctioned their gift, nothing remained to be done but to demarcate the land and place on record the fact that the Crown had waived its right of pre-emption. That might have been effected in various ways. The course adopted was to issue a Crown grant. That, perhaps, was the simplest way, though the Crown had no beneficial interest to pass. After all it was only a question of *conveyancing*, as to which the native owners were very possibly not consulted.⁹¹

One reason why the Privy Council could claim that the Ngatitōa tribe had effectively ceded their land directly to the Bishop was its assumption that "...[i]t was not until 1852 that it was made unlawful for any person other than Her Majesty to acquire or accept land from the natives...".⁹² Hence, according to Lord Macnaghten, the Crown was able legally to waive its exclusive right of pre-emption, allowing for what in effect was a direct cession of land from the Ngatitōa tribe to the Bishop.⁹³ This enabled the Privy Council to conclude that:

The founders of the charity, therefore, were the native donors. All that was of value came from them. The transfer to the bishop was their doing.⁹⁴

transfer such a right to the Bishop" (ibid). He then pointed to the long line of legislative authority which he believed supported the Court of Appeal's view that the Crown, and not the Ngatitōa tribe, were the donors of the land to the Bishop (ibid, at 748-49, per Williams J). He then summed up this legislative authority as follows: "Whether, however, we were right or wrong, there was certainly an unbroken current of authority. First, that the Native occupiers had no right to their land cognizable in a Court of law, and that having no such right themselves they could not transfer any right to others. Secondly, that the Crown grant was not a mere piece of conveyancing, but was essential to create any right at all of which this Court could take notice, and that any such right was derived from the Crown grant, and by virtue of the grant, and from the grant alone. Thirdly, that as the Natives never had any rights cognizable in a Court of law they had no *locus standi* to impeach the grant, and were neither necessary nor proper parties in any proceedings between the Crown and its grantee in relation to the subject-matter of the grant...Had we not so held we should not only have had to overrule all previous decisions, but should have differed in opinion from every Judge who has ever sat in this Court" (ibid, at 750).

⁹¹ *Wallis v Solicitor-General*, supra note 4, at 179-80, emphasis added.

⁹² Ibid, at 179. In the Court of Appeal Protest against this judgment, Williams J. questions this opinion, arguing that at least from 1846, Maori were not entitled to sell land to whomever they pleased (see "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", supra note 4, at 748, per Williams J). Indeed, the Crown's exclusive right of pre-emption was upheld in the Treaty of Waitangi itself.

⁹³ *Wallis v Solicitor-General*, supra note 4, at 179-80.

⁹⁴ Ibid, at 179.

This assumption that the Crown only played an intermediary role in the transfer of land from the Ngatitooa tribe to the Bishop, never acquiring full possession of the land itself, was central to the Privy Council's conclusions in this case. It was the basis upon which the Privy Council departed from the Court of Appeal's opinion that the land in question should revert to the Crown due to the non-fulfilment of the purposes of the grant. The Privy Council argued that, because the Crown in its intermediary role never had full possession of the land, any argument that the land should "revert" to the Crown due to a non-fulfilment of the grant was spurious, because it was, in effect, an argument that land should revert to a party that had never possessed it in the first place.⁹⁵

However, the main grounds for the Privy Council's belief that the Ngatitooa tribe had directly ceded their land to the Bishop was its assumption that the Maori still had full possession of their lands as guaranteed by the Treaty of Waitangi, and therefore were fully capable of ceding land to the Bishop on their own volition (subject to the Crown's waiver of its right of pre-emption). As Lord Macnaghten stated:

As the law then stood under the treaty of Waitangi, the chiefs and tribes of New Zealand, and the respective families and individuals thereof, were guaranteed in the exclusive and undisturbed possession of their lands so long as they desired to possess them, and they were also entitled to dispose of their lands as they pleased, subject only to a right of pre-emption in the Crown.⁹⁶

2. *The Privy Council and the Treaty*

What is evident in the passage above is that the Privy Council was claiming that the Treaty of Waitangi, in and of itself, was the ultimate source of Maori land rights in New Zealand law. The claim is extraordinary because it moves against the well-known common law principle that treaties, in and of themselves, do not give rise to rights cognisable within municipal Courts until embodied in statute.⁹⁷ Nevertheless, with this claim, the Privy Council

⁹⁵ Hence Lord Macnaghten described the Solicitor-General's evidence before the Court of Appeal as entailing the contradictory assertion that "...property of which the Crown was never possessed had 'reverted' to the Crown". (ibid, at 186).

⁹⁶ Ibid, at 179.

⁹⁷ This principle was most famously affirmed by the Privy Council in regard to the Treaty of Waitangi some thirty-eight years later in *Te Heuheu Tukino v Aotea District Maori Land Board*, NZLR [1941] 590, 596-97.

was definitely rejecting the legacy of *Wi Parata v Bishop of Wellington*, which had held that the Treaty gave rise to no such rights.⁹⁸

3. Privy Council Rejection of the Court of Appeal Judgment

As we saw above, in *The Solicitor-General v The Bishop of Wellington*, the New Zealand Court of Appeal found for the Crown on two grounds. The Court of Appeal found that the Crown had been “deceived” in the grant because its purposes had not been fulfilled, and that the grant itself presupposed a conditional limitation which held that the land should revert back to the Crown when these purposes were no longer fulfilled.⁹⁹ The Privy Council rejected both of these findings.

Concerning the Court of Appeal’s second finding that the grant contained a conditional limitation, ensuring that the land reverted to the Crown when it ceased to be used for the purposes described in the grant, the Privy Council stated that such a conditional limitation never came into effect, because the purposes of the grant were never fulfilled in the first place.¹⁰⁰

Concerning the first ground for the Court of Appeal’s decision, that the Crown had been “deceived” in the grant, the Privy Council stated:

The learned counsel for the respondent were in much the same difficulty in attempting to support the first ground upon which the Court of Appeal relied. There too the Court had recourse to an assumption which has no basis in fact. What evidence is there that the Crown was deceived? Absolutely none. The evidence is entirely the other way.¹⁰¹

⁹⁸ Supra notes 2 and 4.

⁹⁹ Supra notes 78 and 79.

¹⁰⁰ As the Privy Council put it: “Now as it is common ground that no school was ever established at or in the neighbourhood of Porirua, it would seem to follow that the occasion on which the trust, according to the construction placed on the grant by the Court of Appeal, was to cease and determine never arose and never could have arisen. It appears, therefore, hardly necessary to consider the second ground on which the Court of Appeal determined the case in favour of the Crown. It was not pressed at their Lordships’ bar” (*Wallis v Solicitor-General*, supra note 4, at 183).

¹⁰¹ *Ibid*, at 183-84. Indeed much of the disagreement between the Privy Council and the Court of Appeal concerning whether the Crown was “deceived” in the grant turned on differing accounts of what it meant to be deceived. The position of the Privy Council was that, given that the Crown itself had drawn up the grant and included in the recitals the commitment to building a school, if the Crown had been deceived then it had effectively deceived itself (*ibid*, at 183-84, 184-85).

As such, Lord Macnaghten claimed that the counsel for the Solicitor-General, in the course of their argument before the Privy Council, did not feel that they could support either of the findings of the Court of Appeal in the Solicitor-General's favour.¹⁰² They therefore adopted an argument suggested by the Solicitor-General that "there was no general purpose of charity [in the grant] but only an intention to erect 'a specific school on a specified site'".¹⁰³ This meant that, in the absence of such a general purpose, the trust could not be administered *cy-près*, but had to fulfil its original purposes or revert back to the Crown. However the Privy Council dismissed such a position, stating that it is "a very narrow view of the transaction, at variance, in their Lordships' opinion, with the express terms of the gift, and opposed to principles laid down in recognised authorities..."¹⁰⁴

4. Privy Council Rejection of the Court of Appeal's *Obiter Dicta*

While overturning the substantive elements of the Court of Appeal's judgment, the Privy Council reserved its most scathing criticism for the *obiter dicta* on the amended statement of defence which arose at the end of that judgment. Lord Macnaghten claimed that the amended statement added to the "confusion" of the case.¹⁰⁵ He stated:

[O]n the hearing of the appeal the Solicitor-General applied for and obtained leave to amend his defence. A formal order for the amendment was afterwards obtained on the ground that such amendment was necessary 'to more clearly define the grounds of defence of the Crown'. But the amendment only made the confusion worse. It was a medley of allegations incapable of proof and statements derogatory to the Court. But the Court accepted it, and treated it with extreme deference. The learned judges intimate pretty plainly that if they had not been able to find satisfactory reasons for deciding in favour of the Crown, the amendment would of itself have prevented their making an order in favour of the trustees.¹⁰⁶

However, the Privy Council dismissed such "intimations" on the part of the Court of Appeal, insisting that it was "unable to follow" the Court of Appeal's claim that it lacked jurisdiction over the matters raised in the Solicitor-General's amended statement of defence.¹⁰⁷ The Privy Council was unable to follow this claim because, from the Privy Council's perspective,

¹⁰² *Ibid.*, at 185.

