

BACKGROUND TO PROJECT WAITANGI

Project Waitangi got under way late in 1985 in response to an initiative from the NCC Programme on Racism. Upwards of 40 people, representing different community organisations, had a series of meetings in Wellington to consider how best to focus a Pakeha debate of the Treaty.

They formed a core groups which went on meeting every week throughout 1986, to organise funding, structure the media approach and generally to sort out the whole project. The core groups reported back in August.

They had decide to target middle New Zealand and develop the debate of Treaty issues through the media and through community organisations and the churches.

The aims stated for the project:

- * That Pakeha will study and debate the Treaty of Waitangi in order to understand Pakeha commitments under the Treaty.
- * That Pakeha will recognise Maori as the tangata whenua.
- * That Pakeha will study the hisotry of New Zealand since 1840 and, by coming face to face with our history, will begin to move towards a genuine bi-cultural and eventually multi-cultural society.

It's intended to be a broad educational approach to generate discussion - this will of course be at many levels. Some will just be starting to talk, others may work within their own organisations or with the anti-racism movement for substantial change.

BACKGROUND

THE COURT OF APPEAL DECISION

"The Treaty obliges the Crown not only to recognise the Maori interests specified in it, but actively to protect them."

Justice Casey

"The Treaty of Waitangi must be viewed as a solemn contract between the Crown and the Maori through which the colonisation of New Zealand was to become possible."

Justice Richardson

"The duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable."

Justice Cooke

WHY DID THE MAORI COUNCIL BRING THIS CASE AGAINST THE GOVERNMENT?

The Maori Council feared that once Crown land was transferred to the new corporations, the Maori people would never have a chance of claiming it back - even if the Waitangi Tribunal recommended its return.

Either the land would have been sold to a private buyer (and that means huge legal problems in getting it back) or else the government would not be prepared to put up the cash to buy it back from the state-owned enterprises.

The State Owned Enterprises Act had section 9 which said:

Treaty of Waitangi - nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

The Maori Council was sure this meant the Crown was not allowed to give the land to the new corporations until all claims to it could be heard by the Waitangi Tribunal and recommendations made about its return or about compensation.

SO WHAT LAND IS IN DISPUTE?

The government owns and controls huge amounts of land in New Zealand. This is Crown land - land that individual people have no rights to, yet is owned by all New Zealanders.

Crown land is 52% of the country - around 14 million hectares.

The government wants to transfer over four million hectares to the new corporations. The estimated value of this land is \$11.48 billion dollars.

The government wants the new corporations to be able to work like private companies - and especially for them to make a profit. This means they have to be able to sell the land to anyone they like.

This means the government loses all legal rights to the land.

WHAT DID THE MAORI COUNCIL WANT FROM THE COURT OF APPEAL?

They asked the court to rule that it would be illegal for the government to transfer land to the new corporations UNLESS the Maori people were given a "reasonable opportunity" to have their claims heard by the Waitangi Tribunal.

The government should make sure that checking procedures were in place so no land was transferred that was or could be the subject of a claim.

WHAT DID THE COURT DECIDE?

The court agreed with the Maori Council.

They ordered the government to

1. Draw up a procedure to ensure land is not given to the state-owned enterprises without Maori claims being taken into account.
2. Within 21 days to give these procedures to the Maori Council for the council to consider and make suggestions.
3. Both the government and the council to then come back to the court to have the procedures legally set in place. If the council and the government disagree about anything, the court will make the final decision.

DOES THE DECISION GIVE MAORI PEOPLE THEIR LAND BACK?

No.

But it means that if the Waitangi Tribunal supports a claim for the return of land, then the Crown as owner of the land will easily be able to do as the Tribunal recommends.

DOES THE COURT OF APPEAL SAY ANYTHING ABOUT THE WAITANGI TRIBUNAL?

All five judges said the Waitangi Tribunal is a very important body. They said it has special status and skills to look at questions about the Treaty of Waitangi.