¹⁰³ *Ibid.*, at 185, my addition.

¹⁰⁴ *Ibid.*, at 185.

¹⁰⁵ *Ibid.*, at 187.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

the cession of native land referred to in the amended statement of defence did not involve the Crown, but rather was a direct cession of land from the Ngatitōa tribe to the Bishop. From the Privy Council's perspective, therefore, the issues of trust or duty between the Crown and the tribe, referred to in the amended statement of defence, did not arise. As Lord Macnaghten stated:

The land was part of the native reserves, as appears from the Government minute of October 7, 1848. At the date of the cession to Bishop Selwyn the rights of the natives in their reserves depended solely on the treaty of Waitangi. There is not in the evidence the slightest trace of any cession to the Crown, or of any bargain between the Crown and the native donors.¹⁰⁸

However, it was the apparent willingness of the Court of Appeal, when confronted with the amended statement of defence, to surrender its jurisdiction to the Crown, which aroused the most stinging criticism from the Privy Council. As we have seen, in response to the matters raised in the amended statement of defence, the Court of Appeal had concluded that it saw "great difficulty ... in holding that, in such circumstances, the Court could or ought to interfere".¹⁰⁹ The Privy Council fundamentally rejected the proprietary of any such response, and went on to criticize the willingness of the Court of Appeal to exclude its jurisdiction at the bidding of the Crown:

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?¹¹⁰

This statement by the Privy Council was extremely significant for a number of reasons. First, and perhaps least significantly, it was a rejection of the *obiter dicta* put forward by the Court of Appeal in *The Solicitor-General v Bishop of Wellington*. Secondly, it was one of the key statements in the *Wallis* judgment that the Court of Appeal took umbrage at, and led to the protest against the Privy Council in 1903. Finally, and perhaps most significantly, it was a fundamental rejection of the view, which first emerged

¹⁰⁸ *Ibid*, at 188.

¹⁰⁹ *The Solicitor-General v Bishop of Wellington*, *supra* note 64, at 686, cited in *Wallis v Solicitor-General*, *supra* note 4, at 188.

¹¹⁰ *Wallis v Solicitor-General*, *supra* note 4, at 188-89.

in the New Zealand Supreme Court in *Wi Parata v Bishop of Wellington*, that the Crown has prerogative powers over native title which, when exercised, allowed it to make declarations which necessarily excluded the jurisdiction of the Courts. By insisting that, in the face of such a claim by the Crown, the Court should have insisted on its jurisdiction, and that anything less was “not flattering” to its dignity or independence, the Privy Council was implying that the Crown had no prerogative rights in such circumstances. In other words, the Privy Council’s *Wallis* judgment was overturning that element of the *Wi Parata* ruling which the Privy Council in *Nireaha Tamaki v Baker* had reserved judgment on. Far from “fudging” the issue this time, the Privy Council rejected this aspect of *Wi Parata* in no uncertain terms. Further, it insisted that, far from a declaration by the Crown ousting the jurisdiction of the Courts in such circumstances, any Crown declarations on native title must be subject to the test of evidence within the Courts, in the same way as a claim by any other party. As Lord Macnaghten stated:

[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 proved or admitted. Allegations unsupported go for nothing.¹¹¹

¹¹¹ *Ibid.*, at 188. Hence in regard to that part of the amended statement of defence which “...asserts that the Crown has come under some undefined and undisclosed obligations to the natives” (*ibid.*, at 187), upon which the Court of Appeal concluded that “...this assertion must place the Court ‘in a considerable difficulty’” (*ibid.*, at 187), the Privy Council response is: “Why? Why should a Court which acts on evidence and not on surmise or loose suggestions pay any attention to an assertion which, if true, could not have been proved at that stage of the proceedings, and which the evidence in the cause shews [sic] to have been purely imaginary?” (*ibid.*, at 187). Lord Macnaghten’s claim that the Crown’s assertions were “purely imaginary” is presumably based on his belief that the effective terms of cession were not between the tribal chiefs and the Crown but between the tribal chiefs and the Bishop - with the result that the Crown’s intermediary role gave rise to no “undefined and undisclosed obligations to the natives”. Far from accepting that the Crown had taken on such obligations, as asserted in the Solicitor-General’s amended statement of defence, Lord Macnaghten stated: “According to the evidence, the only obligation which the Crown undertook was to waive its right of pre-emption”. (*ibid.*, at 187). In the Court of Appeal’s Protest against the Privy Council’s decision, Stout CJ singled out this assumption for attack. Stout CJ argued that the Privy Council’s assertion “that the only obligation the Crown undertook was to waive its right of pre-emption” is “based on a fallacy” (“*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, *supra* note 4, at 742, per Stout CJ). Stout CJ said: “[T]he Crown stood in quite a different position. It had the occupancy or possessory rights of the Maoris ceded to it that it might endow a school, and it was in a sense a

If any doubt remained that the Privy Council had removed any semblance of the Crown's prerogative powers over native title, to the exclusion of the Courts, Lord Macnaghten also insisted on the full jurisdiction of the Courts in these matters:

Notwithstanding the doubts expressed by the Court of Appeal, it is perfectly clear that the Court has jurisdiction to deal with a claim to property made on behalf of the Crown when properly brought forward. It has no right to decline jurisdiction. Still less has it a right to stay its hand at the instance of a claimant who may present a case into which it may be difficult, if not impossible, for the Court to inquire, even though that claimant be the Crown.¹¹²

VII. THE COURT OF APPEAL'S PROTEST

The Privy Council's criticisms of the Court of Appeal in *Wallis v Solicitor-General* (1903) drew an unprecedented response from the New Zealand Court, which engaged in an official protest against the Privy Council.¹¹³ As

trustee to give effect to that cession. Further, it gave up its title - the title in fee-simple - to the Bishop" (ibid, at 742). Needless to say, the source of the disagreement between the Privy Council and the Court of Appeal as to the facts in this instance is due to their contrary views as to whom the land was ceded to. From the Privy Council's perspective, the land was effectively ceded by the Ngatitōa tribe directly to the Bishop. From the Court of Appeal's perspective, it was ceded to the Crown, who then granted it to the Bishop. In the latter version of events, the Crown would be likely to undertake a series of obligations to the Ngatitōa tribe which would not have arisen in the former set of circumstances.

¹¹² *Wallis v Solicitor-General*, supra note 4, at 188.

¹¹³ At an adjourned sitting of the Court of Appeal in Wellington on April 25, 1903, "...the Chief Justice indicated that he had something to say regarding the recent judgment of the Privy Council" ("*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", supra note 4, at 730). Besides delivering his own protest, the Chief Justice also read a protest by his colleague, Williams J, and Edwards J also read a protest. Williams J had delivered the Court of Appeal's judgment in *Solicitor-General v Bishop of Wellington* (1901) which had been overturned by the Privy Council in *Wallis*, and which was the subject of this protest. Interestingly, neither Stout CJ nor Edwards J was a party to this Court of Appeal judgment, both having delivered the Supreme Court judgment which this Appeal judgment overturned, and which was therefore subsequently affirmed by the Privy Council in its rejection of the Appeal judgment (see *Solicitor-General v Bishop of Wellington*, supra note 64, at 666; *Wallis v Solicitor-General*, supra note 4, at 189). Nevertheless, the issues raised by the Privy Council judgment were clearly of such moment that both judges still felt obliged to join the protest. At the end of the three readings of protest, a member of the bar, Mr W.L. Travers, rose and, on

Sir Robin Cooke has said, it is “the only recorded instance of a New Zealand Court’s publicly avowing its disapproval of a superior tribunal”.¹¹⁴ The ostensible reason for this Protest was the injudicious use of language used by the Privy Council in the *Wallis* judgment, not least the imputation of improper motives to the Court of Appeal, particularly the accusation that it lacked sufficient independence from the executive.¹¹⁵ As Williams J put it:

The decision of the Court of Appeal of New Zealand in the case of the *Solicitor-General v Wallis* [sic] has recently been reversed by the Judicial Committee of the Privy Council. Their Lordships have thought proper, in the course of their judgment, to use language with reference to the Court of Appeal of a kind which has never been used by a superior Court with reference to an inferior Court in modern times. The judgment of their Lordships has been published and circulated throughout the Colony. The natural tendency of that judgment, emanating as it does from so high a tribunal, is to create a distrust of this Court, and to weaken its authority among those who are subject to its jurisdiction.¹¹⁶

In the context of their Protest, some members of the Court of Appeal made the claim that, as an inferior court, they were not criticising the substantive content of the Privy Council’s decision in *Wallis v Solicitor-General*, only its manner of expressing it; while others accepted that they were criticising the content of the Privy Council’s decision, but only to the extent necessary to defend the dignity of the Court of Appeal.¹¹⁷

behalf of the Bar, joined the justices in their protest (ibid, at 759-60). This latter statement from the Bar was described as “...a unique, impressive incident, made more impressive by reason of the fact that it was quite unrehearsed and unexpected” (ibid, at 759).

¹¹⁴ Sir Robin Cooke, “The Nineteenth Century Chief Justices”, in Cooke, Robin (ed) *Portrait of a Profession. The Centennial Book of the New Zealand Law Society* (1969) 36, 46.

¹¹⁵ Hence the Chief Justice of the Court of Appeal, Sir Robert Stout, began his address by stating: “In the judgment in a recent case before the Lords of the Judicial Committee of the Privy Council – *Wallis v Solicitor-General* – a direct attack has been made upon the probity of the Appeal Court of New Zealand” (“*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, supra note 4, at 730. See ibid, 745, 746, per Stout CJ; 755-56, per Williams J; 757, 759, per Edwards J).

¹¹⁶ Ibid, at 747, per Williams J.

¹¹⁷ Hence Stout CJ stated: “It is not my purpose to canvass the decision of the Privy Council. My object is to show that the comments of the Council on, and its criticism of, the Appeal Court were alike unwarranted” (ibid, p. 731). However his statement then went on to challenge and question many legal aspects of the Privy Council decision. Williams J admitted it was necessary to criticise the decision of the Privy Council, but

However, it is evident that, despite these protestations, a deeper issue of contention underlying the Protest seemed to be the clear difference of opinion which had emerged between the Court of Appeal and the Privy Council over the legal status of native title. As we saw, these differences emerged as a result of the two Privy Council rulings in *Nireaha Tamaki v Baker* and *Wallis v Solicitor-General* which departed from the *Wi Parata* precedent. Indeed, in the context of their response to these Privy Council decisions, all the judges in the Protest went so far as to accuse the Privy Council of ignorance of New Zealand law on native title and other matters.¹¹⁸

Consequently, the motives animating this Protest by the Court of Appeal do not seem to have been confined to wounded pride over injudicious remarks made by the Privy Council. Rather, as much of the following will indicate, a major concern of the Court of Appeal was the extent to which the Privy Council had departed from the *Wi Parata* precedent.

not as an end in itself. Rather, only in so far as this was necessary to defend the dignity of the Court of Appeal: "For an inferior Court to criticize the judgment of a superior Court which reversed its decision would be in general alike, unprofitable and unseemly. But where the decision of the inferior Court has been not only reversed but has been reversed with contumely – where the inferior Court has been taunted with want of independence and subservience to the Executive Government – it is right that the members of the Court who pronounced the decision in question should come forward and defend the honour of the Court they represent. In order that they may do so, it would become necessary for them to refer to their own decision, and also to criticize to some extent the decision of the superior Court. They would do this not so much with a view of justifying their decision as to show that the aspersions cast upon them by the superior Court were unjustifiable" (ibid, p. 746, per Williams J. See also ibid, at 756, per Williams J).

¹¹⁸ Hence Stout CJ accused the Privy Council, in its *Wallis v Solicitor-General* judgment, of making statements of fact and law "...without a knowledge of our legislation" (ibid, at 732, per Stout CJ). He then said of another statement by the Privy Council in that case that it "...could not have been made by any counsel at the Bar in New Zealand, nor by any one conversant with our history". (ibid, at 737, per Stout CJ). He referred to a particular statement of the Privy Council as having been written "through want of knowledge of our statutes" (ibid, at 743, per Stout CJ). He then pointed to other cases in which he believed the Privy Council had pronounced judgment "...under a misapprehension or an ignorance of our local laws" (ibid, at 745, per Stout CJ). Similarly, Justice Williams, referring to the Privy Council's judgment in *Wallis v Solicitor-General*, pointed to "...the ignorance it has shown in this and other cases of our history, of our legislation, and of our practice..." (ibid, at 756, per Williams J). See also ibid, at 757, 759, per Edwards J.

1. Stout CJ and Wi Parata

Stout CJ's ardent desire to defend the *Wi Parata* precedent from the depredations of the Privy Council can be seen in the extent to which he reasserted its principles in his protest. Indeed, Stout CJ's stridency in doing so actually led him to overstate these principles as follows:

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. These must be fulfilled by the Crown. All lands of the Colony belonged to the Crown, and it was for the Crown under Letters Patent to grant to the parties to the Treaty such lands as the Crown had agreed to grant. The root of title being in the Crown, the Court could not recognize Native title. This has been ever held to be the law in New Zealand: see *Reg v Symonds*, decided by their Honours Sir William Martin, C.J., and Mr Justice Chapman in 1847; *Wi Parata v Bishop of Wellington*, decided by their Honours Sir J. Prendergast and Mr Justice Richmond in 1877, and other cases. Nor did the Privy Council in *Nireaha Tamaki v Baker* entirely overrule this view, though it did not approve of all the dicta of the Judges in *Wi Parata's* case.¹¹⁹

The legal position articulated by Stout CJ in this statement is nothing short of extraordinary. While the first part of the statement reflects the conventional and uncontentious view that the courts have no jurisdiction to take account of treaties, in and of themselves, independent of their embodiment in statute, the rest of the statement amounts to a *terra nullius* claim, denying the very existence of native title in New Zealand, since it implies that *all* title to land in New Zealand, including native land, derives from Crown grant.¹²⁰ It appears that Stout CJ did not intend to make this

¹¹⁹ "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", supra note 4, at 732, per Stout C.J. See *ibid*, at 747-48, per Williams J. Stout CJ's claim at the end of this passage that the judgment of the Privy Council in *Nireaha Tamaki v Baker*, does not "entirely overrule this view" [ie that "[t]he root of title being in the Crown, the Court could not recognize Native title"] is clearly disingenuous since Lord Davey insisted that the Courts could recognize native title so long as it fell within the scope of statute (see supra notes 36 and 37).

¹²⁰ As we saw in the *Wi Parata* judgment, the extinguishment of native title is a necessary precondition for the issue of a Crown grant, and Prendergast CJ held that the very existence of a Crown grant was sufficient declaration by the Crown that the native title had been lawfully extinguished (see *Wi Parata v Bishop of Wellington*, supra note 1, at 78). On this basis, the existence of a Crown grant over a piece of land necessarily precludes the continued existence of native title. Consequently, for Stout CJ to suggest

terra nullius claim, since the examples he then cited to support this proposition bore no relation to it, and indeed presupposed the existence of native title.¹²¹ I think that Stout CJ merely wished to assert the conventional proposition, which he had raised elsewhere, that native title, although in existence, and a “burden” upon the radical title of the Crown, could not be recognised in the municipal Courts independent of a certificate from the Native Land Court.¹²² It is possible to explain his confusion on this matter in terms of his anxiety to defend the *Wi Parata* precedent against the recent Privy Council decisions, which perhaps led him to overstate his case against the judicial recognition of native title.

2. Contradictions in Stout CJ's Protest

One of the basic points of contention between the Court of Appeal judgment in *Solicitor-General v Bishop of Wellington*, and the Privy Council's ruling on appeal in *Wallis v Solicitor-General*, concerned who were the original donors of the land to the Bishop of Wellington for the building of a school. This point was a significant one, because the question of who the land should revert to, due to the failure to fulfil the purpose of the grant, was affected by whether the land donated to the Bishop was deemed to come from the native tribes or the Crown. As we have seen, the Privy Council held that the native tribes were the original donors to the Bishop, the Crown

that all title to land in New Zealand derived from Crown grant, including native lands, is in effect to assert a *terra nullius* claim that native title in New Zealand did not exist.

¹²¹ Hence Stout CJ referred to three Ordinances which, he claimed, “...are in accordance with the judgments in the New Zealand cases referred to” (“*Wallis and Others v Solicitor General*, Protest of Bench and Bar, 25 April, 1903”, supra note 4, at 732, per Stout CJ). Yet each of these Ordinances referred to the Crown's exclusive right of pre-emption over native land – a right which presupposes the existence of native title because it is precisely that title which is extinguished when the Crown exercises its right of pre-emption (see *ibid*, at 732-33, per Stout CJ).