Justice Cooke also said that it would be "only in special circumstances, if ever" that the government would not follow at least some of the Tribunal's findings in each case.

He also suggested that if the tribunal recommended land be returned to Maori people instead of giving them money, it would be inconsistent with the principles of the Treaty for the Crown to refuse to do this.

Note: he was talking only about Crown land, not all land.

WHAT DID THE DECISION SAY ABOUT THE TREATY?

The judges all talk about the Treaty as a partnership between the Crown and the Maori people.

This means they must deal with each other with "the utmost good faith" - or else the partnership would be breached.

They also said the government doesn't have to consult with Maori people before deciding on a new policy regarding state-owned enterprises. BUT it does have to consult about the implementing of that policy where it affects Maori people.

IS THIS A FINAL DECISION?

Within 42 days the Maori Council and the government will have to return to the court to have their agreement about the lands finalised.

However, the initial decision is already fixed into New Zealand law. All of the statements in it must be considered by judges dealing with Maori concerns under the Treaty.

The government could appeal to the Privy Council in England for a final opinion; but hasn't indicated it will do this. The Privy Council is very unlikely to find the five Court of Appeal judges wrong.

WHAT IS THE COURT OF APPEAL?

It's the highest court in New Zealand.

Usually three judges listen to a case. For very important cases the full court of five will be present. In this case, all five were sitting and their president - Sir Robin Cooke - said this was perhaps the most important case for the future of New Zealand that had come before the courts.

So this was the most authoritative New Zealand court dealing with the most important case in New Zealand so far.

WHAT DOES THE DECISION MEAN FOR THE FUTURE?

1. The government must have regard to the principles of the Treaty in any future action under the State Owned Enterprises Act. Even inaction could be a breach of the Treaty!

The statements of corporate intent outlining the goals of the new corporations should therefore have reference to the Treaty. These statements are currently being worked out.

2. Any institution which acts under legislation stating that particular regard shall be had to Maori interests, has its duty reinforced by the decision of the court.

So, for example, the Town and Country Planning Act says Maori links with their ancestral land are one of a number of matters of "national importance".

The Planning Tribunal will now have to look at the Court of Appeal's comments about the Treaty being a partnership and the duty of "utmost good faith" when it looks at Maori concerns.

3. The widest possible impact of the decision is that it suggests all law in New Zealand should be seen as consistent with the Treaty - unless it specifically provides that Treaty values may be overridden.

Therefore, for example, the water and soil conservation laws don't mention Maori values but will now be assumed to protect them.

The full judgments of the Court in the Maori Council's case are now available from the Government Bookshop.

The publication is called:

THE TREATY OF WAITANGI IN THE COURT OF APPEAL.

Cost: \$29.95.

Go to the government bookshops in Auckland, Hamilton, Palmerston North, Wellington, Christchurch or Dunedin, or write to:

GP Books Mail Orders, Government Publishing, Kemp Street,
PO Box 14277, Kilbirnie, Wellington.

Note: post and packaging charge is \$3.75.

You can also phone them toll-free on (04) 733-406.

WHAT'S THE CATCH?

The court said the only reason it could consider the Treaty was because of section 9 in the State Owned Enterprises Act which specifically refers to the Treaty:

Treaty of Waitangi - nothing in this act shall permit the Crown to act in a manner which is inconsistent with the principles of the Treaty of Waitangi.

So the Treaty has power only because it was incorporated in the legislation. It still has no independent standing in law.

The court talked of the decision as a Maori victory but many would question just what has been gained. What if governments do not incorporate the Treaty in future legislation?

Also, the government task force set up to consider safeguards for Maori claims is likely to merely extend by a few months the deadline for claims to be registered.

This ignores the extraordinary difficulty and time and money involved in researching and preparing claims. The three sample claims presented to the Court of Appeal took many hours and thousands of dollars to sort through. There's hundreds more such claims.