¹²² Hence in his *Hohepa Wi Neera* judgment, Stout CJ articulated this proposition as follows: “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 Court” (*Hohepa Wi Neera v Bishop of Wellington*, supra note 4, at 665, per Stout CJ. See also *Tamihana Korokai v Solicitor-General*, supra note 4, at 341, per Stout CJ). On the conventional common law view that native title co-exists with the radical title of the Crown, as a “burden” upon it, until extinguished by the Crown, see *Mabo v Queensland*, supra note 8, at 49, 51, 57, per Brennan J. See also *Attorney-General v Ngati Apa* (2003) 3 NZLR 643 (CA) 655-56, per Elias CJ.

merely fulfilling a “conveyancing” role in this process.¹²³ Yet, in his protest, Stout CJ fundamentally rejected this view as follows:

No doubt the Crown had agreed to reserve Witireia for the Ngatitōa tribe, and the letter quoted was a consent of the tribe to give up the occupancy of this reserve. In that sense, and in that sense only, was it the tribe’s gift. The fee-simple was in the Crown, and the Crown gave that to the Bishop. The legal title came from the Crown, and in that sense the Crown was the donor.¹²⁴

Further on he again denied any possibility that native title had been ceded by the Ngatitōa tribe to the Bishop when he stated that “[t]he title, being in the Crown, could not have been conveyed to the Bishop save by the Crown”.¹²⁵

In other words, Stout CJ was insisting that there was no transfer or extinguishment of native title involved in the transaction – that the land in question was a “reserve” that had been granted to the natives by the Crown and so the title had always been in the Crown. In arriving at this conclusion, he seemed to be once again reverting to his *terra nullius* view, expressed above, that the Crown had original title to the exclusion of native title. Yet this attempt by Stout CJ to deny the prior existence of native title encounters problems. For instance, contemporary judicial opinion holds that native title is not extinguished by the Crown’s granting of reserves to natives for their own use.¹²⁶ While judicial opinion may have differed on this question in 1903, nevertheless, only nine years later, Stout CJ himself argued that there was not a part of New Zealand which was not originally claimed by Maori tribes on the basis of customary ownership, so any “reserve” would have

¹²³ *Supra* notes 91 and 94.

¹²⁴ “*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, *supra* note 4, at 734, per Stout C.J.

¹²⁵ *Ibid.*

¹²⁶ Brennan J, representing a majority of the Australian High Court, argued in his *Mabo* judgment that the granting of reserves by the Crown to indigenous inhabitants does not extinguish native title. As Brennan put it: “.....the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive.....A clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title....or which creates a regime of control that is consistent with the continued enjoyment of native title.....A fortiori, a law which reserves or authorizes the reservation of land from sale for the purpose of permitting indigenous inhabitants and their descendants to enjoy their native title works no extinguishment”. (*Mabo v Queensland*, *supra* note 8,) at 64-65, per Brennan J. See *ibid.*, at 111, per Deane and Gaudron JJ; *ibid.*, at 196, per Toohey J).

originally been subject to native title and would have required its extinguishment if, at that time, “reserves” were not consistent with the continued existence of native title.¹²⁷

Also, this denial of the existence of native title is somewhat at odds with other statements which Stout CJ made in his Protest. For instance, he strongly defended the Court of Appeal’s *obiter dicta* in *Solicitor-General v Bishop of Wellington* (1901), where the Court had expressed reservations about its jurisdiction over native title matters raised in the Solicitor-General’s amended statement of defence.¹²⁸ As we have seen, these *obiter dicta* were subject to strong criticism from the Privy Council in *Wallis v Solicitor-General*, but Stout affirmed the Court of Appeal’s opinion on the grounds that any negotiations between Crown and Maori over such matters were acts of state, and therefore outside the jurisdiction of the Courts. As Stout CJ put it:

The Crown stated that the terms of cession prevented the *cy-près* doctrine being applied, and that it had duties toward the Natives. The Court held that the cession was an act of State, and that it was difficult, if not impossible, in 1900 to inquire – if it had jurisdiction to do so – into the act of State in 1850.¹²⁹

Yet, as mentioned above, Stout CJ had earlier claimed that the land ceded by the Ngatitōa tribe was a reserve whose fee-simple lay with the Crown. It was therefore a cession of land which was devoid of native title. Therefore, on what grounds could this cession now be deemed by Stout CJ in the passage above to be an “act of state”? The precedent of *Wi Parata v Bishop of Wellington* is that only issues between the Maori and Crown involving the Treaty or native title are acts of state.¹³⁰ So although Stout CJ had earlier denied that either the Treaty or native title was involved in the transfer of land in this case, nevertheless in his reference to an “act of state” in the passage above, he is clearly referring to a cession of native title between the Ngatitōa tribe and the Crown. Once again, therefore, we see that Stout CJ’s agonistic desire to defend *Wi Parata* from the Privy Council’s departure (in this case, by defending the Court of Appeal’s *obiter dicta* in *Solicitor-*

¹²⁷ As Stout CJ said: “[I]t has been recognised that the lands in the Islands not sold by the Natives belonged to the Natives. All the old authorities are agreed that for every part of land there was a Native owner” (*Tamihana Korokai v Solicitor-General*, supra note 4, at 340, per Stout CJ).

¹²⁸ See “*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, supra note 4, at 742-43, per Stout CJ.

¹²⁹ *Ibid*, at 742, per Stout C.J.

¹³⁰ See *Wi Parata v Bishop of Wellington*, supra note 1, at 78-79.

General v Bishop of Wellington) led him into contradiction and confusion within his protest.

3. *The Defence of Wi Parata*

Williams J was far more coherent than Stout CJ in his defence of *Wi Parata* from Privy Council criticisms.¹³¹ He provided this defence in the context of his explanation of the *obiter dicta* which he himself delivered on behalf of the Court of Appeal in *Solicitor-General v The Bishop of Wellington*. As we have seen, these *obiter dicta* were the subject of the Privy Council's most scathing comment. From the Privy Council's perspective, the Court of Appeal's view, expressed in its *obiter dicta*, that native title matters involving the Crown were outside its jurisdiction, showed undue deference to the executive power.¹³²

In his response, Williams J made a point of noting that, at the time of the Court of Appeal's judgment in *Solicitor-General v Bishop of Wellington*, the Court had not yet read the Privy Council's decision in *Nireaha Tamaki v Baker*, where the Privy Council had asserted that native title in New Zealand had a statutory foundation and so was within the jurisdiction of the Courts.¹³³ Nor did the Court believe that at the time of the land transactions in dispute there were any statutes "regulating the extinction of native title".¹³⁴ Williams J therefore concluded that, at the time of its *obiter dicta*, the Court of Appeal was justified in concluding that native title was outside

¹³¹ Williams J's protest was read to the Court by Chief Justice Stout. His protest was made on behalf of the judges who decided *Solicitor-General v Bishop of Wellington* (1901). Williams J articulated his position as follows: "The Judges of the Court of Appeal of New Zealand who decided the case in question have therefore thought it right that I, who was the Judge who presided on that occasion, should on their behalf protest publicly against the attack made on the honour of the Court they represent, and should endeavour to show that whether their judgment was right or wrong there is no ground whatever for the attack their Lordships have thought fit to make" ("*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", *supra* note 4, at 747, per Williams J.).

¹³² See the section "The Privy Council's Rejection of the Court of Appeal's *Obiter Dicta*" above.

¹³³ *Supra* note 63. Concerning the Privy Council's opinion, expressed in *Nireaha Tamaki v Baker* (1900-01), that native title has a statutory basis in New Zealand, see *supra* notes 36 and 37.

¹³⁴ "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", *supra* note 4, at 749, per Williams J.

the jurisdiction of the Court because an “unbroken current of authority” sustained it in this conclusion:

Whether, however, we were right or wrong, there was certainly an unbroken current of authority. First, that the Native occupiers had no right to their land cognizable in a Court of law, and that having no such right themselves they could not transfer any right to others. Secondly, that the Crown grant was not a mere piece of conveyancing, but was essential to create any right at all of which this Court could take notice, and that any such right was derived from the Crown grant, and by virtue of the grant, and from the grant alone. Thirdly, that as the Natives never had any rights cognizable in a Court of law they had no *locus standi* to impeach the grant, and were neither necessary nor proper parties in any proceedings between the Crown and its grantee in relation to the subject-matter of the grant..... Had we not so held we should not only have had to overrule all previous decisions, but should have differed in opinion from every Judge who has ever sat in this Court.¹³⁵

Consequently, Williams J insisted that, at the time of the Court of Appeal’s judgment in *Solicitor-General v Bishop of Wellington* (1901), there was no authority that justified the Court in departing from the precedent established by *Wi Parata* that native title could not be recognized by the municipal Courts. He points out that the Native Rights Act referred to by the Privy Council in *Nireaha Tamaki v Baker* as a statutory basis for native title was not passed until 1865 –after the cession of the land occupied by the Ngatitōa tribe – and so was not applicable to the case.¹³⁶

VIII. RETROSPECTIVE RE-WRITING

Williams J ended his defence of the *Wi Parata* precedent by claiming that it was this precedent which informed the Court of Appeal’s *obiter dicta* at the end of its judgment in *Solicitor-General v Bishop of Wellington*.¹³⁷ Given

¹³⁵ *Ibid*, at 750, per Williams J. However see *infra* note 140.

¹³⁶ *Ibid*, at 749, per Williams J.

¹³⁷ As Williams J stated: “After we had given our decision on the grounds above mentioned, we made some remarks which were altogether independent of what we had decided. We indicated that there appeared to us in any case, and apart from our decision, to be some difficulty in administering the trust *cy-près*, as the Crown by its counsel had asserted that it had duties towards the Natives who ceded the land which could not be performed if the Court so administered it. We gave at length our reasons for the apparent difficulty, but expressly refrained from giving any decision on the question. It has always been held that any transactions between the Crown and the Natives relating to their title by occupancy were a matter for the Executive Government, and one into which the Court had no jurisdiction to inquire. As was laid down in *Wi Parata v Bishop of Wellington*:

that it was Williams J who delivered the judgment of the Court of Appeal in *The Solicitor-General v The Bishop of Wellington*, one might presume that he had inside knowledge of the reasoning which informed the *obiter dicta* at the end of that case.

Yet Williams J's assertion in his protest that it was the *Wi Parata* precedent which informed the Court of Appeal's reasoning in its *obiter dicta* some two years before seems somewhat disingenuous. If the Court of Appeal was really referring to the *Wi Parata* precedent in its *obiter dicta*, why refer to the very different doctrine of *parens patriae*, as it did throughout? Why not just refer to the doctrine of *Wi Parata* that native title matters involving the Crown fall exclusively within the Crown's prerogative powers and so outside the jurisdiction of the Courts, just as the Court of Appeal had earlier done in *Nireaha Tamaki v Baker* (1894)?¹³⁸ As we have seen, there is no obvious, or even tenuous, connection between the doctrine of *parens patriae* and the Crown's obligations to Maori as defined by *Wi Parata*, which fall entirely within the Crown's prerogative powers.¹³⁹

Consequently, it is fair to assume that, despite Williams J's assertion above, the Court of Appeal's *obiter dicta* in *Solicitor-General v Bishop of Wellington* (1901) were *not* informed by the *Wi Parata* precedent. I think that Williams J's claim that they were was guided by the fact that it was the *Wi Parata* precedent which was most under threat by the recent Privy Council decisions, and, in the context of his protest, he wished to align all of

'Transactions with the Natives for the cession of their title to the Crown are to be regarded as acts of State, and therefore are not examinable in any Court'..... We were considering with hesitancy how far the above principle would have been applicable to the case before us. We considered, as every authority justified us in considering, that the root of all title was in the Crown. What the right of any prior Native occupiers might be, or whether they had any rights, was a matter entirely for the conscience of the Crown. In any case they had no rights cognizable in this Court. Nor could this Court examine in any way what their rights were. If the Crown by its representatives asserted the existence of any duty to the Natives, it seemed to us that the above principles might require the acceptance by the Court of the assertion, and so have placed us in the difficulty suggested" (*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", supra note 4, at 754-55, per Williams J).

¹³⁸ Cf *Nireaha Tamaki v Baker* (1894), supra note 27, at 488, per Richmond J.

¹³⁹ See the discussion on the absence of any such connection in the section "*The Solicitor-General v The Bishop of Wellington*" above.

the Court of Appeal's previous judgments in defence of this precedent in order to buttress its authority.¹⁴⁰

Consequently, both Williams J and Stout CJ (with his reference to "acts of State" above"¹⁴¹) try retrospectively to assimilate the *obiter dicta* in *Solicitor-General v Bishop of Wellington* to the *Wi Parata* precedent, when, in fact, that precedent played little part in the *obiter dicta* in the first place. My evidence for this relates to the *obiter dicta* themselves. Within the *obiter dicta*, Williams J suggested that the doctrine of *parens patriae* made the terms of cession of native title raised in the Solicitor-General's amended statement of defence a matter that ought more appropriately be dealt with by Parliament than the Courts.¹⁴² Yet, if the doctrine of *Wi Parata* was being upheld in the *obiter dicta*, any matter concerning a cession of native title to the Crown would presumably be held to lie exclusively within the jurisdiction of the Crown, rather than Parliament, since it would entail an act of state, and so be subject to the Crown's prerogative powers.¹⁴³ Indeed, in

¹⁴⁰ The same concern underlay Williams J's spurious claim that an "unbroken current of authority" supported the view which the Court of Appeal expressed in its *obiter dicta* in *Solicitor General v Bishop of Wellington*: that they had no jurisdiction to deal with native title matters (see supra note 135). Such a view implies that all New Zealand Court rulings were consistent with the *Wi Parata* view on this matter. But as we saw, there were two major New Zealand native title decisions, prior to *Wi Parata*, which held to a contrary view (see supra note 25). Williams J's reference to an "unbroken current of authority" effectively ignores these, as does his claim that, in arriving at a contrary view, he would "...have differed in opinion from every Judge who has ever sat in this Court" (see supra note 135). Both claims must once again be seen as an attempt to buttress all existing New Zealand judicial authority in support of *Wi Parata*.

¹⁴¹ Supra note 129.

¹⁴² As Williams J stated: "In the above circumstances it seems more appropriate that the matter should be dealt with by the Legislature than by this Court" (*Solicitor-General v Bishop of Wellington*, supra note 64, at 686, per Williams J).

¹⁴³ In so far as prerogative powers include the capacity to summon, prorogue or dissolve parliament, they are exercised by the Crown, independent of parliament itself (see Nygh and Butt, supra note 35, at "Prerogative Powers", 906). However Parliament may circumscribe and extinguish such prerogative powers (*ibid*), but this in itself would be an extraordinary measure, and "acts of state" are therefore generally held to lie within the jurisdiction of the Crown alone. As such, contrary to Stout CJ and Williams J, it is reasonable to assume that the reference in the *obiter dicta* to Parliament as the most likely venue for consideration of a *parens patriae* relationship arising between Crown and Maori means that the *parens patriae* doctrine does not entail acts of state, and so is not an oblique reference to the *Wi Parata* precedent upholding Crown prerogative powers over native title.

his protest, Williams J conceded this when he stated that “[w]hat the rights of any prior Native occupiers might be, or whether they had any rights, was a matter entirely for the conscience of the Crown”.¹⁴⁴

So we have a clear contradiction between the reference to Parliament as the appropriate jurisdiction for the consideration of the matters raised by the Solicitor-General’s amended statement of defence – a reference that occurs within the *obiter dicta* – and a reference to the Crown as the appropriate jurisdiction in the explanation of the *obiter dicta* two years later. The contradiction is explained by the fact that two different principles are being referred to in each case, neither of which is assimilable to the other. If *parens patriae* is the appropriate doctrine governing the Crown’s dealing with the Ngatitōa tribe concerning the cession of native title, then, according to the Court of Appeal in 1901, Parliament is the appropriate authority for dealing with the matter. If the *Wi Parata* precedent concerning Crown prerogative is the appropriate doctrine, then the Crown is the appropriate authority. Consequently, the Court of Appeal’s reference to Parliament as the appropriate jurisdiction for matters involving *parens patriae* indicates that it was not the *Wi Parata* precedent which animated its *obiter dicta* in 1901. It was only the wish, on the part of some Court of Appeal judges, to defend the *Wi Parata* precedent in 1903, in their Protest against the Privy Council, which made them claim otherwise.

This agonistic desire on the part of the Court of Appeal to buttress the authority of *Wi Parata* by assimilating all their previous judgments to it, even those decided on different principles, is one more piece of evidence that what really animated the Court of Appeal’s Protest in 1903 was less the ostensible rationale the Court of Appeal pointed to (the Privy Council’s injudicious use of language and imputation of improper motives in *Wallis v Solicitor-General*) and more the defence of *Wi Parata* from the Privy Council’s departures – departures which threatened the principles which had guided New Zealand jurisprudence on native title for the previous twenty-five years.

IX. THE PRIVY COUNCIL PROTEST: COLONIAL OR NATIONALIST CONSCIOUSNESS?

So the defence of *Wi Parata* was the animating motive which underlay the Court of Appeal’s Protest against the Privy Council. But why was the Court of Appeal willing to go to such lengths to defend this precedent? Why was it

¹⁴⁴ “*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, supra note 4, at 755, per Williams J.

so anxious in the face of any apparent departure from it? I think the answer lies in the material basis of New Zealand society at the time. Like any settler society, particularly a settler society whose establishment involved the peaceful or hostile displacement of indigenous inhabitants, one of the primary material concerns of New Zealand colonists was the stability and security of land settlement. The question of land, of course, had been one of the issues leading to full-scale war between the Crown and some Maori tribes in the 1860s.¹⁴⁵ Consequently, the stability and security of land settlement was an overriding concern within New Zealand settler society as a whole, and it would not be surprising if the same concern animated the views of the judges who sat in the municipal Courts within that same society. Indeed, as we have seen, senior members of the Court of Appeal gave expression to precisely such concerns once it was apparent that the Privy Council had departed from the *Wi Parata* precedent in its judgments on native title.¹⁴⁶

But, as we have seen, these concerns over *Wi Parata* were not limited to isolated statements by individual judges. They actually gave rise to a full-scale protest by the Court of Appeal against the Privy Council in 1903. Such an act of defiance was unprecedented within the colonial structure of the British Empire at that time, where all colonial courts were subordinate to the

¹⁴⁵ See Sinclair, Keith *The Origins of the Maori Wars* (1957); Sorrenson, "Maori and Pakeha", in Oliver, WH and Williams, BR (ed) *The Oxford History of New Zealand* (1987) 175-76; Orange, Claudia *The Treaty of Waitangi* (1988) 159-60.

¹⁴⁶ Hence, as we have seen, Stout CJ said that if the dicta of the Privy Council in *Nireaha Tamaki v Baker* "...were given effect to, no land title in the Colony would be safe" (supra note 61). Similarly, in the Court of Appeal judgment in *Nireaha Tamaki* in 1894, Richmond J, in affirming the *Wi Parata* precedent that the declaration of the Crown on native title is sufficient to oust the jurisdiction of the Courts, said that "[t]he security of all titles in the country depends on the maintenance of this principle" (supra note 27). Finally, Edwards J gave expression to these same concerns over the stability and security of land settlement, in the wake of the Privy Council decisions, when he 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" ("*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", supra note 4, at 757, per Edwards J, emphasis added).

imperial authority represented by the Privy Council.¹⁴⁷ The very precociousness of this action, its defiance of what was an established hierarchy of imperial authority, leads to the question of whether such an act of defiance was, in its way, a nascent act of “independence” on the part of these New Zealand judges? In asserting and defending the standards of New Zealand law against those of the Privy Council, were these judges in fact giving expression to demands for greater independence from imperial authority – demands which have become far more frequent in our own time – thereby exhibiting a “nationalist consciousness”?

Certainly, at times in their protest, the judges gave expression to sentiments that might suggest a “nationalist consciousness” on their part – a desire that New Zealand break from the imperial constraints of the Privy Council and develop its own line of law. Certainly, Stout CJ at one point in the protest suggested that the “Imperial spirit that is the true bond of union amongst His Majesty’s subjects” may have been “weakened” by the actions of the Privy Council which had given rise to the protest.¹⁴⁸ Williams J went even further, referring to the Privy Council as “four strangers sitting 14,000 miles away”, and even suggesting that it had displayed the characteristics of an “alien tribunal”.¹⁴⁹ Certainly, some of the judges in the protest made strong claims that New Zealand lawyers, rather than English ones, were far more qualified to be pronouncing judgment on New Zealand laws.¹⁵⁰ The distance of the Privy Council, and the associated delays in judgment, were also subject to criticism.¹⁵¹ All of these sentiments might point to a veiled demand for greater independence from the Privy Council, and therefore might be considered expressions of a nascent “nationalist consciousness” on the part of the Court of Appeal judges, a consciousness which may have reflected sentiments within the wider settler society. Certainly Stout CJ, in an article he authored in the *Commonwealth Law Review* the following year, expressed these nationalist sentiments in no uncertain terms, insisting that

¹⁴⁷ *Supra* note 114.

¹⁴⁸ “*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, *supra* note 4, at 746, per Stout CJ.

¹⁴⁹ *Ibid*, at 756, per Williams J.

¹⁵⁰ Certainly the strongest claim for the greater expertise of New Zealand lawyers over English ones when it came to considerations of New Zealand law was made by Edwards J, at *ibid*, 758-59. See also *supra* note 118, where the Court of Appeal refers strongly to what they perceive as the “ignorance” of the Privy Council regarding New Zealand law.

¹⁵¹ See “*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, *supra* note 4, at 756, per Williams J.

greater independence from the Privy Council was a necessary step towards greater independence for New Zealand society as a whole.¹⁵²

But while Stout CJ's *Commonwealth Law Review* article clearly was animated by what we could call a "nationalist consciousness", I think that the sentiments expressed by the Court of Appeal in their protest the year before were not. This is because any apparent "nationalist consciousness" which the Court of Appeal might appear to have given expression to in the protest was, I think, largely derivative of, and subordinate to, a wider "colonial consciousness" which most fully informed their perceptions and judgments. For instance, any expression of desire for greater independence from the Privy Council that emerges in the protest seems to be very much a function of the anger and frustration which these judges felt at what they thought was the ignorance of the Privy Council regarding their local laws and judicial precedents relating to native land, and the arrogance with which they believed the Privy Council views were expressed, at least in the *Wallis* judgment. It was because so much was at stake for New Zealand settler society in the maintenance of these local laws and precedents that such anger and frustration so quickly arose. In other words, it was their concern to protect these laws and precedents, and the stability and security of land settlement they ensured, which most animated the Court of Appeal in its response to the Privy Council. Such concerns were therefore essentially "colonial" in nature, dominated by the central colonial concern with land settlement and the security of settler holdings. Any expression of nationalist sentiments for greater independence within the protest were very much subordinate to these colonial concerns.¹⁵³

¹⁵² As Stout CJ put it: "Seeing that the fullest rights of legislation and administration have been granted to the Colonies, it is illogical that the fullest rights of settling legal disputes should not also have been granted to them. Surely the making of laws, and the administering of Government affairs are as important as the interpreting of the laws we ourselves have made [?]" (Stout, "Appellate Tribunals for the Colonies" (1904) *The Commonwealth Law Review* 4). Indeed Sir Robert went so far as to suggest that the continuing dependence on the Privy Council may undermine the colonists' capacity for independence in other respects. As he puts it: "The psychological effect of dependence on some external power for the performance of our highest duties as citizens of these new nations should.....not be lost sight of" (ibid, at 13).

¹⁵³ So, for instance, William J's reference to the Privy Council as an "alien tribunal" was situated within a broader statement that was more nuanced in its demands for independence. As is clear from the following passage, it was the frustration which Williams J felt with what he saw as the "ignorance" of the Privy Council regarding local New Zealand laws, the arrogance it displayed in the *Wallis* judgment, and the delays in delivering its judgments, which provoked his suggestions for reform, rather than any

In contrasting a “colonial” to a “nationalist consciousness”, I do not wish to suggest that a “colonial consciousness” implies an attitude of deference and subordination to the imperial authorities. As we have seen, this “colonial consciousness” gave rise to interests and values which were very much at odds with those expressed in the Privy Council judgments, and led to strident criticism of and opposition to that body.¹⁵⁴ In this sense, a “colonial consciousness” is not the opposite of a “nationalist consciousness”, suggesting a deferential submission to imperial authority. The vigour of the

“nationalist” desire for independence. As Williams J stated: “That the decisions of this Court should continue to be subject to review by a higher Court is of the utmost importance. The knowledge that a decision can be reviewed is good alike for Judges and litigants. Whether, however, they should be reviewed by the Judicial Committee as at present constituted is a question worthy of consideration. That Court, by its imputations in the present case, by the ignorance it has shown in this and other cases of our history, of our legislation, and of our practice, and by its long-delayed judgments, has displayed every characteristic of an alien tribunal” (“*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, supra note 4, at 756, per Williams J). Similarly, Stout CJ’s reference to the “weakening” of the “Imperial spirit” is similarly nuanced when placed in its broader context. Like Williams J, Stout CJ paid lip service to the importance of having a higher tribunal to which New Zealand judgments may be appealed, but again, it is his frustration with the perceived ignorance of the Privy Council regarding New Zealand laws which provokes his criticisms. As Stout CJ stated: “The matter is really a serious one. A great Imperial judicial tribunal sitting in the capital of the Empire, dispensing justice even to the meanest of British subjects in the uttermost parts of the earth, is a great and noble ideal. But if that tribunal is not acquainted with the laws it is called upon to interpret or administer, it may unconsciously become the worker of injustice. And if such should unfortunately happen, that Imperial spirit that is the true bond of union amongst His Majesty’s subjects must be weakened. At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, or our conveyancing terms, or our history. What the remedy may be, or can be, for such a state of things, it is not at present within my province to suggest” (ibid, per Stout CJ, at 746).

¹⁵⁴ Indeed, so effective was this criticism and opposition that, according to the *Dictionary of New Zealand Biography*, the protest initiated a process that eventually led to reform, when it was arranged that “... in hearing cases remitted from dominion courts the Privy Council should, if possible, have sitting with it a judge from the dominion interested” (*A Dictionary of New Zealand Biography* (1940) 342). The result was ironic, in that for all their criticisms of the Privy Council in their protest, both Stout CJ and Williams J were eventually elected to preside on this body themselves – Williams J in 1913 and Stout CJ in 1921 (ibid, at 342, 514).

Court of Appeal's protest against the Privy Council is evidence of this.¹⁵⁵ Rather, it is a consciousness perhaps just as much independent, but animated by different values and concerns than a "nationalist consciousness". Whereas a "nationalist consciousness" might demand independence from the Privy Council because such dependence is inconsistent with national self-development (the very view that Stout CJ expressed in his *Commonwealth Law Review* article), a "colonial consciousness" might demand such independence for the sake of the greater protection of colonial interests, where those interests, as we have seen, are primarily centred on land settlement.

In this sense, I would argue that the Court of Appeal's defence of the *Wi Parata* precedent, and the New Zealand legislature's statutory measures directed towards the same, were motivated primarily by a "colonial consciousness" on the part of these New Zealand authorities. *Wi Parata* provided precisely the stability and security of land settlement which these authorities wanted from the legal system in New Zealand – a stability and security which was sought largely at the expense of the indigenous Maori inhabitants. The fact that some of the Court of Appeal judges themselves admitted that any departure from *Wi Parata* would undermine that stability and security itself shows the wider material interests which underpinned their commitment to this precedent. Any threat to that security, even if arising from the centre of the Empire itself, was a clear challenge to colonial interests and one the colonial authorities resisted with stridency and determination. It is therefore this "colonial consciousness" which I think explains the willingness of the Court of Appeal to go to such inordinate lengths in their defence of the *Wi Parata* precedent, even to the point of an open breach with the Privy Council.

X. CONCLUSION

So were the rulings of the Privy Council in *Nireaha Tamaki v Baker* and *Wallis v Solicitor-General* a "requiem" for *Wi Parata*? At one level yes, and at another no. Certainly in the Court of Appeal's next major native title judgment, *Tamihana Korokai v Solicitor-General* in 1912, the Court of Appeal clearly recognised a statutory basis for the recognition of native title

¹⁵⁵ In this respect, I would disagree with Paul McHugh's characterization of the protest as showing "... how clearly New Zealand lawyers were regarding themselves as umbilically connected both historically and doctrinally to the British constitution" (McHugh, "A History of Crown Sovereignty in New Zealand", in Sharp, Andrew and McHugh, Paul (eds) *Histories, Power and Loss. Uses of the Past – A New Zealand Commentary* (2001) 197).

in New Zealand Courts, and strongly suggested that there was no longer any Crown prerogative remaining over native title matters.¹⁵⁶ In this respect, the Court moved strongly against central elements of the *Wi Parata* precedent and eliminated its differences with the Privy Council over native title which had informed its protest in 1903.

On the other hand, it needs to be remembered that the Privy Council judgments did not depart from the *Wi Parata* precedent in every respect. As we have seen, Prendergast CJ's declaration that a Crown grant was sufficient evidence of the lawful extinguishment of native title was left intact.¹⁵⁷ This meant that all existing Crown grants in New Zealand were safe from native title challenge. Secondly, as we have also seen, the New Zealand legislative response, which the Privy Council ruling in *Nireaha Tamaki v Baker* had initiated, enshrined in statute the basic *Wi Parata* principle that native title claims could not be brought against the Crown without the Crown's permission.¹⁵⁸ In excluding such claims from the Courts, this legislation ensured that the Crown was effectively the "sole arbiter of its own justice" on native title issues. Both of these developments 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 fell outside such restrictions (such as the customary collection of sea-food).¹⁵⁹ It

¹⁵⁶ On the statutory recognition of native title, see *Tamihana Korokai v Solicitor-General*, supra note 4, at 345, per Stout CJ; 351, per Edwards J; 352-53 per Cooper J; 355-56, per Chapman J. On the question of the continuation of Crown prerogative over native title, see *ibid*, at 345, per Stout CJ, where he mentions three methods by which the Native Land Court can be excluded in its jurisdiction over native title, and none of these relate to the Crown prerogative power. For stronger rejections of the continued existence of the Crown prerogative over native title, see *ibid*, at 346-48, per Williams J; 351-52, per Edwards J; 353-54, per Cooper J; and 358, per Chapman J.

¹⁵⁷ Supra note 44.

¹⁵⁸ Supra note 60.

¹⁵⁹ 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. However as Elias CJ pointed out in *Attorney-General v Ngati Apa*, even in regard to these marginal concerns, the *Wi Parata* principle was still, at times, applied. Hence Elias CJ criticized the Court of Appeal ruling in *Re the Ninety-Mile Beach* (1963) NZLR 461 (CA), claiming that it wrongly applied the *Wi Parata* precedent to coastal foreshores and

is the reduction of native title claims in the municipal Courts to these marginal concerns that most exemplifies the continuing salience of the *Wi Parata* precedent in New Zealand.

In this respect, rather than being a “requiem” for *Wi Parata*, the Privy Council rulings were at best an indication of the extent to which New Zealand colonial interests had departed from the more impartial concerns of English common law on native title, and highlighted the extent to which the material interests of settlers had, from the *Wi Parata* judgments onwards, informed the opinions of New Zealand judges on these matters. This “colonial consciousness” received a rude shock from the Privy Council’s rulings in 1901 and 1903, and the protest was a manifestation of the resulting anger and frustration felt by the New Zealand judges towards this imperial body.

was therefore wrongly decided in law (cf *Attorney-General v Ngati Apa*, supra note 122, at 651, per Elias CJ).

BOOK REVIEWS

CIVIL REMEDIES IN NEW ZEALAND, by Justice Peter Blanchard (Consulting Editor), Wellington, Brookers, 2003, 768 pp. New Zealand price \$198.00 gst inclusive.

Civil Remedies in New Zealand is New Zealand's first comprehensive civil remedies book. It is acknowledged by the consulting editor, the Right Hon Justice Peter Blanchard, that the remedies noted in the book can be found in other sources, but this book brings civil remedies together as a convenient and useful reference point for practitioners, academics and students.

There is no doubt that in time *Civil Remedies in New Zealand* will become the first reference point for practitioners when advising clients of potential remedies. Considerations of remedies by practitioners will now be easier, which was one of the intentions of the book (p vii):

How many times is a case won on liability but lost on remedy because a legal adviser has given no or inadequate thought to where a finding of liability may lead? Unfortunately all too often. An object of this work is therefore to encourage earlier and greater concentration on the remedies that might be available if the claimant actually prevails.

The first part of the book is a far-reaching account of the law relating to compensatory remedies in contract, tort and equitable damages. Each chapter while extensive is organised in an easy to follow manner with a thorough examination of the different aspects relating to compensatory remedies, whether they be in contract, tort or equity. While we would expect the authors to cite cases and statute as authority, the wide range of other references and sources is noticeable in most chapters. This is mostly apparent in the chapter on equitable damages where the author Geoff McLay incorporates an interesting academic analysis of the growth and development of equitable damages since *Day v Mead* [1987] 2 NZLR 443 (CA). Also noticeable in this chapter, as it is in other parts of the book, is the simple manner in which the academic arguments are discussed, making the academic issues easy to understand and very informative.

Part 2 of the book considers injunctions, freezing and seizing orders, Anton Pillar orders and specific performance. There is clear advice as to the legal requirements for these remedies. The chapters in this part are extensive and useful to practitioners, with practical advice given in relation to a number of areas including a checklist of what documents need to be filed in Court. Previously practitioners, academics and students would have most probably

relied on *The Laws of New Zealand – Civil Procedure: High Court*, or the various New Zealand Law Society seminars on *Injunctions and Other Emergency Relief*. One would presume that this chapter will become the first point of reference when considering remedies of prohibition and compulsion.

Ross Grantham and Charles Rickett have written part 3 of the book on Return of Property/Disgorgement. The chapters in this part give a thorough examination of matters such as the law of restitution, unjust enrichment, personal restitutionary remedies, and disgorgement. Of particular interest is Grantham and Ricketts' clear and easy to understand section on "accounts", which by their own admission "remains a somewhat arcane and confused area of law" (p 402). One would have to agree with the authors' view that the law of restitution is "one of the most important and far-reaching developments in recent history of the private law of obligations" (p 364). In their chapter on Proprietary Remedies, Grantham and Rickett discuss the remedies available through constructive trust, resulting trust, equitable trust, subrogation and rescission.

Statutory remedies and relief are covered in part 4 of the book but the discussion is confined to section 9 of the Contractual Remedies Act 1979, section 7 of the Illegal Contracts Act 1970 and section 43(2) of the Fair Trading Act 1986. There are numerous other sections of statutes that provide civil remedies, such as particular sections of the Credit Contracts Act 1981, Residential Tenancies Act 1986, Contractual Mistakes Act 1977, Credit (Repossession) Act 1997, Crown Proceedings Act 1950, Family Proceedings Act 1980, Companies Act 1993, Minors Contract Act 1969, Property Law Act 1952, and Employment Relations Act 2000 to name a few. It is not clear why the book concentrates on sections from only three particular Acts. What is noted is that many of the principles discussed in this part are also relevant to many other statutory provisions that provide civil remedies. It would, however, have been helpful to have had remedies under the Consumer Guarantees Act also discussed.

Part 5 deals with exemplary and aggravated damages. The chapter on exemplary damages begins with an academic recount of the development of exemplary damages at common law, followed by analysis of the case *Daniels v Thompson* [1998] 3 NZLR 22. The chapter concludes with practical advice for practitioners regarding how exemplary damages are to be pleaded. The somewhat brief chapter on aggravated damages also incorporates a section advising on the pleading of aggravated damages. Practical advice about how different remedies can be pleaded would have been helpful in relation to many of the other civil remedies discussed in the

book. It would also have been helpful if each chapter was formatted in a similar way and provided the practical advice as to pleadings along with a checklist.

The increasingly important declaratory relief is discussed in part 6. The chapter assesses declaratory relief through both the Declaratory Judgments Act and the Court's inherent jurisdiction. Part 7 discusses the doctrine of contribution which Beck describes as "a cause of action entitling a defendant who has paid the plaintiff to recover anything paid beyond a fair share of the liability" (p 620).

The information in part 8 relating to Official Information Acts, while interesting and informative, appears to be no more than a summary of the relevant provisions of the Official Information Act 1982, Local Government Official Information and Meetings Act 1987, Privacy Act 1993 and the Human Rights Act 1993.

The final part of the book covers the important matter of costs. While the chapter concentrates in the main on costs in both the District and High Courts there is also reference to costs in the Court of Appeal and Privy Council. The author of this chapter also provides a helpful checklist in relation to High Court costs.

The book is comprehensive although not definitive in terms of examining every possible civil remedy available. There are a few areas which have not been traversed, such as remedies under the New Zealand Bill of Rights Act as per *Baigent v Attorney General* [1994] 3 NZLR 667, remedies under the Consumer Guarantees Act and the Credit Contracts and Consumer Finance Act. The few exclusions do not detract from this excellent resource.

Given the thorough and useful examination of civil remedies that the book undertakes it is certain that *Civil Remedies in New Zealand* is (as its promotional pamphlet claims) "the definitive reference point for practitioners, judges, and law students seeking to find the appropriate remedy for liability in civil law".

Overall, this book is an excellent resource for all involved in the law. It is an essential resource for practitioners working in civil litigation. The book sets out the relevant law relating to particular areas in a clear manner and provides useful practical advice. The book is an essential text for students studying towards a law degree given the number of topics it covers and the commentary relating to different remedies. The book will also be essential

reading for academics lecturing in the various areas of law covered in the book.

Craig Coxhead*

INTERNATIONAL LAW AND INDIGENOUS PEOPLES, by S James Anaya (Editor), Ashgate, Aldershot, England, 2003, xxi, 483pp. Publisher's price £110.00 (hardback).

As part of the Ashgate *Library of Essays in International Law*, this volume is dedicated to "one of the most dynamic areas on international law today" – the rights and status of indigenous peoples (p xi). The volume brings together eleven previously published articles under several themes that look to the past, present and future. It is an important and useful addition to the Ashgate *Library* series.

Anaya introduces the volume by explaining how indigenous peoples have used international law to highlight and progress sovereignty and rights issues within their colonised homelands. Two strands of international law are identified. On one front, indigenous peoples have used it to invoke legal rules relating to the acquisition and transfer of territory by and among states so as to demonstrate the illegitimacy of domestic state assault on indigenous sovereignty. On another front, indigenous peoples have used it to invoke the moral and ethical discourse relating to the international human rights movement so as to portray indigenous peoples as groups of human beings with fundamental human rights concerns that deserve attention (p xii). Anaya's well-chosen eleven essays provide a valuable insight into the domestic indigenous peoples' struggles for self-determination in the context of international law.

International Law and Indigenous Peoples consists of five parts: historical antecedents and their contemporary significance; the argument for recognition of indigenous sovereignty on the basis of established modern principles; the dynamics and challenges of the contemporary international indigenous rights movement; the emergence and contours of a new indigenous rights regime; and invoking the contemporary indigenous rights regime. Key terms such as indigenous peoples, sovereignty, self-determination, indigenous rights, and minority rights are explored in depth against the international law regime. Many of the doctrines are traced back to their origins. For example, G Marks' essay discusses the uses of legal

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history in developing the doctrine of indigenous rights in international law with reference to 16th century Spanish writers.

As a credit to Anaya, the chosen essays provide an insightful, broad range of domestic case studies relating to Australia (Gillian Triggs); east, south-eastern and south Asia (Benedict Kingsbury); Hawaii (James Anaya); the United States (John Howard and Clinebell Jim Thomson); and Canada (Darlene Johnston). References to New Zealand appear in several of the essays. Siegfried Wiessner's global comparative essay recognises that "the claims of Maori regarding self-government and ownership of land are far from settled, and the violent actions such as the March 1997 sledgehammer attack on the America's Cup by an indigenous protestor have called world attention to an angry new generation of Maori" (p 271). Likewise, Robert Williams' "Encounters on the Frontiers" essay acknowledges that "in the sessions of the Working Group and other international human rights forums, the governments of the United States, Australia, and New Zealand – all of which possess exemplary reputations for protecting individual human rights within their domestic legal systems – are among the most frequently cited violators of indigenous peoples' human rights" (p 176). The volume contains important messages for our country, especially now in 2004.

The current foreshore and seabed controversy has seen New Zealand's indigenous peoples resort to international law to highlight government abuse of international human rights. In May 2004, Te Runanga o Ngai Tahu, in conjunction with the Treaty Tribes Coalition, took its anger and dismay over the Government's handling of the foreshore and seabed issue to the United Nations Permanent Forum on Indigenous Issues in New York. There the Deputy Kaiwhakahaere of Te Runanga o Ngai Tahu, Edward Ellison, stated: "We are being stripped of our status as indigenous peoples, and are facing an immediate, and to us, unparalleled threat to the retention of our culture and cultural identity in over 100 years" (see Federation of Maori Authorities website at www.foma.co.nz/hot_topics/details.htm?topicid=122 (accessed 7 July 2004)). Ellison asked the Permanent Forum to assert that states should unreservedly respect customary law and relationships, and that the state of New Zealand should take immediate steps to implement the substantive realisation of cultural pluralism through abandoning its intent to pass the Foreshore and Seabed Bill.

The recourse to the Permanent Forum provided New Zealand's indigenous peoples with an opportunity to highlight the domestic experience. However, the New Zealand Government has been dismissive of the action, reiterating simply that "the process we have been through fulfils all of our international human rights obligations" (Hon Dr Michael Cullen, "Human Rights and the

Foreshore and Seabed” 1 June 2004 Human Rights Commission Speakers Forum speech – to view a copy of the speech see www.beehive.govt.nz/PrintDocument.cfm?DocumentID=19914 (accessed 7 July 2004)). Most Maori, and many others, including the Waitangi Tribunal, disagree (see Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy* (GP Publications, 2004)).

Nonetheless, at the very least, the New Zealand experience has been shared with the international community. Or, as Robert Williams concluded in his essay in *International Law and Indigenous Peoples*, international forums provide “a powerful and empowering instance of the ways in which ... indigenous peoples, through their own stories, can seek to transform legal thought and doctrine about their human rights according to the terms of a different vision of justice in the world” (p 209). New Zealand’s indigenous peoples are clearly playing an active role in seeking to achieve just this.

With consciences being raised as we conclude the International Decade of the World’s Indigenous Peoples (1995-2004) celebrations, and, as a nation, work through the foreshore and seabed issue, *International Law and Indigenous Peoples* is a timely volume. While it would be possible to hunt through the journals stacked in the law library shelves and individually locate each of the essays, the value of Anaya’s publication is that this becomes unnecessary. In any event, it is highly unlikely that each law school library would even hold copies of the eleven law journals where the essays were first published – for instance, at Otago, only eight of the eleven journal volumes are held. With this in mind, coupled with the excellent thematic approach in bringing the essays together, this book would be a valuable addition to the law libraries throughout the country. Its comprehensive coverage of indigenous peoples’ rights in the international arena is impressive. Its value lies, not in adding anything new to this scholarship in the sense of content, but rather in the themes it strives to emphasise in this field. Academics and students alike would find real value in this book. Despite its hefty price tag, I highly recommend it.

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